

NEWSLETTER

SHIPPING

March 2012

NEW GREEK MARITIME POLLUTION LEGISLATION

Law 4037/2012 was recently passed implementing (i) Directive 2005/35 EC of 7 September 2005 (on ship-source pollution and on the introduction of penalties for infringements) and (ii) Council Framework Decision 2005/667/JHA of 12 July 2005

SCOPE OF APPLICATION

Law 4037/2012 deals with the discharge by ocean going vessels of the substances referred to in Annex I and II of MARPOL (i.e. oil and noxious liquid substances) in the following geographical areas :

- internal waters and the territorial sea of any Member State,
- straits used for navigation subject to the regime of transit passage over which any Member State exercises jurisdiction,
- the exclusive economic zone of any Member State
- the high seas.

THE PROHIBITION

Any discharge, willful or not, operational or accidental, is considered an infringement of the law and results in the imposition of penalties,

except if it is permissible under the following MARPOL Regulations:

- 15 of Annex I, regulating operational discharges of oil or oily mixtures from any ship;
- 34 of Annex I, regulating discharge of oil or oily mixtures from the cargo tanks of a tanker; and
- 13 of Annex II, regulating the discharge of noxious liquid substances.

EXCEPTIONS

Article 4 incorporates part of the exceptions of MARPOL.

Specifically, for all of the above geographic areas where the law is applicable, the discharge of oil or

liquid noxious substances is not considered an infringement if it was necessary for the purpose of securing the **safety of the ship** or **saving life at sea**, or when a discharge is being done with the approval of the administration (both flag and territory, if any) for the purpose of **combating pollution** (Regulations 4.1, 4.3 of Annex I and 3.1.1, 3.1.3 of Annex II).

For all of the above areas, except internal and territorial sea of a Member State, a discharge is not considered an infringement if it was caused due to damage to the ship or her equipment, provided all reasonable precautions have been taken after the occurrence of the damage, or discovery of the discharge, for the purpose of preventing or minimizing the discharge, and under the condition that the Owner or Master did not act with intent to cause the damage, or recklessly and with the knowledge that the damage would probably result (Regulations 4.2 of Annex I and 3.1.2 of Annex II).

From the above it is evident that accidental pollutions in internal waters or territorial sea of a Member State is not exempted, contrary to MARPOL Regulations.

CRIMINAL PENALTIES

For willful discharges

- a) Imprisonment between 5 to 10 years and pecuniary penalty between €3,000 to €300,000, in cases of significant pollution that caused risks to human life, or risks of severe bodily damage, or of wide environmental disturbance or disaster;
- b) Imprisonment between 1 to 5 years and pecuniary penalty between €1,500 to €50,000 in all other single pollution incidents; and
- c) Imprisonment between 6 months to 5 years and pecuniary penalty between €1,000 to €15,000 in case of repeated minor discharges which in conjunction, result in the deterioration in the quality of sea water.

Discharges due to gross negligence or recklessness

- a) Imprisonment between 6 months to 5 years and pecuniary penalty between €1,000 to €15,000, in cases of significant pollution that caused risks to human life, or risks of severe bodily damage, or of wide environmental disturbance or disaster.
- b) Imprisonment between 3 months to 5 years and pecuniary penalty between €200 to €3,000 in all other single pollution incidents and also in case of repeated minor discharges which in conjunction result in the deterioration in the quality of sea water.

However, if the party responsible for the negligent discharge, punishable as per the above, significantly minimized the pollution or contributed to that effect by promptly notifying the authorities the above penalties may be reduced or even abolished altogether.

The Court may impose the above criminal penalties (reduced as per the provisions of the Greek Penal Code) against any person whatsoever, in addition to the actual perpetrator or accomplice, who may have contributed in any way in the willful or negligent discharges that are punishable. This may result in the possibility of indictment of any person from the ship management office (such as Director or DPA), the charterers, cargo owners etc.

Discharges caused by simple negligence (i.e. not gross negligence, or recklessness) are not punishable under Law 4037/2012.

It should be noted that the above penalties of imprisonment are provided by Law 4037/2012 irrespective of the geographical place of the discharge and of the flag of the infringing vessel.

Therefore said law is contrary to the provisions of Article 230 of UNCLOS (United Nations Convention on the Law of the Sea of 1982) providing that monetary penalties only may be imposed with respect to violations of national laws and regulations, or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by **foreign flagged vessels**, except in case of a wilful and serious act of pollution committed within the territorial sea of a Member State.

LIABILITY OF LEGAL ENTITIES

Legal entities may face a fine of up to € 500,000 for any of the offences, which are punishable under the law, committed **for their benefit**:

- by any person acting, either individually or as part of a body of the legal person, who has power of representation or the authority to take decisions for the legal person, or an authority to exercise control within such legal person; or
- by any person under the control of the legal entity when the offence was committed due to lack of supervision by any of the persons of the legal entity who have power of representation, authority of decision making and exercise of control.

ADMINISTRATIVE FINES

In addition to the above penalties, the authorities may impose against all persons liable for pollution (physical or legal), an administrative fine of up to €60,000. In case of a serious incident the fine is imposed by a ministerial decision and may vary from €60,000 to €1,200,000. Currently, the competent ministers are the Minister of Growth, Competition and Shipping and the Minister of Protection of the Citizen. The authorities may prohibit the sailing of the liable vessel until the

fine is paid or until the submission of a letter of guarantee of a bank operating in Greece.

The provisions of Law 743/77 on the protection of the maritime environment (which was codified by presidential decree 55/1998), remain in force for the matters not dealt with by Law 4037/2012 and are applied complementary.

CONCLUSION

Law 4037/2012 provides severe penalties of imprisonment not only to crew members but also to any other person that has contributed to a punishable discharge, either willfully or by gross negligence (for example officers or managers of the shipmanaging company, the classification society, the charterers or cargo owners etc), without exempting accidental pollution (as provided in MARPOL). This results to an intense criminalization in the shipping industry. In providing such penalties of imprisonment Law 4037/2012 is in contrast with Article 230 of UNCLOS 1982 as regards to foreign flagged vessels.

According to Greek precedents, European Union legislation (and implementing laws) prevails over any contrary sub-constitutional legislation. Therefore, if a respective case was brought before a Greek Court chances are that the provisions of Law 4037/2012 will be found to prevail over the provisions of MARPOL and UNCLOS mentioned above.

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