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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 2.3.2009  
COM(2009) 94 final

Proposal for a

**COUNCIL DECISION**

**on the signing by the European Community of the Protocol to the Convention on  
International Interests in Mobile Equipment on Matters Specific to Railway Rolling  
Stock, adopted in Luxembourg on 23 February 2007**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### 1. Purpose of the present proposal

The Commission is proposing that the Community sign the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (hereinafter "the Rail Protocol" or "the Luxembourg Protocol") adopted at a Diplomatic Conference held under the joint auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Organisation for International Carriage by Rail (OTIF) in Luxembourg from 12 to 23 February 2007. 42 States and 11 International Organisations participated in the Diplomatic Conference. The European Commission participated in the negotiations for the European Community on the basis of Council directives adopted on 28 February 2003. Two Member States, Luxembourg and Italy, signed the Protocol at the end of the Conference.

### 2. The Cape Town Convention and the Rail Protocol

#### 2.1. Scope

The Convention on International Interests in Mobile Equipment (hereinafter "the Cape Town Convention" or "the Convention") and the Protocol on Matters Specific to Aircraft Equipment (hereinafter "the Aircraft Protocol") were adopted, at a Diplomatic Conference held in Cape Town from 29 October to 16 November 2001.

The Convention lays down uniform rules for the constitution and effects of an international interest (security agreement, title reservation agreement or leasing agreement) in certain categories of mobile equipment designated in the Protocols relating to the following categories: aircraft, railway rolling stock and space assets.

The instrument consists of the basic Convention laying down legal rules applicable to all categories of mobile equipment mobiles and a number of specific Protocols containing special rules relating to particular types of equipment.

These Protocols may amend the Convention where the specific features of the relevant sector so require. It is accordingly the Protocol and not the Convention that prevails as regards each category of mobile equipment. The Member States' obligations under the Convention vary with the Protocol to which they accede. The Convention can apply to a category of mobile equipment only when the relevant Protocol comes into force, and only as between the Parties to that Protocol. But the Convention and the Protocol must then be read together as a single instrument.

The Convention applies when the debtor is situated in a contracting State (Article 3) since the various protocols provide for specific connecting factors (i.e. the State of registration). The interest established by the Convention (Articles 1 and 2) concerns the asset registered, but also associated rights and proceeds, and the relevant protocol may provide for the Convention to apply to the sale of an asset (Article 41 of the Convention). The Convention strengthens the rights of the beneficiaries of this unified interest *in rem* in mobile equipment assets if the debtor should default on his obligations (Articles 8 to 15). The Convention finally establishes an international system for creditors to register interests in the various categories of mobile equipment assets (Articles 16 to 26), giving priority to the creditor's registered interest (Article 29).

The Rail Protocol fixes certain rules concerning the priority and enforceability of registered international interests for certain types of creditors financing rolling stock – i.e. the chargor, conditional seller or lessor. Furthermore the Protocol provides to creditors specific default remedies (Article VII) and three alternatives for remedies on insolvency of the debtor (Article IX). Under Chapter III an international registry will be accessible through the internet and a Supervisory Authority is created. Finally Article XXV authorises under certain conditions Contracting States to make declarations on public service exemptions.

## 2.2. Objectives of the Rail Protocol

This instrument is intended to facilitate the financing of high-value railway rolling stock by creating a particularly strong international guarantee for creditors (sellers on credit and institutions supplying credit for such sales) which gives them "absolute" priority over these assets in an international register.

Such instrument, to which many of the Community's main trading partners are party, is likely to be of great benefit to the European rail industry, banks and Governments by encouraging capital investment in the rail sector and boosting the creation of a genuine lease market. Before the Community can benefit from it, however, it must sign and ratify the Rail Protocol.

## 3. Community Powers

The Cape Town Convention and its Protocols are mixed agreements falling partly under exclusive Community competence. In 2002, the Commission presented two proposals for the signing and the conclusion by the Community of the Cape Town Convention and the Aircraft Protocol. In July 2008 the Commission presented a revised proposal for the conclusion only of these international instruments as they are no longer open to signature following their entry into force.

The Community has jurisdiction over certain matters governed by the Rail Protocol and affecting Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters<sup>1</sup>, Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings<sup>2</sup> and Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>3</sup>. Furthermore, there is Community legislation in matters governed by the Rail Protocol and affecting Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on interoperability of the Rail system within the Community (Recast)<sup>4</sup> and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency<sup>5</sup>. For these reasons, the Member States cannot sign the Rail Protocol independently.

On 28 February 2003, the Council authorised the Commission to negotiate on behalf of the Community, at the Diplomatic Conference in Luxembourg, provisions of the Rail Protocol which fall within the exclusive powers of the Community and affected Community law.

Under Article XXII of the Rail Protocol, "Regional Economic Integration Organisations" may sign, accept, approve or accede to this instrument. For the purposes of the Rail Protocol, a

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<sup>1</sup> OJ L 12, 16.1.2001, p. 1.

<sup>2</sup> OJ L 160, 30.6.2000, p. 1.

<sup>3</sup> OJ L 177, 4.7.2008, p. 6.

<sup>4</sup> OJ L 191, 18.07.2008, p. 1.

<sup>5</sup> OJ L 220, 21.6.2004, p. 3.

"Regional Economic Integration Organisation" is taken to mean an organisation which has competence over certain matters governed by the Protocol and may sign it. This definition will allow the Community to sign this instrument on condition that it obtains the necessary approval of the Community institutions. Pursuant to Article XXII(3) any reference in the Protocol to "Contracting State(s)" or "States Parties" also applies to the Community when so required by the context.

Article XXII(2) of the Rail Protocol requires that at the time of signature,, acceptance, approval or accession, the Community make a general declaration indicating the matters covered by the Rail Protocol which fall within the Community's jurisdiction. To this end a draft declaration is attached in Annex. The text has been drawn up on the basis of the Community's present powers conferred by Regulations (EC) No 44/2001 of 22 December 2000, No 1346/2000 of 29 May 2000 and No 593/2008 of 17 June 2008, Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on interoperability of the Rail system within the Community (Recast) and Regulation (EC) No 881/2004 of 29 April 2004.

In view of the foregoing, the Commission proposes that the Council adopt the decision set out below, authorising signature of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, by making the abovementioned declaration, the text of which is attached in Annex.

Proposal for a

## COUNCIL DECISION

### **on the signing by the European Community of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, adopted in Luxembourg on 23 February 2007**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) in conjunction with the first subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission<sup>6</sup>,

Whereas:

- (1) The Community is working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions.
- (2) The Protocol to the Convention on International Interests in Mobile Equipment (hereinafter referred to as the "Cape Town Convention") on matters specific to railway rolling stock (hereinafter referred to as the "Rail Protocol"), adopted in Luxembourg on 23 February 2007, makes a useful contribution to the regulation at international level. It is therefore desirable that the provisions of this instrument which concern matters falling within the exclusive competence of the Community should be applied as soon as possible.
- (3) The Commission negotiated the Rail Protocol on behalf of the Community, for the parts falling within the exclusive competence of the Community.
- (4) Article XXII(1) of the Rail Protocol provides that Regional Economic Integration Organisations, which have competence over certain matters governed by the Rail Protocol, may sign the said Protocol;
- (5) The Protocol remains open for signature until its entry into force.
- (6) Some of the matters governed by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>7</sup>, Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings<sup>8</sup>, Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>9</sup>, Directive 2008/57/EC of the European Parliament

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<sup>6</sup> OJ C , , p. .

<sup>7</sup> OJ L 12, 16.1.2001, p. 1. Regulation as last amended ....

<sup>8</sup> OJ L 160, 30.6.2000, p. 1. Regulation as last amended ...

<sup>9</sup> OJ L 177, 4.7.2008, p. 6.

and of the Council of 17 June 2008 on interoperability of the Rail system within the Community (Recast)<sup>10</sup> and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency<sup>11</sup> are also dealt with in the Rail Protocol.

- (7) The Community has exclusive competence over some of the matters governed by the Rail Protocol, while the Member States have competence over other matters governed by this instrument.
- (8) The Community should therefore sign the Rail Protocol. Article XXII(2) of the Rail Protocol provides that, at the time of signature, acceptance, approval or accession a Regional Economic Integration Organisation shall make a declaration specifying the matters governed by the said Protocol in respect of which competence has been transferred to that organisation by its Member States.
- (9) The United Kingdom and Ireland take part in the adoption and application of this Decision.
- (10) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Decision and is not bound by it or subject to its application,

HAS DECIDED AS FOLLOWS:

#### *Article 1*

1. Subject to a possible conclusion at a later date, the signing of the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to railway rolling stock, adopted in Luxembourg on 23 February 2007, is hereby approved on behalf of the Community.
2. In this Decision, "Member State" shall mean all the Member States with the exception of Denmark.

#### *Article 2*

The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to railway rolling stock, subject to the condition set out in Article 3.

#### *Article 3*

When signing the Rail Protocol, the Community shall make the declaration set out in Annex, in accordance with Article XXII (2) of the Protocol.

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<sup>10</sup> OJ L 191, 18.07.2008, p. 1.

<sup>11</sup> OJ L 220, 21.6.2004, p. 3.

The text of the Protocol is attached to this Decision.

Done at Brussels,

*For the Council  
The President*



## ANNEX

### **Declaration pursuant to Article XXII(2) concerning the competence of the European Community over matters governed by the Protocol to the Convention on International Interests in Mobile Equipment on matters specific to railway rolling stock ("Rail Protocol"), adopted in Luxembourg on 23 February 2007, in respect of which the Member States have transferred their competence to the Community**

1. Article XXII of the Rail Protocol provides that Regional Economic Integration Organisations which are constituted by sovereign States and which have competence over certain matters governed by the Protocol may sign it on condition that they make the declaration referred to in Article XXII(2). The Community has decided to sign the Rail Protocol and is accordingly making that declaration.

2. The current Members of the European Community are the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.

3. However, this declaration does not apply to the Kingdom of Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaties.

4. This declaration is not applicable in the case of the territories of the Member States in which the Treaty establishing the European Community does not apply and is without prejudice to such acts or positions as may be adopted under the Rail Protocol by the Member States concerned on behalf of and in the interests of those territories.

5. The Member States of the European Community have transferred competence to the Community as regards matters which affect Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>12</sup>, Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings<sup>13</sup>, Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)<sup>14</sup>, Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on interoperability of the Rail system within the Community (Recast)<sup>15</sup> and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency<sup>16</sup>.

6. As far as the numbering system of vehicles is concerned, the Community has adopted through its decision 2006/920/EC (Commission Decision of 11 August 2006 concerning the technical specification of interoperability relating to the subsystem Traffic Operation and

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<sup>12</sup> OJ L 12, 16.1.2001, p. 1. Regulation as last amended ...

<sup>13</sup> OJ L 160, 30.6.2000, p. 1. Regulation as last amended ....

<sup>14</sup> OJ L 177, 4.7.2008, p. 6.

<sup>15</sup> OJ L 191, 18.07.2008, p. 1.

<sup>16</sup> OJ L 220, 21.6.2004, p. 3.

Management of the trans-European conventional rail system) a numbering system which is appropriate for the purpose of identification of rolling stock as referred to in article V (2) of the Protocol.

Furthermore, as far as data exchange between Member States of the Community and the International Registry is concerned, the Community has made considerable progress through its decision 2007/756/EC (Commission Decision of 9 November 2007 adopting a common specification of the national vehicle register provided for under Articles 14(4) and (5) of Directives 96/48/EC and 2001/16/EC). In accordance with that decision EC Member States are implementing National vehicle registers and duplication of data with the international registry should be avoided.

7. The exercise of competence which the Member States have transferred to the Community pursuant to the Treaty establishing the European Community is, by its nature, liable to continuous development. In the framework of that Treaty, the competent institutions may take decisions which determine the extent of the competence of the Community. The latter therefore reserves the right to amend the present declaration accordingly, without this constituting a prerequisite for the exercise of its competence with regard to matters governed by the Rail Protocol.