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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	27 July 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 622 final
Subject:	Proposal for a DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the United Kingdom concerning the construction and operation by private concessionaires of a Channel Fixed Link

Delegations will find attached document COM(2020) 622 final.

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EUROPEAN
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Brussels, 27.7.2020
COM(2020) 622 final

2020/0160 (COD)

Proposal for a

DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the United Kingdom concerning the construction and operation by private concessionaires of a Channel Fixed Link

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the construction and operation by private -concessionaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986 (hereafter "The Treaty of Canterbury") established an Intergovernmental Commission to supervise all matters concerning the construction and operation of the Channel Fixed Link.

Until the end of the transition period put in place by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community,[1] the Intergovernmental Commission is the national safety authority within the meaning of Article 3(7) of Directive (EU) 2016/798 of the European Parliament and the Council[2], which is competent for the Channel Fixed Link.

In accordance with Article 3(7) of Directive (EU) 2016/798, a national safety authority may be a body entrusted by several Member States with the tasks regarding railway safety and, in view of Directive (EU) 2016/797, railway interoperability. However, after the end of the aforementioned transition period, the Intergovernmental Commission will be a body established by a Member State and a third country. Directive (EU) 2016/798 does not foresee the possibility of a national safety authority as a body entrusted by a Member State and a third country. Therefore, unless otherwise provided, after the end of the transition period, the Intergovernmental Commission will cease to be the national safety authority within the meaning of Directive (EU) 2016/798 for the Channel Fixed Link. From the same point in time, Union law will no longer be applicable to the part of the Channel Fixed Link under the jurisdiction of the United Kingdom. In application of Directive (EC) 2016/798 and Article L 2221/1 of the French Code des Transports, the French Etablissement public de sécurité ferroviaire would become the national safety authority for the part of the Channel Fixed Link under French jurisdiction.

In order to ensure the safe and efficient operation of the Channel Fixed Link, it would be preferable to have a single safety authority responsible which would apply the same set of rules over the whole infrastructure, including in its section under the jurisdiction of the United Kingdom. The Intergovernmental Commission should remain as this single authority and should continue applying Union rules on railway safety and interoperability. This would notably require amending Article 3(7) of Directive (EU) 2016/798. Such an amendment is sought by the parallel Commission Proposal for a Regulation amending that Directive COM (2020) 623.

By letter dated 16 July 2020, France informed the Commission that it would like to negotiate an agreement supplementing the Treaty of Canterbury.

The aim of this proposal is to empower France to negotiate an international agreement with the United Kingdom to ensure the safe and efficient operation of the Channel Fixed Link by retaining a single safety authority responsible for the whole of this infrastructure, and to lay down the specific requirements that the proposed agreement must comply with, such as the

[1] OJ L 29, 31.1.2020, p.7.

[2] Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety, (OJ L 138, 26.52016, p. 102).

obligation for the Intergovernmental Commission to apply Union rules on railway safety and interoperability.

Such an agreement is liable to affect an area covered to a large extent by Union law and in particular Directive (EU) 2016/797[3], Directive (EU) 2016/798 and Regulation (EU) 2016/796[4]. Therefore, such an agreement would fall within the Union's exclusive external competence. In accordance with Article 2(1) TFEU, the Union may empower Member States to act in areas where it has exclusive competence. Given the interaction of such empowerment with the existing rules adopted by the Union legislator, it is also necessary that any such empowerment be granted by the latter, in accordance with the legislative procedure referred to in Article 91 TFEU.

- **Consistency with existing policy provisions in the policy area**

The objective of the international agreement that France will seek to conclude with the UK on the basis of the proposed empowerment decision is to maintain the Intergovernmental Commission as the single national safety authority for the Channel Fixed Link and to ensure that it continues complying with the provisions of Union law applicable to national safety authorities, and in particular Directive (EU) 2016/798, and Directive (EU) 2016/797 and Regulation 2016/796 over the entire Channel Fixed Link, including the section under UK jurisdiction.

This objective is therefore fully consistent with existing policy provisions in the area of railway safety and interoperability.

- **Consistency with other Union policies**

An agreement supplementing the Treaty of Canterbury to ensure the safe and efficient operation of the Channel Fixed Link by retaining a single safety authority responsible for the whole of this infrastructure would not be inconsistent with any other Union policy.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The legal basis for this proposal is Articles 2(1) and 91 TFEU.

- **Subsidiarity (for non-exclusive competence)**

The proposal falls under the exclusive competence of the Union.

- **Proportionality**

The objective of the proposal is to authorise, pursuant to Article 2(1) TFEU, the negotiation of an agreement supplementing the Treaty of Canterbury with the aim of ensuring the safe and efficient operation of the Channel Fixed Link by retaining a single safety authority responsible for the whole of this infrastructure. Subject to amending Article 3(7) of Directive (EU) 2016/798, the Intergovernmental Commission, established by the Treaty of Canterbury should remain the single safety authority and should continue applying Union rules on railway

[3] Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, (OJ L 138, 26.5.2016, p. 44).

[4] Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No881/2004, (OJ L138, 26.5.2016, p. 1).

safety. Consequently, the proposed Decision of the European Parliament and of the Council does not go beyond what is necessary to achieve this objective.

- **Choice of the instrument**

The objective sought is to ensure that the Intergovernmental Commission applies Union law over the entire Channel Fixed Link, including the part under the jurisdiction of the United Kingdom. The Intergovernmental Commission is a binational body set up by France and the United Kingdom. Its functioning is regulated by the Treaty of Canterbury concluded between France and the United Kingdom. Therefore, it is appropriate to include the above mentioned elements into in an agreement between the France and the United Kingdom, hence the need to empower France to that effect.

The proposed Decision of the European Parliament and of the Council addressed to France and empowering it under Article 2(1) and 91 TFEU to negotiate and conclude such an agreement with the United Kingdom therefore represents an adequate instrument.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Stakeholder consultations**

This proposal is based on a request made by France and the empowerment proposed would be addressed to this Member State only. Given the time constraints, stakeholders such as the concessionaire of the Channel Fixed Link have been informally consulted and confirmed that the Intergovernmental Commission should be maintained as the single safety authority, applying Union law over the entire Channel Fixed Link.

4. BUDGETARY IMPLICATIONS

This proposal has no impact on the Union budget.

2020/0160 (COD)

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DECISION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the United Kingdom concerning the construction and operation by private concessionaires of a Channel Fixed Link

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[5],

Having regard to the opinion of the Committee of the Regions[6],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the construction and operation by private concessionnaires of a Channel Fixed Link, signed at Canterbury on 12 February 1986 ("the Treaty of Canterbury") established an Intergovernmental Commission to supervise all matters concerning the construction and operation of the Channel Fixed Link.

(2) Until the end of the transition period put in place by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community[7], the Intergovernmental Commission is considered as a body entrusted by several Member States with the tasks regarding railway safety in respect of the Channel Fixed Link. For those purposes, it therefore constitutes the national safety authority within the meaning of Article 3(7) of Directive (EU) 2016/798 of the European Parliament and the Council[8]. In that capacity, it applies the provisions of Union law relevant to railway safety and interoperability.

(3) After the end of the transition period referred to in recital (2) the Intergovernmental Commission will constitute a body established by a Member State and a third country. Furthermore, and unless otherwise provided for in an international agreement committing the United Kingdom, Union law would no longer be applicable to the part of the Channel Fixed Link under the jurisdiction of the United Kingdom.

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5 OJ C , , p. .

6 OJ C , , p. .

7 OJ L 29, 31.1. 2020, p.7.

8 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety, (OJ L 138, 26.5.2016, p. 102).

(4) An international agreement with a third country regarding the application of railway safety and interoperability rules in cross-border situations is liable to affect an area covered to a large extent by Union law, and in particular by Directive (EU) 2016/798, Directive (EU) 2016/797 of the European Parliament and the Council [9] and Regulation (EU) 2016/796 of the European Parliament and the Council[10]. Therefore, any such agreement falls within the Union's exclusive external competence. Member States may negotiate or enter into such agreement only if empowered to do so by the Union in line with Article 2(1) of the Treaty on the Functioning of the European Union (TFEU). Because of the interaction with existing Union legislation, it is also necessary that such empowerment be granted by the Union legislator, in accordance with the legislative procedure referred to in Article 91 TFEU.

(5) By letter of16 July 2020, France requested an empowerment by the Union to negotiate and conclude an international agreement supplementing the Treaty of Canterbury with the United Kingdom.

(6) To ensure the safe and efficient operation of the Channel Fixed Link, it would be appropriate to retain a single safety authority, the Intergovernmental Commission, as responsible for the whole of that infrastructure. Considering the special position of the Channel Fixed Link as a railway link involving a single, complex engineering structure situated partly in the territory of France and of a third country respectively, it is appropriate to authorise France to enter into an international agreement with the United Kingdom regarding the application of the railway safety rules of the Union to the Channel Fixed Link in order to maintain a unified safety regime in the whole Tunnel, provided that certain requirements are fulfilled.

(7) The Intergovernmental Commission could fulfil the role of national safety authority responsible for the part of the Channel Fixed Link under French jurisdiction subject to amending Article 3(7) of Directive (EU) 2016/798, and provided that certain conditions are met.

(8) The Intergovernmental Commission should apply the same rules over the entire Channel Fixed Link, irrespective of whether they apply to the parts under the jurisdiction of France or of the United Kingdom. Such rules should be the relevant provisions of Union law and in particular Directive (EU) 2016/798, Directive (EU) 2016/797, and Regulation (EU) 2016/796, as amended or replaced, as well as the acts adopted on their basis.

(9) In accordance with Article 19 of the Treaty of Canterbury, disputes between France and the United Kingdom relating to the interpretation or application of the Treaty of Canterbury are settled by an arbitral tribunal. Where such disputes raise questions relating to the interpretation of Union law, in order to ensure the correct application of Union law, the arbitral tribunal should refer the question to the Court of Justice of the European Union and be bound by its decision.

(10) It is also necessary to establish specific rules regarding the implementation of Union law on the part of the Channel Fixed Link under France's jurisdiction, in order to ensure that Union law is correctly implemented at all times and that the Commission can oversee its application under the control of the Court of Justice, including in circumstances of urgency or in case of failure by the Intergovernmental Commission to comply with a decision of the arbitral tribunal. To that end, France should retain the right to act unilaterally, where

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[9] Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union, (OJ L 138, 26.5.2016, p. 44).

[10] Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004, (OJ L138, 26.5.2016, p. 1).

necessary, to ensure the full and correct application of Union law on the part of the Channel Fixed Link under its jurisdiction.

(11) In order to ensure effective legal protection in the fields covered by Union law, courts or tribunals to which Article 19(1) TFEU applies should be exclusively competent for applications made by concessionnaires and users of the Channel Fixed Link against decisions of the Intergovernmental Commission.

(12) The elements described in recitals (8) to (11) should be reflected in the international agreements between France and the United Kingdom regarding the Channel Fixed Link. Those international agreements should be compatible with Union law in all respects,

HAVE ADOPTED THIS DECISION:

Article 1

France is empowered to negotiate, sign and conclude an international agreement with the United Kingdom regarding the application of railway safety rules within the Channel Fixed Link, provided that that agreement enters into force after the end of the transition period provided for in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community and complies with the following:

(1) In order to maintain a unified safety regime on the whole Channel Fixed Link, the Intergovernmental Commission established by the Treaty of Canterbury shall ensure the application, as regards the Channel Fixed Link, of the provisions of Union law relevant to the tasks of National Safety Authorities within the meaning of Article 3(7) of Directive (EU) 2016/798, and in particular of thatDirective, Directive (EU) 2016/797 and Regulation (EU) 2016/796, as amended or replaced, as well as of the acts adopted on their basis.

(2) Where a dispute submitted to arbitration in accordance with Article 19 of the Treaty of Canterbury raises a question relating to the interpretation of a provision of Union law, the arbitral tribunal shall not have the power to decide on any such question. In such case, the arbitral tribunal shall request the Court of Justice of the European Union to give a ruling on the question. The ruling of the Court of Justice of the European Union shall be binding on the arbitral tribunal.

(3) Where necessary, in particular in circumstances of urgency or in case of failure by the Intergovernmental Commission to comply with a decision of the arbitral tribunal, France shall retain the right to act unilaterally with a view to ensuring the full, correct and expeditious application of Union law on the part of the Fixed Link under French jurisdiction.

(4) Courts or tribunals to which Article 19(1) TFEU applies shall be exclusively competent to decide on remedies sought by concessionnaires and users of the Channel Fixed Link against decisions taken by the Intergovernmental Commission in its capacity referred to in paragraph 1.

(5) The agreement must be compatible with Union law in all respects.

Article 2

France shall keep the Commission regularly informed of the negotiations with the United Kingdom supplementing the Treaty of Canterbury or concluding a new agreement, as referred to in Article 1 and, where appropriate, invite the Commission to participate as an observer.

Upon completion of the negotiations, France shall submit the resulting draft text to the Commission. The Commission shall inform the Council and the European Parliament thereof.

Within one month from the notification of the draft agreement, the Commission shall take a decision as to whether the requirements set out in Article 1 are fulfilled or not. Where the Commission decides that they are fulfilled, France may sign and conclude the corresponding agreement. A copy of the signed agreement shall be provided to the Commission within one month of its entry into force, or, where the agreement is to be applied provisionally, within one month of the start of its provisional application.

Article 3

This Decision is addressed to the French Republic.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*