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PROPOSAL

from:	European Commission
dated:	12 March 2008
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 for infringements

Delegations will find attached a proposal from the Commission, submitted under a covering letter from Mr Jordi AYET PUIGARNAU, Director, to Mr Javier SOLANA, Secretary-General/High Representative.

Encl.: COM(2008) 134 final



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.3.2008
COM(2008) 134 final

2008/0055 (COD)

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 for infringements**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

Out of concern about the over-frequent illegal operational discharges of polluting substances from ships at sea, and in the aftermath of major accidental oil spills, the Commission presented in 2003 a proposal for a Directive, based on Article 80(2) of the Treaty establishing the European Community, "on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences" and a proposal for a Framework Decision, based on Articles 29, 31 and 34(2)(b) of the Treaty on the European Union, "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution". The proposal for a Directive provided that ship-source pollution should be considered a criminal offence, subject to criminal penalties. The proposal for a Framework Decision mainly aimed at approximating the levels of criminal penalties.

With these two measures, the Commission proposed that the provisions on the nature (criminal) and type (custodial or financial) of penalties should appear in the Community instrument and the provisions on the levels of criminal penalties in the intergovernmental instrument. At the time of the negotiations on the proposals, the splitting between the first and third pillars for criminal-law matters was a controversial issue between the European Union institutions. Eventually, the two instruments were adopted in 2005 along the following lines:

Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements contains a precise definition of the infringements along with the rule that they will "be subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties". The provisions on the nature, type or levels of criminal penalties were included in the parallel Framework Decision 2005/667/JHA.

Following the judgment of 13 September 2005 (case C-176/03) in which the European Court of Justice (ECJ) ruled that under certain conditions the Community legislator could provide for criminal-law-related measures, the Commission decided to bring a case for annulment of Framework Decision 2005/667/JHA, taking the view that the Framework Decision had been adopted on the wrong legal basis (case C-440/05).

On 23 October 2007, the ECJ annulled the Framework Decision, ruling that its articles on the definition of the criminal offence and the nature of the penalties (Articles 2, 3 and 5) could have been adopted on the basis of Article 80(2) of the EC Treaty and that the Framework Decision therefore violated Article 47 of the EU Treaty by encroaching upon the powers of the Community.

After the annulment of the Framework Decision by the ECJ on 23 October 2007, the legal vacuum created concerning a harmonised approach regarding possible penalties in the fight against maritime pollution needs to be filled by provisions adopted on the correct legal basis, namely Article 80(2) of the EC Treaty.

The objective of introducing a system of penalties is to address the rare cases of pollution, where the behaviour of the operator is considered intolerable and must be punished with criminal penalties. Quality operators will benefit from this system, which will make it

possible effectively to hold responsible the small minority which is presently tarnishing the image of the shipping industry.

The proposed measures are necessary to ensure that the Community's rules on maritime safety will be fully effective for the following reasons:

- When adopting Council Framework Decision 2005/667/JHA, the Member States unanimously agreed that ship-source pollution committed with intent, recklessly or with serious negligence should be considered a criminal offence. Following the annulment of this Framework Decision by the ECJ, the Commission proposes to adapt the directive without changing the substance, by incorporating in the directive the above-mentioned provision of the Framework Decision and thus making implementation more effective (due to the role of the ECJ in ensuring compliance and uniform interpretation of acts decided under the first pillar).
- The system of penalties, as it stands in Directive 2005/35/EC, only partially implements the International Convention for the Prevention of Pollution from Ships (MARPOL). To ensure that penalties are “adequate in severity to discourage” potential polluters, as provided for in Article 4(4) of MARPOL, the deterrent effect of the system of penalties must be reinforced, sending a strong signal, with a much greater dissuasive effect, to potential offenders¹. Furthermore, criminal investigation and prosecution and judicial cooperation between Member States can be essential and more powerful than administrative action.
- Certain Member States, in particular acting as coastal States, have recently reinforced their system of criminal penalties. Their vigilance on the prevention side and the severity of the penalties imposed by criminal courts, combined with the publicity given to these cases has helped to reduce significantly the number of illegal discharges. In order to avoid safe havens for perpetrators within the European Community, it is of the utmost importance that the same approach be adopted by all Member States, whether acting as flag State, port State and/or coastal State.

General context

Environmental crime is one of the European Union's central concerns. The Tampere European Council on 15 and 16 October 1999 asked that efforts be made to adopt common definitions of offences and penalties, focusing on a limited number of especially important sectors, such as environmental crime. In the aftermath of the sinking of the tanker *Prestige* in November 2002, the Copenhagen European Council of 12 and 13 December 2002 declared the European Union's determination to adopt all the necessary measures to preclude further disasters. The Council particularly welcomed the Commission's intention of looking into the need for specific new measures, including measures relating to liability and the corresponding penalties. The Council meeting of 19 December 2002 on justice and home affairs adopted a statement undertaking to consider all complementary measures to protect the environment, in particular the seas, against pollution through the criminal law.

¹ See also item 2.2 of the explanatory memorandum to the original Commission proposal of March 2003: COM(2003) 92 final.

Existing provisions in the area of the proposal

The proposal builds on Directive 2005/35/EC and takes over the substantive content of the annulled Framework Decision 2005/667/JHA.

Consistency with the other policies and objectives of the Union

The proposed Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union. In particular, it has been drafted in accordance with the principles on justice set out in Chapter VI of the Charter and seeks to promote the integration into Community policies of a high level of environmental protection in accordance with the principle of sustainable development, as laid down in Article 37 of the Charter.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

Consultation of interested parties

Consultation of interested parties was not deemed necessary in this case, since this proposal incorporates exactly provisions already adopted unanimously by the Council in the annulled Framework Decision. In addition, since the annulment of Framework Decision 2005/667/JHA by the European Court of Justice on 23 October 2005, there has been a legal vacuum concerning a harmonised approach regarding possible penalties in the fight against maritime pollution that needs to be filled as quickly as possible.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

An impact assessment was not considered necessary, remembering that this proposal only transfers into Community law provisions already adopted unanimously by the Council in the annulled Framework Decision 2005/667/JHA.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The proposed directive defines as criminal the infringement already established in Article 4 of Directive 2005/35/EC.

Inciting or aiding and abetting such activities should also be considered a criminal offence.

The criminal offence should be punishable by effective, proportionate and dissuasive penalties, which have to be of a criminal nature for natural persons. Effective, proportionate and dissuasive penalties should also be applied to legal persons if they are considered liable under this Directive.

Legal basis

The provisions of this Directive relate to maritime transport. Consequently, the legal base chosen is Article 80(2) of the EC Treaty.

Subsidiarity principle

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons:

Maritime pollution typically leads to damage with cross-border dimensions. Therefore, it is essential that Member States have the same understanding of which maritime pollution infringements constitute criminal offences and that they should be addressed by criminal penalties, at least for criminal offences committed by natural persons. Diverging national approaches in this regard hinder efficient judicial cooperation and allow offenders to escape prosecution.

Due to the frequent transboundary impact of maritime pollution and the fact that perpetrators act across borders, action by Member States alone would not be suited to tackle this problem.

Community action will better achieve the objectives of the proposal for the following reasons:

A minimum standard on the constituent elements of criminal offences and the requirement of criminal penalties for natural persons need to be established at Community level. This will ensure that ship-source pollution offences are dealt with in a similar manner in every Member State and that perpetrators cannot escape from prosecution for their crimes inside the EU.

The proposed Directive sets only a minimum level of harmonisation with regard to the activities that should at least be considered criminal offences and does only generally establishes that criminal penalties should be applied to natural persons. It leaves the Member States the choice of whether criminal penalties should also apply to legal persons.

The proposal therefore complies with the subsidiarity principle.

Proportionality principle

The proposal complies with the proportionality principle for the following reasons:

The action chosen is a Directive, which leaves Member States a high degree of flexibility in implementation, including for determining the types and levels of penalties. Only a minimum standard is set. Member States are free to maintain or introduce more stringent measures, for example to establish additional criminal offences or to introduce criminal penalties for legal persons too. This is made clear explicitly in Article 1(2) of Directive 2005/35/EC.

Implementation of the Directive entails no significant financial and administrative burden as the criminal law and judicial structures required already exist in every Member State.

Choice of instruments

Proposed instrument: Directive.

Other means would not be adequate for the following reason:

The existing Directive 2005/35/EC must be brought into line with the Court ruling in case C-440/05. A directive can only be amended by an amending directive.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

5. ADDITIONAL INFORMATION

Correlation table

The Member States are required to communicate to the Commission the text of their national provisions transposing the Directive along with a correlation table between those provisions and this Directive.

European Economic Area

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

Detailed explanation of the proposal

1. Criminal offence

Member States are required to lay down that any ship-source discharge of polluting substances, as defined in Article 2 of Directive 2005/35/EC, into any of the areas referred to in Article 3(1) of Directive 2005/35/EC, if committed with intent, recklessly or with serious negligence, is to be considered a criminal offence. The definition of “criminal offence” corresponds to Article 2 of the annulled Framework Decision 2005/667/JHA.

2. Liability of legal persons

As stated in the annulled Framework Decision, Member States should ensure that legal persons can be held liable for the criminal offences committed for their benefit by certain persons acting on their behalf or when lack of supervision or control enabled those persons to commit an offence.

3. Penalties

Penalties imposed against ship-source pollution offences must be effective, proportionate and dissuasive, for both natural and legal persons.

In addition to this requirement, for the criminal offence defined in the new Article 4 Member States are required to provide that the penalties for natural persons be of a criminal nature. For legal persons, it is not specified whether the penalties should be of a criminal or non-criminal

nature. Member States that do not recognise the criminal liability of legal persons in their national law are therefore not under any obligation to change their national system.

4. Implementation period

The period for implementation by the Member States is six months, taking into account that Article 1 largely covers the same content as Articles 2, 3 and 5 of the annulled Framework Decision 2005/667/JHA. The period for implementation of this Framework Decision ended on 12 January 2007, so Member States will already have done a significant part of the work to implement this Directive.

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 for infringements

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Having regard to the opinion of the European Economic and Social Committee⁴,

Having regard to the opinion of the Committee of the Regions⁵,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The purpose of 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 for infringements⁶, and also of this amendment, is to approximate the definition of ship-source pollution offences committed by natural or legal persons, the scope of their liability and the criminal nature of penalties that can be imposed for such criminal offences by natural persons.
- (2) On 23 October 2007 the Court of Justice of the European Communities annulled⁷ Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution,⁸ which had previously supplemented Directive 2005/35/EC with criminal-law measures. This amendment to the Directive fills the legal vacuum following the judgment.

² OJ C., p.

³ OJ C., p.

⁴ OJ C., p.

⁵ OJ C., p.

⁶ OJ L 255, 30.9.2005, p.11.

⁷ See Case: C-440/05 *Commission v Conseil*, not yet published in the European Court Reports.

⁸ OJ L 255, 30.9.2005, p.164.

- (3) Criminal penalties, which demonstrate social disapproval of a different nature than administrative sanctions, strengthen compliance with the legislation against ship-source pollution in force.
- (4) Common rules on criminal penalties make it possible to use more effective methods of investigation and assistance within and between Member States.
- (5) Effective, proportionate and dissuasive penalties should also apply to legal persons throughout the Community because frequently ship-source pollution offences are committed in the interest of legal persons or for their benefit.
- (6) Member States should provide information to the Commission on implementation of this Directive, in order to enable the Commission to evaluate its effect.
- (7) Since the objectives of this Directive cannot be achieved adequately by the Member States and, by reason of the cross-border damage which may be caused by the behaviour concerned, can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the same Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (8) This Directive respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union,
- (9) Directive 2005/35/EC should therefore be amended accordingly.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2005/35/EC is amended as follows:

- (1) The title is replaced by the following:

“Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences”.
- (2) In Articles 5(1) and (2), Article 6(2) and Article 7(2), the term “infringement” is replaced by “criminal offence”.
- (3) Article 4 is replaced by the following:

“Criminal offences

1. Member States shall ensure that ship-source discharges of polluting substances into any of the areas referred to in Article 3(1) are regarded as criminal offences if committed with intent, recklessly or with serious negligence.

2. Each Member State shall take the measures necessary to ensure that inciting or aiding and abetting a criminal offence referred to in paragraph 1 is punishable by criminal law. ”

(4) After Article 5, the following Article 5a is inserted:

“Penalties against natural persons

1. Each Member State shall take the necessary measures to ensure that the criminal offences referred to in Article 4 are punishable by effective, proportionate and dissuasive criminal penalties.
2. Each Member State shall take the measures necessary to ensure that the criminal penalties referred to in paragraph 1 apply to any person who is found responsible by a court for a criminal offence within the meaning of Article 4.”

(5) After Article 5a, the following Article 5b is inserted:

“Liability of legal persons

1. Each Member State shall take the measures necessary to ensure that legal persons can be held liable for the criminal offences referred to in Article 4, committed for their benefit by any natural person acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
 - (a) a power of representation of the legal person, or
 - (b) an authority to take decisions on behalf of the legal person, or
 - (c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the measures necessary to 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 possible the commission of the criminal offence referred to in Article 4 for the benefit of the 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 who are involved as perpetrators, instigators or accessories in the criminal offences referred to in Article 4.”

(6) After Article 5b, the following Article 5c is inserted:

“Penalties against legal persons

1. Each Member State shall take the measures necessary to ensure that a legal person held liable pursuant to Article 5b(1) and (2) is punishable by effective, proportionate and dissuasive penalties.

2. Each Member State shall take the measures necessary to ensure that the penalties referred to in paragraph 1 apply to any legal person who is found responsible by a court for a criminal offence within the meaning of Article 4.”

(7) Article 8 is deleted.

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than six months following the date of its entry into force. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

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 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President