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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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COVER NOTE

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Subject: Recommendation for a COUNCIL DECISION authorising the opening of negotiations on the conclusion of a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol)

Delegations will find attached document COM(2017) 448 final.

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EUROPEAN
COMMISSION

Brussels, 23.8.2017
COM(2017) 448 final

Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations on the conclusion of a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol)

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• **Reasons for and objectives of the proposal**

Under the auspices of UNIDROIT (International Institute for the Unification of Private Law), an intergovernmental organisation to which all the Member States belong, a Convention on International Interests in Mobile Equipment (“the Cape Town Convention”) and a Protocol on Matters Specific to Aircraft Equipment were adopted at a Diplomatic Conference at Cape Town, South Africa, in November 2001.

The Cape Town system has a flexible structure: it is formed by a framework Convention laying down legal rules applicable to all categories of mobile equipment complemented by specific Protocols containing special rules relating to particular types of equipment.

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

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 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 categories of mining, agriculture and construction are areas of commercial activity of universal importance, especially in developing countries. That's why, since 2006, the preparation of a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (hereinafter: "MAC Protocol") was included in the UNIDROIT Work Programme. The reasons agricultural, construction and mining equipment were proposed by UNIDROIT for a fourth protocol are twofold. Firstly, it would allow enterprises engaged in agriculture, construction and mining the ability to acquire equipment they would otherwise not be able to acquire and thus to permit them to optimise their activity. Secondly, it would allow producers of equipment to export to markets that without such a protocol would remain closed to them.

After preparatory work, including several meetings of a Study Group and consultations with private industry, at its 95th session (18-20 May 2016), the Governing Council of UNIDROIT considered the draft text produced by the Study Group sufficiently developed to warrant the convening of a Committee of Governmental Experts. The first session of the Committee of Governmental Experts took place in Rome, from 20 to 24 March 2017.

The Commission, representing the European Union, which has observer status at UNIDROIT, participated in the meeting on the basis of the coordinated position adopted by the Council Working Party in Civil Law Matters (General Questions) and set out in Council document 7083/17 EU RESTRICTED.

The second and likely last session of the Committee of Governmental Experts will take place in Rome from 2 to 6 October 2017. The Diplomatic Conference for the adoption of the MAC Protocol should take place in the second half of 2018. It is therefore advisable that the coordinated position agreed by the Council Working Party is confirmed by official negotiating directives allowing the Commission to represent EU's interest also at the future Diplomatic Conference.

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

The EU has already taken action in relation to the Cape Town Convention, by acceding to the Convention and its Aircraft Protocol in 2009², by signing the Railway Protocol in 2009³ and approving it in 2014⁴.

Also in relation to the Space Protocol, on the basis of the negotiating directives adopted by the Council on 10 February 2004⁵, the Commission, representing the EU, closely followed the meetings of the five sessions of the UNIDROIT Committee of Governmental Experts for the adoption of the draft Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets and participated to the 2012 Diplomatic Conference where the Space Protocol was adopted.

- **Consistency with other Union policies**

This recommendation for negotiating directives is consistent with the general policy of the EU to take action to ensure that the EU exclusive external competence is respected in the international framework, by joining international conventions including provisions under EU exclusive external competence when this is permitted by the presence of a REIO clause, allowing (as in the present case) Regional Economic Integration Organisations to sign or ratify an international instrument, or by authorizing EU Member States to do so on behalf of the Union.

As the *acquis* related to judicial cooperation in civil matters is well developed, this has led to a correspondent extension of the EU exclusive competence in the international area. In some cases, this exclusive competence covers the whole instrument (e.g. The Hague Convention of 30 June 2005 on Choice of Court Agreements and The Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance); in other cases, the EU exclusive competence is limited to some provisions of the instrument and this leads, to the extent that the EU does not decide to exercise also shared competence, to "mixed agreements".

The Cape Town Convention and its Protocols are mixed agreements: some matters fall within the EU exclusive competence, while others are in the competence of Member States to the extent that the EU has not decided to also exercise shared competences in relation to this Convention and its Protocols. On the basis of the general rules governing EU exclusive competence, Member States can only act in matters of exclusive competence if authorised by the EU and therefore may sign/ratify the Protocols only after signature/ratification-accession-approval by the EU.

² 2009/370/EC: Council Decision of 6 April 2009 on the accession of the European Community to 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, OJ L 121, 15.5.2009, p. 3-7.

³ 2009/940/EC: Council Decision of 30 November 2009 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, OJ L 331, 16.12.2009, p. 1–16.

⁴ 2014/888/EU: Council Decision of 4 December 2014 on the approval, on behalf of the European Union, 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, OJ L 353, 10.12.2014, p. 9-12.

⁵ 5609/04 JUSTCIV 9 TRANS 35 OC 46 RESTREINT UE

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The recommendation for a Council Decision on the negotiating directives is based on Articles 81 and 218(3) and (4) of the TFEU, being the MAC Protocol an international instrument. Judicial cooperation in civil and commercial matters is governed by Article 81 TFEU, which is thus the legal basis of EU's competence in this area.

In line with Article 3(2) TFEU, and the jurisprudence of the Court of Justice of the European Union, in particular Opinion 1/03 of 7 February 2006 on the competence of the Union to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as well as Opinion 1/13 of 14 October 2014 on the exclusive competence of the Union related to the acceptance of the accession of a third State to the Convention on the civil aspects of international child abduction, the negotiation and conclusion of some provisions of the UNIDROIT draft MAC Protocol come in the scope of the EU's exclusive external competence as they "*may affect common rules or alter their scope*".

The issue has been extensively dealt with in the previous recommendations to the Council in relation to the negotiation directives adopted in relation to the Cape Town Convention and its three Protocols and there is no need to elaborate further on the subject. However, a detailed explanation of the provisions under EU exclusive competence is provided below.

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

Not applicable.

- **Proportionality**

The recommended negotiating directives are similar to those adopted for the previous three Protocols and do not go beyond the aim of ensuring that the EU exclusive external competence on certain provisions of the MAC Protocol is respected and that Member States are allowed to apply EU law among themselves.

Moreover, the EU participation to the preparation of the MAC Protocol on the basis of these negotiation directives is without prejudice to the question on whether the EU would accede to the future instrument. Indeed, the EU has full discretion to take such a decision in the future, as it has been the case for the Space Protocol in relation to which the EU has not yet taken any decision concerning its signature or ratification.

- **Choice of the instrument**

Not applicable.

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

- **Stakeholder consultations**

Since when UNIDROIT convened the first meeting of the Governmental Experts in September 2016, Member States were regularly informed and consulted in the Council Working Party on Civil Law Matters (General Questions) on the coordinated lines to take in relation to the EU position. The

EU coordinated position for the first meeting of the Governmental Experts is to be found in the mentioned Council Document 7083/17 EU RESTRICTED. In addition, the delegates of the Member States were informed on the spot in Rome during the *ad hoc* EU coordination meeting. The Commission reported about the outcome of the first session in the Council Working Party on Civil Law Matters (General Questions) of 29 May 2017.

- **Collection and use of expertise**

The Commission has relied upon the experience gained during the preparation of the negotiating directives related to the negotiations of the Cape Town Convention and its Protocols. However, it may be mentioned that, in the context of preparatory work carried out before the first meeting of Governmental Experts in March 2017, consultations with private industry (2010-2012) were conducted by Germany and the United States, which showed a general interest and support for the MAC Protocol.

At the 93rd session of the UNIDROIT Governing Council in 2014 it was agreed to convene a Study Group entrusted with preparing a first draft of the MAC Protocol prior to its 95th session. The Study Group is composed of various international experts in secured transactions law and has met four times since 2014. Ahead of the first meeting of Governmental Experts, UNIDROIT invited its Member States and States parties to the Cape Town Convention to attend on 2 December 2016 a half-day symposium to discuss key aspects of the project.

- **Impact assessment**

This recommendation is not supported by an impact assessment, as it was the case for the three precedent recommendations for negotiating directives adopted by the Council in relation to the Cape Town Convention and its Aircraft Protocol, Railway Protocol and Space Protocol. At this stage the only thing to be decided by the Council is whether the EU participates in the final stages of the negotiation, and this is without prejudice of whether or not the EU will sign and conclude the Protocol.

The few provisions under EU exclusive competence detailed below are not controversial, being the same private international law rules included in the Convention and its previous Protocols which are deemed to affect the EU *acquis* (provisional measures, insolvency provisions, provisions on choice of law). As for the precedent instruments, these provisions are opt-in provisions, meaning that the EU, -if the choice to ratify the Protocol would be made at a later stage-can choose not to apply these rules in order to preserve the application of the EU *acquis* among EU Member States. This was the choice made at the time of the accession to the Cape Town Convention and its Aircraft Protocol and at the time of the approval of the Railway Protocol. As indicated above, no action has been taken yet in relation to the signature/ratification of the Space Protocol.

The EU's exclusive competence is limited to the private international law provisions; the substantive rules of the Protocol are the competence of the Member States insofar as the EU will not exercise any shared competence in this regards. Therefore an impact assessment on the rules under EU exclusive competence would not be meaningful as there is no choice available for the EU.

However, as it has been reported in the above paragraph, there has been intensive consultations/preliminary studies carried out in the context of UNIDROIT before the work on the draft Protocol was considered sufficiently ripe to convene the first meeting of Governmental Experts.

This work has also included a paper prepared by the Director of Research at the Center for the Economic Analysis of Law (CEAL), on the potential economic benefits of the MAC Protocol, which was presented to the Governing Council at the 92nd session in 2013. The CEAL study noted that the MAC Protocol could facilitate using about \$2 trillion in MAC equipment and would increase the sales of MAC equipment by \$600 billion over five-seven years⁶.

- **Fundamental rights**

Not applicable

4. BUDGETARY IMPLICATIONS

Not applicable

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

As it is common practice, the Commission will regularly inform Member States in the context of the Council Working Party on Civil Law Matters (General Questions) about the progress of the negotiations.

- **Detailed explanation of the specific provisions of the recommendation**

The negotiating directives recommended to the Council are identical to the coordinated position adopted ahead of the first meeting of Governmental Experts. They are also virtually identical to those adopted for the other Protocols, taking into account the fact that the text of the MAC Protocol is already stable and should not be subject to major changes in the next meeting. In any case, no changes are expected in relation to the provision under EU exclusive competence or of general EU interest (REIO clause, declarations).

I. The provisions under EU exclusive competence

a) Provisional measures and insolvency

The issues under EU exclusive competence are not controversial. They are very similar to, if not identical with, the correspondent provisions of the Aircraft, Rail and Space Protocols.

In the negotiating directives concerning the previous Protocols, the provisions regarding jurisdiction, recognition, enforcement, provisional and protective measures were specifically taken into account in so far as they could affect the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters.

In addition, concerning the provisions on remedies on insolvency and on insolvency assistance of the Protocols, the negotiating directives stated that their compatibility with the with Regulation (EC) No 1346/2000 on insolvency proceedings should be ensured.

⁶ For further information on the preparatory works on the development of the MAC Protocol, see: <http://www.unidroit.org/work-in-progress-studies/current-studies/mac-protocol>

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A negotiating directive concerning the accession of the European Community (now: European Union) by means of a REIO clause was also included.

The Commission considers that the current draft MAC Protocol fully respects the EU acquis as far as the provisional measures (Article IX of the draft Protocol-*Modification of provisions regarding relief pending final determination*) and the insolvency provisions (Article X-*Remedies on insolvency* and Article XI-*Insolvency assistance*) are concerned.

Article 55 of the Cape Town Convention concerns the declaration regarding relief pending final determination (possibility not to apply Article 13 (*Relief pending final determination*) and 43 (*Jurisdiction under Article 13 (1)*)). Both provisions could have indeed affected the application of Article 31 (*Provisional, including protective measures*) of Council Regulation (EC) No 44/2001 of 22 December 2000 (the "Brussels I Regulation").

At the November 2001 Diplomatic Conference on the Cape Town Convention, the European Community, in order to safeguard the application of Article 31 of the Brussels I Regulation, obtained that the full or partial application of Article 13 and 43 of the Convention would depend on a declaration.

At the time of its accession to the Cape Town Convention, the European Community made indeed a declaration stating that "*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 matters will apply Articles 13 and 43 of the Cape Town Convention for interim relief only in accordance with Article 31 of Regulation (EC) No 44/2001 as interpreted by the Court of Justice of the European Communities in the context of Article 24 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters*".

In the negotiations guidelines concerning the Aircraft, Rail and Space Protocols it was expressly mentioned that Article 55 of the Cape Town Convention should continue to be applied also to the Protocols.

Article IX of the draft MAC Protocol "*Modification of provisions regarding relief pending final determination*" provides for this possibility and it is virtually identical to the equivalent Articles of the Aircraft, Rail and Space Protocols (Articles X, VIII and XX respectively).

It has to be noted that, after the recast of the Brussels I Regulation⁷, Article 31 has become Article 35 but its wording is identical.

Concerning insolvency, the negotiating directives concerning the adopted Protocols asked that the relevant provisions should be optional as they affected the application of Regulation (EC) No 1346/2000 on insolvency proceedings.

Article X of the draft MAC Protocol (*Remedies on insolvency*) provides indeed for the opt-in possibility and it is virtually identical to the equivalent Articles of the Aircraft Protocol (Article XI), the Rail Protocol (Article IX) and the Space Protocol (Article XXI). Also Article XI (*Insolvency assistance*) of the draft MAC Protocol is an opt-in provision and it is virtually identical to the equivalent Articles of the Aircraft Protocol (Article XII), the Rail Protocol (Article IX) and the Space Protocol (Article XXII).

⁷ Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32 (

Also in this case, the recent recast of the Insolvency Regulation⁸ has not changed the affectation of EU law by the insolvency provisions of the MAC Protocol.

b) Choice of law

Article VI of the current version of the draft MAC Protocol contains provisions on the choice of law by the parties which is to govern their contractual rights and obligations, wholly or in part.

At the time of the adoption of the previous negotiating directives, no European Union legislation in matters relating to the law applicable to contractual obligations was in force, therefore no specific negotiating directive on this matter was provided by the Council to the Commission.

Meanwhile, Regulation (EC) No 593/2008 on the law applicable to contractual obligations (known as "Rome I") was adopted on 17 June 2008 and entered into application as from 17 December 2009⁹.

The extensive choice of law possibilities provided for in paragraph 2 of Article VI is not compatible with the system established by Regulation No 593/2008; therefore this Article should not be applied by EU Member States.

This is the solution chosen by the EU also for the other Protocols.

Council Decision of 6 April 2009, concerning the accession of the European Union to the Cape Town Convention and its Protocol on matters specific to aircraft equipment, contains specific reference to the exclusive Community competence on some matters governed by the Aircraft Protocol and, in particular, to the Rome I Regulation. Therefore, the Article of the Aircraft Protocol on choice of law was subject to a specific declaration made by the Community.

In a similar way, in relation to the Rail Protocol, the matter of the choice of law was specifically considered in the declaration pursuant to Article XXII(2) concerning the competence of the European Community over matters governed by the Rail Protocol. Point 5 of the Declaration states that the Member States of the European Community have transferred their competence to the Community as regards matters which affect (inter alia) the Rome I Regulation.

Article VIII of the Space Protocol is instead an opt-out provision, meaning that it applies unless expressly excluded in a declaration made by a Contracting State. Thus, at the time of the possible signature/ratification/approval of the Space Protocol, the EU would have to make the correspondent declaration.

The current version of Article VI in the draft MAC Protocol is an opt-in provision and this should be maintained in the final text.

II. Final provisions of EU interest

The draft final provisions (Article XXII-*Regional Economic Integration Organisation*) contain a REIO clause which is virtually identical to those of Article 48 of the Cape Town Convention, Article XXVII of the Aircraft Protocol, Article XXII of the Rail Protocol and Article XXXVII of the Space Protocol.

⁸ Regulation (EU) 2015/848 on insolvency proceedings, OJ L 141, 5.6.2015, p. 19–72

⁹ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16

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This article enables a Regional Economic Integration Organisation established by sovereign States and having competence over matters within the scope of the Protocol (meaning the European Union) to sign, accept, approve or accede to the Protocol as it were a Contracting State.

The EU should also pay attention to the insertion of the opt-in possibilities of EU interest in the draft final provisions (Article XXVI-*Declarations regarding certain provisions*). The provisions of this Article are modelled on the correspondent rules of the Aircraft, Rail and Space Protocols.

In conclusion, the provisions of the draft MAC Protocol under EU exclusive competence or of EU interest, in their current formulation, do not raise any concern. The Commission therefore proposes, consistently with the coordinated position adopted for the first meeting of the Governmental Experts in March 2017, to retain these provisions as they are now.

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Recommendation for a

COUNCIL DECISION

authorising the opening of negotiations on the conclusion of a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) The European Community acceded to the Convention on International Interests in Mobile Equipment and its Protocol on matters specific to aircraft equipment on 29.4.2009.
- (2) The European Community signed the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock on 10.12.2009.
- (3) The European Union approved the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock on 18.12.2014.
- (4) Preparatory work on a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol) in the context of the International Institute for the Unification of Private Law (UNIDROIT) framework is on-going.
- (5) The European Union has exclusive competence over some of the matters governed by the draft MAC Protocol.
- (6) The European Union should participate in the negotiations of such instrument in relation to matters falling within the exclusive competence of the Union.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, in relation to matters falling within the exclusive competence of the Union, a Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol).

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Article 2

The negotiating directives are set out in the Annex.

Article 3

The negotiations shall be conducted in consultation with the special committee hereby designated pursuant to Article 218(4) of the Treaty.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*

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