

The Protection of Waters against Pollution Caused by Ships through Criminal Law in the European Union

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Abstract: In this paper we examine briefly the provisions of two European legislative acts which establish a punishment criminal system for discharges of polluting substances by ships in the waters under the jurisdiction of EU Member State. Although the two European legislative acts were adopted in 2005, the conducted research is a novelty; it can be useful both to theorists, practitioners in the field, and to the European legislator. The essential contribution in the field is to examine the documents adopted at EU level, as well as the critical opinions formulated, completed also by the need to supplement or taking another piece of legislation, given the new changes in the structure of crime in the area, and the need for effective preventive measures. Also, the paper highlights the need for increased specific activities of judicial cooperation in criminal matters between Member States, by adopting effective legislation, including the territorial jurisdiction and resolve operational conflicts of competence. Also, the paper highlights the need for increased specific activities of judicial cooperation in criminal matters between Member States, by adopting effective legislation, including the territorial jurisdiction and hence the operative resolving conflicts of jurisdiction arising between Member States or between a Member State State not being a member of the European Union.

Keywords: pollutants discharges; crime; criminal liability; EU

1. Introduction

At EU environment was and is a priority, the constant current, the permanent organization and attention to each Member State.

Ensure environment protection involves primarily the adoption of a coherent regulatory framework, both at the organizational level and in each Member State.

In addition to other elements of environmental protection, water protection is at present a different challenge, with major implications for the European construction.

In this context, EU policy aimed at ensuring maritime safety a high level of safety and environmental protection and is based on the principle that all Member States involved in the transport of goods by sea are responsible for the ships used in waters to be in accordance with rules and standards. These concrete standards for discharges of polluting substances from ships are under Marpol Convention 73/78.

However, in the recent years it has been found that the above standard rules are violated and ignored by a large number of ships sailing in the Community waters, and the prevention and control measures taken or not taken, have no practical efficiency.

Given the extent and danger of pollution from ships, it was forced by necessity to adopt some normative acts that would ensure an effective protection of the environment, and also efficient sanctions with deterrent effects. The regulations in question are designed to close the existing legal provisions, especially the exact definition of the infringement, exceptions, minimum rules for penalties, liability and jurisdiction.

Against this background, it was adopted Directive 2005/35/EC of Parliament and the Council of 7 September 2005 on ship-source pollution and the introductions of penalties for infringements¹ and Council Framework Decision 2005/667/JHA of 12 July 2005 Commission to strengthen the criminal law enforcement against pollution caused by ships.

The two European regulations establish general rules of criminal sanction of some acts due which there are produced prejudices because of the pollution caused by ships.²

The need for adopting the two acts was determined by cross-border feature of the prejudices that may result from the unlawful activity of sea or river pollution and the need to enhance the specific activities of judicial cooperation in criminal matters in the European Union, the ultimate goal being that of preventing and combating crime in this particularly sensitive area.

In this paper we examine the two European legislative acts, focusing on the criminal's liability established for physical and legal entities, with some critical comments.

2. Scope, Violations, Exceptions, Measures on Ships

To provide an appropriate framework, within the examined legislative act there were defined places where the discharges of pollutants can determine the occurrence of criminal liability. Thus, in accordance with the depositions of article 3 of the Directive 2005/35/EC of Parliament and the Council, the sanctioning measures within the pollution caused by ships it shall apply in the:

- internal waters and ports of a Member State, insofar as the Marpol regime is applicable;
- territorial waters of a Member State;

¹ Published in the Official Journal of the European Union L 255/11, 30.09.2005.

² Published in the Official Journal of the European Union L 255, 30.09.2005, pp. 0164-0167.

- straits used for international navigation subject to the regime of transit transportation, in accordance with Part III, section 2 of the 1982 United Nations Convention on Law of the Sea, to the extent that a Member State exercises a jurisdiction over such straits;
- exclusive economic area or an equivalent one of a Member State, established in accordance with the international law and
- free sea.

The regulatory provisions of the normative act shall apply in case of discharges of polluting substances from any type of ships, irrespective of their flag, except warships and auxiliary warships and other vessel of a State or exploited by state and used at that time exclusively for a public non-commercial service.

According to the European legislative act, all Member States shall take measures as oil spills polluting substances by ships in the areas specifically mentioned (above), there are considered infringements, if they were committed deliberately, recklessly or following a serious negligence. All these violations (known as such in the European legislative act), shall be considered offenses under the provisions of Framework Decision 2005/667/JHA supplementing the depositions of Directive 2005/35/EC.

However, not all discharges of hazardous substances will be considered crimes, the exceptions on discharges meet the conditions specified in Annex I, Regulations 9,10,11 (a) or 6 (c) of Marpol Convention 73/78, or under the conditions where the discharges are committed by the owner, master or crew when acting under the authority of the commander, in the case where there are met the conditions established in Annex I, Regulation 11 (b) and Annex II, Regulation 6 (b) of MARPOL 73 / 76 (the back and explained).

If the vessel is in the port of a Member State voluntarily or offshore terminal, and some irregularities or information give rise to the suspicion that it was involved or is involved in a discharge of pollutants into one of the areas mentioned above, the competent bodies of the Member State concerned shall conduct a proper inspection in accordance with its national law, taking into account the applicable guidelines of the International Maritime Organization (IMO).

When following the inspection mentioned above, such criminal acts are found (as mentioned in the European legislative act), the authorities of the Member State and the ship's flag State will be informed.

We note that the above mentioned measures will be incident only if they are considered the internal waters including the ports of a Member State.

When it is found that the offenses concerned are committed in a Member State's territorial waters, the straits used for international navigation subject to transit transport, where the Member State exercises its jurisdiction, the exclusive economic zone or high seas, it will proceed as follows:

- If the next call of the ship takes place in a Member State, Member States concerned shall cooperate during the mentioned above investigation, and in subsequent decisions;
- If the next call of the ship takes place in a port of a State not a member of the EU, the Member State will ensure that the ship's next port of call to be informed about the alleged dumping and it will request the next state stops to take appropriate measures regarding the discharge in question.

When the result of the mentioned inspection it is established a clear and objective evidence, which shows that a ship sailing in territorial waters or exclusive economic zone or equivalent zone of a Member State has committed in the last of the places mentioned above a breach that led to discharges that have caused or threaten to cause damage to the coast or related interests of that State or the resource in the areas, the Member State concerned, subject to Part XII, section 7 of the 1982 United Nations Convention on Law of the Sea and in the case where the evidence warrants justifies this fact, the competent authorities will present this issue to forward the action, involving among others the immobilization of the vessel in accordance with the national law.

In all such cases there will be informed obligatory the competent authorities of the flag of the vessel.

All Member States shall take necessary measures for the above facts to be punished proportionately and dissuasively, being included both criminal and administrative sanctions.

3. Criminal Liability of Physical Entities

Given the specific features of environmental offenses, the possibility of their commission by physical and legal entities, in the provisions of Council Framework Decision 2005/667/JHA there were provided different legal rules of criminal sanctioning.

According to Article 2, line (1) of Council Framework Decision 2005/667/JHA, all Member States shall take measures to ensure that discharges of pollutants are considered criminal offenses and punished as such. In minor cases, namely when the act itself does not cause a deterioration of water quality, the Member States may provide for other sanctions, namely administrative, commercial, civil, contravention, etc.

Also, if the mentioned offenses occur in straits used for international navigation, in the exclusive economic areas and at high seas, the crew members will receive a case of non-punishment, when there are fulfilled the conditions established in Annex I, Regulation 11 (b) or Annex II, Regulation 6 (b) the Marpol Convention 73/78.

Also, each Member State shall take measures to punish the complicity and inciting to such offenses.

By the two European regulations there are set a series of specific conditions relating to penalties that should be provided under the national laws of Member States for abetting the discharge of pollutants in the places expressly mentioned.

Thus, a first condition concerns the establishment of an effective, proportionate and dissuasive sanction, which must include, at least in serious cases, the maximum prison sentence of one to three years, both for authors, as well as instigators or accomplices.

The mentioned above penalties, may be accompanied by other sanctions or measures, in particular fines or loss of right to exercise an activity requiring an official authorization or approval, or the loss of being a founder, director or member of the Administration Board of a company or foundation, in the case where the facts led to conviction show an obvious risk of exercising the same type of criminal activity.

Such offenses committed deliberately must be punishable by maximum imprisonment of at least five to ten years if the offense caused significant and widespread damage to water quality, species of animals and plants or on some parts thereof, and death or serious injury to persons.

Also, each Member State will ensure that the offenses committed deliberately are punishable by maximum imprisonment of at least two years to five years in the following cases:

- the offense caused significant and widespread prejudices to water quality, species of animals or plants or parts thereof, or
- the offense was committed in the case of a criminal organization as defined in 98/733/JHA Joint Action of 21 December 1998 of the Council concerning the incrimination of participation in a criminal organization in the Member States of the European Union,¹ regardless of the level of the provided penalty.

In the case where the crimes were committed by serious negligence, they must be provided with maximum prison sentence of at least two to five years, when the result consisted in significant prejudices which were spread on the water quality, species of animals or plants or to parts thereof and the death or serious injury to persons.

When the offense is committed with serious negligence that caused significant and widespread damage to water quality, species of animals or plants or the parts thereof, the maximum penalty is imprisonment of at least one to three years.

¹ Published in Official Journal L 351 of 29.12.1998, p 1.

4. Criminal Liability of Legal Entities

Each Member State shall take measures to ensure that the legal persons can be held liable for the mentioned offenses, where they were committed for their benefit, by persons acting either individually or as part of an organ of the legal entity which holds a leading position, based on:

- A document of representation of the entity, or
- An authority to make decisions in the name of the legal entity, or
- An authority of exercising the control at the level of the legal person.

Also, the Member States shall take measures that besides the mentioned above cases, the legal entity is criminally held responsible where through the lack of supervision or control exercised by an authorized person, the offense was committed for the benefit of the legal entity, by a person under his authority. The liability of the legal entity will not exclude the liability of the physical entity, as it quality of author, instigator or accomplice to the commitment of the crime.

In these situations, the legal author persons, accomplice or instigator in an offense of this kind, will be sanctioned with criminal or contravention fines or other sanctions.

The fines will be for the most serious crimes, ranging from a maximum of at least 750,000 to 1500000 EUR, and for less serious offenses, the maximum of at least 150000 EUR to 300000.

Meanwhile, other sanctions will be:

- measures of exclusion from the benefit of an advantage or help of public origin;
- temporary or permanent disqualification to engage in a commercial activity;
- placing under judicial supervision;
- a judicial liquidation measure;
- the obligation to adopt special measures to repair the consequences of the offense that attracted the legal entity liability.

Regarding the fine, it must be proportionate to the turnover of the legal entity, the financial advantage achieved or envisaged by the offense or any other value indicating the financial situation of the legal entity, under the condition that such system authorizes maximum values, at least equal to the minimum with the minimum of the established fines.

5. Jurisdictional Competence

Each Member State shall adopt appropriate legislative measures establishing the criminal competence and judgment, when the offense was committed in the following places:

- a) all or part of its territory;
- b) in the exclusive economic zone or in an equivalent area determined in accordance with international law;
- c) on board of a ship that approaches its flag;
- d) by one of its nationals, if the offense is punishable under criminal law where it was committed or in the case where the place where it was committed does not fall under any territorial jurisdiction;
- e) is in the benefit of a legal entity whose headquarters is situated on its territory;
- f) outside its territory, but has caused or threatens to cause pollution in its territory or its economic zone, and the ship is voluntarily within a port or offshore terminal of the Member State;
- g) the seas, and the vessel is voluntarily within a port or offshore terminal of the Member State.

In relation to its interests, any Member State may decide not to apply in specific cases or circumstances the competence norms referred to above in points d) and e).

In the case where an offense falls under the competence of several Member States, they will cooperate as regards the conditions under which the consequences are sought, and mutual aid rules.

Effective establishing of the prosecutorial and judgment competence it will be set according to the following elements:

- the Member State in whose territory, in whose exclusive economic zone or equivalent zone, the offense was committed;
- the Member State in whose territory, exclusive economic zone or equivalent area there are produced the effects of the offense;
- the Member State in whose territory, in whose exclusive economic zone or equivalent zone passes the ship from which the crime was committed;
- the Member State of the offender is a national or resident;
- the Member State in whose territory the legal entity has his headquarters in whose behalf the offense was committed;
- the flag of Member State whose ship the offense was committed.

The depositions of the European the law, which relate solely to the rules of jurisdiction in criminal matters, are applicable only in cases expressly provided.

Each time, where the discharges of pollutants occurred in inland waters of a member State, and the consequences have not been sustained by another Member

State, the prosecutorial and judgment competence will always belong to the judicial authorities of the internal law of the Member State in question.

We find that the judicial rules presented above, which determine the competence of investigating and prosecuting authorities in special situations, normally can cause a conflict of jurisdiction between two or more Member States, according to socially dangerous result that occurred, the actual damage caused by the discharge of hazardous substances.

Under the conditions of a positive conflict of jurisdiction between two or more Member States, it may be solved by taking into account the provisions specified in the European legislative act based on judicial cooperation between judicial authorities of the Member States concerned.

6. Conclusions

There is no doubt that the environmental protection in general and especially the aquatic environment, represent a major objective assumed by the European Union.

Thus, the global practice in this area has revealed that no international regime on civil liability and the compensation in case of oil pollution nor that relating to pollution or harmful hazardous substances does provide sufficient dissuasive effects to discourage the parties involved in the transport of dangerous cargoes by sea as to use practices below the standards.

Under these circumstances, it was highlighted the growing problem that in this area there should be adopted a uniform law to secure a safer deterrent effect, by introducing penalties that should be imposed on any person who causes or contributes to marine pollution, i.e., owner or commander of the ship, cargo owner, classification society or any other person involved.

In addition to adopting an effective legislative framework, the most important measure to contribute directly to preventing and combating crime more effectively is represented by increasing specific activities of judicial cooperation between Member States. (Boroi, Rusu & Blan-Rusu, 2012, p. 104)

Enhancing judicial cooperation between Member States can be performed under the European Convention on the Transfer of Proceedings in Criminal Matters, which represents a European instrument, under which the Member States, on the basis of mutual trust, organizes an international organized crime prosecution to punish all those offenders and to avoid risks which may arise as a result of conflicts of jurisdiction. (Boroi & Rusu, 2008, p. 355)

The existence of incomplete international legal norms and sometimes inapplicable, or with an effect that does not achieve its purpose, are all reasons to adopt an effective discouraging legislative framework in the European Union.

In this context there were adopted the two examined legislative acts establishing a series of penalties for both physical and legal entities involved and it gives a certain competence of prosecution and judgment to the Member States.

The establishment of some measures to sanction the physical and legal entities responsible for pollution by ships, gives better protection of the aquatic environment of the EU Member States.

However, the two European legislative acts may be supplemented with new legal rules, due to structural changes occurred in the recent years in this particularly sensitive area.

Thus we consider the completion of two acts or the adoption of such other legislative document to institute rules of jurisdiction in positive or negative conflicts of jurisdiction between one or more Member States and a State not a member of the European Union.

Given the seriousness of these crimes through the eyes of sometimes unimaginable consequences, difficult to quantify, in terms of destruction of marine flora and fauna, or other serious consequences related to health and life of physical entities, we consider that the minimum and maximum penalties should be increased.

7. Bibliography

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