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*Committee on Legal Affairs  
The Chair*

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24.1.2024

Mrs Karima Delli  
Chair  
Committee on Transport and Tourism  
BRUSSELS

Subject: Opinion on the legal basis of the proposal for a decision of the European Parliament and of the Council empowering the French Republic to negotiate, sign and conclude an international agreement on the safety and interoperability requirements within the Channel Fixed Link (COM(2023)0328 – C9-0205/2023 – 2023/0192(COD))

Dear Madam Chair,

By letter of 13 December 2023<sup>1</sup>, you requested the Committee on Legal Affairs (JURI), pursuant to Rule 40(2) of the Rules of Procedure, to provide an opinion on the appropriateness of the amended legal basis of the Commission's proposal for a decision empowering the French Republic to negotiate, sign and conclude an international agreement on the safety and interoperability requirements within the Channel Fixed Link (hereinafter "the proposed Decision").

JURI considered the above question at its meeting of 24 January 2024.

## **I - Background**

The Coordinators of the Committee on Transport and Tourism (TRAN) decided to deal with the proposed Decision under simplified procedure with amendments pursuant to Rule 52(2) of the Rules of Procedure and tasked the TRAN standing Rapporteur for the relations with the United Kingdom to draft the report.

The Commission based the proposed Decision on Article 2(1) and Article 91 of the Treaty on the Functioning of the European Union (TFEU). After the Council indicated that it intends to

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<sup>1</sup> D(2023)42171.

delete the reference to Article 2(1) TFEU as the legal basis, with the justification that it is not an appropriate legal basis from a technical point of view, the TRAN standing Rapporteur agreed with that position and proposed to do the same.

TRAN therefore requested JURI to assess the appropriateness of the legal basis, in particular the deletion of the reference to Article 2(1) TFEU, pursuant to Rule 40(2) of the Rules of procedure.

## **II - The relevant Treaty Articles**

Title I of Part one of the Treaty on the Functioning of the European Union, on “Categories and areas of Union competence” reads, *inter alia*:

### *Article 2*

*1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.*

*2. [...]*

Title VI of Part three of the Treaty on the Functioning of the European Union, on “Transport” reads, *inter alia*:

### *Article 91*

*(ex Article 71 TEC)*

*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;*

*(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.*

## **III – CJEU case law on the choice of legal basis**

The Court of Justice has traditionally viewed the question of the appropriate legal basis as an issue of constitutional significance, guaranteeing compliance with the principle of conferred

powers (Article 5 of the Treaty on European Union) and determining the nature and scope of the Union's competence<sup>2</sup>.

According to well-established case-law, the legal basis of a Union act does not depend on an institution's conviction as to the objective pursued, but must be determined according to objective criteria amenable to judicial review, including in particular the aim and the content of the measure<sup>3</sup>. The legal basis for an act must be determined having regard to its own aim and content<sup>4</sup>.

If examination of an act 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<sup>5</sup>. Only exceptionally, if it is established that the act simultaneously pursues a number of objectives, inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases<sup>6</sup>. This would however only be possible if the procedures laid down for the respective legal bases are compatible with and do not undermine the right of the European Parliament<sup>7</sup>.

#### **IV – Aim and content of the proposed Decision**

The Channel Fixed Link is a unique railway link involving a single, complex engineering structure situated partly in the territory of France and partly in a third country, namely the United Kingdom. To ensure the safe and efficient operation of the Channel Fixed Link, France has requested, in March 2023, an empowerment to negotiate and conclude with the United Kingdom an international agreement on the safety and interoperability requirements within the Channel Fixed Link. The proposed Decision would grant that empowerment.

The international agreement would partly transpose the Fourth Railway Package technical pillar for the part of the Channel Fixed Link under the French jurisdiction<sup>8</sup>. The agreement should ensure that the part of the Channel Fixed Link under the French jurisdiction is governed by Union law, with the Court of Justice exclusively competent to interpret that law. As regards the part of the Channel Fixed Link under the United Kingdom's jurisdiction, the agreement should ensure coherence of the safety and interoperability requirements, thereby contributing to safety and interoperability in the Channel Fixed Link.

These aims are reflected in the normative provisions of the proposed Decision, which contain

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<sup>2</sup> Opinion 2/00 ("Cartagena Protocol"), ECLI:EU:C:2001:664, paragraph 5.

<sup>3</sup> Case C-300/89, *Commission v Council* ("Titanium dioxide"), ECLI:EU:C:1991:244, paragraph 10, Case C-411/06 *Commission v Parliament and Council*, ECLI:EU:C:2009:518, paragraph 45.

<sup>4</sup> Case C-187/93, *Parliament v Council*, ECLI:EU:C:1994:265, paragraph 28. See also Case C-411/06, *Commission v Parliament and Council* ("Shipments of waste"), ECLI:EU:C:2009:518, paragraph 77, and Case C-81/13, *UK v Council*, ECLI:EU:C:2014:2449, paragraph 36.

<sup>5</sup> *Ibid.* paragraph 30 and Case C-137/12, *Commission v Council*, ECLI:EU:C:2013:675, paragraph 53 and case-law cited.

<sup>6</sup> Case C-300/89, paragraphs 13 and 17; Case C-42/97, *Parliament v Council*, ECLI:EU:C:1999:81, paragraph 38; Opinion 2/00, paragraph 23; Case C-94/03, *Commission v Council* ("Rotterdam Convention"), ECLI:EU:C:2006:2 and Case C-178/03, *Commission v Parliament and Council*, ECLI:EU:C:2006:4, paragraphs 36 and 43.

<sup>7</sup> Case C-300/89, paragraphs 17-25; Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461.

<sup>8</sup> Directives (EU) 2016/797 and (EU) 2016/798 of the European Parliament and of the Council.

the concrete empowerment to France to negotiate and conclude the agreement (Article 1), a series of conditions the agreement must comply with (Article 2), and a provision that the Commission is to decide whether the draft agreement complies with those conditions (Article 3). Finally, the proposed Decision would empower France to amend the agreement, in accordance with a mechanism to be laid down therein, in order to adapt it to future changes in Union law (Article 5).

## **V – Analysis**

The Commission explains in its explanatory memorandum that the agreement should fall within the Union’s exclusive competence: *“An international agreement with a third country on railway safety and interoperability in cross-border situations is liable to affect an area covered to a large extent by Union law [...]. Therefore, any such agreement falls within the Union’s exclusive external competence”*. It also refers to Article 2(1) in accordance with which *“Member States may negotiate and conclude such agreement only if empowered to do so by the Union in accordance with Article 2(1) of the Treaty on the Functioning of the European Union”*. The Commission continues by saying that *“Since the agreement concerns areas covered by existing Union law in the area of transport, it is necessary that such empowerment be granted by the Union legislator, in accordance with the legislative procedure referred to in Article 91 TFEU.”* Under the title “Legal basis” of the explanatory memorandum, the Commission merely states that *“The legal basis for this proposal is Articles 2(1) and 91 TFEU.”*

### **(a) The appropriateness of Article 91 TFEU**

Article 91 TFEU provides for legal bases in the field of transport policy for transport by rail, road and inland waterway. The agreement at stake concerns areas covered by existing Union *acquis* in the area of transport. In light of the aim and content of the proposed Decision, it is manifest that the proposal is linked to the functioning of the internal market in the transport sector. Thus, Article 91 TFEU is the appropriate legal basis for the proposal.

### **(b) No possibility to add Article 2(1) TFEU as a legal basis**

Contrary to Article 91 TFEU, Article 2(1) TFEU is not a legal basis. In fact, that provision does not confer any competence on the Union institutions to adopt a legally binding Union act, nor does it contain, or refer to, any procedure to that effect. Therefore, it cannot be used as a legal basis.

Recital 5 of the proposed Decision recalls that the agreement falls under the Union’s exclusive external competence. In areas under such exclusive competence Member States may adopt legally binding acts only if so empowered by the Union, as provided for in Article 2(1) TFEU. However, that does not mean that Article 2(1) TFEU should be added as a legal basis for the actual act of empowerment. In the present case, such empowerment is given via the legislative act adopted under the ordinary legislative procedure in accordance with Article 91 TFEU.

In 2020 France was similarly empowered by Decision (EU) 2020/1531<sup>9</sup> to negotiate an

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<sup>9</sup> Decision (EU) 2020/1531 of the European Parliament and of the Council of 21 October 2020 empowering France to negotiate, sign and conclude an international agreement supplementing the Treaty between France and

agreement with the United Kingdom that would have ensured the unified and dynamic application of Union law over the entire Channel Fixed Link. It should be recalled that that Decision was also based solely on Article 91 TFEU following a similar assessment of the appropriateness of the legal basis.

Lastly, it is worth noting that there are also other similar authorisations empowering a Member State to negotiate agreements with a third country in an area of exclusive external competence of the Union<sup>10</sup>, in which Article 2(1) TFEU does not figure as the legal basis for the act proposed.

## **VI – Conclusion and recommendation**

At its meeting of 24 January 2024 the Committee on Legal Affairs accordingly decided unanimously<sup>11</sup>, to confirm to the Committee on Transport and Tourism that the proposal for a Decision of the European Parliament and of the Council empowering the French Republic to negotiate, sign and conclude an international agreement on the safety and interoperability requirements within the Channel Fixed Link can correctly be based on Article 91 TFEU alone.

Yours sincerely,

Adrián Vázquez Lázara

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the United Kingdom of Great Britain and Northern Ireland concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link (OJ L 352, 22.10.2020, p. 4).

<sup>10</sup> Latest example: Proposal for a Decision of the European Parliament and of the Council on an authorisation addressed to France to negotiate a bilateral agreement with Algeria on matters related to judicial cooperation in civil and commercial matters (COM(2023)0065 – 2023/0028(COD)).

<sup>11</sup> The following were present for the final vote: Adrián Vázquez Lázara (Chair); Sergey Lagodinsky (Vice-Chair); Marion Walsmann (Vice-Chair); Raffaele Stancanelli (Vice-Chair); Pascal Arimont, Gunnar Beck; Benoît Biteau (for Marie Toussaint pursuant to Rule 209(7)); Jorge Buxadé Villalba; Ilana Cicurel; Pascal Durand; Christian Ehler (for Juan Ignacio Zoido Álvarez pursuant to Rule 209(7)); Ibán García Del Blanco; Virginie Joron; Pierre Karleskind; Gilles Lebreton; Angelika Niebler; Witold Pahl (for Javier Zarzalejos pursuant to Rule 209(7)); Sabrina Pignedoli; Jiří Pospíšil; Franco Roberti; Nacho Sánchez Amor; Jana Toom; Axel Voss; Tiemo Wölken.