

## **CRIMINALISATION OF THE MARITIME PILOT**

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The IMO General-Secretary, Mr. Mitropoulos, has voiced his concerns many times in the past, and particularly to the European Parliament (EP), regarding the increasing use of criminal prosecution in many national legislations for every maritime accident, and regarding the introduction of criminal sanctions in case of ship's pollution resulting from negligence.

### **What does “criminalisation” mean?**

It is a process consisting in transferring the qualification of damage from a different category to a criminal one. For the Pilot, it means that in the past another person was prosecuted – either the Captain or the Ship-owner – or no prosecution was carried out – minor offence or less pressure - or else the qualification upheld was civil – what mattered was repair. From civil liability requiring damage directly linked to a cause, criminalisation establishes penal liability for which a material fact, the *actus reus* – a law infringement even without any damage – must be accompanied in principle by a psychological element, the *mens rea* – intention or recklessness. Even in a criminal offence of “strict liability”, which is normally minor, some elements of the crime require *mens rea*.

A judgment of the Piraeus District Tribunal dated the 28<sup>th</sup> of January 2008, in the case of the “Grande Europa”, sentenced the Pilot and the Captain of the ship for the negligent infringement of the Collision Regulations. The ship had only hit an uncharted underwater obstacle, but the Tribunal, without having stated which rule was not complied with, decided that the men were guilty.

### **Why is criminalisation happening?**

This is due to a general context resulting from a lesser level of acceptance by the general public when faced with maritime pollution – since the accident of the “Exxon Valdez” in the USA in 1989, and the accidents in Europe of the “Erika” in 1999 and of the “Prestige” in 2000, polluters must be punished no matter what. Criminalisation is also the consequence of a political will to prevent such pollution from happening again by deterring unacceptable behaviour and by eliminating “rogue” operators. To this, the 11<sup>th</sup> of September syndrome has to be added.

### **What is the process leading to criminalisation?**

It can be sighted at three different levels. The first one, international, involves the rules 4.2 – formerly 11(b) – of Annex I and 3.2 of Annex II of the MARPOL 73/78 Convention. These rules refer to the Captain or the Ship-owner only, and solely for pollution damage they wilfully caused, or due to “recklessness knowing that such damage will probably occur”. Article 230 of the Montego Bay Convention only allows for fines to be inflicted unless the pollution caused in the territorial waters is intentional **and** severe. Pollution, even a black tide, is not enough to be made a criminal offence and the Universal Declaration on Human Rights, as well as the European Convention on Human Rights and fundamental freedoms, ensures the principle that a person is innocent until proven guilty.

At the Community level, the European Directive 2005/35/EC transposes MARPOL into Community law, disregarding M. Mitropoulos’ remarks. The Directive clashes with International law on two accounts because it adds the gross negligence as a psychological element of the offence that can now be attributed to more people than just the Captain or the Ship-owner. A major change occurred with two judgments by the ECJ giving the EC legislative competence in criminal matters. The proposal for a directive, COD(2008)/0055, amending Directive 2005/35/EC, sets minimal sanctions and the EP’s 1<sup>st</sup> reading report even suggested amending the text from gross negligence to negligence. Simple negligence would suffice to be criminally sanctioned. In addition, with the proposal for a Directive COD(2007)/0022, Member States would have to impose criminal sanctions for certain acts causing serious damage to the environment.

At the national level, according to a 2006 BIMCO study, France, with its “Code de l’environnement”, has the most severe regime in Europe. Pilots in that country are concerned with the possibility that its Article L218-19 could be applied to them. Should the pilots in France be considered as actually having the conduct of the ship, they would be criminally sanctioned as direct actors of the damage if accidental pollution occurred. If not, the pilot could still be considered as an indirect actor, but then in order to establish guilt it would be necessary to prove that he/she deliberately violated a specific obligation of prudence or safety provided by a related act, or that he/she committed a legally defined error which put others at a particularly serious risk that he/she could not ignore.

In the UK, where MARPOL is strictly adhered to, it seems that only the Captain or the Ship-owner can be criminally prosecuted for pollution, and only if it is intentional.

### **What are the effects of criminalisation?**

One of the possible effects mentioned by Mr. Mitropoulos is the deterrent effect on people wanting to embrace a maritime career. It would be catastrophic as the industry is already facing a shortage of officers. The maritime world is basically unanimous on this aspect. Another devastating effect is the impossibility for the offender to be insured for the consequences of criminal liability when this possibility is offered in the case of civil liability. P&I Clubs usually pay the fines inflicted on Captains when there is an absence of will in the offence, but there is little chance to see this happening for pilots. This could lead to over cautiousness with a damaging effect on the fluidity of the traffic which in turn would have negative economic consequences.

### **One solution: legal protection cover.**

The only realistic solution for pilots at present, since they are faced with this wave of criminalisation, is to recourse to legal protection insurance. The possibility to gain access to a renowned and efficient lawyer is becoming the only way for him to get out of a situation where he should have never been put in the first place. The funds required to enable him to get proper defence are not of the kind an uninsured pilot can afford. Therefore, legal protection cover becomes the pilot's lifeboat.