



Plenary sitting

A8-0191/2016

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INTERIM REPORT

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))

Committee on Legal Affairs

Rapporteur: Pavel Svoboda

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MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

**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,
- 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 damage (the 'Environmental Liability Directive' or 'ELD')³,
- 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 2015⁴,
- 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

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.

³ OJ L 143, 30.4.2004, p.56.

⁴ Item note 13142/15.

- soonest in line with the Commission's proposed approach¹,
- 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 2014²,
 - 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 2016³,
 - 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 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

¹ Available online at: <http://www.ics-shipping.org/docs/default-source/Submissions/EU/hazardous-and-noxious-substances.pdf>.

² Available online at: http://ec.europa.eu/environment/legal/liability/pdf/BIO%20ELD%20Effectiveness_report.pdf.

³ PE576.992

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 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;

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.

- (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 interim report 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.

EXPLANATORY STATEMENT

Parliament received a letter requesting it to give its consent to the draft Council decision on the ratification and accession by Member States on behalf of the Union to the 2010 Protocol to the HNS Convention on 17 December 2015.¹ In the absence of a REIO (Regional Economic Integration Organisation) clause in the text of the Convention or the Protocol, Member States should conclude this international agreement on behalf of the Union, after the authorisation of the Council and the consent of the European Parliament upon a proposal by the Commission (Article 218(6) (a) TFEU). The rapporteur proposes an interim report in order to work towards a positive outcome with the Council and the Commission. The rapporteur believes that it would not be appropriate for the Parliament to give its consent before the uniformity, integrity and effectiveness of Union law as well as the fundamental principle of conferral of EU competences is ensured.

The International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 is the last one of the International Maritime Organisation (IMO) Conventions dealing with liability and compensation for damages arising from the carriage of Hazardous and Noxious Substances by sea, including liquefied natural gas (LNG) and liquefied petroleum gas (LPG) that has not yet been ratified. 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. Neither the 1996 HNS Convention, nor the 2010 Protocol to the HNS Convention have entered into force.

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 and on board that ship. There are limited exceptions to the strict liability of the owner, which is coupled with the owner's obligation to take out insurance or other financial security to cover his liability for damage under the Convention. More importantly, a specialised compensation fund is established that is aimed at compensating any person suffering damage in connection with the carriage of HNS by sea where such person has been unable to obtain full and adequate compensation for the damage from the shipowner and its insurer. The total amount of compensation available is 250 million units of account (approximately 310 million euros in today's monetary exchange rates), based on an elaborate system of contributions paid to the HNS Fund by persons receiving HNS in each State Party.

Both the 1996 and the 2010 HNS Conventions overlap in scope with Directive 2004/35/EC on the liability of operators of occupational activities,² including shipping, in so far as (i) environmental damage caused to the territory, including the territorial sea, of a State Party, (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, and (iii) 'preventive measures, wherever taken, to prevent or minimise such damage' are concerned.

Presently, there is nothing under the Environmental Liability Directive to provide for

¹ SGS15/14574 regarding decision 13806/15.

² OJ L 143, 30.4.2004, p. 56.

compensation of victims in excess of the limits of the shipowner's liability. Furthermore, the existing legal framework in the EU lacks a mandatory insurance requirement, whereas the Convention specifically establishes this obligation for shipowners coupled with a right of claimants for direct action against the insurer.

Against this background, the rapporteur understands that the 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. It will also ensure availability of sufficient funds for compensation of victims of such accidents.

Whereas the term “pollution damage” in the 2010 HNS Convention is narrower than the term “environmental damage” under the ELD, and thus by bringing incidents involving hazardous and noxious substances under the ELD the possibility for compensation for pure environmental damage would open up, the rapporteur considers that the application of the ELD to incidents covered by the 2010 HNS Convention would entail an effective repudiation by the EU of the IMO approach, which could have considerable adverse repercussions.

Specifically, EU legislation would not be binding on non-EU countries, including those which are major Flag State, which could be problematic whenever there is a need to deal with claims arising from spills of hazardous and noxious substances having international aspects. Moreover, a scenario where EU Member States’ neighbouring countries would be parties to the 2010 HNS Conventions - Norway and Turkey have already signed the Convention - and an incident would affect both an EU Member State and a neighbouring country could be envisaged, in which case claimants and ship owners would be subjected to different (and conflicting) regimes.

Therefore, the rapporteur is of the opinion that an international regime, rather than regional solutions, for the purpose of ensuring uniform application of rules on liability and compensation in connection with accidents caused by ships carrying HNS at sea across the EU is better suited considering the nature of shipping as a global business with a cross-boundary impact.

In view of the significant share HNS cargo represents in maritime freight transport, the global nature of the shipping business, as well as the cross-boundary impact accidents involving HNS cargo are likely to have, the rapporteur believes it is in the interest of the Union as a whole to have a homogenous liability regime applicable to environmental damage arising from the carriage of HNS at sea, which can only be achieved if Parliament's recommendations are duly considered by the Council and the Commission.

The rapporteur stresses that the present interim report should not be seen as an impediment to the establishment of a uniform liability regime, but as an effort to ensure that this is done in the most effective and fair fashion, without impairing the uniformity, integrity and effectiveness of common rules of EU law and without creating excessive disparity for the victims of pollution (e.g. coastal communities, fishermen, etc.) and the shipping industry.

The rapporteur thus wants to enter into dialogue with the Council and the Commission in order to frame a coherent EU policy in the area of liability and compensation for environmental damage arising from the carriage of HNS at sea.

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS ON THE LEGAL BASIS

Mr Pavel Svoboda
Chair
Committee on Legal Affairs
BRUSSELS

Subject: Opinion on the legal basis of the 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 [2015/0135 (NLE) – 13806/2015 – C8-0410/2015]

Dear Mr Chair,

By letter of 17 December 2015 the Council requested Parliament to give its consent to the above-mentioned proposal for a Council decision.¹ In view of the change of the legal basis of the proposal by the Council, the Committee on Legal Affairs, also responsible for the subject-matter of the proposed decision, decided at its meeting of 28 January 2016, pursuant to Rule 39(2) of the Rules of Procedure, to take up of its own initiative the question concerning the appropriateness of the legal basis for the proposed Council decision.

On 22 June 2015 the Commission made a 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 (hereinafter, the “Council decision on the ratification and accession to the 2010 Protocol” or the “Council decision”).² This proposal is based on Articles 192 and 218(6)(a)(v) of the Treaty on the functioning of the European Union (hereinafter, “TFEU”). According to Article 218(6)(a)(v) TFEU, agreements covering fields to which the ordinary legislative procedure applies or to which a special legislative procedure requiring consent by Parliament applies, shall be adopted by the Council, after obtaining the consent of the European Parliament. Article 192(1) TFEU is part of Title XX on Environment and allows for the adoption by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, of measures aimed at achieving the objectives referred to in Article 191 TFEU.

On 1 December 2015 the Council published its proposal for a Council decision on the

¹ See 13806/15

² COM(2015) 304 final.

ratification and accession to 2010 Protocol, which is based on Articles 100(2) and 218(6)(a)(v) TFEU instead. Article 100(2) TFEU is part of Title VI on Transport and allows for the adoption by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, of appropriate provisions for sea and air transport.

I. - Background

Liability and compensation for damages arising from specific types of shipping activities is regulated at international level with a series of International Maritime Organisation 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 to the Carriage of Hazardous and Noxious Substances by Sea, 1996 (hereinafter referred to as '1996 HNS Convention') is the last one of the International Maritime Organisation Conventions dealing with liability that is still awaiting ratification by states to enter into force. 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 par Articles 2 and 18 of the Protocol. 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. 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.

In the absence of a Regional Economic Integration Organisation clause in the text of the Convention or in the Protocol, Member States shall conclude this international agreement on behalf of the Union. The proposed Council decision 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.

II. - The relevant Treaty Articles

Article 218(6)(a)(v) TFEU, in Part Five entitled 'The Union's External Action', in conjunction with Article 192 TFEU, in Part Three entitled 'Union Policies and Internal Actions' are presented as the legal basis in the Commission's proposal and read as follows (emphasis added):

Article 218
(ex Article 300 TEC)

[...]

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

[...]

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

Article 192

(ex Article 175 TEC)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

[...]

Article 191 TFEU has the following wording (emphasis added):

Article 191

(ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

[...]

The proposed Council decision is based on Article 218(6)(a)(v) TFEU in conjunction with Article 100(2) TFEU, which reads as follows (emphasis added):

Article 100
(ex Article 80 TEC)

[...]

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.

III. - The case-law on legal basis

It is settled case law of the Court of Justice that: "the choice of legal basis for a Community (now Union) measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure".¹ The choice of an incorrect legal basis may therefore justify the annulment of the act in question.²

As regards multiple legal bases, if examination of a measure reveals that it pursues a twofold purpose or that it has a twofold component one of which is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, that measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.³ However, where a measure has several contemporaneous objectives or components which are indissociably linked, without one being secondary and indirect in relation to the other(s), such a measure will have to be based on the various corresponding legal bases.⁴

IV. - The aim and content of the proposed Council decision and the 2010 HNS Convention

As outlined above, the aim of the proposed Council decision is to authorise Member States to ratify, or accede to, on behalf of the Union, the 2010 HNS Protocol and, as a consequence, be bound by the rules of the 2010 HNS Convention.

Specifically, Article 1 of the proposed Council decision sets out the authorisation for Member States to ratify or accede to the 2010 Protocol to the HNS Convention in the interest of the Union. Articles 2 and 3 define actions that Member States should undertake in order to ratify the 2010 Protocol and to set up a reporting system for the HNS contributing cargo. Articles 4

¹ Case C-411/06 *Commission v Parliament and Council* [2009] E.C.R. I-7585, para. 45 and Case C-130/10 *Parliament v Council* [2012] E.C.R., para. 42, and the case-law cited therein.

² Opinion 2/00 on the *Cartagena Protocol* [2001] E.C.R. I-9713, para. 5.

³ Case C-137/12 *Commission v Council* EU:C:2013:675, para. 53; Case C-411/06 *Commission v Parliament and Council*, [2009] E.C.R. I-7585, para.46 and the case-law cited there; C-490/10 *Parliament v Council* EU:C:2012:525, para. 45; C-155/07 *Parliament v Council* [2008] ECR I-08103, para. 34.

⁴ Case C-211/01 *Commission v Council* [2003] ECR I-08913, para. 40; Case C-411/06 *Commission v Parliament and Council*, [2009] E.C.R. I-7585, para. 47; Case C-178/03 *Commission v European Parliament and Council* [2006] E.C.R. I-107, paras 43-56.

and 5 contain the final provisions regarding the date of entry into force of the decision and its addressees, namely the Member States.

As regards the aim and content of the 2010 HNS Convention, it is confirmed in the note prepared by the Legal Service of the Parliament that:¹

"The aim of the 2010 HNS Convention is to provide 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. The Convention covers both pollution damage and damage caused by other risks, e.g. fire and explosion. Its content covers the questions of liability for damage to persons, property and the environment, of compensation for such damage by the International Hazardous and Noxious Substances Fund and rules on claims and actions, [...]."

Specifically, Article 3(a) covers damage that can be environmental or non-environmental; Article 3(b) covers environmental damage; Article 3(c) covers non-environmental damage; and Article 3(d) covers measures to prevent or minimise environmental or non-environmental damage. After setting out the general provisions in Articles 1-6, the Convention establishes: rules on liability in case of damage falling within the scope of the Convention in its Chapter II (Articles 7-12); rules on compensation by the International Hazardous and Noxious Substances Fund (HNS Fund) in case of such damage in Chapter III (Articles 13-36); rules on claims and actions in case of such damage in Chapter IV (Articles 37-42).² Chapters V and VI concern transitional provisions and final clauses.

V. - Determination of the appropriate legal basis

As mentioned above, the choice of legal basis for an EU measure must rest on objective factors that are amenable to judicial review; these include in particular the aim and content of that measure. In addition, recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other or where the use of two legal bases is liable to undermine the rights of the Parliament. Both Article 100(2) TFEU - proposed by the Council - and Article 192(1) TFEU - proposed by the Commission - provide for the ordinary legislative procedure for the European Parliament and the Council to take any action and lay down appropriate provisions in the areas of transport and environment, respectively. What is more, since the aim of the proposed Council decision is to authorise Member States to ratify or accede to the 2010 HNS Protocol and, as a result, be bound by the rules of the 2010 HNS Convention, which in turn is aimed at providing 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, it can be concluded that the environmental aspect can by no means be considered as "*merely incidental*". It would therefore appear that the 2010 Convention pursues several objectives and has several components that are indissociably linked. On the one hand, it aims to provide for the polluter pays principle and for the principle that preventive action should be taken in case of environmental damage and contains rules on liability and compensation for environmental damage. On the other hand, it aims to give effect to a Convention, which was concluded

¹ SJ-0066/16, p.3

² Chapter IV is subject to a separate proposal for a Council decision.

under the auspices of the International Maritime Organisation and which aims to regulate damage caused as a consequence of maritime transport, including non-environmental damage caused by maritime transport, as well as to prevent or minimize such damage. As such, it contains rules on liability and compensation for non-environmental damage.

As a result and in conformity with the case-law of the Court of Justice, it could be concluded that the proposed Council decision should be based on Article 100(2) TFEU and on Article 192(1) TFEU in conjunction with Article 218(6)(a)(v) TFEU.

VI. - Conclusion and recommendation

In light of the foregoing analysis, since the proposed Council decision is aimed at authorising Member States to ratify, or accede to, on behalf of the Union, to 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.

At its meeting of 17 February 2016, the Committee on Legal Affairs accordingly decided unanimously¹, that the correct legal basis for the proposed Council decision is Article 100(2) TFEU, Article 192(1) TFEU and Article 218(6)(a)(v) TFEU.

Yours sincerely,

Pavel Svoboda

¹ The following Members were present for the final vote: Max Andersson, Marie-Christine Boutonnet, Therese Comodini Cachia, Kostas Chrysogonos, Mady Delvaux, Angel Dzhambazki, Jytte Guteland, Dietmar Köster, Gilles Lebreton, Jiří Maštálka, António Marinho e Pinto, Julia Reda, Evelyn Regner, Virginie Rozière, Pavel Svoboda, Axel Voss, Tadeusz Zwiefka.

RESULT OF FINAL VOTE IN COMMITTEE RESPONSIBLE

Date adopted	24.5.2016
Result of final vote	+: 21 -: 0 0: 2
Members present for the final vote	Max Andersson, Marie-Christine Boutonnet, Jean-Marie Cavada, Kostas Chrysogonos, Therese Comodini Cachia, Mady Delvaux, Rosa Estaràs Ferragut, Laura Ferrara, Enrico Gasbarra, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Dietmar Köster, Gilles Lebreton, Jiří Maštálka, Emil Radev, Julia Reda, Evelyn Regner, József Szájer, Axel Voss, Tadeusz Zwiefka
Substitutes present for the final vote	Daniel Buda, Angel Dzhambazki, Stefano Maullu
Substitutes under Rule 200(2) present for the final vote	Jens Nilsson