**Comité Maritime International**

**EU Maritime Law Update**

**9 November 2018**

**BREXIT**

The most significant development in contemporary European Union ("EU") maritime law is undoubtedly the planned withdrawal from the EU of both the United Kingdom and Gibraltar on 29 March 2019.

While the EU fully respects the wishes of the voters in the UK and Gibraltar to decide to leave the EU, there is widespread disappointment and sadness among the EU institutions and officials that the UK has decided to leave.

In terms of the development of EU maritime law, the UK will be a significant loss to the cause. The UK has, with its rich maritime tradition and sophisticated maritime law community, made an enormous contribution to the development of EU law in terms of, for example, the 1986 package of measures on competition, economic dumping, freedom to provide maritime services and so on. Over time, many of the measures proposed by the European Commission have been tempered and amended by the input from the UK maritime law community as well as UK maritime industries with the result that there is little doubt that the final measures have benefitted from the input from the maritime community in the UK. There is a risk that the interest in the UK in EU maritime measures might decline over time after the UK leaves but, in reality, the interest in the UK should remain at least as strong in monitoring EU proposals and developments as it is now. Indeed, given the fact that the UK Government will not be at the table, there is an even greater need for the UK maritime legal community to monitor, and comment on, EU maritime proposals. This is all the more so as many EU legal measures will apply to UK maritime interests because some of the EU rules will apply to all vessels in EU waters irrespective of the vessel's flag.

Turning to the specifics of the implications of Brexit and maritime law, it is worth noting that the European Commission has published a series of papers outlining the implications of a so-called "No Deal" Brexit on maritime issues. It is useful to consider a sample of them.

First, on 27 February 2018, the European Commission’s Directorate-General for Mobility and Transport issued a “Notice to Stakeholders” on the “**Withdrawal of The United Kingdom and EU Rules in the Field of Maritime Transport**”. There are features to the Notice which are irrelevant to the issue of safety but key provisions include:

“…Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of maritime transport no longer apply to the United Kingdom. This has in particular the following consequences in the different areas of Union law in the field of maritime transport: ….

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• Recognition of organisations: The withdrawal of the United Kingdom does not as such affect the recognitions by the Commission in accordance with Article 4 of Regulation (EC) No 391/2009 of organisations referred to in Article 2(c) of that Regulation. However, according to Article 8 of Regulation (EC) No 391/2009 Recognised Organisations are to be assessed on a regular basis (at least every two years) by the Commission, together with the Member State that initially submitted the request for recognition for the organisation in question. This also applies to the organisations which had initially been recognised by the relevant Member State and which now enjoy recognition pursuant to Article 15 of Regulation (EC) No 391/2009. As of the withdrawal date, the United Kingdom will no longer be in a position to participate in the assessments carried out in accordance with Article 8 of Regulation (EC) No 391/2009 of organisations initially recognised by it. With respect to this procedural requirement, the Commission is considering the necessary and appropriate steps to allow for the assessment in accordance with the terms of the Regulation.

• Port State Control: Directive 2009/16/EC sets out the EU Port State Control system. The Directive requires Member States to inspect foreign ships in ports by Port State Control officers for the purpose of verifying that the condition of a ship and its equipment comply with the requirements of international conventions, and that the vessel is manned and operated in compliance with applicable international law. Directive 2009/16/EC also requires verification of compliance with a number of other EU-law based requirements, including insurance certificates under Directive 2009/20/EC. While EU-27 Member States will continue to verify United Kingdom ships calling to EU ports, as of the withdrawal date, the Port State Control inspection system set out in Directive 2009/16/EC no longer applies in the United Kingdom. Relations between the United Kingdom and the EU in respect of Port State Control will be governed by the Paris Memorandum of Understanding on Port State Control.

• Operations of passenger ships: According to Articles 4, 5 and 6 of Council Directive 1999/35/EC, host States, as defined in that Directive, are to carry out mandatory inspections to provide for assurance of safe operation of regular ro-ro ferry and high-speed passenger craft services to or from ports of the EU. While these ships will continue to be subject to such inspections in the EU-27 Member States to or from which they operate, as of the withdrawal date, the United Kingdom will no longer have to carry out such inspections in accordance with Directive 1999/35/EC….

The Commission services stand ready to provide further clarifications to interested stakeholders. The website of the Commission on maritime transport (https://ec.europa.eu/transport/modes/maritime\_en) provide for general information.

These pages will be updated with further information, where necessary. Further information on other maritime safety related questions is available on European Maritime Safety Agency’s website at the following link: <https://www.emsa.europa.eu/>.”

In regard to **seafarer qualifications**, the European Commission’s Directorate-General for Mobility and Transport issued a notice to stakeholders on 19 January 2018. It is entitled “Notice to stakeholders - Withdrawal of the United Kingdom and EU rules on the minimum level of training of seafarers and the mutual recognition of seafarers' certificates”. After reciting that the UK had served notice under Article 50 of the TEU and would therefore become a “third country” if it leaves the EU, the Notice continues:

“In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, all seafarers subject to Directive 2008/106/EC on the minimum level of training of seafarers and Directive 2005/45/EC on the mutual recognition of seafarers' certificates issued by the Member States are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of minimum level and mutual recognition of seafarers' certificates no longer apply to the United Kingdom. This has in particular the following consequences for the validity of certificates:

• According to Article 3 of Directive 2008/106/EC, seafarers serving on board a vessel flying the flag of an EU Member State have to hold the requisite certificate of competency or certificate of proficiency (hereafter "certificates") issued by that Member State, by another EU Member State or by one of the third countries recognised under Article 19 of Directive 2008/106/EC. The Member State of the vessel recognises the certificates issued to seafarers by the other Member States or the recognised third countries, for such certificates to be valid in that Member State. There are two distinct recognition procedures:

• Article 3 of Directive 2005/45/EC provides that every Member State shall recognise the certificates issued to seafarers by the other Member States: the recognition of these certificates (by the Member State of the vessel) must be accompanied by an 'endorsement attesting such recognition'.

• Article 19(4) of Directive 2008/106/EC provides that a Member State may decide to endorse the certificates issued by the recognised third countries.

• As of the withdrawal date, the certificates issued to seafarers by the United Kingdom can no longer be presented for an 'endorsement attesting recognition' by an EU-27 Member State under Directive 2005/45/EC.

The 'endorsement[s] attesting recognition' issued prior to the withdrawal date by EU-27 Member States under Directive 2005/45/EC of certificates issued to seafarers by the United Kingdom will continue to be valid until their expiry. A master or an officer holding an 'endorsement attesting recognition' issued by a Member State will be able to continue working on board vessels flying the flag of that Member State. However, they will not be able to change and work on board a vessel flying the flag of another Member State on the basis of their existing UK-issued certificates, given that the basis for the recognition of their certificates by that Member State (Directive 2005/45/EC) would no longer be applicable.

• As of the withdrawal date, recognition by an EU-27 Member State of certificates issued to seafarers by the United Kingdom will be subject to the conditions set out in Article 19 of Directive 2008/106/EC, in line with the new status of the United Kingdom as a third country.

Preparing for the withdrawal is not just a matter for Union and national authorities, but also for private parties.

The website of the Commission on maritime transport (https://ec.europa.eu/transport/modes/maritime/seafarers\_en) provides general information. These pages will be updated with further information, where necessary….”

On 22 January 2018, the European Commission issued a “Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of industrial products” which touches on **marine equipment** as well. The Notice states:

“Currently, Union product legislation does not generally oblige the manufacturer to designate an authorised representative. However, if the manufacturer chooses to do so, the applicable legislation requires the authorised representative to be established in the Union. In addition, specific Union legislation does provide for the obligation to have an authorised representative (e.g. ….marine equipment) or a responsible person (cosmetic products….) established in the Union.

Authorised representatives or responsible persons established in the United Kingdom will not, as from the withdrawal date, be recognised as authorised representatives or responsible persons for the purposes of the applicable Union product legislation. Therefore, manufacturers are advised to take the necessary steps to ensure that, as from the withdrawal date, their designated authorised representatives or responsible persons are established in the EU-27.”

On 28 March 2018, the European Commission’s Directorate General for Environment issued a Notice to Stakeholders entitled “Withdrawal of The United Kingdom and the EU **Ship Recycling** Regulation.” The Notice recalled that the UK submitted on 29 March 2017 the notification of its intention to withdraw from the Union pursuant to Article 50 of the TEU and the Notice continued, this “means that, unless a ratified withdrawal agreement establishes another date, all Union primary and secondary law will cease to apply to the United Kingdom from 30 March 2019, 00:00h (CET) ('the withdrawal date'). The United Kingdom will then become a 'third country'. ” Turning to the specific of recycling, the Notice states:

“Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules on ship recycling, and in particular Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling no longer apply to the United Kingdom.

This has in particular the following consequences:

According to Article 6(2)(a) of Regulation (EU) No 1257/2013, owners of ships flying the flag of a Member State shall ensure that ships destined to be recycled are only recycled at ship recycling facilities that are included in the European List of ship recycling facilities (‘the European List’). As of the withdrawal date, the entries in the European List of ship recycling facilities for facilities located in the United Kingdom will become void. As a consequence, ships flying the flag of a Member State of the Union may no longer be recycled at these ship recycling facilities.

The above is without prejudice to the possibility for the Commission to list facilities located in third countries in the European List in accordance with Article 16 of Regulation (EU) No 1257/2013.

The website of the Commission on the European Union's ship recycling policy (http://ec.europa.eu/environment/waste/ships/index.htm) provides general information concerning shipments of waste and the recycling of specific waste streams. These pages will be updated with further information, where necessary.”

The **litigation dimension** was also considered. 48.047 On 21 November 2017, the European Commission’s Directorate-General Justice and Consumers issued a “Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law.” The operative parts are:

“In view of the considerable uncertainties, in particular concerning the content of a possible withdrawal agreement, members of the legal professions as well as other stakeholders are reminded of legal repercussions, which need to be considered when the United Kingdom becomes a third country.

Subject to any transitional arrangement that may be contained in a possible withdrawal agreement, as of the withdrawal date, the EU rules in the field of civil justice and private international law no longer apply to the United Kingdom. This has in particular the following consequences in the different areas of civil justice:

• International jurisdiction: the rules on international jurisdiction in EU instruments in the area of civil and commercial law as well as family law no longer apply to judicial proceedings in the United Kingdom and under certain circumstances (in civil and commercial cases where the defendant is domiciled in the United Kingdom) to judicial proceedings in the EU. International jurisdiction will be governed by the national rules of the State in which a court has been seized.

• Recognition and enforcement: judgments issued in the United Kingdom are no longer recognised and enforced in EU Member States under the rules of the EU instruments in the area of civil and commercial law as well as family law, and vice versa. Recognition and enforcement of judgments between the United Kingdom and an EU Member State will be governed by the national law of the State in which recognition and enforcement is sought or by international Conventions where both the EU (or EU Member States) and the United Kingdom are contracting parties.

• Judicial cooperation procedures: EU instruments facilitating judicial cooperation (e.g. in relation to the service of documents, taking of evidence or within the context of the European Judicial Network in Civil and Commercial Matters) no longer apply between EU Member States and the United Kingdom.

• Specific EU procedures: EU instruments making available specific procedures, in particular the European Payment Order Procedure or the European Procedure for Small Claims, will no longer be available in courts of the United Kingdom and will not be available in the courts of EU Member States where one or more parties are domiciled in the United Kingdom.

The website of the Commission on civil justice https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/civil-justice\_en as well as the dedicated webpage of the European Judicial Network in civil and commercial matters https://ejustice.europa.eu/content\_ejn\_in\_civil\_and\_commercial\_matters-21-en.do provides

general information concerning the field of civil justice. These pages will be updated with further information, where necessary.”

Staying with Brexit, there are a number of measures currently going through the EU legislative process.

There is a proposed regulation to amend rules on **NSM corridor**. On 1 August 2018, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 1316/2013 with regard to the withdrawal of the UK from the EU. The proposal is being adopted under the ordinary legislative procedure, which means that the European Parliament and the Council, being co-legislators, will need to adopt the same final text.

There is a proposed regulation to amend rules on **ship inspection and survey organisations**. Again, this would be adopted under the ordinary legislative procedure. It essentially takes the UK out of the EU regime.

At a more general level, there will be growing divergence between EU and UK law. 48.048 If the UK adopts various elements of EU law as UK law on the day in which the country leaves the EU, then the risk of divergence is minimised. However, the divergence will be greater than many imagine. This notion that there would be convergence or even identical laws is grossly inaccurate. First, the laws of the EU and the UK will not be the same at the moment when the UK leaves because the way in which these laws will be interpreted by the UK courts would differ from the ways in which the CJEU would interpret them and, in any event, some of the general principles of EU law are not easily incorporated into UK law. Secondly, the way in which the EU law and the "EU laws dressed as UK laws" would be applied and implemented would differ (not least because of the divergent objectives of the EU (e.g., internal market and EU interests) and the UK (e.g., a more national-centred approach). Thirdly, the EU adopts laws on an on-going basis – several hundred measures are adopted each year by the EU. Fourthly, if Brexit is to be in anyway meaningful then it makes sense that the UK will choose different rules. Ultimately, it is to be assumed that there will be greater divergence between the EU and the UK legal regimes both substantively and procedurally.

Turning away from Brexit, there is a proposal in regard to **port reception facilities for the delivery of waste from ships**, there is likely change in that area as well. .On 16 January 2018, the Commission adopted a proposal for a Directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU.

Apart from Brexit, the most significant development in EU maritime law is likely to be the so-called **Third Mobility Package**. On 17 May 2018, the Commission adopted its Third Mobility Package. This includes: a proposal for a Regulation of the European Parliament and of the Council establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU.and a proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information.

This has been a brief summary of some of the developments in EU maritime law which continues to evolve and have a shape and a substance of its own.

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9 November 2018