

REPORT TO THE COMITÉ MARITIME INTERNATIONAL  
ON SELECTED RECENT DEVELOPMENTS  
IN EUROPEAN UNION MARITIME LAW

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## **1. INTRODUCTION**

This report describes and discusses a selection of recent developments in European Union ("EU") maritime or shipping law over the last two years or so.

Given the range of the EU's activities, no report can be comprehensive so this document is inevitably selective. For readers who are less familiar with EU law, there are several footnotes which provide some background information.

To contextualise the significance of the maritime sector for the EU, it is useful to recall the keynote speech delivered by the European Commission's Environment, Maritime Affairs and Fisheries Commissioner, Karmenu Vella, on 28 May 2015 at the European Maritime Day in Piraeus. He recalled that almost 90% of the EU's external trade and 37% of its internal trade are carried by sea; the EU's maritime economy represents a gross value added of over €500 billion annually; while the maritime sector provides between 3.5 million and almost 5 million jobs in the EU and this number is growing (e.g., the cruise sector adds an extra 3% of jobs to this total in Europe annually). He also said that to harness the potential of the maritime sector, "Europe needs to do five things: protect, innovate, invest, train and reach out....That's my vision for seizing the opportunities that blue growth offers to Europe."

There is an increasing overlap between the interests of the CMI and the EU so this paper considers a range of issues in EU maritime law which would hopefully interest the CMI and its Executive as well as some issues of EU maritime law which would be of general interest.

## **2. EXECUTIVE SUMMARY**

This report highlights:

- the new European Commission and its relevance for maritime law;
- an important judgment by the Court of Justice of the European Union ("CJEU") on the relationship between EU law and international maritime treaties where, in that case, the CJEU said that non-EU vessels had to comply with the EU sulphur emissions directive when in EU waters and could not plead the International Maritime Organisation convention as a defence when emitting higher levels of sulphur;
- an 8 May 2015 report by the European Commission on the operation over time of Regulation 789/2004 on the transfer of cargo and passenger ships between registers in the EU (i.e., how easy is to transfer vessels between the registers of the EU Member States);
- the EU's Competition Consortia Block Exemption has been extended For five years until 2020;
- the forthcoming Second Global Maritime Regulatory Summit to be held in Brussels on 18 June 2015;
- the 7 May 2015 European Commission decision that the Portuguese shipyard operator Estaleiros Navais de Viana do Castelo, S.A. ("ENVC") had received €290 million of State aid from Portugal which was incompatible with Articles 107-109 of the Treaty on the

Functioning of the European Union (“TFEU”) and that Portugal must recover the aid from ENVC (but not, interestingly, from the new operator of the yard, namely, WestSea);

- the 18 May 2015 Council Decision on the position to be adopted by EU Member States, on behalf of the EU, in the Port State Control Committee of the Paris Memorandum of Understanding on Port State Control;
- the 13 May 2015 position adopted by the Council's Committee of Permanent Representatives (or COREPER) confirming a compromise text for the new directive improving seafarers' employment/labour rights;
- the 9 January 2014 Commission study on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport;
- the Commission published, on 12 May 2015, a public summary of non-binding Guidelines for customs controls on transboundary shipments of waste;
- Regulation 2015/757 of 29 April 2015 of the European Parliament and of the Council on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16;
- Decision 2014/241 concerning the ratification of, or the accession to, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009;
- Regulation 1257/2013 of the European Parliament and of the Council of on ship recycling and repealing Regulation 1013/2006 on shipments of waste;
- Regulation 788/2014 laying down detailed rules for the imposition of fines and periodic penalty payments and the withdrawal of recognition of ship inspection and survey organisations pursuant to Articles 6 and 7 of Regulation 391/2009 of the European Parliament and of the Council;
- the proposed Regulation establishing a framework on market access to port services and financial transparency of ports;
- the Report on the Functioning of the Directive on the Reporting Formalities for Ships Arriving in and/or Departing from EU Ports;
- the Mediterranean migration crisis; and
- the public consultation on the EU’s Maritime Transport Strategy.

### **3. NEW EUROPEAN COMMISSION**

The new European Commission<sup>1</sup> took office on 1 November 2014. It will serve a five year term. It is led by Jean-Claude Juncker.<sup>2</sup>

The European Commissioner for Transport (including maritime transport) is Violeta Bulc.<sup>3</sup> She is a Slovenian telecom entrepreneur and politician. She served as a Minister without Portfolio in the Slovenian Government was but responsible for Development, Strategic Projects and Cohesion from 19 September 2014 to 1 November 2014 in the centre-left Cerar Government in Slovenia. She seems well-qualified for the shipping brief having practised fire-walking and engaged in tae kwon do! Commissioner Bulc is responsible for DG Mobility and Transport (“MOVE”) and the relevant parts of

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<sup>1</sup> [http://ec.europa.eu/index\\_en.htm](http://ec.europa.eu/index_en.htm).

<sup>2</sup> [http://ec.europa.eu/commission/2014-2019/president\\_en](http://ec.europa.eu/commission/2014-2019/president_en).

<sup>3</sup> [http://ec.europa.eu/commission/2014-2019/bulc\\_en](http://ec.europa.eu/commission/2014-2019/bulc_en).

the Innovation and Networks Executive Agency (“INEA”) as well as being responsible for relations with: (a) the European Railway Agency (“ERA”); (b) the European Aviation Safety Agency (“EASA”); and (c) the European Maritime Safety Agency (“EMSA”). As this Commission is organised into “project teams” where different Commissioners come together to work on common projects, it is notable that Commissioner Bulc is part of the Project Teams which deal with Jobs, Growth, Investment and Competitiveness, Digital Single Market, Energy Union, Better Regulation and Interinstitutional Affairs, Budget and Human Resources as well as Europe in the World; interestingly, there is no specific maritime-related item on that agenda.

There are other Commissioners in the Juncker Commission whose portfolios are directly relevant to maritime matters including the following: Karmenu Vella who is the Commissioner with responsibility for the Environment, Maritime Affairs and Fisheries; Federica Mogherini who is the High Representative of the Union for Foreign Affairs and Security Policy / Vice-President of the Commission; Cecilia Malmström who is the Trade Commissioner; Miguel Arias Cañete is the Commissioner with responsibility for Climate Action & Energy; and Margrethe Vestager is the Competition Commissioner. Ultimately, the work of all the Commissioners could have an impact on maritime matters including, for example, Marianne Thyssen who is the Commissioner for Employment, Social Affairs, Skills and Labour Mobility would be relevant in the on-going extension of EU employment rights to seafarers.

This new Commission has a particular interest in the rule of law and the Charter of Fundamental Rights which could well be useful for those in the maritime sector whose rights are infringed. For example, shipping companies which cannot avail of the fundamental freedoms<sup>4</sup> or whose rights were infringed during an inspection (more commonly referred to as a “dawn raid”) by the European Commission’s Directorate General for Competition may be able to sue the EU for damages.

#### **4. RELATIONSHIP BETWEEN EU AND INTERNATIONAL LAW**

##### **Introduction**

An issue of key concern to the CMI is whether EU law prevails over international treaty law (in particular, treaties in the maritime sector).

The issue arose very clearly in the context of the *Manzi and Another v Capitaneria di Porto di Genova* (The “*MSC Orchestra*”)<sup>5</sup> case.

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<sup>4</sup> E.g., these freedoms include the freedom of establishment, freedom to provide services or the free movement of persons.

<sup>5</sup> CJEU, Case C-537/11, ECLI:EU:C:2014:19. The case was decided by the Fourth Chamber of the CJEU which was composed of Judges Bay Larsen (President of the Chamber), Lenaerts, Safjan, Malenovský (Rapporteur) and Prechal. The Advocate General was AG Kokott. The CJEU after hearing the Advocate General decided to proceed to judgment without an opinion from the Advocate General which is unusual but not unheard of where the matter is clear to the Chamber of the CJEU. For a note on the case, see Hjalmarsson, J (2014) “*Manzi and Another v Capitaneria di Porto di Genova (The “MSC Orchestra”)* Case C-537/11” (2014) 14(1) *Shipping and Trade Law* 7-8. The ruling is available on the CJEU’s website at:

On 23 January 2014, the CJEU gave a preliminary ruling<sup>6</sup> in *Manzi and Another v Capitaneria di Porto di Genova* (The “*MSC Orchestra*”) on the interpretation of Articles 2(3g) and 4a(4) of Council Directive 1999/32/EC on the reduction of sulphur content of certain liquid fuels and amending Directive 93/12/EEC,<sup>7</sup> as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005<sup>8</sup> (“Directive 1999/32”).

The case has wider implications than the subject matter would suggest at first. The case addresses, in part, the issue of what happens in the EU when the emissions regulation legislation of the EU diverges from the legislation of the International Maritime Organization (“IMO”). As this divergence is likely to grow (with the EU likely to have the tougher regime than the wider international community) then the case is interesting in that regard at the very least. While it relates to sulphur levels, it could well have a wider significance for the way in which maritime matters generally are addressed by the EU (and its courts) when there is a divergence between the EU and the international legal regime.

## Factual Background

The factual background was straightforward. The Genoa Port Authority (i.e., the Capitaneria di Porto di Genova) (the “Port Authority”) found that the Panamanian-flagged cruise ship *MSC Orchestra* (the “Vessel”) consumed within the Port of Genoa marine fuels with a sulphur content in excess of the level of 1.5% by mass enshrined in EU law. The Port Authority thus issued an administrative penalty order against the captain, Mr Manzi (the “Master”) and the vessel owner, Compagnia Naviera

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<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30dd6b150072dc9e4245a896b6fc5968edda.e34KaxiLc3qMb40Rch0SaxuQahv0?text=&docid=146688&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=174548>.

<sup>6</sup> The preliminary ruling mechanism enables courts and certain tribunals in European Union Member States to refer to the CJEU questions of EU law which need to be answered so as to decide the case before the Member State institution but the answers to those questions are not yet clear; see Art.267 of the Treaty on the Functioning of the European Union (“TFEU”) which provides:

“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”

<sup>7</sup> OJ 1999 L 121, p. 13.

<sup>8</sup> OJ 2005 L 191, p. 59.

Orchestra (“Shipowner”) as being jointly and severally liable. The Master and Shipowner instituted proceedings against the Port Authority and appealed the penalty order to the Tribunale di Genova.

The appellants argued: (a) there was a discrepancy between the EU’s Directive 1999/32 and the IMO’s Annex VI, Rule 14(1) to the International Convention for the Prevention of Pollution from Ships (the “Marpol Convention”) on the maximum amount of sulphur contained in marine fuels;<sup>9</sup> (b) the Vessel flew the flag of a State Party to the Marpol Convention and was thus authorised to use a fuel with a sulphur content of less than 4.5% by mass where it is in the port of another State Party to the same protocol; and (c) Art. 4a(4) of Directive 1999/32/EC and Legislative Decree 152/2006 transposing that provision apply only to ships which operate “regular services” and this was not a category to which cruise ships belonged.

It is clear therefore that the Vessel owner wanted to abide by the higher IMO level of sulphur content at 4.5% in contrast to the lower EU 1.5% level and the net issue was which should prevail. The Vessel owner emphasised the fact that the Vessel flew a non-EU flag and, moreover, flew the flag of a State which had agreed to the higher IMO level.

## **Legal Background**

### ***Introduction***

It is best to see the legal background as divided into three: (a) the international; (b) the EU; and (c) the Italian. Nothing turned on the Italian legal dimension because there was no issue about whether the Directive had been implemented properly; the issues turned therefore on the international and EU law aspects of the case.

### ***International Law***

The Marpol Convention - the International Convention for the Prevention of Pollution from Ships - was signed in 1973 and supplemented by a 1978 Protocol to establish rules to combat pollution of the marine environment.<sup>10</sup> There was a further 1997 Protocol which added Annex VI to the convention. This Annex was entitled “Prevention of Air Pollution from Ships” (“Annex VI”). At the time of the case, among the Contracting Parties to the 1997 Protocol were 25 of the EU Member States (the Czech Republic, Hungary and Austria were not parties to it) and at that time, Rule 14(1) of Annex VI provided that, outside the emission control areas for sulphur oxide (SO<sub>x</sub>), the content of sulphur oxide in marine fuels must not exceed 4.5% by mass.

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<sup>9</sup> I.e., the 1997 Protocol to the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 (MARPOL 73/78).

<sup>10</sup> [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx).

## **European Union Law**

The Directive at issue was Directive 1999/32. Recitals 1, 3 and 8 to the preamble to the Directive stated:

“(1) Whereas the objectives and principles of the Community’s environmental policy ... aim in particular to ensure the effective protection of all people from the recognised risks from sulphur dioxide emissions and to protect the environment by preventing sulphur deposition exceeding critical loads and levels....

(3) Whereas emissions of sulphur dioxide contribute significantly to the problem of acidification in the Community; whereas sulphur dioxide also has a direct effect on human health and on the environment....

(8) Whereas sulphur which is naturally present in small quantities in oil and coal has for decades been recognised as the dominant source of sulphur dioxide emissions which are one of the main causes of “acid rain” and one of the major causes of the air pollution experienced in many urban and industrial areas.”

Article 1(1) explained the purpose of Directive 1999/32:

“The purpose of this Directive is to reduce the emissions of sulphur dioxide resulting from the combustion of certain types of liquid fuels and thereby to reduce the harmful effects of such emissions on man and the environment.”

Article 2(3f) of Directive 1999/32 provides a number of definitions for the purpose of that directive:

“passenger ships” means ships that carry more than 12 passengers, where a passenger is every person other than:

- (i) the master and the members of the crew or other person employed or engaged in any capacity on board a ship on the business of that ship, and
- (ii) a child under one year of age”.

Critically important in the context of a cruise liner, Article 2(3g) of the Directive states that, for the purpose of that directive:

“regular services” means a series of passenger ship crossings operated so as to serve traffic between the same two or more ports, or a series of voyages from and to the same port without intermediate calls, either:

- (i) according to a published timetable, or
- (ii) with crossings so regular or frequent that they constitute a recognisable schedule.”

Article 4a(4) of the Directive provided the relevant time line for the case:

“From [11 August 2006], Member States shall take all necessary measures to ensure that marine fuels are not used in their territorial seas, exclusive economic zones and pollution

control zones by passenger ships operating on regular services to or from any Community port if the sulphur content of those fuels exceeds 1.5% by mass. Member States shall be responsible for the enforcement of this requirement at least in respect of vessels flying their flag and vessels of all flags while in their ports.”

### **Italian law**

The provisions of Directive 1999/32 were transposed into Italian law<sup>11</sup> by way what may be termed the “Italian Legislative Decree” so there was no issue in that regard.

### **Appellants’ Arguments in the Tribunale di Genova**

The Master and the Shipowner made three arguments to appeal against the penalty. First, there is a discrepancy between the Directive and Annex VI as regards the maximum amount of sulphur contained in marine fuels. Secondly, the Vessel as a ship flying the flag of a State Party to the Marpol Convention and the 1997 Protocol, was authorised to use a fuel with a sulphur content of less than 4.5% by mass where it is in the port of another State Party to the same Protocol (i.e., in this case, Italy). Thirdly, Article 4a(4) of the Directive, and, therefore, the Italian Legislative Decree transposing that provision apply only to ships which operate ‘regular services’, a category to which cruise ships do not belong.

### **Questions referred by the Italian Court to the CJEU**

During the course of the appeal proceedings, some questions of EU law arose. Those questions were referred to the CJEU under Article 267 of the TFEU. The three questions referred were:

“1. Is Article 4a of [Directive 1999/32], which was adopted in the light of the entry into force of [Annex VI], to be interpreted, in accordance with the international principle of good faith and the principle of cooperation in good faith as between the Community and its Member States, as meaning that the limit, fixed by that provision, of 1.5% m/m of sulphur in marine fuels does not apply to ships flying the flag of a non-European Union State which is party to the Marpol Convention 73/78, where such ships are in the port of a Member State which is itself a party to [Annex VI]?”

2. If Article 4a of [Directive 1999/32], is not to be interpreted as having the meaning proposed in Question 1, is that provision – in so far as it limits to 1.5% m/m the sulphur content of fuel for use by passenger ships operating regular services to or from a Community port, including ships flying the flag of a non-European Union State which is party to [Annex

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<sup>11</sup> Para.12 of the preliminary ruling recalled that the provisions of the Directive had been transposed into Italian law by Articles 295 and 296 of Legislative Decree No 152 of 3 April 2006 (Ordinary supplement to GURI No 88 of 14 April 2006) as amended, in particular, by Legislative Decree No 205 of 6 November 2007 implementing Directive 2005/33/EC amending Directive 1999/32/EC as regards the sulphur content of marine fuels (Ordinary Supplement to GURI No 261 of 9 November 2007 (‘Legislative Decree No 152/2006’)).



VI], pursuant to which, outside [the emission control areas for SO<sub>x</sub>] the 4.5% m/m sulphur content limit applies – invalid on the basis that it is contrary to the general principle of international law *pacta sunt servanda* and to the principle of cooperation in good faith as between the Community and its Member States, in that it requires Member States which have agreed to and ratified Annex VI to act in breach of the obligations entered into towards the other States which are party to [Annex VI]?

3. Is the term “regular services” in Article 2(3g) of [Directive 1999/32], to be interpreted as meaning that cruise ships also count as ships operating “regular services”?”

## Responses by the CJEU

### *Introduction*

Interestingly, the CJEU decided to deal first with the third question. The CJEU is entitled to do this because it has given itself the power to answer just some of the questions asked by referring tribunals where it believes that this would be sufficient, to re-order the questions and even to reformulate entirely the questions referred. In this case, re-ordering the questions was very logical because the third question was a “threshold” one which if answered in the negative would have disposed of the issues for the CJEU.

### ***The Third Question: Does a Cruise Ship fall within the Definition of “Regular Services”?***

The third question asked whether a cruise ship fell within the scope of Article 4a(4) of the Directive with regard to the criterion of ‘regular services’ as laid down in Article 2(3g) in the Directive.

The CJEU ruled that a cruise ship falls within the definition of “regular services”, if it operates cruises finishing in the port of departure or another port, provided those cruises are organised at a particular frequency, on specific dates, and with interested persons being able to choose between the various cruises offered. So, the phrase “regular services” is not confined to scheduled ferry services. The CJEU was not determining whether the particular activities of the Vessel in this case amounted to “regular services” – that is a matter for the referring court, not the CJEU, to ascertain – but it laid the groundwork from which the referring court could hold that cruise liner services are regular services.

It is useful to study the CJEU’s reasoning in rejecting the appellants’ arguments:

“18 ...in order to be covered by the system established by Article 4a(4) of [the] Directive..., cruise ships must satisfy the criterion relating to ‘regular services’ laid down by Article 2(3g) thereof applicable to passenger ships. It is common ground that cruise ships fall within the latter category of ships.

19 According to the first condition of that provision, a passenger ship operates regular services if it makes ‘a series of ... crossings operated so as to serve traffic between the same two or more ports’ or ‘a series of voyages from and to the same port without intermediate calls’.

20 A cruise ship therefore satisfies the first condition if it operates cruises which end at the port of departure without making intermediate calls.

21 In order to determine whether a cruise ship may also satisfy the first condition in other situations, it must be ascertained whether such a ship may be regarded as operating crossings so as to ‘serve traffic between the same two or more ports’.

22 The applicants in the main proceedings claim, first, that a cruise ship, such as that at issue in the main proceedings does not ‘serve traffic’. Cruise passengers do not purchase a package to be transported from one place to another; they do so with the broader purpose of tourism, the service provided being also the entertainment of those persons.

23 However, such an interpretation of the concept of ‘traffic’, laid down in Article 2(3)(g) of [the] Directive..., cannot be accepted.

24 It must be observed that cruise ships transport passengers from one port to another in order for them to visit those ports and various places nearby. Since the European Union legislature has not specified the aims for which transport is carried out, it follows that such aims are irrelevant for the purpose of Article 2(3g) of [the] Directive.... Thus, a series of crossings for the purpose of tourism must be regarded as traffic within the meaning of that provision.

25 In so far as that directive intends to contribute to the protection of human health and the environment by reducing sulphur dioxide emissions, including those produced on sea voyages, that finding cannot be invalidated by the fact that those passengers enjoy additional services during the crossings, such as accommodation, catering services and entertainment.

26 Second, the applicants in the main proceedings submit that a ship such as that at issue in the dispute before the referring court, does not operate crossings ‘between the same two or more ports’, since the port of departure is the same as the port of arrival and since it often happens that the intermediate calls planned in the itinerary are not made, whereas calls which have not been planned in the itinerary may be made when passengers so request in the interests of tourism.”

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28 In order to satisfy the criterion relating to ‘traffic between the same two or more ports’, which is specific to cases involving transport with intermediate calls, it is necessary that the traffic operated by a cruise ship be between ‘the same two or more ports’. A cruise between two or more ports must be regarded as a transport operation between ‘the same two or more ports’.

29 The list of ports contained in the itinerary for a normal cruise will necessarily consist of at least two ports which cannot be avoided, that is the port of departure and the port of arrival. The transport is thus made between ‘the same two or more ports’, even where the transport ends at the port of departure.

30 Furthermore, it must be observed that that interpretation is supported by the objective underlying [the] Directive..., as set out in paragraph 25 of the present judgment. Whether or not cruise ships return to the port of departure is not such as to alter the rate of sulphur dioxide emissions.

31 Consequently, if there are intermediate calls, the issue as to whether or not certain intermediate calls planned when the package is bought are made, while other unscheduled calls may be made in their place, is irrelevant with regard to the concept of ‘traffic’ within the meaning of Article 2(2g) of [the] Directive....

32 It follows that a cruise ship which operates crossings with intermediate calls between two separate ports or finishing in the port of departure serves traffic between the same two or more ports within the meaning of that provision.

33 According to the second condition laid down in Article 2(3g) of [the] Directive..., which is cumulative with the first, a passenger ship must operate a series of crossings or voyages in accordance with a published timetable or with crossings so regular or frequent that they constitute a recognisable schedule.

34 That condition is satisfied, in particular, where a shipping company proposes to the public a list of sea crossings on a cruise ship of a frequency determined, in particular by the capacity of that company and by public demand, on specific dates and, in principle, with specified times of departure and arrival, interested persons being able to choose freely between the various cruises offered by that company.”

The CJEU therefore responded<sup>12</sup> that a cruise ship, such as the Vessel, fell within the scope of Article 4a(4) of Directive 1999/32 with regard to the criterion of ‘regular services’, as laid down in Article 2(3g), “provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.”

***The Second Question: whether Article 4a(4) of Directive 1999/32 is valid in the light of the general principle of international law *pacta sunt servanda* and the principle of cooperation in good faith***

The CJEU then proceeded to answer the other two questions. The second question asked the CJEU whether Article 4a(4) of Directive 1999/32 is valid in the light of the general principle of international law *pacta sunt servanda* and the principle of cooperation in good faith laid down in the first

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<sup>12</sup> Para.35.

subparagraph of Article 4(3) of the Treaty on European Union (“TEU”), on the ground that that provision of the Directive may lead to an infringement of Annex VI and thereby require Member States party to the 1997 Protocol to infringe their obligations with regard to the other Contracting Parties thereto. The CJEU responded:

“...37 It must be held at the outset that the validity of Article 4a(4) of Directive 1999/32 cannot be determined in the light of Annex VI since the European Union is not a contracting party to the Marpol 73/78 Convention, including Annex VI, and is not bound by it (see, by analogy, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraphs 47 and 52).

38 Nor can the validity of Article 4a(4) be examined in the light of the general principle of international law *pacta sunt servanda*, since that principle applies only to those subject to international law who are contracting parties to a specific international agreement and which, as a result, are bound by it.

39 Furthermore, it does not appear that Annex VI constitutes an expression of the customary rules enshrined by general international law which, are binding upon the institutions of the Union and form part of the legal order of the Union (see, to that effect, Case C-386/08 *Brita* [2010] ECR I-1289, paragraph 42).

40 Finally, it must be stated that the principles laid down in paragraphs 47 to 52 of *Intertanko and Others*, according to which the validity of Directive 1999/32 cannot be examined in the light of Annex VI may not be circumvented by relying on the alleged infringement of the principle of cooperation in good faith laid down in the first subparagraph of Article 4(3) TEU.

41 In those circumstances, the answer to the second question is that the validity of Article 4a(4) of Directive 1999/32 cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI and thereby oblige the Member States party to the 1997 Protocol to infringe their obligations with respect to the other contracting parties thereto.”

### ***The first question: Impact of Annex VI***

In its first question, the national court asked the CJEU a question concerning the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32 with respect to the general principle of international law which requires international agreements to be implemented and interpreted in good faith. The CJEU responded:

“...43 Annex VI was inserted into the Marpol 73/78 Convention by the 1997 Protocol. It contains, in particular, Rule 14(1) which provides that the sulphur content in marine fuels must not exceed 4.5% by mass.

44 Directive 1999/32 provides, in Article 4a(4), that the maximum sulphur content in marine fuels must not exceed 1.5% by mass. Neither that article nor any other provision of the Directive makes any reference, as regards the maximum sulphur content, to Annex VI.

45 In that connection, the Court has already held that, although the European Union is not bound by an international agreement, the fact that all its Member States are contracting parties to it is liable to have consequences for the interpretation of European Union law, in particular the provisions of secondary law which fall within the field of application of such an agreement. Therefore, it is incumbent upon the Court to interpret those provisions taking account of the latter (see, to that effect, *Intertanko and Others*, paragraphs 49 to 52).

46 That case-law cannot therefore be applied as compared with an international agreement to which only some Member States are contracting parties while others are not.

47 To interpret the provisions of secondary law in the light of an obligation imposed by an international agreement which does not bind all the Member States would amount to extending the scope of that obligation to those Member States which are not contracting parties to such an agreement. The latter Member States must however be regarded as 'third countries' for the purposes of that agreement. Such an extension would be incompatible with the general international law principle of the relative effect of treaties, according to which treaties must neither harm nor benefit third countries (*'pacta tertiis nec nocent nec prosunt'*).

48 It is clear from the case-law of the Court that the latter is required to observe that principle since it constitutes a customary rule of international law which, as such, is binding upon the European Union institutions and forms part of its legal order (see, to that effect, *Brita*, paragraphs 42 to 44).

49 Furthermore, such an interpretation of secondary law would not be consistent with the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU.

50 In the present case, the 1997 Protocol is an international agreement to which only certain Member States are contracting parties while others are not.

51 Therefore, the Court is not required to interpret Article 4a(4) of Directive 1999/32 in the light of Annex VI and, in particular, Rule 14(1) thereof.

52 In those circumstances, the general principle of international law of good faith cannot usefully be relied upon before the Court.

53 Even assuming that the Court could interpret Article 4a(4) of Directive 1999/32 in the light of the sulphur content laid down in Annex VI, it suffices to state that, in the light of the objective pursued by that annex and set out in the title thereof, namely to protect the atmosphere by a reduction in harmful emissions produced by marine transport, that provision, in so far as it fixes a maximum limit on the sulphur content of marine fuel lower than that provided for by that annex, does not appear to be incompatible with such an objective.

54 Having regard to the foregoing, the answer to the first question is that it is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32.”

So, the CEJU declined to rule on the impact of Annex VI on the scope of Article 4a(4) of the Directive.

### **Summary of the CJEU’s Preliminary Ruling**

The CJEU summarised its ruling as follows:

“1. A cruise ship, such as that at issue in the main proceedings, falls within the scope of Article 4a(4) of Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, as amended by Directive 2005/33/EC of the European Parliament and of the Council of 6 July 2005 with regard to the criterion of ‘regular services’, as laid down in Article 2(3g) thereof, provided that it operates cruises, with or without intermediate calls, finishing in the port of departure or another port, provided that those cruises are organised at a particular frequency, on specific dates and, in principle, at specified departure and arrival times, with interested persons being able to choose freely between the various cruises offered, which is a matter for the referring court to ascertain.

2. The validity of Article 4a(4) of Directive 1999/32, as amended by Directive 2005/33, cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI to the International Convention for the Prevention of Pollution from Ships, signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978 and thereby oblige the Member States party to the Protocol of 1997 amending the International Convention of 1973 for the Prevention of Pollution from Ships, as amended by the Protocol of 1978 relating thereto, signed in London on 26 September 1997, to infringe their obligations with respect to the other contracting parties thereto.

3. It is not for the Court to rule on the impact of Annex VI on the scope of Article 4a(4) of Directive 1999/32.”

### **Assessment of the Case**

The *Manzi* case has a wider significance than might first appear. First, it answered the question of whether a cruise ship can be engaged in “regular service” and, if so, in what circumstances. Secondly, the CJEU decided that Article 4a(4) of Directive 1999/32, as amended by Directive 2005/33, cannot be examined in the light of the general principle of international law *pacta sunt servanda* or the principle of cooperation in good faith enshrined in the first subparagraph of Article 4(3) TEU on the ground that that provision of the directive may lead to an infringement of Annex VI. Ultimately, and not surprisingly given that the duty of the CJEU is to uphold and apply EU law, the CJEU’s ruling means that owners and operators of vessels flying non-EU must comply with the EU

requirements (i.e., Article 4a(4) of Directive 1999/32) rather than the IMO but lesser requirements of Annex VI of MARPOL 73/78. In other words, compliance with international law is no defence, in this context, to a breach of EU law: it goes back to the notion that EU law can be supreme not only Member State law where there is a conflict but also, in some circumstances, international law as well. One might say: when in Rome, live by the Treaty of Rome!

## 5. REGISTRATION OF SHIPS

### a. European Commission Report on Implementation of Regulation 789/2004

While the European Commission contemplated the creation of an EU register (the so-called “EUROS” proposal),<sup>13</sup> the regime remains (and is likely to remain) one characterised by Member States having their own national registers (whether one national registry or a national registry with a parallel one) rather than there being an EU register.

A central core value of the EU is that there must be, as a general rule (to which there are very few and narrow exceptions), free movement within the EU’s internal market. It follows that there ought to be freedom to move ships between the registers operated by Member States. It has not always been as easy as one would imagine to transfer vessels between national registers.

Regulation 789/2004 was adopted so as to facilitate the transfer of vessels between the shipping registers within the EU.<sup>14</sup> The transfer of vessels between registers is also dealt with in a number of International Maritime Organisation (“IMO”) conventions and instruments. Within the EU, Regulation 789/2004 is the key instrument.

Regulation 789/2004 seeks to eliminate technical barriers to the transfer of vessels<sup>15</sup> flying the flag of an EU Member State between the registers of those Member States while simultaneously seeking to ensure a high level of ship safety and environmental protection. It applies to both national and secondary registers. The essence of Regulation 789/2004 is that, under Article 4 of the Regulation, a Member State may generally not withhold from registration a vessel which is registered in another Member State which complies with the "requirements" of, and carries valid certificates and equipment approved or type-approved in accordance with, Directive 96/98 of 20 December 1996 on marine equipment.

The European Commission has an admirable tradition of having reflective and retrospective reports prepared on the success (or otherwise) of various EU measures. A report was thus commissioned on the success (or otherwise) of Regulation 789/2004. On 8 May 2015, the European Commission adopted a report on the operation of Regulation 789/2004 on the transfer of cargo and passenger

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<sup>13</sup> See Power, *EC Shipping Law* (Lloyd’s Shipping Law Library, 2<sup>nd</sup> ed., 1998), para.6.030 *et seq.*

<sup>14</sup> OJ 2004 L138/19, 30.4.2004. For a consolidated version of the regulation as amended, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R0789:20090420:EN:PDF>.

<sup>15</sup> The Regulation applies to both cargo and passenger vessels.

ships between registers in the Community.<sup>16</sup> The Report should be read in conjunction with a very interesting Staff Working Document which provides statistical background information.<sup>17</sup> The Report found that there were no particular problems arising during the under review (i.e., 2006-12). This is an important finding because the period under review was long and there were a significant number of transfers between registers as well during that timeframe so it was a good base period on which to conduct a study. Therefore, it would appear, at least according to the European Commission's report that Regulation 789/2004 has worked well to date.

## **6. COMPETITION AND THE MARITIME SECTOR**

### **a. Introduction**

The EU's competition rules have been, and remain, significant for all sectors of the economy. The shipping sector is no different. The EU's competition rules on cartels/anti-competitive arrangements, abuse of dominance, State aid and merger control all apply with some vigour to the maritime sector. It is useful to examine some recent examples of that application.

### **b. Consortia Block Exemption Extended For Five Years**

Consortia agreements typically allow liner shipping carriers to rationalise their activities and achieve economies of scale. If consortia face sufficient competition and are not used to fix prices or share the market then users of services provided by consortia are usually able to benefit from improvements in productivity and service quality.

However, consortia agreements are potentially anti-competitive. However, the Commission exempted consortia agreements in 1995<sup>18</sup> and then prolonged the regime several times.<sup>19</sup>

A market investigation by the Commission, conducted in 2013, showed that the main tenets of the Commission's approach are still valid. This has been confirmed by a public consultation conducted by the Commission in early 2014.<sup>20</sup> The Commission thus decided that the exemption has worked well, providing legal certainty to agreements which bring benefits to customers and do not unduly distort competition, and that current market circumstances warrant a prolongation.

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<sup>16</sup> *Report on the implementation of Regulation (EC) 789/2004 on the transfer of cargo and passenger ships between registers in the Community* (COM (2015) 195) (8 May 2015).

<sup>17</sup> *Statistical Background Material accompanying the Report* (SWD) (2015) 101 final) (8 May 2015). The SWD sets out the data in five Annexes: Annex 1 sets out details of individual transfers of ships between Member State registers; Annexes 2-4 summarise in graphic form the data received from Member States; and Annex 5 sets out the top 10 EU registers in relation to transfers to and from third countries (i.e., non-Member States). The data derive from external data obtained from the European Maritime Safety Agency's MARINFO, which is drawn from commercial sources.

<sup>18</sup> See Power, *op.cit.*, ch.16.

<sup>19</sup> See Power, *op.cit.*, ch.16.

<sup>20</sup> See IP/14/196. [http://ec.europa.eu/competition/consultations/2014\\_maritime\\_consortia/index\\_en.html](http://ec.europa.eu/competition/consultations/2014_maritime_consortia/index_en.html).



On 24 June 2014, the European Commission decided to extend for another five years the validity under Article 101 of the TFEU of the European Commission's block exemption regime for liner shipping consortia until April 2020.<sup>21</sup>

The Commission's renewed consortia block exemption regulation allows shipping lines with a combined market share of below 30% to enter into cooperation agreements to provide joint cargo transport services.

The Commission commented, at the time of the extension, that for "consortia and alliances exceeding the market share threshold established in the block exemption regulation, it is the responsibility of the companies themselves to make sure that their agreements comply with Article 101 TFEU, and the Commission can decide to intervene if necessary. The Commission will continue to closely monitor market developments and the conduct of companies to ensure that markets remain open and competitive. In particular, in the context of the recent developments in the sector, the Commission will remain vigilant as regards any risks for competition that may arise from the implementation of maritime consortia and might intervene if necessary."<sup>22</sup>

### **c. Regulatory Summit**

On 8 May 2015, the European Commission announced that DG Competition will host the second Global Maritime Regulatory Summit on 18 June 2015 in Brussels.<sup>23</sup> It will be a follow-up to the first Summit in Washington in December 2013. Representatives of the Chinese Ministry of Transport, the United States' Federal Maritime Commission and the European Commission will convene to discuss current market and regulatory developments in the maritime transport sector. The discussions are expected to centre on the global trend towards increased co-operation and market consolidation in liner shipping as well as on regulatory and policy issues related to ports.

## **7. STATE AID**

### **a. Introduction**

In EU law, "State aid" arises when a Member State provides, directly or indirectly,<sup>24</sup> an advantage in any form whatsoever,<sup>25</sup> using State resources, on a selective basis to undertakings<sup>26</sup> which could distort competition and is likely to affect trade between Member States.

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<sup>21</sup> Commission Regulation 697/2014 of 24 June 2014 amending Regulation (EC) No 906/2009 as regards its period of application OJ L184/3, 25.6.2014.

<sup>22</sup> [http://europa.eu/rapid/press-release\\_IP-14-717\\_en.htm](http://europa.eu/rapid/press-release_IP-14-717_en.htm).

<sup>23</sup> MEX/15/4952.

<sup>24</sup> The aid could still be illegal State aid when it provided by a private party when it ultimately derived from State resources.

<sup>25</sup> E.g., subsidies (i.e., positive aid) or remission of charges or taxes (i.e., negative aid). Examples include grants, interest and tax reliefs, guarantees, the sale of State holdings in all or part of a business, or providing goods and services on preferential terms.

State aid has been a prominent feature of the air transport sector generally and airports in particular. By contrast, there have been fewer State aid cases in the context of the maritime sector than in the air transport sector but the consequences for those in receipt of illegal State aid are no less. It is quite possible that State aid will become an area of even greater significance for the maritime sector in the future.

#### **b. Portuguese Shipyard ENVC**

On 7 May 2015, the European Commission decided that the Portuguese shipyard operator Estaleiros Navais de Viana do Castelo, S.A. (“ENVC”) had received €290 million of State aid from Portugal which was incompatible with Articles 107-109 of the Treaty on the Functioning of the European Union (“TFEU”). The Commission went further and also ordered Portugal to recover the aid from ENVC (but not, interestingly, from the new operator of the yard, namely, WestSea).<sup>27</sup>

ENVC was founded in 1944. It used to operate the largest Portuguese shipyard in Viana do Castelo. It was nationalised by Portugal in 1975. ENVC made heavy losses since 2000. Portugal, directly and indirectly, granted various subsidies to ENVC via various measures, including: (a) a capital increase in 2006; (b) several loans, between 2006 and 2011, to cover operating costs; and (c) comfort letters and guarantees to underwrite financing agreements between ENVC and commercial banks. The Commission valued the aid element as being circa €290 million.

In January 2013, the Commission opened an in-depth State aid investigation to examine whether these aid measures were compatible with the State aid rules. In December 2013, Portugal decided to liquidate ENVC and to start selling its assets. The yard was then acquired by WestSea following an open and competitive tender.

The Commission found that there had been State aid provided to ENVC. The Commission found that the market economy investor principle (the “MEIP”)<sup>28</sup> was not respected<sup>29</sup> and that the State aid was not granted in accordance with the conditions in the Commission’s 2004 Guidelines on Rescue and Recovery Aid for Firms in Difficulty.<sup>30</sup> The Commission first examined whether the aid was granted in accordance with the MEIP. If the aid measures were granted on terms that a private operator would have accepted under market conditions then the measures would not involve State aid within the meaning of Article 107(1) of the TFEU. The Commission has concluded that the MEIP test was not fulfilled because no private investor would have agreed to subsidise a loss-making company for over 13 years in these circumstances. The measures were therefore not granted on “market terms” and therefore amounted to State aid. The Commission then considered the issue from the

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<sup>26</sup> Subsidies or other forms of assistance granted to individuals (i.e., non-undertakings) or general measures open to all undertakings are not covered by the EU’s State aid rules. The term “undertaking” refers to persons who are operating in the market economy.

<sup>27</sup> Commission press release IP/15/4940. Case number SA.35546.

<sup>28</sup> This principle is also known as the Market Economy Operator Principle.

<sup>29</sup> I.e., a market economy operator or market economy investor would not have concluded a comparable deal on comparable terms in comparable circumstances. In such a scenario, the extra assistance would amount to State aid. For example, if a private investor would have paid €20m for an asset but the Member State paid €30m for it then the difference (i.e., €10m) would potentially be State aid.

<sup>30</sup> OJ C 244/2, 1.10.2004.

perspective of the 2004 Guidelines on Rescue and Restructuring Aid for Firms in Difficulty. The Commission concluded that the conditions of the Guidelines were not satisfied as: (a) ENVC, at the time, had no realistic restructuring programme to ensure the company's long-term viability without further State support; and (b) ENVC received repeated State aid, at least over the last ten years, in breach of the "one time last time" principle, which allows the grant of rescue or restructuring aid only once in a ten-year period. The Commission, therefore, concluded that the measures amounted to incompatible State aid. Moreover, the Commission ordered Portugal to recover the aid from ENVC.

The Commission ordered ENVC to repay the State aid but in considering who should be responsible for repaying the aid, the Commission had to take into account the fact that ENVC was in the process of being wound up and that part of its assets (including a sub-concession of the land on which ENVC operated) has been acquired by the WestSea (owned by Martifer and Navalria). The background was that in December 2013, Portugal decided to liquidate ENVC and to start selling its assets. A private operator, WestSea, acquired some of ENVC's assets. So, would the Commission order recovery from WestSea? To establish whether State aid has been passed on to new owners in an asset sale, the Commission would assess whether there is economic continuity between the new owner and the previous one or, put another way, whether the economic link had been broken. The Commission deploys various tests to examine the economic reality (e.g., the scope of the assets sold, the sale price/consideration, the identity of the buyer and the economic logic of the transaction). Interestingly, the Commission found that there was no economic continuity between ENVC and WestSea because the assets were bought by WestSea at market conditions following an open and competitive tender and are therefore free of State aid. The Commission also found that WestSea is not the economic successor of ENVC so the obligation to repay the incompatible aid remained with ENVC. This case highlights the importance, in the maritime sector as in all economic sectors, of buying assets from Member States at market conditions and as part of an open and competitive process.

## **8. PORT STATE CONTROL**

### **a. Introduction**

The EU regime on Port State Control ("PSC")<sup>31</sup> is largely set out in Directive 2009/16 of the European Parliament and of the Council of 23 April 2009 on port State control (as amended).<sup>32</sup> There had been EU legislation on PSC since 1995 but there had been legislation stretching back to 1982.<sup>33</sup> While all the EU Member States with coasts are members of the PSC regime, the EU is itself not a member. Hence, the Commission seeks to have the Council adopt an EU position on issues.

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<sup>31</sup> On the EU and port State control, see <http://www.emsa.europa.eu/implementation-tasks/port-state-control.html>.

<sup>32</sup> OJ L 131/57, 28.5.2009. For the text of the recast directive, see the following link: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0016&from=EN>.

<sup>33</sup> See Power, *op.cit.*, ch.23.

## **b. Council adopts draft Council Decision on EU position in Port State Control Committee**

The 48th meeting of the Port State Control Committee ("PSCC") took place from 18-22 May 2015. In advance of it, on 18 May 2015, the Council adopted<sup>34</sup> a European Commission proposal for a Council Decision on the position to be adopted, on behalf of the EU, in the PSCC of the Paris Memorandum of Understanding ("PMoU")<sup>35</sup> on PSC. The Commission had adopted its proposal for a Council Decision only on 16 April 2015 so the matter moved quickly. The Decision sets out: (a) the guiding principles and orientations of the EU's position for the PSCC for the period 2015-18 (Annex I); and (b) the year-to-year specification of the EU's position for the PSCC (Annex II).

## **9. EMPLOYMENT**

### **a. Proposed Directive to Increase Protection of Seafarers' Labour Rights**

While the EU has a long history of enhancing the rights of workers generally, seafarers have been somewhat neglected by EU law because of various exemptions for seafarers from various EU measures over time.

On 19 November 2013, the Commission proposed a Directive to enhance seafarers' rights. Technically, the proposal was entitled: "Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC".<sup>36</sup> The proposal was to give seafarers the same rights as enjoyed by workers based on land (i.e., shore workers). The proposal involved making amendments to five employment/labour law Directives which currently either exempt seafarers, or allow Member States to exempt seafarers from the scope of these Directives without any express justification.

On 13 May 2015, the Council's "Committee of Permanent Representatives" ("COREPER") announced it had confirmed a compromise text for the new directive (i.e., approved the Council and European Parliament agreement on amending Directive improving seafarers' labour rights). If the measure is adopted, which looks increasingly likely,<sup>37</sup> it should improve employment rights for seafarers. The

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<sup>34</sup> It is interesting to note the tensions which can exist between Member States and the EU institutions over the extent to which the EU may adopt positions in regard to international instruments. While it agreed to the draft Council Decision, Germany declared in a statement that it believed that the PMoU on PSC is not an 'international agreement' as defined by Title V of the TFEU; instead Germany believes that it is only an administrative agreement and not an international agreement. Hence, Germany believes that, legally speaking, the procedure in accordance with Article 218(9) of the TFEU for establishing the positions to be adopted by the member states in the PSCC cannot be applied. (See Council: Public Register, Statement by Germany on the proposal (8419/15/ADD1/REV2) (8 May 2015)).

<sup>35</sup> The PMoU on Port State Control is the official document in which the 27 participating Maritime Authorities agree to implement a harmonised system of Port State Control. It consists of a the main body, including Annexes, in which the Authorities agree on: their commitments and the relevant international conventions; the inspection procedures and the investigation of operational procedures; the exchange of information; and the structure of the organisation and amendment procedures.

<sup>36</sup> <http://data.consilium.europa.eu/doc/document/ST-16472-2013-INIT/en/pdf>.

<sup>37</sup> It is noteworthy though that the proposal would be adopted under the ordinary legislative procedure which means that the Council and the Parliament must agree on the same final text.

compromise text was already informally agreed between the Council and the Parliament in a so-called “trialogue” meeting on 6 May 2015. This triologue meeting followed the adoption of the Council’s General Approach in December 2014 and the position adopted by the European Parliament’s Employment Committee position in April 2015.

## **10. ENVIRONMENT & SAFETY**

### **a. Emission Controls Study**

On 9 January 2014, a study was published on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport.<sup>38</sup> The study argued that a tightening of the proposed regulation would bring further reductions in CO<sub>2</sub> emissions as well as a reduction in the operational costs for shipowners.

### **b. Shipment of Waste: Commission Guidelines for Customs Controls on Transboundary Shipments of Waste**

On 12 May 2015, the Commission published a public summary of non-binding Guidelines for customs controls on transboundary shipments of waste in the Official Journal.<sup>39</sup> The Guidelines are aimed at supporting the EU Member States’ customs’ authorities and national competent authorities to carry out controls on waste shipments and to support compliance with Regulation 1013/2006 of 14 June 2006 on shipments of waste.<sup>40</sup> The Guidelines apply to shipments of waste into, through and out of, the territory of the EU. Movements of waste between Member States (i.e., cabotage shipments) are not addressed in the Guidelines. They are aimed at improving co-operation methods and developing good administrative practice. Interestingly, all the Commission has published is a summary so as to minimise the risk that the controls would be circumvented if the rules themselves were published.

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<sup>38</sup> See [http://www.transportenvironment.org/sites/te/files/publications/CE\\_Delft\\_7B83\\_Economic\\_impacts\\_of\\_MRV\\_Def%20\(1\).pdf](http://www.transportenvironment.org/sites/te/files/publications/CE_Delft_7B83_Economic_impacts_of_MRV_Def%20(1).pdf).

<sup>39</sup> OJ C 2015 157/1.

<sup>40</sup> I.e., Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste provides for detailed control procedures in order to ensure the protection of the environment and EU citizens OJ L190/1, 12.7.2006.

**c. Regulation 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16**

On 19 May 2015, Regulation 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport and amending Directive 2009/16 was published in the EU's Official Journal.<sup>41</sup>

Regulation 2015/757 will enter into force on 1 July 2015. It will apply to the carbon dioxide (i.e., CO<sub>2</sub>) emissions from ships over 5,000 grt during voyages to, from and between EU ports. The Regulation will not apply to warships, naval auxiliaries, fish-catching or fish-processing ships, primitive-built wooden ships, ships not propelled by mechanical means or government ships used for non-commercial purposes. It will oblige shipowners or operators to monitor, verify and report on CO<sub>2</sub> emissions every year from 1 January 2018. The Regulation provides for expulsion orders to be made refusing ships entry to EU ports until the shipowner or operator submits its emissions reports.

The background to the Regulation lies in the EU's ETS Amending Directive 2009<sup>42</sup> which required that the EU include greenhouse gas ("GHG") emissions from the maritime sector in its 2020 GHG emissions reduction target if no international agreement on reducing shipping emissions had been reached by 31 December 2011.

The amount of CO<sub>2</sub> and other GHG emissions of EU-related maritime transport activities is not known because of a lack of monitoring, reporting and verification ("MRV") of these emissions. The Commission therefore proposed in 2013 a Regulation to require MRV of shipping GHG emissions. Regulation 2015/757 is the resultant measure. The Commission's impact assessment contemplates that the MRV system should reduce CO<sub>2</sub> emissions by up to 2% compared with a "business as usual" situation.

The final regulation differed to some extent from the original proposal but the Commission was able to support the measure because it was sufficiently close to the Commission's original proposal.

Separately, the EU's negotiations with the IMO towards a global MRV system to reduce shipping emissions have not made much progress but it is likely that maritime GHG emissions will be a feature of negotiations at the next UN Framework Convention on Climate Change conference in Paris in December 2015.

**d. Ship Recycling**

Ship recycling is a topic which straddles safety and the environment.

It is useful to consider two measures: (a) Decision 2014/241 concerning the ratification of, or the accession to, the Hong Kong International Convention for the Safe and Environmentally Sound

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<sup>41</sup> OJ L 123/55, 19.5.2015.

<sup>42</sup> Directive 2009/29 of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community OJ L190/1, 12.7.2006.

Recycling of Ships, 2009; and (b) Regulation 1257/2013 of the European Parliament and of the Council of on ship recycling and repealing Regulation 1013/2006 on shipments of waste.

First, on 14 April 2014, the Council adopted Decision 2014/241 concerning the ratification of, or the accession to, the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, by the EU Member States in the interests of the EU.<sup>43</sup> The decision authorises Member States to ratify or accede to, for the parts falling under the EU's exclusive competence, the Hong Kong Convention. (The EU itself may not accede to the Hong Kong Convention, as only States may be Parties but this did not stop the EU from guiding Member States on how they should act.). Member states which have ratified or acceded to the Hong Kong Convention must notify the Commission within six months of the date of deposit of their instruments of ratification or accession. The Council will review the progress of the ratification by 31 December 2018.

Secondly, Regulation 1257/2013 of the European Parliament and of the Council of on ship recycling and repealing Regulation 1013/2006 on shipments of waste was adopted on 20 November 2013 and published in Official Journal on 10 December 2013.<sup>44</sup>

Regulation 1257/2013 has several functions: (a) it amends Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste; (b) implements the rules of the 2009 Hong Kong Convention for the safe and Environmentally Sound Recycling of Ships; and (c) aims to improve ship recycling conditions for EU-flagged ships worldwide by prompting the upgrade of ship recycling facilities to the standards included in the Regulation.

It will be interesting to see how the new regime operates. Therefore the Commission must, by 31 December 2016, submit to the European Parliament and to the Council a report on the feasibility of a financial instrument that would facilitate safe and sound ship recycling and will, if appropriate, accompany it by a legislative proposal. The Commission will also assess which infringements of Regulation 1257/2013 should be brought under the scope of Directive 2008/99 to achieve equivalence of the provisions related to infringements between this Regulation as well as Regulation 1013/2006. The Commission will report on its findings by 31 December 2014 to the European Parliament and to the Council and, if appropriate, accompany it by a legislative proposal. The Commission must review Regulation 1257/2013 not later than 18 months prior to the date of entry into force of the Hong Kong Convention and at the same time, submit, if appropriate, any

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<sup>43</sup> OJ 2014 L 128/45.

<sup>44</sup> OJ L330/1, 10.12.2013. The entry into force of Regulation 1257/2013 was somewhat complex. It would enter into force on the 20th day following that of its publication in the Official Journal. It would apply from the earlier of the following two dates, but not earlier than 31 December 2015: (a) six months after the date that the combined maximum annual ship recycling output of the ship recycling facilities included in the European List constitutes not less than 2.5 million light displacement tonnes ("LDT"). The annual ship recycling output of a ship recycling facility is calculated as the sum of the weight of ships expressed in LDT that have been recycled in a given year in that facility. The maximum annual ship recycling output is determined by selecting the highest value occurring in the preceding 10-year period for each ship recycling facility, or, in the case of a newly authorised ship recycling facility, the highest annual value achieved at that facility; or (b) 31 December 2018. However, to make matters a little more complicated, in relation to the following provisions the following dates of application will apply: Article 2, the second subparagraph of Article 5(2), Articles 13, 14, 15, 16, 25 and 26 have applied since 31 December 2014 but the first and third subparagraphs of Article 5(2) and Article 12(1) and (8) will only apply from 31 December 2020.

appropriate legislative proposals to that effect. Such a review must consider the inclusion of ship recycling facilities authorised under the Hong Kong Convention in the European List so as to avoid duplication of work and administrative burden.

**e. Ship inspection and survey organisations: Commission Regulation 788/2014 laying down detailed rules pursuant to Articles 6 and 7 of Regulation 391/2009**

On 18 July 2014, the Commission adopted Regulation 788/2014 laying down detailed rules for the imposition of fines and periodic penalty payments and the withdrawal of recognition of ship inspection and survey organisations pursuant to Articles 6 and 7 of Regulation 391/2009 of the European Parliament and of the Council.<sup>45</sup>

## **11. PORTS**

### **a. Background to EU Action in Ports**

The Commission has intervened in ports in an *ad hoc* manner for many years particularly through the means of competition law. Its attempts to create a formal regime have not been very successful to date. Indeed, its proposals to adopt legislation have even met with angry protests on the streets of Brussels by dockworkers.

It is useful to trace the background so as to understand the current position.

On 13 February 2001, the Commission adopted its first legislative “Ports Package”. This included a Communication entitled *Reinforcing Quality Service in Sea Ports: A Key for European Transport* and a proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services. The proposal met with a hostile reaction in some quarters. Ultimately, on 20 November 2003, after almost three years of sectoral and institutional disagreements, the European Parliament voted in plenary session to reject the compromise text of the proposed Directive.

The Commission was not deterred. On 1 October 2004, the Commission made another proposal for a Directive of the European Parliament and of the Council on market access to port services. However, on 18 January 2006, that proposal was also rejected at first reading by the European Parliament so the Commission withdrew that proposal.

On 18 October 2007, following a consultation with stakeholders, the Commission adopted a *Communication on the European Ports Policy* which identified the main causes of the challenges faced by the sector.

On 23 May 2013, the Commission adopted its second Ports Package. This Package included a proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports. It is part of the key action on maritime transport announced in the Single Market Act II adopted by the Commission in October 2012. On 8 October 2014, the Transport,

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<sup>45</sup> OJ 2014 L214/12. See corrigendum published on 7 August 2014: OJ 2014 L 234/15.



Telecommunications and Energy Council adopted a general approach on the proposal. The next step would be for the European Parliament Committee on Transport and Tourism (TRAN) to adopt a report on the proposal. It is slowly making its way through the EU system!

#### **b. Report on the Functioning of the Directive on the Reporting Formalities for Ships Arriving in and/or Departing from EU Ports**

Directive 2010/65 deals with the reporting formalities for ships arriving in and/or departing from ports of EU Member States.<sup>46</sup> Its aim was to simplify and harmonise some of the reporting procedures by establishing a standard electronic transmission of information and by rationalising reporting formalities for ships arriving in, and ships departing from, EU Member State ports thereby reducing the administrative burden for all concerned.

On 25 June 2014, the European Commission adopted a report on the functioning of Directive 2010/65.<sup>47</sup> The report dealt with the following five issues: (a) the progress made towards harmonisation and co-ordination of reporting formalities (the implementation of the so-called "National Single Window"); (b) the availability of data concerning ship traffic/movement within the EU, and/or calling at third country ports; (c) the feasibility of avoiding or simplifying formalities for ships that have called at a port in a third country or free zone; (d) the compatibility of the River Information Services with the electronic data transmission process; and (e) the possibility of extending the simplification introduced by Directive 2010/65 to inland waterway transport.

## **12. MIGRATION**

As is well known, there is a serious crisis in the Mediterranean relating to migrants from Africa to Europe. The EU has paid increased attention to this migration crisis in the Mediterranean. The EU's High Representative for Foreign Affairs and Security Policy, Federica Mogherini, has said that "not one single action will be effective alone [to address the crisis]. All different parts of our action are relevant: saving lives at sea, working on the root causes with our partners and dismantling criminal networks that are smuggling people." One action which has been taken was instituted on 18 May 2015 when the Council established an EU naval operation to disrupt the business model of human smugglers in the Mediterranean, EUNAVFOR Med. Under the Council's plan, EUNAVFOR Med will be conducted in sequential phases and in accordance with the requirements of international law. The first phase involves surveillance and assessment of human smuggling and trafficking networks in the Southern Central Mediterranean. The second and third phases of the operation would work to search, seize and disrupt the assets of smugglers, based on international law and in partnership with Libyan authorities.

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<sup>46</sup> See Commission, Report on the functioning of Directive 2010/65/EU on reporting formalities for ships arriving in and/or departing from ports of the Member States (COM (2014) 320) (25 June 2014): [http://ec.europa.eu/transport/modes/maritime/ports/doc/com\(2014\)320.pdf](http://ec.europa.eu/transport/modes/maritime/ports/doc/com(2014)320.pdf).

<sup>47</sup> See the Commission's Press release, Maritime Transport: Continuous efforts needed to establish harmonised reporting procedures for vessels (IP/14/742) (25 June 2014).

### 13. EU MARITIME STRATEGY

On 21 January 2009, the Commission adopted a Communication setting the strategic goals and recommendations for the EU's maritime transport policy until 2018.<sup>48</sup> On 5-6 June 2014, the Transport, Telecommunications and Energy Council adopted conclusions on the Mid-Term Review of the EU's Maritime Transport Policy until 2018 and Outlook to 2020 and invited the Commission to present a mid-term review of the EU's Maritime Transport Policy while taking into account the Athens Declaration adopted in May 2014.<sup>49</sup> On 28 January 2015, the Commission commenced a public consultation on the EU's Maritime Transport Strategy to feed into the mid-term review of the Strategy.<sup>50</sup> The consultation closed on 22 April 2015. It will be interesting to see the impact of the consultation and review on EU shipping policy.

### 14. CONCLUSION

It has been an interesting but not spectacular period for developments in regard to EU maritime or shipping law. Nonetheless, there have been concrete steps taken in recent years to further develop the growing and evolving body of rules known as EU shipping law. Many of the developments are more in the nature of enhancements and refinements rather than bold moves which is probably indicative of a maturing regime.

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<sup>48</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0008&from=EN>.

<sup>49</sup> [http://gr2014.eu/sites/default/files/ATHENS%20DECLARATION\\_FINAL.pdf](http://gr2014.eu/sites/default/files/ATHENS%20DECLARATION_FINAL.pdf).

<sup>50</sup> [http://ec.europa.eu/transport/modes/maritime/consultations/2015-mts-review\\_en.htm](http://ec.europa.eu/transport/modes/maritime/consultations/2015-mts-review_en.htm).