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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Shipping
N° prev. doc.:	ST 15117/23
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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 - Comments by the Netherlands

Delegations will find attached comments by **the Netherlands** on the above proposal.



Comments of the Netherlands on the Ship Source Pollution proposal after SWP 15-16th of November 2023

General position

- First of all we want to voice our appreciation for the hard work of the Presidency on this Directive and the compromises proposed.
- The Netherlands would like to reiterate its support for the review and the broadening of the scope of the Directive.
- The Netherlands firstly wants to ask the presidency whether the current amendments with regards to EGCS provisions changes anything for the applicability of the directive to possible pollution by EGCS. We would like clarity on that.
- The Netherlands repeats and emphasizes its position that the Member States should have flexibility in choosing the manner in which to fulfil the required enforcement objectives of 'dissuasive, effective and proportionate' penalties.
- We therefore believe wording in article 8.1 should be altered, drafting included in this document. It is the right of the Member State to decide which type of penalties are imposed, which is now better reflected in article 8.1 in line with article 1.2.
- We can furthermore support the wording proposed by the presidency in article 8.2, however this is conditional on inclusion of the proposed wording by the Netherlands for recital 9. Drafting included hereunder.
- Regards article 8d.1 we support retaining all criteria a to f, as well as support the new wording in the chapeau which includes "may" and "including but not limited to". We believe this wording offers sufficient flexibility to Member States.
- Finally, we are strongly in favor of a transposition period of four years.
- Having said the above, we are looking forward to the final proposed text of the Presidency, taking our comments into account.

Comments and text proposals per article by NL

Explanation proposals in writing:

Proposed additional wording

Proposed deleted wording

Wording to be retained as is

Recital 9

(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 **where the company was found liable. Member States may also impose fines on other natural or legal persons if they are found responsible of the infringement, 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 only concerns administrative penalties and do not apply to criminal proceedings against natural or legal persons in accordance with national law, taking into account the obligations deriving from the aforementioned Directive (EU) 2023/xxxx and leaves the decision to the Member State on the manner of imposing criminal penalties.**

Justification

There should be flexibility here and touch on the company as well as other possible natural or legal persons. This is brought in line with current article 8.2 proposal. Flexibility should be maintained.

The addition at the end of the recital is a proposal by the NL and has been slightly amended after liaising with legal experts. The meaning does not change.

Article 8

Administrative penalties

1. Without prejudice to the obligations of Member States under Directive (EU) 2023/xxxx³⁶ 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 **should shall ensure that they are applied. The administrative penalties provided for shall be dissuasive, effective and proportionate.**

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 where the company was found liable. Member States may also impose fines on other natural or legal persons if they are found responsible of 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.~~

~~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.~~

Justification:

The obligation to impose administrative penalties under the SSP-Directive would necessitate the creation of an additional and separate administrative sanctioning regime. We believe double enforcement and an increase in the regulatory burden must be avoided. This flexibility should be better reflected in article 8.1, which is currently not in line with the right of Member States to decide on what type of penalty they impose. Therefore we propose drafting to article 8.1.

The Netherlands can agree to the current text in article 8.2, on the condition that additional wording to recital 9 is retained with a few amendments, as follows: *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) of this Directive only concerns administrative penalties and do not apply to criminal proceedings against natural or legal persons in accordance with national law, taking into account the obligations deriving from the aforementioned Directive (EU) 2023/xxxx.*

Article 12a
Evaluation and review

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 **and marine** pollution from ships subject to **present and future regulations 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.**

Justification

we agree with the addition by the presidency and would like to propose to also include marine pollution by ships, not just air pollution.

We were in favor of keeping the former text. However, we can accept a deletion but in that case propose the inclusion of water pollution in addition to air pollution. As to cover a few examples proposed in the original wording that have now been deleted.

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. 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 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.**

Justification

Since this is still a point open to discussion, The Netherlands wants to reiterate its former proposal to delete point b. We believe that this could interrupt enforcement proceedings or lead to unjust accusations. The identification of the ship is indeed shared in PSC, if you do conduct a specific search for that ship. This is different to what is proposed here, where it is not a targeted search but actively published.