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COMMISSION STAFF WORKING DOCUMENT

Compensation for terrorism-related damage under the proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents COM(2005)592

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1. BACKGROUND

1.1 Commission proposal

1.1.1 Overview of the Commission proposal

On 23 November 2005, the Commission presented a proposal for a Regulation of the European Parliament and of the Council on the liability of carriers of passengers by sea and inland waterways in the event of accidents COM(2005)592.

This proposal aims at incorporating into Community law the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974 (hereafter "the Athens Convention 2002") as adopted under the aegis of the International Maritime Organisation. Furthermore, the proposal seeks to bring the following adaptations to the Athens Convention 2002:

- extension of the scope of application to cover domestic traffic (the scope of the Athens Convention being limited to international maritime traffic);
- extension of the scope of application to inland waterway;
- introduction of a harmonised level of compensation establishing as maximum levels the levels fixed by the Convention;
- introduction of specific compensation for damage or loss of mobility equipment/medical equipment belonging to a passenger with reduced mobility;
- provision for advance payments as provided in the air and rail sectors;
- obligation for pre-journey information.

1.1.2 The Commission proposal and the terrorism-related damages

The explanatory memorandum of the proposal, under its section 2, reads:

"Further concerns were expressed by industry (shipowners and P&I clubs) in relation to the implementation of the Athens Convention 2002 and in particular its Article 3(1) on the liability for incidents caused by terrorism.

The Commission has taken note that these concerns are already addressed at global level within the IMO and should not at this stage be subject to any solution at regional level. It is reported that a solution will be found in Spring 2006 at the next meeting of the IMO Legal Committee, through a commitment by States to issue a certain reservation clause when acceding to the Convention."

Given these parallel developments at global level on the issue of terrorism-related damages, the Commission proposal did not include in its proposal any further reference to this issue.

1.2 Developments within the IMO on the issue of terrorism-related damages

1.2.1 2002-2006 discussions

The contentious issue was the implementation of Article 3(1)(a) of the Convention which exempts the carrier from liability and related compulsory insurance in case of incidents which are "wholly caused by an act or omission done with the intent to cause the incident by a third party". This refers, inter alia, to terrorist attacks where there is no other contributing factor.

For the damages where terrorism is involved and where the carrier is at fault, the mandatory insurance cover would then be, under the Convention, 250,000 SDR per passenger and the carrier could be held liable and pay up to 400,000 SDR per passenger (fault-based liability).

Concerns have been expressed by the industry on the implementation of Article 3(1)(a) since the time of the negotiations on the draft Protocol. Discussions on this issue have been on the agenda of all IMO Legal Committee meetings since then. Initially, the industry sought exemption from liability in the situations concerned whilst most states preferred to fully implement the Convention. Eventually, in October 2006, a compromise solution was found.

Concerns were also expressed on the need to grant a parallel exemption for damages caused by biochemicals.

1.2.2 2006 Guidelines for implementation

The IMO Legal Committee reached agreement on this issue in its 92nd session held from 16 to 20 October 2006, with the adoption of "Guidelines for the implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002" (re. IMO Circular letter No.2758 of 20 November 2006 – annexed to this Working Document).

The solution found was as follows:

The Convention must be ratified with the reservation that for the damages referred to in Article 3(1)(a) of the Convention, the liability rules and cover will be up to 250,000 SDR in respect of each passenger or 340 million SDR overall per ship on each separate occasion.

The insurance cover will be provided not by the P&I market, but by a new scheme developed by brokers in the war risks market.

The Guidelines also include the rule that there is neither mandatory insurance nor liability resulting from an incident involving biochemical risks.

1.3 Discussions within the European Parliament and within the Council

1.3.1 European Parliament

The European Parliament has started its discussions on this proposal. In the latest version of the draft opinion by Mr. Costa, amendment no 22 reads:

"Article 3, paragraph 1 [of the proposed Regulation]

The liability of a carrier and of a performing carrier in respect of passengers and their luggage shall be governed by all provisions of the Athens Convention 2002 relevant to such liability, including the reservation of paragraph 1 of the Guidelines for implementation of Convention adopted by the Legal Committee of the IMO on the 19 October 2006, both annexed to this Regulation."¹

The European Parliament is expected to adopt its opinion in April 2007.

1.3.2 Council of Ministers of the European Union

The Council Shipping Working Party met on 3 and 31 October 2006, under the Finnish Presidency, to start examination of this proposal. In its meeting of 31 October 2006, the Working Party invited the Commission to produce a document outlining the conclusions to be drawn from the IMO Guidelines and in particular their consequences for the proposed Regulation.

The progress report submitted to the Transport Council meeting of 11 December 2006 (re. 15068/1/06), read on this point: "*Limitation of liability of carriers in case of terrorism-related incidents - During the discussions, it was pointed out that the decision of the International Maritime Organisation on Guidelines for implementation of the Athens Convention, adopted by the Legal Committee in October 2006, must be taken into account accordingly*".

2. CONCLUSIONS TO BE DRAWN FROM THE IMO GUIDELINES ON TERRORISM-RELATED DAMAGES

2.1 Voyages falling within the scope of both the Convention and the EC Regulation

The Convention and its associated Guidelines for implementation cover international maritime traffic.

The future Regulation seeks to incorporate the Convention in full, avoiding any divergence between the international regime and the Community one.

As far as international maritime traffic is concerned, there is no other option than incorporating the Guidelines. Therefore, a way forward could be to act as proposed by the European Parliament rapporteur Mr Costa in his amendment no 22: the full text of the IMO Guidelines, with its reservation, Guidelines and appendixes is to be referred to in Article 3, paragraph 1 of the future Regulation, and attached to it.

This incorporation of the Guidelines will ensure their effective implementation all over the EU and furthermore ensure their uniform interpretation through the European Court of Justice.

2.2 Voyages falling within the scope of the EC Regulation only

The Convention and its associated Guidelines for implementation do not cover domestic maritime traffic and international and domestic traffic on inland waterway.

¹ The Commission text is reproduced in full and the amendments are underlined.

The future Regulation seeks for its part to make all passengers onboard ships benefit from the scheme established by the Convention, be they on an international or domestic maritime voyage, or travelling by inland waterway.

As mentioned above, there is one single option for international maritime transport, i.e. the full implementation of the Guidelines.

As for domestic maritime services and international and domestic transport on inland waterways, there would be four options to contemplate:

2.2.1 Full application of the Guidelines

This option would ensure full and uniform rules all over the sectors, in line with the overall objective of the Commission as mentioned above (i.e. to make all passengers onboard ships benefit from the scheme established by the Convention, be they on an international or domestic maritime voyage, or travelling by inland waterway).

This option would however entail certain changes for the carriers concerned, in the cases where they do not have any insurance cover or where their insurance cover do not include terrorism-related damage.

In parallel, insurers and brokers would have to adapt to provide the necessary cover.

It could be that the policies are distinct and negotiated separately by the carriers, or it could be that the separate extra cover for terrorism is arranged by the insurance provider. The former would represent a heavier administrative and financial burden than the latter.

In any case, the legislator would need to strike the balance between the advantages and drawbacks of such scheme, taking into consideration the remaining options as follows.

2.2.2 Non- application of the Guidelines

The Guidelines are to be viewed as granting a derogative regime reducing the financial burden of operators. Furthermore, the Guidelines contain specific rules on biochemical risks which are necessary complements to the Convention.

Referring to the two above points, the non-application of the Guidelines to the domestic maritime traffic and international and domestic traffic on inland waterway, i.e. the full implementation of the Convention regime, would mean that the operators (carriers and their insurers) on international maritime lines are better treated than the operators falling within the scope of the Regulation.

2.2.3 Partial application of the Guidelines

The option would consist in applying to domestic maritime transport and international and domestic transport on inland waterways the rules in the Guidelines referring to biochemical risks which are necessary complements to the Convention.

The regime on terrorism-related damages would result from the Convention as such.

This option could be contemplated against the following background.

The derogating regime as agreed upon within the IMO Legal Committee in October 2006 was tailored for the carriers and their insurers on international maritime routes. The Guidelines seek to find a means to alleviate the burden of this specific market, with a capping for larger claims affecting 1360 passengers and beyond².

Carriers and insurers for domestic maritime routes and for international and domestic services on inland waterway would a priori be outside the above market. In effect, the capping for 1360 passengers does not have the same impact since only a few of the ships concerned would be affected.

Against this background, the legislator could contemplate the partial application of the Guidelines along the above lines.

2.2.4 Replacement of the Guidelines with new rules exempting carriers from liability

When discussing the terrorism issue within the IMO, states did not follow the suggestion made by the industry to exempt the carrier from liability, because this would entail significant amendments to the Convention. The EC legislator is not bound by the Convention, as far as domestic maritime transport and international and domestic transport on inland waterways are concerned, and could contemplate this option.

Under this option, there would be neither mandatory insurance nor liability under the EC regime for terrorism-related damages. In addition, the new rules at EU level should include the biochemical exemption as in the Guidelines.

The above option could be workable, considering the existing compensation schemes established or to be set up at national level for the victims of terrorism. It should be noted that the EC legislator already adopted a Directive ensuring that national compensation schemes are available in domestic as well as in cross-border situations, i.e. regardless of the country of residence of the victim and regardless of the Member State in which the crime was committed³.

² Under the Guidelines, the liability rules and insurance cover will be the lower of 250,000 SDR in respect of each passenger or 340 million SDR overall per ship on each separate occasion. The 340 million ceiling is reached with 1360 victims (340,000,000 / 250,000).

³ Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims - OJ L 261 of 6 August 2004, p.15.