Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 3 September 2015 [1]

Case C-121/14

United Kingdom of Great Britain and Northern Ireland
v
European Parliament,

Council of the European Union

(Actions for annulment — Article 91 TFEU — Article 170 TFEU et seq. — Transport — Trans-European transport network — Connecting Europe Facility — Extension of rail freight corridors beyond London — Projects of common interest requiring the approval of the Member State concerned)

1. By its action, the United Kingdom of Great Britain and Northern Ireland requests the Court to annul Article 29 of, and Annex II to Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010,[2] chiefly on the ground that extensions of the initial rail freight corridors provided for therein are intended to further the objectives referred to in Article 170 TFEU and that, consequently, they should have been adopted in accordance with Articles 171 TFEU and 172 TFEU.

I – **Legal framework**

A – *The FEU Treaty*

2. Article 91 TFEU provides as follows:

‘1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:

(a) common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States;

(b) the conditions under which non-resident carriers may operate transport services within a Member State;

1 — Original language: French.

2 — OJ 2013 L 348, p. 129, ‘the contested regulation’.

(c) measures to improve transport safety;

(d) any other appropriate provisions.

2. When the measures referred to in paragraph 1 are adopted, account shall be taken of cases where their application might seriously affect the standard of living and level of employment in certain regions, and the operation of transport facilities.'

3. In Title XVI, headed 'Trans-European Networks', Article 170 TFEU provides:

'1. To help achieve the objectives referred to in Articles 26 and 174 and to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers, the Union shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

2. Within the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks. It shall take account in particular of the need to link island, landlocked and peripheral regions with the central regions of the Union.'

4. Also in Title XVI, Article 171(1) TFEU provides

'In order to achieve the objectives referred to in Article 170, the Union:

— shall establish a series of guidelines covering the objectives, priorities and broad lines of measures envisaged in the sphere of trans-European networks; these guidelines shall identify projects of common interest,

— shall implement any measures that may prove necessary to ensure the interoperability of the networks, in particular in the field of technical standardisation,

— may support projects of common interest supported by Member States, which are identified in the framework of the guidelines referred to in the first indent, particularly through feasibility studies, loan guarantees or interest-rate subsidies; the Union may also contribute, through the Cohesion Fund set up pursuant to Article 177, to the financing of specific projects in Member States in the area of transport infrastructure.

The Union's activities shall take into account the potential economic viability of the projects.'

5. Lastly, Article 172 TFEU, which also appears in Title XVI relating to the trans-European networks, provides as follows:

'The guidelines and other measures referred to in Article 171(1) shall be adopted by the ... Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions.

Guidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned.'

B – *The regulation on rail freight*

6. The purpose of Regulation (EU) No 913/2010 of the European Parliament and of the Council of 22 September 2010 concerning a European rail network for competitive freight,[3] adopted on the basis of Article 91 TFEU, is to lay down rules for the establishment and organisation of international rail corridors with a view to the development of a European rail network for competitive freight. To that end, it sets out rules for the selection, organisation, management and the indicative investment planning of freight corridors.[4]

7. Under Article 2(2) of the regulation on rail freight, a '"freight corridor" means all designated railway lines, including railway ferry lines, on the territory of or between Member States, and, where appropriate, European third countries, linking two or more terminals, along a principal route and, where appropriate, diversionary routes and sections connecting them, including the railway infrastructure and its equipment and relevant rail services in accordance with Article 5 of Directive 2001/14/EC'. [5]

8. Chapter II of the regulation on rail freight lays down provisions for the designation and governance of international freight corridors. Article 3 of the regulation, which appears in Chapter II, is worded as follows:

'The Member States referred to in the Annex shall make operational by the dates set out therein the initial freight corridors set out in the Annex. The Member States concerned shall inform the Commission about the establishment of the freight corridors.'

9. The annex to the regulation on rail freight stipulates as follows:

	'Member States	Principal routes (1)	Establishment of freight corridors:
...	...	...	...
"North Sea — Mediterranean"	NL, BE, LU, FR UK (+)	Glasgow (*)/Edinburgh (*)/Southampton (*)/Felixstowe (*)-London (+)/Dunkirk (+)/Lille (+)/Liege (+)/Paris (+)/Amsterdam (+)-Rotterdam-Zeebrugge (+)/Antwerp-Luxembourg-Metz-Dijon-Lyon/[Basel]-Marseille (+)	By 10 November 2013:
...	...	...	...

(1) '/' means alternative routes. In line with the TEN-T [trans-European transport network] guidelines, the Atlantic and the Mediterranean corridors should in the future be completed by the Sines/Algeciras-Madrid-Paris freight axis which crosses the central Pyrenees via a low elevation tunnel.

3 — OJ 2010 L 276, p. 22, and corrigendum, OJ 2012 L 325, p. 19. This Regulation, as amended by the contested regulation, is hereinafter referred to as 'the regulation on rail freight'.

4 — See the first subparagraph of Article 1(1) of the regulation.

5 — Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29).

(+) Routes marked with + shall be included in the respective corridors at the latest 3 years after the date of establishment set out in this table. Existing structures defined under Article 8 and Article 13(1) of this regulation shall be adjusted with the participation of additional Member States and infrastructure managers in the respective corridors. These inclusions shall be based on market studies and take into consideration the aspect of existing passenger and freight transport in line with Article 14(3) of this regulation.

(*) Routes marked with * shall be included in the respective corridors at the latest 5 years after the date of establishment set out in this table. Existing structures defined under Article 8 and Article 13(1) of this regulation shall be adjusted with the participation of additional Member States and infrastructure managers in the respective corridors. These inclusions shall be based on market studies and take into consideration the aspect of existing passenger and freight transport in line with Article 14(3) of this regulation.

...'

10. Before the modification made by the contested regulation, initial freight corridor No 2 was presented as follows:

'2.	NL, BE, LU, FR	Rotterdam-Antwerp-Luxembourg-Metz-Dijon-Lyon/[Basel]	By 10 November 2013:'

11. Articles 4 to 6 of the regulation on rail freight lay down the criteria for establishing further freight corridors and lay down rules for the selection of such corridors and their modification. They provide as follows:

'Article 4

Criteria for further freight corridors

The selection of further freight corridors referred to in Article 5 and the modification of freight corridors referred to in Article 6 shall take account of the following criteria:

(a) the crossing by the freight corridor of the territory of at least three Member States, or of two Member States if the distance between the terminals served by the freight corridor is greater than 500 km;

(b) the consistency of the freight corridor with the TEN-T, the [European Rail Traffic Management System (ERTMS) [6]] corridors and/or the corridors defined by [RailNetEurope (RNE) [7]];

(c) the integration of TEN-T priority projects into the freight corridor;

(d) the balance between the socio-economic costs and benefits stemming from the establishment of the freight corridor;

(e) the consistency of all of the freight corridors proposed by the Member States in order to set up a European rail network for competitive freight;

6 — The ERTMS is a system designed to harmonise railway signalling. It also encompasses train/track detection.

7 — RNE, founded in 2004, is an association of infrastructure managers.

(f) the development of rail freight traffic and major trade flows and goods traffic along the freight corridor;

(g) if appropriate, better interconnections between Member States and European third countries;

(h) the interest of the applicants in the freight corridor;

(i) the existence of good interconnections with other modes of transport, in particular due to an adequate network of terminals, including in maritime and inland ports.

Article 5

Selection of further freight corridors

1. Each Member State with a rail border with another Member State shall participate in the establishment of at least one freight corridor, unless this obligation has already been met under Article 3.

2. Notwithstanding paragraph 1, Member States shall, upon request from a Member State, participate in the establishment of the freight corridor as referred to in that paragraph or the prolongation of an existing corridor, in order to allow a neighbouring Member State to fulfil its obligation under that paragraph.

3. Without prejudice to the obligations of Member States under Article 7 of Directive 91/440/EEC, [8] where a Member State considers, after having provided a socio-economic analysis, that the establishment of a freight corridor would not be in the interest of the applicants likely to use the freight corridor or would not bring significant socio-economic benefits or would cause a disproportionate burden, the Member State concerned shall not be obliged to participate as referred to in paragraphs 1 and 2 of this Article, subject to a decision of the Commission acting in accordance with the advisory procedure referred to in Article 21(2).

4. A Member State shall not be obliged to participate as referred to in paragraphs 1 and 2 if it has a rail network which has a track gauge which is different from that of the main rail network within the Union.

5. The establishment of a freight corridor shall be proposed by the Member States concerned. For this purpose they shall send jointly to the Commission a letter of intent including a proposal drawn up after consultation of the infrastructure managers and applicants concerned, taking into account the criteria set out in Article 4.

In order to meet the obligation under paragraphs 1 and 2, the Member States concerned shall send jointly to the Commission a letter of intent by 10 November 2012.

6. The Commission shall examine the proposals for the establishment of a freight corridor as referred to in paragraph 5 and, in accordance with the regulatory procedure referred to in Article 21(3), adopt a decision on the compliance of such a proposal with this Article at the latest 9 months after submission of the proposal.

7. The Member States concerned shall establish the freight corridor at the latest two years after the decision of the Commission referred to in paragraph 6.

8 — Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25).

Article 6

Modification of further freight corridors

1. The freight corridors referred to in Article 5 may be modified on the basis of a joint proposal by the Member States concerned to the Commission after consulting the infrastructure managers and applicants concerned.

2. The Commission shall, in accordance with the regulatory procedure referred to in Article 21(3), adopt a decision on the proposal taking into account the criteria set out in Article 4.'

C – *The TEN-T regulation*

12. Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU,[9] was adopted on the basis of Article 172 TFEU. According to Article 1(1) and (2) thereof, the purpose of the TEN-T regulation is to establish guidelines for the development of a trans-European transport network ('TEN-T') comprising a dual-layer structure consisting of the comprehensive network and of the core network, the latter being established on the basis of the comprehensive network, and to identify projects of common interest and specify the requirements to be complied with for the management of the infrastructure of the TEN-T.

13. Article 2 of the TEN-T regulation provides:

'1. This Regulation applies to the [TEN-T] as shown on the maps contained in Annex I. The [TEN-T] comprises transport infrastructure and telematic applications as well as measures promoting the efficient management and use of such infrastructure and permitting the establishment and operation of sustainable and efficient transport services.

2. The infrastructure of the [TEN-T] network consists of the infrastructure for railway transport, inland waterway transport, road transport, maritime transport, air transport and multimodal transport, as determined in the relevant sections of Chapter II.'

14. In accordance with Article 3(a) of the TEN-T regulation, a 'project of common interest' is any project carried out pursuant to the requirements and in compliance with the provisions of that regulation.

15. Article 5(1)(a) of the TEN-T regulation provides that the TEN-T is to be planned, developed and operated in a resource-efficient way, inter alia, through the development, improvement and maintenance of existing transport infrastructure.

16. In accordance with Article 6 of the TEN-T regulation, the gradual development of the TEN-T is to be achieved, in particular, by implementing a dual-layer structure for that network with a coherent and transparent methodological approach, comprising a comprehensive network and a core network. The comprehensive network is to consist of all existing and planned transport infrastructures of the TEN-T as well as measures promoting the efficient and socially and environmentally sustainable use of such infrastructure. The core network is to consist of those parts of the comprehensive network which are of the highest strategic importance for achieving the objectives for the development of the TEN-T. The comprehensive network and the core network are to be identified and developed in accordance with Chapters II and III respectively.

9 — OJ 2013 L 348, p. 1. The regulation, as amended by Commission Delegated Regulation (EU) No 473/2014 of 17 January 2014 (OJ 2014 L 136, p. 10), is hereinafter referred to as 'the TEN-T regulation'.

17. Article 7 of the TEN-T regulation is worded as follows:

‘1. Projects of common interest shall contribute to the development of the [TEN-T] through the creation of new transport infrastructure, through the rehabilitation and upgrading of the existing transport infrastructure and through measures promoting the resource-efficient use of the network.

2. A project of common interest shall:

(a) contribute to the objectives falling within at least two of the four categories set out in Article 4;

(b) comply with Chapter II, and if it concerns the core network, comply in addition with Chapter III;

(c) be economically viable on the basis of a socio-economic cost-benefit analysis;

(d) demonstrate European added value.

3. A project of common interest may encompass its entire cycle, including feasibility studies and permission procedures, implementation and evaluation.

...’

18. Article 32(a) of the TEN-T regulation, which appears in Chapter II, dedicated to the comprehensive network, states that the Member States are to pay particular attention to projects of common interest which both provide efficient freight transport services that use the infrastructure of the comprehensive network and contribute to reducing carbon dioxide emissions and other negative environmental impacts, and which aim to improve sustainable use of transport infrastructure, including its efficient management.

19. Article 42 of the regulation provides as follows:

‘1. Core network corridors are an instrument to facilitate the coordinated implementation of the core network. In order to lead to resource-efficient multimodal transport, thereby contributing to cohesion through improved territorial cooperation, core network corridors shall be focused on:

(a) modal integration;

(b) interoperability, and

(c) a coordinated development of infrastructure, in particular in cross-border sections and bottlenecks.

2. Core network corridors shall enable Member States to achieve a coordinated and synchronised approach with regard to investment in infrastructure, so as to manage capacities in the most efficient way. The core network corridors shall support the comprehensive deployment of interoperable traffic management systems and, where appropriate, the use of innovation and new technologies.’

20. Article 43 of the TEN-T regulation defines the core network corridors as follows:

‘1. Core network corridors cover the most important long-distance flows in the core network and are intended, in particular, to improve cross-border links within the Union.

2. Core network corridors shall be multimodal and open to the inclusion of all transport modes covered in this regulation. They cross at least two borders and, if possible, involve at least three transport modes, including, where appropriate, motorways of the sea.’

21. In accordance with Article 44(1) of the TEN-T regulation, the list of core network corridors is set out in Part I of Annex I to the contested regulation. The Member States are to participate, as provided for in Chapter IV of the TEN-T regulation, in those core network corridors.

22. Articles 45 to 47 of the TEN-T regulation establish a governance structure for the core network corridors, in order to facilitate their coordinated implementation, in agreement with the Member States concerned. For each core network corridor, one or more European Coordinators are to be designated. They are to be assisted by a consultative forum established in agreement with the Member States concerned. The European Coordinators are to draw up work plans for the corridors in question together with the Member States concerned and monitor their implementation.

23. Lastly, Article 48 of the TEN-T regulation is worded as follows:

'1. Adequate coordination shall be ensured between the core network corridors and the rail freight corridors provided for in [the regulation on rail freight], in order to avoid any duplication of activity, in particular when establishing the work plan or setting up working groups.

2. The provisions of this Chapter shall be without prejudice to the governance structures set out in [the regulation on rail freight].'

D – *The contested regulation*

24. Article 1 of the contested regulation states that the purpose of the regulation is to establish the Connecting Europe Facility. This facility determines the conditions, methods and procedures for providing European Union financial assistance to trans-European networks, in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures and to exploit potential synergies between those sectors.

25. Under Article 2(1) of the contested regulation, a 'project of common interest' means a project identified in the TEN-T regulation, in Regulation (EU) No 347/2013 [10] or in a regulation on guidelines for trans-European networks in the area of telecommunications infrastructure.

26. Part I of Annex I to the contested regulation establishes, inter alia, the 'North Sea — Mediterranean' core network corridor. In so far as the United Kingdom is concerned, that corridor provides for the following alignments:

— Glasgow/Edinburgh — Liverpool/Manchester — Birmingham,

— Birmingham — Felixstowe/London/Southampton,

— London — Lille — Brussel/Bruxelles.

27. Article 29 of the contested regulation provides that the regulation of rail freight is to be amended as follows:

'The annex to [the regulation on rail freight] is replaced by the text of Annex II to [the contested regulation]. Consequently, the rail freight corridors revised shall remain subject to the provisions of [the regulation on rail freight].'

10 — Regulation (EU) No 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009 (OJ 2013 L 115, p. 39).

28. In Annex II to the contested regulation, the 'North Sea — Mediterranean' freight corridor replaces initial freight corridor No 2 established in the annex to the regulation on rail freight prior to its amendment by Article 29 of the contested regulation. [11]

29. In this way, initial rail freight corridor No 2 was extended as far as Glasgow, so as to include, in so far as the United Kingdom is concerned, Glasgow, Edinburgh, Southampton, Felixstowe and London.

II – **The legislative procedure leading to the adoption of the contested regulation**

30. Initially, the United Kingdom was not a participant in any of the initial rail freight corridors provided for in the regulation on rail freight. Subsequently, on the basis of socio-economic studies, it initiated a procedure to establish a further freight corridor, in accordance with Article 5 of the regulation on rail freight, extending initial freight corridor No 2 as far as London, via the Channel Tunnel.

31. In its application, the United Kingdom explains, with regard to the contested regulation, that it supported the principles set out in Article 1 of that regulation. However, during the course of the negotiations for the adoption of the regulation, an amendment was tabled to amend initial freight corridor No 2, extending it as far as Glasgow. That extension was neither approved by the United Kingdom nor, according to the United Kingdom, was it supported by socio-economic analysis.

32. In the circumstances, the United Kingdom abstained from the vote on the adoption of the contested regulation and, on 25 November 2013, lodged a statement setting out the reasons for its abstention. [12] The Federal Republic of Germany and the Republic of Latvia also lodged statements explaining their concerns regarding the extension of initial freight corridors by the method chosen. [13]

III – **Forms of order sought**

33. The United Kingdom claims that the Court should:

— annul Article 29 of, and Annex II to the contested regulation, in so far as they extend initial freight corridor No 2 beyond London and

— order the Parliament and the Council to pay the costs.

34. The Parliament and the Council, and also the Commission, which has intervened in support of the form of order which they seek, contend that the Court should:

— dismiss the action and

— order the United Kingdom to pay the costs.

11 — See points 9 and 10 of this Opinion.

12 — See Council document 16096/13 ADD 2 on the proposal for a regulation of the European Parliament and of the Council establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010.

13 — Idem.

IV – **The admissibility of the action in so far as it seeks the partial annulment of the contested regulation**

35. The United Kingdom considers that Article 29 of, and Annex II to the contested regulation are distinct and severable from the remainder of the regulation. Accordingly, it states that, by its action, it seeks the partial annulment of the regulation, that is, of Article 29 and Annex II only.

36. According to settled case-law, the partial annulment of a European Union act is possible only if the elements the annulment of which is sought may be severed from the rest of the act. The Court has repeatedly held that that requirement of severability is not satisfied where the partial annulment of an act would have the effect of altering its substance. [14]

37. The Parliament, Council and Commission are agreed that the United Kingdom's application for partial annulment is admissible.

38. I concur with that view.

39. Article 29 of, and Annex II to the contested regulation are indeed severable from the remainder of the regulation. In the event that they are held to be unlawful, the regulation would not cease to produce legal effects, since the remaining provisions of the regulation pursue a different objective from that pursued by Article 29 and Annex II.

40. The principal aim of the contested regulation is to establish the Connecting Europe Facility in order to accelerate investment in the field of the trans-European networks. [15] To that end it determines the conditions, methods and procedures for providing EU financial assistance to trans-European networks in order to support projects of common interest in the sectors of transport, telecommunications and energy infrastructures. [16]

41. By contrast, Article 29 of, and Annex II to the contested regulation are intended solely to align the rail freight corridors provided for in the regulation on rail freight and the core network corridors. Consequently, their annulment would in no way alter the essential substance of the contested regulation.

42. Since Article 29 of, and Annex II to the contested regulation are severable from the remainder of that regulation, I believe that the United Kingdom's application for partial annulment should be held to be admissible.

V – **The action**

43. The United Kingdom puts forward two pleas in law in support of its action.

44. By its first plea, it submits that the amendments made by Article 29 of, and Annex II to the contested regulation to the initial version of the annex to the regulation on rail freight, which resulted in the extension of initial rail freight corridor No 2, should have been adopted in accordance with Articles 171 TFEU and 172 TFEU, since those amendments are intended to further the objectives referred to in Article 170 TFEU.

14 — See judgment in *Commission* v *Parliament and Council* (C-427/12, EU:C:2014:170, paragraph 16 and the case-law cited).

15 — See recital 2 in the preamble to the regulation.

16 — See Article 1 of the regulation.

45. By its second plea, the United Kingdom submits that, since those amendments are intended to further the objectives referred to in Article 170 TFEU, the extensions to the initial rail freight corridors, which are 'projects of common interest' within the meaning of Article 171(1) TFEU, were adopted, in so far as they relate to the territory of the United Kingdom, in breach of the requirement for the consent of the Member State concerned laid down in the second paragraph of Article 172 TFEU.

A – *The first plea, alleging that the wrong legal basis was chosen for the extension of initial rail freight corridor No 2*

1. Arguments of the parties

46. The United Kingdom maintains that the modification of initial rail freight corridor No 2 brought about by Article 29 of, and Annex II to the contested regulation, which has the effect of extending that corridor as far as Glasgow, should have been adopted on the basis of Article 172 TFEU, which appears in Title XVI of the FEU Treaty relating to trans-European networks.

47. It submits that the extensions to the initial rail freight corridors are a key component of the establishment of the TEN-T and, as such, are intended to further the objectives referred to in Articles 170 TFEU and 171 TFEU. That is confirmed by the fact that the purpose of the extension of initial rail freight corridor No 2 is to align that corridor with the core network corridor, which is an objective of the TEN-T regulation — and thus of Article 170 TFEU — as is indicated in recital 46 in the preamble to that regulation, which states that '[t]he core network corridors should be in line with the rail freight corridors set up in accordance with [the regulation on rail freight]'. The United Kingdom also refers in this connection to recital 16 in the preamble to the contested regulation, which states that '[t]he geographical alignment of rail freight corridors as provided for by [the regulation on rail freight] and of core network corridors under Part I of Annex I to this regulation should, where appropriate, be ensured, taking into consideration the objectives of the respective instruments, in order to reduce the administrative burden and streamline the development and use of the railway infrastructure'.

48. In addition, the United Kingdom submits that the modification of initial rail freight corridor No 2 pursues the very objective defined in Article 170(2) TFEU: '[w]ithin the framework of a system of open and competitive markets, action by the Union shall aim at promoting the interconnection and interoperability of national networks as well as access to such networks'.

49. The United Kingdom explains in this connection that rail freight corridors and core network corridors are both coordination tools whose very purpose is to improve interoperability and facilitate access to national networks. That is confirmed by Article 48(1) of the TEN-T regulation, which provides that '[a]dequate coordination shall be ensured between the core network corridors and the rail freight corridors provided for in [the regulation on rail freight], in order to avoid any duplication of activity, in particular when establishing the work plan or setting up working groups'.

50. Furthermore, whilst it is conscious of the fact that it can no longer challenge the legal basis for the adoption of the regulation on rail freight, the United Kingdom maintains that the principal goal of that regulation is the attainment of the objectives referred to in Article 170(2) TFEU, as is contemplated by recital 5 in the preamble to the regulation: 'the establishment of international rail corridors for a European rail network for competitive freight on which freight trains can run under good conditions and easily pass from one national network to another would allow for improvements in the conditions of use of the infrastructure'.

51. The United Kingdom also submits that, contrary to the Parliament's and the Council's positions, it is not necessary for new railway infrastructure to be put in place in order for rail freight corridors to fall within the scope of the objectives pursued by Article 170 TFEU; nor is it an obligation under the TEN-T regulation, with regard to the establishment of core network corridors.

52. Lastly, the United Kingdom believes that the decisive question is whether the measure, taken as a whole, is predominantly a measure under the common transport policy or a network measure, and in this connection it compares and contrasts Article 91 TFEU with Article 170(2) TFEU. Whilst it does not dispute that the regulation on rail freight is intended to contribute to the development of competitive, efficient rail freight, and thus also pursues the objectives of Article 91 TFEU, it submits that the primary objective of the regulation is in fact the creation of a network of reliable rail freight corridors backed by mechanisms for cooperation among infrastructure managers, which in turn promotes the objectives of the TEN-T regulation and thus those of Article 170(2) TFEU.

53. Accordingly, Article 172 TFEU is a more specific legal basis than Article 91 TFEU and the modification of initial rail freight corridor No 2 should have been adopted in accordance with Article 172 TFEU.

54. For the Parliament and Council, the fact that Article 172 TFEU alone is cited as the legal basis in the preamble to the contested regulation is the result of the application of the rules on legal bases. The Parliament points to the case-law of the Court according to which the choice of legal basis for a European Union measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure.[17] It also cites the judgment in *Commission* v *Council*,[18] in which the Court stated that '[i]f examination of that measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component'.[19]

55. The Parliament, the Council and the Commission take the view that, in accordance with Article 1 of the contested regulation, the main and predominant aim and content of that regulation are to provide European Union financial assistance to the trans-European networks and to support projects of common interest, whereas Article 29 of, and Annex II to the regulation, which modify initial rail freight corridor No 2, pursue a purely ancillary objective, namely that of amending the regulation on rail freight so as to align the core network corridors and the initial freight corridors. In reality, if a separate act had been adopted to bring about that amendment, Article 91 TFEU would have been its legal basis.

56. Moreover, I understand the Parliament's and the Council's position to be that, in order to be part of the TEN-T, a corridor must be a project in the sense that there must be an obligation to modify existing infrastructure or to build new infrastructure, which is not the case in this instance. The obligation to put in place an initial rail freight corridor does not require the Member States to build new railway lines; it merely requires them to ensure better coordination of the transport of rail freight on certain existing railway lines and to ensure better management of those lines, in particular, by recourse to a 'one-stop shop'. The Council concludes that the mere use of infrastructure cannot be regarded as 'infrastructure' within the meaning of Article 170(1) TFEU.

17 — Judgments in *Commission* v *Parliament and Council* (C-411/06, EU:C:2009:518, paragraph 45 and the case-law cited) and *Parliament* v *Council* (C-130/10, EU:C:2012:472, paragraph 42 and the case-law cited).

18 — C-137/12, EU:C:2013:675.

19 — Paragraph 53.

57. Furthermore, the Parliament submits that the rationale for the modification of initial rail freight corridor No 2, that is to say, the alignment of that corridor with the corresponding core network corridor, as referred to in recital 16 in the preamble to the contested regulation, in no way proves that those corridors are connected or that they both pursue the objectives of Article 170(2) TFEU. In its view, that alignment is meant solely to rationalise the use of the infrastructure, by the rail freight corridors, and its development, by means of the creation of the core network, in particular, so as to reduce the administrative burden.

58. The Parliament also argues that the term 'network' as used in the regulation on rail freight has a functional aspect. It submits that if every measure that generated improvements in the use of infrastructure, such as those contemplated by the regulation on rail freight, could be classified as a 'TEN-T measure', that would include all transport-related measures in this area, including measures relating to safety or specifications or ticketing. Network measures relating to rail transport are, in accordance with Articles 11 to 13 of the TEN-T regulation, solely those which are intended to meet the requirements for the transport infrastructures and constitute the basis for the identification of projects of common interest.

59. For its part, the Council submits that the regulation on rail freight was adopted on the basis of Article 91 TFEU and that it does not contain any guidelines concerning the trans-European networks within the meaning of Article 171(1) TFEU. It thus falls entirely within the scope of the common transport policy. As regards, more specifically, Article 29 of, and Annex II to the contested regulation, the Council states that the need to ensure the geographical alignment of the rail freight corridors with the core network corridors does not make the modification of initial rail freight corridor No 2 part of the TEN-T.

60. As regards the United Kingdom's argument that, in order to determine whether a measure falls under Article 170 TFEU, it is necessary to establish whether it is a network measure as opposed to a common transport policy measure, the Council submits that it is necessary to refer to Article 9 of the TEN-T regulation and the conditions set out therein. It also notes that Articles 11 to 13 of the TEN-T regulation concern infrastructure components, infrastructure requirements and priorities for infrastructure development. Consequently, a TEN-T measure is one that affects infrastructure.

61. Lastly, the Council adds that Article 11 of the regulation on rail freight, which appears in Chapter III of the regulation, entitled 'Investment in the Freight Corridor', is no more than a management or coordination instrument and imposes no obligation to invest in railway infrastructure. It therefore disputes the United Kingdom's argument that this regulation too has given rise to projects of common interest qualifying for TEN-T funding.

62. For the Commission, Article 29 of, and Annex II to the contested regulation do not fall within the material scope of that regulation. They constitute a formal amendment to the regulation on rail freight adopted on the basis of Article 91 TFEU and are thus governed by that provision.

63. The Commission also takes the view that the provisions relating to rail freight corridors are essentially coordination and management tools to ensure competitive rail freight services. They therefore fall within the common transport policy.

2. Assessment

64. The first plea put forward by the United Kingdom alleges infringement of essential procedural requirements, within the meaning of the second paragraph of Article 263 TFEU. More precisely, that Member State considers that the extension of initial rail freight corridor No 2 is intended to further the objectives of Article 170 TFEU and that the amendments brought about by Article 29 of, and Annex II to the contested regulation should therefore have been adopted in accordance with Articles 171 TFEU and 172 TFEU.

65. Although the contested regulation was adopted on the basis of Article 172 TFEU, the Parliament and the Council, supported by the Commission, submit that the modification made to initial rail freight corridor No 2 by Article 29 of, and Annex II to that regulation pursues an objective that is merely ancillary to the principal objective of the regulation and that the extension of the corridor falls within the scope of the common transport policy. Accordingly, the appropriate legal basis for that modification, were it the subject of a separate act, would be Article 91 TFEU.

66. The crux of the question is therefore whether the geographic alignment of the initial rail freight corridors with the core network corridors is a matter falling under the common transport policy or under TEN-T policy. That question is of considerable significance, for if the Court finds that the appropriate legal basis is indeed Article 172 TFEU, the error in the choice of decision-making procedure might have deprived the United Kingdom of its right to exert an influence over the actual content of the act in question, inasmuch as the second paragraph of Article 172 TFEU states that the approval of the Member State concerned by guidelines and projects of common interest relating to the trans-European networks is required and the United Kingdom does not consent to the extension of rail freight corridor No 2 as far as Glasgow.

67. It must be borne in mind that, according to settled case-law, 'the choice of the legal basis for a European Union measure must rest on objective factors amenable to judicial review, which include in particular the aim and the content of the measure'.[20] 'The legal basis which has been used for the adoption of other European Union measures which might, in certain cases, display similar characteristics is irrelevant in that regard, as the legal basis for a measure must be determined having regard to the measure's own aim and content'.[21]

68. Moreover, the Court has repeatedly held that '[i]f examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely, that required by the main or predominant purpose or component'.[22]

69. It is therefore in the light of that case-law that the Court must determine whether, as the United Kingdom maintains, the only appropriate legal basis for the extensions to the rail freight corridors which result from Article 29 of, and Annex II to the contested regulation is Article 172 TFEU.

70. In order to decide that, it will be necessary first to examine the provisions of the FEU Treaty relating to the common transport policy and those relating to the trans-European networks and then to ascertain whether or not, in light of the aim and content of Article 29 of, and Annex II to the contested regulation, the European Union action contemplated by those provisions falls within the scope of Article 170 TFEU et seq.

20 — Judgments in *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 35 and the case-law cited) and *Spain* v *Council* (C-147/13, EU:C:2015:299, paragraph 68 and the case-law cited).

21 — Judgment in *United Kingdom* v *Council* (C-81/13, EU:C:2014:2449, paragraph 36 and the case-law cited).

22 — Judgment in *Commission* v *Parliament and Council* (C-43/12, EU:C:2014:298, paragraph 30 and the case-law cited).

a) Common transport policy and trans-European networks policy

71. In accordance with Article 90 TFEU, the objectives of the Treaties are to be pursued, in transport matters, within the framework of a common transport policy. As far as these objectives are concerned, Article 3(3) TEU provides that '[t]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

72. The specific purpose of Article 91(1)(a) and (b) TFEU is to attain that objective of achieving an internal market by laying down guidelines in that regard for the EU legislature. Accordingly, Article 91(1)(a) and (b) TFEU provide that the legislature is to establish 'common rules applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States' and the 'conditions under which non-resident carriers may operate transport services within a Member State'.

73. Article 91(1)(a) and (b) TFEU provide the EU legislature with the necessary basis for the liberalisation of services and the opening-up to competition of transport.[23] These provisions thus govern competitive conditions and trade within the European Union. In the railway sector, for example, the progressive liberalisation of services and the opening-up of the sector to competition were brought about by three successive legislative packages.[24]

74. Article 91(1)(c) and (d) TFEU address measures of a non-commercial nature. Under those provisions, the EU legislature is to adopt measures to improve transport safety and any other appropriate provisions. As regards transport safety, I would cite Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences[25] and, concerning inland waterways, Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships.[26]

75. As regards 'other appropriate provisions', the Court had occasion to clarify the scope of that concept in its judgment in *Schumalla*,[27] in which it held that the EU institutions enjoyed wide legislative powers as regards the adoption of appropriate common rules concerning the common transport policy.[28] More specifically, it is clear from that judgment that common provisions that

23 — See judgment in *Parliament* v *Council* (C-13/83, EU:C:1985:220, paragraph 62).

24 — The first railway package is made up of Directive 2001/12/EC of the European Parliament and of the Council of 26 February 2001 amending Directive 91/440 (OJ 2001 L 75, p. 1), Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings (OJ 2001 L 75, p. 26) and Directive 2001/14. The second railway package is made up of Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004 establishing a European railway agency (Agency Regulation) (OJ 2004 L 164, p. 1) and Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14 (OJ 2004 L 164, p. 44). The third railway package is made up of Directive 2007/58/EC of the European Parliament and of the Council of 23 October 2007 amending Council Directive 91/440 and Directive 2001/14 (OJ 2007 L 315, p. 44) and Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community (OJ 2007 L 315, p. 51). I should also mention Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ 2012 L 343, p. 32).

25 — OJ 2006 L 403, p. 18.

26 — OJ 2009 L 163, p. 1.

27 — 97/78, EU:C:1978:211.

28 — Paragraph 4. See also the judgment in *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraph 29).

contribute to the elimination of disparities liable to cause substantial distortion of the conditions of competition in the transport sector are 'appropriate', within the meaning of Article 91(1)(d) TFEU, for establishing a common transport policy. [29] On the basis of this provision the EU legislature has adopted measures, inter alia, in the field of taxation and in the social field. [30]

76. As regards Article 170 TFEU, the objective of that provision is to establish and develop the trans-European networks, so as to contribute to the establishment of the internal market, and to strengthen economic, social and territorial cohesion, in accordance with Articles 26 TFEU and 174 TFEU respectively. Article 170 TFEU also states that the trans-European networks are intended to enable citizens of the Union, economic operators and regional and local communities to derive full benefit from the setting-up of an area without internal frontiers.

77. The establishment and development of the trans-European networks, and the TEN-T in particular, is designed to facilitate the interconnection of national networks so as to overcome any obstacles to the free movement of goods and persons. Such obstacles are frequently geographical, as in the case of the Alps between France and Italy, or technical, such as the existence of a variety of national on-board signalling and speed-control systems for railway transport, which enable trains to react to signals transmitted from the ground. Such barriers are necessarily an impediment to the establishment of the internal market.

78. As regards achieving the objectives referred to in Article 174 TFEU, I would recall that the first two paragraphs thereof provide that, '[i]n order to promote its overall harmonious development, the Union shall develop and pursue its actions leading to the strengthening of its economic and social cohesion' and that, '[i]n particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions'. In its Communication on territorial cohesion, [31] the Commission stated that territorial cohesion is about 'ensuring the harmonious development of all [the various places in the European Union] and about making sure that their citizens are able to make the most of [the] inherent features of these [places]. As such, it is a means of transforming diversity into an asset that contributes to sustainable development of the entire EU'. [32]

79. As far as the TEN-T is concerned, that is put into effect through the harmonious development of the European network in such a way as to offer economic operators and users access to innovative, effective and competitive infrastructures in all regions of the European Union. [33] The TEN-T therefore plays an essential role in the harmonious development of the Union as a whole, since it will afford economic actors mobility in conditions that are designed to be optimal, so as to distribute economic activity in the best way possible throughout the European Union. [34] It is the TEN-T that will make it possible to connect the most landlocked regions of the Union with the most central, urban areas. It is therefore an instrument for the benefit of the Union's economic actors and citizens. It does not seem to me to be merely accidental that the Title in the FEU Treaty dealing with the trans-European networks appears just after Title XV, devoted to consumer protection, and before Title XVII, concerning industry.

29 — See judgments in *Schumalla* (97/78, EU:C:1978:211, paragraph 6) and *Spain and Finland* v *Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497, paragraph 40).

30 — See, inter alia, Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures (OJ 1999 L 187, p. 42) and Directive 2002/15/EC of the European Parliament and of the Council of 11 March 2002 on the organisation of the working time of persons performing mobile road transport activities (JO L 80, p. 35).

31 — See the Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the European Economic and Social Committee — Green paper on territorial cohesion: turning territorial diversity into strength (COM(2008) 616 final).

32 — Section 1, p. 3.

33 — See, in particular, recitals 2 to 5 in the preamble to the TEN-T regulation.

34 — In its Communication on social cohesion, mentioned above, the Commission stated that '[t]ransport policy has obvious implications for territorial cohesion through its effect on the location of economic activity and the pattern of settlements. It plays a particularly important role in improving connections to and within less developed regions' (point 3.1, p. 10).

80. In its Green Paper on the TEN-T, [35] the Commission explained that 'transport policy aims to promote economically and environmentally efficient, safe and secure transport services within the internal market and beyond'. [36] As for TEN-T policy, it must 'ensure that [transport services] operate to best effect, based on an integrated and innovative infrastructure that keeps pace with technological developments in the energy, infrastructure and [transportation means of all modes] sectors'. [37]

81. In light of the foregoing, the question is therefore whether Article 29 of, and Annex II to the contested regulation are merely instruments whose principal, or indeed exclusive aim is the establishment of the internal market or whether they go beyond that aim and pursue, more specifically, the harmonious development of the Union as a whole.

b) Does the extension of the initial rail freight corridors fall within the scope of Article 170 TFEU et seq?

82. Article 29 of, and Annex II to the contested regulation are an integral part of that regulation. The regulation's objective is to establish a financial instrument designed to finance projects of common interest within the framework of the trans-European networks policy. [38] More specifically, its aim is, according to recital 2 in its preamble, to accelerate investment in the field of trans-European networks and to leverage funding from both the public and the private sectors.

83. To that end, the contested regulation specifies objectives in each of the areas covered. For example, in the field of transport, it states, in Article 4(2), that the financial mechanism set up is to support projects of common interest to remove bottlenecks, enhance rail interoperability, bridge missing links and, in particular, improve cross-border sections. The regulation also establishes a budget for a fixed period [39] and defines the various forms of financial assistance and the financial provisions required for their implementation. [40]

84. Article 29 of the contested regulation appears under the last title of the regulation, which sets out general and final provisions. Recital 16 in the preamble to the regulation alone is of assistance in understanding the reason for which the EU legislature inserted Article 29 into the contested regulation. It states that '[t]he geographical alignment of rail freight corridors as provided for by [the regulation on rail freight] and of core network corridors under Part I of Annex I to [the contested regulation] should, where appropriate, be ensured, taking into consideration the objectives of the respective instruments, in order to reduce the administrative burden and streamline the development and use of the railway infrastructure'.

85. The purpose of Article 29 of, and Annex II to the contested regulation is therefore to modify the initial rail freight corridors so as to make them match the pre-defined core network corridors in the transport sector, as provided for in Part I of Annex I to that regulation.

86. However, that finding alone does not settle the question of whether or not the provisions at issue fall within the scope of Article 170 TFEU. Since those provisions are designed to amend the initial version of the regulation on rail freight, it is necessary to focus on the aim and content of that regulation in order to determine whether the extension of the initial rail freight corridors, brought about by Article 29 of, and Annex II to the contested regulation, should have been adopted in accordance with Article 172 TFEU.

35 — TEN-T: A policy review — Towards a better integrated transeuropean transport network at the service of the common transport policy (COM(2009) 44 final).

36 — Section 1, p. 3.

37 — Ibidem.

38 — See Articles 1 and 3 of the regulation.

39 — See Article 5 of the contested regulation.

40 — See Chapters II to V of the regulation.

87. While the title of the regulation on rail freight suggests that the regulation's sole or principal objective is to improve the internal rail market, a closer examination of its provisions reveals that, in fact, it goes beyond mere harmonisation of market conditions within the Union in the rail sector.

88. I would observe, first of all, that recital 3 in the preamble to the regulation states that, '[i]n order to be competitive with other modes of transport, international and national rail freight services ... must be able to benefit from a good quality and sufficiently financed railway infrastructure, namely, one which allows freight transport services to be provided under good conditions in terms of commercial speed and journey times and to be reliable'. In order, specifically, to optimise the use of the network and ensure its reliability, the regulation on rail freight introduces 'additional procedures to strengthen cooperation on allocation of international train paths for freight trains between infrastructure managers'. [41]

89. Recital 5 in the preamble to the regulation places emphasis on the required interoperability of national infrastructures. Accordingly, it states that 'the establishment of international rail corridors for a European rail network for competitive freight on which freight trains can run under good conditions and easily pass from one national network to another would allow for improvements in the conditions of use of the infrastructure'. Recital 9 also highlights the need for and importance of interconnection between existing railway infrastructures when rail freight corridors are being developed.

90. Article 1 of the regulation on rail freight states that its purpose is to lay down 'rules for the establishment and organisation of international rail corridors for competitive rail freight with a view to the development of a European rail network for competitive freight'. To that end, it sets out 'rules for the selection, organisation, management and the indicative investment planning of freight corridors'.

91. Accordingly, a number of initial rail freight corridors were designated by the Member States; they are set out in the annex to the regulation. [42] Among them is initial rail freight corridor No 2, which, after being modified by the contested regulation, became the 'North Sea — Mediterranean' corridor. Further rail freight corridors may subsequently be selected and modified in accordance with the procedure laid down in Articles 4 to 6 of the regulation on rail freight.

92. Article 8 of the regulation on rail freight provides for the creation, for each freight corridor, of an executive board, to be established by the Member States concerned, and for a management board, to be established by the infrastructure managers concerned. These boards are responsible for ensuring that the freight corridor in question is developed in accordance with an implementation plan drawn up by the management board, in accordance with Article 9 of the regulation.

93. Under Article 11 of the regulation on rail freight, the management board must also draw up and periodically review an investment plan for the infrastructure in the rail freight corridor and submit it to the executive board for approval. The investment plan must include, in particular, the list of the projects foreseen for the extension, renewal or redeployment of railway infrastructure and its equipment along the freight corridor and a deployment plan relating to the interoperable systems along the rail freight corridor. [43]

41 — See recital 4 in the preamble to the regulation.

42 — See Article 3 of the regulation on rail freight.

43 — See Article 11(1)(a) and (b) of the regulation.

94. In addition, under Article 13 of the regulation, the management board responsible for the freight corridor must put in place a 'one-stop shop' allowing economic operators to submit, in a single place, requests for train paths [44] for journeys crossing a number of Member States.

95. The creation of international pre-arranged train paths is the responsibility of the various infrastructure managers concerned, which must take into account market needs, after capacity needs have been evaluated. [45]

96. The purpose of the regulation on rail freight is thus to create and develop, in a coherent, coordinated fashion, rail freight corridors in which all operators in the relevant sector participate or are consulted.

97. Article 2(2)(a) of the regulation on rail freight defines a freight corridor as meaning 'all designated railway lines, including railway ferry lines, on the territory of or between Member States, and, where appropriate, European third countries, linking two or more terminals, along a principal route and, where appropriate, diversionary routes and sections connecting them, including the railway infrastructure and its equipment and relevant rail services in accordance with Article 5 of Directive 2001/14'.

98. The decision to develop the European rail network by establishing freight corridors is significant. The concept of a corridor suggests the taking into account of a multitude of criteria and characteristics that need to be considered in order for the harmonious development of a territory to be possible. A corridor has been defined, for example, as an 'area the extent of which depends on the criteria used: geographic conditions, population density, cultural criteria, spheres of influence, institutional structures, political divisions, etc.'. [46] This term 'corridor' helps us to 'identify transport routes ..., to describe the process of overcoming the isolation of remote areas ..., to justify access to resources ..., to express a network of interdependent urban cross-roads characterised by heavy traffic, important connections and significant flows ... or even to describe routes on different geographical scales'. [47]

99. I do not dispute the fact that, through the creation of rail freight corridors, the regulation on rail freight is designed to improve the functioning of the internal market in the rail transport sector. Indeed, all EU legislation in this sector — which has been in decline since the Second World War — has been enacted with the aim of revitalising the sector, which has lagged behind road, sea and air transport.

100. However, having analysed the content of this regulation I come to the view that it does have the aim of providing a balanced, harmonised service throughout the European Union, one that takes into account the specific needs, both economic and social, of the relevant actors. [48] Article 4 of the regulation is particularly illuminating in this regard. It requires a number of criteria to be taken into account when further freight corridors are established. When further freight corridors are selected, account must be taken, inter alia, of the crossing by the freight corridor of the territory of at least three Member States, or of two Member States if the distance between the terminals served is greater

44 — A train path is where a certain number of trains, travelling at similar speeds and in swift succession between two places over a given period, can be accommodated. In other words, it represents the capacity to allocate infrastructure to trains travelling between two points on the rail network.

45 — See Article 14 of the regulation on rail freight.

46 — See Debrie, J., and Comtois, C., 'Une relecture du concept de corridors de transport: illustration comparée Europe/Amérique du Nord' in *Les Cahiers Scientifiques du Transport*, No 58/2010, p. 127, especially section 2.1.1, p. 128.

47 — Ibidem.

48 — The Commission's idea, in its proposal for a Regulation of the European Parliament and of the Council concerning a European rail network for competitive freight (COM(2008) 852 final) was to 'create a transport system for the benefit of [Union] citizens and undertakings [in the European Union] which is the cleanest and most efficient possible' (section 1.1).

than 500 km, of the consistency of the freight corridor in question with the TEN-T, the ERTMS corridors and/or the corridors defined by RNE, of the integration of TEN-T priority projects [49] into the freight corridor, and of the balance between the socio-economic costs and benefits resulting from the establishment of the freight corridor. [50]

101. To my mind, the regulation on rail freight is therefore responsive to the dual objective pursued by trans-European network policy, as referred to in Article 170 TFEU, that is to say, to establish or ensure the functioning of the internal market (Article 26 TFEU) and promote the overall harmonious development of the Union by strengthening economic, social and territorial cohesion (Article 174 TFEU).

102. Moreover, it appears that the EU legislature itself had it in mind that the creation of rail freight corridors was part of the development of the TEN-T. In the preparatory work leading to the adoption of the regulation, we read that a freight corridor is meant to allow international and national rail freight services to be operated on the territory of at least two Member States and that it has the characteristic of being part of the TEN-T. [51]

103. One of the arguments put forward by the Parliament, the Council and the Commission is that the regulation on rail freight cannot fall within the scope of Article 170 TFEU et seq. because that would require the measure in question to have the aim of creating new railway infrastructure.

104. I cannot share that view.

105. First of all, there is nothing in the regulation to support the conclusion that the establishment of rail freight corridors, or the implementation of measures to promote their efficient management and use, does not require the creation of physical infrastructure. In my view, creating such infrastructure may be necessary in order to achieve interoperability between infrastructures in the Member States, which, it should be remembered, is an objective of the establishment of these corridors, [52] inasmuch as interoperability is defined as 'the ability, including all the regulatory, technical and operational conditions, of the infrastructure in a transport mode to allow safe and uninterrupted traffic flows which achieve the required levels of performance for that infrastructure or mode'. [53]

106. Next, there is nothing in the wording of Articles 170 TFEU or 171 TFEU to suggest that the creation of new physical infrastructure is a necessary condition.

107. Article 170(1) TFEU provides that the Union is to contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. Setting up the trans-European networks does not necessarily entail the creation of new infrastructure; it may draw, in part, on national infrastructure that already exists. That is confirmed by recitals 7 and 8 in the preamble to the TEN-T regulation, which state, respectively, that '[t]he [TEN-T] consists to a large extent of existing infrastructure' and that it 'should be developed through the creation of new transport infrastructure, *through the rehabilitation and upgrading of existing infrastructure* and through measures promoting its resource-efficient use'. [54]

49 — The concept of 'priority project', used in Article 4(c) of the regulation on rail freight, has been replaced in accordance with Article 58(2) of the TEN-T regulation, which provides that '[r]eferences to priority projects as listed in Annex III to Decision No 661/2010/EU [of the European Parliament and of the Council of 7 July 2010 on Union guidelines for the development of the trans-European transport network (OJ 2010 L 204, p. 1)] shall be construed as references to the core network as defined in this regulation'.

50 — See Article 4(a) to (d) of the regulation.

51 — See the proposal for a regulation of the European Parliament and of the Council mentioned in footnote 48 (p. 13), Parliament documents A7-0162/2010 (p. 47) and P6_TA(2009)0285 (p. 7) and Council document 11069/5/09 REV 5 ADD 1.

52 — See recital 5 in the preamble to the regulation.

53 — See Article 3(o) of the TEN-T regulation.

54 — Emphasis added.

108. Moreover, in accordance with Article 170(2) TFEU, action on the Union's part must aim at promoting the interconnection and interoperability of national networks as well as access to such networks. That, in my view, is clearly a reference to existing national networks, which must be interconnected one with the other and rendered interoperable.

109. Lastly, the second indent of Article 171(1) TFEU refers to actions that are clearly oriented towards the interoperability of the networks, with particular emphasis on technical standardisation. Such actions do not necessarily require the creation of new infrastructure. Furthermore, rail interoperability is one of the goals pursued by the EU guidelines laid down in the TEN-T regulation. As early as recital 2 in the preamble to that regulation, we read that 'railway interoperability could be enhanced by innovative solutions aimed at improving compatibility between systems, such as on-board equipment and multi-gauge tracks'. While multi-gauge tracks would undoubtedly require work to be carried out on the tracks, and thus on the railway infrastructure itself, that is not the case with on-board equipment. Moreover, recital 5 states that '[t]he White Paper [[55]] calls for the deployment of transport-related information and communication technology to ensure improved and integrated traffic management and to simplify administrative procedures through improved freight logistics, cargo tracking and tracing, and optimised schedules and traffic flows. As *such measures promote the efficient management and use of transport infrastructure, they should fall within the scope of this regulation*'. [56]

110. Accordingly, Article 2(1) of the TEN-T regulation stipulates that the TEN-T comprises transport infrastructure and telematic applications as well as measures promoting the efficient management and use of such infrastructure and permitting the establishment and operation of sustainable and efficient transport services. It is therefore clear that measures which do not entail the creation of new physical infrastructure, in the sense of new railway lines, nevertheless fall within the scope of this regulation devoted to the TEN-T.

111. If it were necessary for an EU measure to provide for the creation of new infrastructure in order for it to fall within the scope of Article 170 TFEU, that would, I believe, considerably restrict the opportunities for adopting such measures, not only in the transport sector but also in the telecommunications and energy sectors, which are also covered by trans-European networks. The trans-European networks, whether they relate to transport, telecommunications or energy, are more than just physical infrastructure; they embrace all measures capable of furthering the objectives of Article 170 TFEU.

112. In light of all the foregoing considerations, I am of the opinion that the extension of the initial rail freight corridors, as provided for by Article 29 of, and Annex II to the contested regulation, falls within the scope of Article 170 TFEU relating to the trans-European networks.

113. Consequently, the first plea, alleging that the wrong legal basis was chosen for the extension of initial rail freight corridor No 2 is well founded.

114. It now remains to be determined whether the EU legislature should have obtained the United Kingdom's approval for that extension, in accordance with the second paragraph of Article 172 TFEU.

55 — Commission White Paper entitled 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (COM(2011) 144 final/2).

56 — Emphasis added.

B – *The second plea in law, alleging infringement of the second paragraph of Article 172 TFEU in that the requirement for the consent of the Member State concerned was not observed*

115. By its second plea in law, the United Kingdom submits that the extension of initial rail freight corridor No 2 was adopted in breach of the second paragraph of Article 172 TFEU, which provides that '[g]uidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned'.

1. Arguments of the parties

116. The United Kingdom puts forward two arguments in support of its second plea in law, namely that the extension of initial rail freight corridor No 2 is a project of common interest and that it relates to the United Kingdom.

a) The extension of initial rail freight corridor No 2 is a project of common interest

117. The United Kingdom submits that the modifications brought about by Article 29 of, and Annex II to the contested regulation are 'projects of common interest' within the meaning of the second paragraph of Article 172 TFEU. Those modifications, extending initial rail freight corridor No 2, were decided upon within the framework of the guidelines established under TEN-T policy. In particular, recital 46 in the preamble to the TEN-T regulation and recital 16 in the preamble to the contested regulation, which state that the core network corridors must be aligned with the rail freight corridors established in accordance with the regulation on rail freight, express the need for that extension. Moreover, the United Kingdom notes that the extension was brought about by the contested regulation, which was adopted on the basis of Article 172 TFEU.

118. Furthermore, the United Kingdom maintains that the extension clearly falls within the definition of projects of common interest given in Article 7(1) of the TEN-T regulation.

119. The United Kingdom also states that the comprehensive network, the core network and the corridors which make up the core network, and the initial rail freight corridors are closely connected. I understand the United Kingdom's position to be that, under Article 9(1)(d) of the TEN-T regulation, the comprehensive network constitutes the basis for the identification of projects of common interest; the core network consists of those parts of the comprehensive network which are of the highest strategic importance for achieving the objectives of TEN-T policy, in accordance with Article 38(1) of the regulation; the core network, moreover, consists of the corridors which cover the most important long distance flows in the core network and are intended, in particular, to improve cross border links within the Union.[57] The extensions to the initial rail freight corridors, which result in their alignment with the core network corridors, further the objectives of TEN-T policy and can, therefore, be identified as projects of common interest, since, in reality, they form part of the comprehensive network.

120. The United Kingdom also states that Article 7(1) of the TEN-T regulation, which itself contains guidelines covering the objectives of trans-European network policy, within the meaning of Article 171(1) TFEU, describes a project of common interest as contributing to the development of the TEN-T, inter alia, through measures promoting the resource-efficient use of the network. That is precisely what the amendments to the list of initial rail freight corridors seek to bring about, inasmuch as, according to recital 16 in the preamble to the contested regulation, the alignment of the core network corridors and the rail freight corridors is intended 'to reduce the administrative burden and streamline the development and use of railway infrastructure'.

57 — Article 43(1) of the TEN-T regulation.

121. The United Kingdom adds that, in any event, the initial rail freight corridors, as established by the regulation on rail freight, are themselves projects of common interest, since they constitute fundamental aspects of the TEN-T. The regulation on rail freight is not focussed on the creation of an internal rail market; according to recitals 5 and 10 in its preamble, its concern is to implement an international rail network on which trains can run under good conditions and can easily pass from one network to another. Article 4(b) and (c) of the regulation clearly show that the regulation was intended to ensure that the rail freight corridors were consistent with the TEN-T and to ensure that the integration of core network projects into the rail freight corridors was taken into account.

122. In addition, the United Kingdom submits that the concept of 'projects of common interest' should not be interpreted restrictively and that it does not only include projects to create infrastructure. It cites in this connection Article 3(a) of the TEN-T regulation, which defines projects of common interest as any project carried out pursuant to the requirements and in compliance with the provisions of that regulation, and Article 7(1) of the regulation, which, it submits, merely refers to the creation of new transport infrastructure as one of the ways in which projects of common interest are to contribute to the development of the TEN-T.

123. The United Kingdom therefore believes that the extension of initial rail freight corridor No 2 provided for by Article 29 of, and Annex II to the contested regulation is therefore a 'project of common interest' within the meaning of Article 171 TFEU. It is sufficient, in this respect, that the extension was identified within the framework of the guidelines established under the TEN-T regulation and the contested regulation, that it was adopted under the contested regulation, the purpose of which is to enable projects of common interest to be prepared and financed within the framework of trans-European network policy and that it clearly falls within the definition of projects of common interest given in Article 7(1) of the TEN-T regulation.

124. For the Parliament, the initial rail freight corridors cannot be 'projects' within the meaning of the second paragraph of Article 172 TFEU. The mere fact of enabling a single reply to be given regarding their use, via the 'one-stop shop', is no more than a reasonable follow-on from the existence of the infrastructure. The sole objective of the initial rail freight corridors is to facilitate the use of the railway lines in order to improve the efficiency of rail freight transport.

125. The Parliament argues that, given the wording of Article 7(4) of the TEN-T regulation, the link between projects of common interest and infrastructure is self-evident. It states that Article 7(4) requires the Member States to ensure that projects of common interest are carried out in compliance with relevant Union and national law, in particular with Union legal acts on the environment, climate protection, safety, security, competition, State aid, public procurement, public health and accessibility. The Parliament therefore fails to understand why and in what way the creation of a coordination board or of a 'one-stop shop' could be comparable to something necessitating such requirements.

126. The Parliament argues, in order to distinguish between the initial rail freight corridors and the core network corridors, that the latter, according to recitals 42 to 44 in the preamble to the TEN-T regulation, are a different concept from the former. Referring to the wording of those recitals, the Parliament states that a corridor approach to the core network could be used as an instrument to coordinate different projects on a transnational basis and that the core network corridors should help to develop the infrastructure of the core network. It goes on to state that their specific object and nature lead to the need to identify the sources of financing, both private and public, for complex cross-border projects for each core network corridor.

127. The Council, for its part, points to the fact that the regulation on rail freight was adopted on the basis of Article 91 TFEU and that it does not contain any guidelines relating to the trans-European networks or any definition of projects of common interest. It therefore falls entirely within the scope of the common transport policy.

128. The Council too submits that it is clear from reading the TEN-T regulation that projects of common interest are projects which have the effect of creating new transport infrastructure or of rehabilitating and upgrading existing infrastructure.

129. The Council also states that it is not sufficient for a measure to fulfil just one of the requirements of Article 7 of the TEN-T regulation in order for it to fall within the definition of a project of common interest, as the United Kingdom suggests. It states that the United Kingdom has not demonstrated that the extension of initial rail freight corridor No 2 complies with Chapters II and III of the TEN-T regulation, which concern the requirements for the comprehensive network and the core network respectively, as provided for in Article 7(2)(b) of the regulation.

130. For the Commission, the creation, the alignment and the replacement of the list of initial rail freight corridors do not fall within the scope of the guidelines laid down in Article 171(1) TFEU and they cannot, therefore, be regarded as projects of common interest.

131. The Commission also submits that the *raison d'être* of the requirement for the approval of the Member State concerned by a project of common interest, as recorded in the second paragraph of Article 172 TFEU, can only be that any measure producing effects in a Member State requires the approval of that Member State.

b) The extension of initial rail freight corridor No 2 relates to the territory of the United Kingdom

132. For the United Kingdom, extensions of the initial rail freight corridors clearly relate to the territory of a Member State, within the meaning of the second paragraph of Article 172 TFEU. According to the United Kingdom, the approval of the Member State concerned of the guidelines and projects of common interest referred to in Article 171 TFEU is necessary because they affect the interests of the Member State. That is the case in this instance, with the creation of the extension to one of the initial rail freight corridors.

133. The United Kingdom states that, once a corridor is established, a series of obligations under the rail freight regulation arises for the Member State concerned. In particular, Article 14 of that regulation requires that pre-arranged train paths be reserved for freight trains via the 'one-stop shop' established under Article 13 of the regulation. That has a clear effect on the infrastructure capacity of the Member State concerned. In addition, the fact that the procedure under the regulation on rail freight for the selection of further freight corridors factors must, in accordance with Article 5(3) of the regulation, take into account whether the establishment of a corridor would impose a disproportionate burden on the Member State and the fact that a Member State is not obliged, in accordance with Article 5(4) of the regulation, to participate if it has a track gauge which is different from that of the main railway network in the Union prove that the establishment of a rail freight corridor has very real and significant effects on the Member State in question.

134. The United Kingdom's position is that, in order for a project of common interest to relate to the territory of a Member State, within the meaning of the second paragraph of Article 172 TFEU, it need not necessarily entail the creation of new infrastructure. That is demonstrated by the fact that the core network corridors, which, according to Article 42(1) of the TEN-T regulation, are an instrument to facilitate the coordinated implementation of the core network, do not in themselves require the creation of new infrastructure and yet that does not preclude them from being projects of common interest which relate to the territory of a Member State, within the meaning of the second paragraph of Article 172 TFEU.

135. For the Parliament, the situation where guidelines or projects of common interest relate to the territory of a Member State, within the meaning of that provision, can arise only where an infrastructure project has a direct link with its territory. Any broader interpretation of that concept would mean that the approval of every Member State would be required for any measure to improve the operation of the trans-European networks, since any measure of that nature is, by definition, intended to apply in the territory of the Member States. The Parliament and the Council cite the judgment in *Spain* v *Council*,[58] in which, with regard to Article 192(2)(b) TFEU, which provides for an exceptional voting procedure for measures relating to town and country planning and affecting land in environmental matters, the Court held that measures which do not regulate the performance of specific infrastructure projects are of a general nature and therefore do not trigger the exceptional procedure. That applies equally to 'measures which ... although imposing certain limits on the way in which land may be used in the Member States, do not regulate the use to which the Member States plan to put their land'.[59]

136. The Parliament draws a parallel with the initial rail freight corridors and states that, in this case, not even such an indirect link to the territory can exist, since nothing can be seen as imposing any limit on the use of the land, the sole purpose of these corridors being coordination among infrastructure managers and the establishment of a 'one-stop shop', so as to achieve competitive freight.

137. The Parliament also submits that the initial rail freight corridors cannot affect the territory of the United Kingdom since the loss of control over capacity allocation, to which that Member State refers, is a purely operational consideration. The fact that infrastructure managers will have to consult with others on the allocation of train paths does not affect the territory of any Member State.

138. The Council, for its part, considers that a relationship to the territory of a Member State exists only where the relevant infrastructure project has a direct connection with the territory of a Member State, that is to say, where it affects the Member State's autonomy in planning its territory in a concrete manner. That is not the case with the initial rail freight corridors, which cannot lead to any work projects in the same way as core network corridors.

139. The requirement relating to infrastructure flows directly from Article 170 TFEU and it is essential to the establishment of the trans-European networks. According to the Council, the second paragraph of Article 172 TFEU, which determines the decision-making procedure, must be interpreted narrowly.

2. Assessment

140. The first paragraph of Article 172 TFEU contemplates a co-decision procedure, after consultation of the Economic and Social Committee and the Committee of the Regions. However, if the act which is the subject of the procedure concerns guidelines or projects of common interest which relate to the territory of a Member State, the approval of the Member State concerned is required.

141. The second plea in law therefore leads me to examine, first, whether the extension of initial rail freight corridor No 2 is a 'project of common interest' within the meaning of the second paragraph of Article 172 TFEU and, secondly, whether it relates to the territory of the United Kingdom, within the meaning of that provision.

58 — C-36/98, EU:C:2001:64.

59 — Paragraph 53.

a) Is the extension of an initial rail freight corridor a 'project of common interest'?

142. The TEN-T regulation, which, as I have mentioned, establishes guidelines for the development of the TEN-T, identifies projects of common interest.[60] It is these projects of common interest that contribute to the creation of the TEN-T. They also correspond to the priorities established in the guidelines,[61] in particular, the general priorities set in Article 10 of the TEN-T regulation and, of relevance to the present case, the priorities for railway infrastructure development listed in Article 13 of the regulation.

143. In order to be classified as a project of common interest, a project must fit the framework defined by the TEN-T regulation. Article 3(a) of the regulation defines projects of common interest as 'any project carried out pursuant to the requirements and in compliance with the provisions of [that] regulation'.

144. Article 7 of the TEN-T regulation sets out a number of additional aspects which further define this concept. Paragraph 1 states that '[p]rojects of common interest shall contribute to the development of the [TEN-T] through the creation of new transport infrastructure, through the rehabilitation and upgrading of the existing transport infrastructure and through measures promoting the resource-efficient use of the network'.

145. In addition, Article 7(2) of the regulation states that a project of common interest must further the objectives falling within at least two of the four categories set out in Article 4 of the regulation, comply with Chapter II of the regulation relating to the comprehensive network and also with Chapter III if it concerns the core network, be economically viable on the basis of a socio-economic cost-benefit analysis and offer European added value. The four categories listed in Article 4 of the TEN-T regulation are cohesion, efficiency, sustainability and increasing benefits for users.

146. It is therefore in light of all those factors that I must consider whether initial rail freight corridor No 2 may be classified as a project of common interest, within the meaning of the second paragraph of Article 172 TFEU.

147. As regards Article 7(1) of the TEN-T regulation, the Parliament, Council and Commission read that provision too narrowly, in my opinion. In substance, they take the view that a project of common interest necessarily entails the construction or development of railway infrastructure, which is not the case with the initial rail freight corridors.

148. However, as explained in points 105 to 111 of this Opinion, the establishment and development of the trans-European networks is not confined to the creation of new infrastructure. The same therefore applies to projects of common interest, since it is these projects of common interest that contribute to the creation of the TEN-T.

149. The wording of Article 7(1) of the TEN-T regulation supports that conclusion, inasmuch as, in addition to mentioning the creation of new infrastructure, it also states that projects of common interest contribute to the development of the TEN-T through measures promoting the resource-efficient use of the network. Moreover, that wording is entirely consistent with Article 2(1) of the regulation, which states that the TEN-T comprises transport infrastructure and telematic applications as well as 'measures promoting the efficient management and use of such infrastructure and permitting the establishment and operation of sustainable and efficient transport services'. Measures of that kind include, for example, those listed in Article 32 of the regulation, which provides that the Member States must pay particular attention to projects of common interest which both

60 — See Article 1(1) and (2) of the regulation.

61 — See recital 20 in the preamble to the regulation.

provide efficient freight transport services that use the infrastructure of the comprehensive network and contribute to reducing carbon dioxide emissions and other negative environmental impacts, and which aim, inter alia, to improve sustainable use of transport infrastructure, including its efficient management, to facilitate multimodal transport service operations, including the necessary accompanying information flows, and improve cooperation between transport service providers, or to analyse and provide information on fleet characteristics and performance, administrative requirements and human resources.

150. Clearly, the notion of 'projects of common interest' is not confined to projects that entail the construction or adaptation of infrastructure. It goes far beyond that and includes, in particular, measures to facilitate the coordinated, coherent management and use of infrastructure, which is the very objective of the initial rail freight corridors. That is a common sense approach inasmuch as, in order for the TEN-T to operate optimally, the construction or physical improvement of infrastructure is certainly not in itself sufficient; it must necessarily be accompanied by efficient management and use.

151. Furthermore, there can, I think, be no doubt that the establishment of further rail freight corridors, such as the extension to initial rail freight corridor No 2, is responsive to the objectives referred to in Article 4 of the TEN-T regulation, in particular the objectives of cohesion and efficiency.

152. Indeed, as I have mentioned, the creation of these corridors is intended to strengthen economic, social and territorial cohesion within the European Union, with a particular focus of interoperability and interconnection.[62] The development of rail freight corridors also pursues the objective of enabling freight transport services to be provided under good conditions and to be reliable.[63] That objective is much the same as the objective referred to in Article 4(d) of the TEN-T regulation, which is to increase benefits for users.

153. Moreover, in accordance with Article 4 of the regulation on rail freight, account must be taken of a number of criteria when further freight corridors are selected or modified. In particular, Article 4(b) provides that, in their selection, account must be taken of the consistency of the freight corridor with the TEN-T, with the ERTMS corridors and/or with the corridors defined by RNE. Article 4(c) states that, in the selection of further freight corridors, account must also be taken of the integration of TEN-T priority projects into the freight corridors. It seems to me, therefore, that further freight corridors must necessarily satisfy the requirements of Chapter II of the TEN-T regulation, relating to the comprehensive network, and those of Chapter III of the regulation, relating to the core network.[64]

154. In addition, when further freight corridors are selected, a socio-economic analysis must be provided, one that highlights the balance between the anticipated costs and benefits of the creation of the corridor.[65]

155. Lastly, as regards the European added value which projects of common interest must offer,[66] that is defined as the 'value of a project which, in addition to the potential value for the respective Member State alone, leads to a significant improvement of either transport connections or transport flows between the Member States which can be demonstrated by reference to improvements in efficiency, sustainability, competitiveness or cohesion, in line with the objectives set out in Article 4 [of the

62 — See recitals 5, 9 and 11 in the preamble to the regulation on rail freight.

63 — See recitals 3 and 4 in the preamble to the regulation.

64 — In accordance with Article 38 of the TEN-T regulation, the core network consists of the parts of the comprehensive network which are of the highest strategic importance. Therefore, the core network must necessarily be developed in accordance with the requirements applicable to the comprehensive network.

65 — See Article 4(d) of the regulation on rail freight.

66 — Article 7(2)(d) of the TEN-T regulation.

TEN-T regulation]'.[67] Given the criteria defined in Article 4 of the regulation on rail freight and the *raison d'être* of freight corridors, as explained in points 97 and 98 of this Opinion, I believe that further freight corridors, such as the extension to initial freight corridor No 2, are most certainly intended to bring about such improvements.

156. Consequently, in light of the foregoing, I am of the opinion that extensions of the initial freight corridors must be regarded as 'projects of common interest' within the meaning of the second paragraph of Article 172 TFEU.

b) Do extensions of initial rail freight corridors relate to the territory of a Member State?

157. The second paragraph of Article 172 TFEU provides that guidelines and projects of common interest which relate to the territory of a Member State require the approval of that Member State.

158. In my view, the decision to establish a right of veto for the Member State concerned may be explained by the fact that trans-European network policy includes territorial aspects and thus in some way touches upon town and country planning, which is an area that traditionally falls within the sovereignty of the Member States.

159. As I explained in points 132 to 139 of this Opinion, the parties are not in agreement on the interpretation to be given to the words 'relate to the territory of a Member State' which appear in the second paragraph of Article 172 TFEU.

160. In my view, the terms used in that provision are clear and require no interpretation. Once a project that may be classified as being 'of common interest' relates to the territory of a Member State, the Member State's approval is required in order for the project to be implemented. Indeed, a project of common interest, as we have seen in the preceding points, entails a whole series of measures for the Member State concerned, which will necessarily have an impact on its territory.

161. The use, by those drafting the FEU Treaty, of the plain words 'relate to the territory of a Member State' necessitates no interpretation. The words must simply be given their true meaning.

162. In the present, the extension of initial rail freight corridor No 2, which is the subject of this action, concerns a section between London and Glasgow. It is therefore undeniable that this project of common interest relates to the territory of the United Kingdom, within the meaning of the second paragraph of Article 172 TFEU. Consequently, this project of common interest required the approval of that Member State, and in this case it was not obtained.

163. In light of all the foregoing, I am of the opinion that the second plea in law put forward by the United Kingdom, by which it alleges a failure to observe the requirement for approval under the second paragraph of Article 172 TFEU, is well founded.

C – *Final remarks*

164. It seems to me appropriate to make clear that a different analysis of this case would in any event still lead me to the same conclusion.

67 — See Article 3(d) of the regulation.

165. Indeed, if it were to be accepted that the extension of initial rail freight corridor No 2 had been adopted on the correct legal basis, that is to say, Article 91 TFEU, in which case the approval of the Member State concerned by the extension would not be required at all, Article 29 of, and Annex II to the contested regulation would still have to be annulled.

166. I would reiterate that the regulation on rail freight lays down a very particular procedure for the selection and modification of further rail freight corridors. In particular, Article 5(3) of the regulation states that, 'where a Member State considers, after having provided a socio-economic analysis, that the establishment of a freight corridor would not be in the interest of the applicants likely to use the freight corridor or would not bring significant socio-economic benefits or would cause a disproportionate burden, the Member State concerned shall not be obliged to participate as referred to in paragraphs 1 and 2 of this Article, subject to a decision of the Commission acting in accordance with the advisory procedure referred to in Article 21(2)'. In addition, Article 5(5) of the regulation states that '[t]he establishment of a freight corridor shall be proposed by the Member States concerned'. It is therefore at the instigation of the Member States concerned that a freight corridor may be established.

167. In this case, the United Kingdom has initiated a procedure, in accordance with those provisions, concerning the extension of initial rail freight corridor No 2 as far as London. [68]

168. However, the United Kingdom has made no proposal concerning the corridor's extension as far as Glasgow, nor has there been any socio-economic analysis to demonstrate the benefits of such an extension. The United Kingdom considers that the extension at issue should have been subject to the procedures provided for in the regulation on rail freight. [69] I understand the Council's position to be that it was not necessary to follow the procedure specially provided for in Article 5 of the regulation on rail freight. [70] For its part, the Commission submits that it matters little, in the circumstances of this case, whether or not there is a special procedure for the modification of the initial rail freight corridors. [71]

169. It is appropriate to recall in this connection that, in the procedure leading to the adoption of the contested regulation, the Federal Republic of Germany and the Republic of Latvia voiced their concerns regarding the failure to follow the procedure laid down in the regulation on rail freight for the modification of the initial rail freight corridors. [72]

170. It is plain that Article 29 of, and Annex II to the contested regulation, which are intended to modify initial rail freight corridor No 2, were adopted without following the procedure laid down in Article 5 of the regulation on rail freight.

171. The failure to follow that procedure must necessarily lead to the annulment of Article 29 of, and Annex II to the contested regulation, since it indisputably constitutes an infringement of essential procedural requirements, within the meaning of the second paragraph of Article 263 TFEU. Indeed, the error in the choice of decision-making procedure deprived the United Kingdom of its right to exert an influence over the actual content of those provisions.

68 — See paragraph 23 et seq. of the United Kingdom's application and paragraph 33 of the Council's defence.

69 — See paragraph 12 of the United Kingdom's observations on the Commission's statement in intervention.

70 — See paragraph 42 of the Council's defence.

71 — See paragraph 39 of the Commission's statement in intervention.

72 — See Council document 16096/13 ADD 2.

VI – **Conclusion**

172. In the light of all the foregoing considerations, I propose that the Court should:

(1) annul Article 29 of, and Annex II to Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010;

(2) order the European Parliament and the Council of the European Union to pay the costs, and order the European Commission to bear its own costs.