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| From: | General Secretariat of the Council |
| To: | Delegations |
| Subject: | Proposal for a Council Decision on the ratification and accession by Member States, in the interest of the European Union, to the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, with the exception of the aspects related to judicial cooperation in civil matters |

In view of the Shipping Working Party meeting on 15 July 2016, delegations will find attached the European Parliament resolution adopted on 8 June 2016 on the above proposal.



TEXTS ADOPTED
Provisional edition

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Ratification and accession to the 2010 Protocol to the Hazardous and Noxious Substances Convention with the exception of aspects related to judicial cooperation in civil matters

European Parliament resolution of 8 June 2016 on the draft Council decision on the ratification and accession by Member States, in the interest of the European Union, to the Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, with the exception of the aspects related to judicial cooperation in civil matters (13806/2015 – C8-0410/2015 – 2015/0135(NLE))

The European Parliament,

- having regard to the draft Council decision (13806/2015),
- having regard to the request for consent submitted by the Council in accordance with Article 100(2) and Article 218(6) point (a) (v) of the Treaty on the Functioning of the European Union (C8-0410/2015),
- having regard to Article 3(2) of the Treaty on the Functioning of the European Union,
- having regard to the opinion of the Court of Justice of 14 October 2014¹,
- having regard to the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the ‘1996 HNS Convention’),
- having regard to the Protocol of 2010 to the 1996 HNS Convention (the ‘2010 HNS Convention’),
- having regard to the proposal for a Council decision (COM(2015)0304),
- having regard to Council decision 2002/971/EC of 18 November 2002 authorising Member States, in the interest of the Community to ratify or accede to the 1996 HNS Convention²,

¹ Opinion of the Court of Justice of 14 October 2014, 1/13, ECLI:EU:C:2014:2303.

² OJ L 337, 13.12.2002, p. 55.

- having regard to Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage¹ (the ‘Environmental Liability Directive’ or ‘ELD’),
 - having regard to the Statement by the Commission to the minutes of the Permanent Representatives Committee and of the Council of 20 November and of 8 December 2015²,
 - having regard to the paper of 18 September 2015 of the shipping industry urging Member States to ratify or accede to the Protocol of 2010 to the HNS Convention soonest in line with the Commission’s proposed approach³,
 - having regard to the final report prepared for the European Commission by BIO Intelligence Service, entitled ‘Study on ELD Effectiveness: scope and exceptions’ of 19 February 2014⁴,
 - having regard to the note by the Legal Service of the Parliament of 11 February 2016 on the legal basis for the above mentioned proposal for a Council decision (SJ-0066/16) and the subsequent opinion in letter form on the appropriate legal basis for the said proposed decision adopted by the Committee on Legal Affairs on 19 February 2016⁵ and annexed to report A8-0191/2016,
 - having regard to Rule 99(3) of its Rules of Procedure,
 - having regard to the interim report of the Committee on Legal Affairs (A8-0191/2016),
- A. whereas the aim of the 2010 HNS Convention is to ensure accountability and the payment of adequate, prompt and effective compensation for loss or damage to persons, property and the environment arising from the carriage of hazardous and noxious substances by sea through the specialised International HNS compensation Fund;
- B. whereas therefore on the one hand it aims to provide for the ‘polluter pays’ principle and for the principles of prevention and precaution to the effect that preventive action should be taken in case of possible environmental damage, and thus falls within the Union policy and general principles regarding the environment, and on the other hand it aims to regulate issues arising from damage caused by maritime transport and to prevent and minimise such damage, and thus falls within the Union policy on transport;
- C. whereas according to the Commission proposal (COM(2015)0304), the conclusion of the 2010 HNS Convention would thus overlap with the scope of the rules of the Environmental Liability Directive;
- D. whereas the 2010 HNS Convention overlaps in scope with the Environmental Liability Directive in so far as environmental damage caused to the territory and marine waters under the jurisdiction of a state party, damage by contamination of the environment

¹ OJ L 143, 30.4.2004, p. 56.

² Item note 13142/15.

³ Available online at: <http://www.ics-shipping.org/docs/default-source/Submissions/EU/hazardous-and-noxious-substances.pdf>

⁴ Available online at: http://ec.europa.eu/environment/legal/liability/pdf/BIO%20ELD%20Effectiveness_report.pdf

⁵ PE576.992.

caused in the exclusive economic zone (EEZ) or equivalent area of a state party (up to 200 nautical miles from baselines) and preventive measures to prevent or minimise such damage are concerned;

- E. whereas the 2010 HNS Convention establishes strict liability of the shipowner for any damages resulting from the carriage of hazardous and noxious substances by sea covered by the Convention as well as the obligation to take out insurance or other financial security to cover its liability for damage under the Convention, prohibiting for that purpose any other claim being made against the shipowner except in accordance with the said Convention (Article 7(4)(5));
- F. whereas there is thus a risk for a potential conflict between the ELD and 2010 HNS Convention, this risk can be averted via Article 4(2) of the ELD, which provides that the Directive 'shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof, which is in force in the Member State concerned';
- G. whereas the ELD thus excludes from its scope of application environmental damages or imminent threats of such damages which are covered by the 2010 HNS Convention once the latter enters into force, unless all Member States ratify or accede to the 2010 HNS Convention within the same timeframe, there is a risk that a fragmented legal landscape will emerge with some Member States being subject to the 2010 HNS Convention and others to the Environmental Liability Directive; this will create a disparity for the victims of pollution, such as coastal communities, fishermen, etc. and would also be against the spirit of the 2010 HNS Convention;
- H. whereas the basic principles underlying International Maritime Organisation conventions also provide the basis for the 2010 HNS Convention, these principles being strict liability of the shipowner, mandatory insurance to cover damages to third parties, a right of direct recourse of persons suffering damages against the insurer, limitation of liability and, in the case of oil and hazardous and noxious substances, a special compensation fund that pays for damages when these exceed the liability limits of the shipowner;
- I. whereas it is in the interest of the Union as a whole to have a homogenous liability regime applicable to damage arising from the carriage of hazardous and noxious substances at sea;
- J. whereas it is not absolutely clear whether Article 4(2) of the ELD means that application of the ELD is barred in a Member State that has ratified the 2010 HNS Convention, or that the bar is limited to the extent to which liability or compensation falls within the scope of the said Convention;
- K. whereas the 2010 HNS Convention constitutes a compensation regime and is thus less far-reaching than the ELD in establishing a regime that requires operators, and directs competent authorities to require operators, to prevent or remediate an imminent threat of, or actual, environmental damage, respectively;
- L. whereas contrary to what is the case under the ELD, no compensation can be awarded under the 2010 HNS Convention for damage of a non-economic nature;

- M. whereas the ELD does not impose mandatory financial security on operators so as to secure that they have funding to ensure the prevention and remedying of environmental damage, unless a Member State has adopted more stringent provisions than the ELD;
- N. whereas the 2010 HNS Convention establishes a clear obligation for the owner to take out insurance or other financial security to cover his liability for damage under the Convention;
- O. whereas the other International Maritime Organisation Conventions contained in Annex IV of the ELD have proved effective, as they have managed to strike a balance between environmental and commercial interests through the clear channelling of liability whereby there is normally no uncertainty as to who the liable party is, as well as through the establishment of compulsory insurance and swift compensation mechanisms, which are not limited to environmental damage only;
1. Asks the Council and the Commission to take into account the following recommendations:
- (i) Guarantee respect for the principle of conferral of Union competences under Article 5(1) TEU and the settled case law of the Court of Justice which provides that ‘the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure’¹;
 - (ii) Embrace therefore the opinion in letter form of 19 February 2016 adopted by the Committee on Legal Affairs according to which:

‘since the proposed Council decision is aimed at authorising Member States to ratify, or accede to, on behalf of the Union, the 2010 HNS Protocol and subsequently to be bound by the 2010 HNS Convention and considering that the latter covers not only cases of environmental damage (giving effect to the principles that preventive action should be taken and that the polluter should pay), but also cases of non-environmental damage, both caused by carriage of certain substances by sea, Articles 100(2), 192(1) and 218(6)(a)(v) TFEU constitute the appropriate legal bases for the proposal.’
 - (iii) Ensure that the uniformity, integrity and effectiveness of common Union rules will not be adversely affected by the international commitments undertaken by the ratification of or accession to the 2010 HNS Convention in accordance with the settled case law of the Court of Justice²;
 - (iv) Pay increased attention in this regard to the overlap between the Environmental Liability Directive and the 2010 HNS Convention in so far as environmental damage caused to the territory and marine waters under the jurisdiction of a state

¹ Judgment of the Court of Justice of 19 July 2012, *European Parliament v Council of the European Union*, C-130/10, ECLI:EU:C:2012:472, paragraph 42.

² Opinion of the Court of Justice of 19 March 1993, 2/91, ECLI:EU:C:1993:106, paragraph 25; Judgment of the Court of Justice of 5 November 2002, *Commission of the European Communities v Kingdom of Denmark*, C-467/98, ECLI:EU:C:2002:625, paragraph 82; Opinion of the Court of Justice of 7 February 2006, 1/03, ECLI:EU:C:2006:81, paragraphs 120 and 126; Opinion of the Court of Justice of 14 October 2014, 1/13, ECLI:EU:C:2014:2303.

party, damage by contamination of the environment caused in the EEZ or equivalent area (up to 200 nautical miles from baselines) of a state party and preventive measures to prevent or minimise such damage (preventive measures, primary remediation, and complementary remediation) are concerned;

- (v) Ensure that the possibility for a conflict between the Environmental Liability Directive and the 2010 HNS Convention is minimised by taking all appropriate action to ensure that the exclusivity clause under Article 7(4) and (5) of the 2010 HNS Convention, whereby no other claim can be made against the shipowner except in accordance with the said Convention, is fully respected by the ratifying or acceding Member States in accordance with Article 4(2) and Annex IV of the Environmental Liability Directive;
 - (vi) Ensure that the risk is diminished of creating and consolidating a competitive disadvantage for the states that are ready to accede to the 2010 HNS Convention, compared to those who might wish to delay this process and continue to be bound by the ELD only;
 - (vii) Ensure the removal of the permanent co-existence of two maritime liability regimes – a Union-based one and an international one – which would result in the fragmentation of Union legislation and, moreover, compromise the clear channelling of liability and could lead to lengthy and costly legal proceedings to the detriment of victims and the shipping industry;
 - (viii) Ensure in that regard that a clear obligation is imposed on Member States to take all necessary steps to achieve a concrete result, namely to ratify or accede to the 2010 HNS Convention within a reasonable timeframe, which should be no longer than two years from the date of entry into force of the Council decision;
2. Concludes that this resolution would be a further possibility for the Council and the Commission to address the recommendations set out in paragraph 1;
 3. Instructs its President to request further discussion with the Commission and the Council;
 4. Instructs its President to forward this resolution to the Council and the Commission and the governments and parliaments of the Member States.