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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	22 November 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the Ministerial Council set up under the Treaty establishing the Transport Community

Delegations will find attached document COM(2017) 691 final.

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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*