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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.8.2008
COM(2008) 508 final

2008/0162 (CNS)

Amended proposal for a

COUNCIL DECISION

**on the conclusion by the European Community of the Convention on International
Interests in Mobile Equipment and its Protocol on matters specific to aircraft
equipment, adopted jointly in Cape Town on 16 November 2001**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. PURPOSE OF THE PRESENT PROPOSAL

The Commission is proposing that the Community should conclude the Convention on International Interests in Mobile Equipment ("the Cape Town Convention" or "the Convention") and its Protocol on matters specific to aircraft equipment ("the Aircraft Protocol") adopted, at a Diplomatic Conference held in Cape Town from 29 October to 16 November 2001, under the combined auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organisation (ICAO).

The Cap Town Convention and Aircraft Protocol adopted in 2001 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 these instruments. These proposals contained declarations to be made by the Community on the application of specific provisions of both instruments which affect Community law. Following discussions in the Civil Law Committee, the file was sent to COREPER in October 2003, but it did not reach adoption because of a dispute between ES and UK relating to the Gibraltar authorities in the context of mixed agreements. This dispute has been solved in December 2007. However the context has substantially changed since December 2003 as a number of new Member States joined the Community and the Convention and Protocol are no more open to signature. Therefore an amended proposal was necessary.

Against this background, this issue was raised at the meeting of 3 March 2008 of the Civil Law Committee where the Commission committed itself to prepare an amended proposal for the conclusion of these international instruments. The amended proposal would merge the draft Community declarations for the signature and conclusion into a proposal for one Council Decision on the conclusion.

This proposal replaces and updates the following proposals that were presented by the Commission in 2002:

- Proposal for a Council Decision on the signing by the European Community of the Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001,
- Proposal for a Council Decision on the conclusion by the European Community of the Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, adopted jointly in Cape Town on 16 November 2001.¹

2. COMMUNITY POWERS

Since the Community has jurisdiction over certain matters governed by the Convention and its Aircraft Protocol and affecting Council Regulations (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial

¹ SEC(2002) 1308 final/2, 03.03.2003.

matters² and (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings,³ the Member States cannot ratify these instruments independently.

On 29 October 2001, the Council authorised the Commission to negotiate on behalf of the Community, at the Diplomatic Conference in Cape Town, provisions of the Convention and Aircraft Protocol which fell within the exclusive powers of the Community and affected its two Regulations. Four Member States have signed the Convention and its Aircraft Protocol. Since the entry into force of the Cape Town Convention on 1 April 2004 and of its Aircraft Protocol on 1 March 2006, the Community cannot sign these international instruments and the 2003 proposal for the signing has become obsolete. However, the Community shall accede to the Convention and Aircraft Protocol by making the relevant declarations.

Under the Convention and its Aircraft Protocol, "Regional Economic Integration Organisations" may become party to these instruments (Articles 48 and XXVII respectively). For the purposes of the Convention and its Aircraft Protocol, a "Regional Economic Integration Organisation" is taken to mean an organisation which has competence over certain matters governed by the Convention or the Protocol and may sign, approve, accept or accede to them. This definition will allow the Community to become a party to these two instruments on condition that it obtains the necessary approval of the Community institutions. Any reference in the Convention or the Protocol to "Contracting State(s)" or "States Parties" also applies to the Community when so required by the context (Articles 48(3) and XXVII(3) respectively).

The two instruments require that at the time of signature, acceptance, approval or accession, the Community must make a general declaration indicating the matters covered by the Convention and the Protocol which fall within the Community's jurisdiction (Articles 48(2) and XXVII(2) respectively). To this end a draft declaration is attached in Annex I. The text has been drawn up on the basis of the Community's present powers conferred by Council Regulations (EC) n° 44/2001 of 22.12.2000 and n°1346 of 29.05.2000.

3. DECLARATIONS ON MATTERS FALLING WITHIN THE SCOPE OF THE COMMUNITY'S EXCLUSIVE JURISDICTION

In the course of the Cape Town Diplomatic Conference in November 2001, the Community obtained provisions allowing it to apply Community law instead of the Convention and the Aircraft Protocol in matters covered by the two Regulations mentioned above. The Community will be required, at the time of conclusion, to make declarations on the matters falling within the Community's exclusive jurisdiction. These declarations attached in Annex II deal with the following matters:

3.1. Interim relief (Article 55 of the Convention and Article X of the Protocol)

With regard to compatibility with Articles 13 and 43 of the Convention, it should be pointed out that the only measures which are provisional or protective measures within the meaning of Article 31 of Regulation No 44/2001 are measures which, in the areas within its scope, are

² OJ L 12, 16.1.2001, p. 1.

³ OJ L 160, 30.6.2000, p. 1.

intended to maintain a *de facto* or *de jure* situation in order to safeguard rights which the court hearing the case is requested to recognise.⁴

Moreover, the grant of provisional or protective measures pursuant to Article 31 of the Regulation is subject, in particular, to the condition that there is a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought.⁵

The Community will have to declare that the grant of interim relief under Article 13 of the Convention by the courts which have jurisdiction under Article 43 will be possible, where the debtor is domiciled in the Community, only in accordance with Article 31 of Regulation No 44/2001 (Article 24 of the Brussels Convention of 27 September 1968, as interpreted by the Court of Justice of the European Communities).

Under Article X(1) and Article XXX(2) of the Protocol, Article X 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. This Article includes the sale of the object in the list of forms of interim relief set out in Article 13 of the Convention. Where a Contracting State makes such a declaration with regard to Article X(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 the Community should not make the declaration referred to in Article X pursuant to Article XXX(2).

3.2. Insolvency (Articles XI and XII of the Protocol)

Articles XI and XII of the Aircraft Protocol on insolvency of the debtor apply only where a Contracting State that is the primary insolvency jurisdiction makes a positive declaration to this effect pursuant to Article XXX.

Article XI lays down the detailed rules for giving possession of the aircraft object which is the creditor's surety in the event of the debtor's insolvency (Alternative A or B). These rules are provisions of substantive law, designed to protect the creditor secured by a right in rem from any possible consequences of the debtor's insolvency.

Regulation 1346/2000 lays down rules on jurisdiction, recognition and enforcement and rules on conflict of laws applicable to insolvency proceedings opened in the Community. However, Article 5 stipulates that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. This is a substantive provision of private international law, which directly determines what happens to rights in rem in immovable assets situated in a Member State other than that in which the proceedings are opened. Rather than referring either to the law of the State in which the proceedings are opened or to the *lex situs* to determine whether the assets subject to rights in rem form part of the insolvency estate, the Regulation directly stipulates that the rights in rem in respect of these assets are not affected by the opening of the insolvency proceedings.

⁴ [Judgment of 31 March 1982 *C.H.W. v G.J.H.* \(Case 25/81 \[1982\] ECR 1189\).](#)

⁵ [Judgment of 17 November 1998 *Van Uden Maritime v Kommanditgesellschaft in Firma Deco-Line and Another* \(Case 391/95 \[1998\] ECR I-7091\).](#)

Recital 12 to the Regulation states that "the main insolvency proceedings ... have universal scope and aim at encompassing all the debtor's assets", irrespective of the Member State in which the assets are located, except where territorial insolvency proceedings are opened under Article 3(2) of the Regulation. It follows that the State in which proceedings are opened under Article 4 should determine which assets form part of the assets in the main proceedings and which are excluded. As regards assets subject to rights in rem, the Regulation does not require them to be included in the estate in the main proceedings, or to be excluded from it. Article 5 merely stipulates that the rights in rem of third parties in respect of assets situated within the territory of a Member State (which is a Contracting State to the Protocol) other than the State in which the main proceedings are opened must be respected. Consequently, even if the law of the State in which proceedings are opened lays down that all assets form part of the estate, the holder of the right in rem does not lose any particular right attached to that right, especially the possibility of realising the asset in order to be satisfied. Thus, Article 5 of the Regulation and Article XI of the Protocol have in common the provision that an asset subject to a right in rem does not form part of the insolvency estate.

It follows that, pursuant to the Court of Justice's ruling in *AETR*,⁶ the Community has exclusive power to enter into external commitments in this area, and to decide whether or not to make the declaration referred to in Article XXX(3) in order to specify the Alternative chosen (A or B) and the time-period required by Article XI.

The Commission considers that, where the primary insolvency jurisdiction is in a Member State, Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings should in any case be applicable instead of the Convention and the Aircraft Protocol. To achieve this objective and preserve certainty in the law, it recommends that the Community should not opt for full or partial application of either of the alternatives set out in Article XI of the Protocol. This would seem to be the only solution which would guarantee the uniform operation of Regulation No 1346/2000 within the Community, when there is no justification for derogating from it for aircraft equipment.

It follows that the Community will not make the declaration referred to in Article XI of the Protocol pursuant to Article XXX(3), or the declaration on insolvency assistance referred to in Article XII, which is linked to that in Article XI, pursuant to Article XXX(1).

3.3. Jurisdiction of the place of registration

Finally, with regard to Article XXI of the Protocol, we think it preferable to avoid a situation whereby this new rule on jurisdiction creates an exception from the provisions of Community law. If the debtor is situated within the Community in accordance with Article 4 of the Convention, then Community law should be applied uniformly. Article XXX(5) of the Protocol allows Contracting States to declare that they will not apply this Article. It is proposed that the Community should declare that it will not apply this Article, which will enable it to apply Regulation No 44/2001.

4. DECLARATIONS UNDER ARTICLE VIII OF THE PROTOCOL

Since the Member States are all bound by the 1980 Rome Convention on the law applicable to contractual obligations until such time as they may be bound by the rules of Regulation (EC)

⁶ Case 22/70.

No 593/2008 of the European Parliament and of the Council of 17 June 2008⁷, the Commission proposes that they should not make a declaration pursuant to Article XXX(1) of the Protocol that they will apply Article VIII of the Protocol concerning the choice of law.

In view of the foregoing, the Commission proposes that the Council adopt the decision set out below authorising conclusion of the UNIDROIT Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment, by making the abovementioned declarations, the text of which is attached in Annexes I and II.

⁷ OJ L 177, 4.7.2008, p. 6.

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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) and the first subparagraph of Article 300(3) thereof,

Having regard to the proposal from the Commission⁸,

Having regard to the opinion of the European Parliament⁹,

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 Convention on International Interests in Mobile Equipment (hereinafter referred to as the "Cape Town Convention") and its Protocol on matters specific to aircraft equipment (hereinafter referred to as the "Aircraft Protocol"), adopted jointly in Cape Town on 16 November 2001, make a useful contribution to the regulation at international level in their respective areas. It is therefore desirable that the provisions of the two instruments which concern matters falling within the exclusive competence of the Community should be applied as soon as possible.
- (3) The Commission negotiated the Cape Town Convention and the Aircraft Protocol on behalf of the Community, for the parts falling within the exclusive competence of the Community.
- (4) Regional Economic Integration Organisations, which have competence over certain matters governed by the Cape Town Convention and the Aircraft Protocol, may accede to the said Convention and the said Protocol after their entry into force.
- (5) Some of the matters governed by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁰, Council Regulation (EC) No 1346/2000 of 29 May

⁸ OJ C , , p. .

⁹ OJ C , , p. .

¹⁰ OJ L 12, 16.1.2001, p. 1. Regulation as last amended

2000 on insolvency proceedings¹¹ and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹² are also dealt with in the Cape Town Convention and the Aircraft Protocol.

- (6) The Community has exclusive competence over some of the matters governed by the Cape Town Convention and the Aircraft Protocol, while the Member States have competence over other matters governed by these two instruments.
- (7) The Community should therefore accede to the Cape Town Convention and the Aircraft Protocol.
- (8) Article 48 of the Cape Town Convention and Article XXVII of the Aircraft Protocol provide that, at the time of accession, a Regional Economic Integration Organisation shall make a declaration specifying the matters governed by the said Convention and the said Protocol in respect of which competence has been transferred to that organisation by its Member States. The Community should therefore make such a declaration at the time of accession.
- (9) Article 55 of the Cape Town Convention provides that a Contracting State may declare that it will not apply the provisions of Article 13 or Article 43, or both, wholly or in part. At the time of accession to the said Convention the Community should make such a declaration.
- (10) Articles X, XI, XII and XIII of the Aircraft Protocol apply only where a Contracting State has made a declaration to that effect pursuant to Article XXX of the said Protocol and under the conditions specified by that declaration. At the time of accession to the Aircraft Protocol, the Community should declare that it will not be making any declaration pursuant to Article XXX(3). The competence of the Member States concerning the rules of substantive law as regards insolvency will not be affected.
- (11) The application of Article VIII of the Aircraft Protocol on choice of law is also subject to a declaration which may be made by any Contracting State pursuant to Article XXX(1). At the time of accession to the Aircraft Protocol the Community should declare that it will not apply Article VIII.
- (12) The United Kingdom will remain bound by the 1980 Rome Convention on the law applicable to contractual obligations¹³ until such time as it may be bound by the rules of Regulation (EC) No 593/2008 of the European Parliament and of the Council. It is assumed that the United Kingdom, if it accedes to the Aircraft Protocol before such time, at the time of accession will make a declaration pursuant to Article XXX(1) which will not prejudice the application of the rules of the said Regulation.
- (13) The United Kingdom and Ireland should take part in the adoption and application of this Decision.

¹¹ OJ L 160, 30.6.2000, p. 1. Regulation as last amended ...

¹² OJ L 177, 4.7.2008, p. 6.

¹³ OJ C 27, 26.1.1998, p. 34.

- (14) 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. The Convention on International Interests in Mobile Equipment (hereinafter referred to as the "Cape Town Convention") and the Protocol on matters specific to aircraft equipment (hereinafter referred to as the "Aircraft Protocol"), adopted jointly in Cape Town on 16 November 2001, are hereby approved on behalf of the European Community.
2. The texts of the Cape Town Convention and of the Aircraft Protocol are attached to this Decision.
3. 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 deposit, on behalf of the European Community, the instrument referred to in Article 47(4) of the Cape Town Convention and Article XXVI(4) of the Aircraft Protocol.

Article 3

1. At the time of accession to the Cape Town Convention, the Community shall make the declaration set out in point I of the Annex I and the declaration set out in point I of Annex II.
2. At the time of accession to the Aircraft Protocol, the Community shall make the declaration set out in point II of the Annex I and the declaration set out in point II of Annex II.

Done at Brussels,

*For the Council
The President*

ANNEX I

General declarations concerning the competence of the Community to be made by the Community at the time of accession to the Convention on International Interests in Mobile Equipment ("Cape Town Convention") and the Protocol on matters specific to aircraft equipment ("Aircraft Protocol"), adopted jointly in Cape Town on 16 November 2001

I. Declaration pursuant to Article 48(2) concerning the competence of the European Community over matters governed by the Cape Town Convention in respect of which the Member States have transferred their competence to the Community

1. Article 48 of the Cape Town Convention provides that Regional Economic Integration Organisations which are constituted by sovereign States and which have competence over certain matters governed by the Convention may accede to it on condition that they make the declaration referred to in Article 48(2). The Community has decided to accede to the Cape Town Convention 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 Cape Town Convention 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 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁴, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings¹⁵ and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹⁶.

6. At the time of accession to the Cape Town Convention, the Community will not make any of the declarations permitted under the Articles referred to in Article 56 of the said Convention. Member States keep their competence concerning the rules of substantive law as regards insolvency.

¹⁴ OJ L 12, 16.1.2001, p. 1. Regulation as last amended

¹⁵ OJ L 160, 30.6.2000, p. 1. Regulation as last amended ...

¹⁶ OJ L 177, 4.7.2008, p. 6.

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 Cape Town Convention.

II. Declaration pursuant to Article XXVII(2) concerning the competence of the European Community over matters governed by the Aircraft Protocol, in respect of which the Member States have transferred their competence to the Community

1. Article XXVII of the Aircraft 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 accede to it on condition that they make the declaration referred to in Article XXVII(2). The Community has decided to accede to the Aircraft 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 Aircraft 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 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁷, Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings¹⁸ and Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)¹⁹.

6. At the time of accession to the Aircraft Protocol, the Community will not make a declaration pursuant to Article XXX(1) that it will apply Article VIII nor will it make any of the declarations permitted under Article XXX(3). Member States keep their competence concerning the rules of substantive law as regards insolvency.

¹⁷ OJ L 12, 16.1.2001, p. 1. Regulation as last amended ...

¹⁸ OJ L 160, 30.6.2000, p. 1. Regulation as last amended

¹⁹ OJ L 177, 4.7.2008, p. 6.

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 Aircraft Protocol.

ANNEX II

Declarations to be made by the Community at the time of accession to the Cape Town Convention and the Aircraft Protocol concerning certain provisions and measures contained therein

I. Declaration by the Community pursuant to Article 55 of the Cape Town Convention

Pursuant to Article 55 of the Cape Town Convention, where the debtor is domiciled in the territory of a Member State of the Community, the Member States bound by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²⁰ will apply Articles 13 and 43 of the Cape Town Convention for the interim relief only in accordance with Article 31 of Regulation No 44/2001 as interpreted by the Court of Justice of the European Communities in the context of the Brussels Convention of 27 September 1968²¹ (Article 24).

II. Declaration by the Community pursuant to Article XXX of the Aircraft Protocol

In accordance with Article XXX(5) of the Aircraft Protocol, Article XXI thereof will not apply within the Community and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters²² will apply to this matter for the Member States bound by the said Regulation or by any other agreement designed to extend its effects.

²⁰ OJ L 12, 16.1.2001, p. 1. Regulation as last amended ...

²¹ OJ C 27, 26.1.1998, p. 1.

²² OJ L 12, 16.1.2001, p. 1. Regulation as last amended ...