

SECOND SUPPLEMENT TO THE GIBRALTAR GAZETTE

No. 4777 GIBRALTAR Thursday 5th November 2020

LEGAL NOTICE NO. 384 OF 2020

EUROPEAN UNION (WITHDRAWAL) ACT 2019

GIBRALTAR MERCHANT SHIPPING (ACCIDENT REPORTING AND INVESTIGATION) (EU EXIT) REGULATIONS 2020

In exercise of the powers conferred on him by section 11 of and paragraph (1) of Schedule 3 to the European Union (Withdrawal) Act 2019, the Minister has made the following Regulations-

Title and commencement.

1. These Regulations may be cited as the Gibraltar Merchant Shipping (Accident Reporting and Investigation) (Amendment) (EU Exit) Regulations 2020 and come into operation on 1 January 2021.

Amendments to the Gibraltar Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.

Amendment of the long title.

2. The Long title of the Gibraltar Merchant Shipping (Accident Reporting and Investigation) Regulations 2012 (the Principal Regulations) is amended by deleting the following words-

“and for the purpose of transposing into the law of Gibraltar Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council”.

Amendments of regulation 2.

3. Regulation 2(1) of the Principal Regulations is amended -

- (a) by deleting the definition of “the Directive”;
- (b) by deleting the definition of “EEA State”;
- (c) by substituting the following definition for the definition of “IMO Code for the Investigation of Marine Casualties and Incidents”-

“IMO Code” means the code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code) adopted by the IMO by Resolution MSC.255(84) on 16th May 2008 in its up-to-date version”;
and

- (d) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “lead investigating State”;
- (e) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “marine casualty”;
- (f) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “marine casualty or incident safety investigation”;
- (g) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “marine incident”;
- (h) by substituting the words “IMO Code” for the word “Directive” in the definition of “safety investigation”;
- (i) by substituting the following definition for the definition of “safety recommendation”-

““safety recommendation” means any proposal made, including for the purposes of registration and control, by the MAICO when conducting, or leading, the safety investigation on the basis of information derived from that investigation;”;

- (j) by deleting the definition of “serious casualty”;
- (k) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “substantially interested State”; and
- (j) by deleting the words “for the Investigation of Marine Casualties and Incidents” in the definition of “very serious casualty”.

Amendment of regulation 3.

4. Regulation 3 of the Principal Regulations is amended in sub-regulation (2)(a), by substituting the words “the Government of Gibraltar or of the United Kingdom” for the words “a Member State”.

Amendment of regulation 5.

5. Regulation 5(1) of the Principal Regulations is amended by substituting the words “IMO Code” for the word “Directive” after the words “these Regulations, the”.

Amendment of regulation 10.

6. Regulation 10 of the Principal Regulations is amended in sub-regulation (12) by substituting the words “as set out in Schedule 2” for the words “developed pursuant to Article 2(e) of Regulation (EC) No 1406/2002”.

Amendments of regulation 11.

7. Regulation 11 of the Principal Regulations is amended –

- (a) in sub-regulation (1), by substituting the words “substantially interested State” for the words “Member State”;
- (b) in sub-regulation (2) –
 - (i) by substituting the words “any other substantially interested State” for the words “at least one Member State” in the first line, and
 - (ii) by substituting the words “counterpart in that substantially interested State” for the words “counterparts in those Member States” in paragraph (a);
- (c) in sub-regulation (3) by deleting the words “who will then ensure that the European Commission is notified of the reasons for doing so”; and
- (d) in sub-regulation (4) by substituting the words “another substantially interested State” for the words “a Member State”.

Amendment of regulation 13.

8. Regulation 13 of the Principal Regulations is amended in sub-regulation (2) by substituting the words “regulation 15” for the words “Article 13 of the Directive” after the words “of compliance with”.

Amendments of regulation 15.

9. Regulation 15 of the Principal Regulations is amended by-

- (a) substituting the words “the substantially interested States” for the words “Member States” in the heading;
- (b) deleting the word “Member” after the words “substantially interested” in sub-regulation (1);
- (c) substituting the words “substantially interested State” for the words “Member State” in sub-regulation (2);

- (d) by substituting the words “Gibraltar or the substantially interested State has” for the words “Member States have” sub-regulation (3)(b); and
- (e) deleting the word “Member” after the words “substantially interested” in sub-regulation (4).

Repeal of regulations 16.

10. The Principal Regulations is amended by repealing regulation 16.

Amendments of regulation 17.

11. Regulation 17 of the Principal Regulations is amended by-

- (a) substituting the words “other States” for the word “third countries” in the heading;
- (b) substituting the word “States” for the words “third countries” in sub-regulations (1);
- (c) substituting the words “other States” for the word “third countries” in sub-regulation (2);
- (d) substituting the words “other State” for the words “third country” in sub-regulations (3); and
- (e) substituting the following sub-regulation for sub-regulation (4)-

“(4) Where a substantially interested other State is leading a safety investigation involving Gibraltar, the MAICO may decide not to carry out a parallel safety investigation, if the safety investigation led by the substantially interested State is conducted in accordance with the IMO Code.”.

Amendments of regulation 19.

12. Regulation 19 of the Principal Regulations is amended by-

- (a) inserting the words “containing the information set out in Schedule 1” after the words “to be prepared” in sub-regulation (1); and
- (b) inserting the word “and” at the end of paragraph (c); and deleting paragraph “(d)” in sub-regulation (8) .

Amendments of regulation 20.

13. Regulation 20 of the Principal Regulations is amended by-

- (a) deleting the words “for the purposes of the Directive” in sub-regulations (1) and (2) appearing twice;
- (b) substituting the following sub-regulation for sub-regulation (4)-
 - “(4) The MAICO must ensure that a copy of the final report into serious and very serious casualties is submitted to the IMO.”.

Repeal of regulations 25 and 26.

14. The Principal Regulations are amended by repealing regulations 25 and 26.

Amendments of regulation 27.

15. Regulation 27 of the Principal Regulations is amended by-

- (a) substituting the words “substantially interested State” for the words “Member State” in sub-regulation (1);
- (b) in sub-regulation (2) by substituting-
 - (i) the words “substantially interested State” for the words “Member State”, and
 - (ii) the words “the substantially interested State” for words “the Member State”.

Substitution of Schedule 1.

16. The Principal Regulations are amended by substituting the following Schedule for Schedule 1-

“SCHEDULE 1

Regulation 19 (1)

Information to be included, where relevant, in reports in relation to an accident

Summary

1. An outline of the basic facts of the marine casualty or incident, including what happened, when, where and how it happened.
2. Summary information about any deaths or injuries, or any damage to the ship, cargo, third parties or environment that occurred.

Factual information

3. Particulars about the vessel concerned, including details of its-
 - (a) flag and register;
 - (b) identification;
 - (c) main characteristics;
 - (d) ownership and management;
 - (e) construction;
 - (f) minimum safe manning;
 - (g) authorised cargo.
4. Particulars about the voyage, including-
 - (a) ports of call;
 - (b) the type of voyage;
 - (c) cargo information;
 - (d) manning.

5. Marine casualty or incident information, including-
 - (a) the type of marine casualty or incident;
 - (b) the date and time of casualty or incident;
 - (c) the position and location of the marine casualty or incident;
 - (d) information about the external and internal environment;
 - (e) information about the vessel's operation and voyage segment;
 - (f) the place on board the ship where the casualty or incident occurred;
 - (g) human factors data;
 - (h) information about its consequences (for people, any ship, cargo, the environment or other).

6. Information about shore authority involvement and emergency response, including-
 - (a) who was involved in the response;
 - (b) the means used to respond to the casualty or incident;
 - (c) the speed of response;
 - (d) actions taken;
 - (e) results achieved.

Narrative details

7. A description or reconstruction of the marine casualty or incident setting out, in chronological order, the sequence of events leading up to, during and following the marine casualty or incident and the involvement of relevant actors or factors (persons, material, environment, equipment or external agents).

8. Relevant details of the safety investigation conducted, including the results of any examinations or tests.

Analysis

9. Analysis and comment, as necessary, to enable the report to reach logical conclusions, establishing all of the contributing factors, including those with risks for which existing defences aimed at preventing an accidental event, and those aimed at eliminating or reducing its consequences, are assessed to be either inadequate or missing, including-

- (a) an analysis of each accidental event, with comments relating to the results of any relevant examinations or test conducted during the course of the safety investigation and to any safety action that might have been taken to prevent marine casualties in relation to the incident;
- (b) the context of, and the environment in relation to, the accident or incident;
- (c) human errors and omissions;
- (d) events involving hazardous material;
- (e) environmental effects of the accident or incident;
- (f) equipment failures;
- (g) external influences or factors;
- (h) contributing factors involving person-related functions, shipboard operations, shore management or regulatory influence.

Conclusions

10. The main conclusions, including conclusions as to the established contributing factors and missing or inadequate defences (material, functional, symbolic or procedural) for which safety actions should be developed to prevent marine casualties.

Safety Recommendations

11. Any safety recommendations derived from the analysis and conclusions and related to particular subject areas, such as legislation, design, procedures, inspection, management, health and safety at work, training, repair work, maintenance, shore assistance and emergency response.

12. Safety recommendations must be addressed to those that are best placed to implement them, such as ship owners, managers, recognised organisations, maritime authorities, vessel traffic services, emergency bodies and international maritime organisations with the aim of preventing marine casualties and incidents.

13. Any interim safety recommendations that may have been made, or any safety actions taken, during the course of the safety investigation.

Appendices

14. If appropriate, the following non-exhaustive list of information may be attached to the report (in paper or electronic form)-

- (a) photographs, moving images, audio recordings, charts, drawings;
- (b) applicable standards;
- (c) technical terms and abbreviations used;
- (d) special safety studies;
- (e) miscellaneous information.”.

Substitution of Schedule 2.

17. The Principal Regulations are amended by substituting the following Schedule for Schedule 2-

“SCHEDULE 2

Regulation 10(12)

COMMISSION REGULATION (EU) No 1286/2011 OF 9 DECEMBER 2011

adopting a common methodology for investigating marine casualties and incidents developed pursuant to Article 5(4) of Directive 2009/18/EC of the European Parliament and of the Council as modified by Part 3 of the Gibraltar Merchant Shipping (Accident Reporting and Investigation) (Amendment) (EU Exit) Regulations 2020.

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council (1), and in particular Article 5(4) thereof,

Whereas:

- (1) Directive 2009/18/EC requires the Commission to adopt a common methodology for investigating marine casualties and incidents to be followed by investigative bodies when carrying out safety investigations.
- (2) The common methodology for investigating marine casualties and incidents should provide for common standards applicable in principle to all investigations carried out in accordance with Directive 2009/18/EC in order to achieve a high level quality investigation.
- (3) The general rules as provided for by the common methodology should be directly used by the investigative bodies of the Member States.
- (4) The measures provided for in this Regulation are in accordance with the opinion of the Committee on Safe Seas and the Prevention of Pollution from Ships,

HAS ADOPTED THIS REGULATION:

Article 1

The common methodology for investigating marine casualties and incidents is set out in the Annex to this Regulation.

Article 2

(omitted)

ANNEX

COMMON METHODOLOGY FOR INVESTIGATING MARINE CASUALTIES AND INCIDENTS

A. PURPOSE, SCOPE AND APPLICATION

The purpose of safety investigations into marine accidents is to reduce the risk of future casualties and incidents and reduce their serious consequences including loss of life, loss of ships and pollution of the marine environment.

The purpose of this document is to provide a common methodology for investigative bodies to conduct marine safety investigations.

The methodology aims to establish common approach in principle applicable in all investigations and it outlines the characteristics of a good safety investigation. It is not a check list. The investigators shall exercise their professional judgment and training to take into account the circumstances of each case.

In this way, through application of this common methodology and an objective and systemic approach to the investigation, the investigative body should best be able to draw lessons from each accident and so enhance maritime safety.

Proper identification of the causes of a marine casualty or incident requires timely and methodical investigation, going beyond the immediate evidence and looking for underlying conditions which may cause other future occurrences. Investigation may therefore be seen as a means of identifying not only immediate causes, but also issues in the total environment from regulation and policy through to implementation.

B. CONTENT

1. Operational readiness

1.1 Each investigative body shall plan in advance in order to ensure that unnecessary delays, after the notification and during the initiation of any investigation, do not occur as a result of a lack of relevant/prerequisite information, preparedness or knowledge. Such preparedness plan shall ensure resources and procedures are, as far as possible, immediately available to meet the requirements, including sufficient suitably qualified investigators and any necessary co-ordination, nationally and internationally, to enable initial actions to be taken promptly, after notification of a casualty or incident is first received.

1.2 Arrangements shall be put in place to ensure prompt receipt of casualty and incident notifications by the accident investigation body on a twenty-four hour basis.

2. Initial assessment and response

2.1 On being notified, the investigative bodies shall assess the situation. The initial assessment is critical for investigative bodies to gather an overview as quickly as possible, minimise the potential loss of evidence, and determine the scope of information required to decide the appropriate action.

2.2 This assessment shall include, as far as possible, an understanding of-

- (a) the overall events;
- (b) key timings;
- (c) the personnel involved; and
- (d) the category of the event.

In addition to the seriousness of the marine casualty or incident, the type of vessel and cargo involved, and the potential for the findings of the safety investigation to lead to the prevention of future casualties and incidents, the following may amongst others also be considered in deciding which non very serious casualties or incidents to investigate:

- (a) the potential safety value that may be gained by conducting an investigation;
- (b) the public profile of the casualty;
- (c) whether the casualty is part of an identifiable trend;
- (d) the potential consequences of the casualty;
- (e) the extent of resources available and projected to be available in the event of conflicting priorities and the extent of any investigation backlog;
- (f) any risks associated with not investigating;
- (g) serious injuries occurring on-board to crew and/or passengers;
- (h) the pollution of environmentally sensitive areas;
- (i) ships subject to significant structural damages;
- (j) casualties which disrupt, or have the potential to disrupt, major port operations.

2.3 After a decision is taken to investigate a serious casualty or another marine casualty or incident, the investigation shall normally be conducted with the same immediacy as that for a very serious casualty.

2.4 Where an investigation is to be carried out, the investigative bodies shall take immediate action as far as practicable to ensure preservation of evidence, coordination with other substantially interested parties and the appointment of a lead investigating state.

3. Strategy and evidence collection

3.1 The investigative body of the lead investigating other States, in close liaison with those of the other substantially interested States, shall expeditiously develop a strategy for the scope, direction and timing of the investigation.

3.2 The investigative body shall keep the plan under review during the course of the investigation; by the end of the evidence collection phase the investigative body shall, as far as practicable, have ensured the completeness of evidence from all areas that could have influenced the casualty or incident.

3.3 The scope of a safety investigation and the procedure to be followed shall be sufficient as to eliminate uncertainty and ambiguity to the maximum extent possible and so enable robust logical assessments to be made of what led to the marine casualty or incident.

3.4 If Gibraltar is substantially interested, the MAICO shall provide support to the lead investigating other State, in a timely fashion, to the extent practicable.

3.5 The lead investigative body shall nominate an investigator to carry out the investigation, deploy appropriate resources and start the collection of evidence as soon as possible, as the quality of evidence, particularly that relying on the accuracy of human recollection, can deteriorate rapidly with time; and also in recognition that any ship involved in a marine casualty or incident should not be delayed more than is absolutely necessary by the need to gather evidence.

3.6 During the initial stage of every investigation, investigators shall collect as much of the relevant evidence as possible which may help understanding the incident and determining its causes, keeping in mind the possible breadth of any investigation.

3.7 In addition to that gained during the initial notification stage, investigators shall obtain appropriate background and reference information. This can include evidence or data requested from any monitoring system, from the traffic control system, from the maritime administration, from the rescue services, from the shipping company and the casualty vessel.

3.8 Where appropriate, the MAICO shall query databases, and other sources of information to help identify potential safety issues that may be relevant to the marine casualty or incident under investigation.

3.9 In principle, investigators shall, if feasible visit the casualty and/or occurrence site in order to obtain undisturbed evidence and to gain an initial appreciation of the incident. Where it has not been possible to preserve the site ,arrangements shall, where possible, be made to obtain appropriate documentation of the scene for example by photographs, audio-visual recordings, sketches or any other means available with the object of gathering important evidence and possibly recreating the circumstances at a later stage.

3.10 Where a VDR is fitted, the investigators shall make every effort in order to obtain and preserve the information recorded on it. In particular they shall take early action to ensure that the VDR is "saved" to prevent it being overwritten. They also shall make every effort to obtain any relevant information from electronic sources, both on the ship and ashore. They shall review, in the order they find appropriate, any available, relevant documents, procedures and records.

3.11 Interviews shall be conducted with all available witnesses considered by the lead investigative body to be relevant. Investigators shall identify which witnesses they wish to interview initially and develop an interview plan. This plan shall, among other things, take into account fatigue (of both the witness and the investigator), the fragility of human evidence and the intended movements of the prospective witnesses.

Potential witnesses may include, among others:

- (a) persons directly involved in the marine casualty or incident and its consequences;
- (b) eyewitnesses to the marine casualty or incident;
- (c) emergency response personnel;
- (d) company personnel, port officials, designers, repair personnel technical experts.

If it is not possible to speak directly with some witnesses, the lead investigative body shall take steps to gain the evidence by other means.

Evidence may be obtained from them through telephone interviews or by asking other trained safety investigators to conduct the interview on behalf of the lead investigative State. In the latter case, the person conducting the interview will need to be carefully briefed by the investigator carrying out the investigation. Many key witnesses may need to be re-interviewed perhaps more than once.

3.12 Information shall be verified whenever possible. Statements made by different witnesses may conflict and further supporting evidence may be needed. To ensure that all of the relevant facts are uncovered, the broad questions of “who”, “what”, “when”, “how” and “why” shall be asked.

3.13 Human factors form an integral part of most investigations, and safety investigators must be trained appropriately. The success of the investigation of human factors depends largely on the type and quality of the information collected. As no two occurrences are the same, the investigative body shall determine the type and quality of data to be collected and reviewed. As a rule, the investigator shall be over-inclusive in gathering information initially and set aside superfluous data as the investigation unfolds.

3.14 If need be, the investigative body will have to secure some physical evidence in particular in order to obtain a scientific examination, inspection or testing ashore. In these cases, the investigators shall keep in mind that the passage of time could pollute the available evidence and therefore proceed with their removal as soon as appropriate. Prior to removal, such evidence shall be if possible photographed in situ. Their removal and their preservation shall be made with all the appropriate precautions in order to avoid affecting their examination.

3.15 If they appear to be relevant to the occurrence as part of their investigation, the investigative bodies may have to conduct or to order specialist examination, in particular technical examination of the vessel and of the different systems and equipment on board, if necessary by appropriate experts.

3.16 While gathering evidence, the investigative bodies shall try to identify any evidence that may be missing.

4. Analysis

4.1 Having collected evidence and related additional data, the investigative body of the lead investigating other State in cooperation with other substantially interested States as appropriate, shall analyse it with a view to identifying causal and contributing factors.

In that respect, the investigators shall take into account the variable value of the evidences they have collected and shall consider how best to resolve any ambiguities or conflicts of evidence.

4.2 Proper identification of causal factors requires timely and methodical investigation, going beyond the immediate evidence and looking for underlying conditions, which may be remote from the site of the marine casualty or incident, and which may cause other future marine casualties and marine incidents. Marine safety investigations should therefore in principle serve as a means of identifying not only immediate causal factors but also conditions that may be present in the whole operational process. To achieve this, the analysis of the evidence collected shall be thorough and iterative.

4.3 If a gap of information cannot be resolved and is filled in by logical extrapolation and reasonable assumptions, such extrapolation and assumptions shall be made clear in the wording of the report. A useful tool in this process can be the identification of all options and their analytical reduction to reach the most likely hypotheses.

5. Safety recommendations

5.1 Any safety recommendations shall be based on the analysis. They shall be addressed to those organisations or individuals best placed to take remedial action.

5.2 They may be based on safety investigations, or on research and abstract data analysis. Their formulation may be achieved in cooperation and consultation with the relevant stakeholders since these are often well-placed to identify and implement appropriate safety actions. The final decision on the content and addressees of safety recommendations shall, however, rest with the lead investigative body.

5.3 Where a causal or contributing factor is considered so serious that it should be addressed urgently, appropriate follow-up action shall be taken such as, for instance, issuing an interim safety recommendation.

5.4 To facilitate as much as possible acceptance and implementation by the recipients, any recommendation shall be:

- (a) necessary;
- (b) likely to be effective;
- (c) practicable;
- (d) relevant;
- (e) targeted;
- (f) stated in a clear, concise and direct manner;
- (g) stated so that it can be the basis for corrective action plans, highlighting the safety gap that needs to be addressed.

6. Reports

6.1 The investigative body of the lead investigating other State shall produce a draft report in liaison with other substantially interested States. It shall clearly present, in a consistent and concise style, the facts and analysis which are used to support the conclusions and recommendations.

6.2 Where practicable, the draft report, or appropriate parts thereof, shall be circulated in confidence for consultation to any person or organisation that could be affected by it. The investigative body shall publish the final report, amended as appropriate.

7. Follow-up

The investigative bodies shall endeavour to ascertain details of action taken in response to safety recommendations.”.

Dated: 5th November 2020.

VIJAY DARYANANI,
Minister with responsibility for the Port and Shipping.

EXPLANATORY MEMORANDUM

These Regulations are made in exercise of the powers conferred by the European Union (Withdrawal) Act 2019 in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of Gibraltar from the European Union. These Regulations amend the Gibraltar Merchant Shipping (Accident Reporting and Investigation) Regulations 2012.