



COMMISSION OF THE EUROPEAN COMMUNITIES

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2001/0271 (CNS)

Proposal for a

**COUNCIL DECISION**

**authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention)**

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

### **The Bunkers Convention**

The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the 'Bunkers Convention'), was adopted by a Diplomatic Conference at the International Maritime Organization (IMO) on 23 March 2001. The Convention was adopted to ensure that adequate, prompt, and effective compensation is available to persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. The Convention applies to damage caused on the territory, including the territorial sea, and in exclusive economic zones of States Parties. By covering all ships, the Convention complements the existing conventions on the civil liability for pollution damage caused by oil tankers and by ships carrying hazardous and noxious substances. The Convention therefore fills a significant gap in the international regulation of marine pollution liability.

The Bunkers Convention requires the registered owner of a vessel over 1,000 gross tonnage to maintain insurance cover. Its provisions on the right of direct action allows a claim for compensation for pollution damage to be brought directly against the insurer. The financial limit of the liable party is established by reference to the applicable national or international limitation regime, but the liability shall not exceed an amount calculated in accordance with the Convention on Limitation of Liability for Maritime Claims, 1976, as amended. The Bunkers Convention enters into force 12 months following the date on which 18 States, including five major flag States, have ratified or acceded to it. In line with previous practice of IMO liability conventions, the Bunkers Convention is only open to ratification by States (Article 12).

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 bunker pollution damage.

However, Articles 9 and 10 of the Bunkers Convention include 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 9 of the Bunkers Convention mandates the exclusive jurisdiction of the State Party where pollution damage occurred. Moreover, Article 10 of the Bunkers 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 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 Bunkers Convention**

There is exclusive Community competence as regards its provisions on jurisdiction, recognition and enforcement contained in Articles 9 and 10 of the Bunkers 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.

## **The Diplomatic Conference adopting the Bunkers Convention**

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, was brought to the attention of the negotiators of the Bunkers Convention at a very late stage. The problems were highlighted only at the diplomatic conference adopting the Bunkers Convention that took place in London on 19-23 March 2001. Despite efforts by the Presidency and the Commission to arrive at a co-ordinated position during the conference, aiming at providing for accession by the Community to the Convention and allowing Member States to continue to apply Regulation 44/2001 in their mutual relations, it proved impossible to modify the Convention text at such a late stage.

In order to recognise the Community dimension of the ratification of the Convention, and to safeguard the objectives of the Convention, the following declaration was made by the Member States attending the conference:

*“The Member States of the European Union attending the International Conference on Liability and Compensation for Bunker Oil Pollution Damage mentioned above, recognize the importance of the International Convention on Civil Liability and Compensation for Bunker Oil Pollution Damage.*

*They note that certain issues regarding the relationship between the Convention and recent EU legislation on jurisdiction and the recognition and enforcement of judgments will have to be addressed at EU level.*

*Furthermore, they recognize the desirability of this Convention entering into force rapidly and the need for a continued effort within the European Union to achieve that result.”*

The existing situation is thus that the final text of the Bunkers Convention does not recognize the exclusive Community competence in relation to the rules on jurisdiction, recognition and enforcement, and in particular does not allow accession of the Community to the Convention. Moreover, at this stage, it does not seem feasible to modify either Articles 9 and 10 or Article 12 of the Bunkers Convention.

### **Authorisation of the Member States**

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 exceptionally 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 Bunkers 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 Bunkers 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 Bunkers 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 the Bunkers Convention, subject to making a reservation on the matters under exclusive Community competence, a somewhat 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 10 of the Bunkers 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. Article 9 of the Bunkers Convention is elaborated with the specific suitability for disputes arising from ship-source pollution incidents in mind. In line with existing maritime pollution liability conventions, it mandates the exclusive jurisdiction of the State Party, or States Parties, where the pollution damage has occurred. This 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 pollution incidents will frequently involve defendants, including insurers, from legal jurisdictions outside the Community. In these cases, Regulation 44/2001, in article 5.3 establishes a similar rule as to the competent jurisdiction, based on the place where the harmful event occurred. The application of the rules of jurisdiction contained in Regulation 44/2001 could therefore be restricted to cases where the defendant, or co-defendant, is domiciled within the Community and the pollution damage has occurred in the geographical area of one (or more) Member State(s). In such cases, it is considered that the situation has a predominantly Community dimension and that there are not sufficient grounds to depart from the regime established by Community law for other types of civil and commercial judgments. In such cases, Regulation 44/2001 shall therefore continue to regulate the mutual relations between Member States. 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 Bunkers 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.

Proposal for a

**COUNCIL DECISION**

**authorizing the Member States to sign and ratify in the interest of the European Community the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the Bunkers Convention)**

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 Commission<sup>1</sup>,

Having regard to the opinion of the European Parliament<sup>2</sup>,

Whereas:

- (1) The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (the 'Bunkers Convention') was adopted on 23 March 2001 with the aim of ensuring adequate, prompt, and effective compensation of persons who suffer damage caused by spills of oil, when carried as fuel in ships' bunkers. 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 Bunkers Convention, the Community having exclusive competence in relation to Articles 9 and 10 thereof;
- (3) Articles 9 and 10 of the Bunkers Convention affect 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 Bunkers Convention has been adopted 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 Article 9 and 10 of the Convention and Council Regulation 44/2001.
- (5) The Council may exceptionally authorize the Member States with the exception of Denmark to sign and ratify the Bunkers Convention in the interest of the Community, subject to making an appropriate reservation.

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<sup>1</sup> OJ C ..., ..., p. ...

<sup>2</sup> OJ C ..., ..., p. ...

- (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 sign and ratify the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, subject to the conditions set out in Articles 2 and 3.

*Article 2*

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

*“The Member States of the European Community subject to Community rules in this area shall apply Community rules on jurisdiction in their mutual relations insofar as the pollution damage is caused in a geographical area referred to in Article 2 of the Convention of a Member State of the European Community and the defendant is domiciled in a Member State of the European Community.*

*Judgments referred to in Article 10.1 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 Bunkers 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 Bunkers 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*