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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

[1] Document declassified by the European Commission on 26 September 2023.

COUNCIL OF THE EUROPEAN UNION

Brussels, 17 January 2003 (22.01)
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COVER NOTE

from	:	Secretary-General of the European Commission signed by Mr Sylvain BISARRE, Director
date of receipt	:	14 January 2003
to	:	Mr Javier SOLANA, Secretary-General/High Representative
Subject:		Recommendation for a Council Decision in order to authorise the Commission, on behalf of the European Community, to open negotiations for an agreement on civil liability for transboundary damage caused by hazardous activities within the scope of the Convention on the protection and use of transboundary watercourses and international lakes and the Convention on the transboundary effects of industrial accidents

Delegations will find attached Commission document SEC(2003) 23 final.

Encl.: SEC(2003) 23 final

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 13.01.2003
SEC(2003) 23 final

RESTREINT UE

Recommendation for a

COUNCIL DECISION

in order to authorise the Commission, on behalf of the European Community, to open negotiations for an agreement on civil liability for transboundary damage caused by hazardous activities within the scope of the Convention on the protection and use of transboundary watercourses and international lakes and the Convention on the transboundary effects of industrial accidents

(presented by the Commission)

EXPLANATORY MEMORANDUM

I. Background

Following the Baia Mare cyanide spill in Romania in January 2000 and subsequent steps taken by the Government of Switzerland, the governing bodies of the 1992 Helsinki UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Water Protection Convention" and of the 1992 Helsinki UN/ECE Convention on the Transboundary Effects of Industrial Accidents ("Industrial Accidents Convention"), decided, in view of the shortcomings of the existing regimes on civil liability, that:

- an intergovernmental negotiation process be entered into aimed at adopting an agreement on civil liability for transboundary damage caused by hazardous activities, within the scope of both Conventions (hereafter the agreement)
- to this end, an open-ended Intergovernmental Working Group (IWG) will be responsible for drafting the above-mentioned agreement to be adopted at a future Joint Special Session, possibly within the framework of the Ministerial Conference "Environment for Europe", to be held in Kiev on 23-25 May 2003.

The first four meetings of the IWG took place in November 2001, February 2002, May 2002 and September 2002. Further meetings are scheduled for November 2002 and February 2003; if need be, (an) additional meeting(s) could be convened.

The European Community is a contracting party to both the Water Protection Convention and Industrial Accidents Convention.

II. Objectives and scope of the draft agreement on civil liability

The draft agreement intends to regulate civil liability for damage resulting from cases that fall under the scope of the two Conventions mentioned above: the UN/ECE "Water Protection Convention" and "Industrial Accidents Convention". Moreover, the draft agreement may amend these conventions where the specific features of the liability regime to be established so require.

Thus, the objective of the draft agreement is to provide for a comprehensive civil liability regime and for adequate and prompt compensation for damages resulting from the transboundary effects of industrial accidents occurring in transboundary waters among the Parties to this agreement (Articles 1 and 3). The draft agreement intends to cover traditional damage (personal and property damage) as well as environmental damage. To that effect, it grants to the victims legal standing against the polluter on the basis of a strict liability regime, that is complemented by a limited number of defences available (Article 4), and associated with a requirement for financial security (Article 11). Furthermore this strict liability regime is supplemented by a fault-based liability scheme in case of wrongful intentional or negligent act or omission in accordance with the relevant rules of domestic law (Article 5). Financial limits should be foreseen in relation to strict liability, while fault-based liability remains unlimited (Article 9).

Ancillary provisions necessary for the proper functioning of the future arrangements are also provided (see, for example, art 10 on time limits of liability and arts 13 to 17 bis on procedures). There is also the question of introducing provisions granting access to information and access to justice complying with the principles established under the Aarhus Convention (Article 11 bis).
As far as procedures are concerned, the draft agreement contains, *inter alia*, provisions dealing with competent courts (Article 13), related actions (Article 14) and the mutual recognition and enforcement of judgements (Article 17).

III. Matters falling under Community competence

A. Matters falling under shared competence

The European Community, in accordance with the Treaty establishing the European Community, and in particular Article 175 (1) thereof, is competent for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 (1) of the EC Treaty.
Under its article 174 (1) the European Community Treaty establishes the objectives of the Community policy on the environment, as follows:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- Promoting measures at the international level to deal with regional or worldwide environmental problems.

Pursuant to Article 174 (2) of the EC Treaty, Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. Policy also shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at its source and, that the polluter should pay.
Environmental liability aims at making the polluter pay for remedying the damage that he has caused.
In so doing, environmental liability contributes to:

- implementing the key environmental principles of the EC Treaty;
- ensuring the decontamination and restoration of the environment;
- giving operators the incentive to fully comply with environmental legislation;
- improving, be it on a marginal basis, the functioning of the internal market.

Providing for a comprehensive regime for civil liability and for adequate and prompt compensation

for damage resulting from the transboundary effects of industrial accidents on transboundary waters, will contribute to the achievement and the implementation of the objectives of the environmental policy of the Community, in accordance with Article 174 of the Treaty.
Finally, in addition to this general competence, the draft agreement overlaps with existing EC legislation (on access to information) and, under discussion, legislative proposal (on liability for environmental damage).

3.1.1. Proposal for a Directive of the European Parliament and of the Council on environmental liability

With respect to legislative proposals, it should be noted that on 23 January 2002 the Commission adopted a proposal for a Directive of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage[1].
The proposal establishes a framework based on environmental liability to ensure that future environmental damage is remedied or prevented. Environmental liability includes environmental damage and imminent threat in the case of specifically limited operational activities, as well as damage to the biodiversity protected at Community and national levels, to the waters covered by the Water Framework Directive (2000/60/EC[2]), and land contamination which causes serious harm to human health.
Under the proposal the parties potentially liable for the costs of preventing or remedying environmental damage are the operators of the risky or potentially risky activities listed in Annex I. These include activities which release dangerous chemical substances into water or into the air, i.e. installations producing dangerous chemicals, landfill sites and incineration plants.
The proposal also foresees certain exceptions and defences. For example, authorised emissions will not give rise to liability. Also activities and emissions, which were not considered harmful according to the state of scientific and technical knowledge at the time they occur, are also exempted under the proposal. Notably, both of these defences do not apply to negligent operators. Moreover, operators found to be negligent in conducting occupational activities outside Annex I, may also be liable for the costs of preventing or restoring bio-diversity damage.
Finally, public authorities should play an important role in the proposed liability scheme by ensuring that responsible operators personally undertake or finance the necessary preventive or restorative measures.
The types of transboundary environmental damages caused by industrial accidents on

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1 COM(2002) 17 final – OJ C 151 E, 25.6.2002, p. 132.

2 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22/12/2000 p. 1).

transboundary waters to be covered by the draft agreement, will fall under the scope of the future Community environmental liability legislation. Even though, the proposal for a Directive on environmental liability does not cover personal injury and damage to goods and property, the legislative proposal and the draft agreement will both cover claims for compensation in relation to the cost of measures of reinstatement of the impaired transboundary waters and the cost of response measures taken at the moment where the accident occurs.

It is to be noted in this context that the various provisions of the proposal for a Directive (i.e. the definition of environmental damage) do not make a distinction between "national" and "transboundary" damage. The scope of the proposal of Directive should be interpreted as covering both types of damage.

Furthermore, Article 17 of the Directive (concerning co-operation between M-S) does not forbid a Member State to use a "bilateral transnational civil liability action" where useful, or a fortiori necessary, in reaching the objectives assigned to the Member States concerned. However the alternative civil liability path of the Member State should at least, be compatible with the relevant substantive provisions of the proposal.

In the absence of a derogatory clause, there is a need for the bilateral transnational civil liability regime to comply with the substantive features of the liability scheme in terms of type of liability, defences available, time limits, etc.

Furthermore, the urgent need of a consistent approach between international and community legislation on environmental liability should be stated. Different examples of forthcoming or continuing international negotiations directed at establishing a target for environmental liability where this EC general position is needed, could be mentioned:

- the Basel Convention Protocol on liability and compensation for damages resulting from transboundary movements of hazardous waste. This Protocol was signed in 1999 and is currently open for ratification.
- the "Cartagena" Protocol on biosafety: A decision to open negotiations on the elaboration of international rules and procedures on liability should be acted upon by the Governing body at its first Meeting of the Parties, in spring 2003.
- the Convention on Biodiversity establishes in its art. 14.2 that a Working Group examines the issue of liability under the Convention before the end of 2003.

Therefore, it is appropriate to authorise the Commission to participate in the negotiations of the draft instrument.

3.1.2. Access to environmental information and access to justice

The introduction of provisions on access to environmental information, which would also regulate access to justice in case of unlawful refusal to supply the requested information, is likely to affect the Community legislation on the same subject. Access to environmental information is at present

regulated by Council Directive 90/313/EEC on the freedom of access to information on the environment[1]. A new Commission Proposal for a European Parliament and Council Directive on public access to environmental information introduced on 29 June 2000 is currently under discussion[2].

B. Matters of exclusive external competence under Council Regulation No 44/2001

Since the Amsterdam Treaty, the Community has acquired new powers on judicial co-operation in civil matters, which it exercised by adopting Regulation N° 44/2001[3]. This EC Regulation binds all Member States except for Denmark. Thus, the 1968 Brussels Convention remains in force for relations between Denmark and the other Member States.

The adoption of Regulation 44/2001 implies that Member States no longer have the power to enter into new obligations affecting this instrument. 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 solely the Community is competent for the negotiation, conclusion and fulfilment of such international commitments. Therefore it is necessary to provide for machinery enabling the Community to assume its role.

In accordance with the Protocol on the position of Denmark, annexed to the Union and EC Treaties, Denmark is not bound by Regulation (EC) 44/2001 or subject to its application. Consequently, Denmark does not participate in the adoption of this Decision in these matters as and is free to decide whether to approve the agreement or not. However the duty to cooperate under Article 10 of the EC Treaty dictates that it must consult the other Member States on the question in the Council.

The draft agreement on civil liability under negotiation contains ancillary provisions (arts. 13, 14 and 17) which affect EC Regulation on common rules on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. "the EC regulation provides that harmonised rules of jurisdiction will apply when the defendant is domiciled in one of the MS bound by the regulation, and that, according to article 4, actions against 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 .

Rules on jurisdiction

Art. 13 of the draft instrument contains specific rules on jurisdiction that give the plaintiff the choice of the Court where ”the damage was suffered” or “the industrial accident occurred” or the defendant has his “habitual residence or principal place of business”.

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1 OJ L 158, 23.6.1990, p. 56. Directive 90/313/EEC–

2 COM(2000) 402 final – OJ C 337E, 28.11.2000, p. 156)

3 OJ L 12, 16.1.2001, p. 1

For the purpose of the Regulation jurisdiction is based primarily on the domicile of the defendant. In addition, for 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.

Initially, even if the jurisdiction analysis under both regimes is substantially similar, future discrepancies could result from new case law or changes in legislation**.**

Related actions

The scope of "related actions" in the draft instrument after the definition established in Article 14 (3), is the same as in art 28.3 of the EC Regulation. Anyway substantial differences between the two instruments exist. They can be analysed as follows:

- In the event that related actions are pending in the courts of different Parties, article 14 (1) of the draft instrument gives any Court other than the court seized first, the faculty, at the request of one of the parties, to stay its proceedings, but only while the action is pending at first instance. This deviates from Art. 28(1) of the EC Regulation, that allows all courts seized to stay the proceedings without any limits concerning the action's pending instance.
- Article 14(2) of the draft instrument establishes the conditions that allow courts to decline their jurisdiction in favour of another court. These conditions differ substantially from the regime set under Article 28(2) of the EC Regulation.

In conclusion, Article 14(2) of the draft instrument and Article 28(2) of the Regulation are not compatible.

Recognition and enforcement

1.- Mutual recognition:

Article 17(1) of the draft instrument on mutual recognition differs from Articles 33, 34, 35 and 37 of the EC Regulation in three respects:

a) The draft instrument establishes as a condition for mutual recognition that the judgement to be recognised must be given by a court having jurisdiction according to the rules of the draft instrument, and that it should be enforceable in the State of origin. Conversely, the EC Regulation, as a general rule, forbids that the second court reviews the competence of the first court; in addition, no enforceability condition is mentioned.

b) The draft instrument also makes recognition conditional upon the fact that the judgement to be recognised is no longer subject to ordinary forms of review, while the EC Regulation entitles the court in front of which recognition is sought, to stay its proceedings in case of ordinary appeal against the judgement to be recognised.

c) Finally, most of the grounds for refusal of recognition justified under the draft instrument are divergent from the corresponding grounds foreseen in the Regulation.

In conclusion, the draft instrument and the Regulation are not compatible regarding the recognition of judgements.

2.- Enforcement of judgements: There are no apparent inconsistencies.

Therefore, the Commission evaluation of the Community interest is as follows:

- in order to safeguard the community interest in view of its external competence, it will be necessary that the agreement include a disconnection clause allowing for the application of Regulation 44/2001 between Member States, instead of the relevant provisions of the draft agreement, in all matters covered by EC Regulation.

- the exercise of external powers by the Community in matters of EC competence implies community accession to the draft instrument. It should be noted that the European Community is a Party to both conventions. The draft agreement already contains a clause enabling Regional Economic Integration Organisations to become Parties.

RECOMMENDATION

In the light of the above , the Commission recommends:

- that the Council authorises the Commission to negotiate an agreement on civil liability for transboundary damage caused by hazardous activities within the scope of the Convention on the protection and use of transboundary watercourses and international lakes, and the Convention on the transboundary effects of industrial accidents;

- that since, in accordance with the Treaty, the Commission will conduct these negotiations on behalf of the European Community the Council appoints a special committee to assists it in its tasks

- that the Council issues the appended negotiating directives.

ANNEX

NEGOTIATING DIRECTIVES

(1) The Commission shall ensure that the agreement is consistent with relevant Community legislation and proposed legislation on access to environmental information and environmental liability, as well as with international conventions in this domain as well as with objectives of the Community strategy on sustainable development including prior impact assesment. The Commission shall ensure that the agreement includes one or more clauses enabling Member States of the European Community to apply relevant community law, instead of the concerned provisions of the international agreement.

(2) The Commission shall ensure that the agreement contains appropriate provisions enabling the Community to become a contracting Party thereto

(3) The Commission shall report on the outcome of the negotiations to the Council, and where appropriate, on any problem that may arise during the negotiations.