CRIMINAL PENALTIES FOR SHIP-SOURCE POLLUTION IN THE ENVIRONMENTAL LEGISLATION

ABSTRACT

As maritime pollution typically leads to cross-border dimension, environmental crime is one of the concerns of the European Union. Directive 2005/35/EC on ship-sources pollution and the introduction of penalties for infringements contains a precise definition of the infringements along with the rule that they will be subject to effective, proportionate and dissuasive penalties. At the time of adoption of Council Framework Decision 2005/667/JHA the Member States agreed that the ship-source pollution committed with intent, recklessly or with serious negligence should be considered a criminal offence. Following annulment of the mentioned Council Framework Decision, the Commission proposes to adopt the directive without changing the substance. In author's opinion environmental legislation in addition to civil liability system in accordance with the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended, should be reinforced by a system of criminal penalties at the level of the European Community bearing in mind that criminalising unintentional act is counter-productive in that it is a discouragement both for the seafarers and to the accident investigation.

Key words: ship-source pollution, criminal penalties, environmental legislation

JEL classification: K32

1. INTRODUCTION

The European Union maritime safety policy is aimed at high level of safety and environmental protection and it is based on the understanding that all policies involved in the transport of goods by sea have responsibility for ensuring that ships used in the Community waters comply with applicable rules and standards.

In European Union regulatory instruments which deal with maritime safety we can find a number of explicit objectives of protecting the environment and almost all maritime safety measures contribute at least indirectly to that objective. The reduction of pollution from shipping constitutes an integral part of European Union maritime safety policy and a system of penalties is crucial to address the rare cases of pollution where the behaviour of the operator is considered intolerable and must be punished as criminal offence.

Marine pollution typically leads to damage with large-scale dimensions. Diverging national approaches hinder efficient judicial cooperation and allow offenders to escape prosecution. For that reason, it is essential that Member States have the same understanding of which maritime pollution infringements constitute criminal offences and that they should be addressed by criminal penalties, at least for criminal offences committed by natural persons. The action chosen is a Directive, which leaves Member States a high degree of flexibility in implementation, including for determining the types and levels of penalties.

The purpose of this Directive is to integrate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges are liable to adequate penalties in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships.

The Directive addresses the punitive side of non-compliance with the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended, the standards and provides that any intentional or seriously negligent infringements of those standards shall be effectively dealt with by the EU Member State.

The Directive contains a precise definition of the infringements along with the rule that they will be subject to effective, proportionate and dissuasive penalties, which may include criminal and administrative penalties. Member States shall insure that ship-sources discharges of polluting substances in internal waters, territorial sea, straits used for international navigation, the exclusive economic zone or equivalent zone and high sea are regarded as infringements if committed with intent, recklessly or by serious negligence. The regime applies to discharges of any ship, irrespective of flag, with the exception of any warship or other ship owned or operated by a State and used only on government non-commerce service.

Should that irregularities or information give rise to a suspicion that the ship, which is voluntarily within the port or an off-shore terminal of a Member State, is engaged in or is engaging in a discharge of pollution substances, that Member State shall ensure that an appropriate inspection, taking into account the relevant guidelines adopted by the International Maritime Organisation (IMO), is undertaken in accordance with its national law. If the next port of call of the ship is in another Member State, enforcement measurers include the provision that the Member States concerned shall cooperate closely in the inspection and in deciding on the appropriate measures in respect of any discharge. In the case that the next port of call of the ship is a port of the State outside the Community, the Member State shall take the necessary measures to ensure that the next port of the ship is notified about the suspected discharge and shall request the State of the next port of call to take the appropriate measures in respect of any such discharge.
3. **COUNCIL FRAMEWORK DECISION 2005/667/JHA OF 12 JUNE 2005 TO STRENGTHEN THE CRIMINAL-LAW FRAMEWORK FOR THE ENFORCEMENT OF LAW AGAINST SHIP-SOURCE POLLUTION**

The provisions on the nature, types and levels of criminal penalties, as mentioned in the Directive, are included in the separate instrument Framework Decision intended to supplement and ensure the effectiveness of the Directive. The parallel Framework Decision is essentially aimed at approximating the levels of criminal penalties covering, among others, articles on the liability of legal persons and penalties against legal persons.

The penalties it imposes include imprisonment for more serious offences and fines or disqualification for performing a regulated activity for the less serious ones. It also takes into account the possibility of holding a legal person responsible for any offence committed for the benefit by an individual with managerial powers or where such an individual has been subject to insufficient supervision. That is, that legal person can be held liable for offence committed for its benefit by any person acting either individually or as a part of an organ of legal person, who have leading position within the legal person based on a power of representation of the legal person or an authority to take decisions on behalf of the legal person or any authority to exercise control within the legal person.

4. **THE EUROPEAN COURT OF JUSTICE CASE C-440/05**

The European Court of Justice (ECJ) on 23 October 2007 in the case C-440/05 Commission of the European Communities v. Council of the European Union annulled the Framework Decision ruling that its articles on the definition of the criminal offence and the nature of penalties have been adopted on the basis of Article 80(2) of the EC Treaty and that the Framework Decision consequently violated Article 47 of the EU Treaty by encroaching upon the powers of the Community. Namely, the ECJ confirmed that the Community may adopt measures aimed at improving maritime safety, including the imposing on Member States of an obligation to envisage criminal penalties for certain conducts. However, determination of the type and level of criminal penalties themselves to be applied does not fall within the Community’s competence and remain therefore with the Member State.

The ECJ finds, as a general rule that neither criminal law nor rules of criminal procedure fall within the Community’s jurisdiction. The fact remains however that when the application of effective, proportionate and dissuasive criminal penalties by national authorities is an essential measure for combating serious environmental offences, the Community may require the Member State to introduce such penalties in order to ensure that the rules which it lays down in the field of environmental protection are fully effective.

In view of the fact that the Framework Decision encroaches on the competence of the type and level which the European Union attributes to the Community and thus infringes the Treaty of the European Union which gives priority to such competence, the ECJ annuls the Framework Decision, which is indivisible, in its entirely. Consequently the
legal vacuum regarding penalties in combating maritime pollution needs to be fulfilled by provisions adopted on the correct legal basis.


The range of a new directive entitled Directive of the European Parliament and of the Council on ship-sources pollution and the introduction of penalties, including criminal penalties, for pollution offences, is focused on the clarification of the nature of infringements, including considering criminal offences sanctioned by criminal penalties, as well as the obligation for Member States to ensure companies to be held liable for criminal offences committed for their benefit and that these companies are subject to penalties of an administrative or criminal nature.

The proposed Directive, covering also the provisions of the annulled Framework Decision, sets only a minimum level of harmonisation with regard to the activities that should be considered criminal offences in addition to only generally establishing that criminal penalties should be applied to natural persons. In that sense it complies with the subsidiarity principle leaving Member States the choice of whether criminal penalties should also apply to legal persons.

As the proposal does not fall under the exclusive competence of the Community, the proposal complies with the subsidiary principle. The new provisions will ensure that infringements against the directive are considered criminal offences and will clarify the scope of liability of companies for offences committed by persons having leading position within that company or being enabled to be committed owing to a lack of control or supervision.

The new Directive is an important improvement on the protection of the environment through criminal law and it is signal that the Community does not tolerate safe havens for offenders who severely damage natural resources. What’s more it seeks to promote the integration into Community policy of a high level of environmental protection in accordance with the principle of sustainable development. The action chosen is a Directive and accordingly Member States are free to maintain or introduce more stringent measures.

6. SHIP-SOURCE POLLUTION AND CRIMINAL PENALTIES

The European Union environmental policy is targeted at high level of protection based on precautionary principle, polluter pays principle, as well as taking preventive action. The European Maritime Safety Agency (EMSA) has a key role to play in working with Member States in developing technical solutions and providing technical assistance. The struggle against intentional or seriously negligent ship-source pollution constitutes one of
Environmental crime usually has cross-border implications, as it often involves trans-boundary activities and often has trans-boundary effects such as resulting pollution to the environment. Instruments of dissuasive nature form an integral part of maritime safety policy, as they ensure a link between responsibility of each of the parties involved in the transport of polluting goods by sea and their exposure to penalties.

The implementation of the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended shows discrepancies among Member States and thus there is a need to harmonise its implementation at Community level, in particular the practice of Member States relating to imposition of penalties for discharges of polluting substances differs significantly.

The scheme of sanctions, as it currently stands in Directive 2005/35/EC and in the Framework Decision 2005/667/JHA as a comprehensive package, only partially gives the effect to the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended. To ensure that penalties are adequate in severity to discourage potential polluters, the different effect of the system of sanctions must be reinforced. After the European Court of Justice annulled the Framework Decision 2005/667/JHA, ruling that parts of it should have been adopted on the basis of the European Union Treaty, its content, within the limits set by the Court, should now be included in the Directive 2005/35/EC.

The current significant differences in sanctions in national legislation of the Member States should be eliminated, at least for particularly serious cases. The frustrating circumstances for which approximation of penalties is foreseen are the particularly serious outcomes of the offences, such as death or serious injury to a person or substantial damage to the environment. Administrative or other financial sanctions may not be dissuasive in cases where offenders are impecunious or, on the contrary financially very strong. In addition, the means of criminal investigation and prosecutions are more powerful than tools of administrative or civil law and can enhance the effectiveness of those procedures.

The new Proposal for a Directive of the European Parliament and the Council amending Directive 2005/35/EC on ship-sources pollution and the introduction of penalties for infringements follows the lines of the judgment and copies the content of the relevant provisions of the Framework Decision 2005/667/JHA which will amend the existing Directive 2005/35/EC. It will clarify which infringements have to be considered as criminal offences and have to be sanctioned as criminal penalties. Besides it will oblige Member States to ensure that companies can be held liable for criminal offences committed for their benefit and that these companies are subject to effective, proportionate and dissuasive penalties of an administrative and criminal nature.
7. CONCLUSION

Criminal penalties, which demonstrate social disapproval of nature different than administrative sanction, strengthen compliance with the legislation against ship-source pollution in force. A minimum standard on the constituent elements of criminal offences need to be established at the Community level.

The vigilance of costal States in relation to prevention and severity of sanctions imposed by criminal courts, together with the publicity these cases have received has helped significantly the number of illegal discharges. Therefore, it is important that the same approach in tackling those crimes is adopted by all Member States, whether acting as flag State, port State or coastal State. Although, as a general rule, neither criminal law nor rules of criminal procedure fall within the Community’s competence, common rules on criminal offences make it possible to use effective methods of juridical cooperation between Member States.

The legal action chosen by the European Union should be a Directive, which leaves Member States a high degree of flexibility in implementation, including definition of the types and levels of penalties. Thus the Proposal for a Directive of the European Parliament and the Council amending Directive 2005/35/EC on ship-sources pollution and the introduction of penalties for infringements provides clear disincentives for irresponsible practices with streamline on sanctions against maritime pollution focused on a small minority operators behaving not responsibly and correctly.

As regards the human rights of seafarers and others there is the need for appropriate safeguards both before and after trial. The European Union adopted the position concluding that ship-source pollution should be sanctioned in conformity with international law, particularly with the United Nations Convention on the Law of the Sea (UNCLOS) and International Maritime Organisation (IMO) Conventions.

In author’s opinion environmental legislation in addition to civil liability system in accordance with the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973/78, as amended, should be reinforced by a system of criminal penalties at the level of the European Community bearing in mind that criminalising unintentional act is counter-productive in that it is a discouragement both for the seafarers and for accident investigation. It should be pointed out that according to the United Nations Convention on the Law of the Sea (UNCLOS), 1982 recognized rights of the accused shall be observed in conduct of proceeding in respect of violations of pollution prevention laws.

REFERENCES


Decision 2850/2000/EC of the European Parliament and the Council of 20 December 2000 setting up a Community framework for cooperation in the field of accidental or deliberate marine pollution, O.J., L 322


The European Court of Justice Case C-440/05 Commission of the European Communities v. Council of the European Union


