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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

Report on liability and compensation for financial damages sustained by places of refuge when accommodating a ship in need of assistance

(Text with EEA relevance)

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1. INTRODUCTION

The Commission decided in 2005 to present a modification to the legal framework on reception of ships in need of assistance to places of refuge as initially set up by Directive 2002/59/EC of the European Parliament and of the Council establishing a Community vessel traffic monitoring and information system and repealing Directive 93/75/EEC. The Commission proposed the introduction of an obligation to receive ships in need of assistance if, following an assessment, this appears to be the best course of action with a view to protecting human safety and the environment.

Having regard to specific concerns about the costs ports would have to assume when providing refuge to vessels in need of assistance, Article 20d in the amended text of the Directive 2002/59/EC requires the Commission to examine existing compensation mechanisms in MS for potential economic losses suffered by places of refuge when accommodating a ship, and to report on the results of this exercise to the European Parliament and the Council[1].

Prior to its amendment in 2009, Directive 2002/59/EC, more specifically Article 26(2) thereof, established an obligation for the Commission to report on the implementation by Member States (MS) of appropriate plans for places of refuge. The Commission had asked the European Maritime Safety Agency (EMSA) to produce relevant information also on the mechanisms of liability and compensation applicable in case of reception of a ship in a place of refuge. The data collected by EMSA formed the basis for the Commission's report in 2005 and provided additional input during the inter-institutional discussions for the third maritime safety package, in particular for Directive 2009/17/EC. Following the adoption of the latter, the Commission has received additional, up-to-date, information from EMSA, focusing mainly on the applicable international instruments and the reinforced EU law framework pertaining to liability and compensation for damages to places of refuge. More to the point, the Commission designated an external consultant to undertake a study on the liability and compensation mechanisms available under national law in EU MS.

[1] Directive 2009/17/EC of the European Parliament and of the Council amending Directive 2002/59/EC, OJ L 131 of 28/05/2009, p. 101.

It is on the basis of this input received by the Commission that the need for an additional mechanism of liability and compensation for the damages suffered by a place of refuge following reception of a vessel in need of assistance is assessed in this report. The question of insurance of ships is also considered in this context, in view of the recent entry into force of Directive 2009/20/EC of the European Parliament and of the Council on the insurance of shipowners for maritime claims, and the latest amendments to the liability limits introduced under the International Convention for Limitation of Liability in Maritime Claims (LLMC Convention 1976), as amended by the 1996 Protocol, in the international plane[2].

2. INTERNATIONAL FRAMEWORK

There is no specific obligation under public international law to accommodate a ship in need of assistance in a place of refuge. However, there is a series of legal provisions regulating maritime transport and liabilities resulting from maritime accidents, including pollution by ships and, more specifically, the payment of compensation to affected parties. These include, explicitly in some instruments, places of refuge and the damages caused by ships in distress accommodated therein, as the following analysis shows.

2.1. UNCLOS

The UN Convention on the Law Of the Sea is of little relevance in this case, but contains some general provisions on attribution of responsibility for unlawful measures taken in response to maritime pollution incidents and compensation in cases of marine pollution, which can also apply to places of refuge[3].

2.2. Specialised International Conventions

Specialised conventions set up strict liability regimes under international law, with specific limitations, covering different types of pollution at sea.

2.2.1. The CLC – IOPC system

The most developed liability regime has been established by the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC 1992), complemented by the 1992 Convention creating the International Oil Pollution Fund (IOPC Fund) and the 2003 Protocol creating a Supplementary Fund with the same objective. 27 States are parties to all of these instruments, including 19 EU MS.

Scope of Application:

The CLC-IOPC system covers damages caused by pollution resulting from the loss or dumping at sea of hydrocarbons transported by a vessel. Such damages may also

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[2] IMO Resolution LEG.5 (99), adopted on 19/04/2012 (not yet in force) proposing the increase of the relevant amounts of the liability limits to reflect the changes in monetary values, inflation and accident rates.

[3] See Articles 232 and 235(2) of UNCLOS: http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

result from precautionary measures taken to avoid pollution. Despite the lack of an example of this type of damages, the reception of a ship in a place of refuge could be considered a precautionary measure when it is based on a reasonable decision seeking to address a grave and imminent pollution risk. In that case, there would be no need for additional compensation mechanisms, unless the decision to accommodate the vessel was taken in order to save the vessel itself or its cargo, which would – in any event – be difficult to distinguish from a risk of pollution. Payable damages are conceived very broadly in this system, covering damages to goods, loss of revenue suffered by pollution, environmental damages, and pure economic losses (resulting from the impossibility for the owners of non-polluted goods to derive the usual revenues from their goods). The only applicable limitation to the latter type of damages pertains to the lack of a direct causal link between the economic loss and the pollution.

Shipowner liability:

Under the 1992 CLC, strict liability applies to the shipowner, who is covered by compulsory insurance in accordance with the LLMC provisions. The shipowner cannot be exonerated from liability, with the exception of the case of damage resulting from an act of war, a natural disaster taking the form of *force majeure*, a third-party act committed with the intention to cause the specific damage, or in case the damage was caused exclusively by negligence of the competent authority in charge of providing navigation assistance to the vessel during the exercise of that function. In the context of reception of a ship in a place of refuge, the decision to receive the ship could give rise (e.g. if unfounded, or based on erroneous assessment of the facts) to fault liability of the competent authority taking the decision or negligence of the victim (i.e. place of refuge); thus, precluding liability for compensation of the shipowner partially or on the whole.

Additional liability cover:

For damages beyond the limits of the CLC, or in case of non-responsibility or of a default of the shipowner, the IOPC Fund and Supplementary Fund will pay compensation to the victims. Under these regimes liability exemptions are even narrower and apply only to circumstances of pollution resulting from an act of war, from a war ship, or a ship operated by a State for non-commercial purposes, or in case of a lack of evidence of causality between the ship and the damage caused, or between the damage and the intentional act or negligence of the victim. Compensation payable by these funds can reach a cumulative ceiling of approximately 1.1 billion euros[4] for all damages. Except for the case of the Prestige accident, at which time the second additional fund had not been set up yet, there are no examples where compensation payable under the CLC-IOPC mechanism has been insufficient to cover damages. All the more so, given that damages to places of refuge are comparatively small in the scale of pollution by hydrocarbons, the compensation cover provided by funds in these cases appears to be sufficient.

[4] These amounts are calculated on the basis of Special Drawing Rights (SDR) conversion rates as at 26 September 2012: http://www.imf.org/external/np/fin/data/rms_five.aspx .

2.2.2. The HNS Convention

The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea ("HNS Convention") covers damages caused by hazardous and noxious substances transported by sea, other than hydrocarbons. It was amended by a Protocol in 2010, which is considered to have lifted the obstacles to ratification of the Convention paving the way for its entry into force.

Based on the CLC-IOPC system, the HNS Convention also establishes two levels of compensation for victims:

(a) On the first level, compensation relies on liability of the shipowner, which is automatic and has a threshold of approximately 137 million euros[5] that are covered by compulsory insurance taken by the registered shipowner;

(b) If the latter is not responsible (i.e. Article 7(2)) or is in default or in case the liability threshold for the shipowner is surpassed, a special fund covers compensation up to approximately 300 million euros[6].

According to information provided to the Commission by the International Group of Protection and Indemnity Clubs ('P&I Clubs'), there have not been any cases of pollution by hazardous and noxious substances where the amount of damages went over the limits defined in the Convention.

2.2.3. The Bunker Oil Convention

The International Convention on Civil Liability for Bunker Oil Pollution Damage ("Bunker Oil Convention") entered into force in 2008 and has been ratified by 22 EU Member States. It establishes a liability regime for damages caused by bunker oil, which include both damages resulting from pollution and impairment of the environment, as well as costs of preventive measures and further loss or damage caused by preventive measures.

Liability for compensation is exclusively assigned to the shipowner (defined *lato sensu* in the Convention), it is automatic – with the same applicable exceptions as in the CLC-IOPC system, and it is guaranteed by compulsory insurance cover for vessels over 1000 tonnes. However, liability is also limited by the limits established in the LLMC Convention. These limits should, in principle, cover any compensation claim for damages resulting from ship operations, in view also of current accident statistics, which show that pollution damages where the LLMC limits proved to be insufficient have been relatively rare.

2.2.4. The Wreck Removal Convention

The Nairobi International Convention on the Removal of Wrecks ("Wreck Removal Convention) was adopted in 2007 and has not entered into force yet, with only 1 EU

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5 Ibid.

6 Ibid.

Member State having ratified it. It specifically prescribes the possibility for coastal States to proceed with the removal of a shipwreck, situated in a place of refuge, at the cost of the shipowner who should have insurance covering the relevant damages, within the limits established under the LLMC Convention.

It is important to note that States parties to the Wreck Removal Convention may, on the basis of a special notification to the IMO Secretary-General issued under Article 3.2 of the Convention, exclude the application of the limits to the liability of the shipowner provided in the LLMC Convention for the costs of removing a shipwreck within their territory. Several States have made use of this provision to issue notifications, thus lifting the limitations to liability for costs of wreck removal within their territorial waters, including damages suffered by places of refuge.

2.3. Other international proceedings

The IMO has adopted in 2003 the Guidelines on places of refuge for ships in need of assistance[7]. These include the holding of insurance and the required financial security as factors in the assessment of the vessels by coastal authorities for admission in a place of refuge. Following the adoption of the Guidelines, the Legal Committee of the IMO, on a number of occasions, has discussed the issue of liability and compensation for damages suffered, which was not addressed in the Guidelines.

In 2009, a draft instrument on 'Places of Refuge'[8], sponsored by the Comité Maritime International (CMI), was submitted to the IMO Legal Committee. The draft proposed a specific provision on guarantee or other financial security to be provided by the shipowner at the request of a place of refuge that has agreed to accommodate the ship. The Committee saw no need for an additional instrument to address the issue of compensation for damages suffered by places of refuge following admission of a ship, and concluded: "*the international regime comprising the existing liability and compensation conventions for pollution damage at sea provided a comprehensive legal framework, especially when coupled with the Guidelines on places of refuge adopted pursuant to resolution A.949(23) and other regional agreements*"[9].

There are also a few examples of regional instruments, to which both the EU and certain EU MS are parties, addressing the issue of accommodation of ships in places of refuge[10]. They focus on an enhanced cooperation between coastal States in the specific region including information exchange and resource-sharing for immediate

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7 IMO Resolution 949(23), adopted on 05/12/2003.

8 Document LEG95/9 of 23/01/2009, submitted by CMI under 'Any Other Business', Annex I "Draft Instrument on Places of Refuge".

9 Document LEG95/10 of 22/04/2009, "Report of the Legal Committee on the Work of its Ninety-Fifth Session", pp. 24-25.

10 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combatting Pollution of the Mediterranean Sea, adopted 25/01/2002, entered into force 17/03/2004. (Source: www.unepmap.org). Also, Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and Other Harmful Substances ('Bonn Agreement'), signed in 1983 as amended by the Decision of 21/09/2002, Chapter 27 "Places of Refuge". (Source: www.bonnagreement.org). Baltic Marine Environment Protection Commission ('HELCOM), Recommendations on a "Mutual Plan for Places of Refuge in the Baltic Sea Area", HELCOM Document "Recommendation 31E/5" adopted on 20/05/2010, available at: http://www.helcom.fi/Recommendations/en_GB/rec31E_5/

response to situations of distress, with a view to avoiding or limiting pollution. However, these do not include any provisions on liability and compensation for damages sustained by places of refuge. They all make reference to the international instruments, the 2003 IMO Guidelines and relevant EU legislation on this topic. Hence, these examples confirm the importance of an imminent entry into force for all relevant instruments, as well as the interest of individual EU MS in ensuring better implementation of the existing framework in their region.

3. EU FRAMEWORK

Apart from Directive 2002/59/EC, EU law regulates, indirectly, the issue of liability and damages for losses sustained by places of refuge when accommodating a vessel in distress in two legal instruments outlined below. These are without prejudice to the international conventions that already apply in the EU (CLC-IOPC, Bunker Oil, and LLMC Conventions– pending ratification and entry into force of the HNS and Wreck Removal Conventions). Furthermore, on the issue at hand, the European Court of Justice has ruled[11] that other pieces of EU legislation can provide a basis for compensation for preventive and remedial measures to Member States' administrations, outside the scope of international conventions, such as the Council Directive 75/442/EEC on Waste[12].

3.1. Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage

The Directive applies to environmental damages caused by transport of dangerous or polluting goods by sea or to any imminent threat of such damage arising from an incident, with the exception of damages falling within the scope of the international conventions listed in Annex IV to this Directive (e.g. CLC-IOPC Convention, HNS Convention, Bunker Oil Convention). It establishes liability of the transporter of these goods, within the limits of the LLMC Convention in its up-to-date version, in order to finance preventive measures or reparation and restitution.

This instrument is imposing important obligations on the ship's operator to prevent the damage and to clean-up the resulting pollution. On the other hand, it only allows ports acting as places of refuge to invoke responsibility of shipowners for reparation of environmental damages.

Transposition of this Directive by Member States is complete, and control of implementation by the Commission has also produced highly satisfactory results.

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11 Case C-188/07, Commune de Mesquier v. Total France SA, ECR 2008, p. I-4501.

12 OJ L 194, 25/07/1975, p. 39, repealed by Directive 2006/12/EC of the European Parliament and the Council of 5 April 2006 on waste, OJ L114, 27/04/2006, p.9.

3.2. Directive 2009/20/EC of the European Parliament and of the Council on the insurance of shipowners for maritime claims

The Directive creates an obligation for all ships flying the flag of a Member State or entering the port of a Member State to have sufficient insurance cover for all maritime claims subject to the limits of the LLMC Convention as amended by the 1996 Protocol.

Under Article 2(1) of the LLMC, the list of claims subject to limitation of liability includes damages to property (including port installations) in direct relation with the ship operations or the salvage operations, as well as the losses resulting from these operations. Damages pertaining to wreck removal are also expressly mentioned in this list. Hence, the main damages that can be sustained by places of refuge fall within the scope of Directive 2009/20/EC and are covered by compulsory insurance in the EU.

Only in cases where the totality of claims resulting from operations of the vessel in question goes beyond the threshold set up by the Convention, could the place of refuge be left without compensation for part of its damages. Taking into account the relevant amount of these thresholds the likelihood of such cases should be limited, if not inexistent.

In light of the provisions of this Directive, it is unlikely that a vessel not having sufficient insurance cover will find itself in a position to request accommodation in a place of refuge, as it cannot enter EU waters in any event. This introduces an additional layer of liability cover – *rationae loci* – for places of refuge against shipowners in case of damages. Albeit unlikely, one may not exclude the scenario whereby a vessel flying a third-State flag, thus not covered by the strict obligation to have insurance applicable to all EU MS flags under this Directive, needs to be accepted in a place of refuge without sufficient insurance cover (Article 20c(1) of Directive 2002/59/EC).

The mechanism of insurance only applies when liability of the shipowner is invoked. In general, unless a right of direct legal action of the victims against the insurer is created by specific rules (i.e. special terms in the insurance contract), the prevailing principle states that shipowners must first compensate the victims before being able to turn to their insurer to cover the relevant costs. According to the practice of P&I Clubs – providing liability insurance to more than 90% of the world fleet tonnage – the insurer only covers liability of the shipowner if that has been established by a definitive court judgment or an arbitral award approved by the insurer.

The Directive 2009/20/EC had to be transposed by Member States by 1 January 2012. The vast majority of Member States have already communicated to the Commission the adopted measures. The Commission has planned a detailed examination of the notified transposition measures to be carried out in the second half of this year.

4. NATIONAL FRAMEWORK

In cases not covered by the specific mechanisms emanating from an international convention or Directive 2004/35/EC damages suffered by a place of refuge are dealt with by the national provisions on liability of one of the 22 coastal States of the EU. More specifically, cases where national law will apply instead of the international and EU framework outline above are limited to: (a) non-ratification by the State concerned of the relevant international instrument; (b) non-entry into force of the relevant international convention; (c) the exemptions to and limitation of liability that are established above under international and EU law; and (d) type of damages to places of refuge not covered by international and EU law. In regards to the latter case, it must be noted that this is not very likely as the most important types of damages (i.e. oil, HNS, wreck removal, or any environmental damage) have now been covered by specialised international instruments and Directive 2004/35/EC.

4.1. Liability of shipowners

'Fault' is the basis for liability of private operators, namely shipowners, which constitutes a common ground among the 22 coastal States of the EU. In 10 of these States, liability of the shipowner may, however, be maintained even in the absence of fault, either in his capacity as operator of an activity entailing risks, or as guardian of a potentially dangerous object, or as responsible – in principle – for the damages caused by his subordinates. In 2 other States liability of shipowners with regard to damages caused by reception of a ship in a place of refuge is, in most cases, automatic.

In general, reparations due to places of refuge cover the totality of these damages, independently of the existence of a direct or indirect causal link.

The rules of limitation of liability of shipowners emanating from the LLMC Convention apply, either in their 1976 version (IE), or in their amended 1996 version (18 coastal Member States having ratified the 1996 Protocol). In the 3 remaining coastal States, liability is subject to specific limitations (IT), or is in principle unlimited, without prejudice to pertinent international conventions (PT, SL).

4.2. Liability of the coastal State

In cases where liability of the shipowner cannot be invoked, it is possible to engage liability of the coastal State whose competent authority has taken the decision to accept a vessel in a place of refuge, thus, resulting in the damages eventually suffered.

All coastal EU MS can be held responsible in such cases on the basis of fault. However, in 11 of those, liability of the State can also be founded in the absence of fault. That is either under a general regime of 'objective liability' of the State (on the basis of risk or of breach of equality *vis-à-vis* public burdens), or on the basis of special provisions that prescribe reparation of damages specifically caused to places of refuge. In these cases, reparation can be limited to irregular damages, exceeding the threshold of damages a place of refuge must reasonably sustain.

In general, in the residual cases where the right to reparation of damages suffered by a place of refuge is solely based on national law, one finds a generally accepted framework of liability based on fault among EU MS, despite the lack of harmonisation at EU level. There are, however, several cases where other types of liability may apply, both for the private operators and the State (e.g. objective liability, or absolute liability).

In view of the applicable national laws on this issue, one may draw the following conclusions. In 6 coastal MS (DK, EE, FR, DE, PT, SL) a national authority controlling a place of refuge can in principle always obtain compensation for the damages incurred, either on the part of the shipowner or of the State. Only in specific cases certain types of damages, irregular or constituting pure economic losses, can remain incumbent on the competent authority taking the decision to accommodate a vessel in a place of refuge. In the majority of other MS (BU, GR, IT, LV, LT, MT, NL, PL, RO, ES, SW, UK), this particular issue is covered by a liability regime where the grounds for liability exemption remain very limited: *force majeure*, lack of fault of the public authority, or – in some cases – damages constituting pure economic losses.

5. CONCLUSIONS

In light of this analysis, there are three layers of applicable law to the issue of liability and compensation for damages sustained by places of refuge, which are complementary. The Commission's conclusions as well as some recommendations for better implementation of the existing framework are presented below.

5.1. International

International conventions adopted to this date on the subject of liability in the area of maritime transport offer a system of rules ensuring the applicability of liability mechanisms that are satisfactory in the areas covered by these conventions, and also pertinent in the context of reception of a ship in a place of refuge.

It is important to note that Member States have endorsed in Council in 2008 a strict commitment to ratify all relevant international instruments for the complete international system of rules relating to maritime safety – addressing also damages to places of refuge – to enter into force[13]. The Commission has reminded MS of this commitment on several occasions thereafter. For these purposes, an up-to-date table on the status of ratification of pertinent international conventions, including EU Member States, is published by the IMO[14].

Recommendations for better implementation:

1. With regard to limitation of liability for maritime claims, MS should ratify the 1996 Protocol to the LLMC Convention. In order to avoid the risk of reduction of payable

[13] Council Document No. 15859/08 ADD 1, of 19/11/2008, "Statement by the Member States on Maritime Safety".

[14] See IMO website at: http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx

compensation following application of these limits, the latter should be regularly updated, as has been done recently at IMO (LEG 99, see above).

2. It would also be advisable that all MS parties or prospective parties to the LLMC Convention exclude from its scope of application, as it is possible under Article 3.2 of the Nairobi Wreck Removal Convention, the costs of removing wrecks within their territorial waters, including damages to places of refuge. This will mean that there cannot be a liability limit for such damages.

3. It could be useful to obtain all relevant clarifications at the IMO level in order to confirm that reception of a vessel in a place of refuge can, in principle, be considered a preventive measure, as this would ensure applicability of some international conventions (e.g. CLC-IOPC, Bunker Oil) to this issue.

4. Another possible improvement of the current system would be the clarification, at the IMO level, of the notion of 'pure economic losses' for which compensation can be excluded, in order to achieve a coherent approach to this matter, bearing in mind that these may not have a sufficiently direct causal link with the damaging act.

5. A general compulsory liability insurance requirement, including third party liability, in line with the current practice of P&I Clubs, should be created at the international level, following up on earlier discussions at the IMO on this subject[15].

5.2. EU

The existing EU legislation on this issue adds to the international conventions a particularly strict approach to liability for environmental damage, and an obligation to have sufficient insurance cover or other financial guarantee for every vessel entering EU waters – without exceptions. This regime protects also places of refuge as it addresses the most 'sensitive' aspects of their operation.

Albeit not relevant for the purposes of this report, enhancing cooperation and communication between MS in order to facilitate decision-making in cases of ships in need of assistance can form a potential improvement to the general framework on places of refuge.

5.3. National

For the residual cases that rely solely on national laws, the study carried out on behalf of the Commission shows that in the majority of MS damages to places of refuge are sufficiently covered by rules of reparation, which – in some cases – go as far as ensuring systematic compensation for any potential damages.

The few differences that exist in regimes of compensation among MS do not threaten the uniform application of the Directive in respect of reception of vessels in places of refuge. Hence, these are not sufficient to justify the creation of a new regime specific to one category of operators.

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15 IMO Resolution A.898(21), Guidelines on Shipowners' Responsibilities in Respect of Maritime Claims, adopted on 25/11/1999.

Recommendation for better implementation:

MS, in their national laws, should continue to carefully consider and define the risks that places of refuge must assume as part of their normal operation, as it is the case with other economic operators.