The sinking of the "Prestige" in November 2002 and of the "Erika" in December 1999, coupled with the significant number of illegal and deliberate discharges of waste and oil cargo residues from ships in European seas led to the formation of EU Directive 2009/35/EC on Ship-Source Pollution ("the Directive").

The Directive defines those ship-source discharges of oil and noxious liquid substances which Member States are to regard as infringements when committed with intent, recklessly or as a result of serious negligence. The Directive states that an offence is committed if the discharging of polluting substances is carried out in internal waters of a Member State, territorial waters of a Member State, straits used for international navigation, the Exclusive Economic Zone (EEZ) of a Member State or on the high seas. Furthermore, such rules apply to any ship irrespective of its flag.

The EU Council Framework Decision (2005/667/JHA) of 12 July 2005 is a separate instrument that was adopted in conjunction with the Directive, intended to supplement and ensure the effectiveness of the Directive. This instrument defines the regime of criminal penalties applicable to conduct constituting an offence as defined in the Directive. It requires Member States to take measures to ensure that infringements are subject to "effective, proportionate and dissuasive" sanctions. It also requires such measures to be applied to anyone deemed responsible, including the ship owner, cargo owner, charterer, and classification society. The penalties imposed include imprisonment for the more serious offences and fines or disqualification from performing a regulated activity for the less serious. It also takes into account the possibility of holding a legal person responsible for any offence committed for their benefit by an individual with managerial powers or where such an individual has been subject to insufficient supervision.

These controversial and much debated legal instruments have resulted in two separate, yet related cases in the European Court of Justice ("the ECJ").

In the first case INTERTANKO and others in the shipping industry ("the Coalition") have instituted proceedings questioning the legality and validity of the Directive with regards to pre-existing international law, such as MARPOL 73/78 and UNCLOS 1982.

The English High Court posed four questions to the ECJ concerning the validity and legality of the Directive:
1) Whether Article 5(2) of the Directive was invalid in so far as it limited the exceptions in Annex I 11(b) and Annex II 6(b) of MARPOL to owners, masters and crew in respect of straits, EEZs and the high seas
2) In respect of territorial seas whether
   a) Article 4 is invalid in so far as it imposes the test of 'serious negligence' of liability, and
   b) Article 5(1) is invalid in so far as it excludes the application of exceptions of Annex I Reg 11(b) and Annex II Reg 6(b) of MARPOL
3) Whether Article 4 of the Directive requiring the adoption of the 'serious negligence' test of liability and which penalises discharge in territorial seas breaches the right of innocent passage in UNCLOS and, if so, if the Article is therefore invalid, and
4) Whether the test of 'serious negligence' under Article 4 infringes the principle of legal certainty.

Article 4 of the Directive lays down general standards of liability applicable to all; it stipulates that discharges of polluting substances shall be regarded as infringements if committed with 'intent, recklessly or by serious negligence.' Article 5 provides exceptions to this standard with express reference to MARPOL. Under Article 5(2) the exception extends to the owner, master or crew of a vessel.

Under MARPOL, Regs 11 & 6 the prohibition on discharge of polluting substances does not apply to discharges resulting from damage to the ship or its machinery except if the owner or the master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.

It was argued by the Coalition that Articles 4 & 5 are incompatible with MARPOL in that:
   a) MARPOL does not refer to persons other than the owner and the master, and
   b) the concept of 'serious negligence' is incompatible with the test laid down in MARPOL.

The Attorney General dismissed this argument, finding that the reference within MARPOL to owner and master is merely by way of example and that there was nothing within the objective of MARPOL to require liability to be limited to such persons.

The Coalition argued that Article 5(2) 'serious negligence' is stricter than the test applied under MARPOL and is therefore in contravention of MARPOL and UNCLOS (which prohibits the Community from laying down a stricter standard than MARPOL in sea areas). It was argued that 'recklessness' in Article 4 is stricter than MARPOL as there is no reference to the perpetrator requiring knowledge that damage would result. The Attorney General opined that this should be construed on the basis that for recklessness to exist at all there must be knowledge that damage would probably result.

The Attorney General also opined that, although knowledge that damage would result was not an essential criteria for 'serious negligence' in many legal systems recklessness in knowledge that damage will probably result is treated as a form of serious negligence. It was therefore opined that the term 'serious negligence' could be interpreted strictly and be akin to recklessness in knowledge that damage will probably result.

The Attorney General thus found that when interpreted restrictively the test of liability under Article 4 did not go beyond MARPOL or UNCLOS when applied to straits, EEZ, or the high seas.

Questions two and three concerned the standard of liability of 'serious negligence' in territorial seas. It was acknowledged by the Attorney General that the restrictive concept of 'serious negligence' adopted outside territorial seas was merely to avoid a breach of Community obligations under international law. It is however the case, according to the Attorney General, that the Community is not bound by MARPOL when considering issues within territorial waters of Member States. Further, that UNCLOS does not restrict the Community's power to make laws on environmental
protection within territorial seas. It was also opined that both the wording and legislative context of the Directive indicated that ‘serious negligence’ was intended to be construed broadly and as an additional test to MARPOL. The Attorney General therefore opined that ‘serious negligence’ should be afforded a broader interpretation within territorial seas.

The final question asked whether the use of the term ‘serious negligence’ infringed the principle of legal certainty when applied within territorial seas. The principle of legal certainty requires rules to be clear and precise in order that individuals may know their rights and obligations. It requires that legislation clearly define all offences and penalties it seeks to apply.

The Attorney General reasoned that the Directive did not have to meet this criteria fully as it could not, as a Directive, contain direct penal provisions (which must be adopted by individual Member States – this issue is discussed below). She argued the Directive sought to lay down a minimum standard which did not require uniform application. It was noted that the subject proceedings themselves were helping to define ‘serious negligence’ and that there were a number of checks and safeguards built into the legal framework of the Community to ensure compliance by Member States in implementing the Directive at national level and to allow appeals against what may be perceived as improper or unjust applications of Community law.

On this analysis the Attorney General concluded that the Directive was not in contravention of existing international law and was therefore not invalid. The ECJ’s judgment is expected early 2008. The ECJ is not bound to follow the opinion of the Attorney General, however, it does tend to do so. It is reported that the Court has followed the opinion of the Attorney General in up to 80% of cases to date.

The second dispute - Commission v. Council (C-440/05) - was instituted by the European Commission in order to annul the EU Council Framework Decision.

The Commission brought its case in front of the ECJ in order to seek annulment of the Council Framework Decision which sought to strengthen the criminal law framework for the enforcement of the law against ship-source pollution. The Commission’s case was that the imposition of sanctions via separate instrument was illegal under EU law and that this infringed Art 47. The ECJ concurred.

The provisions laid down in the Framework Decision relate to conduct which is likely to cause serious environmental damage as a result of infringement of the Community Rules on maritime safety. It is clear that the Court took the view that criminal penalties were necessary to ensure compliance with such Community Rules. The Commission, on the other hand, opined that the Directive itself and not a separate instrument should prescribe penalties for breach of the Directive. However, the Court went further and held that the Community was not competent to legislate as to the type and level of any penal sanctions for criminal offences committed under Community law (as it had sought to do under Articles 4 and 5 of the Framework Decision).

As a general rule, neither criminal law nor rules of criminal procedure fall within the Community’s competence. However, when the application of effective, proportionate and dissuasive criminal penalties by competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require Member States to introduce penalties in order to ensure that the rules which it lays down in that field are fully effective. It remains, however, up to each Member State to set down its own appropriate penalties.

The ECJ finally concluded that the Framework Decision 2005/667 in encroaching on the competence which Article 80(2) EC attributes to the Community, infringed Article 47 EU and must therefore be annulled. Article 50(2) EC grants the Community legislature the power to promote environmental protection with regards to ‘measures to improve transport safety’ and ‘any other appropriate provisions’ in the field of maritime transport. It is in fact the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the EU Treaty, ‘Provisions on police and judicial co-operation in criminal matters’, do not encroach upon the powers conferred by the EC Treaty on the Community.

Although Articles 2, 3 and 5 of the Framework Decision were held by the Court to be validly adopted on the basis of Article 80(2) EC, since they were regarded as being essentially aimed at improving maritime safety, the Court considered Articles 4 and 6 to have been adopted in infringement of Article 47 EU. The Court also noted how these latter provisions were inextricably linked with Articles 2, 3 and 5 and hence held that the Framework Decision, being indivisible, must be annulled in its entirety. The Court further noted how Articles 7-12, concerning jurisdiction, notification of information between Member States and so on, are also inextricably linked to the above-mentioned provisions and as such did not find it necessary to rule on whether they should fall within the sphere of competence of the Community legislature or not.

As a result of this decision the current draft Directive is now subject to revision in order to remove any provisions on penalties that have already been inserted, whilst the Framework Decision 2005/667 has been annulled in its entirety. It is clear that the Directive cannot be amended so as to include applicable penalties in the event of a breach but that such measures must be decided by each individual Member State.

Thus, when viewed from this angle, it is clear that it is not entirely true to state that the Ship-Source Pollution Directive has been thrown out by the ECJ, but, as it stands, only its sanctions referred to in the EU Council Framework Decision have been annulled.

In the meantime, doubt and uncertainty remain as to whether the ECJ will follow the Advocate General’s opinion and uphold the legality of the Directive - its main scope being the creation of criminal liability for accidental pollution - in the legal proceedings instituted by INTERTANKO and others. The position will remain uncertain until the ECJ delivers judgement in 2008.