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PROPOSAL

From: Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director

date of receipt: 3 December 2021

To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.: COM(2021) 746 final

Subject: Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the 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(2021) 746 final.

Encl.: COM(2021) 746 final



Brussels, 3.12.2021
COM(2021) 746 final

2021/0390 (NLE)

Proposal for a

COUNCIL DECISION

**on the signing, on behalf of the European Union, of the Protocol to the Convention on
International Interests in Mobile Equipment on Matters specific to Agricultural,
Construction and Mining Equipment (MAC Protocol)**

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 fourth 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.

Two sessions of the Committee of Governmental Experts took place in Rome: the first from 20 to 24 March 2017 and the second from 2 to 6 October 2017, where the text of the Protocol was considered mature to convene a Diplomatic Conference for its adoption. The Commission represented the EU - which has observer status at UNIDROIT - on the basis of a EU

coordinated position¹. On 23 August 2017, the Commission submitted to the Council a Recommendation for a Council Decision authorizing the opening of negotiations on the conclusion of the MAC Protocol. The Recommendation² and the Directives³ were adopted by the Council on 9 March 2018.

A Diplomatic Conference followed on 11-22 November 2019 in Pretoria, where the text of the MAC Protocol was officially adopted by UNIDROIT. The Commission represented the EU for the provisions of the Protocol falling within the EU exclusive external competence on the basis of the negotiating directives adopted in 2018 and the supplemental negotiating directives adopted in 2019⁴.

- **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 2009⁵, by signing the Railway Protocol in 2009⁶ and approving it in 2014⁷.

Also in relation to the Space Protocol, on the basis of the negotiating directives adopted by the Council on 10 February 2004⁸, 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 proposal for Council Decision 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.

¹ EU position set out in Council document 7083/17 EU RESTRICTED

² Council document 5109/18

³ Council document 6287/18 EU RESTRICTED

⁴ As set out in Council document 13444/1/19 REV 1 EU RESTRICTED

⁵ 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.

⁶ 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.

⁷ 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.

⁸ 5609/04 JUSTCIV 9 TRANS 35 OC 46 RESTREINT UE

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

This proposal for a Council Decision is based on Article 81(2), in conjunction with Article 218(5) 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, some provisions of the UNIDROIT MAC Protocol come in the scope of the EU's exclusive external competence as they "*may affect common rules or alter their scope*".

The MAC Protocol contains provisions regarding jurisdiction, recognition, enforcement, provisional and protective measures which may affect the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgement in civil and commercial matters (Article IX of the MAC Protocol "*Modification of provisions regarding relief pending final determination*").

In addition, the MAC Protocol contains provisions on remedies on insolvency and on insolvency assistance, which may affect the application of Regulation (EU) No 2015/848 on insolvency proceedings (Article X –*Remedies on Insolvency* and Article XI *Insolvency assistance*).

Finally, Article VI of the MAC Protocol (*Choice of law*) provides that the parties to an agreement or related guarantee contract or subordination agreement 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).

- **Declarations on matters falling under the scope of European Union's exclusive competence**

It is required by Article XXIV (*Regional Economic Integration Organisation*) that the European Union at the time of signature of the MAC Protocol makes the declaration to Depository specifying the matters governed by the Protocol in respect of which competence has been transferred to the European Union by its Member States. This declaration is annexed to the present proposal.

Moreover, several rules of the MAC 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. All these are opt-in provisions and are applicable only if, at the time of ratification, approval of, or accession to this Protocol a declaration is made under article XXVIII of the MAC Protocol (*Declarations regarding certain provisions*).

The European Union has the power to make declarations to the Articles VI, IX, X and XI of the MAC Protocol, whose subject matters fall under its exclusive competence. However, as required by article XXVIII of the MAC Protocol, this issue will be dealt with only at the time of the decision on the ratification, approval of, or accession to this Protocol by the European Union.

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

Not applicable.

- **Proportionality**

The present proposal is similar to those adopted for the other Protocols to the Cape Town Convention and does 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.

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 and second session in the Council Working Party on Civil Law Matters (General Questions) in 2019. Further discussions took place in 2018 and 2019 at the occasion of the adoption of the negotiating guidelines in preparation of the Diplomatic Conference in November 2019.

- **Collection and use of expertise**

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.

Other initiatives took place ahead of the Diplomatic Conference, for instance an International Conference in London “*The MAC Protocol: Legal and economic benefits for States, international trade and development*” on 12 September 2019, to which also the Commission and several Member States participated.

Consultations with private industry showed a general interest and support for the MAC Protocol and several initiatives have been organised by UNIDROIT in order to raise awareness on the Protocol, before and after its adoption.

- **Impact assessment**

As it was the case for the other initiatives concerning the Cape Town Convention and its Protocols, no specific impact assessment was carried out.

However, as indicated above, there have 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 in 2013 by the Director of Research at the Center for the Economic Analysis of Law (CEAL), on the potential economic benefits of the MAC Protocol. Another Economic Assessment of the MAC Protocol was published in August 2018 under the auspices of UNIDROIT, which highlights the benefits for the international trade by improving access to finance and reduce credit risk.

- **Fundamental rights**

Not applicable

4. BUDGETARY IMPLICATIONS

None.

5. OTHER ELEMENTS

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

Not applicable

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COUNCIL DECISION

on the signing, on behalf of the European Union, of the 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 81(2), in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

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 on matters specific to Agricultural, Construction and Mining Equipment ("MAC Protocol"), adopted in Pretoria on 22 November 2019, makes a useful contribution to the regulation at international level. It is therefore desirable that the provisions of that instrument are applied as soon as possible.
- (3) The Commission negotiated the MAC Protocol on behalf of the European Union, for the parts falling within the exclusive competence of the European Union.
- (4) Article XXIV(1) of the MAC 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 that Protocol.
- (5) Some of the matters governed by Regulations (EC) No 593/2008¹, (EU) No 1215/2012², and (EU) 2015/848³ are also dealt with in the MAC Protocol.
- (6) The European Union has exclusive competence over some of the matters governed by the MAC Protocol.

¹ 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) (OJ L 177, 4.7.2008, p. 6).

² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1).

³ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015, p. 19).

- (7) Article XXIV(2) of the MAC Protocol provides that, at the time of signature, acceptance, approval or accession, a Regional Economic Integration Organisation is to make a declaration specifying the matters governed by that Protocol in respect of which competence has been transferred to that organisation by its Member States.
- (8) Ireland is bound by Regulations (EC) No 593/2008, (EU) No 1215/2012 and (EU) 2015/848 and is therefore taking part in the adoption of this Decision.
- (9) In accordance with Articles 1 and 2 of Protocol (No 22) on the position of Denmark, annexed 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.
- (10) Therefore, the MAC Protocol should be signed on behalf of the Union, subject to its conclusion at a later date and the attached Declaration be approved.

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Agricultural, Construction and Mining Equipment (MAC Protocol) adopted in Pretoria on 22 November 2019, is hereby approved on behalf of the European Union.

The text of the Protocol is attached to this Decision.

Article 2

The Commission shall designate the person empowered to deposit, on behalf of the Union, the instrument of signature of the MAC Protocol subject to the condition set out in Article 3.

Article 3

When signing the MAC Protocol, the European Union shall make the declaration set out in the Annex, in accordance with Article XXIV (2) thereof.

Article 4

This Decision shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels,

*For the Council
The President*