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NOTE

from:	General Secretariat
to:	Permanent Representatives Committee/Council
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 - Outcome of the European Parliament's first reading (Strasbourg, 4 to 7 May 2009)

I. INTRODUCTION

The rapporteur, Mr Luis DE GRANDES PASCUAL (EPP-ED - ES), presented a report containing 19 amendments (amendments 1-19) to the proposal for a Directive, on behalf of the Committee on Transport and Tourism.

In accordance with the provisions of Article 251(2) of the EC Treaty and the joint declaration on practical arrangements for the co-decision procedure¹, a number of informal contacts had taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for a second reading and conciliation.

¹ OJ C 145, 30.6.2007, p. 5.

In this context, a single compromise amendment (amendment 20) was presented by the EPP-ED, PES, ALDE and Greens/EFA political groups. This single amendment had been agreed during the informal contacts referred to above.

II. VOTE

When it voted, on 05 May 2009, the plenary adopted the single compromise amendment (amendment 20) to the proposal for a Directive. No other amendments were adopted. The amendment adopted corresponds to what was agreed between the three institutions and ought therefore to be acceptable to the Council. Consequently, once the legal linguists¹ have scrutinized the text, the Council should be in a position to adopt the legislative act.

The text of the amendment adopted and the European Parliament's legislative resolution are set out in the Annex hereto. The amendments are presented in the form of a consolidated text where added wordings are highlighted in ***bold and italics***, the symbol "■" indicates deleted text and the symbol "||" indicates changes of a linguistic or clerical nature.

¹ Delegations with legal-linguistic observations can send them to the secretariat of the Council's Directorate for the Quality of Legislation (secretariat.jl-codecision@consilium.europa.eu) until 1.06.2009, in order better to prepare the lawyer-linguists' meeting with national experts.

Ship-source pollution and penalties for infringements *I**

European Parliament legislative resolution of 5 May 2009 on the 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 (COM(2008)0134 – C6-0142/2008 – 2008/0055(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2008)0134),
 - having regard to Article 251(2) and Article 80(2) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0142/2008),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Transport and Tourism and the opinions of the Committee on the Environment, Public Health and Food Safety and the Committee on Legal Affairs (A6-0080/2009),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and to the Commission.

Position of the European Parliament adopted at first reading on 5 May 2009 with a view to the adoption of Directive 2009/.../EC 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 Commission ||,

Having regard to the opinion of the European Parliament ||,

Having regard to the opinion of the European Economic and Social Committee¹,

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty²,

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 infringements, 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 annulled³ Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution⁴, which had previously supplemented Directive 2005/35/EC with criminal-law measures. This amendment to the Directive fills the legal vacuum following the judgment.
- (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 ***and should be sufficiently severe to dissuade all potential polluters from any violation thereof.***

¹ OJ C ...

² *Position of the European Parliament of 5 May 2009.*

³ See Case: C-440/05 *Commission v Conseil*, not yet published in the European Court Reports.

⁴ OJ L 255, 30.9.2005, p. 164.

- (3a) *A consistent set of legislative measures has already been adopted at EU level to reinforce maritime safety and help prevent ship-source pollution. The legislation in question is addressed to flag States, ship owners and charterers, classification societies, port States and coastal States. The existing system of sanctions for illegal ship-source discharges supplementing that legislation needs to be further strengthened by the introduction of criminal penalties.*
- (4) Common rules on criminal penalties make it possible to use more effective methods of investigation and *effective cooperation* within and between Member States.
- (5) *The Member States should also apply effective, proportionate and dissuasive penalties to legal persons throughout the Community because frequently ship-source pollution offences are committed in the interest of legal persons or for their benefit.*
- (5a) *The applicability of the provisions of this Directive should not be subject to exceptions other than those set out in the text. Therefore, certain categories of legal and natural persons, such as classification societies or owners of cargo should be included in the scope of applicability.*
- (5b) *This Directive obliges Member States to provide in their national legislation for criminal penalties in respect of discharges of polluting substances to which it applies. This Directive creates no obligations regarding the application of such penalties or any other available system of law enforcement, in individual cases.*
- (5c) *Under the terms of the present Directive, illicit ship-source discharges of polluting substances will be considered as a criminal offence as long as they have been committed with intent, recklessly or with serious negligence and result in a deterioration of the quality of water. Less serious cases of illicit ship-source discharges of polluting substances that do not cause a deterioration of the quality of water need not be considered as criminal offences. Under the terms of the present Directive such discharges shall be referred to as "minor cases".*
- (5d) *The high level of safety and protection of the environment in the maritime transport sector as well as the effectiveness of the principle whereby the polluting party pays for the damage caused to the environment, requires that repeated minor cases that do not in a singular case but in conjunction result in a deterioration in the quality of water shall be considered as criminal offence.*
- (5e) *This Directive is without prejudice to other liability systems for damage caused by ship-source pollution under Community, national or international law.*
- (5f) *Jurisdiction with regard to criminal offences should be established in accordance with national law of Member States and in accordance to their obligations pursuant to international law.*
- (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,
- (8a) In accordance with point 34 of the Interinstitutional Agreement on better law-making¹, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.**
- (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 *shall be* 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"

- (1a) Article 1(1) shall be replaced by the following:**

"1. The purpose of this Directive is to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships."

- (1b) In Article 2, the following point 4a shall be added:**

"4a. "Legal person" means any legal entity having such status under the applicable national law, except for States or public bodies in the exercise of State authority and for public international organisations."

- (3) Article 4 *shall be* replaced by the following:

"Article 4

¹ OJ C 321, 31.12.2003, s. 1.

Infringements

1. Member States shall ensure that ship-source discharges of polluting substances, ***including minor cases of such discharges***, into any of the areas referred to in Article 3(1) are regarded as ***infringements*** if committed with intent, recklessly or with serious negligence."
2. Each Member State shall take the measures necessary to ensure that ***any natural or legal person committing an infringement within the meaning of paragraph 1 can be held liable therefore.***"

(3a) Article 5 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

"1. A discharge of polluting substances into any of the areas referred to in Article 3(1) shall not be regarded as an infringement if it satisfies the conditions set out in Annex I Regulations 15, 34, 4.1 or 4.3 or in Annex II, Regulations 13, 3.1.1 or 3.1.3 of Marpol 73/78."

(b) paragraph 2 shall be replaced by the following:

"2. A discharge of polluting substances into the areas referred to in Article 3(1)(c), (d) and (e) shall not be regarded as an infringement for the owner, the master or the crew if it satisfies the conditions set out in Annex I, Regulation 4.2 or in Annex II, Regulation 3.1.2. of Marpol 73/78."

(4) After Article 5 following Articles 5a and 5b are inserted:

"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 ***does not*** apply to ***minor cases, where the act committed does not cause a deterioration of the quality of water.***
3. ***Repeated minor cases that do not in a singular case but in conjunction result in a deterioration in the quality of water shall be considered a criminal offence when committed with intent, recklessly or with serious negligence.***

█
Article 5b

Inciting, aiding and abetting

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

(5) *After Article 7 following Articles 8, 8a, 8b and 8c are inserted:*

"Article 8

Penalties

Each Member State shall take the necessary measures to ensure that infringements within the meaning of Article 4 and 5 are subject to effective, proportionate and dissuasive penalties.

Article 8a

Penalties against natural persons

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

Article 8b

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 Articles 5a(1), 5a(3) and 5b, 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. 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 possible the commission of an offence referred to in Articles 5a(1), 5a(3) and 5b 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 who are involved as perpetrators, inciters or accessories in the criminal offences referred to in Articles 5a(1), 5a(3) and 5b.*

Article 8c

Penalties against legal persons

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

Article 2

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than *twelve 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 ||

For the European Parliament

The President

For the Council

The President
