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EU MIXED AGREEMENTS AND THEIR CONSTITUTIONAL BOUNDARIES.

CASE 600/14, GERMANY V COUNCIL, AMENDMENT OF THE CONVENTION CONCERNING INTERNATIONAL CARRIAGE BY RAIL (COTIF I)

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TABLE OF CONTENTS

Introduction.......... 4

CHAPTER 1.......... 7

1.1. Exclusive and shared external competences.......... 7

1.1.1. Shared external competences in the context of EU mixed agreements.......... 8

1.1.2. Implied EU external competences: Art. 216(1) TFEU.......... 10

1.1.3. Implied EU exclusive external competences and the *ERTA* doctrine: Art. 3(2) TFEU.......... 14

1.2. Compulsory or facultative mixity?.......... 18

1.2.1. False compulsory mixity: is it constitutionally possible?.......... 19

1.2.2. False facultative mixity: is it constitutionally possible?.......... 23

CHAPTER 2.......... 27

2.1. Juridical context: Background.......... 27

2.2. Germany's pleas against the Council of the European Union.......... 28

2.2.1. First plea: infringement of the principle of conferral, Art. 5(2) TEU29

2.2.2. Second plea: The failure to state reasons, Art. 296 TFEU.......... 30

2.2.3. Third plea: infringement of the principle of sincere cooperation in conjunction with the principle of effective judicial protection, Art. 4(3) TEU and Art. 263 TFEU.......... 31

2.3. The Council's counterarguments against Germany's pleas of law.......... 32

2.3.1. The Council's argument against Germany's first plea of law.......... 32

2.3.2. The Council's arguments against Germany's second plea of law.......... 34

2.3.3. The Council's arguments against Germany's third plea of law.......... 35

CHAPTER 3.......... 38

3.1. Opinion of Advocate-General Szupnar.......... 38

3.2. The Court's judgement.......... 42

3.2.1. The Court's judgement on the first plea and the "necessity clause": Art. 216 (1) TFEU and Art. 3(2) TFEU.......... 42

3.2.2. The Court's judgement on the second plea and the "substantive and procedural legal basis": Art. 91(1) TFEU 45

3.2.3. The Court's judgement on the third plea: the availability of the contested decision before it produced irreversible effects 47

3.3. *COTIF II*: a turn of events? 49

3.3.1. The letter of formal notice and the reasoned opinion. 49

3.3.2. The start of the proceedings for an infringement of an essential procedural requirement and Germany's objection of inadmissibility. 51

3.3.3. The arguments by the parties concerned. 52

3.3.4. The Court's judgement 54

Conclusion 57

Bibliography 59

Riassunto 63

Introduction

When it comes to the conclusion of international agreements with third parties, the European Union follows significantly various paths, which generally depend on the objective and the region of competences where the agreement falls: normally, when an international agreement signed and ratified by the EU and a third party entirely falls within the exclusive competences of the former, the singular Member States have a relatively limited role to play in the international arena: in these cases, theoretically, once the provisions composing the international agreement have been approved, through qualified majority or unanimity, depending on the subject-matter, in the Council of the European Union, the international position of the European Union is determined, allowing it to conclude a EU-only agreement with a third party. In these cases, "the Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives"[1]. Clearly, for the EU to conclude an EU-only agreement, the subject-matter of the latter must entirely fall within the exclusive competences of the Union, which are, according to Art. 3(1) TFEU:

> a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

On the other hand, when the subject-matter of the international agreement entirely or partially falls within the shared competences of the Union and the Member States, a distinctive kind of agreement, typical of the Union, can be concluded: a mixed agreement.

> It is a consequence of the sui generis nature of the Union: unlike intergovernmental organizations, the Union has been granted extensive internal and external competences by the Treaties which in certain areas are shared with the Member States, and in other areas they are (or may become) exclusive"[2].

A mixed agreement is defined as an agreement with a third party which must be signed and concluded by both the Member States and the Union, who shall,

[1] Art. 4(3) TEU.
[2] PRETE (2020: 1).

"[p]ursuant to the principle of sincere cooperation, […] in full mutual respect, assist each other in carrying out tasks which flow from the Treaties"[3]. This was confirmed and codified in EU case law in Opinion 2/15 on the conclusion of the EU-Singapore Free Trade Agreement (EUSFTA), where the Court argued that an agreement falling exclusively under shared competences cannot be concluded by the European Union alone, but by both the EU and the Member States concerned[4].

> The provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the Member States[5].

Furthermore, the Court argued that since some of the provisions of the agreement[6] do not entirely fall neither under the exclusive competence of the Union conferred to it by the Treaties (namely, the Common Commercial Policy[7]) nor under the so-called "supervening" exclusive competences under Art. 3(2) TFEU, the latter ones should be considered as falling under the shared competences and therefore "mixity" is compulsory[8].

Opinion 2/15, therefore, seems to equate shared competences and mixed agreements, the latter being a natural consequence of the former. Following jurisprudence has shown, however, that this is not always the case. In *COTIF I*[9], when Germany, among other pleas[10], brought a case of infringement of the principle of conferral enshrined in Art. 5(2) TEU against the Council of the European Union, arguing, referring to Opinion 2/15, that the Council had no competence to express, alone, a Union position on the amendments of specific provisions of the Convention concerning International Carriage by Rail, which falls, as the latter is a mixed agreement, under the shared competences between the Union and the Member States, the Court replied in a surprising manner.

> [In Opinion 2/15, the Court did] no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was

[3] Art. 4(3) TEU.
[4] Opinion 2/15, EU-Singapore Free Trade Agreement.
[5] Court of Justice of the European Union PRESS RELEASE No 52/17 Luxembourg, 16 May 2017.
[6] See *infra*.
[7] *Ibid.*
[8] This concept will be thoroughly explained in Chapter 1 of this thesis. Either way, by using the terms "compulsory mixity", the Court alluded to the fact that, following the impossibility to determine that all provisions composing the EU-Singapore Free Trade Agreement fall under EU exclusive competences, the latter agreement should be signed and concluded by both the EU and the Member States, *ergo* as a mixed agreement.
[9] Which is the case that will be largely discussed in Chapters 2 and 3 of this thesis.
[10] See *infra*.

> no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area[11].

Ergo, there are no reasons to believe that the existence of shared competences necessarily precludes the conclusion of a mixed agreement. With this judgement, the Court clarified the ambiguous wording of Opinion 2/15 and opened the gates for a heated debate concerning the constitutionality of such decision: can the European Union, alone, act on the international scene, by amending the provisions of a mixed agreement which fall under the shared competences of the Union and the Member States? In other words, can the European Union act a sole player in the international scene in areas which should also involve the participation of the single Member States? This is a question which this thesis will try to answer in the following chapters.

[11] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 68.

CHAPTER 1

A CONSTITUTIONAL ANALYSIS OF MIXED AGREEMENTS

1.1. Exclusive and shared external competences

The existence of exclusive competences of the Member States and the Union, as well as the competences they share, are clearly listed and defined in the Treaties in Art. 3(1) TFEU and Art. 4 TFEU. Art. 3(1) TFEU lists the exclusive competences of the European Union [12], while Art. 4 TFEU[13] defines the areas where the Union and the Member States share their competences. It is important to highlight the fact that there is no provision in the Treaties which clearly defines the exclusive competences of the Member States: Art. 6 TFEU only lists the areas where the Union plays a role to "carry out actions to support, coordinate or supplement the actions of the Member States". These are:

> a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation.

These can be considered as, *de facto*, exclusive competences of the Member States, although the Union still plays a role, despite limited and only as a positive and non-contradictory supplementation to the Member States' discretion. For this reason, they are generally called "complementary competences"[14].

Furthermore, it is important to pay attention to an important detail, which has been the basis for a series of academic discussions and judicial cases, such as *COTIF I*[15]. There is no provision which limits these competences to the internal action of

[12] See *supra*.
[13]Art. 4 TFEU: "Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty".
[14] SCHUTZE (2019: 245-246).
[15] See *infra*.

the Member States and the Union, as one may initially think. It is implied that these are also meant to be valid in the external field, for instance when it comes to the conclusion and ratification of an international agreement, whether as EU-only or mixed.

1.1.1. Shared external competences in the context of EU mixed agreements

Theoretically speaking, EU mixed agreements, to be concluded as such, must contain provisions which fall either under the shared competences of the Union and the Member States or under the exclusive competences of both, meaning that there are provisions which clearly fit the shape of being EU-exclusive competences and others which are clearly part of the Member States' exclusive competences. Of course, in the cases where the entirety of the provisions composing the agreement fall under the exclusive competences of either the Union or the Member State, there is no room for decision making: the agreement must be concluded either as EU-only or as a traditional State-to-State international agreement.

In the former case, there is no room for decision-making either, the EU case law is quite clear on this matter: the agreement must be signed as mixed. In this case, there is a situation where the Member States' jurisdictions "embrace" a certain set of provisions (the ones falling under its own exclusive competences) whereas the Union embraces its own: there is a clear wall standing in-between these two entities, separating one from the other. Despite being called a "mixed" agreement, in this case it's far from being "shared" between the Union and the Member States. There are no areas composing it which are dealt by both entities at the same time: there is just, clearly, a duty of "sincere cooperation"[16] which, in this case, can be considered more as a duty of non-interference. A more realistic term for these situations was coined in recent academic and juridical debates, which is that of "joint" competences[17].

> Joint competence does not mean shared competence, as [it] refers to the competence to conclude a mixed agreement, some of the provisions of which may fall under exclusive Member States' competence[18].

[16] See *supra*.
[17] NEFRAMI (2007: 12).
[18] ID (2019: 504).

As a result, a "joint" competence has no similarities with a shared competence, although the term may suggest so: indeed, rather than a competence, it describes a possible course of events, involving the conclusion of a mixed agreement which contains provisions falling under the exclusive competences of both the Member States and the Union. It's clearly far from being a competence in itself.

The so-called "choice of mixity"[19] indeed becomes more complicated when the provisions of an international agreement fall under the shared external competences, as defined by Art. 4 TFEU[20]. To what extent, and under which precise circumstances, shall such an agreement be considered as mixed or as EU-only? Why should the ECJ, in this case, allow for the European Union to sign an agreement by itself, alone? To what extent is this constitutionally possible? The ECJ, as with many other subject-matters, is very unclear and contradictory when providing answers to such questions. Generally speaking, when analyzing EU jurisprudence, it's quite rare to find a direct, one-track logical thread which gives to the reader a clear, defined and enlightening answer: there is often a sudden "change of direction" by the ECJ which is either caused by new amendments of the Treaties, which would justify this change, or by a different interpretation of the same provisions, which can sometimes be, in my opinion, erroneous and, unless they are acceptably justifiable, highly debatable. For instance, following Opinion 2/15[21], given by the ECJ prior to the conclusion of the EU-Singapore Free Trade Agreement, there seemed to be quite a clear, straightforward answer by the Court to the question of mixity: an international agreement which includes provisions which fall under the shared competences between the Member States and the Union cannot be signed by the Union alone, but by both the Member States and the Union, as a mixed agreement, since the provisions which compose this international agreement are considered to be internally affecting both entities concerned, and therefore it would be impossible, "as it stands, [to] be concluded without the participation of the Member States"[22]. In my opinion, the wording of the Court in Opinion 2/15 seemed to be quite clear and straightforward:

> "It follows that […] the envisaged agreement cannot be approved by the European Union alone"[23].

> "Since the [provisions composing Chapter 14 of the envisaged agreement] fall, […], within a competence that the European Union shares with the Member States,

[19] PRETE (2020: 1).
[20] See *supra*.
[21] *Ibid*.
[22] *Ibid.*
[23] Opinion 2/15, para. 244.

> Chapter 14 of the envisaged agreement cannot be approved by the European Union alone"[24].
>
> "Consequently, for the same reasons as those stated in paragraphs 243 and 244 of this opinion, Chapter 15 cannot be approved by the European Union alone"[25].

In pursuance of this opinion, a clear pathway seemed to be paved by the Court. However, successive jurisprudence has shown that the so-called question of mixity was far from being univocally answered by the Court: In *COTIF I*[26], the ECJ seemingly deviated from its initial reasoning and argued that an international agreement which contains provisions considered to be falling under the shared competences between the Member States and the Union, under certain circumstances, can be signed by the Union alone. There is therefore "room for political choice"[27] left to the Council, which seems to have the discretion to determine, following Art. 216(1) TFEU, Art. 3(2) TFEU and a debatable interpretation of these last[28], whether an agreement containing provisions falling under the shared competences can be signed and ratified as mixed or as EU-only.

This statement clearly needs further clarifications and a contextualization: what are Art. 216(1) and Art. 3(2)? Why have they been so relevant for the Court in this case? The following sections of this chapter will try to shed light on these questions.

1.1.2. Implied EU external competences: Art. 216(1) TFEU

Art. 216(1) TFEU states that:

> 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.

Art. 216 (1), therefore, defines four different situations where the Union can conclude an international agreement, whether mixed or EU-only: firstly, "where

[24] *Ibid*., para. 282.
[25] *Ibid.*, para. 304.
[26] See *infra* for a more detailed analysis of the case.
[27] NEFRAMI (2019: 506).
[28] See *infra*.

the Treaties so provide"; secondly, "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" ; thirdly, where it "is provided for in a legally binding Union act; and finally, when "[the international agreement] is likely to affect common rules or alter their scope". It is important to notice that Art. 216(1) makes no explicit reference as to whether the international agreement should be concluded as mixed or as EU-only, nor any other provision in the Treaties. The lack of binding provisions on this matter is one of the main reasons which has led to contradictory arguments and, as a result, to the need for clarification by the Court.

The first and the third situations are relatively straightforward: in the first one, it is implied that the Union can conclude an international agreement as long as the Treaties (the TEU and the TFEU) allow for it to do so. With this sentence, it is implied that the Union must follow the specific steps described in detail in Art. 218 TFEU and Art. 219 TFEU, depending on the subject-matter[29], to conclude an agreement with a third party. No derogation of any kind is allowed. The Union must strictly follow the guidelines provided by the two provisions. Furthermore, the Treaties shall also give the Union the competence to do so, meaning that a specific provision giving the Union the competence to operate in the subject-matter of the international agreement shall exist. For instance, Art. 90 and Art. 91 TFEU are specific provisions which attribute to the Union the competence to conclude an international agreement as long as "[t]he objectives of the Treaties […] (are) pursued within the framework of a common transport policy"[30]. In the third situation, which is of a similar nature to the first one, it is specified that the Union can conclude an international agreement on a certain subject-matter if there is a legally binding Union act which allows it to do so. Therefore, the sources of law which allow the Union to conclude an agreement are not only limited to the Treaties, but to any legally binding provision of EU law, namely regulations, directives and judgements by the Court.

The second situation, on the other hand, is less specific and, above all, quite implicit: it argues that the Union has the competence to conclude an international

[29] Art. 219 TFEU is a specific provision, derogating from the more general Art. 218 TFEU, which describes the steps to be followed in order to conclude an international agreement dealing specifically with the economic and monetary policies of the Union. "The Council, either on a recommendation from the European Central Bank or on a recommendation from the Commission and after consulting the European Central Bank, in an endeavour to reach a consensus consistent with the objective of price stability, may conclude formal agreements on an exchange-rate system for the euro in relation to the currencies of third States. The Council shall act unanimously".
[30] Art. 90 TFEU.

agreement to the extent that the latter proves to be necessary in order to achieve a Union's objective as defined by the Treaties. At first, it may seem relatively normal and, moreover, related to the other situations: there is still the need to identify a Union's objective, clearly defined in the Treaties, for this competence to exist. However, it is important to focus on the word "necessary", which is not present in the other two situations: "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"[31]. What is the reasoning behind the use of this term? Apparently, as far as I understand it, the Union can possibly extend its external competences, as defined by Art. 3 TFEU and Art .4 TFEU, insofar as it proves to be "necessary in order to achieve […] one of the objectives referred to in the Treaties". However, it is important to stress the fact that this provision does not focus on the exclusivity of the implied external competence attributed to the Union, but only on the existence of an implied external competence which allows the Union to choose to conclude an international agreement, which falls in areas of shared competence, as EU-only or as mixed. This new interpretation was given in *COTIF I*[32], where the Court clearly deviated from its previous logical interpretation of shared competences in the context of international agreements, outlined in Opinion 2/15[33].

Moreover, it is important, in my opinion, to stress a further point: this "necessity criterion of Art. 216(1) TFEU may lead to pre-emption[34] and, thus, exclusivity[35]. Even though, as it has been argued earlier, the goal of Art. 216(1) TFEU is not to attribute an exclusive external competence to the Union, but to stress the existence of an implied external competence in cases where it is "necessary in order to achieve […] one of the objectives referred to in the Treaties", exclusivity may

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[31] See *supra*.
[32] See *infra*.
[33] See *supra*.
[34] The principle of pre-emption is one of the most fundamental principles of EU law. It "denotes the actual degree to which national law will be set aside by EU law" [SCHUTZE (2018: 138)]. There are three main categories of pre-emption: field pre-emption, obstacle pre-emption and rule pre-emption. Field pre-emption simply states that it applies in "those situations where the Court […] simply excludes the Member States on the grounds that the Union has exhaustively legislated [in that] field. […] [A]ny national legislation within the occupied field is prohibited" [ID (2018:139)]. Obstacle pre-emption requires the Court to "[find out] that national law somehow interferes with the proper functioning or impedes the objectives of the Union legislation" [ID (2018: 140)]. There is need in this case to find a connection, which is not even particular, but must be material and more detailed than field pre-emption. Finally, rule pre-emption is the most "concrete form of conflict [and] will occur where national legislation literally contradicts a specific European rule. Compliance with both set of rules is […] impossible" [ID (2018: 141)].
[35] NEFRAMI (2019: 511).

eventually, and most likely, occur, since this provision, as it has been proved in *COTIF I*, attributes to the Union the competence to possibly conclude an EU-only international agreement even though the latter entirely or partially falls within the shared competences. To a certain extent, the Union is given an exclusive external competence through Art. 216 (1) TFEU.

> [T]he Union's exercise of shared competence pursuant to the necessity criterion of Article 216(1) TFEU is liable to have pre-emptive effect, to the extent to which the international commitments undertaken by the Union cover the relevant field. Such pre-emptive effect stems from the exercise of EU competence [...] also when it concludes a mixed agreement[36].

Nonetheless, there is a specific provision which attributes implied exclusive external competences to the Union under certain circumstances, which is Art. 3(2) TFEU[37]. This provision, however, in order to be put in place, is limited by a certain number of pre-requisites, namely that the conclusion of an international agreement "may affect common rules or alter their scope"[38] and that "is necessary to enable the Union to exercise its internal competence"[39]. As it can be noticed, in the first case the Court needs to identify the extent to which the conclusion of the agreement affects the common rules or "alter their scope", whereas in the second case there is the need to identify a corresponding internal competence. These two characteristics are indeed challenging to identify by the Court, which is why this provision is rarely used[40]. On the contrary, Art. 216 TFEU doesn't require the existence of a corresponding internal competence for the Union to have an implied external competence, which is why it has been used by the Court to widen the scope of the Union's external competences[41].

Finally, the fourth and last situation envisaged in Art. 216(1) argues that the Union can conclude an international agreement with a third party if "[it] is likely to affect common rules or alter their scope"[42]. The wording is identical to Art. 3(2) TFEU and has, *de facto*, the same meaning.

The next section of this thesis will further examine Art. 3(2) TFEU, its history and its most recent and important implications.

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[36] NEFRAMI (2019: 511).
[37] See *infra*.
[38] Art. 3(2) TFEU.
[39] *Ibid*.
[40] ID (2019: 508).
[41] See *infra*.
[42] Art. 216(1) TFEU.

1.1.3. Implied EU exclusive external competences and the *ERTA* doctrine: Art. 3(2) TFEU

While Art. 3(1) TFEU precisely lists the areas where the Union enjoys exclusive competences, internal and external[43], Art. 3(2) TFEU identifies some residual exclusive competences that can be applied for the conclusion of international agreements under certain circumstances, namely:

> 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].

Art. 3(2) TFEU is the codification of the so-called "implied exclusive external competences doctrine" or, as it is more commonly known, the *ERTA* doctrine, after the name of the case where it was first applied by the Court. More precisely, however, the *ERTA* case is the origin only of the third situation of Art. 3(2), where the Union enjoys exclusive external competences in the conclusion of international agreements "in so far as its conclusion may affect common rules or alter their scope".

The first situation of Art. 3(2) was first used by the Court in Opinion 1/94 "on the compatibility of the WTO Agreement with the Treaties"[45] and it was called the "WTO doctrine". The Court, at a fundamental point of this Opinion, stated that:

> Whenever [the Union] has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts"[46].

The second situation described in Art. 3(2) allows the Union to conclude an international agreement where "[it] is necessary to enable the Union to exercise its internal competence". This provision originated from Opinion 1/76 and was therefore called "Opinion 1/76 doctrine". However, it is important to underline that the second situation which was codified in Art. 3(2) TFEU is slightly different with respect to the wording of the Court in Opinion 1/76, which argues that:

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[43] It is not explicitly written in the Treaties, but recent case law suggests that this is the case. See *COTIF I*, for instance.
[44] Art. 3(2) TFEU.
[45] SCHUTZE (2018: 282).
[46] Opinion 1/94, para. 95.

> the power to bind the [Union] vis-à-vis third countries […] flows, by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the [Union] in the international agreement is, as here, necessary for the attainment of one of the objectives of the [Union][47].

The first part of this provision is the one which was codified in Art. 3(2) TFEU: there is the need for the existence of a corresponding internal competence for the Union to conclude an international agreement as EU-only and be therefore given an exclusive external competence to do so. The second part, on the other hand, describes something different, although quite familiar: in addition to the existence of a corresponding internal competence, the conclusion of the international agreement by the Union must be "necessary for the attainment of one of the objectives of the [Union]". The latter wording appears to be strikingly similar to the second situation of Art. 216(1) TFEU[48]. As a result of this, why was the provision stemming from Opinion 1/76 codified into two different articles and not into one? Why was the "[necessity] for the attainment of one the objectives of the [Union]" considered as an implied external competence of the Union under Art. 216(1) TFEU and not, following the reasoning behind Opinion 1/76, as an implied exclusive external competence under Art. 3(2)?

First of all, it is important to state that Opinion 1/76 presupposes the existence of both conditions at the same time to guarantee exclusivity. On the one hand, to some extent, Art. 3(2) has eased the process of attribution of exclusivity to the Union, requiring only the "[necessity] to enable the Union to exercise its internal competence". On the other hand, the so-called "necessity criterion"[49] of Art. 216(1) TFEU to "achieve […] one of the objectives referred to in the Treaties" is an implied external competence and therefore does not guarantee exclusivity. However, *COTIF* has shown that the Union can, following Art. 216(1) TFEU, conclude an EU-only agreement which falls within the shared competences as long as the necessary objective described in Art. 216(1) is achieved: this, *de facto*, gives the Union an exclusive external competence[50], since the Member States are *de facto* excluded from the conclusion and the ratification of an EU-only agreement[51], even though the subject-matters of the agreement partially affect them singularly. Consequently, the objective of Opinion 1/76 has, although not in

[47] Opinion 1/76, para. 4.
[48] See *supra*.
[49] NEFRAMI (2019: 512).
[50] See *supra*.
[51] As it is clearly expressed in Art. 4(3) TEU "[t]he Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

the same manner, materialized following the judgement that the Court gave in *COTIF*.

To a certain extent, in my opinion, in can be argued that the Union has gone even further than Opinion 1/76 in the attribution of implied external competences: following Art. 216(1) TFEU , the Union enjoys a *de facto* exclusive external competence to conclude an international agreement without the need for the implementation of the corresponding internal competence, but only if it is considered to be "necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties".

Lastly, the third situation identified in Art. 3(2) TFEU is historically the most relevant one and has been called "the *ERTA* doctrine". It states that:

> The Union shall also have exclusive competence for the conclusion of an international agreement […] in so far as its conclusion may affect common rules or alter their scope[52].

The latter provision derived from the renowned *ERTA* judgement, where the Court ruled the following:

> [E]ach time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules[53].

Consequentially, under the latter circumstances, the Union enjoys an exclusive external competence to conclude an international agreement as EU-only. The reason behind this doctrine, codified in Art. 3(2) TFEU, is clearly to safeguard the uniform application of the Union common rules from the interference of Member States, which will inevitably and rightly take place if the agreement was concluded as mixed[54].

In summary, Art. 216(1) and Art. 3(2) seem to, *de facto*, have an objective in common, which is that, under the previously mentioned circumstances, of attributing to the Union an exclusive competence to conclude an international agreement with a third party. However, despite the similarities, there are some explicit differences between the two provisions, which have been clarified in

[52] Art. 3(2) TFEU.
[53] Judgement of the Court, 31 March 1971, Case 22/70, *Commission v Council* (*ERTA* case), para. 17.
[54] Opinion 1/03 (Lugano Convention).

COTIF I[55]: first and foremost, Art. 216(1) TFEU leaves room for political choice to the Council, who can freely determine, following the specific circumstances, whether an international agreement whose provisions fall under the shared competences has to be concluded as EU-only or as mixed. In Art. 3(2), there is no political choice left in the hands of the Council, since the provision only considers the possibility for the conclusion of an EU-only agreement, because it makes explicit reference solely to EU exclusive external competences. Furthermore, Art. 216(1) TFEU "applies not only not situations in which the *ERTA*-exclusivity criterion […] is not met, but also in the absence of common rules"[56], contrary to the *ERTA* criterion, which necessarily requires that the conclusion of the agreement affects common rules or alter their scope. Additionally, Art. 3(2) TFEU does not refer to the "[necessity] to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties"[57] for the Union to enjoy an external competence to conclude an international agreement: this is only the case when the latter is presumed to "affect common rules or alter their scope" or if it "is necessary to enable the Union to exercise its internal competence". As a result, Art. 3(2) TFEU only applies when the external competence is derived from an internal competence or from an internal rule[58], not when an external competence is derived from an internal objective which may not be grounded in an internal competence nor in an internal provision[59]. Art. 216(1) TFEU has proved to attain the latter objective and has therefore a significantly wider scope than Art. 3(2) TFEU.

These are the main reasons why Art. 3(2) TFEU is rarely used by the Court when attributing implied external competences to the Union: it is quite challenging to apply and, additionally, Art. 216(1) TFEU, despite not formally attributing exclusive external competences to the Union to conclude an international agreement, has proved to be, controversially, a significantly more effective tool in doing so.

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[55] See *infra*.
[56] NEFRAMI (2019: 512).
[57] See *supra*.
[58] Referring to the Opinion 1/76 doctrine and the *ERTA*-exclusivity doctrine.
[59] SCHUTZE (2018: 276).

1.2. Compulsory or facultative mixity?

As it has been argued in the previous sections of this thesis, the question of compulsory and facultative mixity[60] is a controversial one, which has provoked debatable and sometimes unclear interpretations by the Court. For instance, the Court has expressed in Opinion 2/15 that an international agreement which falls, entirely or partially, under the shared competences of the Union and the Member States, cannot be concluded by the Union alone[61]. Therefore, according to this Opinion, in this precise situation mixity is compulsory, meaning that there is no room of choice for the Council to determine whether it is more appropriate, given the circumstances, to conclude an EU-only agreement or a mixed one. Following jurisprudence, on the other hand, has shown the opposite[62]: under certain circumstances and conditions, the Union can choose to conclude by itself an international agreement which falls within the shared competences. It's a question of political choice which is left to the Council to determine, and therefore mixity is facultative. To justify itself from this seemingly unreasonable deviation, the Court argued that it never "had […] intended to suggest that the existence of shared competence necessarily implies the conclusion of a mixed agreement"[63] but that it had done:

> no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in [the area of foreign direct investment][64].

Lastly, if the provisions which are part of an international agreement fall within the exclusive competences of both the Union and the Member States, then mixity is compulsory: there is no apparent reason to believe that the Union is legally allowed to conclude alone an international agreement which also includes provisions falling under the exclusive competences of the Member States.

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[60] When, during the conclusion of an international agreement, we say that "compulsory mixity" is required, we mean that the latter must be concluded as mixed. On the other hand, in the same context, when we say that "facultative mixity" is allowed, we mean that there is the possibility to choose whether to conclude an international agreement as mixed or as EU-only. This discretion is generally left in the hands of the Council.
[61] See *supra*.
[62] *Ibid*.
[63] PRETE (2020: 3).
[64] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 68.

Despite the seemingly definite nature of these arguments, there is the need to shed light on certain matters: should an international agreement triggering compulsory mixity, under certain circumstances, be concluded as EU-only, or, for that matter, as Member State-only? Analogically, can the opposite take place as well? Are there situations in which an international agreement which naturally triggers facultative mixity must be signed as EU-only? To what extent is there a "question of political choice" on the part of the Council? These are some questions that the following sections of this thesis will try to answer.

1.2.1. False compulsory mixity: is it constitutionally possible?

The ambiguous terminology used in the title of this section could raise doubts as to the validity and possibility that such an event can occur: are there situations in which, even though an international agreement logically triggers compulsory mixity, the latter should be concluded as EU-only, or, for that matter, as a traditional State-to-State agreement? If that was the case, to what extent is this constitutionally correct and possible? The latter questions have provoked diverse answers, opinions stemming from different Advocate-Generals of the Court[65] to whom these queries were posed.

First of all, however, it is important to define one of the most important principles of EU law, which is the duty to state reasons, to "make reference to the relevant substantive and procedural bases"[66] following Art. 296(2) TFEU. The latter provision states that "[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties"[67]. Therefore, a European institution, whether it is operating on the internal or external field[68], has the duty to clearly display the substantive and procedural bases[69] from which it derives its legislative

[65] Namely, Advocate General Kokott and Advocate General Wahl, respectively in Case 13-07 (*Viet Nam*), where he expressed his Opinion, and in Opinion 3/15.
[66] PRETE (2020: 4).
[67] Art. 296 TFEU, subparagraph 2.
[68] See *infra*.
[69] The substantive legal basis of a legal act is the specific provision stemming from primary EU law from which a EU institution or a Member State derive its competence to tackle that legal act (or one objective of it). On the other hand, the procedural legal basis of a legal act is the specific provision stemming from EU primary law from which a EU institution or a Member State obtain the specific legislative procedure to follow in order to tackle the legal act (or one of the objectives of it). See *infra* for a concrete example.

proposition. The latter process can be somewhat detailed, depending on the complexity and the explicitness of the substantive and procedural legal bases from which the proposition derives: this is generally left to the Court's discretion to determine. Additionally, a further issue must also be discussed: what if the legal bases supporting a certain matter are more than one and, furthermore, they are incidental to one another? In other words, since there should always be only one legal basis that is supporting an objective of the proposition [70], what if there are two or more? In this case, EU case law comes into play: if the objectives of a proposition or, for that matter, of an international agreement are more than one, than it is possible to include more than one legal basis supporting them. The Court has explicitly stated this in *Commission v Council*.

> [If an international] [a]greement pursues a twofold objective […] consequently, [it] should […] [be] founded on a dual legal basis[71].

On the other hand, if there are multiple legal basis supporting only one objective of the agreement, then a so-called "center of gravity approach"[72] should be pursued. To put it in simple terms, the latter approach tries to identify, among the various legal bases, the one which is the most predominant and consistent with the objective concerned: this should be the only legal basis upon which the relevant agreement should be based on, whereas the other ones are merely incidental[73].

When there were doubts concerning the legal basis upon which the provisions of an international agreement were supposed to be based on, this approach was thoroughly applied by the Court in areas where the Union enjoys exclusive and shared competences, therefore in "horizontal" situations[74]. It has not, however, been clearly specified by the Court whether this approach was also applicable in "vertical" situations, so where the international agreement also includes provisions falling under the Member States' exclusive competences. In the latter

[70] Clearly, the substantive and procedural legal bases of an objective can be multiple, since they have very distinct meanings and, for this reason, they cannot be manifested in the same provision. In this case, the question refers to the situations in which there are multiple substantive legal bases and/or multiple procedural legal bases supporting a single objective of the legal act.
[71] Judgement of the Court, 1 October 2009, Case 370/07, *Commission v Council*, para. 38.
[72] PRETE (2020: 4).
[73] ID.
[74] ID. With the term "horizontal situations" it is meant that the center of gravity approach is applicable in situations where there is a conflict of multiple legal bases in areas which fall under the exclusive competences of the Union or under the shared competences of the Union and the Member States, therefore only in areas where the Union enjoys exclusive competences to conclude a EU-only agreement or where facultative mixity is triggered.

situation, mixity should be compulsory, and, for this reason, this procedure, since it is solely limited to the Treaties and more generally to EU law, should not be allowed to be carried in areas where it cannot constitutionally arrive[75].

However, despite the seemingly univocal and clear answer to the question, Advocate General Wahl, in one of his Opinions, seems to have slightly deviated from it. He argued that:

> [A] mixed agreement would be required, generally, where an international agreement concerns coexistent competences: that is, it includes a part which falls under the exclusive competence of the Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other[76].

What is the meaning behind the phrase "without any of those parts being ancillary to the other"? In my opinion, Advocate-General Wahl's intent was to highlight that mixity is not always compulsory when the international agreement has a part which falls under the exclusive competences of the Union and another one which falls under the exclusive competences of the Member States[77], but only if the two parts have a clear and, most importantly, unique sense in themselves. The word "ancillary" used by the Advocate General in this case means that the exclusive competences on both sides (on the Union side and on the Member States' side) should not be subsidiary, complementary to one another, but should each contribute to the same extent, and, most importantly, in their own ways for an objective of the international agreement.

Even though the latter Opinion, as such, is not legally binding on the Union's institutions nor on the Member States, the idea behind it has aroused some academic debate: will it ever be possible to conclude an international agreement as EU-only even though there are, although very limited in number and scope, provisions which fall under the exclusive competences of the Member States? Wouldn't this breach the principle of conferral under Art. 5(2) TEU and thus go beyond the prerogatives of the Union? As of today, these questions have not been duly answered by the Court.

Furthermore, there is another question which deserves attention: are the areas of exclusive competence attributed to the Union and the Member States clearly defined by the Treaties "and [can we consider] their boundaries to be

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[75] That is, the Member States' own constitutions. The EU, in doing so, would be breaching the principle of conferral under Art. 5(2) TEU.
[76] (emphasis added); Opinion of Advocate General Wahl (Opinion 3/15), para. 122.
[77] See *supra*.

watertight"[78]? In other words, are we sure that there is no overlapping between the Union's exclusive areas of competence and the Member States' ones? Clearly, the answer to this question is negative. There are several activities pursued by the Union which are affected, at the same time, by policies which fall both under the exclusive competences of the Member States and the Union, namely the production of renewable energy and the treatment of waste[79]. In this case, is mixity compulsory? In other words, should the act encompassing these activities be, without any doubt, concluded as mixed, or should a center of gravity approach be carried by the Court[80]? There is a least one case which suggests that the second option is indeed the right answer: the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. This is one of the numerous UN conventions which has been ratified by many Member States but not by the Union. Art. 5 of this convention states that:

> The requesting State Party shall […] afford to persons […] and to organizations […] exemption from taxation, duties or other charges, except for those which are normally incorporated in the price of goods or services, in respect of the performance of their assistance functions or on the equipment, materials and other property brought into or purchased in the territory of the requesting State Party for the purpose of providing telecommunication assistance under this Convention[81].

Now, the latter provision is clearly dealing with customs' duties and therefore on the regulation of the internal markets of the States which are parties to the Convention, which is undoubtedly an exclusive competence of the Union under Art. 3(1) TFEU. However, the Member States have concluded this Convention without consulting the related Union's institutions. Why hasn't the Commission, despite the obvious breach of EU primary law, brought an infringement procedure to the Court against the Member States concerned? The reason behind this decision clearly relates to the fact that the central objective of the Convention focuses on disaster relief, which is an exclusive competence of the Member States, whereas the customs' duties' provisions are just ancillary in the overall scheme of the agreement[82] . For this reason, an implicit "center of gravity" approach has been carried, which has determined that the most relevant legal basis for the objective pursued in the Treaty falls within the exclusive competences of the Member

[78] PRETE (2020: 5).
[79] ID.
[80] See *supra*.
[81] Art. 5(1)(b) of the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations.
[82] PRETE (2020: 5).

States, allowing them to conclude the Convention without the need for the participation nor the consent of the Union.

So, in summary, false compulsory mixity has been taken into consideration, although always indirectly and rarely, by the Court. It is clear, however, that it is applicable only when the provisions of the agreement which fall under the exclusive competences of the Union or the Member States are considered to be marginal in the overall scheme of the agreement[83]: if that was not the case, there would be no need to carry a center of gravity test and therefore mixity would inevitably be compulsory. Although there seems to be a quite clear answer to this issue, there is the need for the Court to directly face it in the future, since a sense of uncertainty and ambiguity is still present in the European institutions, especially within the Council and the Commission, which represent two opposite views with regard, more in general, to the question of mixity.

1.2.2. False facultative mixity: is it constitutionally possible?

After *COTIF I*, in situations where the conclusion of a mixed agreement is not required[84], the Council of the European Union enjoys the discretion to freely determine whether to conclude an international agreement by itself (following the procedure of Art. 218 TFEU) or alongside the Member States: it's a question of political choice which is left in the hands of the Council.

Despite the clarity expressed by the Court regarding this matter, a natural doubt comes to mind: to what extent does the Council enjoys this discretion? Aren't there limits to it which are set by the Court? The answers to these questions are multiple, since the barriers that can be raised to control this Council's discretion are numerous.

First of all, the most obvious limitation is of constitutional nature: The Court should be in a position to review the Council's decision in line with the procedures set out in Art. 218 TFEU. It should analyze whether the Council is pursuing the legitimate path when concluding a hypothetical international agreement, whether mixed or EU-only.

[83] ID.
[84] See *supra*.

For our purpose, however, the possibility for a different kind of limitation should be analyzed.

> [Are there] situations in which, despite the subject-matter of the agreement falling in area which, in principle, should trigger facultative mixity, there may nonetheless be a legal obligation for the Union to proceed in a specific way: be it to conclude a EU-only agreement or a mixed agreement[85] ?

In other words, does the Council always enjoy the freedom to choose the nature of an international agreement which triggers facultative mixity, or is it constrained, in certain contexts, by an external obligation to pursue one of the two possible paths?

The answer to this question should be affirmative: the so-called general principles of EU law, which are part of EU primary law, can have a constraining effect on the Council's discretion, since the Court can appeal to them if it deems necessary to revise the Council's actions.

One of these principles which naturally comes to mind is the principle of subsidiarity, outlined in Art. 5(3) TEU.

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level[86].

This one of the most important yet controversial principles of EU law, which can be applied, internally and externally[87], to widen the Union's competences and to, at the same time, control them. In our case, the principle of subsidiarity can serve as a referee whose role is to determine whether, in the given circumstances, it is more appropriate, in an area of shared competences, to conclude a EU-only agreement or a mixed one: for instance, if the Member States' local diversity of values and cultures are of outmost importance in order to attain the objectives of the agreement, then the Council is somehow forced to conclude the agreement together with the singular Member States. The opposite can also be true: if there is the need to express a concerted Union's position at the international level through the conclusion of an agreement and the latter is considered, by the Court,

[85] PRETE (2020: 6).
[86] Art. 5(3) TEU.
[87] There is no provision which limits the scope of the principle of subsidiarity to the internal sphere of action of the Union, therefore it is assumed that it is also valid for external action's purposes.

to be “sufficient” to attain the envisaged objectives[88], then “[there would be] no scope for voluntary participation by individual Member States”[89], and therefore it would be better to conclude the agreement as EU-only.

Another issue which needs further clarifications is the extent to which the Court can revise the Council’s decision and therefore influence it. First, it is important to state that the Council is given a relatively large room for choice to determine which is the most suitable form to conclude the agreement.

> The assessment [by the Court] is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the rules in question[90].

The wording used by the Court in this case suggests that, in contexts where the Council is given broad discretion to act autonomously, a revision by the Court of the legal basis and, more in general, of the compliance of the agreement with the Treaties is only allowed, given the information available at the moment, when the action pursued by the Council is considered as being “manifestly inappropriate in terms of the objective which the [Council and, more in general, the Union] is seeking to pursue”[91]. Thus, the judgement of “manifest inappropriateness” of the decision is not solely related to the exact wording of the decision and its compliance with the Treaties, but also to the “objectives set out therein”[92]. As a result, for instance, if the Council’s decision to conclude an international agreement as EU-only is deemed to undermine its effectiveness in the future, or if it is deemed, as such, to breach principles of international law, the Court has the possibility, if not the obligation, to challenge the decision, since these are considered to be “manifest” breaches of EU law and of the objectives set out in the agreement.

In conclusion, this chapter of the thesis has tried to analyze and shed light on the most relevant features which characterize mixed agreements. As we have seen, it is quite challenging to identify a common thread leading to a consolidated conclusion: there are always sudden changes of position on the part of the Court, exceptions to the already complex juridical interpretations and, as a result, there is a great deal of uncertainty, which is typical in a subject as complex and multi-

[88] The term “sufficient”, in this case, means that the Union’s action is considered to be valid enough for the purpose of the agreement to conclude it by itself, and that the singular Member States’ contribution would not bring any added value for the attainment of the objectives set out.
[89] Opinion of Advocate-General Kokott in Joined Cases 626/15 and 659/16, point 4 (b).
[90] Judgement of the Court, 5 October 1994, Case 280/93, *Germany v Council*, para. 90.
[91] PRETE (2020: 9).
[92] Art. 5(2) TFEU.

faceted as EU law. The next chapter will further examine these concepts in a more practical manner, by analyzing one of the most prominent and controversial cases of EU external relations law: *COTIF I*.

CHAPTER 2

A PRACTICAL EXAMPLE: CASE 600/14, *GERMANY V COUNCIL – COTIF I*

2.1. Juridical context: Background

The feud between Germany and the Council of the European Union originated from the proposition of amending certain provisions of the Convention Concerning International Carriage by Rail (COTIF), which is a mixed agreement signed by both the European Union and most EU Member States (except the Republic of Cyprus and the Republic of Malta) with a significant number of Northern African and Middle Eastern countries[93]. COTIF is the convention which regulates OTIF, that is the Intergovernmental Organization for International Carriage by Rail, to whom, clearly, the latter countries and the Union are parties. In short, the organization's goal is to regulate and harmonize international railway law in order to facilitate the movement of goods, people and services across the world.

Nevertheless, the Convention, since it covers areas which might affect the internal market of the European Union and its Member States, which is an exclusive competence attributed to the former under Art. 3(1) TFEU, contains a series of "disconnection" clauses which are dedicated solely to the Member States of the Union which are parties to the Convention. One of them states that:

> The provisions […] shall not affect the obligations which the parties to the contract of use of infrastructure have to meet in an EU Member State or in a State where

[93] The countries which are parties to the Convention are the following: Afghanistan, Albania, Algeria, Austria, Armenia, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Georgia, Germany, Greece, Hungary, Iran, Iraq, Ireland, Italy, Jordan, Latvia, Lebanon, Liechtenstein, Lithuania, Luxembourg, Monaco, Montenegro, Morocco, Netherlands, North Macedonia, Norway, Pakistan, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Ukraine, the United Kingdom and, clearly, the European Union.

> legislation of the European Union applies as a result of international agreements with the European Union[94].

It is clear from this provision that, in the areas where the Union and its Member States have settled case law which contradicts the Convention's provisions, the latter should not be applied. EU law clearly have primacy over international law in this case.

Furthermore, as in any mixed agreement, there is need to ensure unity and close cooperation between the Union and the Member States when, for instance, voting for a certain amendment of the Convention or, more in general, when there is the need to express a concerted Union's position on a certain matter. Therefore, the Convention also includes rules whose goal is to coordinate the prerogatives of the Union and of the singular Member States, despite this being *de facto* an internal matter between the Union and its Member States.

When, in June 2014, the OTIF Revision Committee proposed a set of amendments to be made, the Council, following a proposition by the European Commission, felt entitled, under Art. 218(9) TFEU[95], to adopt a common position on behalf of the Union, through a legislative act, regarding the proposed amendments. On that matter, Germany expressed its disagreement, by arguing that the Union was not allowed to act by itself in areas which fall under the shared competences of the Union and the Member States[96]. As a result, it decided to bring a case of annulment of the Council's decision before the European Court of Justice.

2.2. Germany's pleas against the Council of the European Union

Germany's argument against the Council's decision was mainly supported by three pleas: firstly, it argued that the Council had breached the principle of

[94] Consolidated version of the Convention concerning International Carriage by Rail, Article 5, ∮2 of the section "Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic", Title II.

[95] Art. 218(9) TFEU states that: "The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement".

[96] These were "related to the modification of the COTIF's uniform rules on contracts for international carriage of goods by rail and on contracts for the use of vehicles and infrastructure in international rail traffic". [NEFRAMI (2019: 492)].

conferral under Art. 5(2) TEU; secondly, it asserted that the Council had failed to state the reasons behind its decision, which is an obligation stemming from Art. 296 TFEU; and, lastly, it maintained that the Council had, by not collaborating with the Member States in areas where it was supposed to do so, infringed the principle of sincere cooperation in conjunction with the principle of effective judicial protection, enshrined, respectively, in Art. 4(3) TEU and Art. 263 TFEU.

The following sections of this chapter will try to shed light on these three pleas as well as providing the Council's argument against the latter.

2.2.1. First plea: infringement of the principle of conferral, Art. 5(2) TEU

The first plea which was supporting Germany's argument asserted an infringement of the principle of conferral under Art. 5(2) TFEU by the Council in Art. 1 of the so-called "contested decision"[97]. In the latter, Germany argued that the Council was acting in a merely "EU-way" in establishing a position regarding the proposed amendments to the Convention, which fell under the shared competences of the Union and the Member States and therefore required the participation of the singular Member States as well. The subjects of these amendments fell, namely, in the field of transport, which is, under Art. 4(2)(g) TFEU, an area where the Union and the Member States share their competences. On that matter, despite accepting the view that a coordinated Union's position can be pursued following Art. 4(3) TEU and Art. 91(1) TFEU[98], Germany asserted that the Union cannot follow this path unless the ERTA-exclusivity criterion, enshrined in Art. 3(2) TFEU, is triggered[99]: if the Union happened to enjoy implied exclusive external competences under Art. 3(2) TFEU, then it could adopt

[97] This is the term which is used in the judgement for the Council's decision, in line with Art. 218(9) TFEU, to adopt a Union's position concerning the proposed amendments to COTIF. I will be using this term for the remaining part of this thesis.

[98] Art. 4(3) TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives". Art. 91(1) TFEU: "The Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down: (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States.

[99] See *supra*.

a common position, through the contested decision, with regard to the proposed amendments of COTIF. More particularly, Germany refers to the last two situations of Art. 3(2) TFEU to support its argument: these state that "[t]he Union shall also have exclusive competence for the conclusion of an international agreement […] in so far as its conclusion may affect common rules or alter their scope". On this matter, Germany argued that the Union did not implement any common rules internally that were liable to be affected by the suggested amendments of COTIF, *ergo* it was not entitled to rely on Art. 3(2) TFEU as a justification for the drafting of the contested decision. On this matter, moreover, Germany asserted that the Union was not entitled to exert an external competence in a field where it has not exercised an internal one, whether the latter is exclusive or shared with the Member States, and "if it [does so it would] circumvent the ordinary legislative procedure and impinge on the rights of the European Parliament"[100].

2.2.2 Second plea: The failure to state reasons, Art. 296 TFEU

In its second plea, Germany argued that the Council had failed to state and prove that the areas which were covered by the provisions composing the contested decision were regimented by EU law and, by behaving in this way, it had breached the principle to state reasons under Art. 296(2) TFEU[101], and, moreover, it had failed to "state that the decision fell under EU [exclusive] external competence according to the ERTA criterion"[102]: According to Germany, since the areas covered by the proposed amendments and, consequentially, the contested decision clearly fell under an area of shared competence, the only legitimate way that the Union could have undertaken without involving the singular Member States was through Art. 3(2) TFEU, which attributes, under certain circumstances, an exclusive external competence to the Union to conclude an international agreement.

Furthermore, Germany asserted that the Council, in its contested decision, did not specify the substantive legal basis behind its external competence: it only referred to Art. 91 TFEU, which is a provision allowing the Council to lay down common

[100] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 37.
[101] Art. 296 TFEU, subparagraph 2, states that "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties".
[102] NEFRAMI (2019: 493).

rules for the Member States in the field of transport[103]. The latter, however, only applies to internal matters within the territory of the Union, meaning that it is insufficient to support the contested decision's arguments, which focus on an external matter. Although the Council referred, during the hearing, to Art. 216(1) TFEU, which would allow for the latter to happen, the contested decision, being the only valid and binding document, does not refer in any way to this provision, and therefore Art. 216(1) should not be considered as a valid substantive legal basis justifying the Council's position, adopted through the contested decision.

2.2.3. Third plea: infringement of the principle of sincere cooperation in conjunction with the principle of effective judicial protection, Art. 4(3) TEU and Art. 263 TFEU

In its third and final plea, Germany accused the Council, first, of having infringed the principle of sincere cooperation outlined in the first subparagraph of Art. 4(3) TEU. It argued that, when it comes to the definition of a common Union objective in the context of a mixed agreement, the Union and the Member States have the duty to collaborate "in good faith, in order to clarify the situation and to overcome difficulties that [could] arise [in every stage of negotiation, ratification, conclusion and emendation of a mixed agreement]"[104].

Among these mutual obligations, there is the duty to devote a sufficient time span before the Council's decision becomes binding and therefore irreversible to allow the Member States, in the event that they manifest some reservations, to bring a case before the Court of Justice. The latter notion is supported by the so-called principle of effective judicial protection, which is enshrined in Art. 263 TFEU:

> [The Court] shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement

[103] Art. 91 TFEU is a provision which states that: "For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down: (a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States; (b) the conditions under which non-resident carriers may operate transport services within a Member State; (c) measures to improve transport safety; (d) any other appropriate provisions.

[104] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 95.

> of the Treaties or of any rule of law relating to their application, or misuse of powers[105].

In this article, the Court allows any European institution, Member State, natural and legal person to bring a case of infringement of EU law before it. It is a basic right which must be guaranteed in any democratic judicial system.

In the contested decision, Germany argued that it was not given enough time by the Council to challenge the validity of the envisaged amendments of COTIF.

> The Council waited until the 24th of June 2014, that is to say the day before the opening of the 25th session of the OTIF Revision Committee, to adopt the contested decision [which would have produced irreversible effects], thus leaving the Federal Republic of Germany fewer than 24 hours to refer the matter to the Court of Justice. The Federal Republic of Germany states that it was not possible for it, in that period of time, to conclude the internal procedures necessary for the lodging before the Court of an application and a request for the suspension of implementation[106].

As a result of the limited amount of time at disposal and of the irreversibility of the contested decision, Germany claimed that the Council had breached the principle of effective judicial protection under Art. 263 TFEU, in conjunction with the principle of sincere cooperation, enshrined in Art. 4(3) TFEU.

2.3. The Council's counterarguments against Germany's pleas of law

2.3.1. The Council's argument against Germany's first plea of law

In order to counter Germany's first plea, the Council of the European Union, supported by the European Commission, argued that the amendments which were submitted by the OTIF Revision Committee were inclined to affect common rules or alter their scope, and, therefore, fell within the plausible situations identified in Art. 3(2) TFEU which granted exclusive external competences to the Union. In this case, the Council would be most certainly entitled to adopt a Union position in an international agreement pursuant Art. 218(9) TFEU.

Furthermore, the Council argued that even if, in the most remote case, the proposed amendments were found to be inconsistent with the conditions set forth in Art. 3(2) TFEU, there would be no necessity, for the Union, to refer to the

[105] Art. 263 TFEU, subparagraph 2.
[106] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 98.

exclusivity criterion of Art. 3(2) TFEU to exercise a shared external competence, nor there would be the need for the existence of a corresponding and, most importantly, peculiar internal competence for the latter prerogative to be legitimate. To defend its argument, the Council referred to settled EU case law on the nature of mixed agreements.

> [Even though] those [areas] [have] not been the subject of specific [Union] legislation, [they nonetheless] fall […] within the [Union] framework since those articles are in mixed agreements concluded by the [Union] and its Member States and concern a field in large measure covered by [Union] law[107].

The latter interpretation by the Court exactly proves the Council's point: there is no need to identify a specific internal competence or rule in order to exercise an external one, as long as the latter fall within "a field at large covered by [Union] law". Furthermore, the Council referred to settled case law from *Commission v Ireland*, where the Court specified the following:

> The [Union] can enter into agreements […] even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at [Union] level, which, by reason of that fact, are not likely to be affected[108].

Following this argument by the Court, it is implied that the Union can exercise an external competence[109] without the need of any complementary internal legislation in the field. This goes even further then the interpretation given by the Court in *Commission v France*: in the latter judgement, it was argued that an external competence of the Union can exist even though the matter is not covered by a specific internal rule, the latter falling within "a field at large covered by [Union] law [internally]"[110]. In *Commission v Ireland*, the Court allowed the Union to enjoy an external competence in a field where there are no relevant internal competences or rules.

Lastly, the Council has argued that there is no provision in the Treaties which specifically requires the exercise of shared competences in the internal field as a precondition for their validity in the external sphere: Art. 4(2) TFEU, for instance, which lists the areas where the Union and the Member States share their competences, including the common transport policy[111], makes no reference as to whether the cited competences are intended to be applied internally before they

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[107] Judgement of the Court, 7 October 2004, Case 239/03, *Commission v France*, para. 31.
[108] Judgement of the Court, 30 May 2006, Case 459/03, *Commission v Ireland*, para. 95.
[109] It is not specified, in the latter judgement, whether the external competence is exclusive or shared, therefore it is assumed that it can be applicable in both situations.
[110] See *supra*.
[111] *Ibid*.

can have their effect externally. By referring to the common transport policy in Art. 4(2)(g), it is implied that the latter area of competence is applicable to both internal and external situations, without the former being a precondition of the latter.

2.3.2. The Council's arguments against Germany's second plea of law

With regard to Germany's second plea of law, the Council, supported by the Commission, argued that, in the contested decision, it correctly listed the provisions of the Treaties which were likely to be affected by the COTIF's amendments, and therefore there was no reason to believe that it had breached the obligation to state reasons, enshrined in Art. 296 TFEU. Furthermore, the Council asserted that, in the contested decision, it had satisfyingly specified the procedural legal basis from which it derived its competence to adopt a common Union position in an international agreement through Art. 218(9) TFEU, which, either way, does not limit this prerogative to EU-only agreements, but it is valid as long as the Union enjoys a competence, whether shared or exclusive, in the relevant field of the agreement.

In addition, the Council contended that an appropriate substantive legal basis behind the contested decision was provided, since, in the latter, it "simply referr[ed] to the appropriate legal basis and […] describe[ed] its position"[112]. According to the Council, there is no obligation to provide all the specific details which are composing the relevant legal basis, but a "mere reference to [it] […] ought to be sufficient"[113]. The latter explanation by the Council is clearly based on settled case law regarding Art. 296 TFEU.

> It is not necessary for the reasoning [which is behind, generally, a Union's decision] to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question[114].

The latter provision underlines that the Union, in our case the Council, is generally not called into question to specify all the details concerning the legal basis from which it has derived its decision's provisions, but only the most relevant and,

[112] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 77.
[113] NEFRAMI (2019: 494).
[114] Judgement of the Court, 17 March 2011, Case 221/09, *AJD Tuna*, para. 58.

therefore, superficial facts, because the assessment of its compliance with Art. 296 TFEU is not only based on the exact wording of the decision, but also on the context in which that decision was taken and the objectives it was pursuing[115].

So, the Council, basing itself on the latter case law, asserted that a simple reference to the legal basis from which the provisions composing the contested decision derived was sufficient, and that, therefore, it had not breached the obligation to state reasons under Art. 296 TFEU.

2.3.3. The Council's arguments against Germany's third plea of law

In order to respond to Germany's third plea of law, the Council tried to prove and explain the reasons why it had not allegedly infringed the principle of sincere cooperation, enshrined in Art. 4(3) TEU, nor the principle of effective judicial protection, laid down in Art. 263 TFEU. To support the latter argumentations, the Council first focused on the timelines which featured the receiving, the approval and the submission of the contested decision to the OTIF Revision Committee.

With regard to the reception of the necessary documents, the Council argued that it had obtained the totality of them by the 12th of May 2014, therefore roughly one month before the 25th session of the OTIF Revision Committee on the 25th of June 2014. Within this time span, the Council approved the contested decision the 17th of June 2014, which came into force the 24th of June, one day before the OTIF Revision Committee's session. According to the Council, the enforcement of the contested decision was adopted in "good time […] before the opening of the 25th session of the OTIF Revision Committee, on 25 June 2014"[116]. By stating that the contested decision was adopted "in good time" before the start of the OTIF Revision's session, the Council contended that one day was sufficient for any Member State, institution or natural person to challenge the validity of the contested decision, pursuant to Art. 263 TFEU[117]. In my opinion, this argument by the Council is strikingly unrealistic: how can it be realistically assumed that such a proceeding can be conducted within a single day, or maybe less?

Furthermore, the Council sustained that the period of one month between the reception of the necessary documents from the OTIF Revision Committee and the

[115] See *supra*.
[116] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 100.
[117] See *supra*.

beginning of the OTIF's revision's session was a very limited time for it to fulfill its requirements, and therefore it was impossible to approve the contested decision earlier, since many legal and complicated issues were at stake. It argued, for instance, that it needed time, together with the Commission, to prove to Germany, who already expressed its reservations at that time, that the Union had the necessary competence to approve the contested decision. Moreover, by openly discussing the matter with Germany, the Council stated that it had fulfilled the requirements of the principle of sincere cooperation under Art. 4(3) TEU.

Lastly, it argued that the proposed amendments, if they will eventually be enforced by the OTIF Revision Committee, would not have irreversible effects. It is provided by COTIF that:

> Member States [parties to the Convention] may formulate an objection during the four months from the day of the notification [of the envisaged amendments]. In the case of objection by one-quarter of the Member States, the modification shall not enter into force[118].

On this provision, however, there is, in my opinion, an important implication to underline: the latter procedure could be conducted by, for instance, EU countries who have expressed reservations on the contested decision only if the Court will choose to annul the latter: it would be impossible for, say, Germany, France and other EU Member States to pursue this path if the contested decision was considered legitimate by the Court, since there is an obligation to express, through the latter decision, a concerted and uniform Union's position in the context of an international agreement, even though the latter is mixed[119]. The justification behind this claim is surely questionable: why should Member States who are singularly parties to a Convention be restrained of their legitimate right to formulate objections against a proposed amendment, as enshrined in Art. 35 of COTIF, because they are subjected to European Union law? Doesn't this place the other Member States of the Convention in a privileged position with respect to them? Unfortunately, the answers to both questions are quite simple and straightforward: European Union law, within the context of COTIF, has supremacy for EU Member States over the obligations provided by the Convention on matters where the two display clear inconsistency with one another. This is clearly stated in the COTIF full consolidated version.

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[118] Consolidated version of the Convention concerning International Carriage by Rail (COTIF), Art. 35, ʃ 2, Title VI, section "Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 in the version of the Modification of Protocol of 3 June 1999".
[119] See *supra* and *infra*.

> The provisions […] shall not affect the obligations which the parties to the contract of use of infrastructure have to meet in an EU Member State or in a State where legislation of the European Union applies[120].

This chapter has provided a judicial overview of the *COTIF I* case, focusing, more specifically, on the three pleas presented by Germany to support its argument against the Council of the European Union, along with the latter's counterarguments.

The next chapter will be focalized on the Court's judgement with regard to these pleas, its findings and its resulting developments.

[120] See *supra*.

CHAPTER 3

THE COURT'S JUDGEMENT AND FURTHER DEVELOPMENTS: *COTIF II*

3.1. Opinion of Advocate-General Szupnar

As in any legal case where the Court is required to express a judgement, there is also the need, beforehand, for a non-binding, subjective Opinion stemming from the Advocate-General of the Court, which can be of significant help for the drafting of the final, binding judgement.

In the case of *COTIF I*, AG[121] Szupnar delivered an Opinion that has proved to be of outmost importance for the Court's judgement regarding the first plea of law. In this section, I will try to shed light on the most relevant questions raised by AG Szupnar in his Opinion by, subsequently, highlighting their importance for the final position taken by the Court in its findings.

First and foremost, it is important to state that AG Szupnar, in his Opinion, gave little importance to Germany's second and third pleas, since he believed that their judicial interpretations, following the Treaties and previous case law, were relatively straightforward and linear. On the other hand, he focused on the first plea, in which Germany argued that the Council, by acting in a merely "EU-way" through the adoption of the contested decision, had breached the principle of conferral under Art. 5(2) TEU[122]. The question which naturally arises out of this plea is the following: does the Union have the competence to act, by itself, in an area where it enjoys a shared competence, which is transport policy[123]? In other words, does it possess the exclusive competence to address the question of the proposed amendments to COTIF?

According to the AG Szupnar, the answer to both questions is affirmative: the Council is able, under certain circumstances, to enjoy and exert an implied

[121] AG stands for "Advocate General": I am going to use this abbreviation throughout this Chapter.
[122] See *supra*.
[123] *Ibid*.

external competence outside of the situations laid out in Art. 3(2) TFEU[124], that is through the application of Art. 216(1) TFEU[125].

> [Art. 216(1) TFEU has a] more extensive [scope] than that of Article 3(2) TFEU [:] [o]nly some of the competences set out in Article 216(1) TFEU are exclusive competences pursuant to Article 3(2) TFEU[126].

More specifically, Szupnar referred to two situations identified in Art. 216(1) TFEU.

> "The Union may conclude an agreement with one or more third countries or international organisations […] 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 [and where it] is likely to affect common rules or alter their scope[127].

These are, in his opinion, two further situations other than the ones identified in Art. 3(2) TFEU from which the Union can derive an implicit external competence to conclude an international agreement or, in this case, express a concerted Union's position regarding the amendments proposed by the OTIF Revision Committee: The AG doesn't make any explicit comment as to the validity of Art. 216(1) TFEU clauses in a situation, such as the concerned one, where there is the need to identify an implicit external competence to express a concerted Union's position, not to conclude an international agreement. The lack of precision on this matter is probably caused by the fact that AG Szupnar considers the two prerogatives as equally justifiable by Art. 216(1) TFEU, which is, in my opinion, a debatable statement: it is clearly stated, in Art. 216(1) TFEU, that the situations identified through which the Union can enjoy implied external competences are triggerable only when the Union has to conclude an international agreement with a third party, not when there is the need to express a position on certain proposed amendments of the agreement (which has already been concluded) following the procedure of Art. 218(9) TFEU.

In any case, Szupnar relied on one of the two aforementioned clauses of Art. 216(1) TFEU to justify the claim that the Union enjoyed a implied external competence to express a position following Art. 218(9) TFEU: he asserted that the EU's stance to the COTIF proposed amendments was necessary in order to achieve, within the framework of the Union's policies, one of the objectives

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[124] *Ibid*.
[125] *Ibid*.
[126] Opinion of AG Szpunar in Case 600/14, *Germany v Council*, para. 81.
[127] Art. 216(1) TFEU. See *supra*.

referred to in the Treaties, which is the transport policy objective, identified in Art. 91(1) TFEU, and, consequently, he claimed that the Union had the implied external competence to rely on Art. 216(1) TFEU to exercise the prerogative of Art. 218(9) TFEU, even if transport is clearly an area where the Union and the Member States share their competences. Through this statement, the Advocate-General had introduced a new tool which will be of outmost importance for the Court to support its findings on the first plea.

Furthermore, Szupnar has managed to prove that one of the situations identified in Art. 3(2) TFEU, which would give to the Union an implied exclusive external competence, had been fulfilled by the Council: since the areas covered by some of the proposed amendments to COTIF[128] are deemed to have explicit implications on EU legislation in this area, they would also be liable to affect some internal common rules of the Union, thus triggering one of the exclusivity clauses of Art. 3(2) TFEU[129]. One of the main counterarguments which may be raised against Szupnar's claim focuses exactly on the common rules: since the field of transport policies is clearly part of the shared competences that the Union enjoys together with the Member States, it is not difficult to imagine that there are very few coherent and comprehensive common rules at the Union level in the latter field. For this reason, it is important to specify exactly which common rule is liable to be affected by the proposed amendments. On this matter, the Advocate-General did not go into details in his Opinion, since, firstly, the main point he intended to focus on was the existence of an implied external competence for the Union through Art. 216(1) TFEU, and, secondly, because he considered the question of exclusivity under Art. 3(2) TFEU brought by Germany as irrelevant[130].

Moreover, the AG Szupnar focused on another statement made by Germany in its first plea, which focused on the impossibility for the Union to exert an external competence in a field where it has not exercised an internal one. On this matter, the AG Szupnar agreed with the Council's position: the Union is clearly allowed to exercise an external competence even if there is not a corresponding, precise internal competence in the field[131]. He specifically referred to mixed agreements' case law to support its argument[132].

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[128] Namely, those related to Appendix D of the COTIF which focus on the definition of the "keeper" of a vehicle.
[129] See *supra*.
[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.

Lastly, and very briefly, Szupnar opined on Germany's second and third pleas. Regarding the second plea, he asserted that the Council managed to satisfyingly display the legal basis behind its decision and fulfill its obligation to state reasons under Art. 296 TFEU.

With regard to the third plea, he argued that the Council did not breach the principle of effective protection under Art. 263 TFEU since he believed, following the reasoning of the Council, that the contested decision would not have any irreversible effects on Germany.

> [T]here is no evidence that the contested decision was able to influence the result [of the voting for the proposed amendments], in the light of the views of the various Member States of OTIF and the relevant rules concerning the adoption of decisions. The Federal Republic of Germany itself recognizes that a majority of votes was in favor of the adoption of the proposals, even without its vote[133].

With this statement, the AG Szupnar was claiming that, in his view, the contested decision would not have played an influential role in shaping the final voting result for the proposed amendments, which had been already approved by a majority of COTIF Member States even without Germany's vote: without this causal relationship, it is unconceivable, in his opinion, to formulate an infringement of the principle of effective judicial protection. In my opinion, the latter statement is highly debatable: the European Union controls a majority of votes in COTIF, meaning that their position and, therefore, vote is of outmost importance to pass, reject or amend any provision of the Convention. For this reason, in our case, the contested decision would surely play a key role in favor of the approval of the proposed amendments to the Convention. Furthermore, it would be impossible for Germany and any other EU Member State to object the proposed amendments following the procedure identified in the Convention[134], since it would contradict the concerted position taken by the Union at the international level through the contested decision and therefore breach the principle of sincere cooperation, enshrined in Art. 5(2) TEU[135]. For this reason, I am still siding with Germany on this matter, who argued that the proposed amendments, once they will come into force, would *de facto* enjoy irreversible effects.

[133] Opinion of AG Szpunar in Case 600/14, *Germany v Council*, para. 172.
[134] See *supra* and *infra*.
[135] *Ibid*.

3.2. The Court's judgement

Following the arguments stemming from both parties concerned, an undoubtedly peculiar Opinion delivered by Advocate-General Szupnar and a careful examination of the matters at hand, the European Court of Justice managed to devise a detailed and precise judgement for each plea presented by Germany, which resulted in its final decision concerning the request for annulment of the contested decision and, moreover, in the judgement delivered in a related and contemporary case: *COTIF II*. In the remaining sections of this thesis, I will try to shed light on the main arguments brought by the Court to support its judgement, as well as providing a very brief overview of the arguments, the parties involved and the legal facts which have given rise to *COTIF II*.

3.2.1. The Court's judgement on the first plea and the "necessity clause": Art. 216 (1) TFEU and Art. 3(2) TFEU

With regard to the various questions posed by Germany in its first plea of law, the Court presented a view similar to that expressed by Advocate-General Szupnar in his Opinion.

First of all, it focused on Germany's argument which claimed that an implied external competence of the Union can solely derive from Art. 3(2) TFEU. On that matter, the Court, siding with the Advocate-General, asserted that Art. 3(2) TFEU is not the only provision which attributes to the Union implied external competences: the latter emphasizes, under certain circumstances, the exclusivity attributed to the Union to act in the external sphere. There is, consequentially, a provision which is wider and thus also encompasses the situations identified in Art. 3(2) TFEU: that is Art. 216(1) TFEU. The latter "addresses the existence of an implied EU external competence, while Art. 3(2) TFEU deals with the exclusive character of such competence"[136] .

Following this reasoning, the Court argued that Art. 216(1) TFEU constituted another valuable source of implied external competences which, contrary to Art. 3(2) TFEU, do not necessarily attribute exclusivity and, moreover, does not require the implementation of internal rules as a precondition for its validity.

[136] NEFRAMI (2019:497).

More specifically, the Court has focused on the second situation identified by Art. 216(1) TFEU[137], which attributes to the Union an implied external competence if the latter is deemed to be necessary in order to achieve, within the framework of the Union's policies, one of the objectives defined in the Treaties. Following this provision, the question which aroused some relevance in the Court focused on the extent through which the Council had, through the contested decision, fulfilled this condition: in other words, was the contested decision, which expressed a concerted Union's position regarding the proposed amendments to COTIF, necessary in order to attain one of the objectives referred to in the Treaties?

The answer to this question by the Court, following the Opinion delivered by the Advocate-General, was affirmative: since the issues covered by the proposed amendments of COTIF, which focused on the Uniform rules concerning International carriage by rail, concern matters which fall within the EU common transport policy, identified by Title VI of the third section of the TFEU, which is an objective referred to in the Treaties, the Council, through the adoption of a concerted Union's position with regard to these amendments, which was necessary to pursue the latter objective, had fulfilled the requirements of the second situation of Art. 216(1) TFEU.

Secondly, the Court dealt with the second major argument presented by Germany in its first plea, who argued that the Union, or, in this case, the Council, was not entitled to exercise an external competence without having exerted the corresponding one in the internal sphere[138]. On this matter, once again, the Court supported the Opinion of the Advocate-General and, therefore, of the Council by relying on previous case law on mixed agreements[139].

> [W]here the Union and its Member States have a shared competence [in an area], […] the Union can enter into agreements in that area even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at EU level[140].

In the example which was analyzed by the Court, however, it is important to specify that the central subject-matter of the agreement was environmental protection, which is an explicit external competence conferred on the Union by

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[137] See *supra*.
[138] *Ibid*.
[139] *Ibid*.
[140] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 63.

the Treaties in Art. 191(1) TFEU, subparagraph 4[141]. On this matter, however, the Court argued that there is no difference between the exercise of an express or implied external competence, and therefore the latter question did not constitute an issue for the judgement of the Court.

> [Art. 4(2)(g)] does not state that a prerequisite of the Union having an external competence that is shared with its Member States is the existence, in the Treaties, of a provision explicitly conferring such an external competence on the Union[142].

Moreover, the Court referred to Opinion 2/15 in order to further stress its argument: in the latter document, it was argued that the provisions composing the EU-Singapore Free Trade Agreement, relating to non-direct foreign investment, were exerted in the external sphere (through the conclusion of the international agreement) without their prior integration in the internal one. While referring to this Opinion, the Court also clarified the distinction between shared competences and mixed agreements: it argued that the former is not necessarily a precondition of the latter, contrary to what Germany had deduced from Opinion 2/15[143].

> [In Opinion 2/15, the Court] did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area[144].

Lastly, the Court focused on Germany's argument which stated that the Council had, through the adoption of the contested decision, circumvented the ordinary legislative procedure. On this matter, the Court argued that the contested decision was legally drafted in pursuance of Art. 218(9) TFEU, which attributes to the Union the competence to express a position in an international body[145]. For this reason, this argument by Germany as well had to be rejected. Furthermore, to conclude its judgement with regard to Germany's first plea of law, the Court asserted that the procedure allowing for the establishment of a concerted Union position in an international body, enshrined by Art. 218(9) TFEU, could also be undertaken in areas of international action where the Union had not adopted internal rules. On the grounds of this argument, the Council, through the adoption

[141]"Union policy on the environment shall contribute to pursuit of the following objectives: — promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change".
[142] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 66.
[143] See *supra*.
[144]Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 68.
[145] See *supra*.

of the contested decision, had not circumvented the ordinary legislative procedure nor breached Art. 218(9) TFEU.

In conclusion, the Court, on the grounds of these arguments, had rejected Germany's first plea of law, which claimed that the Council had infringed the principle of conferral, enshrined in Art. 5(2) TEU.

3.2.2. The Court's judgement on the second plea and the "substantive and procedural legal basis": Art. 91(1) TFEU

With regard to Germany's second plea of law, the Court first dealt with Germany's initial claim, which focused on the illegitimacy for the Council to address an issue which had not been regimented by EU law. On that matter, the Court referred to its judgement with regard to Germany's first plea, where it managed to ascertain that the Union indeed enjoyed an implied external competence to express a concerted Union's position regarding the proposed amendments through the contested decision[146]: for these reasons, the Court rejected Germany's argument.

Moreover, the Court examined Germany's central argument of its second plea, which accused the Council of having breached the obligation to state reason, enshrined in Art. 296 TFEU, and, therefore, of failing to state the substantive and procedural legal basis from which it derived the competence to draft the contested decision. Germany argued that the Council mentioned Art. 91(1) TFEU as its substantive legal basis, which, however, only attributes an implied competence to the Union in the field of transport in the internal sphere, not in the external one: the latter can be derived from the second situation of Art. 216(1) TFEU, which, however, the Council failed to formally state in the contested decision[147]. On the subject, the Court first recalled the importance of Art. 296 TFEU.

> [That provision is needed] by […] the Court to be able to exercise its power of judicial review[148], in order to preserve the prerogatives of the EU institutions[149] [and] in the light of the principle of conferral of powers enshrined in Article 5(2) TEU, according to which the European Union must act within the limits of the competences conferred on it by the Member States in the Treaties to attain the

[146] *Ibid*.
[147] See *supra*.
[148] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 82.
[149] *Ibid*., para. 81.

> objectives set out in the Treaties with respect to both the internal action and the international action of the European Union[150].

After having stressed the importance of Art. 296 TFEU, the Court asserted that, as it had been established in *Commission v Council*[151], the failure by the Council to refer to Art. 216(1) TFEU as a legal basis did not constitute a breach of Art. 296 TFEU if the latter could successfully be derived from other parts of the contested decision: in other words, the Court argued that, in the event that a reliable legal basis supporting the Council's contested decision could originate from another provision of the measure in question, the Council would not have breached the obligation to state reasons, enshrined in Art. 296 TFEU. On that matter, the Court stated that the Council correctly referred to Art. 91(1) TFEU as its substantive legal basis, and, for this reason, there was no obligation to mention Art. 216(1) TFEU in the contested decision. Moreover, the Court addressed the remaining problematic arisen by Germany in its plea, who asserted that Art. 91(1) TFEU, which confers to the Union an implied competence to act in the field of the common transport policy, would only be applicable in internal situations, therefore not in the present case.

> In so far as the argument of the Federal Republic of Germany relies on the claim that Article 91 TFEU cannot be capable of conferring an external competence on the Union, suffice it to state that that argument relates to the question whether a competence actually exists and cannot therefore be validly relied on in support of a plea in law alleging a breach of the obligation to state reasons[152].

As it can be inferred from this statement, the Court did not directly reply to Germany's argument concerning Art. 91(1) TFEU: it simply changed the subject of the discourse by claiming that Germany was not entitled to refer to a question of attribution of competences in a plea where it was alleging a breach of Art. 296 TFEU. In my understanding, this explanation provided by the Court is debatable: regardless of the fact that Germany was not entitled to discuss a question of attribution of competences in a plea alleging a breach of the obligation to state reasons, the doubt as to whether the Council could, as a matter of fact, solely rely on Art. 91(1) TFEU to justify the drafting of the contested decision remained unresolved, since the Court did not further address this issue in the judgement. The reasons behind the silence of the Court on this matter were probably related, in my opinion, to the fact that Germany's argument was indeed correct and unquestionable: the Council did not enjoy the necessary competence to draft the

[150] *Ibid*, para. 80.
[151] Judgement of the Court, 25 October 2017, Case 687/15, *Commission v Council*.
[152] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 86.

contested decision on the grounds of Art. 91(1) TFEU provisions. Moreover, I believe that another reason behind the silence of the Court is related to the fact that, in the evaluation of the first plea in law, it had already determined that the Council enjoyed an implied external competence pursuant to the second situation of Art. 216(1) TFEU, and, consequentially, it did not deem it necessary to further examine the compliance of the contested decision with Art. 91(1) TFEU. On this matter, however, it is important to emphasize the fact that the Council had the obligation to state, in the contested decision, the substantive legal basis from which it derived the competence to draft it, regardless of what the Court had determined in its judgement. Since Art. 91(1) TFEU did not constitute a valuable substantive legal basis, the Council, in my opinion, had breached the obligation to state reasons, enshrined in Art. 296 TFEU, because the latter clearly specify that there is always the need to state the substantive legal basis behind a decision[153]: it is not sufficient to simply address it, for instance, orally or informally.

Lastly, the Court focused on the procedural legal basis upon which the Council based itself to draft the contested decision. In the latter, it referred to Art. 218(9) TFEU, which is a provision that describes the procedure to be followed by the Council to establish a concerted Union position in an international body[154]. On that matter, the Court argued that the Council had correctly stated the procedural legal basis for the contested decision, and, consequentially, it did not breach Art. 296 TFEU.

In conclusion, the Court, on the grounds of these arguments, had rejected Germany's second plea of law, deeming it unfounded.

3.2.3. The Court's judgement on the third plea: the availability of the contested decision before it produced irreversible effects

With regard to Germany's third plea in law, the Court replied in quite a concise and succinct way, since it only dedicated one page to it. It is clear, consequentially, that the matters in question were, in the Court's opinion, quite simple and straightforward to elucidate.

[153] Art. 296 TFEU, second subparagraph: "Legal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties" (emphasis added).
[154] See *supra*.

First, it focused on Germany's initial claim of the plea, which alleged a breach of the principle of sincere cooperation, enshrined in Art. 4(3) TEU, since the Council did not make the contested decision available sufficiently early, before it would inevitably have irreversible effects, as to allow the Member States to challenge it. As a result of this, moreover, the Council had also breached the principle of effective judicial protection, enshrined in Art. 263 TFEU[155]. With regard to the apparent breach of the principle of sincere cooperation, the Court sided with the Council, who asserted that it did make the contested decision available early enough for any Member State, institution or natural person to challenge it before the Court. On this matter, the Court argued that Germany failed to indicate, in its action, that "[a] period of one week [had] elapsed between the approval of the proposal for a decision by the Permanent Representatives Committee[156] and the adoption of the contested decision by the Council"[157]. Furthermore, the Court claimed that Germany was already aware of the content of the proposed decision once it was approved by the Permanent Representative Committee, and, therefore, even if the time span which elapsed between the approval of the contested decision by the Council and the 25th Session of the OTIF Revision Committee was of only one day, it could reasonably bring proceedings against the Council before the Court.

With regard to the Council's alleged breach of the principle of effective judicial protection, the Court held that, in either case, Germany, in its argument, did not demonstrate that the contested decision would have irreversible effects, and, in either way, as it had been stated in the previous paragraph, Germany was in a position to bring proceedings against the contested decision before it supposedly started to produce irreversible effects.

For these reasons, according to the Court, the Council did not breach the principle of sincere cooperation, enshrined in Art. 4(3) TEU, nor the principle of effective judicial protection, enshrined in Art. 263 TFEU: as a result, the third plea in law brought by Germany was dismissed as unfounded.

So, in conclusion, the Court rejected all three pleas of Germany's action for annulment of the contested decision. Consequentially, following the Court's

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[155] *Ibid*.
[156] The Permanent Representatives Committee is the committee of the Council of the European Union which was commissioned to formulate, after a proposal from the Commission, an example of the provisions composing the contested decision, which would eventually be either approved or rejected, through qualified majority, by the Council in plenary.
[157] Judgement of the Court, 5 December 2017, Case 600/14, *Germany v Council*, para. 107.

Rules of Procedure, Germany and the other Member States who supported its action were under an obligation to bear the costs of their unsuccessful activity.

3.3. *COTIF II*: a turn of events?

3.3.1. The letter of formal notice and the reasoned opinion.

While the action for annulment of the contested decision brought by Germany against the Council seemed to be terminated, another different but related question was pursued: two months after the 25th session of the OTIF Revision Committee was conducted, on August 2014, the European Commission, supported by the Council, delivered, on the grounds of Art. 258 TFEU[158], a letter of formal notice[159] which accused Germany of infringement of a fundamental obligation. In their opinion, the Member State had failed to fulfill its obligations deriving from Art. 4(3) TEU and the contested decision during the 25th Session of the OTIF Revision Committee. On that matter, the Commission argued that Germany, by expressly refusing to side, during the 25th Session of the OTIF Revision Committee, with the concerted Union's position regarding the OTIF proposed amendments, had breached the principle of sincere cooperation, enshrined in Art.4(3) TEU, which normally requires the Member States to "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives"[160]. In the Commission's opinion, the position taken, in this case, by Germany could compromise the fulfillment of the common transport policy, which is an objective of the Union identified in Title VI of the TFEU. For

[158] Art. 258 TFEU: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

[159] A letter of formal notice is a non-binding document which is normally sent by the Commission to a Member State when the latter is suspected of having infringed a provision of the Treaties. This is generally the first step that the Commission undertake to warn the Member State concerned of the suspected infringement of which it is accused. Furthermore, in this letter, the Commission generally gives a deadline for the Member State to comply with the necessary requirements. If that would not be the case, the Commission will issue a reasoned opinion and, consequently, bring the matter before the Court.

[160] Art. 4(3) TEU, subparagraph 3.

these reasons, Germany was solicited to provide a clear justification for its allegedly illegitimate actions.

Germany, while waiting for the Court's judgement on *COTIF I*[161], delivered a statement during the negotiations for the approval of the contested decision, whose aim was to reply to the latter Commission's letter of formal notice.

> [The Federal Republic of Germany] considers, from a legal point of view, that it is entitled to vote on [the items of the Convention concerned] even if that goes against the [contested] decision. The reason is that the European Union does not have competence in that regard. The division of competences between the EU and the Member States is the subject of pending proceedings before the Court … (Case C-600/14 — Germany v Council). Pending a decision of the European Court of Justice, [the Federal Republic of Germany] will exercise its voting right in the OTIF General Assembly, maintaining its legal position and without prejudice to the pending proceedings at the [Court], not in derogation of that Council Decision … although it considers this decision to be unlawful[162].

This statement by Germany had clarified its position with regard to the Commission's letter of formal notice: it did not have any intention to side with it, since the Member State believed that its action was perfectly legitimate. Moreover, in its statement, Germany asserted that the contested decision was, in its opinion, unlawful.

Following this very firm position taken by Germany, the Commission determined that a further step in the action against the Member State was needed: in pursuance of Art. 258 TFEU's procedure, it issued a reasoned opinion[163], where it invited Germany to "take the necessary measures to comply with the reasoned opinion within the time limit laid down"[164]. On this matter, Germany reiterated its position adopted with regard to the letter of formal notice by ignoring the Commission's requests.

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[161] See *supra*.

[162] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 22.

[163] A reasoned opinion is a formal request to comply with EU law. The difference with a letter of formal notice is that the latter is a request to provide a reasonable justification to an apparently illegitimate conduct, while the former directly invite the Member State to comply, within a predefined period of time, with EU law.

[164] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 25.

3.3.2. The start of the proceedings for an infringement of an essential procedural requirement and Germany's objection of inadmissibility.

After having failed to come to terms, the Commission decided to bring a case of infringement of an essential procedural requirement to the Court against Germany, who, in its opinion, had failed to fulfill its international obligations as a Member State and, consequentially, it had breached the principle of sincere cooperation, enshrined in Art. 4(3) TEU. In the latter, Germany was also solicited to issue a public apology with regard to its illegitimate conduct. This action by the Commission, peculiarly, was pursued at approximately the same time as the action by Germany against the Council, *COTIF I*[165], and, moreover, it managed to settle most of the unresolved questions which arose in its counterpart, while, at the same time, instigating new ones.

In any case, once the Commission brought the action for infringement against Germany before the Court, the impugned Member State immediately raised an objection of inadmissibility, in pursuance of Article 151 of the Rules of Procedure of the Court, against the Commission's action. In that regard, it asserted, first, that its stance in occasion of the 25th session of the OTIF Revision Committee would not have any further repercussions on the international credibility of the Union, since it "had exhausted all its effects by the end of the 25th session of the OTIF Revision Committee"[166]. Moreover, Germany claimed that the contested decision, in the way it was structured by the Council, did not allow for any Member State to obtain judicial protection[167], and "thus contribut[ed] to the difference of opinion at that session"[168]: in any case, however, since the deadline given to the impugned Member State to comply with the requirements of the reasoned opinion had not expired yet, Germany claimed that the Commission was not entitled to bring a related infringement procedure before that deadline had expired. On the grounds of these arguments, Germany declared that it considered the Commission's action for infringement as inadmissible.

The Court, first, dealt with the initial question posed by Germany in its objection of inadmissibility, which focused on the restrictive temporal validity of its stance. On this matter, the Court argued that the deleterious effects that Germany's stance would have towards the Union's international credibility would not end up with

[165] See *supra*.
[166] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 31.
[167] See *supra*.
[168] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 33.

the 25th session of the OTIF Revision Committee, but would "manifest themselves, more generally, in the international action of the European Union within that international organization [,] […] call[ing] into question the unity and consistency of the EU's external action"[169]. Furthermore, the Court held that if the statement brought by Germany was generalized, then any Member State could evade from an accusation of infringement of an essential procedural requirement by asserting that the detrimental effects of its legitimate conduct had expired. In my opinion, the Court's argumentation in this regard was impeccable: it is clear that Germany's stance on the 25th session of the OTIF Revision Committee, whether it was legitimate or not, would inevitably have a long term impact on the Union's credibility in the Convention if the latter was expected to express a concerted position: since this was apparently the case, it is clear that the singular position taken by Germany would necessarily have detrimental effects that would go beyond the 25th session of the OTIF Revision Committee. Secondly, the Court focused on the alleged impossibility for the Member States, because of the way the contested decision was structured, to rely on the principle of effective judicial protection[170]. On this matter, the Court gave a quite direct answer: a breach of a principle of EU law could not be raised in an objection of inadmissibility, but in a proper action against a party[171]. Primarily because of these arguments, the Court rejected Germany's objection of inadmissibility and considered the Commission's action as permissible.

3.3.3. The arguments by the parties concerned.

Subsequently, the Court went on analyzing the arguments brought by the Commission and Germany.

Briefly, the Commission first argued that the contested decision was binding every EU Member State in its entirety in pursuance of Art. 288, subparagraph 4 TFEU[172], even though its validity had been challenged by Germany in *COTIF I*. Secondly, and most importantly for the purpose of this thesis, the Commission held that Germany, by expressing and voting, at the 25th session of the OTIF Revision Committee, for a position with regard to the proposed amendments to

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[169] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para(s). 46-47.
[170] See *supra*.
[171] *Ibid*. For this reason, Germany raised this issue in its third plea of law in *COTIF I*.
[172] Art. 288, subparagraph 4 TFEU: "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them".

COTIF which significantly deviated from the Union's position, expressed in the (binding) contested decision, had infringed the fundamental principle of sincere cooperation, enshrined in Art. 4(3) TEU: consequentially, the Commission accused Germany of having created confusion and therefore doubt as to the international credibility and unity of the European Union.

On the other hand, Germany, first, stated, as it did in response to the Commission's letter of formal notice[173], that it was impossible, because of the very late adoption of the contested decision by the Council with respect to the day of the 25th session of the OTIF Revision Committee, for it to rely on the fundamental principle of effective judicial protection, which would have allowed it to challenge that decision. For this reason, the Member State deemed the contested decision as unlawful, and, therefore, unsuitable for use in a court of law. Moreover, regardless of the latter statement, Germany argued that the contested decision only suggested a "recommended coordinated position"[174] by the Union regarding the COTIF proposed amendments: there is no provision in the latter decision which undoubtedly obliged the Union to express a coordinated position. The Member State recalled Art. 288, subparagraph 5 TFEU, which states that "[r]ecommendations […] shall have no binding force"[175]. Consequentially, "the European Union was limited to defining recommendations for positions, without any binding effect"[176]. Lastly, Germany referred to the Commission's second submission, which alleged an infringement of the principle of sincere cooperation, enshrined in Art. 4(3) TFEU. On this matter, it argued that the Union, in its argumentation, had failed to prove and explicate the alleged damage that Germany's stance had provoked to its international credibility and reputation. For this reason, it could not accuse Germany of having infringed the principle of sincere cooperation: on the contrary, the Member State asserted that the very accession of the European Union to COTIF had created a great deal of confusion, uncertainty as to, for instance, the attribution of competences to the latter and to its Member States.

[173] See *supra*.
[174] Decision 2014/699 (the contested decision).
[175] Art. 288, subparagraph 5 TFEU.
[176] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 72.

3.3.4. The Court's judgement

On the grounds of these arguments, the Court gave a final judgement which managed to clarify a great deal of uncertainties with regard to mixed agreements and the division of competences between the Union and the Member States in this context which arose in *COTIF I*.

First of all, the Court dealt with the first submission of the Commission, to whom Germany replied in its argumentation in a relatively peculiar way. The Member State basically asserted that since the contested decision, in its official documentation, only recommended a coordinated Union's position with regard to the proposed amendments, it could not be binding on the Member States, since a recommendation, in pursuance of the Treaties, is not a binding document. On this matter, the Court, supporting the Commission's view, asserted that the contested decision, despite only recommending a coordinated Union position, was a decision of the Union, thus, following Art. 288, subparagraph 4 TFEU, "shall be binding in its entirety [for the Member States]"[177]. Moreover, the Court argued that the contested decision contained specific terms which suggested the mandatory nature of the document, such as 'amendments … to be supported', 'the Union is not in a position to support … and proposes' or 'the Union adopts'[178]. Furthermore, the Court addressed Germany's comment with regard to the contested decision, which basically stated that the latter, since it did not allow for any Member State to rely on the fundamental principle of effective judicial protection, was unlawful, and, consequentially, it could not enjoy a binding nature towards the Member States. On this matter, the Court stated that Germany's accusations of unlawfulness of the contested decision could not in any way compromise the binding nature of the document, since the latter were only accusations, which, in any case, have been deemed unfounded following the judgement of *COTIF I*[179]. Moreover, as the Court already stated in its *COTIF I* judgement, the very fact that Germany was allowed, in that context, to bring an action for annulment of the contested decision necessarily implied that the requirements of the principle of effective judicial protection, enshrined in Art. 263 TFEU, for the contested decision, had been fulfilled[180].

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[177] See *supra*.
[178] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 79.
[179] See *supra*.
[180] *Ibid*.

> The Federal Republic of Germany — as a member of the Council, which was the author of [the contested] decision — necessarily had knowledge of it, and was fully in a position to bring an action seeking annulment of that decision within the period of two months laid down in the sixth paragraph of Article 263 TFEU, as it did, moreover, in the case which gave rise to the judgment of 5 December 2017, *Germany* v *Council* (C-600/14, EU:C:2017:935)[181].

Lastly, the Court dealt with the Commission's second submission, which alleged an infringement of the principle of sincere cooperation, enshrined in Art. 4(3) TEU. First, the Court reiterated the importance of the principle and of Art. 218(9) TFEU, especially when the subject-matter of the international agreement falls within the shared competences of the Union and the Member States, in order to ensure "unity in the international representation of the European Union"[182]. Consequentially, the correct fulfillment of these provisions by the Union and the Member States symbolizes the unity of representation of the Union in an international body where the two are both parties. As a result, Germany, who, at the 25th session of the OTIF Revision Committee, expressed a position which significantly differed from the one pursued by the European Union through the contested decision, "allowed doubts to exist as to the European Union's ability to express a position and represent its Member States on the international stage"[183] and, for this reason, it had breached its Union obligations stemming from the latter decision and Art. 4(3) TEU.

> [The Court hereby] [d]eclares that the Federal Republic of Germany, by having, at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee, voted against the position laid down in Council Decision 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and the Appendices thereto, and having publicly opposed that position and the arrangements for the exercise of voting rights provided for therein, failed to fulfil its obligations under that decision and Article 4(3) TEU[184].

Consequentially, Germany was required to pay the costs which were requested by the Commission, such as, for instance, the issuance of a public apology before the OTIF Revision Committee[185].

[181] Judgement of the Court, 27 March 2019, Case 620/16, *Commission v Germany*, para. 90.
[182] *Ibid*., para. 93.
[183] *Ibid*., para. 95.
[184] *Ibid*., para. 101(1).
[185] See *supra*.

In conclusion, the *COTIF II* final judgement managed to clarify, most importantly, a significant question which was arisen by Germany in *COTIF I* to whom the Court gave little to no importance: the fact that the Commission brought a case of infringement of the principle of sincere cooperation against Germany proves that the latter, in its third plea of law against the Council in *COTIF I*, when it asserted that the contested decision and, therefore, the proposed amendments would have irreversible effects on the EU Member States[186], was indeed correct: despite the fact that COTIF allows for its Member States to formulate an objection against an amendment to the Convention[187], the Union and its Member States are required to express a concerted position, in pursuance of the principle of sincere cooperation, with regard to the proposed amendments. For this reason, no EU Member State is allowed to express reservations on the Union position, and, consequentially, on the final decision taken by the OTIF Revision Committee with regard to the proposed amendments. As a result, no EU Member State is allowed to participate to a motion of objection, in pursuance of Article 35, ʗ2 of COTIF[188], against the amendments adopted at the 25th session of the OTIF Revision Committee without compromising the Union's position which was taken through the contested decision in line with the principle of sincere cooperation and Art. 218(9) TFEU[189]. For this reason, in my opinion, the Court's judgement on the possibility, in *COTIF I*, for the EU Member States to challenge the validity of the COTIF proposed amendments even after they would come into force[190] is, in the wake of the position expressed by the latter in *COTIF II*, erroneous. Unfortunately, the Court has never reconsidered its position on Germany's third plea in law, nor has it addressed the latter issue further.

[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*

Conclusion

This thesis has tried to analyze the constitutional boundaries of EU mixed agreements from a theoretical perspective, through the analysis of concepts such as implied shared external competences and Art. 216(1) TFEU, the exclusivity criterion of Art. 3(2) TFEU, facultative and compulsory mixity, Art. 4(3) TEU, and from a pragmatical perspective, through a critical analysis of, notably, Opinion 2/15, *COTIF I* and *COTIF II*. In the latter cases, on the one hand, the Court of Justice of the European Union managed to clarify, among other relevant constitutional questions, the degree of flexibility in the attribution of external competences to the Union and the Member States, especially in areas where the two, in pursuance of the Treaties, share their competences: the choice as to whether it is more appropriate to conclude an international agreement as mixed or as EU-only depends, since the judgement given by the Court in *COTIF I*, on the Council, who enjoys a (relative) freedom of choice in determining, following the circumstances, the nature of the latter. Consequentially, we can say that mixity, in this case, is facultative, in opposition to the arguments that were advanced by Germany during its action for annulment. However, it is important to underline that the freedom of choice in determining the nature of an international agreement, which is formally attributed to the Council since *COTIF I*, can be limited by several constitutional factors, such as, for instance, the principle of subsidiarity, which, in this case, serves as a referee in determining the most suitable form, following the circumstances, for the conclusion of the international agreement. Moreover, the Court can also be in a position to revise and annul the Council's choice if the latter appears to be "manifestly inappropriate" in terms of the objectives which the Union is pursuing in line with the Treaties. On the other hand, even if the Court managed to solve, through the latter cases, a significant number of constitutional queries, a great deal of uncertainty and imprecision regarding certain matters remained present: for instance, in *COTIF I*, the Court made no distinction between the conclusion of an international agreement and the expression of a Union position, through a binding act, regarding the proposed amendments to the Convention (which had already been concluded as mixed by the Union and its Member States). Art. 216(1) TFEU and Art. 3(2) TFEU, in the wording of the Treaties, can only attribute an implied external competence to the Union, under some specific circumstances, when there is the need to conclude an international agreement with a third party, not when the Union is expressing a position in an international body, in pursuance of Art. 218(9) TFEU: both of these provisions make explicit reference solely to the conclusion of an international

agreement as a precondition for the attribution of implied external competences to the Union, therefore there is no reason to believe that any other binding act of the Union which has an external objective was supposed to be included in the wording of Art. 216(1) TFEU and Art. 3(2) TFEU. In my opinion, it will be very likely, as well as of fundamental importance, that this matter will be raised by a Member State before the Court in the future.

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Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, came into force on the 8 January 2005;

Court of Justice of the European Union PRESS RELEASE No 52/17 of the 16 May 2017.

Riassunto

Questo elaborato ha cercato di analizzare i confini costituzionali degli accordi misti UE da un punto di vista teorico, attraverso l'analisi di concetti delineati dai Trattati dell'Unione europea e dalla Corte di giustizia, e pratico, attraverso alcune sentenze e opinioni stipulate da quest'ultima. Con il termine "accordo misto" si intende un accordo internazionale con un terzo che viene concluso sia dall'Unione sia dai singoli Stati membri. In un accordo misto, l'Unione e suoi Stati membri, ai sensi del principio di leale cooperazione sancito dall'Articolo 4(3) TUE, "si rispettano e si assistono reciprocamente nell'adempimento dei compiti derivanti dai trattati". L'intero elaborato, fondamentalmente, ha avuto l'obiettivo di cercare di rispondere alla seguente domanda: Fino a che punto l'Unione europea può avere un ruolo singolare, o meglio, coordinato sulla scena internazionale in aree di competenza che dovrebbero comportare anche la partecipazione dei singoli Stati membri?

Il primo capitolo della tesi ha cercato di analizzare e far luce sulle più importanti questioni e disposizioni giuridiche che caratterizzano gli accordi misti dell'UE. L'obiettivo di questo capitolo è stato quello di fornire un *excursus* teorico sulle principali caratteristiche e sfaccettature giuridiche degli accordi misti dell'Unione. Inizialmente, ho introdotto brevemente i concetti di competenze esterna esclusiva e concorrente ponendoli, successivamente, nel quadro degli accordi misti dell'Unione. In breve, un accordo internazionale che presenta disposizioni che rientrano, parzialmente o interamente, nelle competenze esclusive dell'Unione e degli Stati membri deve necessariamente essere concluso da entrambi, come un accordo misto, in quanto è evidente che quest'ultimo avrà anche degli effetti diretti sulle giurisdizioni dei singoli Stati membri, sulle quali questi ultimi detengono la sovranità. Al contrario, quando un accordo presenta disposizioni che rientrano nelle competenze concorrenti dell'Unione e degli Stati Membri, la questione diventa decisamente più intricata. In seguito al Parere 2/15, la Corte di giustizia dell'UE sembrava aver chiaramente trovato una soluzione a questo problema, affermando che un accordo internazionale le cui disposizioni rientrano nelle competenze concorrenti dell'Unione e degli Stati membri deve essere imperativamente concluso da entrambi, in quanto queste ultime avranno delle conseguenze su entrambi gli enti. Al contrario, nella sentenza *COTIF I*, la Corte ha chiaramente specificato che un accordo internazionale, le cui disposizioni rientrano nelle competenze concorrenti, non deve obbligatoriamente

essere concluso sia dall'Unione sia dagli Stati membri: questa scelta è lasciata al Consiglio, che gode della discrezione di determinare, secondo le circostanze specifiche, la soluzione migliore.

Successivamente, ho analizzato da un punto di vista più tecnico le disposizioni principali su cui la Corte si è basata nella sentenza *COTIF I,* che sono articolo 216(1) TFUE e articolo 3(2) TFUE, fornendo un breve *excursus* storico sull'origine di queste ultime e facendo un'analisi comparativa.

L'articolo 216(1) TFUE prevede quattro possibili situazioni in cui l'Unione può concludere un accordo internazionale.

> qualora i trattati lo prevedano o qualora la conclusione di un accordo sia necessaria per realizzare, nell'ambito delle politiche dell'Unione, uno degli obiettivi fissati dai trattati, o sia prevista in un atto giuridico vincolante dell'Unione, oppure possa incidere su norme comuni o alterarne la portata.

Nell'elaborato, ho analizzato nel dettaglio ogni singola situazione, evidenziando il fatto che la prima e la terza situazione hanno un significato alquanto esplicito e inequovocabile, mentre invece la seconda e la quarta, al contrario, sono di difficile interpretazione: in particolare, mi sono focalizzato sulla seconda situazione e sul significato specifico di "necessità" nel contesto della disposizione.

In secondo luogo, ho analizzato le diverse situazioni delineate nell'articolo 3(2) TFUE, che, al contrario dell'articolo 216, attribuiscono esplicitamente all'Unione una competenza esclusiva esterna per concludere un accordo internazionale con un terzo. Queste sono in totale quattro.

> L'Unione ha inoltre competenza esclusiva per la conclusione di accordi internazionali allorché tale conclusione è prevista in un atto legislativo dell'Unione o è necessaria per consentirle di esercitare le sue competenze a livello interno o nella misura in cui può incidere su norme comuni o modificarne la portata.

Per ognuna di queste, ho evidenziato, inizialmente, le rispettivi origini storico-giuridiche, le quali, a mio parere, sono di fondamentale importanza per conoscere i contesti corretti in cui le disposizioni interessate devono essere implementate. Successivamente, ho analizzato nel dettaglio il significato e le conseguenti implicazioni di ciascuna situazione per l'Unione europea e i suoi Stati membri, facendo, quando rilevante, parallelismi con le situazioni delineate nell'articolo 216(1). Ad esempio, ho comparato le ultime due situazioni dell'articolo 3(2), le quali specificano che "L'Unione ha inoltre competenza esclusiva per la conclusione di accordi internazionali [...] nella misura in cui può incidere su norme comuni o modificarne la portata", e le analoghe ultime due situazioni

dell’articolo 216(1), le quali in italiano, curiosamente, presentano una terminologia simile, ma leggermente diversa: “L'Unione può concludere un accordo con uno o più paesi terzi o organizzazioni internazionali qualora [...] [quest’ultima] possa incidere su norme comuni o alterarne la portata”.

Infine, per concludere il sottocapitolo 1.1., ho fatto un’analisi specifica comparativa tra le due disposizioni, che presentano diverse somiglianze ma anche svariate differenze: ad esempio, l’articolo 216(1) non specifica, quando l’Unione deve concludere un accordo internazionale (misto o unicamente dell’Unione), la tipologia specifica di competenza esterna che conferisce a quest’ultima: la disposizione ne stabilisce semplicemente l’esistenza nei contesti citati, non facendo esplicito riferimento, contrariamente all’articolo 3(2), all’esclusività di azione per l’Unione. Questo, di conseguenza, lascierebbe pensare che l’articolo 216(1) abbia uno scopo implicito più vasto rispetto all’articolo 3(2), essendo applicabile in contesti decisamente più comuni e variegati.

Nella seconda parte del primo capitolo, ho voluto mettere in discussione alcuni preconcetti stabiliti nella prima parte legati alla conclusione di accordi misti. In seguito a *COTIF I*, la Corte ha stabilito che la scelta riguardante la natura di un accordo internazionale le cui disposizioni rientrano nelle competenze concorrenti dell’Unione e degli Stati membri ricade nel Consiglio, il quale detiene la completa discrezione di scegliere la soluzione più appropriata nel contesto specifico. Tuttavia, fino a che punto il Consiglio gode di questa discrezione? Fino a che punto, e secondo quali circostanze specifiche, la Corte può contestare questa discrezioni? Le chiari limitazioni che la Corte ha posto a questa libertà sono chiaramente di tipo costituzionale: il Consiglio è sempre limitato dalle obbligazioni provenienti dai Trattati e da qualsiasi altra disposizione vincolante dell’Unione se la sua scelta si è rivelata chiaramente inadeguata alla luce delle informazioni di cui disponeva al momento dell'adozione delle norme in questione e rispetto agli obiettivi che i Trattati intendevano perseguire. Di conseguenza, il Consiglio detiene un potere di scelta decisamente vasto, in quanto le sue azioni possono essere contestate solamente se sono considerate decisamente inappropriate rispetto agli obiettivi prestabiliti.

In secondo luogo, ho cercato di analizzare la situazione opposta, focalizzandomi sulla seguente questione: esistono circostanze in cui un accordo internazionale, il quale, secondo quanto detto prima, richiede obbligatoriamente la conclusione sia da parte dell’Unione che degli Stati Membri, debba essere concluso unicamente dall’Unione, o, al contrario, solamente dagli Stati Membri? Per rispondere a questa domanda, ho dovuto analizzare dei pareri di alcuni Avvocati-Generali della

Corte, tra cui l'Avvocato-Generale Wahl nel Parere 3/15, il quale ha affermato che un accordo misto sarebbe necessario, in generale, quando un accordo internazionale riguarda competenze coesistenti: esso comprende cioè una parte che rientra nella competenza esclusiva dell'Unione e una parte che rientra nella competenza esclusiva degli Stati Membri, senza che nessuna di queste parti sia accessoria all'altra. A mio parere, l'intento dell'avvocato generale Wahl era quello di sottolineare che non esiste sempre l'obbligo di concludere un accordo internazionale come misto se quest'ultimo presenta una parte che rientra nelle competenze esclusive dell'Unione e un'altra che rientra nelle competenze esclusive degli Stati membri, ma solo se queste due "partecipano" all'accordo in maniera indipendente e ugualmente importante.

Nel secondo capitolo di questo elaborato, ho esaminato ulteriormente questi concetti in modo più pratico, analizzando una delle sentenze più importanti e controverse nel campo delle relazioni esterne dell'UE: *COTIF I*. In primo luogo, ho introdotto brevemente la COTIF, sottolineando, ad esempio, che si tratta di una convenzione che regola OTIF, un accordo misto che l'Unione e i suoi Stati Membri hanno concluso e ratificato assieme ad alcuni Stati del Medio-Oriente e dell'Africa settentrionale con l'obiettivo di regolamentare e armonizzare il diritto ferroviario internazionale al fine di facilitare la circolazione di merci, persone e servizi in tutto il mondo. In seguito, mi sono incentrato sulle questioni fondamentali che hanno portato alla disputa tra la Germania e il Consiglio dell'Unione europea: in breve, il Comitato di Revisione di OTIF, il cui ruolo è proporre eventuali emendamenti a COTIF o ai suoi Appendici agli Stati partecipanti, chiese a ognuno di questi ultimi di formulare una posizione in materia di alcune bozze di emendamenti alla convenzione entro una data prestabilita. Il Consiglio, a seguito di una proposta della Commissione europea, si è sentito autorizzato, ai sensi dell'art. 218(9) TFUE, di adottare una posizione comune a nome dell'Unione, mediante un atto legislativo, in merito alle modifiche proposte. A tale proposito, la Germania ha espresso il proprio disaccordo, sostenendo che l'Unione non poteva agire da sola in settori che rientrano nelle competenze concorrenti dell'Unione e degli Stati membri . Di conseguenza, essa ha deciso di presentare dinanzi alla Corte di giustizia dell'Unione europea un ricorso di annullamento della decisione del Consiglio, strutturata in tre motivi: in primo luogo, ha sostenuto che questa instituzione aveva violato il principio di attribuzione ai sensi dell'art. 5(2) TUE, in quanto, a suo giudizio, non godeva delle competenze necessarie, non soddisfando i requisiti dell'articolo 3(2) TFUE, per esprimere una posizione coordinata a nome di tutta l'Unione riguardante le modifiche proposte dal Comitato di Revisione di OTIF, e, in ogni caso, non

avendo previamente esercitato la medesima competenza internamente, non poteva certamente esercitarla esternamente; in secondo luogo, essa ha affermato che il Consiglio non aveva fornito motivi a sostegno della decisione impugnata, che è un obbligo derivante dall'articolo 296 TFUE; infine, la Germania ha sostenuto che il Consiglio, non avendo collaborato con gli Stati Membri nei settori in cui avrebbe dovuto farlo, aveva violato il principio di leale cooperazione, unitamente al principio di tutela giurisdizionale effettiva, sanciti, rispettivamente, nell'articolo 4(3) TUE e nell'articolo 263 TFUE. In merito a quest'ultimo, la Germania sostenne che il Consiglio, avendo formalmente adottato la decisione impugnata, che avrebbe avuto effetti irreversibili, solamente ventiquattro ore prima della deadline imposta dal Comitato di Revisione di OTIF, non aveva permesso, volutamente, a nessuno Stato Membro di contestarla dinanzi alla Corte, violando, di conseguenza, il principio di tutela giurisdizionale effettiva.

In sua difesa, il Consiglio ha affermato, facendo riferimento al primo motivo presentato dalla Germania, che, a suo parere, godeva di una competenza esterna esclusiva ai sensi dell'articolo 3(2) TFUE, in quanto le modifiche proposte della COTIF si sarebbero rilevate incidenti sulle norme comuni interne dell'Unione: In questo caso, il Consiglio avrebbe certamente il diritto di adottare una posizione coordinata in un accordo internazionale ai sensi dell'art. 218(9) TFUE. In ogni caso, ha sottolineato il Consiglio, al contrario di quanto stabilito dalla Germania, la Corte ha dichiarato, in alcune sentenze precedenti, che l'Unione può certamente esercitare una competenza esternamente senza la necessità di aver esercitato la medesima internamente. In merito al secondo motivo presentato dalla Germania, il Consiglio sostenne che, nella decisione impugnata, egli aveva elencato correttamente le basi giuridiche sostanziali e procedurali a supporto di quest'ultima, le quali, in ogni caso, non devono essere eccessivamente dettagliate, e, di conseguenza, non vi era motivo di ritenere che avesse violato l'articolo 296 TFUE. In merito, infine, al terzo motivo, il Consiglio dichiarò di aver adottato la decisione impugnata in tempo utile per permettere a qualsiasi Stato Membro, persona o istituzione europea di contestarla. Inoltre, al contrario di quanto sostenuto dalla Germania, la decisione, e, conseguentemente, le modifiche proposte della COTIF, non avrebbero avuto effetti irreversibili, in quanto, secondo una disposizione di quest'ultima, possono essere perfettamente annullate tramite una mozione presentata da almeno un quarto degli Stati partecipanti alla convenzione. Su questo argomento, tuttavia, è importante fare un'osservazione: quest'ultima procedura potrebbe essere condotta, ad esempio, da alcuni paesi dell'UE solo se la Corte scegliesse di annullare la decisione impugnata, in quanto vi è l'obbligo di esprimere, attraverso quest'ultima, una posizione europea

uniforme nel rispetto del principio di leale cooperazione, sancito dall'articolo 4(3) TEU. Una domanda quindi sorge spontanea: siamo certi che gli Stati Membri dell'UE, una volta che le modificazioni proposte della COTIF entrano in vigore, possano effettivamente partecipare a una mozione di annullamento di queste ultime, andando, quindi, in contrasto con la posizione coordinata dell'Unione? La risposta a questa domanda è stata poi fornita dalla Corte in *COTIF II*, ed è stata *de facto* negativa.

Il terzo e ultimo capitolo di questo elaborato si è focalizzato invece sulla sentenza vera e propria della Corte in merito ai motivi presentati dalla Germania, le sue conclusioni e i suoi conseguenti sviluppi, tra cui *COTIF II*.

In primo luogo, ho analizzato il Parere dell'Avvocato Generale Szupnar, il quale si è concentrato prevalentemente sul primo motivo presentato dalla Germania. A questo proposito, l'AG si è posto la seguente domanda : L'Unione ha la competenza di agire, da sola, in un settore in cui gode di una competenza concorrente, ossia la politica comune dei trasporti ? In altre parole, l'Unione ha la competenza esclusiva per affrontare la questione degli emendamenti proposti per la COTIF? Secondo l'AG Szupnar, la risposta a questa domanda è affermativa: il Consiglio può, in determinate circostanze, godere ed esercitare una competenza esterna implicita al di fuori delle situazioni delineate nell''art. 3(2) TFUE mediante l'applicazione dell'art. 216(1) TFUE. A suo avviso, la presente circostanza è una di queste, in quanto la decisione impugnata è, ai sensi dell'articolo 216(1), "necessaria per realizzare, nell'ambito delle politiche dell'Unione, uno degli obiettivi fissati dai trattati", ossia la politica comune dei trasporti. Per quanto riguarda il secondo motivo, l'AG affermò che il Consiglio è riuscito a dimostrare in modo soddisfacente la base giuridica a sostegno della sua decisione e ad adempiere al suo obbligo di motivazione ai sensi dell'art. 296 TFUE. Per quanto riguarda il terzo motivo, egli sostenne che il Consiglio non violò il principio di tutela giurisdizionale effettiva ai sensi dell'art. 263 TFUE, in quanto ritenne che la decisione impugnata non avrebbe avuto effetti irreversibili sulla Germania ne su nessun altro Stato membro.

In secondo luogo, ho esaminato la sentenza finale della Corte. Per quanto riguarda il primo motivo presentato dalla Germania, la Corte ha assunto una posizione molto simile all'Avvocato-Generale, affermando che, attraverso l'articolo 216(1) TFUE, l'Unione gode della competenza necessaria per esprimere una posizione coordinata nei confronti degli emendamenti proposti della COTIF tramite la decisione impugnata. In questo contesto, la Corte ne ha anche approfittato per chiarire la distinzione tra competenze concorrenti e accordi misti, spiegando che

l'esistenza di un competenza concorrente non presuppone necessariamente la conclusione di un accordo misto, contrariamente a quanto la Germania aveva dedotto dal parere 2/15. In situazioni simili, il Consiglio gode della possibilità di scegliere l'opzione più appropriata a seconda del contesto. Sulla base di questi e altri argomenti, la Corte respinse il primo motivo.

Per quanto riguarda il secondo motivo, la Corte sostenne, come l'Avvocato-Generale, che il Consiglio aveva riportato correttamente le basi giuridiche procedurali e sostanziali, ossia, rispettivamente, l'articolo 218(9) TFUE e l'articolo 91 TFUE. Quest'ultima disposizione, tuttavia, come argomentato dalla Germania, è applicabile esclusivamente in situazioni interne all'Unione, quindi non può essere giudicata come una base giuridica sostanziale valida in questo contesto. La Corte, a questo proposito, si espresse in maniera alquanto riduttiva, affermando che la Germania non era nella posizione di far valere una questione di attribuzione di competenze nell'ambito di un motivo relativo ad una violazione dell'art. 296 TFUE. A mio avviso, la causa alla base di questa affermazione è la seguente: La Corte aveva già accertato che il Consiglio disponeva di una competenza esterna implicita ai sensi della seconda situazione dell'articolo 216(1) TFUE e, conseguentemente, non ha ritenuto necessario esaminare ulteriormente la conformità della decisione impugnata con l'art. 91(1) TFUE. A proposito di questo, tuttavia, è importante specificare che l'articolo 296 TFUE obbliga ogni istituzione europea a motivare i propri atti giuridici formalmente, in un documento vincolante: il Consiglio, avendo fatto riferimento esplicito, nella decisione impugnata, solamente all'articolo 91(1), ha, a mio avviso, violato questa obbligazione. In ogni caso, sulla base di questi argomenti, la Corte respinse anche il secondo motivo presentato dalla Germania in quanto infondato.

Per quanto riguarda il terzo motivo, la Corte assunse una posizione alquanto simile a quelle dell'Avvocato-Generale e del Consiglio, sostenendo, inoltre, che la Germania era già a conoscenza della decisione impugnata da una settimana prima che quest'ultima entrasse in vigore, quindi il tempo a sua disposizione per contestarla dinanzi alla Corte, seppur solo di ventiquattro ore, è stato più che sufficiente. Per quanto riguarda l'accusa di violazione del principio di leale cooperazione, la Corte ritenne che il Consiglio aveva informato in maniera soddisfacente la Germania sulle caratteristiche della decisione impugnata, e, di conseguenza, non aveva violato l'articolo 4(3) TUE. Sulla base di questi argomenti, la Corte respinse il terzo motivo, e, in generale, il ricorso di annullamento della decisione impugnata presentato dalla Germania.

Infine, nell’ultima sezione di questo elaborato, ho esaminato brevemente una sentenza correlata a *COTIF I*: *COTIF II*. La disputa nacque in seguito alla sessione di revisione della COTIF, in cui la Germania si distaccò esplicitamente dalla posizione coordinata dell’Unione. La Commissione europea, dopo aver emesso, senza successo, ai sensi dell’articolo 258 TFUE, un parere in cui veniva richiesto alla Germania di conformarsi con le richieste dell’Unione, fece ricorso alla Corte. In breve, la Commissione ritenne che la Germania, esprimendo, durante la sessione di revisione della COTIF, una posizione in merito alle proposte di modifica della COTIF che si discostava significativamente dalla posizione dell'Unione, espressa nella decisione impugnata, aveva violato il principio fondamentale della leale cooperazione, sancito dall'articolo 4(3) TUE, creando, di conseguenza, confusione e dubbio tra gli Stati partecipanti alla convenzione sulla credibilità internazionale dell'Unione europea.

La Corte, dopo aver esaminato i fatti presentati da entrambe le parti, decretò accolto il ricorso presentato dalla Commissione, sostenendo che la Germania, in occasione della sessione di revisione della COTIF, essendosi pubblicamente distaccata dalla posizione coordinata dell’Unione, non solo aveva messo a repentaglio l’immagine internazionale di quest’ultima, ma aveva anche compromesso gli obiettivi dell’Unione, violando, quindi, il principio di leale cooperazione, sancito dall’articolo 4(3) TUE. Questa sentenza, di conseguenza, ha chiarito, fondamentalmente, il dubbio che avevo espresso riguardante il terzo motivo presentato dalla Germania in *COTIF I*: Uno Stato Membro non può esprimere una posizione contraria, in un accordo internazionale, a quella coordinata dell’Unione se quest’ultima è stata giudicata valida e legittima dalla Corte, in quanto violerebbe il principio di leale cooperazione tra Stati Membri e Unione sancito dall’articolo 4(3) TUE. Di conseguenza, per ritornare al terzo motivo di *COTIF I*, la decisione impugnata, una volta giudicata legittima dalla Corte, avrebbe, a mio parere, degli effetti irreversibili per gli Stati Membri.