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#### NOTE

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From:	General Secretariat of the Council
To:	Working Party on Shipping
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 - Presidency non-paper

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In view of the Shipping Working Party meeting on the 29 January 2024, delegations will find attached a Presidency non-paper related to the outcome of the third technical meeting with the European Parliament on 25 January 2024, and to the preparation of the fourth technical meeting on 30 January 2024.

## 1. INTRODUCTION

1. The third technical meeting took place on 25 January.
2. Below are some compromise proposals as a result of that meeting for the consideration of delegations. An oral debrief, going more into detail on the discussions, will be provided.

## 2. COMPROMISE PROPOSALS / OPTIONS

3. **Possibility to impose fines on legal persons / natural persons / companies as well as liability / responsibility, including secondary liability**

### Row 43

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.

### Row 66

2. Each Member State shall take all necessary measures to ensure that **any company, natural or legal person**, ~~or those that may be held liable~~ having committed an infringement within the meaning of paragraph 1, is held liable.

### Row 81-83

1. Without prejudice to the obligations of Member States under Directive (EU) 2023/xxxx, Member States shall lay down ~~in their national law~~ a system of administrative penalties 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 at the time of the infringement. ~~+~~**

3. **Where another natural or legal person committed the infringement, Member States shall ensure that penalties can be imposed on such persons in accordance with the provisions of this Directive.**

*The purpose is to simplify the provisions as much as possible and make their implementation as straightforward as possible.*

#### 4. Effective application of penalties

##### Row 90

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, **as appropriate**, all relevant circumstances of the infringement, ~~including but~~ not limited to:

*With this less strict provision, could Member States agree to also include “the [degree of] culpability”?*

#### 5. Verification rate

##### Row 107

d) within three years from the date of transposition of this Directive, ensure that competent authorities **digitally analyse all high confidence** alerts and verify **at least [xx%]** of those **high confidence** alerts sent by CleanSeaNet every year, 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.

*Compromise floated by EP during the meeting (though proposing 50%). To be read in conjunction with the relevant recitals below.*

##### Row 23

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 Council<sup>1</sup> (‘SafeSeaNet’) and the Inspection Database set up by Directive 2009/16/EC of the European Parliament and of the Council<sup>2</sup> (‘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, could 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. In order to ensure the effective monitoring of the Directive’s implementation by all Member States, **a verification rate of [xx%] of the high confidence alerts** sent by CleanSeaNet should be ensured by each Member State within the first three years from the transposition of this Directive. **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 to Marpol 73/78.** 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. 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.

*In this recital, most important the addition of “on-site verification” as one means among others for verification; the re-introduction of a reference to a percentage; the use of “high confidence alerts” with a definition that the high confidence alerts should be limited to Annex I to Marpol, i.e. oil, thus significantly reducing the number of relevant alerts.*

#### Row 26a

It is acknowledged that there is a limitation in the available capacity and resources to detect, verify and collect evidence in respect of discharge of certain polluting substances at source. These constraints should be taken into account in Member States’ implementation and enforcement of this Directive.

*With the understanding that it is not technology that is unavailable, but rather capacity and resources (human/material/financial), the wording is proposed to be changed in this respect.*

## **6. Training**

#### Row 122

The Commission shall, ~~at the request of a Member State~~ **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.

*Commission original proposal, but with the addition of reference to EMSA and, most importantly, cooperation with Member States, so that Member States’ needs are taken duly into account.*

## 7. Evaluation and review

### Row 140

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 pollution from ships subject to present and future provisions in Marpol 73/78, **such as marine plastic litter, loss of plastic pellets and underwater noise.**

*Based on general approach text, but with addition of some examples that the review could encompass. It should be noted that EP seems willing to give up on its specific reporting requirements etc. for lost containers.*

### Row 31

Discussions are ongoing at the IMO regarding new environmental issues in relation to international shipping, resulting in ~~both~~ water ~~and air~~ 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, loss of plastic pellets and underwater noise.** 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.

*Based on general approach text, but with addition of some examples that the review could encompass (same as in proposal for row 140 above). Reference to air pollution has been taken out in line with general approach article. "If appropriate" reinstated to preserve Commission right of initiative.*

## 8. IMO

### Row 13b

Member States should work within the IMO to make IMO conventions, including Marpol 73/78 and its annexes, as widely accessible as possible to the public. ~~{...}~~

*Same compromise as proposed for last Shipping Working Party, but with the part on transparency deleted. This could be combined with a new point (3) in Annex II (the Commission Union-wide overview, which will be a web site) which could read: **"(3) A summary, solely for reference purposes, of relevant parts of Marpol 73/78"**. This could avoid the whole issue of delegated acts and inclusion of Marpol in a separate annex, with all the legal and other complications this would entail.*

3. **CONCLUSION**

9. Delegations are invited to consider the above compromise proposals and give directions for the way forward.

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