Parliamentary **Assembly**
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Sea pollution

Report
Committee on the Environment, Agriculture and Local and Regional Affairs
Rapporteur: Mr Guy Lengagne, France, Socialist Group

Summary

The Parliamentary Assembly, concerned about the possibility of European seas falling victim to further environmental disasters such as those caused by the sinking of the *Erika* and the *Prestige* a few years ago, is studying the developments in international law concerning marine pollution. It welcomes the strengthening of Community and international legislation and extends its full support to this development, urging that this legislation be applied fully in all member states.

The Assembly is, however, raising the alarm about some major malfunctions in the application of some of the recommended measures at both European and international level. The present situation requires political will and clear decision-making, especially regarding the use of flags of convenience and the impunity still enjoyed by those who are actually responsible for marine pollution.

The Assembly invites member states inter alia to adopt the necessary measures to receive ships in distress in their territorial waters, to improve the training of seafarers, to come to an agreement within the International Maritime Organisation in order to extend the possibilities of engaging the civil liability of the ship-owner, the charterer, the classification society or the flag state in the event of ship-based pollution, as well as to work towards setting up an international maritime criminal court.

I. Draft resolution

1. The Parliamentary Assembly recalls that Europe has experienced several maritime disasters in recent years which had very severe effects on the environment. Two of the most dramatic incidents were the sinking of the *Erika*, in December 1999, off the coast of Brittany (France) and the *Prestige* accident in November 2002 off the shores of Galicia (Spain), both of which caused very substantial pollution of the sea and coastline through oil spills.

2. It has been deeply touched by the hardships endured by the local communities concerned and the spontaneous drive of solidarity shown by citizens who have came to their aid. It notes that action plans do not provide for adequate resources to remedy the social and environmental consequences of such catastrophes.

3. The Assembly deplores the enormous economic, social and environmental costs of accidental sea pollution and believes that the compensation provided for by the International Oil Pollution Compensation Funds (IOPC Funds) and national compensation systems is still far from covering those costs in full (despite the reform adopted by the International Maritime Organisation (IMO) in May 2003 which has brought the IOPC compensation ceiling to approximately one billion dollars).

4. The Assembly had put forward concrete proposals for improving the safety of maritime oil shipping following the *Erika* accident (Resolution 1229 (2000) on accidents causing damage to the environment). Following the sinking of the *Prestige*, its Resolution 1317 (2003) on marine pollution reiterated the measures required to effectively protect Europe's maritime area.

5. It regrets that the measures it had proposed, as well as those recommended by the European Union and numerous international organisations competent in this field, have not been fully implemented in order to substantially reduce the risks of accidental sea pollution, particularly off European coasts.

6. It welcomes the setting up of the European Maritime Safety Agency and wishes this body to become a leading player in the prevention of ecological damage inflicted on the marine environment by human activity. It is also satisfied to see that the European Union is developing a strategy for the protection of the marine environment.

7. The Assembly recalls that the waters of Western Europe and the Baltic Sea are particularly sensitive sea areas requiring special protection owing to their vulnerability to the consequences of shipping and related activities. Therefore coastal states should be able to control the passage of ships more strictly.

8. It points out that, in addition to the effects of accidental sea pollution, there is the far more substantial impact of deliberate pollution caused by discharges of oil waste and flushing of ballast tanks, which can now be detected but remains common practice, despite the existing legal ban and related penalties.

9. It notes that, while there are serious malfunctions in the application of Community and international regulations, Europe is facing grave dangers of marine pollution, particularly in semi-enclosed seas.

10. Consequently, the Assembly invites the governments of member states to fully apply existing international regulations in the area of maritime shipping and in particular to:

i. adopt the necessary measures to receive ships in distress in their territorial waters, provide places of refuge and draw up appropriate action plans;

ii. build port reception facilities for ship-generated waste and cargo residues and draw up plans for processing such waste;

iii. improve training for seafarers in order to reduce the risks of maritime accidents, 80% of which are caused by human error.

11. The Assembly invites European Union member countries in particular to fully transpose all the measures recommended under the "Erika I" and "Erika II" packages and non- EU members to draw on those measures to improve their domestic legislation.

12. It also invites member states to:

i. introduce or develop coastguard services for the tasks of maritime safety and port security and also protection of the marine environment;

ii. ensure that any offshore oil exploitation complies with the most stringent operating regulations to minimise the risk of accidental pollution;

iii. encourage the transport of oil via pipelines wherever possible;

iv. develop surveillance systems for discharges of oil waste and flushing of ballast tanks, including satellite monitoring, air surveillance of coasts, port checks, etc;

v. provide for effective, proportionate and dissuasive penalties for those responsible for any sea pollution, including the possibility of prison sentences in cases of deliberate pollution;

vi. draw up a register of the natural resources (fauna and flora) and economic resources (fishing, tourism, etc) of coastal areas in order to have a prior inventory for assessing damage caused by an oil slick;

vii. work towards setting up an international maritime criminal court.

13. The Assembly invites the governments of member states to consult and agree on a common position within the IMO with the aim of:

i. empowering that body to monitor the application of its international conventions, by carrying out audits of member states' services responsible for monitoring compliance with maritime regulations;

ii. introducing regulations enabling a state which has suffered damage from ship-based pollution to demand reparation from the state whose flag the ship flies where it is established that the damage is linked to the flag state's failure to exercise appropriate control of the vessel concerned;

iii. extending the possibilities of engaging the civil liability of the ship-owner, the charterer, the classification society or the flag state in the event of ship-based pollution;

iv. reforming the International Oil Pollution Compensation Funds (IOPC Funds) so that the victims of maritime disasters receive rapid and satisfactory compensation.

14. The Assembly invites the European Union to ensure that the European Maritime Safety Agency is given the resources it needs to work effectively against sea pollution and proposes that the Agency co-ordinate national coastguard services, particularly their surveillance and monitoring of vessels that constitute a potential danger to the environment.

II. Explanatory Memorandum by Mr Guy Lengagne

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Introduction

1. The Assembly has already turned its attention on several occasions to the question of marine pollution, as demonstrated by Resolutions 1229 (2000) on accidents causing damage to the environment, 1295 (2002) on the state of the environment of the Baltic Sea and 1317 (2003) on marine pollution.

2. The latter resolution, voted in the wake of the *Prestige* accident, very clearly spells out the measures that Europe should take to effectively protect its maritime area. And while that accident, barely three years after the sinking of the *Erika*, provides sad confirmation of the difficulties encountered by Europe in successfully pursuing that aim, it is precisely because Community and international regulations only go part of the way towards what was called for by our Assembly.

3. These regulations, and their application, suffer from serious shortcomings, at a time when Europe is confronted with very substantial sources of pollution, at Kaliningrad and in the eastern Mediterranean.

4. This report begins, therefore, by analysing the development of community and international regulations before going on to consider the factors that limit their impact and the serious threats of pollution hanging over Europe. Finally, it makes proposals that would enable Europe to better equip itself in this area.

FIRST PART - **STRENGTHENING OF COMMUNITY AND INTERNATIONAL REGULATIONS**

I. The European Commission's ambition to give the European Union effective instruments

5. Since the sinking of the *Erika*, the European Commission has been a driving force in stepping up maritime safety in Europe and also at international level. Some of the measures it has recommended have been adopted within the International Maritime Organisation (IMO).

1. The Erika I and Erika II packages

1.1 An initial set of measures to strengthen existing legislation (Erika I package)

6. On 21 March 2000, three months after the sinking of the *Erika*, the European Commission adopted a Communication on the safety of the seaborne oil trade, setting out a global strategy together with several practical proposals: this first package of measures was intended to fill the most flagrant loopholes in community legislation.

i. Tightening up of port state control

7. To make up for inadequate checking on the part of flag states, coastal states have sought to inspect ships calling at their ports, on the maritime law principle that foreign merchant shipping is subject to the jurisdiction of the coastal state while in its territorial waters and in its ports.

8. In Europe, this control is exercised under the 1982 Paris Memorandum, which obliges the main European states to inspect at least 25% of the foreign vessels calling at their ports each year.

9. Directive 95/21/EC built the Memorandum's mechanisms into the community framework, with some improvements, making them uniform and compulsory for all European Union member states.

10. However, the application of this directive has been criticised on several counts, including for the failure of certain states to meet the 25% requirement and the lack of thoroughness of inspections.

RATE OF INSPECTIONS CARRIED OUT BY EUROPEAN UNION MEMBER STATES IN RESPECT OF PORT STATE CONTROL IN 2001

Member states	Inspection rate %
Germany	21.78%
Belgium	29.00%
Denmark	25.50%
Spain	30.28%
France	09.63%
Greece	28.13%
Ireland	21.05%
Italy	43.54%
Netherlands	23.47%
Portugal	28.45%
United Kingdom	27.89%
Sweden	23.09%

Source: European Commission.

11. Consequently, Directive 2001/106/EC was adopted on 19 December 2001, amending the previous text by improving and tightening up the inspection regime. In particular, it provides for the obligation for member states to inspect certain categories of vessel presenting major risks, and those vessels are subjected to tighter checks, covering a number of vital components.

12. In addition, the directive obliges member states to deny access to their ports to any vessel twice immobilised in a port owing to its poor state in the previous two years and flying a flag of convenience, on the basis of a blacklist (published by the Commission on 3 December 2002).

ii. Stricter supervision of the activities of classification societies

13. The role of classification societies in shipping control is, as we know, absolutely fundamental. In particular, they are the only bodies able to truly check the structural state of vessels during their regular inspections.

14. Nevertheless they stand accused of occasionally lacking thoroughness in applying the regulations in force, owing to the fact that they are competing businesses which might be tempted to be less strict in their checks in order to keep the custom of their shipowner clients. In addition, their dual activity of certification and classification could generate conflicts of interest and the attendant risks.

15. It was to overcome such shortcomings that Directive 2001/105/EC of 19 December 2001 amended the previous directive of 22 November 1994 on classification societies, introducing greater constraint and more harmonisation.

16. Directive 2001/105/EC introduces a procedure for suspension and withdrawal of recognition by the Commission should the latter find that classification societies do not comply with applicable community rules. In addition, the directive provides that the approved bodies must meet stricter qualitative criteria in certain respects.

17. It also harmonises the conditions governing financial liability of approved societies: liability is unlimited in the event of deliberate omission or serious negligence, and the maximum amount is proportionate to the seriousness of negligent action on the part of the society.

iii. Acceleration of phasing out of single-hull tankers

18. In its regulation of 18 February 2002 the European Union introduced a specific timetable for single-hull vessels to cease entering its member states' ports or flying those same states' flags.

19. American legislation, in the Oil Pollution Act, had made the use of double hulls compulsory for new oil tankers and provided for a timetable for the phasing out of service of single-hull vessels. This unilateral measure had pushed the IMO into taking action: in 1993, the MARPOL convention was amended to provide for a plan for the phasing out of single-hull oil tankers albeit less restrictive than that of the American Act. Then, in a resolution of 27 April 2001, the phasing-out timetable was tightened up.

20. For that reason, the regulation of 18 February 2002, which is directly applicable, establishes a timetable for the phasing out of vessels according to their category, binding on member states and reflecting the latest developments in IMO regulations.

Presentation of the criteria defining the different categories of vessel

Category 1: single-hull oil tankers designated as "pre-MARPOL", ie cargo vessels of 20 000 tons deadweight and above carrying crude oil and cargo vessels of 30 000 tons deadweight and above carrying oil products which are not fitted with segregated ballast tanks in protective locations (SBT/PLs). These are the oldest oil tankers and present the greatest risk. They generally date from before 1982.

Category 2: single-hull oil tankers designated as "MARPOL" which are the same size as those of category 1 but fitted with SBT/PLs and mostly built between 1982 and 1996.

Category 3: single-hull oil tankers of a smaller size than the limits defined in categories 1 and 2, but with a capacity of 5 000 tons deadweight and above. These smaller tankers are often used for regional transport.

21. The final dates for operating tankers entering ports under the jurisdiction of a member state and oil tankers flying the flag of a member state have been set at 2007 for oil tankers in category 1 and 2015 for those in categories 2 and 3. In addition, the regulation lays down age limits of between 26 and 30 years for single-hull oil tankers depending on their category and year of construction.

COMPARATIVE TIMETABLE FOR PHASING OUT SINGLE-HULL OIL TANKERS AS ESTABLISHED IN 2002

	United States (OPA 90)	International (MARPOL)	European Union
Category 1: "MARPOL"-size single-hull oil tankers, without protective tanks	2010	2007	2007
Category 2: "MARPOL"-size single-hull oil tankers, with partial protection of the cargo tank area	2010/2015	2015	2015
Category 3: Single-hull oil tankers below "MARPOL" size (less than 20 000 tdw)	2015	2015	2015

Source: European Commission.

1.2. A second wave of provisions, geared more to long-term action (Erika II)

i. Tighter monitoring of traffic in European waters and the problem of places of refuge

22. Directive 93/75/EC of 13 September 1993 had introduced an information system for the competent authorities on vessels carrying dangerous or polluting goods bound for member state ports and incidents at sea.

23. However, the Commission felt that the directive had shortcomings, particularly a lack of specific procedures for enforcing its provisions.

24. Directive 2002/59/EC, adopted on 27 June 2002, contained several provisions to remedy this. Firstly, it imposed a mandatory reporting requirement on any vessel bound for a European Union member state port, at least 24 hours in advance.

25. It also provides that, in line with a standard adopted by the IMO in 2000, any vessel calling at a European port must be fitted with a transponder. It sets out a precise timetable for the introduction of this system running up to 1 July 2007, and stipulating *inter alia* that all vessels built after 1 July 2002 must have such devices. The purpose of these transponders - also known as automatic identification systems for ships (AIS systems) is to enhance the identification and monitoring of vessels along European coasts. The directive also provides for the introduction of a voyage data recording system (VDR system) on all ships, which is the equivalent of an aircraft's black box. A timetable sets out deadlines for fitting these systems to ships in the different categories, running up to 1 January 2008.

26. The notification system introduced by the previous directive for vessels carrying dangerous or polluting goods was improved in order to better use the information on cargoes.

27. All these measures are designed to step up monitoring of ships in European waters, with a special focus on vessels carrying dangerous or polluting goods.

28. Finally, one of the directive's provisions tackles the extremely sensitive issue of places of refuge, which took on particular importance following the *Prestige* crisis and became a subject of controversy and debate in both Spain and France.

29. The directive provides for the introduction of a legal framework for the reception of ships in distress in the territorial waters of member states and asks the latter to draw up plans for this purpose; the plans are to include any useful information enabling those responsible for operations to take a decision, such as the accommodation capacities of ports and special constraints linked to the configuration of the zone or its ecological vulnerability. Drawing up such plans is doubtlessly tricky, in view of the multiple issues surrounding the reception of vessels carrying dangerous goods that could seriously pollute a given zone.

ii. Greater coordination of the actions of EU member states: setting up of the European Maritime Safety Agency

30. In addition to laying down community provisions, it was thought necessary to set up a specific body dealing with maritime safety with responsibility for reinforcing and harmonising applicable rules and practices in this area. This was the purpose of the regulation of 27 June 2002 setting up the European Maritime Safety Agency (EMSA), which came into operation - after many an episode - at the end of 2003.

31. Under the terms of the current regulation, the EMSA has a dual role of providing the European Commission with advice and monitoring:

- under its brief on advice and expertise, the Agency is to provide the Commission with scientific and technical opinions on maritime safety and prevention of pollution, in order to

assist with drawing up legislation, monitoring its implementation and evaluating the effectiveness of the measures in place. The Agency therefore has no regulatory power of its own but may propose improvements to regulations on the basis of terms of reference from the Commission. It also has the tasks of devising a common methodology for accident investigations and helping to set up the European maritime traffic information system;

- within its monitoring tasks the EMSA is to help tighten the regime of inspection by port states and check on classification societies recognised at European level. There is also provision for representatives of the Agency to carry out inspections in member states to ensure that the community system is functioning correctly. As an autonomous body under the authority of the Commission, the Agency has to work in close collaboration with European Union member states.

iii. Desire to introduce machinery for the additional compensation of victims

32. The Commission has noted the difficulties of maritime disaster victims in satisfactorily obtaining compensation within the framework of the IOPC Funds and pointed out that one of the factors underlying this shortcoming was the inadequate level of funding in relation to the real cost of disasters. For that reason it proposed a draft regulation aimed at setting up a community pollution damage compensation fund, the COPE Fund, which would make up the difference in compensation for victims, up to an overall ceiling of one billion euros (equivalent to the amount provided for in the American Oil Pollution Act), where the amounts exceed the current ceiling of 171 million euros.

33. In contrast to the European Parliament, which reached agreement on 14 June 2001, the Council did not adopt a common position on this proposal, with states preferring to negotiate reform of the International Oil Pollution Compensation Funds (IOPC Funds) within the IMO framework.

1.3. Additional provisions relating to the training of seafarers and the combating of unlawful discharges of oil waste and flushing of ballast tanks

i. Training of seafarers

34. The human factor is fundamental in maritime safety, with 80% of maritime accidents resulting from human failings. A ship meeting the most draconian safety criteria may be dangerous if it has a poorly trained or understaffed crew.

35. For that reason, a number of international legal instruments, such as conventions of the International Labour Organisation (ILO) and the International Maritime Organisation (IMO) (particularly the 1995 STCW (Standards of Training, Certification & Watchkeeping) and the 1971 SOLAS (International Convention for the Safety of Life at Seas), which regulate the training and working conditions of seafarers. However, given the difficulties of monitoring their application – unfortunately a characteristic of any international instrument – the European Union thought it useful, in the wake of the *Erika*, to back these provisions up with a new community text, following on from Directives 94/58/EC et 98/35/EC on the same subject and setting the objective of establishing a minimum level of training for seamen for all member states.

36. Directive 2001/25/EC builds on the provisions of the Conventions mentioned above. For seafarers working on merchant ships flying the flag of a European Union member state, it lays down minimum standards for training and issuing of diplomas, based on the standards approved by the STCW Convention. Furthermore, it provides for a procedure for recognising diplomas and certificates issued by non-EU states.

ii. Combating discharges of oil waste and flushing of ballast tanks

37. Directive 2000/59/EC tackles the issue of discharges of oil waste and unlawful flushing of ballast tanks, which, while less spectacular than oil slicks, are a substantial source of maritime pollution. It is estimated that discharges of oil waste and flushing of tanks account for some 90% of maritime pollution.

38. The flushing of ballast tanks entails discharging ballast water before the ship begins to load its cargo, resulting in the discharge in ports or at sea of the suspended solids in ballast water. Discharges of oil waste mean that the ship leaves an iridescent trail in its wake resulting from the presence of hydrocarbons. Both operations entail discharges of polluting substances into the sea, which are prohibited by international regulations but unfortunately remain very frequent occurrences.

39. The issue was already addressed by the aforementioned directive of 19 June 1995 on port state control, which stipulated that vessels constituting a threat to the marine environment were not authorised to cast off.

40. However, as the provisions were not restrictive enough, they were reinforced by Directive 2000/59/EC of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, which obliges ships' captains calling at ports of member states to deliver all discharges of ship-generated waste to port reception facilities, for which a fee is payable. Member states must ensure that specific facilities suited to the size of the port and the categories of calling vessels are provided. Each port must draw up a plan for waste reception and processing.

2. Measures subsequent to the sinking of the Prestige

41. The European Union had shown a determined response immediately after the *Erika* disaster, adopting a set of ambitious measures, the *Erika I* and *II* packages. But after the sinking of the *Prestige*, accusations were levelled against the EU: some argued that Europe had not drawn lessons from the *Erika* episode and had done nothing to stop such disasters occurring. While there is certainly room for improvement in the actions of the EU, these claims of inertia are unjust to say the least, and all the more so given the differing levels of member state support for the community measures adopted.

42. Seeing that implementation of these provisions had run into difficulties and recognising that they had to be supplemented, the Union once again took a proactive stance following the sinking of the *Prestige*. It very quickly proposed strong initiatives to supplement the body of Community legislation, which had loopholes, while making proposals to the IMO, a key but none too responsive body.

2.1. Launch of new concrete initiatives

i. Publication of a blacklist of ships

43. On 3 December 2002, the Commission published a blacklist of ships that would have been banned had the new community provisions of Directive 2001/106/EC on port state control, forming part of the *Erika I* package, been in force in the period from 1 December 1999 and 1 December 2002 (the deadline for its transposition by EU member states had been set for July 2003). It based its document on the information published within the Paris Memorandum framework.

44. The list comprised 66 ships, registered under 13 different flags. Noteworthy is the fact that 26 of the blacklisted vessels flew the Turkish flag, 12 of them the flag of Saint-Vincent-et-Grenadines, and 9 flew the Cambodian flag. The age of each ship, the number of times detained in ports and the degree of risk it represented were also indicated.

45. The aim of publishing such a list was to send out a warning to the shipowners in question and the states that register them so that they take the necessary steps to remedy the shortcomings noted. In addition blacklisting particularly dangerous vessels also tends to deter oil companies from using such vessels.

ii. Development of a community network for traffic monitoring

46. The Commission embarked upon the setting up of a community network for traffic monitoring called "Safeseanet": it took the initiative even before the deadline for transposing the related directive, set for February 2004, which placed obligations on member states in this respect.

47. The aim of "Safeseanet" is to develop a European platform for exchanges of information about maritime safety among member states, as well as between states and the European Commission.

48. Ultimately it will be a valuable tool for monitoring shipping and make it possible to swiftly, detect risky situations. It is to be coordinated with national systems, such as the French "Traffic 2000" initiative.

2.2. Initiatives aimed at swifter implementation of the Erika I and Erika II packages

i. Early setting up of the European Maritime Safety Agency

49. The regulation of 27 June 2002 creating the European Maritime Safety Agency set it the objective of being operational by the second half of 2003.

50. Following the *Prestige* accident, which demonstrated the need for swift action, and under pressure from France in particular, the Commission decided to bring forward the operational date set for the Agency by six months. Without waiting further for the European Council to decide on a location for its headquarters, the subject of laborious, global negotiations covering the headquarters of several community agencies, the Commission decided to provisionally house the EMSA on its own premises.

51. Its Administrative Board, comprising one representative per member state, four Commission representatives and four independent professionals appointed by the Commission, held its first meeting on 4 December 2002.

52. In December 2003, the European Council chose Lisbon for the Agency's headquarters.

ii. Speeding up of preparation of plans for the reception of vessels in places of refuge

53. The sinking of the *Prestige* was a sad illustration of the importance of places of refuge. The Spanish authorities' refusal to receive the *Prestige* in a port or sheltered creek and their decision to tow the vessel out to sea away from the Spanish coastline prompted widespread debate, not to mention condemnation, nationally and internationally, of the Spanish officials involved.

54. These are difficult and delicate decisions, since an operation like this either succeeds and goes unnoticed or fails and makes whoever opted for it hugely unpopular. In addition there is the well-known NIMBY - "not in my backyard" - syndrome: while every state wishes a ship in distress to be given refuge to limit the risk of pollution, none of them wishes to do so itself and suffer the possible consequences on its coastline.

55. It is vital, therefore, to draw up plans and procedures for the reception of ships in distress in a European framework that, once established, would be mandatory: if only certain member states establish reception procedures, there is a strong risk that unseaworthy ships finding themselves in difficulty would head straight for their coasts, exposing those states to greater risk for having adopted a provision in the general interest, which would be inadmissible. Plans for the reception of vessels including the necessary technical and environmental data must therefore be drawn up as soon as possible at European level.

56. That was the objective of the aforementioned Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system, which was to be transposed by February 2004. Given the importance of the issue since the *Prestige* disaster, the Commission had decided to speed matters up by asking member states to provide the documents required for the drawing up of national plans for places of refuge by 1 July 2003; reticence among member states meant that the deadline was not met.

2.3 *Adoption of a stricter timetable for the phasing out of single-hull vessels and the prohibition of the carriage of heavy fuel oil in single-hull vessels*

57. The sinking of the *Prestige* clearly highlighted the urgent need to phase out single-hull oil tankers and the specific problem posed by heavy fuel oil, which is more often than not carried by ageing single-hull tankers more at risk from accidents. These factors had already been partly taken into account in the adoption of the *Erika I* package, one of its measures being a timetable for phasing out single-hull oil tankers. However, as we saw, the provisions ultimately opted for did not go as far as the Commission's initial proposals and did not tackle the specific issue of heavy fuel oil.

58. Consequently, the Commission presented a proposal on 20 December 2002 for a regulation revising the previous retirement timetable and banning the transportation of heavy fuel oil by single-hull vessels. The Transport Council of 27 and 28 March 2003 adopted the measures, which were forwarded to the European Parliament and approved on 4 June 2003:

- it will now be prohibited to transport heavy oil products in single-hull tankers calling at or leaving from EU ports. The aim of this measure is to reverse the prevalent pattern of transporting the most polluting substances in the least safe ships. A minimum level of safety will now be required for the carriage of heavy oil products;

- the regulation also provides for the acceleration at European level of the phasing out of single-hull vessels used for the transport of all types of oil. The measures entail lowering the age limits and bringing forward retirement dates, to bring them into line with the Commission's initial proposal in the *Erika I* package and, in some cases, lower them even further.

CHANGES IN THE TIMETABLE FOR RETIRING SINGLE-HULL OIL TANKERS

	Rules in force	**New rules proposed**
Age limits	Between 26 and 30 years	Between 23 and 28 years
Retirement date for category 1 oil tankers	2007	2005
Retirement date for category 2 oil tankers	2015	2010
Retirement date for category 3 oil tankers	2015	2010

Source: European Commission

59. Under these provisions, category 1 oil tankers such as the *Erika* or the *Prestige*, aged over 23 years, will now be banned from EU ports and also from flying the flags of member states.

60. These measures will help give fresh impetus to the modernisation of the sea-borne oil shipping industry, along the same lines as those adopted by the American Oil Pollution Act.

61. In this respect, it seems that the community regulations are now as strict, if not stricter, than the Oil Pollution Act's provisions. There has been no ban so far on carrying heavy fuel oil in single-hull vessels in American legislation. The European Union is leading the way here, and this can be but welcomed.

62. Finally, the new regulations impose broader and earlier application of reinforced inspection rules for single-hull oil tankers that have not reached the age limit. All single-hull oil tankers, including the smallest, initially taken out of the equation, will now be subject to the Condition Assessment Scheme (CAS) once they have been in service for 15 years.

2.4 An ambitious proposal: introducing criminal penalties at community level for marine pollution caused by ships

63. On 5 March 2003, the Commission adopted a proposal for a directive providing for criminal penalties, going as far as imprisonment, for those responsible for pollution either in territorial waters or on the high seas. These penalties are to be applicable to the classification society and any person, including the ship's captain, owner, operator and charterer, found to be responsible for causing illegal pollution, intentionally or through serious negligence. It has been given extensive scope which includes unlawful discharges of noxious substances (discharges of oil waste and flushing of ballast tanks) and also pollution caused by accidents involving ships carrying polluting products.

2.5 Monitoring of seafarers' level of training, with complex implementation procedures

64. As mentioned above, a directive on the minimum level of training for seafarers was adopted on 4 April 2001 and provides for a procedure of recognition by member states of diplomas issued outside the European Union. The aim was to ensure that seafarers holding diplomas issued outside the EU and working on board community ships were properly trained and had qualifications meeting the minimum requirements laid down by the international conventions.

65. Nevertheless, the Commission realised that the application of that procedure by states was not without its problems. For that reason, it proposed an amendment providing for a mechanism for recognising training in non-EU countries that is centralised at community level. This new approach was designed to more effectively assess third states' compliance with international requirements. The Commission forwarded a proposal for a directive along these lines to the Council and the European Parliament on 13 January 2003.

66. The directive seeks to bring current community provisions into line with the international rules of the STCW and SOLAS conventions in terms of the language skills of crews, making English the language of communication that has to be systematically used between crew members and between the ship and the authorities on land; the use of English is undeniably essential in reducing the risks of misunderstandings within crews often comprising several nationalities.

67. The text was definitively adopted, becoming Directive 2003/103/EC of 19 November 2003.

68. Subsequent to that text, the Commission has presented a new proposal intended to specify obligations as regards language skills, automatic mutual recognition of diplomas and other training qualifications issued by the member states.

2.6 The wish of the EU to increase its influence within the IMO

69. The measures decided on within the European Union framework reflect a regional approach and apply only to its member states. But the Union is fully aware of the eminently international nature of maritime transport, and all the more so since many ships pass its coasts without calling at any of its ports and are therefore under no obligation to apply community rules.

70. While adopting provisions at Community level is fully justified by the difficulty of establishing international rules needing a consensus between all IMO member states within a satisfactory timespan, this international body is an obligatory port of call if the adoption of rules applying to all states is to be secured.

71. That is why the Union decided to take a proactive line with the IMO, so that stricter safety standards are applied to the entire world shipping fleet. The European Commission has forwarded a proposal to the IMO calling for the adoption of a tighter timetable for the phasing out of single-hull oil tankers and the prohibition of the carrying of heavy fuel oil in single-hull vessels, which mirrors the measures laid down in the aforementioned regulation.

72. This would have the effect of harnessing the unilateralism of community provisions, comparable to those under the American Oil Pollution Act, to an active international approach, to obviate the risk of overly regional measures in a context of worldwide competition.

73. In addition, the European Union would like to enjoy more direct influence with the IMO, by becoming a full member of the organisation, whereas it is still just an observer. The Commission has requested a negotiating mandate from the Council to this end.

74. Finally, it is clear that the Union's efforts to influence the IMO from within through its member states have already borne fruit. As mentioned above, the Commission proposed a draft regulation aimed at setting up a supplementary fund to compensate the victims of hydrocarbon pollution, the COPE Fund, which would raise the overall compensation ceiling to one billion euros. The Council did not adopt a position on this point and referred to negotiations on the reform of the International Oil Pollution Compensation Funds (IOPC Funds) held within the IMO framework in May 2003. With this in mind, the Commission sought to coordinate the action of the different member states and harmonise their respective positions, so that the member states would unanimously back the same proposal and the outcome of discussion on IOPC ceiling revision within the IMO would be as close as possible to the initial proposal of one billion euros.

75. As we will see, that goal was achieved.

II. The remarkable development of International Maritime Organisation (IMO) standards

76. The determination shown by the European Commission has not been without impact within the IMO. On the two sensitive issues of speeding up the phasing out of single-hull oil tankers and the reform of the system of compensation for damage caused by hydrocarbon pollution, the initiatives taken by the Commission have prompted the IMO to review its regulations.

1. Acceleration of phasing out of single-hull oil tankers

77. The IMO firstly adopted a plan for the phasing out of single-hull oil tankers decided by its resolution of 27 April 2001. The timetable drawn up to accelerate the phasing out of single-hull vessels, adopted after the *Erika* disaster in the form of a revision of rule 13G of appendix I to MARPOL 73/78, entered into force on 1 September 2002 concurrently with the Condition Assessment Scheme (CAS), which introduces a specially improved inspection procedure to detect structural weaknesses in single-hull tankers.

78. Checks are carried out every two and a half years by the state of registration, which in practice delegates the work to a classification society. The aim is to check the structural integrity of oil tankers and assess the quality of maintenance work on them. A computerised database has been set up to centralise information on statements of compliance for those oil tankers satisfying the assessment system's requirements.

79. The entry into force on 21 October 2003 of regulation (EC) 1726/2003, which speeded up the phasing out of single-hull oil tankers, prompted the European Commission to ask the IMO to consider adopting similar rules for the worldwide fleet. At a diplomatic conference held in London from 1 to 5 December 2003, the IMO adopted an amendment to the MARPOL 73/78 Convention, to bring its standards into line with those adopted by the European Union in July 2003 regarding the phasing out of single-hull vessels and the carriage of heavy fuel oil. The amendment will enter into force on 5 April 2005.

2. Reform of the system of compensation for damage caused by hydrocarbon pollution

80. The first level concerns the liability of the shipowner, which is governed by the CLC (*Civil Liability Convention*), an international convention of 1969 on liability for damage caused by hydrocarbon pollution. It establishes the strict civil liability of the shipowners, independent of their fault or negligence, and who are allowed to limit their liability to an amount proportionate to the ship's tonnage. At present that amount is set at a maximum of 72 million euros for the largest vessels.

81. The CLC system is backed up by the IOPC Funds, with which applications may be filed in three cases: when damage exceeds the maximum liability of the owner; when the owner can rely on exoneration clauses provided for in the CLC; or when it is materially impossible for the owner to meet their obligations. The compensation ceiling is set at 162 million euros. It is funded *inter alia* by the oil companies and, in the event of damage, the bodies concerned contribute to compensation on condition of it being proven that the damage was caused by an oil tanker. The victims may lodge their compensation claim directly with the IOPC Funds. If the total of claims deemed admissible exceeds the compensation ceiling, they are proportionally reduced. Claimants may also lodge claims in the courts of the state where the damage occurred. The *Erika* disaster showed that the compensation ceilings were too low, and a working group was set up by the IOPC Funds to explore possibilities of improving existing tools. It proposed the setting up of an optional supplementary fund, provided for in a draft protocol, which was adopted by a diplomatic conference of the IMO in London on 16 May 2003. The supplementary fund, which is closely linked to the IOPC Funds, since IOPC participation is a condition of accepting the protocol, could pay compensation of up to 920 million euros, which is approximately one billion dollars.

82. This mechanism is comparable to the one proposed by the Commission in a draft regulation under the *Erika II* package. The Compensation Fund for Oil Pollution in European Waters (COPE Fund) – was intended to compensate the victims of oil slicks occurring in European waters who could not receive compensation under the IOPC Funds because the ceilings were too low. However, the Transport Council of June 2003 opted for a shared approach with the IMO concerning the establishment of a third level of compensation and the compulsory participation of the states parties to the CLC and IOPC Fund conventions.

SECOND PART - **MARITIME SAFETY IN EUROPE EXPOSED TO MAJOR MALFUNCTIONS AND VERY SERIOUS POLLUTION RISKS**

Existence of major malfunctions

1. Malfunctions at European level

1.1. Limited Council backing for the Commission's proposals

83. Three examples clearly demonstrate that the Council has taken a far more timorous position than the Commission or even the European Parliament.

84. The first example concerns the proposal for a regulation to accelerate the phasing out of single-hull vessels.

85. On this point, the Council opted for the timetable recommended by the European Parliament rather than the one presented by the Commission. The Commission pointed out that if it had been backed by the Council, the 26 year-old *Prestige* would have been retired from service by 1 September 2002, when the regulation of 18 February 2002 entered into force, and not in 2005 as established by a European Parliament amendment. It was explained in relation to that amendment, shaping the text ultimately adopted, that the timetable proposed took account of the common position of the member states within IMO negotiations and of the timetable agreed on by the IMO's Marine Protection Environment Committee in October 2000 and was aligned as closely as possible with the Commission's initial proposal!

86. It is not to be excluded that this decision was influenced by certain states, such as the United Kingdom, the Netherlands, Sweden and Greece, which are hostile to any unilateral intervention by the Commission.

87. Discussion on the proposal for a directive on control by port states was another revealing illustration, with the Council going less far than the Commission and the European Parliament would have liked.

88. The Council cut the number of potential inspections by deciding on an inspection rate of 25% of the annual average number of ships entering its ports, calculated on the basis of the three most recent calendar years for which statistics were available. These provisions, which were ultimately adopted, certainly go less far than the Commission's initial text, which based the 25% on the number of ships entering ports in the previous calendar year.

89. Similarly, where the application of the regime of compulsory inspection of certain ships is concerned, it is stated that these *may be* subject to inspection whereas the Commission had placed the member states under obligation to ensure that inspections were carried out. The Council justified its restriction by saying that it would be illusory to demand a substantial increase in the number of ships subjected to expanded inspection if that objective could not be met in practice, and therefore thought it important to target the ships that were potentially the most dangerous, and not just in terms of age, for expanded inspections.

90. Furthermore, the Council allowed member states until 1 January 2003 to gradually reinforce their inspection service should they be unable to increase their capacity in the required time to carry out all the additional inspections required. And that time limit may be extended by six months for the port of Rotterdam!

91. Finally, where conditions for the detention of certain ships are concerned, the Council did not include two amendments from the European Parliament, unlike the Commission. One of these proposed banning ships flying a state's flag classified as high-risk in the blacklist published in the annual report of the Paris memorandum of understanding. The second amendment sought to have the lack of a black box established as a criterion for banning ships for which carrying one was not mandatory.

92. The final example comes from discussion of the proposal for a directive, presented on 5 March 2003, on pollution caused by ships and the introduction of penalties, including of a criminal nature, for pollution offences, which was one of the initiatives taken by the Commission following the *Prestige* accident.

93. Penalties were already provided for in principle in Article 10 of the proposed regulation presented under the *Erika II* package on setting up the COPE Fund, aimed at improving the regime of compensation for oil slicks at community level. Under Article 10 criminal penalties could be imposed on any person - including legal persons - responsible for pollution through negligence. However, the Council did not agree on a common position on this text, since the states preferred to negotiate the reform of the IOPC Funds, which happened, as previously mentioned, at a diplomatic conference held in London on 16 May 2003.

94. Along the same lines as that Article 10, the framework decision 2003/80/JHA of the Council of 27 January 2003 on the protection of the environment through criminal law obliges Member States to take the necessary measures to establish as criminal offences a number of acts when committed with negligence, or at least serious negligence. The text does not refer solely to pollution by hydrocarbons, but this is covered as one criminal offence listed as *"the unlawful discharge, emission or introduction of a quantity of substances or ionising radiation into air, soil or water which causes or is likely to cause their lasting or substantial deterioration or death or serious injury to any person or substantial damage to protected monuments, other protected objects, property, animals or plants"*. This applies to offences committed by physical or legal persons.

95. These points are important as they provide a better insight into the unexpected turn taken by the discussion on proposed directive of 5 March 2003.

96. The purpose of the text was to fill various loopholes at both community and international level.

97. At community level, it is true that all the member states have ratified the MARPOL 73/78 convention, which lays down detailed standards and strict requirements for the discharge of waste and residues into the sea. In addition, Directive 2000/59/EC – adopted pursuant to that convention – obliges ports to provide adequate reception for waste from ships and the ships to use those facilities.

However, there are major disparities in terms of quality of port facilities, quality of inspections to be carried out by the port state and penalties imposed on those breaching the rules.

98. At international level, the United Nations Convention on the Law of the Sea, known as the Montego Bay convention, authorises a coastal state to take action on the high seas only if there is a grave or imminent danger of pollution, Article 230 of the convention stipulates that monetary penalties only may be imposed on foreign vessels for marine pollution on the high seas. In territorial waters, prison sentences may be imposed within certain limits. Finally the international regime of liability for damage from hydrocarbons - the CLC and IOPC conventions - is not likely to deter negligent conduct.

99. To fill those loopholes, the Commission is proposing a reform going beyond the current international standards and seeking to harmonise the legislation of the member states. The proposal for a directive establishes an extensive notion of unlawful discharge covering not only discharges in breach of the MARPOL 73/78 convention but also pollution resulting from an accident although this is an exception to the principle of prohibiting discharges.

100. Concerning its scope, the directive will apply to inland waters, territorial waters, straits used for international shipping, the high seas and the exclusive economic zone, and cover unlawful discharges from any kind of vessel regardless of its flag, thus including ships from third countries.

101. Where the sanctions are concerned, Article 6 states that they are applicable to any person - physical or legal - found guilty of having contributed to an illegal discharge or having caused it intentionally or through serious negligence. This covers the shipowner, the owner of the cargo, the classification society or any other person involved, such as charterers, ship captains, shipping agents, banks or insurance companies. Although this imprecise notion of "person" has been heavily criticised by some professionals, it does have the merit of preventing imprisonment of the ship's captain, as was the case with the *Erika* and *Prestige* disasters. The list does not include states, who may nevertheless be liable, as was apparent from Spain's conduct in the *Prestige* affair or when port waste reception facilities are defective.

102. The proposal for a directive also provides for custodial sentences for physical persons in the most serious cases, in compliance with the applicable international law.

103. As regards the harmonisation of domestic legislations, it concerns:

- refining of infringements: these relate to participation in and incitation to illegal discharges of polluting substances, whether committed intentionally or by negligence;

- provision for sanctions: whether criminal or not, they are to be, in compliance with the case-law of the Court of Justice, effective, proportionate and dissuasive;

- definition of the system of sanctions: in addition to the custodial sentences applicable to physical persons, the proposal for a directive provides for sanctions against physical persons and legal persons.

104. However, from the start of discussions, most member states contested the idea that the Commission could establish the system of sanctions via a directive.

105. Indeed, that is why the Commission presented a proposal for a framework decision with the purpose of specifying the applicable sanctions.

106. But while a legal instrument of this kind preserves state sovereignty, since the framework decision must be adopted unanimously, it prevents the Commission, in contrast to a directive, from initiating proceedings against member states for failure to fulfil an obligation or for not properly or belatedly transposing that framework decision.

107. As a result, as can be seen from the political agreement[1] reached by the Transport Council on 11 June 2004, the initial proposal presented by the Commission is largely devoid of its substance.

108. Under that political agreement, member states are bound to impose *"effective, proportionate and dissuasive sanctions, which may include criminal or administrative sanctions"* on those responsible for discharges of polluting substances into the sea committed with intent, recklessly or by serious negligence. Contrary to the Commission proposal, the Council preferred not to make compulsory the introduction of a system of criminal sanctions for illegal discharges. It did follow the Commission, though, in deciding to make that system applicable to the entire chain of transportation (captains, shipowners, classification societies etc) and seek to cover discharges of polluting substances in internal waters (including ports), territorial seas and the exclusive economic zone of a member state and on the high seas.

109. The proposal for a framework decision is still under discussion within the Council, there being no unanimity between the member states.

1.2. Mediocre results for the transposition of the Erika I and Erika II packages

110. In its communication on improving safety at sea following the sinking of the *Prestige* oil tanker on 3 December 2002, the Commission regretted the slow pace of adoption and implementation of its proposals, stressing that *"at the European Council meeting in Nice on 7, 8 and 9 December 2000, Member States committed themselves to implement in advance the measures approved by the 15 where they do not require an international framework".*

111. But when we look at progress in transposing the *Erika I* and *II* packages, it is clear that not all the member states have honoured the commitments entered into at the European Council meeting in Nice. In the report presented by the Commission to the European Council on 21 March 2003, only Germany, Denmark and Spain are mentioned as having transposed the packages.

112. More specifically regarding Directive 2001/106/EC of 19 December 2001, concerning port state control, the table below shows that only France and the Netherlands did not attain the required control rate of 25% in 2002.

RATE OF CONTROLS CARRIED OUT BY PORT STATES IN 2002

Member state	Control rate
Germany	26.0%
Belgium	26.0%
Denmark	25.5%
Spain	30.0%
Finland	34.0%
France	16.0%
Greece	29.0%
Ireland	30.0%
Italy	43.5%
Norway	25.0%
Netherlands	24.0%
Portugal	28.0%
United Kingdom	27.9%
Sweden	27.0%

Source: French Ministry of Infrastructure and Transport.

[1] In the procedure for discussing a text, the political agreement prefigures the common position which, in principle, is only officially agreed upon after the opinion of the European Parliament.

113. In the case of France, the Commission took the country to the Court of Justice of the European Communities in June 2002, at a time when the control rate stood at less than 10%. In a judgment of 22 June 2004, the Court declared that the proceedings brought by the Commission were founded.

114. While the French inspectors carry out inspections of a very high quality, the low control rate is due to the fact that the team of inspectors was diminished by 50% in the second half of the 1990s because retiring officials were not systematically replaced.

115. As for the Netherlands, the Commission served that country with a reasoned opinion indicating non-compliance with the required level of 25% in 2002, which had already been the case in 2001, as the control rate had been 23.6%. This situation was blamed on the recruitment difficulties encountered by the Netherlands.

116. The delay in the European Maritime Safety Agency becoming operational further illustrates the failings of the member states. It was not until 12 December 2003 that the Agency's headquarters were fixed in Lisbon, as part of broader negotiation on the headquarters of several other European institutions!

117. Finally, on the tricky point of places of refuge, it is clear that many member states are hostile to the Commission's proposal to publish a list, with the result that it could not be drawn up by 1 July 2003 as the Commission had wished. In reality, most member states favour a case-by-case treatment, ruling out the idea of a list.

1.3. Broadly shared refusal to set up a European coastguard service

118. When the *Prestige* and the *Erika* went down, unfavourable comparisons were made with the United States, which, thanks to its coast-guards, were in a position to effectively apply the draconian rules of the Oil Pollution Act and – at the same time – avoid a disaster on the scale of the *Exxon Valdez* accident.

119. The American example clearly confirms the need for a "secular arm", without which it would be impossible to effectively ensure maritime safety.

120. The coast-guards fulfil the following tasks: search and assistance at sea, maritime safety and safety in ports, operations to uphold maritime law (including the combating of drugs and illegal immigration), protection of the marine environment and assistance for navigation.

121. For those tasks, the coast-guard authority has substantial human and material resources at its disposal: the coast-guard corps, which is one of the five armed forces of the United States and therefore enjoys military status, has a staff of 35,000 servicemen, 5,600 civilians, 8,000 reservists and 32,000 auxiliaries. It has a large, modern fleet, including 211 aircraft, 230 ships and 1,400 launches. Finally, the *National Pollution Funds Center* and the *Oil Pollution Spill Liability Trust Fund* form part of that administration. The coast-guards are funded entirely by the federal government and their annual budget amounts to some 5.2 billion dollars.

122. The European Commission and the vast majority of member states are against the idea of such a structure, preferring to develop coordinated action between member states.

123. However, given the example of the European gendarmerie, whose setting up was proposed by France and approved on 17 September 2004 at a meeting of the Defence ministers of the Union in Noordwijk, there is some hope that, one day, progress may be made in the discussion of coast-guards.

2. *Malfunctions at international level*

2.1. Shortcomings of the international legal system

i. The unsatisfactory functioning of the IMO

124. It is regrettable that the discussion process within the IMO is generally lengthy, exposing it to accusations of inertia; it would be more accurate to say that the IMO has too little leverage. It has no power to induce states to ratify the conventions on which there is a consensus but above all no power to monitor the application of its own conventions and certainly no power of policing to sanction violations.

125. On international day of the sea in 2002 the IMO pointed out that most maritime shipping accidents and the loss of human life and pollution they entail are not the result of a lack of regulations at world level but the direct consequence of the ineffectual measures of flag states to enforce the existing rules. The way to prevent shipping accidents appears to be not to adopt more regulations but rather to ensure that the existing ones are effectively applied.

ii. The imperfect framework of international maritime law

126. On two occasions at least, the member states and the European Commission have realised just how far international maritime law – particularly the United Nations convention on the law of the sea of 10 December 1982 (Montego Bay Convention) – lags behind their own initiatives.

127. Under the Malaga agreement signed by France and Spain on 26 November 2002, following the sinking of the *Prestige*, whose measures were also applied by Portugal, the parties agreed to a measure of immediate effect for inspecting dangerous ships of the same type as the *Prestige*, ie single-hull oil tankers over fifteen years of age, carrying heavy fuel oil or tar and lacking gauges to measure the level and pressure of hydrocarbons in their holds.

128. This means that the owners and charterers of such ships entering the exclusive economic zone of France and Spain are under obligation to provide all the necessary information regarding the flag state, the exact nature of the cargo, the classification society, the checks carried out on the vessel in the port of departure prior to casting off and all the operators involved in commercial use. Where there are doubts, inspections are to be carried out at sea by inspectors from the coastal state, and the ship may be turned back.

129. In the case of France, 28 ships were turned back between November 2002 and March 2003.

130. When the provisions of the Malaga Agreement were applied, certain member states voiced doubts as to whether this fully complied with the Montego Bay Convention.

131. Under Article 55 of the United Nations Convention on the Law of the Sea of 10 December 1982 (Montego Bay Convention) *"the exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention".*

132. The exclusive economic zone may, under Article 57 of the convention, extend up to 200 nautical miles (188 miles) from the baselines from which the breadth of the territorial sea is measured.

133. Several of the convention's provisions specify the rights, jurisdiction and obligations of the coastal state in the exclusive economic zone.

134. The first paragraph of Article 56, in sub-paragraph b.iii, gives the coastal state jurisdiction over the *"protection and preservation of the marine environment".*

135. Article 220 of the convention specifies the powers that may be exercised by the coastal state where there are clear grounds for believing that a vessel navigating in its exclusive economic zone has committed a violation of applicable international rules and standards. Such a violation may take the form of a substantial discharge causing or threatening significant pollution of the marine environment or a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state, or to any resources of its territorial sea or exclusive economic zone. In the first case the coastal state may undertake physical inspection of the vessel, while in the second case it may *"institute proceedings, including detention of the vessel, in accordance with its laws"*.

136. With regard to the Franco-Spanish Malaga Agreement, it would appear that it is Article 56 of the convention that is relied on, in order to limit transit of single-hull oil tankers carrying heavy fuel oil within the 200-mile zone.

137. Secondly, as we have already seen, the proposal for a directive aimed at introducing sanctions, including criminal sanctions, for pollution infringements, may appear to go beyond the MARPOL 73/77 Convention and the Montego Bay Convention. In particular, unlike the latter convention whose Article 230 provides only for monetary sanctions for pollution of the marine environment, except in the case of a wilful act of pollution, the initial proposal for a directive referred to the possibility of imposing custodial sentences. That provision was removed during discussions and replaced with a reference to sanctions, including criminal sanctions in accordance with domestic law.

2.2. Malfunctions of the international system encourage a chain of irresponsibility

138. The "hooligans of the seas", as President Jacques Chirac called them, can act with impunity because, as the *Prestige* disaster showed, and it was little different from the *Erika* in this respect, they exploit an opaque shipping system.

139. In the case of the Erika, there were six barrier layers set up between the actual owner and the cargo owner, as shown below:

1. Actual owner: Messrs Vitiella and Savarese (Italy),
2. Holding company: *Drytank/Sa* (Greece),
3. Nominal owner: *Tevere Shipping* (Malta), a single vessel: *Erika* (Malta),
4. Nautical management: *PavShip* (Italy),
5. Crew management: Mumbai (India),
6. Temporary chartering: *Selmont Amarship* (Switzerland/Bahamas),
7. Broker: *Petriann* (London),
8. Cargo owner: Total Fina (Bermuda).

140. In the case of the *Prestige*, the situation was just as complex:

1. Actual owner: Mr Coulouthros (Greece).
2. Holding company: *Universe Maritime* (Liberia).
3. Nominal owner: *Mare Shipping Inc.* (Liberia), a single vessel: *Prestige* (Bahamas).
4. Broker: *Petriann* (London).
5. Philippino crew.
6. Charterer and cargo owner: *Crown Resources AG* (Switzerland).

141. On top of that, the Russian conglomerate *Alpha* sold off its *Crown Resources* subsidiary, whose shares were bought up by a Swiss lawyer, who renamed the company *ERC Trading*.

142. Through that transaction the Russian conglomerate has shielded itself from any legal proceedings that might be brought over the sinking of the *Prestige*. The movement of capital is said to have begun in August 2002, three months before the *Prestige* went down. In addition, before selling off the stock of *Crown Resources*, the *Alpha* conglomerate apparently received compensation from insurance companies for the total loss of the cargo!

143. It is goings-on like this that exasperate public opinion, which rightly considers that those truly responsible for oil slicks enjoy total impunity too easily. However, the criminal law aspects are only one part - albeit an important one - of what might be an effective European maritime safety policy.

THIRD PART - **RECOMMENDATIONS FOR A TRUE EUROPEAN POLICY TO PREVENT MARINE POLLUTION**

I. Action needed at European level

144. Europe will not be able to ensure effective protection of its coasts unless, within the European Union, the member states **fully** apply the measures advocated by the Commission. In addition, the European Union must engage in close co-operation with Russia as a matter of urgency.

1. Firmer support from EU Member States for the Commission's policy

145. It is clear that if they are to remain credible in the eyes of public opinion, which is increasingly attentive to the issue of maritime safety, member states cannot continue saying one thing and doing another much longer. As we have seen, under the pressure of the media states called on the Commission to reinforce maritime safety and then, when discussing the measures concerned in the Council of Ministers or transposing them, they limit or cancel out their effects.

146. In the immediate, therefore, member states must take the necessary measures - concerning both staffing and material aspects - to fully transpose the provisions recommended under the two *Erika* packages, be it for port state control or designating places of refuge. Whatever the case, the latter measure, to be properly implemented, requires close co-operation between member states in order to prevent a new disaster similar to the *Prestige* accident.

147. It is regrettable that, on the repressive side, discussion of the proposal for a directive introducing sanctions, including criminal sanctions, has halted in midstream, since, as already pointed out, the text of the political agreement fell well short of the Commission's initial proposal. It would be a pity if, by the time the final text is adopted, the Council still refused to rectify its position and missed the opportunity to enable the Union to equip itself with a vital tool.

148. At the same time, it is important that *all* the member states of the Council of Europe - including those of the European Union - swiftly ratify the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) signed in London in 1996.

149. For the compensation aspect, the convention draws on the two conventions of 1969 and 1971 on damage caused by hydrocarbons during their transport at sea (CLC and IOPC), themselves amended by protocols in 1992.

150. Along the lines of those two conventions, the HNS Convention sets up a two-tier system for compensation:

- the first tier concerns the liability of the owner of the transporting vessel,
- the second tier concerns the liability of receivers of HNS cargoes.

151. The convention prompted a strongly hostile reaction from professionals who, while agreeing that it was necessary to set up compensation machinery for pollution by chemical substances, thought that the HNS Convention did not meet that objective. They saw it as dealing with all hazardous substances transported in every conceivable way.

152. Whatever the case, and despite the convention's shortcomings, the European Commission - following a joint approach by the United Kingdom and France to the Transport Council of June 2001 - encouraged the member states to speedily implement it. The Commission thought it desirable that the convention enter into force simultaneously in the EU member states and be applied in the same manner, in particular to avoid distorting competition between European ports.

153. Secondly, it would be infinitely regrettable if, in the event of a major chemical accident, the victims had no prospect whatsoever of swift compensation while a text for that purpose has been in existence since 1996.

2. The need to develop close co-operation with Russia

154. Co-operation with Russia is already ongoing. On 9 July 2002 the European Commission and six states[2], including Russia, set up an international fund to help depollute North-western Russia, particularly the Kola peninsula and the Barents sea (regions described as "nuclear dustbins").

155. However, in the area of marine pollution prevention, it is extremely important that Russia engages in heavily sustained co-operation with the European Union, having apparently expressed the intention to do so during discussion of the Commission's proposal on the acceleration of the phasing out of single-hull vessels and the prohibition of the carriage by these of heavy fuel oil.

156. Such co-operation is all the more important for the fact that, in the opinion of some, Russia might come to offer a replacement for or at least an alternative to Middle Eastern oil, guaranteeing energy supplies for the United States and the European Union.

157. This co-operation might result for example in Russia's immediately agreeing to the "particularly sensitive sea area" status of the Baltic sea and consideration of extending that status to the Bosphorus area or at least to the Mediterranean sea.

158. Finally, it is highly desirable for the EU and Russia to work together at international level.

II. Europe must play a major part in the reform of international maritime law

159. The acceleration of single-hull oil tankers, while confirming Europe's capacity as a driving force in reforms, also demonstrates the necessity of securing validation of those reforms at international level.

160. Consequently, it is highly desirable that Council of Europe member states strive to promote the necessary amendments to international legislation in the spheres of prevention, penalties and reparation.

1. In the sphere of prevention

161. Initiatives might focus on the following points:

1.1 Greater responsibility of flag states

162. A definition is needed for the notion of a *"genuine link"* between the flag state and the shipowner, specifying their respective obligations (having a minimum maritime authority for example) and rights.

1.2 Improving the role and functioning of the IMO

i. Role of the IMO

[2] In addition to Russia, those states were: Denmark, Finland, Norway, Sweden and the Netherlands. Each state paid 10 million euros and the Commission 50 million euros.

163. The IMO needs to be empowered to monitor the application of international conventions by including in each of these a clause providing that *"The IMO may have audits carried out of member states' services responsible for the monitoring of application of maritime regulations".*

ii. Functioning of the IMO

164. IMO rules prohibiting the accession of a regional organisation should be amended, so that the European Union may join in future.

iii. Stepping up control of service quality

165. In particular this entails placing increased obligations on the classification societies most capable of carrying out in-depth inspections, by introducing expanded checks on the structures of oil tankers presenting a risk.

166. But it will clearly also be necessary to plan a reform of classification societies in order to tighten up requirements regarding the shareholding of governing boards or to exclude shipowners from board membership. The functioning of classification societies needs to be made more transparent.

2. In the sphere of penalties

167. Four lines of thought must be pursued:

a) The excessively absolute principle of freedom of navigation must be revised, as it is no longer appropriate in the context of present-day transport flows. Legally speaking, this would open the way for passive control and ultimately active control, at least in zones subject to risk. The issue of the responsibilities of control bodies could be considered at the same time.

b) A state which has suffered pollution damage caused by a ship must be able to demand reparation from the state whose flag that ship flies where it is established that the damage results completely or partly from the flag state's failure to exercise any effective monitoring of the vessel causing the damage.

c) Article 230 of the Convention on the Law of the Sea must be amended to make clearer the possibility of penalties of imprisonment for the most serious pollution offences.

d) An international maritime criminal court must be set up. In the same way that the notion of crimes against humanity finally yielded the creation of the international criminal court, it cannot be excluded in the future that states may eventually enshrine the notion of "crime against the environment", drawing the consequences, in legal terms, of the idea put forward by some of establishing the sea as the common heritage of humanity.

3. In the sphere of reparation

3.1. Implementation of compensation for chemical hazards

168. In particular the aspects of the HNS Convention that need to be improved within the IMO should be assessed and reasonable and operational alternatives presented.

3.2. Reform of the CLC (International Convention on Civil Liability)

i. The scope should be increased for invoking the civil liability of the shipowner, charterer, classification society or flag state in the event of admitted fault, with the requirement of adequate insurance in return, which will help to select the risks;

ii. Unlimited liability should be imposed in the event of real proven fault, by returning to the old wording of the 1969 Convention, according to which *"actual fault or privity"* entailed the loss of entitlement to a limitation of civil liability;

iii. In the event of persistent refusal of the IMO to move in this direction, a threat should be made, jointly with the other EU member states, to leave the CLC Convention, as the United States have done in the past.

3.3. Reform of the IOPC Fund Convention (International Oil Pollution Compensation Funds)

i. A distinction ought to be made between financial contributions from different oil companies, according to their chartering policy and the nature of the cargo, so as to encourage shippers to use a high-quality fleet and avoid carrying polluting products in vessels with poor safety levels;

ii. A claims hierarchy should be created, giving priority to private individuals' "subsistence" claims over claims of public bodies; similarly, a distinction needs to be made in reimbursements between states which are solely victims and those which may well have a liability for the damage;

iii. Account must be taken of ecological damage, particularly by:

a) drawing up a register of coastal natural resources in order to have a prior inventory so that damage caused by an oil slick can be assessed:

b) making broader allowance for the expenditure connected to restoration of the environment.

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Members of the Committee: Mr Walter **Schmied** (Chairman), Mr Alan **Meale** (1st Vice-Chairman), Mr Antonio Nazaré Pereira (2nd Vice-Chairman), Mr Renzo **Gubert** (3rd Vice-Chairman), Mr Ruhi **Açikgöz**, Mr Olav Akselsen, Mr Gerolf Annemans, Mrs Sirkka-Liisa **Anttila**, Mr Ivo Banac, Mr Jean-Marie **Bockel**, Mr Malcolm Bruce (*alternate: Mr Edward **O'Hara***), Sir Sydney **Chapman**, Mrs Pikria Chikhradze, Mrs Grażyna Ciemniak, Mr Viorel Coifan, Mr Valeriu Cosarciuc, Mr Osman **Coşkunoğlu**, Mr Alain Cousin, Mr Miklós Csapody, Mr Taulant Dedja, Mr Hubert **Deittert**, Mr Adri Duivesteijn *(alternate: Mr Leo **Platvoet**)*, Mr Mehdi Eker, Mr Bill **Etherington**, Mrs Catherine Fautrier, Mr Adolfo **Fernàndez Aguilar**, Mrs Siv Fridleifsdóttir, Mr György Frunda *(alternate: Mr Atilla Bela **Kelemen**)*, Mr Fausto **Giovanelli**, Mrs Maja Gojković, Mr Peter Götz, Mr Vladimir **Grachev**, Mrs Gultakin Hajiyeva, Mr Mykhailo Hladiy, Mr Anders G. Högmark, Mr Jean Huss, Mr Ilie **Ilaşcu**, Mr Jaroslav Jaduš, Mrs Renate Jäger, Mr Gediminas **Jakavonis**, Mr Ivan Kalezić, Mrs Liana Kanelli, Mr Karen Karapetyan, Mr Orest Klympush, Mr Victor **Kolesnikov**, Mr Zoran Krstevski, Mr Miloš **Kužvart**, Mr Ewald Lindinger, Mr Jaroslav **Lobkowicz**, Mr François Loncle *(alternate: Mr Guy **Lengagne**)*, Mr Theo Maissen *(alternate: Mr John **Dupraz**)*, Mr Andrzej Mańka, Mr Tomasz **Markowski**, Mr Giovanni Mauro *(alternate: Mr Pasquale **Nessa**)*, Mrs Luísa Mesquita, Mr Gilbert Meyer, Mr Goran Milojević, Mr Vladimir Mokry *(alternate: Mrs Svetlana **Smirnova**)*, Mrs Carina Ohlsson, Mr Gerardo Oliverio *(alternate: Mr Giovanni **Crema**)*, Mr Pieter Omtzigt, Mr Mart Opmann, Mrs Elsa **Papadimitriou**, Mr Jakob **Presečnik**, Mr Lluís Maria de Puig *(alternate: Mr Gabino **Puche**)*, Mr Jeffrey Pullicino Orlando, Mr Maurizio Rattini, Mr Marinos Sizopoulos, Mr Rainder Steenblock, Mrs Inger Støjberg, Mrs Maria **Stoyanova**, Mr Gàbor **Szalay**, Mr Nikolay Tulaev *(alternate: Mr **Yuri Kovalev**)*, Mr Iñaki **Txueka**, Mr Vagif Vakilov, Mr Borislav Velikov, Mr Geert Versnick, Mr Klaus Wittauer, Mr G.V. Wright, Mr Kostyantyn Zhevago

Secretariat to the committee: Mr Sixto, Mr Torcătoriu and Ms Lasén Díaz

N.B. The names of those members present at the meeting are printed in **bold**.