



COMMISSION OF THE EUROPEAN COMMUNITIES

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2003/0088 (CNS)

Proposal for a

COUNCIL FRAMEWORK DECISION

**to strengthen the criminal-law framework for the enforcement of the law against
ship-source pollution**

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. GROUNDS FOR THE PROPOSAL

Environmental crime is among the European Union's central concerns. The Tampere European Council on 15 and 16 October 1999 asked that efforts be made to adopt common definitions of offences and penalties focusing on a limited number of specially important sectors such as environmental crime. On 28 September 2000, the Council (Justice and Home Affairs) recognised the need to establish a body of law with regard to environmental offences. The Commission has presented a proposal for a Directive.¹ On 27 January 2003, the Council adopted a Framework Decision on the protection of the environment through criminal law.²

The recent shipwreck of the tanker Prestige off the coast of Galicia in November 2002 highlighted the urgent need for action on ship-source pollution. The Copenhagen European Council of 12 and 13 December 2002 declared the European Union's determination to adopt all the necessary measures to preclude further disasters of this type. The Council particularly welcomed the Commission's intention of looking into the need for specific new measures, including measures relating to liability and the corresponding penalties.³ The JHA Council meeting of 19 December adopted a statement undertaking to consider all complementary measures to protect the environment, in particular pollution of the seas, through the criminal law.

The proposal for a Directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences,⁴ constitutes a first fundamental stage in this respect. This proposal transposes into Community law the international rules on ship-source pollution emissions and regulates the implementation of these rules. It applies, beyond the usual international standards, to prohibited behaviour on the high seas (seas outside the jurisdiction of any State). It provides that there must be effective, proportional and dissuasive penalties for these offences. With regard to natural persons, these are criminal penalties, involving imprisonment in the most serious cases. Regarding natural or legal persons, the applicable penalties include fines.

To fight effectively against the phenomena of ship-source pollution, the mechanism put in place should be backed up by measures of judicial cooperation pursuant to Title VI of the Treaty on European Union.

This proposal for a Framework Decision therefore aims to strengthen the criminal-law measures to approximate the provisions laid down by law or regulation in the Member States concerning ship-source pollution offences and to facilitate and encourage cooperation between the Member States to repress these offences.

2. THE REGIONAL AND INTERNATIONAL CONTEXTS; THE EU FRAMEWORK

This proposal for a Framework Decision falls within a regional and international context by which it is heavily inspired.

¹ Proposal for a Parliament and Council Directive concerning environmental protection by the criminal law, presented by the Commission on 13.3.2001 (OJ C 180 E, 26.6.2001, p. 238), as amended on 30 September 2002 (OJ C 20 E, 28.1.2003, p. 284).

² OJ L 29, 5.2.2003, p. 55.

³ Points 32 to 34.

⁴ COM (2003) 92 final, 5.3.2003.

In addition to MARPOL Convention 73/78, to which the proposal for a Directive 2003/... /EC directly refers, the most relevant instrument in the context of this Framework Decision is the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), the Community being a party⁵ along with all the Member States, for all of them have ratified it except Denmark. Part XII of this Convention (“Protection and safeguarding of the marine environment”), which regulates the powers of investigation and prosecution of the States party, and establishes heads of jurisdiction, constitutes a source of direct inspiration for this proposal.

The European Community, alongside Germany, Belgium, Denmark, France, Norway, the Netherlands, Sweden and Great Britain, is a party to the “Bonn Agreement” of 13 September 1983 for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, which is noteworthy in that it stipulates a monitoring and mutual assistance mechanism between the States party, extending to the gathering of evidence. The Baltic Task Force is another relevant regional reference framework as regards ship-source pollution. The “Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea” (REMPEC) also deals with the matters of relevance to this Framework Decision, among other more general aspects of environmental protection.

This Framework Decision takes account of a number of aspects of instruments that have been or soon will be adopted by the Council. Such is the case in particular of the judicial cooperation aspects of the recent Framework Decision concerning environmental protection through criminal law.⁶

3. LEGAL BASIS

Article 29 of the Treaty on European Union treats the development of common action among the Member States in the fields of police and judicial cooperation in criminal matters as a means of achieving the Union’s objective of providing citizens with a high level of safety in the area of freedom, security and justice.

This objective is to be achieved through closer cooperation between judicial and other competent authorities of the Member States. Article 31(1) of the Treaty lists a number of aspects to be covered by common action in the sphere of judicial cooperation and the approximation of legislation in criminal matters.

This proposal meets these aims.

The variability of levels of penalties in the current situation creates distortions in the potential financial and other consequences of pollution, depending where it occurs, while this pollution is likely to affect several Member States of the Union. The harmonisation of levels helps to discourage forum-shopping. Recognition of powers of investigation of the State of the port or terminal where a ship is lying off shore and the possibility of setting up joint investigation teams helps to improve cooperation between judicial authorities. The establishment of heads of jurisdiction helps to prevent conflicts of jurisdiction, in accordance with Article 31(d) of

⁵ This Convention entered into force with regard to the European Community on 1.5.1998.

⁶ This reference is without prejudice to the Commission’s position on the legal basis for this instrument, which it has always disputed and of which it announced in a statement annexed to the minutes of the Council meeting which adopted the Framework Decision that the Commission reserved all the rights conferred on it by the Treaty. On 24 March 2003 the Commission accordingly decided to bring an action against the Council for judicial review of the legality of this Framework Decision (PE/2003/410).

the Union Treaty. And the establishment of contact points for the exchange of information facilitates and accelerates cooperation between authorities and is a means of securing compatibility between the rules applicable in the Member States, as required by Article 31(a) and (c).

Article 34(2)(b) of the Union Treaty mentions the Framework Decision as the instrument to be used for approximating the provisions laid down by law or regulation in the Member States. Framework Decisions are binding on the Member States as regards the result to be achieved but leave to national authorities the choice of form and methods.

4. CONTENT OF THE PROPOSAL

Title: Framework Decision to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution

The title of the Framework Decision immediately highlights the fact that the instrument is to complement Directive 2003/... /CE. This is why the terms “ship-source pollution” already used in the title of the Directive are taken over exactly. The terms “to strengthen the criminal-law framework” state how the proposed measures are to complement the earlier instrument and are inspired by other Union instruments.

Article 1 – Subject-matter

Article 1 specifies that the purpose of this Framework Decision is to supplement Directive 2003/... /EC with detailed rules in criminal matters. The scope of this Framework Decision necessarily coincides therefore with the scope of the Directive. It applies to the illegal discharge of polluting substances from ships within the meaning of the Directive; this basically means enforcement of the ban on illegal discharges of bulk hydrocarbons and harmful liquid substances in all waters within the jurisdiction of a Member State (inland waterways, territorial waters, straits used for international navigation subject to the regime of transit passage, exclusive economic areas), and on the high seas, from a ship or seagoing vessel, irrespective of its flag, of any type whatsoever operating in the marine environment, including hydrofoil boats, air-cushion vehicles, submersibles and floating craft.

The reference to criminal matters precludes any further measures of civil or administrative law.

Article 2 – Definitions

This Article specifies that the definitions adopted in Directive 2003/... /EC apply for the purposes of this Framework Decision. This flows from the fact that the Framework Decision is designed as a complement to Directive 2003/... /CE. The definitions of illegal discharge of polluting substance, by reference to MARPOL 73/78 standards, including hydrocarbons and harmful liquid substances, and of ships and natural and legal persons for the purposes of this Decision are in Article 2 of Directive 2003/... /CE.

Article 3 – Detailed rules for applying penalties

Directive 2003/... /EC creates an offence of the illegal discharge of polluting substances intentionally or by serious negligence, for which, in accordance with Article 6 of the Directive, there must be effective, proportional and dissuasive criminal or other penalties. In the most serious cases, in accordance with the same provision, these penalties can include prison sentences for natural persons. Article 6 also provides that these penalties can take the

form of fines for both natural and legal persons, which will probably tend to be the case in view of current national practices.

Article 3 of the Framework Decision deals with the detailed rules for imposing the penalties provided for by the Directive. But it deals only with the specific aspects of them. It leaves aside the more horizontal aspects, which will be addressed in other contexts.⁷

The first paragraph relates to prison sentences, likely to be imposed under Directive 2003/.../EC in the “most serious” cases. A minimum level of maximum prison sentences is provided for. This level is in conformity with the conclusions of the JHA Council of 25 and 26 April 2002, which identifies four possible levels of penalty.⁸ The level envisaged in this Framework Decision corresponds to the third level identified in the JHA Council conclusions. Under this Framework Decision, the seriousness of imprisonable offences is such (we are looking at the “most serious” cases according to the Directive) that it would seem right to set a harmonisation threshold corresponding to the level 3. The minimum level of maximum prison sentence provided for cannot, therefore, be below a bracket ranging between five and ten years’ imprisonment. But setting this threshold, of course, does not mean that shorter prison sentences are precluded in national law. Member States remain free to provide for a level of penalties corresponding to the lower thresholds, i.e. a sentence ranging from one to three years, or a sentence ranging from three to five years for offences which, without being negligible, are not however “the most serious ones”, which are the only ones for which the Directive 2003/.../EC demands a prison sentence.

The appraisal of the seriousness of cases punishable by imprisonment under the Directive is not defined and is left to each Member State, which will interpret it in the light of its traditions and its own legal system. The Framework Decision does, however, identify four types of specific circumstances in which a case will be treated as being in the “most serious” category for the purposes of the Directive. They include the commission of offences by a criminal organisation within the meaning of the Joint Action of 1998⁹ and offences as a result of which persons suffer death or serious bodily harm or substantial damage is caused to water quality or to animal or vegetable species or of parts of them.

The Commission wishes to stress that the four types of circumstances provided for in this Article are without prejudice to other circumstance regarded as highly serious by the legislation of the Member State concerned. The four “most serious” circumstances mentioned in this Framework Decision correspond to those which are generally recognised as such in national law and have already been provided for by other European Union instruments. Participation in a criminal organisation is an aggravating circumstance in the proposal for a Framework Decision on attacks against information systems.¹⁰ Particularly serious injury caused to the victim is an aggravating circumstance which must be taken into account in

⁷ There is currently an initiative of the Greek Presidency for a Council Framework Decision to harmonise the application of the *ne bis in idem* principle. Repeat offences should be considered in the forthcoming Commission Communication on the alignment of criminal penalties, probably to be followed by a proposal for a Council Framework Decision on the approximation of criminal penalties.

⁸ Level 1: Penalties of a maximum of at least between 1 and 3 years of imprisonment; level 2: Penalties of a maximum of at least between 2 and 5 years of imprisonment; level 3: Penalties of a maximum of at least between 5 and 10 years of imprisonment; level 4: Penalties of a maximum of at least 10 years of imprisonment (cases where very serious penalties are required).

⁹ Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ L 351, 29.12.1998, p. 1).

¹⁰ Commission proposal (COM (2002) 173 final), published in OJ C 203 E, 27.8.2002, p. 109.

offences of trafficking in human beings, for example.¹¹ And substantial damage to water quality and to animal or vegetable species is taken into account in the Framework Decision concerning protection of the environment through criminal law for the definition of intentional criminal offence.

Given the nature of a Framework Decision, which is binding on the Member States as regards the result to be achieved but leaves them free to determine the form and methods, Member States retain a certain margin for manoeuvre in adapting their legislation to these rules and determining the seriousness of the penalties imposed within the limits set by the Framework Decision.

In accordance with Directive 2003/... /EC, prison sentences will not always be the penalty, or the only penalty, that fits the crime. For one thing, they apply only to the most serious offences, as has already been stressed. For another, provision must also be made for a dissuasive harmonisation system with regard to legal persons, and a prison sentence can quite well be imposed in combination with another penalty.

Article 3(2) deals, therefore, with the harmonisation of the penalties that Member States may impose in addition to or in place of a prison sentence under Directive 2003/... /EC, in accordance with their respective traditions and legal systems.

Approximation of levels was sought without requiring a Member State whose legal system does not have minimum sentences to adopt them. A system of minimum ranges for maximum sanctions has been adopted, the principle being close to the conclusions of the JHA Council relating to prison sentences.

Rather than adopting ranges of amounts expressed in currency, which could evolve as a result of index-linking and by definition would not be in accordance with the proportionality requirement expressed in Article 6 of Directive 2003/... /EC,¹² a reference is made to a certain percentage of turnover or assets. This system is inspired by different instruments of Community law, in the field of competition law in particular.¹³ The assets approach must be included as a pendant of the turnover approach. It is intended also to cover the situation of natural persons, or even of not-for-profit legal persons, for whom the turnover approach is not possible. The way it is applied is left to the discretion of national legislation.

Two levels of penalty are envisaged. The first, from 1% to 10% of turnover, concerns hypotheses in which a prison sentence will not necessarily be passed under Article 6(4) of the Directive where a natural person is concerned: this means those cases which are not considered by national law to be among the most serious. These hypotheses were not covered by the approximation under the previous paragraph, since the Directive does not require them to be punishable by a prison sentence. The second, from 10% to 20% of the turnover,

¹¹ E.g. Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1), Art.3(2)(c).

¹² But the Baltic Marine Environment Protection Commission (HELCOM) has provided in a non-criminal context for a harmonised level of administrative penalties (Recommendation HELCOM 19/14). This recommendation envisages a minimum level of penalty for each offence provided for in the annexes to the MARPOL 73/78 Convention. Concerning illicit discharges of hydrocarbons or other harmful liquid substances, covered by Directive 2003/... /EC, this level is 1 500 SDR ("Special Drawing Rights" - the unit of account defined by the International Monetary Fund), which is equivalent more or less to €1 900 at the time of this proposal for a Framework Decision.

¹³ See Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

concerns the most serious cases in which a prison sentence is most likely to be passed under Article 6(4) of Directive 2003/... /CE. These are the hypotheses in which the previous paragraph provides for a minimum penalty of from five to ten years (Article 3(1) of the Framework Decision).

Without prejudice to Article 6(5)(b) of Directive 2003/... /EC, concerning the confiscation of the proceeds of the offence, there is no reason why Member States should not provide that the amount of the penalties ordered under this provision should take account of the profit gained from the offence.

Article 4 – Jurisdiction

Since this Framework Decision is designed to complement Directive 2003/... /EC, jurisdiction over offences covered by the Directive, which is determined by Article 4, is defined by reference to the scope of the Directive, provided for in Article 3.

Consequently, pursuant to this provision, each Member State is to take the measures necessary to establish jurisdiction with regard to offences committed in:

- a) its inland waterways, including its ports;
- b) its territorial waters;
- c) straits used for international navigation subject to the regime of transit passage, in accordance with Part III, section 2, of the United Nations Convention on the Law of the Sea of 1982, insofar as this Member State exercises jurisdiction in these straits;
- d) its exclusive economic area, established in accordance with international law; and
- e) the high seas.

Article 8, concerning cooperation between Member States, supplements this by providing for the coordination of proceedings between Member States and for criteria for settling conflicts of jurisdiction that may arise under Article 4.

Article 5 – Criminal investigations in the Port state

Article 5 supplements Article 4 of Directive 2003/... /EC concerning measures with regard to ships in a port of a Member State. Under this Article, the relevant authorities, generally the harbour authorities, of the Port state, must perform a number of checks. If these raise the suspicion that an offence has been committed, the relevant criminal authorities must be informed.

The first paragraph of this Article specifies that these authorities are then to conduct a criminal investigation.

The second paragraph then details the extent of the powers of investigation of the national State authorities in a port of which a ship suspected of an illegal polluting discharge to which Article 3(1) of Directive 2003/... /EC applies is located. The relevant provisions of the UNCLOS Convention are taken over in substance. The inspection can extend to any relevant equipment, including inspections on board, the hearing of witnesses and the examination of photographic and other evidence and samples of substances, this enumeration not being exhaustive.

Article 6 – Joint investigation teams

Article 6 requires Member States to take the measures necessary to set up joint investigation teams in accordance with the Framework Decision of 13 June 2002.¹⁴ This provision is intended to ensure closer cooperation between the competent authorities in the Member States in their investigations. The transnational character of the offences covered by the Directive 2003/... /EC often makes it difficult to coordinate investigations. That is all the more detrimental as the phenomena of ship-source pollution demand rapid and almost immediate action by the competent authorities, in particular for the effective collection of evidence, which can be particularly perishable when hydrocarbons or other harmful liquid substances are involved.

The Framework Decision of 13 June 2002 provides the necessary framework for the establishment of such joint investigation teams. The model agreement to set up such joint investigation teams, currently under discussion in the Council, is designed to make it easier to set them up. Europol will naturally have a role to play in such joint investigation teams once the Protocol permitting it to do so is into force.¹⁵

Article 7 – Commencement of proceedings

Article 7 is basically taken over from the UNCLOS Convention, which all the Member States have signed.

Being inspired directly by this international context, this Article establishes the principle of mandatory proceedings in a Union instrument for the first time, setting it in a tightly defined context.

Since the principle is likely to conflict with the principle of discretionary proceedings that applies in certain Member States, it is specified that proceedings must be commenced “in accordance with the national law” of the State concerned and in the presence of “reasonable evidence”. In other words, a Member State which allows the prosecution service to decide whether or not to prosecute would not be bound by the principle. But even a Member State which does not allow the prosecution service to decide whether or not to prosecute would not be required to provide for mandatory prosecution in the absence of reasonable evidence.

It is specified that this provision applies “without prejudice to Article 8”, concerning cooperation between Member States, in order to establish a link with the need to attain a certain degree of coordination with the aim of centralising proceedings.

Article 8 – Cooperation between Member States

Article 8 answers the need for Member States to give each other the fullest possible assistance and to consult each other when the same offence is within the jurisdiction of several of them.

¹⁴ Framework Decision concerning the joint investigation teams (OJ L 162, 20.6.2002, p. 1).

¹⁵ Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol (OJ C 312, 16.12.2002, p. 1).

To this end, paragraph 1, like so many other Union instruments,¹⁶ refers in broad terms to conventions, bilateral or multilateral agreements or other applicable arrangements. The UNCLOS Convention will be particularly relevant here; Article 228 provides for machinery for suspending proceedings and places restrictions on the prosecuting institution.

Paragraph 2 requires Member States to cooperate to decide which of them will prosecute the alleged offender, when an offence is within the jurisdiction of more than one Member State and any of these States can validly commence proceedings on the basis of the same facts, the aim being to centralise proceedings in a single Member State where possible. To this end, Member States can avail themselves of any body or mechanism set up in the European Union to facilitate cooperation between their competent authorities and to coordinate their action. They can avail themselves in particular of Eurojust, instituted by the Framework Decision of 28 February 2002.¹⁷

Paragraph 3 enumerates heads of jurisdiction in descending order of priority, for the purposes of paragraph 2. It takes the heads of jurisdiction already used in the UNCLOS Convention or other Framework Decisions, in particular the Decision relating to environmental protection through criminal law. The following connecting factors are taken into account in succession:

- (a) the Member State in whose maritime territory the offence was committed (i.e. inland waterways, including ports, territorial waters, the exclusive economic area and straits over which this State exercises jurisdiction);
- (b) the Member State in which there is at least a risk of pollution where the offence is committed on the high seas;
- (c) the Member State in whose maritime territory a ship is in transit, whatever the place of commission of the offence, within the limits set by Article 3(1) of Directive 2003/... /EC;
- (d) the Member State of which the perpetrator of the offence is a national or a resident;
- (e) the Member State in whose territory the legal person on whose behalf the offence was committed has its registered office;
- (f) the Member State of the flag of the ship from which the offence was committed.

The drafting takes account of existing precedents in Union law.¹⁸

Article 9 – Notification of information

Article 9 provides for the notification of information between Member States. Two types of information are envisaged.

The first two paragraphs of this Article concern information to prevent pollution or its extension. The need for immediate information is fundamental here and goes without saying.

¹⁶ See for example Article 11 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149, 2.6.2001, p. 1).

¹⁷ Council Framework Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (OJ L 63, 6.3.2002, p. 1).

¹⁸ See in particular Article 9(2) of the Framework Decision of 13 June 2002 on combating terrorism (OJ L 164, 22.6.2002, p. 3).

Under the third paragraph, Member States must basically notify first of all the flag state, but also any other Member State concerned, of any measure taken under this Framework Decision. Here again it is important for information to circulate quickly. The degree of urgency is, however, lower than in the first paragraph. This is why the expression “without delay” is preferred here to the term “immediately”, used in the first paragraphs.

The means by which these notifications must be made are deliberately left unspecified: it will be for each Member State to decide in the light of the need for immediate and rapid action.

Article 10 – Designation of contact points

The purpose of Article 10 is to facilitate the exchange of information by ensuring that operational contact points are designated. Member States can use the existing cooperation mechanisms for this purpose. This provision plays an important role for the purposes of effective cooperation in criminal matters.

Paragraph 2 requires Member States to notify the General Secretariat of the Council and the Commission of the contact points that they designate, on the understanding that the General Secretariat of the Council will notify the other Member States of these contact points.

Article 11 – Territorial scope

This Article specifies that the Framework Decision has the same territorial scope as Directive 2003/... /CE. This again flows from the fact that one instrument depends on the other. The provisions of Article 299 of the EC Treaty, which have no equivalent in the Union Treaty, therefore apply.

Article 12 – Implementation

Article 12 concerns the implementation and monitoring of this Framework Decision. Member States are to adopt the measures necessary to comply with the Framework Decision no later than 31 December 2004.

By the same date, Member States are to communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. On the basis of that information and a written report by the Commission, the Council is to check within a year the extent to which Member States have complied with this Framework Decision.

Article 13 – Entry into force

Article 13 provides that the Framework Decision is to enter into force on the day of its publication in the *Official Journal of the European Union*.

Proposal for a

COUNCIL FRAMEWORK DECISION

**to strengthen the criminal-law framework for the enforcement of the law against
ship-source pollution**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 29, 31 and 34 (2)(b) thereof,

Having regard to the proposal from the Commission,¹⁹

Having regard to the opinion of the European Parliament,²⁰

Whereas:

- (1) The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice²¹ and the conclusions of the Tampere European Council of 15 and 16 October 1999 (point 48)²² call for proposals for legislation to combat environmental crime, in particular common penalties and comparable procedural guarantees.
- (2) In this context, the Commission adopted on 13 March 2001 a proposal for a Directive on the protection of the environment through criminal law,²³ which requires Member States to create criminal or other offences and penalties in respect of a number of activities committed intentionally or with serious negligence, if they breach the rules of Community law protecting the environment as set out in the Annex and/or rules adopted by Member States in order to comply with such Community law.
- (3) The fight against intentional or negligent ship-source pollution is among the European Union's priorities. The conclusions of the Copenhagen European Council of 12 and 13 December 2002 (points 32 to 34) and the statement of the JHA Council of 19 December 2002 following the shipwreck of the tanker Prestige, in particular, express the Union's determination to adopt all the measures needed to avoid recurrences of such damage.

¹⁹ OJ C [...], [...], p. [...].

²⁰ OJ C [...], [...], p. [...].

²¹ OJ C 19, 23.1.1999, p. 1, point 18.

²² <http://ue.eu.int/en/Info/eurocouncil/index.htm>.

²³ OJ C 180 E, 26.6.2001, as amended on 30.9.2002 (OJ C 20 E, 28.1.2003, p. 284).

- (4) To this end, as the Commission stated in its Communication to Parliament and the Council on improving safety at sea in response to the Prestige accident,²⁴ the legislation of the Member States must be approximated.
- (5) The purpose of Parliament and Council Directive 2003/... /EC on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences²⁵ is to undertake this approximation with regard to the definition of the relevant offences and commission, participation and incitement, on the one hand, and the nature, possibly criminal, of the penalties that can be imposed. It also contains technical and operational supporting measures.
- (6) To supplement these provisions, there should be an approximation of, among other things, the level of penalties corresponding to the seriousness of offences in relation to the natural or legal persons who commit them or are liable for them, in accordance with the conclusions of the JHA Council of 25 and 26 April 2002.
- (7) Provisions must be laid down to facilitate criminal investigations. Member States must be able, where necessary, to set up joint investigation teams with which Europol could be associated.
- (8) Rules on cooperation must be laid down to ensure that the offences to which Directive 2003/... /EC applies can be effectively prosecuted. To this end, the European Union must supplement the results obtained in regional or international organisations. The United Nations Convention on the Law of the Sea of 1982, signed by all the Member States of the Union and with the European Community as a party, is particularly important in this context.
- (9) The best possible cooperation must be organised between the Member States to guarantee the swift transmission of information from one Member State to another. Operational contact points must be designated and identified.
- (10) Since the objectives of the proposed action cannot be achieved adequately by the Member States separately, but can, owing to the cross-border character of the damage which may be caused by the behaviour concerned, be better achieved by the Union, the Union can take measures, in accordance with the subsidiarity principle enshrined in Article 5 of the Treaty. In accordance with the proportionality principle as declared by that Article, this Framework Decision does not go beyond what is necessary to achieve these goals.
- (11) This Framework Decision fully respects the fundamental rights and the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

²⁴ Communication of 3 December 2002, COM (2002) 681 final.

²⁵ OJ C [...], [...], p. [...].

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1
Subject-matter

The purpose of this Framework Decision is to supplement Directive 2003/... /EC with detailed rules in criminal matters.

Article 2
Definitions

For the purposes of this Framework Decision, the definitions provided for in Article 2 of the Directive 2003/... /EC shall apply.

Article 3
Detailed rules for applying penalties

1. With regard to natural persons, each Member State shall take the measures necessary to ensure that the offences referred to in Article 6(1) of Directive 2003/... /EC are punishable by a maximum sentence of at least five to ten years' imprisonment in the most serious cases in accordance with Article 6(4) of Directive 2003/... /EC, in particular:
 - a) where the offences were committed in the context of a criminal organisation within the meaning of Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union;²⁶
 - b) where the offences caused the death or serious injury of persons;
 - c) where the offences caused substantial damage to water quality;
 - d) where the offences caused substantial damage to animal or vegetable species or to parts of them.

2. With regard to natural and legal persons, each Member State shall take the measures necessary to ensure that the offences referred to in Article 6(1) of Directive 2003/... /EC are punishable, pursuant to Article 6(5)(a), by criminal or non-criminal penalties of a maximum amount of no less than:
 - a) 1% to 10% of the total turnover in the previous financial year or of the total assets held in the previous year, in cases other than the most serious cases;
 - b) 10% to 20% of the total turnover in the previous financial year or of the total assets held in the previous year, in the most serious cases, in particular those to which paragraph 1 applies.

²⁶ OJ L 351, 29.12.1998, p. 1.

Article 4
Jurisdiction

Each Member State shall take the measures necessary to establish its jurisdiction with regard to the offences referred to in Article 6(1) of Directive 2003/... /EC in the cases to which Article 3 of Directive 2003/... /EC applies.

Article 5
Criminal investigations in the Port state

1. Where, under Article 4(3) of Directive 2003/... /EC, the competent authorities in criminal matters are informed of a suspected offence within the meaning of Article 6(1) of that Directive, they shall conduct a criminal investigation.
2. The investigation shall extend to any useful element, including inspections on board, the hearing of witnesses and the examination of photographic evidence and samples of substances, this enumeration not being exhaustive.

Article 6
Joint investigation teams

Member States shall, where appropriate, take the measures necessary to constitute joint investigation teams in accordance with Framework Decision 2002/465/JHA of 13 June 2002 in order to conduct criminal investigations into offences to which Article 6(1) of Directive 2003/... /EC applies.

Article 7
Commencement of proceedings

Without prejudice to Article 8, a State which has established its jurisdiction under Article 4 shall without delay commence proceedings in respect of the suspected offence in accordance with its national law, provided reasonable evidence is present.

Article 8
Cooperation between Member States

1. In accordance with the conventions, bilateral or multilateral agreements or other applicable arrangements, Member States shall provide each other with the broadest possible assistance in proceedings in respect of offences to which Article 6(1) of Directive 2003/... /EC applies.
2. When an offence is subject to the jurisdiction of more than one Member State and any one of those States may validly commence proceedings on the basis of the same facts, the relevant Member States shall cooperate to decide which of them will prosecute the perpetrators of the offence for the purpose of centralising proceedings in a single Member State if possible. To that end, Member States may avail themselves of any body or mechanism set up within the European Union to facilitate cooperation between their competent authorities and coordinate their action. They shall avail themselves in particular of Eurojust.

3. The following connecting factors shall be taken into account in succession:
 - a) the Member State in whose territory the offence was committed;
 - b) the Member State in whose territory the effects of the offence are felt;
 - c) the Member State in whose territory a ship from which the offence was committed is in transit;
 - d) the Member State of which the perpetrator of the offence is a national or a resident;
 - e) the Member State in whose territory the legal person on whose behalf the offence was committed has its registered office;
 - f) the Member State of the flag of the ship from which the offence was committed.
4. For the purposes of paragraph 3, the territory includes the area referred to in Article 3(1)(a) to (d) of Directive 2003/... /EC.

Article 9
Notification of information

1. Where a Member State is informed of the commission of an offence to which Article 6(1) of Directive 2003/... /EC applies or of the risk of the commission of such an offence which causes or is likely to cause imminent pollution, it shall immediately inform such other Member States as are likely to be exposed to this damage, and the Commission.
2. Where a Member State is informed of the commission of an offence to which Article 6(1) of Directive 2003/... /EC applies or of the risk of the commission of such an offence which is likely to fall within the jurisdiction of a Member State, it shall immediately inform that other Member State.
3. Member States shall without delay notify the flag state or any other State concerned of measures taken pursuant to this Framework Decision, and in particular Articles 4, 5, 6 and 7.

Article 10
Designation of contact points

1. Each Member State shall designate operational contact points for the exchange of information for the purposes of implementation of this Framework Decision, and in particular for the collection of evidence.
2. Each Member State shall inform the Commission which of its departments acts or act as contact points in accordance with paragraph 1. The Commission shall notify the other Member States of these contact points.

Article 11
Territorial scope

This Framework Decision shall have the same territorial scope as Directive 2003/... /EC.

Article 12
Implementation

1. Member States shall adopt the measures necessary to comply with the provisions of this Framework Decision no later than 31 December 2004.
2. By the same date, Member States shall communicate to the General Secretariat of the Council and to the Commission the texts of the provisions transposing into their national law the obligations imposed on them by this Framework Decision. On the basis of that information and a written report by the Commission, the Council shall, no later than 31 December 2005, check the extent to which Member States have taken the measures necessary to comply with this Framework Decision.

Article 13
Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Done at Brussels, [...]

For the Council
The President
[...]