

EXPLANATORY MEMORANDUM TO
THE MERCHANT SHIPPING (IMPLEMENTATION OF SHIP-SOURCE
POLLUTION DIRECTIVE) REGULATIONS 2009

2009 No. 1210

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 These Regulations will give effect to the Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringement (“the Directive”).

2.2 The Directive incorporates certain provisions of Annexes I and II to the International Convention for the Prevention of Pollution from Ships 1973 as amended by its Protocol of 1978 (MARPOL 73/78) (“MARPOL”) into Community Law.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 These Regulations implement the Directive by amending relevant sections of the Merchant Shipping Act 1995, the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (“POP Regulations”) and the Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996 (“NLS Regulations”). The powers cited in the preamble other than the section 2(2) European Communities Act 1972 power are the powers under which these two sets of 1996 Regulations were made.

4.2 The current structure of the UK legislation governing oil pollution is that section 131 of the Merchant Shipping Act 1995 prohibits discharges into United Kingdom national waters (defined in section 313(2)(b) of that Act) and the two sets of 1996 Regulations govern discharges outside those waters. MARPOL applies to discharges into sea areas, which may be inside United Kingdom national waters or outside those waters. In order to implement the Directive and MARPOL through a more coherent legislative framework, these Regulations amend section 131 so that it no longer applies to discharges into sea areas within United Kingdom national waters, and extend the 1996 Regulations so that they apply to such discharges. As a result, all discharges into sea areas will fall within the scope of the 1996 Regulations.

4.3 Regulation 4 amends the POP Regulations by disapplying regulation 11 of the 1996 Regulations in relation to ships to which the Directive applies by virtue of the defined term “excepted ship” and providing that such ships will have access to the defences in new regulations 11A and 11B instead. New regulations 11A and 11B

implement MARPOL together with the further requirements of the Directive subject to the constraints of international law (as required by Article 3(1) of the Directive).

4.4 In relation to penalties, regulations 4 and 5 effectively rewrite existing provisions in the two sets of 1996 Regulations (namely regulation 36(2) of the POP Regulations and regulation 14(1A) of the NLS Regulations) so as to better facilitate the extension of those penalties to those persons falling within the wider scope required by the Directive.

4.5 The term “serious negligence” is used in new regulations 11A and 11B inserted by regulation 4. This term is not defined in the regulations as, in the consultation exercise, the MCA received mixed views as to whether it would or would not benefit stakeholders to have an explicit definition. The term therefore falls to judicial interpretation in the light of relevant caselaw, which would include the decision of the ECJ in the *Intertanko* case (Case C-308/06). Paragraph 77 of the judgment in that case contains a definition of the term.

4.6 A Transposition Note is attached.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 Jim Fitzpatrick has made the following statement regarding Human Rights:

In my view the provisions of the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2009 are compatible with the Convention rights.

7. Policy background

- *What is being done and why*

7.1 MARPOL already provided an international regime dealing with oil pollution from ships. However, the Commission’s concern in promoting the Directive was that while it was possible to prosecute deliberate spills (which are normally very small) under MARPOL, some very big spills were not open to prosecution under national laws derived from MARPOL because of MARPOL’s explicit exceptions in respect of discharges resulting from damage to the ship. The regulations therefore limit the defences available to the master or owner of a ship and also extend liability for the discharge to others such as charterers and classification societies (survey organisations).

7.2 The number of major spills resulting from damage to the vessel are quite small, however their impact can be considerable, as with incidents such as the BRAER off the coast of Scotland, SEA EMPRESS off the coast of Wales and the PRESTIGE off the coast of Spain.

- ***Consolidation***

7.3 The Department recognises that these Regulations amend other domestic legislation, and therefore the issue of consolidation arises. However, there have been recent amendments to MARPOL Annexes I and II which will need to be implemented in UK law in due course. The Department expects that this separate workstream will involve further changes to domestic legislation, and will therefore provide a more appropriate opportunity for consolidation of relevant statutory instruments.

7.4 There are no plans at present to re-consolidate the Merchant Shipping Act 1995.

8. Consultation outcome

8.1 These Regulations, with the associated Impact Assessment, were consulted on over a period of 3 months between August 2008 and November 2008. Consultees included Central Government, the Devolved Administrations, Non Governmental Organisations, industry groupings representing those affected by this legislation (such as the British Chamber of Shipping).

8.2 The consultation package was placed on the MCA's website and a press notice was released by the MCA to inform the general public and industry of this consultation. Eight consultee bodies responded.

8.3 The main responses from the consultation can be summarised as follows:

- Environmental groups were generally supportive of the proposals.
- Concern was raised that the revised defences available in the POP Regulations potentially depended upon the actions and intentions of unconnected third parties.
- There were mixed views as to whether a definition of "serious negligence" should be included.
- There was concern that the maximum penalty for a noxious liquid substance discharge should be the same as that for oil, given the discrepancy between the maximum fines available on summary conviction under the two sets of 1996 Regulations.

8.4 The Department has taken account of these responses in finalising the Regulations. In relation to the second point above, the Department recognised the concern as valid and introduced a further requirement that the relevant intentions are restricted to those persons who are connected with the business of the ship in question, as defined in the Regulations. In relation to the third point, the Department noted the different views expressed and concluded that it was appropriate not to include an explicit definition. In relation to the fourth point, the Department again recognised the concerns, but is constrained by existing vires from making appropriate changes at this time. The Department will look at this issue again as part of the separate workstream on the implementation of the amendments to Annexes I and II of MARPOL, but considers that there is no substantive concern in the meantime as both types of discharge are subject to unlimited fines upon conviction on indictment, so more serious punishment remains available for each.

9. Guidance

9.1 The Department would accept that these Regulations are necessarily complex and difficult to follow, as it is a difficult exercise to properly integrate the relevant domestic, European and International law. However as far as seafarers are concerned these Regulations contain no significant changes to the current position, and nothing that requires a change to their operational practices.

9.2 In relation to others in the shipping industry, the Regulations do make changes which may affect their liability for a discharge of oil. The Department considers that such persons are already aware of the changes involved, as the Directive was high profile within the industry, as was the progress of the *Intertanko* case.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil provided that a ship does not pollute. However should it pollute then the Regulations extend the criminal liability from Owners and Masters to others such as ship charterers and ship managers.

10.2 The impact on the public sector is minimal as these regulations will be enforced under the existing regimes.

10.3 An Impact Assessment is attached to this memorandum.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is that the MCA expects to focus on large ships and major discharges in its enforcement of the prohibitions on ship-source oil pollution in UK legislation which are enhanced by the changes made in these Regulations.

11.3 The basis for the final decision on what action to take to assist small business is the need for effective, dissuasive and proportionate penalties recorded at recital 4 of the Directive.

12. Monitoring & review

12.1 The effect of these regulations will be reviewed by end 2010 under Article 12 of the Directive.

13. Contact

Capt Jeremy Smart of the Maritime and Coastguard Agency: Telephone 023 8032 9218 or e-mail: Jeremy.smart@mcga.gov.uk can answer any queries regarding the instrument.

TRANSPOSITION NOTE

relating to the implementation of Council Directive 2005/35/EC on the introduction of penalties for infringements of the law against ship-source pollution by means of the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2009 (“the Regulations”).

ARTICLES	IMPLEMENTATION
Article 1(1)	No legislation is needed.
Article 1(2)	No legislation is needed.
Article 2	No legislation is needed.
Article 3(1) and (2)	The scope of the Directive is reflected in the implementation of the operative Articles of the Directive as described below.
Article 4	The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, Part 3, as amended by regulation 4 of these Regulations
Article 5(1)	The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, Part 3, as amended by regulation 4 of these Regulations
Article 5(2)	The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, Part 3, as amended by regulation 4 of these Regulations (in particular the insertion of regulation 11B and 36A).
Article 6(1)	No legislation is needed.
Article 6(2)	No legislation is needed.
Article 7(1)	No legislation is needed.
Article 7(2)	No legislation is needed.
Article 7(3)	No legislation is needed.
Article 8(1)	The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, Part 9 as amended by regulation 4 of the Regulations; and regulation 14 of the Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996, as amended by regulation 5 of the Regulations.
Article 8(2)	The Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, Part 9 as amended by regulation 4 of these Regulations; and regulation 14 of the Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996, as amended by regulation 5 of these Regulations.
Article 9	No legislation is needed.
Article 10(1)	No legislation is needed.
Article 10(2)	No legislation is needed.
Article 11	No legislation is needed.
Article 12	No legislation is needed.
Article 13	No legislation is needed.
Article 14	No legislation is needed.
Article 15	No legislation is needed.
Article 16	These Regulations.

Article 17	No legislation is needed.
Article 18	No legislation is needed.

Summary: Intervention & Options

Department /Agency: Maritime & Coastguard Agency	Title: Impact Assessment of MERCHANT SHIPPING (IMPLEMENTATION OF SHIP-SOURCE POLLUTION DIRECTIVE) REGULATIONS 2009	
Stage: Final	Version: 5	Date: 11 May 2009
Related Publications: Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996. Merchant Shipping (Prevention of Oil Pollution) Regulations 1996.		

Available to view or download at:

<http://www.mcga.gov.uk/c4mca/mcga07-home/shipsandcargoes/consultations.htm>

Contact for enquiries: Capt Jeremy Smart

Telephone: 023 8032 9218

What is the problem under consideration? Why is government intervention necessary?

Individual shipping accidents, such as that involving the Prestige oil tanker, can cause tens of millions of pounds worth of damage to the environment. At present, there are those associated with the shipping industry whose actions may cause or contribute to polluting incidents but who are not subject to the criminal sanctions in our legislation. There is a concern that if such persons cannot be penalised for actions (or failures to act) which lead to pollution they face a weak incentive for ensuring the safe operation of ships for which they have responsibility.

What are the policy objectives and the intended effects?

The EU and UK policy objective remains to minimise the risk of accidents occurring and to ensure the polluter pays. The new UK legislation will transpose Directive 2005/35/EC on ship-sourced pollution and on the introduction of penalties for infringements ("The Directive").

The effect of the legislation is to amend existing domestic law so that: for UK ships, and non-UK ships while in UK territorial waters, criminal offences will cover ship-source pollution which results from serious negligence and extend criminal sanctions to others responsible such as ship owners/charterers.

What policy options have been considered? Please justify any preferred option.

Option 1. Transpose the Directive in line with the UK's interpretation of the UN Convention of the Law of the Sea (UNCLOS). This is the preferred option.

Under this approach, outside UK territorial waters - the sanctions applicable would be different depending on whether the ship was registered with an EEA state.

No other option has been identified that implements the Directive in a manner consistent with UNCLOS. There is no "do nothing" option in this context as the UK is obliged to implement the Directive.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? Policy will have to be reviewed by end 2010 under Article 12 of the Directive

Ministerial Sign-off For final proposal/implementation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister:

Jim Fitzpatrick

..... Date:
11th May 2009

Summary: Analysis & Evidence

Policy Option: 1	Description: Transposition of the Directive in line with the UK's interpretation of UNCLOS
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COSTS	ANNUAL COSTS	Description and scale of key monetised costs by 'main affected groups' Future impacts would be specific to case by case pollution incidents of which quantification would be uncertain and inaccurate.	
	One-off (Transition) Yrs		
	£ N/A		
	Average Annual Cost (excluding one-off)		
	£ N/A	Total Cost (PV)	£ N/A
<p>Other key non-monetised costs by 'main affected groups'</p> <p>There will be no additional cost to industry provided that they do not pollute, however, if they should pollute then they become criminally liable.</p>			

BENEFITS	ANNUAL BENEFITS	Description and scale of key monetised benefits by 'main affected groups'	
	One-off Yrs		
	£ N/A		
	Average Annual Benefit		
	£ N/A	Total Benefit (PV)	£ N/A
<p>Other key non-monetised benefits by 'main affected groups'</p> <p>Increasing and extending the sanctions which may apply to ship charterers and ship managers should increase operating standards, thereby reducing the risk of accident and seaborne pollution.</p>			

Key Assumptions/Sensitivities/Risks

Price Base Year	Time Period Years	Net Benefit Range (NPV) £ N/A	NET BENEFIT (NPV Best estimate) £ N/A
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What is the geographic coverage of the policy/option?	Worldwide				
On what date will the policy be implemented?	May 2009				
Which organisation(s) will enforce the policy?	DfT (MCA)				
What is the total annual cost of enforcement for these	£ 0				
Does enforcement comply with Hampton principles?	Yes				
Will implementation go beyond minimum EU requirements?	No				
What is the value of the proposed offsetting measure per year?	£ N/A				
What is the value of changes in greenhouse gas emissions?	£ 0				
Will the proposal have a significant impact on competition?	No				
Annual cost (£-£) per organisation (excluding one-off)	<table style="display: inline-table; border: none;"> <tr> <td style="border: none; padding: 0 10px;">Micro</td> <td style="border: none; padding: 0 10px;">Small</td> <td style="border: none; padding: 0 10px;">Medium</td> <td style="border: none; padding: 0 10px;">Large</td> </tr> </table>	Micro	Small	Medium	Large
Micro	Small	Medium	Large		

Are any of these organisations exempt?	No	No	N/A	N/A
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Impact on Admin Burdens Baseline (2005 Prices)		(Increase - Decrease)	
Increase	£ 0	Decrease	£ 0
		Net	£ 0

Key: Annual costs and benefits: Constant Prices (Net) Present Value

[Use this space (with a recommended maximum of 30 pages) to set out the evidence, analysis and detailed narrative from which you have generated your policy options or proposal. Ensure that the information is organised in such a way as to explain clearly the summary information on the preceding pages of this form.]

Due to the specific and case-by-case nature of future pollution incidents, a quantified impact assessment based on uncertain future incidents would be of limited value and accuracy. Therefore, we present a qualitative analysis.

The intention of the MCA has been to prepare UK legislation which would transpose the Directive into domestic law and, in particular, that the UK legislation should address the transposition of Article 5(2) of the Directive in a manner that is compatible with UNCLOS.

The rationale for the intervention of the Government:-

Article 16 of the Directive stipulates that Member States must bring in to force the laws, regulations and administrative provisions necessary to comply with the Directive.

The existing UK legislation which will be amended is:-

- Merchant Shipping Act 1995, section 131.
- Merchant Shipping (Prevention of Oil Pollution) Regulations 1996, regulations 1, 10, 11, 12, 13, 32, 35, 36 and 37.
- Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996, regulation 14.

Costs

There will be no additional costs to industry provided that they do not pollute, however, if they should pollute then they become criminally liable.

Benefits

Increasing and extending the sanctions which may apply to ship charterers and ship managers should increase operating standards, thereby reducing the risk of accident and seaborne pollution.

Competition impacts

The Directive gives further effect to EU policy to raise shipping standards and improve safe operation. Many other countries regulate their shipping to achieve the same policy objectives as the EU. However, it is inevitable that the safety regulation playing field will remain somewhat uneven. Some less scrupulous ship charterers and ship operators may exploit these differences. However, other users will be attracted by the higher standards and reputation of EU and EEA shipping. No significant impact on competition is expected.

Enforcement

There is not expected to be any increase in enforcement costs above the current costs incurred.

Consultation

A full 12 week public consultation was issued in August 2008 on the draft Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2008. The consultation

comprised of a covering letter providing a background and summary of the Regulations together with specific questions on the consultation package. The associated documents to the letter were the draft Statutory Instrument on Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2008, Directive 2005/35/EC, Transposition Note and a signed Impact Assessment (IA).

As a result of consulting over 100 organisations representing the shipping industry, associations, government and non government bodies, unions, authorities and other organisations; the Maritime and Coastguard Agency received a total of 8 replies (one of which was from the Intertanko consortium) though none making specific comment on the IA.

The public consultation has confirmed the impact assessment presents a reasonable view of likely costs and benefits. There were no specific comments on the impact assessment.

Due to the specific specific and case-by-case nature of shipping accidents that may come forward in the future, and aggregated, quantified impact assessment can not be estimated. However, these changes are intended to benefit the marine environment and human safety. The impact assessment provides a reasonable view of the expected impact of the policy and that the regulations provide net benefits to the UK without imposing cost to government.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	No	No
Legal Aid	No	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	No	No
Race Equality	No	No
Disability Equality	No	No
Gender Equality	No	No
Human Rights	No	No
Rural Proofing	No	No

Annexes