



NAVIGATING EUROPEAN REGULATIONS ON POLLUTION PREVENTION IN THE SHIPPING INDUSTRY: A SHIPOWNER'S PERSPECTIVE

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Abstract

This article discusses European regulations related to pollution prevention in the shipping industry, including the Ship-Source Pollution Directive, the Ship Recycling Regulation, and the Environmental Liability Directive. These regulations place responsibility on shipowners for compliance and the cost of pollution incidents. All of them are currently under review in the European legislative process, influenced by the European Commission's push for better environmental protection outlined in the Green Deal and the Environmental Crime Directive. The paper provides an overview of recent developments in this field and argues for the continued use of sectoral legislation with administrative penalties rather than legislation focused on criminalizing offenses.

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Introduction

The shipping industry is subject to various European regulations designed to prevent and minimize pollution. In this paper we will focus on three of them, namely the Ship-Source Pollution Directive, the Ship Recycling Regulation, and the Environmental Liability Directive. Shipowners are responsible for ensuring that their ships comply with these regulations, and they also bear the cost of any damage caused by pollution incidents. These regulations are however all under scrutiny – although in different phases – in the European legislative process. The review process is impacted, directly or indirectly, by the European Commission's recent push to achieve ambitions laid out in the Green Deal and the adoption of a more general regime on the protection of the environment through criminal law within the Environmental Crime Directive. This paper aims to provide a short overview of recent developments in this evolving field of European legislation. It will argue² for the continued use of sectoral legislation with administrative penalties for pragmatic reasons rather than a general legislation focused on criminalizing certain offenses.

Specific provisions for marine environment offenders

Over the years specific provisions on administrative and criminal sanctions for marine environment offenders have been introduced in the European Union (EU). The shipping and maritime industry is particularly affected by these regulations. Several drivers³ led to the establishment of these regulations, including:

- The need to protect the marine environment: since the 1970s several regulations were adopted in response to concerns about the environmental impact of shipping, including the pollution of the marine environment by oil and other harmful substances.
- High-profile oil spills: There have been several high-profile oil spills in European waters, including the Prestige oil spill in 2002, which led to significant environmental damage and public concern about the impact of shipping on the environment. Regulation was adopted to address these concerns and to prevent similar incidents from occurring in the future.
- The aim to implement international regulation: the EU has implemented several international maritime regulations in order to protect the marine environment and ensure the safety of ships, and to comply with the international agreements adopted by the International Maritime Organization (IMO).
- The desire to harmonize EU regulations: several regulations were adopted in order to harmonize the rules for preventing and combating pollution in European waters. It establishes common requirements that apply to all EU Member States, and it aims to ensure that ships operating in European waters are subject to consistent rules and standards.

² This paper draws, among others, on arguments developed in various fora of the European Community Shipowners Associations (ECSA) and the International Chamber of Shipping (ICS). However, the views expressed are those of the author.

³ Gonsaeles, G. (2011). The EU Regulatory Framework on Criminal Sanctions for Ship-Source Pollution—A Consumer Law Perspective in Accordance with International Law. *European Journal of Consumer Law*, 209-239.

The following paragraphs introduce three relevant mechanisms that are of importance for the maritime and shipping industry, namely the Ship-Source Pollution Directive (SSP Directive)⁴, the Ship Recycling Regulation (SRR)⁵ and the Environmental Liability Directive (ELD)⁶.

Ship-Source Pollution Directive

The Ship-Source Pollution Directive is an EU directive that sets out specific rules for preventing and combating pollution from ships in European waters. More specifically, the SSP Directive covers the penalisation of both EU and foreign vessels. It also brings the possibility for prosecuting unintentional discharges committed with serious negligence. Prior to the entry into force of the Directive, the enforcement of the international maritime pollution prevention regime targeted illegal discharges mostly in territorial waters. The Ship-Source Pollution Directive is based on the provisions of International Convention for the Prevention of Pollution from Ships (MARPOL, 1973), the international treaty that aims to prevent and minimize marine pollution from ships. The directive was adopted in order to implement the provisions of MARPOL within the EU. The SSP Directive thus complements the international framework by establishing the liability regime pursuant to which international standards on illegal discharges should be enforced. The SSP Directive has been effective in requiring a common framework on ship-source pollution for infringements regarding MARPOL Annex I and Annex II discharges – pollution by oil and noxious liquid substances – into the sea and provides the legal basis for the creation of a new European tool for satellite surveillance and detection of spills – the CleanSeaNet (CSN) service⁷.

The process to revise the SSP Directive is underway. The European Commission is expected to evaluate the SSP Directive on its relevance, effectiveness, efficiency, coherence and EU added value in 2023. It is likely that it will be proposed that the SSP Directive be expanded to include Annexes III, IV and V of MARPOL.

Ship Recycling Regulation

Ship recycling is a complex process that risks to generate hazardous waste, such as asbestos and other toxic substances, and impacts on the environment and human health. It may also contribute to marine pollution if not properly managed as ships may release hazardous substances into the ocean during the recycling process. Therefore, it is essential that proper regulations and supervision are in place to ensure safe and environmentally sound recycling practices. To reduce the risk of substandard ship recycling, several international Conventions and EU regulations have been adopted. The most relevant texts are the Basel Convention (1989), The Hong Kong Convention (2009), the Waste Shipment Regulation⁸ on waste shipments and the Ship Recycling Regulation.

⁴ Directive 2009/123/EC amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements

⁵ Regulation (EU) No 1257/2013 on ship recycling

⁶ Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage,

⁷ See following link for more information on the CSN: <https://emsa.europa.eu/csn-menu.html>

⁸ Regulation (EC) No 1013/2006 on shipments of waste

The Ship Recycling Regulation – adopted in 2013 – is a piece of European legislation that sets out rules for the environmentally sound recycling of ships. The regulation is aimed at facilitating early ratification of IMO's 2009 Hong Kong Convention for the Safe and Environmentally Sound Recycling of Ships - both within the EU and in other countries outside the EU - by applying controls to ships and ship recycling facilities on the basis of the Hong Kong Convention. It sets out specific requirements for ship recycling in the European Union, including safety and environmental standards for the facilities where ships are recycled and the training and qualifications of workers involved in the process. The SRR sets higher standards than the IMO's 2009 Hong Kong Convention–requirements related to downstream toxic waste management. Moreover, labour rights are included.

EU-listed ship recycling facilities are thus subject to a higher level of scrutiny and independent third-party certification and auditing. As of December 2018, EU-flagged commercial vessels over 500 GT must be recycled in safe and environmentally sound facilities that are included on the rather limited list of approved ship recycling facilities⁹. From 2020 on it applies also to non-EU flagged ships calling at a port or anchorage of an EU member state. The geographical concentration of these facilities raises concerns together with their capacity to accommodate vessels of substantial size, such as very large crude carriers (VLCCs). Additionally, it remains uncertain if these facilities possess the necessary capacity to efficiently handle the significant volume of EU-flagged ships that are expected to require recycling in the foreseeable future. It does not align with the current reality within the international shipping industry. This discrepancy has the potential to disrupt the established level playing field and place EU shipowners at a disadvantage. It is important to note that the proceeds generated from the sale of a ship for scrapping are often re-invested in the acquisition of new, more sustainable vessels.

The European Commission has announced that it will have a proposal ready for a revision of the Ships Recycling Regulation by 2025. In the meantime a number of assessments and evaluations will be prepared. Among other things, on a financial instrument.

Environmental Liability Directive

The European Union introduced the Environmental Liability Directive to establish a framework of environmental liability ('environmental liability regime'). The European framework is based on the 'polluter pays' principle¹⁰. The aim of the framework is the restoration by a polluter of environmental damage caused to natural species and habitats, to water resources and to land. In the event of damage, the polluter will be required to identify and fund measures necessary to return the affected area to its pre-incident condition. The Directive embeds some new and often challenging concepts, both in an economic and ecological sense (e.g. economic valuation of damage or compensatory remediation of damage)¹¹. This led to a long run-up which concluded eventually in a much narrower approach that focuses on administrative liability that would be better suited for tackling environmental damage in the European context.

⁹ See https://environment.ec.europa.eu/topics/waste-and-recycling/ships_en for the current EU list of ship recycling facilities

¹⁰ See for more background on the ELD following weblink: <https://ec.europa.eu/environment/legal/liability/>

¹¹ See for an extensive overview of the scope ELD Bergkamp, L., & Goldsmith, B. (eds.). (2013). The EU environmental liability directive: a commentary. Oxford University Press.

The ELD outlines the types of damages and activities for which an operator may be held liable. It holds strict liability for environmental damage caused by specified occupations carrying out 'dangerous activities' including industrial and agricultural installations needing an IPPC¹² permit, transport of waste, carbon capture and storage and others. The Directive holds a limited set of exemptions where the ELD does not apply. Next to the rather classical defences for strict liability such as 'activities to serve national defence or international security or protection against natural disasters', 'act of armed conflict, hostilities, civil war, insurrection' and 'natural phenomenon of exceptional, inevitable and irresistible character', there is also the exemption with regard to 'diffuse pollution' when no causal link can be assigned to individual operators. The exemption of environmental damage arising from an incident of which liability or compensation that falls within the scope of any of the international conventions listed (in Annex IV). Examples include (mainly IMO conventions) on oil pollution, carriage of hazardous substances at sea and on land, and nuclear risks.

The European Commission is expected to finish the evaluation of the ELD in 2023.

Regulation	Ship-Source Pollution Directive	Ship Recycling Regulation	Environmental Liability Directive
Date Adopted	Directive 2009/123/EC	EU Regulation 1257/2013	2004/35/EC
Scope	Prevention of pollution from ships	Ship recycling	Environmental liability
Objective	To minimize the risk of pollution from ships, including oil spills and discharge of harmful substances	To ensure that ships are recycled in an environmentally sound and safe manner	To ensure that operators are held liable for damage to the environment and that measures are taken to prevent and remedy such damage
Focus on Shipping Sector	Establishes rules for the prevention and control of pollution from ships, including regulations on equipment and procedures for preventing spills and discharges, and emergency response plans, specifically related to the shipping sector.	Establishes rules and standards for the recycling of ships, including requirements for ship recycling facilities to be authorized and regularly inspected, and for ships to carry an inventory of hazardous materials before being recycled.	Establishes rules for the liability of operators for environmental damage, including provisions for preventing and remedying damage, and for compensation for victims of such damage.
Step in the European legislative process	The new SSPD proposal is planned for the first quarter of 2023	The new SSR proposal is planned for 2025	The adoption of the evaluation report is provisionally scheduled for the second quarter of 2023

Table 1: Summary of three European provisions for marine environment offenders

Environmental Crime Directive

Simultaneously with the aforementioned adoption of specific regulations, a more general regime on the protection of the environment through criminal law is currently laying under scrutiny of the European legislative process. In 2008, the directive on the

¹² IPPC: Integrated Pollution Prevention and Control.

protection of the environment through criminal law was adopted¹³ (hereinafter 'Environmental Crime Directive' or 'ECD'). It is the main European instrument in the field of environmental criminal law. The ECD criminalises serious violations of over 70 legal instruments in the environmental field and requires effective, proportionate and dissuasive sanctions.

More particularly, the ECD:

- defines environmental offences that Member States must criminalise (based on the most serious infringements of rules aiming at protecting the environment as set out in legal instruments listed in the annexes to the Directive);
- requires Member States to ensure criminal liability also with regard to inciting, aiding and abetting;
- obliges all Member States to ensure effective, proportionate and dissuasive criminal sanctions for environmental crimes. Sanctions for legal persons do not need to be criminal sanctions.

Based on a recent evaluation¹⁴, the European Commission found that the ECD has not fully met its objectives and that significant divergence remains between Member States. Overall, it was found that the ECD did not have much effect on the ground and its implementation in practice is poor in all Member States. This is reflected by the fact that the Directive did neither lead to more prosecution and convictions of environmental crime nor to the imposition of more dissuasive sanctions in the Member States. The European Commission began an initiative to review and assess various options to address these challenges and to help improve the effectiveness of a revised Directive, especially by provisions facilitating and fostering the work of practitioners such as law enforcement authorities, prosecutors and judges. The Commission presented its legislative proposal for a revised Directive at the end of 2021. The proposal is now being debated by the European Parliament and the Council.

Discussion

One of the observations in the evaluation is that the list of 72 pieces of administrative environmental legislation contained in the Annexes is largely outdated, as the included legislation has in many cases been amended or repealed. New legislation and new areas of environmental law have not been included since the ECD entered into force. This leads to uncertainties regarding the scope of the ECD, demands a high degree of specialised knowledge from law-enforcement practitioners and creates inconsistencies as new areas of environmental protection are not protected by the ECD. It is thus clear that there is a will to broaden the scope of the Directive: a wider range of offence categories has been identified currently not covered by the current ECD. The scope of the proposed Directive has also been expanded to include more offences which could be committed by a ship or a shipping company, notably 'source discharge of polluting substances from ships' and the 'illegal recycling of ships'.

¹³ Directive 2008/99/EC on the protection of the environment through criminal law

¹⁴ The evaluation can be found at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/environmental-crime_en

Indeed, the Commission adopted a proposal which also covers infringements under the SSP Directive¹⁵. The SSP Directive¹⁶ will continue to include provisions on the definitions of illegal discharges considered as infringements and provide for administrative penalties for illegal ship-source pollution. In parallel, criminal law enforcement and criminal penalties will apply through the ECD to most serious cases of ship-source pollution, when the elements of the offence description are fulfilled and the evidence base is sufficient. As such, the criminal offence for ship-source pollution, as defined in the proposal for a new ECD, mirrors the offence description of the current SSP Directive, including the geographical scope, definition of infringement and exceptions¹⁷. The Commission's proposal further covers the recycling of ships flying the flag of an EU Member State in yards that do not appear on the EU list under the Ship Recycling Regulation¹⁸, and thus Member States will be required to provide for criminal prosecution for violations. The potential application of custodial penalties in serious cases of maritime pollution caused by shipping accidents is a major concern, as UNCLOS states that only monetary penalties can be imposed unless the pollution is deemed "*willful and serious*".

The efforts to reinforce environmental protection are clearly endorsed by shipowners. In our opinion the new proposal of the ECD leads however to discrepancies in the interpretation of existing EU and international instruments such as MARPOL and UNCLOS and creates legal uncertainty for shipowners, potentially leading to increased costs and difficulties in compliance. Overall, a global international framework has the preference from a shipowners point of view. It provides legal certainty for an international industry, in contrast to regional European legislation. Zero pollution could be achievable following MARPOL and other already implemented international conventions.

Broadening the scope of the ECD through enlisting new legislative acts in the scope of the Annexes of the ECD would oblige Member States to provide for criminal sanctions in their national law, where some Member States currently apply effective administrative sanctions. Member States should remain competent to determine whether administrative or criminal sanctions are the best means to tackle infringements. Furthermore, in the shipping industry, administrative sanctions have proven to be efficient, effective, proportionate and dissuasive¹⁹. Shipping regulation in general is enforced by very effective port state control and flag state control systems and provisions in national law with effective and dissuasive sanctions in case of non-compliance. A criminal case has to be proven beyond reasonable doubt, which makes prosecution resource-intensive and difficult. Hence requiring Member States to apply criminal sanctions where civil ones currently apply will not add any value. Indeed, it is

¹⁵ Ship-source criminal offences are currently not covered by the ECD but are covered by the SSP Directive, after its amendment through Directive 2009/123/EC.

¹⁶ Additionally, a legislative proposal for the revision of the SSP Directive is expected early '23. It is likely that the Commission will propose that the SSP Directive is expanded to include some of, or potentially all of the other Annexes to MARPOL.

¹⁷ The proposed ECD includes a ship-source pollution offence with the same content as the criminal offence currently described in the SSP Directive, i.e. it is a transfer of the offence to the ECD for consistency and because of the legal basis for criminal law measures. In itself, it does not matter that penalties are covered by another directive but from our point of view the SSP Directive establishes a lower threshold of criminal liability which does not cover accidental pollution. This ultimately creates legal uncertainty.

¹⁸ The Waste Shipment Regulation is already included in the ECD.

¹⁹ For example, with the introduction of the new Belgian Shipping Code, Belgium has removed criminal penalties for among others offences on ship recycling and provided administrative penalties instead. For other environment-related offences (MARPOL), criminal sanctions continue to exist, but administrative sanctions will remain the preferred option. With the proposed ECD the Member State will have to provide criminal penalties again.

likely to divert resources away from preventive and enforcing measures and therefore weaken the ability of Member States to apply the regulation.

The criminalization of seafarers has been a growing concern as it implies that they are solely responsible for accidents and incidents that occur on board. However, it is important to note that shipping accidents and incidents can be caused by a variety of factors, including human error, equipment failure, and weather conditions. Statistics prove that the amount of trade by sea, especially the carriage of oil, has gradually increased and that the number of accidents has actually decreased.²⁰ The move towards criminalisation of seafarers within a highly regulated shipping industry indicates that those responsible for passing such legislation may not be aware of these facts. It is imperative that laws at the national level recognize and align with international law, as established in UNCLOS and MARPOL in order to counteract the recent trend towards criminalizing seafarers.

The use of technology such as Automatic Information Systems (AIS), Vessel Traffic Management Information Systems (VTMIS) and especially CleanSeaNet – the European satellite-based oil spill and vessel detection service – can provide greater visibility and understanding of shipping activities, potentially reducing the number of accidents and minimizing the need for criminalization of seafarers.

To conclude, we are convinced that it is important to have a balanced system with both administrative and criminal enforcement playing parallel roles. Administrative sanctions should be reflected upon as the most appropriate, sustainable and pragmatic approach to be used in the international shipping sector.

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*The **ROYAL BELGIAN SHIPOWNERS' ASSOCIATION** represents the common interests of all shipowners and ship managers based in Belgium and active in international maritime transport by sea. The RBSA plays a dynamic role in promoting the sector as an attractive employer and provides its members with operational support and technical expertise on fiscal, social, environmental and maritime regulations.

As a maritime knowledge centre based in Belgium, the beating heart of a maritime Europe, the RBSA plays a pioneering role in the further expansion and long-term growth of an innovative international maritime transport sector. Through its role as a forward-looking opinion maker, the association aims to act as the interlocutor for all stakeholders at the European and the international levels.

²⁰ See for example IMO's Global Integrated Shipping Information System (GISIS), the Safety and Shipping Review (2002). Allianz Corporate & Speciality or Chen, J., Zhang, W., Wan, Z., Li, S., Huang, T., & Fei, Y. (2019). Oil spills from global tankers: Status review and future governance. *Journal of Cleaner Production*, 227, 20-32.