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2018/0408 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be taken on behalf of the European Union
in the Regional Steering Committee of the Transport Community
as regards certain budgetary and personnel matters in relation to the implementation of
the Treaty establishing the Transport Community**

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on behalf of the European Union in the Regional Steering Committee set up under the Treaty establishing the Transport Community ('the TCT') as regards the envisaged decisions on certain budgetary and personnel matters in relation to the implementation of the TCT, relevant to the initiation of the work by the Permanent Secretariat of the Transport Community.

2. CONTEXT OF THE PROPOSAL

2.1 The Treaty establishing the Transport Community

Following signature, the TCT is applied provisionally in accordance with Article 41(3) thereof. By 25 October 2018, Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo* (hereinafter referred to as Kosovo) Montenegro and Serbia had ratified the TCT. For the Union, provisional application is provided by the Council Decision on the signing, on behalf of the European Union, and provisional application of the Treaty establishing the Transport Community¹.

The European Union is a party to the TCT.

2.2 The Regional Steering Committee

The Regional Steering Committee is established by Article 24 of the TCT to be responsible for the administration of the TCT and to ensure its proper implementation. For this purpose, it shall make recommendations and take decisions in the cases provided for in the TCT. Notably, the Regional Steering Committee:

- (a) prepares the work of the Ministerial Council,
- (b) decides on the establishment of technical committees,
- (c) makes recommendations and takes decisions in accordance with the TCT,
- (d) as regards newly adopted EU acts, takes appropriate action, notably through the revision of Annex I to the TCT,
- (e) appoints the Director of the Permanent Secretariat after consulting the Ministerial Council,
- (f) may appoint one or more Deputy Directors of the Permanent Secretariat,
- (g) lays down rules of the Permanent Secretariat,
- (h) may review, by way of a decision, the level of budget contributions,
- (i) adopts the annual budget of the TCT,

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 (1999) and the ICJ Opinion on the Kosovo declaration of independence.

¹ OJ L 278, 27.10.2017, p. 1.

(j) adopts a decision specifying the procedure for the implementation of the budget, for presenting and auditing accounts and for inspection,

(k) takes decisions on disputes brought by the Contracting Parties,

(l) adopts general principles in the area of access to documents, in respect of documents held by bodies established by, or under, the TCT,

(m) adopts annual reports to the attention of the Ministerial Council on the implementation of the Comprehensive Network;

(n) in respect of certain Union acts, establishes time limits and ways for the transposition by the South East European Parties.

The Regional Steering Committee consists of one representative and one alternate representative of each Contracting Party. Participation as observer shall be open to all EU Member States. The Regional Steering Committee acts by unanimity.

2.3 The envisaged acts of the Regional Steering Committee

The draft Council decision concerns the adoption of decisions by the Regional Steering Committee on certain budgetary and personnel matters in relation to the implementation of the TCT and relevant to the initiation of the work by the Permanent Secretariat.

The envisaged decisions will become legally binding on the parties under Article 24(1) in combination with Articles 30 and 35 of the TCT.

Budget

The contribution to the budget of the Transport Community is set out in Annex V to the TCT. The share of the Union amounts to 80% of the budget, while the remaining 20% shall be provided by the Western Balkans parties.

The EU has earmarked funding to support the Permanent Secretariat of the Transport Community through two decisions, in 2017, for an amount of **EUR 1.0 M** (Decision C(2017) 5343 final of 27.7.2017, adopting a Multi-country Action Programme for the year 2017) and in 2018, for an amount of **EUR 2.0 M** (Decision C(2018) 5074 final of 31.7.2018, adopting a Multi-country Action Programme for the year 2018). The amount of funding made available by the Union amounts to **EUR 3.0 M**.

In absence of an appointed Director, a budget has been set up for the year 2019, taking into consideration the progressive appointment of the staff of the Permanent Secretariat. The budget should cover the costs of setting up the Permanent Secretariat as well as its running costs. It should be noted that, according to Annex I to the Headquarters Agreement between the Transport Community and Serbia, the host country, Serbia shall provide free of charge the offices, furniture and security of the Permanent Secretariat. In view to cover the costs of recruitment of the Director and Deputy Director as well as certain costs related to the setting up of the Permanent Secretariat, not addressed in the Head Quarters' Agreement with the host country, it is proposed to charge the Commission, on a temporary basis, with the implementation of the budget. The draft decision of the Regional Steering Committee on the budget of the Transport Community covering the year 2019 as well on the empowerment of the Commission as Budgetary Authority is included as Annex I to the draft Council Decision.

Rules on recruitment, working conditions and geographical equilibrium

The Rules on the recruitment, working conditions and geographical equilibrium of the staff of the Permanent Secretariat lay down the basic rules for the recruitment of all staff, including the senior management of the Permanent Secretariat (Director and Deputy Director). They are based on the relevant rules of the Energy Community Secretariat and amended, where necessary, taking into account the experience with the latter and the specificities of the Transport Community.

The draft decision of the Regional Steering Committee on the Rules on recruitment, working conditions and geographical equilibrium is included as Annex II to the draft Council Decision.

Staff Regulations of the Permanent Secretariat

The Staff Regulations have been prepared to ensure that the Secretariat can recruit staff having high standards of competence, efficiency and integrity required by the Transport Community. The Staff Regulations are largely inspired by the Staff Regulations of the Energy Community Secretariat and amended, where necessary, taking into account the experience with the latter and the specificities of the Transport Community.

The draft decision of the Regional Steering Committee on the Staff Regulations of the Secretariat is included as Annex III to the draft Council Decision.

Vacancy notices for the Director and the Deputy Director of the Permanent Secretariat

The Director will be responsible for the implementation of the budget of the TCT and for the proper functioning of the Permanent Secretariat. The Deputy Director will be responsible for financial and personnel matters in relation to the Permanent Secretariat. It is important to ensure that highly qualified and experienced candidates will apply to both posts. The vacancy notices set out the requirements accordingly.

The draft decisions of the Regional Steering Committee on the Vacancy notices for the Director and the Deputy Director of the Secretariat are included as Annex IV and V to the draft Council Decision.

Launching the recruitment of the permanent Director and Deputy Director does not preclude the possibility – if deemed necessary – to propose, in parallel, the appointment of an interim director whose role will be, before the permanent Director takes office, to ensure a smooth transition between SEETO which mandate terminates on 31 December 2018 and the Transport Community and to technically set up the Permanent Secretariat.

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

It is important that the Regional Steering Committee adopts decisions necessary for the implementation of the TCT, in particular those necessary for the initiation of the work by the Permanent Secretariat. As the Union is a party to the TCT, it is necessary to establish a Union position.

In this respect, it shall be recalled that the TCT is one element liable to strengthen regional cooperation within the Western Balkans, as further explained in the Commission's proposal for a Council decision on the signing of the TCT [COM(2017)324 final, sub "General Context"].

4. LEGAL BASIS

4.1 Procedural legal basis

4.1.1 Principles

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

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'².

4.1.2 Application to the present case

The Regional Steering Committee is a body set up by an agreement, namely the TCT.

The acts which the Regional Steering Committee is called upon to adopt constitute acts having legal effects. The Regional Steering Committee is empowered to lay down rules of the Permanent Secretariat in accordance with Article 30 of the TCT and to appoint the Director and one or more Deputy Directors. Moreover, under Article 35 of the TCT, the Regional Steering Committee is empowered to adopt the budget. By their nature, and as a matter of international law governing the Regional Steering Committee, those rules contain elements that affect the legal position of the parties to the TCT and therefore also of the Union. Consequently, they must be considered as having legal effects.

As regards the appointment of the Director and the Deputy Director, the envisaged decision of the Regional Steering Committee so far only concerns the respective vacancy notices. However, those notices equally have legal effects, since they set the criteria to be respected during the appointment procedure.

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

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

4.2 Substantive legal basis

4.2.1 Principles

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

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

² Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.2.2. Application to the present case

The envisaged acts are necessary for the proper functioning of the TCT. In turn, the TCT pursues objectives and has components in the areas of road, rail and inland waterways transport, which are modes covered by Article 91 TFEU as well as in the area of sea transport, a mode covered by Article 100(2) TFEU. Because of its horizontal nature, the envisaged acts pertain to all these elements. All these elements are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Articles 91 and 100(2) TFEU.

4.3 Conclusion

The legal basis of the proposed decision should be Articles 91 and 100(2) TFEU, in conjunction with Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 and Article 100(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Treaty establishing the Transport Community ('the TCT') was signed by the Union in accordance with Council Decision (EU) 2017/1937³.
- (2) In accordance with Article 41(3) of the TCT, the TCT applies provisionally between the Union, the Republic of Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo,* Montenegro and the Republic of Serbia since 9 October 2017.
- (3) The Regional Steering Committee of the Transport Community ('the Steering Committee') is to adopt decisions on certain budgetary and personnel matters in order to ensure that the TCT is implemented.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Steering Committee, as such decisions are necessary to the initiation of the work of the Permanent Secretariat of the Transport Community, and will have legal effects vis-à-vis the Union.
- (5) The intended empowerment of the Commission to provisionally implement the budget of the Transport Community does not alter the the essential characer of the powers conferred on that institution by the Treaties.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the Regional Steering Committee of the Transport Community shall be based on the draft decisions of the Regional Steering Committee attached to this Decision.

³ Council Decision (EU) 2017/1937 of 11 July 2017 on the signing, on behalf of the European Union, and provisional application of the Treaty establishing the Transport Community (OJ L 278, 27.10.2017, p. 1).

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Minor changes to the draft decisions may be agreed to by the representatives of the Union within the Regional Steering Committee without further decision by the Council.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*