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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 14th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards the election of the Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at the 14th session of the General Assembly of the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF), due to take place on 27 February 2019, as regards the election of the Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021. The meeting documents are available (with credentials) on the website of OTIF at the following link: http://extranet.otif.org/en/?page_id=1083

2. CONTEXT OF THE PROPOSAL

2.1. The Convention concerning International Carriage by Rail (COTIF)

The COTIF Convention¹ governs the running of the OTIF, its objectives, attributions, relations with the OTIF Member States, and its activities in general.

It comprises the Convention itself and seven Appendices that establish uniform railway law, i.e. technical and functional requirements, and model contracts: Contract of International Carriage of Passengers by Rail; Contract of International Carriage of Goods by Rail; International Carriage of Dangerous Goods by Rail; Contract of use of vehicles in international rail traffic; Contract of use of infrastructure in international rail traffic; Validation of Technical Standards and the Adoption of Uniform Technical Prescriptions applicable to Railway Material intended to be used in International Traffic; Technical Admission of Railway Material used in International Traffic.

There are 50 countries party to the COTIF Convention, including 26 Member States, i.e. all except Cyprus and Malta. The Union is also a contracting party since 2011.

2.2. The agreement between the Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF)

On 16 June 2011, the Council adopted Council Decision 2013/103/EU on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation Convention for International Carriage by Rail (OTIF) on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (OJ L 51, 23.2.2013, p. 1). The Agreement entered into force on 1 July 2011. The Council Decision specifies that the Commission shall represent the Union at OTIF meetings. It also contains a Declaration by the Union concerning the exercise of competence and provides for internal arrangements for the Council, the Member States and the Commission in proceedings under OTIF.

2.3. The General Assembly of OTIF

The General Assembly is OTIF's supreme decision-making body. It takes decisions on proposals to amend the Convention. Depending on the case, two thirds or half of the OTIF Member States must approve the adopted amendments.

By virtue of Article 14 § 2 (c) of the COTIF Convention, the General Assembly has the competence to elect the Secretary General, for a period of three years, renewable twice at most (COTIF Article 21 § 2). The Rules of Procedure of the General Assembly (Article 21 § 2) specify that *"In principle, decisions of the Assembly shall be taken by a*

¹ Convention concerning International Carriage by rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol in force from 1.7.2006.

majority of the total number of votes duly represented in the meeting room at the time of the vote.”

It holds an ordinary session every three years and can hold extraordinary sessions. The last General Assembly took place in September 2018².

The Union and/or its Member States participate in accordance with the provisions of the COTIF Convention, of the Rules of Procedure of the General Assembly and of the Agreement on the Accession of the Union to the COTIF Convention.

2.4. The envisaged acts of the General Assembly of OTIF at its 14th session

2.4.1. Contextual background

The Secretary General’s term of office ended on 31 December 2018. He had been elected for three years by the 12th General Assembly of OTIF in September 2015.

The Secretary General for the period from 1 January 2019 to 31 December 2021 had to be elected by the 13th General Assembly in September 2018. However, the only candidate for the post withdrew his application to take up other duties with effect from 1 January 2019, and the election could not take place as foreseen during this session.

The 13th General Assembly therefore instructed the Secretary General to convene an extraordinary General Assembly (14th session) on 27 February 2019 with a single agenda item: election of the next Secretary General. The 13th General Assembly adopted the call for applications for the post of Secretary General, which was published on 5 October 2018 with a deadline of 5 January 2019 for the receipt of applications in due and proper form.

The next Secretary General will take up his post on 8 April 2019.

The 13th General Assembly also nominated Mr Bas Leermakers (presently the head of OTIF's technical department) as Secretary General *ad interim* with effect from 1 January 2019 until the date on which the new elected Secretary General takes up his/her post.

2.4.2. Profile of qualifications for the holder of the post of Secretary General of OTIF

The profile of qualifications set out in the annex to the call for applications reads as follows:

Applicants must meet the following requirements:

- 1. Nationality of an OTIF Member State, but not necessarily the nationality of the proposing Member State.*
- 2. An individual with many years professional experience in different areas of activity and who has demonstrated ability in a position of major responsibility.*
- 3. Knowledge of all three working languages of OTIF (English, French, German), with the ability to draft easily and fluently in one of the working languages. Applicants should be able to express themselves sufficiently well in the other two languages so that they can lead negotiations and draft comprehensibly.*
- 4. Holder of a degree in a discipline relevant to the work of OTIF, preferably in law and political science; knowledge of international public law, rail transport law, the carriage of dangerous goods, rail transport in general and transport logistics would be an advantage.*

² Council Decision (EU) 2018/1296 of 18 September 2018 establishing the position to be adopted on behalf of the European Union at the 13th General Assembly of the Intergovernmental Organisation for International Carriage by Rail (OTIF) as regards certain amendments to the Convention concerning International Carriage by Rail (COTIF) and to the Appendices thereto (OJ L 243, 27.9.2018, p. 11.

5. *Proven ability to head an administration such as that of the OTIF Secretariat, using modern information technology, several years' experience in personnel management on the basis of general principles and specific rules of personnel law and the ability to head the Organisation's financial affairs.*

6. *Knowledge of how international organisations function, diplomatic negotiations and professional experience in the international transport sector.*

7. *Ability to represent OTIF effectively in the [OTIF] Member States, at international level – particularly at conferences – and in public. Ability to speak at international conferences.*

8. *Comprehensive understanding of economic correlations and processes (including in the international context) and a proven interest in the transport sector and railways. Experience in legislative activities is necessary.*

9. *At least ten years professional experience, preferably in a State administration, an international organisation, an international association, an undertaking working in the international transport sector or from a teaching and research background. Applicants should have at least ten years experience in the international field, during which they must be able to demonstrate that they have undertaken activities with major decision-making responsibilities.*

10. *Lengthy experience of international negotiations; candidates must also be able to deal with a very high workload and be willing to undertake numerous and demanding official journeys.*

The Secretary General should also be a dynamic team-player, forward-looking, approachable and decisive, with a track record of working with other cultures. Applicants must also have the ability to develop political, legal, institutional and financial concepts.

The General Assembly itself will have to assess whether and to what extent the applicants meet the requirements of the call for applications. On 21/01/2019, the OTIF Secretariat communicated the official list of the candidates with their applications dossiers, which were received during the application period.

The election of the Secretary General of OTIF is a decision of the General Assembly by way of a voting procedure, which is described in the section 2.3 above. It shall become effective as from the date on which the new elected Secretary General takes up his/her post, normally on 8 April 2019. The decision of the General Assembly produces legal effects on the parties to the COTIF Convention, as further explicated in section 4 below.

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

3.1. List of candidates as officially communicated by the OTIF Secretariat

Following the communication of the OTIF Secretariat of 21/01/2019, the list of the candidates for the post of Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021 is officially established as follows (presentation by alphabetical order):

- Mr CRINIER Raphaël (application submitted by France);
- Mr D'ALFONSO Salvatore (application submitted by Italy);
- Mr EBNER Stefan (application submitted by Austria);
- Mr GROOT Hinne (application submitted by the Netherlands);
- Mr KÜPPER Wolfgang (application submitted by Germany).

It is noted that all five applications were submitted by Member States of the European Union.

3.2. Proposal for the position to be taken on behalf of the Union

3.2.1. The tasks of OTIF's Secretary General and the Union interest in the election

3.2.1.1. The tasks of OTIF's Secretary General

The tasks of OTIF's Secretary General go beyond those related to the management, application and functioning of the COTIF Convention. Specifically, the Secretary General has the following functions:

- Article 21 § 4 of the COTIF Convention provides that *“The Secretary General may, on his own initiative, present proposals aiming to modify the Convention.”*;
- The Secretary General represents OTIF externally, draws up the work programme, drafts budget and management reports and manages the financial affairs of the Organisation (Article 21 §3 point b), h), and i) of the COTIF Convention);

These tasks confer a certain margin of manoeuvre upon the Secretary General;

- Importantly also, the Secretary General plays a discrete and independent role in the settlement of disputes among contracting parties. He *“endeavour[s], at the request of one of the parties concerned, by using his good offices, to settle disputes between them arising from the interpretation or application of the Convention”* (Article 21 §3 point j) of the COTIF Convention);
- The Secretary General also *“give[s], at the request of all parties concerned, an opinion on disputes arising from the interpretation or application of the Convention”* (Article 21§ 3 point k) of the COTIF Convention).

Hence, the election of one rather than another person may have important consequences on the manner the tasks are discharged, beyond purely technical issues.

This is also reflected in the profile of qualifications. Among other things, the candidate is supposed to demonstrate a *“lengthy experience of international negotiations”* and the *“ability to develop political, legal, institutional and financial concepts”*.

3.2.1.2. The Union interest in the election

The Union has a substantial interest in the election of OTIF's Secretary General.

OTIF's activities are covered by Union competence and, for many, by the Union's exclusive external competence.

Thus, Annex I of Council decision 2013/103/EU includes an Appendix listing the Union instruments existing at the time and relating to subjects dealt with by the COTIF Convention; the list includes more than 20 Union Regulations and Directives in respect of the Union rail legislation on economic/market access, safety, interoperability, and public service obligations.

In some specific areas (e.g. safety, interoperability of the railway systems), the scope of the uniform rules developed by OTIF is directly related to the provisions of the Union rail acquis, and necessitates precise harmonisation in order to avoid conflict or misalignment to emerge between the two sets of requirements.

The explanations given above³ show that the Secretary General is conferred important margins of manoeuvre in several areas, notably as regards the submission of proposals and the settlement of disputes.

Therefore, the action by the Secretary General is liable to affect the operation of OTIF in areas directly related to the development and application of the Union's rail policy. Similarly, it is also liable affect the Union in its capacity as OTIF Member.

Given the Union's interest in the election of the Secretary General, the Union should adopt a position concerning that election.

3.2.2. On the applications

On the basis of the documents communicated by the OTIF Secretariat, it appears that all five candidates fulfil the requirements set out in profile of qualifications annexed to the call for application.

Moreover, all five candidates have been proposed by Member States and are EU nationals.

The considerations conducting the choice to be made by Member States should be developed against this background:

First of all, it should be clear that votes should only be cast for candidates that are citizens of the Union, have been proposed by a Member State and meet all requirements of the profile of qualifications. Even though the time limit for applications has lapsed, this first set of criteria should guard against last minute surprises. Secondly, having regard to the **specific Union interest** in the exercise, the vote should go to the **candidate who best meets** a number of **criteria** relevant to that interest. Some of those criteria are already established in the call for application. Another criterion is linked to a requirement of the call for applications, but is more specific, having regard to the Union interest in the election.

Overall, the following list of criteria is suggested:

Possible selection criteria	Requirements of the call for application
EU competences	Criterion not explicitly mentioned in the annex to the call for applications: <i>Knowledge of the European Union institutional framework and of the Union's rail acquis and policies</i> (linked to requirement referred to in point 4 of the annex to the call for applications)
Technical competences	Criteria referred to in points 4, 5 and 6 of the annex to the call for applications
General competences	Criteria referred to in points 8 and 9 of the annex to the call for applications, in addition to the criteria referred to in the paragraph concluding the list of requirements in that annex: <i>Dynamic team-player, forward-looking, approachable and decisive, with a track record of working with other cultures.</i> <i>Ability to develop political, legal, institutional and financial concepts.</i>

³ Section 4.1.

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 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.

4.1.2. Application to the present case

The General Assembly of OTIF is a body set up by an agreement, namely the COTIF Convention. The election of the Secretary General of OTIF, which the General Assembly is called to decide upon, constitutes an act having legal effects. The legal effects arise because of the tasks conferred upon the Secretary General, which go beyond the simple management, application and functioning of the international agreement. Details are described in subsection 3.2.2.1 above. As explained in that subsection, the election of one rather than another person may have important consequences on the manner the tasks are discharged, beyond purely technical issues. Thanks, notably, to his ability to present proposals aiming to modify the Convention and to intervene in disputes between Members, the Secretary General is capable of providing political and legal orientation to the works of OTIF.

For these reasons, it must be concluded that the election of the Secretary General of OTIF has legal effects. It 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.

4.2. Substantive legal basis

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.

The main objective and content of the envisaged act relate to 'rail transport'.

Therefore, the substantive legal basis of the proposed decision is Article 91 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 91 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, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Union has acceded to the Convention concerning International Carriage by Rail of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (the ‘COTIF Convention’), by virtue of Council Decision 2013/103/EU⁴.
- (2) The General Assembly of OTIF was set up in accordance with point (a) of Article 13(1) of the COTIF Convention (‘General Assembly’). The Union participates in the General Assembly in accordance with the provisions of the COTIF Convention, of the Rules of Procedure of the General Assembly, and of the Agreement on the Accession of the Union to the COTIF Convention.
- (3) At its 14th session due to take place on 27 February 2019, the General Assembly is expected to decide upon the election of the Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021.
- (4) The Union has a substantial interest in the election of OTIF’s Secretary General. OTIF’s activities are covered by Union competence and, for many, by the Union’s exclusive external competence. The Secretary General is conferred important margins of manoeuvre in several areas, notably as regards the submission of proposals of amendments to the COTIF Convention and the settlement of disputes. Therefore, the action by the Secretary General is liable to affect the operation of OTIF in areas directly related to the development and application of the Union’s rail policy. Similarly, it is also liable to affect the Union in its capacity as OTIF Member. Given the Union’s interest in the election of the Secretary General, the Union should adopt a position concerning that election.
- (5) All five applications for the post of Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021 were submitted by Member States, and all candidates are nationals of Member States. It was assessed that all five candidates meet the

⁴ Council Decision 2013/103/EU of 16 June 2011 on the signing and conclusion of the Agreement between the European Union and the Intergovernmental Organisation for International Carriage by Rail on the Accession of the European Union to the Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999 (OJ L 51, 23.2.2013, p. 1).

requirements of the profile of qualifications for the holder of the post of Secretary General of OTIF.

- (6) It is appropriate to establish the position to be taken on the Union's behalf at the 14th General Assembly of OTIF, as the envisaged decision concerns a matter of interest for the Union, which falls under the competence of the Union and produces legally binding effects upon it.
- (7) Votes should be cast for a candidate, who is citizen of the Union, has been proposed by a Member State, meets all requirements established in the call for applications issued by OTIF, and best meets a set of criteria related to the specific Union interest in the election.
- (8) The position of the Union at the 14th session of the General Assembly of OTIF should therefore be to vote according to all those criteria,

HAS ADOPTED THIS DECISION:

Article 1

- (1) The position to be taken on the Union's behalf at the 14th session of the General Assembly of OTIF shall be to vote for the candidate who:
 - (a) is citizen of the Union, has been proposed by a Member State, meets all requirements set out in the annex to the call for applications for the election of the Secretary General of OTIF for the period from 8 April 2019 to 31 December 2021 (document SG-18106 of 5 October 2018), and
 - (b) best meets the following criteria:
 - knowledge of the European Union institutional framework and of the Union's rail acquis and policies;
 - the criteria set out in points 4, 5 6, 8 and 9 of the annex to the call for applications;
 - the criteria figuring below the enumeration set out in the annex to the call of applications, of the person being a dynamic team-player, forward-looking, approachable and decisive, with a track record of working with other cultures and having the ability to develop political, legal, institutional and financial concepts.
- (2) The Member States shall cast their vote in accordance with paragraph 1.

Article 2

This Decision is addressed to the Member States and the Commission.

Done at Brussels,

*For the Council
The President*