Evaluation

of the

Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and the introduction of penalties for infringements

on the basis of the

Manifesto for a European Criminal Policy

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1. On the requirement of a fundamental legal interest worthy of protection

a) What interest does the legal instrument in question aspire to protect?

The Directive is intended to avoid ship-source pollution of the seas and thus protect the maritime environment, including the quality of sea water, fauna and flora.

b) Is the protected interest fundamental in terms of its nature?

Apart from the value that can be attributed to environmental vitality and biodiversity as such, the protection of the seas helps to maintain maritime resources for humans and ensures that those resources will be available to future generations. Therefore the interest protected by the Directive is to be deemed fundamental in terms of its nature.

c) Is the protected interest anchored in the primary law of the EU?

Yes, especially in Art. 3 (3) TEU and Art. 11, 191 et seq. TFEU, which include the maritime environment.

d) Is it possible to reconcile the protected interest with the constitutional traditions of the Member States and the EU Charter on Fundamental Rights?

Yes, cf. Art. 37 of the Charter on Fundamental Rights and – as an example for a national constitutional provision – Art. 20a of the German Constitution; both of which also include the protection of the maritime environment.

e) In what way is the impact of the proscribed conduct on the protected interest especially harmful to the society?

Without protection of the environment, the fundaments of life for future generations would be at risk. However, it is a characteristic of maritime pollution – even more than of environmental crimes in general – that its noxious effects normally do not become visible at once. To a certain extent this is due to the fact that an act of maritime pollution, considered alone, will rarely have major consequences for the maritime environment (although exceptions are not difficult to find, for instance shipwrecks of big oil tankers). Rather it is the total amount of noxious substances which are discharged into the seas over a longer period of time that will have the described negative effects. Thus it can take many years, even generations, until the consequences of maritime pollution for the environment and the health of humans become fully evident. Therefore it is normally not the individual act that is particularly harmful to the society, but the phenomenon as such. This observation does not delegitimise criminal law measures per se, but it calls for a differentiated approach that adequately takes into account to what extent the individual act actually causes or is likely to cause damage.

g) Does the EU legislator deal with the question of a legal interest worthy of protection, and is there any explicit and detailed justification as to whether a legitimate interest of this kind actually exists?

No such justification could be found.

2. On the *ultima ratio* principle

a) Are there for the protection of the legitimate interest (according to 1) alternative protection mechanisms – unrelated to the imposition of criminal sanctions – available to the EU?

Alternative protection mechanisms could be the establishment of detailed standards regarding the construction of ships and the transport of hazardous substances, as well as intensive controlling measures by national port administrations.

Apart from these entirely preventive measures, administrative sanctions and liability rules of civil law nature, especially on compensations to be paid for damages caused through maritime pollution, could achieve a repressive effect.

However, it can be assumed that the main impediment to an effective sanctioning – no matter if of administrative or criminal nature – of maritime pollution is the lack of controls carried out at sea. As a consequence, infringements are discovered too rarely and it turns out difficult to proof who committed them, all this resulting in a high chance that perpetrators cannot be made responsible.

b) Can the European legislator demonstrate the inadequate effectiveness of alternative, non-penal/criminal measures in practice?

Due to the legislation in the field of preventing maritime pollution adopted at the European level in the last 15 years, there is some experience with alternative measures. For instance, Directive 2000/59/EC establishes rules on port reception facilities for ship-generated waste and cargo residues in order to reduce illegal discharges into the sea (see its Art. 1). Apart from such preventive measures, there are several international instruments which provide rules for compensation. However, the materials accompanying the Commission's proposal(s) convincingly show that additional repressive measures are needed (see *infra* 2c).

What remains to be criticised is that the lack of effective controls at sea is not adequately tackled. The idea of establishing a European coastguard, as envisaged by Art. 11 of Directive 2005/35/EC, has not yet been put into practice. At least Art. 10 (1) of the amended Directive 2005/35/EC calls upon Member States and Commission to cooperate "in order to […] establish common practices and guidelines […] for the monitoring and early identification of ships discharging polluting substances […and for] reliable methods of tracing polluting substances in the sea to a particular ship". Furthermore the European Maritime Safety Agency (EMSA), established by Regulation 1406/2002/EC, shall help to improve the identification and pursuit of ships making unlawful discharges (Art. 2 (4) (f) of that Regulation). Art. 10 (2) (a) of the amended Directive 2005/35/EC goes more into detail, instructing the EMSA to "work with the Member States in developing technical solutions and providing technical

assistance […] in actions such as tracing discharges by satellite monitoring and surveillance". That are certainly a few steps in the right direction, but in order to comply with the *ultima ratio* principle they should have been taken *before* deciding about criminal law measures. With an effective system of controls severe administrative sanctions – at least to a large extent – might have been sufficient in order to deter from unlawful discharges.

c) Does the EU legislator deal with the question of alternative protective measures, and is there an explicit and detailed explanation as to whether resort to criminal law (of Member States, where appropriate) is necessary?

Yes, see COM (2003) 92 final, p. 5 et seq.: "In line with its policy on offences against environmental crime, the Commission considers that only criminal sanctions will be sufficiently effective for ensuring the intended effects of the ship-source pollution rules. A measure of a penal nature will serve as a Community-wide application of a deterrent sanction for those involved in the transport of polluting goods by sea. Sufficiently dissuasive effects will only be achieved by establishing that illegal discharges is a criminal offence, which demonstrates a social disapproval of a qualitatively different nature compared to compensation mechanisms under civil law or administrative measures. It therefore sends a strong signal, with a greater dissuasive effect, to potential offenders.

Aside from such considerations, however, there is another important feature of existing maritime law which particularly calls for criminal measures as far as pollution by shipping is concerned. This has to do with the international civil liability regimes that govern ship-source pollution incidents, which involve significant shortcomings with respect to their dissuasive effects.

As far as compensation of oil pollution is concerned, pollution by tankers is presently regulated at international level by the regime set up by the International Convention on Civil Liability for Oil Pollution (CLC) and the International Convention setting up the Oil Pollution Compensation Fund (Fund Convention), as amended by their Protocols of 1992, to which all coastal Member States are parties. The two conventions establish a two-tier liability system, which builds upon a strict – but in practically all cases limited – liability for the registered shipowner and a Fund, financed collectively by oil receivers, which provides supplementary compensation to victims of oil pollution damage who cannot obtain full compensation for the damage from the shipowner.

Thus, the focus of the international regime on oil pollution (and pollution by other hazardous and noxious substances, which is regulated by a convention which is yet to come into force) is mainly on the compensation of victims. The liability of the actual polluter is a considerably less prominent feature in these regimes, as the personal liability of the polluter is diluted by an almost unbreakable right of the shipowner to limit the liability and by collective compensation by cargo receivers through the Funds, irrespective of their actual role in the accident in question. The maritime pollution liability and compensation regime as they stand therefore provide few dissuasive elements to discourage those involved in the transport of dangerous or polluting goods by sea from engaging in negligent practices and is therefore of limited value for helping to prevent accidents from happening in the first place. […]"

d) Do the proscribed types of conduct indeed call for criminal sanctions as a last resort?

In principle yes. In this context it must be emphasised that the Directive contains an exception for minor cases in Art. 5a (2) as long as they do not cause deterioration in the quality of water. Such a general de minimis clause is a very helpful tool in order to avoid conflicts with the *ultima ratio* principle and can certainly serve as an example for other legal acts with relevance for criminal law (by contrast, it is missing in the Directive on the protection of the environment through criminal law). The only point of criticism in this regard concerns the rather broad and unclear formulation, which might limit its practical effect considerably. However, this aspect shall be dealt with under the principle of legality (*infra* 4).

3. On the principle of guilt

a) Does the punishment provided for the instrument relate in a proper way to the actual responsibility of the individual?

Yes, individual responsibility is a necessary requirement for criminal liability as required by the Directive: according to Art. 5a (1), read in conjunction with Art. 4 (1), Member States only have to provide for criminal sanctions where the perpetrator acted "with intent, recklessly or with serious negligence".

b) Do these sanctions correspond to individual guilt in terms of their type and gravity?

Due to the controversies regarding the former EC competence, the Directive in its present form remains silent on the type and level of criminal sanctions to be imposed. For that reason the member states enjoy a broad margin of discretion in this respect, which they can (and have to) use in order to provide for sanctions that correspond to the wrong actually done in the individual case. However, the approach taken by the Commission in its original proposal for a Framework Decision, setting up concrete rules for criminal sanctions in the area of maritime pollution, seemed preferable (at least generally speaking). Since now Art. 83 (2) TFEU provides a clear basis for the harmonisation also of type and level of sanctions, this original approach could be reconsidered in order to make sure that the sanctions imposed take account of the gravity of the individual case. If this should be done, however, due care must be paid to the coherence of the Member States' criminal justice systems (vertical coherence).

c) Does the legislator explicitly deal with the question whether these sanctions are appropriate having regard to the guilt of the individual?

No.

4. On the principle of legality

a) If the proposed legislative act aims at the introduction of a supranational criminal offense:

aa) Do the elements of crimes (objective and subjective) clearly emanate from the text of the proposed Directive itself?

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bb) Are the sanctions provided for foreseeable?

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b) If the legislative act aims at harmonising national criminal law provisions:

aa) To the extent that the obligation to adjust national criminal law does not give any leeway for the implementation (and thus exhaustively defines the criminal offence): Are the objective and subjective prerequisites for criminal liability as well as the sanctions which could be imposed foreseeable (as *supra* a)?

(1) To a large extent, the terms used in the Directive in order to describe the behaviour that at least needs to be criminalised are sufficiently clear. A lack of clarity exists, however, with regard to the definition of minor cases in Art. 5a (2) of the Directive: what shall be regarded as "deterioration in the quality of water"? This term could be interpreted in a very narrow sense as referring only to the place of the discharge itself. Since deterioration will occur in its direct surroundings – let us say within a radius of 10 meters – the exception for minor cases would then be of virtually no value in practice. By contrast, the exception clause could also be understood extremely broadly so that only deterioration in the water on a very large scale – maybe within a radius of 200 kilometres – could not be regarded as a minor case. This lack of clarity can cause different problems for the implementation into national law. If the formulation used in the Directive is simply copied into national criminal law, this will lead to imprecise criminal law provisions that risk to conflict with the principle of legality. If it is construed very narrowly, thus depriving the exception of its effect, the *ultima ratio* principle would be violated. And if it is interpreted in a broad sense, there is a risk that Member States might escape their obligation to provide for criminal sanctions, making the intended harmonisation a farce.

Thus, such an imprecise notion does not make sense with regard to a global ecosystem. It would have been preferable to clarify the exception clause by enumerating concrete circumstances that exclude a minor case, for instance that the consequences of the discharge can be detected in a certain distance from the place of commission, that the death of more than single animals or plants is caused etc.

(2) Even more serious deficits in terms of foreseeability originate from the reference to the MarPol Convention and its 1978 Protocol "in its up-to-date version" that can be found in Art. 2 (1) of the amended Directive 2005/35/EC. It must be acknowledged that the EU legislator did attach some provisions of this international instrument as annex to the Directive. In doing so, it has made clear for national legislators how far their obligation to implement the Directive reaches and the national criminal law provisions – which must be interpreted in the light of the Directive and thus the MarPol Convention – are easy to apply and their scope is foreseeable for citizens. However, it deserves being criticised that several provisions from the Convention have not been included in the annex to the Directive. For instance, Art. 2 (2) of the Directive provides that "'polluting substances' shall mean substances covered by Annexes I (oil) and II (noxious liquid substances in bulk) to Marpol 73/78". Part 2 of the annex contains the abstract definitions of "noxious liquid substances in bulk" laid down in the MarPol Convention. What is missing are the "[f]urther guidelines on the categorisation of

substances, including a list of categorised substances" that are given in Regulation 3(2) to (4) and Regulation 4 and the Appendices to Marpol 73/78 Annex II. But without those additional provisions it is virtually impossible to find out the discharge of which substances actually is criminalised. The same problem arises with regard to the definition of "discharge" in Art. 2 (3) of the Directive. That provision refers to Art. 2 of the MarPol Convention, which is not included in the annex. It states that – amongst others – a release of harmful substances "directly arising from the exploration, exploitation and associated off-shore processing of sea-bed mineral resources; or […] for purposes of legitimate scientific research into pollution abatement or control" shall not be covered by the MarPol Convention. Such limitations are of key importance in order to discern the illegal conduct. Therefore there must not be any ambiguities with regard to them.

Of course it might be objected that nowadays international instruments are often available to the public on the internet. In the case of the MarPol Convention, however, a reliable and easily accessible internet source is missing: the website of the International Maritime Organization (which is responsible for amendments to the MarPol Convention) requires registration; once registered and logged in the user will be confronted with a database so full of material that it is hard to find the relevant amendments (let alone a consolidated version of the Convention). If recourse is had to other, "unofficial" internet sources, there is no guarantee that the texts which can be found there are up to date.

These problems could have been avoided by the EU legislator by simply attaching not only selected provisions of the MarPol Convention, but a consolidated version of all relevant texts.

bb) Do the national legislators have the possibility to implement each single prescription imposed by the European legislative act in such a concrete manner that this results in a strict and unambiguous provision of national criminal law (please give reasons for the answer using possible examples on how to formulate the implementing law)?

In principle yes, but subject to the condition that they find the latest version of the MarPol Convention and its 1978 Protocol, see *supra*.

c) Does the proposed Directive introduce retroactive rules, or does it compel member States to introduce such rules?

No.

d) Is any potential retroactivity justified with reference to the principle of *lex mitior*?

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e) Have national Parliaments, organizations, and citizens been informed of the proposed Directive in a timely and comprehensive manner, and have they been given a reasonable possibility to voice their own opinion?

An involvement of national parliaments is neither indicated in the Directive nor in the accompanying materials.

5. On the principle of subsidiarity

a) Why is it not enough with criminal law measures at Member State level?

The cross-border implications of ship-source pollution are even more obvious than those of environmental crimes in general: they affect the sea (including the high seas), which is an open and global eco-system where noxious substances are distributed easily. The acts covered by the Directive thus produce effects which normally are not limited by state borders.

b) Why is the objective of each measure – whether in terms of its scope or its impact – better served on a European level?

The need to take action on a supranational level is already indicated by the MarPol Convention and its protocols. The differences in national laws can only be overcome through harmonisation on EU level. Furthermore it should be noted that the Union (and the Community before) has – without major controversies – adopted legislation on the field of environmental law. Considering the annex character of the present Directive, this is an additional argument for the Union's possibility to require criminal sanctions.

c) Does the EU legislator deal with the question of subsidiarity and is there an explicit and detailed evaluation of the fulfilment of this requirement in Union acts – taking into account all the alternatives and weighing all circumstances?

Yes, see COM (2008) 134, p. 5. Although this explanation is kept in rather general terms, it sufficiently specifies the reasons why maritime pollution is regarded as a cross-border phenomenon that the Union can deal with in a more satisfactory manner than the Member States can.

d) Have national Parliaments expressed their views as to the preservation of the subsidiarity principle and, if so, what was their opinion? Has the EU legislator explicitly considered these arguments?

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6. On the coherence of domestic criminal justice systems and the consistency with the EU frame of reference

a) Do the criminal law provisions of the proposed Directive undermine the coherence of the criminal justice system of one or more member States?

Generally speaking, the risk that the present Directive causes serious incoherencies in national criminal justice systems is low. This is due to the fact that the rules of conduct (i.e. the provisions of environmental law that shall be enforced through the present Directive) have been consented by all Member States on the international level before (see the MarPol Convention with its protocols).

Furthermore it is positive that the obligation to penalise inciting, aiding and abetting only refers to intentional conduct because many legal orders limit these forms of participation to cases where an offence has been committed intentionally (such as Germany).

However, it can be criticised that the Directive calls for criminal sanctions also when an offense has been committed "recklessly or with serious negligence". These categories are not common to all Member States and their use in the Directive may thus provoke inconsistencies. Furthermore it should be noted that reckless or negligent behaviour does not per se have to be criminalised to the same extent as intentional behaviour. In Member States with a rather strict approach to criminalising negligence, the obligation to provide criminal sanctions for reckless or (grossly) negligent pollution may therefore collide with their general principles of criminal policy.

b) In terms of systematicity and substantive content, is the proposed Directive in line with other EU legislative acts (related to criminal law)?

A lack of coherence with other measures of EU law could not be detected.

c) Does the EU legislator deal with the question of horizontal and vertical coherence, and is there an explicit and detailed explanation as to whether the proposed Directive does not undermine the coherence of domestic criminal justice systems or at least whether any such undermining is inevitable – particularly in view of the obligation to respect the national identity of each member State?

Yes, at least in the original proposal by the Commission, see COM (2003) 92 final, p. 7: "The proposed measure does not oblige Member States to change their fundamental system of criminal law, comprising, for instance, the doctrine of criminal responsibility or the general definitions of guilt. Measures approximating such principles and general definitions are not related specifically to the Community objectives in question. Nor does the scope extend as far as providing for (minimum) requirement of criminal sanctions, or address general principles of criminal law, administration of justice, and/or criminal jurisdiction and criminal procedure."

As far as conflicts with national criminal policy regarding the criminalisation of negligence arise, the reasoning presented by the Commission for the need to introduce criminal sanctions in this area can still be regarded as sufficient.

However, at least the introduction of criminal liability for reckless or seriously negligent acts by the Directive (as finally adopted) would have required a more in depth analysis.

OVERALL EVALUATION

❒ The legislative act **fully complies with** the requirements of the Manifesto on European Criminal Policy.

☒ The legislative act **satisfies essentially** the requirements of the Manifesto on European Criminal Policy. Alterations or improvements are required only on certain points (see recommendations).

❒ The legislative act meets **only partially** the requirements of the Manifesto on European Criminal Policy. Significant alterations or improvements are required (see recommendations).

❒ The legislative act **does not substantially meet** the requirements of the Manifesto on European Criminal Policy. Extensive and structural alterations are required (see recommendations)**.**

❒ The legislative act **does not meet at all** the requirements of the Manifesto on European Criminal Policy. The proposal/enactment of such a legal instrument must be wholly re-examined (see recommendations).

RECOMMENDATIONS FOR THE AMENDMENT OF SPECIFIC PROVISIONS OF THE PROPOSED DIRECTIVE:

The main problems that need to be solved originate from the unclear exception clause for minor cases in Art. 5a (2) of the Directive and the lack of a reliable and easily accessible source for the up-to-date version of the MarPol Convention.

Art. 5a (2) of the Directive should therefore be amended: by way of examples it should be indicated by the EU legislator which effects of an illegal discharge exclude the application of the exception clause.

The annex attached to the Directive should not only comprehend selected provisions of the MarPol Convention, but a consolidated and up-to-date version of its entire text.