

The Eighth Cadwallader Memorial Lecture - The Extra-Territorial Jurisdiction in Criminalisation Cases: Sovereign Rights in Legislation and New Risks for the Shipping Industry

1. Importance of Shipping for the EU

The European Commission's objective in shipping policy is to promote quality shipping, provide a level playing field for our quality minded operators competing in the Global market, thus improving the competitiveness of the EU fleet. At the same time we have to protect our 70.000 kms of coastal patrimony.

Our policy responds to the needs of European industry, but also of European Citizens. Ignoring their needs is not an option.

- Over the last decade, shipping has gradually been included as an important asset in the economic policy and law making of the European Union and its Member States. **Shipping is a key factor in the EU's economic life** and a fundamental element in our international trade relations. It would be worth mentioning here that the EU is the largest trading area in the world accounting for more than 20% of world trade¹ and that 90% of the Community's external trade, and about 40% of intra-community trade, is carried by sea.

- The **EU registered trading fleet** totals 8.690 vessels, representing more than 24% of the world tonnage. At the same time the share of the EU controlled fleet amounts for 38% of the world tonnage,

¹ European Commission, DG TRADE Website.

while the EEA residents (EU plus Norway & Iceland) control some 43% of the world trading fleet.²

Around 30% of the total seafarer workforce, that is about 220,000 seafarers, are EU citizens, currently employed essentially on EU vessels. Employment in the wider European maritime sector and related industries, including notably shipping company offices, agencies, shipyards, equipment manufacturers, maritime services, ports and terminals is estimated to be around 3 million people.

Therefore very high political and economic importance of shipping for Europe underlines the necessity of an active policy approach by the EU and its Member States. An approval that takes into account its global nature of business and reflecting the new world market, the economic and regulatory environment.

The EU has become, as a matter of fact, a major player in the shipping regulatory environment.

- The European Community is more and more actively involved with shipping issues covering a wide range of topics namely: maritime safety and maritime security and the protection of the marine environment but also the human element and its role in the broad maritime cluster, cabotage regulations, competition and liberalisation rules, research and financing, and last but not least, market access for maritime services and maritime external relations. Those who are familiar with the Brussels “machinery” will agree with me that competences in all these areas, transferred by law on an EU level, are growing day by day increasing the EU’s impact and influence on the international maritime scene.

² European Commission, DG TREN, Maritime Vade Mecum, April 2005.

Incentive measures are in place which aim at promoting EU shipping, such as the Community guidelines on state aid to the maritime sector and the “tonnage tax “schemes”, the multimillion € funding related to the Motorways of the sea, the Marco Polo programme, Transeuropean Transport Networks or Short Sea Shipping programmes, all aiming at moving more cargo from the congested roads to the sea.

2. **EC and EU** - I will come to this later on; beforehand I owe you a few words about the EU system itself for those of you who may not be familiar with it. The following information would be a precondition for a better understanding of the remaining parts of my speech.

The Commission is to prepare draft legislation. EP and Council - or Council alone – are to examine it and after a (long) negotiation process, to jointly adopt it. The legislation as adopted is the final product, which might not reflect the Commission’s original proposal. Commission's role is to explain, defend and control the application of the EU legislation as ultimately adopted.

I wish to give you some further information on the characteristics of the European legislation.

- **We have EC legislation like** Directives or Regulations which are adopted jointly by EP and Council through co-decisions. This is the traditional Community system which proves its efficiency with the ultimate intervention of the EC Court of Justice, which ensures that in the interpretation and application of the EC treaty, the law is observed. We do not hesitate at all to take Member States to the Court and there is a long list of cases already in the Court for certain elements, like for example, not respecting our directive on

imposing the application of the rules on the places of refuge, or lately with the “reception facilities” (for residues of engines, etc.)

- And we have **EU legislation like Framework Decisions** which are adopted unanimously by the Council only: this is the classic intergovernmental cooperation method with no monitoring system to ensure strict compliance. Just like IMO Conventions.

3. **Positive/negative** - It is no news to say that Europe is perceived in two ways:

- as a positive force when giving urgency to the implementation and enforcement of IMO Conventions and helping to improve the performance of its Member States when harmonising provisions (e.g. avoiding 25 MS dif. Legislation or giving incentives to industry).
- a less positive force when we take initiatives that push International legislation to move forward e.g. phasing out of single Hulls tankers or with e.g. criticisms that the EU wants to "criminalise" seafarers. All this comes from a misperception. Criminalisation was the subject-matter of last year's Caldwell lecture. Now I would understand that time has gone by and misunderstandings and emotions have been put aside.

4. **New legislation on ship source pollution: its status** - My role in this panel is to give you an overview of this new piece of legislation with a first emphasis on its present and future status.

4.1 **present status** - First there are two legal instruments: a Directive and a complementary Framework Decision (refer to my words earlier on the Community and the inter-governmental working methods); they were

adopted formally the same day and were published last week in the Official Journal of 30 September. Member States will have to implement the two texts by April 2007.

- 4.2 **future status** - I will be longer on this point. I have now to refer to what appears to be the key provision of the set of legislation: the provision whereby Member States are required to impose criminal sanctions for serious offences.

At the time when the two instruments on ship source pollution were negotiated, there was a dispute between on the one hand the Commission and the European Parliament and on the other hand the Council. This dispute had to do with the adoption by the Council in 2003 of a Framework Decision on the protection of the environment through criminal law. The Commission and European Parliament claimed that this Framework Decision must be annulled since it should be for an EC instrument not an EU instrument to require Member States to use criminal sanctions for violations of EC environment law. In a nutshell, the question was: where should the splitting be between Community and intergovernmental?

This dispute was referred to the Court of Justice.

Pending the Court ruling, the negotiations on the ship source pollution proposal, which started in 2003, were threatened to be blocked but the legislator decided ultimately to proceed with the adoption of the texts along the following lines:

The directive provides in its Article 4 that discharges are regarded as infringements, whilst the Framework Decision provides in its Article 2 that the infringements are regarded as criminal offences. In other words, the "incrimination" does not appear in the Community instrument, but in

the intergovernmental instrument instead: the same splitting as for the environmental case referred to the Court.

Now the Court issued its ruling on the 13 September 2005 in this environmental case.

The Court confirmed the position of the Commission. Although, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, that does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures that relate to the criminal law of the Member States; measures which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

This reasoning appears to be transposable to other policy areas like maritime transport indeed.

The Commission has not made up its mind yet, but it may be appropriate to amend the Directive with a view to align it with the Court ruling.

This will be a kind of "reformattage à droit constant", with no change on the substance elsewhere in the texts.

The consequence would be at the end of the day that we would have the means – which we do not have right now - to ensure that all over Europe, the same dissuasive sanctions would be applicable in case of pollution, and be controlled by the European Court of Justice.

5. **The case with accidental discharges** - I have to address now the core provision on the definition of illegal discharges.

5.1 **Objective** - Throughout the negotiation on this legislation, we had very clearly in mind the objective: to set up a dissuasive scheme where all operators are actually sanctioned if at fault. Responsibilise not criminalise!

There are two elements:

- The intention is to cover the whole chain of responsibility and liability. This is a key point in our legislation which is not properly addressed by international standards.
- The unacceptable behaviours are strictly defined, in a way which is in line with modern penal law: intention, recklessness or serious negligence. Here I insist that the word "serious negligence" was agreed upon by all Governments (Ministers of Justice and of Transport and of Environment) who considered this was in line with their national terminology.

But we had to make sure this objective is legally feasible under international standards.

5.2 **International standards on the substance** - You might be familiar with MARPOL which, in its Annex I Regulation 11, clarifies the conditions under which the owner and the master are to be sanctioned. This leads me to address the following:

- (a) MARPOL only speaks about the owner and the master: does it leave untouched the rest of the transport chain who could have caused or contributed to the pollution? In other words: what about the chain of liability?

Now, the directive fills in the regulatory gap by establishing that sanctions for pollution infringements will be applicable to any party

found responsible, the master, the owner, the manager, the charterer, the classification society, the port authority - so I think this is something to keep in mind.

- (b) MARPOL envisages that in the case of an accident the master or the owner of the ship can be sanctioned, but in very limited cases, only if the owner or the Master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result. This threshold is virtually unbreakable. These are the words of our colleagues from the IMO on their webpages.

All this contrasts with the situation in existing national law. We have found that in most European and third countries' legislation when implementing MARPOL in the internal and territorial water the liability test is lowered, using serious or even simple negligence.

- 5.3 **International standards on jurisdiction** - This leads us to the key question of "what is feasible under international law?" The international law: what does it say about all this?

We have MARPOL which does not address the issue of legislative and enforcement jurisdiction. This is well explained in the guide published by the IMO: "MARPOL - how to do it?", a Manual on the practical implications of ratifying, implementing and enforcing MARPOL: "*the Law of the Sea affects how MARPOL is implemented and enforced*".

This reflects Article 9 (2) of MARPOL which reads "*Nothing in the present convention shall prejudice*" the Law of the Sea.

We have the Law of the Sea Convention and in particular its Article 211(4). This Article clarifies the rights of coastal States within their

territorial sea: they can adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels. Article 211(5) adds that beyond territorial sea coastal States can only apply international rules and standards.

Just as the reminder the question as to how far a coastal state may deviate from Marpol in its territorial sea was discussed vividly during the conference adopting Marpol in 1973, but the matter was eventually left for the conference negotiating UNCLOS to resolve.

Both the draft Marpol article on this issue and the eventual compromise which was accepted in UNCLOS (Article 21) distinguished between rules related to construction, design, manning and equipment on the one hand and other types of rules on the other.

While coastal states may not exceed the international rules of the former category, there is no similar restriction with respect to other kinds of rules for the protection of the marine environment. The directive, obviously, does not deal with construction, design, equipment or manning.

5.4 **Architecture** - How has this whole "Architecture" been applied into the new EC legislation?

- First, within the territorial sea, **all operators are liable if** they cause pollution, recklessly or by serious negligence.
- Beyond the territorial sea, for the master and the shipowner and also we have added the crew (see Article 5(2) of the directive and the somehow redundant Article 2(2) of the Framework Decision), which is not exclusively mentioned in the MARPOL, the full MARPOL text applies, that is to say we have to have caused

pollution with intent or recklessly and with knowledge that damage will be caused in order to be prosecuted.

- In addition beyond the territorial sea, for all other operators "recklessness or serious negligence" applies; so if the classification society has done something wrong with serious negligence, causing pollution, then they are prosecutable.

6. **Criminal sanctions for corporate bodies** – There are many elements in the two texts which might be of interest to you; which have to do with judicial cooperation for instance. Dr Sheppard asked me address also the issue of sanctions for corporate bodies.

First there is indeed the rule that legal persons are liable for offences committed for their benefit by any person acting either individually or as part of an organ of the legal person, which have a leading position within the legal person. This is not a rule where by all MS must admit criminal liability of legal persons. There may be another “horizontal” initiative in the future.

Second, there are the provisions which harmonise the level of financial penalties. The Framework decision aims at the approximation of the level of all sorts of penalties: financial penalties, custodial penalties, vis-à-vis individuals and vis-à-vis legal persons (NB custodial for legal persons are not applicable). But this area of financial sanctions for legal persons is the one where the most significant progress is made. This is somehow very positive because (a) prison sentences are not always the penalties that fit the crime and (b) it is more legitimate to deal with legal persons rather than members of the crew. Furthermore, this is the first time in an EU instrument that the level of fines are harmonised.

The rules apply irrespective of which flag the ship is flying (somebody can be stricter only for own flag).

Currently, the level of fines differs greatly from one Member State to another (from a minimum of 2.500.000 € for Belgium to 15.000 € for Latvia!).

The Commission in its original proposal suggested to approximate fines by a reference to a certain percentage of turnover assets. Member States did not go down that route: they agreed on a system of minimum ranges for maximum sanctions with two minimum levels of fines:

- One of a maximum of at least between 150.000 € and 300.000 €
- one of a maximum of at least between 750.000 € and 1.500.000 € in the most serious cases, including at least intentional cases, leaving the possibility for the Member States that could not apply this method to revert to a certain percentage of the turnover.

You understand that with this legislation, the level of fines has been successfully increased in a number of Member States.

7. **A final word on imprisonment!**

Different penalties may be applied (administrative or penal), but everything must respect art.230.1 of UNCLOS.

There is this specific reference in article 4(8) of the framework decision to the international requirement that only monetary penalties may be imposed unless the pollution is both wilful and serious, a fact which most people writing on this “criminalisation of seafarers” instrument incidentally fail to report.