



## The introduction of penalties for ship-source pollution in community law: recent developments

Francesca Pellegrino<sup>1\*</sup>

<sup>1</sup> Professor of Aviation Law - Messina University

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### Abstract

This article focuses on relevant European Directives and decisions affecting ship-source pollution, such as (1) 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; and (2) Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution. The vacuum created by the two judgments of the European Court of Justice in Cases C-176/03 and C-440/05 (both) Commission v. Council, annulling Council Framework Decision 2005/667/JHA, was filled in by 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. The penalties introduced by the Directive cover offences committed by natural and legal persons. The purpose of this Directive is to incorporate international standards for ship-source pollution into European law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

*Keywords:* Ship-source pollution; Penalties; Noxious liquid substances; Deterrent measures; Maritime safety; Discharge.

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### 1. A harmonized system of sanctions for ship-source pollution: Directive 2005/35/EC

The European Parliament and Council Directive 2005/35/EC of September 7, 2005<sup>1</sup>, transposing into European law the international rules on marine pollution caused by

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\* Corresponding author: Francesca Pellegrino (fpellegrino@unime.it)

<sup>1</sup> Directive 2005/35/EC on "Ship-source pollution and on the introduction of penalties for infringements" (OJ L 255, 30.9.2005, p. 11), entered into force on November 24, 2007. See: Salamone, L. "La Direttiva (CE) n. 2005/C 25E/03 sull'armonizzazione del sistema sanzionatorio previsto al fine di aumentare la sicurezza marittima e migliorare la protezione dell'ambiente marino dall'inquinamento provocato da navi." *Diritto&diritti*, internet site [www.diritto.it](http://www.diritto.it). See also European Court of Justice (ECJ) Judgement of

discharges of polluting products (oil and noxious liquid substances), has strengthened the criminal-law framework for the enforcement of the law against ship-source pollution.

Following the sinking of the *Prestige*<sup>2</sup>, this legislation - as results from Recitals no. 7 and no. 9 - has been imposed by the fact that international law is being ignored by a very large number of ships sailing in Community waters.

In this case, in addition to the inefficiency of safety checks, it emerged that the *Prestige* vessel was, like the *Erika*<sup>3</sup> vessel, a single-hulled ship, 26 years old, sailing under a flag of convenience.

Experience has shown that international rules on liability and compensation for oil pollution does not produce a deterrent effect. This regime is founded on the principle of channeling civil liability<sup>4</sup> to a single liable party, the ownership, while sanctions should be applied to any person (owner, shipper, charterer, classification society, carrier) who causes or contributes to marine pollution.

The criminal legislations of Member States are very different, requiring an approximation and harmonization of their laws<sup>5</sup> and regulations and the provision of effective and criminal protection against any person who is found responsible for an infringement, through adequate penalties and deterrent measures, in order to improve maritime safety and to enhance the protection of the marine environment.

This Directive is designed to satisfy these needs more effectively and to remedy these shortcomings.

With regard to the scope, the 2005 Directive applies (without limitations) to discharges of polluting substances from any ship: a) in the territorial sea of a Member State; b) in the exclusive economic zone (or equivalent zone) of a Member State, established in accordance with international law, c) in the high seas, but also in straits used for international navigation subject to the regime of transit passage, in accordance with the 1982 Montego Bay Convention on the Law of the Sea (part III, section 2), to the extent that a Member State exercises jurisdiction; d) in the internal waters, including ports, of a Member State, insofar as the Marpol regime is applicable (Article 3).

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9 July 2009 (Case C-557/08), *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (OJ C 44, 21.2.2009).

<sup>2</sup> The *Prestige* was an oil tanker whose sinking in 2002 off the Galician coast caused a large oil spill. *Prestige* was carrying a 77,033 metric tons cargo of oil products. The spill polluted thousands of kilometers of coastline and more than one thousand beaches on the Spanish and French coast. See Arroyo, I. (2003) "Problemi giuridici relativi alla sicurezza della navigazione marittima (con particolare riferimento al caso *Prestige*)", *Diritto marittimo*, 1198 ss.; M. Micciché, M. and Montebello C., (2006) "La sicurezza in mare. Interrogativi urgenti e proposte dopo il caso *Prestige*", *Rivista di diritto dell'economia, dei trasporti e dell'ambiente*, internet site [www.giureta.unipa.it](http://www.giureta.unipa.it).

<sup>3</sup> On 12 December 1999 the tanker *Erika* broke in two in heavy seas off the coast of Brittany (France) while carrying approximately 30,000 tonnes of heavy fuel oil: 14,000 tonnes of oil were spilled and more than 100 miles of Atlantic coastline were polluted. See ECJ Judgement of 24 June 2008 (Case C-188/07), *Commune de Mesquer v Total France SA, Total International Ltd* (OJ C 188, 11.08.2009:16-18). See Pellegrino, F. (2009) "La Corte di giustizia europea si pronuncia sul caso dell'Erika", *Diritto dei trasporti*, I: 133 ss.; Rella, A. (2009) "Le conclusioni della Corte di Giustizia sull'interpretazione della responsabilità per il caso "Erika"", *AP Argomenti*, 2: 42.

<sup>4</sup> See *United States District Court, Southern District, New York*, of 2 January 2008, *Diritto marittimo*, 2008: 247.

<sup>5</sup> Bernardi, A. (2005) "Strategie per l'armonizzazione dei sistemi penali europei", in Canestrani, S. and Foffani, L. (eds), *Il diritto penale nella prospettiva europea*, Giuffrè, Milano: 377-378.

This Directive also makes no distinction as regards the nationality of ships, referring to any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on government non-commercial service (Article 3, paragraph 2).

The list of categorised substances is taken from Marpol 73/78, the International Convention for the Prevention of Pollution from Ships. Particularly its Annex I has introduced rules on the prevention of pollution by oil and mixtures thereof, identifying special areas where the discharge is subject to special restrictions.

For the purposes of international law, 'oil' means petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products (other than petrochemicals which are subject to the provisions of Marpol 73/78 Annex II).

Annex II provides for the control of pollution by noxious liquid substances in bulk, including a new categorization system for noxious and liquid substances, taking into account the degree of risk, and establishing limits and procedures for discharge into the sea, both within and outside of the special areas.

Noxious liquid substances are divided into four categories: a) those which, if discharged into the sea from tank cleaning or deballasting operations, would present a serious hazard to either marine resources or human health or cause serious harm to amenities or other legitimate uses of the sea and, therefore, justify the implementation of strict measures for pollution control (Category A), b) those which, if discharged into the sea from tank cleaning or deballasting operations, are deemed to present a hazard to either marine resources or human health or cause harm to amenities or other legitimate uses of the sea and, therefore, justify the application of strict anti-pollution measures (Category B) c) those which, if discharged into the sea from tank cleaning or deballasting operations would present a minor hazard to either marine resources or human health or cause minor harm to amenities and other legitimate uses of the sea and, therefore, require special operational conditions (Category C), d) those which, if discharged into the sea from tank cleaning or deballasting operations, would present a recognizable hazard to either marine resources or human health or cause minimal harm to amenities or other legitimate uses of the sea and, therefore, require some attention in operational conditions (category D).

Despite the express reference to regulations contained in the Marpol Convention as regards the relations between International and European law on this subject, the European Court of Justice (Case C-308/06)<sup>6</sup> upheld that it could not examine the validity of Directive 2005/35/EC considered in the light of all the rules of international law, in relation to the Marpol Convention and to the Montego Bay Convention. According to the EC Court, the first Convention must be considered binding for a Member State, but not for the EC because the Community it is not party to the Marpol Convention. The second treaty does not contain provisions having legal effect, in fact individuals are not granted independent rights and freedoms by virtue of UNCLOS.

The most significant provisions of this Directive, however, are contained in Articles 4 and 8, which imposed on States the obligation to consider 'infringements' the behaviour

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<sup>6</sup> On 3 June 2008 the European Court of Justice delivered judgement in Case C-308/06, issued by *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, concerning the validity of EU Directive 2005/35/EC on Ship Source Pollution (OJ C 183, 19.07.2008: 2). See Hachez, N. (2008-2009) "The Requirement of Direct Effect in the Judicial Review of EU Law against International Law", *Columbia Journal of European Law*, 15: 143.

causing pollution, if committed with “intent, recklessly or by serious negligence” (except where otherwise required by the Marpol Convention), and to adopt necessary measures to ensure that any person who is found responsible for an infringement is subject to ‘effective, proportionate and dissuasive’ penalties, which may include criminal or administrative penalties. The fourth Recital, however, says that measures of a dissuasive nature form an integral part of the Community’s maritime safety policy ‘as they ensure a link between the responsibility of each of the parties involved in the transport of polluting goods by sea and their exposure to penalties’.

## **2. The relationship between Directive 2005/35/EC and Framework Decision 2005/667/JHA**

The purpose of Framework Decision 2005/667/JHA of July 12, 2005<sup>7</sup> was to supplement the Directive 2005/35 and to strengthen the criminal-law framework, with the introduction of detailed rules of criminal law, dealing with two different aspects: on the one hand, by requiring Member States to take the necessary steps to establish in their national legal systems ‘effective, proportionate and dissuasive’ criminal penalties in the event of ship-source pollution and, on the other hand, by the determination of the type and degree of criminal penalties, depending on the damage caused.

In particular, Article 4, paragraphs 4 and 5, obliged each Member State to apply, at least for the most serious crimes, criminal penalties of a maximum of at least between one and three years of imprisonment.

The functional complementarity between the two acts of the EU (the Directive and the Framework Decision), one typical of the First Pillar, the other typical of the Third (Police and Judicial Co-operation in Criminal Matters) (PJCC)<sup>8</sup>, was specified by the fourth recital of the Framework Decision. It was intended to achieve the approximation and harmonization of national laws through the double-text mechanism.

Under Article 34 paragraph 2 of the EU Treaty (before the amendments by the Lisbon Treaty)<sup>9</sup>, the Framework Decision targeted the approximation and harmonization of the

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<sup>7</sup> OJ L 255, 30.09.2005: 164.

<sup>8</sup> The former Third Pillar ‘Justice and Home Affairs’ was redefined and renamed ‘Police and Judicial Co-operation in Criminal Matters’ after the Amsterdam Treaty transfer of some provisions under the EC Treaty. The Lisbon Treaty, signed on 13 December 2007, merges First and Third Pillar. See O’Keeffe, D. (1995) “Recasting the Third Pillar”, *Common Market Law Review*, 893; O’Keeffe, D. (1997) “La cooperazione intergovernativa e il terzo pilastro del Trattato sull’Unione Europea”, *Rivista italiana diritto pubblico comunitario*: 651-652 ss.

<sup>9</sup> See Louis, J.-V. (2007), “Le Traité de Lisbonne”, *Journal des tribunaux. Droit européen*, vol. 15, no. 144: 289-298; Zarka, J.-C. (2007) “Le ‘Traité modificatif’ adopté lors du Conseil européen de Lisbonne”, *La Gazette du Palais*, vol. 127, 5: 3176-3178; Sauron, J.-L. (2007) *Comprendre le Traité de Lisbonne: texte consolidé intégral des traités, explications et commentaires: Traité sur l’Union européenne (TUE); Traité sur le fonctionnement de l’Union européenne (TFEU)*, Gualino éditeur, Paris: 351. The EC Treaty was renamed to “Treaty on the Functioning of the European Union” (TFEU) by the Lisbon Treaty. See also Blumann, C. (2007) “Traité modificatif: peut-être la sortie du tunnel”, *La Semaine Juridique*, no. 48: 15-17; Ponzano, P. (2007) “Le traité de Lisbonne: l’Europe sort de sa crise institutionnelle”, *Revue de droit de l’Union européenne*, no. 3: 569; Chaltiel, F. (2008) “Le Traité de Lisbonne: de l’élaboration à la signature et la structure”, *Les Petites Affiches*, vol. 397, no. 7: 5; Fisher, K. H. (2008) “Der Vertrag von Lissabon: Text und Kommentar zum Europäischen Reformvertrag”, *Nomos*: 550-551.

laws and regulations of the Member States, and - like the Directive - was binding, as to the result to be achieved, upon each Member State to which they are addressed. Member States' freedom of choice of form and method with regard to the implementation of this act remains unaffected. However, the Framework Decision did not produce any direct effect, i.e. it did not confer rights and impose obligations on individuals which the courts of European Union Member States would be bound to recognise and enforce.

The need to complete and strengthen the framework also emerged clearly from the fifth Recital of this Framework Decision, where it was stated that this act is the correct instrument to impose on Member States the obligation to implement criminal penalties<sup>10</sup>.

Recitals no. 1 and no. 2, however, listed several documents to justify the intervention of the European Union: 1) the Action Plan of the Council and the Commission<sup>11</sup> on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice; 2) the Conclusions<sup>12</sup> of the Tampere European Council of 15 and 16 October 1999 and in particular point 48 thereof, calling for proposals for legislation to combat environmental crime, in particular common penalties and comparable procedural guarantees for the creation of a genuine European area of justice; 3) the Conclusions of the Copenhagen European Council of 12 and 13 December 2002<sup>13</sup>; 4) the statement of the JHA Council of 19 December 2002 following the shipwreck of the tanker *Prestige*, in particular, express the Union's determination to adopt all measures needed to avoid recurrence of such damage.

Many important provisions oblige Member States: a) to provide that discharges of pollutants into the sea from ships be considered criminal offences (Article 2) and punished with 'effective, proportionate and dissuasive' criminal penalties, specifying - within some limits - the type and the degree of criminal penalties (Articles 4 and 6), b) to take the measures necessary to ensure that aiding, abetting or inciting an offence referred to in Article 2 is punishable (Article 3) and to ensure that not only natural persons but also legal persons be held liable (Article 5).

This Framework Decision was annulled<sup>14</sup> by the judgment of the Court of Justice of 23 October 2007 (Case C-440/05)<sup>15</sup> for breach of Article 47 of the EU Treaty (now replaced by Article 40). This Article, by prohibiting that the rules it contains affect the provisions laid down by the EC Treaty, provides that, in the event of competing spheres of competence between the EC Treaty and the EU Treaty, the former is to take precedence<sup>16</sup>.

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<sup>10</sup> See Nalin, E. (2006) "Comunità europea e competenza ad imporre sanzioni penali", *Sud in Europa*, internet site [www.sudineuropa.net](http://www.sudineuropa.net).

<sup>11</sup> Council and Commission Action Plan (Vienna Action Plan) of 3 December 1998 (OJ C 19, 23.01.1999: 1).

<sup>12</sup> Presidency Conclusions, Tampere European Council, 15 and 16 October 1999, Document SN 162/99 (OJ L 26, 31.01.2003: 47).

<sup>13</sup> See Presidency Conclusions, Copenhagen European Council, 12 and 13 December 2002, Document SN 400/02, points 32 to 34.

<sup>14</sup> See Opinion of the Advocate General Mazák.

<sup>15</sup> ECJ Judgment of 23 October 2007, *Commission v Council*, in *Guida al diritto*, 46/2007: 105 ss., annotated by Damato, A. (2007) "La Commissione non può decidere tipo e livello delle sanzioni applicabili." *Guida al diritto*: 114.

<sup>16</sup> Article 47 of the EU Treaty said that: "nothing in this Treaty shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them".

Article 47 reflected the same architecture of the European Union. It could not only be considered a watershed between the EC Treaty and the EU Treaty, but it also regulated the relationship between the First Pillar, based on the 'Community method'<sup>17</sup>, that limited the role of national governments, and the Second and Third Pillar, which applied intergovernmental cooperation instead, attributing decision-making power to the Member States.

This Framework Decision has been annulled by the judgment of the European Court of Justice in the light of the following considerations. In order to assess whether Article 47 had been infringed, the Community Court had previously focused on the 'horizontal division' of powers between the EU Pillars, not to be confused with the 'vertical division' of powers between the EU and the Member States and between supranational and national law.

The EC Court had already expressed its own opinion with regard to this matter in the previous judgement of 13 September 2005 (Case C-176/03)<sup>18</sup>, which annulled the Framework Decision 2003/80/JHA<sup>19</sup> because the correct legal basis of the act, aimed at the approximation and harmonization of national criminal laws, must be found under Article 175 of the EC Treaty (now Article 192), and not under the EU Treaty<sup>20</sup>.

According to the Court of Justice opinion, these were fundamental and essential measures to combat serious infringements in the environmental field and to ensure the full effectiveness of European Law. This act, therefore, was contrary to Article 47 because it was non compliant with European law primacy. If criminal law, a field traditionally considered to be an expression of a State's authority and sovereignty, does not fall within the European Community's sphere of competence<sup>21</sup>, because in accordance with the principle of subsidiarity, Member States would be the best placed to introduce criminal penalties into their legal systems, it is sometimes possible that supranational laws recognize that States have the power to adopt measures that explicitly oblige them to punish criminal behaviours to achieve a partial harmonization of national laws.

This exceptional power, however, must be exercised within precise limits: there must be penalties 'necessary' to combat serious infringements and to ensure the full effectiveness of Community law.

While by the 2005 judgment<sup>22</sup> the Court recognized the Community's competence to introduce criminal measures for environmental protection, but did not resolve the

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<sup>17</sup> See Toulemon, R. (2002) "De l'Europe économique à l'Europe politique par le méthode communautaire", *Revue du Marché Commun et de l'Union Européenne*: 216.

<sup>18</sup> ECJ Judgement of 13 September 2005, *Commission v Council*. This judgement clarifies the distribution of powers between the First and Third Pillars as regards provisions of criminal law even though, as a general rule, criminal law does not fall within the Community's competence (point 16). See Apps, K. M., (2006) "Pillars Askew: Criminal Law EC-style", in *Columbia Journal of European Law*, 12: 625.

<sup>19</sup> Framework Decision of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 05.02.2003, pp. 55 -58).

<sup>20</sup> See Wasmeier, M. and Thwaites, N. (2004) "The «battle of the pillars»: does the European Community have the power to approximate national criminal laws?", *European Law Review*: 613; White, S. (2006) "Harmonization of criminal law under the First Pillar", *European Law Review*: 81.

<sup>21</sup> See COM(2005)583 final: Communication from the Commission to the European Parliament and the Council on the implications of the Court's Judgement of 13 September 2005 (Case C-176/03), *Commission v Council*.

<sup>22</sup> Case C-176/03, *supra*: 1116.

question of the scope of this competence, in this case, however, it has gone further, expressing its opinion relating to both the type and the degree of criminal penalty.

The EC Court resolves the 'vexata quaestio' of the legal basis of this act and indicates the article giving the Council the power to act. By referring to previous similar judgements<sup>23</sup> the Court thinks that the choice of the 'legal basis' for such a measure must rest on objective factors, that can be subjected to judicial review. The Court refers in its analysis to the traditional criterion of the aim and content of the act in order to establish whether the legal basis is correct<sup>24</sup>.

As regards the aim pursued, in the judges opinion, this act is intended to supplement Directive 2005/35/EC, by introducing measures to control pollution at sea and to enhance maritime safety, that falls under the common transport policy (Article 80 paragraph 2 of the EC Treaty, now Article 100). According to the Court, this policy, far from playing a secondary role, is one of the Community's foundations.

As regards the content of this act, Articles 2, 3, and 5 of the Framework Decision, on the one hand, required that discharges of pollutants from ships, regardless of flag, were considered 'crimes' and, on the other hand, obliged the Member States to impose 'effective, proportionate and dissuasive' criminal penalties in relation to these behaviours.

Consequently, the Court - referring to the previous cases<sup>25</sup> and in the light of the aim and content of this act - stated that Article 80(2) of the EC Treaty, while not excluding the application of the Treaty to maritime transport, provides that maritime transport policy measures shall be taken as and when the Council decides (thus automatic application is limited to rail, road and internal water transport)<sup>26</sup>.

According to the combined third and fifth Recitals and under Articles 2, 3 and 5 of the Framework Decision, the correct legal basis must be found in Article 80 paragraph 2 of the EC Treaty.

The Court also noted that the determination of the type and level of penalties applicable does not fall within the Community's sphere of competence: Articles 4 and 6 were adopted in violation of Article 47 of the EU Treaty. According to the principle of indivisibility of this Framework Decision, the Court has, therefore, annulled this act in

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<sup>23</sup> See ECJ Judgement of 26 March 1987 (Case 45/86), *Commission v Council (Generalized Tariff Preferences)*, in *European Court Reports*, 1987, I: 1493, § 5, in which the Court says: "the choice of legal basis is not in the discretion of the Community legislator but must be determined by objective factors which are amenable to judicial review, such as the aim and content of the measure in question".

<sup>24</sup> See also Court's Judgement of 11 June 1991, *Commission v Council, "Titanium dioxide"* *European Court Reports*, 1991: I-2867.

<sup>25</sup> See Court's Judgment of 17 May 1994 (Case C-18/93), *Corsica Ferries Italia S.r.l. v Corpo dei Piloti del Porto di Genova*, in *European Court Reports*, 1994: I-01783.

<sup>26</sup> See Judgement of 4 April 1974 (Case C-167/73), *Commission/Francia*, so-called "French Merchant Seamen Case", in *European Court Reports*: I-395, point 32, in which the Court of Justice ruled that "far from excluding the application of the basic principles of the EEC Treaty to sea and air transport, Article 84 (now Article 80) provide only that the special provisions of the title relating to transport shall not automatically apply to them that therefore sea and air transport remained, like other modes of transport, subject to the general rules of the Treaty". See also Judgement of 22 May 1985 (Case C-13/83), *European Parliament v Council*, in *European Court Reports*, 1985, 1513. See, in particular, Breton, J. M. (1970), "Les problèmes posés par l'article 84, paragraphe 2, du Traité de Rome." *Revue française de droit aérien et spatial*, 3: 2; Estienne-Henrotte, E. (1988) "L'application des règles générales du Traité de Rome au transport aérien", Bruxelles, Bruylant: 39-41; Erdmenger, J. (1991) "Vorbemerkung zu den Artikeln 74 bis 84", in Groeben, H. and Thiesing, J. and Ehlermann C. D. (eds), *Kommentar zum, Baden-Baden, EWG-Vertrag*, 1991, § 23.

its entirety because it has gone too far, invading the competence that Article 80 paragraph 2 gives the European Community.

### 3. Directive 2009/123/EC amending Directive 2005/35/EC

The need to fill the regulatory gap created by the decision of the Court of Justice of October 2007 (Case C-440/05), which annulled the Framework Decision 2005/667/JHA, has led the European legislator to enact the recent Directive 2009/123/EC<sup>27</sup>, amending Directive 2005/35/EC.

The new guidelines confirm the aim to make the legislation on pollution caused by ships more severe through the instrument of penalties, thereby increasing safety at sea and, at the same time, improving the protection of the marine environment. However, the new Directive is without prejudice to other compensation systems for damage caused by ship-source pollution under European Community, national or international law.

Member States are required, within one year after the date of entry into force of this Directive, to introduce ‘appropriate’ penalties (including criminal penalties)<sup>28</sup> for the prevention of illicit ship-source discharges of polluting substances (oil and hazardous liquids) (Article 1.1, new text).

The pollutant substances included in the new Directive are the same as those of the Directive 2005/35/EC, which comply with the Annexes to the Marpol Convention. They are hydrocarbons (petroleum in any form, including crude oil, fuel oil, sludge, oil refuse and refined products), mixtures thereof, and noxious liquid substances carried in bulk.

The noxious liquid substances carried in bulk, if discharged into the sea from tank cleaning or deballasting operations, present a hazard (ranging from slight to severe) to either marine resources or to human health or cause harm to amenities or other legitimate uses of the sea.

The 2009 Directive also applies to discharges of polluting substances from all ships, including hydrofoils, hovercrafts, submersibles, etc.. The law does not make any distinction based on nationality of the ships, with the only exception of military vessels, warships or auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

Under the new regulatory regime, Member States should ensure that they will consider a ‘crime’ any discharge of polluting substances from ships and will be required to take the necessary measures to ensure that the natural or legal persons (including cargo owners and classification societies) that commit it ‘can be held responsible’ (Article 5 *bis*). It is also stated that not only the directly responsible persons are

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<sup>27</sup> Directive 2009/123/EC of the European Parliament and 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, 52). See de Grandes Pascual L., (2009) “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)).

<sup>28</sup> See Court’s Judgment of 3 May 2005, *Silvio Berlusconi and Others* (Joint Cases C-387/02, C-391/02 and C-403/02), in *European Court Reports*, 2005, I-3565. See also Judgement of 11 November 1981 (Case C- 203/80), *Casati*, in *European Court Reports*, 1981, 2595.

punished, but also who commits the offence of incitement and aiding and abetting (Article 5 *ter*).

The concept of ‘discharge’ is broadly interpreted to include even minor spills, but based on three conditions: a) if ‘committed with intent, recklessly or by serious negligence’ (i.e. intentional or gross negligence) and b) if it produces ‘a deterioration of water quality’, c) if it occurs periodically (Article 5 *bis* paragraphs 2 and 3).

Consequently, States are required to take the necessary measures to ensure that infringements under this legislation are punishable by ‘effective, proportionate and dissuasive’ penalties (Article 8). The penalties should be sufficiently strict and effective to dissuade all potential polluters from any violation thereof.

The reason for the introduction of criminal penalties is explained in the Directive itself, which emphasizes its deterrent function. Criminal penalties (see Recitals 3 and 5) demonstrate social disapproval of a different nature than administrative sanctions, strengthen compliance with the legislation on ship-source pollution in force and should be sufficiently severe to dissuade all potential polluters from any violation thereof. Common rules on criminal penalties ‘*make it possible to use more effective methods of investigation and effective cooperation within and between Member States*’.

By conforming with the above judgment of the EU Court of October 2007, this Directive does not specify the degree of criminal penalties, giving Member States the competence to legislate in relation to this matter.

In this perspective, far from reserving a general competence of the EU in criminal law, the Member States are obliged to harmonize essential elements of environmental crimes.

Consequently, although criminal law, as well as the rules of criminal procedure, does not fall within European Community competence, it does not prevent the Community legislature from obliging States to apply ‘effective, proportionate and deterrent’ criminal penalties if those measures are needed to combat serious environmental infringements, in order to ensure the effectiveness of European standards for ship-source pollution.

This Directive follows the recent case-law that has obliged Member States to introduce criminal penalties in their domestic legislation with reference to a small number of serious infringements of European law, so as to strengthen the European standards, ensuring full compliance with them.

#### **4. Final considerations**

Criminalization of ship-source pollution in Community law stimulates some considerations.

Directive 2009/123/EC, although it is limited to a specific mode of transport and to a particular source of pollution, nevertheless, represents the means by which the EU can exercise its power to provide criminal penalties for marine pollution. It is, also, an instrument of ‘maritime safety policy’ and of the ‘integrated maritime policy’<sup>29</sup>, i.e. the

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<sup>29</sup> Green Paper “Towards a future Maritime Policy for the Union: A European vision for the oceans and seas”, Brussels, 7 June 2006, COM(2006)275 final. The Green Paper proposes a policy that treats the

modern European Community strategy which will release untapped potential for economic growth and employment, but also be a measure to uphold an EU ‘sustainable transport policy’<sup>30</sup>, which will reconcile market needs with protection of the ecosystem, safety and human health, thus following an acceptable model of economic, environmental and social sustainability.

But there is more. Enforcement of criminal protection from ship-source pollution is not only a fundamental Community objective to give full effect to its environmental policy and to its sustainable transport policy, but is also an absolutely vital target to combat serious environmental damage.

While Directive 2005/35/EC had already established a system of ‘effective, proportionate and dissuasive’ penalties against illegal discharges of pollutants into the sea, the new Directive, amending the previous act, has tightened the sanctions in case of discharges committed with any criminal intent, but has made no provisions regarding the determination of the type and level of penalties applicable.

I believe that this solution is completely consistent with the Court of Justice Decision of 23 October 2007. In fact, the only limit imposed by the Court in relation to the directives affecting criminal competence of States in this matter is represented by the determination of the type and level of criminal penalties.

In my opinion, this conclusion involves recognition of the Community's competence to affect the criminal law of Member States through an EU directive, obliging them to introduce into their national legislations criminal sanctions both in the environmental field and in maritime transport. This is an instrumental competence<sup>31</sup> to guarantee that serious offences against the environment be adequately punished. Consequently, Article 80 (now Article 100) of the EC Treaty should be considered a proper legal basis for enacting the new Directive on the criminal aspects of ship-source pollution, but only provided that the residual competence of Member States is respected. The latter might play their part by not merely transposing the supranational provisions in national law, but should make these compatible with the legal tradition of national criminal systems.

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oceans and seas in a holistic way in order to achieve a Sustainable Development of these areas; this is, to ensure mutual reinforcement of economic growth, social welfare and environmental protection.

<sup>30</sup> Blue Paper “An Integrated Maritime Policy for the European Union”, Brussels, 10 October 2007, COM(2007)575 final. In this document an “Integrated Maritime Policy” is “based on the clear recognition that all matters relating to Europe’s oceans and seas are interlinked, and that sea-related policies must develop in a joined-up way if we are to reap the desired results”.

<sup>31</sup> See Schiano di Pepe, L. (2006) “Competenze comunitarie e reati ambientali: il “caso” dell’inquinamento provocato da navi.”, *Diritto dell’UE*: 613.