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EUROPEAN COMMISSION PROPOSAL FOR A REGULATION ON THE ESTABLISHMENT OF A FUND FOR THE COMPENSATION OF OIL POLLUTION DAMAGE IN EUROPEAN WATERS AND RELATED MEASURES

Note by the Director

Summary:	The Commission of the European Communities has published a proposal for a Regulation which would set up a fund to provide supplementary compensation up to a maximum limit of 1 000 million Euros (£628 million) for oil spills in Member States of the European Union. Compensation would only be payable for claims which have been approved by the IOPC Fund. The proposed fund would be financed by contributions levied on receivers of sea-borne oil in European Union Member States.
Action to be taken:	a) Information to be noted; b) Give the Director such instructions in respect of this matter as the Assembly may deem appropriate.

1 Introduction

1.1 In March 2000, following the *Erika* incident, the Commission of the European Communities (the European Commission) published a 'Communication on the safety of the sea-borne oil trade' and adopted a first set of measures on maritime safety. On 6 December 2000, the European Commission published a second set of proposed measures, namely a Directive establishing a Community monitoring, control and information system for maritime traffic, a Regulation on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures and a Regulation establishing a European Maritime Safety Agency.

1.2 The proposed Regulation on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures would set up a fund (the COPE Fund) to provide supplementary compensation for oil spills in Member States of the European Union. The amount of compensation available would be 1 000 million Euros (£628 million), including the amount payable under the 1992 Civil Liability Convention and the 1992 Fund Convention, ie 135 million SDR (£118 million or 188 million Euros).

1.3 The proposed Regulation is accompanied by an Explanatory Memorandum. The Memorandum and the proposed Regulation are reproduced at the Annex.

1.4 The proposed Regulation will be considered by the European Parliament and the Council of the European Union during 2001.

1.5 In view of the fact that the proposed Regulation is intended to supplement the international compensation regime established by the 1992 Civil Liability Convention and the 1992 Fund Convention, the Director considers that the Assembly should be informed of the proposal at the earliest opportunity.

2 Assessment of the existing system

2.1 In its 'Communication on the safety of the sea-borne oil trade', the European Commission established three criteria against which the adequacy of a compensation system needs to be assessed, namely:

a) It should provide prompt compensation to victims without having to rely on extensive and lengthy judicial procedures.

b) The maximum compensation limit should be set at a sufficient level to cover claims from any foreseeable disaster occurring as a result of an oil tanker incident.

c) The regime should contribute to discouraging tanker operators and cargo interests from transporting oil in anything other than tankers of an impeccable quality.

2.2 The Explanatory Memorandum states that the Commission has examined the existing international system provided by the Civil Liability and Fund Conventions in the light of these criteria and has concluded that the system satisfies the first criterion, notwithstanding some important exceptions, but that it has important shortcomings with regard to the latter two criteria.

Compensation procedures

2.3 The Commission has identified some important benefits of the existing system, which are instrumental in ensuring the prompt payment of compensation and/or the general functionality of the system, for incidents which may potentially involve a number of parties under different legal jurisdictions. The Commission also notes that the mechanism for the financing of the IOPC Funds by cargo interests is relatively straightforward and that, although there is a problem with some States which fail to notify quantities of received oil, the system has worked satisfactorily.

2.4 The Commission's assessment is that, bearing in mind the considerable inventiveness involved in the development of the existing international system, it has, generally speaking, proved to be workable. It notes that the vast majority of some 100 oil spill compensation cases dealt with by the IOPC Funds have been satisfactorily resolved in the sense that the procedures of assessing and paying the claims have been relatively smooth. It is also noted that claimants have normally chosen to settle their claims directly with the Fund, out of court, which indicates that there is a considerable degree of acceptance of the assessment of claims made by the IOPC Funds.

2.5 However, the Commission observes that by no means all cases dealt with under the international regime have been swift and straightforward and that most, if not all, oil spills that threaten to

exceed the maximum compensation limit have encountered significant delays in the payment of compensation as a result of the payment of approved claims being pro-rated due to uncertainty as to the final cost of the spill. The Commission states that, in addition, for major oil spills, the role of national courts in the settlement process tends to increase leading to further complexities and delays.

2.6 The Commission considers that such long delays in the payment of compensation are unacceptable but takes the view that these delays are primarily due to insufficient limits of compensation rather than deficiencies inherent in the compensation procedures as such.

2.7 The Commission notes that some other elements in the system, which may contribute to delayed payments or otherwise complicate the compensation of victims, are currently being examined by a working group within the IOPC Fund. The Commission is taking part in this work and hopes that it will produce some additional measures improving the prospects of fair and prompt compensation of victims.

Adequacy of limits

2.8 In the view of the Commission, the inadequacy of compensation limits is the most important shortcoming of the international system, resulting in victims of an expensive oil spill not necessarily receiving full compensation for valid claims and contributing to uncertainty and delays in the settlement of claims.

2.9 The Commission notes that both major oil spills (the *Nakhodka* and the *Erika*) that have occurred since the 1992 regime took effect cast serious doubts as to the sufficiency of the new limits, despite rather limited amounts of fuel oil released on both occasions. Claims from the *Erika* incident are likely to exceed the maximum compensation considerably, so that claimants will have to rely on voluntary undertakings by the Government and the oil company concerned.

2.10 The Commission takes the view that all oil spills should be adequately and promptly compensated and that the maximum limits should therefore cover any foreseeable disaster. It considers that the 50% increase of the existing limits, providing a total of some 300 million Euros (£189 million), which will come into effect in three years' time, is insufficient and that the maximum amount should be set at 1 000 million Euros (£628 million).

Responsibilities and liabilities

2.11 The Commission considers that the international system also has a number of shortcomings relating to the balance between the liabilities and the responsibilities of the parties involved so that there is insufficient incentive to ensure that oil is only carried on board tankers of impeccable quality.

3 Proposed Regulation

The COPE Fund

3.1 The Commission proposes to complement the existing international two-tier regime established by the 1992 Conventions through the creation of a European 'third-tier' fund, the COPE Fund, which would provide supplementary compensation for oil spills in European waters. The COPE Fund would be based on the same principles and rules as the current IOPC Fund system, but subject to a maximum of 1 000 million Euros (£628 million).

3.2 The COPE Fund would only be activated when a spill occurs in European Union waters that exceeded, or threatened to exceed, the maximum limit of the IOPC Fund. Victims of an oil spill would receive full compensation as soon as their claims had been approved by the IOPC Funds, so that the problems and delays associated with pro-rating of claims would be avoided. At the

end of the case, once the total costs were known, there would, according to the Memorandum, be a bilateral financial settlement between the IOPC Fund and the COPE Fund.

3.3 The COPE Fund would be financed by European oil receivers according to procedures similar to those of contributions to the IOPC Fund.

3.4 The Commission of the European Communities would represent the COPE Fund. Any major decision relating to the operation of the COPE Fund would be taken by the Commission, assisted by a COPE Fund Committee.

Financial penalties for grossly negligent conduct

3.5 The proposed Regulation requires individual Member States to implement legislation introducing financial penalties for grossly negligent behaviour of any person involved in the transport of oil at sea.

4 Action to be taken by the Assembly

The Assembly is invited:

a) to take note of the information contained in this document; and

b) to give the Director such instructions in respect of this matter as it may deem appropriate.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.12.2000
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2000/0325 (COD)
2000/0326 (COD)
2000/0327 (COD)

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

ON A SECOND SET OF COMMUNITY MEASURES ON MARITIME SAFETY FOLLOWING THE SINKING OF THE OIL TANKER ERIKA

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing a Community monitoring, control and information system for maritime traffic

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

establishing a European Maritime Safety Agency

(presented by the Commission)

EXPLANATORY MEMORANDUM

GENERAL INTRODUCTION

1 Present situation and problems

The compensation of victims of an accidental oil spill caused by oil tankers forms an important aspect of the overall regulatory framework for marine oil pollution and is consequently an issue of major importance for the European Commission. As was pointed out in its Communication on the safety of seaborne oil trade of 21 March 2000 (COM(2000) 142 final), the Commission considers that the existing international liability and compensation regime, while having served its purpose relatively well over the last decades, entails a number of shortcomings. The most pressing one is the inadequacy of the current limits for liability and compensation. Some recent accidents, most notably the sinking and consequential oil spill of the *Erika* in December 1999, have clearly shown the insufficiency of the existing limits, having the consequence that victims of an oil spill may not be fully compensated and also contributing to significant delays in the payment of compensation. For this reason, the Commission has decided to act particularly quickly in order to create a mechanism for raising the limits of compensation in order to ensure that future oil spills in Europe will be adequately compensated. The other shortcomings need to be rectified as well, but it is considered that they could be addressed over a slightly longer period of time. Outside the scope of liability and compensation, the Commission also proposes to introduce a sanction of a penal nature for established grossly negligent behaviour on behalf of any person involved in the transport of oil at sea.

2 Background

The transport of oil by sea is an intrinsically hazardous activity, which entails considerable risks for the marine environment. The full scale of the environmental threats posed by the rapid growth in tanker traffic and ship size became apparent in March 1967 when the 120 000 tonne deadweight Liberian-flagged tanker *Torrey Canyon* ran aground on the Seven Stones' reef off Land's End, UK. This resulted in 119 000 tonnes of crude oil being spilled causing severe pollution along the coasts of southwest England and northern France.

This disaster prompted the international community to elaborate, through the International Maritime Organization, a number of instruments aimed at improved safety of oil tankers and increased protection of the marine environment, including two conventions laying down detailed rules of liability and compensation for pollution damage caused by oil tankers.

The 1969 International Convention on Civil Liability for Oil Pollution (CLC) and the 1971 International Convention setting up the Oil Pollution Compensation Fund (Fund Convention) entered into force in 1975 and 1978 respectively. The two conventions established a two-tier liability system, which builds upon a strict but limited liability for the registered shipowner and a Fund, financed by oil receivers, which provides supplementary compensation to victims of oil pollution damage who cannot obtain full compensation for the damage from the shipowner.

This regime has been revised in substance only once, in the early 1980's. That revision resulted in the 1984 Protocols to the two conventions which never entered into force, due to lack of sufficient ratification by oil receiving States. In the early 1990's, a new effort was made to bring the modifications into force. The resulting 1992 Protocols retained the

substance of the 1984 amendments, but modified the entry into force requirements. These Protocols to the CLC and Fund Conventions entered into force in 1996. All EU Member States with a coastline are now parties to the two 1992 Protocols, except Portugal which is still in the process of finalising the ratification procedures.

The USA does not participate in this international liability and compensation regime. The *Exxon Valdez* accident in Alaska in 1989 brought discussions of a potential US accession to the system to an end. Instead, the US decided to create, within the framework of the 1990 Oil Pollution Act, a separate federal liability regime, with the possibility for individual states to introduce more stringent legislation.

3 Summary of the 1992 international liability and compensation system

The 1992 regime covers pollution damage caused by spills of persistent oil from tankers in the coastal waters (up to 200 miles from the coastline) of the participating States. The loss and damage covered by the regime includes property and, to some extent, economic losses and costs of environmental restoration as well as preventive measures, including clean-up costs.

The first liability tier, the liability of the registered shipowner, is governed by the CLC. The shipowner's liability is strict and thus not depending on fault or negligence on his part. The owner is normally allowed to limit his liability to an amount which is linked to the tonnage of the ship, presently maximum EUR 90 million for the biggest ships, in the case of the *Erika* only around EUR 13 million. The shipowner loses the right to limit his liability only if it is proved that the pollution damage "resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result". The CLC also requires shipowners to maintain liability insurance and gives claimants the right of direct action against the insurer up to the limits of the shipowner's liability. Through the 'channelling' of the liability to the registered shipowner only, many other parties, including notably the ship's manager, operator and the charterer, are explicitly protected from liability claims, unless their negligence amounts to the same as that of shipowners' loss of right to limit their liability, quoted above.

The CLC regime is supplemented by the International Oil Pollution Compensation Fund (the IOPC Fund), which was established through the Fund Convention in order to compensate victims when the shipowner's liability is insufficient to cover the damage. Recourse to the IOPC Fund may take place in three cases. The most common is where the damage exceeds the shipowner's maximum liability. The second case is where the shipowner can invoke any of the defences allowed in the CLC[10]. The last case is where the shipowner (and his insurer) are financially incapable of meeting their obligations. The maximum compensation by the IOPC Fund is around EUR 200 million. The IOPC Fund is financed by contributions from companies or other entities receiving oil carried by sea. In the event of an oil spill, thus, all oil receivers world-wide which are established in the States parties to the Fund Convention will contribute to the compensation as well as to the administrative expenses of the Fund, wherever the pollution damage has occurred. The IOPC Fund will not pay compensation if

[10] According to Article III.2 of the CLC the shipowner is exempted from liability if he proves that the damage:
(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
(b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
(c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

the pollution damage resulted from an act of war or was caused by a spill from a warship. It also has to be proved that the oil originated from a tanker.

Victims of oil spills may present their claims directly against the IOPC Fund and, to the extent claims are justified and meet the relevant criteria, the Fund will compensate the claimant directly. If the total of approved claims exceeds the maximum limit of the IOPC Fund all claims will be reduced proportionately. Claimants may also decide to pursue their claims before the courts of the State where the damage occurred. Since it was first established in 1978, the IOPC Fund has dealt with some 100 cases, most of which have been within the limits of compensation and thus fully compensated according to the Fund's own assessment as to the validity of claims.

4 Assessment of the international liability and compensation regime

4.1 Assessment criteria

In its Communication on the safety of the seaborne oil trade, the Commission established three criteria against which the adequacy of a compensation system needs to be assessed.

(1) It should provide prompt compensation to victims without having to rely on extensive and lengthy judicial procedures.

(2) The maximum compensation limit should be set at a sufficiently high level to cover claims from any foreseeable disaster occurring as a result of an oil tanker accident.

(3) The regime should contribute to discouraging tanker operators and cargo interests from transporting oil in anything other than tankers of an impeccable quality.

Following the Erika accident, the Commission was bound to examine the existing international system, provided by the CLC and Fund conventions, in the light of these criteria. The Commission's assessment is that the international system satisfies some of these concerns but not all of them.

4.2 Procedures of compensation

Regarding the promptness of compensation and the general functionality of the system, the Commission recognises that the existing international oil pollution liability and compensation system provides some important benefits, some of which are instrumental in ensuring the prompt compensation for incidents potentially involving a number of parties under different legal jurisdictions. The way the system is built, claimants generally have no difficulty in identifying the liable party nor need they prove fault or negligence on behalf of the shipowner in order to obtain compensation. Questions relating to the nationality of the ship or its owner and the owner's financial situation are similarly unconnected to the availability of compensation within the limits, thanks to the requirements of compulsory insurance and the right of direct action against the insurer. Such features contribute to a more expeditious settlement of claims and to facilitating the general administration of the system.

As regards the financing of the Fund too, a relatively straightforward mechanism for the contribution of cargo interests has been laid down. The expenses of the IOPC Fund are collectively shared between the main receivers of crude oil and/or heavy fuel oil in the participating States in a proportion corresponding to the quantities of oil received by each receiving company. The quantities of received oil are reported by the Governments of the States parties to the IOPC Fund, which invoices the oil receivers directly, based upon an

estimate of the expenses for the forthcoming year. Governments are not responsible for these payments, unless they have voluntarily accepted such responsibility. In general, this system has worked satisfactorily and it has normally been possible to collect the required means within a reasonable period of time. There is, however, still a problem with some States which fail to notify the quantities of received oil, leading to difficulties for the IOPC Fund to collect the contributions from oil receivers in those States.

Bearing in mind the considerable inventiveness involved in the development of the international liability and compensation regime for oil spills, it has, generally speaking, proved to be workable. The vast majority of some 100 cases of oil spill compensation cases which have been dealt with by the IOPC Fund have been satisfactorily resolved in the sense that the procedures of assessing and paying the claims have been relatively smooth. Claimants have normally chosen to settle their claims directly with the Fund, outside courts, which indicates that there is a considerable degree of acceptance as regards the assessment of claims made by the IOPC Fund.

By no means all cases have been swift and straightforward, however. Most, if not all, oil spills that threaten to exceed the maximum compensation limit have encountered significant delays in the payment of compensation, because of uncertainty as to the final cost of the oil spill. If it appears that the total of valid claims may exceed the maximum amount of compensation available, it will result in a 'prorating' of approved claims, that is, claimants will receive only a certain percentage of their compensation until all potential claims emanating from the incident have been submitted and assessed, which normally will take several years. In addition, major oil spills and subsequent dissatisfaction with the compensation procedures tend to increase the role of national courts in the settlement process, which often lead to further complexities and delays. Consequently, compensation procedures in major oil spills have normally been both complex and slow. A number of high-profile European oil spills in the 1990's, such as *Aegean Sea* (Spain, 1992), *Braer* (UK 1993), *Sea Empress* (UK, 1996) have encountered such problems and claimants who have suffered damage from those spills still do not know if and when they will receive full compensation. There are no indications that the *Erika* oil spill will be different in this respect.

The Commission considers that such long delays in the payment of compensation are unacceptable. It does, however, acknowledge the strong correlation between the length of proceedings and the risk of reaching the limit for the maximum available compensation amount. Given the consequences of nearing the maximum limit outlined above, the Commission takes the view that the unacceptably long delays in payment of compensation are primarily due to insufficient limits of compensation rather than deficiencies inherent in the compensation procedures as such. Some other elements in the system, which may contribute to delayed payments or otherwise complicate the compensation of victims, are currently being examined by a working group within the IOPC Fund[11]. The Commission takes part in this work and hopes that it will produce some additional measures improving the prospects of fair and prompt compensation of victims. In conclusion, therefore, the Commission considers that the existing international compensation system, notwithstanding some important exceptions, satisfies the first criterion relating to the adequacy of the procedures for compensating victims of an oil spill.

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[11] The items which have been taken up for discussion in this respect include the question of priority treatment of certain claims and a more general review of the procedures on submission and handling of claims.

4.3 Adequacy of limits

The inadequacy of compensation limits is, in the view of the Commission, the most important shortcoming of the international system. Inadequate limits have the consequence that victims of an expensive oil spill may not receive full compensation even if the validity of their claims has been established. This is questionable from a point of view of principle. In addition, as explained above, inadequate limits almost inevitably contribute to uncertainty and delays in the settlement of claims. In effect, therefore, insufficient limits have the consequence that a victim of a major oil spill is likely to be compensated later and less than a person having suffered similar damage from a smaller oil spill. The Commission considers this to be difficult to justify.

Out of some 100 oil spills dealt with by the IOPC Fund so far, some ten have raised more serious doubts as to the sufficiency of the limits and/or the promptness of settling claims. This may not seem much, in particular when bearing in mind that a large proportion of the world's tanker oil spills do not trigger IOPC Fund action at all, as they are settled with the shipowner under the CLC Convention if the totality of claims does not exceed the limit of the shipowner's liability. It is also true that most of the problematic cases have occurred under the 'old' regime before the entry into force of the 1992 Protocols which more than doubled the available maximum amount of compensation.

Such statistics are largely irrelevant, however, if one, like the Commission, takes the view that all oil spills shall be adequately and promptly compensated. It is not acceptable that citizens and other victims who have suffered at times dramatic consequences of a major oil spill are not fully compensated. The maximum limits should therefore cover any foreseeable disaster. The distance between that goal and the present situation is evidenced by the fact that both major oil spills (*Nakhodka*, Japan, 1997 and *Erika*, France, 1999) that have occurred since the 1992 regime took effect have cast serious doubts as to the sufficiency of the new limits, despite rather limited amounts of fuel oil released at both occasions[12]. Claims of the *Erika* accident are likely to exceed that amount considerably, meaning that its victims will have to rely on voluntary undertakings by the Government and the oil company concerned in order to obtain even the most essential compensation. The Commission finds it difficult to see how such compensation limits could meet the criteria of being satisfactory.

The insufficiency of the existing limits may not be surprising when one considers that those limits were developed in the early 1980's and thus took effect in Europe some 12-20 years later, depending on the time of ratification by the Member States. Following the *Erika* accident, the process has already started whereby the existing limits of the CLC and Fund Conventions will be increased, according to a specific simplified amendment procedure envisaged in the Conventions. The maximum increase under this procedure depends on a number of factors and will not at present facilitate an increase of more than some 50% of the current limits. The first decisions to approve this increase were taken in October 2000 and the amendments will, if finally adopted, be applicable at the earliest on 1 November 2003.

The Commission considers that a 50% increase of the existing limits, providing a total of some EUR 300 million, which will come into effect in three years' time, is insufficient to guarantee adequate protection for victims of a potential major oil spill in Europe. As already stated, it considers that any foreseeable pollution disaster should be fully covered by the

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[12] The *Nakhodka* incident resulted in the release of some 6,200 tonnes of medium fuel oil while the spill of the *Erika* is estimated to be around 19,000 tonnes of heavy fuel oil.

compensation system, not only for today but also for some time in the future. The proposed increase would seemingly not even cover the total claims of the *Erika* accident.

The sufficiency of the limit also needs to be evaluated in the context of the type of damage that is covered by the regime. If the range of damage to be covered is extended, the amounts will obviously have to be raised accordingly. Since, as explained below, it is the view of the Commission that compensation of environmental damage should be extended, it follows that a significant rise in the overall limits is further justified.

It is considered that an overall ceiling of EUR 1,000 million would provide the necessary safeguard of coverage for any foreseeable disaster. This limit is more consistent with the ceiling of the Oil Spill Liability Trust Fund established under federal laws in the United States and with existing insurance practices as regards shipowners' third party liability cover for oil pollution, which may come into play if the limitation under the CLC is not applicable.

To conclude, the existing maximum limits of the CLC and Fund Conventions fall well short of being adequate. In order to ensure decent compensation for European citizens following an oil spill, and greater correspondence to the compensation of the US Oil Spill Liability Trust Fund, the maximum amount should be set at EUR 1,000 million. The argument that such accidents are likely to happen rarely cannot, in the view of the Commission, provide a justification for setting limits under the costs of entirely conceivable oil pollution incidents and thereby seriously compromising the adequate compensation of victims.

4.4 Responsibilities and liabilities

4.4.1 General

For any liability and compensation system to be considered adequate, it needs not only to provide adequate compensation, but should also reflect a fair balance between the responsibilities of the players concerned and their exposure to liability. In addition, a liability system should, where possible, contribute to discouraging the stakeholders from deliberately taking risks which could be devastating for the protection of lives and the environment.

The Commission considers that the international regime for liability and compensation of oil pollution damage entails a number of shortcomings in this regard. The way the liability system is construed it produces few incentives for the players to ensure that oil is only carried on board tankers of an impeccable quality. As illustrated by the fact that ships in an appalling condition continue to be employed for transportation of oil in Europe and elsewhere, neither carriers nor cargo interests have sufficient disincentives to give up their intolerable practice of deliberately providing and using low-quality tonnage for transport of oil at sea.

More particularly, those shortcomings include the following features, all of which are at odds with more recent environmental liability developments at international and Community level:

4.4.2 The threshold for losing limitation right

The right of shipowners to limit their liability is practically unbreakable. As already indicated, the owner of a ship does not lose the right to limit, unless it is proven that the damage "resulted from his personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result". Negligence or even gross negligence on behalf of the owner does not meet these criteria and it is evident that in

most circumstances it would be very difficult to breach this threshold. While it is true that the quoted phrase has its equivalents in some other maritime liability conventions, the Commission fails to see the justification for copying such an unassailable test for the loss of the limitation right into the oil pollution liability regime. It considers that the extraordinary risks involved in the transport of oil by sea need to be reflected in a greater exposure of the shipowner to unlimited liability.

The problems of nearly unbreakable rights are further aggravated by the methods by which the shipowner's liability is established. It is solely calculated on the basis of the size of the ship, ignoring factors such as the nature of cargo carried and the amount of oil spilled. The owner of the *Erika*, for instance, could thus count on a right to limit his liability to some EUR 13 million, with a very limited risk of losing this right due to any potential conduct on his part, whether before or during the incident.

In many environmental liability regimes developed in the 1990's the trend has been to abolish limitations of liability. This is equally true for the evolving Community environmental liability regime, as outlined in the Commission's White Paper on Environmental Liability (COM(2000) 66 final). Normally, however, such unlimited liability rules are not coupled with compulsory insurance requirements. That may not be a problem for land-based sources of pollution, as the identification of and jurisdiction over the liable person normally will not generate difficulties. In the case of maritime pollution the situation is different, as the polluter may be of any nationality and otherwise difficult to trace. Compulsory insurance and a right of direct action against the insurer are therefore instrumental if the protection of victims is to be ensured. However, a potentially unlimited liability does not necessarily mean that the whole liability needs to be covered by insurance. It is perfectly possible to envisage a system, in which the insurance requirement is restricted to the limits of the strict liability, whereas the fault-based unlimited liability is borne by the owner himself. A case in point in this regard is the newly adopted Liability Protocol to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[13]. It is further worth noting that even within the international oil spill compensation system itself, a significantly lower threshold for loss of right to limitation, that of 'actual fault or privity' on behalf of the owner, was applied until 1996 through the 1969 CLC Convention. As far as is known, this wording did not cause any major complications in the international oil pollution liability regime throughout its 25 years of operation.

The Commission therefore considers that the current threshold for loss of limitation rights should be lowered in order to bring it into line with other comparable regimes. At least proof of gross negligence on behalf of the shipowner should trigger unlimited liability. Such a measure would relate the exposure to liability more closely to the conduct of the shipowner and would thus produce both preventive and punitive effects.

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[13] The 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal provides for strict liability up to certain minimum limits, which shall be covered by insurance. Article 5 of the Protocol provides that without prejudice to the strict liability "any person shall be liable for damage caused or contributed to by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions." Article 12(2) goes on by providing that "there shall be no financial limit on liability under Article 5".

4.4.3 Protection of other parties than the registered shipowner

The liability for oil pollution damage is channelled to the registered shipowner only. The channelling of liability to one specified person has some advantages in providing clarity as to the liable party, thus facilitating the identification of the person to whom claims for compensation should be made. Channelling of liability is also a device for avoiding multiple insurance and hence contributes to higher theoretical levels of the liability to be insured. However, the type of channelling which is provided under the CLC goes some steps further by explicitly prohibiting claims against a number of other players (including notably, operators, managers, charterers), who may well exercise as much control over the transport as the registered owner of the ship. These persons are protected from any compensation claims unless the damage "resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that such damage would probably result" (which is the same test as that relating to the shipowner's loss of the right to limit his liability). Such protection of a number of key players implies that those persons can act within an almost assured protection from compensation claims following an oil pollution incident.

The Commission considers that such protection of key players is counterproductive with regard to its efforts of creating a sense of responsibility in all parts of the maritime industry. Therefore, it is of the opinion that the prohibition of claiming compensation from a number of key players involved in the transport of oil at sea should be removed from the CLC Convention and that, to the extent protection of certain players is considered to be necessary for the functioning of the system, the threshold should at least be lowered to the same as that advocated for the shipowner above. As to the practicalities of such a measure, it can be noted that here, too, the regime that applied until 1996, when the 1992 protocols entered into force, provided for a much less rigorous channelling by only excluding the servants or agents of the shipowner, and even for them only insofar as the damage was not due to their own fault or privity.

4.4.4 Environmental damage

The type of damage covered by the existing CLC/IOPC Fund regime is mostly centred on damage to or loss of property and economic losses. As regards environmental damage, it covers preventive measures, which includes clean-up costs, and "reasonable measures of reinstatement undertaken or to be undertaken". The loss to the environment as such is thus not subject to compensation, the principal reason being the difficulty involved in assessing and quantifying this type of damage.

The Commission acknowledges that there are problems involved in covering damage to the environment *per se* and considers that the assessment of such damage should be quantifiable, verifiable and predictable in order to avoid a wide variety of interpretations between the various parties to the regime. However, consistency with compensation of environmental damage from other sources of pollution is equally important. From a Community perspective it is not justifiable that compensation of environmental damage varies widely depending on whether the pollutant was an oil tanker, another ship or a factory on shore[14]. In the context of the forthcoming proposal for a Directive on environmental liability, the Commission is presently undertaking a study on the evaluation of environmental damage, which could

[14] In the Commission's White Paper on environmental liability, the Commission indicated its intention to cover 'damage to biodiversity' in a future instrument. This type of damage would relate to significant damage in EC-protected natural resources in the Natura 2000 areas. In this context a system for valuing natural resources is considered necessary (paragraph 4.5.1 of COM (2000) 66 final).

provide useful input for the assessment of damage in that Directive. Without prejudice to any future proposal to be made in the context of a general Community-wide environmental liability regime, the Commission considers that the existing coverage of reinstatement costs could be expanded to include at least costs for assessing the environmental damage of the incident as well as costs for the introduction of components of the environment equivalent to those that have been damaged, as an alternative in case reinstatement of the polluted environment is not considered feasible[15]. The Commission's position will be reconsidered in light of the forthcoming proposal concerning a Community-wide environmental liability regime.

4.5 Conclusion

The assessment above leads the Commission to conclude that the international liability and compensation regime satisfies the first assessment criterion while entailing important shortcomings as to the two others. The importance of the shortcomings is further heightened by the fact that the international regime explicitly prohibits any additional compensation claims to be made outside the convention regime. This means that it would be very difficult for the Community to impose additional individual liabilities on shipowners or any of the protected parties without being in conflict with the international conventions. In case such individual liabilities were introduced at Community level, Member States would thus have to denounce the conventions before being in a position to implement any such Community rules.

The Commission recognises that an international liability and compensation regime provides important benefits, both in terms of uniformity and straightforwardness and in terms of sharing the costs for oil spills, wherever they occur, among oil receivers world-wide. It therefore concludes that introducing measures that would necessitate the denunciation of the international regime by the Member States would be counterproductive at this stage. As outlined in its Report for the Biarritz European Council (COM (2000) 603 final), the Commission takes the view that considerable efforts need to be put in amending the conventions along the lines outlined above, while addressing the insufficiency of the existing limits as an immediate priority at Community level.

5. Proposed action

A series of measures are needed in order to improve the existing liability and compensation regime. Some of them require Community measures, while others may be addressed within the international framework.

5.1 Creating a supplementary compensation fund in Europe

Raising the compensation limits of the existing system is the most pressing concern, as it is the one most directly concerned with the adequate compensation of victims of an oil spill. In order to remedy this, the Commission proposes to complement the existing international two-tier regime through the creation of a European supplementary 'third-tier' fund, which would compensate internationally valid

[15] Along these lines, Article 2.8 of the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment defines 'measures of reinstatement' in the following way: "any reasonable measures aiming to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. Internal law may indicate who will be entitled to take such measures."

claims relating to oil spills in European waters which exceed the limit of the IOPC Fund.

The Fund for Compensation for Oil Pollution in European waters (the COPE Fund) will thus 'top up' the financial means of the IOPC Fund in cases where claims that are deemed to be valid under the latter regime cannot be fully compensated due to insufficient resources. Compensation by the COPE fund would be based on the same principles and rules as the current IOPC Fund system, but subject to a ceiling which is deemed to be sufficient for any foreseeable disaster, i.e. EUR 1,000 million.

The COPE fund will be financed by European oil receivers according to procedures similar to those of contributions to the IOPC Fund. Thus, the combined financial means of the contributions by European oil receivers will be available to cover pollution damage in any Member State. The COPE Fund is intended to provide a guarantee for European citizens that they will be adequately compensated, until the levels of the international regime are set at a sufficiently high level. Apart from providing a five-fold increase of available compensation, the funds of the COPE Fund may also be used for accelerating the full compensation of victims of a European oil spill. With the help of these means claims may be compensated in full as soon as their eligibility has been confirmed, without awaiting the outcome of the time-consuming process of establishing the final costs of the accident and the resulting prorating problem in the international regime, described in section 4.2. In this way victims may receive their full compensation at an earlier stage, while the financial settlement at the end of the case, once the total costs are known, would be settled bilaterally between the IOPC Fund and the COPE Fund. By its nature the COPE Fund would only be activated once a spill that exceeds, or threatens to exceed, the international maximum limits has occurred in EU waters.

5.2 Addressing the other shortcomings in the international system through the IMO

In order to achieve a closer link between exposure to liability and the conduct of the various parties concerned, the Commission considers that a thorough overhaul of the existing regime should be undertaken in parallel.

The rectification of the shortcomings described in section 4 can, in the judgement of the Commission, be addressed within the international community and, indeed, the first steps in this direction have already been taken. The Commission considers that this work should ultimately result in amendments to the existing legal instruments introducing significantly higher limitation amounts as well as advancement regarding the shortcomings indicated in section 4.4 above, while still safeguarding the 'user-friendliness' of the system with regard to claimants seeking compensation.

The Commission therefore requests the Council to advance this matter as soon as possible with a view to achieving a thorough review of the international liability and compensation regime. More particularly, the Community shall submit a request to the International Maritime Organization or the IOPC Fund, as appropriate, with a view to achieving the following amendments to the Liability Convention:

– The liability of the shipowner shall be unlimited if it is proved that the pollution damage resulted from gross negligence on his part;

– The prohibition of compensation claims for pollution damage against the charterer, manager and operator of the ship shall be removed from Article III.4(c) of the Liability Convention;

– Compensation of damage caused to the environment should be reviewed and widened in light of comparable compensation regimes established under Community law.

Apart from the measures to improve the existing international oil pollution liability regime, an advancement regarding the regime for liability and compensation for hazardous and noxious substances is necessary. An international convention on this subject was adopted in 1996 but has not been ratified by any Member State and is not in force[16]. The sinking of the chemical tanker *Ievoli Sun* off the Channel Islands on 31 October 2000, was the latest incident to highlight the highly unsatisfactory regulatory situation regarding the liability and compensation of hazardous substances other than oil. This issue needs to be addressed as a matter of priority at international and European level.

If efforts to achieve the appropriate improvements to the international liability and compensation rules fail, the Commission will make a proposal for adopting Community legislation introducing a Europe-wide maritime pollution liability and compensation regime.

5.3 Ensuring, through the Member States legislation that grossly negligent conduct is subject to penalties

The Commission recognises that liability rules as such have limits as regards their effects on the individual responsibility of the players involved in oil pollution incidents. This is particularly so if the liabilities are insurable, which is normally the case.

To complement the measures in the area of liability and compensation described above, the Commission therefore proposes, as announced in paragraph 5.b.iv) in its Communication on the safety of the seaborne oil trade (COM(2000) 142 final), to include in this Regulation an article on financial penalties or sanctions for established grossly negligent behaviour on behalf of any person involved in the transport of oil at sea. This measure is of a penal nature and hence not related to the compensation of damage. Rather it is intended to ensure a Community-wide application of a deterrent sanction for those involved in the transport of oil by sea.

[16] The following States have signed the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea: Canada, Denmark, Finland, Germany, the Netherlands, Norway, Sweden and the United Kingdom. Only the Russian Federation has ratified it.

JUSTIFICATION FOR A REGULATION

The Treaty provides for the establishment of a common transport policy and the measures envisaged to implement such a policy include measures to improve safety and environmental protection in maritime transport. The adequate compensation of victims of maritime oil spills and the introduction of sanctions for gross negligence in the transport of oil at sea form an integral part of such measures.

While there are international conventions regulating liability and compensation of oil spills, to which all relevant Member States are parties, or will be parties in the near future, recent accidents, most notably the sinking of the *Erika* in 1999, have highlighted the insufficiency of those mechanisms to ensure that the victims are adequately compensated.

The Regulation involves the setting up of a Fund for Compensation of Oil Pollution in European waters (the COPE Fund). Only Member States which have a maritime coastline and ports will be directly concerned by the fund. Austria and Luxembourg would only be indirectly and remotely concerned by this part of the proposal.

Given that a relatively well-functioning international system for compensating oil spills already exists, the most efficient solution to raise the compensation limits is to build upon and complement the international system, thereby avoiding duplication of work and excessive administration. The COPE Fund is therefore largely based upon procedures and assessment carried out within the international system. It is inferred that a certain exchange of information between the proposed European Fund and the existing International Oil Pollution Compensation Fund, either on a more permanent or on a case by case basis, will be necessary for the effective functioning of the system.

An oil spill can cause potentially enormous damage. In accidents where the international compensation limits are exceeded, victims will not, as far as the existing international regime is concerned, be fully compensated. Community-wide action in this field will greatly improve the possibilities to fully compensate victims of a European oil spill by creating a Fund to which oil receivers in all Member States concerned contribute. The available amount of maximum compensation will be raised from the current EUR 200 million to EUR 1,000 million. In addition, the costs of oil spills in European Union waters would be spread among all EU coastal States.

The concrete added value of the proposed measure is thus a five-fold increase of the compensation amount available for compensation compared to existing amounts, a much stronger guarantee that adequate compensation actually will be available and a sharing of the risk of oil spills between all coastal Member States. Another benefit is that the additional funding can be used for expediting the compensation of victims of European oil spills in the International Oil Pollution Compensation Fund, by providing advance payments as soon as the claims have been assessed and approved by the IOPC Fund.

The creation of a compensation fund for oil spills requires a regulatory measure. The parties liable to contribute to the fund, i.e. European oil receivers, are unlikely to contribute with potentially large sums unless they are legally required to do so. In addition, requirements on contribution to, and compensation payments of, the fund are not enforceable in a unified and harmonised way unless they are identical for each Member State and each entity involved. Harmonised rules are therefore instrumental for ensuring uniform implementation of the obligations. Hence it is necessary to ensure uniform application of these provisions in the form of a Regulation.

CONTENT OF THE REGULATION

The proposed Regulation complements the existing international two-tier regime on liability and compensation for oil pollution damage by tankers, provided by the CLC and Fund Conventions, by creating a European supplementary fund, the COPE Fund, to compensate victims of oil spills in European waters. The COPE Fund will only compensate victims whose claims have been considered justified, but who still have been unable to obtain full compensation by the international regime, due to insufficient limits of compensation.

Compensation from the COPE fund would thus be based on the same principles and rules as the current international fund system, but subject to a ceiling which is deemed to be sufficient for any foreseeable disaster, i.e. EUR 1,000 million.

The COPE fund will be financed by European oil receivers. Any person in a Member State who receives more than 150.000 tonnes of crude oil and/or heavy fuel oil per year will have to pay its contribution to the COPE Fund, in a proportion which corresponds to the amounts of oil received. In this way, the oil industry, and indirectly perhaps the consumers of oil products, rather than the taxpayers, would bear the costs of expensive oil spills in Europe.

The COPE Fund will only be activated once an accident that exceeds, or threatens to exceed, the maximum limit provided by the IOPC Fund has occurred in EU waters. If no such accident occurs, the COPE Fund will not require any contributions to be made.

The Commission will represent the COPE Fund. Any major decision relating to the operation of the COPE Fund will be taken by the Commission, assisted by a COPE Fund Committee, which is a management committee under Article 4 of Council Decision 1999/468/EC.

The proposed Regulation finally includes an article introducing financial penalties for grossly negligent behaviour on behalf of any person involved in the transport of oil at sea.

SPECIAL CONSIDERATIONS

Article 1

The purpose of the Regulation is to ensure adequate compensation of pollution damage in EU waters resulting from the incidents involving oil tankers. The bulk of the Regulation consequently addresses what the Commission considers to be the most immediate concern in the current international oil pollution liability and compensation regime, i.e. the insufficiency of the compensation limits. Other shortcomings of the system will be addressed through other means, at least initially, within the international framework. A separate purpose of the Regulation is the establishment of a financial penalty for intentional or grossly negligent acts or omissions leading to oil pollution incidents, as laid down in Article 10.

Article 2

This article defines the geographical scope of application of the Regulation. It covers pollution damage in an area of up to 200 nautical miles from the coastline. The scope corresponds to that applicable in the international regime, which is essential given the very close link between the Regulation and that regime.

Article 3

Article 3 contains the definitions of the key concepts of the Regulation, which in essence duplicate the most relevant definitions of the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as amended by the 1992 Protocol thereto.

Some of these definitions are arguably unnecessary, given that the close link between the proposed measure and the international compensation system is laid down elsewhere in the Regulation. For reasons of legal clarity, however, the international definitions relating to the responsibilities of the main involved parties have been replicated in Article 3.

Article 4

Article 4 establishes the COPE Fund and sets out its main responsibilities.

Article 5

This article regulates the circumstances as to when and how the COPE Fund shall pay compensation and is thus one of the key articles of the Regulation.

In paragraph 1 and 2 the close link to the International Oil Pollution Compensation (IOPC) Fund is established. In essence this link means that compensation by the COPE Fund will only come into question once victims of a tanker spill in European waters have had their claims approved by the IOPC Fund, but have been unable to recover their full compensation because the totality of valid claims exceed the amount of compensation available under the Fund Convention.

Paragraph 3 ensures that any decision to pay compensation through the COPE Fund is approved by the Commission, assisted by the COPE Fund Committee. If the Commission is unable to approve claims, no compensation will be paid.

Normally, however, it is envisaged that claimants who meet the criteria of paragraphs 1 and 2 will be compensated by the COPE Fund. The main exception is provided by paragraph 4, which allows the Commission a certain discretion as to the extent to which expenses by those most directly involved in the accident will be compensated. This is a mechanism to ensure that a link between the actual conduct of those involved and their right to compensation is established. On the other hand, it is considered important to preserve the possibility to compensate claims by the persons most involved in the incident. Otherwise shipowners, cargo owners and other crucial parties, who normally are well placed to act immediately after an incident, would be discouraged from contributing to the mitigation of damage.

Paragraph 5 sets the maximum compensation limit of the COPE Fund at EUR 1,000 million, including the share paid through the CLC and Fund Conventions. This is deemed sufficient to cover the full compensation of any foreseeable accident involving an oil tanker and it corresponds to the current maximum level of compensation provided by the Oil Spill Liability Trust Fund in the USA.

Paragraph 6 provides that in the – highly unlikely – event that this maximum of EUR 1,000 million is exceeded, compensation shall be 'pro-rated'. In practice this would mean that each claimant would receive only a given percentage of its established claims. The percentage would be the same for all claimants.

Article 6

Article 6 deals with the income side of the COPE Fund. Contributions to the COPE Fund will only be collected following an incident in EU waters, which is so grave that it exceeds or threatens to exceed the maximum compensation limits of the IOPC Fund.

Confirming existing practices for contribution to the IOPC Fund, which have proved to be workable, the Regulation establishes a symmetry between the persons liable to contribute to the IOPC Fund and those liable to contribute to the COPE Fund. The contribution system is based on the amount of oil received by each receiver and the contribution to the COPE Funds is thus proportionate to the quantities of oil received. Contributions are paid directly by the oil receivers to the Commission.

There is a relatively short time limit as to the collection of contributions, which is justified in view of the importance to have the necessary funding available as soon as possible after the accident has occurred and the assessment of claims for that accident has been undertaken by the IOPC Fund.

In order to ensure that money is not illegitimately collected by the COPE Fund, paragraph 9 provides that any potential surplus which has been levied for a particular incident and has not been used for the compensation for damage in relation to that incident or any immediately related purpose, shall be returned to the contributors.

Paragraph 10 provides that Member States which do not fulfil their obligations as regards the COPE Fund shall be liable to compensate the COPE Fund for any loss caused thereby.

Article 7

The right of subrogation by the COPE Fund is laid down in Article 7. This provision provides for the possibility of the COPE Fund recovering at least parts of its expenses through recourse action against various parties involved in the incident, to the extent such action is not prohibited in the international conventions.

Article 8

Article 8 provides that the representation of the COPE Fund will be taken on by the Commission. It imposes a number of specific tasks for the Commission in this respect which are necessary for carrying out the functions of the Fund.

Article 9

The COPE Fund Committee will assist the Commission in operating the Fund, in the sense that the main decisions relating to the operation of the COPE Fund will be made by the Commission in accordance with established comitology procedures. The COPE Fund Committee is a management committee under Article 4 of Council Decision 1999/468/EC[17]. The article fixes the period for the Council to act to one month, given the need for urgent decisions by the COPE Fund Committee.

Article 10

Article 10 provides for financial penalties or sanctions for established grossly negligent conduct on behalf of any person involved in the transport of oil at sea. This measure is of a penal nature and hence not related to the compensation of damage. By covering any incident involving oil pollution at sea, this article, unlike the rest of the Regulation, covers oil pollution from any ship, whether or not an oil tanker. The exact nature of the sanctions to be employed for this purpose (criminal, administrative, 'punitive damages' etc.) is left unspecified in order to allow Member States to apply the type of sanctions which best fits their legal system.

Article 11

No comments.

[17] Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.07.1999, p. 23.

2000/0326 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 80(2) and 175(1) thereof,

Having regard to the proposal from the Commission[18],

Having regard to the opinion of the Economic and Social Committee[19],

Having regard to the opinion of the Committee of the Regions[20],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[21],

Whereas:

(1) There is a need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from tankers in European waters.

(2) The international regime for liability and compensation of oil pollution damage from ships, as established by the International Convention on Civil Liability for Oil Pollution Damage, 1992 and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as amended by the 1992 Protocol thereto, provide some important guarantees in this respect.

(3) The maximum compensation afforded by the international regime is deemed insufficient to fully cover the costs of foreseeable oil tanker incidents in Europe.

(4) A first step to improve the protection of victims in case of an oil spill in Europe is to considerably raise the maximum amount of compensation available for such spills. This can be done by complementing the international regime through the establishment of a European Fund which compensates claimants who have been unable to obtain full compensation under the international compensation regime, because the totality of valid claims exceed the amount of compensation available under the Fund Convention.

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18 OJ C , , p. .
19 OJ C , , p. .
20 OJ C , , p. .
21 OJ C , , p. .

(5) A European oil pollution compensation fund needs to be based on the same rules, principles and procedures as those of the IOPC Fund in order to avoid uncertainty for victims seeking compensation and in order to avoid ineffectiveness or duplication of work carried out within the IOPC Fund.

(6) In view of the principle that the polluter should pay, the costs of oil spills should be borne by the industry involved in the carriage of oil by sea.

(7) Harmonised Community measures to provide additional compensation for European oil spills will share the costs of such oil spills between all coastal Member States.

(8) A Community-wide compensation Fund (COPE Fund) which builds upon the existing international regime is the most efficient way to attain these objectives.

(9) The COPE Fund shall have the possibility to reclaim its expenses from parties involved in the oil pollution incidents, to the extent that this is permissible under international law.

(10) Since the measures necessary for the implementation of this Regulation are management measures within the meaning of Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[22], they should be adopted by use of the management procedure provided for under Article 4 of that Decision.

(11) Since the adequate compensation of victims of oil spills does not necessarily provide sufficient disincentives for individual operators in the seaborne oil trade to act diligently, a separate provision is needed providing for financial penalties to be imposed on any person who has contributed to an incident by his wrongful intentional or grossly negligent acts or omissions.

(12) A Regulation of the European Parliament and the Council is, in view of the subsidiarity principle, the most appropriate legal instrument as it is binding in its entirety and directly applicable in all Member States and therefore minimises the risk of divergent application of this instrument in Member States.

(13) A revision of the existing international oil pollution liability and compensation regime should be undertaken in parallel to the measures contained in this Regulation in order to achieve a closer link between the responsibilities and actions of the players involved in the transport of oil by sea and their exposure to liability. More particularly, the liability of the shipowner should be unlimited if it is proved that the pollution damage resulted from gross negligence on his part, the liability regime should not explicitly protect a number of other key players involved in the transport of oil at sea and the compensation of damage caused to the environment as such should be reviewed and widened in light of comparable compensation regimes established under Community law.

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22 OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS REGULATION:

Article 1
Objective

The purpose of this regulation is to ensure adequate compensation of pollution damage in EU waters resulting from the transport of oil by sea, by complementing the existing international liability and compensation regime at Community level, and to introduce a financial penalty to be imposed on any person who has been found to have contributed to an oil pollution incident by his wrongful intentional or grossly negligent acts or omissions.

Article 2
Scope

This Regulation shall apply:

1. to pollution damage caused:

   (a) in the territory, including the territorial sea, of a Member State, and

   (b) in the exclusive economic zone of a Member State, established in accordance with international law, or, if a Member State has not established such a zone, in an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured;

2. to preventive measures, wherever taken, to prevent or minimize such damage.

Article 3
Definitions

For the purpose of this Regulation, the following definitions shall apply:

1. "Liability Convention" shall mean the International Convention on Civil Liability for Oil Pollution Damage, 1992.

2. "Fund Convention" shall mean the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 as amended by the 1992 Protocol thereto.

3. “Oil” shall mean means any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.

4. "Contributing Oil" shall mean crude oil and fuel oil as defined in points (a) and (b) below:

   (a) "Crude Oil" shall mean any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation. It also includes crude oils from which certain distillate fractions have been removed

(sometimes referred to as "topped crudes") or to which certain distillate fractions have been added (sometimes referred to as "spiked" or "reconstituted" crudes).

(b) "Fuel Oil" shall mean heavy distillates or residues from crude oil or blends of such materials intended for use as a fuel for the production of heat or power of a quality equivalent to the "American Society for Testing and Materials' Specification for Number Four Fuel Oil (Designation D 396-69)", or heavier.

5. "Ton", in relation to oil, shall mean a metric ton.

6. "Terminal installation" shall mean any site for the storage of oil in bulk which is capable of receiving oil from waterborne transportation, including any facility situated off-shore and linked to such site.

7. "Incident" shall mean any occurrence, or series of occurrences having the same origin, which causes pollution damage or creates a grave and imminent threat of causing such damage. Where an incident consists of a series of occurrences, it shall be treated as having occurred on the date of the first such occurrence.

8. "Person" shall mean any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

9. "IOPC Fund" shall mean the fund established by the Fund Convention.

Article 4

Establishment of a Fund for Compensation for Oil Pollution in European waters

A fund for Compensation for Oil Pollution in European waters (hereinafter 'the COPE Fund') is hereby established with the following aims:

(a) to provide compensation for pollution damage to the extent that the protection afforded by the Liability Convention and the Fund Convention is inadequate; and

(b) to give effect to the related tasks set out in this Regulation.

Article 5

Compensation

1. The COPE Fund shall pay compensation to any person who is entitled to compensation for pollution damage under the Fund Convention but who has been unable to obtain full and adequate compensation under that Convention, because the totality of valid claims exceed the amount of compensation available under the Fund Convention.

2. The assessment as to whether a person is entitled to compensation under the Fund Convention shall be determined under the terms of the Fund Convention and carried out in accordance with the procedures foreseen therein.

3. No compensation shall be paid by the COPE Fund until the relevant assessment referred to in paragraph 2 is approved by the Commission, acting in accordance with Article 9 paragraph 2.

4. Notwithstanding paragraphs 1 and 2, the Commission may decide not to pay compensation to the shipowner, manager or operator of the ship involved in the incident or to their representatives. Similarly, the Commission may decide not to compensate any person in a contractual relationship with the carrier in respect of the carriage during which the incident occurred or any other person directly or indirectly involved in that carriage. The Commission, acting in accordance with Article 9 paragraph 2, shall establish which claimants, if any, fall under these categories and shall decide accordingly.

5. The aggregate amount of compensation payable by the COPE Fund shall in respect of any one incident be limited, so that the total sum of that amount and the amount of compensation actually paid under the Liability Convention and the Fund Convention for pollution damage within the scope of application of this regulation shall not exceed EUR 1,000 million.

6. Where the amount of established claims exceeds the aggregate amount of compensation payable under paragraph 5, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this regulation shall be the same for all claimants.

Article 6
Contributions by oil receivers

1. Any person who receives contributing oil in total annual quantities exceeding 150,000 tons carried by sea to ports or terminal installations in the territory of a Member State and is liable to contribute to the IOPC Fund shall be liable to contribute to the COPE Fund.

2. Contributions shall only be collected following an incident falling under the scope of this regulation which exceeds or threatens to exceed the maximum compensation limits of the IOPC Fund. The total amount of contributions to be levied for each such incident shall be decided by the Commission in accordance with Article 9, paragraph 2. On the basis of that decision, the Commission shall calculate for each person referred to in paragraph 1 the amount of his contribution, on the basis of a fixed sum for each ton of contributing oil received by such persons.

3. The sums referred to in paragraph 2 shall be arrived at by dividing the relevant total amount of contributions required by the total amount of contributing oil received in all Member States in the relevant year.

4. Member States shall ensure that any person who receives contributing oil within its territory in such quantities that he is liable to contribute to the COPE Fund appears on a list to be established and kept up to date by the Commission in accordance with the subsequent provisions of this article.

5. Each Member State shall communicate to the Commission the name and address of any person who in respect of that State is liable to contribute to the COPE Fund

pursuant to this article, as well as data on the relevant quantities of contributing oil received by any such person during the preceding calendar year.

6. For the purposes of ascertaining who are, at any given time, the persons liable to contribute to the COPE Fund and of establishing, where applicable, the quantities of oil to be taken into account for any such person when determining the amount of his contribution, the list shall be prima facie evidence of the facts stated therein.

7. The contributions shall be made to the Commission and the collection shall be fully completed no later than one year after the decision to levy the contributions has been made by the Commission.

8. The contributions referred to in this article shall be used solely for the purpose of compensating pollution damage as referred to in Article 5.

9. Any potential surplus of contributions which have been levied for a particular incident and have not been used for the compensation for damage in relation to that incident or any immediately related purpose, shall be returned to the person who made the contribution, no later than 6 months after the completion of the compensation proceedings of that incident.

10. Where a Member State does not fulfil its obligations relating to the COPE Fund and this results in a financial loss for the COPE Fund, that Member State shall be liable to compensate the COPE Fund for such loss.

Article 7
Subrogation

The COPE Fund shall, in respect of any amount of compensation paid by it in accordance with Article 5, acquire by subrogation the rights that the person so compensated may enjoy under the Liability Convention or the Fund Convention.

Article 8
Representation and management of the COPE Fund

1. The Commission shall be the representative of the COPE Fund. In this respect, it shall perform the tasks presented by this Regulation or otherwise necessary for the proper operation and functioning of the COPE Fund.

2. The following decisions relating to the operation of the COPE Fund shall be made by the Commission, acting in accordance with the procedure in Article 9 paragraph 2:

   a. fixing the contributions to be levied in accordance with Article 6;

   b. approving the settlement of claims in accordance with Article 5.3 and taking decisions in respect of the distribution among claimants of the available amount of compensation in accordance with Article 5.6;

   c. taking decisions in respect of payment to claimants referred to in Article 5.4; and

d. determining the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims are compensated as promptly as possible.

Article 9
Committee

1. The Commission shall be assisted by a COPE Fund Committee composed of representatives of the Member States and chaired by the representative of the Commission.

2. Where reference is made to this paragraph, the management procedure laid down in Article 4 of Decision 1999/468/EC shall apply, in compliance with Articles 7 and 8 thereof.

   The period provided for in Article 4 paragraph 3 shall be one month.

Article 10
Penalties

1. Member States shall lay down a system for financial penalties to be imposed on any person who has been found by a court of law to have contributed by his wrongful intentional or grossly negligent acts or omissions to an incident causing or threatening to cause oil pollution in an area referred to in Article 2, paragraph 1.

2. The penalties awarded in accordance with paragraph 1 shall not affect the civil liabilities of the parties concerned as referred to in this Regulation or elsewhere and shall be unrelated to the damage caused by the incident. They shall be set at a level high enough to dissuade the person from committing or persisting in an infringement.

3. Penalties referred to in paragraph 1 shall not be insurable.

4. There shall be a right for the defendant to appeal against penalties referred to in paragraph 1.

Article 11
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*. It shall be applicable on [12 months after its entry into force date].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*