



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

27 March 2019*

(Failure of a Member State to fulfil obligations — Article 258 TFEU — Decision 2014/699/EU — Principle of sincere cooperation — Article 4(3) TEU — Admissibility — Effects of the conduct criticised on the expiry date of the time limit set in the reasoned opinion — Ongoing effects on the unity and consistency of the European Union’s international action — Sufficiency of the measures taken by the Member State concerned in order to comply with the reasoned opinion — Vote by the Federal Republic of Germany against the Union position laid down in Decision 2014/699/EU at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee and opposition expressed by that Member State against that position and the arrangements for the exercise of voting rights as defined in that decision)

In Case C-620/16,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 29 November 2016,

European Commission, represented by W. Mölls, L. Havas, J. Hottiaux and J. Norris-Usher, acting as Agents,

applicant,

supported by:

Council of the European Union, represented by R. Liudvinaviciute-Cordeiro and J.-P. Hix, acting as Agents,

intervener,

v

Federal Republic of Germany, represented by T. Henze and J. Möller, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of T. von Danwitz, President of the Seventh Chamber, acting as President of the Fourth Chamber, K. Jürimäe, C. Lycourgos, E. Juhász and C. Vajda (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: K. Malacek, Administrator,

* Language of the case: German.

having regard to the written procedure and further to the hearing on 4 July 2018,
after hearing the Opinion of the Advocate General at the sitting on 9 January 2019,
gives the following

Judgment

- 1 By its application, the European Commission is asking the Court to declare that the Federal Republic of Germany, by having, at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee, voted against the position laid down in Council Decision 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and the Appendices thereto (OJ 2014 L 293, p. 26), and having publicly declared its opposition to that position and to the arrangements for the exercise of voting rights provided for therein, failed to fulfil its obligations under that decision and Article 4(3) TEU.

Legal context

International law

The COTIF

- 2 The Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 ('the COTIF'), entered into force on 1 July 2006. The 49 States, including all the Member States of the European Union (with the exception of the Republic of Cyprus and the Republic of Malta), which are parties to the COTIF constitute the OTIF.
- 3 Under Article 2(1) of the COTIF, the aim of the 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 rail traffic.
- 4 The OTIF Revision Committee, in principle, is composed of all parties to the COTIF. In accordance with Article 17(1)(a) and (b) of the COTIF, the OTIF Revision Committee is to take decisions, within the limits of its competences, on proposals aiming to modify the COTIF and is to consider, in addition, proposals to be submitted for decision to the General Assembly of OTIF. The respective competences of those two bodies of OTIF with respect to modification of the COTIF are laid down in Article 33 of that convention.
- 5 Within Title VI of the COTIF, entitled 'Modification of the [COTIF]', Article 33 of that convention, headed 'Competence', provides as follows:

' ...

2. The General Assembly shall take decisions about proposals aiming to modify the [COTIF] in so far as [paragraphs] 4 to 6 do not provide for another competence.

...

4. Subject to decisions taken by the General Assembly in accordance with [paragraph] 3, first sentence, the Revision Committee shall take decisions about proposals aiming to modify

(a) Article 9 and Article 27 [paragraphs] 2 to 5;

...

(d) the CUV Uniform Rules except Articles 1, 4, 5 and 7 to 12;

...'

6 Under Article 35 of the COTIF, headed 'Decisions of the Committees':

'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 12th month following that during which the Secretary-General has given notice of them to the Member States. ...

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 12th month following that during which the Secretary-General has given notice of them to the Member States. ...

...'

7 In accordance with Article 38(2) of the COTIF, the European Union, as a regional organisation having acceded to the COTIF, may exercise the rights available to its Member States under the COTIF in so far as they cover matters within its competence. It follows from Article 38(3) of the COTIF that, for the purposes of the exercise of the right to vote and the right to object provided for in Article 35(2) and (4) of that convention, the European Union is to enjoy the number of votes equal to that of its Member States which are also members of OTIF. The latter may exercise their rights, in particular their right to vote, only to the extent allowed by Article 38(2).

The accession agreement

8 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) ('the accession agreement'), signed on 23 June 2011 in Berne, entered into force, pursuant to Article 9 thereof, on 1 July 2011.

9 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 members 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 Convention of the cases where, with regard to the various items on the agendas of the General Assembly and the other deliberating bodies, it will exercise 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.'

European Union law

Decision 2013/103/EU

- 10 The accession agreement was approved on behalf of the European Union by Council Decision 2013/103/EU of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (OJ 2013 L 51, p. 1).
- 11 Article 5 of that decision provides that 'the internal arrangements for the preparation for OTIF meetings and for the representation and voting at such meetings are set out in Annex III to this Decision'.
- 12 Annex III to that decision is devoted to the internal arrangements for the Council of the European Union, the Member States and the Commission in proceedings under OTIF, for the purposes of implementing 'the requirement of unity of the international representation of the Union and its Member States in accordance with the [TEU] and the [TFEU] and the case-law of the Court ... also at the stage of implementation of international obligations', as is stated in the introductory paragraph of that annex.
- 13 Point 2 of that annex, headed 'Coordination procedure', provides:
- '...
- 2.2. The coordination meetings will agree on positions on behalf of the Union only or, where relevant, on behalf of the Union and its Member States. Positions of the Member States relating to their exclusive competence may be subject to coordination at these meetings if so agreed by the Member States.
- ...
- 2.6. If the Commission and the Member States in coordination meetings cannot agree a common position, including for reasons of disagreement on the repartition of competence, the matter will be referred to the Committee of Permanent Representatives and/or the Council.'
- 14 Point 3 of Annex III, on 'Statements and voting in the OTIF meetings', states:
- '3.1. Where an agenda item deals with matters of exclusive Union competence, the Commission will speak and vote for the Union. After due coordination, the Member States can also speak in order to support and/or develop the Union position.
- 3.2. Where an agenda item deals with matters of exclusive national competence, Member States will speak and vote.

- 3.3. Where an agenda item deals with matters containing elements of both national and Union competence, the Presidency and the Commission will express the common position. After due coordination, Member States can speak to support and/or develop the common position. The Member States or the Commission, as appropriate, will vote on behalf of the Union and its Member States in accordance with the common position. The decision on who will be voting is made in the light of where the preponderance of the competence lies (e.g. mainly national or mainly Union competence).
- 3.4. Where an agenda item deals with matters containing elements both of national and of Union competence and the Commission and the Member States have not been able to agree a common position as referred to in point 2.6, Member States and the Commission can speak and vote on matters falling clearly within their respective competence.
- 3.5. On matters for which there is no agreement between the Commission and the Member States on division of competence, or where it has not been possible to obtain the majority needed for a Union position, a maximum effort will be made to clarify the situation or achieve a Union position. Pending this, and after due coordination, the Member States and/or the Commission, as appropriate, would be entitled to speak on condition that the position expressed will not prejudice a future Union position, will be coherent with Union policies and previous Union positions, and will be in conformity with Union law.
- 3.6. ...

The representatives of the Member States and the Commission will make serious efforts to reach a common position and to defend this position during the discussions in the OTIF working groups.'

Decision 2014/699

- 15 Article 1(1) of Decision 2014/699 provides that 'the position to be taken on the Union's behalf at the 25th session of the [OTIF] Revision Committee shall be in accordance with the Annex to this Decision'. Under Article 1(2) of that decision 'minor changes to the documents mentioned in the Annex to this Decision may be agreed by the representatives of the Union in the Revision Committee without further Decision of the Council'.
- 16 Section 3 of the Annex to Decision 2014/699 sets out, with respect to the various items on the agenda at the 25th session of the OTIF Revision Committee, the divisions of competence between the European Union and its Member States, the exercise of voting rights and the recommended coordinated position.
- 17 As regards items 4 and 7 on the agenda at the 25th session of the OTIF Revision Committee, which concern the proposed amendments to Article 12 of the COTIF and Articles 2 and 9 of Appendix D (CUV) to the COTIF, on the Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic (CUV) ('the amendments at issue'), Section 3 of the Annex to Decision 2014/699 provides:

'Item 4. Partial Revision of COTIF — Basic Convention

...

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.

...

Item 7. Partial revision of Appendix D (CUV)

...

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/EC 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)]). ...

...’

Pre-litigation procedure and proceedings before the Court

- 18 By letter of 4 August 2014, the Commission invited the Federal Republic of Germany to explain its conduct at the 25th session of the OTIF Revision Committee, which took place on 25 and 26 June 2014.
- 19 In its reply of 12 November 2014, the Federal Republic of Germany considered that its conduct was entirely legitimate and lawful, on the grounds that none of the amendments at issue fell within the competence of the European Union, inasmuch as the latter had not exercised its internal competence in the areas in question.
- 20 On 29 May 2015 the Commission opened an infringement procedure pursuant to Article 258(1) TFEU by addressing a letter of formal notice to the Federal Republic of Germany, in which it claimed that that Member State, by its conduct at the 25th session of the OTIF Revision Committee, had failed to fulfil its obligations under Decision 2014/699 and Article 4(3) TEU. The Commission further noted that it could be inferred, based on the fact that the Federal Republic of Germany expressly considered, according to its own statements, that its conduct was legitimate, that this Member State would be likely to engage in similar conduct in the future under similar circumstances.
- 21 In its reply of 7 July 2015, the Federal Republic of Germany disputed the Commission’s claims.
- 22 On the adoption of Council Decision (EU) 2015/1734 of 18 September 2015 establishing the position to be adopted on behalf of the European Union at the 12th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards certain

amendments to the Convention concerning International Carriage by Rail (COTIF) and to its Appendices (OJ 2015 L 252, p. 43), the Federal Republic of Germany made a statement ('the statement of 17 September 2015'), which was entered in the minutes of the Council and states:

'[The Federal Republic of Germany] considers, from a legal point of view, that it is entitled to vote on Items 8 (Partial Revision of the COTIF — Basic Convention), 10 [Partial Revision of Appendix D (CUV)] and 13 (Revised and consolidated Explanatory Report), even if that goes against the decision [2015/1734]. The reason is that the European Union does not have competence in that regard. The division of competences between the EU and the Member States is the subject of pending proceedings before the Court ... (Case C-600/14 — *Germany v Council*). Pending a decision of the European Court of Justice, [the Federal Republic of Germany] will exercise its voting right in the OTIF General Assembly, maintaining its legal position and without prejudice to the pending proceedings at the [Court], not in derogation of that Council Decision ... although it considers this decision to be unlawful.'

- 23 On 11 December 2015 the Commission issued a reasoned opinion, in which it reiterated its position as expressed in its letter of formal notice. The Commission invited the Federal Republic of Germany to take all measures necessary to comply with the reasoned opinion within two months of receipt of the opinion, and in particular to put an end to the alleged infringing practices described therein.
- 24 By letter dated 1 February 2016, the Federal Republic of Germany replied to the reasoned opinion, reiterating the position expressed in its reply to the letter of formal notice.
- 25 Taking the view that the Federal Republic of Germany had failed to take the measures necessary to comply with the reasoned opinion within the time limit laid down, the Commission decided to bring the present action.
- 26 By decision of the President of the Court of 3 January 2018, the Council was granted leave to intervene in support of the form of order sought by the Commission.

Judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935)

- 27 On 22 December 2014 the Federal Republic of Germany brought proceedings before the Court of Justice, seeking the partial annulment of Decision 2014/699, in so far as it related in particular to the amendments at issue. Its pleas related to alleged infringements of (i) the principle of conferral of powers laid down in Article 5(2) TEU, owing to a lack of competence of the European Union, (ii) the obligation to state reasons laid down in Article 296 TFEU, and, (iii) the principle of sincere cooperation, laid down in Article 4(3) TEU, read in conjunction with the principle of effective judicial protection.
- 28 By its judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935), delivered after the end of the written phase of the procedure in the present case, the Court dismissed the action brought by the Federal Republic of Germany, rejecting the three pleas in law put forward by that Member State.

The action

Admissibility

- 29 By separate document of 8 February 2017, the Federal Republic of Germany raised an objection of inadmissibility in relation to the present action, under Article 151 of the Rules of Procedure of the Court. By decision of 10 May 2017, the Court, having heard the Advocate General, reserved a decision on the objection of inadmissibility for the final judgment and the Federal Republic of Germany was invited to lodge a statement of defence.

Arguments of the parties

- 30 The Federal Republic of Germany takes the view that the action is inadmissible.
- 31 That Member State argues that the conduct at issue in this action had exhausted all its effects by the end of the 25th session of the OTIF Revision Committee, that is, before the expiry of the time limit laid down by the Commission in its reasoned opinion. In accordance with the case-law of the Court arising from the judgments of 27 October 2005, *Commission v Italy* (C-525/03, EU:C:2005:648), and of 11 October 2007, *Commission v Greece* (C-237/05, EU:C:2007:592), an action for failure to fulfil obligations is inadmissible where the act for which the Member State is criticised has ceased to produce any legal effects before that time limit has expired.
- 32 The Federal Republic of Germany points out, in that connection, that the specific aim of an action for failure to fulfil obligations, provided for in Article 258 TFEU, is to ensure that Member States put an end to infringements, the effects of which persist until the expiry date of the time limit laid down in the reasoned opinion, and that, in any event, they do not repeat those infringements. The disputed conduct of the Federal Republic of Germany did not, it claims, give rise to any negative consequence which could or ought to have been excluded.
- 33 That Member State argues that its exercise of the right to vote did not have any bearing on the outcome of the decisions taken at the 25th session of the OTIF Revision Committee, as the Commission concedes; nor did that damage the reputation, credibility or unitary representation of the European Union among members of the international community. The Federal Republic of Germany claims that, in any event, the European Union structured the procedure for adopting Decision 2014/699 in such a way as to prevent that Member State from obtaining judicial protection in respect of that decision, thus contributing to the difference of opinion at that session.
- 34 Furthermore, the Federal Republic of Germany, relying on the wording of the second paragraph of Article 258 TFEU, argues that it is only when the Member State in question fails to comply with the reasoned opinion within the time limit laid down therein that the Commission may bring infringement proceedings before the Court. As a procedural rule, Article 258 TFEU ought to be subject to a restrictive interpretation so as to ensure legal certainty. In the same vein, the Federal Republic of Germany refers to the case-law of the Court, from which it follows that the Commission cannot bring an action for failure to fulfil obligations before it where the Member State concerned has put an end to the infringement before the expiry of the time limit set in the reasoned opinion (judgment of 5 June 2003, *Commission v Italy*, C-145/01, EU:C:2003:324, paragraph 15).
- 35 The Federal Republic of Germany maintains that the alleged damage to the European Union's image can no longer be remedied. As to the remainder, that Member State disputes the Commission's assertion that it failed to take any measures to (i) remedy the consequences of the conduct at issue in the infringement procedure in the present case, and (ii) dispel any doubts as to its future conduct. The Federal Republic of Germany claims that, on the adoption of Decision 2015/1734, by its statement of

17 September 2015, it indicated that, although it took the view that that decision was unlawful and that it was entitled to vote contrary to that decision with regard to two agenda items, pending the judgment of the Court of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935), it would not exercise its voting rights in respect of the disputed agenda items by diverging from the position adopted by the European Union. Thus, according to that Member State, it had already put an end to the practice criticised by the Commission in its reasoned opinion, even before the period indicated therein had begun to run.

- 36 The Federal Republic of Germany claims that it cannot be required to issue a public apology or to abandon its legal analysis, for the purposes of eliminating, a posteriori, the alleged harm to the European Union's reputation and credibility. In any event, there is nothing in the letter of formal notice that would suggest that the Federal Republic of Germany had infringed EU law on account of its failure to submit such an apology. Moreover, if an action for failure to fulfil obligations is to be admissible, it is not sufficient, according to the case-law of the Court, for differences of opinion on questions of law between a Member State and the Commission to persist, provided that, despite those differences, that Member State complies with the Commission's analysis. This applies a fortiori when the legal issue is already the subject of proceedings before the Court, as is the case here.
- 37 Moreover, the Federal Republic of Germany criticises the Commission for allowing doubts to remain as to the exact scope of its application, contrary to the requirements relating to the sufficiently clear wording of an application. The Federal Republic of Germany argues that the Commission made clear for the first time in its reply that it was criticising that Member State for infringement of Decision 2014/699 only in so far as concerns items 4 and 7 of the agenda for the 25th session of the OTIF Revision Committee.
- 38 The Commission contends that the Court should dismiss the objection of inadmissibility raised by the Federal Republic of Germany.

Findings of the Court

- 39 As a preliminary point, it should be recalled that it is clear from the second paragraph of Article 258 TFEU that, if the Member State concerned does not comply with the reasoned opinion within the period laid down therein, the Commission may bring the matter before the Court. According to the settled case-law of the Court, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of that period (see, in particular, judgment of 4 May 2017, *Commission v Luxembourg*, C-274/15, EU:C:2017:333, paragraph 47).
- 40 It is also clear from the case-law of the Court that the procedure provided for in Article 258 TFEU presupposes an objective finding that a Member State has failed to fulfil its obligations under the FEU Treaty or secondary legislation and also makes it possible to establish an infringement of EU law in a given case (judgment of 22 February 2018, *Commission v Poland*, C-336/16, EU:C:2018:94, paragraphs 61 and 62 and the case-law cited).
- 41 The Federal Republic of Germany disputes the admissibility of the present action for failure to fulfil obligations on two grounds.
- 42 In the first place, it takes the view that the failure to fulfil obligations for which it is criticised relates to past conduct which exhausted its effects before the expiry date of the period laid down in the reasoned opinion, so that it was impossible to put a stop to that conduct within that period.

- 43 In that connection, it must be noted that the Commission criticises the Federal Republic of Germany for its conduct at the 25th session of the OTIF Revision Committee, namely that Member State's vote within that committee, and the point of view which it expressed in breach of (i) Decision 2014/699 and (ii) Article 4(3) TEU.
- 44 The infringement thus complained of consists in the alleged failure to observe a position adopted by the European Union, as it is set out in a Council decision adopted under Article 218(9) TFEU, which provides for a simplified procedure for the purposes of defining positions to be adopted on behalf of the European Union in the context of its participation in the adoption, within a decision-making body set up by the international agreement in question, of acts applying or implementing that agreement (judgment of 6 October 2015, *Council v Commission*, C-73/14, EU:C:2015:663, paragraph 65). The context of that alleged infringement is therefore the external action of the European Union and it concerns, more specifically, the decision-making process of an international body set up by an agreement to which the European Union is a party and to which the European Union had been authorised, by Decision 2014/699, to contribute.
- 45 An infringement of a Council decision adopted on the basis of Article 218(9) TFEU, such as that for which the Federal Republic of Germany is criticised in the present case, manifests its effects not only at domestic level, but also at international level on the unity and consistency of the external action of the European Union, interests which are specifically to be safeguarded by a decision taken on that basis (see, to that effect, Opinion 1/94 (*Agreements annexed to the WTO Agreement*) of 15 November 1994, EU:C:1994:384, paragraph 108; judgments of 2 June 2005, *Commission v Luxembourg*, C-266/03, EU:C:2005:341, paragraph 60; of 14 July 2005, *Commission v Germany*, C-433/03, EU:C:2005:462, paragraph 66; and of 20 April 2010, *Commission v Sweden*, C-246/07, EU:C:2010:203, paragraph 73).
- 46 It should be added that, contrary to the argument put forward by the Federal Republic of Germany, the detrimental effects of an infringement of a Council decision adopted under Article 218(9) TFEU are not confined to the decision-making process of the body of the international organisation, in the context of which the disputed conduct takes place, but also manifest themselves, more generally, in the international action of the European Union within that international organisation.
- 47 Such an infringement may, inter alia, call into question the unity and consistency of the EU's external action, beyond the specific decision-making process concerned.
- 48 In those circumstances, if the argument put forward by the Federal Republic of Germany were to be upheld, then any Member State which, by its conduct, were to impede the achievement of the objective inherent in a decision adopted under Article 218(9) TFEU, could evade infringement proceedings, on the grounds that that infringement has already exhausted its effects, as a result of which the Member States might take advantage of their own misconduct.
- 49 In such a situation, the Commission would be unable to bring proceedings, within the powers that it holds under Article 258 TFEU, against the Member State concerned before the Court with a view to obtaining a declaration of such an infringement and to perform fully its role as guardian of the Treaties, conferred on it by Article 17 TEU.
- 50 Moreover, to uphold the inadmissibility of an action for failure to fulfil obligations brought against a Member State on the grounds of infringement of a decision adopted under Article 218(9) TFEU would be detrimental both to the binding nature of decisions, pursuant to the fourth paragraph of Article 288 TFEU, and, more generally, to the respect for the values on which the European Union, in accordance with Article 2 TEU, is founded, one such being the rule of law.

- 51 The Federal Republic of Germany, after taking part in the deliberations and voting within the Council concerning a decision taking a position on behalf of the European Union, such as Decision 2014/699, would be able to eschew that decision following its adoption, while being confident that the Commission would be unable to bring proceedings before the Court under Article 258 TFEU against such a failure to fulfil its obligations.
- 52 It follows that all the effects of the disputed conduct of the Federal Republic of Germany at the 25th session of the OTIF Revision Committee cannot be considered to have ceased at the end of that session. That conduct must be considered to have produced effects on the unity and consistency of the international action of the European Union within the OTIF that extended beyond that session.
- 53 It follows that, bearing in mind the particular context to which the disputed conduct relates, the Federal Republic of Germany cannot rely, in order to contest the admissibility of the present action, on case-law in the area of public procurement, delivered in contexts that are purely internal to the European Union, case-law from which it follows that an action seeking to obtain a declaration of a failure to fulfil obligations under EU rules on public procurement is inadmissible when, on the expiry of the period laid down in the reasoned opinion, the disputed procurement notice or the contracts at issue had already exhausted all their effects (judgments of 27 October 2005, *Commission v Italy*, C-525/03, EU:C:2005:648, paragraphs 12 to 17, and of 11 October 2007, *Commission v Greece*, C-237/05, EU:C:2007:592, paragraphs 33 to 35).
- 54 As to the claim relied upon by the Federal Republic of Germany that the European Union structured the procedure for adopting Decision 2014/699 in such a way as to prevent that Member State from obtaining judicial protection with regard to that decision, such a submission comes within the scope of the substantive examination of the present action and not that of the admissibility of that action.
- 55 In the second place, the Federal Republic of Germany claims to have taken all measures necessary under the second paragraph of Article 258 TFEU to comply with the reasoned opinion within the period laid down therein, so that the Commission's action for failure to fulfil obligations is inadmissible.
- 56 In that connection, it should be observed that such a claim merges into the substantive examination of the failure to fulfil obligations, in that the analysis of that claim implies a review of the conduct of the Federal Republic of Germany following the 25th session of the OTIF Revision Committee (see, by analogy, judgment of 14 April 2005, *Commission v Luxembourg*, C-519/03, EU:C:2005:234, paragraph 20). Consequently, the question of whether that claim is well founded will be the subject of the substantive examination of that failure to fulfil obligations.
- 57 As to the claim relied upon by the Federal Republic of Germany that it is no longer possible to remedy the alleged harm to the reputation and credibility of the European Union, it could not — assuming it to be established — give rise to the inadmissibility of the present action. As the Advocate General observes in point 62 of his Opinion, a Member State cannot be allowed to rely upon a *fait accompli* of which it is itself the author so as to evade proceedings brought before the Court for failure to fulfil obligations (judgment of 7 February 1973, *Commission v Italy*, 39/72, EU:C:1973:13, paragraph 10).
- 58 Moreover, the criticism expressed by the Federal Republic of Germany with regard to a lack of clarity in the Commission's application must be rejected.
- 59 In that connection, it is clear from paragraphs 15 to 19 of the application that the Commission criticises that Member State for failure to fulfil obligations under Decision 2014/699 and Article 4(3) TEU, solely in so far as concerns items 4 and 7 of the agenda for the 25th session of the OTIF Revision Committee. In its application, the Commission in fact refers to the Annex to Decision 2014/699 only

in so far as that annex relates to amendments to the COTIF specified in items 4 and 7 of the agenda for that session, and referred to those two agenda items in its summary of the facts, which have not been disputed by the Federal Republic of Germany.

60 It follows from the foregoing that the action brought by the Commission is admissible.

Substance

Arguments of the parties

61 By its first submission, the Commission criticises the Federal Republic of Germany for having infringed Decision 2014/699, by voting, at the 25th session of the OTIF Revision Committee, against the position defined by the European Union in that decision with regard to items 4 and 7 on the agenda for that session, and by publicly challenging the exercise of the right to vote by the European Union.

62 The Commission points out that, in accordance with the fourth paragraph of Article 288 TFEU, Decision 2014/699 is binding in its entirety, both on the institutions of the European Union and on the Member States. The Commission adds that the fact that the Federal Republic of Germany voted against that decision in the Council and brought an action for annulment of the same decision before the Court does not affect the binding nature of the decision and the obligations resulting therefrom for the Member States.

63 It is apparent from the Court's case-law that Member States cannot unilaterally take corrective or protective measures intended to cure any infringement of EU law by the institution which adopted the disputed act. On that basis, for as long as the Court has not annulled Decision 2014/699 or suspended its execution, the Federal Republic of Germany has to respect it. Otherwise, the consistent and uniform application of EU law, which is a fundamental feature of the EU system, would be undermined.

64 Moreover, the Commission takes the view that it was neither impossible nor inexpedient for the Federal Republic of Germany to request provisional measures. The Commission stresses that the FEU Treaty has established a comprehensive system of remedies which, as is apparent from Articles 278 and 279 TFEU, makes it possible to deal with emergency situations. Any difficulties in that respect, such as those invoked by that Member State, do not allow Member States to act unilaterally in breach of EU law.

65 In that context, the Commission also points out that the Federal Republic of Germany had been given the opportunity to obtain provisional measures in due time.

66 As regards the objection of unlawfulness raised by the Federal Republic of Germany against Decision 2014/699, the Commission recalls that, according to the Court's case-law, Member States cannot rely on the unlawfulness of an act in infringement proceedings relating to failure to implement that act. That case-law applies, it is argued, in respect of all acts of general application, irrespective of whether or not such acts were addressed to the Member State concerned.

67 By its second submission, alleging infringement of Article 4(3) TEU, the Commission claims that the fact that the Federal Republic of Germany voted against the EU's position at the 25th session of the OTIF Revision Committee, distanced itself from the European Union's vote and asked to exercise its right to vote when that right had been attributed to the European Union created confusion as to the result of the vote and harmed the EU's credibility and reputation, the unity of its international representation and its image in general. That conduct consequently was in breach of the principle of sincere cooperation, enshrined in Article 4(3) TEU.

- 68 As regards the Commission's first submission, the Federal Republic of Germany does not dispute the fact that it failed to comply with Decision 2014/699, in so far as the latter relates to the amendments in question. However, it takes the view that the relevant provisions of that decision cannot be invoked against it, since they are unlawful, for the reasons already set out in the case giving rise to the judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935).
- 69 In that context, that Member State stresses that the Court's case-law, from which it follows that the unlawfulness of a directive or decision addressed to the Member States cannot be invoked by the Member States as a ground of defence against infringement proceedings based on a failure to implement such an act, does not preclude the Federal Republic of Germany from raising, in accordance with Article 277 TFEU, an objection of unlawfulness in respect of Decision 2014/699, that is, an act of general application which has not been notified to those to whom it is addressed, in the context of infringement proceedings concerning a failure to comply with that decision.
- 70 The Federal Republic of Germany maintains that it is entitled to rely, as an incidental point, on the unlawfulness of Decision 2014/699 in the infringement proceedings, particularly in view of the fact that it was de facto impossible for it to obtain judicial protection against that decision before the opening of the 25th session of the OTIF Revision Committee.
- 71 At the hearing, the Federal Republic of Germany formally withdrew the plea as to the exception of illegality under Article 277 TFEU. However, it stated its intention to continue to rely, as an incidental point, on the unlawfulness of Decision 2014/699 because it had been impossible to obtain judicial protection against that decision before the opening of the 25th session of the OTIF Revision Committee.
- 72 Be that as it may, the Federal Republic of Germany states that, as regards the modification of Article 12 of the COTIF, which was the subject of item 4 of the agenda for the 25th session of the OTIF Revision Committee, it did not infringe Decision 2014/699, inasmuch as it defines a 'recommended coordinated position' only and provides, with regard to that agenda item 4, that Member States are to exercise the right to vote. That Member State recalls that, in accordance with the fifth paragraph of Article 288 TFEU, a recommendation is not binding. As regards the amendment of Articles 2 and 9 of Appendix D (CUV), which was the subject of item 7 of the agenda for the 25th session of the OTIF Revision Committee, that Member State maintains that, although Decision 2014/699 provided for the exercise of the European Union's voting rights, the European Union was limited to defining recommendations for positions, without any binding effect.
- 73 Moreover, the Federal Republic of Germany suggests that, on account of its serious deficiencies, Decision 2014/699 is a non-existent act which, as such, the Court would have to examine *ex officio*.
- 74 As regards the Commission's second submission, alleging infringement of Article 4(3) TEU, the Federal Republic of Germany takes the view that that institution has failed to established either the actual existence of harm to the European Union's credibility and reputation, or the fact that the disputed conduct is the cause of such harm. On the contrary, the Federal Republic of Germany considers that it is the European Union's accession to the OTIF, which posed new challenges for the latter organisation, and the haste with which the EU institutions prepared for the 25th session of the OTIF Revision Committee, which caused confusion during the voting in that body.

Findings of the Court

- 75 As regards the first submission, alleging failure to comply with Decision 2014/699, it follows from a reading of pages 31 to 36 of the minutes of the 25th session of the OTIF Revision Committee, annexed to the Commission's application, that in connection with items 4 and 7 of the agenda for that session, the Federal Republic of Germany expressed a separate point of view from the position adopted

by the European Union, as defined in that decision, and voted against that position. It follows, furthermore, from a reading of pages 33 to 36 of the minutes of that session that, with regard to agenda item 7, that Member State expressed its disagreement with the European Union exercising a right to vote, as provided for in that same decision.

- 76 The Federal Republic of Germany does not dispute those facts. However, it argues, in the first place, that since Decision 2014/699 defines ‘recommended coordinated position[s]’ with regard to items 4 and 7 of the agenda for the 25th session of the OTIF Revision Committee, and attributes the right to vote to Member States with regard to agenda item 4, it did not infringe that decision.
- 77 That argument cannot be accepted.
- 78 Although the positions defined in Point 3 of the Annex to Decision 2014/699 are preceded by the words ‘recommended coordinated position’, that decision was made under Article 218(9) TFEU, which provides for the adoption of a ‘decision’ establishing the positions to adopt on behalf of the European Union in a body set up by an agreement. In accordance with the fourth paragraph of Article 288 TFEU, ‘a decision shall be binding in its entirety’.
- 79 Moreover, it follows from an examination of the content of Decision 2014/699 that it sets out, in accordance with Article 1(1) thereof, ‘the position to be taken on the Union’s behalf at the 25th session of the [OTIF] Revision Committee’, in mandatory terms, as is attested by the use of the phrases ‘amendments ... to be supported’, ‘the Union is not in a position to support ... and proposes’ or ‘the Union adopts’, in order to define the European Union’s position in Point 3 of the Annex to Decision 2014/699, as regards items 4 and 7 of the agenda for that session.
- 80 The binding nature of the European Union’s position laid down in that decision is corroborated by Article 1(2) thereof, which allows representatives of the Union in the OTIF Revision Committee to agree only to ‘minor changes’ to the documents mentioned in the annex to that decision. It should be added, moreover, that Decision 2014/699 was published in the L series of the *Official Journal of the European Union*, as a binding act.
- 81 Furthermore, the Court’s examination of the lawfulness of that decision in the judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935) having regard to the pleas in law relied upon by the Federal Republic of Germany in support of the action which gave rise to that judgment, presupposes, in fact, that that decision is challengeable, in so far as it is intended to produce binding legal effects.
- 82 It follows that Decision 2014/699 is a measure which produces binding legal effects, in that it establishes the European Union position at the 25th session of the OTIF Revision Committee, on the one hand, for the Commission and, on the other hand, for the Member States inasmuch as it obliges them to defend that position (see, to that effect, judgment of 1 October 2009, *Commission v Council*, C-370/07, EU:C:2009:590, paragraph 44).
- 83 Accordingly, the Federal Republic of Germany, by its conduct as described in paragraph 75 of the present judgment, infringed the Union position defined in that decision, and, with regard to item 7 of the agenda for that session, the arrangements for exercising the right to vote, also defined in that decision.
- 84 As regards, in the second place, the argument alleging the unlawfulness of Decision 2014/699, on the ground that the Federal Republic of Germany was not able to obtain judicial protection against that decision before the opening of the 25th session of the OTIF Revision Committee, nor can that be accepted.

- 85 As the Advocate General stated in point 84 of his Opinion, in a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness. Since Decision 2014/699 had been adopted, the Federal Republic of Germany was bound to comply with and implement it (see, to that effect, judgment of 20 September 2007, *Commission v Spain*, C-177/06, EU:C:2007:538, paragraphs 36 and 38).
- 86 The fact that the Federal Republic of Germany subsequently also disputed the lawfulness of Decision 2014/699 before the Court, under Article 263 TFEU, on account, inter alia, of an alleged breach of the principle of effective judicial protection, in no way alters the binding nature of that decision.
- 87 The disputed conduct occurred at a date prior to that on which the Federal Republic of Germany brought an action seeking annulment of Decision 2014/699. Moreover, that Member State failed to seek either the suspension of the implementation of that decision or the adoption of interim measures by the Court, under Articles 278 and 279 TFEU, so that the action for annulment had no suspensive effect, in accordance with Article 278.
- 88 It is clear from the Court's case-law that a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to cure any breach by an institution of rules of EU law (see, to that effect, judgment of 12 February 2009, *Commission v Greece*, C-45/07, EU:C:2009:81, paragraph 26).
- 89 In any event, it should be recalled that the system of remedies established by the FEU Treaty distinguishes between the actions mentioned in Articles 258 and 259 TFEU, which seek a declaration that a Member State has failed to fulfil its obligations, and the actions mentioned in Articles 263 and 265 TFEU, which seek review of the lawfulness of acts or failures to act of the European Union institutions. Those remedies have different objectives and are subject to different rules. In the absence of a provision of the Treaty expressly permitting it to do so, a Member State cannot, therefore, properly plead the unlawfulness of a decision or a directive addressed to it as a defence in an action for a declaration that it has failed to fulfil its obligations arising out of its failure to implement that decision or that directive. The position could be different only if the act in question contained such particularly serious and manifest defects that it could be categorised as a non-existent act (judgments of 18 October 2012, *Commission v Czech Republic*, C-37/11, EU:C:2012:640, paragraph 46, and of 11 October 2016, *Commission v Italy*, C-601/14, EU:C:2016:759, paragraph 33).
- 90 Contrary to the argument put forward by the Federal Republic of Germany, that same case-law applies *mutatis mutandis* in the present case with regard to Decision 2014/699, even though that decision was not formally addressed to that Member State. The Federal Republic of Germany — as a member of the Council, which was the author of that decision — necessarily had knowledge of it, and was fully in a position to bring an action seeking annulment of that decision within the period of two months laid down in the sixth paragraph of Article 263 TFEU, as it did, moreover, in the case which gave rise to the judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935).
- 91 As to the argument put forward by the Federal Republic of Germany that Decision 2014/699 constitutes a non-existent act, on the ground that it has the status of mere recommendations with no binding effect as regards items 4 and 7 of the agenda for the 25th session of the OTIF Revision Committee, it should be observed that, by its judgment of 5 December 2017, *Germany v Council* (C-600/14, EU:C:2017:935), the Court dismissed the action for partial annulment brought by that Member State without making any finding, as it could have done *ex officio*, that that decision was non-existent. In those circumstances, that decision cannot be categorised as a non-existent act within the meaning of the case-law cited in paragraph 89 of the present judgment. In any event, it should be added that that argument must be rejected as it is based, for the reasons already stated in paragraphs 78 to 82 of the present judgment, on a misinterpretation of Decision 2014/699.

- 92 As regards the second submission, alleging infringement of Article 4(3) TFEU, it should be recalled that it is clear from that provision, which sets out the principle of sincere cooperation, that the European Union and the Member States are, in full mutual respect, to assist each other in carrying out the tasks provided for by the Treaties (judgment of 5 December 2017, *Germany v Council*, C-600/14, EU:C:2017:935, paragraph 105).
- 93 It is settled case-law that, in particular where the subject matter of an agreement or convention falls partly within the competence of the European Union and partly within that of its Member States, it is essential to ensure close cooperation between the Member States and the EU institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the European Union (judgment of 20 April 2010, *Commission v Sweden*, C-246/07, EU:C:2010:203, paragraph 73 and the case-law cited).
- 94 Consequently, compliance on the part of the Member States with a decision adopted by the Council under Article 218(9) TFEU is a specific expression of the requirement of unity in representation of the European Union, arising from the obligation of sincere cooperation.
- 95 It is clear that, by the conduct at issue at the 25th session of the OTIF Revision Committee, the Federal Republic of Germany, as is attested by the minutes of that session, allowed doubts to exist as to the European Union's ability to express a position and represent its Member States on the international stage, despite the adoption of Decision 2014/699. More specifically, the fact that the Federal Republic of Germany distanced itself, at that session, from the European Union's position as established in that decision runs the risk of undermining the EU's power of negotiation within the OTIF, so far as concerns the subjects discussed during that session, as well as related subjects.
- 96 That finding is not called into question by the argument put forward by the Federal Republic of Germany that, in the declaration of 17 September 2015, it dispelled any doubt as to its future conduct, so as to preclude the risk of a recurrence of the conduct for which it is criticised. In that connection, it should be observed that, as the Commission states in its application, the Federal Republic of Germany, in its response of 1 February 2016 to the reasoned opinion, failed to dispel the Commission's fears as to any risk of recurrence, but, on the contrary, stressed the legitimacy of the conduct at issue inasmuch as Decision 2014/699 was, in the view of that Member State, unlawful and produced no binding effect. Furthermore, the Federal Republic of Germany based its position, in that context, not on the declaration of 17 September 2015, but rather on a previous declaration made when Decision 2014/699 was adopted, from which it was apparent that that Member State intended to adopt a different position to that set out in that decision within the OTIF Revision Committee.
- 97 Moreover, the Federal Republic of Germany has not maintained before the Court that it had informed the competent bodies of the OTIF of the content of the declaration of 17 September 2015, or that it had clarified to the OTIF its future conduct within that body.
- 98 It follows that, by its conduct, that Member State harmed the effectiveness of the international action of the European Union, as well as the latter's credibility and reputation on the international stage.
- 99 The Federal Republic of Germany cannot justify its conduct either by a possible failure on the part of the EU institutions to comply with the obligation of sincere cooperation (see, to that effect, judgment of 12 February 2009, *Commission v Greece*, C-45/07, EU:C:2009:81, paragraph 26), or by the difficulties linked to the European Union's accession to the OTIF.
- 100 In the light of the foregoing, it must be found that the Federal Republic of Germany, by having, at the 25th session of the OTIF Revision Committee, voted against the position laid down in Decision 2014/699 and having publicly opposed that position and the arrangements for the exercise of voting rights provided for therein, failed to fulfil its obligations under that decision and Article 4(3) TEU.

Costs

¹⁰¹ Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs. Under Article 140(1) of the Rules of Procedure, which states that institutions intervening in the proceedings are to bear their own costs, it must therefore be held that the Council must bear its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Declares that the Federal Republic of Germany, by having, at the 25th session of the Intergovernmental Organisation for International Carriage by Rail (OTIF) Revision Committee, voted against the position laid down in Council Decision 2014/699/EU of 24 June 2014 establishing the position to be adopted on behalf of the European Union at the 25th session of the OTIF Revision Committee as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and the Appendices thereto, and having publicly opposed that position and the arrangements for the exercise of voting rights provided for therein, failed to fulfil its obligations under that decision and Article 4(3) TEU;**
- 2. Orders the Federal Republic of Germany to pay the costs;**
- 3. Orders the Council of the European Union to bear its own costs.**

[Signatures]