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Questions and Answers on criminal law measures against maritime pollution

Why is the Commission presenting a new proposal for a directive?

The new proposal for an amending directive on ship-source pollution aims to fill a legal vacuum created by a ruling of the European Court of Justice in October 2007 which annulled Framework Decision 2005/667/JHA "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution".

Out of concern about the illegal operational discharges of polluting substances from ships at sea, and in the aftermath of major accidental oil spills, the Commission had presented in 2003 both a proposal for a Directive, based on the EC Treaty, "on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences" ([IP 03/316](#)), and for a Framework Decision, based on the EU Treaty, "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution". The proposed first pillar instrument provided that ship-source pollution should be considered a criminal offence, subject to criminal penalties, whilst the proposed third pillar instrument was primarily designed to approximate levels of criminal penalties.

This splitting between Community and intergovernmental competence for criminal law related measures was initially supported by the European Parliament but opposed by the Council. Eventually, the legislation was adopted in 2005, in accordance with the Council's point of view. Directive 2005/35/EC currently 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" ([IP 05/888](#)), whilst Framework Decision 2005/667/JHA included provisions on the nature, type and levels of criminal penalties.

In a ruling given on 23 October 2007, the European Court of Justice, seized by the Commission, invalidated this approach. The Court ruled that the provisions relating to the definition of criminal offences and to the nature of sanctions can be adopted on the basis of the EC Treaty if necessary to ensure that the Community rules on maritime safety are fully effective. For this reason, the Court annulled Framework Decision 2005/667/JHA.

What are the major differences between a Framework Decision and a Directive?

Whereas a Framework Decision is adopted only by the Council, the proposed Directive will go through both the European Parliament and the Council as part of the Community co-decision making process. Furthermore, a Directive is more effective than a Framework Decision owing to the possible intervention of the European Court of Justice, which ensures that in the interpretation and application of the EC treaty, the law is observed. With regard to Framework Decisions, the European Commission does not have the option of bringing infringement proceedings in the event that a Member State does not correctly implement its provisions.

Why is criminal law a necessary instrument in the fight for an effective enforcement of the rules on maritime safety?

The system of sanctions, as it currently stands in Directive 2005/35/EC, only partially gives effect to 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 in Article 4(4) of MARPOL, the deterrent effect of the system of sanctions must be reinforced, sending a strong signal, with a much greater dissuasive effect, to potential offenders. Common rules on criminal offences make it possible to use effective methods of judicial cooperation between Member States. Criminal investigation and prosecution can be more powerful than administrative action.

Certain Member States, in particular those that are acting as coastal States, have recently reinforced their system of criminal sanctions. Their vigilance in relation to prevention and the severity of sanctions imposed by criminal courts, together with the publicity these cases have received has helped to reduce significantly the number of illegal discharges. In order to avoid that safe havens for perpetrators exist within the European Community, it is of the utmost importance that the same approach in tackling those crimes is adopted by all Member States, whether acting as flag State, port State and/or coastal State.

What is the added value of the proposed Directive as compared with the existing Directive 2005/35/EC?

When adopted in 2005, Directive 2005/35/EC and Framework Decision 2005/667/JHA were considered to form a comprehensive package in which the Framework Decision supplemented the Directive with certain criminal law related provisions that - according to the Council position at that time - belonged to the "Third Pillar" of intergovernmental cooperation. After the European Court of Justice annulled the Framework Decision, ruling that parts of it should have been adopted on the basis of the EC Treaty, its content – within the limits set by the Court – should now be included in Directive 2005/35/EC. This corresponds broadly to the initial proposal for a Directive which had been submitted by the European Commission in 2003 (COM (2003) 92 final). The added provisions will ensure that infringements against the Directive are considered criminal offences which have to be sanctioned with effective, proportionate and dissuasive criminal sanctions, at least as far as natural persons are concerned. The amendments will also clarify the scope of liability of companies for offences committed by persons having a leading position within that company or being enabled to be committed owing to a lack of control or supervision.

Why does the proposal not provide for the approximation of sanction levels included in Framework Decision 2005/667/JHA?

The European Court of Justice ruled in a judgment of 23 October 2005 that "the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence" (C-440/05, para. 70). While the European Commission believes that significantly differing sanction levels in the Member States risks providing for safe havens for offenders, the European Commission is bound by this judgment and could therefore not include provisions on sanction types and levels in its proposal under the current legal conditions.

Does the European Commission envisage submitting a new proposal on the approximation of sanction levels?

For the time being, the European Commission focuses on submitting a proposal in the first pillar along the lines indicated by the European Court of Justice. However, the European Commission continues to believe that the approximation of sanction levels is an important issue and will reconsider the possibility and need for a legislative proposal in due course.

Does the Commission intend fully to harmonise Member States' criminal laws with regard to environmental crimes?

The aim of this initiative is not to harmonise national criminal laws fully, but to take only those measures at Community level that are necessary to ensure the effective implementation of the Community's maritime safety policy.

The instrument chosen is a Directive, which leaves Member States a high degree of flexibility as to implementation. Member States are free to maintain or introduce more stringent measures than those foreseen in the Directive within the limits of their obligations under international law.

The proposal is worded in a way that leaves maximum flexibility to Member States to adapt its requirements to their existing criminal law systems. The different legal traditions and systems of Member States have been taken into account in the proposal. For instance, the Directive recognises that not all legal systems in the Member States acknowledge the criminal liability of legal persons. It therefore allows Member States to choose other forms of liability for legal persons.

What are the next steps for implementing the Directive?

Member States will have to implement the Directive at the latest 6 months after its adoption and send their implementing legislation to the Commission. This short implementation period should not pose any difficulties for Member States because the provisions of the proposal copy those already contained in the annulled Framework Decision 2005/667/JHA. The implementation period for this Framework Decision ended on 12 January 2007 so that Member States should in principle already have done the required implementation work for this Directive.

As a first step, the Commission will then assess whether the implementing measures submitted by Member States are in compliance with the Directive. In case of insufficient implementation, the Commission can bring infringement proceedings against the Member State concerned before the European Court of Justice, which can impose severe penalties.

Are there any other relevant instruments in the field of environmental crime?

In the general field of environmental crime, a proposal for a Directive on the protection of the environment through criminal law is currently under discussion in the Council and in the European Parliament (COM 2007 (51) final). The European Commission hopes that agreement on this proposal can be achieved in the first half of 2008. The proposal aims to harmonise the definition of a list of serious environmental offences as well as the scope of liability of natural and legal persons. It also requires Member States to provide for effective, proportionate and dissuasive penalties which have to be of a criminal nature for natural persons. The proposal for an environmental crime Directive does not, however, cover infringements of Directive 2005/35/EC on ship-source pollution which will be exclusively dealt with under the new proposal presented today.

Are there any other EC instruments or initiatives to help prevent ship source pollution?

Besides the instruments concerning ship safety¹, an important Directive was adopted in 2000 concerning port reception facilities for ship-generated waste and cargo residues². This Directive requires Member States to ensure the availability of port reception facilities and requires all ships to deliver their waste to these facilities. The Commission is carefully monitoring the implementation of this Directive.

To find out more about Vice President Frattini's work please see his website http://www.ec.europa.eu/commission_barroso/frattini/index_en.htm

For more information on the maritime transport policy: http://ec.europa.eu/transport/maritime/index_en.htm

¹ See brochure " Maritime Transport Policy: Improving the competitiveness, safety and security of European shipping" - http://ec.europa.eu/transport/maritime/index_en.htm

² Directive 2000/59 of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues (OJ L 332 of 28.12.2000, p 81)