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The relationship between security services and public order in the port area - legal issues

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Abstract. Social relations regarding economic transport activity in maritime ports require a clear, concise and coherent body of legislation to support the transport community and the representatives of related industries, so that they can pursue their proposed business objectives, a fair, competitive and safe public order environment.

We believe that piloting and sea towing must be circumscribed by this desideratum, a poor legal regulation making it difficult for ships to enter and exit from and to the Port of Constanta and, moreover, be able to cause a real economic or environmental disaster.

In this respect, we have proposed in the present paper to analyze from the perspective of legal regulations, as a case study, the most important piloting accident that occurred in the Romanian ports on November 1st 2015 between two commercial ships flag Malta and Turkey, showing the consequences, as well as the potential dangers that could have occurred.

Key words: maritime piloting, port security, Port of Constanta, the transport community

The social relations in the field of economic transport activity in maritime ports require a clear, concise and coherent body of legislation to support the transport community and the representatives of related industries so that they can pursue their proposed business objectives in a fair environment - competitive and safe from the point of view of public order.

We believe that maritime navigation must be circumscribed by this desideratum, a weak legal regulation making it difficult for ships to enter and exit from and to Constanta harbor and, moreover, to cause a real economic or environmental disaster.

In this regard, we propose with this paper to analyze, as a case study, the most important piloting accident that occurred recently at the entrance to Constanta Port, on 01.11.2015, between the ships Akdeniz - Turkey pavilion and Matilde A-pavilion Malta, from the perspective of the legal regulations governing flight operations, the consequences it has produced, as well as the potential consequences.

Constanta harbor is located at the junction of 3 pan-European corridors: Corridor IV, Corridor IX and Corridor VII (Danube) - connecting the North Sea to the Black Sea through the Rhine-Main-Danube corridor and, implicitly, the markets of landlocked countries in Central and Eastern Europe with the Trans-Caucasus region, Central Asia and the Far East.

Constanța port, together with the ports of Midia and Mangalia and the touristic port of Tomis, are public-private maritime ports, owned by the Romanian authorities. They ensure their regulation and operation through the Ministry of Transports by virtue of the attributions established locally to National Company Maritime Ports Administration (MPA) and the Romanian Naval Authority (ANR), both subordinated to the Ministry of Transportation.

Many of the modern harbors of the world are running under the management of a central port authority, which is referred to in national legislation as the port authority, port

management authority or port administration. A definition of the port authority was formulated in 1977 by the European Union Commission, which stated that the port authority is "the state institution with public or private participation that is responsible for the surrounding safety, namely the construction, management and sometimes operation port facilities". Although this definition only referred to the legal realities across the European Union, the concept was also adopted by the United Nations Conference on Trade and Development (UNCTAD), as the permanent Specialized Body of the UN General Assembly and the rest of the world.

Coordination of maritime and river traffic, the establishment of the entry / exit order and the transit of sea and river vessels in the ports of Constanta, Mangalia and Midia, as well as the allocation of taxes are made by the Commission for the Co-ordination of Maritime and Maritime Vessel Movements in Constanta maritime ports, Mangalia and Midia (CCMN), which operate in Constanta Port. The Commission meets on a daily basis and the Presidency and the Secretariat are insured by Constanta MPA, which daily publishes the Maritime and River Vessel Bulletin, which also contains data on the identification of sea and river vessels, data on port operations, as well as data identifying the goods.

At the same time, each of the actors interested in piloting and towage services uses an electronic platform (called NEPTUN HARBOUR), administered by MPA Constanta. These entities (ship owners, agency companies or port operators) ask for the service requirements and their deployment period after which the port authority draws up the Flight Bulletin and assigns this to the pilot companies. Customers pay to Constanta MPA the value of the services rendered, after which in turn, they allocate the revenues made to the pilot companies, proportionally to the volume of work performed.

At present, Constanta MPA has a service contract with four specialized shipping companies and four specialized companies for the delivery of the towing activity, four service shifts, each of them consisting of seventy-two hours interval.

The present organizing method is valid from 2017, being endorsed by the Competition Council until the implementation in the national legislation of the European Parliament and Council Regulation no. 352/2017, establishing a framework for the provision of port services and common rules on the financial transparency of ports.

The Romanian Naval Authority issues authorizations for public safety and for those of particular importance for the port: cargo-discharge, bunker, ship supply. In order to authorize activities that use the port infrastructure, it is necessary to approve by Constanta MPA the implementation of the legal norms regarding "safety services in ports and inland waterways, hereinafter referred to as safety services, such as: piloting of ships at the entrance and exit from ports, between the berths of the same port and inland waterways and the maneuvering of seagoing vessels in ports". (3)

In this respect, the ship's in-and-out operations in and out of the port basins, as well as in the crossing by approaching them are carried out only in the presence of experienced pilots by ship commanders, who know the particularities of these areas having in principle, the role of assisting ship masters in crossing potentially hazardous areas.

At international level, through the International Maritime Organization, all Member States of the United Nations were drafted and then ratified by introducing Resolution No. 960 of 05.12.2003 on "Recommendations on Operational Training and Certification Procedures for Maritime Pilots, other than the high seas".

Thus, in seaport areas, maritime navigation is organized as a public safety service provided in accordance with the legal norms of each state in whose territory the maritime port is

located, which is the ship's port of shipment, contracted directly by the port administrations or by the delegation of their duties, to pilots or associations of independent pilots or economic agents with this activity profile.

The headquarters of this activity in Romania is the Government Ordinance no. 22 of January 29, 1999, on the management of the ports and waterways, the use of the public transport infrastructure in the public domain and the carrying out of the shipping activities in ports and inland waterways, published in the Official Monitor of Romania, Part I, republished in the Official Monitor of Romania, Part I, no. 69 of 3 February 1999, republished in the Official Monitor of Romania, Part I, no. 69 of 3 February 2003, Order of the Minister of Transportation no. 1008/2012, regarding the establishment of the management of the ship's seagoing service, the Port Regulation of the Romanian maritime ports under the administration of the Maritime Ports Administration, elaborated on the basis of the Order of the Minister of Transportation no.636 of 13.08 .2010 for the approval of the Port Framework Regulation, published in the Official Monitor Part I no. 590 from 2010 and the Government Decision no. 876 from 2007 on the establishment and sanctioning of contraventions to the ship transport regime, published in the Official Monitor, Part I no. 557 from 2007.

Piloting as a safety service in Romanian maritime ports is ensured by Constanta MPA through specialized economic agents.

This service is necessarily performed in the following situations: entry / exit to / from seaports, transiting port harbors to / from shipyards, transiting port harbors for entry / exit to / from inland waterway links with inland waterways, maneuvers between the same port, maneuvers between the inner rails and the darts of the same port.

In order to qualify for this activity, companies must have a material basis (like pilots, communication systems, contracts with towed companies, etc.) and qualified human resources, capable of providing the necessary support to the master and the ship which this manages in the area and within the harbor aquarium.

After the liberalization of piloting services, since 1991, a number of companies have been involved in this activity. The lack of clarity of the legislative system, the dissatisfaction with some of the lack of transparency in the award of pilot contracts and the imposition of endowment conditions that only very few of them could comply with, but also the reasonable suspicion that among the elected operators these services were entrusted with certain anti-competitive agreements, led to several actions in court and to the notification of the Competition Council This authority took a control activity in 2012, after which it decided to sanction seven companies with activity in the flight and towage market of which four piloting, two towed and Constanta MPA, by decision no. 51 of 10.08.2016, regarding the finding of violation of art. 5 of the Competition Law and art. 101 of TFEU (4) on the market for piloting and offshore services and the sanctioning of the undertakings concerned, as well as the finding of a violation of art. 6 of the Competition Law and of art. 102 TFEU on the Maritime Pilot Services Market, respectively Art. 8 of the Law on competition on the market for seagoing services by the MPA. Following the investigation, the Competition Council found that there were several anti-competitive facts (understandings and abuse of dominant position) that eliminated competition in the ports of Constanta, Midia and Mangalia, which led to the blocking of the entry of other operators and implicitly to reducing the attractiveness of these services to potential investors.

In this context, in 2012 Constanta MPA concluded contracts with three independent operators. They agreed to exclude any form of competition from both other companies and between them. So they agreed to coordinate their work through a chief pilot and sharing pilots

system. Under this agreement, there was a penalty clause stating that the pilot company, signatory of the agreement that did not respect or violate the contract, would pay the other damages of 5 million euro. This practice has led to higher tariffs for piloting services, as well as the report on the impact of existing regulations on the competitive environment, conducted by the OECD (Organization for Economic Cooperation and Development), published in June 2016 (5). This is considered to lead to a poor quality of service, sometimes corroborated by a poor collaboration of pilots with State authorities, especially with the Vessel Traffic Maritime Service (VTMS) of the Romanian Naval Authority, thereby reducing the level of safety of the services these companies offer. The document shows that charges for piloting services in maritime ports in Romania were 2 or 3 times higher than those charged in other EU ports, which manage a total volume of comparable goods (gross weight) such as Barcelona, Valencia, Genova and Koper, the three companies implied being fined.

The towing services were insured at the time of the inspection by MPA in the same way by concluding contracts with private operators meeting the criteria for the number of tugs and their structure. For towage services, MPA has entered into a contract with a company set up for this purpose by the three sanctioning companies. In this way, the three assured themselves that they would be the only ones to provide towage services (no other operator could meet the criteria imposed by MPA alone, but only by association with one of the three).

By the agreement concluded, however, they ensured that none of them would leave the association, otherwise they would be obliged to pay compensation of 10,000,000 euro to the other two.

As a result, the competition authority proceeded to sanction the four companies. During the control, it was also found that although the services had been leased to private equity companies, CNAPMC invoiced these services, withholding 25%, without performing any kind of activities. After receiving the equivalent of the services from the beneficiaries, MPA equally divided all approved operators, beneficiaries of pilot contracts, the resulting amounts, without taking into account the volume of activities carried out by each of them. As a result of this behavior, competition has been eliminated between companies operating piloting services, directly disadvantaging the beneficiaries of these services. That is why the Competition Council sanctioned the Constanta MPA with a fine of 2,649,419 euro, equivalent in lei, for abuse of a dominant position on the maritime pilot market.

Also in the field of towage, the MPA imposed more restrictive conditions than those set by the law, for example imposing a minimum number of tugs, higher than the one stipulated by the law. In this way, the port authority restricted competition, limiting the entry of new companies into the towing service market. In order to avoid such situations, the Competition Council supports the OECD's recommendation to set up an independent regulator in the field to establish the conditions for access to the port services market and to ensure the financial transparency of the ports.

Furthermore, without claiming an exhaustive approach, we try to analyze the most important maritime incident spent inside the port of Constanta, in the last two decades, the main causes for it being pilot error products, we consider the substance of legislative ambiguity. Thus, finding precarious scrutiny of authorities (Romanian Naval Authority and the MPA) on how to comply economic operators authorized to provide piloting legislation regulating this activity, the preparation of the documents necessary for carrying on the good conditions (like the Risk Management Manual), lack of organization of pilot training activities; we believe that such an incident would be less likely to occur if the piloting service was provided by a state security

service provider (based on the SMURD, Mobile Emergency Service, Rescue and Demobilization example), the private economic entities having the main objective of maximizing financial profit by any means.

Ship Presentation:

AKDENIZ ship

Vessel's Type: IMO Type II Chemical & Oil Tanker

Pavilion: Malta, Valletta Recording Port

The ship arrived on the port of Constanta on 31.10.2015 at 09.00 and anchored in, waiting for entry to the cargo. On the same date at 22.30, he lifted the anchor for the pilot, which was at 23.25. At 23:50 information was exchanged between the ship and the pilot.

MATILDE A ship

Vessel type: feeder type of container

Pavilion: Turkey, Registration Port Istanbul

Main engine: MAB B & W 7 S 50 MC-C - 11060

Summer draft / Summer DWT: 9.00 m / 17148 mt

The ship arrived in the port of Constanta to unload / load containers in the berth terminal 52. On October 31, 2015 at 23.15 aboard the pilot to make the departure maneuver from the port of Constanta.

Event Development:

On October 31, 2015, AKDENIZ ship made an entry maneuver at the port of Constanta with a pilot on board, while MATILDE A ship operated a departure maneuver from the port of Constanta, also with a pilot on board. The two ships collided at 00.02. on 01.11.2015.

The technical maritime expertise carried out established that the event was the result of:

- Non-observance of the maneuvering plans in that the vessels have been put in a too distant position, thus putting them in danger of collision;
- Poor communication between pilots and shipmasters on the one hand and between the VTS (ship traffic system in Constanta port) and the two pilots on the other;
- Failure to adapt the speed of vessels to maneuvering conditions;
- Failure to carry out the tasks relating to the safe navigation of ships, in particular with regard to the provision of watch on the operation of ships and the avoidance of collisions;
- Misfiring of the ship maneuvering in that the two pilots performed maneuvers contrary to rule No 8 of the International Maritime Prevention Regulation⁵.

The communication between the two pilots was done in Romanian language, contrary to the provisions of the Port Regulation, which stipulates that the communication in the pilot activity is done only in English, did not give the captain of the two ships the possibility to understand correctly and completely all the information in transmissions of the two pilots.

To take into account that the two pilots were belonging to the same piloting company, knew that both maneuvers would be carried out at approximately the same time and, on the basis of their professional experience, they would have had to take all measures to avoid dangerous situations.

According to art. 130 of the Port of Constanta Port Regulation, "the master and the pilot are obliged to provide each other with all information for the safe maneuver". Also, according to art. 131 of the Constanta Harbor Port Regulation "the pilot is not responsible for the

incidents or accidents produced during the maneuver, except when they have occurred as a result of the incomplete or incorrect information he has provided to the master of the ship." The Romanian communication between the pilots, unknown to the commander of the vessel MATILDE A, put him in a position not to make a decision based on the knowledge of all the circumstances, a fact confirmed in his statement quoted in the maritime technical expertise.

Failure to observe the ship's craft

Even though on board of MATILDE A, the maneuvering plan from the loading and unloading port of the ship, presented by the pilot to the master of the ship before the maneuver was commenced, was agreed by the two, it was not fully respected. Thus, the pilot of the MATILDE A vessel agreed with the pilot of the AKDENIZ ship a maneuver for the passing of the ships one next to each other, respectively the passing of the ships one through the starboard of the other ("green in green"), different from the initial maneuver plan.

Considering that in the maneuver plan verbally agreed by the pilots of the two ships, namely passing a ship through the starboard of the other, the maneuver had to be done in a very small perimeter (at the moment of the approval of the maneuver plan by the two pilots respectively 00: 00: 40 / 01.11.2015, the vessels were at a distance of about three cables from each other, the bow of the MATILDE ship was at a distance of about one (1) head of the berth no 78, and the AKDENIZ ship lies between the incoming port bases at a distance of approximately one cable from the berth 78 and about 0.3 Covers from the Red Lighthouse), both ships were put in a major danger situation, violating therefore the rule no. 8, rule no. 9 and rule 15 provided by the International Regulations for the Prevention of Collisions at Sea, while at the same time creating a danger situation for other nearby ships as well as for the safety of navigation in port, port infrastructure and the environment.

Moreover, AKDENIZ's pilot did not write a written maneuver plan to be made available to the authorities, although the ship he witnessed at the port of maneuver was petroleum tanker; the accumulation of gas inside it creates a special danger. No internal proceedings of the pilot company were found in the case file.

However, it should be noted that in the Port Regulation to Art. 126 (6) provides for the following mandatory flight crew: "Pilot companies are required to draw up and make available to the Port Captain the Risk Management Manual. The risk management manual will necessarily include risk analysis of maneuvers based on the berth, vessel type and hydro-meteorological conditions. "

In addition, IMO Resolution 960 (23) 7, Annex 1, Article 5, paragraphs 5.3 and 5.5, provides recommendations on the continuing training of the pilot in resource management at the bridge resource management with emphasis notably on pilot training in assessing particular and emergency situations and communicating with the command team on the ship's deck in such situations.

It is clear from the above-mentioned national legislation that the parts of the acts detained by the pilots are formulated without taking into account the rules of legislative technique necessary to create a clear, concise legislative framework that is inconsistent with the internationally applicable rule - IMO A. 960 (23). Thus, the training of pilots is regulated by Order no. 382 of 2007 for the approval of the Regulation on minimum criteria for training, training and certification of pilots, other than the large-scale pilots, modified by Order no. 1090 of 2007 to replace Annex no. 2 to the Regulation on Minimum Criteria for Training, Training and Certification of Maritime Pilots, other than the large-scale pilots, approved by the Order of

the Minister of Transport no. 382 modified by Order no. 1096 2014 amending the Regulation on minimum criteria for training, refinement and certification of pilots, other than the large-scale pilots, approved by the Order of the Minister of Transport no. 382.

We consider that this over-regulation does not meet the minimum requirements for a good social organization that guides the conduct of the pilot services community and adapts them to the need to develop progress in the modern organization of society promoted within the European Union.

According to the General Theory of Law, it is necessary for the legislator to take into account in the drafting of normative acts the rules of general juridical structure - recognized by the juridical doctrine: "The basic idea from which the legislator starts in the construction of a legal norm is that the legal norm must meet the requirements regarding the good organization of the relations in society, in the sense that it must not contradict the logic of social action. Starting from this desideratum, from the point of view of its logical structure, the legal norm consists of the following three elements: the hypothesis, the disposition and the sanction. The hypothesis - is that part of the legal norm in which the legislator establishes (fixes) the circumstances or facts in which the rule enters into force, as well as the category of legal subjects. B. Provision - is defined as the element of the logical structure of the legal norm that provides for the conduct to be followed in the case of the formulated hypothesis. C. Sanction - is the third structural element of the legal norm, which specifies the consequences of non-compliance with the provision of the legal norm. The sanction is the way of reaction, the legal response of the society towards conduct not in conformity with the rule of law, the concrete measures taken against the persons who have violated the law (7).

Therefore, the conduct to be followed by pilots and companies is governed by the Port Regulation and sanctions are enforced by Government Decision no. 876 from 2007 for establishing and sanctioning contraventions to the ship transport regime, published in the Official Monitor, Part I no. 557 of 2007.

In view of the above, we consider it appropriate to develop a single legal norm to regulate the piloting activity and reconsideration of the way this state security service is provided by state institutions, the only ones able to provide an efficient endowment with technical means and to ensure the continuous training of the respectable staff.

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