Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 April 2017 [1]

Case C-600/14

Federal Republic of Germany
v

Council of the European Union

(Action for annulment — External action of the European Union — Competences of the European Union — Article 216(1) TFEU — Establishment of the position to be adopted on behalf of the European Union in a body set up by an international agreement — Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee — Amendments to the Convention concerning International Carriage by Rail (COTIF) and to the appendices thereto — Validity of Decision 2014/699/EU)

Table of contents

1 Original language: French.

I. Introduction

1. The present action for annulment, which has been brought by the Federal Republic of Germany against the Council of the European Union, arises from a dispute between them concerning the external competence of the European Union in the field of transport.

2. It will give the Court the opportunity to rule that, in principle, a shared competence — in the field of transport in the present case — may be exercised without the need for corresponding internal legislation. In applying Article 216(1) TFEU, it is sufficient that the exercise of external competence is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties.

II. Legal context

A. International law

1. Convention concerning International Carriage by Rail (COTIF)

3. All Member States of the European Union, with the exception of the Republic of Cyprus and the Republic of Malta, are parties to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, establishing the Intergovernmental Organisation for International Carriage by Rail (OTIF). The COTIF was amended by the Vilnius Protocol of 3 June 1999. The COTIF was ratified by the European Union with effect from 1 July 2011.

4. Under Article 2(1) of the COTIF, the aim of OTIF is to promote, improve and facilitate, in all respects, international traffic by rail, in particular by establishing systems of uniform law in various fields of law relating to international traffic by rail.

5. Article 6 of the COTIF, entitled ‘Uniform Rules’, is worded as follows:

‘§ 1 So far as declarations are not made in accordance with Article 42 § 1, first sentence, international rail traffic and admission of railway material to use in international traffic shall be governed by:

(a) the “Uniform Rules concerning the Contract of International Carriage of Passengers by Rail (CIV)”, forming Appendix A to the [COTIF],

(b) the “Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM)”, forming Appendix B to the [COTIF] [“Appendix B (CIM)”],

(c) the “Regulation concerning the International Carriage of Dangerous Goods by Rail (RID)”, forming Appendix C to the [COTIF],

(d) the “Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV)”, forming Appendix D to the [COTIF] [“Appendix D (CUV)”],

(e) the “Uniform Rules concerning the Contract of Use of Infrastructure in International Rail Traffic (CUI)”, forming Appendix E to the [COTIF] [“Appendix E (CUI)”],

(f) the “Uniform Rules concerning the Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic (APTU)”, forming Appendix F to the [COTIF],

(g) the “Uniform Rules concerning Technical Admission of Railway Material used in International Traffic (ATMF)”, forming Appendix G to the [COTIF],

(h) other systems of uniform law elaborated by the [OTIF] pursuant to Article 2 § 2, letter a), also forming Appendices to the [COTIF].

§ 2 The Uniform Rules, the Regulation and the systems listed in § 1, including their Annexes, shall form an integral part of the [COTIF].’

6. The Revision Committee, which, in principle, is composed of all parties to the COTIF, takes decisions, pursuant to Article 33(4) of the COTIF, on proposals aiming to modify the provisions of the COTIF and the appendices thereto.

7. Article 35 of the COTIF, entitled ‘Decisions of the Committees’, states:

‘§ 1 Modifications of the [COTIF], decided upon by the Committees, shall be notified to the Member States by the Secretary-General.

§ 2 Modifications of the [COTIF] itself, decided upon by the Revision Committee, shall enter into force for all Member States on the first day of the twelfth month following that during which the Secretary-General has given notice of them to the Member States. Member States may formulate an objection during the four months from the day of the notification. In the case of objection by one-quarter of the Member States, the modification shall not enter into force. If a Member State formulates an objection against a decision of the Revision Committee within the period of four months and it denounces the [COTIF], the denunciation shall take effect on the date provided for the entry into force of that decision.

§ 3 Modifications of Appendices to the [COTIF], decided upon by the Revision Committee, shall enter into force for all Member States on the first day of the twelfth month following that during which the Secretary-General has given notice of them to the Member States. …

§ 4 Member States may formulate an objection within the period of four months from the day of the notification referred to in § 3. In the case of objection by one-quarter of the Member States, the modification shall not enter into force. In the Member States which have formulated objections against a decision within the period allowed, the application of the Appendix in question shall be suspended, in its entirety, from the moment the decisions take effect, in so far as concerns traffic with and between those Member States. However, in the case of objection to the validation of a technical standard or to the adoption of a uniform technical prescription, only that standard or prescription shall be suspended in respect of traffic with and between the Member States from the time the decisions take effect; the same shall apply in the case of a partial objection.

…'

8. Article 2 of Appendix B (CIM), entitled 'Prescriptions of public law', states that 'carriage to which these Uniform Rules apply shall remain subject to the prescriptions of public law, in particular … the prescriptions of customs law and those relating to the protection of animals'.

2. Accession agreement

9. 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, as amended by the Vilnius Protocol of 3 June 1999 (OJ 2013 L 51, p. 8), signed on 23 June 2011 in Bern ('the accession agreement'), entered into force on 1 July 2011, pursuant to Article 9 thereof.

10. Article 2 of the accession agreement provides:

'Without prejudice to the object and the purpose of the [COTIF] to promote, improve and facilitate international traffic by rail and without prejudice to its full application with respect to other Parties to the [COTIF], in their mutual relations, Parties to the [COTIF] which are Member States of the Union shall apply Union rules and shall therefore not apply the rules arising from that [COTIF] except in so far as there is no Union rule governing the particular subject concerned.'

11. Under Article 6 of the accession agreement:

'1. For decisions in matters where the Union has exclusive competence, the Union shall exercise the voting rights of its Member States under the [COTIF].

2. For decisions in matters where the Union shares competence with its Member States, either the Union or its Member States shall vote.

3. Subject to Article 26, paragraph 7, of the [COTIF], the Union shall have a number of votes equal to that of its Member States who are also Parties to the [COTIF]. When the Union votes, its Member States shall not vote.

4. The Union shall, on a case-by-case basis, inform the other Parties to the [COTIF] 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 the voting rights provided for in paragraphs 1 to 3. That obligation shall also apply when decisions are taken by correspondence. That information is to be provided early enough to the OTIF Secretary-General in order to allow its circulation together with meeting documents or a decision to be taken by correspondence.'

12. Article 7 of the accession agreement states:

‘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. That declaration may be modified as appropriate by notification from the Union to 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 of formal voting or otherwise.’

B. EU law

1. Decision 2013/103/EU

13. The accession agreement was approved on behalf of the European Union by Decision 2012/103/EU.[2]

14. Annex I to Decision 2013/103 contains a declaration by the European Union made upon signing the accession agreement, concerning the exercise of competence.

15. That declaration reads as follows:

‘In the rail sector, the European Union … shares competence with the Member States of the Union … pursuant to Articles 90 and 91, in conjunction with Article 100(1), and Articles 171 and 172 [TFEU].

…

On the basis of Articles 91 and 171 TFEU, the Union has adopted a substantial number of legal instruments applicable to rail transport.

Under Union law, the Union has acquired exclusive competence in matters of rail transport where the [COTIF] 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] in relation to which the Union has exclusive competence, Member States have no competence.

Where Union rules exist but are not affected by the [COTIF] or legal instruments adopted pursuant to it, the Union shares competence on matters in relation to the [COTIF] 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 take 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 [COTIF].’

2 Council Decision 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, as amended by the Vilnius Protocol of 3 June 1999 (OJ 2013 L 51, p. 1).

16. The Appendix to Annex I to Decision 2013/103 lists the EU instruments relating to matters covered by the COTIF. Those instruments include Directive 2001/14/EC,[3] Directive 2004/49/EC[4] and Directive 2008/110/EC.[5]

17. Annex III to Decision 2013/103 lays down internal arrangements for the Council, the Member States and the European Commission in proceedings under OTIF.

2. Regulation (EEC) No 2913/92

18. Article 94 of Regulation No 2913/92[6] states:

'1. The principal shall provide a guarantee in order to ensure payment of any customs debt or other charges which may be incurred in respect of the goods.

2. The guarantee shall be either:

(a) an individual guarantee covering a single transit operation; or

(b) a comprehensive guarantee covering a number of transit operations where the principal has been authorised to use such a guarantee by the customs authorities of the Member State where he is established.

3. The authorisation referred to in paragraph 2(b) shall be granted only to persons who:

(a) are established in the Community;

(b) are regular users of Community transit procedures or who are known to the customs authorities to have the capacity to fulfil their obligations in relation to these procedures, and

(c) have not committed any serious or repeated offences against customs or tax laws.

4. Persons who satisfy the customs authorities that they meet higher standards of reliability may be authorised to use a comprehensive guarantee for a reduced amount or to have a guarantee waiver. The additional criteria for this authorisation shall include:

(a) the correct use of the Community transit procedures during a given period;

(b) cooperation with the customs authorities, and

(c) in respect of the guarantee waiver, a good financial standing which is sufficient to fulfil the commitments of the said persons.

The detailed rules for authorisations granted under this paragraph shall be determined in accordance with the committee procedure.

3 Directive of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29).

4 Directive of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ 2004 L 164, p. 44, and corrigendum OJ 2004 L 220, p. 16).

5 Directive of the European Parliament and of the Council of 16 December 2008 amending Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive) (OJ 2008 L 345, p. 62).

6 Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 955/1999 of the European Parliament and of the Council of 13 April 1999 (OJ 1999 L 119, p. 1, 'Regulation No 2913/92').

5. The guarantee waiver authorised in accordance with paragraph 4 shall not apply to external Community transit operations involving goods which, as determined in accordance with the committee procedure, are considered to present increased risks.

6. In line with the principles underlying paragraph 4, recourse to the comprehensive guarantee for a reduced amount may, in the case of external Community transit, be temporarily prohibited by the committee procedure as an exceptional measure in special circumstances.

7. In line with the principles underlying paragraph 4, recourse to the comprehensive guarantee may, in the case of external Community transit, be temporarily prohibited by the committee procedure in respect of goods which, under the comprehensive guarantee, have been identified as being subject to large-scale fraud.'

3. Regulation (EEC) No 2454/93

19. Article 412, Article 416 and Article 419 of Regulation (EEC) No 2454/93[7] are set out under point A, entitled 'General provisions relating to carriage by rail', of subsection 8, itself entitled 'Simplified procedures for goods carried by rail or in large containers', of that regulation.

20. Article 412 of the implementing regulation provides:

'Article 359 [on the formalities at the office of transit en route] shall not apply to the carriage of goods by rail.'

21. Under Article 416(1) of that regulation:

'A railway company which accepts goods for carriage under cover of a CIM consignment note serving as a Community transit declaration shall be the principal for that operation.'

22. Article 419(1) and (2) of that regulation is worded as follows:

'1. The consignment note CIM shall be produced at the office of departure in the case of a transport operation to which the Community transit procedure applies and which starts and is to end within the customs territory of the Community.

2. The office of departure shall clearly enter in the box reserved for customs on sheets 1, 2 and 3 of the CIM consignment note:

(a) the symbol "T1" where the goods are moving under the external Community transit procedure;

(b) the symbol "T2", where goods, with the exception of those referred to in Article 340c(1), are moving under the internal Community transit procedure in accordance with Article 165 of the Code;

(c) the symbol "T2F", where goods are moving under the internal Community transit procedure in accordance with Article 340c(1).

The symbol "T2" or "T2F" shall be authenticated by the application of the stamp of the office of departure.'

7 Commission Regulation of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 2787/2000 of 15 December 2000 (OJ 2000 L 330, p. 1, 'the implementing regulation').

4. Regulation (EU) No 952/2013

23. Article 233 of Regulation (EU) No 952/2013,[8] entitled 'Obligations of the holder of the Union transit procedure and of the carrier and recipient of goods moving under the Union transit procedure', provides in paragraph 4 thereof:

'Upon application, the customs authorities may authorise any of the following simplifications regarding the placing of goods under the Union transit procedure or the end of that procedure:

…

(e) the use of an electronic transport document as customs declaration to place goods under the Union transit procedure, provided it contains the particulars of such declaration and those particulars are available to the customs authorities at departure and at destination to allow the customs supervision of the goods and the discharge of the procedure.'

5. Regulation (EC) No 136/2004

24. Article 2(3) and (4) of Regulation (EC) No 136/2004[9] provides:

'3. The [Common Veterinary Entry Document (CVED)] shall be drawn up in an original and copies as determined by the competent authority to meet the requirements of this Regulation. The person responsible for the load shall fill in part 1 of the CVED and transmit this to the veterinary staff of the border inspection post.

4. Without prejudice to paragraphs 1 and 3, the information contained in the CVED may, with the agreement of the competent authorities concerned by the consignment, be made the object of an advanced notification through telecommunications or other systems of electronic data transmission. Where this is done, the information supplied in electronic form shall be that required by part 1 of the model CVED.'

25. Article 3(2) and (3) of that regulation is worded as follows:

'2. The original of the CVED for consignments to which veterinary clearance has been given shall consist of parts 1 and 2 together, duly completed and signed.

3. The official veterinarian or the person responsible for the load shall notify the customs authorities for the border inspection post of the veterinary clearance of the consignment as provided for in paragraph 1 by submitting the original of the CVED, or by electronic means.

– After customs clearance … is obtained, the original of the CVED shall accompany the consignment to the first establishment of destination.

– The official veterinarian at the border inspection post shall retain a copy of the CVED.

– The official veterinarian shall transmit a copy of the CVED to the person responsible for the load.'

8 Regulation of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast) (OJ 2013 L 269, p. 1), which entered into force on 30 October 2013. With effect from 1 May 2016, that regulation repeals Regulation No 2913/92 in particular.

9 Commission Regulation of 22 January 2004 laying down procedures for veterinary checks at Community border inspection posts on products imported from third countries (OJ 2004 L 21, p. 11).

26. Pursuant to Article 4(3) of that regulation:

'For first customs clearance the person responsible for the load shall present the original of the CVED to the customs office responsible for the establishment where the consignment is located. This may also be done by electronic means, subject to authorisation of the competent authority.'

27. Article 10 of Regulation No 136/2004 states:

'The production, use, transmission and storage of the CVED as set down in the various situations described in this Regulation may be done by electronic means at the discretion of the competent authority.'

6. Directive 2008/110

28. Recitals 3 and 4 of Directive 2008/110 state:

'(3) The entry into force of the [COTIF] on 1 July 2006 brought in new rules governing contracts for the use of vehicles. According to [Appendix D (CUV), wagon keepers are no longer obliged to register their wagons with a railway undertaking. The former "Regolamento Internazionale Veicoli" (RIV) Agreement between railway undertakings has ceased to apply and was partially replaced by a new private and voluntary agreement (General Contract of Use for Wagons, GCU) between railway undertakings and wagon keepers whereby the latter are in charge of the maintenance of their wagons. In order to reflect these changes and to facilitate the implementation of Directive 2004/49/EC as far as safety certification of railway undertakings is concerned, the concept of the "keeper" and the concept of "entity in charge of maintenance" should be defined, as well as the specification of the relationship between these entities and railway undertakings.

(4) The definition of the keeper should be as close as possible to the definition used in the 1999 [COTIF]. Many entities can be identified as a keeper of a vehicle, for example, the owner, a company making business out of a fleet of wagons, a company leasing vehicles to a railway undertaking, a railway undertaking or an infrastructure manager using vehicles for maintaining its infrastructure. These entities have the control over the vehicle with a view to its use as a means of transport by the railway undertakings and the infrastructure managers. In order to avoid any doubt, the keeper should be clearly identified in the National Vehicle Register (NVR) provided for in Article 33 of [the] Directive … on the interoperability of the rail system within the Community.' [10]

7. Directive 2004/49

29. Article 1 of Directive 2004/49, as amended by Directive 2008/110 [11] ('Directive 2004/49'), states:

'The purpose of this Directive is to ensure the development and improvement of safety on the Community's railways and improved access to the market for rail transport services by:

…

(b) defining responsibilities between the actors;

…'

10 Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 (recast) (OJ 2008 L 191, p. 1).
11 'Directive 2004/49' (OJ 2008 L 345, p. 62).

30. Article 3 of that directive provides:

‘For the purposes of this Directive, the following definitions shall apply:

…

(s) “keeper” means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport and is registered as such in the National Vehicle Register (NVR) provided for in Article 33 of [the Railway Interoperability Directive];

(t) “entity in charge of maintenance” means an entity in charge of maintenance of a vehicle, and registered as such in the NVR;

…’

31. Article 4(3) and (4) of that directive is worded as follows:

‘3. Member States shall ensure that the responsibility for the safe operation of the railway system and the control of risks associated with it is laid upon the infrastructure managers and railway undertakings, obliging them to implement necessary risk control measures, where appropriate in cooperation with each other, to apply national safety rules and standards, and to establish safety management systems in accordance with this Directive.

Without prejudice to civil liability in accordance with the legal requirements of the Member States, each infrastructure manager and railway undertaking shall be made responsible for its part of the system and its safe operation, including supply of material and contracting of services, vis-à-vis users, customers, the workers concerned and third parties.

4. This shall be without prejudice to the responsibility of each manufacturer, maintenance supplier, keeper, service provider and procurement entity to ensure that rolling stock, installations, accessories and equipment and services supplied by them comply with the requirements and the conditions for use specified, so that they can be safely put into operation by the railway undertaking and/or infrastructure manager.’

32. Under Article 14a of Directive 2004/49:

‘1. Each vehicle, before it is placed in service or used on the network, shall have an entity in charge of maintenance assigned to it and this entity shall be registered in the NVR in accordance with Article 33 of the Railway Interoperability Directive.

2. A railway undertaking, an infrastructure manager or a keeper may be an entity in charge of maintenance.

3. Without prejudice to the responsibility of the railway undertakings and infrastructure managers for the safe operation of a train as provided for in Article 4, the entity shall ensure that the vehicles for which it is in charge of maintenance are in a safe state of running by means of a system of maintenance. To this end, the entity in charge of maintenance shall ensure that vehicles are maintained in accordance with:

(a) the maintenance file of each vehicle;

(b) the requirements in force including maintenance rules and [technical specifications for interoperability] provisions.

The entity in charge of maintenance shall carry out the maintenance itself or make use of contracted maintenance workshops.

…'

III. The background to the dispute and the contested decision

33. In April 2014, the Secretary-General of OTIF notified the contracting parties to OTIF of proposed amendments to the COTIF submitted to the OTIF Revision Committee at its 25th session in Bern (Switzerland) from 25 to 27 June 2014. Those proposed amendments concerned, in particular, Appendices B (CIM), D (CUV), in conjunction with Article 12 of the COTIF, and Appendix E (CUI). On 25 April and 27 May 2014, respectively, the French Republic and the Federal Republic of Germany submitted proposed amendments concerning Appendix D (CUV), which were also submitted to the OTIF Revision Committee during that same session.

34. On 26 May 2014, the Commission submitted a working document to the Council's Working Party on Land Transport, concerning a number of amendments to the COTIF, in preparation for the 25th session of the OTIF Revision Committee. On 5 June 2014, it sent to the Council a proposal for a Council decision setting out the position to be adopted by the European Union at that session of the OTIF Revision Committee (COM(2014) 338 final). During the period of work within the Council preparatory bodies, the 'General Affairs' Council adopted Decision 2014/699/EU[12] ('the contested decision') at its meeting of 24 June 2014, relying on Article 91 TFEU, read in conjunction with Article 218(9) TFEU.

35. The Federal Republic of Germany voted against that proposal and, when the contested decision was adopted, made the following statement:

'The Federal Republic of Germany takes the view that the [European Union] is not competent as regards the amendments to Appendix B (CIM Uniform Rules), Appendix D (CUV Uniform Rules) and Appendix E (CUI Uniform Rules) to the [COTIF], and consequently that there is no need to coordinate an EU position for the 25th session of the OTIF Revision Committee from 25 to 27 June 2014. To date, the [European Union] has not exercised its legislative competence in the areas of private transport law governed by those appendices. Member States may therefore continue to exercise their competence in accordance with the second sentence of Article 2(2) TFEU. Moreover, in cases where competence is shared, Article 6(2) of the [accession agreement] explicitly provides that Member States may continue to vote independently in these areas. [The Federal Republic of] Germany hereby asserts, as a precaution, that it refuses any casting of Germany's vote by the European Commission.'

36. According to recitals 4 to 6 and 9 of the contested decision:

'(4) The amendments to the [COTIF] have the objective of updating the tasks of the Committee of Technical Experts and the definition of "keeper" in line with Union law; and of modifying certain rules concerning the financing of [OTIF], its auditing and reporting as well as minor administrative changes.

(5) The amendments to Appendix B (CIM) aim to give preference to the electronic form of the consignment note and its accompanying documents and to clarify certain provisions of the contract of carriage.

12 Council Decision 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 to the Appendices thereto (OJ 2014 L 293, p. 26).

(6) The amendments to Appendix D (CUV) presented by the Secretary-General of OTIF have the objective of clarifying the roles of the keeper and the entity in charge of maintenance in the contracts of use of vehicles in international rail traffic. [The French Republic] has presented a separate proposal concerning the liability for damage caused by a vehicle. [The Federal Republic of] Germany has also presented a separate proposal concerning the scope of the CUV Uniform rules.

…

(9) The amendments to Appendix E (CUI) suggested by the International Rail Transport Committee (CIT) aim to extend the scope of the uniform rules concerning the contract of use of infrastructure to domestic rail transport, to create a legal basis for general terms and conditions of use of railway infrastructure and to extend the liability of the infrastructure manager for damage or losses caused by the infrastructure.'

37. Article 1(1) of the contested decision provides that 'the position to be taken on the Union's behalf at the 25th session of the Revision Committee set up by the [COTIF] shall be in accordance with the Annex to this Decision'.

38. Item 4 of that annex, relating to the partial revision of the COTIF, is worded as follows:

'…

Competence: shared.

Exercising voting rights: Member States

Recommended coordinated position:

…

Amendments to Article 12 (Execution of judgments. Attachment) to be supported as it amends the definition of "keeper" in line with Union law.

…'

39. Item 5 of that annex, relating to the partial revision of Appendix B (CIM), reads as follows:

'…

Competence: shared.

Exercising voting rights: Union for Articles 6 and 6a; Member States for other Articles.

Recommended coordinated position:

Amendments to Article 6 and new Article 6a concern Union law because of the use of the consignment note and its accompanying documents for customs and sanitary and phytosanitary (SPS) procedures. The Union agrees with the intention of OTIF to give priority to the electronic form of consignment notes. However, at present the adoption of these amendments may lead to unintended consequences. The current simplified procedure for customs transit by rail is only possible with paper documents. Therefore, if railways opt for the electronic consignment note, they will have to use the standard transit procedure and the New Computerised Transit System (NCTS).

The Commission has started preparations for a working group to discuss the use of electronic transport documents for transit under [Regulation No 952/2013]. That working group will have its kick-off meeting on 4-5 June 2014. The Union agrees also with the intention to provide the accompanying documents in electronic format. However, under current Union law there is no legal basis to provide the documents (e.g. Common Veterinary Entry Document, Common Entry Document) which have to accompany SPS-related goods in electronic format and therefore they need to be provided on paper. The Commission has prepared a draft Regulation, which will cater for electronic certification and the draft is currently under discussion in the European Parliament and the Council. That Regulation (Official Control Regulation) is envisaged to be adopted by end of 2015/beginning of 2016, however, there will be a transitional period for the enforcement.

Therefore, the Union suggests that no decision should be taken on these items at the present session of the RC and that OTIF continue cooperation with the Union on this issue in order to have a well-prepared solution for an upcoming revision of CIM which should ideally be synchronised with [Regulation No 952/2013] and its implementing provisions which are to be in force from 1 May 2016. Certain electronic procedures may be phased in between 2016 and 2020 in accordance with Article 278 of [Regulation No 952/2013].

…’

40. Item 7 of that annex, relating to the partial revision of Appendix D (CUV), is worded as follows:

‘…

Competence: shared.

Exercising voting rights: Union.

Recommended Union position: Amendments to Articles 2 and 9 to be supported as they clarify the roles of the keeper and of the entity in charge of maintenance in line with Union law [Directive 2008/110]. However, the proposed amendment to Article 7 submitted by [the French Republic] concerning the liability of the person who has provided a vehicle for use as a means of transport in case of damage resulting from a defect of the vehicle needs further analysis within the Union before taking a decision in OTIF. Therefore, the Union is not in a position to support this amendment proposal at this RC and proposes to postpone the decision until the next General Assembly in order to further assess this issue. The Union takes the same position, i.e. to postpone the decision until the next General Assembly in order to further assess the issue, on the proposal of [the Federal Republic of] Germany for a new Article 1a presented to OTIF during Union coordination.

Additional recommended Union position: In document CR 25/7 ADD 1, page 6, at the end of paragraph 8a, add: “The amendment to Article 9, paragraph 3, first indent, does not affect the existing allocation of liabilities between ECM [the entity in charge of maintenance] and the keeper of the vehicles.”’

41. Item 12 of the annex to the contested decision, concerning the partial revision of Appendix E (CUI), is worded as follows:

‘…

Competence: shared.

Exercising voting rights: Union.

Recommended coordinated position: amendments to be rejected. These amendments suggested by CIT include the extension of the scope of CUI to domestic operations, the introduction of contractually binding General Terms and Conditions and the extension of the infrastructure manager's liability for damage. They may deserve further consideration but as they have not been discussed in any internal forum of OTIF before the Revision Committee, their impact could not have been assessed in sufficient detail. It seems to be premature to amend CUI (which is at present in line with Union law) at this RC without proper preparation.'

42. At the 25th session of the OTIF Revision Committee, the Commission put forward the position of the European Union, as set out in the annex to the contested decision, while the Federal Republic of Germany maintained an independent position concerning the proposed amendments to Article 12 of the COTIF and Appendices B (CIM), D (CUV) and E (CUI) (together 'the disputed amendments') and demanded that it exercise its right to vote on those matters itself. The Federal Republic of Germany voted against the position put forward by the European Union concerning the proposed amendments to Article 12 of the COTIF and Appendix D (CUV). Since that proposal received the required majority, the amendments at issue were adopted by the OTIF Revision Committee.

43. Since then, the Commission has sent the Federal Republic of Germany a letter of formal notice regarding its vote the 25th session of the OTIF Revision Committee, which conflicted with the contested decision.

IV. Procedure before the Court and forms of order sought

44. The Federal Republic of Germany asks the Court to annul the contested decision in so far as it relates to the disputed amendments and to order the Council to pay the costs.

45. The Council asks the court to dismiss the appeal and, in the alternative, in the event that the contested decision is annulled, to maintain the effects thereof, and to order the Federal Republic of Germany to pay the costs.

46. The governments of the French Republic and of the United Kingdom of Great Britain and Northern Ireland have intervened in support of the form of order sought by the Federal Republic of Germany, while the Commission has intervened in support of the Council.

47. All of the abovementioned parties, with the exception of the United Kingdom, participated at the hearing that took place on 25 October 2016.

V. Analysis

48. The present case arises from is a dispute between the Federal Republic of Germany and the Council concerning a decision by the latter establishing the position to be adopted on behalf of the European Union at a session of the OTIF Revision Committee as regards certain amendments to the COTIF and to the appendices thereto.

49. The Federal Republic of Germany raises three pleas, alleging (i) infringement of the principle of conferral owing to a lack of competence of the European Union, (ii) infringement of the obligation to state reasons, and (iii) infringement of the principle of sincere cooperation in conjunction with the principle of effective judicial protection.

50. I shall analyse those three pleas in the order in which they were raised by the Federal Republic of Germany.

A. The first plea, alleging infringement of Article 5(2) TEU

51. By its first plea, the Federal Republic of Germany claims that Article 91 and Article 218(9) TFEU do not confer upon the European Union the competence to establish the EU position to be adopted at the 25th session of the OTIF Revision Committee as regards the proposed amendments to Appendices B (CIM), D (CUV) and E (CUI).

52. Article 13(1)(c) of the COTIF establishes a Revision Committee which is to take decisions, pursuant to Article 33(4) of the COTIF, concerning proposals aiming to modify the latter or the appendices thereto. [13]

53. The amendments at issue in the present case are included in the list in Article 33 of the COTIF.

1. Article 218 TFEU

54. Article 218 TFEU governs the procedure for negotiating and concluding an agreement between the European Union and third countries or international organisations. It is the Council, as the institution representing the interests of the Member States, which is the primary decision-making body in that procedure. As such, pursuant to Article 218(2) TFEU, it is to authorise the opening of negotiations (it is usually the Commission which conducts negotiations), [14] adopt negotiating directives, [15] authorise the signing of agreements [16] and conclude them. [17] That article also governs the degree of involvement of the European Parliament, whether in the form of consent in the cases listed exhaustively [18] or, alternatively, consultation. [19] In the remaining cases, the Parliament is to be informed at all stages of the procedure. [20] Throughout the procedure, the Council is to act by a qualified majority [21] except where otherwise provided. [22]

55. As regards amendments to an agreement, as a general rule, there is a parallelism of forms in so far as the procedure for amending an agreement is the same as that for concluding an agreement. [23]

13 See also Article 17(1)(a) of the COTIF.

14 See Article 218(3) TEU.

15 See Article 218(4) TEU.

16 See Article 218(5) TEU.

17 See Article 218(6) TEU.

18 See Article 218(6)(a) TFEU: association; accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'); agreements establishing a specific institutional framework by organising cooperation procedures; agreements with important budgetary implications for the European Union, and agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

19 See Article 218(6)(b) TFEU.

20 It must be informed 'immediately and fully'; see Article 218(10) TFEU.

21 See Article 16(3) TEU.

22 See Article 218(8) TFEU: unanimity is required when the agreement covers a field for which unanimity is required for the adoption of an EU act, for association agreements, for economic, financial and technical cooperation agreements with the States which are candidates for accession and for the accession of the European Union to the ECHR.

23 See, for example, Eeckhout, P., *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 209; Bungenberg, M., 'Artikel 218 AEUV, point 81', in von der Groeben, H., Schwarze, J., and Hatje, A. (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th ed., Nomos, Baden-Baden, 2015, and Terhechte, J. Ph., in Schwarze, J. (ed.), *EU-Kommentar*, 3rd ed., Nomos, Baden-Baden, 2012.

56. However, as an exception to that general rule, Article 218(9) TFEU provides for a simplified procedure.[24] According to that provision, incorporated into the FEU Treaty by the Treaty of Amsterdam[25] and as amended by the Treaty of Nice,[26] the Council, on a proposal from the Commission, is to adopt a decision establishing the positions to be adopted on the European 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.[27]

57. Finally, I note that, as regards amendments to an agreement, Article 218(7) TFEU[28] constitutes a derogation from Article 218(9) TFEU. The first provision is, as it were, a procedure which is more simplified than the simplified procedure,[29] though that provision is not applicable in the present case.

58. In the present case, the Council, following the Commission's proposal, adopted a decision establishing the position to be taken on behalf of the European Union within the Revision Committee (that is to say a body set up by the COTIF). That body is called upon to adopt acts having legal effects, since the purpose of those acts is to amend the COTIF and the annexes thereto. Moreover, as will be seen in detail later, the proposed amendments have no impact on the institutional framework of the COTIF.[30] They therefore fall within the scope of Article 218(9) TFEU.

59. The present dispute therefore falls entirely within the scope of that provision. I would even go so far as to say that it is one of the 'standard situations' provided for by the simplified procedure introduced by that provision.[31]

60. Obviously, any amendment to an agreement in accordance with the procedure in Article 218(9) TFEU presupposes the existence of EU competence.

61. That leads me to the system of competences introduced by the Treaties.[32]

2. The system of competences of the European Union

62. Pursuant to the first sentence of Article 5(1) TEU, the limits of EU competences are governed by the principle of conferral. According to Article 5(2) TEU, the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Any competences not conferred upon the European Union in the Treaties remain with the Member States.[33]

63. The principle of conferral applies to internal as well as external competences.

24 See the Opinion of Advocate General Kokott in *United Kingdom* v *Council* (C-81/13, EU:C:2014:2114, footnote 63).

25 See the second subparagraph of Article 300(2) EC.

26 See the Opinion of Advocate General Sharpston in *Council* v *Commission* (C-73/14, EU:C:2015:490, points 71 to 73). See also Eeckhout, P., *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 208.

27 For a detailed historic overview of that provision, see the Opinion of Advocate General Cruz Villalón in *Germany* v *Council* (C-399/12, EU:C:2014:289, point 39 et seq.).

28 Under that provision, by way of derogation from Article 218(5), (6) and (9) TFEU, the Council may, when concluding an agreement, authorise the negotiator to approve on the European Union's behalf modifications to that agreement where it provides for them to be adopted by a simplified procedure or by a body set up by that agreement. The Council may attach specific conditions to such authorisation.

29 See also the Opinion of Advocate General Sharpston in *Council* v *Commission* (C-73/14, EU:C:2015:490, point 67).

30 They are minor and quite technical amendments.

31 For example, the Court has excluded the applicability of Article 218(9) TFEU in a situation involving the determination of a position to be expressed on behalf of the European Union *before an international judicial body*; see the judgment of 6 October 2015, *Council* v *Commission* (C-73/14, EU:C:2015:663, paragraphs 66 and 67).

32 I refer in that regard to the very detailed Opinion of Advocate General Sharpston in Opinion procedure 2/15 (*Free Trade Agreement with Singapore*, EU:C:2016:992, points 54 to 78).

33 That principle, which underlies the very logic of the Treaties, was formulated explicitly as a principle governing the vertical competences (those of the European Union vis-à-vis those of the Member States) only in the Maastricht Treaty (see Article 3(b), now Article 5 EC).

(a) Internal and external competences

64. The FEU Treaty confers competences upon the European Union. In that regard, that Treaty contains various legal bases authorising the European Union to act, such as Article 91 TFEU in the field of transport, to which I shall return.

65. As regards, more specifically, external competence, that is to say the capacity of the European Union (which has legal capacity pursuant to Article 335 TFEU) to conclude agreements with third countries or international organisations, the Treaty of Lisbon, for the first time in the history of the European Union,[34] clarifies[35] in summary form the situations in which the European Union has such competence. Article 216(1) TFEU provides for EU external competence in four situations which essentially affirm the case-law of the Court concerning external competences.[36]

66. Under Article 216(1) TFEU, the European Union may conclude an agreement with one or more third countries or international organisations, (1) where the Treaties so provide[37] or where the conclusion of an agreement (2)[38] is necessary in order to achieve, within the framework of the European Union's policies, one of the objectives referred to in the Treaties,[39] (3) or is provided for in a legally binding EU act[40] (4) or is likely to affect common rules or alter their scope.[41]

67. I note at the outset that the second and fourth situations are concerned with competences which, before the entry into force of the Treaty of Lisbon, were commonly referred to as 'implicit' competences.

68. Article 216(1) TFEU remains silent on whether the external competence is exclusive or shared, and with good reason. I shall return to that issue shortly.

(b) Exclusive and shared competences

69. The categories and areas of EU competence are, since the entry into force of the Treaty of Lisbon, explained in detail in Title I ('Categories and areas of Union competence') of the first part of the FEU Treaty entitled 'Principles'.

70. First of all, under Article 2(1) TFEU, when the Treaties confer on the European Union exclusive competence in a specific area, only the European Union may legislate and adopt legally binding acts. However, according to Article 2(2) TFEU, when the Treaties confer on the European Union a competence shared with the Member States in a specific area, the European Union and the Member States may legislate and adopt legally binding acts in that area.

34 See Geiger, R., 'Article 216, point 1', in Geiger, R., Khan, D.-E., and Kotzur, M. (ed.), *European Union Treaties*, Hart, Oxford, 2015.

35 See the Opinion of Advocate General Kokott in *Commission* v *Council* (C-137/12, EU:C:2013:441, point 42). See also Cremona, M., 'Defining competence in EU external relations: lessons from the Treaty reform process', in Dashwood, A., and Maresceau, M., *Law and Practice of EU External Relations — Salient Features of a Changing Landscape*, Cambridge University Press, Cambridge, 2008, pp. 34 to 69, in particular p. 56.

36 See also the Opinion of Advocate General Sharpston in Opinion procedure 2/15 (*Free Trade Agreement with Singapore*, EU:C:2016:992, point 64).

37 This is a simple affirmation of the principle of conferral of competences. See also Opinion 1/13 (*Accession of a non-Union country to the Hague Convention*, EU:C:2014:2303, point 67 and the case-law cited).

38 It should be pointed out that in the German version of Article 216(1) TFEU the phrase 'within the framework of the European Union's policies' refers not only to the second situation but also to the third and fourth situations. In this, the German version differs, for example (the following list not being intended to be exhaustive), from the English, French, Polish, Dutch, Italian, Spanish, Portuguese, Danish and Swedish versions. This observation is, however, irrelevant to the present case.

39 See Opinion 1/76 (*Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, point 3); Opinion 2/91 (*Convention No 170 of the ILO*, EU:C:1993:106, point 7), and Opinion 1/03 (*New Lugano Convention*, EU:C:2006:81, point 115).

40 See Opinion 1/94 (*Agreements annexed to the WTO Agreement*, EU:C:1994:384, point 95).

41 See the judgment of 31 March 1971, *Commission* v *Council* (22/70, 'the *AETR* judgment', EU:C:1971:32, paragraphs 17 and 18).

71. That latter provision contains a principle of pre-emption, in that it states that the Member States are to exercise their competence to the extent that the European Union has not exercised its competence and that they are again to exercise their competence to the extent that the European Union has decided to cease exercising its competence.

72. That principle applies to both internal and external competences. [42]

73. Next, Articles 3 to 6 TFEU determine the different types of EU competence according to its areas of action. Article 3 TFEU, which I shall examine in more detail below, covers exclusive competence; Article 4 TFEU provides that the shared competence is the 'default' [43] competence and lays down the principal areas in which the European Union and the Member States share competences [44] (transport is expressly included in that list); [45] Article 5 TFEU covers the coordination of economic policies within the European Union and Article 6 TFEU provides that the European Union is to have competence 'to carry out actions to support, coordinate or supplement the actions of the Member States' in particular areas, such as the protection and improvement of human health and industry.

74. I shall now return to Article 3 TFEU. That provision sets out an exhaustive list of the areas in which the European Union has exclusive competence. Article 3(1) lists the areas in which the European Union has (express) exclusive competence, namely the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and the common commercial policy.

75. Article 3(2) TFEU provides that the European Union is also to have exclusive competence for the conclusion of an international agreement (1) when its conclusion is provided for in a legislative act of the European Union or (2) is necessary to enable the European Union to exercise its internal competence, or (3) in so far as its conclusion may affect common rules or alter their scope. It should be emphasised that Article 3(2) TFEU, unlike Article 3(1) TFEU, by referring to 'the conclusion of an international agreement', is limited to EU external competences.

76. However, where the European Union has shared competence, both it and the Member States have the power to act.

77. Nevertheless, where, and to the extent that, the European Union has exercised its shared external competence, the Member States are no longer capable of acting. [46] The Member States are to exercise their competence only to the extent that the European Union has not exercised its competence. [47] Where the European Union exercises its shared external competence, it acts alone. [48] The exercise of a shared competence by the European Union therefore includes an element of exclusivity, since the Member States may no longer act. The principle of pre-emption enshrined in Article 2(2) TFEU applies in such a situation. [49]

42 See Opinion 2/94 (*Accession by the Community to the ECHR*, EU:C:1996:140, point 24), and the judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:59, paragraph 46).

43 According to Article 4(1) TFEU, the European Union is to share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6 TFEU.

44 See Article 4(2) TEU.

45 See Article 4(2)(g) TFEU.

46 See also Lenaerts, K., 'Les répercussions des compétences de la Communauté européenne sur les compétences externes des États membres et la question de "préemption"', in Demaret, P. (ed.) *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels*, Bruges, 1986, pp. 37 to 62 and in particular p. 61.

47 See the second sentence of Article 2(2) TFEU. See the judgment of 14 July 1976, *Kramer and Others* (3/76, 4/76 and 6/76, EU:C:1976:114, paragraph 39).

48 See the Opinion of Advocate General Kokott in *Commission* v *Council* (C-13/07, EU:C:2009:190, point 76).

49 That provision may be regarded as a codification of the law applicable to date. See also the Opinion of Advocate General Kokott in *Commission* v *Council* (C-13/07, EU:C:2009:190, point 76 and footnote 40).

78. The question of when and how the European Union exercises that competence is essentially a political one [50] which is covered by the procedure laid down in Article 218 TFEU. [51]

79. It is necessary to point out the difference between an exclusive competence, within the meaning of Article 3 TFEU, and a shared competence which the European Union has decided to exercise. Thus, pursuant to the third sentence of Article 2(2) TFEU, the Member States are again to exercise their competence to the extent that the European Union has decided to cease exercising its competence. That provision applies only to shared competences.

80. Therefore, as regards the relationship between Article 216(1) and Article 3(2) TFEU, it should be noted that the first provision concerns the existence of external competence, whereas the second resolves the issue of whether or not such external competence (which exists pursuant to Article 216 TFEU) is exclusive. [52]

81. In my view, that clearly follows from the wording of those two provisions and from their respective positions in the FEU Treaty. It also follows that the wording, and therefore the scope, of Article 216(1) TFEU is more extensive than that of Article 3(2) TFEU. Only some of the competences set out in Article 216(1) TFEU are exclusive competences pursuant to Article 3(2) TFEU. [53]

82. It must therefore be determined, as a first step, whether an EU competence exists pursuant to Article 216(1) TFEU, read in conjunction, where appropriate, with other provisions of the FEU Treaty, before addressing the question of the nature of that competence, in particular the question whether it is exclusive pursuant to Article 3(2) TFEU or merely shared. The Court follows that same approach. [54]

(c) Shared competences and mixed agreements: two separate issues

83. It should be emphasised 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.

84. As Advocate General Wahl noted in his Opinion in Opinion procedure 3/15, [55] '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 the EU legislature'.

50 See also, in that regard, Mögele, R., 'Artikel 216 AEUV, point 32', in Streinz, R. (ed.), *EUV/AEUV (Kommentar)*, 2nd ed., C. H. Beck, Munich, 2012.

51 See also the Opinion of Advocate General Sharpston in Opinion procedure 2/15 (*Free Trade Agreement with Singapore*, EU:C:2016:992, point 74).

52 See also the Opinion of Advocate General Sharpston in Opinion procedure 2/15 (*Free Trade Agreement with Singapore*, EU:C:2016:992, point 64). It should be added that most of the legal literature supports that approach. See, for example, Eeckhout, P., *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford, 2012, p. 112; Hartley, T., *The foundations of European Union law*, 8th ed., Oxford University Press, Oxford, 2014, p. 186; Geiger, R., 'Article 216 TFEU, point 3', in Geiger, R., Khan, D.-E., and Kotzur, M., *European Union Treaties*, Hart, Oxford, 2015; Lachmayer, K., and von Förster, St., 'Artikel 216 AEUV, point 4', in von der Groeben, H., Schwarze, J., and Hatje, A. (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th ed., Nomos, Baden-Baden, 2015, and Mögele, R., 'Artikel 216 AEUV, point 29', in Streinz, R. (ed.), *EUV/AEUV (Kommentar)*, 2nd ed., C. H. Beck, Munich, 2012.

53 In some language versions, the fourth situation provided for in Article 216(1) TFEU may paradoxically appear more restrictive than the third situation described in Article (3)(2) TFEU. That is not the case in the French version. In any event, like Advocate General Sharpston in her Opinion in Opinion procedure 2/15 (*Free Trade Agreement with Singapore*, EU:C:2016:992, footnote 26), I attach no decisive significance to any difference in wording between those two provisions in certain language versions.

54 See, for example, Opinion 1/13 (*Accession of a non-Union country to the Hague Convention*, EU:C:2014:2303, point 67 et seq.).

55 Opinion (*Marrakesh Treaty to Facilitate Access to Published Works*), EU:C:2016:657, point 119.

85. 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. [56]

86. Similarly, amendments to a mixed agreement, such as that in the main proceedings, follow the same principle. If, for example, in an area of shared competences, the European Union decided to exercise its competence in connection with such amendments, it would then be the European Union, and no longer the Member States, which would take any decision.

87. The accession agreement reflects that reality. Under 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.

88. It is common ground among the parties that, under Article 4(2)(g) TFEU, as regards measures relating to transport policy within the European Union, competence is shared between the European Union and the Member States and that, where there is shared competence, it follows from Article 2(2) TFEU that both the European Union and the Member States may legislate and adopt legally binding acts and that the Member States are to exercise their competence only to the extent that the European Union has not exercised its competence.

89. Moreover, it is common ground [57] that, first, the European Union has internal competence, on the basis of Article 91(1) TFEU, to adopt provisions in areas relating to private transport law for rail transport undertakings, namely (private) law relating to the carriage of goods, law relating to charter contracts or contracts regarding the provision of a vehicle for use and contract law relating to the use of infrastructure and that, secondly, the European Union has not yet exercised that competence.

90. Curiously, the Council indicates in the paragraphs at issue in the contested decision that the competence is a shared competence, whereas in its statement in defence it states that the European Union has exclusive competence.

3. The existence of external competence

(a) Arguments of the parties

91. The Federal Republic of Germany claims that, outside the European Union, transport policy is an area of competence shared by the European Union and the Member States, except in the situations covered by Article 3(2) TFEU, in which the external competence of the European Union is exclusive.

92. In order to ensure that the European Union has competence to adopt, in accordance with Article 218(9) TFEU, a decision establishing 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 a mixed agreement, it is necessary, according to the Federal Republic of Germany, to verify whether the amendments relate to provisions of the agreement which fall within EU competence. In the absence of such competence, no decision establishing the position of the European Union can be adopted. For the Federal Republic of Germany, what is important, for the purposes of that verification, is whether the decision of the international body in question has a direct effect on the EU acquis and, therefore, whether there are common rules which may be undermined or

56 See the Opinion of Advocate General Wahl in Opinion procedure 3/15 ((*Marrakesh Treaty to Facilitate Access to Published Works*), EU:C:2016:657, point 122).

57 The Federal Republic of Germany concedes that the 'European Union could potentially … adopt common provisions'.

whose scope may be altered as a result of the decision at issue. According to the Federal Republic of Germany, the existence of such a risk presupposes that the amendments to provisions of an international agreement fall within an area in which the European Union has already adopted common rules. In that regard, the Federal Republic of Germany refers to the case giving rise to the *AETR* judgment.[58]

93. The Council, supported by the Commission, notes that EU external action is not restricted to matters which are already the subject of EU internal provisions. It claims that the European Union may also act, externally, where the matters in question are not yet or are only partially the subject of legislation within the European Union, and that legislation therefore cannot be affected. It considers that an international agreement could be concluded by the European Union alone, using a 'potential' competence externally.

94. Unlike the Federal Republic of Germany, the Council considers that, in an area falling within the scope of a shared competence, a position to be adopted on behalf of the European Union within a body set up by an international agreement may be established by a decision adopted pursuant to Article 218(9) TFEU, since such a position serves EU interests, even where there are no common rules relating to the matter in question. Such a case would involve the exercise of a shared external competence, which, pursuant to Protocol (No 25) on the exercise of shared competence, annexed to the EU Treaty and the FEU Treaty,[59] would be limited to the specific elements governed by the legal act of the European Union.

95. In the present case, the European Union chose to exercise its external competence in the area of transport with a view to becoming a contracting party to the COTIF, by specifying the extent and the nature of its competence in matters for which it has assumed competences, as confirmed by the reference to Article 91 TFEU in the first citation of Decision 2013/103 and the declaration on the competence of the European Union annexed to that decision. That declaration, which might suggest that the transfer of shared competences is subject to the existence of EU provisions, does not in fact exclude the possibility of a new transfer of shared competences in the context of the COTIF.

(b) Assessment

96. As a first step, it is necessary to analyse whether in the present case the European Union had external competence pursuant to Article 216(1) TFEU.

(1) The second situation referred to in Article 216(1) TFEU

97. As I have already indicated, the second situation referred to in Article 216(1) TFEU authorises the European Union to 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'.

98. In the present case, the convention at issue does indeed concerns an EU policy,[60] since transport is the subject matter of Title VI of Part Three of the FEU Treaty. Pursuant to Article 90 TFEU, the objectives of the Treaties are to be pursued, in matters governed by that title, within the framework of a common transport policy. More precisely, it follows from Article 91(1) TFEU that the European Union has (internal) competence to draw up that transport policy. Moreover, pursuant to Article 100(1) TFEU, the provisions of Title VI are to apply, inter alia, to transport by rail.

58 Judgment of 31 March 1971 (22/70, EU:C:1971:32).

59 OJ 2016 C 202, p. 306.

60 Moreover, as indicated above, it is common ground among the parties that the European Union has internal competence on the basis of Article 91(1) TFEU. The present case therefore clearly concerns transport policy.

99. Furthermore, it follows from the case-law of the Court that Article 91(1) and Article 80(1) TFEU provide for an EU power to act in the field of transport. [61]

100. In a broader sense, transport policy is inextricably linked with the policy of the internal market. Not only does transport policy directly contribute to the accomplishment of the internal market, but the FEU Treaty itself also provides that certain aspects of transport constitute in themselves a particular category of services. [62]

101. As regards the criterion of necessity referred to in the second situation provided for in Article 216(1) TFEU, [63] that must, in my view, be interpreted broadly. [64] In that regard, the political institutions with competence have a wide margin of discretion. The criterion of necessity could even be regarded as a simple declaratory confirmation of the principles of subsidiarity [65] and proportionality. [66]

102. In any event, as I understand the second situation envisaged in Article 216(1) TFEU, the criterion of necessity is a criterion which primarily serves to exclude EU external competence where external action by the European Union does not allow the objectives of the FEU Treaty to be achieved.

103. That is not the case here. The purpose of the amendments at issue is the achievement of the objectives of the FEU Treaty within the framework of transport policy.

104. The question which now arises is whether the European Union has external competence, given that the requirements of the second situation provided for in Article 216(1) TFEU have been fulfilled, or whether additional requirements must be fulfilled. Does the European Union therefore have external competence without the need for prior internal legislation?

105. I think that it does.

106. Also clear and leaving little room for doubt is the wording of the second situation provided for in Article 216(1) TFEU; this is strikingly similar to the wording of Article 352(1) TFEU, [67] which may be explained by the fact that the case-law of the Court prior to the adoption of the Treaty of Lisbon has, 'in a sense, transposed to the sphere of the [European Union's] external competence the logic underlying Article [352 TFEU]'. [68] That provision refers to the objectives set out in the Treaties, within the framework of the European Union's policies. [69] No prior internal regulation is required. In the

61 See the judgment of 14 July 2005, *Commission* v *Germany* (C-433/03, EU:C:2005:462, paragraph 41).

62 Pursuant to Article 58(1) TFEU, freedom to provide services in the field of transport is to be governed by the provisions of the title relating to transport.

63 'Necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties'.

64 Unlike the criterion of necessity referred to in Article 3(2) TFEU, a provision which, I would point out, deals with the *exclusive* nature of a competence.

65 See Article 5(3) TEU.

66 See Article 5(4) TEU.

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

68 See the Opinion of Advocate General Tizzano in *Commission* v *United Kingdom* (C-466/98, EU:C:2002:63, point 48).

69 See also Schmalenbach, K., 'Artikel 216 AEUV, point 12', in Calliess, Chr., Ruffert, M. (ed.), *EUV/AEUV*, 5th ed., C. H. Beck, Munich, 2016, and Schütze, R., *European Union Law*, Cambridge University Press, Cambridge, 2015, p. 272. According to Hartley, T., *The foundations of European Union law*, 8th ed., Oxford University Press, Oxford, 2014, p. 186, the wording of the second situation envisaged in Article 216(1) TFEU is even 'based' on that of Article 352 TFEU.

provisions of the FEU Treaty, it is only at the stage of classifying an external competence (established pursuant to Article 216(1) TFEU) that the question of internal legislation addressed in the second situation described in Article 3(2) TFEU[70] arises and, even then, prior internal legislation is not required.[71]

107. Moreover, the case-law of the Court does not contain a requirement concerning prior internal legislation. Each time the question of prior internal legislation has been raised, it was necessary to determine not whether an external competence existed but whether or not an external competence was to be classified as an exclusive external competence.[72]

108. Furthermore, it follows from the judgment in *Kramer and Others*[73] that the mere existence of an internal competence an external competence, even where internal measures have not (yet) been adopted.[74]

109. In Opinion 2/00,[75] the Court ruled on the choice of the appropriate legal basis for the act by which the Council proposed to conclude the Cartagena Protocol on Biosafety. That issue divided the Commission, on the one hand, and the Council and the Member States, on the other. Whilst, in the Commission's view, pursuant to Article 207 TFEU that protocol essentially fell within the scope of the common commercial policy, an exclusive external competence of the European Union, according to the Council and the Member States, pursuant to Article 192(1) TFEU the protocol fell within the scope of environmental policy, (likewise) an external competence but a shared one.

110. According to the Court, the conclusion of the Cartagena Protocol on behalf of the European Union had to be founded on a single legal basis which was specific to environmental policy, namely Article 192(1) TFEU.[76] Moreover, the Court added, referring to the *AETR* judgment,[77] that 'it is thus also necessary to consider whether the [European Union] holds *exclusive* competence [[78]] under Article [192 TFEU] to conclude the Protocol because secondary legislation adopted within the framework of the [European Union] covers the subject of biosafety and is liable to be affected if the Member States participate in the procedure for concluding the Protocol.'[79] The Court considered that, in that case, the harmonisation achieved at internal level in the Cartagena Protocol's field of application covered only a very small part of such a field and concluded that the European Union and its Member States shared competence to conclude the protocol.[80]

111. The Court therefore found, first, that an EU competence exists, before addressing the question of its exclusive nature. It is only at the second stage that it examined whether there existed any secondary legislation. It thus follows from Opinion 2/00[81] that the existence of a shared external competence is independent of the existence of secondary legislation and, therefore, of the exercise of an internal competence.

70 'Necessary to enable the Union to exercise its internal competence'.

71 See also, to that effect, Kadelbach, S., 'Artikel 5 EUV, point 24', in von der Groeben, H., Schwarze, J., and Hatje, A. (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th ed., Nomos, Baden-Baden, 2015, and Hartley, T., *The foundations of European Union law*, 8th ed., Oxford University Press, Oxford, 2014, p. 180.

72 Judgment of 31 March 1971, *AETR* (22/70, EU:C:1971:32, paragraph 31); Opinion 1/76 (*Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63); Opinion 1/94 (*Agreements annexed to the WTO Agreement*, EU:C:1994:384, point 77), and the judgment of 5 November 2002, *Commission* v *Germany* (C-476/98, EU:C:2002:631, paragraph 89).

73 Judgment of 14 July 1976 (3/76, 4/76 and 6/76, EU:C:1976:114).

74 See also Craig, P., and De Burca, G., *EU law*, 6th ed., Oxford University Press, Oxford, 2015, p. 80.

75 Opinion 2/00 (*Cartagena Protocol on Biosafety*, EU:C:2001:664, points 44 to 47).

76 Opinion 2/00 (*Cartagena Protocol on Biosafety*, EU:C:2001:664, points 42 and 44).

77 Judgment of 31 March 1971 (22/70, EU:C:1971:32).

78 Emphasis added.

79 Opinion 2/00 (*Cartagena Protocol on Biosafety*, EU:C:2001:664, point 45).

80 Opinion 2/00 (*Cartagena Protocol on Biosafety*, EU:C:2001:664, points 46 and 47).

81 Opinion (*Cartagena Protocol on Biosafety*, EU:C:2001:664).

112. Next, it follows from the cases which gave rise to the judgments in *Commission* v *France*[82] and *Commission* v *Ireland*[83] that the European Union may conclude international agreements even where the specific matters covered by those agreements are not yet or are only partially subject to legislation at EU level, legislation which, therefore, cannot be affected.

113. Those three cases[84] concerned the external competence of the European Union in the field of the environment, a competence which is shared. The fact that the competence in question was an explicit external competence based on Article 192 and the fourth indent of Article 191(1) TFEU[85] and, unlike that in Article 91 TFEU, read in conjunction with the second situation provided for in Article 216(1) TFEU, not an implicit external competence in no way alters the finding in the preceding point, contrary to what the Federal Republic of Germany claims. An implicit competence is no less valid that an explicit competence.

114. Moreover, I am well aware that the contexts of the cases which gave rise to the above judgments in *Commission* v *France* and *Commission* v *Ireland* were different from that of the present case, in so far as those cases were primarily concerned with an examination by the Court of its own jurisdiction to interpret the provisions of a mixed agreement and to hear and rule on a dispute relating to compliance with those provisions. However, that does not alter the findings of the Court in those cases in the slightest. The context may be different but the law is not. What was at issue in those two cases was the external competence of the European Union in the field of the environment, a competence which is, in principle, shared.

115. The findings of the Court in *Commission* v *France* and *Commission* v *Ireland* may therefore be transposed to the present case.[86]

(2) The Council's other obligations

116. My proposed reading of the second situation provided for in Article 216(1) TFEU does not mean that the political institutions of the European Union have unlimited discretion.

117. First, they are subject to the obligation to state reasons under Article 296(2) TFEU. I shall deal with that point in depth during the examination of the second plea raised by the Federal Republic of Germany.

118. Secondly, if those institutions exercise a shared competence, they must comply with the principle of subsidiarity enshrined in Article 5(3) TEU. That principle applies to the exercise of any shared competence, whether internal or external.[87]

82 Judgment of 7 October 2004 (C-239/03, EU:C:2004:598, paragraph 30).

83 Judgment of 30 May 2006, *Commission* v *Ireland* (C-459/03, EU:C:2006:345, paragraph 95).

84 Opinion 2/00 (*Cartagena Protocol on Biosafety*, EU:C:2001:664); judgments of 7 October 2004, *Commission* v *France* (C-239/03, EU:C:2004:598), and of 30 May 2006, *Commission* v *Ireland* (C-459/03, EU:C:2006:345).

85 See also the first situation referred to in Article 216(1) TFEU.

86 The judgment of 8 March 2011, *Lesoochranárske zoskupenie* (C-240/09, EU:C:2011:125, paragraph 36), relied on by the Federal Republic of Germany, does not alter those findings in the slightest. In that case, there was internal legislation (see paragraph 37 of that judgment).

87 See also, to that effect, Lorz, R.A., Meurers, V., '§ 2, point 42', in von Arnauld, A. (ed.), *Europäische Außenbeziehungen (Enzyklopädie Europarecht, Band 10)*, Nomos, Baden-Baden, 2014; Kadelbach, S., 'Artikel 5 EUV, point 24', in von der Groeben, H., Schwarze, J., and Hatje, A. (ed.), *Europäisches Unionsrecht (Kommentar)*, 7th ed., Nomos, Baden-Baden, 2015, and Roldán Barbero, J., 'The relationship of the Member States' International Agreements with the EU', in Eeckhout, P., and Lopez-Escudero, M. (ed.), *The European Union's external action in times of crisis*, Hart, Oxford, Portland (Oregon), 2014, pp. 249 to 269, in particular p. 266.

(c) Conclusion

119. In the light of those considerations, 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. I noted above 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. 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.

120. Consequently, the Council did not infringe the principle of conferral contained in Article 5(2) TEU and the first plea must therefore be rejected.

121. The assessment of the first plea ought to be concluded here, since I propose that it be rejected. I shall nevertheless continue my analysis in the event that the Court may also desire an analysis concerning whether, in the present case, the European Union likewise has exclusive external competence.

4. The existence of exclusive external competence

(a) The third situation envisaged in Article 3(2) TFEU

122. It must be assessed whether the European Union has exclusive external competence pursuant to Article 3(2) TFEU.

123. In the absence of a corresponding clause in an EU legislative act, the first situation provided for in Article 3(2) TFEU must be immediately ruled out.

124. The same applies to the second situation provided for in that article which, in my view, is not applicable, since it in no way follows from the file that the Council's adoption of the decision is 'necessary to enable the Union to exercise its internal competence'. The present case is therefore not an 'Opinion 1/76 situation'.[88]

125. That leaves the third situation described in Article 3(2) TFEU.

126. The question which arises is the following: how must the phrase 'insofar as its conclusion [that is the conclusion of an international agreement] may affect common rules or alter their scope' contained in Article 3(2) TFEU be interpreted?

127. That phrase corresponds to that used by the Court in paragraph 22 of the *AETR* judgment,[89] in which it defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the FEU Treaty.[90] That phrase must, therefore, be interpreted in the light of the clarifications provided by the Court in the *AETR* judgment and in the case-law flowing from that judgment.[91]

128. How, then, must the phrase 'may affect common rules or alter their scope' be interpreted?

88 (*Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63).

89 Judgment of 31 March 1971 (22/70, EU:C:1971:32).

90 See the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 66).

91 See the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 67).

129. The wording of Article 3(2) TFEU implies that EU rules must already exist in the area covered by the international agreement. If no such rules exist, it is difficult to imagine how the conclusion of the latter could affect or alter the scope of the former.[92] The 'common rules' within the meaning of that provision are, in my view, necessarily provisions of secondary EU law and do not include the provisions of the Treaties, for the simple reason that the purpose of that phrase is, broadly speaking, to codify the case-law flowing from the *AETR* judgment.[93]

130. According to settled case-law, there is a risk of international commitments undermining the common EU rules or altering their scope sufficiently to justify an exclusive external competence of the European Union where those commitments fall within an area in which those rules are applicable.[94] A finding that there is such a risk does not presuppose that the area covered by the international commitments and that of the EU rules coincide fully.[95] Such commitments may also affect or alter the scope of common EU rules when those commitments fall within an area which is already covered to a large extent by such rules.[96]

131. Moreover, the Court has noted that any EU competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and specific analysis of the relationship between the envisaged international agreement and the EU law in force. That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, respectively, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish.[97]

132. The present case must be analysed in the light of those elements.

133. The disputed amendments relate to the field of private contract law relating to goods and passenger transport by rail. It is common ground that that field has not yet been subject to EU legislation.

134. In that regard, the Council does not dispute the absence of comprehensive and coherent EU private law legislation in the field of transport. It considers, however, that the disputed amendments are likely to undermine other EU provisions, the majority of which are contained in 'Annex III'[98] to Decision 2013/103, and, therefore, that they fall under the exclusive competence of the European Union.

(b) Item 5: partial revision of Appendix B (CIM)

135. The proposed amendments to Article 6 and Article 6a of Appendix B (CIM) provide for the introduction of an electronic consignment note.

92 See also the Opinion of Advocate General Sharpston in *Commission* v *Council* (C-114/12, EU:C:2014:224, point 89).

93 Judgment of 31 March 1971 (22/70, EU:C:1971:32). See Opinion of Advocate General Kokott in *Commission* v *Council* (C-137/12, EU:C:2013:441, points 111 to 117), and Opinion of Advocate General Sharpston in *Commission* v *Council* (C-114/12, EU:C:2014:224, point 96). See also the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 67).

94 See the judgments of 31 March 1971, *AETR* (22/70, EU:C:1971:32, paragraph 30); of 5 November 2002, *Commission* v *Denmark* (C-467/98, EU:C:2002:625, paragraph 82), and of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 68).

95 See Opinion 1/03 (*New Lugano Convention*, EU:C:2006:81, point 126), and the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 69).

96 See Opinion 2/91 (*Convention No 170 of the ILO*, EU:C:1993:106, point 25); the judgment of 5 November 2002, *Commission* v *Denmark* (C-467/98, EU:C:2002:625, paragraph 82); Opinion 1/03 (*New Lugano Convention*, EU:C:2006:81, points 120 and 126), and the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 70).

97 See Opinion 1/03 (*New Lugano Convention*, EU:C:2006:81, point 124); the judgment of 4 September 2014, *Commission* v *Council* (C-114/12, EU:C:2014:2151, paragraph 74), and Opinion 1/13 (*Accession of a non-Union country to the Hague Convention*, EU:C:2014:2303, point 74).

98 I imagine that the Council's reference is, rather, to the appendix to Annex I

(1) Arguments of the parties

136. The Federal Republic of Germany emphasises that there is no provision in that connection in EU law in the field of goods transport. In such circumstances, no provision of EU law could be affected by the amendment of Appendix B (CIM). An indirect effect of that amendment on certain EU customs or veterinary provisions, which fall under public law, is insufficient to establish an effect on EU law. In any event, Article 2 of Appendix B (CIM), from which it follows that the provisions of customs law and those relating to animal protection remain unchanged, excludes any indirect effect on EU provisions on those matters. Moreover, the amendment at issue does not affect the right of the parties to agree on the use of paper consignment notes.

137. The Council claims that the introduction of electronic consignment notes will have an effect on the simplified procedure for customs transit by rail provided for in Articles 414 and 419 of Regulation No 2454/93 and, more particularly, on the formalities provided for in Article 412, Article 416(1) and Article 419(1) and (2) of that regulation, as well as Article 94 of Regulation No 2913/92. In fact, the use of electronic consignment notes would make it impossible to opt for a simplified customs procedure and, consequently, would render customs checks significantly more onerous. Moreover, the introduction of such notes would also have an impact on the legislation relating to animal and phytosanitary protection, namely on Directive 97/78/EC,[99] on Directive 2000/29/EC[100] and on Regulation No 136/2004, which provide as a general rule for the use of paper documents as accompanying documents. Furthermore, the origins of Article 6(7) of Appendix B (CIM) also demonstrate the direct interaction between the CIM consignment notes and EU customs law. Therefore, the amendment of Article 6 and the introduction of Article 6a into Appendix B (CIM) are likely to undermine the provisions of EU law.

138. According to the Council, the Federal Republic of Germany's argument that the provisions of transport law set out in Annex I to Decision 2013/103 are not affected cannot succeed. Apart from the fact that that annex does not contain an exhaustive list of EU acts relating to subjects covered by the COTIF, the case-law of the Court does not require that the EU rules which may be undermined be contained in one and the same EU instrument.

139. Therefore, the Council contends that the European Union has exclusive competence as regards the proposed amendments to Appendix B (CIM).

(2) Assessment

140. On the basis of the case-law cited above, concerning the European Union's exclusive external competence and interpreting Article 3(2) TFEU, I do not see how, in the present case, the proposed amendments to Appendix B (CIM) 'may affect common rules or alter their scope'.

141. Appendix B (CIM) concerns the contract of international carriage of goods by rail (CIM), that is to say the contract between a consignor of goods and a rail carrier. Such a contract must be certified by a 'consignment note' in a standard form, which accompanies every consignment. The consignment note contains, in particular, detailed information about the route and the dispatched goods. In the EU customs procedure, the consignment note replaces the transit declaration, which is usually necessary

99 Council Directive of 18 December 1997 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1998 L 24, p. 9).

100 Council Directive of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community (OJ 2000 L 169, p. 1).

for all goods in transit through the European Union.[101] Even though the regulation implementing the customs code expressly refers to the CIM consignment note, that simplification, as the Federal Republic of Germany claims without contradiction from the Council, also applies in practice[102] to consignment notes governed by other international agreements.

142. The proposed amendment is for the introduction of a new Article 6a into Appendix B (CIM), the purpose of which is to define, inter alia, the requirements applicable to electronic consignment notes. Even now, under Article 6(9) of Appendix B (CIM), 'the consignment note and its duplicate may be established in the form of electronic data registration which can be transformed into legible written symbols'.[103] The option to use a consignment note in electronic form therefore already exists, even though no standard is specified. Regulation No 2913/92 is silent on the use of that electronic consignment note. Only Article 233(4) of that regulation deals with the issue of 'electronic documents' in general. That provision stipulates only that, in principle, the use of electronic documents must be possible. However, that provision nowhere refers to a consignment note in any format.

143. The amendment proposed by the introduction of Article 6a into Appendix B (CIM), namely the requirement of an electronic format as the norm for consignment notes, has no direct effect on the way in which the customs procedure is conducted. While the Council claims in that regard that, under EU law as it now stands, electronic notes are not accepted by the relevant authorities, it must be stated that it is sufficient to print the electronic document in order to comply with the customs procedure.

144. It cannot, therefore, be a question of exclusive competence.

(c) Items 4 and 7: partial revision of the COTIF — basic Convention and Appendix D (CUV)

145. The purpose of Appendix D (CUV), that is to say the uniform rules concerning contracts of use of vehicles in rail traffic (CUV), is, in particular, to establish liability in case of loss of or damage to a vehicle or in case of damage caused by that vehicle. The proposed amendment relates to the definition of the 'keeper' of a vehicle within the meaning of the COTIF.

(1) Arguments of the parties

146. The Federal Republic of Germany claims that there is currently no EU provision in that field. The only EU act to which the Council refers as regards one of the five amendments concerned, namely Directive 2008/110, relates only to public law issues concerning rail security. Therefore, even though the term 'keeper' is used both in Directive 2008/110 and in Appendix D (CUV), it relates to a different legislative context in those two cases. Whereas Directive 2008/110 governs the public law obligations of rail undertakings and the competences of the authorities, Appendix D (CUV) relates to contractual rights and obligations in the event of loss of a railway vehicle or of damage caused by such a vehicle. That is why, according to the Federal Republic of Germany, the definition of the term 'keeper' in the amendments in question was different from that given in EU law.

101
See Article 413 of the implementing regulation.

102
That also follows from the guidelines concerning export and exit in the context of Regulation (EC) No 648/2005, of 27 October 2010, adopted by the Customs Code Committee, published by the Commission with the reference 'TAXUD/A3/0034/2010' at http://ec.europa.eu/ecip/documents/procedures/export_exit_guidelines_en.pdf (see part B, paragraph 10.4). Clearly, that document is not legally binding but it clearly describes practice.

103
That provision continues as follows: 'The procedure used for the registration and treatment of data must be equivalent from the functional point of view, particularly so far as concerns the evidential value of the consignment note represented by those data.'

147. By contrast, the Council emphasises the strong links between the provisions in Appendix D (CUV) and EU law. As is clear from recitals 3 and 4 of Directive 2008/110, prior amendments to that appendix concerning the rights and obligations of keepers have, in the past, already given rise to amendments to Directive 2004/49. The purpose of the current proposed amendments is, first, to bring the definition of the term 'keeper' in Appendix D (CUV) into closer alignment with that used in Directive 2008/110. Secondly, they are intended to impose on the keeper the obligation to nominate an entity in charge of maintenance ('ECM') during the conclusion of a contract of use and to regulate the exchange of information between the keeper and the ECM, matters which are already subject to detailed rules in EU law, namely in Directive 2008/110 and Regulation (EU) No 445/2011.[104] If their content had been different, those amendments could have undermined and made it difficult to apply provisions of EU law and could also have sent a negative message outside the European Union.

148. Therefore, the Council contends that the proposed amendments to Appendix D (CUV) fall under the exclusive competence of the European Union.

(2) Assessment

149. It is clear that the purpose of the proposed amendment to Article 12 and to Appendix D (CUV) is to bring the definition used in the COTIF into closer alignment with that used in Directive 2004/49 on safety on the Community's railways. That directive contains a provision stating that the keeper may be an ECM. According to recitals 3 and 4 of Directive 2008/110, the definition of 'keeper', within the meaning of that directive, must be as close as possible to that used in the COTIF. Since definitions of the same concept contained in a specific EU act, in the present case Directive 2008/110, and in the COTIF draw inspiration from each other, any change to the definition in question in the COTIF will have direct repercussions for that specific act and is therefore likely to affect it.

150. The European Union therefore has exclusive competence in that regard.

(d) Item 12: partial revision of Appendix E (CUI)

(1) Arguments of the parties

151. As regards the proposed amendments to Appendix E (CUI), the Federal Republic of Germany considers that they pertain exclusively to issues of private law concerning contractual liability or concerning the use of rail infrastructure. It is true that, in the field of rail infrastructure, the European Union has adopted a number of measures, set out in the appendix to Annex I to Decision 2013/103, such as Directive 2001/14 and Directive 2004/49. Nevertheless, those measures pursue objectives falling under public law and therefore do not govern the issues dealt with in Appendix E (CUI). On the contrary, Directive 2004/49 explicitly excludes issues falling under private law from the scope of its provisions. Moreover, Article 5a of Appendix E (CUI) has the effect of excluding any indirect effect by the amendments in question on EU public law.

152. As regards the EU position to be adopted on the proposed amendments to Appendix E (CUI), the Council takes the view that the contractual provisions relating to the use of infrastructure must not be considered in isolation, since they interfere with provisions of international and European rail law and, more particularly, with those of public law relating to safety. The extension of the manager's liability for financial losses arising from damages paid by the carrier as a result of infrastructure could possibly have the effect of altering the conditions of liability governed by EU law, notwithstanding the clause

104
Commission Regulation of 10 May 2011 on a system of certification of entities in charge of maintenance for freight wagons and amending Regulation (EC) No 653/2007 (OJ 2011 L 122, p. 22).

relating to law remaining unaffected in Article 5a of Appendix E (CUI). The same applies to proposed amendments seeking to extend the scope of Appendix E (CUI) to national transport and to create a legal basis for the general terms and conditions relating to contracts of use of infrastructure in international rail traffic.

(2) Assessment

153. Appendix E (CUI) governs contracts of use of rail infrastructure (CUI) for transport purposes, including the form and the framework conditions of the contract. The amendments suggested by CIT include the extension of the scope of CUI to internal operations, the introduction of general terms and conditions which are contractually binding and, finally, the extension of the infrastructure manager's liability for damage.

154. A single article of EU law refers to agreements between rail undertakings and infrastructure managers. That article is Article 28 of Directive 2012/34/EU,[105] which provides that those agreements must be non-discriminatory and transparent.

155. That does not provide a sufficient basis for exclusive competence.

B. The second plea, alleging infringement of Article 296 TFEU

156. By its second plea, the Federal Republic of Germany, supported by the French Republic, claims that the contested decision is vitiated by a lack of reasoning, on the ground that the Council did not demonstrate that the matters covered by the EU position were concerned with a field which has already largely been regulated in EU law.

1. Arguments of the parties

157. According to the Federal Republic of Germany, the clear demarcation of competences is particularly important in cases of mixed agreements in order to determine the competences of the various participants within bodies of international organisations. However, in the present case, the Council has not cited any instrument of EU law or has referred only to instruments connected with public law, even though the proposed amendments relate only to transport law falling within the scope of civil law. According to the Federal Republic of Germany, the Council has not indicated the legal basis for substantive EU external competence either in the contested decision or in its defence. It adds that while the Council, in its defence, has relied on certain EU acts which could, in the view of that party, be affected if the disputed amendments are approved, the majority of those acts are not, however, mentioned in the contested decision, or even in Decision 2013/103.

158. The Council, supported by the Commission, contends that the reasoning justifying the competence of the European Union clearly follows from the contested decision. The EU provisions which the disputed amendments may undermine are indicated in that decision. The fact that, in the view of the Federal Republic of Germany, the provisions of EU law relied on are irrelevant cannot call into question the adequacy of the reasoning in the contested decision. In any event, in a matter which, at the very least, falls under a competence shared by the European Union and the Member States, the Council has fulfilled its obligation to state reasons by simply referring to the legal basis of its action

105
Directive of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

and by describing its position. According to the Council, Article 218(9) TFEU constitutes the appropriate legal basis for the adoption of the contested decision and an additional statement of reasons was not necessary. Moreover, the fact that the contested decision relies on provisions of EU law which are not set out in Decision 2013/103 is, in the Council's view, irrelevant.

2. Assessment

159. This plea is based on the arguments put forward by the Federal Republic of Germany in the context of its first plea, which I propose that the Court reject. Since, as I have already stated, the field with which the amendment is concerned need not already largely be regulated internally, the requirements relating to a statement of reasons are consequently reduced.

160. According to the second paragraph of Article 296 TFEU, legal acts are to state the reasons on which they are based and are to refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties.

161. According to settled case-law, that obligation to give reasons requires that all of the measures concerned should contain a statement of the reasons which led the institution to adopt them, in order that the Court can exercise its power of review and that the Member States and the third parties concerned may learn of the conditions under which the EU institutions have applied the FEU Treaty.[106] The obligation to indicate the legal basis of a measure is also related to that duty to state reasons.[107] Moreover, according to settled case-law, it is not necessary for details of all relevant factual and legal aspects to be given in the statement of reasons.[108] The question whether the statement of the grounds for a decision meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question.[109]

162. While Article 218(9) TFEU is the procedural legal basis for adopting decisions in the context of the procedure to be followed by the political institutions of the European Union to amend the provisions of an agreement which does not fall within the institutional framework of that agreement and since, as I noted earlier in the present Opinion, that provision presupposes the existence of a substantive EU competence, the Council is obliged, in that decision, to state the substantive legal basis underlying the European Union's competence and the justification for that competence. The Council is obliged to state the applicable substantive and procedural legal bases.[110] That obligation arises from Article 296 TFEU.[111]

163. In the present case, the Council has fulfilled that obligation. 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 in Article 218(9) TFEU.

106
See the judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 37 and the case-law cited).
107
See the judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 38 and the case-law cited).
108
See the judgment of 14 February 1990, *Delacre and Others* v *Commission* (C-350/88, EU:C:1990:71, paragraph 16).
109
See the judgment of 14 February 1990, *Delacre and Others* v *Commission* (C-350/88, EU:C:1990:71, paragraph 16 and the case-law cited).
110
See the Opinion of Advocate General Kokott in *Commission* v *Council* (C-370/07, EU:C:2009:249, point 78).
111
See the judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 37).

164. During the proceedings before the Court, the Council stated that it considers not only that there is (shared) competence pursuant to Article 91(1) and the second situation provided for in Article 216(1) TFEU, but that the competence is exclusive pursuant to Article 3(2) TFEU.

165. However, the Council at no point refers to that latter provision in its statement of reasons. Moreover, since, except in one particular respect, 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.

166. Nevertheless, the absence of any reference to Article 3(2) TFEU is irrelevant to the present plea since the lack of reasoning with regard to (non-existent) exclusive competence is irrelevant for the purposes of Article 296 TFEU.

167. The second plea must therefore be rejected.

C. The third plea, alleging infringement of Article 4(3) TEU

1. Arguments of the parties

168. The Federal Republic of Germany claims that the principle of sincere cooperation enshrined in Article 4(3) TEU requires that, in cases of disagreement between Member States and the European Union concerning the limits of competences in the context of the exercise of rights as members of an international organisation, the institutions of the European Union ensure that the EU act establishing an EU position is adopted in good time to allow the Member State contesting the European Union's competence to bring the matter before the Court in sufficient time to receive clarification on the issue. The principle of effective legal protection also requires that the adoption procedure be organised in such a way as to allow a Member State contesting the adopted act to apply to the Courts of the European Union for a suspension of operation before the act in question produces irreversible effects.

169. In the present case, even though the Federal Republic of Germany stated its reservations concerning the competences of the European Union immediately after the Commission submitted the draft decision on 5 June 2014, the Council waited until the 24 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, thus leaving the Federal Republic of Germany fewer than 24 hours to refer the matter to the Court of Justice. In doing so, the Council infringed both the principle of sincere cooperation and the principle of effective legal protection. Although it was no longer possible to revisit the acts adopted by the OTIF Revision Committee, the need for legal protection persisted owing to the fact that the Commission opened an EU Pilot procedure against the Federal Republic of Germany in which the Commission alleged that that Member State had infringed the contested decision. Moreover, the circumstances in which the Council adopted a decision under Article 218(9) TFEU in the context of the work of the OTIF Revision Committee could arise once again.

170. The Council, supported by the Commission, considers that it complied with the principle of sincere cooperation. In the preparatory bodies of the Council, several meetings were dedicated to debating, in particular, the points on which the Federal Republic of Germany had expressed doubts concerning the competence of the European Union. The Federal Republic of Germany's argument that the EU position should have been adopted sufficiently early to allow it to apply to the Court for a suspension of operation is excessive and unrealistic. The Council adds that the fact that the Federal Republic of Germany initiated the present proceedings in fact demonstrates that the principle of effective legal protection has been complied with.

171. Moreover, the Council notes that, in view of the period within which the disputed amendments are due to enter into force according to the applicable rules of the COTIF, no irreversible effects for the Federal Republic of Germany can be identified as resulting from the contested decision. In any event, the European Union, which holds the majority of votes within OTIF, could exercise some influence within that organisation if a new EU position or a coordinated position has to be adopted following the judgment to be delivered the Court in the present case. The Council adds that, in the event that the Court annuls the contested decision, it is in any event obliged, under the first paragraph of Article 266 TFEU, to take the necessary measures to comply with the judgment of the Court. Furthermore, compliance with the judgment is possible since the European Union holds the majority of votes within OTIF.

2. Assessment

172. As the Commission notes, there is no evidence that the contested decision was able to influence the result, 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 recognises that a 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.

173. Accordingly, the third plea must be rejected and this action must therefore be dismissed in its entirety.

VI. Costs

174. Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the pleadings of the successful party. The Council applied for the costs in its pleadings and the Federal Republic of Germany is the unsuccessful party.

175. In accordance with Article 140(1) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs.

VII. Conclusion

176. In the light of the above considerations, I propose that the Court:

– dismiss the action;

– order the Federal Republic of Germany to pay the costs; and

– order the French Republic, the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own costs.