



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DECISION

authorizing the Member States to ratify in the interest of the European Community the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the 'HNS Convention')

(presented by the Commission)

EXPLANATORY MEMORANDUM

The HNS Convention

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (the HNS Convention) was adopted in 1996. It establishes a liability and compensation regime for pollution damage caused by a great variety of substances, including gases and chemicals, when carried by sea. The Convention is thus aimed at complementing the existing international regime for oil pollution damage, and largely follows the same pattern as that regime. However, the HNS Convention has not entered into force and is currently ratified only by the Russian Federation.

The HNS Convention, like the two conventions establishing the oil pollution compensation regime, is based on a two-tier compensation system. The first tier, the liability of the registered shipowner is regulated in Chapter II of the Convention. The shipowner's liability is strict and thus not depending on fault or negligence on his part. The owner is normally allowed to limit his liability to an amount which is linked to the tonnage of the ship, presently maximum SDR 100 million (around € 147 million) for the biggest ships. The HNS Convention also requires shipowners to maintain liability insurance and gives claimants the right of direct action against the insurer up to the limits of the shipowner's liability.

The first tier is supplemented by the HNS Fund, which is set up in Chapter III of the Convention in order to compensate victims when the shipowner's liability is insufficient to cover the damage. The HNS Fund is financed by contributions from companies or other entities who receive a certain minimum quantity of HNS cargo during a calendar year. The tier will consist of one general account and three separate accounts for oil, liquefied natural gas (LNG) and liquefied petroleum gas (LPG). The system with separate accounts has been seen as a way to avoid cross-subsidization between different HNS substances. The maximum compensation by the HNS Fund is around SDR 250 million (around €370 million).

In line with previous practice of IMO liability conventions, the HNS Convention is only open to ratification by States (Article 45).

So far, the civil liability of marine pollution incidents is regulated by means of international conventions and national legislation. Consequently there are no Community rules regulating specifically the matter of liability for pollution damage caused by HNS substances.

However, Chapter IV of the HNS Convention includes provisions on the jurisdiction, recognition and enforcement of judgments relating to the application of the Convention. These articles affect provisions which are regulated under Community law, in Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12 of 16.1.2001, p. 1). In contrast to the multiple grounds of jurisdiction available under the Regulation, Article 38 of the HNS Convention, as a main rule, mandates the exclusive jurisdiction of the State Party where pollution damage occurred. Article 38(5) of the HNS Conventions provides that the courts of the State where the shipowner, or the insurer, has constituted a fund in order to benefit from the right to limit the liability, shall have exclusive jurisdiction to determine all matters relating to the apportionment and distribution of the fund. As regards actions involving the HNS Fund, Article 39 provides for a similarly restrictive jurisdiction regime.

Moreover, Article 40 of the HNS Convention requires the recognition of a judgment given by a Court with jurisdiction where it is no longer subject to ordinary forms of review except where the judgment was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present his case. Judgments shall be enforceable in each State Party as soon as the formalities required in the State where the judgment was given have been complied with. Those formalities shall not permit the merits of the case to be re-opened.

Council Regulation 44/2001

Council Regulation 44/2001 sets out common rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Regulation binds all Member States except for Denmark. The 1968 Brussels Convention remains in force in the relations between Denmark and the other Member States.

The common rules on jurisdiction of Regulation 44/2001 apply when the defendant is domiciled in one of the Member States bound by the Regulation, while a defendant not domiciled in a Member State may be brought before the courts of each Member State in accordance with its national rules of jurisdiction. The jurisdiction regime is based in the first place on the domicile of the defendant. In addition, in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in the Member State where the harmful event occurred or may occur. In matters relating to insurance, an insurer domiciled in a Member State may be sued (a) in the courts of the Member State where he is domiciled, or (b) in the Member State where the plaintiff is domiciled, in the case of actions brought by the policyholder, the insured or a beneficiary, or (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer. In respect of liability insurance, the insurer may in addition be sued in the courts of the place where the harmful event occurred, as well as, if the law of the court permits it, be joined in proceedings brought by the injured party against the insured.

Regulation 44/2001 stipulates that a judgment given in a Member State shall be recognized and enforced in other Member States without any special procedure being required. However, a limited number of grounds of non-recognition are provided to take into account public policy considerations, respect for the rights of defense and the existence of certain irreconcilable judgments.

Community competence with respect to the HNS Convention

There is exclusive Community competence as regards its provisions on jurisdiction, recognition and enforcement contained in Articles 38, 39 and 40 of the HNS Convention, as these affect the corresponding rules of Council Regulation 44/2001.

In accordance with the case law of the Court of Justice, Member States, whether acting individually or collectively, lose their right to assume obligations with third countries as and when common rules which could be affected by those obligations come into being. It follows that only the Community is competent for the negotiation, conclusion and fulfillment of such international commitments.

Authorisation of the Member States

The content of Regulation 44/2001 was not known at the time of the negotiation of the HNS Convention. By that time, the matters were regulated by the 1968 Brussels Convention on Jurisdiction and the Enforcement of judgments in Civil and Commercial Matters, which in its article 57 made an exception for conventions that govern these issues in question in relation to particular matters.

However, given that the HNS Convention is still to be ratified and implemented by Member States, the altered legal situation following the adoption of Regulation 44/2001, both as regards the incompatibility between the instruments in substance and as regards the Community competence, has to be recognised.

The existing situation is that the HNS Convention does not recognize the exclusive Community competence in relation to the rules on jurisdiction, recognition and enforcement, and it is no longer feasible to modify Chapter IV of the HNS Convention.

As a result, Member States cannot approve the Convention, which is nonetheless generally recognized as making a valuable contribution in strengthening the international regime of shipowners' liability for pollution damage and requirements on mandatory liability insurance. In order to safeguard the Community interests in view of its external competence, while at the same time enabling the Member States to ratify the convention, a Council decision to authorise ratification, subject to making a reservation, is proposed. The Council could thus exceptionally authorize the Member States, with the exception of Denmark, to sign and ratify the HNS Convention in the interest of the Community, subject to making a reservation whereby Member States undertake to apply Regulation 44/2001 in their mutual relations.

This measure should be considered to be an interim solution. In the longer term, at the earliest opportunity, the HNS Convention should be revised in order to allow for the necessary modifications in the Convention text. Given, however, the fact that a revision of the HNS Convention is unlikely to be feasible within the coming years, and the recognised desirability of its rapid entry into force and application in Community waters, the option of ratification, subject to making a reservation, is exceptionally authorised.

It is understood that the present proposal, which takes into account the recent adoption of Regulation 44/2001, does not constitute a precedent for future cases. Future international agreements affecting regulation 44/2001 or other comparable Community instruments will have to be negotiated and concluded by the Community, insofar as the provisions of the agreements which may affect the Community instruments are concerned.

Content of the Reservation

The Commission considers that in ratifying or acceding to the HNS Convention, subject to making a reservation on the matters under exclusive Community competence, a differentiated approach is justified for the rules regulating the competent jurisdiction, as compared to the rules on the recognition and enforcement of judgments. As to the latter category, a continued application of Chapter III of Regulation 44/2001 between Member States is essential, when it comes to the recognition and enforcement of judgments given by a court of a Member State in another Member State. Limiting the application of Article 40 of the HNS Convention in this way would ensure unity in the Community judicial area and the free 'movement' of court rulings within the Community, without involving repercussions on the effective

implementation of the Convention nor fundamental implications on non-EU States Parties to it.

As regards the rules on jurisdiction, the situation is more complex. Articles 38 and 39 of the HNS Convention is elaborated with the specific suitability for disputes arising from pollution incidents involving hazardous and noxious substances in mind. As explained above, this regime contrasts to the multiple grounds of jurisdiction available under Regulation 44/2001.

In assessing the difference between the two jurisdiction regimes, the underlying reasons for limiting the availability of jurisdictions in maritime pollution cases need to be considered. Those reasons include the efforts to avoid 'forum shopping', ensuring the equal treatment of claimants, a link between the court involved and the action, as well considerations relating to the sound administration of justice aimed at avoiding difficulties involved in settling the same issues, involving the same experts, the same witnesses, the same defendants etc. in different of courts in several jurisdictions. Maritime incidents involving HNS substances will frequently involve defendants, including insurers, from legal jurisdictions outside the Community. In addition, the HNS Convention foresees actions against the HNS Fund or taken by the HNS Fund, including those relating to the apportionment and distribution of the available funds, which are limited to one particular court.

In light of the highly specific nature of the jurisdiction regime of the HNS Convention and the anticipated legal and practical difficulties involved in applying a separate jurisdiction regime within the Community, as compared to that applying for other parties to the HNS Convention, it is considered that an exception to the general application of Council Regulation 44/2001 is justified. In light of the specific considerations outlined above, and of the fact that the negotiations of the the HNS Convention were carried out several years before the adoption of Regulation 44/2001, it is exceptionally accepted that Articles 38 and 39 of the HNS Convention could apply as special law in relation to Council Regulation 44/2001 and thus take precedence over the latter. Such a reservation would be compatible with the object and purpose of the Convention, as required under international law (see Article 19 c) of the Vienna Convention on the Law of Treaties)

In accordance with the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not bound by Council Regulation 44/2001 nor subject to its application. As a result, Denmark is free to decide whether to approve the HNS Convention. However, the duty of cooperation enshrined in Article 10 of the Treaty establishing the European Community translates into a duty to consult on this matter with the other Member States in the Council.

Conclusion

For these reasons, the Commission recommends that the Council adopt the following decision.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61 point c), 67 paragraph 1 and Article 300 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas:

- (1) The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (the ‘HNS Convention’) is aimed at ensuring adequate, prompt, and effective compensation of persons who suffer damage caused by spills of hazardous and noxious substances, when carried by sea. The Convention fills a significant gap in the international regulation of marine pollution liability.
- (2) The Community and the Member States share competence for subject areas covered by the HNS Convention, the Community having exclusive competence in relation to Articles 38, 39 and 40 thereof;
- (3) Articles 38, 39 and 40 of the HNS Convention are not consistent with Community secondary legislation on the jurisdiction, recognition and enforcement of judgments, as laid down in Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- (4) The text of the Convention has been adopted in 1996 and there are no short-term prospects of re-opening the negotiations for the purpose of taking into account the Community competence and the inconsistencies between the Convention and Community legislation.

¹ OJ C ..., ..., p. ...

² OJ C ..., ..., p. ...

- (5) The Council may exceptionally authorize the Member States with the exception of Denmark to ratify the HNS Convention in the interest of the Community, subject to making an appropriate reservation.
- (6) Denmark has a duty to consult with the other Member States in the Council on this matter,

HAS ADOPTED THIS DECISION:

Article 1

The Member States are hereby authorized to ratify or accede to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, subject to the conditions set out in Articles 2 and 3.

Article 2

When ratifying or otherwise expressing their consent to be bound by the HNS Convention, Member States shall enter the following reservation:

“Judgments referred to in Article 40 of the Convention shall, when given by a Court of a Member State of the European Community subject to Community rules in this area, be recognised and enforced in another Member State of the European Community according to such Community rules.”

Article 3

When ratifying the HNS Convention, or when acceding thereto, Member States shall inform the Secretary-General of the International Maritime Organization in writing that such ratification or accession has taken place in accordance with this Decision.

Article 4

Member States shall, at the earliest opportunity, take measures to ensure that the HNS Convention is amended in order to allow the Community to become a contracting party to it.

Article 5

This Decision is addressed to the Member States, with the exception of Denmark.

Done at Brussels,

*For the Council
The President*