

POLLUTION LEGISLATION IN THE UK AND THE EU –AN OVERVIEW

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The business of relationships.

SECTION 128 MERCHANT SHIPPING ACT 1995

- International Convention for the Prevention of Pollution from ships 1973 as amended by a Protocol thereto in 1978
- MARPOL 73/78

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- Prevention of pollution by operational & accidental causes
- Six technical annexes
 - I. Oil UK & internationally 2 October 1983
 - II. NLS UK & internationally 6 April 1987
 - III. Packages UK & internationally 1 July 1992
 - IV. Sewage UK & internationally 27 September 2003
 - V. Garbage UK & internationally 31 December 1988
 - VI. Air Adopted September 1997

ENFORCEMENT

- Violations punishable in coastal or flag state
- Article 4
 - Proceedings by flag State ASAP
 - Any other signatory to cause proceedings according to own law or furnish flag State with evidence and be advised by flag State of outcome
- Penalties
 - Must be adequate to discourage
 - Equally severe irrespective of location

PENALTIES UNDER UK LAW

- MSA 1995 & subordinate legislation
- Illegal discharge of oil - £250,000 (SC) or unlimited fine (I)
- Failure to maintain ORB - £5,000 (SC)
- Falsified/misleading entries in ORB - £5,000 or 6 months imprisonment or both (SC) or unlimited fine or 2 years imprisonment or both (I)
- Detention

ROLE OF MCA

- Merged MSA & HMCG in 1998
- Responsibilities include:
 - Implementing UK safety & pollution policy
 - Checking ships meet UK and international standards
 - Inspection Branch
 - Enforcement Unit

ENFORCEMENT OFFICERS

- Section 256 MSA 1995
 - Surveyor of ships
 - Inspectors

SURVEYOR OF SHIPS

- Section 258 MSA 1995 outlines powers
- Role is to ensure compliance with Act
- Includes MARPOL 73/78
- Can board
 - Any ship in UK waters (NB rights of innocent passage)
 - At any reasonable time
 - For inspection of ship, equipment & documents carried pursuant to Act
- Penalty for obstruction

INSPECTORS

- Section 259 MSA 1995 outlines powers
- Role is to investigate marine accidents
- Includes where ship causes “*significant harm*” to the environment
- Powers far wider than surveyor of ships
- Includes power to require a person to answer questions and sign declaration of truth
- No right to silence
- Penalty if answers withheld
- No self-incrimination

CAUTION

- Important to know who dealing with and identify rights
- Warrant card
- S. 256(2) is surveyor of ships = enforcement = right to silence
- S. 256(6) is inspector = investigation of accident = no right to silence

EU SHIP-SOURCE POLLUTION DIRECTIVE

- Directive 2005/35/EC created on 7 September 2005
- Reasons
 - PRESTIGE 2002
 - MARPOL 73/78 routinely ignored without corrective action
 - Inconsistency among community members
 - Co-operation needed to detect, identify and punish
- Conclusions
 - Effective, dissuasive and proportionate penalties
 - Establishment of European Coastguard dedicated to pollution prevention and response

SCOPE OF THE DIRECTIVE

- Applies to what?
 - Any release from a ship howsoever caused
- Applies where?
 - All community waters including their EEZ's and high seas
- Applies when?
 - Any discharge is an infringement if committed with intent, recklessly or by serious negligence
- Applies to who?
 - Anyone involved i.e. master, crew, owner, salvor, charterers, class etc.
- Exception
 - MARPOL defence of operational discharge allowed only outside territorial waters

MARPOL 73/78 COMPARED WITH EU DIRECTIVE

- MARPOL 73/78
 - Distinguishes between operational and accidental discharge
 - Operational discharges allowed when conditions complied with
 - Accidental discharge not punishable if reasonable precautions taken to prevent/minimise and no intent or recklessness with knowledge

DIRECTIVE

- No distinction between operational and accidental discharge
- Criminal offence where intent, recklessness or “*serious negligence*” involved
- Applies within community waters, their EEZ’s and high seas
- Wide application to master, crew, owner, salvor, charterers, class etc.
- MARPOL operational discharge not allowed in Member’s territorial waters

THE CONTROVERSY

- “*Serious Negligence*” imprecise and open to interpretation
- Departure from MARPOL 73/78
 - Within Member’s territorial waters for operation discharge
 - Accidental discharge punishable
- Broad scope of persons who may be punished, particularly for accidental discharge

INDUSTRY RESPONSE

- Directive challenged in European Court of Justice
- Led by INTERTANKO
- 4 key issues
 - Issues of EU imposing criminal liability on foreign flag ship in EEZ and high seas
 - Legality of EU excluding MARPOL 73/78 defences in territorial waters
 - Whether criminal liability for discharge caused by “*serious negligence*” hampers right of innocent passage
 - Whether standard of liability resulting from “*serious negligence*” satisfies requirement of legal certainty

ECJ RULING

- Not likely before end of 2007
- Until then:
 - UK not to implement Directive
 - Cyprus, Malta, and Greece following suit
 - Implemented by Spain, Belgium, Germany, Estonia, Czech Republic, Sweden & Netherlands
- Uncertainty

IN THE MEANTIME

- NEPIA July 2007 NEWSLETTER advises:
 - Pollution incidents likely to be investigated by enforcement bodies
 - Maybe right to silence
 - In some circumstances adverse inferences can be drawn from silence
 - Strongly advised to obtain legal advice
 - Distinguish between inspection and investigation
 - Co-operation during inspection may assist in mitigating penalties
 - Use caution when inspection becomes an investigation

THANK YOU

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