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2017/0278 (NLE)

Proposal for a

**COUNCIL DECISION**

**on the position to be taken on behalf of the European Union in the Ministerial Council  
set up under 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 Ministerial Council set up under the Treaty establishing the Transport Community ('the TCT') as regards the envisaged adoption of the decision on the seat of the Permanent Secretariat of the Transport Community ('the Secretariat').

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1 The Treaty establishing the Transport Community**

The English version of the TCT with the Western Balkans parties (Albania, Bosnia and Herzegovina, Kosovo<sup>\*</sup> (hereinafter referred to as Kosovo), the former Yugoslav Republic of Macedonia, Montenegro and Serbia) was signed by all parties except Bosnia and Herzegovina in the framework of the Western Balkans Six summit that took place in Trieste on 12 July 2017, while Bosnia and Herzegovina signed the text on 18 September 2017 in Brussels. The other language versions of the TCT were signed by the parties on 9 October 2017. Following signature, the TCT is applied provisionally in accordance with Article 41(3) thereof. 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 Community<sup>1</sup>.

The European Union is a party to the TCT.

#### **2.2 The Ministerial Council**

The Ministerial Council is established by Article 21 of the TCT, to ensure that the objectives set out therein are attained. Its responsibilities are as follows:

- (a) provide general policy guidelines;
- (b) review progress on the implementation of the TCT including follow-up of the proposals put forward by the Social Forum;
- (c) give opinions on the appointment of the Director of the Secretariat; and
- (d) decide on the seat of the Secretariat.

The Ministerial Council consists of one representative of each Contracting Party. Participation as observer shall be open to all EU Member States. Unless otherwise provided, it decides by consensus.

#### **2.3 The envisaged act of the Ministerial Council**

At its first meeting, the Ministerial Council is to adopt a decision on the seat of the Secretariat set up under Article 28 of the TCT. This decision will be essential for the timely implementation of the TCT.

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<sup>\*</sup> 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.

<sup>1</sup> CSST/2017/10301,

[http://register.consilium.europa.eu/content/out?lang=en&typ=SET&i=ADV&RESULTSET=1&DOC\\_ID=10301/17|10301/\\*|17&DOC\\_LANCD=FR&ROWSPP=25&NRROWS=500&ORDERBY=DOC\\_DATE+DESC](http://register.consilium.europa.eu/content/out?lang=en&typ=SET&i=ADV&RESULTSET=1&DOC_ID=10301/17|10301/*|17&DOC_LANCD=FR&ROWSPP=25&NRROWS=500&ORDERBY=DOC_DATE+DESC)

Indeed, the decision on the seat of the Secretariat is the first important milestone of the effective implementation of the TCT. The Secretariat will play a key role in supporting the implementation of the TCT and it is essential that it could be soon fully operational. Following a preliminary political agreement reached by all regional partners, and should the European Union agree, the Ministerial Council is likely to reach the required consensus on Belgrade as the seat of the Secretariat, in accordance with Article 21(d) of the TCT.

The envisaged decision will become legally binding on the parties under Article 21(d) of the TCT, according to which the Ministerial Council "shall decide" on the seat of the Secretariat.

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

It is proposed to support Belgrade as the seat of the Permanent Secretariat. This choice is largely supported by the South East European Parties and, Belgrade being situated within the territory of one of those Parties, is liable to contribute to the successful implementation of the TCT.

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"].

Pursuant to Article 21(d) of the TCT, the Ministerial Council is to decide on the seat of the Secretariat by consensus. As the Union is a party to the TCT, a Union position is needed.

### **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*'<sup>2</sup>.

##### *4.1.2 Application to the present case*

The Ministerial Council is a body set up by an agreement, namely the TCT.

The act which the Ministerial Council is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 21(d) of the TCT.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

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<sup>2</sup> 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.

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.

### *4.2.2. Application to the present case*

The envisaged act, regarding the seat of the Secretariat, is of organisational nature, and as such necessary to 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 act pertains 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.

Proposal for a

## **COUNCIL DECISION**

**on the position to be taken on behalf of the European Union in the Ministerial Council  
set up under the Treaty establishing the Transport Community**

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<sup>3</sup>.
- (2) In accordance with Article 41(3) of the TCT, the TCT is applied on a provisional basis as of [XXX] between the European Union and XXX.
- (3) Pursuant to Article 21(d) of the TCT, the Ministerial Council is to decide on the seat of the Permanent Secretariat.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Ministerial Council, as the decision on the seat of the Permanent Secretariat will be binding on the Union.
- (5) It is appropriate to support Belgrade as the seat of the Permanent Secretariat. This choice is largely supported by the South East European Parties and, Belgrade being situated within the territory of one of those Parties, is liable to contribute to the successful implementation of the TCT,

HAS ADOPTED THIS DECISION:

### *Article 1*

The position to be taken on the Union's behalf in the first meeting of the Ministerial Council shall be based on the draft Decision of the Ministerial Council attached to this Decision.

Minor changes to the draft Decision may be agreed to by the representatives of the Union in the Ministerial Council without further decision of the Council.

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<sup>3</sup> OJ L , , p. .

*Article 2*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council  
The President*