



**COUNCIL OF  
THE EUROPEAN UNION**

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**NOTE**

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from: the General Secretariat of the Council  
to: the Shipping Working Group

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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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In Annex, delegations will find a revised draft of the proposal, presented by the Presidency.<sup>1</sup>

Additionally, a joint Council / Commission declaration on a common interpretation of the Marpol 73/78 provisions can be examined.

During the Working Party meeting on 23 January and answering questions by DK, the representative of the Council's Legal Service observed that, in accordance with the case law of the Court of Justice, Community legislation may foresee the introduction of sanctions in order to ensure the application of the obligations established by legislative Community acts (see, a.o. legal opinions 12471/02 JUR 382 PECHE 140, dated 27.09.2002, and 11196/01 JUR 251 COPEN 41,

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<sup>1</sup> All delegations and the Commission have a general scrutiny reservation, DK/F/UK in addition a parliamentary scrutiny reservation.

dated 15.10.2001, and the case law and Community acts mentioned in both opinions). He added that the revised draft of the proposal as presented by the Presidency (doc. 5300/04 dated 19/01/2004) was in line with the traditional approach of the acts adopted by the Council.

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

**Presidency compromise text**<sup>1</sup>

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;**<sup>2</sup>

**(4b) The purpose of this Directive is to provide a definition of illegal discharges and consequently to render more effective the implementation of framework Decision 2004/.../JHA in order to prevent that infringement;**<sup>2</sup>

[...]

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<sup>1</sup> Changes compared to the Commission proposal are presented in **bold** and [...]. Changes compared to docs 5300/04 are additionally presented in *italics* and ~~strikethrough~~.

<sup>2</sup> These new recitals aim at establishing a link with the Council framework Decision, preferably to be adopted and published the same day as this Directive.

**(8a) Suspicion that a ship has been engaged or is engaging in an illegal discharge could be based for instance on irregularities with respect to the oil and other relevant record books, discovered in port State control inspections carried out under Directive 95/21/EC, irregularities or information with respect to the delivery of ship-generated waste or cargo residues according to Directive 2000/59/EC, information relating to potential infringements by the ship, obtained through the procedures foreseen in Directive 2002/59/EC, aerial surveillance or any other information by persons involved in the operation of the ship, including pilots, which suggests irregularities relating to the respect of the obligations under this Directive.**

[...]

HAVE ADOPTED THIS DIRECTIVE:

#### *Article 1*

##### **Purpose**

The purpose of this Directive is to [...] ensure that persons responsible for **violations of the international standards 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.

#### *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. “Illegal discharges” shall mean discharges of **polluting substances** in violation 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 **and** submersibles and floating craft;

[...]

### *Article 3*

#### **Scope**

1. This Directive shall apply, **in accordance with international law**, to illegal discharges [...] 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.
2. This Directive shall apply to illegal discharges **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*

#### *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 ship and any other State concerned of measures taken in accordance with this Directive.**

### *Article 4*

#### **Enforcement with respect to ships within a port of a Member State**

##### *Inspection and enforcement*

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 an illegal discharge [...] in any of the sea areas referred to in Article 3.1, ~~the~~ **that** Member State shall ensure that an appropriate **inspection, bearing in mind the relevant guidelines adopted by the International Maritime Organisation (IMO)** <sup>3</sup> is undertaken in accordance with its national law.
2. [...] <sup>4</sup>
3. *[moved to modified article 5]*
- [2. **Where there are clear grounds for believing that a ship navigating in the territorial sea of a Member State has, during its passage therein, committed an illegal discharge, that Member State shall undertake, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, physical inspection of the ship for matters relating to the illegal discharge and shall, where the evidence so warrants, institute proceedings, including detention of the ship, in accordance with its national law.**

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<sup>3</sup> *IMO Resolution A.787 (19) of 23. November 1995, Procedures for Port State Control, Appendixes 2 and 3 - Guidelines for Investigations and Inspections carried out under Annex I respectively II of Marpol 73/78.*

<sup>4</sup> The examples originally given in Annex II have been included in the new recital 8a.

3. **Where there are clear grounds for believing that a ship navigating in the exclusive economic zone or equivalent zone or the territorial sea of a Member State has, in the exclusive economic zone or equivalent zone of that Member State, committed an illegal discharge, that Member State shall, *as far as practicable*, require the ship to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether an illegal discharge has occurred.**
4. **Where there are clear grounds for believing that a ship navigating in the exclusive economic zone or equivalent zone or the territorial sea of a Member State has, in the exclusive economic zone or equivalent zone of that Member State, committed an substantial illegal discharge causing or threatening significant pollution of the marine environment, that Member State shall undertake, *using for this purpose the best practicable means at their disposal and in accordance with their capabilities*, physical inspection of the ship for matters relating to the illegal discharge if the ship has refused to give information or if the information supplied by the ship is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.**
5. **Where there is clear objective evidence that a ship navigating in the exclusive economic zone or equivalent zone or the territorial sea of a Member State has, in the exclusive economic zone or equivalent zone, committed an illegal discharge causing major damage or threat of major damage to the coastline or related interests of the Member State, or to any resources of its territorial sea or exclusive economic zone or equivalent zone, that Member State shall institute proceedings, including detention of the ship, in accordance with its national law.**
6. **Notwithstanding the provisions of paragraph 5, whenever appropriate procedures have been established, either through the competent international organisation or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the Member State concerned, if bound by such procedures shall allow the ship to proceed.]<sup>5</sup>**

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<sup>5</sup> These paragraphs are the former paragraphs 1 to 5 of Article 5.

*Article 5*

**Enforcement with respect to ships in transit**

***Follow-up of infringements***

**[paragraphs 1 to 5 have been moved to the modified article 4]**

1. As far as the ~~examination~~ ***inspection*** referred to in *Article 4*, paragraph 1 reveals facts that could **indicate** an illegal discharge, **Member States shall ensure that appropriate measures are taken in accordance with their national law.**
  
2. **In the situations referred to in *Article 4*, paragraphs 2 to 5 ~~the previous paragraphs and in the situation where~~** the suspected ***illegal*** discharge takes place in **high seas** 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, ~~as far as practicable,~~ apply:
  - If the next port of call of the ship is another Member State, the Member States concerned shall co-operate closely in the ~~examination~~ ***inspection*** referred to in article 4 paragraph 1 and in deciding on the appropriate administrative measures in respect of any such discharge, **without prejudice to national provisions;**
  
  - 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 ***illegal*** discharge and shall request the State of the next port of call to take the appropriate measures in respect of any such discharge.



## Article 6

### Infringements and sanctions

1. ~~Member States shall ensure that the illegal discharges of polluting substances, the participation in and instigation of such discharge are regarded as [...] offences, when committed intentionally or by **accident at sea, caused by lack of due care, negligence or failure to observe the relevant regulations.**~~
  
- ~~2 1.~~ **Member States shall ensure that the illegal discharge, the participation in and instigation of such discharge in *any area* ~~the exclusive economic zone or high seas, as defined referred to in Article 3, paragraph 1, *d) and e)*~~, are regarded as infringements if ~~the owner or the master acted intentionally, or in case of casualty acted recklessly and with knowledge that damage would probably result.~~**
  
- ~~3 2.~~ **Member States shall ensure that appropriate measures are taken, including administrative action or criminal proceedings in conformity with their national law, against any person (i.e. not only the shipowner but also the owner of the cargo, the classification society or any other person involved) who has been found by *responsible suspected of responsibility for an infringement referred to in paragraph 1, such as the master, the shipowner, the owner of the cargo, the classification society or any other person involved* within the meaning of paragraph 1, shall be subject to sanctions, ~~including, where appropriate, criminal sanctions, in accordance with national law.~~**
  
- ~~4 3.~~ **Member States shall take the measures necessary to ensure that the infringements referred to in paragraph ~~3 2~~ are subject to effective, proportionate and dissuasive sanctions. *Such sanctions* shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the possible economic benefit of the infringements and of producing results proportionate to the seriousness of such infringements, effectively discouraging further illegal discharges of the same kind**

[...]

[5. Fines referred to in this article **possibly imposed as a sanction in accordance with paragraph 4** shall not be insurable.]<sup>6</sup>

[...]<sup>7</sup>

#### *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/EC<sup>8</sup> 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.

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<sup>6</sup> The issue of the insurability of fines could be placed in the framework Directive.

<sup>7</sup> Article 7 moved to new Article 3a.

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

### *Article 9*

#### **Reporting**

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

### *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)<sup>9</sup>.
2. Where reference is made to this paragraph, articles 5 and 7 of Decision 1999/468/EC<sup>10</sup> 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. The annexes of this Directive and the references to Marpol 73/78 may be amended in accordance with the procedure laid down in article 10.2.
2. The amendments to the Marpol 73/78 referred to in paragraph 1 may be excluded from the scope of this Directive, pursuant to article 5 of Regulation (EC) No 2099/2002.

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<sup>9</sup> OJ L 324, 29.11.2002, p. 1.

<sup>10</sup> OJ L 184, 17.7.1999, p. 23.

*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 [...] <sup>11</sup> 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.

*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*

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<sup>11</sup> 18 months following the date of its entry into force.

**ANNEX I TO THE ANNEX**

**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**

[...] <sup>1</sup>

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<sup>1</sup> 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.

[ANNEX II TO THE ANNEX]

[...]

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