

UK P&I CLUB



# Legal Briefing

FEBRUARY 2010

EU ENVIRONMENT LAW

## An update on EU Environmental Legislation

UK P&I CLUB  
IS MANAGED  
BY **THOMAS  
MILLER**

# About us

*This briefing is one of a continuing series which aims to share the legal expertise within the Club with our Members*

A significant proportion of the expertise in the Managers' offices around the world consists of lawyers who can advise Members on general P&I related legal, contractual and documentary issues.

These lawyers participate in a virtual team, writing on topical and relevant legal issues under the leadership of our Legal Director Chao Wu.

As part of Thomas Miller that virtual team can also call on executives who support the UK Defence Club and the experience and expertise that serves the largest defence mutual in the world, with over 3,500 owned and time chartered ships entered.

If you have any enquiries regarding the issues covered in this briefing please contact the team via Chao Wu and we will be pleased to respond to your query. The team also welcomes suggestions from Members for P&I related legal topics and problems which would benefit from explanation by one of these briefings.

## Chao Wu

Legal Director



Chao has a doctorate in law and is based in London as Legal Director, where she is responsible for giving general legal advice, including guidance on the legal aspects of P&I Club documentation, and on the legal aspects of cover for Members' contractual arrangements. She represents the Club on various subcommittees and working groups of the International Group of P&I Clubs. Chao speaks Mandarin, French and Shanghainese.

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Ioana joined Thomas Miller in 2009 after spending four years working in another International Group P&I Club, where she handled P&I and Defence claims mainly for Greek shipowners. She is dual-qualified as a lawyer in both England & Wales and Romania and holds Master's degrees in Maritime Law from Southampton University and European Law from Paris. Ioana is fluent in French and Romanian.

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## Acknowledgement

We would like to thank David Baker of the International Group Secretariat for his useful summary of EU environment directives.

# An update on EU Environmental Legislation

*The European Union is taking a high profile in the regulation of shipping, particularly in relation to environmental protection. The entry into force of the Lisbon Treaty has prompted a review of recent EU law relevant to the shipping industry. So where are we and what should we expect further?*

The Treaty of Lisbon amending the “Treaty on European Union” and the “Treaty establishing the European Community” was signed at Lisbon on 13 December 2007. Having been ratified by all 27 EU member states, the treaty entered into force on the 1 December 2009.

Under the treaty, protection and improvement of the environment have become an explicit objective of the EU. For the first time, the treaty contains the objective of ‘improvement of the quality of the environment’, rather than just preservation of the environment. In addition, by the EU adopting the Charter of Fundamental Rights ‘a high level of environmental protection’ would become a fundamental right of EU citizens.

Following the introduction of the treaty, the EU will have legal personality in international law. The treaty’s aim is to simplify the way in which the EU works by reforming its institutional structure and the way in which decisions are taken. As it creates new powers for EU institutions to harmonise civil and criminal national laws and procedures, it is possible to envisage that the EU will want to revisit environmental legislation in order to fully harmonise it in all member states.

Current EU environmental legislation relevant to the shipping industry is already quite cumbersome. For the benefit of Members interested in having a handy summary, the enclosed table provides a useful comparison of liabilities and sanctions under the following recent EU directives:

- Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004

on Environmental Liability with regard to the Prevention and Remedying of Environmental Damage (ELD);

- Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties including criminal penalties, for pollution offences, as amended by Directive 2009/123/EC (SSPD);
- Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law;
- Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives.

For further background information regarding developments in European legislation, Members may be interested to revisit the Circular 08/09 on our website, which explains the impact of the 3rd EU Maritime Safety Package on Members whose ships enter EU waters.

However, it should be noted that in the case of all directives, member states have a degree of flexibility with regard to how the objectives set out in the directive are met in their domestic law. A full list of EU member states is set out below: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

## **Directive 2004/35/CE**

More than 20 states in the EU have now brought this European Directive on Environmental Liability (ELD) into law. Under the ELD shipowners are strictly liable for the costs of preventative and remedial actions for the environmental damage arising from the transport of dangerous or 'polluting' goods, if such costs are outside the scope of application of a relevant liability convention.

In July 2009 the Club published a circular (07/09) which explained the differing liability and compensation regimes of the ELD and relevant international conventions. The circular can be downloaded from the Club Circulars section of the Publications area of the UK Club website ([www.ukpandi.com](http://www.ukpandi.com)).

## **Directive 2005/35/EC**

The Directive 2005/35/EC entered into force on 1 October 2005 and had to be implemented by all EU member states by 1 March 2007. The controversial directive states that ship-source discharges of polluting substances constitute a criminal offence if committed with intent, recklessly or by serious negligence. The directive was supplemented by detailed rules on criminal offences and penalties set out in Council Framework Decision 2005/667/JHA, which was annulled by the European Court of Justice (ECJ) in October 2007 on the ground that it had not been adopted on the correct legal basis. To fill the resulting legal vacuum, the Directive 2005/35/EC was amended by the Directive 2009/123/EC.

## **Directive 2009/123/EC**

This directive entered into force on 16 November 2009, obliging member states to provide in their national legislation for criminal penalties in respect of those discharges of polluting substances to which this directive applies by 16 November 2010. The text of the amending directive is similar to the annulled decision, but leaves the nature and level of penalties at the member states' discretion.

A broad coalition of shipping industry interests challenged the Directive 2005/35/EC in the English High Court as being inconsistent with, and contrary to, the internationally harmonised rules contained in MARPOL 73/78 and the Law of the Sea Convention (UNCLOS) 1982, in spite

of having the aim of incorporating international standards for ship-source pollution into EU law.

The most controversial aspect is the criminalisation of the pollution caused by 'serious negligence', which is susceptible of various interpretations. The case was referred to the ECJ who decided in June 2008 that the validity of the directive cannot be assessed by reference to MARPOL or UNCLOS.

It has upheld that as the Community itself - unlike its member states - is not a party to MARPOL, it is not bound by the convention. The Court has also taken the view that although the Community is a party to UNCLOS, that convention does not establish rules intended to apply directly and immediately to individuals. As it also held that "serious negligence" does not infringe the requirement of certainty in Community legislation, the decision remains of concern to the shipping industry.

## **Directive 2008/99/EC**

The Directive 2008/99/EC entered into force on 26 December 2008 and has to be implemented by all EU member states by 26 December 2010. It complements the above directive as it obliges member states to provide for criminal penalties in their national legislation in respect of serious infringements of certain EU laws on the protection of the environment.

The type and level of criminal penalties are not specified, but as this directive provides for minimum rules, member states are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment. Under the directive, it will, for example, be a criminal offence if an unlawful discharge into water results in death or serious injury to any person, or the destruction of protected wild fauna or flora species, or substantial damage to the quality of water or to animals or plants, or if there is any infringement of EU legislation on the shipment of waste.

## **Directive 2008/98/EC**

The Directive 2008/98/EC entered into force on 12 December 2008. EU member states are required to implement and give force of law to the directive by 12 December 2010. Having repealed existing waste related legislation, the directive consolidates and updates the framework of EU law

on all aspects of waste. It clarifies concepts like waste, recycling and recovery, disposal, hazardous waste, bio-waste, emphasises producer responsibility, as well as applies more stringent waste reduction and waste management targets for member states.

### **Liability**

The aim of the directive is to induce member states to lay down measures to protect the environment by preventing or reducing the adverse impacts of the generation and management of waste. Based on the fundamental principle of 'polluter pays', the directive imposes strict liability, on the original waste producer and on the current and previous waste holders, for the costs of waste management.

For the purposes of the directive, waste is defined as 'any substance or object which the holder discards or intends or is required to discard'. The definition of waste is deliberately very wide, replacing reference to listed categories that had been used in previous, now repealed, directives.

Waste 'producer' is defined as 'anyone whose activities produce waste (original waste producer) or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste'. Waste 'holder' is defined as 'the waste producer or the natural or legal person who is in possession of the waste'.

Whilst the directive might seem at first glance to have nothing to do with shipowners' or charterers' operations, the directive is relevant to Members because they may be considered a 'waste producer' or 'waste holder' within the meaning of the directive, in view of the ECJ's decision, rendered on 24 June 2008 in *Commune de Mesquer v. Total France SA* and others (in an 'offshoot' of the Erika main proceedings). Although this decision referred to the previous waste Directive 75/442/EC now repealed, the ruling remains valid.

It was held in this decision that hydrocarbons accidentally spilled at sea, following a shipwreck, and mixed with water and sediment and drifting along the coast of a member state until being washed up on the shore, constitute 'waste' within the meaning of the directive, because it was a substance which its holder did not intend to produce and which the holder discarded, albeit involuntarily, during transport, and which was no longer capable of being exploited or marketed without prior processing.

The ECJ stated that the national court could regard *the seller of hydrocarbons and charterer of the ship carrying them* as "producers" of that waste – and therefore liable for the costs of removal – if the national court were to find that the seller/charterer contributed to the risk that the pollution caused by the shipwreck would occur and failed to take measures (including the choice of a safer ship) to prevent such an occurrence.

The directive does not apply to emissions into the atmosphere, emissions on land, radioactive waste, and certain other categories which are excluded from its scope (and are covered by other EU legislation).

### **Linkage with the existing international liability and compensation regimes**

The directive refers to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, and the 1996 Protocol thereto as amended in 2006, but it does not provide for the application of any other international conventions – including LLMC 1976 as amended by 1996 Protocol – or compensation regimes.

The ECJ in *Commune de Mesquer v. Total France SA* and others seems to have recognised that where CLC is applicable a charterer could avoid liability under the directive by virtue of the CLC channelling provisions, excluding a charterer from liability for pollution damage arising under CLC, but the court would still allow the charterer to be held liable under the directive for the disposal of the waste in their capacity as the cargo owner.

### **Remedial measures**

The directive provides that the Members can avoid liability for waste management costs if a recovery operation (including recycling) is carried out in compliance with specific criteria to be developed by member states in accordance with certain conditions: the substance is commonly used for specific purposes; a market or demand exists for it; it fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and its use will not lead to overall adverse environmental or human health impacts.

# Current EU legislation – in a nutshell

	Directive 2008/99/EC (Criminal)	Directive 2008/98/EC (Waste)
<b>Entered into force</b>	26/12/2008	12/12/2008
<b>Implementation date</b>	26/12/2010	12/12/2010
<b>Objective</b>	Obliges Member States to provide for criminal penalties for serious infringements of EU law on the protection of environment.	Protection of the environment & human health by preventing or reducing the adverse impacts of the generation & management of waste & by reducing overall impacts of resource use & improving the efficiency of such use.
<b>Offence / Damage covered</b>	Unlawful discharge [...] of a quantity of materials [...] into water; and unlawful collection, transport, recovery or disposal of waste [...] which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of [...] water, or to animals or plants.  Unlawful shipment of waste.  Inciting, aiding and abetting with intent.	Waste management costs.
<b>Scope</b>	Infringement of certain EU regulation. Relevant for Members: <ul style="list-style-type: none"> <li>▪ Reg. (EC) 1013/2006 on shipments of waste;</li> <li>▪ Directive 2006/11/EC on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community.</li> </ul>	Waste: any substance or object which the holder discards or intends or is required to discard; & oil spilled in connection with a shipwreck, mixed with water and sediment and drifting along coastline until being washed up on shore of member states.
<b>Liable parties</b>	Legal and natural persons.  Excluded: States or public bodies exercising state authority and public international organisations.	Legal and natural persons; Waste producer Current/previous waste holder Charterer Cargo owner.
<b>Basis of liability</b>	Intentionally or with serious negligence.	Strict liability based on 'polluter pays' principle;  Fault based for a 'producer' who is a charterer/ cargo seller that contributed to the risk of pollution caused by shipwreck by e.g. the choice of ship.
<b>Defences</b>	None specified, but probably lawful conduct.	End-of-Waste status when waste undergoes a recovering operation.  Due diligence on vetting ship.
<b>Sanctions</b>	Effective, proportionate and dissuasive criminal penalties, the level of which is left to the member states' discretion.	Effective, proportionate and dissuasive penalties.
<b>Limit of liability</b>	None specified.	None specified.

Directive 2009/123/EC (SSPD)	Directive 2004/35/CE (ELD)
16/11/2009	30/04/2004
16/11/2010	30/04/2007
To incorporate international standards for ship-source pollution into EU law & to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety & to enhance protection of the marine environment from pollution by ships.	To induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.
<p>Illicit ship-source discharges of polluting substances which result in deterioration in the quality of water.</p> <p>Repeated minor cases which do not individually but in conjunction result in deterioration in quality of water.</p> <p>Inciting, aiding and abetting with intent.</p>	<p>Environmental damage or imminent threat of such damage.</p> <p>Direct/indirect damage to the aquatic environment, to species and natural habitats; contamination of the land which creates a significant risk to human health.</p> <p>Cost of the necessary preventive or remedial measures.</p>
<p>Discharges within internal &amp; territorial waters, including ports, of a member state, in so far as the Marpol regime is applicable; straits used for international navigation subject to the regime of transit passage, as laid down in Part III, section 2, of 1982 UNCLOS, to the extent that a member state exercises jurisdiction over such straits; the exclusive economic zone of a member state; the high seas.</p> <p>Discharges from any ship, irrespective of its flag, with the exception of any warship, naval auxiliary or other ship owned or operated by a state and used only on government non-commercial service.</p>	<p>Certain specified occupational activities presenting a risk for human health/ environment.</p> <p>Other activities in cases where operator is at fault.</p> <p>Exclusions:</p> <ul style="list-style-type: none"> <li>▪ When international conventions listed in Annex IV apply;</li> <li>▪ Damage caused by armed conflict; a natural exceptional phenomenon;</li> <li>▪ Activities the main purpose of which is to serve national defence or international security, or to protect from natural disasters.</li> </ul>
<p>Legal and natural persons.</p> <p>Included: shipowner, master, crew, charterer, classification, cargo owners.</p> <p>Excluded: States themselves or public bodies in the exercise of state authority or public international organisations.</p>	<p>Operator: any legal, or natural, private or public person who operates or controls the occupational activity or to whom decisive economic power over the technical functioning of an activity has been delegated.</p>
<p>With intent, recklessly or with serious negligence.</p>	<p>Strict for environmental damage arising from a specified occupational activities.</p> <p>Fault based for environmental damage caused by all other occupational activities.</p>
<p>If discharge satisfies the conditions set out in Annex I, Regulations 15, 34, 4.1 or 4.3 or in Annex II, Regulations 13, 3.1.1 or 3.1.3 of Marpol 73/78.</p> <p>For the owner, the master or the crew when acting under the master's responsibility if it satisfies the conditions set out in Annex I, Regulation 4.2 or in Annex II, Regulation 3.1.2 of Marpol 73/78.</p> <p>If minor case.</p>	<p>Damage caused by third party and occurred despite the fact that appropriate safety measures were in place.</p> <p>Complying with compulsory order or public authority instruction.</p>
<p>Effective, proportionate and dissuasive criminal penalties against natural persons.</p> <p>No minimum penalty provided.</p> <p>Effective, proportionate and dissuasive penalties against legal persons. The exact nature of penalties is up to governments to decide.</p>	<p>Natural or legal persons who may be adversely affected &amp; environment protection organisations may ask the competent authorities to act when faced with damage. Legal action may be brought before a court / ad hoc body for review of the lawfulness of the decisions and actions of the competent authority, or of its failure to act.</p>
<p>None specified.</p>	<p>None specified.</p>

**UK P&I CLUB** The logo for the UK P&I Club features a stylized blue and yellow shield with a white speech bubble inside.

**UKDC**  
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