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TRANS 505

PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union at the 15th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF)

Delegations will find attached document COM(2021) 478 final.

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EUROPEAN
COMMISSION

Brussels, 17.8.2021
COM(2021) 478 final

2021/0271 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union at the 15th General
Assembly of the Intergovernmental Organisation for International Carriage by Rail
(OTIF)**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at the 15th session of the General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF), in connection with the envisaged adoption of a Regulation on the election and conditions of service of the Secretary General, and of other decisions concerning: the modification of the rules of procedures of the General Assembly, the proposal for a long-term strategy for OTIF, the monitoring and assessment of legal instruments, and the activities of the Group of Experts towards Unified Railway Law under the auspices of the United Nations Economic Commission for Europe (UNECE).

2. CONTEXT OF THE PROPOSAL

2.1. The Convention concerning International Carriage by Rail (COTIF)

The COTIF governs the functioning of OTIF, its objectives, attributions, relations with its members and its activities in general. There are 51 countries party to the COTIF, including 25 EU Member States (all except Cyprus and Malta). Since 1 July 2011, the European Union is also a contracting party to the COTIF. The COTIF consists of the main Convention and seven Appendices that form an integral part of the Convention and establish uniform railway law, i.e. technical functional requirements and model contracts for the carriage of passengers and goods (Appendix A: Contract of International Carriage of Passengers by Rail – CIV; Appendix B: Contract of International Carriage of Goods by Rail – CIM; Appendix C: International Carriage of Dangerous Goods by Rail – RID; Appendix D: Contract of use of vehicles in international rail traffic – CUV; Appendix E: Contract of use of infrastructure in international rail traffic – CUI; Appendix F: Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic – APTU; Appendix G: Technical Admission of Railway Material used in International Traffic – ATMF).

2.2. The agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail (OTIF)

On 16 June 2011, the Council adopted Council Decision 2013/103/EU on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail (OTIF) 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. The Agreement entered into force on 1st July 2011. Council Decision 2013/103/EU contains a Declaration by the Union concerning the exercise of competence (Annex I) and internal arrangements for the Council, the Member States and the Commission in proceedings under OTIF (Annex III).

2.3. The General Assembly of OTIF

The General Assembly is OTIF's supreme decision-making body. It holds an ordinary session every three years. It can also hold extraordinary sessions. The General Assembly takes decisions on proposals to amend the Convention. Depending on the case, two thirds or half of the contracting parties must approve the adopted amendments. The last ordinary session of the General Assembly took place in September 2018.

The Union and/or its Member States participate in that process in accordance with their respective competences, the Rules of Procedure of the General Assembly and the provisions of the Agreement on the Accession of the Union to the COTIF.

There is a quorum in the General Assembly when the majority (or two thirds) of the OTIF contracting parties enjoying the right to vote are represented at the time of the vote.

2.4. The envisaged act of the General Assembly of OTIF

During its 15th session, the General Assembly is expected to adopt certain legal acts and administrative decisions, which would have an impact on the activities of OTIF.

The General Assembly:

- will discuss the Secretary General’s proposal to prepare a long-term strategy for OTIF and may decide on the next steps and activities;
- will consider the opportunity and may decide to merge the activities of the advisory Working Group of Legal Experts and of the ad hoc Committee on Cooperation into a single ad hoc Committee on Legal Affairs and International Cooperation;
- will consider and may adopt a proposal for a decision on the monitoring and assessment of OTIF legal instruments;
- may decide to formulate OTIF’s views on the UNECE initiative on Unified Railway Law, in particular as regards the two alternative approaches on the unification of railway law at global level;
- is expected to adopt a proposal for a Regulation on the election and conditions of service of the Secretary General;
- will consider and may adopt proposals for modification of the Rules of Procedure of the General Assembly.

The General Assembly will also decide on the election of the Secretary General of OTIF, on the election of the members of the Administrative Committee, and on the Budget framework.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

Agenda Item 7 – OTIF long-term strategy

The General Assembly will be informed by the Secretary General of the proposal to prepare a long-term strategy for OTIF as a complement to the biennial work programme.

On 25 January 2021, the Secretary General addressed a Circular letter to consult OTIF members (including the EU) on a “Draft proposal for a long term OTIF strategy”. The initial intention was to present a more revised proposal, taking into account the results of the consultation, for adoption at the 15th session of the General Assembly in September 2021.

The EU contribution, was submitted to the OTIF Secretariat by the Commission on 17.3.2021. It welcomed the initiative but suggested that the draft strategy is not sufficiently developed and is not mature for adoption at the 15th General Assembly. The Union pointed that more background analysis and discussion at expert level is needed, in order to elaborate a solid, meaningful, long-term strategic document for OTIF. The starting point should be the analysis of the existing situation in international rail transport, including the mapping of current and emerging challenges, and the consideration of relevant legal, economic, environmental and technological evidence.

The meeting document prepared by the Secretary General for the 15th General Assembly summarises the contributions of the consultation. It states inter alia that it would be too early to take a final decision on the draft long-term strategy at this juncture, and proposes to continue and intensify the discussion within and outside OTIF. A new revised draft proposal for the long-term strategy would then be submitted for adoption to the next General Assembly scheduled for autumn 2024.

The proposal for decision at the 15th General Assembly is in line with the general comments submitted by the Union during the consultation process and should therefore be supported.

The position of the Union during the further discussions within OTIF on this matter should be to ensure that:

- The long-term OTIF strategy is consistent with the EU Strategy for Connecting Europe and Asia, and relevant EU rail transport policy objectives, including as regards on-going and future developments in the rail sector under the influence of economic and societal changes (e.g. green and digital transition, globalisation)¹;
- The formulation of long-term strategic objectives for OTIF covers adequately the aims of the organisation, as set out in Article 2 of COTIF, and does not lead to adding new objectives to OTIF and/or to formulating an interpretation of existing objectives implying an extension of OTIF competences;
- The potential impact of the long-term strategy on OTIF's organisation and resources is assessed and documented as part of the proposal for a revised draft proposal;
- The strategy, once adopted by the General Assembly, is primarily implemented with the use of existing tools and procedures, as established in COTIF (work programme, budget, management reports, activities of the organs, etc.).

Agenda item 8, a) – Report on the activities of the ad hoc Committee on Cooperation and the Working Group of Legal Experts

The General Assembly will be informed about the activities of the ad hoc Committee on Cooperation and of the Working Group of Legal Experts during the period 2019-2021 (SG-21018-AG 15/8.1). It will consider the proposal of the Secretary General to merge the activities of these two bodies into a single ad hoc Committee on Legal Affairs and International Cooperation.

The institutional framework of OTIF is defined in Title III of COTIF (Structure and Functioning). Article 13 of COTIF defines OTIF's organs, including the General Assembly, the Administrative Committee, the Revision Committee, the Committee of Experts for the Carriage of Dangerous Goods (RID Expert Committee), the Rail Facilitation Committee, the Committee of Technical Experts and the Secretary General. Paragraph 2 of that article also provides that "*The General Assembly may decide to establish temporarily other committees for specific tasks.*" It follows that the proposal of the Secretary General to establish temporarily an ad hoc Committee on Legal Affairs and International Cooperation would not change the institutional framework of OTIF.

The report presented by the Secretary General indicates that the ad hoc Committee on Cooperation and the Working Group of Legal Experts have effectively fulfilled their mandates and demonstrated their value in the context of developing OTIF law and strengthening international cooperation. At their 4th sessions in April 2021, the two bodies

¹ In particular as defined in the Commission's Communication "Sustainable and Smart Mobility Strategy – putting European transport on track for the future", COM(2020) 789 final, 9.12.2020

agreed on a joint proposal to reorganise their work in future and hence to reduce the administrative burden, through the establishment of a single ad hoc Committee.

The proposal for re-organisation is relevant and appropriate. During the four sessions held by the ad hoc Committee on Cooperation and the Working Group of Legal Experts, it was noted that the members were usually the same OTIF members' representatives attending both meetings. In addition, as far as OTIF activities are concerned, most of the issues requiring cooperation at international level have a strong legal dimension. The creation of a new ad hoc Committee on Legal Affairs and International Cooperation would effectively reduce the administrative burden on OTIF Secretariat, but also reinforce OTIF's capacity to improve the application of COTIF and to contribute to addressing emerging challenges concerning international rail transport at global level (see e.g. agenda item 8, d)).

The proposal should therefore be supported, subject to the following observation.

The proposed mandate of the new ad hoc Committee adequately covers those of the ad hoc Committee on Cooperation and of the Working Group of Legal Experts², except for one element. The 13th General Assembly decided that the ad hoc Committee on Cooperation is to coordinate its activities with the organs defined in Article 13 § 1 of COTIF (i.e. the General Assembly, the Administrative Committee, the Revision Committee, the Committee of Experts for the Carriage of Dangerous Goods, the Rail Facilitation Committee, the Committee of Technical Experts, and the Secretary General). This element is missing in the text of the proposal for decision. The Secretary General suggests to mandate the Committee of Experts on the Carriage of Dangerous Goods and the Committee of Technical Experts, exclusively within their respective competence, to take decisions on cooperation with other international organisations and associations and to inform the ad hoc Committee on Legal Affairs and International Cooperation of their activities on international cooperation and to coordinate such activities with it if need be. The Union may support this element. However, it is also important and necessary that the ad hoc Committee on Legal Affairs and International Cooperation, itself, coordinates its activities with the other permanent organs of OTIF.

Since an ad hoc Committee can only be established on a temporary basis, it is necessary to define the time period of the mandate to be given by the 15th General Assembly (either three or six years). In order to facilitate the monitoring of its activities by the General Assembly, it would seem preferable that the new ad hoc Committee is established for a first period of three years, which could be renewed as appropriate.

The Union should support the adoption of the proposal for decision, provided that the mandate of the ad hoc Committee on Legal Affairs and International Cooperation is established for a first period of not more than three years and includes the requirement to coordinate its activities with the organs defined in Article 13 § 1 of COTIF.

Agenda item 8, b) – Monitoring and assessment of legal instruments

The advisory Working Group of Legal Experts prepared a proposal for a decision on the monitoring and assessment of legal instruments and the accompanying Explanatory Notes. The proposed decision sets out the legal provisions for the organisation and implementation of a monitoring and assessment policy of OTIF legal instruments (scope, planning and prioritisation, cooperation, data collection, assessment and follow-up), in line with the objectives of OTIF's Work Programme 2020-2021³. In accordance with its work plan, the

² See 7.5 and 7.17 of the final document of the 13th General Assembly [SG-18088-AG13-e-final-document-Add.pdf \(otif.org\)](#)

³ https://otif.org/fileadmin/new/5-Media/5D-WorkProgramme/2020-2021/WP_EN_20-21.pdf

Working Group of Legal Experts considered various issues relevant to the establishment of a monitoring and assessment policy of COTIF legal framework. It elaborated draft legal provisions, based on a proposal prepared by the Secretariat, and discussed Article by Article. At its 4th session, it finalised the draft decision and the accompanying Explanatory Notes, for submission to the 15th session of the General Assembly for adoption.

The proposed decision formalises and operationalises the task of OTIF set out in COTIF Article 2 § 1, letter e) to keep a watch on the application of all the rules and recommendations (legal instruments) established within the organisation. To this end, the draft decision establishes specific requirements for the Secretary General of OTIF and for the OTIF members, in particular: the Secretary General shall systematically perform monitoring and assessment of the implementation of the Convention (Article 2, §1, of the draft decision); the OTIF organs shall be entitled to initiate monitoring and assessment of the application of a particular legal instrument within the sphere of their competence or specific provisions thereof. The Secretary General may initiate monitoring and assessment of any legal instrument (Article 1, §2, of the draft decision); OTIF members shall cooperate with the Secretary General and provide all relevant information for the purpose of performing monitoring and assessment of legal instruments (Article 4, §1, of the draft decision).

The Union should support the adoption by the General Assembly of the Decision on the monitoring and assessment of legal instruments, and approves the Explanatory Notes.

Agenda item 8, c) – Modification of the General Assembly’s Rules of Procedure regarding participation and representation (credentials)

The Working Group of Legal Experts prepared proposals to amend the provisions of the General Assembly’s Rules of Procedure (Articles 4 to 7) concerning credentials, with a view to improving and clarifying them, for consideration and adoption by the General Assembly.

The proposed modifications are of a strict administrative nature and aim at improving the procedure concerning credentials and proxies for the representation and voting powers of the OTIF members participating in the General Assembly.

The Union should support the adoption by the General Assembly of the amendments to Articles 4 to 7 of its Rules of Procedure and approve the corresponding Explanatory Notes.

Agenda item 8, d) – UNECE initiative on Unified Railway Law

The subject matter concerns the harmonisation and unification of rail transport law for international traffic in Eurasia that is currently managed through two distinct legal regimes:

- The COTIF administered by the Intergovernmental Organisation for International Carriage by Rail (OTIF), which involves 51 States, including 25 EU Member States, and the European Union since 2011;
- The Agreement on International Traffic by Rail (SMGS) administered by the Organisation for Cooperation between Railways (OSJD), which involves 29 States, including 9 EU Member States from eastern Europe.

OTIF rules cover all types of contracts dealing with international railway traffic, including for carriage of goods, carriage of passengers, carriage of dangerous goods, use of infrastructure, use of vehicles. OTIF rules also include safety and interoperability requirements. The Russian Federation, China, and most of the central Asian countries are members of OSJD, created in 1956, and all contracts for international carriage of goods by rail through one of these countries must apply OSJD rules. As a result, shippers and railway companies operating rail freight transport services between Europe and China have to establish two distinct contracts, under two different legal and liability regimes. This is considered an impediment to the

growing rail traffic between Europe and Asia, and to the competitiveness of rail transport for this type of service. The UNECE Unified Railway Law initiative aims at solving these issues. It started in 2011 in a form of a Group of Experts towards Unified Railway Law (URL) mandated to develop an approach for the unification of rail transport law with the view to improving the competitiveness of Euro-Asia rail freight services. The Group gathered experts from: the Russian Federation, Switzerland, Turkey, several EU Member States, the European Commission (observer), and from relevant international rail organisations, associations and railway undertakings (e.g. OTIF, OSJD, CIT, Russian Railways, Deutsche Bahn, PKP Cargo).

During its last mandate (2018-2021), the Group of Experts was to develop a legally binding instrument, taking into account the draft URL Legal Provisions for the contract of carriage of goods developed in previous mandates. However, the group did not manage to reach consensus due to the persistent divide between two distinct and opposite approaches:

The EU experts advocate a pragmatic and step-by-step approach, starting, as a first step, with the adoption of a “URL contract of carriage’s Convention” (similar to the CMR convention for road transport), which could co-exist with relevant rules of OTIF and OSJD; to support this approach, the Commission submitted an analytical paper in April 2019⁴, which was welcomed and supported by the majority of experts. On the other hand, the Russian Federation promotes the adoption of a “global framework convention” covering the entire spectrum of rail transport law, i.e. the entire current scope of OTIF rules as well as several areas of the EU rail acquis; this approach foresees the dissolution of both OTIF and OSJD for the benefit of a new dedicated UN Agency yet to be defined/organised.

In the report that will be submitting to its parent body, the Working Party on Rail Transport (SC.2), in November 2021, the Group of Experts deems that its mandate has been completed after it held two additional sessions in September 2020 and January 2021.

The Group of Experts agreed to present one particular output document titled “Convention on the contract for international carriage of goods by rail as a first Convention of a system of Unified Railway Law Convention”⁵. While this document provides provisions from preamble through substantive provisions to final provisions which together form a draft “URL Contract of Carriage’s Convention”, the Group of Experts was not able to fully agree on these provisions and thus finalise them, due to the fact that, the Group of Experts was not able to overcome a difference in approaches to URL, as described below:

“5. (...) ”

Approach A - creation of unified rules for rail transport on Euro-Asian corridors in areas where they are urgently needed by the industry – i.e. the contract of carriage – while leaving unaffected the two existing rail organisations and the legal rules (in particular CIM and SMGS) applicable for transports of goods within their respective territories (interface law); ECE/TRANS/SC.2/GEURL/2021/3 contains a legal regime for the contract for international carriage of goods by rail that is considered to serve its purpose of interface law. It could be formally adopted as a convention rapidly and would then facilitate carriage of goods on Euro-Asian corridors responding to the needs of both the rail carriers and the relevant industry; and

⁴ SWD(2019) 152 final, 27.3.2019: Contribution to the 19th session of the UN ECE Group of Experts towards Unified Railway Law, meeting on 2-4 April 2019: Options available for converting URL into a legally binding instrument – URL as contract of carriage’s convention

⁵ ECE/TRANS/SC.2/GEURL/2021/3 – consolidated draft text of a “Convention on the contract for international carriage of goods by rail as a first Convention of a system of Unified Railway Law Convention” (interface law)

Approach B – creation of a single set of unified legal rules for any cross-border rail transport in the Euro-Asian area replacing the existing systems of CIM and SMGS and only being put in force after all annexes (e.g. infrastructure, rolling stock, wagon law, transport of dangerous goods, etc.) have been negotiated and adopted. The industry does not have an urgent demand in the third legal regime, as CIM/SMGS consignment note provides seamless railway deliveries. ECE/TRANS/SC.2/GEURL/2021/3 does not correspond to this approach. (...).

6. If approach A was followed, URLCoC Convention would have been produced based on ECE/TRANS/SC.2/GEURL/2021/3 to serve as an interface international law for immediate application on an opt-in basis for carriage of goods by rail on the Euro-Asian transport corridors by its Contracting Parties, leaving the COTIF/CIM Convention and the SMGS Agreement unaffected.

7. If approach B was followed, URL as a single set of legal rules for Euro-Asian rail transport operations could be developed which would replace CIM and SMGS upon their adoption. However, that would have been outside the Terms of Reference of the Group of Experts which, apart from finalizing a Contract of Carriage convention, requests the Group only to identify other issues relevant to international rail freight traffic.

8. In view of the above, the Group of Experts invites the Working Party on Rail Transport (SC.2) to take stock of the two approaches.”

Given the potential impact on OTIF, the 13th OTIF General Assembly tasked the Working Group of Legal Experts to consider the UNECE initiative on unified railway law. At its 4th session, the Working Group of Legal Experts noted the updated version of the report on the unification of railway law prepared by the Secretariat of OTIF⁶. It discussed the two approaches described above and concluded as follows:

“An interface law between COTIF/CIM and SMGS would not contradict or overlap with COTIF, provided that its aim is to avoid any conflict with the CIM UR and SMGS and to fill a gap in the international regulations for international carriage when neither the CIM UR nor SMGS can be applied over the entire journey (traffic between Europe and Asia);

A single set of unified legal rules for any cross-border rail transport in the Euro-Asian area replacing the existing OTIF and OSJD legal systems will contradict and overlap with COTIF. Such a single regime could be developed only with the clear political commitment and participation of OSJD and OTIF and their members. This approach would also lead to the denunciation of the two tried and trusted legal regimes, COTIF/CIM and SMGS, and the dissolution of OTIF and OSJD.”

On this basis, the Secretary General of OTIF suggests that the General Assembly should:

- (1) note the Secretary General’s report and the conclusions of the Working Group of Legal Experts on the possible approaches to the unification of railway law;
- (2) support the formation and adoption of an interface law between COTIF/CIM and SMGS to facilitate international rail freight transport between Europe and Asia, provided that this interface law must not conflict with the CIM UR and SMGS;
- (3) instruct the Secretary General to continue to participate in the UNECE work on the project to unify railway law and the ad hoc Committee on legal affairs and international cooperation to monitor the UNECE project concerning the unification of railway law;

⁶ LAW-21058-GTEJ 4 ‘UNECE initiative on Unified Railway Law - Report on the unification of railway law’, Annex to SG-21021-AG 15/8.4

- (4) reiterate the decision taken at its 13th session, whereby the General Assembly recognises that it must take a prior decision with regard to participating in the preparation of any new text on international railway law whose scope of application and objectives may conflict or partially coincide with the scope of application of COTIF and the objectives of OTIF.

In view of the 74th session of the UNECE Working Party on Rail Transport in November 2021, it is important that OTIF establishes a clear position on the URL initiative.

The elements of the proposed decision are convergent and supportive of the approach advocated by the experts of the EU Member States in the UNECE Group of Experts towards Unified Railway Law. Therefore, the Union should support all four above-listed elements of the proposed decision.

Agenda item 9 – Rules on the election and conditions of service of the Secretary General

The 13th General Assembly instructed the Administrative Committee to explore a structural solution for the appointment of a Secretary General ad interim and to prepare detailed rules applicable to the election of the Secretary General.

At its 130th session in February 2019, the Administrative Committee requested the Working Group of Legal Experts to examine the issue of appointing a Secretary General ad interim and electing the Secretary General and to submit proposals to regulate these two issues. Based on best international practices and lessons learned within OTIF, the Secretariat proposed that a legally binding instrument be adopted. Such rules should be decided and adopted by the General Assembly. The Working Group of Legal Experts prepared a proposal for a Regulation on the election and conditions of service of the Secretary General, with the accompanying Explanatory Notes, and a proposal for modification of the General Assembly's Rules of Procedure (concerning the Secretary General's election) with the Explanatory Notes.

The main document for consideration under this agenda item is the 'Proposal for a Regulation on the election and conditions of service of the Secretary General' (Annex 1 of document SG-21022-AG 15/9). It provides a comprehensive legal framework covering all main aspects of the subject-matter (election principles, qualification criteria, call for application, applications, curriculum vitae, certificate of good health, submission and examination of applications, transparency, voting, conditions of service, vacancy of the post). It also provides for a "candidate's forum" meaning an informal meeting for the presentation of the candidates. The Administrative Committee is to convene the candidates' forum at least four weeks before the session of the General Assembly at which the election is to take place. The justification of this proposal can be found in the Explanatory Notes: *"1. As a general rule, the Member States' preferences with regard to candidates are decided before the General Assembly, so both candidates and members must be given an opportunity to meet before the General Assembly. (...) 3. The candidates' forum provides an opportunity for all candidates to make themselves and their vision known to all OTIF Members on an equal footing at least several weeks in advance of the General Assembly. Not only would it give all candidates more visibility, it would also give members time for reflection and consultations before the election. 4. The forum should consist of presentations by each candidate followed by an opportunity for questions and answers. (...) 7. In view of the sensitive nature of the process and in order to respect the dignity of the candidates as well as to ensure a more candid interaction between candidates and members, participation is limited to the members."*

In general, the proposed regulation would improve the efficiency and the transparency of the election process of OTIF's Secretary General.

However, during the deliberations of the Working Group of Legal Experts, an intensive discussion took place concerning the provision on language requirements, as part of the qualification criteria for applicants to the post of OTIF Secretary General (Article 5 c) of the proposal for regulation), which states:

“Knowledge of English and at least one of OTIF’s other working languages (French or German). Knowledge at proficient user level is required for one language and knowledge at independent user level is required for the other language in accordance with the Common European Framework of Reference for Languages (CEFR) global scale”.

Unlike the qualification criteria applied previously for applicants to the post of OTIF Secretary General (knowledge of all three working languages of OTIF, with the ability to draft easily and fluently in one of the working languages), the proposed regulation puts explicitly the emphasis on the knowledge of the English language. In addition, the knowledge of only two of the three OTIF working languages would be required. The Explanatory Notes indicate: *“However, knowledge of other languages and, above all, OTIF’s third working language, is an advantage. Moreover, it is noted that English is predominantly used in external meetings (as opposed to internal OTIF meetings) and for external communication.”*

Despite the above explanation, the provision concerned does not seem consistent with Article 1 § 6 of COTIF, which provides that: *“The working languages of the Organisation shall be English, French and German. The General Assembly may introduce other working languages”*. Also, as demonstrated by the high quality and the various nationalities of the five candidates to the previous election in 2019 (French, German, Italian, Dutch, Austrian), there is no indication that the language criteria applied so far – knowledge of all three working languages of OTIF, with the ability to draft easily and fluently in one of the working languages – constitute an obstacle for the application of highly qualified professionals to the post of OTIF Secretary General.

The Commission considers that the Union should support the adoption of the ‘Regulation on the election and conditions of service of the Secretary General’, but request that Article 5 (Qualification criteria) is amended to avoid any discrimination between the three working languages of OTIF. The Union should also support the approval of the Explanatory Notes, as modified in session with regard to the proposed amendment to Article 5 of the Regulation. The Union should also support the adoption of the amendments to Articles 10 and 22 of General Assembly’s Rules of Procedure that relate to the election and conditions of service of the Secretary General and the approval of the Explanatory Notes.

Agenda item 10 – Modification of the Rules of Procedure of the General Assembly

As mentioned above under agenda items 8, point c), and 9, the General Assembly will decide on proposals for modification of its Rules of Procedure. In application of Article 27 of the General Assembly’s Rules of Procedure, a consolidated version of all amendments to the Rules of Procedure should be submitted for consideration and adoption by the General Assembly. A consolidated proposal for modification of the General Assembly’s Rules of Procedure is presented in Annex 1 of the meeting document SG-21024-AG 15/10. It also includes some editorial corrections to the German text of the some documents (Annex 4 to SG-21022-AG 15/9) and suggests that Article 28 ‘Entry into Force’ of the Rules of Procedure be modified to enter into force the first day after the 15th session of the General Assembly.

In accordance with the positions set out under agenda items 8, point c), and 9, the Union should support the adoption of the amendments to Articles 4 to 7, 10, 22 and 28 of the Rules of Procedure of the General Assembly and the approval of the relevant Explanatory Notes.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

The concept of *‘acts having legal effects’* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *‘capable of decisively influencing the content of the legislation adopted by the EU legislature’*⁷.

4.1.2. Application to the present case

The General Assembly of OTIF is a body set up by an agreement, namely the Convention concerning International Carriage by Rail (COTIF). The acts which the General Assembly of OTIF is called upon to adopt constitute acts having legal effects, as explicated in the previous section.

The envisaged acts do not supplement or amend the institutional framework of the agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

The main objective and content of the envisaged act relate to 'rail transport'.

Therefore, the substantive legal basis of the proposed decision is Article 91 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 91 TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the 15th General Assembly of OTIF will not amend the COTIF or its Appendices, it is not necessary to publish it in the Official Journal of the European Union after its adoption.

⁷ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 15th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Union has acceded to the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (the 'COTIF'), by virtue of Council Decision 2013/103/EU⁸.
- (2) The General Assembly of OTIF was set up in accordance with point (a) of Article 13(1) of the COTIF Convention (the 'General Assembly').
- (3) The Union participates in the General Assembly in accordance with the provisions of the COTIF, of the Rules of Procedure of the General Assembly, and of the Agreement on the Accession of the Union to the COTIF.
- (4) At its 15th session planned on 28 and 29 September 2021, the General Assembly is expected to decide upon: the preparation of a long-term strategy for OTIF; a proposal for a Regulation on the election and conditions of service of the Secretary General; a proposal to merge the activities of the Working Group of Legal Experts and of the ad hoc Committee on Cooperation into a single ad hoc Committee on Legal Affairs and International Cooperation; a proposal for a decision on the monitoring and assessment of OTIF legal instruments; proposals for modification of the Rules of Procedure of the General Assembly.
- (5) At this session, the General Assembly is also expected to formulate OTIF's views on the UNECE initiative on Unified Railway Law, in particular as regards the two alternative approaches on the unification of railway law at global level.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the 15th session of the General Assembly of OTIF, as the Union is a member of OTIF and the decisions to be taken by the General Assembly will have an impact on the functioning and on the development strategy of the organisation.
- (7) The 15th General Assembly will consider the adoption of a legally binding instrument that would regulate the election and conditions of service of the Secretary General,

⁸ 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 L 51, 23.2.2013, p. 1).

which is one of the organs of OTIF set out in Article 13 of COTIF. The new regulation would provide a comprehensive framework covering all main aspects of the subject matter (election principles, qualification criteria, call for application, submission and examination of applications, transparency, voting, conditions of service, etc.).

- (8) As regards the strategic development of OTIF, the Secretary General proposes to continue and intensify the discussion on a draft proposal for a long-term strategy for OTIF, following the consultation organised at the beginning of 2021. A revised draft proposal would then be submitted for consideration and adoption by the General Assembly at its next ordinary session. The General Assembly will be expected to instruct the Secretary General to undertake the necessary actions for this purpose.
- (9) The General Assembly will consider the opportunity to merge the activities of the ad hoc Committee on Cooperation and of the Working Group of Legal Experts into a single ad hoc Committee on Legal Affairs and International Cooperation. It is noted that the institutional framework of OTIF is defined in Title III of COTIF. Article 13 of COTIF defines OTIF's organs. Pursuant to the second paragraph of that article, the General Assembly may decide to establish temporarily other committees for specific tasks. Thus, the proposal of the Secretary General to establish temporarily an ad hoc Committee on Legal Affairs and International Cooperation is to be considered within the OTIF's existing institutional framework.
- (10) In order to better monitor and improve the application of the COTIF, the General Assembly is expected to adopt an internal decision on the monitoring and assessment of COTIF legal framework. The proposed decision operationalises the task of OTIF set out in COTIF Article 2 § 1, letter e) to keep a watch on the application of all the rules and recommendations (legal instruments) established within the organisation. To this end, the draft decision establishes specific requirements for the Secretary General of OTIF and for the OTIF members, in particular: the Secretary General shall systematically perform monitoring and assessment of the implementation of the Convention; the OTIF organs shall be entitled to initiate monitoring and assessment of the application of a particular legal instrument within the sphere of their competence or specific provisions thereof; the Secretary General may initiate monitoring and assessment of any legal instrument; OTIF members shall cooperate with the Secretary General and provide all relevant information for the purpose of performing monitoring and assessment of legal instruments.
- (11) The General Assembly will also consider and adopt a position on the latest developments of the United Nations Economic Commission for Europe (UNECE)'s initiative on Unified Railway Law. In particular, the General Assembly may express its support for the formation and adoption of an interface law to facilitate international rail freight transport between Europe and Asia, provided that such interface law does not conflict with the rules of the COTIF Convention. This position would be conveyed to the 74th session of the UNECE Working Party on Rail Transport in November 2021, which is the competence standing body to decide on the next steps of the Unified Railway Law initiative.
- (12) At this session, the General Assembly will also decide on some modifications of its rules of procedure. A consolidated version of the rules of procedure will be adopted and should enter into force the first day after the 15th session of the General Assembly.
- (13) The proposed decisions are in line with the law and the strategic objectives of the Union, and should therefore be supported by the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the 15th session of the General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) is set out in the Annex.

Minor changes to the positions expressed in the Annex of this Decision may be agreed by the representatives of the Union at the General Assembly without further decision of the Council.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*