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Proposal for a

COUNCIL DECISION

on the ratification and accession by Member States on behalf of the 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 aspects related to judicial cooperation in civil matters

EXPLANATORY MEMORANDUM

1. **CONTEXT OF THE PROPOSAL**

1.1. Introduction

Liability and compensation for damages arising from specific types of shipping activities is regulated at international level with a series of International Maritime Organisation (hereinafter referred to as 'IMO') conventions, which rely on the same main principles. These principles are: 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 (hereinafter referred to as 'HNS'), a special compensation fund that pays for damages when these exceed the liability limits of the shipowner.

The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter referred to as '1996 HNS Convention') is the last one of the IMO Conventions dealing with liability that is still awaiting ratification by States to enter into force. This is an important piece of the international maritime liability regime, in particular as the carriage of HNS by sea, including liquefied natural gas ('LNG') and liquefied petroleum gas ('LPG'), is a booming trade representing a significant share of the maritime transport sector.

The Protocol of 2010 (hereinafter referred to as '2010 Protocol') to the 1996 HNS Convention contained necessary amendments to address problems identified in the 1996 HNS Convention. The 2010 Protocol and the provisions of the Convention, as amended by the Protocol, are to be read, interpreted and applied together as one single instrument, as per Articles 2 and 18 of the Protocol. A consolidated text of the Protocol was produced by the IMO Secretariat and endorsed at IMO in 2011 at the 98th Meeting of its Legal Committee, and is referred to as the '2010 HNS Convention'. The 2010 HNS Convention, as a single, consolidated instrument for the Convention, will take effect once the 2010 Protocol enters into force.

State signature, ratification or acceptance of the 2010 Protocol nullifies any prior signature or ratification by that State of the 1996 HNS Convention, in accordance with Article 20(8) of the Protocol (Article 45(8) of the 2010 HNS Convention).

Neither the 1996 HNS Convention, nor the 2010 Protocol to the HNS Convention has entered into force. The latter has no contracting parties to it to this day.

It is important to note that an expression to be bound by the 2010 Protocol must be accompanied by the submission of data on the total quantity of contributing cargo received during the preceding calendar year, in accordance with Article 20(4) thereof (Article 45(4) of the 2010 HNS Convention). This prerequisite is the main reason why no State has ratified the Convention yet.

Following the adoption of the 2010 Protocol to the HNS Convention at the IMO, a group of States with the assistance of the International Oil Pollution Compensation Funds (hereinafter 'IOPC Funds') Secretariat have produced a set of Guidelines on reporting of HNS contributing cargo. These Guidelines were endorsed by the IMO

Legal Committee at its 100th Session on 19 April 2013¹, thereby addressing the main practical difficulty with ratification of the Convention.

An HNS Correspondence Group was created at the 101st Session of the IMO Legal Committee to assist States with setting up the procedures for implementation of the Convention, in particular for the reporting of contributing HNS, in order to pave the way for ratification. A number of EU Member States and the European Commission are members to this Group.

1.2. EU competence and ramifications

In accordance with the rules on the Union's external competence as laid down in Article 3(2) of the Treaty on the Functioning of the European Union ('TFEU'), the 2010 Protocol, and in the future the 2010 HNS Convention, comes under Union exclusive competence as it affects common rules of the Union and alters their scope.

As elaborated in Section 1.4 of this Memorandum, conclusion of the 2010 Protocol to the Convention would affect the scope and the rules of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage². In addition, for the reasons detailed in Section 1.5 below, conclusion of the 2010 Protocol would affect the rules laid down in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast Brussels I Regulation).³

The latter overlap between the Convention rules, as amended, and the rules laid down in the Union regarding judicial cooperation in civil and commercial matters also formed the legal basis for Council Decision 2002/971/EC authorising Member States, in the interest of the Community, to ratify or accede to the 1996 HNS Convention⁴. However, as established in the Introduction, the 2010 Protocol amended the 1996 HNS Convention, and the 2010 HNS Convention is the consolidated instrument stemming from this amendment. Hence, the effect of the 2010 HNS Convention on EU rules needs to be assessed in the light of the developments in the Union legal order since Council Decision 2002/971/EC was adopted.

The Union's exclusive competence for the conclusion of the 2010 Protocol cannot be exercised by the Union itself as separate legal entity, in the absence of a REIO (Regional Economic Integration Organisation) clause in the text of the Convention or in the Protocol. This leaves the Member States subject to the obligation to conclude this international agreement on behalf of the Union. As the 2010 Protocol concerns matters of exclusive EU competence, Member States cannot decide autonomously on the signature and ratification of this Protocol. They can only do this, on behalf of the Union, after the authorisation of the Council and the consent of the European Parliament upon a proposal by the Commission, in accordance with Article 218 (6) (a) TFEU.

¹ IMO LEG 100th Session, LEG 100/14, "Report of the Legal Committee on the work of its one hundredth session", pp. 5-6; LEG 100/3, submission by Canada on "Monitoring the Implementation of the HNS Protocol, 2010", Annex 2 "Reporting guidelines on the submission of HNS contributing cargo".

² OJ L 143, 30.4.2004, p. 56.

³ OJ L 351, 20.12.2012, p. 1.

⁴ Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), OJ L 337, 13.12.2002, p. 55.

1.3. Details of the Convention

The 2010 Protocol, and thereby the consolidated 2010 HNS Convention, will enter into force 18 months after the date on which at least 12 States, 4 of which with no less than 2 million units of gross tonnage each, have ratified it, and the relevant data on contributing cargo have been submitted to the IMO Secretary-General as appropriate showing no less than 40 million tonnes of cargo contributing to the general HNS account received in total in those States during the preceding calendar year. The conditions for entry into force were the same in the 1996 HNS Convention.

The main changes from the 1996 HNS Convention to the 2010 HNS Convention are:

- (a) excluding packaged HNS from the definition of contributing cargo to the HNS Fund, while damage caused by packaged HNS remains covered by the two-tier system of compensation established in the Convention (Article 1 (10) 2010 HNS Convention);
- (b) increasing the liability limits of the shipowner for ships carrying packaged HNS in order to accommodate better the exclusion of packaged HNS as contributing cargo to the HNS Fund (Article 9 (1)(b) 2010 HNS Convention);
- (c) making the physical receiver of LNG the responsible party for payment of the relevant contributions to the HNS Fund, unless there is a different agreement between the titleholder and the receiver (Article 19 (1bis) 2010 HNS Convention);
- (d) making payment of compensation by the HNS Fund in case of a covered incident conditional upon the fulfilment by the State concerned of its obligation to submit reports on contributing cargoes for all years prior to the incident (Article 21bis (2) 2010 HNS Convention).

These changes lift the main obstacles that blocked the process of ratification of the 1996 HNS Convention.

Scope: The 2010 HNS Convention applies to claims for damage arising from the carriage of HNS by sea, except for claims arising under a contract for the carriage of goods or passengers. Damage covered by the Convention includes any damage to the territory – including the territorial sea – of a State Party, environmental damage caused in the EEZ of a State Party, any damage – other than environmental damage – caused outside the territory and territorial sea of a State Party by a ship registered in a State Party, as well as any preventive measures taken to minimise the aforementioned types of damage. Warships or other State-owned or State-operated ships used for non-commercial purposes are excluded from the scope of the Convention, unless the State concerned decides otherwise. In addition, a State may exclude from the scope of this Convention ships below 200 gross tonnes, which carry HNS exclusively in packaged form, while these are engaged in voyages between ports or facilities of that State. The latter exemption may also apply between two neighbouring States upon explicit agreement of both States. Such exemptions concerning one or two neighbouring States must be notified to the IMO as appropriate.

Main aspects of liability and compensation: The 2010 HNS Convention establishes strict liability of the owner of the ship carrying HNS for any damage resulting from an incident in connection with the carriage of HNS by sea on board that ship. There are limited exceptions to the strict liability of the owner, and for these to apply the burden of proof lies with the owner.

Strict liability is coupled with the obligation of the owner to take out insurance or other financial security to cover his liability for damage under the Convention. State Parties must certify the presence of such insurance or financial security in line with the Convention.

In order for the strict liability and mandatory insurance requirements to be supported by the industry concerned, the Convention also provides for a right of limitation of liability of the owner up to 100 million units of account for HNS carried in bulk form and 115 million units of account for packaged HNS, respectively. In addition, as is the case with all maritime liability conventions, there is a clause prohibiting recourse against the shipowner for damage falling under the 2010 HNS Convention "otherwise than in accordance with this Convention".

The biggest contribution of this Convention to the international regime covering liability and compensation for accidents caused by shipping activities and, in particular, by HNS trade by sea is the establishment of a specialised compensation fund. The HNS Fund aims at paying compensation to any person suffering damage in connection with the carriage of HNS by sea to the extent that such person has been unable to obtain full and adequate compensation for the damage from the shipowner and its insurer. The latter failure may arise due to different circumstances, namely the absence of liability on the part of the shipowner, the financial incapability of the shipowner and its insurer to fully satisfy claims, or the damage exceeding the liability limits of the shipowner.

The total amount for compensation available under this two-tier system is 250 million units of account (approximately 310 million euros in today's monetary exchange rates). In order for this amount to be available, an elaborate system of contributions paid to the HNS Fund by persons receiving HNS in each State Party is set up under the 2010 HNS Convention. State Parties are in turn responsible for the accuracy, timeliness and regularity of the reporting of contributing cargo to the HNS Fund; whereas, a State may also decide to pay the contributions due to the Fund itself instead of the HNS receiver.

Claims and actions before courts of a State Party: The 2010 HNS Convention contains rules on jurisdiction of courts of State Parties over claims made by persons suffering damage covered by the Convention against the owner or its insurer, or against the HNS Fund. Recognition and enforcement of judgments by courts in State Parties is also covered by the Convention. These elements, which remain un-changed from the 1996 HNS Convention, aim at ensuring that victims of accidents covered by the Convention can benefit from clear procedural rules and legal certainty, to make their claims more effective.

1.4. Implications for Directive 2004/35/EC

Since 2004, Directive 2004/35/EC is the applicable law in the EU on the liability of operators of occupational activities, including shipping, with regard to the prevention and remedying of environmental damage in the territory and waters under the jurisdiction of Member States.

Both the 1996 and the 2010 HNS Conventions overlap in scope with the Directive, in so far as (i) environmental damage caused to the territory, including the territorial sea, of a State Party (Article 3 (a) 2010 HNS Convention), (ii) damage by contamination of the environment caused in the EEZ or equivalent area (up to 200 nautical miles from baselines) of a State Party (Article 3(b) 2010 HNS Convention), and (iii) 'preventive

measures, wherever taken, to prevent or minimise such damage' (Article 3 (d) 2010 HNS Convention) are concerned. The corresponding provisions of the Directive are Article 2(1) on the definition of 'environmental damage' and Article 2(10) on the definition of 'preventive measures' thereof, in combination with Article 3(1)(a) of Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy⁵, and Article 1(1) of the Birds Directive 79/409/EEC⁶ and Article 2(1) of the Habitats Directive 92/43/EEC⁷, as referred to in the 'Commission Guidelines for the establishment of the Natura 2000 network in the marine environment - Application of the Habitats and Birds Directives'⁸. The definition of 'environmental damage' in the Convention and Directive 2004/35/EC, albeit largely overlapping, is not identical. However, in practice, it is expected that the Convention should aim for equally high standards of environmental damage remediation as in the Directive.

Due to the overlap in the scope of Directive 2004/35/EC and the 2010 HNS Convention, it is clear that the conclusion of the 2010 Protocol, amending the 1996 HNS Convention and resulting in a new legal text (i.e. the 2010 HNS Convention), affects existing Union rules.

More to the point, Directive 2004/35/EC explicitly refers to the 1996 HNS Convention excluding any damage arising from an incident that is covered by that Convention, and any future amendments thereof, from the scope of the Directive, provided that the Convention is in force in the Member State concerned (Article 4 (2) and Annex IV of Directive 2004/35/EC). This is to allow specialised international regimes that cover civil liability from specific occupational activities to prevail over the Directive, as these were deemed more effective in granting prompt and adequate compensation for environmental damage and better suited to the nature of such occupational activities. The 2010 Protocol as an amendment to the 1996 HNS Convention is covered by that exemption to Directive 2004/35/EC; thus, making it clear that ratification or accession to the Convention will affect the scope of existing EU rules.

Apart from the significant overlap between the rules of the Convention and the Directive, there is also a key conflict that defines the effect of the Convention's provisions on Union rules. Article 7(4) of the HNS Convention (common in both the 1996 and the 2010 text of the Convention) precludes any claims for damage against the owner of the ship in any other way – or forum – than that prescribed under the Convention. This means that the Directive cannot apply in addition to the Convention, in so far as the shipowner's liability for HNS damage is concerned; hence, the scope of the Directive is limited by the Convention, and this is relevant for the purposes of the conclusion by Member States of the 2010 Protocol.

1.5. Implications for Regulation (EU) No 1215/2012 (recast of Regulation (EC) No 44/2001 – 'Brussels I')

Chapter IV of the 2010 HNS Convention lays down the rules of procedure applicable to claims and actions under the Convention before courts of State Parties. In particular, Articles 38, 39 and 40 of the Convention lay down the rules on jurisdiction of courts, and recognition and enforcement of judgments. These Articles are identical to Articles

⁵ OJ L 164, 25.6.2008, p. 19.

⁶ Council Directive 79/409/EEC on the conservation of wild birds, OJ L 103, 25.4.1979, p. 1.

⁷ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

⁸ http://ec.europa.eu/environment/nature/natura2000/marine/docs/marine_guidelines.pdf

38, 39 and 40 in the 1996 HNS Convention, which were the legal basis of the Community's exclusive competence justifying Council Decision 2002/971/EC.

Regulation (EU) No 1215/2012 sets out rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the EU Member States and the above-mentioned provisions of the Convention – should this enter into force – would affect the rules of the Regulation. The 'Proposal for a Council Decision authorizing the Member States to ratify in the interest of the European Community the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the 'HNS Convention')', COM (2001) 674 final⁹, contains a detailed overview and explanations of the overlap between Chapter IV of the Convention and the Brussels I Regulation (Regulation (EC) No 44/2001¹⁰).

In addition to the above, Articles 37, 41 and 42 in Chapter IV of the 2010 HNS Convention are of an ancillary nature, and, as such, they cannot stand alone or be applied separately from other provisions of the Convention. Hence, exclusive Union competence covers Chapter IV of the Convention as a whole.

The special position of Denmark as regards Chapter IV of the Convention needs to be addressed separately, in accordance with Protocol No 22¹¹ on the position of Denmark annexed to the Treaties. Denmark is exempted from the application of Title V of Part Three TFEU and, as a result, it does not take part in the adoption of the proposed Council Decision on the ratification and accession by Member States on behalf of the 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 regard to aspects related to judicial cooperation in civil matters.

1.6. Conclusions

The adoption and entry into force of international rules on liability for non-contractual damages arising from the carriage of HNS by sea is crucial in view of the significant share HNS cargo represents in maritime freight transport worldwide.

Having gained experience with similar international regimes governing liability for damages arising from other shipping activities, such as oil carriage by tankers, the IMO adopted this international agreement, as amended by the 2010 HNS Protocol, to complement the system of maritime liability conventions with a specialised instrument establishing also a new compensation fund targeting HNS damage.

On the basis of Council Decision 2002/971/EC, Member States were authorised to proceed with ratification of the 1996 HNS Convention. The 2010 Protocol amending the Convention also needs to form the subject of a new Council Decision, in accordance with the Treaties and taking into account the developments in Union law since 2002. The 2010 Protocol leads to the constitution of a new international agreement (see in particular Article 45(8) in the consolidated text of the 2010 HNS Convention). As a consequence, by ratifying or acceding to the 2010 Protocol, the Union is authorising its Member States to apply the 2010 HNS Convention not only in relation to matters covered by the Protocol, but also in relation to all the other matters covered by the amended text of the 2010 HNS Convention.'

⁹ OJ C 51E, 26.2.2002, p. 370.

¹⁰ OJ L 12, 16.1.2001, p. 1.

¹¹ OJ C 326, 26.10.2002, p. 299.

In the light of the above, the Commission proposes the adoption of two separate Council Decisions on the ratification of and accession to the 2010 Protocol by Member States on behalf of the Union to ensure that the objectives of the Treaties as enshrined in Directive 2004/35/EC and Regulation (EU) No 1215/2012 are attained and that the provisions of Protocol 22 are complied with. In relation to the aforementioned Regulation, and in particular with regards to rules concerning recognition and enforcement of judgments given by a court of a Member State, Member States are required to issue the appropriate declaration, as that is laid down in the Annex to the proposed Council Decision, when ratifying or acceding to the 2010 Protocol, which would ensure a continued application of rules concerning recognition and enforcement of judgments of Regulation (EU) No 1215/2012 when it comes to recognition and enforcement of judgments given by a court of a Member State in another Member State. The declaration should also cover other relevant rules of the Union on the subject, notably, the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007¹².

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

No formal Impact Assessment is required at this stage of the process where the scope for the EU action is already limited by negotiations over the international instrument being concluded.

However, several options have been examined and weighed:

(1) No action

Currently, the HNS Convention not having entered into force, Directive 2004/35/EC applies to environmental liability arising out of any accident caused by a ship carrying HNS at sea in the EU. This means that the definition of environmental damage established in the Directive applies, coupled with the right of the shipowner to limit his liability in accordance with the International Convention on Limitation of Liability for Maritime Claims 1976 as amended (hereinafter referred to as 'LLMC'), as per Article 4(3) of the Directive. The right of the shipowner to limit his liability up to the general limits established in LLMC has limited exceptions, namely intent to cause such damage or recklessness. The limits of liability under the LLMC are lower than those established in Article 9 of the 2010 HNS Convention. In the absence of a compensation fund such as that established in Chapter III of the 2010 HNS Convention, there is presently nothing under the Directive to provide for compensation of victims (eg. fishermen, local communities) of HNS pollution at sea in excess of the limits of the shipowner's liability. Furthermore, the existing legal framework lacks a mandatory insurance requirement, whereas Article 12 of the 2010 HNS Convention specifically establishes this obligation for shipowners coupled with a right of claimants for direct action against the insurer (Article 12(8)). Finally, in Directive 2004/35/EC, the EU co-legislators have chosen to provide for an exemption in favour of the international liability regime for shipping activities for all relevant conventions, including the HNS Convention and to exempt incidents falling under the international conventions from the scope of the Directive. Should no action be taken at EU level to allow Member States to ratify or accede to the 2010 HNS Protocol for the last IMO liability convention to enter into force, a discrepancy in the international –

¹² OJ L 339, 21.12.2007, p. 3.

and EU – liability regime for shipping activities will be crystallised at the expense of legal certainty and homogeneity of norms applicable to, *inter alia*, environmental damage arising from the carriage of HNS at sea.

(2) Alignment of the HNS Convention with the Union *acquis*

Directive 2004/35/EC does not fully overlap with the 2010 HNS Convention in so far as the definition of environmental damage is concerned. Namely, the definition in the Directive is broader and encompasses more types of remediation, including primary restoration of damaged natural resources to their baseline, including if necessary, taking complementary and compensatory measures if the resources cannot be brought back to their baseline condition, and respectively compensation for the interim loss of resources (such measures never consist of monetary compensation but always of measures to improve natural resources at the damaged site or a site close by). Hence, one could advocate in favour of the possibility of an amendment of the Convention to tally with the provisions of the Directive.

However, it is highly unlikely to achieve sufficient support among State Parties to the IMO, in particular in view of the difficulties that had to be addressed before the current version of the Convention could be agreed upon. Also, the definition of pollution damage under the Convention has been carefully established in line with other existing regimes on liability for accidents at sea from different types of shipping activities (e.g. 1992 International Convention on Civil Liability for Oil Pollution Damage, 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage). Amending that definition in the 2010 HNS Convention would seriously disrupt the balance among the different sectors of shipping and would meet widespread resistance at the IMO.

(3) Inserting a 'disconnection-clause' in the HNS Convention and the consequential amendment of Directive 2004/35/EC

One could potentially explore also the possibility of amending the Convention to insert a 'disconnection' clause in order to ensure that when Member States become party to the Convention the rules of Union law will continue to govern the special relationship between the EU and its Member States. In relation to third states, the obligations under the Convention would remain unchanged.

By accepting such a 'disconnection-clause', all Parties to the Convention (including non-EU States) would agree that the EU and its Member States shall apply EU law in their relations between themselves insofar as it also governs the subject matter of the Convention. Yet, the same rationale as developed above applies to this possibility, meaning that this is not a realistic option for Member States on behalf of the Union to engage with at the IMO.

In addition, such a clause would require the amendment of Directive 2004/35/EC in order to alleviate the exemption that applies to damage arising from incidents falling under the scope of the HNS Convention from the scope of the Directive. However, the Directive treats all of the maritime liability conventions listed in Annex IV thereof on par. Thus, introducing a different regime for one of the conventions would go against the spirit of the Directive itself, in particular where all IMO liability conventions have been construed on the same principles to establish a strict liability framework for the shipowner coupled with mandatory insurance and the availability of sufficient funds for compensation for pollution damage resulting from a shipping incident.

(4) Ratification of the 2010 HNS Protocol

Conclusion of the 2010 Protocol to the HNS Convention will ensure uniform application of rules on liability and compensation in connection with accidents caused by ships carrying HNS at sea across the EU. In addition, it will ensure availability of sufficient funds for compensation of victims of such accidents. Using an international regime rather than regional solutions for these purposes better suits the nature of shipping as a global business and the cross-boundary impact such accidents are likely to have.

It was therefore concluded that the present draft decision authorising Member States to ratify the 2010 HNS Protocol and, thus, accepting to be bound by the consolidated text of the 2010 HNS Convention, is the best course of action.

3. LEGAL ELEMENTS OF THE PROPOSAL

As already mentioned in the Introduction, State signature, ratification or acceptance of the 2010 Protocol nullifies any prior signature or ratification by that State of the 1996 HNS Convention. States ratifying the Protocol express their consent to be bound by the consolidated text of the 2010 HNS Convention, as a single, consolidated instrument for the Convention, which will take effect once the 2010 Protocol enters into force.

The proposed Council Decisions will therefore authorise Member States to ratify, or accede to, on behalf of the Union, to the 2010 HNS Protocol and, as a consequence, be bound by the rules of the 2010 HNS Convention.

The proposed Council Decisions are based on Article 218(6) TFEU in conjunction with, on the one hand Article 81 TFEU, which provides the main legal basis for EU legislation on judicial cooperation in civil matters relevant to the rules of procedure applicable to claims and actions under Chapter IV of the 2010 HNS Convention, and on the other hand Article 192 TFEU, which provides the main legal basis for EU legislation on protection of the environment.

The 2010 HNS Convention pursues objectives which are inseparably linked without one being secondary and indirect in relation to the other. A single decision cannot be adopted on a dual legal basis where the procedures required by each legal basis are incompatible with each other.¹³ Such is the case here in view of the fact that matters related to judicial cooperation in civil matters do not bind Denmark, which leads to diverging voting rights in the Council. Consequently, two separate Council decisions are required.

The two decisions are built up similarly. Their Article 1 authorises Member States to ratify or accede to the 2010 Protocol to the HNS Convention on behalf of the Union, due to the impossibility for the EU to become a party to such Convention.

Common Article 2 requires Member States to agree to be bound by the 2010 Protocol within two-year period from the entry into force of this Decision. Early adherence to the 2010 Protocol by all EU Member States will allow the threshold for entry into force concerning both the number of IMO Member States and aggregate fleet required (12 States including 4 with not less than 2 million units of gross tonnage each) to be attained. More importantly, ratification within a specified timeframe will prevent any competitive advantage being gained by Member States who delay their accession to the 2010 Protocol and, thus, the 2010 HNS Convention, at the expense of equal

¹³ See recent ECJ, judgment of 11 June 2014, Case C-377/12, para 34.

remedies being available to parties suffering damages from HNS incidents at sea. Exchange of information and best practices will be particularly beneficial to the process of ratification or accession, especially as regards the reporting of contributing cargo under the Convention.

Article 3 in the proposed Council Decision excluding aspects related to judicial cooperation in civil matters requires Member States to make reference, in writing, to both Council Decisions when depositing their instrument of ratification or accession to the 2010 Protocol.

Article 3 in the proposed Council Decision concerning aspects related to judicial cooperation in civil matters refers to the declaration Member States are required to make when agreeing to be bound by the 2010 Protocol, on the subject of recognition and enforcement of judgments, on account of the Union exclusive competence on these matters. The declaration is similar to the declaration included in Article 2 of Council Decision 2002/971/EC.

Common Article 4 determines the date of entry into force of the proposed Council Decisions.

In common Article 5 it is made clear that, as the purpose of the Decisions is to authorise the Member States to be bound by the 2010 Protocol on behalf of the Union, the Decisions are addressed to them in accordance with the Treaties.

4. BUDGETARY IMPLICATION

None

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on the ratification and accession by Member States on behalf of the 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 aspects related to judicial cooperation in civil matters

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union ('TFEU'), and in particular Article 192, in conjunction with Article 218(6) (a) (v) thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹⁴,

Whereas:

- (1) The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter referred to as the '1996 HNS Convention') was aimed at ensuring adequate, prompt and effective compensation of persons who suffer damage caused by spills of hazardous and noxious substances, when carried by sea. The 1996 HNS Convention filled a significant gap in the international regulation of marine pollution liability.
- (2) In 2002 the Council adopted Council Decision 2002/971/EC¹⁵ authorising Member States, in the interest of the Community, to ratify or accede to the 1996 HNS Convention. Decision 2002/971/EC obliged Member States to take the necessary steps to ratify or accede to the 1996 HNS Convention before 30 June 2006. Four Member States have subsequently ratified that Convention. The 1996 HNS Convention has never entered into force.
- (3) The 1996 HNS Convention has been amended by the Protocol of 2010. Pursuant to Articles 2 and 18(1) of the Protocol of 2010, the Protocol of 2010 and the 1996 HNS Convention are to be read, interpreted and applied together as one, single instrument, as between the parties to the Protocol of 2010.
- (4) A consolidated text of the Protocol of 2010 and the 1996 HNS Convention was prepared by the International Maritime Organisation ('IMO') Secretariat and approved by the IMO Legal Committee at its 98th meeting (hereinafter referred to as the '2010 HNS Convention'). The 2010 HNS Convention is not an instrument open to signature or ratification. The 2010 HNS Convention will take effect once the Protocol of 2010 enters into force in Member States.

¹⁴ OJ C326, 26.10.2012, p.47.

¹⁵ Council Decision 2002/971/EC of 18 November 2002 authorising the Member States, in the interest of the Community, to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the HNS Convention), (OJ L 337, 13.12.2002, p.55).

- (5) The expression of consent by a State to be bound by the Protocol of 2010 nullifies any prior expression of consent by that State to the 1996 HNS Convention, in accordance with Article 20(8) of the Protocol (Article 45(8) of the 2010 HNS Convention). As a result, States that are Contracting Parties to the 1996 HNS Convention will cease to be so the moment they express their consent to be bound by the Protocol of 2010 in accordance with Article 20 of that Protocol, and in particular paragraphs (2), (3) and (4) thereof.
- (6) Since the adoption of Decision 2002/971/EC, Union law has evolved with the adoption of new secondary legislation and the amendment of the Treaties by the Treaty of Lisbon. The 2010 HNS Convention now falls in its entirety under exclusive Union competence.
- (7) Directive 2004/35/EC of the European Parliament and of the Council¹⁶ is the applicable law in the Union on the liability of operators of occupational activities, including shipping, with regard to the prevention and remedying of environmental damage in the territory and marine waters under the jurisdiction of Member States. Both the 1996 and the 2010 HNS Convention overlap in scope with Directive 2004/35/EC, in so far as environmental damage caused to the territory and marine waters under the jurisdiction of a State Party (Article 3, paragraphs (a) and (b) of the 2010 HNS Convention), and preventive measures – wherever taken – to prevent or minimise such damage (Article 3(d) 2010 HNS Convention) are concerned.
- (8) Apart from the overlap in the scope of the 2010 HNS Convention and Directive 2004/35/EC, there is also a potential conflict between the two instruments, which has been foreseen and addressed in Article 4(2) and Annex IV of that Directive. In accordance with Article 7, paragraphs (4) and (5), of the 2010 HNS Convention, the Convention establishes strict liability of the shipowner for any damages resulting from HNS carriage by sea covered by the Convention, premised on the channelling of liability to the shipowner and the prohibition of any other claims being made against the shipowner except in accordance with that Convention. Thus, the exemption that applies to damages covered by the Convention under Article 4(2) and Annex IV of Directive 2004/35/EC prevents the conflict between Article 7 of the Convention and that Directive.
- (9) Due to the overlap in the scope of Directive 2004/35/EC and the 2010 HNS Convention, and the exemption that applies to the Convention in accordance with the Directive, it is clear that the conclusion of the Protocol of 2010 affects existing Union rules, and that the consent to be bound by the Protocol of 2010 should fall within exclusive Union competence.
- (10) The 2010 HNS Convention, as was the case with its predecessor, is particularly important for the interests of the Union and its Member States, as it provides for improved protection of the environment and of the victims of HNS pollution damage at sea under international rules on marine pollution liability, in line with the 1982 United Nations Convention on the Law of the Sea.
- (11) In order for States to become Contracting Parties to the Protocol of 2010, and thereby to the 2010 HNS Convention, they have to submit to the Secretary General of the IMO, at the same time as their instrument of consent, relevant data on the total

¹⁶ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (L 143, 30.4.2004, p.56).

quantities of contributing cargo under the 2010 HNS Convention during the preceding calendar year, in accordance with Article 20(4) thereof. For this purpose, States are required to set up a system for the reporting of contributing cargo prior to expressing their consent to be bound by the Protocol of 2010.

- (12) Exchange of information and best practices among Member States on the procedures leading up to ratification or accession to the Protocol of 2010 can facilitate the Member States' efforts in setting up a functional reporting system for HNS contributing cargo under the 2010 HNS Convention.
- (13) As was the case with the 1996 HNS Convention, only sovereign States may be party to the Protocol of 2010, in the absence of a regional economic integration organisation ('REIO') clause. Therefore, it is not possible for the Union to ratify or accede to the Protocol of 2010, and thereby to the 2010 HNS Convention, for the time being. However, the principle of sincere cooperation binds the Member States and the Union under the Treaties, for the attainment of the Union's objectives in the areas of environmental protection and civil justice cooperation. In this case, it requires the Member States to aim at and use their best efforts to achieve the accession of the Union to this Convention.
- (14) The ratification of the Protocol of 2010 by all Member States within a fixed timeframe should ensure a level playing field for all actors concerned by the application of the 2010 HNS Convention and prevent any competitive advantage being gained by delaying accession to it.
- (15) Member States should, therefore, be authorised to ratify the Protocol of 2010, except for the aspects related to judicial cooperation in civil matters. The provisions of the Convention falling within the competence conferred upon the Union under judicial cooperation in civil matters will be subject to a Decision adopted in parallel to this Decision.

HAS ADOPTED THIS DECISION:

Article 1

Member States are hereby authorised to ratify or accede to, as appropriate, the Protocol of 2010 on behalf of the Union, with the exception of aspects related to judicial cooperation in civil matters, subject to the conditions laid down in Articles 2, 3 and 4 of this Decision.

Article 2

1. Member States shall take the necessary steps to deposit the instruments of ratification of, or accession to, the Protocol of 2010 without delay, and in any case no later than two years from the date of entry into force of this Decision.
2. Member States shall inform the Council and the Commission, within one year from the date of entry into force of this Decision, of the prospective date of finalisation of their ratification or accession procedures.
3. Member States shall seek to exchange information on the state of their ratification or accession procedures, in particular by setting up a system for the reporting of contributing cargo under the Protocol of 2010.

Article 3

When ratifying or acceding to the Protocol of 2010, Member States shall inform the Secretary-General of the International Maritime Organisation in writing that such ratification or accession has taken place in accordance with this Decision and the Decision adopted parallel to this Decision with regard to aspects falling within the competence conferred upon the Union in the field of judicial cooperation in civil matters.¹⁷

Article 4

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

Article 5

This Decision is addressed to the Member States in accordance with the Treaties.

Done at Brussels,

*For the Council
The President*

¹⁷ OJ L