

April 2022

Shipping Industry position paper on the new proposal on the Protection of the Environment through Criminal Law

ECSA, ICS and the IG P&I Clubs¹ welcome the efforts of the European Commission to reinforce environmental protection in particular by setting as a high priority the preservation of the oceans and the seas. However, in the context of shipping, the new proposal on the protection of the environment through criminal law (ECD) which aims to replace Directive 2008/99/EC, leads to discrepancies in the interpretation of existing EU and international instruments. Rather than creating the expected harmonisation and enhancing the protection of the environment, it creates legal uncertainty. Clarity and certainty are essential where criminal liability and an individual's personal freedom is at stake: for a crime to have been committed, the offender should have known that their actions are unlawful. It is the severity of the actions of the offender that should be the focus and most relevant factor when seeking to impose penalties and criminal sanctions and not the severity of the consequences arising from those actions .

Executive Summary

- An extension of the ECD to other areas of maritime legislation is unnecessary and may contradict the Member State's obligations under international maritime treaties and would provide no additional dissuasive measures that would meet the Commission's stated objectives;
- The international treaties MARPOL and UNCLOS already restrict when and what type of criminal

penalties may be applied to foreign seafarers and foreign flagged ships visiting EU ports;

- The concept of "serious negligence" contained in the ECD (Article 3 (2) of the new proposal) is not in line with these international treaties. EU Member States have existing treaty obligations vis-à-vis other State Parties that they are legally bound to uphold and must interpret "serious negligence" in line with the definition of conduct to be regarded as criminal under MARPOL.
- EU regulators should be cautious when aiming to harmonise different legislations through a "one size fits all" framework. Changing the substance of several pieces of legislation could have unintended consequences, especially where they will already have been interpreted by the courts of EU Member States;
- Administrative sanctions have proven effective for the shipping industry and should be maintained over criminal sanctions;
- Sanctions must be effective, dissuasive and proportionate. Their imposition must not have consequences which are manifestly incompatible with the purpose pursued;
- Criminal prosecution of individuals for accidental pollution reduces the attractiveness of the seafaring career and its expansion will contribute to the existing severe difficulties in recruiting seafarers.

The effectiveness of administrative sanctions

The new proposal would broaden the scope of the directive by including new legislative acts. This would oblige Member States to provide for criminal sanctions in their national legislation. However, **in the context of shipping, existing administrative sanctions (via flag State implementation and port**

¹ ECSCA represents 19 national shipowners' associations based in the EU and Norway. European shipowners control 39.5% of the global commercial fleet, contribute 149 billion euros per year to the EU GDP and provide 2 million people with careers both on board and ashore. ECSCA strives for a regulatory environment that fosters the international competitiveness of European shipping, to the benefit of the EU www.ecsa.eu.

The **International Chamber of Shipping** is an international trade association representing shipowners and operators in all sectors and trades and is concerned with all technical, legal, employment affairs and policy issues that may affect international shipping. Its membership comprises national shipowners' associations in the United States and the Americas, Asia and Europe and whose member shipping companies operate over 80% of the world's merchant tonnage. www.ics-shipping.org.

The **International Group of P&I Clubs** (IG) comprises 13 mutual (Protection & Indemnity) liability insurance associations that provide third party liability insurance cover to approximately 90% of the world's ocean-going tonnage. The 13 IG Clubs cover a wide range of liabilities relating to the use and operation of ships, including loss of life and personal injury to crew, passengers and others on board, cargo loss and damage, pollution damage by oil and other hazardous substances, wreck removal, collision and damage to property. www.igpandi.org.

State control) are well-enforced and already accepted as **more dissuasive than criminal prosecutions**. Administrative sanctions include detention of non-compliant ships in port, which has an immediate and effective impact on the protection of the environment and which lasts until the deficiencies that have been identified are rectified. On the other hand, criminal sanctions often involve lengthy and costly procedures with no immediate effect on the protection of the environment. Ship detention is a significant constraint and punishment for operators (due to the significant operational costs that can arise from the resultant delays).

Sanctions must be effective, dissuasive and proportionate. Their imposition must not have consequences which are manifestly incompatible with the purpose pursued. Acts of public authorities should not affect rights and legitimate interests to a larger degree than it is required for the objective for which the public act is issued. **In applying sanctions, the principle of proportionality is therefore a threshold for protecting fundamental rights.**

A number of factors show that there is no necessity for imposing stricter and harmonised penalties at the EU level:

- **The existing flag and port state control regimes are already proven to be effective mechanisms;**
- **The detention of vessels is already a severe and effective economic sanction;**
- **In recent years, there have been no major oil spills in EU waters;**
- **Recent statistics on the impact of major maritime accidents show that ships are safer than in the past and there is a significant reduction in the number and severity of ship-source pollution incidents; this has been driven by a number of factors, including the implementation of the International Safety Management (ISM) code. There is also increased scrutiny of pollution events by society and due to the adverse reputational impact for all parties of any involvement in a maritime pollution incident, more scrutiny of individual ships before hire by other actors in the maritime value chain;**
- **Directive (EU) 2019/883 on port reception facilities for the delivery of waste from ships provides a good example on how ship source pollution can be mitigated/reduced by**

incentives rather than sanctions or criminal prosecution;

- **Administrative penalties in case of infringements of provisions are dissuasive.**

In the shipping industry, **administrative sanctions and appropriate monetary penalties have proven to be efficient, effective, proportionate and dissuasive, in particular when it comes to accidental pollution.** This has been achieved through a comprehensive system of flag state inspection and port state control, including a wide range of EU legislation through three so called “Erika packages” of maritime legislation, and supported by a liability system which ensures that the consequences of an environmental damage are dealt with swiftly and efficiently, to the benefit of all claimants.

Moreover, criminal prosecution of **individuals for accidental pollution undeniably does not promote the attractiveness of the seafaring career. Excessive criminalisation is also a matter of great concern for IMO Member States as they are clearly pushing people away from the seafaring profession which is the backbone of the shipping industry.** This cannot be overlooked as the criminalisation of seafarers is having a severe and longstanding impact on the wider shipping industry. It would be unfortunate if a well-intentioned regulatory proposal, albeit unnecessary and without evidence in the context of shipping, further contributes to this troubling circumstance.

Need for alignment with international treaties

Article 3 (1)h of the new ECD includes in its scope offenses committed under the Ship Source Pollution Directive (SSPD). The SSPD represents the EU’s collective implementation of the first two Annexes of the internationally agreed International Convention for the Prevention of Pollution from Ships (MARPOL), and it already requires Member States to provide for criminal penalties for breaches. Thus, **there is no added value in incorporating it into the ECD.**

Moreover, since the new ECD seeks to harmonise criminal penalties, including the imposition of penal sanctions, including the SSPD in the ECD could inadvertently lead to a breach of Member States’ obligations under MARPOL and United Nations Convention on the Law of the Sea (UNCLOS).

The EU Member States, and the EU, are parties to UNCLOS and all EU Member States are parties 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 the international law, when transposing and interpreting the provisions of the SSPD, the EU Member States are obliged to ensure that this was done in conformity with the provisions of MARPOL and UNCLOS. UNCLOS contains important safeguards for foreign ships and nationals that generally prohibit penal sanctions for accidental ship source pollution. As currently drafted, the new ECD could impose mandatory prison sentences for acts where international treaties would only allow monetary penalties.

In proceedings before the European Court of Justice with regard to the test for conduct that would be regarded as criminal according to the SSPD, the Advocate General's opinion dated 20 November 2007 concluded that in relation to Articles 4 and 5 of the SSPD the notions "serious negligence" and "recklessly" had to be interpreted in conformity with MARPOL, namely "intent to cause damage or recklessly and with knowledge that damage would probably result", at least in areas beyond the territorial sea, which include the Exclusive Economic Zone and the high seas.

If the revised ECD sets out criminal penalties that EU Member States should provide for breaches of the SSPD, it must explicitly recognise that EU Member States are constrained by UNCLOS in the application of penal sanctions for pollution by foreign vessels and that the term "serious negligence" must be interpreted in line with the MARPOL standard of conduct "intent to cause damage or recklessly and with knowledge that damage would probably result".

The inclusion of the Ship Recycling Regulation in the scope of the new proposal

The inclusion of the EU Ship Recycling Regulation (SRR), which largely transposes into EU law the requirements of the IMO Hong Kong Convention, would not necessarily bring any benefit as the main effect would be to criminalise infractions that would be better dealt with under administrative law. As outlined above, the principle of proportionality

should be upheld. In addition, EU Member States can already prosecute under the Waste Shipment Regulation and, thus, there is no added value to include the SRR in Article 3 (1)g of new the ECD.

Moreover, in line with the subsidiarity principle, ECSA, ICS and the IG P&I Clubs consider that the national level is the most appropriate level of action in case of infringement of the SRR.

The shipping industry strongly believes this Regulation should not be included in the scope of the Environmental Crime Directive. Member States should remain competent to determine whether administrative or criminal sanctions are the best means to tackle infringements. If it is considered that harmonisation across the EU is needed concerning sanctions/penalties, then the impact of well implemented administrative sanctions should be evaluated as these may be more efficient, more broadly applied and therefore more effective than criminal sanctions.

Finally, the current EU list mainly contains European ship recycling facilities, which cover only a fraction of the capacity needed to recycle all end-of-life EU flagged vessels and especially vessel types of larger size worldwide. ECSA, ICS and the IG P&I Clubs support the possibility to add non-OECD facilities to the EU SRR list in order to expand the adequate capacity for a more effective environmental recycling for the EU flagged fleet.

Further information:

Eurico Ortiga
Policy Advisor Social and
Legal Affairs
+32 2 510 61 36
eurico.ortiga@ecsa.eu