

## Legal aspects of investigating marine accidents in Poland

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**Key words:** maritime chamber, State Marine Accident Investigation Commission, navigational safety, maritime safety, marine accident investigation, ERIKA III

### Abstract

Implementation of ERIKA III, the third package of EU legislation intended to integrate international standards of marine accident investigation, has significantly changed the way Polish public authorities investigate marine accidents. Until the implementation, maritime chambers conducted the investigation of marine accidents. Since October 2012 there has been a dual system in place whereby public authorities are entitled to investigate marine accidents in Poland. This article reviews distinctive features of both approaches and the impact thereof on the system of investigating marine accidents. Beside a theoretical description of the legal basis for the functioning of both maritime chambers and the State Marine Accident Investigation Commission, this paper includes analytic data of investigations conducted by both these bodies in order to prove that the number of investigations conducted by maritime chambers has drastically decreased since the establishment of the State Commission, and that the number of investigations conducted by the State Commission itself cannot be sufficient, leading to a decrease of safety in maritime navigation.

### Introduction

The role of shipping in international trade has been strengthening for centuries and one cannot imagine the global economy running without this key transport link. Safety, in turn, is one of the fundamental factors affecting the risk associated with shipping. It is unsurprising, therefore, that the international community is constantly introducing legal regulations designed to improve the safety of vessels, crews, passengers and cargo carried by sea.

In this context, European maritime law (also referred to as EU or Community (Godecki, 2008) maritime law) is an important branch of maritime law. The EU legislative efforts undertaken in recent years in this field have taken the form of three legislative packages, ERIKA I, II and III, named after the tanker ERIKA, which in late 1999 broke apart near Brittany, resulting in a spill of more than 10,000 tonnes of oil. The first of the legislative packages was intended to increase the safety of seaborne petroleum products. The ERIKA II package was aimed

at introducing Community monitoring, control and information systems for maritime traffic, while the ERIKA III package introduced, *inter alia*, common regulations on marine accident investigation and was supposed to facilitate cooperation between the authorities of different EU member states (Official Journal of the EU, (OJ), 2009).

Implementation of ERIKA III resulted in a vital change in the system of marine accident investigations within Poland's legislative system. The previous monopoly on proceedings intended to establish the causes of a marine casualty, i.e. accident (sometimes supplemented with parallel criminal proceedings by the police and prosecutors) was replaced by a dual system, with the State Marine Accident Investigation Commission (hereinafter referred to as the Commission) established to operate next to maritime chambers.

This change aimed to fulfil the intentions of the ERIKA III package, that is, to strengthen cooperation between the relevant authorities of EU member States and, primarily, enhance maritime safety.

To assess the impact of these regulations it is therefore necessary to examine the structure and competency of the two bodies, i.e. the maritime chamber and the Commission, and to compare the numbers of proceedings conducted by each over the past years.

## Maritime Chambers

The legal nature of maritime chambers, due to the specific scope of competence, organisational structure, composition of the bench, methods and measures, has been a doctrinal moot point for a long time. Some lawyers regard maritime chambers as *sui generis* courts, others as bodies of maritime administration, and still others as mixed, judiciary-administrative entities (Młynarczyk, 2002, p. 53).

Among the features that make maritime chambers judicial organs are independent jurisdiction, the procedures adopted, the independence of the bench and a clear separation from the structure of maritime administration. On the other hand, maritime chambers in Poland carry certain characteristics of administrative bodies, in particular those regarding powers. Nevertheless, the predominant position seems to be that maritime chambers are state quasi-judicial organs, with autonomy and independence, organised like common courts of law, which in parallel perform several administrative actions (Łopuski, 1982, p. 33; Młynarczyk, 2002, p. 53).

Representing for the purpose of this article the prevailing view that maritime chambers in Poland are quasi-judicial bodies whose principal purpose is to investigate maritime accidents, we must briefly look into their composition, as well as the nature and course of proceedings conducted before them.

Maritime chambers were established by law in Poland in 1925. The chambers of first instance were founded in Gdańsk and Wejherowo, while the Maritime Chamber of Appeal had its seat in Starogard. In 1930, the maritime chamber in Wejherowo was moved to Gdynia. After World War II, maritime courts were reactivated as decreed in the Act of 1925, and in 1949 one more maritime court was set up in Szczecin. That structure of maritime jurisdiction has remained to this day, with maritime chambers in Gdynia and Szczecin, and the Maritime Chamber of Appeal at the Regional Court in Gdańsk, with its seat in Gdynia (Łopuski, 1998, p. 127).

Currently maritime chambers are governed by the regulations of the Act of 1 December 1961 on maritime chambers (OJ, 2016b). In accordance with Article 1(1) of this Act, maritime chambers make rulings

on marine accidents. The key issue is therefore the way a maritime accident (often called a casualty) is understood, unlike road or air accidents, whose establishment requires damage in a broad sense.

The essence of an accident in reference to a ship is slightly different (or, at least, it was different in the text of the Act on maritime chambers before the Act on the Commission came into force). That difference was expressed in the original statutory definition of a marine accident in the part concerning ship accidents. The definition included in the Act on maritime chambers did not comprise the concept of consequence. This meant that material damage or any loss was not a prerequisite for recognising an accident caused by or involving a ship as a marine accident. To explain the essence of a ship's accident at sea we should bear in mind the constant enhancement of navigational safety in the broadest sense. As this was the idea behind the said Act, it becomes obvious that it is not the material damage consequent upon marine casualty, but the very threat to the safety of the vessel, people and cargo which is the essence of a marine casualty (Jabłoński, 1975, p. 75).

The maritime chamber is composed of the chairperson and one or more vice chairpersons, all being judges of common courts of law, and lay judges.

Besides, the minister responsible for the maritime economy (currently the Minister of Maritime Economy and Inland Shipping) appoints a delegate who participates in proceedings before maritime chambers as a commissioner for public interest.

“On the other side” is the person concerned, i.e. anyone whose legal interest is related to the accident.

Maritime chambers examine marine casualties:

- 1) of vessels of Polish nationality;
- 2) of vessels of foreign nationality, if the accident occurred in Polish maritime internal waters or Polish territorial seas, or if the shipowner or Master of such ship applies to institute legal proceedings;
- 3) involving the ships of the Navy, Border Guard or Police - upon the consent of, respectively, the Armed Forces Commander, Commander-in-Chief of the Border Guard and Police Commander-in-Chief.

The procedure comprises two stages: (a) investigation, which aims to clarify the course of action, causes and circumstances of a marine accident, the collection of required information and the preservation of evidence; and (b) trial.

Decisions of marine chambers should fulfil, *inter alia*, the following goals:

- 1) accurately identify the causes of a marine accident;
- 2) indicate the ship or persons guilty of causing the accident and apportion blame;
- 3) identify faults and deficiencies of vessel construction or operation and maintenance, equipment, conditions of loading or manning, and of the fairway and aids to navigation, and infringements by defective organisation of institutions serving the safety of maritime shipping;
- 4) assess the behaviour of the ship and rescue actions taken.

Maritime chambers may apply sanctions. In accordance with the Act on maritime chambers, if a ship crew member or sea pilot, holding a document specifying his qualifications in marine navigation issued by the competent Polish authority, has demonstrated a lack of skills necessary to ensure the safety of navigation or, by gross negligence, caused or contributed to a marine accident, a maritime chamber may deprive him of exercising the partial or full range of those powers for a period of between one year to five years.

A decision issued by the first instance chamber can be appealed to the Maritime Chamber of Appeal. Decisions of the second instance chamber can be appealed to the Court of Appeal in Gdańsk.

It should be noted that an appeal to the Court of Appeal has been possible only since 1 January 2009. By that time the decision of Maritime Chamber of Appeal had closed the case proceedings and there were no ordinary or extraordinary measures to appeal against such decision. However, given the fact that maritime chambers are at the same time investigative and adjudicating bodies in the proceedings, the lack of judicial control over such rulings raised many doubts. In 2005, this issue was addressed by the European Court of Human Rights (ECHR) in *Brudnicka and others vs Poland* (Supreme Court, 2005), which held that, *inter alia*, Polish law does not provide an appeal from the maritime chamber decision to a common court of law. As a result, the ECHR found that Poland had violated Article 6 of the Convention on Human Rights and Fundamental Freedoms (OJ, 1993), which forced Polish legislators to introduce judicial control of maritime chamber decisions by the possibility of appealing to the Court of Appeal in Gdańsk. That sentence reignited a general discussion on the form and future of maritime judicature in Poland, which discussion produced several postulates, including demands that, if implemented, would substantially affect the overall administration of justice. Let us recall the guideline of the then Council of Ministers: “*reform of the*

*maritime chambers should go towards transforming these organs into courts*” (Koziański, 2008).

Until 27 October 2012, i.e. the date on which the relevant provisions of the Act of 31 August 2012 on the Commission (OJ, 2015) came into force, maritime chambers had had powers to initiate proceedings on request or *ex officio*.

Legal proceedings were instituted *ex officio* if:

- 1) a ship sank, or was missing, abandoned or otherwise lost;
- 2) a marine accident resulted in the disappearance or death of a person, or serious injury, as well as direct exposure to risk of loss of life or serious injury;
- 3) the maritime chamber considered that the public interest required a case to be heard (which maritime chambers willingly made use of).

Moreover, in accordance with the Maritime Code (OJ, 2016a) the captain of a ship involved in an accident at sea was obliged to immediately notify the maritime chamber of any marine accident.

In the current state of law, the maritime chamber shall initiate proceedings only on request of the person concerned or the maritime administrative body. Therefore, the maritime chamber no longer has the authority to initiate legal proceedings *ex officio*.

These changes have undoubtedly led to a reduction in the number of cases examined by maritime chambers, a topic discussed in more detail in the section *Maritime Chambers and State Marine Accident Investigation Commission*.

### **State Marine Accident Investigation Commission**

The appointment of the Commission became a necessity due to the implementation of Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 (OJ, 2009) establishing the fundamental principles governing the investigation of accidents in maritime transport, which is part of “the third maritime package” (Erika III). The Directive provides guidelines for conducting investigations and the exchange of experience after a marine casualty or incident.

It appears from the preamble of the Directive that it is not an entirely autonomous act, in the sense that its functioning in the international law system is meant to supplement already existing legal norms of international law, specify and clarify them, facilitate their better implementation, etc. In this connection, it is worth indicating the following provisions made by international conventions:

- Article 2 of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) (OJ, 2002) establishes the right of coastal States to investigate the cause of any marine casualty occurring within their territorial seas which might pose a risk to life or to the environment, involve the coastal State's search and rescue authorities, or otherwise affect the coastal State.
- Article 94 of UNCLOS establishes that flag States are to cause an inquiry to be held, by or before a suitably qualified person or persons, into certain casualties or incidents of navigation on the high seas.
- Regulation I/21 of the International Convention for the Safety of Life at Sea of 1 November 1974 (SOLAS 74) (OJ, 1984), the International Convention of Load Lines of 5 April 1966 and the International Convention for the Prevention of Pollution from Ships of 2 November 1973 lay down the responsibilities of flag States to conduct casualty investigations and to supply the International Maritime Organisation (IMO) with relevant findings.

Currently a European network of commissions for investigating marine accidents consists of 29 bodies in all Member States as well as in Norway and Iceland (EMSA, 2017).

As for proceedings of the Commission (in Poland), it should be pointed out that the procedure is defined by the Commission Regulation (EU) No. 1286/2011, 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 the Act itself makes reference to the text of the EU Regulation. The Regulation sets out the main principles of proceeding, designed to make optimal use of the lessons from each event at sea. The Act requires the Commission, *inter alia*, to be at constant operational readiness, so that upon receipt of notification it can immediately commence work "*without unnecessary delay resulting from a lack of relevant/pre-requisite information, preparation or knowledge*" (Kita & Szymankiewicz, 2014).

Currently the Commission consists of five people, including the Chairperson and a Secretary, although for many months the Commission acted as an incomplete statutory four-member panel. In addition, the Commission may use the knowledge and experience of individual experts and specialised institutions (four, including the Polish Register of Shipping S.A., a classification society set up 80 years ago).

The Commission is a permanent and independent body, operating under the minister in charge of the maritime economy.

The Act introduces four new definitions concerning maritime events that the Commission deals with. These are:

- 1) marine casualty;
- 2) very serious casualty;
- 3) serious casualty; and
- 4) marine incident.

The Commission shall investigate maritime casualties and incidents involving a ship of Polish nationality, a ship of foreign nationality (if the marine casualty or incident occurs in Polish marine internal waters or Polish territorial seas) and casualties involving a ro-ro passenger ferry or high-speed passenger craft, if a marine casualty or incident occurs outside the internal waters or territorial seas of a Member State of the EU, where the last port of call was a port in Poland.

The Act obliges the shipowner and captain of a ship involved in a marine casualty or incident to promptly notify the Commission and Harbour Master's Office of the casualty or incident at the first Polish port which the ship is expected to enter after the marine casualty or incident, and to preserve traces and evidence concerning that marine casualty or incident (Article 47 par. 3 of the Act).

The obligation on the captain to notify the Commission immediately of a marine accident also follows from the Maritime Code (Art. 66).

The Commission shall determine, without delay after receiving notification of a marine casualty or incident, whether a marine casualty or incident occurred.

The Commission shall investigate any very serious or serious casualty, whereby, following an initial assessment of the causes of a serious casualty the Commission may decide to cease the investigation. If a marine casualty or incident occurs, the Commission shall decide whether to undertake an investigation or not.

After investigating a marine casualty or incident, as a rule the Commission draws up a final report (in certain situations it can prepare an interim or simplified report). Such a report should contain, *inter alia*, a description of the circumstances, causes and analysis of the event, comments on the factors that contributed to the occurrence of a marine casualty or incident, and recommendations concerning maritime safety.

The parties to whom the report refers do not have any measures of appeal from the issued report. The

Act only provides that, before releasing the final report, the Commission shall send it to the parties to whom the text of the report refers to allow them to submit comments on the report, and shall specify the deadline for such submissions. The Commission shall decide on the manner the comments will be taken into consideration.

From a legal viewpoint it is important that the Commission in its proceedings should not apportion blame or liability. The reports of the Commission do not constitute proof in criminal proceedings, or other proceedings aimed at apportioning blame and liability. The Commission was set up as a body establishing circumstances and causes of events, aiming at the prevention of marine accidents and incidents in the future.

Another extremely important feature of proceedings by the Commission is that the confidentiality of an investigation into a marine casualty or incident must be ensured. The Commission may not make accessible to the authorities in criminal proceedings, nor to any other authorities conducting an investigation to determine liability or guilt, the following materials collected by the Commission:

- 1) evidence from hearings of persons and other documents drawn up or received by the Commission in the course of the investigation of a marine casualty or incident;
- 2) records revealing the identities of persons heard during the investigation of a marine casualty or incident;
- 3) information on the people who were involved in a marine casualty or incident which is of a sensitive or private nature, including information on their state of health.

Such evidence, documents, records and information may be made accessible only for preparatory, judicial or judicial-administrative proceedings, or proceedings before the maritime chamber only upon permission of the court of law, if the court considers that an overriding public interest justifies their disclosure (the court competent to hear the case is the Regional Court in Gdańsk).

### Maritime Chambers and State Marine Accident Investigation Commission – comparative data analysis

The primary assumption of Directive 2009/18/EC as expressed in the first section “*is to maintain a high general level of safety in maritime transport in Europe*”; it is also pointed out that “*every effort should be made to reduce the number of marine casualties and incidents*” (OJ, 2009).

Given that the proceedings of the maritime chamber or the Commission are primarily aimed at investigating the causes of a marine accident in order to enable the introduction of appropriate changes in the behaviour of shipping stakeholders or relevant legal regulations, it is clear that the largest possible number of marine incidents or casualties should be investigated by the competent authority. Only investigated cases and lessons thereof contribute to navigational safety enhancement.

The following tables provide statistical data stored in the archives of maritime chambers in Szczecin and Gdynia (Figure 1) (Archive of Marine Accidents), as well as collected in the form of annual reports published on the website of the Commission (Figure 2) (PKBWM, 2016).

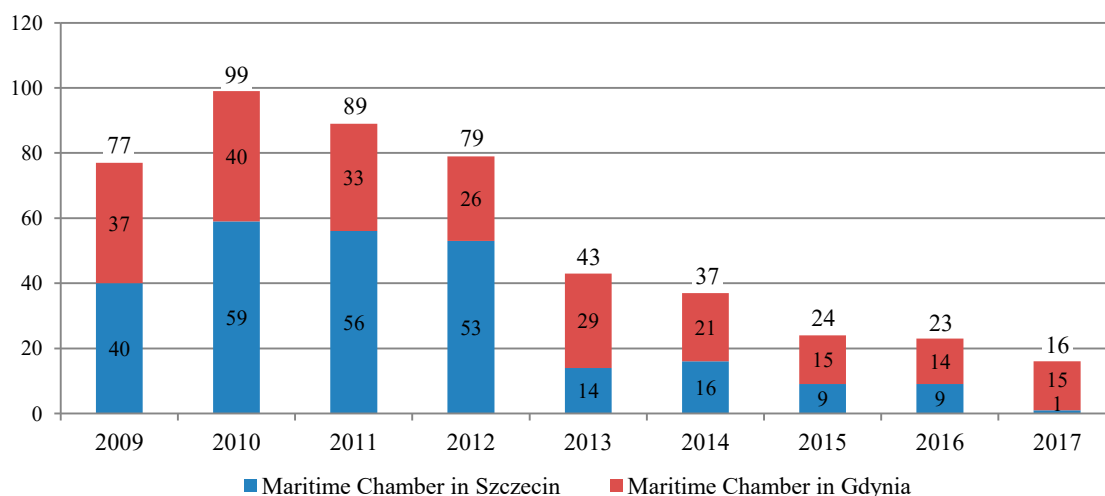


Figure 1. Maritime chambers – investigations of marine accidents

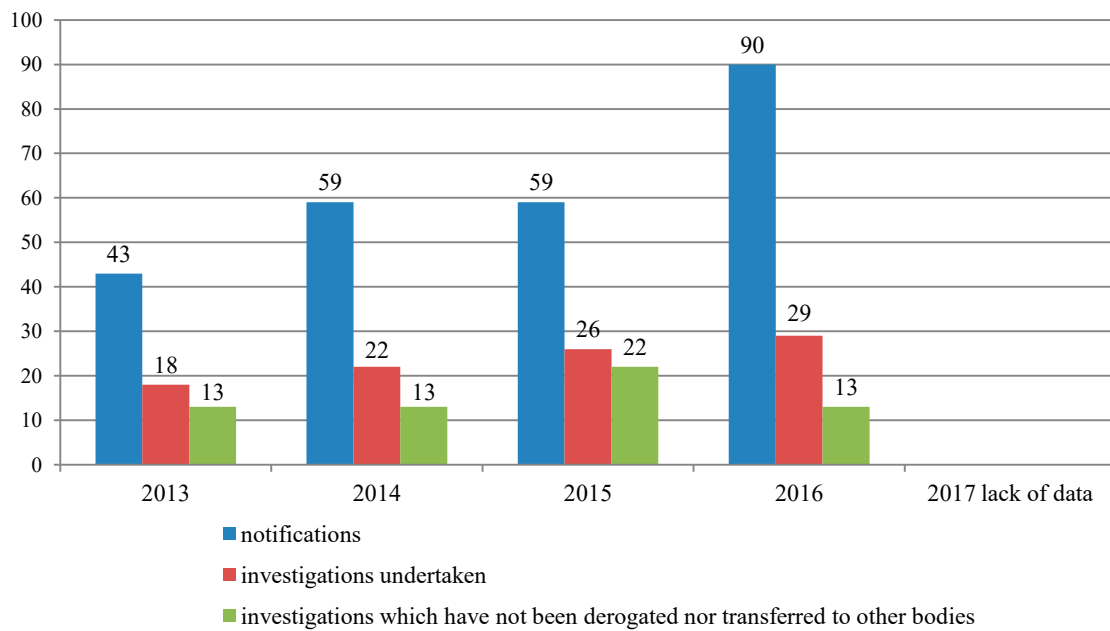


Figure 2. State Marine Accident Investigation Commission – investigations of marine accidents

The information presented in Figure 1 and 2 can lead directly to the conclusion that the number of marine accident investigations conducted by maritime chambers in Szczecin and Gdynia has drastically decreased throughout the years considered. This is obviously a result of changes in the legislation which came into force along with the Act on the State Marine Accidents Investigation Commission, depriving the maritime chambers of their prerogative to initiate investigations *ex officio*. It was most probably the legislators' intention to concentrate the authority to both initiate and conduct marine accidents investigations within one body, which would certainly increase the transparency of the entire proceedings and, as such, is a fully right and just intention.

Nevertheless, it is worth considering whether the Commission, in its current form and composition (having in mind the number of members, not actual and specific persons holding their positions), is capable of taking care of the vast number of cases which have been referred to this one, centralised body.

In the last years before introducing the Commission into the Polish legal system the two maritime chambers collectively conducted between ca. 70 and 100 investigations a year, explaining the causes of multiple marine accidents and contributing in consequence to an increase in maritime safety. The latter is, however, the main concern of the lawmakers who decided to implement the Directive introducing the Commission to the Polish legal system. This can be clearly read from the justification of the draft

bill (RCL, 2017) indicating that the planned consequence of implementation was a decrease in the number of marine accidents and, in consequence, fewer casualties and much lower maintenance costs.

On the other hand, as can be seen from Figure 2, in the Commission's first years of existence, the number of investigations conducted by maritime chambers decreased drastically, especially in Szczecin, sometimes by as much as nearly five times (when comparing, for example, the year 2015 with 2010). Such a drop cannot be accounted for by the possibility that fewer accidents took place in 2015 since in that year the Commission was notified of 59 marine accidents. Those numbers would not in themselves be a problem if the Commission had conducted investigations into most of the reported cases. In reality, however, in more than half the cases the Commission did not undertake an investigation. Moreover, in a couple of cases an investigation was undertaken but later derogated or transferred to another body (this happened five times in 2013, nine times in 2014, four times in 2015 and 16 times in 2016).

Having in mind that the lawmakers' goal, at least officially, was not only to implement the Directive but also to reduce the number of marine accidents, it is worth verifying whether the few years of the Commission's existence have brought about a visible change in navigational safety. According to statistics provided by the Central Statistical Office (GUS) (GUS, 2006) the general number of marine accidents was 97 in 2006, 79 in 2007, 83 in 2008, 73 in 2009,

83 in 2010, 67 in 2011, 64 in 2012, 39 in 2013, 58 in 2014 and 55 in 2015.

The above statistics could, in fact, support the thesis that the number of marine accidents is constantly decreasing and might be correlated to the functioning of the Commission. However, the numbers of accidents above, provided by the GUS, included all kinds of marine accidents/incidents, i.e. not only navigational accidents, but also technical accidents and accidents (injuries) to persons, while the most important, for the purpose of the existence of the Commission, are mainly navigational accidents. In this regard, the statistics are as follows: 42 in 2007, 42 in 2008, 36 in 2009, 40 in 2010, 30 in 2011, 32 in 2012, 22 in 2013, 30 in 2014 and 17 in 2015.

## Conclusions

It appears from the analysis in this paper that there is a visible shift of the burden of conducting proceedings in maritime casualties from maritime chambers to the Commission.

Due to the different scope of powers of these two bodies, with the safety of navigation being the primary goal, the optimal condition would be a certain equilibrium between the number of proceedings conducted by maritime chambers and those carried out by the Commission, completed by issuing a report or recommendations.

Nevertheless, as the Act on the State Marine Accident Investigation Commission came into force, it deprived the maritime chambers of the right to institute proceedings *ex officio*, which has led to a very clear decline in the number of cases heard by the chambers. Since the maritime chambers are nowadays entitled to conduct an investigation only upon an interested party's request, the number of investigations has dropped, and these cannot be entirely taken up by the Commission due to its different scope of activity and definitions (of marine accident, serious accident, incident, etc.). The parties involved in marine accidents are not always interested in commencing an investigation by a maritime chamber since their mutual claims are often resolved by activating insurance policies which are sufficient for those entities to cover their losses. However, this does not contribute to general maritime safety since it rarely ends with a comprehensive accident report and even if it does, the report is hardly ever published and accessible to a wider range of persons involved in maritime navigation.

On the other hand, the statistics seem to support the thesis of a generally decreasing number of marine accidents and it is worth observing whether this tendency will continue in future years. Nevertheless, navigational safety is a complex issue, and it is not likely that the change in approach to marine accident investigation has a direct impact on the decreasing number of accidents. Thus far, it has had, however, a direct impact by way of a decrease in the number of investigations conducted with regard to such accidents and incidents over the past few years.

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