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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the United Nations Economic Commission for Europe Working Party on customs questions affecting transport and in the Inland Transport Committee in connection with the envisaged adoption of a new Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the Decision establishing the position to be taken on the Union's behalf in the United Nations Economic Commission for Europe (UNECE) Working Party on customs questions affecting transport and, possibly, at the United Nations Economic Commission for Europe Inland Transport Committee in connection with the envisaged adoption of a new Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail

The proposed draft Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail ('the proposed draft Convention) was initiated by the Organization for Cooperation between Railways (OSJD) to which 9 Union Member States (Bulgaria, Czech Republic, Slovakia, Poland, Lithuania, Latvia, Hungary, Estonia, Romania) are members and transmitted to the United Nations Economic Commission for Europe by the Government of the Russian Federation.

A Convention with a similar scope is already in force – the 1952 International Convention to facilitate the crossing of frontiers for passengers and baggage carried by rail, of which 8 Union Member States (Austria, Belgium, France, Italy, Luxembourg, Netherlands, Portugal, and Sweden¹) are Contracting Parties. Due to various legal and procedural difficulties, it was not feasible to amend this Convention in order to modernise it. Moreover, member countries of the Organization for Cooperation between Railways supported the idea of drafting a new convention in this field, rather than acceding to the outdated 1952 Convention.

The proposed draft Convention covers three major Union policy areas: railways, customs and the Union *acquis* on border management. It aims at expediting and simplifying border controls of passenger trains. The main new elements in the draft Convention are joint coordinated controls at borders, instead of two or more consecutive controls on either side of the border; controls on moving trains, where the schedules and stops of the trains so permit and agreeing details of the cooperation by means of bilateral agreements or multilateral arrangements. This proposal relates to the Union policy area of border management. The aspect of two other Union policy areas, railways and customs, will be covered by a separate proposal.

2.2. The UNECE Working Party on customs questions affecting transport

The Working Party on customs questions affecting transport is acting within the framework of the policies of the United Nations Economic Commission for Europe and subject to the general supervision of the Inland Transport Committee. The role of the Working Party is to initiate and pursue actions aimed at the harmonisation and simplification of regulations, rules and documentation for border crossing procedures for the various modes of inland transport.

The Union is represented in the Working Party of which all Member States of the Union are members with the right to vote.

¹ Signed, but did not ratify.

2.3. The envisaged act of the Working Party on customs questions affecting transport

The Working Party on customs questions affecting transport will meet in 2018 on the following dates: 12-14 June and 16-19 October. In one of its meetings, the Working Party is to take a decision on the endorsement of the proposed Convention and on its transmission to the Inland Transport Committee for formal approval which meets once a year in February.

The envisaged act will become binding on the parties in accordance with Article 22 of the draft Convention, which provides: ‘1. This Convention shall enter into force three months after the date on which five States have deposited their instruments of ratification, acceptance, approval or accession. 2. For each State that ratifies, accepts, approves or accedes to this Convention after deposit of the fifth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force three months after the date of deposit by such State of its instrument of ratification, acceptance, approval or accession’.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

3.1. Position of the Union

The Union shares the objectives of the draft Convention and supports the concept of facilitation of passenger rail transport, but it has not identified any added value or benefits of the draft Convention for the Union or its Member States. The new draft Convention would not make already existing bilateral or multilateral agreements redundant and perhaps not even facilitate new bilateral or multilateral agreements as the draft Convention does not contain a model for such agreements. Many provisions of the draft Convention have a non-binding nature and cannot be implemented without separate arrangements between the parties concerned. So far, the only function that the draft Convention could have would be to serve as a reference for concluding future multilateral and bilateral agreements.

From the point of view of the **EU acquis on border management**, the draft Convention in its present form does not bring any new or useful tools and thus has no added value for the EU and its Member States. Furthermore, it contains several provisions which are problematic for the EU acquis and which would need to be amended should the Union or its Member States wish to accede to the draft Convention at a future point in time. For example, Article 6 of the draft Convention should clarify that border controls cannot be waived by multilateral or bilateral agreements between States: as the Schengen Borders Code applies upon crossing of the EU external borders, international agreements may only regulate how the controls are carried out without touching the substance of such controls.

From a Union **institutional point of view**, the draft Convention covers matters falling within fields of exclusive and shared Union competence. Member States cannot individually accede to parts of the draft Convention falling within a field of exclusive Union competence. A provision concerning the participation of the Union as a regional economic integration organisation should have been inserted in the draft Convention in line with the general policy on institutional policy– to allow the Union to accede to the Convention.

Even if the Union seems not to have reasons to accede to the proposed Convention, in accordance with its general policy on institutional aspects, any new international Convention should contain a clause allowing participation of regional economic integration organisations.

The United Nations Economic Commission for Europe Inland Transport Committee at its 81st session in February 2019 or at a subsequent session, subject to the endorsement of the draft Convention by the Working Party on customs questions affecting transport, may proceed to a vote on the adoption of the Convention and request the secretariat to transmit it to the Secretary-General of the United Nations in his capacity as depository. It is therefore important to establish a Union position to be able to react in such potential scenario. In matters of exclusive competence, the Commission will vote for the Union.

A large range of public and private sector experts has been consulted during the preparation of the proposed Convention.

Consultations were carried out with the Member States within the Customs Legislation Committee (Geneva coordination), one of which was held jointly with experts from the Single European Railway Area Committee, Justice and Home Affairs counsellors, transport attachés and representatives from the Commission Directorates-General responsible for Mobility and Transport and for Migration and Home affairs (23.1.2017). Consultations were also carried out with the Customs Expert Group.

Further consultations took place during sessions of the Working Party on Customs Questions Affecting Transport and Working Party on Rail Transport of the United Nations Economic Commission for Europe.

Discussions in the relevant fora of the United Nations Economic Commission for Europe, followed either by the Commission Directorate-General responsible for Taxation and Customs Union or the Directorate-General responsible for Mobility and Transport, have been preceded by coordination activities between the above-mentioned Directorate Generals and the Directorate-General responsible for Migration and Home affairs as the draft Convention touches upon policy areas falling under the respective remits of the three Directorate-Generals.

Internal coordination as well as the joint discussions with Member States in the framework of the Customs Legislation Committee and Customs Expert clearly showed that there is no interest, neither for Union Member States nor the Union itself, to accede to the draft Convention as it does not bring any benefits or added value in all fields concerned, i.e. in the Union policy areas covered by this proposal and also the Union institutional point of view.

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing *‘the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.’*

The concept of *‘acts having legal effects’* includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are *‘capable of decisively influencing the content of the legislation adopted by the Union legislature’*².

² Judgment of the Court of Justice of 7 October 2014, Germany v Council, Case C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

4.1.2. Application to the present case

The act which the Working Party on customs questions affecting transport and the United Nations Economic Commission for Europe Inland Transport Committee are called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 22 of the draft Convention.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

4.2.2. Application to the present case

The envisaged act pursues objectives and has components in the area of border checks and includes checks on passengers and their documents. It should therefore be based on Article 77, paragraph 2, b), TFEU, which relates to "the checks to which persons crossing external borders are subject".

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Article 77, paragraph 2b, TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 77, paragraph 2b, in conjunction with Article 218(9) TFEU.

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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 77(2)(b) in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) A new United Nations Economic Commission for Europe ('UNECE') Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail is proposed by the Russian Federation and supported by the Organisation for cooperation between railways ('OSJD').
- (2) The Working Party on customs questions affecting transport is acting within the framework of the policies of the UNECE and subject to the general supervision of the Inland Transport Committee. The role of the Working Party is to initiate and pursue actions aimed at the harmonization and simplification of regulations, rules and documentation for border crossing procedures for the various modes of inland transport.
- (3) The UNECE Working Party on customs questions affecting transport, during its 149th session on 12 to 14 June 2018, or in the subsequent session, is to take a decision on the endorsement of the proposed Convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail and on its transmission to the Inland Transport Committee for formal approval.
- (4) The Union is represented in the UNECE Working Party on customs questions affecting transport by the 28 Member States of the Union that are members with the right to vote. In matters of exclusive competence, the position of the Union is expressed by the Commission on behalf of the Union and its Member States.
- (5) Depending on the specific circumstances and in the interest of unified external representation of the Union and its Member States, the Commission can conduct negotiations covering both Union competences and subject matters where the Member States have not conferred competences on the Union.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the UNECE Working Party on customs questions affecting transport and Inland Transport Committee as the proposed Convention concerns elements on visa formalities that fall within the competence of the Union.

- (7) The Convention contains general provisions on how to organise border controls of passenger trains. It can be seen as basis for any multilateral and bilateral agreements in the absence of which none of the elements covered by the Convention could work.
- (8) For the Union's Member States, such bilateral agreements can be concluded even without the proposed Convention. For Russia and some other countries represented in the OSJD, the legal framework seems to necessitate such a Convention in order to make it easier to conclude multilateral and bilateral agreements.
- (9) The substance of the proposed Convention appears to have neither beneficial nor adverse effects for the Union's Member States. Therefore the Union shall not support the proposed Convention but has no reason to block its adoption.
- (10) Even if it does not appear to be in the Union's interest to accede to the proposed Convention, in accordance with its general policy on institutional aspects, any new international Convention should contain a clause allowing for the participation of regional economic integration organisations. The proposed draft Convention does not contain a clause which would allow the Union to accede to the Convention.
- (11) Therefore, the Union position in the UNECE Working Party on customs questions affecting transport should be neutral if a clause allowing for the participation of regional economic integration organisations is inserted. In such case, the Union should abstain. Otherwise the Union should vote against the adoption of the proposed Convention.
- (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 TFEU, Denmark is not taking part in the adoption of this Decision and is not bound by it or subject to its application. Given that this Decision builds upon the Schengen *acquis*, Denmark shall, in accordance with Article 4 of that Protocol, decide within a period of six months after the Council has decided on this Decision whether it will implement it in its national law.
- (13) As regards Iceland and Norway, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen *acquis*³ which fall within the area referred to in Article 1, point A, of Council Decision 1999/437/EC⁴.
- (14) As regards Switzerland, this Decision constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen *acquis*⁵ which fall within the area referred to in Article 1, point A, of

³ OJ L 176, 10.7.1999, p. 36.

⁴ Council Decision 1999/437/EC of 17 May 1999 on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176, 10.7.1999, p. 31).

⁵ OJ L 53, 27.2.2008, p. 52.

Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC⁶.

- (15) As regards Liechtenstein, this Decision constitutes a development of the provisions of the Schengen acquis within the meaning of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis⁷ which fall within the area referred to in Article 1, point A, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2011/350/EU⁸.
- (16) This Decision constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC⁹; the United Kingdom is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (17) This Decision constitutes a development of the provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC¹⁰; Ireland is therefore not taking part in the adoption of this Decision and is not bound by it or subject to its application.
- (18) As regards, Cyprus, Bulgaria, Romania and Croatia, the provisions of this Decision constitute provisions building upon, or otherwise relating to, the Schengen acquis, within respectively the meaning of Article 3(2) of the 2003 Act of Accession¹¹, Article 4(2) of the 2005 Act of Accession¹² and Article 4(2) of the 2011 Act of Accession¹³,

⁶ Council Decision 2008/146/EC of 28 January 2008 on the conclusion, on behalf of the European Community, of the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis (OJ L 53, 27.2.2008, p. 1).

⁷ OJ L 160, 18.6.2011, p. 21.

⁸ Council Decision 2011/350/EU of 7 March 2011 on the conclusion, on behalf of the European Union, of the Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, relating to the abolition of checks at internal borders and movement of persons (OJ L 160, 18.6.2011, p. 19).

⁹ Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis (OJ L 131, 1.6.2000, p. 43).

¹⁰ Council Decision 2002/192/EC of 28 February 2002 concerning Ireland's request to take part in some of the provisions of the Schengen acquis (OJ L 64, 7.3.2002, p. 20).

¹¹ Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the treaties on which the European Union is founded (OJ L 236, 23.9.2003, p 33).

¹² Act concerning the conditions of accession of the Republic of Bulgaria and Romanian and the adjustments to the treaties on which the European Union is founded (OJ L 157, 21.6.2005, p 203).

¹³ Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty of the European Union, the Treaty on the Functioning of the European Union, and the Treaty establishing the European Atomic Energy Community (OJ L 112, 24.4.2012, p 21).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the sessions of the UNECE Working Party on customs questions affecting transport and Inland Transport Committee concerning the proposed new UNECE convention on the facilitation of border crossing procedures for passengers, luggage and load-luggage carried in international traffic by rail shall be the following:

The Union's position on the draft Convention shall be to abstain if the clause allowing for the participation of regional economic integration organisations is introduced. If such clause is not introduced, the Member States of the Union shall vote against.

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the UNECE Working Party on customs questions affecting transport and Inland Transport Committee acting jointly.

Article 3

This Decision is addressed to the Commission and to the Member States.

Done at Brussels,

*For the Council
The President*