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REPORT

from:	the Shipping Working Party
dated	27 May 2004
to:	the Permanent Representatives Committee

No. Cion prop.:	7312/03 MAR 35 ENV 155 CODEC 303 DROIPEN 19
No. prev. doc.	9789/04 MAR 91 ENV 298 DROIPEN 20 CODEC 762

Subject:	Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences
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1. The TTE Council on 9 October 2003 held a policy debate on the above proposal, which the Commission had presented on 7 March 2003 as a response to the European Council requests following the Prestige accident. A progress report was sent to the TTE Council on 5 December 2003.

The European Parliament agreed its opinion in first reading on 13 January 2004.

The Brussels European Council on 21-22 March 2003 called for "the adoption, before the end of 2003, based on the Commission's most recent proposal, of a system of sanctions, including criminal sanctions, for pollution offences on the appropriate legal basis".

In May 2003, the Commission proposed a parallel 3rd pillar instrument, a Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution.

2. During the Irish Presidency the examination of the proposal continued intensively, leading to a new approach which the Shipping Working Party has examined after the meeting of the Permanent Representatives Committee on 28 April 2004, in order to seek agreement, using the Community's rights under the UNCLOS Convention, whilst complying with the Marpol Convention.
3. The compromise text as it stands following the most recent Working Party meeting is set out in Annex. The delegations who have expressed themselves have made it clear that, pending reconsideration of the file at the Council on 11 June, they maintain their positions and reservations regarding the text on the table.

The following outstanding issues can be highlighted:

a) Discharges resulting from an accident (art. 3b, p. 8)

The Presidency compromise exercises the Community's rights under Article 211(4)/UNCLOS by lifting the exception provided for in Marpol for discharges resulting from accidents in the internal waters and territorial seas of the Member States. It however considers that this exception should be respected for other sea areas.

ES/FR/IT/PT/CION are of the view that the exception for discharges resulting from an accident should also be removed in international straits and in the exclusive economic zone or equivalent sea area, possibly however protecting the owner and the master of the ship if they have met the Marpol conditions.

GR/MT/PL/UK on the contrary consider that the Marpol regime should be applied in all sea areas and that Annex I Regulation 11(b) and Annex II Regulation 6(b) do clearly state that the discharge is permitted if (i) reasonable precautions are taken to minimise the pollution and (ii) the owner or master does not act with intent to cause damage, or recklessly and with knowledge that damage would probably result". CY/GR/PL/UK suggested that, if the Community is dissatisfied with the exceptions provided for in Marpol, then it should adopt a common approach and negotiate in the IMO for the necessary changes to the Convention.

b) Reference to criminal sanctions and related wording

The Commission maintains a reservation on the deletion of the reference to criminal sanctions in the text of the Directive, as well as on the related wording of "infringement" instead of "offence".

The Presidency has pointed to two recent precedents ¹ where the Commission has accepted to lift its reservation on the deletion of criminal sanctions from a 1st pillar instrument in order to allow for adoption of the act, whilst inscribing a unilateral statement to the minutes of the Council. CION responded that these precedents are irrelevant as the primary purpose of this Directive is to establish criminal sanctions, which is not the case for the precedents cited.

c) Exoneration of civil servants (footnote 3 to art. 2, p. 7)

MT, supported by CY/UK, wants to exonerate civil servants performing acts of public authority from the scope of the Directive. It has therefore suggested a definition of "natural person".

¹ Regulation of the European Parliament and of the Council on official feed and food controls adopted by Council on 26 April 2004, together with the following unilateral statement by the Commission: "The Commission considers that the use of penal sanctions would be an important strengthening of controls on food and feed operators. The Commission refutes the Parliament's (and Council's) view that Article 55(2) and (3) relate to the third pillar. On the other hand, it notes that this issue has already been submitted to the Court of Justice for determination (in another case). In these circumstances and taking into account the overall political context of this procedure, the Commission is prepared to withdraw Article 55(2) and (3) of this current proposal pending the Court's determination of this issue and reserves the right to propose again measures providing for criminal sanctions in this field." (doc. 7306/04 + ADD 1 + ADD 2)

Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights adopted by Council on 26 April 2004, together with the following unilateral statement by the Commission: "The Commission considers that effective action against counterfeit and piracy requires criminal sanctions for serious infringements which are intentional and committed for commercial purposes. It also considers, in line with Article 20 of its original proposal that where necessary to achieve a Community objective, such measures may be adopted under the powers conferred for the purposes of achieving the aims set out in Article 95 of the Treaty establishing the European Community. Consequently, the Commission will examine the possibility to propose in due course further measures providing for criminal sanctions in this field." (doc. 8285/04 + ADD 1)

d) Proceedings for enforcement by coastal States (art. 5, pp. 9 – 10)

ES/FR/IT/PT point to Article 220/UNCLOS giving them rights to institute proceedings, including in some cases detention of the vessels, in the case of suspected major pollution by a transit vessel. They have suggested including such a reference in article 5, so as to make the use of such rights compulsory for all Member States. Other Member States highlighted the risk for implementation problems if that would be the case.

e) Insurability of fines

FR/CIION maintain a reservation on the deletion of article 6.6 of the Commission proposal referring to the prohibition to make fines insurable.

4. The Committee of Permanent Representatives is invited to address and streamline the outstanding issues, on the basis of the annexed text, in order to facilitate debate and possible agreement at Council.

Draft

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on ship-source pollution and on the introduction of sanctions for infringements ²
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

[...]

- (4a) **To that end it is essential to approximate existing legal provisions, in particular, on the one hand, the precise definition of the infringement in question and the cases of exemption, which is the subject of this Directive and, on the other hand, minimum rules for penalties, liability and jurisdiction, which is the subject of Council framework Decision 2004/./JHA to strengthen the criminal law framework for the enforcement of the law against ship pollution;**
- (4b) **The purpose of this Directive is to provide a definition of discharges and consequently to render more effective the implementation of framework Decision 2004/.../JHA in order to prevent that infringement;**
- (5) **Neither the international regime for civil liability and compensation of oil pollution nor that relating to pollution by other hazardous or noxious substances provide sufficient dissuasive effects to discourage the parties involved in the transport of hazardous cargoes by sea from engaging in substandard practices; the required dissuasive effects can only be achieved through the introduction of sanctions applying to any person who causes or contributes to marine pollution; sanctions should be applicable not only to the shipowner or the master of the ship, but also the owner of the cargo, the classification society or any other person involved ³;**

² Changes to the doc 9789/04 are highlighted in bold and [...].

³ DE reservation on the last sentence.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Purpose

1. The purpose of this Directive is to ensure that persons responsible for ship-source pollution are subject to appropriate sanctions, 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 against ship-source pollution in conformity with international law.

Article 2

Definitions

For the purpose of this Directive:

1. "Marpol 73/78" shall mean the International Convention for the prevention of pollution from ships, 1973 and its 1978 Protocol, in its up-to-date version;
2. "Polluting substances" shall mean substances covered by annexes I (oil) and II (noxious liquid substances in bulk) of Marpol 73/78;
3. "Discharge" shall mean any release howsoever caused from a ship, as referred to in article 2 of Marpol 73/78;
4. "Ship" shall mean 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. "Person" shall mean natural or legal person;

6. “Legal person” shall mean any legal entity having such status under the applicable national law, except for States or any other public bodies acting in the exercise of their prerogative of public power, as well as public international organisations.

4

Article 3

Scope

1. This Directive shall apply, in accordance to international law, to discharges of polluting substances in:
- (a) the internal waters, including ports, of a Member State, insofar as the MARPOL regime is applicable;
 - (b) the territorial sea of a Member State;
 - (c) straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of the 1982 United Nations Convention on the Law of the Sea, to the extent a Member State exercises jurisdiction over such straits;
 - (d) the exclusive economic zone or equivalent zone of a Member State, established in accordance with international law; and
 - (e) the high seas.

⁴ MT, supported by CY/UK, requests the introduction of the following definition:
"(7) 'Natural person' shall mean any person having such status under the applicable national law, except for persons in the exercise of the functions of their office when performing acts of public authority on the order and on the account of the States they serve or of any of the other bodies acting in the exercise of their prerogative of public power."
Legal Service of the Council **DELETED**.

2. This Directive shall apply to discharges of polluting substances from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service.

Article 3a

Infringements

Member States shall ensure that ship-source discharges of polluting substances into any of the [...] areas referred to in Article 3.1, are regarded as infringements.

Article 3b

Exceptions

1. A discharge of polluting substances into any of the [...] areas referred to in Article 3.1 shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 11(a) or 11(c) or in Annex II, Regulations 6(a) or 6(c) of Marpol 73/78.
2. A discharge of polluting substances into the [...] areas referred to in Article 3.1.c), d) and e) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.⁵
3. A discharge of [...] polluting substances into any of the [...] areas referred to in Article 3.1 shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulations 9 or 10 or in Annex II, Regulation 5 of Marpol 73/78.

⁵ Suggestion by the Presidency of a text that might be acceptable to ES/FR/IT/PT/CION: delete this paragraph and replace it with the following Article 3c:

"Article 3c

Exceptions for discharges resulting from damage to a ship or its equipment

1. A discharge of polluting substances into the high seas referred to in Article 3.1.e) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.
2. A discharge resulting from damage to a ship or its equipment into the areas referred to in Article 3.1.c) and d) shall be regarded as an infringement if it is the consequence of intent, recklessness or negligence."

Article 4

Enforcement measures with respect to ships within a port of a Member State

1. If irregularities or information give rise to suspicion that a ship which is voluntarily within a port or at an off-shore terminal of a Member State has been engaged 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, taking into account the relevant guidelines adopted by the International Maritime Organisation (IMO) is undertaken in accordance with its national law.
2. As far as the inspection referred to in paragraph 1 reveals facts that could indicate an infringement within the meaning of Articles 3a, the competent authorities of that Member State and of the flag State shall be informed.

Article 5

Enforcement measures by coastal States with respect to ships in transit

1. If the suspected discharge of polluting substances takes place in the [...] areas referred to in Article 3.1. b), c), d) or e) and the ship which is suspected of the discharge does not call at a port of the Member State holding the information relating to the suspected discharge, the following shall apply:
 - a) If the next port of call of the ship is another Member State, the Member States concerned shall co-operate closely in the inspection referred to in Article 4.1 and in deciding on the appropriate administrative measures in respect of any such discharge;
 - b) If the next port of call of the ship is a port of a State outside the Community, the Member State shall take the necessary measures to ensure that the next port of call of the ship is informed about the suspected discharge and shall request the State of the next port of call to take the appropriate measures in respect of any such discharge.

2. **In any case**, the authorities of the flag State shall be informed.

Article 6

Sanctions

1. Member States shall take the necessary measures to ensure that the infringements referred to in Articles 3a are subject to effective, proportionate and dissuasive sanctions.
2. Each Member State shall take the measures necessary to ensure that the sanctions referred to in paragraph 1 apply to any person who is found responsible of an infringement as referred to in Articles 3a.⁷

Article 7

Compliance with international law

Member States shall apply the provisions of this Directive without any discrimination in form or in fact among foreign ships and in accordance with applicable international law, including Section 7 of Part XII of the 1982 United Nations Convention on the Law of the Sea, and they shall promptly notify the flag State of the vessel and any other State concerned of measures taken in accordance with this Directive.

⁶ Suggestion by the Presidency of a text that might be acceptable to ES/FR/IT/PT/CION: include a reference to the mandatory implementation of Article 220(6)/UNCLOS in the case of a suspected discharge of polluting substances into the areas referred to in Article 3.1.b), c) or d).

⁷ DE request to delete this paragraph.

Article 8

Accompanying measures

For the purposes of this Directive, Member States and the Commission shall co-operate, where appropriate, in close collaboration with the European Maritime Safety Agency and, where appropriate, in the framework of the action programme to respond to accidental or deliberate marine pollution as set up by Decision N° 2850/2000/EC⁸ in order to:

- (a) develop the necessary information systems required for the effective implementation of this Directive;
- (b) establish common practices and guidelines on the basis of those existing at international level for, in particular:
 - the monitoring and early identification of ships discharging polluting substances in violation of this Directive, including, where appropriate, on-board monitoring equipment;
 - reliable methods of tracing polluting substances in the sea to a particular ship; and
 - the effective enforcement of this Directive.

Article 9

Reporting

Every three years, Member States shall transmit a report to the Commission on the application of this Directive by the competent authorities. Based on these reports, the Commission shall submit a Community report to the European Parliament and the Council.

⁸ Decision No 2850/2000/EC of the European Parliament and of the Council of 20 December 2000 setting up a Community framework for co-operation in the field of accidental or deliberate marine pollution OJ L 332, 28.12.2000, p. 1.

Article 10

Committee

1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS), created by article 3 of Regulation (EC) No 2099/2002 of 5 November 2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS).⁹
2. Where reference is made to this paragraph, articles 5 and 7 of Decision 1999/468/EC¹⁰ shall apply, having regard to the provisions of article 8 thereof. The period laid down in article 5.6 of Decision 1999/468/EC shall be set at three months.
3. The Commission shall regularly inform the Committee set up by Decision 2850/2000 of any proposed measures or other relevant activities concerning the response to marine pollution.

Article 11

Amendment procedure

1. [...]
2. The amendments to the Marpol 73/78 referred to in **Article 2** may be excluded from the scope of this Directive, pursuant to article 5 of Regulation (EC) No 2099/2002.

Article 12

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than ¹¹ and forthwith inform the Commission thereof.
2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

⁹ OJ L 324, 29.11.2002, p.1.

¹⁰ OJ L 184, 17.7.1999, p. 23.

¹¹ 18 months following the date of its entry into force.

Article 13

Entry into force

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

Article 14

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President

Summary, for reference purposes, of the Marpol 73/78 discharge regulations relating to discharges of oil and noxious liquid substances, as referred to in article 2.2

[...] ¹²

¹² The content of this annex is not deleted. It encompasses pages 18 to 25 of the Commission proposal, not repeated in this document. An amendment has however been brought to these pages: the texts referred to in footnotes 20 and 21 of the Commission proposal are inserted.