



Brussels, 22.11.2017
COM(2017) 691 final

2017/0308 (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 decision on the adoption by the Ministerial Council of its Rules of Procedure.

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* (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 Community¹.

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

The draft decision concerns the adoption of the Rules of Procedure of the Ministerial Council in order to ensure the appropriate execution and implementation of its tasks pursuant to Articles 21, 22 and 23 of the Treaty. The draft Rules of Procedure cover subjects such as participation at the meetings of the Ministerial Council, the Presidency of the Ministerial Council, the preparation of meetings of the Ministerial Council and the procedural rules applicable to such meetings, procedures in respect of the various types of action possibly

* 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.

taken by the Ministerial Council, disclosure of information, as well as a number of final provisions. The Rules of Procedure will become effective on the day of their adoption. The decision on the adoption of the Rules of Procedure of the Ministerial Council will be essential for the timely implementation of the TCT.

The envisaged decision will become legally binding on the parties under Article 21 of the TCT.

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

It is essential for the Ministerial Council to adopt its Rules of Procedure in order to ensure the appropriate execution and implementation of its tasks pursuant to Articles 21, 22 and 23 of the Treaty. As the Union is a party to the TCT, a Union position is needed.

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 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. As a body set up by the TCT and empowered to take action in accordance with Article 21 of the TCT, the Ministerial Council must be considered as empowered to adopt rules of procedure so as to enable a proper discharge of the functions conferred upon it. By their nature, and as a matter of international law governing the Ministerial Council, those rules contain elements that are legally binding upon the members of the Ministerial Council and therefore also upon the representative of the Union. Consequently, they must be considered as having legal effects.

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

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

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 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 is 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 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 (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 Community³.
- (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 the Republic of Albania, Bosnia and Herzegovina and the Republic of Serbia.
- (3) It is essential for the Ministerial Council to adopt its Rules of Procedure in order to ensure the appropriate execution and implementation of its tasks pursuant to Articles 21, 22 and 23 of the TCT.
- (4) The Ministerial Council, at its second meeting scheduled to take place no later than the end of 2018, is to adopt a decision on its Rules of Procedure.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the Ministerial Council as the decision on the Rules of Procedures of the Ministerial Council will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the second 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.

³ OJ L 278, 27.10.2017, p. 1.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*



Brussels, 22.11.2017
COM(2017) 691 final

ANNEX 1

ANNEX

to the

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**

ANNEX
DECISION No. 2018/1
OF THE MINISTERIAL COUNCIL OF THE TRANSPORT
COMMUNITY

D/2018/1/MC-TC of ... 2018: Rules of Procedure of the Ministerial Council

THE MINISTERIAL COUNCIL OF THE TRANSPORT COMMUNITY,

Having regard to the Treaty establishing the Transport Community, and in particular Articles 21, 22 and 23 thereof,

HAS DECIDED AS FOLLOWS:

Sole Article

The Rules of Procedure of the Ministerial Council, attached to this Decision, are hereby adopted.

Done in [...], on ... 2018

For the Ministerial Council

.....

ATTACHMENT: RULES OF PROCEDURE OF THE MINISTERIAL COUNCIL OF THE TRANSPORT COMMUNITY

I. GENERAL

1. These Rules of Procedure establish the internal procedures for the operation of the Ministerial Council as an institution under the Treaty establishing the Transport Community ('the Treaty').
2. In case of any contradiction between these Rules of Procedure and the Treaty, the provisions of the Treaty shall apply.

II. PARTIES, OBSERVERS AND OTHER PARTICIPANTS

1. Parties should, in principle, be represented on the Ministerial Council at ministerial level or equivalent.
2. Without prejudice to the position of Observers in accordance with the second sentence of Article 22 of the Treaty, the Presidency and the Vice-Presidency as referred to in paragraph 2 of Section III may, where appropriate, agree to invite representatives of other states, international organisations or other bodies including representatives of the civil society to attend, on an ad hoc basis, specific meetings of the Ministerial Council or one or more parts thereof.
3. Where the Presidency and the Vice-Presidency agree to invite representatives of other states, international organisations or other bodies, the Presidency shall inform the Parties and the Permanent Secretariat of the Transport Community ('the Secretariat') at least three weeks before the meeting. The Parties and the Secretariat may submit their views to the Presidency within five working days from receiving this information.

III. PRESIDENCY

1. The Presidency of the Ministerial Council shall be held by the same South East European Party that presides over the Regional Steering Committee in accordance with Article 24(6) of the Treaty and the arrangements laid down in the Rules of Procedure of the Regional Steering Committee.
2. The Presidency shall chair the Ministerial Council. It shall be assisted by one representative of the European Union and one representative of the incoming Presidency, together referred to as Vice-Presidency.
3. Should the Presidency not be in a position to perform its duties for a particular meeting, that meeting will be chaired by the representative of the European Union as Vice-Presidency.

IV. PREPARATION OF MEETINGS

1. In addition to the meetings held on an annual basis in accordance with Article 23 of the Treaty, the Ministerial Council may hold other meetings in case of need. Meetings for such purposes shall be convened by the Presidency, after having agreed so with the Vice-Presidency.

2. The place of Ministerial Council meetings shall be decided upon by the Presidency after consultations with the Vice-Presidency and the Secretariat. That decision shall be made at least two months prior to the relevant meeting. Contribution by the Secretariat to the organisational costs of the meetings outside the seat of the Secretariat shall be subject to its internal budgetary rules.

3. The dates of the meetings shall be agreed between the Presidency, the Vice-Presidency and the Secretariat. In principle, the dates shall be agreed at least two months prior to the relevant meeting.

4. The draft agenda of the meeting shall be agreed by the Presidency and the Vice-Presidency. The draft agenda and any documents related to it shall be distributed to the Parties and the Observers at least two months prior to the relevant meeting. The Parties may make comments and propose new items to be added. Material of interest to them shall also be distributed to the representatives invited in accordance with paragraph 2 of Section II.

5. The Secretariat shall be responsible for the preparation of meetings. It shall inform the Presidency and the Vice-Presidency periodically and upon request about the preparation process and follow their requests and guidance in this regard.

V. MEETINGS OF THE MINISTERIAL COUNCIL - PROCEDURAL RULES

1. The meetings of the Ministerial Council shall not be public unless the Ministerial Council decides otherwise.

2. Any Party or other participant of the meeting may be accompanied by officials who assist them. The names and functions of those officials shall be notified in advance to the Secretariat. As a principle, those officials shall not be more than three for any Party, and not more than two for any other participant in the meeting. However, the Presidency may further advise on the maximum number of representatives per delegation.

3. The Ministerial Council shall be considered as meeting the required quorum only if four South East European Parties and the European Union are represented.

4. The Ministerial Council shall act by consensus. Abstention by a Party shall not prevent the Ministerial Council from taking action provided that there is quorum as required by paragraph 3 of this Section.

5. The agenda for the meeting shall be approved at its beginning. In urgent circumstances, new items may be included during the meeting subject to the agreement of the Presidency and the Vice-Presidency.

6. Observers may make statements upon permission or when invited by the Presidency.

7. The persons invited in accordance with paragraph 2 of Section II may participate in the discussions but they shall not take part in the Ministerial Council taking action of any kind.

8. The Conclusions of each meeting shall be drawn up with the assistance of the Secretariat. They shall be signed by the Presidency and distributed to the Parties and the Observers. In case it is not possible to finalise the draft Conclusions by the end of the relevant meeting, the Presidency shall ensure that they are finalised and distributed within seven calendar days after the meeting. Any Party may request corrections within seven calendar days upon receipt of the draft Conclusions. The Presidency shall arrange that the final version is distributed within seven days upon the expiry of the deadline for comments.

9. Any General Policy Guidelines or Measures adopted at the meeting shall be recorded in the Conclusions.

10. The Conclusions of meetings may not in any way restrict the scope or effects of legal acts or the Treaty. No statements or conclusions which contradict binding legal provisions shall be made. The Conclusions of meetings shall not form part of legal acts, nor shall have any normative effect.

VI. FORMS OF ACTION AND PROCEDURE TO BE FOLLOWED BY THE MINISTERIAL COUNCIL

1. The Ministerial Council acts by adopting, according to the case:

- General Policy Guidelines and
- Decisions, Recommendations or Opinions (together referred to as 'Measures').

The adoption of rules intended to ensure the functioning of the Ministerial Council as well as the adoption of reports shall be considered as adoption of Decisions.

2. Once General Policy Guidelines or Measures are adopted or amended, they shall be promptly signed by the Presidency and then circulated by the Secretariat to all Parties.

3. General Policy Guidelines and Measures shall enter into force on the date of their adoption, unless they provide otherwise.

General Policy Guidelines

4. The adoption or amendment of General Policy Guidelines may be requested by any Party or the Secretariat. The request shall be made in writing and shall contain sufficient information explaining the necessity of adoption or amendment of the proposed Guidelines by the Ministerial Council.

5. The written request shall be submitted by the requesting Party to the Presidency with copy to the Vice-Presidency and the Secretariat. The Presidency shall notify all other Parties within seven calendar days after the request has been received. Where necessary, the position

of the Regional Steering Committee shall be requested by the Party or the Secretariat which makes the relevant request.

6. The Presidency, in consultation and agreement with the Vice-Presidency, shall organise the preparation of a draft position of the Ministerial Council, which shall be presented for discussion at the next Ministerial Council meeting. The draft position shall be sent to the Parties at least 30 calendar days before the meeting.

7. In duly justified cases, General Policy Guidelines may be adopted or amended without the forms and procedures set out in paragraphs 4 to 6 of this Section being respected.

Measures

9. Unless otherwise specified in these Rules of Procedures or other rules laid down by the Ministerial Council for specific cases, the adoption or amendment of Measures shall follow the same procedure.

10. Any request for the adoption or amendment of a Measure from a Party or the Secretariat shall be made in writing at least 60 calendar days before the meeting of the Ministerial Council at which it shall be discussed.

11. The request shall be sent to the Presidency with copy to all Parties and the Secretariat. It shall be accompanied by relevant explanatory notes. Where necessary, the position of the Regional Steering Committee shall be requested by the Party or the Secretariat which makes the relevant request.

12. In duly justified cases, Measures may be adopted or amended without the forms and procedures set out in paragraphs 10 and 11 of this Section being respected.

Adoption of General Policy Guidelines and Measures by Correspondence

13. The Ministerial Council may, in the intervals between its meetings, adopt or amend General Policy Guidelines or Measures by correspondence. The Presidency, upon the request by a Party or the Secretariat for General Policy Guidelines or a Measure to be taken by correspondence, or upon its own initiative shall decide, in consultation and agreement with the Vice-Presidency, whether the matter warrants that a procedure by correspondence be followed.

14. Where the Presidency has decided that a procedure by correspondence be followed, it shall instruct the Secretariat to dispatch the request to each Party together with such information as the Presidency, in consultation and agreement with the Vice-Presidency, considers necessary. The Presidency, in consultation and agreement with the Vice-Presidency, shall also specify whether and, if so, under which conditions, amendments to the request may be made by the Parties.

15. The Presidency, in consultation and agreement with the Vice-Presidency, shall determine the date and hour by which responses must be received, which shall in no case be earlier than 10 calendar days from the date of transmission of the information referred to in

paragraph 14 of this Section. In exceptional circumstances, upon request or at its own discretion, the Presidency may, in consultation and agreement with the Vice-Presidency, extend the time limit for the receipt of responses. Any Party who has not replied in writing (including through email) within the given time limit shall be regarded as abstaining.

VII. DISCLOSURE OF INFORMATION

1. Unless otherwise decided, the finalized documents of the meetings (agenda, Conclusions etc.) shall be made public on the website of the Secretariat.
2. The right of access to documents held by the Ministerial Council shall be laid down by the Regional Steering Committee in accordance with Article 38(2) and (3) of the Treaty.

VIII. FINAL PROVISIONS

1. Observers and persons invited in accordance with paragraph 2 of Section II shall follow any requirements for confidentiality which apply to the Parties. Such requirements shall be reflected in the Conclusions of the relevant meeting.
2. Persons invited in accordance with paragraph 2 of Section II shall, prior to attending the relevant discussions, be requested to sign a confidentiality statement. Such confidentiality statement shall contain a commitment to respect the confidentiality rules referred to in the first paragraph of this Section. They shall be excluded from those discussions in case they refuse to sign such statement.
3. All acts of the Ministerial Council shall be signed by the Presidency.
4. Any amendments to these Rules of Procedure shall be adopted by a Decision of the Ministerial Council.
5. If application of these Rules of Procedure to a specific situation gives rise to a difficulty of interpretation, the Presidency, in consultation and agreement with the Vice-Presidency, shall provide advice to resolve the situation.
6. Following one year from the entry into force of these Rules of Procedure, based on the practical experience with their application, the Secretariat may propose amendments to these Rules of Procedure as it deems useful or necessary. Where a Party wishes to propose such amendment, it shall consult first with the Secretariat.

These Rules of Procedure shall enter into force on the date of their adoption by the Ministerial Council.