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CASE C-600/14 GERMANY V COUNCIL (OTIF)[1]

Abstract: The commented judgement is (back) in line with the reasoning emerging in the Court's jurisprudence, as well as in the legal doctrine, according to which, expressing it short and to the point, "shared is not always mixed". In other words, the existence of the EU external competence is a decisive factor for the conclusion and execution of an international agreement. If the EU shares competence with the Member States over the whole agreement, it may be concluded by the EU only. Moreover, as follows from the commented judgment, the EU may also be the only one empowered to make decisions at the stage of the implementation of an international agreement with shared competence. This is supposed to be the way to get rid of problematic mixity in EU external relations. A long time ago, the Convention concerning International Carriage by Rail would have been perceived as a mixed agreement with concurrent competences. Nowadays, it is the EU's international agreement with shared competence.

Keywords: existence of the EU external competence, shared competences, implementation of an international agreement, external relations of the EU

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1. Factual and legal background

On 22.12.2014, the Federal Republic of Germany brought to the Court of Justice of the European Union (CJEU) an action on the basis of Article 263 of the Treaty on the Functioning of the European Union (TFEU) for partial annulment of 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) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999, and to the Appendices thereto.

The European Union is a party to COTIF on the basis of Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to that Convention, which was signed on 23.6.2011 in Berne, entered into force on 1.7.2011 (Accession Agreement of 2011).[2]

The 49 States, including all the Member States of the European Union, with the exception of the Republic of Cyprus and the Republic of Malta, which are parties to the COTIF, constitute the Intergovernmental Organisation for International Carriage by Rail (OTIF). The OTIF Revision Committee is a body of that organisation composed in principle of all parties to the COTIF. Its task is *inter alia to* make decisions, within the limits of its competences, on proposals aiming to modify the COTIF and to consider, in addition, proposals to be submitted for decision to the General Assembly of OTIF.

The Accession Agreement of 2011 was approved on behalf of the European Union by Council Decision 2013/103/EU of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980 (Council Decision 2013/103/EU).[3] Because of the shared competence to conclude the Convention, the decision was accompanied by Annex I "Declaration by the European Union concerning exercise of competence". According to Annex I,the European Union shares competence with the Member States

[2] O.J. 23.2.2013 L 51 p. 8, further referred to as the Accession Agreement.
[3] O.J. 23.2.2013 L 51 p. 1, further as Decision 2013/103/EU.

of the Union pursuant to Articles 90 and 91, in conjunction with Article 100(1), and Articles 171 and 172 of the TFEU. Under Union law, the Union has acquired exclusive competence in matters of rail transport where the COTIF Convention or legal instruments adopted pursuant to it may affect or alter the scope of these existing Union rules. For subject matters governed by the COTIF Convention in relation to which the Union has exclusive competence, Member States have no competence. Where Union rules exist but are not affected by the Convention or legal instruments adopted pursuant to it, the Union shares competence on matters in relation to the Convention with Member States. A list of the relevant Union instruments in force at the time of the conclusion of the Agreement is contained in the Appendix to this Annex. The scope of the Union competence arising out of these texts has to be assessed in relation to the specific provisions of each text, especially the extent to which these provisions establish common rules. Union competence is subject to continuous development. In the framework of the Treaty on European Union and the TFEU, the competent institutions of the Union may make decisions which determine the extent of the competence of the Union. The Union therefore reserves the right to amend this declaration accordingly, without this constituting a prerequisite for the exercise of its competence in matters covered by the Convention.

In April 2014, the OTIF Secretary-General notified the Member States of OTIF of proposals for modifications to the COTIF to be submitted to the OTIF Revision Committee at its 25th session in Berne from 25 to 27.6.2014. Those proposals for modifications concerned, in particular, Appendix B to the COTIF on Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM) ('Appendix B (CIM)'), Appendix D to the COTIF on Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV) ('Appendix D (CUV)'), in conjunction with Article 12 of the COTIF, and Appendix E to the COTIF on Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI) ('Appendix E (CUI)').[4]

On 5.6.2014, the Commission sent to the Council a proposal for a Council Decision setting out the position to be adopted by the Union at the 25th session of the OTIF Revision Committee. The Council, at its meeting on 24.6.2014, adopted the contested decision, establishing

[4] See Federal Republic of Germany v Council of the European Union, Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, ECLI:EU:C:2017:935, para. 16.

the position to be adopted on behalf of the European Union. The Federal Republic of Germany voted against that proposal and, on the adoption of the contested decision, raised objections regarding the competence of the Council to adopt a position on behalf of the Union with regard some items of the Agenda for the meeting of the OTIF Revision Committee.

As a consequence of its objections on 22.12.2014, the Federal Republic of Germany brought to the CJEU an action for partial annulment of Council Decision 2014/699/EU of 24 June 2014. The action was based on three pleas. The first plea in law concerns the European Union's lack of competence and the infringement of the principle of conferral, laid down in the first sentence of Article 5(2) TEU. The second plea in law concerns an infringement of the obligation to state reasons laid down in Article 296 TFEU. The third plea in law concerns infringement of the principle of sincere cooperation, together with the principle of effective judicial protection. The first plea is of particular importance, as it raised an interesting discussion regarding the execution of international agreements with shared competence.

The contested decision was made on the basis of Article 218(9) TFEU. According to that provision:

> 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.

The Federal Republic of Germany argued that the Union had not been vested with the competence, under Article 91 TFEU and Article 218(9) TFEU, to adopt the contested decision, in so far as it relates to items 4, 5, 7 and 12 of the Agenda. According to the Federal Republic of Germany in the area of transport, which covers the COTIF in general and the amendments at issue in particular, the European Union and the Member States have, both internally and, as a general rule, externally, shared competence, pursuant to Article 4(2)(g) TFEU. In order to ensure that the Council has competence to adopt, in accordance with Article 218(9) TFEU, a position to be taken on behalf of the European Union in an international body, where the purpose of the act adopted by such a body is to amend the provisions of an international agreement, as is the position in this case, it is necessary, according to the Federal Republic of Germany, to verify whether the amendments relate to provisions of the agreement which fall within

the Union's competence. If that is not the case, a decision establishing the Union's position cannot be adopted. It is essential, for the purposes of that verification, to ascertain whether the decision of the international body concerned has a direct impact on the European Union's acquis in the sense that there are common rules of the Union which the decision at issue is liable to undermine or the scope of which it is liable to alter, within the meaning of the line of case law stemming from the judgment of 31.3.1971, Commission v Council (22/70, ECLI: EU:C:1971:32). According to the Federal Republic of Germany, the existence of such a risk therefore presupposes that the amendments to provisions of an international agreement fall within an area in which the European Union has already adopted common rules.[5] The Federal Republic of Germany argues that there are no common rules in the abovementioned sense in the area covered by the questioned provisions of the decision.

Moreover, it argues that in the area of private law concerning contracts of carriage, which is an area of shared competence, the European Union cannot exercise a competence externally when it has not made use of its competence internally, if it is not to circumvent the ordinary legislative procedure and impinge on the rights of the European Parliament. When the 'disconnection clause' in Article 2 of the accession agreement is taken into consideration, the acts of the OTIF Revision Committee have, in EU law, the same effects as regulations and directives. The Federal Republic of Germany, supported by the French Republic, also argues that, in the area of transport, which is an area where the European Union and its Member States share competence, only in the situations provided for in Article 3(2) TFEU, namely those where the Union has an exclusive external competence, is the Union permitted to conclude an international agreement. In this case, however, no exclusive external competence arises from any of the situations provided for in Article 3(2) TFEU. The Federal Republic of Germany adds that, outside those situations, the Union has no external competence.

It follows that the main allegation of the Federal Republic of Germany is that the Council solely empowered the Union to express its position on the amendments in the area which do not fall within exclusive competence of the Union. As a consequence, the Council's adoption of that decision infringed upon the principle of conferral laid down in the first sentence of Article 5(2) TEU.

[5] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 31-36.

The Council expressed the opinion that the European Union has an exclusive competence, by virtue of the final clause of Article 3(2) TFEU and the case law of the Court stemming from the judgment of 31.3.1971, 22/70 *Commission* v *Council*, to establish a position with respect to the amendments at issue, submitted at the 25th session of the OTIF Revision Committee.[6] In the alternative, the Council, supported by the Commission, referring to the jurisprudence of the CJEU, considered that the European Union had the competence to adopt such a position, in accordance with Article 218(9) TFEU, by virtue of a competence that it shared with the Member States, even in the absence of EU rules in the area of private law concerning contracts of carriage. It argued that any action of the Union externally was not, contrary to what was maintained by the Federal Republic of Germany, limited to areas which were already the subject of EU common rules, but also extends to areas which are not yet, or are only partly, covered by legislation at EU level, which, as a result, is not liable to be affected. In the latter case, the Union also has the competence to adopt a decision, under Article 218(9) TFEU, acting by virtue of shared external competence.[7]

According to the Commission, supporting the Council, the existence of a shared external competence does not depend on the exercise of that competence internally, but stems directly from the Treaties, more specifically from the first sentence of Article 2(2) TFEU and from Article 4(2)(g) TFEU. There is no provision in the Treaties relating to shared competences that provides that, when that competence is exercised for the first time, it may lead solely to the adoption of Union acts which do not relate to external relations.[8]

It follows from the foregoing that the main problem in the case was the interpretation of Article 218(9) of the TFEU in the context of its application to international agreement with shared competence. The Court was to determine whether, for the stage of implementation of international agreement with shared competence, the existence or nature of the EU competence is of a decisive character. The case has given an opportunity to uphold a line of reasoning avoiding mixed agreements, which gives priority to the existence of the EU's competence rather than its nature. As a consequence, the existence of EU (shared) competence is sufficient

[6] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 40.
[7] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 41.
[8] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 42.

not only for the EU to become a party, but also for execution of rights and obligations under international agreement with shared competence.

2. Opinion of Advocate General M. Szpunar

On 24.4.2017, Advocate General Maciej Szpunar gave his opinion in the case[9]. He reminded of the principles underlying the system of the competences of the European Union in the light of primary law. In particular, he considered legal grounds for internal and external competences (paras. 64-68). He distinguished between the existence and nature of the EU competence and referred to exclusive and shared competences in external relations (paras. 69-82). Subsequently, he paid attention to the fact that the issue of competence - whether exclusive or shared - must not be conflated with that of a mixed agreement, namely an agreement, with one or more third States or an international organisation, to which both the European Union and the Member States are parties (para. 83). He reminded that EU law requires the conclusion of a mixed agreement only in the event that that agreement includes a part which falls under the competence of the European Union and a part which falls under the exclusive competence of the Member States, without any of those parts being ancillary to the other (paras. 85-86). The Advocate General proved that the EU undoubtedly has competence in the area of transport policy, and that competence is based on Article 216(1) TFEU. In order to establish EU external competence in the field of transport policy, it is not required that there should be prior internal legislation of the EU in a given area (paras. 96-111).

He also paid attention that according to Article 6(2) of that agreement, for decisions in matters where the European Union shares competence with the Member States, either the European Union or the Member States are to vote. Consequently, once the European Union has decided to exercise its shared external competence, it alone votes within OTIF (see para. 87).

With regard to the first plea, he concludes that the European Union has an external competence pursuant to the combined provisions of Article 91 and the second situation referred to in Article 216(1) TFEU. The Council exercised that competence. It follows that, in accordance with

[9] See Case C-600/14, Opinion of Advocate General Szpunar of 24.4.2017, ECLI:EU:C:2017:296.

the second sentence of Article 2(2) TFEU, the Federal Republic of Germany may no longer exercise its shared competence. Consequently, the Council did not infringe the principle of conferral contained in Article 5(2) TEU, and the first plea must therefore be rejected (119-120).

In his opinion, the second plea was also unfounded. He expressed an opinion that the Council fulfilled its obligation under Article 296 TFEU to state reasons of its decision, as it clearly indicated the applicable substantive legal basis, namely Article 91(1) TFEU, and gave reasons for its position. In the contested decision, the Council also gave reasons, point by point, justifying the necessity of EU action. Moreover, the Council indicated that the applicable procedure was that included in Article 218(9) TFEU. There was no need to state reasons with regard to the existence of exclusive competence of the EU since, except in one particular respect where the European Union does not have exclusive competence, it would have been impossible for the Council to state the reasons why the European Union had such competence (paras. 163-166).

According to the Advocate General, the third plea was also unfounded. There is no evidence that the contested decision was able to influence the result (adoption or rejection of the proposals) in 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 recognised that the majority of votes was in favour of the adoption of the proposals, even without its vote. In the absence of a causal relationship of the sort set out above, it is not possible to raise, if only for that reason, the issue of effective legal protection (para. 172-173).

3. Judgement of the Court of Justice

The Court of Justice of the European Union followed the opinion of the Advocate General and found all the allegations of the Federal Republic of Germany against the Council's decision unfounded.

With regard to the first plea, the Court referred to its jurisprudence, in particular opinion 1/03 (New Lugano Convention)[10] and opinion 1/13

[10] Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Opinion of the Court (Full Court) of 7.2.2006, Opinion 1/03, ECLI:EU:C:2006:81.

(Accession of Third States to The Hague Convention)[11], according to which whenever EU law creates for its institutions powers within its internal system for the purpose of attaining a specific objective, the Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. The last-mentioned possibility is referred to in Article 216(1) TFEU (para. 45). It also distinguished between the existence of the EU external competence and its nature (paras. 46-51). The EU competence in the area of transport policy falls within the scope of the second situation provided for in Article 216(1) TFEU. The external competence of the Union in that second situation, unlike the fourth situation laid down in that provision, is not subject to any condition relating to the prior adoption of EU rules that are likely to be affected (para. 52). Furthermore, it proved that the aim of the contested decision is to establish the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee with respect to a number of amendments to the COTIF. As is stated in Article 2 of the COTIF, OTIF's aim "is to promote, improve and facilitate, in all respects, international traffic by rail", in particular by establishing a system of uniform law in the various fields that constitute such traffic. According to the Court, which shares the view of the Advocate General, the amendments at issue contribute to the realisation of the objectives of the Treaty, within the framework of the common transport policy (paras. 54-58). It has also relied on opinion 2/15 (Free Trade Agreement with Singapore)[12], from which in the Court's opinion is clear that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, fall within the shared competence of the Union and its Member States, even though the Union had taken no internal action (para. 67). Therefore, with regard to the first plea, the Court found that the items on the agenda at the 25th session of the OTIF Revision Committee relating to the amendments at issue, on which the Council, by means of the contested decision, established the positions to be adopted on behalf of the European Union, fall within the scope of the Union's external competence. Accordingly, the Council, in adopting that decision, did not infringe the principle of conferral laid down in the first sentence of Article 5(2) TEU (paras. 71-73).

[11] Opinion of the Court (Grand Chamber) of 14.10.2014, Opinion 1/13, ECLI:EU:C:2014:2303.

[12] Opinion 2/15 of the Court (Full Court) of 16.5.2017, ECLI:EU:C:2017:376.

The Court has also rejected the second plea in law: breach of the obligation to state reasons under Article 296 TFEU. According to the Court, the contested decision makes explicit reference to Article 91 TFEU, and the Council correctly stated in that decision the substantive legal basis for it. 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 say, that argument relates to the question whether a competence actually exists and cannot therefore be validly relied upon in support of a plea in law alleging a breach of the obligation to state reasons. It is also clear that the Council has stated sufficient reasons for the contested decision with regard to the criterion of necessity provided for in the second situation referred to in Article 216(1) TFEU, also taking into account the fact that the reasons to be stated in that second situation differ from those required by Article 3(2) TFEU (paras. 86-87).

Finally, the Court also found the third plea in law unfounded with regard to the infringement of the principle of sincere cooperation in conjunction with the principle of effective judicial protection. It analysed the procedure that led to the adoption of the contested decision (paras. 100 and 107) and found that the Council did not fail to fulfil its duty of sincere cooperation. With regard to the second part of the third plea, namely infringement of effective judicial protection, the Court held that the Federal Republic of Germany did not demonstrate that, during that session, the contested decision produced such effects, nor had it rebutted the arguments relied upon in its defence by the Council on this subject. Consequently, the argument of that Member State that there was an infringement of the principle of effective judicial protection cannot be accepted (para. 108).

4. Comments

4.1. General remarks

The main problem in the commented judgement was the interpretation of Article 218(9) TFEU in the context of its application to an agreement which the Union only has concluded within the framework of shared competence. The Court was to determine whether the EU Council competence to conclude international agreement depends upon either the existence or

the nature of the EU competence. The case has also given an opportunity to clarify issues regarding the EU's competence in concluding international agreements in light of the primary law.

I would generally agree with the conclusion of the CJEU, i.e. I do not see reasons for declaring the contested decision void. However, in my opinion, it is worth going more deeply into detail with regard to the nature and implementation of an international agreement with shared competence.

4.2. Shared is not mixed? International agreements with shared competence and their burdensome nature.

Before the Lisbon Treaty, the Court of Justice often used the expression "shared competence", meaning that an international agreement should be concluded as a mixed agreement.[13] It is noted in legal doctrine and in jurisprudence that mixed agreements are a particularly contentious type of normative instrument in European law.[14] The expression "mixed agreements" is often used to cover a variety of situations, all having in common that both the EU and the Member States participate in the agreement.[15] They reflect the limited character of the external competences of the EU being a supranational international organisation and not a sovereign State with the power to create its own competences. According to Article 5 of the TEU, the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. This refers equally to the internal and external competences of the EU.[16]

The mixed nature of an international agreement concluded by the European Union has its source in the division of competences

[13] To this end, see e.g. Competence of the Community to conclude international agreements concerning services and the protection of intellectual property, Opinion of the Court of 15.11.1994., Opinion 1/94, ECLI: EU:C:1994:384 paras. 98 and 105; Opinion of the Court of 6.12.2001 Opinion 2/00, ECLI:EU:C:2001:664, para. 17.

[14] Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, Opinion of Advocate General E. Sharpston of 15.7.2010, Case C-240/09, ECLI:EU:C:2010:436, para. 43.

[15] See F.C. de la Torre, *The Court of Justice and External Competences After Lisbon: Some Reflections on the Latest Case Law*, [in:] P. Eeckhout, M. Lopez-Escudero, "The European Union's external action in times of crisis", Oxford-Portland 2016, pp. 169-170.

[16] See Opinion of Advocate General M. Szpunar, para. 63.

between the European Union and the Member States. This issue always arises whenever the European Union itself cannot be a party to a given international agreement, because the object of the international agreement goes beyond its exclusive competence. The substantive law criterion – the division of competences between the European Union and the Member States – is usually a factor determining the mixed nature of an international agreement. Mixed international agreements are usually concluded jointly by the European Union and Member States (acting either as one party to the agreement or as separate parties to the international agreement). However, it may happen that an international agreement will be a mixed agreement, but only the Member States will be parties to it. This is the case when the subject matter of the agreement also covers issues falling within the competence of the European Union, but the agreement is open for signature only for States, not for international organisations. In this situation, within the scope of EU competence, Member States act under the authority and on behalf of the European Union.

One shall distinguish obligatory mixity and facultative mixity. The first one is legally necessary, the second is politically desired. Only when parts of the agreement fall within an exclusive competence of either the EU or Member States, the EU shall act together with its States, because in such a situation, none of them is competent to conclude an agreement in entirety. In the case where the EU has external competence with regard to all issues covered in an agreement (shared competence), it may conclude it alone. However, usually in such a situation, there is political pressure from the Member States to became parties to the agreement, as they do not want to lose sight of the powers they share with the EU. A view has been expressed that the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence, is generally a matter for the discretion of EU legislature.[17]

Due to the problematic nature of international mixed agreements and the strive to ensure coherence and transparency in the European Union's activities in the international arena, the doctrine postulates that the formula of a "mixed agreement" should be limited to necessary

[17] Case C-600/14, Opinion of Advocate General Szpunar, para. 85 and opinion of Advocate General N. Wahl in Marrakesh Treaty to Facilitate Access to Published Works, Opinion procedure 3/15, EU:C:2016:657, para. 122.

cases.[18] Advocate General Kokott, in her opinion in Case C-13/07, held that "a characteristic of *concurrent competence* (also referred to as *shared competence*) is that the Member States exercise their competence, in so far as the Community [Union – M.N.] has not exercised its competence. However, if the Community [Union- M.N] does exercise its competence, it acts *alone*, so far as that competence is sufficient".[19]

The question arises: is the agreement in question (COTIF) a mixed agreement or not? It is not mixed formally, as the EU is a party to the agreement on its own, but it is mixed substantially, in the sense that the EU does not have, at least at the time being, exclusive competence over the whole agreement, and it shares competence with the Member States. Therefore, an agreement shall be implemented in accordance with the rules regarding a division of competence between the EU and the Member States laid down in the Accession Agreement of 2011 and Council Decision 2013/103/EU on the signing and conclusion of the Accession Agreement.

4.3. Existence and nature *versus* conclusion and execution of international agreements with shared competence

Both in the opinion of Advocate General M. Szpunar, as well as in the judgment of the Court, it has been underlined that one must distinguish between the existence and the nature of the competence of the European Union. That distinction between whether the Union has an external competence and whether that competence is or is not exclusive is reflected in the TFEU. To that end, the Court pointed to Article 216(1) TFEU, providing 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". It follows from the very wording

[18] See F. Erlbacher, *Recent Case Law on External Competences How Member States can embrace their own Treaty*, 'EPIN Paper', January 2017, pp. 39-41, available at https://www.ceps.eu/publications/recent-case-law-external-competences-european-union-how-member-states-can-embrace-their; F.C. de la Torre, op.cit., pp. 170-171.

[19] Commission of the European Communities v Council of the European Union, Opinion of Advocate General Kokott of 29.3.2009, Case C-13/07, ECLI:EU:C:2009:190.

of that provision, in which no distinction is made according to whether the European Union's external competence is exclusive or shared, that the Union possesses such a competence in four situations.[20] The Court also observed that it is clear from a comparison of the respective wording of Article 216(1) TFEU and Article 3(2) TFEU that the situations in which the Union has external competence, in accordance with the former provision, are not limited to the various scenarios set out in the latter provision, where the Union has exclusive external competence.[21] As a consequence, the competence of the Union may exist outside the situations laid down in Article 3(2) TFEU.[22] This reflects the settled jurisprudence of the Court of Justice and legal doctrine of the parallelism as far as the existence of the Union's implied external competences is concerned (*in foro interno – in foro externo*), originating in the famous ERTA judgement.[23]The Court upheld its jurisprudence that the existence of a competence does not depend on the prior adoption of internal rules harmonising the area concerned. It is only the nature of the EU's competence to be determined on the basis of prior internal exercise of the competence.[24] As a consequence, an agreement over which the Union has shared competence can be concluded by the Union only.[25]

If the Union does not have at all the competence over some parts of an agreement because it falls within the exclusive competence of the Member States, it shall become a party to the agreement together with its Member States (obligatory mixity), usually as the EU and Member States as one party to the agreement.

The European Union is, independently of its Member States,a party to the COTIF. But the EU shares competence over COTIF with the Member States, which follows *inter alia* from the Accession Agreement of 2011 and Council Decision 2013/103/EU on the signing and conclusion

[20] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 46-49. To that end, see also the opinion of the Advocate General M. Szpunar in that case.

[21] Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 50.

[22] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 51.

[23] Commission of the European Communities v Council of the European Communities, Case 22/70, Judgment of the Court of 31.3.1971, ECLI:EU:C:1971:32; Cornelis Kramer and others, Joined Cases 3,4,6/76, Judgment of the Court of 14.7.1976, ECLI:EU:C:1976:114, paras. 19-20.

[24] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 52.

[25] See also F.C. de la Torre, op.cit., p. 180.

of the Accession Agreement, and it shall be executed in line with these documents. This is the consequence of the difference between the existence and the nature of the EU's competence. An agreement over which the EU has shared competence can also be concluded by the EU only. But the nature of the competence determines its execution (the stage of implementation).

Advocate General M. Szpunar has pointed out that "the question of when and how the European Union exercises that competence is essentially a political one which is covered by the procedure laid down in Article 218 TFEU".[26] The procedure of Article 218 is of general application. With regard to international agreements with shared competence, because of their specific and complicated nature, the fundamental issues of their implementation are laid down in an international agreement. This was also the case with regard to the COTIF. Both the Accession Agreement of 2011,as well as Council Decision 2013/13/EU of 16 June 2011 on the signing and conclusion of the Agreement, contain provisions referring to execution of the COTIF, taking into consideration the nature of the EU's competence. According to Article 5 of the Accession Agreement of 2011, "the Union shall be entitled to be represented and involved in the work of all OTIF bodies in which any of its Member States is entitled to be represented as a Party to the Convention, and where matters falling within its competence may be dealt with". Article 6 of the Accession Agreement of 2011 determines the exercise of voting rights. Under Article 6(1) of the Accession Agreement of 2011, for decisions in matters where the Union has exclusive competence, the Union shall exercise the voting rights of its Member States under the Convention. According to Article 6(2) of the Accession Agreement of 2011, for decisions in matters where the Union shares competence with its Member States, either the Union or its Member States shall vote. The Union shall, on a case-by-case basis, inform the other Parties to the Convention of the cases where, with regard to the various items on the agendas of the General Assembly and the other deliberating bodies, it will exercise voting rights. According to Article 7 of the Accession Agreement of 2011, the scope of the competence of the Union shall be indicated in general terms in a written declaration made by the Union at the time of the conclusion of this Agreement. This declaration may be modified as appropriate by notification from the Union to the OTIF. It shall not replace or in any way limit the matters that may be covered by the notifications of Union competence to be made prior to OTIF decision-making by means

[26] See Case C-600/14, Opinion of Advocate General Szpunar, para. 78.

of formal voting or otherwise. While signing an agreement, the Union made a declaration concerning the exercise of its competence (Annex I to Council Decision 2013/103/EU) and arrangements regarding procedures under the OTIF, *inter alia* statements and voting in OTIF meetings (Annex III of Council Decision 2013/103/EU). In particular, according to Annex III, point 3 of Council Decision 2013/103/EU states: "Where an agenda item deals with matters of exclusive Union competence, the Commission will speak and vote for the Union. After due coordination, the Member States can also speak in order to support and/or develop the Union position. Where an agenda item deals with matters of exclusive national competence, Member States will speak and vote. Where an agenda item deals with matters containing elements of both national and Union competence, the Presidency and the Commission will express the common position. After due coordination, Members States can speak to support and/or develop the common position. The Member States or the Commission, as appropriate, will vote on behalf of the Union and its Member States in accordance with the common position. The decision on who will be voting is made in the light of where the preponderance of the competence lies (e.g. mainly national or mainly Union competence). Where an agenda item deals with matters containing elements both of national and of Union competence and the Commission and the Member States have not been able to agree upon a common position, Member States and the Commission can speak and vote on matters falling clearly within their respective competence. In matters for which there is no agreement between the Commission and the Member States on division of competence, or where it has not been possible to obtain the majority needed for a Union position, a maximum effort will be made to clarify the situation or achieve a Union position. Pending this, and after due coordination, the Member States and/or the Commission, as appropriate, would be entitled to speak on condition that the position expressed will not prejudge a future Union position, will be coherent with Union policies and previous Union positions, and will be in conformity with Union law."

Turning to the dispute in the case, it is worth paying attention to the fact that the disputed Council's decision considered the stage of implementation of an agreement (execution of procedural rights under agreement) within the Union's competence and not the exercise of the EU's competence as such. All necessary rules regarding taking the position of the EU within the framework of the OTIF have been laid down, in particular, in the Accession Agreement of 2011 and in the Annexes to Council Decision 2013/103/EU. It follows from the foregoing documents

that it was not excluded that the Council had made a decision establishing the position adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee. Exercising of the right under agreement by the Union is excluded in light of the abovementioned documents only in the case of matters falling under exclusive competence of the Member States. By adopting the disputed Decision 2014/699, the Council has been exercising procedural rights under the international agreement and not the Union's substantial competence in a given area. One should also pay attention to point 3.3. of Annex III to Council Decision 2013/103 on the signing and conclusion of the Accession Agreement, according to which the Member States or the Commission as appropriate will vote on behalf of the Union and its Member States in accordance with the common position. The decision on who will be voting is made in light of where the preponderance of the competence lies (e.g. mainly national or mainly Union competence). The notion of the preponderance of the competence, in any way, does not require that the EU should vote only when it has exclusive competence.

In my opinion, the Court, in the commented judgment, focused too much on the general issues regarding the existence of the EU competence in the area covered by the agenda, which is more significant in determining the competence to conclude an agreement, whereas it should have paid attention to the relevant documents regarding the stage of implementation of an agreement. These documents (the Accession Agreement of 2011 and Council Decision 2013/103/EU) do not exclude adoption of the Union's position by the Council in the area of shared competence.

4.4. Case C-600/14 in light of the previous jurisprudence of the CJEU

In the commented judgment, the CJEU referred to a number of its judgements mostly upholding a settled line of interpretation of EU law on external competences of the European Union. In particular, with regard to the interpretation of Article 216(1) TFEU, it referred to Opinion 1/03 (New Lugano Convention) and held that "the competence of the European Union to conclude international agreements may arise not only from an express conferment by the Treaties, but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU

law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. The last-mentioned possibility is now referred to in Article 216(1) TFEU".[27] It also referred to the settled case-law regarding the necessity to distinguish between the existence and the nature of the competence.[28] The Court's finding that the European Union may have an external competence that falls outside the situations laid down in Article 3(2) TFEU, as the latter considers the nature of the EU's external competence, is also based on its existing jurisprudence. In particular, it referred to Opinion 1/03 (*New Lugano Convention*) and Opinion 1/13 (*Accession of Third States to The Hague Convention*). The Court, on the basis of its jurisprudence, concluded that the existence of the external competence of the Union is not subject to any condition relating to the prior adoption of EU rules that are likely to be affected.[29] The Court also referred to Judgement C-459/03 *Commission v. Ireland*[30], in which it held that the Union can enter into agreements in a given area even if the specific matters covered by those agreements are not yet, or are only very partially, the subject of rules at the EU level which, by reason of that fact, are not likely to be affected. It held that this conclusion has not been changed by its finding in Case C-240/09 *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*[31], as that case did not considered the existence of the competence, but whether, in the specific field covered by a provision of a mixed agreement, the Union had exercised its powers and had adopted provisions to implement obligations that derived from it.[32] In support of the conclusion that the existence of Union

[27] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 45.

[28] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 46.

[29] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 52-53.

[30] Commission of the European Communities v Ireland, Case C-459/03, Judgment of the Court (Grand Chamber) of 30.5.2006, ECLI:EU:C:2006:345.

[31] Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Case C-240/09, Judgment of the Court (Grand Chamber) of 8.3.2011, ECLI:EU:C:2011:125

[32] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 63-64.

competence does not depend upon prior exercise, by the Union, of its internal legislative competence in the area concerned, the Court has also referred to Opinion 2/15 (*Free Trade Agreement with Singapore*).[33]In addition, it has in fact changed the meaning of para. 244 of that opinion, in which it held that the Union alone cannot approve an envisaged agreement, as some parts of it fall within the shared competence of the EU and its Member States. In the commented judgment, the Court explained that "admittedly, the Court found, in paragraph 244 of that opinion, that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, 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".[34] Therefore, the Court has restored and upheld the concept of facultative mixity. It has, however, been criticised for imprecise reasoning.[35]

As the dispute in question fell entirely within the scope of Article 218(9) and was regarded by the Advocate General as one of the 'standard situations' provided for by the simplified procedure introduced by that provision, it is necessary to consider the meaning of the commented judgment for the interpretation of Article 218(9) TFUE.

In its jurisprudence regarding that provision, the CJEU has had to settle whether Article 218(9) TFEU also refers to international agreements to which the European Union is formally not a party. Even before the entry into force of the Treaty of Lisbon, the Court held that "where a given area falls within the competence of the Union, the Union's lack of participation in a given international agreement shall not prevent it from exercising that competence through the establishment, within its institutions, of the positions to be taken on its behalf within the body established by that agreement, in particular through the Member States

[33] Opinion 2/15 of the Court (Full Court) of 16.5.2017, ECLI:EU:C:2017:376. See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 67.

[34] Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 67.

[35] To that end, see H. Lenk, Sz. Gáspár- Szilágyi, Case C-600/14, *Germany v. Council (OTIF). More clarity over Facultative "Mixity"?*, European Law Blog. News and Comments on EU law, available at https://europeanlawblog.eu/2017/12/11/case-c-60014-germany-v-council-otif-more-clarity-over-facultative-mixity (accessed 18.9.2018)

that are parties to that agreement and acting in solidarity in the Union's interest".[36] The CJEU held that the fact that the Union is not a party to the agreement as such does not preclude the application of Article 218(9) TFEU as the legal basis for the Council decision on the position to be adopted on behalf of the European Union with regard to certain acts to be taken within the framework of an international organisation. An important factor is whether the acts to be adopted within such an organisation may affect the content of the provisions adopted by the EU legislator. In that case, this was at issue, because the Union's legislature, within the framework of the common organisation of the market in wine, incorporated recommendations of the International Organisation of Vine and Wine (OIV) into EU secondary law in this area.

In another judgment, the Court held that Article 218(9) does not apply to the determination of a position to be expressed on behalf of the European Union before an international judicial body requested to give an advisory opinion, the adoption of which falls solely within the remit and responsibility of the members of that body, acting, to that end, wholly independently of the parties.[37]

In light of the commented judgement while determining the scope of the Council's action on the basis of Article 218(9) TFEU, it is the existence and not the nature of the EU competence which is decisive. This judgement confirms that "shared" is not "mixed"[38]. If the Union in the area of shared competence is on its own a party to an international agreement, it may also on its own exercise rights and obligations under this agreement within the framework of the shared competence. The detailed conditions on implementation of an international agreement have been laid down in documents accompanying the signing and conclusion of an international agreement, which refer to the division of competences between the EU and the Member States.

[36] See Federal Republic of Germany v. Council, C-399/12, Judgment of the Court (Grand Chamber), 7.10.2014, ECLI:EU:C:2014:2258, para. 63.

[37] See Council v. Commission, C-73/14, Judgment of the Court (Grand Chamber) of 6.10.2015, ECLI:EU:C:2015:663, paras. 66-77.

[38] See F.C. de la Torre, op.cit., p. 180.

4.5. Concluding remarks

The commented judgement is (back) in line with the reasoning emerging in the Court's jurisprudence, as well as in the legal doctrine, according to which, expressing it short and to the point, "shared is not always mixed". In other words, the existence of the EU external competence is a decisive factor for the conclusion and execution of an international agreement. If the EU shares competence with the Member States over the whole agreement, it may be concluded by the EU only. Moreover, as follows from the commented judgment, the EU may also be the only one empowered to make decisions at the stage of the implementation of an international agreement with shared competence. This is supposed to be the way to get rid of problematic mixity in EU external relations. A long time ago, the COTIF would have been perceived as a mixed agreement with concurrent competences[39]. Nowadays, it is the EU's international agreement with shared competence. This new legal formula does not allow, however, to get rid of the main problem, which is the source of mixity, namely the division of competence between the Union and its Member States. This question still underlies EU participation in the COTIF. As I have already mentioned, both the Accession Agreement of 2011,as well as Council Decision 2013/103/EU on the signing and conclusion of the Accession Agreement, refer to the division of competence between the EU and the Member States.[40]The present judgment reveals that the Council's contested decision, although legally justified, was not politically welcomed by some of the Member States. It is not easy to get rid of mixity, as this phenomenon reflects the nature of the EU as an international supranational organisation, however with limited competences.

Another important issue in light of the commented judgement is the meaning of "exercise of shared competence" and the consequences thereof. As it has not been disputed, the COTIF from the perspective of EU law was an EU only agreement concluded within the framework of shared competence. According to Article 2(2) of the Treaty on the Functioning of the European Union, "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member

[39] See J.F.M. Dolmans, *Problems of mixed agreements*, The Hague 1985, pp. 39-41.

[40] See art. 6 of the Accession Agreement and Art. 2 and Annex I and III of Council Decision 2013/103.

States shall exercise their competence to the extent that the Union has not *exercised its competence*. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

In the commented case, Advocate General M. Szpunar referred to the view that "the question of when and how the European Union exercises that competence is essentially a political one".[41] He concludes that the European Union has an external competence pursuant to the combined provisions of Article 91 and the second situation referred to in Article 216(1) TFEU in the area covered by the items of the Agenda for the OTIF Revision Committee. He noted that "in the context of the policies of the European Union, the purpose of the measures at issue is to achieve the objectives referred to in the Treaties. *The Council exercised that competence* [emphasis added – MN]. It follows that, in accordance with the second sentence of Article 2(2) TFEU, the Federal Republic of Germany may no longer exercise its shared competence."[42] Did he indeed mean shared competence or, in fact, exercising voting rights in the OTIF Revision Committee? And what about the competence of the two Member States (Cyprus and Malta) that are not members of the OTIF in the area covered by the disputed items of the Agenda?

The Court did not go that far and held that "the Council, by means of the contested decision, established the positions to be adopted on behalf of the European Union that fall within the scope of the Union's external competence. Accordingly, the Council, in adopting that decision, did not infringe upon the principle of conferral laid down in the first sentence of Article 5(2) TEU".[43] It did not expressly touch upon the question whether adoption of the contested decision has a blocking (pre-emptive) effect for all the Member States in the future. In particular, it did not refer to the argument of the European Commission that there is no provision in the Treaties relating to shared competences that provides that, when that competence is exercised for the first time, the pre-emptive effect refers solely to the adoption of Union internal acts and not to external relations.[44]

[41] See Case C-600/14, Opinion of Advocate General Szpunar, para. 78.

[42] See Case C-600/14, Opinion of Advocate General Szpunar, para. 119.

[43] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 72-73.

[44] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, para. 42.

I doubt whether the question of how the European Union exercises that competence in light of Article 2(2) TFEU is essentially a political one. It follows clearly from Article 2(2) of the TFEU that exercising competence means adopting legally binding acts in a given area on the substantive basis provided for in the Treaty. Therefore, adoption of a decision on the procedural basis of Article 218(9) of the TFEU regarding the stage of implementation of international agreement shall not be equal to exercise of the competence in the meaning of Article 2(2) of the TFEU. I would rather distinguish between the exercise of competence and exercise of rights and obligations under international agreement. The contested decision was an example of the latter, as it was based on Article 91 in conjunction with Article 218(9) TFEU in order to prove the existence of the EU competence to establish the position to be adopted. The aim of the Council's decision was not to adopt internal (substantive) rules.

Moreover, adoption by the EU of the contested decision was not necessary to enable the Union to exercise its internal competence with the result that upon adoption of the contested decision, the EU's competence had become exclusive under Article 3(2) TFUE. It is not, therefore, clear from the commented judgment as to what the consequences of the adoption of the contested decision are for the Member States in the area covered by the items on the agenda at the 25th session of the OTIF Revision Committee. The question is of vital importance if we pay attention to the fact that the Member States (except for the Republic of Cyprus and the Republic of Malta) are, next to the EU, members of the OTIF.

In that context, rejection by the Court of the argument raised by the Federal Republic of Germany that the ordinary legislative procedure was circumvented and that the prerogatives of the European Parliament were infringed, because of the fact that the Council applied Article 218(9) TFEU in areas where the Union had not, to date, adopted internal rules in accordance with that procedure[45], is valid on the condition that adoption of the Council's decision does not have a pre-emptive effect and does not prevent the Member States from exercising shared competence.

It is clear from the commented judgement that shared is not always mixed. The Court has decided to uphold facultative mixity and clarified its jurisprudence that would have indicated the opposite. The Union-only approach has also been extended to the stage of implementation

[45] See Case C-600/14, Judgment of the Court (Grand Chamber) of 5.12.2017, paras. 70-71.

of the international agreement, but it does not release the political tension underlying the competence issue.

The Court has held that Article 218(9) TFEU does not limit the action of the Union to situations where it has, previously, adopted internal rules in accordance with ordinary legislative procedure. But it did not make clear what are, for the Member States, the consequences of the EU action undertaken under Article 218(9) TFEU at the stage of the implementation of an international agreement. In particular, whether the Council's decision has a pre-emptive effect in the meaning of Article 2(2) of the TFEU in the area covered by the relevant items of the Agenda. I rather doubt this.

Shared is not always mixed, but even if shared is not mixed, in external relations, it is always complicated.

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