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# EU Environmental Directive Development

## The EU Directive on Port Reception Facilities: A Case Study in the Development of an EU Environmental Directive

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**Summary:** *This paper provides an analysis of the European Union Directive on Port Reception Facilities which was developed as a result of a number of major oil spills in European waters and from a perceived laxity in the application of enforcement of international environmental regulations identified in the 1993 "A Common Policy on Safe Seas". This paper examines the development of Directive 2000/59/EC in light of the Common Policy, setting it within the decision making process of the EU. An historical overview of the development of the Directive is provided, identifying how it changed and adapted from the Proposal of the Commission being adopted in July 1998 through to the signing off of the Directive by the Parliament and Council in November 2000. Comparison is made of three versions of the Directive – an early working document, the proposed directive and the final directive. Finally, the paper examines recent developments in the Directive in response to other EU legislation and an ongoing review of its implementation in ports in order to assess how the Directive has or might change in the future.*

### I. Introduction

The Commission of the European Communities (1993)<sup>1</sup> published a communication "A Common Policy on Safe Seas" which highlighted the importance of shipping to the European Community, noting that "For centuries maritime shipping has been of great economic and political importance for Europe" as vessels "carry 90% of its total external trade with the rest of the world ... [and] 35% of total goods transport[ed] between Member States" (p. 1). However, the communication further notes that "shipping disasters in European waters or involving European vessels ... show that the level of risk in shipping activities is still very high".

When the Treaty of Rome was signed in 1957 establishing the European Economic Community, it

did not contain any specific environmental policy for that Community. Gallego (2001)<sup>2</sup> notes that the main aim of the Treaty of Rome was "the establishment of the common market without considering other policies [such as environmental policies] that did not help directly towards the achievement of this common market" and that it was not until 1973 that a "community environmental policy came into being". This policy took the form of a series of Environmental Action Programmes (1973, 1977, 1983, 1987, 1993 and 2001).

The First Environmental Action Programme of 1973,<sup>3</sup> which led to the establishment of three principles in dealing with pollution – prevention, polluter pays and most appropriate level of action – marks the point where the European Community took action to introduce legislation to protect the environment. Prior to that time, it was the responsibility of Member States to sign up to regional or international legislation dealing with specific environmental issues of concern to those states. In the case of marine environmental legislation, Carpenter and Macgill<sup>4</sup> identify a range of legislation, ratified both by individual Member States and by the European Community, which was aimed at reducing or preventing marine pollution, the coverage of which included European seas and coastlines. This international legislation includes:

- 1969 Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (Bonn Agreement)<sup>5</sup>
- 1973 Convention for the Prevention of Marine

<sup>1</sup> Commission of the European Communities, 1993. A Common Policy on Safe Seas. Communication from the Commission. COM(93)66 final, Brussels, February 1993, p. 2.

<sup>2</sup> Gallego, G., "Waste Legislation in the European Union" [2001] EELR 342-350 at 342.

<sup>3</sup> OJ 20.12.1973 C112.

<sup>4</sup> Carpenter, A. and Macgill, S. M., "The Development of EU Legislation on the Control of Ship-Generated Waste and Cargo Residues" in *The Marine Environment: Science and Law* (University of Hull Institute of Coastal and Estuarine Studies, UK: 2001), Table 1, p. 87.

<sup>5</sup> The 1969 Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil (Bonn Agreement) was established to aid in the protection of the marine environment of the North Sea region, in the event of oil pollution incidents, "by encouraging states to jointly improve their basic capacity for combating oil pollution" (Bonn Agreement website, 2006). In 1983 the name of the agreement was amended to "Agreement for Cooperation in Dealing with Pollution of the North Sea by oil and other harmful substances". Under the aegis of the Bonn Agreement, aerial surveillance flights are undertaken by all member states to identify oil slicks at sea. Bonn Agreement Website (2006). Background to the Bonn Agreement. Available online from: <http://www.bonnagreement.org/eng/html/welcome.html>

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Pollution from Ships (MARPOL) and Protocols (MARPOL 73/78)<sup>6</sup>

- 1982 Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment (Paris MOU)<sup>7</sup>

While the European Community had ratified a wide range of regional and international legislation to protect the marine environment, it was not until July 1987, with the amendment of the Treaty of Rome by the Single European Act,<sup>8</sup> that specific provisions to protect the environment were included in the Treaty. Gallego<sup>9</sup> notes that the most important provision was Art. 130r(2) which states that “environmental protection requirements shall be a component of the Community’s other policies” and that it was the adoption of the Single European Act which finally resulted in “an environmental policy [being] formally accepted by the Community” (p. 342).

Since the Single European Act a wide range of environmental legislation covering many different environmental areas has been introduced by the EU. This paper examines one such legislative instrument, the EU Directive on Port Reception Facilities for Ship-Generated Wastes and Cargo Residues (Directive 2000/59/EC). The Commission of the European Communities,<sup>10</sup> in its Common Policy on Safe Seas, noted that “under international rules, all parties are obliged to provide and maintain facilities in their ports for the discharging of waste, including bunker oil”. However, it also identified wide variations in the provision of reception facilities between different ports and stated that port policies had the potential to “give rise to deflection of trade ... through weak application of the law to encourage access to the port ... a fact potentially leading to unlawful discharges at sea”.<sup>11</sup> Community-wide initiatives were therefore proposed in order to achieve better results than “individual action by Member States [which might have] a more marginal result”.<sup>12</sup>

The Common Policy<sup>13</sup> only made limited mention of the development and use of reception facilities, and no specific timeline was suggested for the introduction of legislation to improve provision and uptake of such facilities. It was not until July 1998 that the Commission adopted the initial proposal for a Directive<sup>14</sup> and not until November 2000 that Directive 2000/59/EC<sup>15</sup> was signed, with entry into force in December 2002. This paper looks at the development of Directive 2000/59/EC from an early working document through to the final version, and also examines changes to the Directive since its entry into force.

### II. Historical overview of the development of the Directive on Port Reception Facilities

Directive 2000/59/EC was first adopted by the

Commission in July 1998. However, the draft proposal, initially entitled the Draft Directive on Shore Reception Facilities for Ship-Generated Waste was already in its third version in December 1997.<sup>16</sup> The text of the draft proposal was developed using working groups, discussions with government experts and written comments from some Member States.

The timetable of events in the development of the Directive is set out by Carpenter<sup>17</sup> and this appears as Table 1. The table was compiled using a wide range of

<sup>6</sup> The 1973 Convention for the Prevention of Marine Pollution from Ships (MARPOL) entered into force in October 1983 and regulates all forms of marine pollution from ships. MARPOL was modified by the Protocol of 1978 and is referred to as MARPOL 73/78. It covers ship source pollution by oil (Annex I), noxious liquid substances in bulk (Annex II), substances carried by sea in packaged form (Annex III), sewage (Annex IV), garbage (Annex V), and air pollution from ships (Annex VI). MARPOL 73/78 Consolidated Edition (International Maritime Organization, London, 2002).

<sup>7</sup> The 1982 Memorandum of Understanding on Port State Control (Paris MOU) was agreed at a second Ministerial Conference held in Paris in 1982 and entered into force in July 1992. The MOU provides a system of Port State Control under which foreign merchant vessels can be inspected upon entry into a member state’s port to ensure it complies with a range of international standards and relevant instruments including MARPOL 73/78. Paris MOU Website (2006). Relevant Instruments. Available online from: <http://www.parismou.org/ParisMOU/Organisation/About+Us/Instruments/default.aspx>

<sup>8</sup> The Treaty of Rome was amended on 1 July 1987 by the Single European Act. The new Treaty had been adopted in 1986 and entered into force on 1 July 1987

<sup>9</sup> Above, n.2 at 342.

<sup>10</sup> Commission of the European Communities, 1993, paragraph 115, p. 61.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*, paragraph 119, p. 62.

<sup>13</sup> *Ibid.*, Annex I, p. 72.

<sup>14</sup> Commission of the European Communities, 1998, Proposal for a Council Directive on port reception facilities and ship-generated wastes and cargo residues. COM (1998) 452 final – 98/0249(SYN) submitted by the Commission on 17 July 1998 (OJ 31. 8.1998 C271/ 79–86).

<sup>15</sup> Directive 2000/59/EC of the European Parliament and Council of 27 November 2000 on port reception facilities for ship-generated wastes and cargo residues (OJ 28.12.2000 L332/ 81–89).

<sup>16</sup> The Draft Directive on Shore Reception Facilities for Ship-Generated Waste, version 3, December 1997. No document reference is available. The document notes that “The text of this draft is prepared on the basis of the outcomes of discussions with government experts and takes account of the written comments received from some Member States. The text does not necessarily reflect the view of the Commission”.

<sup>17</sup> Carpenter, A., *The Reduction of Ship-Generated Waste in the North Sea: A Contemporary Analysis* (PhD Thesis: University of Leeds, UK, 2005), Table 5.1, p. 91.

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documentation available through the European Union's "Europa" website and from information published in the Official Journals of the European Union and includes all Document and Official Journal References, where they are available.

The Proposal for a Council Directive was adopted in July 1998 and was to be dealt with under the Co-operation Procedure of the EU. However, the timetable includes, at 1 May 1999, a Change in Legal Basis. As the Proposal for the Directive was pending at that date the entry into force of the 1999 Treaty of Amsterdam<sup>18</sup> required a change in the legal basis and legislative procedure to be used to reach agreement on the Directive. As a result, the Co-Decision procedure rather than the Co-operation procedure was used to reach a decision on the Directive.

The Co-operation Procedure, introduced under the 1986 Single European Act, required the Council and European Parliament to co-operate on certain subjects including the environment, and gave the European Parliament greater authority to influence legislation than had been the case prior to its signing. Prior to that the Consultation Procedure had been in force where the Council was required to consult with the European Parliament and obtain an opinion on any proposed measures, but was under no legal obligation to accept any amendments proposed by the Parliament.

The Co-Decision Procedure was introduced in the 1993 Maastricht Treaty<sup>19</sup> and expanded under the Treaty of Amsterdam. It requires co-operation between the Commission, Parliament and Council and gives increased influence to MEPs at the early stages of legislative development. It also gives increased power to the Parliament as legislation requires a majority vote by the Parliament to succeed and, where the Parliament puts forward amendments, if the Council does not agree with them then the proposal goes to a Conciliation Committee to agree a joint text. In order for the legislation to be adopted it must then be agreed by the Council through qualified majority voting and by an absolute majority in the Parliament. If the Council and Parliament are unable to agree on a joint text through the Conciliation Committee, then there will be no legislation.

### III. Development of Directive 2000/59/EC from working paper to final version

Article 1 of Directive 2000/59/EC<sup>20</sup> states that its purpose is "to reduce the discharges of ship-generated waste and cargo residues into the sea, especially illegal discharges, from ships using ports in the Community, by improving the availability and use of port reception facilities for ship-generated waste and cargo residues, thereby enhancing the protection of the marine

environment". This remained virtually unchanged from the working document of December 1997. The main elements of the Directive also remained fundamentally the same between working document, the proposed Directive adopted by the Commission in 1998 and final published Directive of November 2002.

Carpenter<sup>21</sup> set out a comparison between the three versions of the Directive, reproduced as Table 2, which outlines the requirements of the Directive under 13 specific subject headings and highlights changes in either Article number or content between the three documents. A number of these headings are examined in greater detail.

#### Scope of Directive

Article 3 (all versions) sets out the scope of the Directive. It applies to all vessels, including fishing vessels and recreational craft, which operate from or call in at a port in a Member State, irrespective of the flag under which the vessel is registered. There are, however, a number of exceptions set out in the final Directive<sup>22</sup> and these include "any warship, naval auxiliary or other ship owned or operated by a State and used ... only on government non-commercial service". However, for these vessels, Member States are still required to take any reasonable measures to ensure that these vessels still deliver waste in line with the requirements of the Directive.

#### Port Reception Facilities

Article 4 (all versions) requires that member states ensure the provision of reception facilities which should be adequate to meet the needs of vessels normally using ports and the use of which should not unduly delay the vessel. Adequate facilities are defined as being "capable of receiving the types and quantities of [wastes] from ships normally using that port, taking into account the operational needs of the users of the port, the size and geographical location of the port, the type of ship calling at that port and the exemptions provided for under Art. 9".<sup>23</sup>

In the original working document there was merely the basic requirement that the needs of vessels normally using a port be met, while proposed exemptions were set out at Art. 6, part 2 and Annex

<sup>18</sup> The Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts was signed in Amsterdam on 2 October 1997 (OJ 10.11.1997 C340/1-144).

<sup>19</sup> Maastricht Treaty – The Treaty on European Union 1992 – was signed in Maastricht on 7 February 1992 and entered into force on 1 November 1992 (OJ 29.7.1992 C191/1).

<sup>20</sup> OJ 28.12.2000 L332/83.

<sup>21</sup> Above, n.17, Table 5.2, pp. 96-98.

<sup>22</sup> OJ 28.12.2000 L332/83. Article 3(a) lists exceptions to the requirement that all vessels make use of reception facilities.

<sup>23</sup> OJ 28.12.2000 L332/83, Art. 4, subs. 1.

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II. The basic requirement remained constant at Art. 3 throughout the three versions and this is important as ports visited by a vessel of a type which does not normally call in would not be required to provide facilities for that vessel. One example is where a chemical tanker is forced into a port due to poor weather. Even should that tanker require facilities, the port would not have to provide them and the vessel would have to travel on to a port with appropriate facilities at the earliest opportunity, once the bad weather had subsided.

An additional clause was included in the proposed Directive<sup>24</sup> which required member states to establish procedures to report inadequacy of facilities to the International Maritime Organization, i.e. to report those ports not providing adequate facilities. A further requirement was added to the final version of the Directive<sup>25</sup> where the operational needs of port users, the size and geographical location of the port and exemptions provided for under Art. 9 of final Directive were to be considered in determining precisely what could be considered adequate provision.

The provision of port reception facilities under Directive 2000/59/EC also have to be responsive to any changes in the MARPOL 73/78 Convention, the international convention which includes provision of such facilities. As a result, what are deemed to be adequate reception facilities at the current time might not be so in the future so that, if the requirements of MARPOL 73/78 are amended, any such change will need to be considered under the Directive Provision was made within the Directive for the specific case of MARPOL 73/78 Annex IV – Sewage Wastes. At the time of entry into force of the Directive, this Annex of MARPOL was optional and ports were not required to provide reception facilities for sewage wastes. However, Art. 16 of the Directive made allowance for the possible entry into force of Annex IV by suspending implementation of the Directive for sewage wastes “until 12 months after the entry into force of Annex IV to Marpol 73/78”.<sup>26</sup>

### Notification

Under Art. 6 (all versions) the master of a ship “other than a fishing vessel or recreational craft authorised to carry no more than 12 passengers” is required to notify the port when it needs to make use of reception facilities.<sup>27</sup> As far as possible, 24 hours notice is required if the next port of call is known, or as soon as possible if the port of call was not known earlier or is less than 24 hours from the previous port used by the vessel. Information which should be notified to the port is set out in Annex II of the Directive<sup>28</sup> and includes the name, call sign and any IMO identification No of the vessel, the flag state under which it is registered, its estimated time of arrival and departure in the port, previous and next ports of call, the last port and date when waste was delivered to port

reception facilities and the type, volume and proportion of waste which is to be delivered to the port.

The working document originally included, at Annex I, exemptions for ferries and other vessels which regularly traveled between two or more EU ports. However, Annex I in the proposed and final versions<sup>29</sup> of the Directive sets out the requirement for waste reception and handling plans which is discussed at below. The exemptions in the working document no longer appeared under Art. 6, part 2 and Annex II but are included at Art. 9<sup>30</sup> in both the Proposed and Final Directive versions. In the proposed Directive ships would be exempt if they were engaged in regular scheduled traffic, for example passenger ferries, and if they had evidence that they had made an arrangement to discharge wastes at a specific port on a regular basis. Evidence of this would include a contract for the payment of fees to that port. While Art. 6 of the final Directive set the limit of a maximum of 12 passengers on recreational craft in order for that vessel to be exempt, and Art. 9 – exemptions – in the final Directive is similar to that in the Proposed Directive, Art. 9 of the final Directive also includes a requirement that the Commission be updated on at least an annual basis of any exemptions granted by the relevant authorities in individual Member States.<sup>31</sup>

### Waste Reception and Handling Plans

Originally included at Art. 8 and Annex II in the Working Document, waste reception and handling plans appear at Art. 5 in the proposed<sup>32</sup> and final<sup>33</sup> versions of the Directive. Ports were required to provide plans containing accurate, up to date information on the different types and volumes of ship-generated waste which could be discharged into a port. In the proposed Directive, the development of plans was set out in Art. 5 and Annex I.<sup>34</sup> In the final Directive, Art. 5 includes the requirement that ports consult with relevant parties such as port users and their representatives in the preparation of plans; sets out that plans may be developed on a regional basis; and also notes that they should be updated at least

<sup>24</sup> Commission of the European Communities, 1998, Art. 4, paragraph 1, p. 23.

<sup>25</sup> OJ 28.12.2000 L332/83, Art. 4, paragraph 2. Geographical location of the port was not covered in the proposed Directive.

<sup>26</sup> OJ 28.12.2000 L332/86 (Art. 16).

<sup>27</sup> OJ 28.12.2000 L332/84 (Art. 6).

<sup>28</sup> OJ 28.12.2000 L332/88 (Annex II).

<sup>29</sup> OJ 28.12.2000 L332/87 (Annex I).

<sup>30</sup> OJ 28.12.2000 L332/85 (Art. 9).

<sup>31</sup> OJ 28.12.2000 L332/85 (Art. 9, paragraph 2).

<sup>32</sup> Commission of the European Communities, 1998, Art. 5, p. 23

<sup>33</sup> OJ 28.12.2000 L332/83 (Art. 5).

<sup>34</sup> Commission of the European Communities, 1998, Annex I, p. 30.

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every three years or in the event of significant changes in the port. Where regional plans are developed for reasons of efficiency, these plans must identify facilities available specifically in each port covered. The requirements for these plans are set out at Annex I (final Directive)<sup>35</sup> and must include an assessment of the need for facilities based on the Nos and types of vessels calling into a port, a description of the facilities available, a description of charging systems being operated and procedures for reporting inadequacy of facilities, for example. Annex I also sets out the specific information which should be made available to port users.

### Fees

A range of charging systems to cover the cost of reception facilities were set out under Art. 11 and in Annex III of the working document and included the application of a reduced fee for those vessels which could demonstrate a reduction in the volumes of waste generated through the use of on-board equipment. Article 8 in both the proposed and final versions of the Directive set out that the fee system used should provide no incentive for vessels to discharge wastes at sea. Carpenter and Macgill<sup>36</sup> state that a “key element of the Directive ... is the use of a common charging system [to] encourage the use of facilities”. They further note that “the burden of cost of provision of [these] reception facilities should be borne by ships visiting ports”.<sup>37</sup> Carpenter and Macgill provide an evaluation of six different charging systems identified by the International Maritime Organization, setting out the advantages and disadvantages of each system. No specific charging system was set out in the Directive (proposed or final) although Art. 8 in the final Directive<sup>38</sup> notes that “The cost recovery systems for using port reception facilities shall provide no incentive for ships to discharge their wastes into the sea”. It was therefore left to ports and/or member states to determine which system to use.

The issue of appropriate charging system and adequate level of fee was one of the most difficult aspects of the Directive to reach agreement on. The European Parliament,<sup>39</sup> in its recommendation for a second reading on the Common Position on the proposed Directive, set out one of the most significant amendments between the working document and the proposed Directive – Amendment 6. This amendment stated that all vessels “contribute significantly, i.e. at least 90% of the costs ... of port reception facilities including treatment and disposal of waste ... irrespective of actual use of the facilities”. However, this “90% of the costs” figure did not appear in the final text of the Directive which states at Art. 8,<sup>40</sup> paragraph 2(a) that “all ships calling at a port of a Member State shall contribute significantly to the costs”.

Later on in 2000, the European Parliament (2000(b)),<sup>41</sup> in its report on the joint text approved by the Conciliation Committee, concluded that “On

the ‘key issue’ of fees, the Council finally accepted the principle of a percentage of the costs to be applied to all ships calling at a port, irrespective of actual use of facilities. All institutions agreed on the Commission’s interpretation of 30% as a bottom line for this kind of costs”. Fees could be differentiated by vessel type and size while an additional charge would be made to cover the actual cost of waste discharged. This meant that all vessels would have to pay for facilities, irrespective of whether they used them or not, so that the costs to vessels discharging wastes would effectively be part-subsidized by those which did not.

Carpenter and Macgill<sup>42</sup> note that “While the EU has set out its commitment to the ‘Polluter Pays Principle’ in Art. 130(r) of the Single European Act ... it was considered that the direct application of ‘polluter pays’ ... could result in an economic incentive for discharge of waste at sea”. The different charging systems available to ports meant that the “polluter pays principle” could be adhered to in different degrees, or not at all. Some ports might choose to charge the full amount for wastes discharged by a vessel while others might have a flat rate fee for all vessels, with no component to cover actual waste disposal costs. Carpenter and Macgill<sup>43</sup> conclude that “the more flexibility and variation there is between ports and countries, the less likely it will be that a clear and transparent system will occur” and suggest that a “only by monitoring the situation as the Directive comes into effect ... will it be possible to show whether the Directive has any significant impact”.

Article 8 of the final Directive includes a requirement that the Commission submit a report to the Parliament and Council within three years of entry

<sup>35</sup> OJ 28.12.2000 L332/87 (Annex I).

<sup>36</sup> Carpenter, A. and Macgill, S.M., “Charging for Port Reception Facilities in North Sea Ports: Putting Theory Into Practice” (2001) *Marine Pollution Bulletin*, 42(4), 257-266 (Elsevier Science Ltd: Oxford, UK) at 257.

<sup>37</sup> Carpenter and Macgill, above n. 36, p. 262.

<sup>38</sup> OJ 28.12.2000 L332/84 (Art. 8, paragraph 2).

<sup>39</sup> European Parliament (2000(a)). Recommendation for a Second Reading on the Common Position established by the Council with a view to the adoption of a European Parliament and Council Directive on Port Reception Facilities etc. Amendment 6. Session Document A5-0043/2000, Committee on Regional Policy, Transport and Tourism, 29 February 2000.

<sup>40</sup> OJ 28.12.2000 L332/84 (Art. 8, paragraph 2(a)).

<sup>41</sup> European Parliament (2000(b)). Report on the joint text approved by the Conciliation Committee for a European Parliament and Council Directive on port reception facilities etc. Report A5-0213/2000 Final, European Parliament delegation to the Conciliation Committee, 29 August 2000, p. 8.

<sup>42</sup> Carpenter and Macgill, above n. 36, p. 263.

<sup>43</sup> Carpenter and Macgill, above n. 36, p. 264

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into force date which was set as 28 December 2002, "evaluating the impact of the variety of cost recovery systems adopted".<sup>44</sup> Article 8 further notes that the Commission was able to submit a proposal to amend the Directive by "the introduction of a system involving the payment of an appropriate percentage ... by all ships ... or an alternative system with equivalent effects". In the summer of 2005 an independent study focusing mainly on cost recovery systems and port implementation of the Directive was undertaken, with visits to 50 commercial European ports. Early in 2006 the European Maritime Safety Agency delivered a report on cost recovery systems to the European Commission and the Commission is due to present conclusions and recommendations to the European Parliament and Council in the second half of 2006.

### Enforcement

Article 12 of the Working Document made it a priority that inspections be undertaken of vessels not giving advance notice of the need to use facilities as set out under Art. 6, paragraph 1 and not exempt under Art. 6, paragraph 2. These inspections would ensure that the vessel was in compliance with the requirements of the Directive before it was allowed to leave the port. In the proposed Directive enforcement was covered under Art. 11<sup>45</sup> and similarly vessels failing to notify would be inspected. However, if a vessel left port and there was evidence of non-compliance, it was now possible to notify its next port of call and the vessel could be detained at that port for inspection. This strengthened the Directive in terms of ensuring compliance through the use of the inspection system. Art. 11 of the final Directive<sup>46</sup> was further strengthened with the requirement that 25 per cent of all vessels be inspected, not just those which had not given advance notice. Vessels can be detained in port "if the relevant authority is not satisfied with the results of the inspection"<sup>47</sup> and, "where there is clear evidence that a ship has proceeded to sea without having complied with Arts 7 or 10 ... [the ship will] not be permitted to leave [its next port of call] until a more detailed assessment ... has taken place".<sup>48</sup>

Vessel inspections are carried out by national authorities, for example the Maritime and Coastguard Agency in the UK, under the aegis of the 1982 Paris Memorandum of Understanding on Port State Control. Inspections, as previously noted, cover a range of international conventions including MARPOL 73/78. By extending vessel inspections to 25% of all vessels, not just those which have failed to give advance notice of their intention to use port reception facilities, the intention is to reduce the potential for vessels to discharge waste illegally at sea by increasing the risk of such action being detected. The enforcement component is therefore crucial in ensuring that the Directive meets its aim at Art. 1<sup>49</sup> of reducing volumes of waste entering the marine environment and increasing the provision and uptake of reception facilities in ports.

### Summary

This section has examined a number of key "subject headings" included in Directive 2000/59/EC, including the scope of the Directive, the provision of reception facilities, how vessels are to be charged for using those facilities and how the Directive is to be enforced. It has examined how the Directive developed from an early working document, arising initially from the 1993 "A Common Policy on Safe Seas", through to the final Directive published in November 2000. However, since that time the Directive has been subject to amendment resulting from other EU legislation being developed and it is anticipated that further amendments will take place following on from any Council recommendations for changes to the charging systems used, for example. The paper will now examine how more recent European Union legislation has impacted directly on Directive 2000/59/EC since its publication.

## IV. Recent Developments in Directive 2000/59/EC since entry into force

In December 2002, a Regulation establishing a Committee on Safe Seas was published, while two Proposals for Directives were also being developed, all of which make specific reference to Directive 2000/59/EC. These three pieces of legislation, together with their anticipated or actual impact on the Directive, are examined below.

### Regulation (EC) No. 2099/2002 establishing a Committee on Safe Seas<sup>50</sup>

A Regulation establishing a Committee on Safe Seas (COSS) was published in the Official Journal in 2002. Article 1 sets out the purpose of the Regulation as being "to improve the implementation of ... Community legislation".<sup>51</sup> The Regulation makes specific reference to the Directive on port reception facilities at Art. 2<sup>52</sup> in a list of the legislation covered by the Regulation.

As a result of entry into force of the COSS Regulation, some specific amendments were made to the text of Directive 2000/59/EC in the Consolidated

<sup>44</sup> OJ 28.12.2000 L332/84 (Art. 8, paragraph 4).

<sup>45</sup> Commission of the European Communities, 1998, Art. 11, p. 25.

<sup>46</sup> OJ 28.12.2000 L332/85 (Art. 11).

<sup>47</sup> OJ 28.12.2000 L332/85 (Art. 11, paragraph 2(c)).

<sup>48</sup> OJ 28.12.2000 L332/85 (Art. 11, paragraph 2(d)).

<sup>49</sup> OJ 28.12.2000 L332/83 (Art. 1).

<sup>50</sup> Regulation (EC) No. 2099/2002 of the European Parliament and of the Council of 5 November 2002 establishing a Committee on Safe Seas etc. (OJ 29.11.2002 L324/1-5).

<sup>51</sup> OJ 29.11.2002 L3242 (Art. 1).

<sup>52</sup> OJ 29.11.2002 L324/3 (Art. 2).

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Text (2002)<sup>53</sup> of that Directive. Although the majority of the Directive remains unchanged between the 2000 version and the Consolidated Text, there is one specific change resulting from the COSS Regulation. The text of Directive 2000/59/EC<sup>54</sup> on the Regulatory Committee originally read: "1. The Commission shall be assisted by the Committee set up pursuant to Art. 12(1) of Directive 93/75/EEC ... , hereinafter referred to as 'the Committee'".

However, in the Consolidated Text (2002),<sup>55</sup> this has been amended to read: "1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) created by Art. 3 of Regulation (EC) No 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas etc."

The EEC Directive (1993) referred to in Directive 2000/59/EC (Council Directive 93/75/EEC)<sup>56</sup> sets out minimum standards for vessels entering or leaving, Community ports that are carrying some form of dangerous or polluting goods. The Committee referred to in Art. 12(1) of the EEC Directive is "composed of representatives of the Member States and chaired by the representative of the Commission". With the introduction of the COSS Regulation, the original Committee has been superseded, its role now being fulfilled by the Commission with the assistance of members of COSS.

Article 15 of Directive 2000/59/EC<sup>57</sup> is also amended in the Consolidated Text<sup>58</sup> with the addition of a paragraph stating that "amendments to the international instruments referred to in Art. 2 [of the COSS Regulation] may be excluded from the scope of this Directive, pursuant to Art. 5 of Regulation (EC) No 2099/2002". In its definitions, the COSS Regulation<sup>59</sup> states that "'international instruments' shall mean the conventions, protocols, resolutions ... and provisions adopted by an international conference, the International Maritime Organization (IMO), the International Labour Organization (ILO) or the parties to a memorandum of understanding referred to in the provisions of the Community maritime legislation in force". In order to prevent or reduce any potential for conflict between Community maritime legislation and international instruments, Art. 5 of the COSS Regulation<sup>60</sup> states that "Member States and the Commission shall cooperate ... in order to define, as appropriate, a common position or approach in the competent fora."

The COSS Regulation has the potential to make significant changes Directive 2000/59/EC. Where the Directive has applied standards set, for example, under MARPOL 73/78 on the provision of port reception facilities, the Committee on Safe Seas could choose to adopt much more stringent standards or set shorter deadlines to implement specific aspects of an international Convention. These new standards or deadlines would need to be enforced under Directive 2000/59/EC, without any need to amend the Directive, and there could be some confusion in ports and

elsewhere about which deadline or standard applies, and there will be a clear need to ensure adequate dissemination of information to maximize compliance with any such change.

### Proposed Directive COM (2001) 139 final on protection of the environment through criminal law<sup>61</sup>

The European Commission set out a Proposal for a Directive which would "guarantee a high level of protection for the environment" through the use of criminal law to tackle "the increasing problem of environmental crime ... [resulting from the fact that] ... sanctions currently established by Member States are not always sufficient to achieve full compliance with community law".<sup>62</sup> This proposal covered "types of pollution which can be attributed to individuals or legal persons",<sup>63</sup> rather than to broader environmental problems regulated by Community law such as protection of the marine environment.

Offences under this proposed Directive COM (2001) 139 final include, the discharge of hydrocarbons, waste oils or sewage sludge into water<sup>64</sup> and the discharge of waste on or into land or into water.<sup>65</sup> The Annex to this proposed Directive lists over 50 Council Directives and Regs which are covered by it. This list includes Directive 2000/59/EC on port reception facilities<sup>66</sup> together with other Directives directly related to protection of the marine environment.

When, or if, this Directive enters into force, it should provide a minimum standard and ensure that criminal sanctions for serious breaches of Community environmental law can be enforced in all EU Member States, with those sanctions being of a similar standard in all states. In the preamble to the Directive, the European Commission (2001) note that "Common

<sup>53</sup> Consolidated Text, 2002. *Directive 2000/59/EC ... on port reception facilities*. CONSLEG:2000L0059 – 29/11/2002. Luxembourg: Office for Official Publications of the European Communities, 29 November 2002

<sup>54</sup> OJ 28.12.2000 L332/86 (Art. 14, paragraph 1).

<sup>55</sup> Consolidated Text, 2002, p.10.

<sup>56</sup> OJ 5.10.1993 L247/19. Directive as last amended by Directive 98/74/EC (OJ 13.10.1998 L276/7).

<sup>57</sup> OJ 28.12.2000 L332/86 (Art. 15).

<sup>58</sup> Consolidated Text, 2002, p.10.

<sup>59</sup> OJ 29.11.2002 L342/2 (Art. 2, paragraph 1).

<sup>60</sup> OJ 29.11.2002 L342/3 (Art. 5).

<sup>61</sup> European Commission, 2001. Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment Through Criminal Law. *COM (2001) 139 final – COD 2001/0076*. Brussels: Commission of the European Communities, 13 March 2001.

<sup>62</sup> European Commission, 2001. Explanatory Memorandum, Section 1, p. 2.

<sup>63</sup> European Commission, 2001. Explanatory Memorandum, Section 1, p. 3.

<sup>64</sup> OJ 26.6.2001 C180E/8 (Art. 3, paragraph (a)).

<sup>65</sup> OJ 26.6.2001 C180E/8 (Art. 3, paragraph (c)).

<sup>66</sup> OJ 26.6.2001 C180E/15 (Annex).



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rules on criminal sanctions would make it possible to use methods of investigation ... which are more effective than the tools [currently] available”<sup>67</sup> and should also ensure that “judicial authorities, rather than administrative authorities [are entrusted] with the task of imposing sanctions ... independent of those which grant exploitation licences and discharge authorizations”.<sup>68</sup> Both of these should contribute greatly to minimising any incentive for vessels to discharge waste illegally and therefore contribute towards improving the quality of the marine environment.

At June 2006 the first reading by the Council was still pending on the proposed Directive and it is not clear how soon, or if, this Directive will enter into force.

### **Proposed Directive COM (2003) 92 final<sup>69</sup> on ship-source pollution and on the introduction of sanctions etc., agreed as Directive 2005/35/EC<sup>70</sup>**

Directly stemming from the proposal for Directive on the protection of the environment through criminal law was a further Proposal of the European Commission (2003) for a Directive that would specifically impose sanctions on ship-source pollution. The European Parliament and Council (2005) signed this Directive and it entered into force in September 2005 as Directive 2005/35/EC. The Directive notes in its preamble that “standards in all Member States for discharges of polluting substances from ships ... based upon the MARPOL 73/78 Convention ... are being ignored on a daily basis”<sup>71</sup> and that “in order to achieve effective protection of the environment there is ... a need for effective, dissuasive and proportionate penalties”.<sup>72</sup>

In its introduction to the Directive, the European Commission (2003) emphasised the fact that it is not just high profile accidents such as the “sinkings of the ‘Prestige’ in November 2002 and of the ‘Erika’ in December 1999” that are responsible for “ship-source pollution by oil”. Instead it notes that “the main part of the world-wide ship-source pollution by oil is the result of deliberate discharges”.<sup>73</sup> This ship-source pollution is often the result of ‘operational’ i.e. intentional discharges from ships, including “tank-cleaning operations and waste oil disposal [which] is still widely practiced in the coastal waters of Member States and beyond”. This continued practice was evidenced by “390 oil slicks in the Baltic Sea and 596 in the North Sea” in 2001.

This Directive was proposed to “fill in some of the most important remaining regulatory gaps” in the area of ship-source pollution, and “related to both deliberate and accidental discharges”.<sup>74</sup> In the background and justification to the proposed Directive, it was noted Directive 2002/59/EC had been adopted to ensure that ports “provide adequate reception facilities for ships’ waste and [the requirement that ships] use these facilities”.<sup>75</sup> However, while noting that Direc-

tive 2000/59/EC and other earlier legislation “represent important steps to eliminate illegal discharges” it goes on to state that “they do not go all the way in addressing the problem at community level” since an actual offence of “violation of applicable pollution standards, is not fully covered by EC law”. As an example it notes that implementation of MARPOL 73/78 “shows variations, both in practice and in law”, and there is also variation in levels of inspection, prosecution of offenders and in the penalties imposed on such offenders.

In order to overcome these problems, the proposed Directive set out two measures at Section 3 which are: incorporation of “applicable international discharge rules for ship-source pollution into Community law”, together with Regulations to enforce these rules; and that “violations of discharge rules shall be criminal offences”.<sup>76</sup> Guidance on criminal offences and sanctions, including specific details of penalties available, is set out under Art. 6<sup>77</sup> with sanctions including fines, confiscation of proceeds resulting from an offence, a temporary or permanent ban on commercial activities and, potentially, imprisonment. In order to ensure consistency of application of international rules, Annex I of the proposal provides a summary of the relevant Regulations under MARPOL 73/78, covering oily wastes and noxious liquid substances.<sup>78</sup>

This Directive entered into force in September 2005 and should have a direct impact on Directive 2000/59/EC, firstly by allowing greater consistency in the application of the rules on discharge standards by Member States and, secondly, through the introduction of a consistent set of sanctions. Both of these elements should provide a greater incentive for vessels to make use of the available reception facilities in ports.

<sup>67</sup> European Commission, 2001. Paragraph 5, p. 7.

<sup>68</sup> European Commission, 2001. Paragraph 6, p. 7.

<sup>69</sup> European Commission, 2003. Proposal for a Directive of the European Parliament and of the Council on ship source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences. *COM (2003) 92 final*. Brussels: Commission of the European Communities, 5 March 2003

<sup>70</sup> European Parliament and Council, 2005. 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 for infringements (OJ 30.9.2005 L255/11-21).

<sup>71</sup> OJ 30.9.2005 L255/11(paragraph 3).

<sup>72</sup> OJ 30.9.2005 L255/11 (paragraph 4).

<sup>73</sup> European Commission, 2003, p. 2.

<sup>74</sup> European Commission, 2003, p. 3.

<sup>75</sup> European Commission, 2003, p. 4.

<sup>76</sup> European Commission, 2003, p. 7.

<sup>77</sup> European Commission, 2003, Art. 6, pp. 14-15.

<sup>78</sup> European Commission, 2003, Annex I, pp. 18-25.

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## V. Conclusion

This paper has examined Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues from its earliest stages as a working document through to its publication in its final form. It has set the development of the Directive within the process of legislative development of the European Union as it changed from being developed using the Co-operation Procedure set out in the 1986 Single European Act to the Co-Decision Procedure set out in the 1999 Treaty of Amsterdam.

This paper has also set out changes to the Directive resulting from the development of other EU legislation including a Regulation and Directive, and the potential for further change in line with an additional Directive, together with an ongoing evaluation process from which recommendations of the European Commission are due to be placed before the European Parliament and Council in the second half of 2006.

This Directive has served to illustrate the complex nature of the process of legislative development within the EU, and the way that different legislative acts of the EU are interconnected. It has also illustrated how external international legislation, in this case the MARPOL 73/78 Convention, can also directly impact on EU legislation.

Directive 2000/59/EC is an environmental Directive, specifically intended to reduce the pollution of the seas and coastlines of EU Member States by reducing illegal discharges of waste into the marine environment. It provides an important example of how EU legislation can be used to protect the environment in co-operation with other international environmental acts. It also serves to illustrate that EU Environmental legislation should not remain static but needs to respond to changes in knowledge and to developments in other regions of the world or global developments such as the ongoing development of the MARPOL 73/78 Convention.

**Table 1 Timetable of Events in the development of Directive 2000/59/EC**

Date	Event	Doc. Ref or OJ Ref, if known	Notes
17.7.98	Proposal of the Commission for a Council Directive – Adopted by Commission – Transmitted to Council – Transmitted to European Parliament	COM (1998) 452 final OJ 31.8.98 C271	Proposal to be dealt with under the Cooperation Procedure
20.1.99	European Parliament Committee Report 1 (hereafter EP)	A4-0023/99 OJ 28.5.99 C150	The Committee on Transport & Tourism considered Commission proposal and adopted the draft legislative resolution unanimously
11.2.99	EP Opinion, 1st Reading	OJ 28.5.99 C150	Debate of the EP. Approval of the Commission proposal with amendments.
11.3.99	Opinion of the Committee of the Regions	OJ 14.7.99 C198	Adopted unanimously.
24.3.99	Opinion of the Economic and Social Committee	CES/1999/328 OJ 18.5.99 C138	Adopted opinion, 91 votes in favour and 3 abstentions
14.4.99	Working Party on Transport Questions (Maritime Transport)	Interinstitutional File: 98/0249(SYN)	Examined proposal and put forward amendments to the Directive and its Arts.
19.4.99	Adoption of Amended Proposal	COM (1999) 1049 final OJ 28.5.99 C148	Commission adopted an Amended Proposal under the Co-operation procedure, incorporating wholly or in part 8 of the 18 amendments proposed by the European Parliament (EP)
20.4.99	Transmission of Amended Proposal to the Council and the EP		
1.5.99	Change in Legal Basis		A change in the legal basis by the Commission requiring consultation with the Committee of the Regions. Co-decision procedure to be used.
17.6.99	Agreement of Common Position	PRES/1999/134	Political agreement of Council on draft Directive
16.9.99	EP 1st Reading of Amended Proposal	A5-0005/1999 OJ 25.2.00 C54	EP confirms Opinion in framework of Co-decision Procedure

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**Table 1 (continued)**

Date	Event	Doc. Ref or OJ Ref, if known	Notes
8.11.99	Adoption of Common Position by Council	PRES/1999/329 OJC/2000/10	Unanimous adoption of Common Position (EC) No. 1/2000*
12.11.99	Transmission of both the Council and the EP Declarations on Common Position		
19.11.99	Common Position referred by EP to Committee on Regional Policy, Transport & Tourism		
22.2.00	Committee on Regional Policy etc. meeting		Adopted draft decision by 21 voted to 10 and 9 abstentions
29.2.00	Committee on Regional Policy etc. tables recommendation to European Parliament for 2nd Reading	A5-0043/2000 final	
14.3.00	European Parliament 2nd Reading under Co-decision procedure	OJ 29.12.00 C377	Adoption, at second reading, of favourable position including 15 amendments to the common position
14.3.00	Commission Position on EP amendments	52000PC0236	13 of the 15 amendments of the EP are incorporated in the recommended proposal of the Commission, in total or following redrafting.
19.4.00	Adoption of Commission Opinion – Transmission of Council Opinion – Transmission of European Parliament Opinion	COM (2000) 236 final	
23.5.00	Convening of Conciliation Committee		
26.6.00	Conciliation Committee Decision	PRES/00/236	Agreement reached between European Parliament and Council on Directive, and in particular on the cost recovery system to be used.
21.8.00	EP Delegation to the Conciliation Committee	Adoption of draft legislative resolutions by 13 votes to 1.	
29.8.00	Report tabled to EP on joint text approved by Conciliation Committee	A5-0213/2000	
6.9.00	EP Decision at 3rd Reading	OJ 7.5.2001 C135	EP debate and approval of Conciliation Committee joint text
14.9.00	Council Decision at 3rd Reading	PRES/2000/283	Approval of Conciliation Committee joint text and Council adoption of Directive
27.11.00	Signature by EP and Council	OJ 28.12.2000 L332	Directive signed 27.11.00 and entry into force following publication in Official Journal on 28.11.00

Source: Carpenter, A., Ph.D. thesis (2005) pp 91-92.

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**Table 2 Comparison between versions of Directive on Port Reception Facilities**

Subject Heading	Working Document	Proposed Directive	Final Directive
Purpose	Art. 1 (A1)	A1. As working document (WD), plus reference to cargo residues and to enhanced protection of the marine environment.	A1. As proposed Directive (PD).
Definitions	A2. List of categories. Includes competent authorities; excludes cargo residues.	A2. As WD but competent authorities no longer appears; cargo residues introduced.	A2. As PD.
Scope	A3. Has a section 2 referring to other relevant legislation on waste disposal.	A3. As part 1 of working document.	A3. As PD, plus inclusion of fishing vessels/recreational craft. Measures by Member States to ensure excluded vessels still deliver waste consistent with Directive.
Facilities	A4. Basic requirements to meet the needs of vessels normally calling in at port.	A4. Port to receive all categories of waste from normal vessels and to expand facilities as required. Inadequacy notification under IMO reporting procedures.	A4. As PD but also takes account of size and geographical location of port, together with exemptions under Art. 9.
Waste Reception and Handling Plans	A8. Plans are specified under Annex II in document. Exemptions for smaller ports. Plans need re-approval every 3 years.	A5. Development of plan set out under Annex I.	A5. As PD but includes consultation with relevant parties. Allows for the development of plans on a regional basis.
Notification	A6. Advance notification other than for fishing vessels/recreational craft. Annex I outlines exemptions for ferries and other vessels making regular vessel movements.	A6. Advanced notification similar to WD. Information at Annex II. No exemptions. Information from notification to be held on board and made available on request.	A6. Advanced notification similar to WD. Recreational craft limited to no more than 12 passengers. Information at Annex II. Information retained on board at least until next port of call.
Delivery of Ship-Generated Waste	A6a. Disposal of waste required to ensure sufficient capacity on board to proceed to next port of call.	A7. Vessel can proceed if provides proof of sufficient storage capacity on board to travel to next port of call plus for all waste generated during that journey.	A7. As PD but vessels required to discharge if reason to believe facilities at next port are inadequate or port not known and there is a risk of discharge at sea.
Exemptions	A6, part 2. Exemptions at Annex II.	A9. Ships engaged in scheduled traffic exempt if evidence of arrangement for waste delivery/ payment of fees in a port. May also be exempt from 6, 7 & 8. Commission informed of exemptions by Member States	A9. As PD but Commission to be updated with details of exemptions granted by Member States at least annually.
Delivery of Cargo Residues	A7. Delivery in accordance with MARPOL 73/78.	A10. As WD plus fee to be paid by user of facilities.	A10. As PD.
Fees	A11, Choice of system at Annex III. Evidence to be provided to Commission that system works. Exemptions under 6a if evidence of disposal contract with specific port. Reduction in fee for evidence of equipment to reduce waste generated.	A8. No incentive to discharge at sea. All vessels make a substantial contribution towards costs (in port dues or separately). Fees differentiated by size/type of vessel. Additional fee to cover actual cost of waste discharged. Reductions for equipment on board. Fees to be transparent, fair and non-discriminatory; calculations clear to users.	A8. As PD but exclusion added so does not cover fishing vessels and passenger craft with no more than 12 passengers.

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**Table 2 (continued)**

<b>Subject Heading</b>	<b>Working Document</b>	<b>Proposed Directive</b>	<b>Final Directive</b>
Enforcement	A12. Priority for inspection of those vessels not providing advance notice under A6.1 and not exempt under A6.2. Inspections to ensure compliance with A6a before vessel allowed out to sea. Procedures to be established for fishing vessels and recreational craft to ensure compliance.	A11. Inspections to ensure compliance with A7 & A10 for vessels failing to notify under A6. Vessels held in port to comply with A7 & A10 if fail inspection. Next port to be informed if vessel goes to sea and there is evidence of non-compliance. Vessel to be detained in next port for inspection. Procedures as for WD.	A11. As PD, but with the addition of a 25% vessel inspection requirement. Procedures as for working document but recreation craft to carry no more than 12 passengers.
Penalties	A16. System of penalties set out for breaching national provisions. Penalties to be effective, proportionate and dissuasive.	A3. As WD.	A13. As WD.
Evaluation	A17. 3-yearly reports from Member States to Commission on effectiveness of Directive. Commission to evaluate system and report to the EP and the Council on the basis of the 3-yearly reports.	A17. As WD.	A17. As WD.

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*Source:* Carpenter, A., Ph.D. thesis (2005) pp 96-98.