



Report to

Comité Maritime  
International on selected  
recent developments in  
European Union  
Maritime Law

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## Section 1 | Introduction

This report describes and discusses a selection of recent developments in European Union ("EU") maritime or shipping law over the last year or so. The paper highlights developments since the report submitted to the Comité Maritime International ("CMI") at its Istanbul Assembly on 9 May 2015.

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.

Where some matters have not changed, some information is retained from the previous report so as to avoid readers having to cross-refer to the earlier report.

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."

Passenger ships play an important role for the mobility of EU citizens. More than 400 million passengers use EU ports annually within 120 million of them being transported between ports within the same Member State (i.e., cabotage passengers). So passenger safety remains a key concern and issue. Equally, maritime safety generally is foremost in the mind of the EU.

The EU is always experiencing "interesting times" – the current "interesting" and challenging times relate to issues such as a possible Brexit (i.e., the possible withdrawal of the United Kingdom from the EU which would have serious implications for the shipping sector), slow growth in the EU economy generally, the repairing of its banking system and, most seriously from a human perspective, a serious migration crisis which has a significant maritime dimension.

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.



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## Section 2 | Executive Summary

This report highlights:

- the European Commission's role in maritime matters and its relevance for maritime law;
- the EU operational guidelines for ships in need of assistance published on 27 January 2016;
- the European Commission's Report on Better Regulation on EU Passenger Ship Safety Legislation;
- the entry into force on 8 June 2015 of the 1966 Protocol to the International Convention on Limitation of Liability for Maritime Claims ("LLMC 1996");
- the entry into force on 14 April 2015 of the Nairobi International Convention on the Removal of Wrecks;
- on 27 April 2016, the Commission published a "Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic";
- the proposed regulation on ports;
- the ports State Aid Block exemption initiative;
- cases in regard to Spain and ports and leasing;
- initiatives on safety and sulphur content;
- migration;
- the possibility of the United Kingdom leaving the EU and the referendum in the UK and Gibraltar on the question on 23 June 2016 (the so-called "Brexit" debate).

No paper could be comprehensive so this paper has been selective.

## Section 3 | European Commission

The current European Commission<sup>1</sup> took office on 1 November 2014. It is due to serve a five year term so it is well-established in office at this stage. It is presided over 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 but was 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 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

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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).

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 certain EU employment law rights to seafarers.

Interestingly, the allocation of portfolios (which tend to be quite broad<sup>4</sup>) has become more challenging as the EU has enlarged to 28 Member States so it is time to consider the possibility of more specific roles for Commissioners and a Commissionership dedicated to the maritime sector should be considered. Such a role would bring together the diverse roles and portfolios but also give impetus to the “blue Europe” initiative.

This 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 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 and invoke the Charter where there is a breach of the Charter by the EU or those acting on behalf of the EU.

The Commission has faced several challenges over the past year. Not least among these challenges has been that of migration. The Commission, the European Parliament, the Council and the European Council have all worked on this issue and while the migration crisis has not been resolved, there are some signs of political progress.

In terms of the European Commission’s work in the maritime area, it is worth noting that on 23 March 2016, the European Commission announced the appointment of Henrik Mørch as Director “Markets and cases V: Transport, Post and other services” in DG Competition. Mr Mørch had been Acting Director in the post as well as Head of Unit “State aid Transport” since 2015. Before then, he held a number of posts in DG Internal Market and services, including Head of Unit for Legal Affairs between 2005 and 2011 and Head of Unit for Single Market policy between 2011 and 2015. He has also worked as a member of the Cabinets of Commissioner Poul Nielson and Marian Fischer-Boel. He had been with the European Commission since 1992.

## Section 4 | Ships in Need of Assistance

The topic of “ships in need of assistance” has been an issue of interest to both the CMI and the EU.

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<sup>4</sup> E.g., “transport” rather than “shipping”, “air transport” etc.

On 27 January 2016, the European Commission presented new EU operational guidelines for ships in need of assistance.

The EU operational guidelines were drafted to ensure better coordination and exchange of information among competent authorities and industry stakeholders who are involved in the response to an incident concerning a ship in need of assistance.

These lessons were developed by an expert group composed of EU Member States' competent authorities, with the input and support of industry stakeholders, following an initiative of the Commission in the aftermath of the *MSC Flaminia* accident in July 2012. This German-flagged container vessel was in international waters in the Atlantic Ocean when there was an explosion and a fire on board. She was damaged severely. There was a difficult situation (described by the Commission as a "volatile situation") in terms of deciding where to accommodate the vessel after the incident – ultimately, the ship was accommodated in a place of refuge in Germany in September 2012.

Commissioner Bulc congratulated the stakeholders for taking part in this joint effort in the interest of maritime safety and environmental protection: "it is a good example of proactive implementation of EU legislation, building on best practices and sharing experience, which is fully in line with President Juncker's strategic approach to Better Regulation."

The text of the Joint Declaration on the EU Operational Guidelines on Places of Refuge ("PoR") is interesting:

"Joint Declaration on the EU Operational Guidelines on Places of Refuge ('PoR')

At the occasion of the Seas, Rivers, Islands and Coastal Areas (SEARICA) Intergroup meeting in the European Parliament on 27 January 2016, under the patronage of MEP Gesine Meissner, Chair of the Intergroup and MEP Michael Cramer, Chair of the TRAN Committee;

In the presence of Mrs Bulc, Commissioner with responsibility for maritime transport;

In a joint effort of the Member States authorities together with the key industry stakeholders involved in PoR, under the auspices of the Cooperation Group on PoR,<sup>5</sup> chaired by the European Commission.

Supported by the European Maritime Safety Agency;

Recognising that all concerned parties, including industry stakeholders, both through their associations and as individual entities, play an important role and form an integral part in supporting and promoting the use of the EU Operational Guidelines and their continuous improvement in the interest of the protection of safety and security at sea and of the marine and coastal environment;

Building on the IMO Guidelines on Places of Refuge for ships in need of assistance (IMO Resolution A.949(23));

Promoting positive attitudes – within Governments, port and local Authorities, and Industry for the purposes of Places of Refuge;

In a spirit of enhanced co-operation and coordination among all parties involved, including Member States' Authorities and concerned Industry;

Acknowledging that the Operational Guidelines as a matter of principle state that:

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<sup>5</sup> Created under Article 20(3) of Directive 2002/59/EC of the European Parliament and of the Council (hereinafter 'VTMIS Directive').



'Each State involved in the operation should examine their ability to provide a place of refuge. A place of refuge request cannot be refused for commercial or financial reasons, nor should commercial interests become the main driver for the handling of PoR requests, or the selection of a potential PoR. Unless deemed unsafe, there should be no rejection without inspection.'

The involved parties in the Cooperation Group on PoR have, as part of promoting positive attitudes and committing to an effective operational response, to the extent possible, following incidents involving a ship in need of assistance seeking a place of refuge, **agreed to the following key principles:**

- *Implement and use* the PoR Operational Guidelines for the enhancement of international cooperation,<sup>6</sup> within the national PoR plans, in order for these to establish procedures for concerted action.<sup>7</sup>
- *Work towards* including the EU Operational Guidelines in regional agreements/ plans.
- *Promote* the PoR Operational Guidelines in the International Maritime Organization (IMO) and other appropriate stakeholder fora.
- *Support* and promote the use of the Union Maritime Information and Exchange System<sup>8</sup> providing Integrated Maritime Services and its further development.
- *Publish* the PoR Operational Guidelines, as appropriate, on the respective webpages of all stakeholders involved in this work.
- *Continue* working in the context of the Cooperation Group on PoR, *inter alia*, on:
  - (1). The continuous improvement of the EU Operational Guidelines;
  - (2). Setting up appropriate training, with the support of the European Maritime Safety Agency, on the Operational Guidelines including on information sharing;
  - (3). Developing and holding practical PoR exercises and training, building on the work by the European Maritime Safety Agency and the table top exercises already held;
  - (4). Seamless and integrated information flows;
  - (5). Risk assessment methodologies, complementing in particular situations involving more than one jurisdiction;
  - (6). Insurance, liability and compensation matters."

These guidelines are the result of work by various parties including the European Maritime Safety Agency ("EMSA") which is playing an increasingly important and welcome role in maritime matters in the EU. The emphasis of the guidelines is on ensuring objective and expert decision-making which is often difficult in the uncertain and "charged" environment of a ship in distress.

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<sup>6</sup> In accordance with Article 20a(2)(f) of the VTMS Directive.

<sup>7</sup> In accordance with Article 23(d) of the VTMS Directive.

<sup>8</sup> Annex III of the VTMS Directive.



## Section 5 | Better Regulation on EU Passenger Ship Safety Legislation

On 16 October 2015, the Commission published the results of a fitness check conducted on EU legislation applicable to passenger ship safety. It was like a health check to see whether EU legislation was fit for purpose.

In the published report, the Commission assessed whether safety standards for passenger ships sailing in EU waters are effective and efficient as well as how those standards could be improved and simplified. The report took several years to complete and was the result of consultation and evaluation.

The report was influenced heavily by the Commission's Regulatory Fitness and Performance ("REFIT") Programme which is part of President Juncker's plan to rid the EU of "red tape". As Commissioner Bulc stated: "cutting red tape and the safety of European citizens are at the heart of the Commission's transport policy".

The Commission stated that it "envisages proposing a simplified regulatory framework for EU passenger ship safety. Its aim is to remove outdated, ambiguous or disproportionate requirements, and to further improve the effectiveness of search and rescue operations. Where appropriate, the Commission envisages stepping up the efforts to upgrade standards at the level of the International Maritime Organization. This concerns in particular rules concerning the stability of passenger ships when their hull is damaged."<sup>9</sup>

The Commission confirmed that the "fitness check confirmed that the EU passenger ship safety legislation performs well. Out of the 408 accidents registered for ships sailing between ports of the same Member State (It should be noted in this regard that the incidents involving the *Norman Atlantic* ferry in December 2014 and the *Costa Concordia* cruise ship in January 2012 involved ships operating internationally and designed in accordance with international requirements) during the last 4 years, only one has resulted in the fatality of a passenger. While 30 percent of these ships comply with common EU standards, these account for more than 60 percent of the passenger capacity. The respective EU rules have been built up over a period of 15 years and there is scope for modernising them." The sceptic might say that it is helpful that the legislation proposed by the Commission has been seen to work but that view would be wrong; the "proof of the pudding" has been in the eating and it has worked well.

The Commission has confirmed that it "will further assess safety concerns raised by industry professionals, Member States' experts or passenger associations. For this purpose, it intends to put in place a framework for the exchange of views and best practices." It also "envisages stepping up the enforcement of existing requirements and invites national administrations to join in these efforts. The European Maritime Safety Agency (EMSA) stands ready to monitor better implementation."

Further information is to be found in the following documents: Adjusting Course: EU Passenger Ship Safety Legislation Fitness Check;<sup>10</sup> the Staff Working Document Accompanying the document Report from the Commission to the European Parliament and Council REFIT Adjusting course: EU Passenger Ship Safety

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<sup>9</sup> [http://ec.europa.eu/transport/modes/maritime/news/refit-passenger-ship-safety-legislation\\_en.htm](http://ec.europa.eu/transport/modes/maritime/news/refit-passenger-ship-safety-legislation_en.htm).

<sup>10</sup> COM(2015) 508.

Legislation Fitness Check;<sup>11</sup> the Support study for the Fitness Check: final report; and Support study for the Fitness Check: executive summary.<sup>12</sup>

## Section 6 | Limitation of Liability for Maritime Claims

On 8 June 2015, the Commission announced that "[t]oday, amendments to the 1966 Protocol to the International Convention on Limitation of Liability for Maritime Claims ("LLMC 1996") enter into force. The amendment brings a 51% raise to the liability limits of ship owners. Agreed on in April 2012 at IMO, with the support of EU Member States, the amendments have direct effect on EU law (Directive 2009/20/EC) requiring ship owners of ships registered or operating in the EU to have insurance in accordance with LLMC 1996."<sup>13</sup>

## Section 7 | Removal of Wrecks

On 20 April 2015, the Commission welcomed the entry into force of the Nairobi International Convention on the Removal of Wrecks. The Commission commented:

"Strict liability of shipowners for locating, marking and removing ship wrecks deemed to be hazardous has come into force bolstering EU efforts to strengthen cooperation among administrations and industry on places of refuge.

The International Convention on the Removal of Wrecks, adopted in Nairobi, Kenya in 2007, entered into force on 14 April 2015. The Convention is an important addition to the existing maritime conventions: It places strict liability on operators for ship wrecks that cause damage or threat to safety of navigation, the marine environment, and the coastline or related interests of one or more States. It makes financial security compulsory for ships of 300 gross tonnage and above, and obliges State parties to certify the presence of appropriate insurance on ships flying their flag. The Convention also provides State Parties with a right of direct action against insurers. The Convention fills a gap in the existing international legal framework by providing a set of uniform international rules for the prompt and effective removal of wrecks located in a country's exclusive economic zone or equivalent 200 nautical miles zone. Notably, the Convention enables States Parties to "opt in" to apply certain provisions to their territory, including the territorial sea. A 'wreck' under the Convention includes sunken or stranded ships and any parts of such ships or objects that were lost at sea from such ships, as well as ships in distress facing a danger of sinking or stranding.

The European Commission welcomes [the] entry into force of the Convention as it is pertinent to the ongoing work of the Commission and Member States on the accommodation of ships in need of

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<sup>11</sup> SWD(2015) 197.

<sup>12</sup> All are available on the European Commission's website.

<sup>13</sup> [http://ec.europa.eu/transport/modes/maritime/news/2015-06-08-llmc1996\\_en.htm](http://ec.europa.eu/transport/modes/maritime/news/2015-06-08-llmc1996_en.htm).

assistance in places of refuge. In this context, a place of refuge can be a port or any other sheltered area identified by a Member State for accommodating ships in distress. The work carried out within the EU Cooperation Group on Places of Refuge, including Member States, the Commission and the European Maritime Safety Agency (EMSA), in consultation with industry associations, aims at the development of a set of Operational Guidelines for competent authorities dealing with a ship requesting a place of refuge. In addition, the Cooperation Group is set to look into any further challenges faced by administrations and industry, such as the growing size of ships and the capacity required for handling a place of refuge request from a new-type mega-ship."

## Section 8 | EU Policy for the Arctic

Undoubtedly, the Arctic is becoming a more pressing issue. Seven EU Member States have national policies on the Arctic already in place: Denmark; Finland; Germany; Italy; Poland; Sweden; and the UK. France, the Netherlands and Spain are expected to issue Arctic or Polar policy papers in 2016. It was inevitable that the EU would also adopt a policy.

In 2014, the Council and European Parliament asked the Commission and the High Representative for Foreign Affairs and Security Policy to develop a more coherent framework for EU action and funding programmes in the Arctic. There had been a number of existing EU activities and decisions that already have an impact on the region such as the EU's 2008 policy communication and an update and overview of activities in 2012. However, there was a need for an updated and more coherent policy.

On 27 April 2016, the Commission published a "Joint Communication to the European Parliament and the Council: An integrated European Union policy for the Arctic".<sup>14</sup>

In the Joint Communication, the notion "Arctic region" covers the area around the North Pole, north of the Arctic Circle (latitude 66 degrees, 32 minutes North). It includes the Arctic Ocean and territories of the eight Arctic States: Canada, the Kingdom of Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America.

In the Joint Communication, the EU's High Representative (Federica Mogherini) and the European Commission set out an integrated response to the challenges of the Arctic.

It is a policy proposal to guide the EU's actions in the Arctic region. The EU would step up its existing action and engagement in the region with 39 specific actions focussing on climate change, environmental protection, sustainable development and international cooperation. The particular importance of research, science and innovation is reflected across these priority areas.

The High Representative stated: "a safe, sustainable and prosperous Arctic not only serves the 4 million people living there, our European Union and the rest of the world. It is a region of immense environmental, social, and

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<sup>14</sup> JOIN(2016) 21 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1461918642237&uri=JOIN:2016:21:FIN>. See the Joint Communication at [http://eeas.europa.eu/arctic\\_region/index\\_en.htm](http://eeas.europa.eu/arctic_region/index_en.htm) and see also [http://ec.europa.eu/maritimeaffairs/policy/sea\\_basins/arctic\\_ocean/index\\_en.htm](http://ec.europa.eu/maritimeaffairs/policy/sea_basins/arctic_ocean/index_en.htm). See also <http://www.thearcticinstitute.org/2016/04/the-eus-new-arctic-communication-not-so.html>.

economic importance to us all. The steps taken today underline our commitment to the region, its States and its peoples, and to ensuring that the region remains an example of constructive international cooperation. Because the Arctic is also crucial in terms of regional and global security, and a strategic component of our foreign policy.”

Karmenu Vella, the EU Commissioner for Environment, Fisheries and Maritime Affairs, said: "We impact on the Arctic and the Arctic impacts on us. Global weather patterns, our oceans, ecosystems and local biodiversity – the Arctic influences them all. While increasing human development is inevitable, it is in our hands to do it in a sustainable way. We have to do this in full respect of the livelihoods of those who live in the region and by protecting its most valuable resource: the environment."

The integrated policy contains 39 actions to further develop the EU's policy towards the Arctic across three areas that are closely interlinked:

“A.) In order to further tackle climate change and safeguard environmental protection,

The EU has already committed itself to reducing its greenhouse gases by 40% in 2030 and 80% by 2050, compared to 1990 levels. The EU will strive for an international implementation of the climate agreement struck in Paris in December last year. Already 20% of the EU budget has been reserved for climate adaptation and mitigation measures.

The EU stands ready to work together with Arctic states, including their local population and indigenous communities, and relevant international fora to develop an ambitious climate adaptation agenda for the Arctic region.

The EU will also contribute to international measures to limit black carbon and methane emissions.

The EU is to maintain current funding levels for Arctic research under Horizon 2020 (on average 20 million per year). Around 40 million has already been earmarked for 2016 and 2017 for projects on observation, weather and climate change in the northern hemisphere and permafrost decrease.

Twenty-two of Europe's leading Arctic research institutions will develop an integrated European polar research programme under the EU-PolarNet initiative.

The EU is to support the transnational access to research infrastructures in the Arctic (research stations, scientific vessels, satellite observations) and the open access to data resources. The EU's Copernicus space programme is to support international research on climate change in the Arctic.

A number of international environmental agreements, such as the UN Convention on Biological Diversity, are highly relevant for the Arctic, but are still far from implemented by signatories, the EU is to encourage their implementation.

Pollutants and heavy metals that are currently polluting the Arctic's food web should be phased out between now and 2020.

As part of the sustainable management of the Arctic Ocean, the EU supports the development of a network of marine protected areas in the Arctic. The EU is keen to develop an international agreement that is to prevent unregulated fisheries in the Central Arctic Ocean. In the long-term, marine biological resources need to be managed through either a Regional Fisheries Management Organisation or Agreement.

B.) For the benefit of sustainable development in the region:

The European part of the Arctic is suffering from underinvestment, while a number of EU funding instruments and services are ready to support innovation, infrastructure development, such as improving transport links, and businesses (e.g. through respectively the Investment Plan for Europe, Ten-T, Innovfin and the European Enterprise Network), the Commission will make efforts to enhance coordination between EU funding programmes relevant for the Arctic, identify key investment and research priorities as well as facilitate capacity building of stakeholders to maximise financial support for the region.

EU Space programmes and targeted EU research projects are to contribute to maritime safety in the region through surveillance and monitoring of vessel traffic and ice movements (Copernicus) and providing navigation services (Galileo).

C.) As regards international cooperation:

The EU will continue to actively engage in international fora relevant for the Arctic, such as the Arctic Council, the Barents Euro-Arctic Council and the Northern Dimension.

The EU will cooperate with all of its Arctic partners, not only third countries who have territories in the Arctic, but also sub-regional countries with increasing Arctic interests such as China, India and Japan, for example on science and research.

As EU policies directly affect the region, the EU will continue to engage with Arctic indigenous peoples and local communities to ensure that their rights are respected and their views are reflected in the ongoing development of EU policies.”

The proposed actions will now be discussed with the EU Member States in the Council and the European Parliament.

It is useful to consider the Joint Communication in detail:

“JOINT COMMUNICATION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL An integrated European Union policy for the Arctic

JOIN/2016/021 final

An integrated European Union policy for the Arctic

## INTRODUCTION

A safe, stable, sustainable and prosperous Arctic is important not just for the region itself, but for the European Union (EU) and for the world. The EU has a strategic interest in playing a key role in the Arctic region.

Eight states have territories in the Arctic: Canada, the Kingdom of Denmark,<sup>15</sup> Finland, Iceland, Norway, Russia, Sweden and the United States. Three EU Member States are therefore also Arctic states, while Iceland and Norway are members of the European Economic Area.<sup>16</sup> The Arctic is home

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<sup>15</sup> The Kingdom of Denmark consists of Denmark, Greenland and the Faroe Islands.

<sup>16</sup> Iceland and Norway are also associated countries in the EU's Horizon 2020 Framework Programme for Research and Innovation.

to several indigenous peoples.<sup>17</sup> The Arctic region also includes the Arctic Ocean and its adjacent seas. While the Arctic states have primary responsibility for tackling issues within their territories, many of the issues affecting the Arctic region that are discussed in this Joint Communication can be more effectively addressed through regional or multilateral cooperation. This is why EU engagement is important.

Building on previous initiatives,<sup>18</sup> this Joint Communication sets out the case for an EU policy that focuses on advancing international cooperation in responding to the impacts of climate change on the Arctic's fragile environment, and on promoting and contributing to sustainable development, particularly in the European part of the Arctic.

In recent years, the Arctic's role in climate change has become much more prominent.<sup>19</sup> The Arctic is warming at almost twice the global average rate. Whereas in the past attention focused almost solely on the effects of climate change in the Arctic, more recently there has been growing awareness that feedback loops are turning the Arctic into a contributor to climate change. Understanding these dynamics, and helping to develop specific strategies to mitigate and adapt to climate change in the Arctic, will form part of the EU's wider efforts to combat climate change.<sup>20</sup>

Adaptation strategies are needed to help Arctic inhabitants respond to the serious challenges they face because of climate change. The EU's Arctic policy will be an important element in implementing the global agreement reached at the 21st Conference of the Parties under the United Nations Framework Convention on Climate Change in December 2015, which sets out a global action plan to limit global warming to well below 2°C. For the European Union, the Paris Agreement represents an ambitious, balanced, equitable and legally binding agreement and marks a decisive turning point towards comprehensive and collective global action against climate change. When implemented, the Paris agreement will accelerate the transition to a climate resilient, climate neutral global economy.

Given the important role of Arctic as a regulator for the climate of the planet and acting as a sink for long-range pollution, the EU has a duty to protect the Arctic environment and strengthen ecosystem resilience.

The EU should also promote sustainable development in the Arctic, taking into account both the traditional livelihoods of those living in the region and the impact of economic development on the Arctic's fragile environment. The EU should contribute to enhancing the economic, social and environmental resilience of societies in the Arctic.

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<sup>17</sup> The Saami and the Inuit are the only nationally recognised indigenous peoples living partly on the territory of EU Member States. Greenland has a close relationship with the EU based on its status as one of the Overseas Countries and Territories associated with the EU.

<sup>18</sup> In particular, (COM/2008/0763 final), (JOIN(2012) 19 final) and (SWD(2012) 182 final) and (SWD(2012) 183 final).

<sup>19</sup> The Communication from the Commission "An EU Strategy on adaptation to climate change", (COM(2013) 216 final), specifically refers to the Arctic's particular vulnerability to the impacts of climate change.

<sup>20</sup> In line with the EU's climate and energy framework for 2030 adopted by heads of state and government in the European Council of 23 and 24 October 2014 (EUCO 169/14).

A number of EU activities and decisions are having an impact on economic developments in the Arctic region.<sup>21</sup> For example, the EU is a major consumer of products coming from the Arctic states, such as fish products and energy.<sup>22</sup> Investment by European companies can help advance sustainable development in the region, possibly aided by the European Structural and Investment Funds (ESIF) and initiatives under the Investment Plan for Europe. A recent report estimated investment opportunities in the Barents region alone to be EUR 140 billion.<sup>23</sup> Regional 'smart specialisation strategies', combined with EU funding, can help to develop local models of sustainable growth and job creation in the European Arctic with potential benefits across the EU. The forthcoming Finnish Presidency of the Arctic Council (2017-2019) will offer an opportunity to bring European ideas and initiatives to the work of the Arctic Council.

In recent years, the Arctic region has acquired a higher profile in international relations due to its increasing environmental, social, economic and strategic importance. The EU already contributes substantially to Arctic research, satellite observation and regional development as well to the work of the Arctic Council,<sup>24</sup> wherein countries beyond the Arctic such as China, India, Japan, the Republic of Korea and Singapore now have observer status.

While the changes affecting the Arctic present opportunities for local communities, they also have the potential to increase tensions in the region, for example through competition for resources and increasing economic activity. International legal frameworks, such as the United Nations Convention on the Law of the Sea (UNCLOS) and the United Nations Framework Convention on Climate Change, also cover the Arctic. It is now more important than ever to ensure that the Arctic remains a zone of peace, prosperity and constructive international cooperation.

The world's oceans are important resources but are coming under increasing pressure and risk further damage if increased activity is not properly managed. It is in this context that the EU is seeking to advance the agenda on ocean governance. The need for a solid framework for sound stewardship is particularly high in the Arctic: large parts of the high seas areas beyond national jurisdiction are currently not covered by specific arrangements for managing economic activities, nor is there sufficient scientific knowledge about the sea basin. Much work therefore lies ahead to protect the Arctic high seas in view of climatic changes and increasing human activity in the region.

Against this background, several Member States have issued national Arctic policy frameworks in recent years.<sup>25</sup> In 2014, the Council and European Parliament asked the Commission and the High Representative for Foreign Affairs and Security Policy to develop an integrated policy on Arctic matters,

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<sup>21</sup> Report on 'EU Arctic Footprint and Policy Assessment', EcoLogic, Berlin, 2010 ([http://arctic-footprint.eu/sites/default/files/AFPA\\_Final\\_Report.pdf](http://arctic-footprint.eu/sites/default/files/AFPA_Final_Report.pdf)).

<sup>22</sup> Report on 'EU Arctic Footprint and Policy Assessment', EcoLogic, Berlin, 2010 ([http://arctic-footprint.eu/sites/default/files/AFPA\\_Final\\_Report.pdf](http://arctic-footprint.eu/sites/default/files/AFPA_Final_Report.pdf)).

<sup>23</sup> A Strategic Vision for the North, Paavo Lipponen, May 2015.

<sup>24</sup> Three EU Member States (Finland, the Kingdom of Denmark and Sweden) are full members of the Arctic Council, seven EU Member States (France, Germany, Italy, the Netherlands, Poland, Spain, the United Kingdom) are observers to the Arctic Council.

<sup>25</sup> The Kingdom of Denmark, Finland, Germany, Italy, Poland, Sweden and the United Kingdom. The Netherlands, France and Spain are issuing Arctic or Polar policy papers in 2016. Non-EU countries that have issued an Arctic strategy or policy paper include Canada, Iceland, India, Japan, Norway, the Russian Federation and the United States of America.



and to develop a more coherent framework for EU action and funding programmes. In response, an integrated EU Arctic policy is therefore proposed in three priority areas:

1. Climate Change and Safeguarding the Arctic Environment;
2. Sustainable Development in and around the Arctic;
3. International Cooperation on Arctic Issues.

The EU should attach particular importance to research, science and innovation which will play a key role across all three priority areas. Action in the priority areas should contribute to the implementation of Agenda 2030 and be in line with the 17 Sustainable Development Goals adopted by the United Nations in September 2015.

## 1. CLIMATE CHANGE AND SAFEGUARDING THE ARCTIC ENVIRONMENT

The issues

Climate change poses a significant risk. Its effects are tangible in the Arctic, with the summer sea ice having decreased by more than 40% since 1979.<sup>26</sup> Delicate Arctic ecosystems are under threat and the livelihoods of indigenous peoples are being directly affected by climate change. In one of the coldest parts of the world, the thawing permafrost is causing land to subside, depleting habitats and damaging infrastructure as it does so, with potential losses estimated in hundreds of billions of euros.<sup>27</sup> Rising temperatures contribute to the melting of the Greenlandic ice sheet, adding to rising sea levels, and play a role in changing precipitation patterns in the northern hemisphere.

Managing these developments requires closer and more integrated cooperation on climate adaptation in the Arctic as well as reducing greenhouse gases.

According to the International Panel on Climate Change's Fifth Assessment Report, permafrost temperatures have increased in most regions since the early 1980s.<sup>28</sup> Greenhouse gases are escaping the permafrost and entering the atmosphere at an increasing rate. The thawing permafrost has the potential to release carbon dioxide and methane - equivalent to several times today's annual greenhouse gas emissions from man-made sources such as fossil fuel use. This could change the Arctic as well as the global climate.

The Arctic is home to several sensitive ecosystems which in turn are home to many endemic species. More than half of the world's wetlands, crucial for water purification, flood control and shoreline stability, are in Arctic and sub-Arctic regions. Arctic marine ecosystems are crucial for fisheries given the role of fish at the bottom of important food chains. These ecosystems are not only affected by climate change, but also by pollution and invasive alien species. The preservation of biodiversity and the viability of ecosystems in the Arctic will remain a global challenge.

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<sup>26</sup> For example: <http://climate.nasa.gov/vital-signs/arctic-sea-ice/>.

<sup>27</sup> For example through decreased sea ice thickness and extent, less predictable weather, severe storms, sea level rise, changing seasonal melt/freeze-up of rivers and lakes, changes in snow type and timing, increasing shrub growth, permafrost thaw, and storm-related erosion which, in turn, are causing severe loss of land in some regions so that, in some coastal areas, entire communities have to be relocated.

<sup>28</sup> By the end of the 21st century, the area of permafrost near the surface could decrease by 37-81%.

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## Policy response

### 1.1 Research

Fundamental to our response is a better understanding of the developments the region is facing, and for this reason the EU is a major contributor to Arctic research. Over the past decades efforts have been devoted to Arctic observation and monitoring programmes as well as numerous research projects, but yet understanding of the Arctic systems, their functions and possible responses to various drivers are still largely unknown.

The EU is expected to maintain its current funding levels for Arctic research (around EUR 200 million in the past decade) under the Horizon 2020 programme (2014-2020). The EU has already committed EUR 40 million under the 2016-2017 work programme to Arctic-related research. This programme will focus on an integrated observation system, studying the impact of Arctic changes on the weather and climate of the northern hemisphere, and the effect of climate change on the Arctic permafrost and its socio-economic impact. In addition, the European Structural and Investment Funds (ESIF) also provide funding for research and innovation activities in the fields of Climate change and environment in the Arctic.

A central plank of the EU's Arctic research efforts will be the EU-PolarNet initiative, which supports an EU-wide consortium of expertise and infrastructure for polar research to better assimilate Europe's scientific and operational capabilities in the Polar regions. 22 European research institutions will develop and deliver an integrated European polar research programme under EU-PolarNet. The project also involves working with research organisations from Canada, Russia and the USA.

EU research on climate change in the Arctic will also be supported by EU space programmes. The operational infrastructure and services of Copernicus will provide input to Arctic research activities, including weather monitoring, monitoring of climate variables and ice thickness, and improved ocean modelling. In addition, the European Commission will support the implementation of the Svalbard Integrated Arctic Earth Observing System — a multidisciplinary and multinational research infrastructure that is geographically distributed across Svalbard which will contribute to future pan-Arctic monitoring.

The EU should continue to promote and facilitate effective international scientific cooperation through supporting transnational access to research infrastructure and open data resources to improve political and economic links and maintain good relations with key countries in the region. Moreover, the EU should continue to support the work of the Group of Senior Officials<sup>29</sup> on international research infrastructure.

Finally, the EU contributes through Horizon 2020 to pan-Arctic observing initiatives such as those promoted by the Arctic Council with SAON<sup>30</sup> or the GEO Cold Region Initiative,<sup>31</sup> with the view of preparing through research the establishment of operational long-standing systems.

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<sup>29</sup> The Carnegie Group of G8 +5 Science Advisers established a Group of Senior Officials (GSO) on global research infrastructure to reach a common understanding on matters such as governance, funding and management of large-scale research infrastructure. The European Commission is member of the GSO group.

<sup>30</sup> Sustaining Arctic Observing Networks: <http://www.arcticobserving.org/>

<sup>31</sup> <https://www.earthobservations.org/index.php>.

## 1.2 Climate mitigation and adaptation strategies

In responding to the challenge posed by climate change in the Arctic, the EU's objective is in line with the Paris agreement to limit global average temperature increases to well below 2°C and make an effort to limit the temperature increase to 1.5 °C. The EU has already committed to reducing its total greenhouse gas emissions by 40% by 2030 and by 80% by 2050 compared with 1990 levels. The 2030 commitment will be achieved by implementing the EU's intended nationally determined contribution according to the Paris agreement. The EU has also committed itself to spend 20% of the EU budget on climate-related objectives.

As climate change is a circumpolar challenge, the EU is ready to work with the Arctic states, indigenous peoples and relevant Arctic regional and multilateral fora to share experience, expertise and information on climate change, impacts, adaptation and resilience, with a view to developing an ambitious climate adaptation agenda for the Arctic region.

The EU should work with regions in the Arctic to draw up appropriate adaptation and mitigation measures that take account of the local circumstances and special nature of the Arctic regions. It can do this partly through the European Structural and Investment Funds (ESIF),<sup>32</sup> which mainstream climate action.

Alongside its CO<sub>2</sub> commitments for 2030 and 2050, the EU should contribute to international efforts to limit emissions of short-lived climate pollutants such as black carbon and methane that further accelerate climactic changes in the Arctic. Coming from soot and up to 1500 times more powerful than CO<sub>2</sub>, black carbon increases the melting rate of ice and snow. Methane is another greenhouse gas, 20 times more potent than CO<sub>2</sub>, with vast reserves projected to be stored under the Arctic permafrost. The EU could limit emissions through: the Convention on Long-Range Transboundary Air Pollution (UNECE CLRTAP); the amended Gothenburg Protocol, the Commission's Air Quality Package proposal; the Climate and Clean Air Coalition; and engagement with Arctic Council initiatives such as the Task Force on Black Carbon and Methane.

## 1.3 Protecting the Environment

The EU aims to protect, preserve and improve the environment, including in the wider region, for present and future generations. The EU should continue its engagement in multilateral environmental agreements that also have particular relevance to the Arctic, and encourage their implementation.<sup>33</sup> The EU should encourage full respect for the provisions of UNCLOS, which is considered customary international law, including the obligation to protect and preserve the marine environment.

The EU should also work with partners to promote a high level of biodiversity protection with a view to halting the loss of biodiversity and achieving the global biodiversity 2020 targets. The EU should promote establishing marine protected areas in the Arctic, these areas being an important element in the effort to preserve biodiversity. The EU should also work with Arctic states and other international

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<sup>32</sup> ESIF (2014-20) allocates 25% of its funds to support climate change objectives.

<sup>33</sup> These include the Convention for Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Migratory Species and Wild Animals, the African Eurasian Waterbirds Agreement, the Bern Convention, the International Convention for the Regulation of Whaling, the Stockholm Convention on Persistent Organic Pollutants and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR).

partners to develop an instrument under UNCLOS for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.

Arctic inhabitants increasingly suffer from high levels of pollutants and heavy metals that end up in the Arctic's food web.<sup>34</sup> The EU should continue to support work at international level to prohibit or phase out the use of persistent organic pollutants in the environment between now and 2020.<sup>35</sup> Effective implementation of the Stockholm Convention by all Arctic states will be important in this regard. The EU should encourage swift ratification of the Minamata Convention with a view to preventing and reducing emissions of mercury. Taking into account its comprehensive waste legislation, the EU could share experience and best practices on the circular economy with Arctic states.

As regards the risk of invasive alien species, action should include voluntary measures, such as those proposed by the International Maritime Organisation's Guidelines for the Control and Management of Ships' Biofouling, as well as mandatory measures. Action could build on the experience gained in the EU and its Member States in managing certain pathways, including measures established through the International Convention for the Control and Management of Ships Ballast Water and Sediments adopted in 2004. Accordingly, the EU should take all appropriate steps to encourage all signatories to ratify the Convention.

The EU should be committed to working closely with Member States, the OSPAR Convention and other stakeholders on oil and gas activities to promote the adoption of the highest standards of major accident prevention and environmental control. The EU should be ready to share regulatory<sup>36</sup> and technological best practice with international partners to support the safety and preservation of the environment in the region. The EU should therefore welcome the Arctic Council Agreement on Cooperation on Marine Oil Pollution, Preparedness and Response in the Arctic.

## 2. SUSTAINABLE DEVELOPMENT IN AND AROUND THE ARCTIC

### The issues

Sustainable economic development faces specific challenges in the Arctic region. Compared with other parts of Europe, the European part of the Arctic has a sparse population spread over a wide area and is characterised by a lack of transport links, such as road, rail or east-west flight connections. The wider Arctic region is rich in natural resources such as fish, minerals, oil and gas.<sup>37</sup> The lack of terrestrial communications means that space infrastructure has an increasingly important role to play in connecting people and businesses, and meeting the educational, health, linguistic and cultural needs of Arctic communities.

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<sup>34</sup> See for example the AMAP 2009 Assessment: Human health in the Arctic, <http://www.amap.no/documents/doc/amap-assessment-2009-human-health-in-the-arctic/98>.

<sup>35</sup> Particularly persistent organic pollutants, very persistent and very bioaccumulative substances as well as persistent, bioaccumulative and toxic substances.

<sup>36</sup> Such as the Offshore Safety Directive (2013/30/EU).

<sup>37</sup> A 2008 assessment of the US Geological Survey estimated that the area north of the Arctic circle contains about 13% of the world's undiscovered technically recoverable oil resources and 30% of the world's undiscovered natural gas resources.

The European part of the Arctic also has significant potential to support growth in the rest of Europe. However, as the EU does not currently have a complete north-south traffic connection, it could explore the merits of strengthening links to the Arctic through trans-European networks, for example from Finland to Norway, providing access to the Arctic Ocean.

Through its Member States and its close ties with Iceland and Norway (as members of the European Economic Area), as well as with Greenland,<sup>38</sup> the EU can play an influential role in shaping the future development of the European part of the Arctic through the application of EU rules relevant for the EEA<sup>39</sup> and the deployment of financial instruments. Cooperation between countries and regions in the European Arctic has been good, for example in the context of the Barents-Euro Arctic Council and the Northern Dimension policy framework.

The EU's cohesion policy supports investments as well as capacity building in the European Arctic, with an emphasis on research and innovation, SME competitiveness and supporting the shift towards a low-carbon economy.<sup>40</sup> Other important sources of project financing in the region are the EU territorial cooperation programmes such as: the Interreg North Programme; the Botnia-Atlantica Programme; the Baltic Sea Region Programme; and the Northern Periphery and Arctic Programme; as well as the Karelia and Kolarctic cross-border cooperation programmes under the European Neighbourhood Instrument. The EU should work to strengthen collaboration, synergies and complementarity between these programmes and other funding sources in the region. Infrastructure projects have so far proved difficult to develop, and national and regional authorities have made clear that they see a need for more coordinated and effective EU funding in this area.<sup>41</sup>

The climate of the Arctic region also makes it an ideal innovation site for cold climate technologies and services. Harsh climatic conditions and the fragile environment require specialised technology and know-how to meet high environmental standards. Opportunities in the 'Green Economy', such as sustainable multi-source energy systems, eco-tourism and low-emission food production, could be developed further. The European Commission will help to monitor potential opportunities for sustainable economic activities, including in 'Blue Economy' sectors such as aquaculture, fisheries, offshore renewable energy, maritime tourism and marine biotechnology. With wide variations across this vast region, energy is expected to be a growth sector, and may include on- and off-shore wind power, ocean energy, geothermal energy and hydropower.

## Policy Response

### 2.1 Support for sustainable innovation

The EU should support the deployment of innovative technologies in the Arctic. These technologies could be applied to a wide range of activities such as the development of advanced materials capable

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<sup>38</sup> Greenland is not a member of the European Union. The long-standing relations with Greenland were confirmed by the signing of the Joint Declaration by the European Union, on the one hand, and the Government of Greenland and the Government of Denmark, on the other, on relations between the European Union and Greenland in 2015.

<sup>39</sup> In line with Article 102(1) of the EEA Agreement.

<sup>40</sup> For the 2014-2020 period, over EUR 1 billion has been allocated to investments in northern Finland and Sweden under the Investment for Jobs and Growth objective, which will be complemented by national public and private co-financing.

<sup>41</sup> [http://ec.europa.eu/dgs/maritimeaffairs\\_fisheries/consultations/arctic-eu-funding/doc/results\\_en.pdf](http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/arctic-eu-funding/doc/results_en.pdf)

of working in extreme conditions in the Arctic winter that could stimulate investments in energy efficiency and renewable energy solutions. Such technologies have the potential to bring broad social and economic benefits within and beyond the Arctic. In addition to Horizon 2020, the ESIF programmes provide funding for research and innovation activities in the European part of the Arctic.

The European Commission will explore how Horizon 2020 could speed up the translation of research outcomes into cold-climate technologies and services with commercial potential. These outcomes should embed the assessments of sustainability of processes and technologies to ensure social and environmental protection and could contribute to the development of 'Arctic standards'. Close links between research, science and technology, while taking account of traditional knowledge, will as well ensure that development is taken forward in a sustainable way.

The InnovFin<sup>42</sup> programme under Horizon 2020, in particular its Finance for Innovators initiative by the European Investment Bank Group and the European Commission can help Arctic-related research and innovation projects<sup>43</sup> get access to the market. Innovfin consists of a series of integrated and complementary financing tools and advisory services, covering the entire value chain of research and innovation to support investments from the smallest to the largest enterprise.

Finally, many companies — especially small and medium sized businesses — located in the northernmost part of the EU thrive on innovative business models and innovative technologies, namely information technology, data processing and services, industrial design, the collaborative economy and the circular economy. Effective access to the Single Market is often critical for bringing innovations from the development stage to the market stage. The Commission will therefore make a special effort to promote the conditions for Arctic innovation and business opportunities as it implements its strategies for a Digital Single Market<sup>44</sup> and in upgrading the Single Market.<sup>45</sup> The European Enterprise Network has been particularly successful in 'coaching' Arctic SMEs at their request; it is driven by strong demand in the region. The Commission will continue to support this activity.

## 2.2 European Arctic stakeholder forum

Consultations by the Commission and the European External Action Service suggest that the European Arctic is suffering from underinvestment. Recognising the need to work closely with national, regional and local authorities in the European Arctic, the Commission will set up a European Arctic stakeholder forum with the aim of enhancing collaboration and coordination between different EU funding programmes.

This temporary forum should bring together EU institutions, Member States, and regional and local authorities to contribute to identifying key investment and research priorities for EU funds in the region. The process will also be open to Norway and Iceland under the European Economic Area Agreement, as well as to Greenland under the EU-Greenland Joint Declaration. This work, chaired by the European Commission, is to be completed before the end of 2017.

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<sup>42</sup> InnovFin consists of a series of financing tools and advisory services. It covers the entire value chain of research and innovation in order to support investments from the smallest to the largest enterprise. More information: <http://www.eib.org/products/blending/innovfin/>.

<sup>43</sup> For instance the automotive winter testing facility of the Arctic Arc project is already funded under Innovfin ( <http://spga.eu/>).

<sup>44</sup> COM (2015)192 final.

<sup>45</sup> COM (2015)550 final.



Complementary to the forum, the Interreg Northern Periphery and Arctic Programme will lead a pilot activity aiming at bringing together a network of managing authorities and stakeholders from various regional development programmes in the European part of the Arctic. It is to facilitate the exchange of information, plan and coordinate calls for proposals and monitor the impact of programmes on the region. The new collaborative network will also be open to participation by relevant national and international financing instruments. Based on the extensive work and experience of the programmes, the network feeds into the work of the stakeholder forum in identifying the research and investment priorities.

To bring the results of the forum and network together after 2017, the Commission will fund and facilitate an annual Arctic stakeholder conference in the European Arctic region to strengthen collaboration and networking between stakeholders to improve capacity building, international project development and awareness of financing sources.

### 2.3 Investment

The Investment Plan for Europe is operational, and could potentially be used to support infrastructure projects in the European part of the Arctic, including Greenland. Through this instrument and its existing lending operations, the European Investment Bank (EIB) could not only help to finance projects to improve transport connections over land, sea and air, but also telecommunications, energy efficiency projects and low-carbon technology. In line with its mandates, the EIB could invest in cross-border projects between Sweden, Finland, the Kingdom of Denmark, Norway and Iceland, which have significant development potential.

The preparation of these projects could also be facilitated by involving the European Investment Advisory Hub and Project Portal. This could help to attract new financing sources by maximising the involvement of the private sector and by complementing the European Structural and Investment Funds. Dedicated platforms could be developed to bring together different investors in the Arctic region. The European Bank for Reconstruction and Development has also been an important investor in the Arctic region.

The EU's integrated Arctic policy is therefore consistent with the Investment Plan for Europe, which offers a range of ways to encourage investment in the Arctic region to benefit citizens and businesses both above and below the Arctic Circle.

In view of transport links, the northern part of Finland, Sweden and Norway belongs to the trans-European Network for Transport (TEN-T). This network facilitates investments in order to optimise network benefits. It focuses on cross-border sections and the removal of bottlenecks, and pushes forward sustainable transport modes. Lulea, Kemi, Oulu, Narvik and Hammerfest have been defined as TEN-T ports. They form important interlinks between maritime and land transport.

In order to enhance both the modal shift and the capacity for rail transport between Narvik, the Bothnian Corridor and southern Scandinavia, works and studies have been co-financed by the EU.

Creating an optimal, sustainable mix between the different transport modes - for both long and short distance, passenger and freight traffic - should be done in cooperation between the EU institutions, Member States, third countries and industry. In order to obtain the optimal use of the network, a coordinated financing strategy should also be considered.

### 2.4 Space technology

Given its vast size and sparse population, the Arctic region can benefit greatly from space-based services. The Arctic region however needs dedicated solutions as it is not covered by geostationary satellites.



The Copernicus programme already provides for surveillance and monitoring services with satellites in polar orbits, thereby contributing to key environmental, safety and security needs. Once deployed, the European Global Navigation System (Galileo) will offer coverage of the Arctic region providing safe and reliable navigation capabilities for air, maritime and ground applications. Telecommunication needs however cannot be adequately met with the present mainly equatorial orbit satellites. The Commission will explore whether a suitable solution for the Arctic could be considered as part of a possible proposal to support the next generation of Government satellite communications in the context of the upcoming Space Strategy or European Defence Action Plan. The EU will also promote an integrated pan-Arctic observing system through the GEO Cold Region Initiative as an essential tool to study, forecast and assess changes that support the region's sustainable development.

## 2.5 Safe and secure maritime activities

In view of increasing vessel traffic in the Arctic, including some carrying flags from EU Member States, the EU should contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of spatial and temporal developments of the increasing maritime activities in the Arctic; such knowledge is essential to assess the consequent risks and make better decisions on possible mitigating measures. As a first response, the European Commission is to launch a call in 2016 under Horizon 2020 that is to prepare a network for the Arctic and the Atlantic that is to cope with maritime security threats resulting from the opening of the North East passage.<sup>46</sup> The EU should also support international efforts to implement the International Polar Code covering shipping-related matters relevant to navigation in Arctic waters, including enhanced Search and Rescue. The Polar Code is expected to enter into force on 1 January 2017.

While Satellite AIS (Automatic Identification System) provides coverage for the Arctic, there are challenges in ensuring and directing Search and Rescue units in case of a ship in need of assistance, due to the remoteness, difficult navigation due to ice and the less dense maritime traffic in the area. The European Coast Guard Functions Forum (ECGFF) should collaborate closely with the newly established Arctic Coast Guard Forum (ACGF), which could play an important role in fostering safe, secure and environmentally responsible maritime activity in the Arctic.

## 3. INTERNATIONAL COOPERATION ON ARCTIC ISSUES

### The issues

The challenges affecting the Arctic, and the solutions required to address them, require a joined-up response at regional and international level. Wider geopolitical dynamics may add further complexity to the changes affecting the region. The EU has a strong interest in seeing that the Arctic remains a zone of constructive international cooperation where complex issues are addressed through negotiated solutions, and where common platforms can be established in response to emerging risks. Science, in particular, can be used as a catalyst to support a common understanding, enabling jointly agreed solutions to be reached and foster peaceful cooperation. As a global leader in science, the European Union should be ready to engage more in large scale global scientific collaboration. The EU's Horizon 2020 research and innovation programme is open to the world and enables partnerships between regions and countries to tackle global societal challenges.

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<sup>46</sup> Under SEC-21-GM-2016-2017 of Horizon 2020: Pan European Networks of practitioners and other actors in the field of security.

The EU is engaged in issues of direct relevance to the Arctic at international level via the UN and its specialised agencies (the United Nations Framework Convention on Climate Change, the International Maritime Organisation and the International Civil Aviation Organisation) and subsidiary bodies (the United Nations Environmental Programme). A number of Arctic cooperation fora have been set up in recent decades, the most important of which is the Arctic Council. The Arctic states have worked to foster peace and stability through cooperation and the application of the rule of law. Given the importance of the Arctic region and the significant changes underway there, it is important that the EU continues to cooperate with Arctic and non-Arctic partners to identify common positions and solutions on issues such as climate change, environmental protection and scientific research.

It is also important to ensure that appropriate measures are in place for effective stewardship of the Arctic Ocean to ensure environmental protection, peaceful cooperation and dispute settlement, respect for international law and the sustainable use of marine resources. Maritime security is also of increasing importance. In June 2014, the European Council adopted a Maritime Security Strategy for the global maritime domain.<sup>47</sup> The strategy and associated action plan set out a number of challenges that impact on the maritime domain, and proposed responses at EU level.

## Policy response

### 3.1 International organisations and fora

The EU should take an active negotiating position in relevant UN fora to encourage all countries and regions to assume their responsibilities, notably with regard to climate change and environmental protection, but also in relation to emerging challenges such as safety at sea and the sustainable management of land- and sea-based resources.

The EU recognises and supports existing legal instruments for managing the world's seas. In particular, the UN Convention on the Law of the Sea (UNCLOS) provides a framework for managing the Arctic Ocean, including the peaceful settlement of disputes. The EU will support these efforts by engaging in a strategic dialogue with Arctic stakeholders and third countries on security matters and by promoting continued rules-based governance at sea.

The EU will continue its active participation in the Arctic Council — the primary forum for international cooperation in the region by, for example, participating in and contributing to the work of relevant working groups, task forces and expert groups. The EU looks forward to working with the current and future Chairmanships of the Arctic Council and to the early implementation of its observer status in line with the Kiruna Declaration of May 2013.<sup>48</sup> The EU should also engage with the Arctic Council on issues relating to stewardship of the seas including by participating in the Arctic Council Task Force on Arctic Marine Cooperation.

The EU will continue to support regional and sub-regional cooperation, including through its membership of the Barents Euro-Arctic Council, and the Northern Dimension policy. The EU is also engaged in regional cooperation within the UN Economic Commission for Europe and in particular the UNECE Convention on Long-Range Transboundary Air Pollution (CLRTAP). The Nordic Council and

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<sup>47</sup> Council of the European Union (11205/14).

<sup>48</sup> 'The Arctic Council receives the application of the EU for observer status affirmatively, but defers a final decision on implementation until the concerns of Council members, addressed by the President of the European Commission in his letter of 8 May are resolved, with the understanding that the EU may observe Council proceedings until such time as the Council acts on the letter's proposal.'

the Nordic Council of Ministers are also relevant partners for the European Union, not least given their longstanding engagement with EU and their Arctic cooperation programme.

These cooperation frameworks address many important issues at regional level, and can have a substantial impact on the lives of indigenous peoples and local communities.

### 3.2 Bilateral cooperation

The EU should cooperate with all Arctic partners, including Canada, Russia and the United States with a view to identifying further areas for cooperation, such as science and investment. The EU will also engage with all states that take an increasing interest in the Arctic such as China, India, Japan, the Republic of Korea and Singapore on issues of common interest and concern.

The EU cooperates with Greenland under the EU-Greenland Partnership.<sup>49</sup> The partnership aims to support Greenland in addressing its major challenges, in particular the sustainable diversification of its economy and strengthening its administrative capacity. The EU provides budget support to Greenland with the aim of strengthening the education sector as a driver for sustainable development. The EU will further engage in policy dialogue at the appropriate political and technical levels on issues of common concern, such as global issues (energy, climate change and the environment, and natural resources) and Arctic issues.

Arctic policy and Arctic issues will continue to remain an important element of the EU's close relations with Iceland and Norway.

### 3.3 Dialogue with Arctic indigenous peoples

The EU will continue to engage with Arctic indigenous peoples and local communities to ensure that their views and rights are respected and promoted in the ongoing development of EU policies affecting the Arctic. The European Commission hosts an annual dialogue meeting with representatives of Arctic indigenous peoples to exchange views and agree on areas for further cooperation, particularly in relation to business and human rights. The EU should continue to work on advancing consistency between the EU's internal and external policy towards indigenous peoples.

The EU provides support to local communities through several of its funding programmes, including the national ESIF programmes, the Territorial Cooperation programmes and the programmes under the European Neighbourhood Instrument.<sup>50</sup> The Northern Periphery and Arctic Programme focuses on using innovation to maintain and develop robust and competitive communities, promote entrepreneurship, foster energy-secure communities, and promote and develop cultural and natural heritage. The programme is open to participation by partners in Canada and Russia, in addition to the nine programme partner countries in the European Arctic.

### 3.4 Fisheries management

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<sup>49</sup> Council Decision 2014/137/EU of 14 March 2014 on relations between the EU on the one hand, and Greenland and the Kingdom of Denmark on the other.

<sup>50</sup> Interreg IV A North, the Northern Periphery and Arctic programme and the Kolarctic Cross Border Cooperation programme for example.

The EU should welcome the recent declaration signed by five Arctic coastal states on Arctic fisheries<sup>51</sup> and the need to obtain more information on ecosystems in the Arctic Ocean before opening up this region to commercial fishing. However, as the area concerned is beyond national jurisdiction, it will be necessary for all interested countries, not only the coastal states, to work together to establish the appropriate international measures. This framework should in due course include a new Regional Fisheries Management Organisation or Arrangement, combined with a new Regional Sea Convention, to ensure the long-term conservation and sustainable use of resources in the Arctic high seas. The European Commission believes that such a framework can only be established in an open and inclusive manner, and welcomes the broadening of the negotiations to involve major fishing nations.

### 3.5 Scientific cooperation

The EU should promote and facilitate effective international scientific cooperation through supporting transnational access to research infrastructure and open data resources to improve political and economic links and maintain good relations with key countries in the region. It already positions itself as a partner for global cooperation, complementary to its Member States in the Arctic Council. The EU should take forward scientific cooperation at international level under the Transatlantic Ocean (and Arctic) Research Alliance<sup>52</sup>, launched by the Galway declaration in May 2013, which involves Canada, the EU and the United States.

In order to fill gaps in the available marine data about the seabed in the seas and oceans around Europe and the life they support, the European Commission has set out a target to develop a multi-resolution map of the entire seabed and overlying water column by 2020. This project will include the Barents Sea from 2018. Over 100 organisations, including from Iceland, Norway and Russia, are working together under the European Marine Observation and Data Network (EMODnet) to make their marine data more accessible, interoperable and useful to end-users. Data will be available through a single web portal.

This initiative is important for driving sustainable growth in the Blue Economy. It is estimated that making the high-quality marine data held by public bodies in the EU widely available will improve productivity by over EUR 1 billion a year.<sup>53</sup> Private and public bodies, as well as hydrographic offices, research institutions and civil society organisations, would not need to re-survey areas that had already been surveyed, but for which the data have up to now been inaccessible. It would cost them less to process existing data. Research in security matters covering Arctic dual-use resources and exchanges of best practices in this field should be strengthened.

## 4. CONCLUSIONS AND NEXT STEPS

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<sup>51</sup> <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/folkerett/declaration-on-arctic-fisheries-16-july-2015.pdf>.

<sup>52</sup> The EU, Canada and the US try to foster their cooperation concerning marine and Arctic research infrastructures. However, beyond these two partners, Horizon 2020 promotes the broadest transnational access to research infrastructures and supports an open data policy in order to improve political and economic links and maintain good relations with all countries in the region and those interested in Arctic research. More information on the Transatlantic Ocean (and Arctic) Research Alliance.

<sup>53</sup> Commission Staff Working Document Marine Knowledge 2020: Roadmap accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Innovation in the Blue Economy realising the potential of our seas and oceans for jobs and growth (SWD/2014/0149 Final).

1. This policy document should guide the EU's actions for the coming years, and the European Commission and the High Representative for Foreign Affairs and Security Policy invite the views of the European Parliament and Council of the EU. The EU will keep this policy under review in light of developments.

2. As part of its strategic commitment to the Arctic, the EU should engage with the region on these three priority areas:

- climate change and safeguarding the Arctic environment;
- promoting sustainable development in the region;
- supporting international cooperation on Arctic issues.

3. The EU needs to ensure that the necessary coordination structures are in place at EU level to meet the challenges ahead. The Council could consider establishing a Working Party on Arctic Matters and Northern Cooperation and the European Parliament could similarly consider establishing a delegation on Arctic Matters and Northern Cooperation.”<sup>54</sup>

## Section 9 | Ports: The Proposed Regulation

The EU has long attempted to adopt a specific measure to liberalise and deregulate ports. The latest attempt is to adopt a regulation. This is the third attempt since 2001. The first attempt was vetoed by the European Parliament in 2003 and again the same thing occurred in 2006. Liberalisation/deregulation of ports is not easy.

On 23 May 2013, the Commission adopted a proposal for a “Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports”. It also adopted a Communication entitled “Ports: an engine for growth”. The aim is to enhance the performance of the TEN-T seaports so as to contribute to the goal of a more efficient, interconnected and sustainable functioning of the TEN-T in line with the objectives of the EU Transport White Paper and the EU 2020 strategy for a resource efficient growth.

On 8 March 2016, the European Parliament voted in favour of, and adopted some amendments to, the latest stage of the proposed Ports Regulation.

The European Parliament and the Council will now need to agree on the final text before the proposal can be adopted.

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<sup>54</sup> Some footnotes omitted.

Commissioner Bulc commented on the development, "[p]orts are engines for growth. A competitive port sector is critical to the well-functioning of the internal market, and our seaports are gateways from the trans-European network to the rest of the world. Once adopted, the Regulation will facilitate private investment in ports and encourage more efficient public investments and port services".

The proposed Regulation has been described in different ways but, in essence, it is composed of three parts:

- (a) a transparent and easier access to the market of port services;
- (b) financial transparency for port authorities through their accounts in order to ensure a transparent and rational use of public funds; and
- (c) mechanisms to handle disputes and consultations between port stakeholders.

The Council agreed in 2014 to progress the draft regulation.

On 25 January 2016, the Transport Committee of the European Parliament adopted a report on the proposed measure and gave a mandate to the rapporteur Knut Fleckenstein MEP and his colleagues to start trilogues with the Council in view of reaching an agreement in first reading.

## Section 10 | Ports: State Aid Block Exemption Initiative

The EU has adopted a so-called "General Block Exemption Regulation" (i.e., Regulation 651/2014) in regard to State aid and it sets out the procedural rules for the application of State aid generally.

Ports are *not* part of EU's General Block Exemption Regulation on State Aid. It would be advantageous if they were part of the GBER because then some (but not all) projects involving the provision of State aid to ports would not have to be notified to the European Commission under the State Aid regime.

Recital 1 of the GBER provides that the Commission envisages including ports and airports in the GBER, which have so far not been included, as soon as sufficient case experience has been collected. The operative part of Recital 1 states: "[p]rovided that sufficient case experience is further developed allowing the design of operational exemption criteria ensuring the ex-ante compatibility of other categories of aid, the Commission intends to review the scope of this Regulation with a view to including certain types of aid in those areas. In particular, the Commission envisages developing criteria for port and airport infrastructure by December 2015."

In announcing the review, the Commission stated that this "initiative aims to simplify the application of State aid rules, thus reducing administrative burden and costs and speeding up the implementation of projects. By including aid measures for ports and airports into the GBER, Member States will no longer have to notify the measures to the Commission and wait for the approval of the Commission before they can start implementation."

On 7 March 2016, the European Commission announced a "targeted review of the General Block Exemption Regulation (State aid): extension to ports and airports" (the "Review"). This Review is aimed at all citizens, organisations and public authorities so shipping companies, ports and others involved in the shipping sector should consider making submissions. The consultation period opened on 7 March 2016 and will close on 30 May 2016. Contributions will be published on the European Commission's webpage on the consultation.

Submissions that are clearly marked "confidential" will be treated as such and not published. In that case, contributors are asked to provide a non-confidential version of their reply.

The essence of the draft of the proposed regulation is to modify the GBER to widen its scope and include non-problematic investment aid to ports.

It is not going to be a very quick process. Council Regulation (EU) 2015/1588 of 13 July 2015, which is the legal basis for the GBER, provides that the Commission must carry out two public consultations on drafts of the Regulation and will consult Member States in Advisory Committee meetings on both drafts. The March-May consultation is the first public consultation.

Before examining the detail of the proposal, it is useful to consider the Commission's "Explanatory Memorandum" on the initiative:

*"Extension of the General Block Exemption Regulation (GBER) to ports and airports*

The Commission adopted a new General Block Exemption Regulation (GBER) in 2014 as an integral building block of State Aid Modernisation ("SAM"). The GBER declares certain aid measures compatible with the internal market and exempt from prior notification to the Commission. The criteria of the GBER determine, in particular, eligible beneficiaries, maximum aid intensities (i.e. the maximum proportion of the eligible costs of a project that can benefit from state aid) and eligible expenses. These criteria are derived from the Commission's market experience and decision making practice.

*Extension of the GBER to ports and airports*

In recital 1 of the GBER, it is announced that the Commission envisages including ports and airports in the GBER, which have so far not been included, as soon as sufficient case experience has been collected. This initiative aims to simplify the application of State aid rules, thus reducing administrative burden and costs and speeding up the implementation of projects.

As already indicated in recital 1 of the GBER, the new provisions on ports and airports are necessarily based on a codification of existing practice (33 cases on ports and 54 on airports). In addition, the compatibility criteria for airports have to be based on the criteria contained in the Guidelines on state aid to airports and airlines (OJ C 99, 4.4.2014, p. 3).

For the proposed new provisions on airports please see the new Article 56a, as well as the corresponding definitions (Article 2, points 144 et seq.).

For the proposed new provisions on ports please see the new Articles 56b and 56c, as well as the corresponding definitions (Article 2, points 152 et seq. ) and notification thresholds (Article 4 (1) (ee) and (ff)).

*Other changes*

The revision will also address some technical issues that the Commission has become aware of in order to make the GBER easier to use in practice.

This concerns in particular the provisions on regional operating aid in outermost regions (territories located far away from Europe, listed in Article 349(1) TFEU). Articles 349 and 107(3)(a) TFEU allow for exceptional treatment of outermost regions under State aid rules, due to their specific handicaps.



The current GBER rules for regional operating aid treat differently additional transport costs and other additional costs that undertakings have due to operating in outermost regions. However, the distinction between additional transport costs and other additional costs does not correspond to the way operating aid schemes in outermost regions function. In practice, these schemes are horizontal in nature (mainly tax exemptions applied to all undertakings operating in the region in question) and therefore compensate handicaps of companies in outermost regions without making a distinction between different cost elements. Moreover, the current GBER provisions for additional transport cost impose a strict reimbursement system that experience has shown to be burdensome to apply.

Therefore, a simplification of the rules is necessary. The aid ceilings are for this public consultation not yet filled in (percentage/amounts are left in brackets) because the Member States concerned will submit in the course of 2016 updated studies that will help the Commission determine the appropriate level.

In addition, given the general and to some extent permanent character of the handicaps of outermost regions, as well as the fact that the aid schemes to address these handicaps often apply to all undertakings in the region (horizontal schemes), the exclusions of certain sectors from the provisions on operating aid do not seem justified.

In view of the limited negative effects on competition of aid for culture, it is planned to increase the GBER notification threshold for aid to culture.

#### *Reduction of administrative burden*

The Commission estimates the potential annual cost-savings that can be achieved by this initiative at several million Euros for companies and public authorities. As part of the REFIT agenda, the Commission will work with Member States and stakeholders to check whether the potential savings will be achieved in practise. The Commission would therefore appreciate if you could provide in reply to this public consultation any information that is relevant to estimate the reduction in administrative burden or your own estimation of the reduction.

#### *Procedure*

As required by the legal basis of the GBER (Council Regulation (EU) 2015/1588 of 13 July 2015), the Commission will carry out two public consultations on drafts of the Regulation and will consult Member States in Advisory Committee meetings on both drafts. This is now the first public consultation."

There would be new definitions (see the "Definitions for aid for ports" in the proposed regulation):

"(152) 'Port' means an area of land and water made up of infrastructure and equipment for, principally, the reception of waterborne vessels, their loading and unloading, the storage of goods, the receipt and delivery of those goods, or the embarkation and disembarkation of passengers and any other infrastructure necessary for transport operators within the port area;

(153) 'Maritime port' means a port for, principally, the reception of waterborne vessels by sea;

(154) 'Inland port' means a port other than a maritime port, with indirect access to the open sea through inland waterways;

(155) 'Port infrastructure' means infrastructure and facilities that generate a direct income for the port managing body including berths used for the mooring of ships, quay walls, jetties and floating pontoon ramps in tidal areas, internal basins, backfills and land reclamation, and transport facilities within the port area;

(156) 'Port superstructure' means surface arrangements, buildings as well as mobile equipment (e.g. cranes) and fixed equipment that directly relate to the transport function of the port;

(157) 'Access infrastructure' means any type of infrastructure necessary to ensure the access and entry from land or sea and river by users to the maritime or inland port, in particular, access roads, access rail tracks, breakwaters, access channels, locks;

(158) 'Dredging' means the removal of sand, sediment or other substances from the bottom of the waterway access to a port in order to allow waterborne vessels to have access to the port;

(159) 'Maintenance dredging' means dredging routinely done in order to keep the waterway accessible;...."

There would be a new Section 15 added to the GBER. It would contain the following provisions:

#### "Aid for ports

##### Article 56b

##### Investment aid for maritime ports

1. Investment aid for maritime ports shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempt from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.

2. The eligible costs shall be the costs, including planning costs, of investments:

(a) for the construction or upgrade of maritime port infrastructures and superstructures, with the exception of mobile equipment; and

(b) for the construction or upgrade of access infrastructure, including dredging and excluding maintenance dredging, dedicated to commercially exploited maritime port infrastructure.

Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible.

3. The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.

4. The maximum aid intensity for the investments defined in paragraph 2 (a) shall not exceed:

- (a) if eligible costs are up to EUR [20] million: [100]% of the eligible costs;
- (b) if eligible costs are above EUR [20] million and up to EUR [50] million: [80]% of the eligible costs;
- (c) if eligible costs are above EUR [50] million and up to EUR [100] million: [50]% of the eligible costs;
- (d) if eligible costs are up to EUR [120] million for the maritime ports included in the work plan of a core network corridor as referred to in Article 47 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council: [50]% of the eligible costs.

The maximum aid intensity for the investments defined in paragraph 2 (b) shall not exceed [100]% of the eligible costs;

5. The aid intensities laid down in paragraph 4 first subparagraph points (b), (c) and (d) may be increased by [10] percentage points for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty and by [5] percentage points for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty.

6. Any investment started by the same beneficiary within a period of [three] years from the date of the start of works on another aided investment in the same maritime port shall be considered to be part of a single investment project.

7. Any concession or other entrustment to a third party to construct, upgrade, operate or rent port infrastructure and superstructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the Union public procurement rules [and Regulation establishing a framework on market access to port services and financial transparency of ports<sup>55</sup>] where applicable. The duration of any concession or other entrustment for the rental or operation of the infrastructure to a third party shall not exceed a maximum duration of [30] years.

8. The infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use of the infrastructure shall correspond to the market price.

#### Article 56c

##### Investment aid for inland ports

1. Investment aid for inland ports shall be compatible with the internal market within the meaning of Article 93 of the Treaty and shall be exempt from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.

2. The eligible costs shall be the costs, including planning costs, of the investments:

(a) for the construction or upgrade of inland port infrastructures and superstructures, with the exception of mobile equipment; and

(b) for the construction or upgrade of access infrastructure, including dredging

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<sup>55</sup> [The Regulation is currently under examination by the European Parliament and Council, and final adoption is expected by the end of 2016.]

and excluding maintenance dredging, dedicated to commercially exploited inland port infrastructure.

Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible.

3. The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.

4. The maximum aid intensity shall not exceed [100]% of the eligible costs.

5. Any investment started by the same beneficiary within a period of [three] years from the date of start of works on another aided investment in the same inland port shall be considered to be part of a single investment project.

6. Any concession or other entrustment to a third party to construct, upgrade, operate or rent port infrastructure and superstructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the procurement rules where applicable. The duration of any concession or other entrustment for the rental or operation of the infrastructure to a third party shall not exceed a maximum duration of [30] years.

7. The infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use of the infrastructure shall correspond to the market price.'

(18) In Article 58, paragraph 1 is replaced by the following:

'1. This Regulation shall apply to individual aid granted before the respective provisions of this Regulation have entered into force, if the aid fulfils all the conditions laid down in this Regulation, with the exception of Article 9.'

## Section 11 | Ports: Spanish Case

On 28 April 2016, the Commission announced that it had "referred" Spain to the CJEU for the second time for failing to comply with a previous judgement of the Court concerning freedom of establishment at Spanish ports.<sup>56</sup> This was the judgment of the CJEU on 11 December 2014 in Case C-576/13 *Commission v Spain* where the Commission's case that Spain had failed to comply with EU law was upheld by the CJEU. The Commission summarised, in 2016, the case in the following terms:

"In this judgement, the Court found that the obligations for cargo-handling companies in Spanish ports to register with a 'pool company' and to hold shares in that company and to employ as a priority

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<sup>56</sup> [http://europa.eu/rapid/press-release\\_IP-16-1455\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1455_en.htm).

workers provided by that company run counter of Article 49 of the Treaty on the Functioning of the European Union (TFEU).

To date, Spain has not adequately addressed the issues identified in the Court's judgment; therefore, the European Commission has decided to refer Spain to the Court of Justice of the EU for failure to comply with the judgement of 11 December 2014.

The Commission invites Spain to rapidly undertake the necessary reforms in order to comply with this judgement; otherwise, the Court may decide to impose financial penalties on Spain.

In December 2014, the Court of Justice of the EU ruled that the Spanish legislation on dock labour, conflicts with the freedom of establishment as enshrined in Article 49 of TFEU. It obliges undertakings of other Member States wishing to exercise the activity of cargo-handling in Spanish ports of general interest to register with the Dockers' Management Public Limited Liability Company (in Spanish: '*Sociedad Anónima de Gestion de Estibadores Portuarios*', SAGEP) and to hold shares in this company. Moreover, cargo-handling companies are obliged to employ as a priority workers provided by this company.

The Spanish authorities had until February 2015 to communicate to the Commission on measures taken to comply with the Court's judgement. Today, no measures complying with this judgement have been taken and no clear timeframe for the implementation of such measures has been communicated to the European Commission."

## Section 12 | State Aid: Spanish Leasing Case

On 14 April 2016, the CJEU<sup>57</sup> delivered judgment in *Netherlands Maritime Technology Association v European Commission*.<sup>58</sup> The court held that a "new" Spanish tax lease regime did not involve the provision of State aid. The appeal was brought to the CJEU by the Netherlands Maritime Technology Association.

The Commission had concerns about the *former* Spanish tax lease regime. The Commission's concerns were that the system was used exclusively in transactions involving shipping companies purchasing vessels from Spanish shipyards – which would be contrary to the EU's notion of an internal market in the EU. The Commission found that the relevant transactions had involved leasing companies and Spanish taxpayers in deals brought together by Spanish banks. The Commission objected to the early depreciation scheme involving an element of selectivity as there was a need for an authorisation from the tax authority covering all the effects of the leasing contract. It was also the case that applying the tonnage tax regime after using the accelerated depreciation scheme required upfront approval from the Spanish tax authorities. The Netherlands Maritime Technology Association was an association representing the interests of Dutch shipyards. Together with other associations, it had earlier lodged a complaint with the Commission against the Spanish tax schemes.

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<sup>57</sup> Sixth Chamber, composed of Judges Arabadjiev (President of the Chamber), Fernlund and Regan (Rapporteur). The Advocate General was AG Wathelet.

<sup>58</sup> Case C-100/15 P.

According to the complainants, the previous scheme made it possible to secure a rebate of 20% to 30% on the construction price of a vessel.

Spain then modified the tax lease regime. It no longer requires prior approval from the Spanish tax authorities. Given the amendments, the Commission approved the amended Spanish tax lease as being compatible with EU state aid law.

The Netherlands Maritime Technology Association appealed the Commission's approval decision<sup>59</sup> to the General Court but on 9 December 2014, the latter upheld the Commission's approval.<sup>60</sup> On 14 April 2016, the CJEU upheld the General Court's judgment following a further appeal by the Netherlands Maritime Technology Association from the General Court's appeal.

## Section 13 | Passengers: Regulation 1177/2010

On 28 April 2016, the Commission announced that it has asked Belgium to apply correctly rules for waterborne travellers. It asked Belgium to adopt the necessary measures for the correct application of Regulation 1177/2010 on the rights of passengers travelling by sea and inland waterways. Belgium had not yet established a penalty system to ensure that passengers' rights are fully respected by transport companies. The Regulation had become applicable on 18 December 2012, a date by which all Member States were bound to fulfil its requirements. The Commission's request has been sent in the form of a reasoned opinion. Belgium has two months to notify the Commission of measures taken to remedy this situation; otherwise, the Commission may decide to refer it to the CJEU.

## Section 14 | Report on application of Directive 2009/20/EC on insurance of shipowners for maritime claims

On 29 March 2016, the Commission adopted a report on the application of Directive 2009/20/EC of the European Parliament and of the Council on the insurance of shipowners for maritime claims. Directive 2009/20/EC makes it compulsory for shipowners in the EU to have adequate insurance covering their ships.<sup>61</sup>

The Report is the result of a survey undertaken by the European Maritime Safety Agency ("EMSA") at the request of the Commission, as well as on information and data retrieved from the inspection database, commonly known as THETIS, established in accordance with Article 24 of Directive 2009/16/EC, as amended by Directive 2013/38/EU, on port State control. The Report recalls that Member States had to transpose the

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<sup>59</sup> Commission Decision C(2012) 8252 final of 20 November 2012 relating to State aid SA.34736 (2012/N) — Spain — Early depreciation of certain assets acquired through a financial leasing.

<sup>60</sup> Case T-140/13 *Netherlands Maritime Technology Association v Commission* EU:T:2014:1029.

<sup>61</sup> See European Commission, Report on the application of Directive 2009/20/EC on the insurance of shipowners for maritime claims (COM (2016) 167) (29 March 2016).

provisions of Directive 2009/20/EC into national law by 1 January 2012 and that all Member States have notified their national implementing measures to the Commission. No amendments have been communicated since 2012 to the national transposing legislation in Member States.

The Report's conclusion is that after being in force for four years, it appears that Directive 2009/20/EC is working well in pursuing its objectives. This is because the vast majority of ships flying EU flags or entering EU ports have adequate insurance in line with the Directive. The Report also concludes that some of the implementation and enforcement issues, as outlined in the Report, could be further improved through enhanced use of the existing operational information and exchange systems to achieve a more uniform application of the Directive, both from a flag State and port State point of view<sup>62, 63</sup>

## Section 15 | Safety

In regard to maritime safety, the Commission adopted Regulation (EU) 2016/103 of 27 January 2016 amending Regulation (EC) 2099/2002 establishing Committee on Safe Seas and Prevention of Pollution from Ships ("COSS"). The preamble to Commission Regulation (EU) 2016/103 states that the role of the COSS is to centralise the tasks of the committees set up under EU legislation on maritime safety, the prevention of pollution from ships and the protection of shipboard living and working conditions. It also notes that all new EU legislation adopted in the field of maritime safety and the prevention of pollution from ships should provide for recourse to the COSS. As a result, Commission Regulation (EU) 2016/103 amends Regulation (EC) 2099/2002 to take into account all new EU legislation adopted in the field of maritime safety and the prevention of pollution from ships that provide that the Commission should be assisted by COSS.

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<sup>62</sup> The Commission has also stated: "Directive 2009/20/EC makes it compulsory for shipowners in the EU to have adequate insurance covering their ships. It, among other things, stipulates that all ships flying a flag of a member state as well as any ship flying a flag of a third country entering EU ports or in some cases operating in the territorial waters of a member state, will have to be covered by insurance for the amount equal to the relevant maximum amount for liability laid down in the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC 1996). The LLMC 1996 establishes the right of shipowners (including charterers, managers, and operators) and salvors to limit their liability for a variety of maritime claims related to the operation of a ship.

For the purposes of Directive 2009/20/EC, there is no definition of the term "ship" as such. The Directive applies to ships of at least 300 gross tons, excluding "warships, auxiliary warships or other State owned or operated ships used for non-commercial public services". It does however define the term "shipowner", limiting it to seagoing ships, as including other than the registered owner, any person responsible for the operation of the ship.

The Report notes that member states had to transpose the provisions of Directive 2009/20/EC into their national law by 1 January 2012 and that all member states have notified their national implementing measures to the Commission. No amendments have been communicated since 2012 to the national transposing legislation in member states.

The Report's conclusion is that after being in force for four years, it appears that Directive 2009/20/EC is working well in pursuing its objectives, because the vast majority of ships flying EU flags or entering EU ports have adequate insurance in line with the Directive. It further concludes that some of the implementation and enforcement issues, as outlined in the Report, could be further improved through enhanced use of the existing operational information and exchange systems to achieve a more uniform application of the Directive, both from a flag State and port State point of view."

<sup>63</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1459344057840&uri=COM:2016:167:FIN>.



In regard to ship inspection and survey organisations, the Commission adopted a report on progress in implementing Regulation 391/2009 and Directive 2009/15. The report, dated 5 February 2016, was on the progress in the implementation of Regulation 391/2009 and Directive 2009/15 on common rules and standards for ship inspection and survey organisations.<sup>64</sup> Regulation 391/2009 and Directive 2009/15/EC were part of the Third Maritime Safety Package. This was adopted on 11 March 2009. They repealed Council Directive 94/57/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations and form one coherent package of legislation to provide the regulatory framework for ship inspection and survey organisations, also called recognised organisations, in the EU. Article 17 of the Regulation and Article 12 of the Directive provides that the Commission report must inform the European Parliament and the Council on the progress in the implementation of the two legislative measures. The Report describes the background of the Directive and Regulation, the use of recognised organisations by member states in their capacity as Flag State (meaning the state in which a vessel is registered), the oversight and monitoring of recognised organisations at EU level, and the international relevance (EEA, IMO) of the two legislative measures. The Report concludes that although practically all provisions of the Regulation and the Directive have been implemented as required, meaning that the various activities, mechanisms, schemes and working arrangements are now put in place and operative, it is still too early to assess the impact of the legislation. The Commission notes that taking the conclusion of its Report into consideration, priority should be given to further implementation of the existing framework.

## Section 16 | Sulphur Content

On 11 April 2016, the Agriculture and Fisheries Council formally adopted a Directive of the European Parliament and of the Council relating to a reduction in the sulphur content of certain liquid fuels. The new Directive codifies Council Directive 1999/32 relating to a reduction in the sulphur content of certain liquid fuels, which has been substantially amended several times. The codified Directive will be in line with the revised Annex VI to MARPOL so as to ensure coherence with international law and to secure proper enforcement of the new globally established sulphur standards in the EU.

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<sup>64</sup> Report on the progress in the implementation of Regulation (EC) 391/2009 and Directive 2009/15/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (COM (2016) 47) (5 February 2016).

## Section 17 | Brexit

### Introduction

“Brexit” is the notion that the United Kingdom would leave the European Union. What would be the impact of Brexit on the shipping sector?

On 23 June 2016, voters in the UK and Gibraltar will vote on whether the UK should leave the EU. Almost no one living in the UK today under the age of 50 years has any real sense of what it is like for the UK to operate outside the EU. Over 43 years of EU provisions, policy and philosophy have been grafted onto, or embedded into, UK law. The closest analogy is a colony gaining independence and deciding what it wants to do, or not do, with the law and institutions of the departing power.

While a great deal of the focus of the debate to date has been on what will happen on voting day – on whether the proposition will be carried or defeated – in reality, the focus needs to be on what would happen after 23 June 2016 if there was a vote to leave.

Shipping is extremely important to the EU. In 2014, more than 51.5% of EU external freight trade by value was transported by sea. More than 400 million people are transported by sea from EU ports annually. The sector generates €110 billion turnover annually. The EU's 22 coastal Member States have more than 1,200 seaports offering direct employment to around 110,000 people and providing indirect support to around three million more. Almost 90 per cent of the EU's external trade is facilitated by seaports, as are 40 per cent of freight exchanges between member states. The EU's seaports are the gateway for two-thirds of all goods which are imported by more than 60,000 cargo ships from non-EU countries. Over 3.8 billion tonnes of cargo are handled in these ports annually.

Shipping is also extremely important to the UK. The sector contributes around €12 billion annually to the UK economy. Around 240,000 people are employed in the sector in the UK. UK is one of the top 10 ship owning nations according to UNCTAD with about 3% of the world tonnage.

Bringing the two strands together – the importance of shipping to the EU and to the UK – leads to some important conclusions. The rest of the EU is the UK's biggest trading partner. Almost half of the UK's imports are from the rest of the EU (53%) and almost half of the UK's exports are to the rest of the EU (45%). It is believed that several million jobs in the UK are linked to trade with the rest of the EU and the most common estimate is that there around three million people employed in this context.

### EU Law and Shipping

Since the early 1970s – but particularly since the mid-1980s – the EU has become involved in the shipping sector. Over time, an enormous volume of law has been adopted – regulations, directives and decisions as well as case law. If the UK were to leave the EU then the logical question would be as to what would happen to that law vis-à-vis the UK. Answering that question is not simple given that it is not yet known whether the UK will vote to leave and, if it does vote to leave, what arrangements would be put in place to replace the current ones. It is possible that some of the legislation will remain in place (for example, because it is already part of UK law (such as where a directive has been implemented) or because the UK has opted into that piece of legislation) or it may simply disappear from the UK legislative environment. Indeed, if the EU legislation is

retained by the UK, it may be somewhat “frozen” in time if amendments or interpretations by the courts are not also taken on board. There is little doubt that EU shipping law and UK shipping law would diverge in a post-Brexit environment but it is not yet clear (and would not be for some time) as to the extent of that divergence.

### **So what could happen if the UK were to leave the EU?**

It is clear that trade between the UK and the EU would continue but what would differ would be the terms on which that trade would occur. Today, the UK is part of the “internal market” and there are, for the very most part, no barriers to trade among the 28 Member States (whether those barriers are physical, technical or fiscal) and there is a common external customs tariff. It is meant to be as convenient to trade between Liverpool and Lisbon as it would be to trade between Liverpool and Leeds. If the UK leaves the EU then trade will become more difficult – the degree of difficulty depends on the arrangements concluded between the UK and the EU post-Brexit. The campaigners for Brexit are probably correct in saying that there will be trade agreements between the EU and a Brexited UK but the difficulties involved and the time such arrangements would take to adopt should not be underestimated. The EU-India Bilateral Trade and Investment Agreement negotiations commenced in 2007 (nine years ago) and are stalled since March 2015. The Economic and Trade Agreement (CETA) agreement between Canada and the EU is a mammoth exercise. Work on it commenced in October 2008. The launch of negotiations was announced in 2009. An agreement in principle was signed in 2013. The negotiations were concluded in 2014. The 1,634 page agreement has to be translated into 24 EU language and ratification has been an on-going process. In regard to the EU-US “Transatlantic Trade and Investment Partnership” (“TTIP”), the negotiations are currently in their 13th round! The Chairman of Lloyd’s of London, John Nelson, is reported as saying that it would be “fantasy” to think that bilateral negotiations on trade agreements would be simple and he also said that it would take “many, many years” to negotiate such arrangements.

Clearly, there would be trade agreements to be negotiated – not only between the UK and the EU but between the UK and all the States with which the EU has a plethora of arrangements with various countries worldwide. So, it is not just a matter of negotiating a single trade agreement, it would be a matter of negotiating a range of agreements.

Not only would many trade agreements have to be concluded but there would also be uncertainty arising from Brexit itself. Examples of that uncertainty would be currency volatility which has already commenced and may continue further.

There is also no guarantee that the Member States which remain would not seek to either strengthen their own position in the event of a Brexit or even punish the UK so as to deter others from leaving. Guy Platten, the Chief Executive of the UK’s Chamber of Shipping has said: “no one has left the European Union before, and the EU may seek to ‘punish’ the UK for leaving, in order to discourage others from leaving too. The Brexit negotiations are unlikely to be quick or easy”.

### **Examples of Legal Issues which would arise if Brexit were to Occur**

It is impossible to enumerate every legal issue. So a sample of the issues illustrates the point.

If a contract was predicated upon continued membership of the EU or was dependent on the exercise of EU freedoms (e.g., the operation of Cabotage services) then the contract may become frustrated by Brexit occurring. There could also be challenges to the successful operation of contracts caused by volatile currency movements.

EU competition law would continue to apply to UK shipping undertakings whenever their activities had an effect on trade between EU Member States (an easy threshold to meet in practice). Therefore, UK businesses would

not be able to escape from the application of EU competition law. Indeed, many of the UK's own substantive competition law rules are the same as the EU's own substantive rules so it is quite likely that the competition law environment might not change too much in that respect. However, compliance costs could rise for business because it might not be possible to avail of the EU's Merger Control Regulation regime. Equally, businesses could be fined not only at the UK but also the EU level rather than, as is more common now, being fined only at only one level. Conversely, the EU's State aid rules may well not apply to the UK in the event of a Brexit so there could be greater freedom for the UK to provide assistance to UK shipping interests but that would be subject to international trade law and the EU's so-called dumping laws which apply to non-Member States providing assistance which damage EU interests. Ultimately, there is little doubt that competition law regime in a Brexited UK and an EU without the UK would become more complex and complicated leading to higher compliance costs and greater uncertainty.

The rules on freedom to provide services/Cabotage may well not apply to UK entities if the UK were to leave the EU unless there was some special agreement concluded which may well prove difficult.

A Brexited UK could impose different sanctions on third States than the EU would impose. This may mean some inconsistency and divergence in terms of making compliance more complicated.

In regard to employment law, it is very likely that the employment rights of seafarers would be best protected by remaining part of the EU (and that view has been advocated by the trade union Nautilus International) but supporters of Brexit would say that reduced compliance costs would help make UK shipping more competitive.

An area of considerable uncertainty would be in the area of litigation where many judgments and arbitral awards within the EU are easily recognised and enforced within the EU because of the EU's rules governing such matters (e.g., the so-called "Brussels Regulation"). There is no doubt that UK businesses would find it more difficult to have judgments and awards in their favour recognised and enforced within the EU were the UK to be outside (unless special arrangements could be negotiated which would prove very difficult).

### **More Uncertainty?**

There is already considerable uncertainty in the run up to the referendum on 23 June 2016. If the UK votes to leave the EU then there would be, under Article 50 of the Treaty on the European Union, a prolonged period of negotiation on the terms of its departure. Not only would there be that period of uncertainty but there could even be a second referendum on whether or not the UK should accept the terms of the "Withdrawal Treaty". One could see the "Britremain" supporters arguing that the precise terms of the withdrawal – which were not known on 23 June 2016 – should be put to the electorate. All of this means that the uncertainty which currently exists could well be prolonged in the event of a Brexit vote!

## Section 18 | Combined Transport Directive 92/106

On 28 April 2016, the Commission Staff Working Document "REFIT ex-post evaluation of Combined Transport Directive 92/106/EEC Final Report" was put on the Council Public Register. It was Commission document SWD(2016) 140 final of 21 April 2016.<sup>65</sup> An Executive Summary was also published.<sup>66</sup>

## Section 19 | 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.

## Section 20 | Conclusions

Like last year, 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>65</sup> <http://data.consilium.europa.eu/doc/document/ST-8149-2016-INIT/en/pdf>.

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