



C/2023/872

8.12.2023

Opinion of the European Economic and Social Committee 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, including criminal penalties, for pollution offences’

(COM(2023) 273 final – 2023/0171 (COD))

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Rapporteur: **Constantine CATSAMBIS**

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| Referral | European Parliament, 10.7.2023 The Council of the European Union, 18.7.2023 |
| Legal basis | Articles 100(2) and 304 of the Treaty on the Functioning of the European Union |
| Plenary Assembly decision | 26/04/2023 |
| Section responsible | Transport, Energy, Infrastructure and the Information Society |
| Adopted in section | 6.9.2023 |
| Adopted at plenary | 20.9.2023 |
| Plenary session No | 581 |
| Outcome of vote (for/against/abstentions) | 217/0/6 |

1. Conclusions and recommendations

1.1. The European Economic and Social Committee (EESC) welcomes 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, including criminal penalties, for pollution offences of 1 June 2023 (the ‘SSPD-amending proposal’) ⁽¹⁾ and recognises the European Commission’s efforts to strengthen environmental protection, in particular by making the preservation of the seas a high priority and by introducing penalties for pollution offences in European seas.

1.2. Directive 2005/35/EC of the European Parliament and of the Council ⁽²⁾ (‘the SSP Directive’) regulates penalties for illegal discharges of oil and noxious liquid substances from ships into the sea that do not meet the relevant standards set in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), the international treaty that aims to prevent and minimise marine pollution from ships. The SSP Directive thus complements the international framework by establishing the liability regime pursuant to which international standards on illegal discharges should be enforced.

1.3. The EESC acknowledges that the SSP Directive has been effective in requiring a common framework for ship-source pollution infringements relating to discharges into the sea regulated by MARPOL Annex I and Annex II, i.e. pollution by oil and noxious liquid substances, and that it resulted in the successful creation of a European tool for satellite surveillance and detection of spills: the CleanSeaNet (CSN) service.

1.4. The EESC also acknowledges that it is important to have dissuasive and proportionate penalties across the EU for ship-source pollution offences. Establishing such minimum requirements as a reference point and holding the polluter accountable by applying the ‘polluter pays’ principle could be beneficial and have a strong deterrent effect in the EU.

⁽¹⁾ COM(2023) 273 final.

⁽²⁾ 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 (OJ L 255, 30.9.2005, p. 11).

1.5. The SSPD-amending proposal constitutes sectoral legislation which both complements and implements the international legal framework, with administrative penalties for pollution offences in EU waters and beyond. As well as its current scope of illegal discharges of oil and noxious liquid substances, it will cover illegal discharges of harmful substances in packaged form, sewage, rubbish and discharge waters and residues from exhaust gas cleaning systems (scrubbers). This is also an important contribution to the European Green Deal objectives and the green transition to a climate-neutral European economy and society by 2050 ⁽³⁾ which encompass zero accidents, zero waste, zero pollution, and sustainable ambitions that also include these other harmful substances. One major step forward has been the historic agreement at the International Maritime Organization (IMO) in July 2023 adopting the 2023 IMO Greenhouse Gas (GHG) Strategy on reduction of GHG emissions from ships, which sets a target of net zero by or around 2050, and ambitious indicative checkpoints for 2030 and 2040.

1.6. To facilitate effective and timely cross-border cooperation and responses, minimise the administrative burden of enforcement activities and ultimately effectively penalise offenders for infringements, the proposal aims to further enhance CleanSeaNet and integrate it with other Union maritime safety databases, such as SafeSeaNet ⁽⁴⁾ and Thetis ⁽⁵⁾.

1.7. The infringements regarded as criminal offences pursuant to Directive 2005/35/EC as amended by Directive 2009/123/EC of the European Parliament and of the Council ⁽⁶⁾ and the corresponding penalties (the 'SSPD as amended') already represent the EU's collective action which, through its liability regime, facilitates criminal penalisation for infringements in European seas.

1.8. The SSPD-amending proposal complements the Commission's proposal for a Directive on the protection of the environment through criminal law (the revised Environmental Crime Directive — the 'ECD-amending proposal') ⁽⁷⁾, which introduced criminal sanctions for serious environmental offences, including illegal discharges from ships. Applying criminal penalties is now outside the scope of the SSP Directive. The ECD-amending proposal, which is currently in the final stages of the legislative process, includes in its scope a criminal offence where ship-source discharge is unlawful and committed intentionally or with at least serious negligence and where it causes deterioration in the quality of water under the SSPD.

1.9. The SSPD-amending proposal is focused on the enforcement of international standards, meaning that the shipping sector must comply with these standards with or without the SSP Directive. Therefore, no impact on costs is expected for compliant SMEs.

1.10. Effective monitoring, control, identification and enforcement of pollution offences will require both a skilled workforce and technological advancements, including drone technology and satellite imagery. There is a need for properly trained, skilled professionals, for reskilling and up-skilling and further training of staff and crew in shipping, and for mandatory inspections in the event of marine pollution incidents, with due consideration to be given at all times to occupational health and safety protection on the ship and for the staff of the responsible authorities, including port staff. It is also necessary to develop new and detailed standards for the effective implementation of inspections.

1.11. This opinion is part of the European Commission's Maritime Safety Package, along with the Maritime Safety Agency, the revision of the Directive on maritime accident investigation, the revision of the Port State Control Directive, the revision of the Directive on compliance with flag State requirements, and the EU maritime security strategy and associated action plan. In this respect, it would be beneficial for representatives of organised civil society to be involved, to ensure that European citizens' basic rights are respected.

⁽³⁾ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (OJ L 243, 9.7.2021, p. 1).

⁽⁴⁾ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC (OJ L 208, 5.8.2002, p. 10).

⁽⁵⁾ Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ L 208, 5.8.2002, p. 1).

⁽⁶⁾ Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (OJ L 280, 27.10.2009, p. 52).

⁽⁷⁾ COM(2021) 851 final.

2. General comments

2.1. The EESC acknowledges that, with 75 % of the EU's external trade being seaborne, international shipping plays a significant role in the EU and the global economy. The maritime sector is at a turning point. It has embarked on a major transformation to increase its environmental sustainability and contribute to mitigating climate change. Enhancing the enforcement of international environmental law is paramount by adapting rules on compliance and liabilities for illegal behaviour and pollution ⁽⁸⁾.

2.2. All EU Member States are parties to the United Nations Convention on the Law of the Sea (UNCLOS) and to MARPOL. They are bound by the provisions of those international conventions vis-à-vis other contracting States, in particular as regards the ships and nationals of other contracting States. Since the provisions of secondary law have to be interpreted by taking into account international law, when transposing and interpreting the provisions of the SSPD-amending proposal, the EU Member States are obliged to ensure that this is done in conformity with the provisions of MARPOL and UNCLOS. The latter contains important safeguards for foreign ships and nationals that generally prohibit penal sanctions for accidental ship-source pollution.

2.3. In the shipping industry, administrative sanctions have proven to be effective, proportionate and dissuasive, in particular when it comes to accidental pollution. This has been achieved through a comprehensive system of flag State and port State control inspection regimes, including a wide range of EU maritime legislation developed between 2000 and 2009 in the wake of two major maritime accidents involving the ships *Erika* and *Prestige*, and supported by a liability system which ensures that the consequences of environmental damage are dealt with swiftly and efficiently, to the benefit of all claimants.

2.4. The proposal defines the term 'company' to clarify the notion of 'owner' used in MARPOL. This notion applies to any organisation (e.g. manager or charterer) which has assumed the operation of a ship, in alignment with the ISM ⁽⁹⁾ Code.

2.5. Criminal offences for ship-source pollution are addressed under the enlarged ECD proposal. New Article 8 of the SSPD-amending proposal provides for a framework for administrative penalties that should be dissuasive, effective and proportionate without prejudice to the ECD-amending proposal and the penalties provided therein. It also puts forward criteria for the circumstances of infringements for the effective application of administrative penalties (Article 8d). This includes the gravity of the discharge, its impact on the environment and human health, the financial strength of the responsible entity and the economic benefits generated by the infringement.

2.6. A discharge of polluting substances subject to regulation by Annexes I, II and VI to MARPOL 73/78 will be excepted and will not be regarded as an infringement when it fulfils the strict conditions specified in new Article 5 of the SSPD-amending proposal. The new Annex I to the SSPD-amending proposal provides an indicative list of irregularities or examples of situations when enforcement activities should be triggered because there is a suspicion that a ship has discharged polluting substances illegally.

2.7. The European Commission will make publicly available a regularly updated Union-wide overview of the implementation and enforcement of this Directive five years after its transposition. The overview will include the information listed in new Annex II to the SSPD-amending proposal. This is positive. To the extent that information relating to penalties includes personal data, such information will be anonymised.

2.8. In the legislative process of the revision of the SSP Directive, the current state of play in implementing the Directive's legal provisions across the EU has been analysed with a view to highlighting the differences between EU Member States. With the Directive in place, all Member States have transposed the provisions on infringements and penalties into their national legislation. The Commission acknowledged that most of the Member States do indeed use administrative penalties when dealing with ship-source pollution and that 'serious negligence' is covered by the ECD as it applies to

⁽⁸⁾ COM(2023) 268 final; Communication: Maritime safety: at the heart of clean and modern shipping, 1.6.2023.

⁽⁹⁾ Chapter IX of SOLAS 74/78.

criminal offences. All Member States have adopted procedures for holding natural and legal persons responsible for illegal discharges. The Commission investigated two cases of nonconformity — in 2009 (infringement against Greece) and in 2010 (infringement against Ireland). Both cases were closed in 2011⁽¹⁰⁾. An overview on how each Member State transposed the provisions on infringement and penalties is presented in the Commission Staff Working Document (SWD)⁽¹¹⁾.

2.9. The International Maritime Organization (IMO) is working hard to introduce mandatory regulations, inter alia, for the maritime transport of plastic pellets in freight containers regulated by MARPOL Annex III that are lost at sea, prohibiting plastic pellets carried in bulk and preventing tank washings — regulated by MARPOL Annex II — of persistent floating and high-viscosity products from ending up on coastlines and beaches and polluting them. It also intends to regulate underwater noise from ships in order to benefit marine life and coastal habitats, as explained in the following paragraphs.

2.10. Data from ITOPF⁽¹²⁾ (tanker spill statistics) show that the number and volume of oil spills from tankers has dropped dramatically. This reduction in oil spills is being driven by positive changes from the shipping industry and supported by governments. The average number of spills per year in the 1970s was approximately 79. This decreased by over 90 % to six spills in the 2010s and remains at a similar level for the current decade. Only seven oil spills of more than 7 tonnes were recorded from tanker incidents in 2022. Although maritime safety in EU waters is currently very high, with few fatalities and no recent major oil spills, more than 2 000 marine accidents and incidents are still reported every year⁽¹³⁾.

2.11. The shipping industry is committed to preventing all cargo residues regulated by Annex II from entering the marine environment. However, it is a complex industry with many stakeholders involved, such as ship owners, terminal operators, ports, charterers and regulatory authorities.

2.12. IMO has introduced regulatory amendments (MARPOL Annex II, Appendix IV and Appendix V) concerning cargo residues and tank washings of persistent floating products with a high viscosity and/or high melting point in specific sea areas. The amendments entered into force on 1 January 2021. In certain geographical areas (e.g. northwestern European waters), the new MARPOL Annex II regulation 13.7.1.4. requires a prewash for certain substances carried as cargo by product carriers regulated by Annex II.

2.13. Containers lost overboard represent less than 0,001 % of the roughly 250 million packed and empty containers currently shipped each year, according to figures provided by the shipping industry⁽¹⁴⁾. On average, 1 566 containers were lost yearly in the period from 2008 to 2022, including the sinking of container ships as well as the loss of individual deck containers from ships.

2.14. The IMO's PPR Sub-committee⁽¹⁵⁾ has developed guidance, based on experiences and lessons learned from past incidents, such as from *MV Rena* (New Zealand, 2011), *MV Trans Carrier* (Norway, 2020), *MSC Susanna* (South Africa, 2017) and *MV X-Press Pearl* (Sri Lanka, 2021). In those incidents, among other harmful substances, plastic pellets were released and contaminated the adjacent shorelines of the neighbouring countries. The draft amendments to Chapter V of the Safety of Life at Sea (SOLAS) Convention with regard to mandatory reporting requirements of the loss of containers at sea, which were approved by MSC 107⁽¹⁶⁾ in June 2023, will be considered with a view to adopting them at MSC 108 next spring.

⁽¹⁰⁾ Commission Staff Working Document SWD (2023) 159 final, Impact Assessment Report, Part 1/2, 1.6.2023, Footnotes 42, 43, page 9.

⁽¹¹⁾ SWD(2023) 159 final, Evaluation, Part 2/2, 1.6.2023, Figure 6: Implementation of the SSP Directive by the Member States — differences in penalty procedures foreseen for ship-source pollution in the European Union, page 16.

⁽¹²⁾ International Tanker Owners Pollution Federation Limited (ITOPF).

⁽¹³⁾ COM(2023) 268 final.

⁽¹⁴⁾ Containers Lost at Sea — 2023 Update, World Shipping Council, May 2023: <https://www.worldshipping.org/news/world-shipping-council-releases-containers-lost-at-sea-report-2023-update>

⁽¹⁵⁾ Sub-committee on Pollution Prevention and Response (PPR).

⁽¹⁶⁾ Maritime Safety Committee.

2.15. PPR 10 in April 2023 agreed that plastic pellets should not be carried in bulk. It also agreed to consider mandatory regulations for the maritime transport of plastic pellets in freight containers. Meanwhile, the IMO guidelines for safe cargo handling as well as for minimising plastics pollution need to be applied, in the light of the IMO's 2021 strategy for marine plastic litter and the recent criteria established in Commission Implementing Regulation (EU) 2022/91⁽¹⁷⁾.

2.16. The regulations in MARPOL Annex IV prohibit the discharge of untreated sewage into the sea within a specified distance from the nearest land. Governments are required to ensure the provision of adequate reception facilities in ports and terminals for the reception of sewage, without causing delays to ships. Vessels are equipped with wastewater retention tanks and sewage collection systems, approved by the administration of the flag State in accordance with Resolution MEPC.227(64)⁽¹⁸⁾.

2.17. IMO is currently working on providing advice as to whether to amend the fishing gear reporting requirements under MARPOL Annex V or to allow Member States to collect the data using their own resources and legislation.

2.18. The marking of fishing gear is considered an important tool for, inter alia, reducing abandoned, lost or otherwise discarded fishing gear (ALDFG) and its harmful ecological and economic impacts, and its safety and navigational risks. FAO⁽¹⁹⁾ has developed Voluntary Guidelines on the Marking of Fishing Gear (FAO, 2019). These guidelines address the scope of application and the implementation of a gear-marking system and its associated components, including reporting, recovery and disposal of ALDFG.

2.19. During the legislative process, the European Commission decided that compliance with MARPOL Annex VI for sulphur oxides (SOx) through treatment (desulphurisation) by using exhaust gas cleaning systems (SOx scrubbers) could not result in detrimental impacts on the marine environment, water quality, species and habitats in European waters from exhaust gas cleaning system residues discharged overboard into the water (Directive 2008/56/EC on the marine strategy framework is relevant here)⁽²⁰⁾.

2.20. A number of recent studies have concluded that the issue of protective measures with regard to SOx scrubber discharges needs to be urgently addressed in IMO, as well as at EU, national and regional level. Alternative fuels should be pushed forward, especially in view of the need to combat climate change rather than continuing to use fossil fuels by all means⁽²¹⁾.

2.21. Vessels larger than 24 metres should implement IMO guidelines⁽²²⁾ with fully detailed measures based on the four primary sources of underwater noise, namely propellers, hull form, on-board machinery and various operational and maintenance recommendations, such as hull cleaning. By applying the guidelines, vessels should achieve an acceptable level of underwater noise in quiet cruise conditions at a speed of 11 knots and measured in accordance with ISO 17208/2:2019. Following intersessional work at IMO SDC 9⁽²³⁾ in January 2023, MEPC 80⁽²⁴⁾ in early July 2023 approved a draft MEPC circular on revised guidelines for the reduction of underwater radiated noise from shipping to address impacts on marine life (MEPC.1/Circ.906).

⁽¹⁷⁾ Commission Implementing Regulation (EU) 2022/91 of 21 January 2022 defining the criteria for determining that a ship produces reduced quantities of waste and manages its waste in a sustainable and environmentally sound manner in accordance with Directive (EU) 2019/883 of the European Parliament and of the Council (OJ L 15, 24.1.2022, p. 12).

⁽¹⁸⁾ Revised Guidelines on Implementation of Effluent Standards and Performance Tests for Sewage Treatment Plants, 2012.

⁽¹⁹⁾ Food and Agriculture Organization of the United Nations (FAO).

⁽²⁰⁾ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19).

⁽²¹⁾ Environmental Impacts of Discharge Water from Exhaust Gas Cleaning Systems on Ships, German Environment Agency — Final report of the project ImpEx, TEXTE 27/2023.

⁽²²⁾ MEPC.1/Circ.833, 7.4.2014.

⁽²³⁾ Sub-committee of Ship Design and Construction (SDC).

⁽²⁴⁾ Marine Environment Protection Committee.

2.22. It is therefore justifiable that, within five years of the date of transposition, the European Commission will assess the situation, based on information provided by Member States pursuant to new Article 10a, and provide a Union-wide overview pursuant to new Article 12a. The European Commission, in its assessment, will consider modifying the scope of the SSP Directive, if appropriate, in view of standards regulating discharges from ships which have been made subject to regulation by MARPOL 73/78, such as marine litter, container loss, loss of plastic pellets and air pollutants, notably sulphur oxide and nitrogen oxide emissions and including black carbon emissions, as well as standards regulating underwater noise from ships.

3. Specific comments

3.1. Administrative penalties that have been introduced through the SSPD in the event of infringements have proved to be dissuasive, in particular when it comes to accidental pollution. In the context of shipping, administrative sanctions (via flag State ⁽²⁵⁾ implementation and port State control ⁽²⁶⁾) are well enforced and already accepted as more dissuasive than criminal sanctions.

3.2. There is a need for alignment with international rules. The ECD-amending proposal sets out criminal sanctions and penalties and requires that EU Member States provide for infringements of the SSPD, however without recognising that EU Member States are constrained by UNCLOS in the application of penal sanctions for pollution by foreign vessels. The phrase 'when committed with at least serious negligence' must be interpreted in line with the MARPOL standard of conduct 'with intent to cause damage or recklessly and with knowledge that damage would probably result' for legal coherence with Article 5(2) of the SSPD-amending proposal.

3.3. For legal certainty, the following clarifications should be sought in the SSPD-amending proposal:

- The exceptions of Article 5 do not apply to harmful substances in packaged form and sewage discharges (MARPOL Annexes III and IV).
- The exceptions in Article 5 (Annexes I, II and VI) seem to apply in the territorial sea, the exclusive economic zone (EEZ), as declared, and the high seas ⁽²⁷⁾.
- Article 6(3) introduces a list of irregularities in Annex I, however the list does not seem sufficiently linked to the principle of Article 6(1), which only refers to suspicions of irregularities in discharges.
- Article 8 states that penalties (fines) should be imposed on the company of the ship in question, unless it can prove that the master and the crew are responsible. Further clarification is needed on the burden of proof and/or presumption of fault.
- Article 10 and 10d introduce new reporting obligations and protection of whistleblowers, but the right to contradiction by the company is lacking.

3.4. Clarity and certainty are essential where criminal sanctions and liabilities and an individual's personal freedom are at stake, emphasising the need for legal clarity between the scope of the two Directives, aimed at harmonised implementation and enforcement.

Brussels, 20 September 2023.

The President
of the European Economic and Social Committee
Oliver RÖPKE

⁽²⁵⁾ Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements (OJ L 131, 28.5.2009, p. 132).

⁽²⁶⁾ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ L 131, 28.5.2009, p. 57).

⁽²⁷⁾ COM(2023) 273 final, Annex [II], point 2(c).