

REGULATORY IMPACT ANALYSIS

**MERCHANT SHIPPING (INVESTIGATION OF MARINE CASUALTIES)
(AMENDMENT) BILL 2021**

**Prepared by the Irish Maritime Directorate, Department of Transport
November 2021**

1. Summary of the RIA

Summary of Regulatory Impact Analysis (RIA)			
Department/Office: Department of Transport		Title of Legislation: Merchant Shipping (Investigation of Marine Casualties) (Amendment) Bill 2021	
Stage: Publication of Bill		Date: November 2021	
<p>Related Publications: Court of Justice of the European Union Judgment of 9 July 2020 in Case C-257/19, European Commission v Ireland. Merchant Shipping (Investigation of Marine Casualties) Act 2000 (No. 14 of 2000). Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009.</p>			
<p>Available to view or download at: www.curia.europa.eu/jcms/jcms/j_6/en/ www.irishstatutebook.ie www.eur-lex.europa.eu</p>			
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<p>What are the policy objectives being pursued? To amend the legislative framework for the independent Marine Casualty Investigation Board to ensure the continued functioning of the Board through the facilitation of the appointment of new Board members. To support a consistent legislative structure and basis in Irish law for the investigation of marine casualties, be they marine casualties that fall within the scope of Directive 2009/18/EC of 23 April 2009 or otherwise.</p>			
<p>Policy Options Considered:</p> <ol style="list-style-type: none"> 1. Do Nothing – the no change option. 2. Amend the Merchant Shipping (Investigation of Marine Casualties) Act 2000. 3. Undertake a review of maritime accident investigation to encompass current legislation and structures in the context of national, European and international requirements. 			
<p>Preferred Option: Option 2 as an immediate step to address the urgency of the current situation.</p>			
OPTIONS			
	COSTS	BENEFITS	IMPACTS
Option 1.	Potential costs arising from further EU infringement proceedings in the event of not having a fully functioning investigative body to meet the requirements of Directive 2009/18/EC.	No long term benefits	<p>No existing legislative mechanism to allow for the appointment of two replacement Board members.</p> <p>Risks associated with a reduced Board composition of 3 persons, including in terms of the general functioning of the Board and meeting the existing 3 person quorum requirement for a meeting of the Board under the 2000 Act in the event of the absence or required withdrawal of one member from a meeting.</p> <p>No immediate facility to replace</p>

			<p>the knowledge and expertise of the former Board members.</p> <p>Risks associated with having a non-functioning Board in terms of a breach of Article 8 of Directive 2009/18/EC which requires that Member States have an independent investigative body in place. Risk of further EU infringement proceedings.</p> <p>Reputational damage if Ireland is perceived as not meeting its EU obligations.</p> <p>No immediate specific requirement in the 2000 Act for a marine casualty to be notified to the MCIB directly.</p>
Option 2.	<p>Increased costs arising from the appointment of new Board members and the ongoing payment of appropriate board membership fees and allowances for expenses.</p> <p>Costs arising from the potential engagement of additional expertise by the Board to assist it in the performance of its functions.</p>	<p>Amendment of the Merchant Shipping (Investigation of Marine Casualties) Act 2000 to facilitate the appointment of new members to the Marine Casualty Investigation Board.</p> <p>To support the maintenance and ongoing functioning of the MCIB as an independent national body to investigate marine casualties in accordance with national, EU and international requirements and recommendations.</p>	<p>Legislative provision to facilitate the appointment of new and replacement Board members and thereby reinforce the continued effective functioning of the Board as an independent body.</p>
Option 3.	<p>Costs of undertaking a review.</p> <p>Depending on the outcome of a review, and any agreed actions arising therefrom, additional costs may arise.</p>	<p>The benefits, if any, may be determined by the outcome of any review that is undertaken.</p>	<p>Immediate impacts are the same as those outlined for Option 1.</p>

2. Brief Description of Policy Context and Objectives

(i) Policy Context/Background

The Marine Casualty Investigation Board (MCIB) was established under the **Merchant Shipping (Investigation of Marine Casualties) Act 2000** (No. 14 of 2000) (2000 Act) to investigate marine casualties and publish reports of such investigations. The primary purpose of the 2000 Act was to provide for a new legislative regime to regulate the entire area of marine casualty investigation in Ireland and to replace the system established in 1894. The decision to establish the Board followed a wide-ranging examination of the then existing investigation system in Ireland carried out by the Investigation of Marine Casualties Policy Review Group which reported in 1998.

Section 8 of the 2000 Act provides that the MCIB shall be independent of the Minister (currently the Minister for Transport) in the performance of its functions and, in general, shall be independent of any other person or body whose interests could conflict with the functions of the Board. Section 9 of the Act sets out the composition of the Board, which shall consist of three persons appointed by the Minister for Transport, the Chief Surveyor, and the Secretary General of the Department of Transport or his or her nominee.

Under the 2000 Act, a marine casualty means an event or process which causes or poses the threat of –

- (a) death or serious injury in a person;
- (b) the loss of a person overboard;
- (c) significant loss or stranding of, or damage to, or collision with, a vessel or property; or
- (d) significant damage to the environment,

in connection with the operation of –

- (I) a vessel in Irish waters;
- (II) an Irish registered vessel, in waters anywhere; or
- (III) a vessel normally located or moored in Irish waters and under the control of a resident of the State, in international waters contiguous to Irish waters,

and includes an accident or damage referred to in section 26(1)(b) of the Act.

In accordance with section 25 of the 2000 Act, the purpose of investigations is to establish the cause or causes of a marine casualty with a view to making recommendations for the avoidance of similar marine casualties. It is not the purpose of an investigation to attribute blame or fault.

Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009

established the fundamental principles governing the investigation of accidents in the maritime transport sector and was one of a number of measures included in the Third Maritime Safety Package that was introduced in the interest of improving maritime safety. Directive 2009/18/EC is given effect in Ireland in the European Communities (Merchant Shipping) (Investigation of Accidents) Regulations 2011 (S.I. No. 276 of 2011), as amended by the European Communities (Merchant Shipping) (Investigation of Accidents) (Amendment) Regulations 2020 (S.I. No. 444 of 2020). The Directive applies to a subset of the marine casualties covered by the Act of 2000, i.e. it applies to marine casualties and incidents that:

- (a) involve ships flying the flag of one of the Member States;

- (b) occur within Member States' territorial sea and internal waters as defined in the United Nations Convention on the Law of the Sea (UNCLOS); or
- (c) involve other substantial interests of the Member States,

but applies a number of exemptions, as set out in Article 2.2. The Directive does not apply to marine casualties and incidents involving only:

- (a) ships of war and troop ships and other ships owned or operated by a Member State and used only on government non-commercial service;
- (b) ships not propelled by mechanical means, wooden ships of primitive build, pleasure yachts and pleasure craft not engaged in trade, unless they are or will be crewed and carrying more than 12 passengers for commercial purposes;
- (c) inland waterway vessels operating in inland waterways;
- (d) fishing vessels with a length of less than 15 metres;
- (e) fixed offshore drilling units.

Furthermore, the obligation on a Member State to investigate applies only to "very serious marine casualties", under Article 5.1. A requirement for a preliminary assessment only applies in the case of serious casualties. Therefore, the casualties and incidents that come within the scope of the Directive are a subset of the marine casualties that come within the remit of the MCIB.

Article 8.1 of Directive 2009/18/EC provides:

"Member States shall ensure that safety investigations are conducted under the responsibility of an impartial permanent investigative body, endowed with the necessary powers, and by suitably qualified investigators, competent in matters relating to marine casualties and incidents.

In order to carry out a safety investigation in an unbiased manner, the investigative body shall be independent in its organisation, legal structure and decision-making of any party whose interests could conflict with the task entrusted to it."

In S.I. No. 276 of 2011, the MCIB was designated as the investigative body in the State for the purposes of Article 8 of the Directive.

In March 2019 the EU Commission lodged a case with the Court of Justice of the European Union (CJEU) expressing concern at the independence of the MCIB in the context of the independence requirements of Article 8.1 of Directive 2009/18/EC, with particular regard to the membership of the Chief Surveyor and a nominee of the Secretary General of the Department of Transport on the Board.

On 9 July 2020 the CJEU issued a Judgment in Case C-257/19 concerning the independence of the MCIB in so far as its investigative work falls within the scope of Directive 2009/18/EC. The Court declared that by failing to provide for an investigative body which is independent in its organisation and decision-making of any party whose interests could conflict with the task entrusted to that investigative body, Ireland has failed to comply with its obligations under Article 8.1 of Directive 2009/18/EC. The issue was the presence of the Chief Surveyor of the Department of Transport and the nominee of the Secretary General of the Department on the five-person Board of the MCIB. The two members were seen as persons whose interests could conflict with the task entrusted to the MCIB. There was no finding of partiality on the part of the Board.

To address the findings of the Judgment, the two Board members of concern resigned from the Board on 30 July 2020 and the European Communities (Merchant Shipping) (Investigation of Accidents) (Amendment) Regulations 2020 (S.I. No. 444 of 2020) were made on 16 October 2020. These regulations amend S.I. No. 276 of 2011 so as to provide for a revised MCIB Board structure whereby the Chief Surveyor and the Secretary General of the Department or his or her nominee are no longer Board members for the purpose of decisions relating to investigations that fall within the scope of the Directive. The regulations also add to the list of sections of the 2000 Act that apply for the purposes of the Directive and provide for a meeting quorum of two when the Board is performing a function under the regulations.

(ii) Objective of Bill

While the strict requirement of independence on which the CJEU Judgment is based does not apply outside Directive 2009/18/EC and the Court ruling only related to the organisation of the Board in the context of marine casualties that come within the scope of the Directive, the view has been taken that on grounds of consistency, and in order to avoid having two Board structures, a legislative revision should apply to the Board structure generally, so as to encompass the broader spectrum of investigations that come within the remit of the MCIB under the 2000 Act.

The main focus and objective of the Bill is to provide for legislative amendments to the 2000 Act that will facilitate a revised Board composition for the MCIB along with other necessary operational revisions to support the ongoing functioning of the Board in the aftermath of the CJEU Judgment. The immediate objectives are:

- to revise the legislative provisions relating to the composition of the Board and facilitate the appointment of new members to the Board
- through the appointment of additional members of the Board, to assist the Board in meeting the quorum requirements of section 14 of the 2000 Act (currently 3 persons comprising the Chairperson or Deputy Chairperson and 2 other members) and to clarify the possible composition of the quorum
- to facilitate the retention of a specific level of knowledge and expertise on the Board based on a framework of desired skillsets for potential Board members, which will be set out in the Act
- to insert a specific consideration of Board gender balance into the Act
- to remove the age threshold for members of the Board
- to revise the Act provisions relating to tenure of office so as to bring them in line with the updated Code of Practice for the Governance of State Bodies
- to expand the scope of section 16 of the 2000 Act so as to facilitate the engagement of additional expertise by the Board if required
- to apply the disclosure of interests provisions of section 17 of the 2000 Act to any other persons engaged by the Board under section 16
- to confirm a specific requirement for persons involved in or aware of a marine casualty to notify the MCIB of information regarding the marine casualty
- to bring a greater consistency between certain operational provisions of the 2000 Act and those that apply under S.I. No. 276 of 2011 in relation to investigations that fall within the scope of Directive 2009/18/EC
- to provide a transitional provision to confirm the continuation and completion of investigations that are ongoing when the Bill is enacted and to confirm the continued appointment of the 3 remaining members of the Board for the unexpired term of his or her appointment

- to enhance the independent functioning of the MCIB.

Separate objectives relate to:

- maintaining a requirement for persons involved in a marine casualty to notify the Chief Surveyor/Marine Survey Office of a marine casualty, given the potential implications for the safety of vessels, crew, passengers or the environment and the need for any regulatory compliance issues to be addressed or followed up; and
- updating the definition of “Safety Convention” in the Merchant Shipping (Safety Convention) Act 1952, which relates to the International Maritime Organization International Convention for the Safety of Life at Sea (SOLAS Convention), to facilitate the preparation of separate secondary legislation to transpose more recent amendments to the Convention into Irish law.

It is recognised that the 2000 Act and the legislative framework contained therein predates Directive 2009/18/EC. Given the passing of time and in light of the CJEU Judgment, it is view of the Department of Transport that a more fundamental review of maritime accident investigation is desirable. In that regard, separate to the Bill an independent review of the current organisational structures for marine casualty investigation in Ireland was initiated in March 2021. Information regarding the review is provided in section 7 of this RIA.

3. Policy Options

Option 1 – Do Nothing – the no change option

The CJEU Judgment is directed at the composition of the Board insofar as it considers casualties or incidents that fall within the scope of Directive 2009/18/EC. The activities of the Board that fall within the scope of the Directive are legally separate from the other activities of the Board under its broader remit under the 2000 Act.

However, as a consequence of the CJEU Judgment and the actions taken to date to comply with the findings of the Court, the Board now only has 3 members. Doing nothing further is not considered a realistic option in a situation where the existing legislative framework under the 2000 Act has not been amended and does not allow for the appointment of two Board members to replace the Chief Surveyor and the nominee of the Secretary General of the Department of Transport. There are risks associated with a reduced Board composition of 3 persons, including in terms of the general functioning of the Board and meeting the existing 3 person quorum requirement under the 2000 Act for a meeting of the Board. Insofar as EU responsibilities are concerned, in the event that the Board was unable to carry out its role, this could leave the State open to further infringement proceedings for a breach of Article 8 of Directive 2009/18/EC which requires that Member States have an independent investigative body in place. In addition, there is no immediate specific requirement in the 2000 Act for a marine casualty to be notified to the MCIB directly.

In the interest of ensuring the continued effective and consistent operation of the MCIB as an independent investigative body, the option of doing nothing is not considered to be a realistic or prudent course of action.

Option 2 – Amend the Merchant Shipping (Investigation of Marine Casualties) Act 2000 having regard to the core findings and considerations of the CJEU

As part of the State’s response to the findings of the CJEU and in order to facilitate greater

consistency in the approach to the investigation of marine casualties, an amendment of the Merchant Shipping (Investigation of Marine Casualties) Act 2000 is the preferred course of action. At a minimum, this option will facilitate the appointment of new members to the MCIB for its broader remit under the 2000 Act and thereby provide further support to the continued independent functioning of the Board in the immediate term as the investigative body in the State.

Subject to Ministerial, Government and Oireachtas approval to the content of the Bill, it is envisaged that the Regulations that have been made under the European Communities Act 1972 to give effect to Directive 2009/18/EC will be revisited again in the future to address any consequential legislative cross-reference revisions that may arise if the Bill is enacted.

Option 3 – Undertake a review of maritime accident investigation to encompass current legislation and structures in the context of national, European and international requirements.

As mentioned in section 2 above, it is recognised that the 2000 Act and the legislative framework contained therein predates Directive 2009/18/EC of 23 April 2009, the adoption in 2008 of the International Maritime Organization Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty or Marine Incident (Casualty Investigation Code) and Commission Regulation (EU) No. 1286/2011 of 9 December 2011 adopting a common methodology for investigating marine casualties and incidents. While the general principles that underscore EU and international requirements are reflected in the 2000 Act and the Regulations that give effect to Directive 2009/18/EC, it is the view of the Department of Transport that the time is opportune to undertake a fundamental review of maritime accident investigation. Such a review takes time and is separate to the current Bill, which addresses some legislative anomalies in relation to the MCIB in the immediate term for the reasons already outlined. See section 7 for further information regarding the review.

4. Analysis of Costs, Benefits and Impacts

(a) Costs

Option 1

It may be argued that there are no costs with this option. However, there are potential costs arising from further EU infringement proceedings in the event of the Board not being in a position to make decisions due to not meeting quorum requirements, either under the 2000 Act or under S.I. No. 444 of 2020 and, thereby, of not having a fully functioning investigative body in the State to meet the requirements of Directive 2009/18/EC.

Option 2

The implementation of the proposed amendments to the 2000 Act will give rise to additional costs including in relation to the proposed appointment of new Board members, the recruitment process for those appointments and the payment of the appropriate Board membership fees (€5,985 p.a.) and allowances for expenses to those persons when appointed.

Under current arrangements, Ministerial appointments are made following a process that involves the Public Appointments Service/State Boards recruitment system. It is possible that a search for potential interested persons, who are not conflicted having regard to the CJEU findings, may be required and may need to extend beyond the State or involve an Executive Search, with consequential increased recruitment costs.

The MCIB may also require moneys from the Oireachtas to meet the costs of additional consultants, advisers, investigators or other expertise that it may seek to engage in the aftermath of the Judgment.

Option 3

Costs arise from undertaking a review. Depending on the outcome of the review, and any agreed actions arising therefrom, additional costs may also arise. It is not possible to quantify such costs at this point in time.

(b) Benefits

Option 1

No immediate or long term benefits arise.

Option 2

The amendment of the 2000 Act will bring an enhanced consistency to the legislative framework that applies to the MCIB. The Bill will facilitate the appointment of new members to the Board and thereby reinforce the continued effective functioning of the Board as an independent national body appointed to investigate marine casualties in accordance with national, EU and international requirements and recommendations and in terms of its general organisation and decision making.

Option 3

The benefits, if any, have yet to be determined.

(c) Impacts

The proposals have no particular impacts for national competitiveness, socially excluded and vulnerable groups, consumers, the environment, the rights of citizens, North-South or East-West relations or rural communities.

A failure to fully address the current situation by following Option 1 could give rise to reputational damage for Ireland in the event that the MCIB was unable to carry out its role as the national investigative body in relation to marine casualty and investigation. Every effort is being made in the option being pursued to avoid such an occurrence and to enhance the organisational independence of the MCIB in carrying out its important role in investigating marine casualties, establishing the cause or causes of those casualties and making safety recommendations for the avoidance of similar incidents in the future.

The introduction of a specific gender balance consideration in relation to Board membership appointments under the preferred Option 2 is viewed as a positive impact as is the scope for the replacement and broadening of expertise on the Board.

The introduction of enhanced consistency between the treatment of marine casualties and investigations that fall within the scope of Directive 2009/18/EC and the broader 2000 Act may necessitate some administrative adjustments for the MCIB with some additional administrative burden in terms of time-frame monitoring and compliance, for example regarding the scheduling of final or interim investigation reports. However, benefits should arise over time from having consistent and streamlined processes in place.

5. Consultation

The Department of Transport has engaged with the MCIB since the CJEU Judgment and has consulted with the Board in developing the proposed amendments to the 2000 Act.

There has also been consultation with the Marine Survey Office (MSO) given the proposed revisions to the current legislative regime under the 2000 Act and the need for that Office to continue to be notified of marine casualties. The MSO continues to have an interest in knowing about marine casualties, in particular where there may be implications for the safety of a vessel or the performance of equipment on board the vessel.

Pre-Legislative Scrutiny

The Bill was submitted for Pre-Legislative Scrutiny (PLS) to the Joint Committee on Transport and Communications on 25 January 2021. Subsequently, PLS took place at the Joint Committee on Transport and Communications on 29 January 2021, attended by the Minister for Transport. The Minister also responded to a number of further requests for information and comment from the Joint Oireachtas Committee in March and May 2021. The formal Report of the Joint Committee on PLS of the General Scheme of the Bill was received on 22 July 2021.

The Joint Committee recommended two revisions to Head 3 of the General Scheme (now section 3 of the Bill), which substitutes section 9 of the 2000 Act and relates to the composition of the MCIB, and the removal of Head 13 (now section 13 of the Bill), which provides for the notification of marine casualties to the Marine Survey Office (MSO).

The recommendations of the JOC were reviewed and considered and some technical changes are now contained in section 3 of the Bill. Section 13 has been retained as it is considered that a requirement for persons to notify the MSO (as well as the MCIB) when a marine casualty within the meaning of the 2000 Act occurs is an important provision and recognises the fact that, as has been the case up to now, the MSO has an interest in knowing about marine casualties, in particular where there may be implications for the safety of vessels, crew, passengers or the environment, and where there are regulatory compliance issues that need to be addressed or followed up.

6. Enforcement and Compliance

The 2000 Act contains offence and prosecution provisions relating to the compliance of Board members with specific requirements in areas such as disclosure of interests (section 17) and the unauthorised disclosure of confidential information (section 18). Compliance requirements also arise under the Ethics in Public Office Act 1995, the Standards in Public Office Act 2001, the Code of Practice for the Governance of State Bodies and the MCIB Code of Business Conduct to address any conflict of interest issues that may arise in relation to any aspect of the MCIB's activities.

Existing offence provisions in the 2000 Act relating to notification and reporting of marine casualties, obstruction of investigations, non-provision of records or information, medical or physical examinations, failure to comply with a direction of an investigator or publishing a draft report without the consent of the Board also remain. The obligation to notify the MSO of a marine casualty is being retained, albeit in a separate standalone requirement in the current Bill that includes an offence provision mirroring that which applies to the notification requirements relating to the MCIB.

There is no additional compliance burden for the general maritime sector.

7. Review

As outlined in section 3, Option 3, a further step, separate to the Bill, that has been progressed is an independent review of the current organisational structures for marine casualty investigation in Ireland, which was initiated in March 2021. The review was undertaken by Captain Steve Clinch, retired former Chief Inspector of the UK's Marine Accident Investigation Branch. The key objective of the review was to assess the current organisational structures for marine casualty investigation in Ireland and to set out in a report to the Minister for Transport any recommendations, including in relation to change, to achieve the most appropriate and effective marine casualty investigation structures for Ireland, taking into account national, EU and international obligations.

The review report and recommendations are being considered by the Department as part of a review of organisational structures for marine casualty investigation in Ireland. This may lead to further legislative change.