



Council of the
European Union

Brussels, 27 August 2018
(OR. en)

11698/18

Interinstitutional File:
2018/0308 (NLE)

TRANS 348

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	17 August 2018
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

No. Cion doc.:	COM(2018) 598 final
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Subject:	Proposal for a COUNCIL DECISION establishing the position to be adopted on behalf of the European Union as regards the amendments to the Annexes of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and to the Annexed Regulations to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN), adopted by the Working Party on Transport of Dangerous Goods – WP.15 and the ADN Administrative Committee
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Delegations will find attached document COM(2018) 598 final.

Encl.: COM(2018) 598 final



Brussels, 17.8.2018
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Proposal for a

COUNCIL DECISION

establishing the position to be adopted on behalf of the European Union as regards the amendments to the Annexes of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and to the Annexed Regulations to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN), adopted by the Working Party on Transport of Dangerous Goods – WP.15 and the ADN Administrative Committee

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The proposed Council Decision has the objective to establish the position of the European Union with regard to the amendments to the Annexes of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and to the Annexed Regulations to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN), as applicable of 1 January 2019, in connection with the envisaged end of the standstill period in which contracting parties members of the Working Party on Transport of Dangerous Goods (WP.15) and of the ADN Administrative Committee can object to the proposed amendments for the 2019 edition.

2. CONTEXT OF THE PROPOSAL

The above mentioned Annexes and Regulations, commonly known as the Annexes to ADR and the Annexed Regulations to ADN, regulate the international transport of dangerous goods by road and by inland waterways, respectively, between members of the United Nations Economic Commission for Europe (UNECE) which are also contracting parties to ADR and ADN.

The development of transport of dangerous goods by road and inland waterways, both within the Union and between the Union and neighbouring countries, is a key component of the European common transport policy and ensures the proper functioning of all industrial branches producing or making use of the goods classified as dangerous under ADR and ADN. Adaptation to technical and scientific progress of these agreements is therefore essential to allow for development of transport and associated industrial branches within the economic chain. The amendments aim to align ADR and ADN with the UN Model Regulations, including new definitions, classification criteria and UN numbers, packaging / labelling requirements, update of applicable standards and technical provisions, as well as editorial corrections.

The international provisions relating to the transport of dangerous goods are established in various international organisations, such as the UNECE, the Intergovernmental Organisation for International Carriage by Rail (OTIF) and various specialised bodies of the United Nations. Since the rules need to be compatible with one another, a complex international system for coordination and harmonisation has been developed between the organisations involved in this work. The provisions are adapted following a two-year cycle.

2.1 The European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR)

The European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) aims to regulate the international transport of dangerous goods by road between the UNECE Member States and other states that apply ADR (ADR contracting parties). The Agreement entered into force on 29 January 1968. The European Union is not a party to the Agreement, although all its Member States are contracting parties to this Agreement.

2.2 The European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN)

The European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN) aims to regulate the international transport of dangerous goods by inland waterways between the UNECE Member States that apply ADN (ADN contracting parties). The Agreement entered into force on 28 February 2008. The European Union is not a party to the Agreement, although twelve Member States are contracting parties to this Agreement.

2.3 The Working Party on the Transport of Dangerous Goods (WP.15) and the ADN Administrative Committee; decisions adopted and follow up

The Working Party on the Transport of Dangerous Goods (WP.15) and the ADN Administrative Committee and the ADN Safety Committee (WP.15/AC.2) are the bodies set up under UNECE in order to decide on the amendments to ADR and ADN. These bodies are made up by the representatives of the UNECE Member States that apply ADR and ADN. Each ADR and ADN contracting party has a vote.

According to Chapter VII – "Voting" of the Terms of Reference and Rules of Procedure of the Working Party on the Transport of Dangerous Goods (WP.15), only full participants shall have one vote in WP.15, and decisions of that body shall chiefly be taken by consensus. WP.15 votes by show of hands.

According to Article 17(7) of ADN, each contracting party represented at the session of the ADN Administrative Committee shall have a vote.

The amendments adopted during the bienium 2016-2018 include a wide series of adaptations to technical and scientific progress.

Notably, rules for classification of dangerous goods were clarified in both agreements in respect of samples of energetic materials for testing purposes (section 2.1.4.3), classification of articles as articles containing dangerous goods, n.o.s. (section 2.1.5), classification of corrosive substances (section 2.2.8). Several new entries were introduced in the dangerous goods list, starting with UN 3535 TOXIC SOLID, FLAMMABLE, INORGANIC, N.O.S. up to 3548 ARTICLES CONTAINING MISCELLANEOUS DANGEROUS GOODS N.O.S.. New packing instructions were drafted, e.g. a packing instruction P911 for defective cells and batteries (lithium metal batteries, lithium ion batteries when carried individually or contained in equipment). Furthermore, the existing packing provisions in Chapter 3.3 were amended, e.g. the special provision 392 applicable for the carriage of fuel gas containment systems designed to and approved to be fitted in motor vehicles containing gas was amended to reflect the development of dedicated standards and regulations, including Regulation (EC) No 79/2009 of the European Parliament and of the Council of 14 January 2009 on type-approval of hydrogen-powered motor vehicles, and amending Directive 2007/46/EC¹, Commission Regulation (EU) No 406/2010 of 26 April 2010 implementing Regulation (EC) No 79/2009 of the European Parliament and of the Council on type-approval of hydrogen-powered motor vehicles². In terms of mode specific amendments, in ADR, new rules applicable for fastenings were introduced. For ADN, the classification of zones of tank vessels for which explosion protection is required and the classification of equipment category is introduced, in order to

¹ OJ L 35, 4.2.2009, p. 32.

² OJ L 122, 18.5.2010, p. 1.

adjust the requirements applicable for such ships with the current requirements of Directive 2014/34/EU³.

A large range of public and private sector experts has been consulted during the preparation of these amendments. The following technical meetings have been carried out during the development of these amendments:

- at the UN ECOSOC Sub-Committee of Experts on Transport of Dangerous Goods (SCETDG) in its:
 - (1) 47th session in Geneva, 22-26 June 2015,
 - (2) 48th session in Geneva, 30 November - 9 December 2015,
 - (3) 49th session in Geneva, 27 June - 7 July 2016,
 - (4) 50th session in Geneva, 28 November - 6 December 2016,
- at the UNECE – OTIF Joint meeting of the RID Expert Committee and the Working Party on the Transport of Dangerous Goods (WP.15/AC.1) in its:
 - (1) autumn 2016 session in Geneva, 19-23 September 2016,
 - (2) spring 2017 session in Bern, 13-17 March 2017,
 - (3) autumn 2017 session in Geneva, 19-29 September 2017,
 - (4) spring session in Bern, 12-16 March 2018,
- for ADR, at the Working Party on the Transport of Dangerous Goods (WP.15) in its:
 - (1) 101st session in Geneva, 8-10 November 2016,
 - (2) 102nd session in Geneva, 8-12 May 2017,
 - (3) 103rd session in Geneva, 6-10 November 2017,
 - (4) 104th session in Geneva, 15-17 May 2018,
- for ADN, at the ADN Safety Committee (WP.15/AC.2) in its:
 - (1) 29th session in Geneva, 22-26 August 2016,
 - (2) 30th session in Geneva, 23-27 January 2017,
 - (3) 31st session in Geneva, 28-31 August 2017,
 - (4) 32nd session in Geneva, 22-26 January 2018,
- the ADN Administrative Committee in its:
 - (1) twentieth session in Geneva, 26 January 2018.

In these meetings, the individual proposals for amendments have been analysed and processed by the expert committees. In most cases, the recommended action has been agreed upon unanimously. Certain proposals have been recommended by a majority view of the experts.

For ADR, the Working Party on the Transport of Dangerous Goods – WP.15 took the decision on these proposals at every one of the above mentioned sessions. For ADN, the Administrative Committee decided on the amendments at its twentieth session in Geneva, 26 January 2018.

³ OJ L 96, 29.3.2014, p. 309.

In accordance with Article 14 of ADR, once decided upon by the Working Party on the Transport of Dangerous Goods – WP.15, any proposed amendment to the Annexes of ADR shall be deemed to be accepted unless, within three months from the date on which the Secretary-General of the United Nations circulates it, at least one-third of the Contracting Parties, or five of them if one-third exceeds that figure, have given the Secretary-General written notification of their objection to the proposed amendment.

In accordance with Article 20 of ADN, once decided upon by the ADN Administrative Committee, the amendments shall be deemed to be accepted unless, within three months from the date on which the Secretary-General of the United Nations circulates it, at least one-third of the Contracting Parties, or five of them if one-third exceeds this figure, have given the Secretary-General written notification of their objection to the proposed amendment.

The amendments adopted by the WP.15, as presented in the documents contained in the Annex to the present proposal, were sent to the Secretary-General of the United Nations so that they could be notified to ADR Contracting Parties on 1 July 2018 for acceptance in accordance with the procedure set out in Article 14 of ADR and are available online⁴.

The amendments adopted by the ADN Administrative Committee, as presented in the documents contained in the Annex to the present proposal, were notified by the Secretary-General of the United Nations to ADN Contracting Parties on 1 July 2018 for acceptance in accordance with the procedure set out in Article 20 of ADN and are available online⁵.

Until 1 October 2018, the Secretary General of the United Nations, in its capacity as depositary, can receive objections to the amendments to ADR and ADN, as adopted in the sessions mentioned in point 2.3 above.

Unless a sufficient number of objections are raised by the parties, the amendments concerned under this proposal are expected to enter into force on 1 January 2019 and become binding.

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

3.1 Background

The European Union is not a contracting party to ADR and ADN. Nevertheless, the fact that the European Union does not take part in an international agreement does not prevent it from exercising its competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest (see *Germany v Council*, C-399/12 ("OIV"), paragraph 52 and the case law referred to).

Currently, there are 50 Contracting Parties to ADR, and all the EU Member States are contracting parties to this Agreement. There are 17 Contracting Parties to ADN, and 12 EU Member States are Contracting Parties to this Agreement.

Since 1 January 1997 the European Union has applied the provisions of ADR to road transport of dangerous goods on the EU territory, initially pursuant to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road⁶. In 2008, Directive 94/55/EC was

⁴ <http://www.unece.org/trans/main/dgdb/wp15/wp15rep.html>.

⁵ http://www.unece.org/trans/main/dgdb/adn/adn_rep.html.

⁶ OJ L 319, 12.12.1994, p. 7. .

replaced by Directive 2008/68/EC which pursues the principles of its predecessor. Since 1 January 2009, the European Union has applied the provisions of ADN to inland waterway transport of dangerous goods.

Article 4 of Directive 2008/68/EC, concerning third countries, establishes that "the transport of dangerous goods between Member States and third countries shall be authorised in so far as it complies with the requirements of the ADR, RID or ADN, unless otherwise indicated in the Annexes".

Moreover, the above mentioned amendments, to the extent that they become binding, will have an incidence on the operation of Directive 2008/68/EC in view of its Article 8. Under that provision, the Commission is empowered to adapt Annex I, Section I.1 and Annex III, Section III.1 to Directive 2008/68/EC to scientific and technical progress, "in particular to take account of amendments to the ADR, RID and ADN".

3.2 Position of the EU

The Annex to the present proposal provides a detailed list of the envisaged amendments, specifying that they can be accepted by the Union. The envisaged amendments are considered to be appropriate for the safe transport of dangerous goods in a cost effective manner, taking into account technological progress, and can therefore be supported. The proposed amendments concur to safe and secure transport of dangerous goods by aiming to nullify the intrinsic dangers of these goods.

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.'

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement⁷.

The concept of 'acts having legal effects' includes acts that have legal effects through the application 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 EU legislature'⁸.

4.1.2 Application to the present case

The WP.15 is a body set up by an agreement, namely the European Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR).

⁷ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraph 64.

⁸ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

The ADN Administrative Committee is a body set up by an agreement, namely the European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN).

The acts which the WP.15 and ADN Administrative Committee adopted constitute acts having legal effects. Under the conditions described above, the acts adopted will be binding under international law in accordance with Article 14 of the ADR and Article 20 of the ADN and are capable of decisively influencing the content of EU legislation, namely Directive 2008/68/EC. This is because Article 4 of Directive 2008/68/EC concerning third countries provides that 'the transport of dangerous goods between Member States and third countries shall be authorised in so far as it complies with the requirements of the ADR, RID or ADN, unless otherwise indicated in the Annexes'. Moreover, the acts will have an incidence on the operation of Directive 2008/68/EC in view of its Article 8. Under that provision, the Commission is empowered to adapt Annex I, Section I.1 and Annex III, Section III.1 to Directive 2008/68/EC to scientific and technical progress, "in particular to take account of amendments to the ADR, RID and ADN".

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

Therefore, the procedural legal basis of 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.

4.2.2 Application to the present case

The main objective and the content of the Decision relate to transport of dangerous goods by road and inland waterways. Therefore, the substantive legal basis of the proposed decision is Article 91 TFEU.

4.3 Conclusion

The legal basis of the proposed Council Decision should be Article 91 TFEU in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

For reasons of transparency and proper reference, a reference to the decisions of the Working Party on Transport of Dangerous Goods (WP.15) and of the ADN Safety Committee shall be published in the *Official Journal of the European Union*, indicating their entry into force.

Proposal for a

COUNCIL DECISION

establishing the position to be adopted on behalf of the European Union as regards the amendments to the Annexes of the European Agreement concerning the International Carriage of Dangerous Goods by Road (ADR) and to the Annexed Regulations to the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterways (ADN), adopted by the Working Party on Transport of Dangerous Goods – WP.15 and the ADN Administrative Committee

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with the Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The European Agreement Concerning the International Carriage of Dangerous Goods by Road (“ADR”) entered into force on 29 January 1968. The European Agreement Concerning the International Carriage of Dangerous Goods by Inland Waterways (“ADN”) entered into force on 29 February 2008.
- (2) Pursuant to Article 14 of ADR, any Contracting Party may propose one or more amendments to the Annexes to this Agreement and, therefore, the Working Party on Transport of Dangerous Goods – WP.15 may adopt amendments to the Annexes of ADR. Pursuant to Article 20 of ADN, the Safety Committee and Administrative Committee may adopt amendments to the Annexed Regulations to the ADN.
- (3) The amendments adopted during the biennium 2016-2018 by WP.15 and the ADN Administrative Committee on transport of dangerous goods by road and inland waterways were notified to the ADR and ADN contracting parties on 1 July 2018.
- (4) It is appropriate to establish the position to be taken on the Union’s behalf with regard to those amendments to the ADR and the ADN, as those acts will be capable of decisively influencing the content of Union law, namely Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods⁹. This Directive lays down requirements for the transport of dangerous goods by road, rail or inland waterways within or between Member States, by referring to the ADR and the ADN. Thus Article 4 of that Directive provides that the transport of dangerous goods between Member States and third countries shall be authorised in so far as it complies with the requirements of the ADR, RID and ADN, unless otherwise indicated in the Annexes. Moreover, under Article 8 of the Directive, the Commission is empowered to adapt Annex I, Section I.1 and Annex III, Section III.1 to Directive 2008/68/EC to scientific and technical progress, "in particular to take account of amendments to the ADR, RID and ADN".

⁹ OJ L 260, 30.9.2008, p. 13.

- (5) The Union is not a contracting party to the ADR and to the ADN. However, this fact does not prevent it from exercising its competence by establishing, through its institutions, a position to be adopted on its behalf in the body set up by that agreement, in particular through the Member States which are party to that agreement acting jointly in its interest.
- (6) All Member States are contracting parties to and apply the ADR, and 12 Member States are contracting parties to and apply the ADN.
- (7) The amendments adopted, as referred to above, concern technical standards or uniform technical prescriptions, with the objective to ensure safe and efficient transport of dangerous goods whilst taking into account scientific and technical progress in the sector and the developments of new substances and articles that pose danger during their transport. The development of transport of dangerous goods by road and inland waterways, both within the Union and between the Union and its neighbouring countries, is a key component of the common transport policy and ensures proper functioning of all industrial branches producing or making use of goods classified as dangerous under the ADR and ADN.
- (8) All the proposed amendments are justified and beneficial, and should therefore be supported by the Union.
- (9) The Union's position is to be expressed by the Member States of the Union that are contracting parties to ADR and ADN, acting jointly,

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on behalf of the European Union on the amendments adopted by the Working Party on Transport of Dangerous Goods – WP.15 and the ADN Administrative Committee to the Annexes to the ADR and to the Annexed Regulations to the ADN, respectively, as referred to in the Annex to this Decision, is set out in this Annex.

Minor changes to this position may be agreed without further decision of the Council, in accordance with Article 2.

Article 2

The position of the Union shall be expressed by the Member States which are contracting parties of the ADR and the ADN, acting jointly in the interest of the Union.

Article 3

A reference to the decisions of the Working Party on Transport of Dangerous Goods (WP.15) and of the ADN Safety Committee shall be published in the *Official Journal of the European Union*, indicating their entry into force.

Article 4

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council
The President*