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From: General Secretariat of the Council
To: Delegations

Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences

- Letter to the Chair of the European Parliament Committee on Transport and Tourism

Following the Permanent Representatives Committee meeting of 28 February 2024 which endorsed the final compromise text with a view to agreement, delegations are informed that the Presidency sent the attached letter, together with its Annex, to the Chair of the European Parliament Committee on Transport and Tourism (TRAN).



Brussels, 28/02/2024

Ms Karima DELLI
Chair of the Transport and Tourism Committee

European Parliament
Rue Wiertz 60
B-1047 BRUSSELS

Subject: Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences

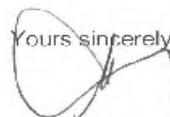
Dear Ms DELLI,

Following the informal contacts on this proposal between the representatives of the three institutions, the Permanent Representatives Committee today agreed with the final compromise text.

I am therefore now in a position to confirm that, should the European Parliament adopt its position at first reading, in accordance with Article 294(3) TFEU, in the form of the compromise text as set out in the Annex to this letter (subject to revision by the lawyer-linguists of the two institutions), the Council, in accordance with Article 294(4) TFEU, will approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the position of the European Parliament.

On behalf of the Council, I also wish to thank you for your close cooperation which should enable us to reach agreement on this file at first reading.

Yours sincerely



Pierre CARTUYVELS
Chair of the
Permanent Representatives Committee (Part 1)

Copy:
Ms Adina VĂLEAN, Commissioner
– Mr Marian-Jean MARINESCU, European Parliament Rapporteur

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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ¹,

After consulting the Committee of the Regions **█** ,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Union's maritime policy is aimed at a high level of safety and environmental protection. This can be achieved through compliance with international conventions, codes and resolutions while maintaining the freedom of navigation as provided for by the United Nations Convention on the Law of the Sea.

¹ OJ *C2023/872*, 8.12.2023.

- (2) The International Convention on the Prevention of Pollution from Ships ('Marpol 73/78') provides for general prohibitions on discharges from ships at sea, but also regulates the conditions under which certain substances can be discharged into the marine environment. *Marpol 73/78 contains exceptions for the discharge of polluting substances subject to its Annexes that shall not be regarded as an infringement when the specified conditions are fulfilled. Those Annexes do not exempt the cases where those liable for the damage acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.*
- (3) Since the adoption of Directive 2005/35/EC of the European Parliament and of the Council **■**³, Marpol 73/78 and its Annexes have been the subject of important amendments, which have put in place stricter norms and prohibitions for the discharges of substances from ships into the sea. These changes as well as the lessons learned from the implementation of Directive 2005/35/EC should be taken into account.
- (3a) While an overarching objective of this Directive is to transpose important amendments to Marpol 73/78 of the International Maritime Organization (IMO), into Union law, an up-to-date and complete text of Marpol 73/78 and its related annexes is not publicly available. This makes it burdensome for the sector, citizens and administrations to gain proper access to the text of Marpol 73/78 and other similar IMO conventions.*
- (3b) Member States should work within the IMO to make the full and up-to date texts of IMO conventions, including Marpol 73/78 and its annexes, accessible to the public free of charge.*

³ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements (OJ L 255, 30.9.2005, p. 11).

- (4) Directive (EU) 2019/883 of the European Parliament and of the Council⁴ ensures that waste is delivered to Union ports, where it is collected by adequate port reception facilities. The enforcement of Directive 2019/883/EC is, together with Directive 2005/35/EC, a key instrument in preventing ship-source pollution. In order to ensure an effective, integrated and coherent enforcement system vis-à-vis the provisions of Directive (EU) 2019/883 on waste delivery to port reception facilities, Directive 2005/35/EC should be amended in order to extend its scope to Annexes IV to VI to Marpol 73/78, in view of discouraging ships from discharging illegally polluting substances into the sea, instead of delivering them in port reception facilities in accordance with the provisions of Directive (EU) 2019/883.
- (5) Directive (EU) 2019/883 does not cover under its scope Annex III of Marpol 73/78 because packaged goods are not categorised as waste, therefore they are usually not delivered in port reception facilities. However, it cannot be ruled out that harmful substances carried in packaged form could be illegally jettisoned into the sea. In light of the above, the scope of Directive 2005/35/EC should be extended to Annex III to Marpol 73/78. Accordingly, jettisoning of harmful substances should be prohibited under Directive 2005/35/EC, unless it is found by competent authorities that it was necessary for securing the safety of the ship or saving life at sea. *In this regard, discharges referred to in this Directive do not include dumping under the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, and its 1996 Protocol.*

⁴ Directive (EU) 2019/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC (OJ L 151, 7.6.2019, p. 116).

(6) Marpol 73/78 includes emissions from ships in the definition of discharges in Article 2 thereof. Annex VI to Marpol 73/78 addresses the prevention of air pollution from ships. Annex VI and the corresponding IMO guidelines on Exhaust Gas Cleaning Systems (EGCS) (Resolution MEPC.340 (77)) allow for the use of EGCS by ships of as an alternative compliance method to reduce sulphur oxide (SO_x) emissions. Annex VI **regulates** the residue **■** from EGCS **■** by prohibiting their discharge at sea and requiring their delivery to adequate port reception facilities **■**. Directive (EU) 2016/802 of the European Parliament and of the Council⁵ transposes international SO_x standards **into** Union law, while Directive (EU) 2019/883 ensures that EGCS residue is delivered in port reception facilities. Since EGCS residue **■** cause pollution to the marine environment, the penalties provided under Directive 2005/35/EC should apply in case of illegal discharges. **■**

(6a) *The “discharge waters”, as defined in both MEPC.1/Circ.899 and Resolution MEPC.340(77), could be discharged directly overboard if they are compliant with discharge water quality criteria set out in the guidelines for exhaust gas cleaning systems. However, the discharge waters from EGCS may affect the ecosystem although they are complying with Marpol 73/78. In this case, the Member State may impose restrictions or limitations which can be based on the evaluation carried out using the methodology for risk and impact assessments contained in the guidelines developed by the IMO and recommended by MEPC. In that case, the “discharge waters” cause pollution to the marine environment, and the administrative penalties provided under Directive 2005/35/EC should apply in case of illegal discharges with due consideration to MEPC.1/Circ.883/Rev.1.*

⁵ Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels (codification) (OJ L 132, 21.5.2016, p. 58).

- (7) Directive (EU) 2023/xxxx *of the European Parliament and of the Council*⁶ ensures common definitions of environmental criminal offences and the availability of dissuasive, effective and proportionate criminal sanctions for serious environmental offences. Directive 2005/35/EC was amended by Directive 2009/123/EC of the European Parliament and of the Council⁷, which introduced criminal penalties for certain infringements of Directive 2005/35/EC, which should now fall within the scope of Directive (EU) 2023/xxxx. Accordingly, the provisions of Directive 2005/35/EC which were added or replaced by Directive 2009/123/EC should be deleted from Directive 2005/35/EC.
- (8) Administrative penalties introduced in transposition of Directive 2005/35/EC should be without prejudice to Directive (EU) 2023/xxxx. Member States should define the scope of administrative and criminal law enforcement with regards to ship-source pollution offences according to their national law. ***This Directive does not prevent Member States from taking more stringent measures in conformity with Union and international law, by providing for administrative or criminal penalties in accordance with their national law.*** In the application of national law transposing Directive 2005/35/EC, Member States should ensure that the imposition of criminal penalties and of administrative penalties respects the principles of the Charter of Fundamental Rights of the European Union, including the prohibition of *ne bis in idem*, *taking due account of the “polluter pays principle”, as and when applicable.*

⁶ OJ L xxxx.

⁷ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (OJ L 280, 27.10.2009, p. 52).

- (9) The penalties provisioned by Directive 2005/35/EC should be strengthened by ensuring consistent application of administrative penalties throughout the Union. To strengthen the deterrent effect of penalties imposed for ship-source pollution offences, such **administrative** penalties should take at least the form of fines imposed to the company of the ship **held liable**. In this context, the company of **a** ship means the shipowner or any other organisation or person, such as the manager or the bareboat charterer, which has assumed the responsibility for the operation of the ship from the shipowner, in alignment with the International Management Code for the Safe Operation of Ships and for Pollution Prevention ('ISM Code')⁸, implemented in Union law by virtue of Regulation (EC) No 336/2006 of the European Parliament and of the Council⁹. Directive 2005/35/EC should recognise that the management of the ship could be delegated by the registered owner to a different entity, which should then be held in the first place **liable** for not implementing its obligations under the ISM Code to ensure the avoidance of damage to the environment or the assignment of shipboard operations to qualified personnel. *Without prejudice to the applicable Union legislation, the decision on the penalty to be applied should be made within the scope of the national administrative and criminal law enforcement systems. For criminal penalties, the Member State adheres to the obligations set out in Directive (EU) 2023/xxxx, the revised Environmental Crime Directive. Accordingly, this Directive only concerns administrative penalties and does not concern criminal proceedings against natural or legal persons in accordance with national law.*
- (9a) *Recognising that compliance for some Member States with the requirement for administrative penalties is not possible due to national constitutional law, Member States may apply the provisions on administrative penalties of this Directive in a manner where the fines are initiated by the competent authority and imposed by competent national courts, while ensuring the need for effective, proportionate and dissuasive penalties. When thus referring to administrative penalties of this Directive, those Member States will apply penalties in the meaning of their national legal system.*

⁸ International Management Code for the Safe Operation of Ships and for Pollution Prevention adopted by the International Maritime **Organization** by Assembly Resolution A.741(18) of 4 November 1993, as amended.

⁹ Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 (**l** OJ L 64, 4.3.2006, p.1).

- (9b) *Irregularities and information could arise from a port State control inspection carried out under Directive 2009/16/EC when it is mandatory or when it is scheduled. Irregularities could also be detected with respect to the delivery of ship-generated waste, or the notification thereof, as required under Directive (EU) 2019/883 or with respect to non-compliance with the criteria for the use of exhaust gas cleaning systems operated as emissions abatement methods set out in Annex II to Directive (EU) 2016/802, as well as information obtained relating to a potential illegal discharge of the ship obtained through the procedures foreseen in Directive 2002/59/EC, including any proof or presumptive evidence on discharges of oil or other infringements of Marpol 73/78 communicated to the Member State or incidents or accidents reported by the master of the ship, and any other information by persons involved in the operation of the ship, including pilots.*
- (9c) *Irregularities or information giving rise to a suspicion that an illegal discharge has taken place might be discovered during a port State control inspection. In that case, a new inspection might not be necessary or sufficiently effective. Rather, the Member State could take other appropriate action, such as detaining the ship, instituting proceedings or taking remedial measures.*
- (10) National administrative and judicial authorities should take into account all relevant circumstances, ***including ship-source pollution recidivism***, when determining the level of penalties to be imposed ***on*** the polluter. Taking into account the diverse nature of polluting substances covered under Directive 2005/35/EC and the importance of consistent application of penalties across the Union in light of the cross-border nature of the regulated behaviour, further approximation and effectiveness of penalty levels should be fostered through ***exchange on*** criteria for the ***determination and the*** application of penalties for discharges of different polluting substances. In order to ensure the ***effective application of penalties and to achieve the objectives of this Directive, it is crucial to facilitate the exchange of experiences and best practices between Member States' national competent authorities. Furthermore, based on the insights gained from this exchange, the Commission could propose more specific guidelines, including on specific types of polluting substances and sensitive areas of concern.***

- (11) When a Member State suspects that a ship which is voluntarily within its port or at an off-shore terminal committed an illegal discharge, an appropriate inspection should take place to establish the circumstances. In order to assist Member States with their obligations under Directive 2005/35/EC to inspect such ships, Annex I to Directive 2005/35/EC provides an indicative list of irregularities or information that should be taken into account by competent authorities on a case-by-case basis when determining whether a ship should be considered suspect.
- (12) The accompanying measures for cooperation and the reporting obligations of Member States have not been sufficient until now to allow a complete analysis whether polluters face effective, dissuasive and proportionate penalties and that adequate data is made available to the Commission to monitor the implementation of Directive 2005/35/EC. In order to ensure the effective and consistent enforcement of Directive 2005/35/EC, exchange of information, *experience and best practices* should be facilitated through enhanced cooperation, while at the same time ensuring that adequate data are made available to the Commission in order to allow the proper monitoring of the implementation of Directive 2005/35/EC.
- (12a) In order to enhance the information required for the effective implementation of this Directive, Member States have at their disposal relevant reporting mechanisms, such as reporting in the framework of regional sea conventions and other regional cooperation arrangements, e.g. the Bonn Agreement, the North Sea Network of Investigators and Prosecutors and the Network of Prosecutors on Environmental Crime in the Baltic Sea Region.*

- (13) The existing satellite-based service ‘CleanSeaNet’ which notifies Member States authorities on potential illegal discharges, should be further enhanced to include information on the additional polluting substances under the scope of Directive 2005/35/EC. Information relating to potential or actual discharges reported by Member States in accordance with Directive 2005/35/EC and to other Union maritime safety databases, such as the Union Maritime Information and Exchange System established by Directive 2002/59/EC of the European Parliament and of the Council¹⁰ (‘SafeSeaNet’) and the Inspection Database set up by Directive 2009/16/EC of the European Parliament and of the Council¹¹ (‘THETIS’) should be integrated and disseminated in a user-friendly electronic format to the national authorities involved in the enforcement chain in order to facilitate their timely response. Such information, when relating to an actual or potential discharge of Exhaust Gas Cleaning System residue from a ship, should further be automatically disseminated, **such as through** the dedicated module of THETIS set up by under Commission Implementing Decision 2015/253 (‘THETIS-EU’), in order to assist Member States with enforcement actions undertaken in accordance with the provisions of Directive (EU) 2016/802. █

(13a) In order to ensure the effective monitoring of the Directive’s implementation by all Member States, a digital analysis of all high confidence alerts should be ensured by each Member State within the first three years from the transposition of this Directive. Within this same timeframe, all Member States should also indicate whether they verify or not those high confidence alerts sent by CleanSeaNet every year, striving to verify at least 25% of those high confidence alerts, where verify means any follow-up actions by competent authorities of an alert sent by CleanSeaNet to determine whether the alert in question present an illegal discharge. If a Member State does not verify an alert, it should indicate the reasons for not doing so.

¹⁰ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC (OJ L 208, 5.8.2002, p. 10).

¹¹ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (recast) (OJ L 131, 28.5.2009, p. 57).

- (13b) In application of this provision, 'high confidence alerts' should be understood as referring to 'Class A' CleanSeaNet alert detections when relating to potential discharges of polluting substances under Annex I and II to Marpol 73/78. With regard to polluting substances under other Annexes to Marpol 73/78, and as these are currently not being monitored by CleanSeaNet, a confidence level approach cannot be currently established. The Commission with the assistance of EMSA will develop semi-automated checks of satellite images for polluting substances under other Annexes to Marpol 73/78 to establish the possibility of determining their confidence level. Verification activities could include many actions by several competent authorities, such as on-site verification, comparing the satellite detection with the nationally available auxiliary data and port State control inspections.*
- (13c) Access to this information should be granted to the authorities of other Member States having an interest in it under their roles as port States of the next port of call, coastal States affected by the potential discharge or flag States of the ship in order to facilitate effective and timely cross-border cooperation, minimise the administrative burden of enforcement activities and ultimately effectively penalise offenders for infringements of Directive 2005/35/EC. The use of new technologies such as drones and decision support techniques, such as artificial intelligence, should also be fostered.*
- (13d) As part of the evaluation and review, the Commission should assess the verification rates of Member States and should envisage to propose, if appropriate, verification rates higher than foreseen in the current Directive, based on technological developments and the particular circumstances and capabilities of Member States.*
- (13e) It should be acknowledged that the circumstances of coastal Member States are very varying in terms of their geographical location, the size of the waters over which they exercise jurisdiction and the density of maritime traffic as well as their resources and cost-efficient access to available technology and means to detect, verify and collect evidence in respect of illegal discharges.*

- (14) The Sub-group on Waste from Ships, which was set up under the European Sustainable Shipping Forum, and which brought together a wide range of experts in the field of ship-source pollution and the management of waste from ships, was adjourned in December 2017 in view of the start of interinstitutional negotiations *on* Directive (EU) 2019/883. Since that temporary Sub-group provided valuable guidance and expertise to the Commission, a similar expert group should be created with a mandate of exchanging experience on the application of this Directive in order to assist Member States in building their capacity to detect and verify pollution incidents and ensure the effective enforcement of Directive 2005/35/EC.
- (15) The European Maritime Safety Agency ('EMSA') should provide the necessary support to the Commission to ensure the implementation of this Directive.
- (16) Member States should report to the Commission the information needed to ensure a proper monitoring of the implementation of Directive 2005/35/EC. In order to limit administrative *burdens* and assist the Commission in analysing the data provided by Member States, such information should be reported by Member States through a dedicated electronic reporting tool, *developed by the Commission*. To the extent that such information relates to penalties imposed *on* or involving natural persons, such information shall be anonymised. In order to ensure that information reported in accordance with Directive 2005/35/EC is comparable in type among Member States and collected on the basis of a harmonised electronic format and procedure for reporting, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 *of the European Parliament and of the Council*¹³.
- (17) In order to assist Member States with the development of their capacities regarding effective enforcement of Directive 2005/35/EC by the national administrative and judicial authorities, the Commission, *with the assistance of EMSA*, should provide Member States with guidance and training relating to, inter alia, best methods and practices for detection, verification and evidence collection, as well as guidance on relevant regulatory developments of Marpol 73/78 and on technological developments available, including new digital tools, in order to facilitate effective, cost-efficient and targeted enforcement activities.
- (18) In order to increase public awareness *of* ship-source pollution discharges and *to* improve environmental protection, information provided by the Member States on the application of Directive 2005/35/EC should be made publicly available through a Union-wide overview

¹³ *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).*

and include the information listed in Annex II of Directive 2005/35/EC. Directive 2003/4/EC of the European Parliament and of the Council¹⁴ aims to guarantee the right of access to environmental information in the Member States in line with the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention), to which the Union is a party. The Commission should protect the confidentiality of information received by Member States, without prejudice to the provisions of Directive 2003/4/EC.

- (19) Directive (EU) 2019/1937 of the European Parliament and of the Council¹⁵ lays down minimum standards on reporting of breaches of Union law, including *breaches* of Directive 2005/35/EC, and for the protection of persons reporting such breaches. Member States should ensure, in particular, that crew under the scope of Directive (EU) 2019/1937 reporting actual or potential illegal discharges are granted protection, *support and assistance, as appropriate, as provided for in that Directive*. In addition to the existing reporting channels provided at national level as regulated under Directive (EU) 2019/1937, the Commission should make available a centralised online external reporting channel for reporting actual or potential illegal discharges and relay such reports to the Member State or Member States concerned, which should subsequently handle these reports in accordance with Directive (EU) 2019/1937, including with regards to acknowledgement of receipt, adequate feedback and follow-up. *Union law on the protection of personal data, in particular Regulation (EU) 2018/1725 of the European Parliament and of the Council and Regulation (EU) 2016/679 of the European Parliament and of the Council¹⁶ apply when personal data are processed in the context of this Directive*. The Commission should ensure the protection of the confidentiality of the identity of reporting persons, including, where necessary, by restricting the exercise of certain data protection rights of persons concerned, such as of individuals included in the report as participating in the potential illegal discharge, in line with Article 25(1) points (c) and (h) and Article 25(2) of Regulation (EU) 2018/1725¹⁷, to the extent and as long as necessary to prevent and address attempts to hinder reporting or to impede, frustrate or slow down follow-up, in particular investigations, or attempts to find out the identity of the reporting persons. *Such restrictions should respect the essence of the fundamental rights and freedoms and be necessary and proportionate*

¹⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26).

¹⁵ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

¹⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

measures in a democratic society to safeguard important objectives of general public interest of the Union or of a Member State, including the protection of the data subject or the rights and freedoms of others.

- (20) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 and delivered an opinion on [xx xx 2023]¹⁸.
- (21) Discussions are ongoing at the IMO regarding new environmental issues in relation to international shipping, resulting in *maritime* pollution. *Those discussions may result in new provisions under Marpol 73/78, bringing under the scope of that Convention other types of pollutants, such as marine plastic litter and loss of plastic pellets. A future review should assess the possibility of modifying the scope of Directive 2005/35/EC, if appropriate, with a view to ensure a coherent, efficient and effective enforcement regime, as well as the imposition of dissuasive penalties. This review should also assess ways for improving satellite surveillance of lost containers, potentially including harmful substances. The Commission should also consider the interaction of this Directive with other relevant Union legislation on marine pollution, such as Directive 2008/56/EC of the European Parliament and of the Council [Marine Strategy Framework Directive 19], Directive (EU) 2023/xxxx [Ambient Air Quality Directive] 20 and Directive (EU) 2016/802 21 [Sulphur Directive], including on excessive underwater noise reporting and on air pollution, such as black carbon, PM, NO_x and SO_x, resulting in harm to biodiversity and living resources in marine ecosystems, as well as in hazards to human health and the impairment of the quality for use of sea water and the sustainable use of marine goods and services, hence hindering other marine activities, such as fishing, tourism and recreation in coastal areas.*

¹⁸ OJ C xxxx.

¹⁹ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (Text with EEA relevance) (OJ L 164, 25.6.2008, p. 19).

²⁰ OJ L xxxx.

²¹ Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels, OJ L 132, 21.5.2016

- (21a) Member States without direct access to the sea or ports cannot apply certain provisions of this Directive due to these geographical reasons. In order to avoid imposing a disproportionate administrative burden on these Member States, they should not be obliged to transpose and implement some of the provisions of this Directive.*
- (22) Since the objectives of this Directive cannot be sufficiently achieved by the Member States by reason of the cross-border damage which may be caused by illegal discharges covered by this Directive and the availability of effective, dissuasive and proportionate penalties across the Union for such discharges but can rather, by reason of *the* scale and effects of the proposed action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (23) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, including the protection of personal data, the right to an effective remedy and to a fair trial, the presumption of innocence and right of defence, the principles of legality and proportionality of criminal offences and penalties, and the right not to be tried or punished twice in criminal proceedings for the same offence. This Directive seeks to ensure full respect for those rights and principles and should be implemented accordingly.
- (24) Directive 2005/35/EC should be amended *accordingly*,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2005/35/EC

Directive 2005/35/EC is amended as follows:

- (1) The title is replaced by the following:
 - ‘ Directive of the European Parliament and of the Council on the enforcement of international standards on pollution from ships and on the introduction of **administrative** penalties for pollution offences.’
- (2) Article 1 is replaced by the following:
 - Article 1
 - Purpose
 1. The purpose of this Directive is to incorporate into Union law international standards on pollution from ships and to ensure that **any company, natural or legal person liable** for illegal discharges of polluting substances are subject to dissuasive, effective and proportionate administrative penalties in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.
 2. This Directive does not prevent Member States from taking more stringent measures in conformity with **Union and** international law, by providing for administrative or criminal penalties in accordance with their national law.’
- (3) Article 2 is replaced by the following:
 - Article 2
 - Definitions
 - For the purposes of this Directive, the following definitions shall apply:
 1. ‘Marpol 73/78’ means the International Convention for the Prevention of Pollution from Ships, 1973, its 1978 **and 1997 Protocols**, in its up-to-date version;

2. 'polluting substances' means substances subject to regulation by Marpol 73/78 Annexes I (oil), II (noxious liquid substances in bulk), III (harmful substances carried by sea in packaged form), IV (sewage from ships), V (garbage from ships) and Exhaust Gas Cleaning System residue;
 - (2a) 'Exhaust Gas Cleaning System residue' *means* any material removed from the washwater or the bleed-off water by a treatment system or discharge water that does not meet the discharge criterion, or other residue material removed from the exhaust gas cleaning system as a result of the operation of a compliance method for emissions reductions, as defined in Annex VI Regulation 4 to Marpol 73/78, used as an alternative in terms of emissions reductions to the standards set forth in Regulation 14 of Annex VI to Marpol 73/78, taking into account the guidelines developed by the IMO;
 - 3a. 'discharge' *means* any release howsoever caused from a ship, as referred to in Article 2 of Marpol 73/78;
 4. 'ship' means a seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment and shall include hydrofoil boats, air-cushion vehicles, submersibles and floating craft;
 5. 'legal person' means any legal entity in possession of such status under applicable national law, other than States themselves or public bodies in the exercise of State authority or public international organisations;
 6. 'company' means the shipowner or any other organisation or person, such as the manager or the bareboat charterer, which has assumed the responsibility for the operation of the ship from the shipowner.;
- (4) Article 4 is replaced by the following:

Article 4

Infringements *and exceptions*

1. Member States shall ensure that discharges of polluting substances into any of the areas set out in Article 3(1) are regarded as infringements, unless:

- (a) for polluting substances subject to regulation by Annex I to Marpol 73/78 **they satisfy** the conditions set out in Annex I Regulations 15, 34, 4.1, **4.2** or 4.3 to Marpol 73/78 **and section 1.1.1 of part II-A of the International Code for Ships Operating in Polar Waters ('Polar Code');**
 - (b) for polluting substances subject to regulation by Annex II to Marpol 73/78, **they satisfy** the conditions set out in Annex II Regulations 13, 3.1.1, **3.1.2** or 3.1.3 to Marpol 73/78 **and section 2.1 of part II-A of the Polar Code,**
 - (c) for polluting substances subject to regulation by Annex III to Marpol 73/78, **they satisfy** the conditions set out in Annex III Regulation 8.1 to Marpol 73/78;
 - (d) for polluting substances subject to regulation by Annex IV to Marpol 73/78, **they satisfy** the conditions set out in Annex IV Regulations 3, 11.1 and 11.3 to Marpol 73/78 **and section 4.2 of part II-A of the Polar Code,**
 - (e) for polluting substances subject to regulation by Annex V to Marpol 73/78, **they satisfy** the conditions set out in Annex V Regulations 4.1, 4.2, 5, 6.1, 6.2, 7 to Marpol 73/78 and section 5.2 of part II-A of the **Polar Code** **;** and
 - (f) for Exhaust Gas Cleaning System residue, **they satisfy** the conditions set out in Annex VI Regulations **4,** 14.1, 14.4, 14.6, 3.1.1 **and 3.1.2** to Marpol 73/78, **taking into account the Guidelines developed by the IMO, including Resolution MEPC.340(77) in its up-to-date version.**
2. Each Member State shall take **all** necessary measures to ensure that any **company,** natural or legal person having committed an infringement within the meaning of paragraph 1 is held liable **;**
- (5) Article 5 is **deleted;**
- deleted**
 - deleted**
 - 1. **deleted**
 - (a) **deleted**
 - (b) **deleted**

2. *deleted*'

(6) Article 5a is deleted;

(7) Article 5b is deleted;

(7a) In Article 6, paragraph 1 is replaced by the following:

1. *If irregularities or information give rise to a suspicion that a ship which is voluntarily within a port or at an off-shore terminal of a Member State has been engaged in or is engaging in a discharge of polluting substances into any of the areas referred to in Article 3(1), that Member State shall ensure that an appropriate inspection or other appropriate action, taking into account the relevant guidelines adopted by the International Maritime Organization (IMO), is undertaken in accordance with its national law.*

(7a) In Article 6, paragraph 2 is replaced by the following:

2. *In so far as the inspection referred to in paragraph 1 reveals facts that could indicate an infringement within the meaning of Article 4, the Member State shall apply the provisions of this Directive. The competent authorities of that Member State and of the flag State shall be informed.'*

(8) In Article 6, the following paragraph **1** is added:

'3. An indicative list of irregularities or information *to be taken into account in the application* of paragraph 1 is provided in Annex I to this Directive.'

(9) Article 8 is replaced by the following:

' Article 8

Administrative penalties

1. Without prejudice to the obligations of Member States under Directive (EU) 2023/xxxx¹, Member States shall lay down a system of administrative penalties, *within the meaning of their national legal system*, for the breach of national provisions implementing *Article 4* of this Directive and shall ensure that they are applied. The administrative penalties provided for shall be dissuasive, effective and proportionate.
2. Member States shall ensure that *administrative* penalties introduced in transposition of this Directive include fines which are imposed *on* the company *held liable* for the infringement.

3. *deleted*
4. *Where the legal system of the Member State does not provide for administrative penalties, this Article may be applied in such a manner that the penalties, including the fines set out in paragraph 2 are initiated by the competent authority and imposed by competent national courts, while ensuring that those legal remedies are effective and have an equivalent effect to the administrative fines imposed by competent authorities. In any event, the penalties imposed in accordance with this paragraph shall be effective, proportionate and dissuasive and applied in accordance with the provisions of this Directive. Those Member States shall notify to the Commission the provisions of their laws which they adopt pursuant to this paragraph by [DATE] and, without delay, any subsequent amendment law or amendment affecting them.’;*

1 OJ L xxxx.’

- (10) Article 8a is deleted;
- (11) Article 8b is deleted;
- (12) Article 8c is deleted;
- (13) The following Article **8** is inserted:

‘ Article 8d

Effective application of penalties

1. *In order to ensure that penalties are dissuasive, effective and proportionate,* Member States shall ensure that, when determining and applying the type and level of administrative penalty to a *company*, natural or legal person found by competent authorities to be *liable, in accordance with Article 8*, for an infringement within the meaning of *Article 4*, the competent authorities take into account all relevant circumstances of the infringement, *in particular*:
 - (a) the nature, gravity and the duration of the discharge;
 - (b) the degree of culpability *or fault* of the responsible person, *within the meaning of the legal system of the Member States*;

- (c) the damage caused from the discharge to the environment or human health, **including, where relevant, its impact on fishing, tourism and coastal communities,**
- (d) the financial **capacity** of the **liable company, natural or** legal person;
- (e) the economic benefits generated or expected to be generated for the **liable** person from the infringement, **when applicable,**
- (f) measures taken by the **liable** person to prevent the discharge or mitigate its impacts;
- (g) the level of cooperation of the **liable** person with the competent authority, including any action aiming to circumvent or obstruct an appropriate inspection or other investigation by a competent authority; and
- (h) any previous **ship-source pollution** infringement by the **liable** person.

1a. Member States shall not set or apply administrative penalties for infringements under this Directive that would be at such a low level so as not to ensure the dissuasive nature, proportionality and effectiveness of those penalties.

2. **deleted'**

(14) Article 10 is replaced by the following:

‘ Article 10

Exchange of information and experience

1. For the purposes of this Directive, the Member States and the Commission, **with the assistance of EMSA,** shall cooperate in the exchange of information, building on the Union Maritime Information and Exchange System set out in Article 22a(3) of and Annex III to Directive 2002/59/EC¹ (SafeSeaNet), in order to attain the following objectives:

- (a) enhance the information required for the effective implementation of this Directive, in particular as provided by the European satellite-based pollution detection service set up by this Directive (CleanSeaNet) **and other relevant reporting mechanisms**, with a view to develop reliable methods of tracing polluting substances in the sea;
- (b) develop and implement an appropriate control and monitoring system, integrating information provided under paragraph (a) with information made available **by the Commission** to the **Member States in SafeSeaNet, THETIS-EU and other Union information databases and tools** in order to facilitate the early identification and monitoring of ships discharging polluting substances, with a view to optimise enforcement actions undertaken by national authorities;
- (c) make optimum use of the information provided in accordance with paragraph (a) and (b) as well as reported by Member States pursuant to Article 10a, with a view to facilitate access to and exchange of such information between competent authorities and with authorities of other Member States and the Commission; and
- (d) within three years from the date of transposition of this Directive, ensure that competent authorities **digitally analyse all high confidence alerts and indicate whether they verify or not those high confidence alerts sent by CleanSeaNet every year, striving to verify at least 25% of those high confidence alerts, where verify means any follow-up actions by competent authorities of an alert sent by CleanSeaNet to determine whether the alert in question present an illegal discharge. If a Member State does not verify an alert, it should indicate the reasons for not doing so.**

1a. Member States shall ensure that information on major ship-source pollution incidents is disseminated to concerned fishing and coastal communities in a timely manner.

2. The Commission shall provide for the organisation of exchange of experiences between Member States' national authorities and experts, including those from the private sector, civil society and trade unions, on the application of this Directive across the Union, with a view to establish common practices and guidelines on the enforcement of this Directive. █

2a. The Commission shall provide for the organisation of exchange of experiences and best practices between Member States' national competent authorities on how to ensure an effective determination and application of penalties. On the basis of the exchange of information, the Commission may propose guidelines, including on types of polluting substances and sensitive areas of concern.

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- 1 Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC (OJ L 208, 5.8.2002, p. 10).'

(15) The following Articles █ are inserted:

Article 10a

Reporting

1. The Commission shall establish an electronic reporting tool, for the purposes of collection and exchange of information between the Member States and the Commission on the implementation of the enforcement system provided by this Directive.
2. Member States shall ensure that the following information relating to the actions undertaken by their competent authorities is reported through the electronic reporting tool referred to in paragraph 1:
 - (a) information relating to the follow-up by competent authorities of an alert sent by CleanSeaNet or the reasons for not following up such an alert, as soon as *possible after* the follow-up activities are completed;
 - (b) information relating to the inspections undertaken in accordance with Article 6, as soon as *possible after* the inspection is completed;

- (c) information relating to the actions undertaken in accordance with Article 7, as soon as **possible after** such actions are completed; **and**
 - (d) information relating to penalties imposed in accordance with this Directive, **once the administrative and, where applicable, legal proceedings are concluded**, without undue delay and in any case, by 30 June each year for penalties imposed during the previous calendar year. To the extent that information relating to penalties include personal data, such information shall be anonymised.
3. In order to ensure the uniform application of this Article, the Commission may, by means of implementing acts, lay down detailed rules on the procedure for reporting the information mentioned in paragraph 2, including specifying the type of information to be reported, in accordance with the examination procedure set out in Article 13.
4. Member States shall notify the Commission of the entitled authorities that will have access to the reporting tool set out in paragraph 1.

Article 10b

Training

The Commission shall, **with the assistance of EMSA and in cooperation with Member States**, facilitate the development of capacities of Member States by providing, as appropriate, training to the authorities responsible for the detection, verification and enforcement of infringements under the scope of this Directive.

Article 10c

Publication of information

1. Based on information reported by Member States in accordance with Article 10a, the Commission shall make publicly available a regularly updated Union-wide overview on the implementation and enforcement of this Directive, **upon conclusion of the administrative and legal proceedings when applicable. To the extent that information relating to penalties include personal data or commercially sensitive information, such information shall be anonymised. The Commission** overview shall include the information listed in Annex II to this Directive.

2. Without prejudice to Directive 2003/4/EC¹, the Commission shall take appropriate measures to protect the confidentiality of information obtained in implementation of this Directive.

Article 10d

Protection of persons who report potential infringements *and their personal data*

1. The Commission shall develop, *make accessible* and maintain a confidential online external reporting channel for receiving reports, within the meaning of Directive (EU) 2019/1937¹ on potential infringements of this Directive and shall relay such reports to the Member State or Member States concerned.
2. Member States shall ensure that national competent authorities receiving reports of violations of this Directive, submitted through the channel referred to in paragraph 1, *investigate, where appropriate, act upon, and* provide feedback, *in a timely manner*, and follow-up on those reports in accordance with Directive (EU) 2019/1937.
3. The Commission may, *pursuant to point (c) and (h) of Article 25(1) and in line with Article 25(2) of Regulation (EU) 2018/1725*, restrict the application of Articles 14 to 22, 35, and 36, as well as Article 4 of Regulation (EU) 2018/1725¹ for the data subjects who are part of or mentioned in the report submitted through the channel referred to in paragraph 1 *of this Article* and who are not the data subjects submitting this report. This restriction may apply only for the duration necessary to investigate the report referred to in paragraph 2 *of this Article* by the competent Member State authorities.²

1 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26).

1 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ L 305, 26.11.2019, p. 17).

1 Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the

processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (Text with EEA relevance) (OJ L 295, 21.11.2018, p. 39).’

(16) Article 11 is deleted;

(17) Article 12 is deleted;

(18) The following Article **1** is inserted:

‘ Article 12a

Evaluation and review

1. By [OP: Please insert a date: five years from the date of transposition of this amending Directive], the Commission shall carry out an evaluation of this Directive. The evaluation shall be based on at least the following:

- (a) the experience gathered from the implementation of this Directive; and
- (b) the information reported by Member States pursuant to Article 10a and the Union wide overview provided in accordance with Article 10c.

(ba) the interaction of this Directive with other relevant international and Union law on marine environment protection and maritime safety;

(bb) the latest data and scientific findings.

2. As part of the review, the Commission shall assess the possibility of modifying the scope of this Directive, if appropriate, in view of ***new or updated*** international standards for the prevention of **1** pollution from ships subject to ***present and future provisions in*** Marpol 73/78, such as **1** marine ***plastic*** litter, container loss ***and*** loss of plastic pellets **1** .’’

(19) Article 13 is replaced by the following:

‘ Article 13

Committee procedure

1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS), established by Article 3 of Regulation (EC) No 2099/2002¹. COSS shall be a committee within the meaning of Regulation (EU) No 182/2011².

2. Where reference is made to this Article, Article 5 of Regulation (EU) No 182/2011 and Article 5 of Regulation (EC) No 2099/2002 shall apply.’;

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- 1 Regulation (EC) No 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) and amending the Regulations on maritime safety and the prevention of pollution from ships (OJ L 324, 29.11.2002, p. 1).
 - 2 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).’

(20) Article 14 is deleted;

(21) Article 15 is deleted;

(21a) In Article 16, the following paragraph is added:

2. Member States without direct access to the sea or without ports shall not be obliged to transpose and implement the provisions of this Directive in Articles 6 and 7(2).’;

(22) The sole Annex is deleted;

(23) The text set out in Annex I to this Directive is added as Annex I;

(24) The text set out in Annex II to this Directive is added as Annex II.

Article 2

Transposition

1. Member States shall adopt and publish, by *[OP: Please insert a date: 30 months from the date of entry into force of this amending Directive]* the laws, regulations and administrative provisions necessary to comply with this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive and any subsequent amendment(s) affecting them.

Article 3

Application of Directive 2009/123/EC

As regards infringements to be regarded as criminal offences pursuant to Directive 2005/35/EC as amended by Directive 2009/123/EC²² and the corresponding penalties, Member States not bound by Directive (EU) 2023/xxxx shall remain bound by Directive 2005/35/EC as amended by Directive 2009/123/EC.

Article 4

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

²² OJ L 280, 27.10.2009, p. 52.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

Annex I

Non-exhaustive list of irregularities or information referred to in Article 6

- (1) Any irregularities with respect to the oil and other relevant record books or with respect to other deficiencies related to potential discharges, discovered during inspections carried out under Directive 2009/16/EC¹, carried out either by the Member State concerned or by another Member State or a State signatory to the Memorandum of Understanding on Port State Control (Paris MOU) at the previous ports of call of the ship;
- (2) Any irregularities with respect to the delivery of ship-generated waste, or the notification thereof, as required under Directive (EU) 2019/883² which took place either in the Member State concerned or in the Member State of the previous ports of call of the ship;
- (3) Any irregularities with respect to non-compliance with the criteria for the use of exhaust gas cleaning systems operated as emissions abatement methods set out in Annex II of Directive (EU) 2016/802 of the European Parliament and of the Council³, which refers to the 2009 Guidelines for Exhaust Gas Cleaning Systems set out in Resolution MEPC.184(59)) as replaced by the 2021 Guidelines for Exhaust Gas Cleaning Systems set out in resolution MEPC.340(77).
- (4) Any information obtained from another Member State relating to a potential illegal discharge of the ship obtained through the procedures foreseen in Directive 2002/59/EC⁴, including any proof or presumptive evidence on deliberate discharges of oil or other infringements of Marpol 73/78 communicated by coastal stations of a Member State to the coastal stations in the Member State concerned in accordance with Article 16 thereof or incidents or accidents reported by the master of the ship to the coastal station of the Member State concerned in accordance with Article 17 thereof; or
- (5) Any other information by persons involved in the operation of the ship, including pilots, which suggests irregularities relating to potential violation of the obligations under this Directive.

¹ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (Recast) (OJ L 131, 28.5.2009, p. 57).

² Directive (EU) 2019/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC (OJ L 151, 7.6.2019, p. 116)

³ Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels (codification) (OJ L 132, 21.5.2016, p. 58).

⁴ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC (OJ L 208, 5.8.2002, p. 10).

Annex II

Information to be included in the Union-wide overview *published by the Commission* referred to in Article 10c

- (1) For each pollution incident verified and confirmed by a Member State, information in the Union-wide overview published *by the Commission* in accordance with Article 10c shall include:
 - a. date of the incident;
 - b. identification of the ship involved in the incident;
 - c. position (latitude and longitude) of the pollution incident;
 - d. extent of the pollution incident (area and length), if applicable;
 - e. type of pollutant;
 - f. Member State(s) involved;
 - g. description of the verification activities of the pollution incident;
 - h. date and time of verification activities and assets used for verification activities;
 - i. details of the administrative penalty imposed.

 - (2) For each Member State, aggregated information contained in the Union-wide overview published *by the Commission* in accordance with Article 10c shall include:
 - a. number of CleanSeaNet possible pollution incidents detected ■ ;
 - b. number of CleanSeaNet possible pollution incidents verified *on-site* by the Member State;
 - ba. number of CleanSeaNet possible pollution incidents verified by other means by the Member State;**
 - c. number of confirmed pollution incidents after verification (detailed per area: territorial waters, EEZ, high seas);
 - d. number of identified offenders;
 - e. number of cases where a penalty was imposed.

 - (3) *A summary, solely for reference purposes, of relevant parts of Marpol 73/78, which shall be updated whenever there are changes to Marpol 73/78 relevant for this Directive.*
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