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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Shipping
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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 - First Presidency compromise proposal

In view of the Shipping Working Party meeting on 15 November 2023, delegations will find attached a first Presidency compromise proposal for the above-mentioned proposal.

Changes to the Commission proposal are indicated in yellow highlight.

~~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, including criminal penalties, for pollution offences~~

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 (NEW TITLE)

Comment Pcy. The focus of this directive lays on administrative penalties and not criminal penalties.

(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.

(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.

(3) Since the adoption of Directive 2005/35/EC of the European Parliament and of the Council, 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 **with due regard to the exclusion of dumping under the London Convention of 1972 and its Protocol**. These changes as well as the lessons learned from the implementation of Directive 2005/35/EC should be taken into account.

Comment Pcy. Dumping as per London Convention/Protocol excluded

(4) Directive (EU) 2019/883 of the European Parliament and of the Council 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.

(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 (SOx) emissions. Annex VI regulate the residue ~~and discharge water~~ from EGCS, either by prohibiting their discharge at sea and requiring their delivery to adequate port reception facilities (in the case of EGCS residue from close loops systems) ~~or regulating the conditions for their discharge (in the case of discharge water from open loop systems).~~ Directive (EU) 2016/802 of the European Parliament and of the Council transposes international SOx standards in Union law, while Directive (EU) 2019/883 ensures that EGCS residue is delivered in port reception facilities. Since EGCS residue ~~and discharge water~~ may cause pollution to the marine environment, the penalties provided under Directive 2005/35/EC should apply in case of illegal discharges. ~~For those reasons, the scope of Directive 2005/35/EC should be extended to EGCS residue and discharge water, taking into account the guidelines developed by the IMO, without prejudice to the provisions of Directive (EU) 2016/802 setting out any stricter discharge norms and penalties therefor.~~

Comment Pcy. Para with two parts the first being general and the second for closed loop scrubbers.

(6bis) The “discharge waters”, as defined in both MEPC.1/Circ.899 and Resolution MEPC.340(77), could be delivered overboard if they are compliant with discharge criteria set out in the guidelines for exhaust gas cleaning systems. However, where local or regional sensitive waters/environment exist, the discharge waters from EGCS may potentially affect the ecosystem although they are complying with MARPOL. In this case, the Member State may impose restrictions or limitations using the impact assessment process contained in the guidelines developed by the IMO. In that case the “discharge waters” may cause pollution to the marine environment, and the administrative penalties provided under Directive 2005/35/EC should apply in case of illegal discharges.

Comment Pcy. Para for open loop scrubbers

(7) Directive (EU) 2023/xxxx 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 Council, 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. 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*.

(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, ~~unless the company can prove that the master of the ship or a member or members of the crew, the latter not acting under the responsibility of the master, was responsible for the discharge.~~ In this context, the company of 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'), implemented in Union law by virtue of Regulation (EC) No 336/2006 of the European Parliament and of the Council. 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 responsible 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. **For criminal penalties, the Member State adhere to the obligations set out in Directive (EU) 2023/xxxx, the revised Environmental Crime Directive which is currently under negotiation. To this end, article 8(2) and 8(3) of this Directive will only apply in the case of imposing administrative penalties and leaves the decision to the Member State on the manner of imposing criminal penalties.**

Comment Pcy. Not to preclude the way to proceed and also to separate from the environmental crime directive

(10) National administrative and judicial authorities should take into account all relevant circumstances when determining the level of penalties to be imposed to 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 the establishment of concrete criteria for the application of penalties for discharges of different polluting substances. In order to ensure the uniform conditions for the application of penalties, implementing powers should be conferred to the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council. The examination procedure should be used for the adoption of these implementing acts.

(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 and experience 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.

(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 Council²⁷ ('SafeSeaNet') and the Inspection Database set up by Directive 2009/16/EC of the European Parliament and of the Council²⁸ ('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 to 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 **10% per year of** the alerts sent by CleanSeaNet should be ensured by each Member State within the first three years from the transposition of this Directive. 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.

(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 of 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.~~** The Commission should continue to 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 on the enforcement of this Directive.

Comment Pcy. COM to provide exchange of experiences

~~(15) The European Maritime Safety Agency ('EMSA') established by Regulation (EU) xxx/xxx¹ should provide the necessary support to the Commission to ensure the implementation of this Directive.~~

Comment Pcy. EMSA not referred to in the text

¹ OJ L xxxx.

(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 burden 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. To the extent that such information relates to penalties imposed to 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.

(16a new) It is acknowledged that there is a limitation in the available technology 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.

Comment Pcy. Available technology is a limitation to expand further. Once it is developed and be usable it could then be a tool to detect infringements

(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 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 **in of** ship-source pollution discharges and 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 and include the information listed in Annex II of Directive 2005/35/EC. Directive 2003/4/EC of the European Parliament and of the Council 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 Council 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. 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. . **This Directive should be without prejudice to 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 Council.** 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) 2018/1725 of the European Parliament and of the Council, 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.

(20) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 **of the European Parliament and of the Council** and delivered an opinion on [xx xx 2023].

(21) Discussions are ongoing at the IMO regarding new environmental issues in relation to international shipping, resulting in both water and air pollution. ~~These include the water pollutants of marine litter, such as the loss of containers and plastic pellets, and underwater noise and air pollutants such as black carbon.~~ These discussions may result in new regulations under MARPOL 73/78. ~~Moreover, Directive 2008/56/EC of the European parliament and of the Council³⁴ requires Member States to achieve good environmental status in the marine environment, which includes, amongst others, marine litter and underwater noise from ships as qualitative descriptors. Relatedly, Directive (EU) 2023/xxxx sets limit values for nitrogen dioxide (NO₂) resulting from nitrogen oxide (NO_x) emissions. Shipping activities contribute to higher NO₂ levels in coastal and port areas. Against this background, a future review of Directive 2005/35/EC should take into account new developments and the Commission should examine the possibility of modifying the scope of this Directive, if appropriate, in view of any new international standards under MARPOL 73/78.~~ A future review should assess the possibility of modifying the scope of Directive 2005/35/EC, ~~if appropriate, to incorporate SO_x and NO_x emissions, as regulated in Annex VI to MARPOL, based on the experience gained in implementing the Directive (EU) 2016/802 and on the development and maturity of monitoring and detecting SO_x and NO_x emissions from ships,~~ with a view to ensure a coherent, efficient and effective enforcement regime, as well as the imposition of dissuasive penalties therefor, in line with the Zero Pollution Action Plan and, in particular, Flagship 5 thereof, 'Enforcing zero pollution together'.

[Comment Pcy.](#) Review clause modified and made general

(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 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) ~~Therefore,~~ Directive 2005/35/EC should be amended ~~accordingly.~~

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 **those persons** responsible for illegal discharges of polluting substances, **including the companies**, 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.

Comment Pcy. Neutral text provided

2. This Directive does not prevent Member States from taking more stringent measures in conformity with international law, by providing for administrative or criminal penalties in accordance with their national law.

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 and its 1978 Protocol, 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;

Comment Pcy. "polluting substances" do not exist in MARPOL convention, however the text has been used in the current directive. Harmful substances is defined in Article 2 of the directive but when it was drafted it had the sense of Annex III. It is recommended to stick to the old terminology and extend it

3. 'Exhaust Gas Cleaning System residue' **shall** mean 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 **discharged overboard** 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;

Comment Pcy. The modified definition includes the residues that are added to the discharge water without saying that the discharge water with the residues is a residue because it depends on the concentration.

3a. (a) 'discharge' **shall** mean 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 **legal persons or** 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.

Article 3

Scope

1. This Directive shall apply, in accordance with international law, to discharges of polluting substances in:

- (a) the internal waters, including ports, of a Member State, in so far 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 that 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.

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 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 harmful substances subject to regulation by Annex I to MARPOL 73/78, **they it-satisfies** the conditions set out in Annex I Regulations 15, 34, 4.1 or 4.3 to MARPOL 73/78 **and section 1.1 of part II-A of the International Code for Ships Operating in Polar Waters (Polar Code));**

[Comment Pcy](#). All to be corrected like this

(b) for polluting substances subject to regulation by Annex II to MARPOL 73/78, ~~it~~ **satisfies they satisfy** the conditions set out in Annex II Regulations 13, 3.1.1 or 3.1.3 to MARPOL 73/78 **and section 2.1 of part II-A of the International Code for Ships Operating in Polar Waters (Polar Code);**

(c) for polluting substances subject to regulation by Annex III to MARPOL 73/78, ~~it~~ **satisfies 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, ~~it~~ **satisfies 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 International Code for Ships Operating in Polar Waters (Polar Code);**

(e) for polluting substances subject to regulation by Annex V to MARPOL 73/78, ~~it~~ **satisfies 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 International Code for Ships Operating in Polar Waters (Polar Code); and

(f) for Exhaust Gas Cleaning System residue, ~~it~~ **satisfies they satisfy** the conditions set out in Annex VI Regulations **4, 14.1, 14.4, 14.6 and 3.1.1 to MARPOL 73/78, the relevant applicable IMO Guidelines, including MEPC.1/Circ 883/Rev 1 and Resolution MEPC.340(77) in its up to date version.**

2. Each Member State shall take the necessary measures to ensure that any company, or ~~the~~ **any other legal or natural persons** having committed an infringement within the meaning of paragraph 1 ~~is~~ **are** held liable therefor.

Comment Pcy. Regarding the company responsibility and liability, the objectives of the ISM Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property. Safety management objectives of the company should establish safeguards against all identified risks. So, any pollution incident from a ship implies a failure of the ISM system of the company. So, ISM system cannot be used to establish any kind of responsibility of crew members, as ISM has failed.

3. A discharge of polluting substances subject to regulation by Annexes I, II, [IV], and VI to MARPOL 73/78 into the areas set out in Article 3(1) points (c), (d) and (e) shall not be regarded as an infringement when the conditions indicated in MARPOL Annexes respective exceptions are fulfilled.

Comment Pcy. We have tried to merge all in one article since the text of article 5 is redundant. Doing this the IT proposal to add exception when there is a need to secure the safety of the ship is not needed

The text proposed by COM in article 5.1 shows the following:

<i>Area\Annex</i>	<i>I</i>	<i>II</i>	<i>III</i>	<i>IV</i>	<i>V</i>	<i>VI</i>
<i>a</i>						
<i>b</i>						
<i>c</i>	<i>excepted</i>					<i>excepted</i>
<i>d</i>						
<i>e</i>						

Noting that Areas a) b) are not incorporated because due to national legislation there may be a possibility to go beyond. Annex IV could be incorporated because it has similar text, Annex III has a different text and Annex V contains the exceptions only for polar waters.

Article 5 **Exceptions**

1. A discharge of polluting substances subject to regulation by Annexes I, II and VI to MARPOL 73/78 into the areas set out in Article 3(1) points (c), (d) and (e) shall not be regarded as an infringement for the company, the master or the crew, if both of the following conditions are fulfilled:

(a) the discharge results from damage to a ship or its equipment;

(b) all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge;

2. Paragraph 1 shall not apply of the where the company, or the master or the crew responsible for the damage acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 5a **Criminal offences**

1. Member States shall ensure that infringements within the meaning of Articles 4 and 5 are regarded as criminal offences.

2. Paragraph 1 shall not apply to minor cases, where the act committed does not cause deterioration in the quality of water.

3. Repeated minor cases that do not individually but in conjunction result in deterioration in the quality of water shall be regarded as a criminal offence, if committed with intent, recklessly or with serious negligence.

Article 5b

~~Inciting, aiding and abetting.~~

~~Member States shall ensure that any act of inciting, or aiding and abetting an offence committed with intent and referred to in Article 5a(1) and (3), is punishable as a criminal offence.~~

Article 6

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

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, taking into account the relevant guidelines adopted by the International Maritime Organisation (IMO), is undertaken in accordance with its national law.

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 competent authorities of that Member State and of the flag State shall be informed.

3. An indicative list of irregularities or information **that may lead to an inspection** within the meaning of paragraph 1 is provided in Annex I to this Directive.

Comment Pcy. This contains an obligation to inspect. We have to take into account the current workload of the port State control. Inspectors always have a margin of appreciation and every case is different. In many cases the proposed criteria will lead to an inspection however this can't be an obligation. In addition, the only obligation to inspect under MARPOL is for the flag State. Port and coastal State may inspect at their own advice.

Article 7

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 in another Member State, the Member States concerned shall cooperate closely in the inspection referred to in Article 6(1) and in deciding on the appropriate 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. Where there is clear, objective evidence that a ship navigating in the areas referred to in Article 3(1)(b) or (d) has, in the area referred to in Article 3(1)(d), committed an infringement resulting in a discharge causing major damage or a threat of major damage to the coastline or related interests of the Member State concerned, or to any resources of the areas referred to in Article 3(1)(b) or (d), that State shall, subject to Part XII, Section 7 of the 1982 United Nations Convention on the Law of the Sea and provided that the evidence so warrants, submit the matter to its competent authorities with a view to instituting proceedings, including detention of the ship, in accordance with its national law.

3. In any event, the authorities of the flag State shall be informed.

Article 8

Administrative penalties

1. Without prejudice to the obligations of Member States under Directive (EU) 2023/xxxx Member States shall lay down a system of administrative penalties for the breach of national provisions implementing Articles 4 and Article 5(2) of this Directive and shall ensure that they are applied. The administrative penalties provided for shall be dissuasive, effective and proportionate **in line with the polluter pays principle.**

2. Member States shall ensure that the **administrative** penalties introduced in the transposition of this Directive include fines imposed on the company at the time of the infringement **unless the investigation identifies other legal or natural person as responsible for the infringement the company can prove that that the master or, if not acting under the responsibility of the master, the crew another natural or legal person was responsible for the infringement.**

Comment Pcy. Company to prove is complex. In order to allow for other persons to be included text was added, but these would be held responsible only when the investigation identifies this

~~3. In the case that it is proven that the master or, if not acting under the responsibility of the master, the crew was responsible for the commission of the relevant infringement, Member States shall ensure that penalties are imposed to such persons in accordance with the provisions of this Directive.~~

Comment Pcy. To be deleted in line with the previous paragraph.

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 fine is 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 supervisory authorities. In any event, the fines imposed shall be effective, proportionate and dissuasive. 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.

Comment Pcy. To allow for a parallel application system. This alternative can not include prison penalties because off the territorial sea prison is excluded.

Article 8a

Penalties against natural persons

Each Member State shall take the necessary measures to ensure that the offences referred to in Article 5a(1), and (3) and Article 5b are punishable by effective, proportionate and dissuasive criminal penalties.

Article 8b

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for the criminal offences referred to in Article 5a(1) and (3) and Article 5b, committed for their benefit by any natural person acting either individually or as part of an organ of the legal person, and who has a leading position within the structure of the legal person, based on:

- (a) a power of representation of the legal person;
- (b) authority to take decisions on behalf of the legal person; or
- (c) authority to exercise control within the legal person.

2. Each Member State shall also ensure that a legal person can be held liable where lack of supervision or control by a natural person referred to in paragraph 1 has made the commission of a criminal offence referred to in Article 5a(1) and (3) and Article 5b possible for the benefit of that legal person by a natural person under its authority.

3. The liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons involved as perpetrators, inciters or accessories in the criminal offences referred to in Article 5a(1) and (3) and Article 5b.

Article 8c

Penalties against legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 8b is punishable by effective, proportionate and dissuasive penalties.

Article 8d

Effective application of penalties

1. Member States shall ensure that, when determining and applying the type and level of administrative penalty to a natural or legal person found by competent authorities to be responsible, **in accordance with Article 8**, for an infringement within the meaning of Articles 4 and 5(2), the competent authorities **may** take into account all relevant circumstances of the infringement, **including but not limited to:**

(a) the nature, gravity and the duration of the discharge;

(b) the degree of culpability of the responsible person;

(c) the damage caused from the discharge to the environment or human health;

(d) the financial strength of the responsible person, taking into account, as appropriate, the annual world-wide turnover of the responsible legal person;

(e) the economic benefits generated or expected to be generated for the responsible person from the infringement.

(f) measures taken by the responsible person to prevent the discharge or mitigate its impacts.

(g) the level of cooperation of the responsible 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 infringement by the responsible person.

Comment Pcy. These criteria are a first step to create uniformity and helps creating a level playing field. It's important that a general set of criteria are determined but it should be made clear that also other relevant criteria could be used when required. There should be uniformity in the fines somehow.

In relation with cumulative effects, cases that do not individually but in conjunction result in deterioration in the quality of water shall be regarded as a criminal offence, if committed with intent, recklessly or with serious negligence.

Comment Pcy. We have tried to solve the matter of minor case but a minor case can be understood in many different manners. We prefer to change repeated minor cases with cases with a cumulative effect

~~2. In order to ensure the uniform application of this Article, the Commission may, by means of implementing acts, lay down detailed rules on the criteria to be considered by Member States when applying penalties in respect of each type of polluting substance pursuant to this Directive. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 13.~~

Comment Pcy. Rules to be provided now. Otherwise MS may develop their own acts

Article 9

Compliance with international law

Member States shall apply the provisions of this Directive without any discrimination in form or in fact against 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.

Article 10

Exchange of information and experience

1. For the purposes of this Directive, the Member States and the Commission 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/EC (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) as well as through other reporting mechanism such as information reported through the Bonn Agreement, 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 in SafeSeaNet and other Union information databases and tools, including disseminating information on actual or potential discharges of Exhaust Gas Cleaning System residue to the dedicated module of THETIS set up by under Commission Implementing Decision 2015/25338 (THETIS-EU), 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 verify at least 10% of the alerts sent by CleanSeaNet every year according to Member States capabilities, where verify means the follow-up actions by competent authorities of an alert sent by CleanSeaNet, or the reasons for not following up such an alert. Such percentage shall be communicated in advance to the Commission.

Comment Pcy. Since no information of the alerts exist for each country and since a substantial part are false alerts, MS should decide based on their national capabilities.

Verify in this case means “the follow-up by competent authorities of an alert sent by CleanSeaNet or the reasons for not following up such an alert”. An obligation to verify a specific number of alerts could be introduced as a second step, when the CleanSeaNet is improved.

Verification can be done by combining data on the CleanSeaNet alert with other available data such as AIS data and on environmental data on the sea area in question.

~~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.~~

Comment Pcy. Moved to a recital in a similar manner to that agreed for flag States proposal.

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, **once the procedures are being brought to a conclusion:**

- (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;
- (d) information relating to penalties imposed in accordance with this Directive, 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; **and**
- (e) information relating to the provision, under national law, of a right of objection or appeal and to the exercise or not of such a right.**

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, **at the request of a Member State**, 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.

Comment Pcy. In line with the agreed texts in previous Directives.

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 proceedings when applicable**. The overview **may shall** include the information listed in Annex II to this Directive.

Comment Pcy. To be done when the publication of a ship when the proceeding is not completed

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

Article 10d
Protection of **data reporting persons who report potential infringements**

1. The Commission shall develop and maintain a confidential online external reporting channel for receiving reports, within the meaning of Directive (EU) 2019/1937 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, provide feedback and follow-up on those reports in accordance with Directive (EU) 2019/1937.

Comment Pcy. If text needs to be more precise here to refer to national legislation proposals would be needed

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) 2018/1725 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.

Comment Pcy. References to Article 25 of regulation 2018/1725 added.

~~Article 11~~
~~Feasibility Study~~

~~The Commission shall, before the end of 2006, submit to the European Parliament and the Council a feasibility study on a European coastguard dedicated to pollution prevention and response, making clear the costs and benefits.~~

~~Article 12~~
~~Reporting~~

~~Every three years, Member States shall transmit a report to the Commission on the application of this Directive by the competent authorities. On the basis of these reports, the Commission shall submit a Community report to the European Parliament and the Council. In this report, the Commission shall assess, inter alia, the desirability of revising or extending the scope of this Directive. It shall also describe the evolution of relevant case law in the Member States and shall consider the possibility of creating a public database containing such relevant case law.~~

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.**

2. As part of the review, the Commission shall assess the possibility of modifying the scope of this Directive, if appropriate, in view of **among other elements new or updated the international standards for the prevention of air pollution from ships subject to regulation by MARPOL 73/78, **notably sulphur oxide and nitrogen oxide emissions from ships, as well as in view of other standards regulating discharges from ships which have been made subject to regulation by MARPOL 73/78, such as black carbon, marine litter, container loss, loss of plastic pellets and underwater noise.****

Comment Pcy. Inconsistent Proposal due to lack of available technology, uncertainty on the future scope of MARPOL. COM is always open to do so.

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 2099/200242 COSS shall be a committee within the meaning of Regulation (EU) No 182/201143.**
- 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.**

~~Article 14~~
~~Provision of information~~

~~The Commission shall regularly inform the Committee set up by Article 4 of Decision No 2850/2000/EC of any proposed measures or other relevant activities concerning the response to marine pollution.~~

~~Article 15~~
~~Amendment procedure~~

~~In accordance with Article 5 of Regulation (EC) No 2099/2002 and following the procedure referred to in Article 13 of this Directive, the COSS may exclude amendments to MARPOL 73/78 from the scope of this Directive.~~

(new directive)

Article 2
Transposition

1. Member States shall adopt and publish, by *[OP: Please insert a date: **three years one year** 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.

Comment Pcy. As suggested by MS

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/EC⁴⁴ 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*.

Article 5
Addressees

This Directive is addressed to the Member States.

Annex I

Deleted



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/EC, 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.**

ANNEX [II]

INFORMATION TO BE INCLUDED IN THE UNION-WIDE OVERVIEW REFERRED TO IN ARTICLE 10C

(1) For each pollution incident verified and confirmed by a Member State, information in the Union-wide overview published in accordance with Article 10c shall include:

- a. date of the incident;
- b. IMO number or MMSI and flag 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.

Comment Pcy. the publications would not properly represent outcomes for countries that enforce through criminal penalties. Once proceeding is completed the information should contain minimum info. IMO number or MMSI should be provided.

(2) For each Member State, aggregated information contained in the Union-wide overview published in accordance with Article 10c shall include:

- a. number of CleanSeaNet possible pollution incidents detected by the Member State;
 - b. number of CleanSeaNet possible pollution incidents verified on-scene 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.
-