

**POLLUTION LEGISLATION IN THE UK AND THE EU**  
**- AN OVERVIEW**

**THE MERCHANT SHIPPING ACT AND MARINE POLLUTION PREVENTION**

The Secretary of State's powers to make Orders and regulations for the prevention of marine pollution from ships, including the power to implement relevant international conventions, are derived from Section 128 of the Merchant Shipping Act 1995 ("MSA 1995"). The principal international instrument relating to the prevention of marine pollution is, to give it its full title, the International Convention for the Prevention of Pollution from Ships 1973 as amended by a Protocol thereto in 1978, collectively referred to as MARPOL 73/78.

**MARPOL 73/78**

This covers prevention of pollution of the marine environment by ships from operational or accidental causes and currently includes six technical annexes:

- Annex I      Regulations for the Prevention of Pollution by Oil  
  
**Entered into force in the UK and internationally on 2 October 1983**
  
- Annex II     Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk  
  
**Entered into force in the UK and internationally on 6 April 1987**
  
- Annex III    Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form  
  
**Entered into force in the UK and internationally on 1 July 1992**
  
- Annex IV    Prevention of Pollution by Sewage from Ships  
  
**Entered into force in the UK on 27 September 2003**
  
- Annex V     Prevention of Pollution by Garbage from Ships  
  
**Entered into force in the UK and internationally on 31 December 1988**
  
- Annex VI    Prevention of Air Pollution from Ships  
  
**Adopted in September 1997 but not yet in force**

**ENFORCEMENT**

Any violation of MARPOL 73/78 within the jurisdiction of any party to the Convention is punishable either under the law of that party or under the law of the flag State.

Article 4 of MARPOL 73/78 requires that signatories cause proceedings to be taken as soon as possible in accordance with its law against the ship flying its flag where

there is sufficient evidence to satisfy itself that a violation has occurred. Where the violation has occurred in another signatory's jurisdiction the latter signatory shall either:

- a) Cause proceedings to be taken in accordance with its law; or
- b) Furnish the flag State with such evidence and information in its possession whereupon the flag State is required to promptly inform the signatory of any action taken.

The penalties specified under the flag State's law are required to be adequate to discourage violations of MARPOL 73/78 and equally severe irrespective of where the violation occurs.

## **PENALTIES**

Penalties for infringement of the various Annex's to MARPOL 73/78 are set out in the MSA 1995 and subordinate legislation made there under.

For example the master and owners are liable in respect of:

- Illegal discharge of oil (including operational discharge infringements) to a fine of up to £250,000 on summary conviction or an unlimited fine on indictment<sup>1</sup>
- Failure to maintain the Oil Record Book to a fine of up to £5,000 on summary conviction<sup>2</sup>
- Falsified or misleading entries in the Oil Record Book to a fine of up to £5,000 or 6 months imprisonment or both or an unlimited fine or 2 years imprisonment or both on indictment<sup>3</sup>

With the exception of very small vessels, ships engaged in international voyages must carry on board valid international certificates which may be accepted at foreign ports as prima facie evidence that the ship complies with the requirements of the Convention.

If there are clear grounds for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of the certificate, or if the ship does not carry a valid certificate, the authority carrying out the inspection may detain the ship until it is satisfied that the ship can proceed to sea without presenting unreasonable threat or harm to the marine environment.

## **THE ROLE OF THE MCA**

In 1998 the Marine Safety Agency (MSA) and HM Coastguard (HMCG) merged to become the Maritime and Coastguard Agency. The MCA is responsible for implementing the UK Government's maritime safety policy including checking that ships meet UK and international safety rules. This latter role is the responsibility of the Inspection Branch and its survey staff. If a breach of Merchant Shipping legislation is suspected then the matter may be handed over to the Enforcement Unit who may prosecute offenders where appropriate.

## **ENFORCEMENT OFFICERS AND THEIR POWERS**

---

<sup>1</sup> Merchant Shipping (Prevention of Oil Pollution) (Amendment) Regulations 1997

<sup>2</sup> Section 142(7) of the MSA 1995

<sup>3</sup> Section 142(8) of the MSA 1995

Section 256 of the MSA 1995 grants the power to the Secretary of State to make appointments of persons as “surveyors of ships” and “inspectors”. These are two very different beasts and it is important to distinguish between their roles and the powers conferred upon them.

### **Surveyor of Ships**

The powers of a surveyor of ships are described in Section 258 of the MSA 1995, which in summary includes the right to board any ship in the UK or UK waters (subject to rights of innocent passage) at any reasonable time for the purposes of inspecting the ship and its equipment and documents carried in pursuance of the Act. His role therefore is for the purposes of seeing that the provisions of the Act are complied with. Self-evidently this includes compliance with MARPOL 73/78 and where it is suspected that a breach of the Regulations has taken, or is taking, place the matter may be handed over to the Enforcement Unit for purposes of prosecuting an offender.

If the matter is investigated with a view to prosecution the suspect will be questioned in accordance with the Police and Criminal Evidence Act (PACE) 1984 by a surveyor of ships including the issuing of a caution advising the right to remain silent.

### **Inspectors**

An inspector’s powers are those described in Section 259 of the MSA 1995 and essentially are those exercised by inspectors of the Marine Accident Investigation Branch (MAIB).

The role of an inspector is to investigate marine accidents, which in the context of marine pollution includes an investigation into an incident whereby a ship causes significant harm to the environment<sup>4</sup> and his powers are far wider than that of a surveyor of ships. Significantly an inspector has the power to require a person (who he reasonably believes is able to assist in his investigation) to answer any questions the inspector thinks fit to ask and to sign a declaration of truth of his answers. There is no right to silence and indeed penalties apply if answers are withheld. Public policy recognises however that a person should be protected from self-incrimination and no answer given is admissible in evidence against that person in any proceedings.

It is essential therefore that any person being questioned by enforcement officers is clear as to his rights. These rights will normally be made clear by the enforcement officer but if in doubt legal advice should be obtained.

**NB:** Every enforcement officer should carry a warrant conferring the requisite powers of the Secretary of State and identifying the relevant sections of the MSA 1995 under which his authority is given:

- (a) If he is appointed by the Secretary of State under Section 256(2) he is a surveyor of ships and appointed for purposes of enforcement of the Act and the right to silence exists; International Convention for the Prevention of Pollution from Ships 1973 as amended by a Protocol thereto in 1978, collectively referred to as MARPOL 73/78.
- (b) If he is appointed by the Secretary of State under Section 256(6) he is an inspector for the purposes of investigating an accident and no right to silence exists.

### **THE EU SHIP-SOURCE POLLUTION DIRECTIVE**

---

<sup>4</sup> The Merchant Shipping (Accident Reporting and Investigation) Regulations 2005

The European Commission put forward a proposal for a Directive on ship-source pollution in 2003. Directive 2005/35/EC of the European Parliament and of the Council was created on the 7th September 2005.

The purpose was to incorporate international standards for ship-source pollution into community law and to ensure that persons responsible for discharges are subject to adequate penalties in order to improve maritime safety and to enhance protection of the marine environment from pollution based ships.

### **Reasons behind the Directive**

- The “PRESTIGE” accident in February 2002 highlighted the need to regulate ship-source pollution more stringently.
- Although all Member States are signatories of the MARPOL 73/78 Convention, the rules are ignored on a daily basis by a very large number of ships sailing in community waters, without corrective action being taken.
- The implementation of MARPOL 73/78 shows discrepancies among Member States - in particular the practices of Member States relating to the imposition of penalties for discharges of polluting substances from ships differ significantly.
- Further effective co-operation amongst Member States is necessary to ensure that discharges of polluting substances from ships are detected in time and that the offenders are identified.

These issues led the Commission and Council to the conclusion that in order to achieve effective protection of the environment, there had to be:

- effective, dissuasive and proportionate penalties i.e. criminal offences and penalties.
- synergies created between enforcement authorities such as National Coastguard Services.
- a European Coastguard dedicated to pollution prevention and response.

### **THE DIRECTIVE AND ITS SCOPE**

The scope of the Directive is extremely broad in terms of what it applies to, who it applies to and the areas it applies to.

- **What it applies to** – Article 2 - Definition of “*discharge*” - any release howsoever caused from a ship.
- **Areas it applies to** – Article 3 - The Directive applies to discharges of polluting substances in:
  - internal waters, including port, of the member’s State;
  - territorial seas of a member’s State;
  - exclusive economic zone or equivalent zone of a member’s State, established in accordance with international law; and
  - the high seas.

- **When it applies** – Article 4 - **ANY** ship-source *discharge* will be an infringement if committed with *intent, recklessly, or by a serious negligence*.
- **Who it applies to** – The Directive applies to **anyone** involved in the pollution  
- Master, crew, salvor, charterer, Class etc.

The only exceptions to this are in Article 5 - Outside of territorial seas, the owner, Master and crew can rely on the MARPOL defence of operational discharge. However, within territorial seas, the MARPOL defence is not available to anyone.

## ENFORCEMENT MEASURES

- **Within Member State Port** - Article 6 - If there is a suspicion that a ship has been engaged in or is engaging in a discharge of polluting substances, when it is in a port or at an offshore terminal of a Member State, that Member State must carry out an appropriate inspection. If this inspection reveals facts that could indicate an infringement, the competent authorities of that member's State and of the flag State must be informed.
- **Ships in Transit-** Article 7 - If the suspected discharge is outside of the internal waters of a Member State and the ship does not call at a port of the Member State, if the next port of call is another Member State, the Member States concerned must co-operate closely in the inspection and in deciding appropriate measures in respect of any discharge. If the next port is a state outside of the community, the Member State shall take necessary measures to ensure that the next port of call is informed of the suspected discharge.

## PENALTIES

Member States must take the necessary measures to ensure that infringements are subject to effective, proportionate and dissuasive penalties, which may include criminal or administrative penalties.

This part of the directive is controversial due to the broadness of its scope and that a great number of people could fall under the Directive and be party to criminal penalties.

## THE DIFFERENCES BETWEEN MARPOL AND THE DIRECTIVE

### MARPOL

- Distinguishes between operational and accidental discharges.
- MARPOL sets out when operational discharges will not be prohibited, i.e. when conditions are complied with.
- Accidental discharges where all reasonable precautions have been taken to prevent or minimise the discharge where the owner/Master acted without intent or recklessly with knowledge are not breaches.

### Directive

- No distinction between operational and accidental discharges.
- Criminal liability for infringement if committed with intent, recklessness or by "serious negligence".

- Applies within the territorial seas, EEZ and on the high seas.
- Applies to owner, Master, crew, salvor, Charterer, Class, etc.
- Within territorial seas, MARPOL defence (of operational discharge falling within the three requirements) is not available. (However, outside of territorial seas, the owner, Master and crew can rely on the MARPOL defence)

## **THE CONTROVERSY**

The Directive is controversial due to its broad scope. The aspect which has attracted most attention is the criminalisation of pollution caused by “*serious negligence*”.

Due to the broad scope of the directive in relation to the type of pollution it affects (accidental and operational), geographical location (anywhere within the EU), those who can be punished (i.e. anyone who is seriously negligent meaning that charterers, Classification Societies, salvors and other may find themselves facing criminal proceedings even though the pollution was caused accidentally) and the fact that the expression “serious negligence” is said to be imprecise and could be open to interpretation by a Court.

Because of this, the Directive has been challenged by a number of industry bodies headed by Intertanko. They petitioned to the European Court of Justice to consider the legality of certain features of the Directive, particularly in relation to the areas of potential conflict with MARPOL.

The case was referred to the ECJ for review on four key issues:

- Whether it is lawful for the EU to impose criminal liability in respect of discharges from foreign flag ships on the high seas or in the exclusive economic zone, and to limit MARPOL defences in such cases.
- Whether it is lawful for the EU to exclude MARPOL defences for discharges in the territorial sea.
- Whether the imposition of criminal liability for discharge is caused by “serious negligence” hampers the right of innocent passage.
- Whether the standard of liability in the Directive of “serious negligence” satisfies the requirement of legal certainty.

Until the ECJ ruling comes out, it is unclear what will happen with regards member’s states implementing the Directive. The UK has not implemented the Directive yet, however, if ECJ do find that the Directive is lawful, then the UK will have no choice but to implement the Directive. The ruling won’t be made until the end of 2007 at the earliest.

It has been reported that Cyprus, Malta and Greece do not intend to implement the Directive pending the ECJ ruling, but Spain, Belgium, Germany, Estonia, Czech Republic, Sweden and the Netherlands have done so.

## **THE COMMISSION’S RESPONSE**

In April 2007, the Commission Vice President in charge of transport said in a press release:

*“We must get tough on illegal discharges and gross negligence must be fought at all cost: the threat of criminal penalties hanging over polluted heads will help to protect our coasts. We cannot tolerate deliberate pollution or gross negligence by a minority of operators who tarnish the image of the shipping industry.”*

It shows that the Commission is serious in relation to the implementation of the Directive and the imposition of criminal penalties on anybody who is found to be seriously negligent and contributed to pollution.

### **FURTHER ACTIONS TO BACK UP THE DIRECTIVE**

The European Maritime Safety Agency (“EMSA”) has created a new unit in order to handle the expansion of its pollution monitoring task.

On 1st April 2007, EMSA’s pollution related activities were split between the Oil Pollution Response Unit and the Pollution Preparedness and Detection Unit.

The Oil Pollution Response Unit will focus on contract acknowledgement of oil recovery vessels; research, evaluation and innovation; as well as operational activities and fleet management.

The Pollution Preparedness and Detection Unit will focus on co-operation arrangements, development of satellite monitoring services, and satellite monitoring operations.

An expert user group is also being set up to ensure an effective interface between the EMSA and the 27 member states.

The EMSA says the agency is now ready for spill spotting from space and in March, EMSA launched its CleanSeaNet system to provide EU Member States with processed satellite data for the monitoring and detection of illegal discharges and accidental oil spills at sea.

This service will ensure that when Member States implement the Directive, they will be given the necessary support so that marine pollution monitoring and detection can be done on a wider and more sustainable scale.

As a result of this, major oil companies are going beyond safety requirements and seeking oil tankers equipped with high end voyage data recorders in an effort to boost marine maritime safety and track accidents. Between 2007 and 2011, the international maritime organisation will require all ships to be retrofitted with a voyage data recorder, similar to a black box on an aircraft.

In addition to increasing maritime safety, the recorders will help to protect ship’s crew from allegations of improper protocols. The high end data recorders will track any given order to its execution and the response from the ship’s equipment.

### **ACTIONS TO BE TAKEN IF DIRECTIVE IS BREACHED**

The North of England P&I Association Ltd gave the following advice in its July 2007 Newsletter.

Future pollution incidents are likely to be handled by local police and relevant prosecuting authorities (E.g. the Maritime Coastguard Agency in the UK) in a similar way to any other criminal infringements

The person charged with an infringement may therefore have a right to silence, legitimately refusing to answer potentially incriminating questions. However this must be approached with caution and with the benefit of legal advice before it is invoked as remaining silent can lead to adverse inferences being drawn.

It is strongly recommended that legal advice be obtained first before there is any refusal to answer questions that may be asked by the relevant authorities.

It is important to remember that there is a distinction between the carrying out of an inspection and an investigation that may lead to the bringing of charges. During an inspection full and frank cooperation should be given, questions should be answered and any right to silence should not be exercised.

Failure to cooperate during an inspection may make it more likely that a formal investigation will be launched and that charges will be brought. On the other hand good cooperation in an inspection may actually benefit anyone who is later charged and may help to mitigate the penalties.

Owners and crew who take reasonable steps on discovery of a pollution incident will be viewed more favourably than those who do not. It is more likely to be in their interests to be open and cooperative from the outset.

However once an inspection becomes an investigation that may lead to the bringing of legal action, it may become appropriate to exercise any available right to silence, subject to advice from local lawyers.

**Ron Clark**  
**Admiralty Manager**

**Shipping Group**  
**Reed Smith Richards Butler**