THE *ERTA* JUDGMENT: THE PROPHETS OF EUROPEAN INTEGRATION AND THE RISE OF INTER-INSTITUTIONAL LITIGATION

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1. *Introduction*

There is really no doubt that the Court of justice ruling on the competence to conclude the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (hereinafter 'ERTA'), delivered on 31 March 1971[1], had a tremendous impact on European external relations law, as well as on the broader issue of the reconstruction and evolution of the, then still relatively new, European legal order[2]. The understanding of basic legal structures of such order, spanning from competences and their adaptive development based on legislation (with implications for the reconstruction of the legal personality of the then Community), to duty of loyal cooperation, effects and uniformity of European law had to be regarded in a new way after the adoption of this landmark judicial decision.

The case revolved, as widely known, around the question of the allocation of the power to conclude the ERTA agreement. The Member States, willing to sign the treaty, followed the instructions issued by the Council to the effect

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[1] Judgment of the Court of Justice of 31 March 1971, *Commission v. Council* (*ERTA*), Case 22/70.

[2] Here I use the adjective European as the long-standing impact of the ERTA judgment has undoubtedly influenced the legal order up until the birth of the Union and afterwards, as well. In the paper, I will refer to the Communities and to Community law where appropriate.

that they had the competence to do so and this behaviour was beyond reproach in light of a seemingly correct, but actually narrow view of the obligations stemming from the EEC Treaty (namely Articles 75 and 228). Furthermore, the reconstruction of a general interest apt to guide the management by Member States of their external relations on the basis of Article 116 EEC Treaty offered little help. The ERTA affair also represented the final point of break after a continuous effort, made by the Commission throughout several years, to gain something more than a foothold in the management of external relations[3]. In this endeavour, the Commission's move to sue the Council would have triggered a ground-breaking decision by the Court of Justice, which, while formally rejecting the action brought by the Commission, would have substantially upheld its grievances. What is more, the Luxembourg Judges grounded their legal reasoning on an innovative conceptualization of the relationships *inside* the Community, going well beyond the concrete points of the litigation between the two sides of *Rue de la loi*.

[3] External relations management was a contentious issue already from the 'chaise vide' (empty chair) crisis in the mid of the sixties: the crisis erupted out of French opposition to some propositions of the Commission, which, in France's view, would have undermined the governments' control over the European Economic Community (EEC). (see following section). Not all French requests had been accepted by the Luxembourg compromise which put an end to that crisis. It will be argued throughout the paper, that, in the still-standing dispute regarding in particular external relations management, the ERTA case can be read as a point in favour of the Commission. In the words of Gérard Bossuat, asking a question to Gerard Olivier: «C'est d'autant plus important que c'était en débat, en 1965, dans le cas de la chaise vide puisque dans l'heptalogue, enfin le décalogue, il y avait justement ce problème de savoir qui représentait les Communautés à l'extérieur. Dans le fond, la France faisait le reproche à la Commission d'outrepasser ses compétences. Et donc, là, il semble qu'en 1971, la Cour ait tranché en faveur de la Commission», interview to Gérard Olivier, CJUE-1171, Historical Archives of the EU (HAEU), p. 54. The «heptalogue» and then the «decalogue» were two lists presented by the representatives of France, submitting their requests aimed at limiting the dynamism and the powers of the Commission in the negotiations for the closing of the 'chaise vide' crisis. In particular, external relations management was a problem for France: *Archives de la Fondation nationale des sciences politiques* (AFNSP), *Fonds Michel Debré, Premier ministre* (2 DE) 12, note de Debré pour Amanrich (cabinet) du 10 février 1960; AFNSP, 2 DE 69, lettre de Debré à Couve de Murville, 13 février 1960; AFNSP, 2 DE 29, Lettre de Debré à de Gaulle, 19 mars 1960, all cited by L. WARLOUZET, *Le Choix de la CEE par la France – L'Europe économique en débat, de Mendès France à de Gaulle* (1955-1969), consulted on-line.

Pierre Pescatore underlined the profound effects and significance of the judgment for the empowerment and development of the Community legal order. There is, nonetheless, another dimension, often neglected, related to the meaning and use of litigation before the then still young Court of Justice. This paper will try to shed some light on this dimension, following three essential steps. First, some 'big' historical events will be briefly recalled in Section 2, with a view to gaining a broad understanding of some circumstances that paved the way for the ERTA *clash*. In Section 3, the main characters of this tale will be presented. In Section 4, a reading of the ERTA case and of its legacy in light of the functioning of the Community/Union judicial dimension will be offered.

2. *The 'Big History' around ERTA*

The 'Big History' around the emergence of the ERTA case should not be confined to events related to European integration. However, given the context and aim of this paper, privileged attention will be devoted to what was going on in Europe, with limited references to the broader international context.

The empty chair crisis is 'just' one of these events. It is well known that it was the decisional deadlock coming out of the decision of France not to take part in the meetings of the Council between June 1965 and January 1966. Indeed, France undertook two *sabotages* in a relatively short time span, within two different European Institutions and regarding two separate, although interrelated, issues. As to the *first*, which took place within the EEC, ostensible reasons related to the financing of the Common Agricultural Policy (CAP) just covered Charles de Gaulle's harsh attitude towards the supranational model and the way the newly established Institutions, namely the Commission, were conducting Community affairs. France attacked the core of the functioning of the Community and of its innovative cooperation method, i.e. the qualified majority vote within the Council. As widely known, the Luxembourg compromise closed the crisis thanks to an agreed interpretation on the rules on qualified majority voting, whereby additional discussion was granted if a Member State asked for it on the basis of relevant interests.

This episode of European integration history can be read, for what matters here, as the emergence of a clear disagreement on the trajectory Commu-

nity life should follow and, more immediately, of a fracture between, on one side, Member States, or some of them, and, on the other side, the Community Institutions, which were growing in their autonomy. Acting on a pathway parallel to the formal internal functioning of the Institutions was the only option to find a way out. Thus, a political agreement on how to handle Community decision-making was found. On this occasion, acting outside the Community framework meant agreeing, on the political plane, on how voting procedures, while formally respecting the Community institutional rules, should be carried out: apart from the formal vote, suspending the vote in presence of a political request by a Member State, with a view to reaching a more shared view (and thus a unanimous vote) was the core of the deal reached. A solution inside the Community machinery proved to be impossible, hence intergovernmentalism obtained a very important, although provisional, victory over supranationalism.

The *second* empty chair crisis regarded the work of the Western European Union (WEU). In the second half of the sixties, when the UK demanded (not for the first time) to join the Communities, the WEU was the principal forum where UK accession could be discussed. In this framework, de Gaulle came up with a new sabotage, which, at that time, actually postponed again the accession, but the snowball was finally rolling downhill.

Apart from personal idiosyncrasies and turbulent political times inside the Member States (with repercussions on the Community life of facts happening also outside Europe[4]), equilibria in the Communities were to be fine-tuned:

[4] Amongst many events that may had some kind of influence on the evolution of European integration in the second half of the sixties and at the beginning of the seventies, the following ones are worth recalling. In the Eastern part of Europe, the communist regimes were experiencing a loss in popularity especially in Poland and Czechoslovakia: in the latter, the push for reforms, which seemed promising even in the context of the national communist party, would have been frustrated in 1968 with the intervention of the Soviet Union and the proclamation of the Brezhnev doctrine. According to such a doctrine, the Soviet Union, having won over the Nazis in World War II in the territories of Eastern Europe, gained the right to influence the governments of such territories, that could exercise only a limited sovereignty. According to a widespread opinion amongst historians, these events shew great uncertainty and a sense of unsafety inside the Soviet empire, where dissenting circles started to flourish in many places and independent thinkers often found ways to communicate their ideas, sometimes from inside communist regimes, sometimes finding hospitality in Western Countries. Meanwhile, the

while the Elysée Treaty signed in 1965, marked the attempt to establish a Franco-German leadership, which could not always function in the difficult times of de Gaulle's presidency, the UK accession would have obliged to redesign the political game inside the European Institutions.

UK accession and negotiations for a broader political project are the two other 'big' elements of our history. The former was finally successful, while the second ended up in a merely diplomatic exercise, with European integration seeming to lose momentum at the beginning of the seventies. The Tindemans report in 1975 would have found Europe in crisis: the economic downturn – provoked, in particular, by the first petrol shock – and the lack of initiative of the Institutions made people losing enthusiasm regarding the European project[5].

3. *Starring Jean Rey…and others*

The decision of the Commission to take action against the Council was a tough one. In the words of Advocate General Lagrange it was the first time that the Court was invested of 'un différend survenu dans ce curieux « mé-

Communities were becoming attractive: not only had the UK and Ireland applied for membership, but also Portugal and Norway did so in 1962: also the latter had just founded the European Free Trade Association four years before. Communist regimes were experiencing some troubles also outside Europe: Mao Zedong started in 1966 the 'cultural revolution', that would have profoundly shaken Chinese society for a decade. In 1969, tensions between China and the Soviet Union finally erupted in an open conflict over the border of the Ussuri river, showing ostensibly that the two communist powers were not acting on friendly terms. The wave of decolonization, reaching a peak at the beginning of the sixties, would have soon made almost all the old colonies free from their former mother lands. As to economic developments, it should be remembered that the Yaoundé agreement was signed by the EEC with eighteen African States in 1963, while the Kennedy Round started in 1964 in the framework of the GATT in an endeavour to reduce tariffs. After years of growing tensions on the financial and monetary markets, on 15 August 1971 President Nixon unilaterally put an end to the free convertibility of dollar to gold. New turmoil would have been provoked during the seventies by two petrol shocks. These difficulties would have pushed further economic and monetary integration in Europe, with mixed success.

[5] Q. JOUAN, *Narratives of European Integration in Times of Crisis: Images of Europe in the 1970s*, in *Journal of European Integration History*, 2016.

nage » que forment le Conseil des ministres et la Commission des Communautés européennes'[6]. However, with a press communiqué, the Council gave green light to the Member States to conclude the agreement and this represented a brutal stop to the efforts of the Commission – carried out for a long time, as already highlighted – to affirm the competence of the Community.

At the time in which the decision was taken, Jean Rey was the president of the Commission. Son of a protestant pastor, Belgian liberal, he was authentically devoted to the construction of Europe. Before the War, he was a fierce opponent of Belgian neutrality, while, after the German attack, he was called to join the army. He experienced the harshness of imprisonment at Oflax XD camp, where he was part of the secret masonic lodge *L'Obstinée*. After the war he played a relevant role in Belgian politics and, what is more important for the present enquiry, he took part, on the Belgian side, in the pioneering experience of the European Communities. He became member of the Commission between 1958 and 1967 (in this capacity he followed the Kennedy Round) and then he succeeded Walter Hallstein as President. He stayed in office until 1970 carrying out various important tasks, such as the completion of the custom union and the evolution of the competences of the Communities in various fields. In particular, under his presidency the European Parliament saw its role growing and the 'own resources' system was put in place. After the end of its experience at the Commission, he remained active in Belgian politics and then he became a member of the European Parliament in 1979, at the first elections by universal direct suffrage.

[6] The English translation is substantially faithfully to the original: «…this is the first occasion on which a dispute has been brought before it arising out of the curious "ménage" formed by the Council of Ministers and the Commission of the European Communities». It is somewhat bizarre that, in the Italian version of the opinion, the translation of the passage in question sounds like this: «…[è] la prima volta che il Consiglio dei ministri e la Commissione delle Comunità europee si rivolgono alla Corte di giustizia chiedendole di ristabilire la pace "in famiglia"». The construction of the sentence is changed - and this may not be a problem, as the general sense could still be preserved in this way - but it should be stressed that there is no hint at a «curious "ménage"» between the Council and the Commission, while the idea is shaped as the need to bring back "peace in family"…a much more conventional and maybe conservative language.

The Commissioners «should not be just clergymen, but prophets»[7]: these words by Rey reflect his spirit and his faith in the mission he saw in European Institutions and namely in the Commission. He understood Commissioners should not limit themselves to act as good '*fonctionnaires*', which would, at the end, be controlled in some way by the will of Member States and thus served the interests of intergovernmentalism. A strong dose of protagonism was (…and, one may say, is…) instead needed to take the lead of the European integration machinery. In 1970, the last year of his presidency, Rey realized that the communiqué by the Council on the ERTA agreement demanded a clear response, as the Council, and thus the Member States, would otherwise have taken the lead in assessing to what extent Community law could be pushed forward (…or backwards) in terms of lines of competences. Therefore, the opportunity of ERTA had to be seized.

More technically, the case could have been a great occasion to welcome *officially* the doctrine of implied powers to Community law and, what is probably even more important, to learn how to channel political tensions through legal avenues. Hence, the intergovernmental reluctances of Member States could be subjected to the law, and namely to Community law, permeated as such by supranationalism. These views will be recalled in the final observations. Let us now move back to the characters acting on the stage of the 'ERTA pièce'.

Gérard Olivier was chosen as agent of the Commission instead of the Director General, Much: the latter was German, but the reason is linked to Rey's personal trust in Olivier, while the DG was supposed to be engaged in other kind of affairs than taking directly the defense of the Commission before the Luxembourg Court. The pleading by the Commission was considered timid if compared to the decision of the Court of Justice: this was the opinion, for instance, of Ganshof van der Meersch, then attorney general at the Belgian Court of Cassation and Professor of European Law at the ULB[8].

The referred reconstruction is offered in an interview by Gérard Olivier, who adds that the initiative was a personal one by Jean Rey, that gave a sort of

[7] See Y. CONRAD, *Jean Rey, un Européen de coeur à l'optimisme modéré*, in M. DUMOULIN (sous la direction de), *La Commission européenne, 1958-1972. Histoire et mémoire d'une institution*, Luxembourg, Office de Publications de l'Union européenne, Luxembourg, 2007, p. 118.

[8] Interview to Gérard Olivier, CJUE-1171, cit., p. 55.

umbrella to the other Commissioners. There had been an opinion of the legal service of the Commission stating the case could be defended, but of course the political initiative was of the Commission. The contribution by Jean Rey was to bring something from the realm of the unconceivable to the actual possibilities. In the words of Olivier, '[c]'est surtout symptomatique de l'idée que l'on pouvait plaider l'un contre l'autre sans être des ennemis. Cela, c'est très important parce que cela s'est retrouvé par la suite'. Olivier speaks about two cases on the economic treatment of Community servants[9], but I will argue the heritage of ERTA goes well beyond those cases.

Ernst Wohlfart and Jean-Pierre Puissochet were agents of the Council. Puissochet reacted badly to the judgment, with a harsh article published in *Le Monde*. Afterwards, he became judge at the Court of Justice and would have to handle cases where the application of Community law would have carried in itself the signs of landmark cases like ERTA. Pierre Pescatore, judge at the Court of Justice at his fourth year in office at the time of the ERTA case, played an important role in our story. His influence on the evolution of the European legal order has been extremely relevant both as a scholar and as a judge and ERTA is an illustrative episode in this respect.

The opinion of the Commission legal service, in its opening general overview, stated that, as regarded EEC law, the Commission itself had never endorsed the view of an 'entire' parallelism between internal and external competence. In saying so, the legal service recalled also the authoritative opinion of the majority of the doctrine, by making reference to Pescatore's *cours* at the Hague Academy of international law, given some years before[10]. As explained by Pescatore, the situation was not the same for all the Communities, as in the other two the specificity of the objectives and of the fields of cooperation made it possible to adopt parallelism between internal and external competences ('thèse de la capacité générale' in his words) as a general canon: in the

[9] See *infra*, Section 4.

[10] See *Note à Monsieur le President Rey*, 25 mars 1970, Jur/867/70, HAEU, CEUE_SEJU-0257EEC, p. 3 (the note examined the reaction to the move of the Council of 20-21 March; we do not exactly know when the opinion was requested, however, it must have been drafted in a very short time); P. PESCATORE, *Les relations extérieures des communautés européennes. Contribution à la doctrine de la personnalité des organisations internationales*, in *Recueil des cours de l'Académie de La Haye*, 1961, (Volume 103), pp. 96 ss.

case of EURATOM, the founding Treaty substantially adopts the parallelism criterion at Article 101, while in the ECSC the praxis of the High Authority resulted in line with the same principle. According to the authoritative Luxembourgish Judge and scholar, in the EEC the intensity of normative conferred powers varied substantially in the various fields. Therefore, deriving external competence from the mere existence of normative powers would not have been correct[11].

What is also interesting is that, in arguing that parallelism could not be resorted to, in general terms, in the context of the EEC, he quoted another scholar sharing his same opinion, who was Ernst Wohlfarth. The latter, as said, happened to be the defender of the Council in the ERTA litigation, while Pescatore sat as a judge. However, Pescatore did not share Wohlfarth's view that the external competence of the EEC could be extended on the basis of a praxis of the Institutions and of the States, in particular by virtue of an authorization of the Council[12].

Moreover, judge Pescatore took the time to explain the significance of the judgment to a young Italian scholar, who would have been another important judge in the following decades, Antonio Tizzano[13].

European law was, at that time, a small family. A few and influential scholars shaped the legal elaboration supporting the theoretical construction of the new legal order of the Communities. Some of them were also called upon to act in the institutional arena, where that new legal order was taking its first important steps, often resonating with the legal thinking promoted by those same people.

Going back to the opinion of the legal service, it is worth noting it underlined that the mere existence of an EEC regulation could not ground the Community competence, therefore the drafters felt the need to find a tie to primary law: such a tie was researched in common commercial policy or in

[11] In the words of P. PESCATORE, *Les relations extérieures*, cit., p. 98: «Mais même dans les domaines où la Communauté exerce un véritable pouvoir normatif à l'intérieur, on ne peut pas accepter l'existence automatique d'un pouvoir correspondant dans les relations extérieures. En effet, le traité de Rome repose, tant dans sa structure générale que dans son détail, sur une application rigoureuse du principe de l'attribution des pouvoirs».

[12] See P. PESCATORE, *Les relations extérieures*, cit., pp. 107-108.

[13] See S. RAMIREZ, *ERTA: the European Commission's Perspective*, forthcoming.

transport policy[14]. In this respect, backing again on Pescatore's writings[15], it was stated that Article 228 could not stand alone as a norm conferring a specific power to the Community to negotiate in a certain area. Therefore, it was argued that this conferral had to be found in Article 71(1) EEC Treaty on transport policy. The legal service, as a conclusive finding, stated the behaviour of Member States negotiating the agreement in question was in breach of the duty of loyal cooperation (Article 5 EEC Treaty) and of the competences of the Institutions, namely of the Commission, to act as a negotiating party (Article 228 EEC Treaty). On 6 April 1970, once the legal service could finally read the text of the act of the Council to be challenged, it was confirmed the action could be successfully brought before the Court of Justice, despite the somewhat soft language used in the text, where, for instance, the word 'mandate' ('mandat' in French) had been avoided[16].

Rey had strongly defended the Commission position before the Council on 20 March 1970, giving a clear *ultimatum*, but the Council refused to accept the Commission's view[17]. Inside the Commission, bringing an action for annulment was considered a convenient move, considering the good chances of having it upheld by the Court outlined by the legal service opinion, and the potential impact on future external relations management of a favourable ruling. Moreover, the impact of a dismissal was considered not very big, as it could have been confined to the absence of Community competence in the transport sector only[18].

Once the judgment was rendered, the legal service circulated a *note d'analyse* with the aim of assessing its impact on Community law[19]. Leaving aside the first part on the receivability of the action, in the second part the legal service seems quite struck by the fact that the Court did not assign capital

[14] See *Note à Monsieur le President Rey*, cit., p. 7.

[15] P. PESCATORE, *Les Novelles. Le droit des Communautés européennes*, Nos 3^3 et 5^5.

[16] See *Note à Monsieur le President Rey*, 6 avril 1970, Jur/950/70, pp. 1 -2.

[17] See Communication de M. Victor Bodson, O.J. 117, *Suite à donner aux décisions du Conseil du 20 mars 1970 sur les négociations avec les Pays Tiers au sujet de l'A.E.T.R.*, HAEU, CEUE_SEJU-0257EEC, pp. 1 ss. Victor Bodson was the Luxembourgish Commissioner in charge of transport.

[18] See again Communication de M. Victor Bodson, cit., pp. 4-6.

[19] See *Note à Messieurs les Membres de la Commission*, JUR/1190/71, 12 mai 1971, HAEU, CEUE_SEJU-0260,143, p. 144.

importance to primary law *per se*, but to the reconstruction of Community law as a system and to the exercise of powers on the internal plane as grounding also external competence. Moreover, great importance was attached to the choice of the Court to welcome the theory of implied powers to Community law, departing from the opinion of some legal scholars that the existence of Article 235 EEC Treaty (the flexibility clause, see today Article 352 TFEU) would have excluded the admissibility of such a theory[20]. In defining the resulting system of external competences, the legal service understood that a perfect parallelism (like in the other two Communities) had not been affirmed and listed three categories: 1) explicit competences; 2) implicit competences; 3) competences stemming from an Article 235 EEC Treaty deliberation. Uncertainties seemed to flow from the idea that Article 235 EEC Treaty deliberations were not compulsory, as they implied a political choice (and no proposal was submitted on the basis of that provision in the ERTA *affaire*), while the legal service dedicated several pages to assess when an automatic mechanism should be considered operating in the presence of 'common rules' (thus triggering an external competence).

In these pages I will not offer a comprehensive comment on the judgment of the Court, as this has already been done on many occasions, both in the aftermath of the publication of the ruling and afterwards in many studies aimed at recalling the big building blocks of external relations and, more in general, of the European legal order. However, building on what has been just recalled, it seems that before the judgment the legal doctrine had set, as an almost uncontentious point, that the EEC could not act in external relations with the same latitude of the two other sisters Communities. The latter could benefit from a perfect parallelism, or a 'capacité générale' in the wording used by Pescatore: given their specific goals and competences, the parallelism in question could not raise particular worries, as the action on the external plane could have been well taken into account by Member States when entering those two Communities. In other terms, this parallelism would have implied no evident erosion of Member States' external competences.

The case of the EEC was different, as, given its more general competences, leaving it free to develop as a living creature would have been more dan-

[20] See *Note à Messieurs les Membres de la Commission*, JUR/1190/71, cit., pp. 8 ss.

gerous. These worries were confirmed by the more structured presence of the principle of conferral in EEC law. Nonetheless, it was not denied that the EEC could acquire some competences on the external plane due to its internal dynamism. Here the doctrine was not unanimous. While someone admitted the possibility of evolutionary praxis as an element that could even trespass the boundaries imposed by primary law, it was discussed how the internal rules could generate external competences. The need to find a foothold in primary law, sustained by the legal service of the Commission is, in the view of the scholarship contemporary to the judgment, obvious and exaggerated at the same time. While it is clear that internal rules must find a legal basis in the Treaties that imposes limits on their scope, legal force and effects, such rules live a life on their own – once provided there are fully legitimate – as the discipline they design shall be fully respected and preserved by Institutions and Member States. At the time of ERTA, the width of the deference Member States had to pay to Community secondary law in their external projection had still to be defined (and after ERTA, as widely known, the Court of Justice would have come back on the issue again). In this respect, the extent to which the duty of loyal cooperation had to be respected by Member States, especially if acting with a green light by the Council, was something that needed to be clarified.

4. *Concluding Remarks: the ERTA case: Institutional Courage and Long-Lasting Legacy*

As said, Gérard Olivier in his interview sustained Jean Rey offered his political coverage to the Commission: much more than the legal feasibility assessed by the legal service and the need to clarify an important juridical issue, the political point was a hard one. Community law could be seen as a tool to ease political tensions, but, at the same time, the unprecedented move by the Commission could break a cooperation climate that, despite ups and downs, had driven the Communities through the difficult sixties and made them obtain visible economic and political fortune. The start of ERTA litigation was, indeed, the last blow by an authentic European federalist, who had struggled against the intergovernmental tide flowing back in the sixties, and who wanted to leave the Commission by giving it a well defendable position in the Communities legal order. He understood collaboration was of essence in the

Community family and saw litigation before the Court of Justice as a way to re-establish equilibrium when something was going wrong. Better than the political deals like the Luxembourg compromise, litigation offered a way to settle disputes with a re-rooting of solutions in the treaties, opening the door also to evolutionary interpretations that could push forward the development of the Communities.

At the beginning of the seventies, European integration seemed to have reached a high pitch. Sociological analyses show that UK accession would have brought a reshuffle in the Commission structure. Moreover, tensions between neo-functionalists and federalists had risen in the Commission, as well, before the Community empty chair crisis[21]. The Commission at the end of the sixties was also a more open and inclusive Institution, while with the UK accession, the economic crisis and the beginning of the seventies it became maybe more mature, but also more rigid and less adaptable[22]. This state of things led to a less courageous attitude and thus inter-institutional litigation would have been frozen for a certain time. To be more precise, there would have been new cases in particular in the domain of civil service law: *Commission v. Council* (Case 70/74) on pension schemes, *Commission v. Council* (Case 81/72) on salaries and pension schemes (these are the cases at which Gérard Olivier hinted at in his interview). A new ruling related to external relations would arrive in 1983 (*Commission v. Council*, Case 218/82) regarding the implementation of the Lomé Convention. Two other cases were removed from the register (*Commission v. Council*, Case C-124/82 and C-73/82).

The shift of political tensions – between the prophets of federalism and those who pushed for an intergovernmental backslide – to the plane of litigation was thus not immediately visible. At least, it opened a possible door for exiting crises, probably avoiding their rise, or easing tensions in view of their possible solution inside the Community circuit.

More broadly, the legacy of the Commission's move in ERTA goes even beyond inter-institutional litigation strictly speaking. In my opinion, it covers

[21] L. WARLOUZET, *Relancer la CEE avant la Chaise vide: Néo-fonctionnalistes vs. fédéralistes au sein de la Commission européenne* (1964-1965), in *Journal of European Integration History*, 2008.

[22] See B. VAYSSIERE, *Raymond Rifflet, européiste et eurocrate*, in *Journal of European Integration History*, 2017.

the strategic use of litigation before the Court of Justice, and namely of action for annulment, also by private claimants, for any purpose related to the building up and coherent reconstruction of the European legal order. Thus, under this perspective, *Parti écologiste Les Verts* (Case 294/83) should be included in the strain of case law inaugurated with ERTA: it concerned the strategic use of action for annulment *inside* the Community legal order and marked a new departure from a classical conception of intergovernmental cooperation within international organizations. The ERTA judgment clarified that legal tools like annulment action could be used strategically in the context of intra-institutional dialectic. This has been a big contribution by ERTA, in a period when, from the *plateau* of Kirchberg, the European legal order was being shaped, marking definitively the evolution of European integration.

Consciously running the risk of a bit too rhetorical reconstruction, it can be argued that ERTA was, like *Parti écologiste Les Verts*, a case on the rule of law inside Community law. In ERTA, litigation was the ultimate weapon to clarify a contentious legal point and, as seen, to reaffirm the law in interinstitutional dynamics. To say it in the words the Luxembourg Court would have used fifteen years afterwards, 'European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'[23], therefore, the acts of the Council and of the Member States when behaving like in the ERTA *affaire* shall have been subject to Court scrutiny to assess whether they were in line with the obligations stemming from the founding Treaties or not. This has to be seen as the constitutional significance of ERTA: the first time an act of the Council was challenged by another Institution, the Court accepted to act as a constitutional actor, defining the spheres of actions of the political Institutions and their duties, as well as those of Member States, also in a then not very well explored area, like external action.

[23] *Parti écologiste Les Verts*, cit., para 23.