

2.4. However, the EESC draws the attention of the institutions to the fact that providing slot protection to the

airlines should not create unfair competition preventing new companies to access to the market.

Brussels, 18 June 2003.

*The President*

*of the European Economic and Social Committee*

Roger BRIESCH

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**Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences'**

(COM(2003) 92 final — 2003/0037 (COD))

(2003/C 220/15)

On 19 March 2003 the Council decided to consult the European Economic and Social Committee under Article 80(2) of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Transport, Energy, Infrastructure and the Information Society which was responsible for preparing the Committee's work on the subject, adopted its opinion on 5 June 2003. The rapporteur was Mr Chagas and the co-rapporteur Dr Bredima-Savopoulou.

At its 400th plenary session of 18 and 19 June 2003 (meeting of 19 June) the European Economic and Social Committee adopted the following opinion by 96 votes to 6 with 5 abstentions.

## 1. Introduction

1.1. As already announced in the Communication on improving safety at sea in response to the Prestige incident <sup>(1)</sup>, the Commission proposes to further 'tighten the net' relating to ship-source pollution. The main part of world-wide ship-source pollution by oil is the result of deliberate discharges. Operational, i.e. intentional discharges from ships are still widely practised in the waters off the coasts of EU Member States. As a consequence of recurring major incidents and continued deliberate discharges, the Commission proposes a Directive establishing that discharges in violation of Community laws shall constitute a criminal offence and that sanctions, including criminal sanctions, are to be imposed if the persons concerned have been found to have caused or participated in the act by intent or grossly negligent behaviour.

1.2. The Commission considers that the introduction of adequate sanctions for marine-pollution offences is particularly important as the international civil liability regimes that govern ship-source pollution incidents involve significant shortcomings with respect to their dissuasive effects, in particular the ability of the polluter to nearly always limit liability. Hence, the deterrent effect of criminal sanctions is proposed.

1.3. The Transport Council (6 December 2002) welcomed the intention of the Commission to present such a proposal and the Justice and Home Affairs Council (19 December 2002) agreed that 'complementary measures should be considered to strengthen the protection of the seas through criminal law'.

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<sup>(1)</sup> COM(2002) 681 final.

1.4. The Commission shares the views of Member States about the urgency of this proposal without prejudice to a more general regime applicable for the protection of the environment through criminal law.

1.5. The European Summit (20-21 March 2003) called for adoption before the end of 2003, based on the Commission's recent proposal, of a system of sanctions, including criminal sanctions for pollution offences on the appropriate legal basis.

## 2. The Commission proposal

2.1. The proposed Directive consists of two parts:

- a) It introduces discharge rules for ship-source pollution into Community law and regulates the enforcement of these rules. The polluting substances include oil, hazardous and noxious liquid substances. It includes violations that have taken place by vessels in EU ports, in territorial waters, in the exclusive economic zone and on the high seas.
- b) It establishes that violations of the discharge rules shall be criminal offences and provides guidance on the nature of the penalties to be awarded. Sanctions may be imposed on any natural or legal person (i.e. the shipowner, the cargo owner, the classification society or any other person involved).

2.2. Sanctions including criminal sanctions may include the following: fines, confiscation, ban on engaging in commercial activities, placing under judicial supervision, judicial winding up, ban on access to public assistance or subsidies and deprivation of liberty.

## 3. General comments

3.1. Legislation to deter maritime pollution is welcomed. Escapes or discharge of oil or other pollutants from ships result in practice from a variety of causes, ranging from operational discharges which deliberately flout international law to accidental spills and relatively low levels of fault. The proposed Directive consists of measures to strengthen the enforcement in EU Member States of the rules laid down under international law, i.e. the MARPOL Convention.

3.1.1. In addressing the causes of pollution from ships, a distinction has long been recognised in international law between operational discharges and accidental escapes. The Commission's Explanatory Memorandum contains statements conveying the impression that operational discharges are an 'unacceptable practice'. There can be no disagreement that

discharges which contravene the MARPOL Convention are unacceptable and should be penalised when illicitly conducted. If the evidence shows that illicit operational discharges are taking place with impunity, there is no objection to measures to implement more effectively in Member States the enforcement provisions of MARPOL.

3.2. The Convention makes clear that operational discharges complying with MARPOL restrictions are permissible. If such discharges are to be eliminated completely, this is unlikely to be possible unless, at least, governments take the necessary measures to ensure that reception facilities become sufficiently widespread to make such discharges unnecessary. The Directive does not address the issue of inadequate reception facilities and their use.

3.2.1. Under Directive 2000/59/EC on Port-Reception Facilities for ship-generated waste and cargo residues<sup>(1)</sup> (Article 13), Member States are to lay down a system of penalties for the breach of national provisions adopted pursuant to the Directive and take all the measures necessary to ensure that those penalties are applied. The penalties thus provided are to be effective, proportionate and dissuasive. However, the requirements of the Directive have still not been fully implemented in some Member States. This situation may encourage ships to discharge at sea. The EESC notes that the Commission has initiated infringement proceedings against those Member States for non-compliance with the above Directive.

3.2.2. In light of the above, the Commission is invited to produce an inventory regarding the compliance of EU Member States with Directive 2000/59/EC and Member States should be urged to proceed rapidly since the deadline for compliance expired on 28 December 2002.

3.2.3. Since in several illegal discharges the polluters are not identified, there is a need to identify ships that pollute by way of satellites and through the installation of Automatic Identification Systems.

3.3. The proposed Directive consistent with MARPOL does not call for sanctions in regard to discharges resulting from damage to the ship or its equipment. The sanctions under this Directive apply only to illegal discharges and are only to be imposed if the pollution results from intentional or grossly negligent conduct by the parties involved. However, it is acknowledged that there is a different interpretation of 'gross negligence' in Member States.

<sup>(1)</sup> OJ L 332, 28.12.2000, p. 81.

3.4. All EU Member States have ratified MARPOL, and they are already required to ensure that such violations are penalised by criminal sanctions (Regulations 9,10 of Annex I, Regulation 5 of Annex II and Articles 4 and 6). However, the Directive provides for uniformity of application to Member States and extension to other parties involved beyond that of the master who may often be the unwilling or innocent party to such incidents.

3.4.1. The Directive purports to strengthen the implementation and enforcement of MARPOL in Member States without having identified the respects in which current national laws in the EU are said to be deficient in this respect. The EESC in its opinion on the Erika II package<sup>(1)</sup> invited the Commission to produce an inventory of relevant national legislation in EU Member States (in compliance with the MARPOL Convention sanctions). Hence, it reiterates that it is of the utmost urgency to have a comparative study of national legislations in order to get a clear picture of the existing sanctions in the EU.

3.5. The proposal to exercise criminal jurisdiction in relation to accidental spills outside the coastal waters of a Member State is not expressly articulated in the Commission's Memorandum. UNCLOS implies some considerable limitations as far as accidental pollution is concerned. However, by several States participating in a network of information sharing and enforcement cooperation, significant action is possible, strengthening the provisions of the MARPOL Convention.

3.6. The legal base of the proposed Directive is Article 80(2) of the Treaty establishing the European Community. The EESC notes that the European Summit has requested 'an appropriate legal basis' for the draft Directive. It appears that the situation is not clear whether the present Directive should have been presented under the first or the third pillar. It notes that the Community competence for sanctions in environmental matters is currently examined by the European Court of Justice. The EESC recalls its past opinion where it was stated that the Community has such competence. However, since the issue is sub judice, the EESC refrains from suggesting a legal basis in this respect. The EESC notes the Proposal for a Council Framework Decision<sup>(2)</sup> to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. The EESC invites the Commission to streamline the

terminology used regarding the present proposal, the above Framework Decision as well as the proposal for a Directive on the protection of the environment through criminal law<sup>(3)</sup> regarding inconsistencies.

3.7. It is an important principle of human rights law that measures affecting the fundamental rights and freedoms of the individual must observe the requirement of proportionality. That is to say, they must not exceed the measures reasonably required to achieve the legitimate objective of the legislation in question (in this case the prevention of pollution). The EESC urges the Council, the Parliament and the Commission to ensure that actions against alleged polluters are accompanied with all legal guarantees for the respect of human rights, due process, the presumption of innocence of the accused and the right of appeal.

3.7.1. The EESC acknowledges the vulnerability of seafarers and draws attention to Article 292 of UNCLOS<sup>(4)</sup> ('prompt release of vessels and crews') and requests that the Council and the Commission make proposals for the protection of masters and other crew members.

3.7.2. The risk of disproportionate action against masters and seafarers is increased by the fact that they are often the only persons connected with the ship who are physically present in the jurisdiction concerned. Investigations may subsequently reveal that any responsibility on their part was relatively minor.

3.7.3. Oil pollution incidents have not infrequently resulted from groundings near ports in circumstances where negligence on the part of pilots or port authorities has been either the primary cause or a significant contributory factor. In such cases, there is a risk for seafarers to be prosecuted with disproportionate zeal. In a climate of this kind, striking a just balance between the rights of the accused and the perceived expectations of the public is a difficult task.

3.7.4. Another potential practical concern relating to the criminalisation of seafarers is the fact that there is a worldwide shortage of competent trained seafarers and that national and international shipowners' associations, seafarers' unions, maritime administrations and the European Commission have, for several years, been considering ways of attracting new recruits to a seafaring career. Widespread media reports of the imprisonment of seafarers following pollution incidents will act as a deterrent to the recruitment of talented young persons, and in the long term will be counter-productive to the objective of enhanced maritime safety.

<sup>(1)</sup> OJ C 221, 7.8.2001, p. 54.

<sup>(2)</sup> COM(2003) 227 final of 2.5.2003.

<sup>(3)</sup> Proposal for a Parliament and Council Directive concerning environmental protection by the criminal law, presented by the Commission on 13.3.2001 (OJ C 180 E, 26.6.2001, p. 238), as amended on 30.9.2002 (OJ C 20 E, 28.1.2003, p. 284)

<sup>(4)</sup> United Nations Convention on the Law of the Sea.

3.7.5. There are three principal safeguards required to ensure that criminal laws for marine pollution do not disproportionately affect human rights:

- a) First, it should be recognised that the imposition of criminal liability on any person is a serious matter, and should not be undertaken in a manner which is disproportionate to the conduct being criticised or the objective of preventing pollution.
- b) If criminal liability is imposed, the penalty should not be disproportionate to the culpability of the offender and
- c) Pending trial of the criminal action there should be respect for the right of the accused to a presumption of innocence, and for his rights to liberty and freedom of movement.

3.8. Where there is 'gross negligence' the burden of proof must be sufficient and if used without any such safeguards, the test of liability would involve a high level of subjectivity, discretion and uncertainty. In the climate which follows a serious pollution incident, a test of this nature has the possibility to expose the defendant to an obvious risk of a criminal conviction which is intended to reflect public outrage at the consequences of the incident but which is out of proportion to their own culpability.

3.9. It is also desirable that the Directive should make it clear that criminal liability can be imposed only in respect of the personal fault of the defendant, whoever they are. Vicarious criminal liability for acts or omissions should not be imposed to other parties than the ones actually committing them (e.g. in cases of navigation error) unless it can be shown that their acts or omissions contributed to fault by the defendant.

3.10. Assuming that criminal liability is imposed, the penalty should not be out of proportion to the wrongdoing. A thoughtlessly retributive regime commands little respect and contributes little if anything to the prevention of pollution.

## 4. Specific comments

### 4.1. Preamble

The preamble states that 'measures of a penal nature are not related to the civil liability of the parties concerned'. For the sake of legal clarity, the EESC proposes to ensure expressly in the operative part of the Directive that punishment is not confused with compensation. Otherwise, there is a risk of legal wrangles that would upset the international civil liability and compensation regime.

### 4.2. Article 2 § 4

The definition of 'ship' seems to exclude pleasure craft. According to recent statistics more oil enters the sea from pleasure crafts than from all the other maritime sources altogether <sup>(1)</sup> except where there is a serious maritime casualty. To the extent that pleasure craft are not covered by MARPOL, the EESC invites the Commission to deal with sanctions for pollution from pleasure craft in another legal instrument in the near future.

### 4.3. Article 2 § 6 and Article 6

The Directive excludes from the definition of 'legal person states' or any other public bodies acting in the exercise of their prerogative of public power as well as public international organisations'. Moreover, regarding the range of persons prospectively liable to prosecution, Article 6 provides sanctions for 'persons' which are only private commercial interests involved in shipping (the shipowner, the cargo owner, the classification society). However, there has been plenty of experience — in Europe and elsewhere — of pollution damage being primarily caused or substantially contributed to by pilots, port administrations and other public authorities. The EESC believes that sanctions should be expressly provided in such cases against them as well.

### 4.4. Article 6 § 1

The EESC recalls its opinion <sup>(2)</sup> on the draft Regulation on the establishment of a fund for the compensation of oil-pollution damage in European waters (Erika II) whereby it stated that the term 'grossly negligent acts or omissions' may not be sufficiently precise for inclusion in a Community legal instrument and may jeopardise already well established and workable legal regimes such as the MARPOL regime. In some legal systems there are difficulties with the term 'gross negligence', and its translation into the languages of different Member States may well have a different meaning. In the context of accidental oil spills the term 'gross negligence' may be an unsatisfactory test of criminal liability. Furthermore, the MARPOL Convention

<sup>(1)</sup> GESAMP (Group of Experts of Scientific Assessment for Marine Pollution) figures: e.g. 68 % from leisure craft, 18 % from shipping general and 14 % from accidents/tankers cargo tank washings/coastal refineries/war-related accidents/natural seeps (2003).

<sup>(2)</sup> OJ C 221, 7.8.2001, p. 54.

makes it clear that the discharge into the sea does not constitute a breach of international law when it results from damage to the ship or its equipment. The EESC invites the Commission to reconsider both issues namely:

- the term 'gross negligence' with a view to arriving at a more appropriate term having no lesser effect than that intended by the Directive and ensuring uniformity of interpretation and application across Member States, and
- the appropriateness of including accidental pollution in the scope of the Directive.

#### 4.4.1. Article 6 § 5

The list of proposed sanctions is far reaching and should be reviewed bearing in mind the proportionality principle.

#### 4.4.2. Article 6 § 6

Regarding the provision that 'fines are not insurable', the EESC believes that there is no scope of application for this paragraph and, hence, it should be deleted. More particularly, a distinction should be made between intentional and accidental pollution. In cases of intentional pollution, fines are not insurable due to the conditions of the insurance contracts. In cases of accidental pollution, fines should be insurable.

## 5. Conclusions

5.1. The EESC notes the objective of the proposed Directive on the protection of the environment through criminal law.

5.2. Mindful of the need to fight environmental crime, the EESC supports the main objective of the proposal to ensure that any party who has been found to have caused or contributed to pollution intentionally or by gross negligence shall be subject to the sanctions in question.

5.3. The EESC invites the Commission to reconsider the following issues:

- the term 'gross negligence' with a view to arriving at a more appropriate term having no lesser effect than that intended by the Directive and ensuring uniformity of interpretation and application across Member States, and
- the appropriateness of including accidental pollution in the scope of the Directive.

5.4. The EESC strongly urges that sanctions should not be disproportionate. It also proposes to ensure expressly, in the operative part of the Directive, that punishment is not confused with compensation.

5.5. Regarding the provision that 'fines are not insurable', the EESC believes that there is no scope of application for this paragraph and, hence, it should be deleted. More particularly, a distinction should be made between intentional and accidental pollution. In cases of intentional pollution, fines are not insurable due to the conditions of the insurance contracts. In cases of accidental pollution, fines should be insurable.

5.6. There is a risk of disproportionate action against masters and seafarers as they are often the only persons connected with the ship who are physically present in the jurisdiction concerned. Therefore, the EESC requests that the Commission make proposals for the treatment and protection of masters and seafarers involved in such incidents having due regard to Article 292 of the UNCLOS Convention ('prompt release of vessels and crews').

5.7. In order to evaluate the scope of the proposed Directive, it is of the utmost urgency for the European Commission to provide: an inventory of the EU Member States' legislation of sanctions for marine pollution (in compliance with the MARPOL Convention) and precise information regarding compliance by EU Member States with Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues.

Brussels, 19 June 2003.

*The President*

*of the European Economic and Social Committee*

Roger BRIESCH