



DIRECTIVE ON CRIMINAL SANCTIONS FOR SHIP-SOURCE POLLUTION INDUSTRY COMMENTS ON THE COUNCIL'S POLITICAL AGREEMENT

This paper comments on the Transport Council's political agreement on the proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences. The paper concludes that in order to avoid legal, economic and political difficulties the proposed Directive must be fully in line with MARPOL and UNCLOS:

- The Directive should provide the same legal regime in respect of accidental (unintentional) ship-source pollution as that of MARPOL, i.e. accidental ship-source pollution within the scope of MARPOL Annex I Regulation 11 and Annex II Regulation 6 should not be a criminal offence.
- The liability basis in the Directive should be aligned with that of MARPOL, i.e. *“intent to cause damage or recklessly and with knowledge that damage would probably result”*.
- The proposed imposition of a different basis of liability on ships of MARPOL States in territorial waters, the high seas and the EEZ is contrary to both MARPOL and UNCLOS.
- The impact on the human rights of seafarers and others should be considered, including the need for appropriate safeguards both before and after trial, in line with UNCLOS and international human rights law.

Directive on Criminal Sanctions for Ship-Source Pollution Industry Comments on the Council's Political Agreement

The Industry¹, represented by ECSA, ICS, INTERTANKO, INTERCARGO, BIMCO, OCIMF, the International Group of P&I Clubs, the International Salvage Union, the ITF and the ETF, has the following comments on the Transport Council's political agreement on the proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences.

Every legal system in Europe guarantees the personal freedom of the individual. Criminal law restricts that freedom in certain specified circumstances; therefore, the imposition of criminal liability is a serious matter that must be guided by certain fundamental principles. Firstly, sanctions must be proportionate to the degree of personal fault on the part of the accused. Secondly, criminal law must be drafted in a clear, concise and unambiguous way and must be of restrictive interpretation so that it does not result in unintentional or unfair penalties against the accused. Thirdly, it must respect the standards set by international conventions and customary international law, including the law on human rights.

The Industry supports the general principle that persons responsible for ship-source pollution in contravention of the applicable international law, i.e. MARPOL² and UNCLOS³, should be subject to appropriate sanctions, including criminal sanctions. However, as shipping is an international industry, discharges from ships should continue to be regulated by international law (IMO Conventions) rather than regional law. National or regional rules (Community Law) on criminal sanctions and their scope of application to global shipping should strictly comply with international law, in particular UNCLOS.

In its first reading, the European Parliament adopted a position mainly consistent with these principles, concluding that ship-source pollution should be sanctioned in conformity with MARPOL and UNCLOS. The Industry hopes that the new European Parliament will maintain this general position in its second reading and it is looking forward to further fruitful co-operation with the new Members of the European Parliament in that respect.

However, the Industry is very concerned about the Transport Council's political agreement on the Directive, as adopted in June. The Industry fears that this agreement, were it to become applicable legislation, would create legal uncertainty. It is also discriminatory and it will raise practical difficulties.

1. The political agreement will create legal uncertainty by criminalising accidental, i.e. unintentional, ship-source pollution, which is explicitly exempted from being an offence under MARPOL. In so doing, the Directive is in clear contradiction with MARPOL. Accordingly, all EU Member States, being Parties to MARPOL, will no longer be able to comply with their treaty obligations and will be obliged to denounce that international Convention. As MARPOL is the fundamental global convention for the protection of the marine environment and works very well and efficiently, denunciation would appear to be beyond reasonable political decision-making.

2. The Industry draws attention to the fact that a stated major aim of the Commission's draft Directive was the harmonisation of the MARPOL rules and standards in Community law. However, the political agreement no longer supports this aim, allowing Member States to determine which person – legal and/or natural – should be liable for ship-source pollution. Today all EU Member States have implemented MARPOL in their national laws and have already provided sanctions, including criminal sanctions, for ship-source pollution in accordance with MARPOL and UNCLOS. Since harmonisation will no longer be achieved through the draft Directive, the Industry can see no purpose in further prolonging discussions on the Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, which seeks to harmonise financial penalties applicable in the case of ship-source pollution.
3. The political agreement will create further legal uncertainty by providing a different basis of liability in respect of ship-source pollution in direct conflict with MARPOL. The liability basis under MARPOL is "*intent to cause damage or recklessly and with knowledge that damage would probably result*", a phrase well recognised, understood and common to numerous other international conventions. However, the Transport Council proposes that the liability basis under the Directive should be "*intent, recklessly or by serious negligence*".
4. It is difficult to understand politically why the proposed threshold for criminal liability should be lower than that for civil liability. Under the international regimes of civil liability and compensation for oil pollution damage (to which most of the EU Member States are Contracting Parties) and hazardous and noxious substances damage, the registered shipowner is not entitled to limit liability where the damage resulted from his personal act or omission committed with intent to cause damage or recklessly and with knowledge that such damage would probably result. Yet the Transport Council proposes that "serious negligence" should be sufficient for the establishment of criminal liability under the draft Directive.
5. The term "serious negligence" is not defined by the Directive or by any European legal system and is likely to lead to varying subjective interpretations by Courts in Member States, thus destroying the desire for uniform application of the Directive. It is especially necessary to avoid the use of vague phrases in criminal law when the consequences of an infringement may be very serious. In the climate following a serious pollution incident, there will be a significant risk of seafarers, with no criminal intent, becoming the "scapegoats". In such cases interpretation of the term "serious negligence" may be confused with the seriousness of the consequences of an incident rather than the seriousness of the action constituting an infringement. For this reason, liability under MARPOL is restricted to those acting with intent, or recklessly and with knowledge that damage would probably result. Criminalising unintentional acts of pollution is counter-productive in that it is a discouragement to seafarers and to accident investigation.
6. The draft Directive is silent as regards the human rights of seafarers and others, and the need for appropriate safeguards both before and after trial. UNCLOS provides that the recognised rights of the accused shall be observed

in the conduct of proceedings in respect of violations of pollution prevention laws.

7. The Transport Council proposes that accidental ship-source pollution may or may not be an infringement depending on the sea area where the pollution occurs and/or the capacity of the accused. However, the imposition of a different basis of liability on ships of MARPOL States in territorial waters, the high seas and the EEZ would be contrary to both MARPOL and UNCLOS. States Parties to MARPOL have treaty obligations that prevent them from imposing standards beyond those set in MARPOL on foreign flag ships of other MARPOL States.

In conclusion, and as supported by the European Parliament, the Industry is strongly of the opinion that the proposed Directive must be fully in line with MARPOL and UNCLOS.

¹ The International Chamber of Shipping (ICS) and the European Community Shipowners' Associations (ECSA) together represent more than 50% of the world's merchant tonnage.

The International Association of Independent Tanker Owners (INTERTANKO) represents some 70% of the world's independently owned tankers.

The International Association of Dry Cargo Shipowners (INTERCARGO) represents international direct entry shipowners in the dry cargo sector with particular reference but not limited to bulk carriers.

BIMCO represents about 65% of the world's merchant fleet.

The Oil Companies International Marine Forum (OCIMF) represents all the world's major oil companies on marine safety and technical matters.

The International Group of P&I Clubs is comprised of thirteen P&I Clubs which are mutual insurers that between them insure the third party liabilities of some 90% of the world's ocean-going tonnage.

The International Salvage Union (ISU) represents over 50 of the world's major salvage companies.

The Seafarers' Sections of the International Transport Workers' Federation (ITF) and the European Transport Workers' Federation represent seafarers at the global and European levels.

² The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL Convention) is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. All EU Member States are Parties to the MARPOL Convention.

³ The United Nations Convention on the Law of the Sea (UNCLOS) lays down a comprehensive globally recognised regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. 145 States are Parties to UNCLOS, including the European Community and most EU Member States (as at May 2004).