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Committee on Transport and Tourism

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DRAFT REPORT

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))

Committee on Transport and Tourism

Rapporteur: Luis de Grandes Pascual

Symbols for procedures

- * Consultation procedure
majority of the votes cast
- **I Cooperation procedure (first reading)
majority of the votes cast
- **II Cooperation procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- *** Assent procedure
*majority of Parliament's component Members except in cases
covered by Articles 105, 107, 161 and 300 of the EC Treaty and
Article 7 of the EU Treaty*
- ***I Codecision procedure (first reading)
majority of the votes cast
- ***II Codecision procedure (second reading)
*majority of the votes cast, to approve the common position
majority of Parliament's component Members, to reject or amend
the common position*
- ***III Codecision procedure (third reading)
majority of the votes cast, to approve the joint text

(The type of procedure depends on the legal basis proposed by the Commission.)

Amendments to a legislative text

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

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 (A6-0000/2008),
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 Commission.

Amendment 1

Proposal for a directive – amending act Recital 3

Text proposed by the Commission

(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.

Amendment

(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 are sufficiently severe to dissuade all potential polluters from any violation thereof.***

Or. es

Justification

Terms used in Article 4(4) of the Marpol Convention, which prefers the principle of dissuasion over repression, should be incorporated word for word.

Amendment 2

**Proposal for a directive – amending act
Recital 5**

Text proposed by the Commission

(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.

Amendment

(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.

Or. es

Justification

The directive confers the power to act on the party taking the measures, namely the Member State, in accordance with the subsidiarity principle and in view of the complexity and diversity of legislation on legal persons.

Amendment 3

**Proposal for a directive – amending act
Recital 7**

Text proposed by the Commission

(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

Amendment

(7) *(Does not affect English version).*

the same Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

Or. es

Justification

(Does not affect English version).

Amendment 4

**Proposal for a directive – amending act
Recital 7 a (new)**

Text proposed by the Commission

Amendment

(7a) The judgments of the Court of Justice of the European Communities of 13 September 2005 in Case C-176/03, Commission v Council and of 23 October 2007 in Case C-440/05, Commission v Council, mean it is now possible to impose criminal penalties but this should not affect Article 5a(1), which makes it clear that penalties 'may include criminal or administrative penalties'.

Or. es

Justification

It must be made clear in the list of possible penalties that administrative penalties may be imposed as well as criminal penalties.

Amendment 5

Proposal for a directive – amending act

Article 1 — point 3

Directive 2005/35/EC

Article 4 — title

Text proposed by the Commission

Amendment

"Criminal offences

"Infringements and criminal offences

Or. es

Justification

The inclusion of criminal offences should not imply that administrative infringements no longer exist.

Amendment 6

Proposal for a directive – amending act

Article 1 — point 3

Directive 2005/35/EC

Article 4 — paragraph 1 a (new)

Text proposed by the Commission

Amendment

“

1a. The Member States may class as administrative infringements cases of minor ship-source discharges of polluting substances where the act committed does not cause a deterioration in the quality of the water.

Or. es

Justification

This reinstates a concept adopted in Framework Decision 2005/667/JHA (now annulled) that distinguished between criminal penalties and penalties of a different type (Article 4(2) of Framework Decision 2005/667/JHA).

Amendment 7

Proposal for a directive – amending act

Article 1 — point 3

Directive 2005/35/EC

Article 4 — paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. Behaviour involving repeated illegal ship-source discharges, even of minor amounts of polluting substances whose effect on the environment concerned is equally serious, shall be regarded as criminal offences if committed with intent, recklessly or through serious negligence.

Or. es

Justification

In line with the distinction made between administrative and criminal penalties, for reasons of consistency, illegal discharges of small quantities on a regular basis must be punished as a criminal offence, since otherwise those who are prepared to pay to pollute are granted impunity.

Amendment 8

Proposal for a directive – amending act

Article 1 — point 3

Directive 2005/35/EC

Article 4 — paragraph 2

Text proposed by the Commission

Amendment

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. ”

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 ***in those cases where the offence is committed with intent.*** ”

Or. es

Justification

Inciting or abetting can only occur where there is intent to deceive or act and not when the criminal offence occurs through recklessness or serious negligence.

Amendment 9

Proposal for a directive – amending act

Article 1 — point 3 a (new)

Directive 2005/35/EC

Article 5 — paragraph 1

Text proposed by the Commission

Amendment

(3a) Article 5(1) is 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 or as a criminal offence if it satisfies the conditions set out in Annex I, Regulations 9, 10, 11(a) or 11(c) or in Annex II, Regulations 5, 6(a) or 6(c) of Marpol 73/78.

Or. es

Justification

The inclusion in the new directive of possible criminal offences previously governed by annulled Framework Decision 2005/667/JHA requires that the amended directive clearly states that the exceptions refer both to criminal offences and to simple infringements.

Amendment 10

Proposal for a directive – amending act

Article 1 — point 3 b (new)

Directive 2005/35/EC

Article 5 — paragraph 2

Text proposed by the Commission

Amendment

(3 b) Article 5(2) is 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 or as a criminal offence for the owner, the master or the crew when acting under the master's

responsibility if it satisfies the conditions set out in Annex I, Regulation 11(b) or in Annex II, Regulation 6(b) of Marpol 73/78.

Or. es

Justification

The inclusion in the new directive of possible criminal offences previously governed by annulled Framework Decision 2005/667/JHA requires that the amended directive clearly states that the exceptions refer both to criminal offences and to simple infringements.

Amendment 11

Proposal for a directive – amending act

Article 1 — point 4

Directive 2005/35/EC

Article 5 a — paragraph 1

Text proposed by the Commission

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.

Amendment

1. Each Member State shall take the necessary measures to ensure that the ***infringements or*** criminal offences referred to in Article 4 are punishable by effective, proportionate and dissuasive ***administrative or*** criminal penalties.

Or. es

Justification

This is changed to accord with the amendments to Article 4 of Directive 2005/35/EC, which does not restrict infringements to criminal offences but also takes in administrative infringements.

Amendment 12

Proposal for a directive – amending act

Article 2 — subparagraph 1

Text proposed by the Commission

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.

Amendment

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.

Or. es

Justification

A reasonable amount of time is needed for the directive's implementation, up to a maximum of twelve months from the date of its entry into force. Extending this beyond one year would not be realistic given that its text is largely based on Framework Decision 2005/667/JHA which had to be implemented by 12 January 2007, meaning that the Member States have already completed a large part of the work needed to implement the directive.

EXPLANATORY STATEMENT

Background:

In order to tackle a widespread problem in sea transport, namely the worrying increase in illegal operational discharges of ship-source polluting substances, in 2003 the Commission submitted a proposal for a directive¹ based on Article 80(2) (transport) of the EC Treaty which states that ‘The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport’. Although international legislation to alleviate the situation already existed at that time – the Marpol 73-78 Convention – the shortcomings in its application and enforcement were becoming evident and it was also clear that the civil liability systems governing ship-source pollution in force then were not dissuasive enough. The proposal for a directive established that ship-source pollution ought to be regarded as a criminal offence subject to criminal penalties. It contained provisions on criminal law that went beyond categorising behaviour (actions that should be penalised) to set out minimum regulations on penalties, liability and jurisdiction, giving guidance on the nature of the penalties. The objections tabled by a considerable number of Member States to the Commission's choice of legal basis, transport policy under the first pillar, meant that the criminal law provisions in the directive had to be withdrawn and a JHA framework decision was submitted in their place. However, in May 2005, both proposals were adopted by Parliament and by the Council. Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements gives precise definitions of said infringements, and includes a clause stating that they are to be ‘subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties’, while provisions on the nature, type and degree of the penalties were included in Framework Decision 2005/667/JHA.

On 13 September 2005², the Court of Justice of the European Communities (CJEC) gave a judgment with very significant legal repercussions in that it stipulated that *the European Union institutions may, on the basis of the first pillar, legislate on criminal matters*. To be precise, the CJEC ruled that under certain conditions the Community legislator could provide for criminal-law-related measures. Subsequent to this, 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). The CJEC ruled in favour of the European Commission, and on 23 October 2007 it annulled the framework decision ruling that its articles categorising the criminal offences and the nature of the penalties (Articles 2, 3 and 5) could have been adopted on the basis of Article 80(2) (transport) of the EC Treaty, and that the framework decision therefore violated Article 47 of the EU Treaty by usurping the powers of the Community.

Aim of the proposal:

The proposal aims to fill a legal vacuum created by the CJEC decision that left on the

¹ COM(2003) 92 final of 5 March 2003.

² Case C-176/03, Commission v Council, judgment of 13 September 2005.

sidelines a harmonised approach to possible penalties to combat maritime pollution. The Commission's new proposal is based on Directive 2005/35/EC and incorporates the essential elements of annulled Framework Decision 2005/667/JHA.

Situation to date in Parliament:

Due to the complexity and importance of the matter in hand, there was a dispute between the Committee on Transport and the Committee on Legal Affairs as to which committee was responsible. In the end, it was decided, following a recommendation from the Conference of Presidents, that the Committee on Transport should be appointed as the committee responsible and the Committee on Legal Affairs and the Committee on the Environment should issue an opinion duly inviting the main rapporteur to work closely with the two rapporteurs for the opinion.

As a result of this recommendation, the rapporteur held joint meetings with the rapporteurs for the opinion from the Committee on Legal Affairs and the Committee on the Environment, as well as with the shadow rapporteurs so that they would be aware, before the report was presented, of the key questions the rapporteur intended asking, without prejudice to his willingness to engage in dialogue throughout the legislative procedure.

Finally, it should be mentioned that this matter has also been the subject of debate in the Committee on Petitions as a petition on ship-source pollution has been received. The petitioners hope that this new proposal for a directive may help to resolve the serious problem affecting them.

Considerations and rapporteur's proposals:

a) General:

The Commission's proposal is very realistic and prudent, sensibly seeking to fill the legal vacuum created by the CJEC judgment of 13 September 2005 (Case C-176/03) and more specifically by the judgment of 23 October 2007 (Case C-440/05) which annulled Framework Decision 2005/667/JHA.

The rapporteur's initial assessment of the proposal is positive, and he takes the view that it is worthy of receiving Parliament's support subject to certain observations detailed by the rapporteur in the amendments put forward.

The Commission has simply reiterated the consensus reached when Directive 2003/35/EC was debated and adopted, but has done so on a new legal basis, since the judgments mentioned make it possible for the Community legislator to take measures connected to the Member States' criminal law.

b) The judgments of 13 September 2005 (Case C-176/03) and 23 October 2007 (Case C-440/05) of the Court of Justice of the European Communities:

Although it would certainly have been preferable for the Commission to have acquired powers in criminal law matters through a reform of the Treaties rather than through case law,

legally it cannot be denied that both judgments make it possible for the Community to adopt criminal law measures.

This said, a restrictive or tight interpretation may be applied. The rapporteur refuses to endorse the first judgment but does not wish to move outside the strict and exceptional limits established by both judgments.

The judgments are fairly strict in laying down the conditions under which this new power can be exercised, namely:

- A requirement that the measure be essential for combating serious offences against the environment.

In the rapporteur's opinion, the civil liability systems governing ship-source pollution in force at present are not sufficiently dissuasive.

- The harmonisation proposed by the Commission is the minimum needed to achieve the aim of effectively combating something specific such as ship-source pollution in the context of protection of the environment, an issue with clear European dimensions.

c) Subsidiarity principle:

The use of a directive as a legal instrument fully complies with the subsidiarity principle as this implies that the Member States have an obligation as to the results thereof but are free to choose the means. Furthermore, it gives the Member States plenty of scope as regards implementation when they transpose the directive into their national legal system.

d) Keys points underpinning the rapporteur's amendments:

- A balanced and strict interpretation of the scope of the CJEC judgments of 13 September 2005 and 23 October 2007.

- An assessment at Community level that the existing regulations to deter ship-source pollution have not worked. The Member States do not enforce the Marpol 73/78 Convention equally, its rules are broken daily by the high number of ships sailing in Community waters, and no corrective measures are taken.

- To distinguish between administrative penalties that penalise illegal minor discharges of ship-source polluting substances defined in the Marpol 73/78 Convention and criminal penalties for serious infringements that must be classed by Member States as criminal offences in those cases where the circumstances laid down in the proposal for a directive apply, reinstating a concept previously adopted in Framework Decision 667/2005/JHA, now annulled.

- To raise behaviour involving repeated minor infringements that cause serious pollution to the status of a criminal offence provided they are committed with intent, recklessly or through serious negligence.

The aim is to dissuade certain responsible parties in sea transport who find illegal pollution preferable in reality because paying the administrative penalty costs them less than complying with the relevant legislation.

This very common practice has transformed the former principle of 'the polluter pays' to 'pay to pollute'.

- To distinguish between natural and legal persons, with subsidiarity applying to the latter on account of the complexity and diversity of legislation in Member States.