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2013/0184 (NLE)

Proposal for a

COUNCIL DECISION

on the approval, on behalf of the European Union, of the Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock, adopted in Luxembourg on 23 February 2007

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1. Purpose of the present proposal

The Commission is proposing that the European Union approves 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.

The European Union decided the signing of the Rail Protocol by Council Decision of 30 November 2009[1] and effectively signed it on 10 December 2009.

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 European Union approved the accession to the Cape Town Convention and the Aircraft Protocol by Council Decision of 6 April 2009 and deposited the instrument of accession on 28 April 2009.

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

[1] OJ L 331, 16.12.2009, p. 1.

equipment assets (Articles 16 to 26), giving priority to the creditor's registered interest (Article 29).

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.

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.

The Rail Protocol creates an international system of unique and unchangeable registration of international interests. The Protocol is complementary to, and supportive of, the European Vehicle Identification Numbering system (adopted under the Railway Interoperability Directive). It guarantees that the parties can register and search against their interests from wherever they are within the EU, using internet thereby making the register accessible 24 hours/day.

Such instrument 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.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES

The Commission's initiative to propose the approval of the Rail Protocol, after the EU signature in 2009, was preceded by consultations with the Rail Working Group, a cross-industry association dedicated to the implementation of the Rail Protocol, whose Members are, *inter alia*, Bombardier Transportation, Deutsche Bahn, English Welsh and Scottish Railways, European Investment Bank, Intergovernmental Organisation for International Carriage by Rail (OTIF), UIC-International Union of Railways, Union of European Railway Industries.

During the consultations, it was particularly highlighted the close link between the conclusion of the Rail Protocol and the adoption of the 4th Railway Package on 30 January 2013.

The 4th Railway Package is aimed at encouraging more innovation in EU railways by opening EU domestic passenger markets to competition, simplifying the procedures for authorisation of rolling stock and improving the governance of infrastructure. It comprises legislative proposals to amend 3 Directives and 2 Regulations together with a Communication and 3 Reports[2] and stresses the importance of financing rolling stock in support of opening financial markets, which is the objective of the Rail Protocol.

The adoption of the Rail Protocol will support new investment in rolling stock in the EU with consequent benefit for operators and the public. It underpins in that way the EU's growth

[2] Information on the 4h Railway Package can be found at the following address: http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.htm

agenda, by encouraging more infrastructure investment and supporting jobs in the manufacturing sector as well.

The Rail Protocol is also consistent with the objective of supporting the shift to greener and more sustainable mode of transport such as the rail transport, as highlighted in the 2011 Transport White Paper.[3]

3. LEGAL ELEMENTS OF THE PROPOSAL

3. European Union powers

The Cape Town Convention and its Protocols fall partly under exclusive European Union competence. Accordingly, Member States cannot ratify the Protocols without first having the Protocols approved by the EU.

By means of Council decisions, the EU has indeed acceded to the Aircraft Protocol at the same time with the Cape Town Convention on 28.4.2009[4] and has signed the Rail Protocol on 10.12.2009[5]. A declaration on the competences of the European Community was made at the time of signature of the Rail Protocol, following Article XXII(2) of the Rail Protocol which requires that at the time of signature, acceptance, approval or accession, the Regional Economic Integration Organisation make a general declaration indicating the matters covered by the Rail Protocol which fall in respect of which competences have been transferred to that Organisations by its Member States.

The paragraph 6 of the declaration on Community competence made at the time of signature should be amended in order to update it, namely to take into account Commission decision 2012/757/EU and correct the reference to Article V(2) of the Protocol which should be instead Article XIV. Therefore, at the time of the approval, the declaration should be modified accordingly. The revised text of the declaration on the European Union competences is set out in the Annex.

The European Union has exclusive competence 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[6], Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[7] and Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)[8]. Furthermore, there is European Union 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)[9] and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency[10].

4. Declarations on matters falling under the scope of European Union's exclusive competence

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3 Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system, COM(2011) 144 final of 28.3.2011.

4 2009/370/EC, OJ L 121, 15.5.2009, p. 3-7

5 2009/940/EC, OJ L 331, 16.12.2009, p. 1–16.

6 OJ L 12, 16.1.2001, p. 1.

7 OJ L 160, 30.6.2000, p. 1.

8 OJ L 177, 4.7.2008, p. 6.

9 OJ L 191, 18.07.2008, p. 1.

10 OJ L 220, 21.6.2004, p. 3.

Several rules of the Rail Protocol require or enable the contracting parties to make declarations as to the applicability or scope of its provisions or the way they will be implemented.

The European Union has the power to make declarations relating to the Articles VI, VIII, IX, and X of the Rail Protocol, whose subject matter fall under its exclusive competence.

Article VI of the Rail Protocol (*choice of law*) provides that the parties to an agreement or related guarantee contract can choose the applicable law. Hence, it regulates a matter covered by Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

This extensive choice of law is not compatible with the system established by Regulation No 593/2008.

Similarly to the solution chosen in Council Decision 2009/370/EC of 6 April 2009 on the accession of the European Community to the Convention on International Interests in Mobile Equipment and its Aircraft Protocol, the Member States of the European Union will continue to apply the provisions of Regulation No 593/2008.

As Article VI applies only if a declaration pursuant Article XXVII of the Rail Protocol is made, at the time of approval of the Rail Protocol the European Union should not make a declaration concerning the application of Article VI.

Article 55 of the Cape Town Convention, *"Modification of provisions regarding relief pending final determination"*, foresees the possibility not to apply the provisions of Articles 13 or Article 43 or both, wholly or in part. Upon its accession to the Cape Town Convention, the European Union declared that Articles 13 and 43 will apply only in accordance with Article 31 of the Brussels I Regulation[11]. It must be stressed that that declaration is entirely applicable to the versions of Articles 13 and 43 of the Cape Town Convention as amended by the Rail Protocol in its Article VIII. As stated in Article XXIX of the Rail Protocol "*Declarations under the Convention*", declarations made under the Cape Town Convention, including that made under Article 55, shall be deemed to be made under the Rail Protocol unless stated otherwise.

Under Article VIII(1), Article VIII of the Protocol, which covers interim relief, applies in whole or in part only if a Contracting State has made a positive declaration to that effect and to the extent stated in such declaration. Where a Contracting State makes such a declaration with regard to Article VIII(2), it must specify the required time-period for obtaining the forms of interim relief set out in Article 13(1) of the Convention. It is proposed that, similarly to what has been decided in the context of the accession to the Aircraft Protocol, the European Union should not make the declaration referred to in Article VIII pursuant to Article XXVII(2).

Article IX (*Remedies on insolvency)* and Article X *(Insolvency assistance*) are virtually identical to the correspondent provisions of the Aircraft Protocol where the Council decided not to opt-in. Indeed, the above-mentioned provisions apply only where a Contracting State that is the primary insolvency jurisdiction makes a positive declaration to this effect pursuant to Article XXVII.

The Commission considers that, where the primary insolvency jurisdiction is in an EU Member State, Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings should in any case be applicable instead of the Rail Protocol, similarly to what has been decided in relation to the Cape Town Convention and its Aircraft Protocol. To achieve this objective and

[11] OJ L 121, 15.5.2009, p. 7.

preserve certainty in the law, it recommends that the European Union should not opt for full or partial application of either of the alternatives set out in Article IX of the Protocol.

It follows that it is proposed that the European Union should not make the declaration referred to in Article IX of the Protocol pursuant to Article XXVII(3), or the declaration on insolvency assistance referred to in Article X, which is linked to that in Article IX, pursuant to Article XXVII(1).

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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 81(2), in conjunction with Article 218(6)(a) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament[1],

Whereas:

(1) The European Union 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 European Union should be applied as soon as possible.

(3) The Commission negotiated the Rail Protocol on behalf of the European Community, for the parts falling within the exclusive competence of the European 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, accept, approve or accede to the said Protocol.

(5) 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 [2], Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [3], Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)[4], Directive 2008/57/EC of the European Parliament and of the Council of 17 June 2008 on interoperability of the Rail system within the

[1] OJ C , , p. .
[2] OJ L 12, 16.1.2001, p. 1.
[3] OJ L 160, 30.6.2000, p. 1.
[4] OJ L 177, 4.7.2008, p. 6.

Community (Recast)[5] and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency[6] are also dealt with in the Rail Protocol.

(6) The European Community signed the Rail Protocol on 10.12.2009, after the Council authorised the signature by means of Decision 2009/940/EC of 30 November 2009[7].

(7) The European Union 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 European Union should therefore approve 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 declaration on the competence of the European Community was made at the time of the signature of the instrument. It is advisable to renew this declaration at the time of the approval of the Rail Protocol in order to take into account legislative developments and correct a factual mistake in the previous declaration.

(10) Articles VII, VIII, IX and X of the Rail Protocol apply only where a Contracting State has made a declaration to that effect pursuant to Article XXVII of the said Protocol and under the conditions specified by that declaration. At the time of approval of the Rail Protocol, the European Union will not make a declaration pursuant to Article XXVII(2) concerning the application of Article VIII nor will it make any of the declarations permitted under Article XXVII(1) and (3). The competence of the Member States concerning the rules of substantive law as regards insolvency will not be affected.

(11) The United Kingdom and Ireland are bound by Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) and are therefore taking part in the adoption of this Decision.

(12) In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application.

HAS ADOPTED THIS DECISION:

Article 1

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 European Union.

The text of the Protocol is attached to this Decision.

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5 OJ L 191, 18.07.2008, p. 1.
6 OJ L 220, 21.6.2004, p. 3.
7 OJ L 331, 16.12.2009, p. 1–16.

Article 2

The President of the Council shall designate the person empowered to proceed, on behalf of the European Union, to the deposit of the instrument of approval provided for in Article XXVII of the Protocol, in order to express the consent of the European Union to be bound by the Protocol.

Article 3

At the time of approval of the Protocol, the European Union shall make the declaration set out in the Annex, in accordance with Article XXII (2) of the Protocol.

Article 4

This Decision shall enter into force on […][8].

Done at Brussels,

For the Council
The President

[8] The date of entry into force of the Agreement will be published in the *Official Journal of the European Union* by the General Secretariat of the Council.

ANNEX

Declaration pursuant to Article XXII(2) concerning the competence of the European Union 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 European Union

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 approve it on condition that they make the declaration referred to in Article XXII(2). The European Union has decided to approve the Rail Protocol and is accordingly making that declaration.

2. The current Members of the European Union 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 Protocol 22 on the position of Denmark, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union to the Treaties.

4. This declaration is not applicable in the case of the territories of the Member States in which the Treaty on the Functioning of the European Union 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 Union have transferred competence to the Community as regards matters which may affect or alter the rules in Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[20], Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [21], Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I)[22], 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)[23] and Regulation (EC) No 881/2004 of 29 April 2004 establishing a European railway agency[24].

6. As far as the numbering system of vehicles is concerned, the EU has adopted by way of Decision 2006/920/EC (Commission Decision of 11 August 2006 concerning the technical specification of interoperability relating to the subsystem Traffic Operation and Management of the trans-European conventional rail system), recently updated through Commission decision 2012/757/EU a numbering system which may be appropriate for the purpose of identification of railway rolling stock as referred to in Article XIV of the Rail Protocol.

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20 OJ L 12, 16.1.2001, p. 1.
21 OJ L 160, 30.6.2000, p. 1.
22 OJ L 177, 4.7.2008, p. 6.
23 OJ L 191, 18.07.2008, p. 1.
24 OJ L 220, 21.6.2004, p. 3.

Furthermore, as far as data exchange between Member States of the European Union and the International Registry is concerned, the EU has made considerable progress by way of 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), recently updated through Commission Decision 2012/757/EU. Member States of the European Union have implemented National Vehicle Registers and duplication of data with the International Registry should be avoided.

7. The European Union does not make a declaration pursuant to Article XXVII(2) concerning the application of Article VIII nor any of the declarations permitted under Article XXVII(1) and (3). The Member States keep their competence concerning the rules of substantive law as regards insolvency.

8. The exercise of competence which the Member States have transferred to the European Union pursuant to the Treaty on European Union and to the Treaty on the Functioning of the European Union is, by its nature, liable to continuous development. In the framework of the Treaties, the competent institutions may take decisions which determine the extent of the competence of the European Union. 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.