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2020/0226 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken 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)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf 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 2021, 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 2021 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). ADR 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). ADN entered into force on 28 February 2008.

The European Union is not a party to the Agreement, although thirteen 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

The Working Party on the Transport of Dangerous Goods (WP.15) and the ADN Administrative Committee and 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 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 biennium 2018-2020 include a wide series of adaptations to technical and scientific progress.

For ADR, the WP.15 took the decision on these proposed amendments at every one of the sessions mentioned in section 2.4 below. For ADN, the Administrative Committee decided on the amendments at its twenty-fourth session in Geneva, on 31 January 2020.

In accordance with Article 14 of ADR, once decided upon by the WP.15, any proposed amendment to the Annexes of ADR shall be deemed to be accepted unless, within three months from the date onwhich 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 2020 for acceptance in accordance with the procedure set out in Article 14 of ADR and are available online[1].

[1] http://www.unece.org/trans/main/dgdb/wp15/wp15rep.html.

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 2020 for acceptance in accordance with the procedure set out in Article 20 of ADN and are available online[2].

Until 30 September 2020, 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.

2.4. The envisaged acts of the WP.15 and ADN Administrative Committee

The purpose of the envisaged acts is to adapt to technical and scientific progress the Annexes to ADR and the annexed Regulations to ADN.

Notably, the exemption applicable for data loggers and cargo tracking devices powered by batteries was clarified, new definitions were inserted e.g. "dose rate" or amended – e.g. "Self-accelerating decomposition temperature (SADT)" and "Self-accelerating polymerization temperature (SAPT)". Rules applicable for classification of dangerous good were clarified in both agreements, in particular with regard to explosives, radioactive material, corrosive substances etc. Several new entries were introduced in the dangerous goods list, e.g. UN 0511 DETONATORS, ELECTRONIC programmable for blasting, UN 3549 MEDICAL WASTE, CATEGORY A, AFFECTING HUMANS, solid or MEDICAL WASTE, CATEGORY A, AFFECTING ANIMALS only, solid. Several amedments were brought to the special packing provisions, and new rules were provided for: the packaging used for a combination of lithium batteries contained in equipment and lithium batteries packed with equipment, nitrocellulose and mixed loading of explosive substances and articles.

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 in its:

(1) 51st session in Geneva, 3-7 July 2017;

(2) 52nd session in Geneva, 27 November - 6 December 2017;

(3) 53rd session in Geneva, 25 June - 4 July 2018;

(4) 54th session in Geneva, 26 November - 4 December 2018;

– at the UNECE-OTIF Joint meeting of the RID Expert Committee and the WP15 in its:

(1) autumn 2018 session in Geneva, 17 - 21 September 2018;

(2) spring 2019 session in Bern, 18 - 22 March 2019;

(3) autumn 2019 session in Geneva, 17 - 26 September 2019;

– for ADR, at the WP.15 in its:

(1) 105th session in Geneva, 6-9 November 2018,

(2) 106th session in Geneva, 13-17 May 2019,

(3) 107th session in Geneva, 11-15 November 2019,

[2] http://www.unece.org/trans/main/dgdb/adn/adn_rep.html.

(4) 108th session in Geneva, 11-15 May 2020. This session was postponed due to the COVID-2019 crisis; however, Member States were consulted in a written procedure by the President of WP.15 and the UNECE Secretariat on editorial amendments that needed to be introduced still in the ADR 2021. View to the 15 May 2020 deadline for comments, a video-conference was organised by the Commission on 8 May 2020. Member States positively received the proposals for editorial amendments and there was an unanimous agreement with the final proposal made in writing by the UNECE Secretariat.

– for ADN, at the ADN Safety Committee (WP.15/AC.2) in its:

(1) 33rd session in Geneva, 27-31 August 2018,

(2) 34th session in Geneva, 21-25 January 2019,

(3) 35th session in Geneva, 26-30 August 2019,

(4) 36th session in Geneva, 27-31 January 2020,

and the ADN Administrative Committee in its twenty-fourth session in Geneva, 31 January 2020.

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.

Unless the proposed amendments to the Annexes of ADR, as notified by the Secretary-General of the United Nations, are deemed rejected pursuant to article 14 (3) within three months from the date of the notification, i.e. on 1 October 2020, the amendments in question will enter into force on 1 January 2021.

Unless the proposed amendments to the annexed Regulations to ADN are deemed rejected pursuant to article 20, paragraph 5 within three months from the date of the notification, i.e. on 1 October 2020, the amendments in question will enter into force on 1 January 2021.

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

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 52 Contracting Parties to ADR, and all the EU Member States are contracting parties to this Agreement. There are 18 Contracting Parties to ADN, and 13 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 road[3]. In 2008, Directive 94/55/EC was replaced by Directive 2008/68/EC[4] which pursues the principles of its predecessor. Since 1

[3] OJ L 319, 12.12.1994, p. 7.

[4] OJ L 260, 30.9.2008, p. 13.

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, lays down 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 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, (…) and ADN".

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 agreement[5].

The concept of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'[6].

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).

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 1 makes compulsory the use of these rules for road and inland waterway transport of dangerous goods within and between the Member States and 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

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

[6] 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.

complies with the requirements of the ADR, RID or ADN, unless otherwise indicated in the Annexes'.

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

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

4.2. Substantive legal basis

4.2.1. Principles

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

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, 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.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91, in conjunction with 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 28 February 2008.

(2) Pursuant to Article 14 of the ADR, any Contracting Party may propose one or more amendments to the Annexes to that Agreement and, therefore, the Working Party on Transport of Dangerous Goods ("WP.15") may adopt amendments to the Annexes of the ADR. Pursuant to Article 20 of the ADN, the Safety Committee and Administrative Committee may adopt amendments to the Annexed Regulations to the ADN.

(3) The amendments adopted during the biennium 2018-2020 by the 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 2020.

(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[1]. That 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. 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 Directive 2008/68/EC, the Commission is empowered to adapt Annex I, Section I.1 and Annex III, Section III.1 to that Directive to scientific and technical progress, in particular to take account of amendments to the ADR, RID and ADN.

[1] Directive 2008/68/EC of the European Parliament and of the Council of 24 September 2008 on the inland transport of dangerous goods (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 13 Member States are contracting parties to and apply the ADN.

(7) The amendments adopted 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 taken on the Union's behalf 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 that Annex.

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

Article 2

The position referred to in Article 1 shall be expressed by the Member States of the Union that are contracting parties of the ADR and the ADN, acting jointly.

Article 3

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 the date of their entry into force.

Article 4

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

For the Council
The President