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Introduction

This report considers many of the developments in European Union (**EU**) maritime law in the period from 1 January 2019 until 1 September 2019.

First, the report considers some institutional changes in the EU as they relate to EU maritime law.

Secondly, the report examines relevant EU legislation which was either adopted or proposed during the period under review. It is worth recalling that the EU adopts legislation which is binding both *at* the EU level (i.e., binding on EU Member States) and also binding *in* the EU Member States (i.e., binding on various parties or, on occasion, binding on everyone). Legislation adopted by the EU is superior to, and prevails over, any Member State law which conflicts with EU law. Typically, EU legislation is in the form of treaties, regulations, directives or decisions. (The EU may also adopt recommendations and opinions but they are not legally binding as such.) Treaties and regulations apply automatically and are legally binding. Directives are binding on Member States, require implementation in Member State law but can, on occasion, become legally binding on States even if they are not implemented in Member State law where they are clear and precise. Decisions are legally binding on the parties to whom the decisions are addressed (e.g., a shipping company which is fined for breaching EU competition law).

Thirdly, the report considers some of the leading cases of the Court of Justice of the European Union (**CJEU**) in the context of maritime transport during the period under review. Typically, cases arise before the CJEU by virtue of so-called "preliminary references". Under this procedure, a Member State court or certain types of decision-making tribunals may refer questions of EU (but not State) law to the CJEU to ask for the latter's guidance on the relevant EU legal position and then the Member State court or tribunal applies that abstract answer to the case in hand. This preliminary ruling procedure is prescribed by Article 267 of the Treaty on the Functioning of the European Union (**TFEU**). There can also be cases before the CJEU where decisions, actions or inactions of the EU institutions are subject to challenge before the CJEU on the basis of provisions in the TFEU other than Article 267 (e.g., annulment actions under Article 263 TFEU).

Fourthly, there is a very brief section on Brexit. It is worth stating at the outset that while Brexit[[1]](#footnote-1) dominated most of the headlines globally about the EU during the period under review, there is more happening in the EU generally than just Brexit. Equally, the position relating to Brexit is still unclear and it is possible, but not certain, that the UK would leave the EU on 31 October 2019. Therefore, despite Brexit, the ordinary day to day activities of the EU continue unabated.

Finally, there is a brief update on competition law issues in the maritime context.

It should be recognised that the period under review was not the most exciting of periods in terms of developments in EU maritime law but there were, nonetheless, some developments.

For the avoidance of doubt, this is a general paper and does not purport to be exhaustive in its collation, treatment or analysis of the issues involved and specialist legal advice should be taken before making any decision on the matters addressed in this paper.

INSTITUTIONAL DIMENSION

The European Commission is central to proposing and administering EU legislation. Proposals for legislation in the maritime field are usually proposed by the European Commission with responsibility being taken by one of the European Commission's Directorates General. Typically in maritime matters, the responsibility lies with DG MOVE (i.e., the Directorate General for Mobility and Transport). However, there are various other Directorates General and Executive Agencies which could be relevant in the EU legislative process including DG CLIMA (i.e., the Directorate General for Climate Action), DG COMP (i.e., the Directorate General for Competition), DG EMPL (i.e., the Directorate General for Employment, Social Affairs and Inclusion), DG ENER (i.e., the Directorate General for Energy), DG MARE (i.e., the Directorate General for Maritime Affairs and Fisheries), DG TRADE (i.e., the Directorate General for Trade) as well as the European Commission's Legal Service. (Some of these directorate general may change over time.)

The European Commission is appointed for a period of five years. The tenure of the current Commission expires on 31 October 2019. A slate of Commissioners Designate has been proposed to take up office on 1 November 2019. The Commissioners have to present their credentials to, and be approved by, the European Parliament and its relevant committees. If the European Parliament gives its consent then the European Council formally appoints the European Commission, in line with Article 17(7) of the Treaty on European Union.

The incumbent European Commissioner for Transport is Violeta Bulc. Her tenure will expire on 31 October 2019. It is expected that her successor will be Rovana Plumb from Romania. Commissioner Designate Plumb is a Member of the European Parliament (and Vice-President of the Social and Democrats Group), and a former Romanian Minister of Environment and Climate Change, Minister of Labour, Minister of European Funds, Minister of Education and Minister of Transport.

In terms of the European Commissioner for Competition, it is anticipated that Margrethe Vestager (from Denmark) will continue to hold the competition portfolio in the new Commission.

Phil Hogan (from Ireland) will probably be the Commissioner with responsibility for Trade.

Virginijus Sinkevičius (from Lithuania) will probably be responsible for ‘Environment and Oceans'.

In terms of monitoring developments at the European Commission in maritime transport then it is useful to monitor the European Commission's Directorate General for Transport: <https://ec.europa.eu/transport/home_en>.

LEGISLATION

Introduction

Increasingly, the EU is adopting legislation on maritime issues. This legislative code is becoming more ambitious over time.

During the period under review, the EU adopted:

(a) Regulation (EU) 2019/1239 establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU;[[2]](#footnote-2)

During the same period, the European Commission is still dealing with the following EU measure which has yet to be adopted by the EU institutions:

(a) a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/757 in order to take appropriate account of the global data collection system for ship fuel oil consumption data.

Both measures were proposed under the so-called "Third Mobility Package" of 17 May 2018, the Commission adopted its Third Mobility Package.

European Maritime Single Window Environment

On 20 June 2019, the European Parliament and the Council adopted Regulation (EU) 2019/1239 establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU.[[3]](#footnote-3)

One of the practical problems facing shipping companies is that they face different legal reporting requirements whenever a ship arrives in, or departs from, a port. This creates a heavy burden on shipping companies. Therefore the Reporting Formalities Directive, Directive 2010/65/EU, was adopted.

The European Maritime Single Window environment, under Regulation 2019/1239, seeks to bring together, in a coordinated and harmonised way, all reporting associated with a port call. This should enhance interoperability and interconnection between the relevant systems. This means that data will be shared and reused more efficiently.

Regulation 2019/1239 was adopted very quickly given that the initiative was proposed by the European Commission only in May 2018 (as part of the Third Mobility Package) and was adopted 13 months later.

A short extract from the Regulation is very revealing:

"CHAPTER II

EMSWe DATA SET

Article 3

Establishment of the EMSWe data set

1. The Commission shall establish and amend the EMSWe data set pursuant to paragraph 3 of this Article.

2. By 15 February 2020, the Member States shall notify the Commission of any reporting obligations stemming from national legislation and requirements, as well as of the data elements to be included in the EMSWe data set. They shall precisely identify those data elements.

3. The Commission is empowered to adopt delegated acts in accordance with Article 23 in order to amend the Annex to this Regulation for the purpose of introducing, deleting or adapting references to national legislation or requirements, Union or international legal acts, and in order to establish and amend the EMSWe data set.

The first such delegated act shall be adopted by 15 August 2021.

As set out in Article 4, a Member State may request the Commission to introduce or amend data elements in the EMSWe data set, in accordance with the reporting obligations contained in the national legislation and requirements. When assessing whether data elements are to be included in the EMSWe data set, the Commission shall take into account safety concerns, as well as the principles of the FAL Convention, namely the principle of only requiring the reporting of essential information and keeping the number of items to a minimum.

The Commission shall decide, within three months after the request, whether to introduce the data elements in the EMSWe data set. The Commission shall justify its decision.

A delegated act which introduces or amends a data element in the EMSWe data set shall include an explicit reference to the national legislation and requirements referred to in the third subparagraph.

In the event that the Commission decides not to introduce the requested data element, the Commission shall give substantiated grounds for its refusal, with reference to the safety of navigation and the principles of the FAL Convention.

Article 4

Amendments to the EMSWe data set

1. Where a Member State intends to amend a reporting obligation under in its national legislation and requirements which would involve the provision of information other than the information that is included in the EMSWe data set, that Member State shall immediately notify the Commission. In that notification, the Member State shall precisely identify the information that is not covered by the EMSWe data set and shall indicate the intended period during which the reporting obligation in question is to apply.

2. A Member State shall not introduce new reporting obligations unless such introduction has been approved by the Commission through the procedure set out in Article 3 and the corresponding information has been incorporated in the EMSWe data set and applied in the harmonised reporting interfaces.

3. The Commission shall assess the necessity of amending the EMSWe data set in accordance with Article 3(3). Amendments to the EMSWe data set shall only be introduced once a year, except in duly justified cases.

4. In exceptional circumstances, a Member State may ask declarants to provide additional data elements without the approval of the Commission during a period of less than three months. The Member State shall notify those data elements to the Commission without delay. The Commission may allow the Member State to continue to request the additional data elements for two further periods of three months if the exceptional circumstances persist.

No later than one month before the end of the last three-month period referred to in the first subparagraph, the Member State may request the Commission that the additional data elements become part of the EMSWe data set, in accordance with Article 3(3). The Member State may continue to ask declarants to provide the additional data elements until a decision by the Commission has been taken, and in the event of a positive decision, until the amended EMSWe data set has been implemented".

Proposed Legislation: Shipping Emissions: Global Data Collection System

On 4 February 2019, the European Commission adopted a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2015/757 in order to take appropriate account of the global data collection system for ship fuel oil consumption data. The measure would be adopted using the ordinary legislative procedure. This means that it would have to be adopted by the European Parliament and the Council.

The European Parliament and the Council will need to agree on the same final text of the proposal under the ordinary legislative procedure.

The measure, if adopted, would amend Regulation 2015/757 of the European Parliament and of the Council on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport (the "MRV Regulation") to take account of a new legal framework for global data collection of fuel oil consumption of ships, the IMO global data collection system ("IMO DCS"), which was established by amendments by the IMO Marine Environment Protection Committee ("MEPC") to the MARPOL Convention. Article 22 of the MRV Regulation anticipated the establishment of the IMO DCS thus requiring the European Commission to review and amend the MRV Regulation once it was established.

The European Parliament's Committees on Industry, Research and Energy (ITRE) and Transport and Tourism (TRAN) have been appointed as Committees of Opinion.

CASE LAW / JURISPRUDENCE

Introduction

There were a number of cases decided during the period under review which were very relevant to EU maritime law (see paragraphs 4.2-4.4 below).

There was also a case referred to the CJEU during the period under review which will be, when decided, very important in the interpretation of the EU's Regulation on the rights of passengers (i.e., Regulation 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004[[4]](#footnote-4)) (see paragraph 4.5 below).

*Grup Servicii Petroliere SA v Agenţia Naţională de Administrare Fiscală,Direcţia Generală de Soluţionare a Contestaţiilor,Agenţia Naţională de Administrare Fiscală and Direcţia Generală de Administrare a Marilor Contribuabili*

Introduction

On 20 June 2019, the CJEU delivered a preliminary ruling in *Grup Servicii Petroliere SA v Agenţia Naţională de Administrare Fiscală,Direcţia Generală de Soluţionare a Contestaţiilor,Agenţia Naţională de Administrare Fiscală and Direcţia Generală de Administrare a Marilor Contribuabili*.[[5]](#footnote-5)

This case was an example of how EU shipping law has matured. The CJEU is not considering fundamental issues but rather how existing EU shipping law should be interpreted.

The case considered the concept of "vessels used for navigation on the high seas" in the context of the application value added tax ("VAT") rules to offshore jackup drilling rigs. Moreover, the case considered the offshore jackup drilling rigs and Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[[6]](#footnote-6)(i.e., the "EU VAT Directive") and the exemptions in that directive relating to international transport.

There were proceedings between Grup Servicii Petroliere SA, a company with its registered office in Romania, and the Romanian tax authorities concerning the refusal of exemption from VAT on the supply by that company of three offshore jackup drilling rigs to Maltese companies. The case turned on the interpretation of Article 148(a) and (c) of the EU VAT Directive.

The CJEU's ruling was as a result of a request for a preliminary ruling under Article 267 TFEU from the Curtea de Apel Bucureşti (i.e., the Court of Appeal, Bucharest, Romania) to the CJEU

The CJEU ruled:

"Article 148(a) and (c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as meaning that the expression ‘vessels used for navigation on the high seas’ in that provision does not apply to the supply of floating structures, such as offshore jackup drilling rigs of the type at issue in the main proceedings, which are used predominantly in a stationary position to exploit hydrocarbon deposits at sea."

So the predominantly stationary nature of these rigs meant that they are not vessels used for navigation on the high seas. The Court's ruling was eminently sensible and practical. But it is interesting to see how the CJEU reached that conclusion.

Legal context

It is useful to consider the legal context of the case from the perspective of EU law and Romanian law.

EU Law

In terms of EU law, Article 15 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment,[[7]](#footnote-7)as amended by Council Directive 92/111/EEC of 14 December 1992 (the "Sixth VAT Directive"),[[8]](#footnote-8)entitled ‘Exemption for exports outside the Community, for like transactions and international transport’, provided:

‘Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any possible evasion, avoidance or abuse:…

4. the supply of goods for the fuelling and provisioning of vessels:

(a) used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities;

(b) used for rescue or assistance at sea, or for inshore fishing, with the exception, for the latter, of ships’ provisions;…

5. the supply, modification, repair, maintenance, chartering and hiring of the sea-going vessels referred to in paragraph 4(a) and (b) and the supply, hiring, repair and maintenance of equipment — including fishing equipment — incorporated or used therein;…’

The Sixth Directive was repealed and replaced by the VAT Directive, which entered into force on 1 January 2007. Article 131 of the VAT Directive, the only article in Chapter 1 of Title IX of the directive, entitled ‘General provisions’, provides:

‘The exemptions provided for in Chapters 2 and 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.’

Article 148 of the VAT Directive, contained in Chapter 7 of Title IX of the directive and entitled ‘Exemptions related to international transport’, provides:

‘Member States shall exempt the following transactions:

(a) the supply of goods for the fuelling and provisioning of vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities, or for rescue or assistance at sea, or for inshore fishing, with the exception, in the case of vessels used for inshore fishing, of ships’ provisions;…

(c) the supply, modification, repair, maintenance, chartering and hiring of the vessels referred to in point (a), and the supply, hiring, repair and maintenance of equipment, including fishing equipment, incorporated or used therein;…’

Romanian Law

First, Article 143(1) of Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code), in the version in force on the date of the facts in the main proceedings (‘the Tax Code’), states:

‘The following shall be exempt from the tax:…

(h) in the case of vessels used for maritime navigation, the international carriage of persons and/or goods, for the purpose of fishing or for any other economic activities or for rescue or assistance at sea:

1. the supply, modification, repair, maintenance, chartering, lease and hiring of vessels, and the supply, lease, hiring, repair and maintenance of equipment, including fishing equipment, incorporated or used therein’.

Secondly, Article 23 of Ordonanța Guvernului nr. 42/1997 privind transportul maritim și pe căile navigabile interioare (Government Ordinance No 42/1997 on maritime and inland waterway transport) provides:

‘For the purposes of this Ordinance, the following are vessels:

(a) sea and inland navigation vessels of all kinds, with or without propulsion, which navigate on the surface or by immersion, designed to carry goods and/or persons, to fish, to tow or to push;

(b) floating installations, such as dredges, floating elevators, floating cranes, floating clamshell buckets, etc., with or without propulsion;

(c) floating structures that are not normally intended for movement, such as floating docks, floating jetties, pontoons, floating boat sheds, drilling platforms and others, floating lighthouses;

(d) pleasure craft.’

Thirdly, point 1 of decizia nr. 3/2015 a Comisiei fiscale centrale (Decision No 3/2015 of the Central Tax Commission) provides:

‘From 1 January 2007 to 31 December 2013: in the case of vessels intended for navigation at sea, used for the international transport of persons and/or goods, for fishing or for any other economic activity at sea, the VAT exemptions provided for in Article 143(1)(h) [of the Tax Code] shall apply if the vessel is used effectively and predominantly for navigation at sea. In determining whether a vessel is used effectively and predominantly at sea, objective criteria alone, such as the length or tonnage of the vessel, cannot be taken into account, but these criteria could be used to exclude from the scope of the exemptions vessels which, in any event, do not fulfil the conditions laid down in Article 143(1)(h) of the Tax Code, namely those which are not suitable for navigation at sea. …

The concept of “sea” navigation, within the meaning of [Directive 2006/112] and Article 143(1)(h) of the Tax Code, covers any part of the sea outside the territorial waters of any State which is beyond the 12 nautical mile limit measured from baselines established in accordance with the international law of the sea (United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982).’

The Dispute in the Romanian Court

In 2008, Grup Servicii Petroliere sold three offshore jackup drilling rigs, operated in the Black Sea, to Maltese companies for US$96 million US dollars (circa €82 million). That company issued invoices for the supply of those rigs, applying the VAT exemption rules provided for in Article 148(c) of the VAT Directive and in Article 143(1)(h) of the Tax Code. The company continued to operate those rigs in the Black Sea during 2008 as a charterer.

In 2016, the Romanian tax authorities issued an adjustment notice for the unpaid VAT in connection with that supply, charging Grup Servicii Petroliere a sum of approximately €25 million, including default interest and penalties for late payment. The grounds of that notice state, inter alia, the following:

"– although the rigs in question are vessels within the meaning of Government Ordinance No 42/1997 and may be put to unlimited use for navigation at sea, they do not navigate during the drilling activity but are rather in a parked position; their columns are in a low position, rest on the seabed and lift the pontoon (the floating part) above the sea, to a height of 60 to 70 metres;

– in the light of the provisions of Decision No 3/2015 of the Central Tax Commission, for the supply of the rigs to fall within the exemption provided for in Article 143(1)(h) of the Tax Code, it is necessary to establish by all forms of evidence that the vessel in question navigates effectively and predominantly on the high seas;

– however, the evidence available showed that the actual and preponderant use of the rigs occurs when they are in a parked position for the purpose of drilling activity and not for navigation, which is only subsidiary to the drilling activity."

As the administrative complaint submitted to challenge that adjustment notice was rejected, Grup Servicii Petroliere brought proceedings before the Curtea de Apel Bucureşti (i.e., the Court of Appeal in Bucharest).

* + 1. **The Arguments before the CJEU**

The company submitted to the CJEU that, in essence, the Romanian tax authorities restricted unlawfully the scope of the exemption provided for in Article 148(a) and (c) of the VAT Directive by making that exemption subject not only to the condition that the vessels operated for commercial or industrial purposes are ‘used’ on the high seas, but also that they ‘navigate’ on the high seas.

The referring Romanian court stated to the CJEU that notwithstanding the case-law of the CJEU on the interpretation of Article 148(a) and (c) of the VAT Directive, the referring court considered that it is necessary, with a view to determining whether the exemption at issue in the main proceedings applies to the supply of an offshore jackup drilling rig, in the first place, to decide the question whether such a rig falls within the concept of ‘vessels’ within the meaning of Article 148(a) of that directive. Secondly, and if that question is answered in the affirmative, the referring court asks whether the exemption provided for in Article 148(a) and (c) of the VAT Directive is subject to the condition that the navigation activity on the high seas is actually predominant as compared with the drilling activity at sea. The Curtea de Apel Bucureşti decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

‘(1) Must Article 148(c) in conjunction with Article 148(a) of [the VAT Directive] be interpreted as meaning that the exemption from value added tax applies, in some circumstances, to the supply of offshore jackup drilling rigs, that is to say, are offshore jackup drilling platforms covered by the term “vessels” within the meaning of that provision of EU law, given that, according to the title of Chapter 7 of that directive, that provision lays down rules governing “exemptions related to international transport”?

(2) If the answer to the first question is in the affirmative, must Article 148(c) in conjunction with Article 148(a) of [the VAT Directive] be interpreted as meaning that an essential condition for applying the exemption from value added tax is that, while it is being used (for commercial/industrial activities), an offshore jackup drilling rig which has navigated into international waters must in fact be in a state of movement, floating or moving at sea from place to place, for a longer period than the period during which it is stationary or immobile as a result of carrying out drilling activities at sea — that is to say, that navigation must in fact predominate vis-à-vis drilling activities?’

* + 1. **The Analysis by the CJEU**

The CJEU stated that by its two questions, which CJEU believed that they should be examined together, the referring Romanian court asked, in essence, whether Article 148(a) and (c) of the VAT Directive are to be interpreted as meaning that the expression ‘vessels used for navigation on the high seas’ in that provision applies to the supply of floating structures, such as offshore jackup drilling rigs of the type at issue in the main proceedings, which are used predominantly in a stationary position to exploit hydrocarbon deposits at sea.

The CJEU made a preliminary point that the supplies for which the exemption is provided for in Article 148(c) of the VAT Directive are subject to the condition that those supplies relate to vessels used for navigation on the high seas and carrying passengers for reward or used for the purpose of commercial, industrial or fishing activities, within the meaning of Article 148(a) of that directive. Article 148(a) of the VAT Directive is drafted in the same terms as Article 15(4)(a) of the Sixth Directive, which was repealed and replaced by the VAT Directive. Therefore, the case-law relating to that provision of the Sixth Directive is still relevant for the interpretation of Article 148(a) of the VAT Directive (e.g., the CJEU judgment of 3 September 2015 in *Fast Bunkering KlaipėdaI*[[9]](#footnote-9)).

Thus the CJEU inferred from that fact that, like the exemptions provided for in the Sixth Directive, those referred to in Article 148 of the VAT Directive constitute independent concepts of EU law which must, therefore, be interpreted and applied uniformly throughout the EU, which means that the exemption of a specific transaction from VAT cannot depend on its classification in national law. The CJEU saw them as a derogation from the general principle that VAT is to be levied on each supply of goods or services made for consideration by a taxable person, those exemptions must be interpreted strictly (see, to that effect, *Elmeka*[[10]](#footnote-10)and *Commission v France*[[11]](#footnote-11)).

The CJEU stated that it had previously held that the condition relating to the use for navigation on the high seas, laid down in Article 15(4)(a) of the Sixth Directive, applied not only to vessels carrying passengers for reward but also to those used for the purpose of commercial, industrial or fishing activities, all of which are now listed in Article 148(a) of the VAT Directive (see, to that effect, judgments of *Elmeka*[[12]](#footnote-12) and *Commission v France*[[13]](#footnote-13)).

The CJEU said that in the light of those considerations that the expression ‘vessels used for navigation on the high seas’ in Article 148(a) of the VAT Directive should be interpreted, taking into account - since neither that expression nor the words making up that expression are defined - the wording of that provision, the context in which it occurs and the objectives pursued by the rules of which it forms part (see to that effect and in particular, *Navicon*[[14]](#footnote-14)).

The CJEU believed that in that context, without there being any need to rule on the concept of the ‘high seas’, the spatial definition of which has evolved under the international law of the sea, or on the technical characteristics to be satisfied by a vessel for it to be regarded as being used for navigation on the high seas, it was important to note, first, that the expression ‘vessels used for navigation’, referred to in Article 148(a) of the VAT Directive, necessarily meant that the floating structures at issue are used for navigation. The CJEU also believed that a vessel cannot be regarded as being ‘used’ for navigation unless it is put to use, at the very least primarily or predominantly, for the purpose of movement in the maritime space.

It is interesting to see how the CJEU turns to the various languages versions of an EU legislative instrument to discern the meaning of a provision. The CJEU found that. textually speaking, its interpretation was supported by the various language versions of Article 148(a) of the VAT Directive which, where they do not employ the word ‘deployed’ (‘affectés’) and generally make use of the past participle of the verb ‘to use’, as in the case of the Czech (‘užívaných’), English (‘used’), Romanian (‘utilizate’), Finnish (‘käytettävät’) and Swedish (‘används’) language versions.

After conducting its linguistic analysis, the CJEU considered the "objective" pursued by the rules of which the exemption provided for in Article 148(a) of the VAT Directive forms part. The CJEU held that it follows from the title of Chapter 7 of Title IX of that directive that the objective is to facilitate international transport. In that context, the supply of vessels used for navigation on the high seas is exempt from VAT by virtue of Article 148(a) and (c) of the VAT Directive, provided that those vessels are intended to move toward the high seas. The CJEU held that the objective thus supports the interpretation to the effect that a floating structure cannot be classified as a ‘vessel used for navigation on the high seas’ unless it is put to use, at the very least primarily or predominantly, for the purpose of movement in the maritime space.

The CJEU found that the pursuit of that objective is not contradicted by the possibility that, for example, in the fields of the environment or excise duties, the concepts of ‘vessels’ or of ‘navigation’ are, as the case may be, interpreted differently. Assuming that such a difference in interpretation does exist, it is sufficient to state that the EU legislation adopted in those fields pursues objectives other than those targeted by the exemptions provided for in Article 148(a) and (c) of the VAT Directive.

The CJEU said that the interpretation of Article 148(a) and (c) of the VAT Directive which involves limiting the scope of that provision to floating structures primarily used for the purpose of movement in the maritime space is consistent with the context in which the provision occurs, namely the system of VAT exemptions, which must be interpreted strictly.

The CJEU also agreed with the views of Advocate General Hogan's observations that it is common ground that the offshore jackup drilling rigs which formed the subject of the supply at issue in the main proceedings are offshore mobile drilling units consisting of a floating pontoon which is fitted with several mobile legs that are raised while it is being towed to the drilling site and, when it is in the drilling position, is raised to several dozen metres above sea level using those legs, which are extended and rest on the seabed, in order to form a static platform.

The CJEU concluded that the offshore drilling rigs at issue were not of such a kind as to be primarily used for the purposes of navigation, which is, however, a matter to be ascertained by the referring court, so that those floating structures cannot be classified as structures ‘used for navigation’ within the meaning of Article 148(a) of the VAT Directive. On the contrary, the CJEU believed (as Romania and the European Commission had argued) and subject to examination by the referring court, the primary function of those structures is to exploit, in a stationary position, hydrocarbon deposits at sea.

* + 1. **The Conclusion by the CJEU**

Ultimately, the CJEU opined that Article 148(a) and (c) of the VAT Directive must be interpreted as meaning that the expression ‘vessels used for navigation on the high seas’ in that provision does not apply to the supply of floating structures, such as offshore jackup drilling rigs of the type at issue in the proceedings, which are used predominantly in a stationary position to exploit hydrocarbon deposits at sea. Put simply, the CJEU placed emphasis on the fact that the structure was "predominantly in a stationary position".

*Conti 11. Container Schiffahrts-GmbH & Co. KG Ms ‘MSC Flaminia’ v Land Niedersachsen*

* + 1. **Introduction**

On 16 May 2019, the CJEU delivered a preliminary ruling in *Conti 11. Container Schiffahrts-GmbH & Co. KG Ms ‘MSC Flaminia’ v Land Niedersachsen*.[[15]](#footnote-15)

The case addressed a number of issues relating to the environment and, in particular, (a) the shipment of waste, (b) Regulation (EC) 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste,[[16]](#footnote-16) (c) what happens when waste is subject to the prior written notification, (d) the so-called consent procedure and, (e) shipments of waste within the EU.

The case was a request for a preliminary ruling under Article 267 of the TFEU from the Landgericht München I (i.e., the Regional Court, Munich I in Germany).

The CJEU heard observations from Conti 11. Container Schiffahrts-GmbH & Co. KG Ms ‘MSC Flaminia’, Land Niedersachsen and the European Commission. The CJEU also heard the opinion of the Advocate General Saugmandsgaard Øe.

The CJEU ruled:

"Article 1(3)(b) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste must be interpreted as meaning that residues, in the form of scrap metal and of fire-extinguishing water mixed with sludge and cargo residues, such as those at issue in the main proceedings, attributable to damage occurring on board a ship at sea, must be regarded as waste generated on board ships, within the meaning of that provision, which is, therefore, excluded from that regulation’s scope until it is offloaded in order to be recovered or disposed of."

* + 1. **Factual Background**

The case concerned the interpretation of Article 1(3)(b) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.[[17]](#footnote-17)

The request was made in proceedings between (a) Conti 11. Container Schiffahrts-GmbH & Co. KG Ms ‘MSC Flaminia’ (‘Conti’) and (b) Land Niedersachsen (the Land of Lower Saxony, Germany) concerning the obligation imposed by the latter on Conti to carry out a notification procedure relating to shipment of waste that was on board the ship *MSC Flaminia* following damage at sea.

The *MSC Flaminia* is a container ship owned by Conti that flew the German flag at the material time.

On 14 July 2012, during a voyage from Charleston (in the USA) to Antwerp (in Belgium), a fire broke out and explosions occurred on board that ship. The ship was transporting 4,808 containers including 151 ‘hazardous substance’ containers. After the fire was put out, Conti obtained authorisation on 21 August 2012 to tow the ship into German waters. By virtue of a letter of the Havariekommando (Central Command for Maritime Emergencies, Germany) of 25 August 2012, Conti was required to draw up an action plan and to specify any contractor undertaking measures under that plan. On 9 September 2012, the ship was towed to Wilhelmshaven (in Germany). Conti undertook with the German authorities, in particular, to ensure safe transfer of the ship to a ship-repair yard in Mangalia (in Romania) and appropriate treatment of the substances on board. By letter of 30 November 2012, the Niedersächsisches Umweltministerium (i.e., the Ministry of the Environment of the Land of Lower Saxony, Germany) informed Conti that the ship itself ‘and the water on board used to extinguish the fire as well as the sludge and scrap metal were to be classified as waste’ and that a notification procedure was therefore necessary. Conti challenged that assessment by letter of 3 December 2012.

By decision of 4 December 2012, the Gewerbeaufsichtsamt Oldenburg (i.e., the Trade and Industry Inspectorate, Oldenburg, Germany) (‘the Trade and Industry Inspectorate’) required Conti to carry out a notification procedure on account of the presence on board the ship of scrap metal and of fire-extinguishing water mixed with sludge and cargo residues. Conti was also prohibited from removing the ship before the notification procedure had been completed and a verifiable waste disposal plan had been submitted in German.

On 21 December 2012, the intact cargo was unloaded and the seaworthiness of the ship was confirmed up to a wave height of 6 metres.

A notification procedure for the shipment of the fire-extinguishing water to Denmark was begun and completed. The pumping of the fire-extinguishing water commenced. Once it was possible to estimate the quantity of extinguishing sludge that could not be pumped out of the ship, the further notification procedure was initiated with Romania on 26 February 2013. The authorisation to leave was issued. However, before the vessel could set sail, 30 containers with waste had to be unloaded – a process which took until 7 March 2013 to complete.

After the notification procedure with Romania was completed, the ship was able to sail on 15 March 2013. In Romania, it was found that approximately 24 000 tonnes of waste were on board.

On 4 January 2013, Conti lodged an administrative appeal with the Trade and Industry Inspectorate against the decision of 4 December 2012. It submitted, in essence, that it should not have been made subject to the notification procedure prescribed by Regulation 1013/2006, on the ground that it did not fall within that regulation’s scope, and it explained that it submitted to that procedure only in order to avoid delays. By letter of 3 April 2013, the Trade and Industry Inspectorate determined that the administrative appeal had become devoid of purpose.

Conti brought an action against the Land of Lower Saxony before the referring court in Germany seeking compensation for the losses resulting, in particular, from the costs of the notification procedures which it had to incur. Conti believed that it was unlawful to classify the substances within the ship as waste and to order, consequently, that those procedures be conducted. Conti argued that a waste disposal plan under national law could not be required since Regulation 1013/2006 precludes the application of national law where waste on board a ship is to be recovered or disposed of in another Member State.

* + 1. **Legal Background**

***Introduction***

The legal background can be viewed from the perspectives of EU law and Member State law.

***EU Law***

* + 1. *Directive 2006/12/EC on Waste*

In terms of EU law, the principal measure was the Directive on Waste. Article 1(1) of Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste[[18]](#footnote-18) provided:

‘For the purposes of this Directive:

(a) “waste” shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard;…’

*Directive 2008/98/EC on Waste*

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives,[[19]](#footnote-19)which repealed Directive 2006/12, provides in Article 3:

‘For the purposes of this Directive, the following definitions shall apply:

1. “waste” means any substance or object which the holder discards or intends or is required to discard;…’

*Regulation 1013/2006 on Shipments of Waste*

Regulation 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste[[20]](#footnote-20) was also relevant. Recitals 1, 7 and 14 of Regulation1013/2006 state:

‘(1) The main and predominant objective and component of this Regulation is the protection of the environment, its effects on international trade being only incidental.…

(7) It is important to organise and regulate the supervision and control of shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment and human health and which promotes a more uniform application of the Regulation throughout the [European Union].…

(14) In the case of shipments of waste destined for disposal operations and waste not listed in Annex III, IIIA or IIIB destined for recovery operations, it is appropriate to ensure optimum supervision and control by requiring prior written consent to such shipments. Such a procedure should in turn entail prior notification, which enables the competent authorities to be duly informed so that they can take all necessary measures for the protection of human health and the environment. It should also enable those authorities to raise reasoned objections to such a shipment.’

Article 1 of Regulation1013/2006 provides:

‘1. This Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination.…

3. The following shall be excluded from the scope of this Regulation:

(a) the offloading to shore of waste, including waste water and residues, generated by the normal operation of ships and offshore platforms, provided that such waste is subject to the requirements of the International Convention for the Prevention of Pollution from Ships, [signed in London on 2 November 1973, as supplemented by the Protocol of 17 February 1978] (Marpol 73/78), or other binding international instruments;

(b) waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of;…’

Article 2 of Regulation 1013/2006 states:

‘For the purposes of this Regulation:

1. “waste” is as defined in Article 1(1)(a) of Directive [2006/12];…

34. “shipment” means the transport of waste destined for recovery or disposal …;

Article 3(1) of Regulation 1013/2006 provides:

‘Shipments of the following wastes shall be subject to the procedure of prior written notification and consent as laid down in the provisions of this Title:

(a) if destined for disposal operations:

all wastes;

(b) if destined for recovery operations:

(i) wastes listed in Annex IV, which include, inter alia, wastes listed in Annexes II and VIII to the Basel Convention [on the control of transboundary movements of hazardous wastes and their disposal, signed on 22 March 1989 and approved on behalf of the European Economic Community by Council Decision 93/98/EEC of 1 February 1993 (OJ 1993 L 39, p. 1)],

(ii) wastes listed in Annex IVA,

(iii) wastes not classified under one single entry in either Annex III, IIIB, IV or IVA,

(iv) mixtures of wastes not classified under one single entry in either Annex III, IIIB, IV or IVA unless listed in Annex IIIA.’

Article 4 of Regulation 1013/2006 provides:

‘Where the notifier intends to ship waste as referred to in Article 3(1)(a) or (b), he/she shall submit a prior written notification to and through the competent authority of dispatch and, if submitting a general notification, comply with Article 13.

When a notification is submitted, the following requirements shall be fulfilled:

1. notification and movement documents:

Notification shall be effected by means of the following documents:

(a) the notification document set out in Annex IA; and

(b) the movement document set out in Annex IB.

In submitting a notification, the notifier shall fill in the notification document and, where relevant, the movement document.…

The notification document and the movement document shall be issued to the notifier by the competent authority of dispatch.…’

***German Law***

To understand the CJEU's analysis, it is also necessary to consider the German legal dimension.

By virtue of Paragraph 2(2)(13) of the Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträglichen Bewirtschaftung von Abfällen (Kreislaufwirtschaftsgesetz — KrWG) (Law to promote the circular economy and ensure the environmentally sustainable management of waste of 24 February 2012),[[21]](#footnote-21)the law is not applicable to the collection and handing over of ship-generated waste and cargo residues in so far as this is governed by federal or Land law on the basis of international or supranational agreements.

Paragraph 32 of the Niedersächsisches Abfallgesetz (Law on Waste of the Land of Lower Saxony) provides:

‘For the purposes of this law, the following terms shall bear the following meanings:…

6. Ship-generated waste:

(a) all waste (including sewage and residues other than cargo residues) which is generated in connection with the operation of a ship and falls within the scope of Annexes I, IV and V to [Marpol 73/78], and

(b) cargo-associated waste within the meaning of point 1.7.5 of the Guidelines for the implementation of [Marpol 73/78];

7. cargo residues: the remnants of any cargo material on board in cargo holds or tanks which remain after unloading procedures and cleaning operations are completed, including loading/unloading excesses and spillage.’

Under Paragraph 35(1) of the Law on Waste of the Land of Lower Saxony), the master is required to deliver all ship-generated waste on board to a port reception facility before leaving the port. Paragraph 36(1) imposes the same obligation as regards cargo residues.

Issues before the CJEU

The referring German court considered that, in so far as the loss pleaded by Conti comprised the costs of carrying out the notification procedure, a right to compensation would exist only if Regulation 1013/2006 were not applicable to the residues from the damage at sea which the ship at issue in the main proceedings suffered. It explains that those costs arose solely because the Trade and Industry Inspectorate considered the carrying out of a notification procedure to be necessary.

The referring court took the view that a notification procedure within the meaning of Article 3(1) of Regulation 1013/2006 was necessary as waste had to be shipped from Germany to Romania. However, it raised the question whether the exception laid down in Article 1(3)(b) of that regulation was applicable and points out that, if that was the case, shipment of the residues at issue in the main proceedings would have fallen outside the regulation’s scope. In its view, it is not apparent from the wording of the latter provision, which includes the term ‘waste generated on board … ships’, from the preparatory documents resulting in the adoption of Regulation 1013/2006, from that regulation’s recitals or from its scheme that waste and residues attributable to damage at sea should be covered by the exception under that provision.

In those circumstances, the Landgericht München I (Regional Court, Munich I, Germany) decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling:

‘Are residues from damage to a ship at sea in the form of scrap metal and fire-extinguishing water mixed with sludge and cargo residues on board the ship “waste generated on board vehicles, trains, aeroplanes and ships” for the purposes of Article 1(3)(b) of Regulation No 1013/2006?’

After the Advocate General had delivered his Opinion, the Land of Lower Saxony requested the CJEU to order the reopening of the oral part of the procedure. The CJEU declined the request believing the request did not refer to any new fact and seeks, in essence, a ruling from the CJEU on two questions which have not been asked by the referring court[[22]](#footnote-22)and, moreover, the CJEU believed that it had all the information necessary to give a ruling and did not have to decide the present case on the basis of an argument which has not been debated between the parties and the interested persons.

Consideration by CJEU of the Question Referred

The CJEU summarised the question as asking, in essence, whether Article 1(3)(b) of Regulation 1013/2006 must be interpreted as meaning that residues in the form of scrap metal and of fire-extinguishing water mixed with sludge and cargo residues, such as those at issue in the main proceedings, attributable to damage occurring on board a ship at sea, must be regarded as waste generated on board ships, within the meaning of that provision.

The CJEU then carefully considered the issues involved. It begun by commenting that:

"34…It…is clear from the…reference that, as the residues at issue in the main proceedings are substances or objects which the holder intends to discard, they fall within the concept of ‘waste’ within the meaning of Article 2(1) of Regulation…1013/2006, which refers to the definition of that term in Article 1(1)(a) of Directive 2006/12, a provision subsequently replaced by Article 3(1) of Directive 2008/98, which contains an essentially analogous definition of that term."

Article 1(3)(b) of Regulation 1013/2006 excludes from the regulation’s scope any waste generated on board vehicles, trains, aeroplanes and ships, until such waste is offloaded in order to be recovered or disposed of. The CJEU therefore said that it followed that if the waste at issue were to be regarded as covered by that provision, Regulation 1013/2006 would not have been applicable to it until it left the ship in order to be recovered or disposed of.

The CJEU said that in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part.[[23]](#footnote-23)

Since Article 1(3)(b) of Regulation 1013/2006 lays down an exception to application of the regulation’s provisions, it must, in principle, be interpreted strictly. Nonetheless, that principle of strict interpretation cannot mean that the words used by that provision to define the scope of the exception which it lays down are to be construed in such a way as to deprive that exception of its intended effect.[[24]](#footnote-24) The CJEU saw that the wording of Article 1(3)(b) of Regulation 1013/2006, according to that provision, in order for waste to fall within that exclusion from the regulation’s scope it must be generated on board inter alia a ship and not have been offloaded from it. The CJEU said that the provision does not contain any indication as to the waste’s origin or as to how it is generated on board the ship concerned.

The CJEU noted that the legislation merely specified in Article 1(3)(b) of Regulation 1013/2006 the place where the waste must be generated, that is to say, on board, among other things, a ship, without laying down specific requirements as to the circumstances in which the waste is generated. The court also noted that it follows from *the* "normal meaning" of the words ‘until such waste is offloaded’ which are used in Article 1(3)(b) of Regulation 1013/2006 that, as regards a ship, that provision applies only as long as the waste concerned has not left the ship, in order to be sent for recovery or disposal. The CJEU therefore said that it "follows from the wording of Article 1(3)(b) of Regulation…1013/2006 that the exclusion from the regulation’s scope which that provision lays down applies to waste generated on board a ship, irrespective of the circumstances in which such waste is generated, until the waste leaves the ship in order to be recovered or disposed of."[[25]](#footnote-25) The CJEU believed that the conclusion is borne out by the *context* of that provision. Article 1(3)(a) of Regulation 1013/2006 relates to the offloading to shore of waste, including waste water and residues, generated by the normal operation of, inter alia, ships, provided that such waste is subject to the requirements of Marpol 73/78, or other binding international instruments. The CJEU identified a contradiction: in contrast to the wording of Article 1(3)(b) of Regulation 1013/2006, Article 1(3)(a) of the regulation expressly refers to waste generated by the normal operation of, among other things, a ship, which confirms the fact that the exclusion laid down in Article 1(3)(b), which does not so provide, covers waste generated on board a ship irrespective of the circumstances in which it has been generated. The CJEU also said that the interpretation of Article 1(3)(b) of Regulation 1013/2006 that results from that provision’s wording and context is not called into question by the objective pursued by the regulation. The CJEU said

"47 It is true that, according to Article 1(1) of Regulation…1013/2006 and recital 7 thereof, the regulation establishes procedures and control regimes for shipments of waste in a way which takes account of the need to preserve, protect and improve the quality of the environment and human health. In particular, it follows from Articles 3(1) and 4(1) of the regulation, read in conjunction with recital 14 thereof, that, for shipments between Member States of waste destined for disposal operations and hazardous waste destined for recovery operations, a prior written notification must be submitted to the competent authorities, enabling them to take the necessary measures for the protection of human health and the environment (judgment of 26 November 2015, *Total Waste Recycling*, C‑487/14, EU:C:2015:780, paragraph 29 and the case-law cited).

48 However, that objective of environmental protection pursued by Regulation…1013/2006 cannot mean that, despite the clear exclusion laid down in Article 1(3)(b) of that regulation, the movement of waste generated on board a ship accidentally must be subject to the regulation’s rules and, in particular, under Article 3(1), to the requirement of prior written notification and consent. Given that the generation of that type of waste is sudden and unforeseeable, it would in practice be impossible or excessively difficult for the person responsible for the ship concerned to be able to be acquainted in sufficient time with the information necessary for the correct application of those rules, which are intended to ensure that the shipment of that waste is supervised and is controlled effectively, as referred to in that regulation."

The CJEU went on to state:

"49 Thus, in the case of waste generated by an accident at sea, such as the waste at issue in the main proceedings, the person responsible for the ship would in all likelihood not be in a position, before docking in a port, to be acquainted with and to provide all the information required by the forms set out in Annexes IA and IB to Regulation…1013/2006, relating, inter alia, to the designation, composition and identification of the waste and the type of disposal or recovery operation envisaged.

50 Moreover, as the Advocate General has observed in point 65 of his Opinion, application of the rules laid down by Regulation…1013/2006 to waste generated on board a ship as a result of damage on the high seas could have the effect of delaying the ship’s entry into a safe port, which would increase the risk of marine pollution and thus undermine the objective pursued by that regulation.

51 It must, however, be pointed out that the exclusion laid down in Article 1(3)(b) of Regulation…1013/2006 cannot apply in the event of abuse on the part of those responsible for the ship concerned. Such abuse would consist, inter alia, of conduct designed to delay, excessively and without justification, the offloading of the waste in order for it to be recovered or disposed of. Such a delay should be assessed in the light, in particular, of the nature of the waste and the significance of the danger that it represents for the environment and human health.

52 In the present instance, since the waste at issue in the main proceedings was brought about by the damage that occurred on board the Flaminia when it was sailing on the high seas, the waste must be regarded as having been generated on board a ship, within the meaning of Article 1(3)(b) of Regulation…1013/2006. That provision thus applies to that waste until it leaves the ship in order to be recovered or disposed of."

Conclusion by the CJEU

The CJEU concluded that Article 1(3)(b) of Regulation 1013/2006 must be interpreted as meaning that residues, in the form of scrap metal and of fire-extinguishing water mixed with sludge and cargo residues, such as those at issue in the main proceedings, attributable to damage occurring on board a ship at sea, must be regarded as waste generated on board ships, within the meaning of that provision, which is, therefore, excluded from that regulation’s scope until it is offloaded in order to be recovered or disposed of. It was a logical and clear result which is justified by the legal provisions.

*Presidenza dei Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo SpA*

Introduction

On 23 January 2019, the CJEU delivered a preliminary ruling in *Presidenza dei Consiglio dei Ministri v Fallimento Traghetti del Mediterraneo SpA*.[[26]](#footnote-26) It was a case which demonstrated that applicants often need tenacity to pursue some cases.

The case related to State aid generally. In particular, the case related to existing aid and new aid, Regulation 659/1999,[[27]](#footnote-27) principles of legal certainty and protection of legitimate expectations, subsidies granted before the liberalisation of a market initially closed to competition and an action for damages against the Member State brought by a competitor of the beneficiary company.

The request for the preliminary ruling came from the Corte suprema di cassazione (i.e., the Supreme Court of Cassation, Italy).

Observations were submitted on behalf of: Fallimento Traghetti del Mediterraneo SpA; the European Commission; France; and Italy.

Request for a Preliminary Ruling

The request for a preliminary ruling concerns the interpretation of Article 1(b)(iv) and (v) of Council Regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU], of Article 93(3) of the EEC Treaty (subsequently, after amendment, Article 88(3) EC, now Article 108(3) TFEU) and the principles of legal certainty and protection of legitimate expectations.[[28]](#footnote-28)

The request has been made in proceedings between the Presidenza del Consiglio dei Ministri (Presidency of the Council of Ministers, Italy) and Fallimento Traghetti del Mediterraneo SpA ("FTDM") concerning a claim for compensation for the damage it suffered due to the grant, during the years 1976 to 1980, of subsidies to Tirrenia di Navigazione SpA ("Tirrenia"), a competitor of FTDM. This is an interesting case where a shipping company sought to claim compensation for alleged anti-competitive behaviour. One would anticipate that there will be an increase in the number of such claims over time.

Factual Background

FTDM and Tirrenia were two maritime transport undertakings which, in the 1970s, ran regular ferry services between mainland Italy and the islands of Sardinia and Sicily.

In 1981, FTDM sued Tirrenia before the Tribunale di Napoli (District Court, Naples, Italy) seeking compensation for the damage which it claimed to have suffered as a result of the low-fare policy operated by Tirrenia between 1976 and 1980. In particular, FTDM argued that Tirrenia had abused its dominant position on the market in question by operating with fares well below cost owing to its having obtained public subsidies in breach of EU law. (There are two aspects of this factual background which are worth stressing. First, this fact pattern demonstrates how some competition law claims can be long-running meaning that plaintiffs need tenacity. Secondly, this case demonstrates how plaintiffs need to consider various provisions across the competition law spectrum.)

FTDM's application was dismissed by the Tribunale di Napoli on 26 May 1993. A verdict upheld on appeal by the Corte d’appello di Napoli (Court of Appeal, Naples) on 13 December 1996.

The appeal brought against that judgment by the insolvency administrator for FTDM was dismissed by the Corte suprema di cassazione (Italian Supreme Court of Cassation) on 19 April 2000, which, in particular, refused to accede to the administrator’s request to refer questions for preliminary ruling to the Court on whether Law No 684 was compatible with EU law, on the ground that the approach adopted by the court ruling on the substance complied with the relevant legislative provisions.

On 15 April 2002, the insolvency administrator for FTDM sued Italy in the Tribunale di Genova to hold Italy liable on various grounds:

1. in its legislative capacity, for having granted aid under Law No 684, which was incompatible with the treaty;
2. in its judicial capacity, for having failed, through the judgment of the Corte di Cassazione (Court of Cassation) of 19 April 2000, to fulfil its obligation to refer questions to the CJEU for a preliminary ruling on the compatibility with EU law of Law No 684; and,
3. in its administrative capacity, for having failed to inform the Corte suprema di Cassazione (Supreme Court of Cassation) about the initiation of infringement proceedings by the European Commission in relation to that law, thereby failing to fulfil its obligation of loyal cooperation with the European institutions.

In its action, FTDM claimed that the Court should order Italy to pay it the sum of €9,240,000 by way of compensation for the damage it had suffered.

On 14 April 2003, the Tribunale di Genova referred a request for a preliminary ruling to the CJEU. That request resulted in the judgment of 13 June 2006, Traghetti del Mediterraneo.[[29]](#footnote-29)

Further to that CJEU ruling, by way of a decision of 27 February 2009, the Tribunale di Genova, found that the Italian judiciary had acted unlawfully, and by way of a separate order directed that the proceedings should continue so that the claim for damages resulting from that unlawful conduct could be heard. It was at that stage of the proceedings that, uncertain as to the interpretation of the EU law on State aid, the Tribunale di Genova made a further reference to the CJEU.

By judgment of 10 June 2010 in *Fallimento Traghetti del Mediterraneo*,[[30]](#footnote-30) the CJEU held that: "[u]nder EU law subsidies paid in circumstances such as those in the main proceedings, pursuant to national legislation providing for payments on account prior to the approval of an agreement, constitute State aid if those subsidies are liable to affect trade between Member States and distort or threaten to distort competition, which it is for the national court to determine".

By way of a decision of 30 July 2012, the Tribunale di Genova ordered the Presidency of the Council of Ministers to pay FTDM the sum of €2,330,355.78, increased to reflect changes in monetary values, together with interest at the statutory rate, as compensation for the damage suffered by FTDM because of the unlawful conduct of the State in its judicial capacity.

The Presidency of the Council of Ministers appealed and FTDM cross-appealed against that decision.

By way of a judgment of 24 July 2014, the Corte di appello di Genova (Court of Appeal, Genoa) set aside that decision and ruled on the merits of the case.

While rejecting FTDM’s claims for compensation based on the liability of Italy in its judicial and administrative capacities, that court upheld the claim based on the liability of that State in its legislative capacity, because of the adoption by the Italian Parliament of Law No 684. It, therefore, ordered that State to pay FTDM the sum of €2,330,355.78, increased to reflect changes in monetary values, together with interest at the statutory rate, as compensation for the harm suffered by that company.

The Corte di appello di Genova believed, in particular, that the subsidies granted to Tirrenia had been liable to affect trade between Member States, on the ground that, "for reasons of geographical proximity, the routes served by Tirrenia, could have been operated by carriers of other Member States (in particular [Spain] and [France]) which, however, found themselves at a disadvantage compared to the former".

Furthermore, that court held that the presence of operators from other Member States on the routes served by Tirrenia had been noted by the Commission in its Decision 2001/851/EEC of 21 June 2001 on the State aid awarded to the Tirrenia di Navigazione shipping company by Italy.[[31]](#footnote-31) That court also found that, having regard to the significant value of the subsidies paid during the years in question, of around 400 billion Italian lire and the fact that Tirrenia also operated on international routes, those subsidies were also caught by the prohibition on so-called cross subsidies. The Corte di appello di Genova thus held that the subsidies at issue in the main proceedings, in that they were not granted before the entry into force of the Treaty, had to be regarded as new aid, subject to the obligation of notification under the Treaty, so that, in the absence of such notification, there was an infringement of EU law.

The Presidency of the Council of Ministers appealed on a point of law against that judgment before the referring court, arguing, among other things, that the aid granted to Tirrenia was wrongly classified as new aid and not as existing aid.

The CJEU observed, first, that, for the purposes of the legal classification as existing or new aid of State aid granted in the context of a non-liberalised market, such as that at issue in the main proceedings, it was necessary to examine the applicability *ratione temporis* of Article 1(b)(v) of Regulation 659/1999 and its scope. Secondly, the importance of one of the characteristics of the market at issue, namely the absence of liberalisation of that market must be considered. Thus, it considered that, in paragraph 143 of its judgment of 15 June 2000, *Alzetta and Others v Commission*,[[32]](#footnote-32)the General Court identified a principle according to which an aid scheme established in a market originally closed to competition had, when that market was liberalised, to be regarded as an existing aid scheme, and it adds that that principle was confirmed by the Court in paragraphs 66 to 69 of the judgment of 29 April 2004, *Italy v Commission*.[[33]](#footnote-33) Thus, for the purposes of the legal classification of the subsidies at issue in the main proceedings as existing or new aid, it was necessary also to examine the scope of that principle.

The referring court, however, also observed that it is apparent from a series of cases concerning undertakings in the Gruppo Tirrenia di Navigazione, which led to the 2005 judgment of the CJEU in *Italy v Commission*,[[34]](#footnote-34) and to the judgments of the General Court in *Tirrenia di Navigazione and Others v Commission*[[35]](#footnote-35)in 2007 and in *Tirrenia di Navigazione and Others v Commission*[[36]](#footnote-36) in 2009, that the lack of liberalisation of the maritime cabotage market was found to be irrelevant for the classification of some of the measures in question as existing aid.

Finally, the referring court is unsure whether Article 1(b)(iv) of Regulation 659/1999, read in conjunction with Article 15 of that regulation, applies to State aid granted before the entry into force of that regulation. According to that court, it was apparent from the 2015 judgment *Trapeza Eurobank Ergasias*[[37]](#footnote-37) that those provisions could be applicable to events prior to the entry into force of that regulation.

Legal Background

(a) EU law

Article 1 of Regulation 659/1999, headed ‘Definitions’, provided:

‘For the purposes of this Regulation:…

(b) “existing aid” shall mean:…

(iv) aid which is deemed to be existing aid pursuant to Article 15;

(v) aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by Community law, such measures shall not be considered as existing aid after the date fixed for liberalisation;…’

Article 15 of Regulation 659/1999, entitled ‘Limitation period’, provided:

‘1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid, shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.’

(b) Italian law

The subsidies at issue in the main proceedings were granted to Tirrenia, a shipping company which was a competitor of FTDM, under legge n. 684 — Ristrutturazione dei servizi marittimi di preminente interesse nazionale.[[38]](#footnote-38)

Article 7 of Law No 684 provides as follows:

‘The Minister for Merchant Shipping is authorised to grant subsidies for the provision of the services referred to in the preceding article, by concluding annual ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments.

The subsidies referred to in the preceding paragraph must provide, over a period of three years, for operation of the services under conditions of economic equilibrium. On a prospective basis, such subsidies are to be determined by reference to net income, the amortisation of investments, operating costs, organisational costs and financial burdens.…’

Article 8 of Law No 684 provides:

‘The services linking the larger and smaller islands, referred to in Article 1(c), and any extensions which are technically and economically necessary, must satisfy requirements relating to the economic and social development of the regions concerned, particularly the Mezzogiorno.

The Minister for Merchant Shipping is consequently authorised to grant subsidies for the provision of those services, by concluding ad hoc agreements, in consultation with the Minister for the Treasury and the Minister for State Investments, for a period of 20 years.’

Article 9 of Law No 684 states:

‘The agreements under the preceding article must stipulate:

(1) the routes to be served;

(2) the frequency of each service;

(3) the types of vessel allocated to each route;

(4) the subsidy, which must be determined on the basis of net income, the amortisation of investments, operating costs, organisational costs and financial burdens.

Before 30 June each year, the subsidy to be paid for the year shall be adjusted whenever, during the previous year, at least one of the economic components specified in the agreement was subject to variation by more than one twentieth of the value used for the same item when determining the previous year’s subsidy.’

Article 18 of Law No 684 provides:

‘The financial burden arising from the application of the present Law is to be met in the sum of ITL 93 billion by the amounts already entered in Chapter 3061 of the Ministry for Merchant Shipping’s estimate of expenditure for the financial year 1975 and by those which will be entered in the corresponding chapters for successive financial years.’

Article 19 of Law No 684 states:

‘Until the date of approval of the agreements provided for under the present Law, the Minister for Merchant Shipping shall, in agreement with the Minister for the Treasury, make in deferred monthly instalments payments on account which may not in the aggregate exceed [ninety] per cent of the total amount indicated in Article 18.’

Article 7 of the Decree of the President of the Republic No 501 of 1 June 1979 (GURI No 285 of 18 October 1979), adopted in order to implement Law No 684, states that the payments on account referred to in Article 19 of that law are paid to companies providing services of major national interest until the date of registration by the Corte dei conti (Court of Auditors, Italy), of the measures relating to the conclusion of new agreements.

Questions referred to the CJEU

The Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and refer the following questions to the CJEU for a preliminary ruling:

‘(1) For the purposes of classifying the aid in question (as “existing” and, therefore, not “new” aid), is Article 1(b)(v) of Regulation [No 659/1999], according to which “aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State. Where certain measures become aid following the liberalisation of an activity by [EU] law, such measures shall not be considered as existing aid after the date fixed for liberalisation”, applicable and, if so, under what conditions; or is the principle (formally different in scope from that of the abovementioned substantive law provision) established by the General Court in its judgment of 15 June 2000, *Alzetta and Others v Commission* (T‑298/97, T‑312/97, T‑313/97, T‑315/97, T‑600/97 to T‑607/97, T‑1/98, T‑3/98 to T‑6/98 and T‑23/98, EU:T:2000:151, paragraph 143) and confirmed, by the ruling, of interest in the present case, of the Court of Justice in its judgment of 29 April 2004, *Italy v Commission* (C‑298/00 P, EU:C:2004:240, paragraphs 66 to 69) — according to which “... a system of aid established in a market that was initially closed to competition must, when that market is liberalised, be regarded as an existing aid system, since at the time of its establishment it did not come within the scope of Article 92(1) of the EEC Treaty [subsequently Article 87(1) EC, now Article 107(1) TFEU], which, having regard to the requirements set out in that provision regarding effect on trade between Member States and repercussions on competition, applies only to sectors open to competition” — applicable and, if so, under what conditions?

(2) For the purposes of classifying the aid at issue, is Article 1(b)(iv) of Regulation No 659/1999, according to which ‘existing’ aid is “aid which is deemed to be existing aid pursuant to Article 15” — Article 15 establishing a 10-year limitation period for recovering unlawfully granted aid — applicable and, if so, under what conditions — or are the well-established principles of the Court of Justice of the protection of legitimate expectation and legal certainty applicable and, if so, under what conditions (whether or not similar to the principle set out in the substantive law provision referred to above)?’

Consideration by the CJEU of the questions referred

The First Question

By its first question, the referring court asked the CJEU whether, in essence, subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, may be classified as existing aid because of the merely formal absence of liberalisation of that market at the time of their grant.

The CJEU said that it must be recalled that, according to the Court’s settled case-law, classification of a national measure as ‘State aid’ requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see *Commission v World Duty Free Group and Others*[[39]](#footnote-39) para.53). These are the usual criteria on what constitutes State aid for the purposes of EU law. Bearing that in mind, it is necessary to ascertain, in a situation such as that at issue in the main proceedings, in which the relevant market was not yet formally open to competition, whether, at the time of their grant, the subsidies concerned constituted State aid because they fulfilled the conditions that there be an effect on trade between Member States and that competition be distorted.

The CJEU was clear that while it is true that State aid may, in principle, be treated as existing aid because it can be established that at the time it was put into effect, among other things because of the absence of liberalisation of the market in question, it did not constitute aid, the CJEU had already held that such absence of liberalisation does not necessarily exclude the possibility that an aid measure is liable to affect trade between Member States or that it distorts or threatens to distort competition.[[40]](#footnote-40) State aid is liable to affect trade between Member States and to distort or threaten to distort competition, even though the market concerned is only partially open to competition. In order for an intervention by the State or through State resources to be liable to affect trade between Member States and to distort or threaten to distort competition, it is sufficient that, at the time of the entry into force of an aid measure, there is a situation of "effective competition" (rather than full competition) on the relevant market.

The CJEU therefore was clear that the fact that the maritime cabotage market at issue in the main proceedings was not liberalised by regulatory means until *after* the granting of the subsidies at issue in the main proceedings did not necessarily mean that, *before* that liberalisation, those subsidies constituted aid. This is important for those in the shipping sector because they may be in receipt of state aid even when they do not believe that they are subject to full competition.

The CJEU found that it was apparent from the 2010 judgment in *Fallimento Traghetti del Mediterraneo*[[41]](#footnote-41)thatit cannot be excluded,[[42]](#footnote-42) first, that Tirrenia was in competition with undertakings from other Member States on the domestic routes concerned[[43]](#footnote-43) and, secondly, that it was in competition with such undertakings on international routes[[44]](#footnote-44) and that, in the absence of any separate accounting for its various activities, there was a risk of cross-subsidisation, that is to say, a risk that the revenue from its cabotage activity, which received the subsidies at issue in the main proceedings, was used for the benefit of activities carried on by it on its international routes.

Thus, the CJEU said that it was apparent from the file before the Court that, even if the relevant market was not formally liberalised, it seemed that, at the time of the facts in the main proceedings that market was a competitive market and that the subsidies granted to Tirrenia were likely to affect trade between Member States and to distort or threaten to distort competition. The CJEU therefore said that in "those circumstances, it must be held that, in so far as the subsidies at issue in the main proceedings came, at the time that they were granted, under the concept of ‘State aid’ because they fulfil all the necessary criteria for that purpose, in particular that they were liable to affect trade between Member States and distort or threaten to distort competition, which it is for the referring court to ascertain, those measures cannot, in principle, be classified as existing aid solely because of a lack of formal liberalisation of the market concerned."[[45]](#footnote-45) This meant that the" answer to the first question is that subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, cannot be classified as existing aid because of the merely formal absence of liberalisation of that market at the time those subsidies were granted, to the extent that those subsidies were liable to affect trade between Member States and distorted or threatened to distort competition, which it is for the referring court to ascertain."

The Second Question

By virtue of the second question, the Italian court asked the CJEU whether, "in a situation such as that at issue in the main proceedings, it is necessary, for the purposes of classification of the subsidies in question as existing aid or new aid, to apply Article 1(b)(iv) of Regulation 659/1999, or whether it should base its decision on the principles of protection of legitimate expectations and legal certainty." This sounds like a very technical question and while it had considerable practical significance for the State aid law analysis, it was not so relevant from a maritime law perspective so it is useful analyse the issue somewhat briefly.

The CJEU identified that the applicability of Article 1(b)(iv), in a situation such as that at issue in the main proceedings, it is necessary to point out that the concept of ‘existing aid’ is closely linked to the role, functions and specific powers conferred on the Commission under the State aid control system. The CJEU stated that the answer to the second question is that Article 1(b)(iv) of Regulation 659/1999 must be interpreted as meaning that it is not applicable to a situation such as that at issue in the main proceedings. In so far as the subsidies at issue in the main proceedings were granted in breach of the obligation of prior notification laid down in Article 108 of the TFEU, The CJEU clarified that State entities cannot rely on the principle of the protection of legitimate expectations in these circumstances. In a situation such as that at issue in the main proceedings, where an action for damages against the Member State is brought by a competitor of the beneficiary company, the principle of legal certainty does not permit, by analogy, a limitation period, such as that laid down in Article 15(1) of that regulation, to be imposed on the applicant.

Rulings by the CJEU

The CJEU responded:

"1. Subsidies granted to an undertaking before the date of liberalisation of the market concerned, such as those at issue in the main proceedings, cannot be classified as existing aid because of the merely formal absence of liberalisation of that market at the time those subsidies were granted, to the extent that those subsidies were liable to affect trade between Member States and distorted or threatened to distort competition, which it is for the referring court to ascertain.

2. Article 1(b)(iv) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] must be interpreted as meaning that it is not applicable to a situation such as that at issue in the main proceedings. In so far as the subsidies at issue in the main proceedings were granted in breach of the obligation of prior notification laid down in Article 93 of the EEC Treaty, State entities cannot rely on the principle of the protection of legitimate expectations. In a situation such as that at issue in the main proceedings, where an action for damages against the Member State is brought by a competitor of the beneficiary company, the principle of legal certainty does not permit, by analogy, a limitation period, such as that laid down in Article 15(1) of that regulation, to be imposed on the applicant."

*Irish Ferries v National Transport Authority*

There is an interesting case which has been referred to the CJEU by the Irish High Court. It is entitled *Irish Ferries v National Transport Authority*.[[46]](#footnote-46) It appears to be the first preliminary reference to the CJEU on Regulation 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004.[[47]](#footnote-47) It is anticipated that the preliminary ruling – which will probably be delivered in 2020 or 2021 will give guidance on the meaning of various provisions in the Regulation which have never been adjudicated upon before and deserve clarification.

BREXIT

Previous reports have addressed Brexit and the maritime sector. So, there is little value in repeating that commentary. It is also clear however that, in some ways, the position is not much clearer now that it was in earlier reports.

Suffice it to say that everything will turn on the terms on which the UK leaves the EU. If there is an agreement (or "deal") then the relevant rules will be dependent on the terms of agreement. If there is no agreement then much will depend on what the EU and the UK decide unilaterally to do. It is possible that the EU and UK would each agree to recognise each other's qualifications, standards and so but there can be no guarantee as, technically, the UK would become a "third country" as far as the EU is concerned.

It would be useful to recall and read some of the EU's documents relating to Brexit:[[48]](#footnote-48)

* Notice to stakeholders - Withdrawal of the United Kingdom and EU rules on transportable pressure equipment
* Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of aviation security and maritime security
* Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of industrial products
* Notice to 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
* Notice to stakeholders - Withdrawal of the United Kingdom and EU rules in the field of maritime transport
* Information for border users in case of a no-deal (French Customs)
* Information on smart border for goods crossing the Channel-North Sea (French Customs)

There are also evolving measures at the UK level but one gets the clear sense that the EU is better prepared than the UK for dealing with Brexit.

The European Commission published a very useful Notice to Stakeholders on 27 February 2018. It would be useful to study it.[[49]](#footnote-49) Key elements of the Notice 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:…

1. MARKET ACCESS

* Intra-Union shipping services and third-country traffic: Regulation (EEC) No 4055/865 stipulates the freedom to provide maritime transport services between Member States, as well as between Member States and third countries, in respect of:
* "nationals of Member States who are established in a Member State other than that of the person for whom the services are intended";… and
* "nationals of the Member States established outside the EU", or "shipping companies established outside the EU and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation."…

Persons or companies who, as of the withdrawal date, do not meet those criteria no longer benefit from this Regulation, notably in terms of non-discriminatory treatment as regards international maritime transport connections.

* Cabotage: According to Article 1(1) of Regulation (EEC) No 3577/928, the provision of maritime transport services within EU Member States (maritime cabotage) is restricted to Community shipowners (as defined in Article 2(2) of that Regulation). As of the withdrawal date it will no longer be possible to provide maritime transport services in accordance with this Regulation if the conditions for constituting a Community shipowner are no longer fulfilled, unless national legislation…allows access to cabotage to vessels flying the flag of a third country.

2. MARITIME SAFETY

* 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 391/200910 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/EC11 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.
* Safety of fishing vessels: According to Article 3(5) of Directive 97/70/EC,…Member States shall prohibit fishing vessels flying the flag of a third country from operating in their internal waters or territorial sea or landing their catch in their ports unless they are certified by their flag State administration to comply with the requirements referred to in Article 3(1)-(4) and Article 5 of Directive 97/70/EC, namely the technical provisions of that Directive. In addition, under Article 7(3) of Directive 97/70/EC fishing vessels flying the flag of a third State shall be subject to control by a Member State when in its ports, in order to verify their compliance with the Torremolinos Protocol,…once it has entered into force.

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/>....."

Given the on-going uncertainty, it is difficult to predict how it will unfold but suffice it to say that maritime transport services between the UK and the EU will not be as smooth or as unfettered as they are at present if the UK chooses to leave the world's largest internal market and trading bloc.

COMPETITION LAW: CONSORTIA BLOCK EXEMPTION CONSULTATION

The EU has a block exemption for certain liner shipping consortia agreements under Article 101 of the TFEU.

Article 101 of the TFEU is the provision which prohibits, as a general rule, anti-competitive agreements between undertakings, decisions by associations of undertakings and concerted practices involving undertakings. It is often seen as the rule against cartels but it has a wider scope than just cartels. Liner conference agreements and consortia agreements fall within its remit. The European Commission is reasonably well disposed towards certain consortia agreements.

The Council conferred power on the European Commission to adopt block exemption regulations in regard to maritime consortia. This power is contained in Regulation 246/2009 of 26 February 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia).[[50]](#footnote-50) The European Commission then has the ability to adopt a block exemption regulation. The current European Commission block exemption for consortia agreements is Regulation 906/2009.[[51]](#footnote-51) It is due to expire on 25 April 2020. It had been extended in June 2014 for five years.

On 7 May 2018, the European Commission published a roadmap for the evaluation of the liner shipping consortia block exemption.

The European Commission opened a period of consultation from 27 September 2018 until 20 December 2018. The Commission published an online questionnaire.

The European Commission set out the objective of the consultation to be as follows:

"Liner shipping services consist of the provision of regular, scheduled maritime cargo transport on a specific route. They require significant levels of investment and therefore are regularly provided by several shipping companies cooperating in "consortia" agreements. Consortia can lead to economies of scale and better utilisation of the space of the vessels. A fair share of the benefits resulting from these efficiencies can be passed on to users of the shipping services in terms of better coverage of ports (improvement in the frequency of sailings and port calls) and better services (an improvement in scheduling, better or personalised services through the use of more modern vessels, equipment and port facilities).

Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements between undertakings that restrict competition. However, Article 101(3) TFEU allows declaring such agreements compatible with the internal market provided they contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits without eliminating competition.

Council Regulation 246/2009 provides that, in accordance with the provisions of Article 101(3) TFEU, the Commission may, by way of Regulation, exempt consortia agreements from the application of Article 101(1) TFEU for a period limited to five years with the possibility of prolongation. Accordingly, the Commission has adopted Regulation 906/2009 (hereafter the "Consortia Regulation"), which sets the specific conditions for the exemption of consortia agreements. These conditions notably aim at ensuring that customers enjoy a fair share of the resulting benefits. The Consortia Regulation will expire on 25 April 2020, and the proposed evaluation is scheduled to be finalized before the expiry date.

This public consultation is a part of the evaluation of the Consortia Regulation, which started in May 2018. The objective of the consultation is to collect evidence and views from stakeholders in order to assess the impact and relevance of the Consortia Regulation and provide an evidence base for determining whether it should be left to expire or prolonged (and if so, under which conditions)."

The European Commission received 37 submissions including some anonymous responses (mainly from individuals). The submissions were mainly from the EU (particularly, Germany and Belgium). The European Commission's decision on whether to abolish, amend or renew the block exemption regulation is awaited eagerly.

1. I.e., the proposal that the United Kingdom, Gibraltar and certain other territories would leave the EU. [↑](#footnote-ref-1)
2. OJ 25 July 2019. [↑](#footnote-ref-2)
3. OJ 25 July 2019. [↑](#footnote-ref-3)
4. OJ L 334, 17.12.2010, p.1. [↑](#footnote-ref-4)
5. Case C‑291/18. ECLI:EU:C:2019:521. The court composed of Judges Prechal (President of the Chamber), Lenaerts (President of the Court), Biltgen, Malenovský and Rossi (Rapporteur). The Advocate General was AG Hogan. There were interventions by various parties including the European Commission, Belgium, Italy and Romania and Grup Servicii Petroliere SA. [↑](#footnote-ref-5)
6. OJ 2006 L 347, 11.12.2006, p. 1, [↑](#footnote-ref-6)
7. OJ 1977 L 145, p. 1. [↑](#footnote-ref-7)
8. OJ 1992 L 384, p. 47. [↑](#footnote-ref-8)
9. Case C‑526/13, EU:C:2015:536, paras.24 and 25. [↑](#footnote-ref-9)
10. **Cases** C‑181/04 to C‑183/04, EU:C:2006:563, para.15. [↑](#footnote-ref-10)
11. Case C‑197/12 EU:C:2013:202, para.30. [↑](#footnote-ref-11)
12. Cases C‑181/04 to C‑183/04, EU:C:2006:563, paras.14 to 16. [↑](#footnote-ref-12)
13. **Case** C‑197/12, EU:C:2013:202, para.32. [↑](#footnote-ref-13)
14. **Case** C‑97/06, EU:C:2007:609, para.24. [↑](#footnote-ref-14)
15. Case C‑689/17, ECLI:EU:C:2019:420. The court was composed of Judges Regan (President of the Chamber), Lycourgos (Rapporteur), Juhász, Ilešič and Jarukaitis. The Advocate General was AG Saugmandsgaard Øe. [↑](#footnote-ref-15)
16. OJ 2006 L 190, 12.7.2006, p. 1. [↑](#footnote-ref-16)
17. OJ 2006 L 190, 12.7.2006, p. 1. [↑](#footnote-ref-17)
18. OJ 2006 L 114, 27.4.2006, p. 9. [↑](#footnote-ref-18)
19. OJ 2008 L 312, 22.11.2008, p. 3. [↑](#footnote-ref-19)
20. OJ 2006, L 190, 12.7.2006, p. 1. [↑](#footnote-ref-20)
21. BGBl. 2012 I, p. 212. [↑](#footnote-ref-21)
22. I.e., relating, first, to the applicability of Regulation No 1013/2006 when the ship is on the high seas and, second, to the validity of the exemption set out in Article 1(3)(b) of that regulation in the light of the Basel Convention. [↑](#footnote-ref-22)
23. CaseC‑425/17 Günter Hartmann Tabakvertrieb EU:C:2018:830, para.18 and the case-law cited. [↑](#footnote-ref-23)
24. See, by analogy, Case C‑19/13 Fastweb EU:C:2014:2194, para.40 and the case-law cited. [↑](#footnote-ref-24)
25. Para.43. [↑](#footnote-ref-25)
26. Case C-387/17, ECLI:EU:C:2019:51, The court was composed of Judges Silva de Lapuerta (acting as President), Arabadjiev (Rapporteur), Regan, Fernlund and Rodin. The Advocate General was AG Wahl. [↑](#footnote-ref-26)
27. Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [ed., now, Art.108 of the TFEU] OJ L 83, 27.3.1999, p.1. [↑](#footnote-ref-27)
28. OJ 1999, 27.3.1999, L 83, p. 1. [↑](#footnote-ref-28)
29. Case C‑173/03, EU:C:2006:391. [↑](#footnote-ref-29)
30. Case C‑140/09, EU:C:2010:335. [↑](#footnote-ref-30)
31. OJ 2001 L 318, 4.12.2001, p.9. [↑](#footnote-ref-31)
32. Cases T‑298/97, T‑312/97, T‑313/97, T‑315/97, T‑600/97 to T‑607/97, T‑1/98, T‑3/98 to T‑6/98 and T‑23/98, EU:T:2000:151. [↑](#footnote-ref-32)
33. CaseC‑298/00 P, EU:C:2004:240. [↑](#footnote-ref-33)
34. CaseC‑400/99, 10 May 2005, EU:C:2005:275. [↑](#footnote-ref-34)
35. Case T-246/99, 20 June 2007, EU:T:2007:186. [↑](#footnote-ref-35)
36. Cases T‑265/04, T‑292/04 and T‑504/04, 4 March 2009, EU:T:2009:48. [↑](#footnote-ref-36)
37. C‑690/13, 16 April 2015, EU:C:2015:235. [↑](#footnote-ref-37)
38. Law No 684 on the restructuring of shipping services of major national interest), of 20 December 1974, (GURI No 336 of 24 December 1974 (‘Law No 684’). [↑](#footnote-ref-38)
39. C‑20/15 P and C‑21/15 P Commission v World Duty Free Group and Others, 21 December 2016, EU:C:2016:981, para.53. [↑](#footnote-ref-39)
40. See Case C‑140/09 Fallimento Traghetti del Mediterraneo, 10 June 2010, EU:C:2010:335, para.49. [↑](#footnote-ref-40)
41. Case C‑140/09 Fallimento Traghetti del Mediterraneo, 10 June 2010, para.50, EU:C:2010:335, para.50. [↑](#footnote-ref-41)
42. This is quite a low standard of proof – "cannot be excluded" is not the same as "proven". It is hard to know how there was competition in those markets which were not open to competition. [↑](#footnote-ref-42)
43. This is quite a low standard of proof – "cannot be excluded" is not the same as "proven". It is hard to know how there was competition in those markets which were not open to competition. [↑](#footnote-ref-43)
44. This is interesting because the CJEU was, somewhat surprisingly, treating domestic/cabotage services as competing with international services. [↑](#footnote-ref-44)
45. Para.44. [↑](#footnote-ref-45)
46. Case C-570/19, pending. [↑](#footnote-ref-46)
47. OJ L 334, 17.12.2010, p.1. [↑](#footnote-ref-47)
48. See https://ec.europa.eu/transport/modes/maritime\_en. [↑](#footnote-ref-48)
49. [↑](#footnote-ref-49)
50. OJ L 79, 25.3.2009, p.1. [↑](#footnote-ref-50)
51. OJ 2009 L256/31. [↑](#footnote-ref-51)