

Industry fails in bid to halt EU pollution sanctions

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But Intertanko-led coalition vows to fight on

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A COALITION of industry bodies led by Intertanko has failed in its legal challenge to the European directive on criminal sanctions for ship-source pollution.

But the group has said that it will take the matter further.

A panel of 13 European Court of Justice judges ruled yesterday that the directive, which provides for penalties even in cases of accidental discharge, was valid.

The ECJ said the court “has concluded that the validity of the directive cannot be assessed in the light of either the Marpol Convention or the Convention on the Law of the Sea [Unclos]”.

It ruled with regard to Marpol, that the EU is not a party to it and the “mere fact that the directive incorporates certain rules set out in it is not sufficient to enable the court to review the directive’s legality in the light of the convention”.

While Unclos was signed by the EU and was binding on it, “the convention does not establish rules intended to apply directly and immediately to individuals. It does not confer upon them rights and freedoms capable of being relied upon against states, irrespective of the attitude of the ship’s flag state”.

The ECJ argued that the nature of Unclos prevented the court from assessing the validity of a community measure in the light of the convention.

Intertanko, Intercargo, Lloyd’s Register, the International Salvage Union and the Greek Shipping Co-operation Committee brought the legal challenge in the English High Court, arguing that the directive ran counter to Marpol and Unclos. The matter was then referred to the ECJ.

Observers seemed to confirm that the ECJ ruled against the industry challenge to the directive. But the European Commission’s interpretation of the court ruling was more circumspect. A commission spokesman pointed out that the court had “in essence” decided that it was not competent to judge whether the directive was compatible with international treaties.

Spokesman Mark English said: “The commission continues to believe that the directive is indeed compatible with international conventions.”

In a joint statement, the coalition said yesterday that the criminal liability regime for pollution remained undecided, adding that “potentially the effect of the judgment is that the scope of criminal liability for accidental pollution may be broader than the international regime”.

The perceived restrictive view of Unclos — that it did not apply to individuals — was “unfortunate given the universal recognition of Unclos as relevant to determine not only the rights but also the obligations of users of the sea”.

According to the coalition, the court had departed from the opinion of Advocate General Juliane Kokott in November last year, who had concluded that “the validity of the directive could and should be tested by reference to Unclos and Marpol, and that the directive exceeded the

community’s powers in international law unless ‘serious negligence’ was construed to have different meaning inside and outside territorial waters”.

The inclusion of the concept of “serious negligence” in the directive is one of four key points on which clarification was sought at the ECJ, with the coalition arguing that the phrase infringed the concept of legal certainty.

The judgment would add to existing concerns about the relationship between community legislation and international rules, the coalition maintains.

Intertanko managing director Peter Swift said the coalition members were “mulling [over] their options”, which included taking the matter to the International Court of Justice or the International Tribunal for the Law of the Sea. “We are not going to let it lie,” Dr Swift said.

Greek Shipping Co-operation Committee chairman Epaminondas Embiricos said non-EU states, whose Marpol and Unclos treaty rights are being “prejudiced”, should give thought to the judgment’s implications. The coalition’s solicitor, Ince & Co’s Colin de la Rue, said it seemed that where there were concerns about incompatibility between EC instruments and international maritime law, these could not be tested in the European Court if flag states outside the community referred them to other international tribunals.

Additional reporting by Justin Stares and Keith Wallis

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