

Regulating shipping in EU: how to render global regulation of shipping seaworthy

1. The need for EU action: a brief history of regulating shipping at EU level

The origin of the European Union maritime transport and maritime safety policy dates back to the early 1990s. A 1993 European Commission Communication, entitled 'A Common policy of Safe Seas'¹, contained a package of accident-driven response measures aiming at reinforcing the implementation of the international rules throughout what was then the European Community². The focus of those measures was on Member States exercising their jurisdiction as coastal States regarding vessel traffic monitoring, especially for dangerous goods and hazardous material (HAZMAT), and as port States regarding port State control. The responsibilities of Member States as flag States regarding technical safety standards were covered to a lesser extent, mainly in relation to their use of classification societies, acting as recognized organisations on behalf of the EU Member States³.

In the aftermath of the sinking of two oil tankers, the *Erika* in 1999 and the *Prestige* in 2002, the EU sought to reinforce this set of measures with additional rules (known as the “Erika” legislative packages) to improve maritime safety and prevent pollution at sea from shipping. The EU-wide vessel traffic monitoring system was revised in 2002 to put in place a vessel traffic monitoring and information system to monitor traffic along EU coasts and to be able to intervene as early as possible, saving life and mitigating any consequences of incidents, such as oil pollution.

The creation of the European Maritime Safety Agency (EMSA) in 2002⁴ was a direct consequence of the *Erika* and *Prestige* accidents involving oil spills. The original idea behind its creation was to establish a body that would provide technical support to the Commission, with expertise to match those available in national administrations and the IMO. Since the start of its operation in January 2004, EMSA provides technical, operational and scientific assistance to the European Commission and to EU Member States that is key for the implementation of EU rules. Its assistance is particularly relevant in the continuous process of updating and developing new legislation, monitoring its implementation and evaluating the effectiveness of the measures in place. EMSA carries out regular 'on the ground' visits to EU

¹ COM(93) 66 final of 24 February 1993.

² The European Union (EU) succeeded the European Community through the Treaty of Lisbon that entered into force on 1 December 2009. See, in particular, Article 1 of the Treaty on the European Union (TEU).

³ Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, OJ L 319, 12.12.1994, p. 20.

⁴ Regulation (EC) No 1406/2002 of the European Parliament and the Council establishing a European Maritime Safety Agency, OJ L 208, 5.8.2002, p. 1.

maritime administrations and inspects classification societies as well as third countries' systems for training and certification of seafarers. Furthermore, EMSA assists Member States affected by pollution caused by ships and oil and gas installations with specialised vessels and equipment and satellite images to detect pollution. A key area under constant development and of increasing added value is EMSA maritime monitoring and information activities and the various systems and databases that the Agency hosts and manages.

With the third maritime safety package adopted in 2009, the so-called third “*Erika*” legislative package, the EU expanded its legislative framework to cover all chains of responsibility in the maritime sector to combat sub-standard shipping and give Europe better protection. This included new legislation on flag State responsibilities, however more in the form of a 'frame' reflecting certain international obligations incumbent on Member States as flag States⁵. Improvements were further introduced on the legislation regarding port State control⁶ while new legislation on accidents investigation was put in place⁷. Finally, the legislation on the Recognised Organisations (ROs)⁸ was revamped and was split in a Directive⁹ providing for the liability of the ROs and the obligations of flag States as authorising flags and a Regulation¹⁰ establishing the minimum requirements that the ROs have to attain to in order to be recognised at the EU level.

2. Flag, Port and Coastal State from an EU perspective

Today the EU legislative framework (or *acquis*) on maritime safety comprises more than sixty legal acts¹¹. EU maritime safety rules have been adopted when national or international rules proved insufficient to address, or prevent, shipping accidents. The EU action in the field of maritime safety and protection of the environment mirrors the international legal

⁵ Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements, OJ L 131, 28.5.2009, p. 132. See in particular Article 4.

⁶ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control, OJ L 131, 28.5.2009, p. 57. The predecessor to this Directive, Council Directive 95/21/EC of 19 June 1995 on port State control of shipping, OJ L 157, 7.7.1995, p. 1, was one of the first maritime safety acts to be adopted in the EU.

⁷ Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council, OJ L 131, 28.5.2009, p. 114.

⁸ Council Directive 94/57/EC, OJ L 319, 12.12.1994, p. 20.

⁹ Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 131, 28.5.2009, p. 47

¹⁰ Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations, OJ L 131, 28.5.2009, p.11

¹¹ For a complete list of the EU maritime safety acts see: <http://www.emsa.europa.eu/publications/legislative-texts.html> (accessed on 15 March 2021)

framework developed by the parties to the International Maritime Organization (IMO). It incorporates IMO rules into the EU legal system ensuring their "harmonised application".

At the global level, maritime transport, maritime safety and marine environmental protection are promoted through an international legal framework that consists primarily of the United Nations Convention on the Law of the Sea, 1982, and a number of conventions adopted under the auspices of the IMO which define the responsibilities of States as flag State (or State of registry), port State and coastal State: the International Convention for the Prevention of Pollution from Ships (MARPOL); the International Convention for the Safety of Life at Sea (SOLAS); the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers (STCW); the Convention on International Regulations for Preventing Collisions at Sea (COLREG); the International Convention on Load Lines (LL); the Convention on Facilitation of International Maritime Traffic (FAL).

These international instruments provide comprehensive standards that serve as bases for the formulation of domestic laws that regulate the design, manning, equipment, operation, management, maintenance and disposal of ships.

The stringent conditions imposed in EU waters irrespective of the flag prevents quality shipping suffering unfair competition from those operators and flags willing to allow lower standards on safety to save money. Moreover, the legislation should ensure a level-playing field within the EU between EU flagged ships through uniform and effective application of the rules and enforcement (which is not possible at international level where there are no such legal means).

The main acts enabling the above objectives at the Union level correspond to the three roles which have been largely defined at international level, through UNCLOS¹²:

- Flag State – the main responsibility for ensuring vessels are fit for purpose in the first place (Directive 2009/21/EC)¹³,
- Recognised Organisations – establishing the single market in the authorisation of private companies (classification societies) with the ship survey and certification (Regulation (EC) No 391/2009¹⁴ and Directive 2009/15/EC¹⁵)

¹² See in particular UNCLOS Articles 11 (definition of ports), 24 and 25 (duties and rights of coastal States), 94 (duties of the flag State), and 211 (pollution from vessels), the latter being the most elaborate example of how these three types of responsibility can apply to a State under the law of the sea.

¹³ Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements - OJ L 131/132, 28.5.2009

¹⁴ Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations, OJ L 131, 28.5.2009, p.11

¹⁵ Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, OJ L 131, 28.5.2009, p. 47

- Port State control – the defence line carrying out verification spot checks (Directive 2009/16/EC)¹⁶,
- Coastal State obligations under international law supported by EMSA systems –for ensuring vessel traffic monitoring and appropriate exchange of information between responsible authorities (Directive 2002/59/EC)¹⁷,
- And, should an accident occur, accident investigation – as part of flag State or coastal State responsibilities, resulting in safety recommendations in the interest of further improving the regime and the effectiveness of applicable rules (Directive 2009/18/EC)¹⁸.

The key pieces of EU maritime safety legislation related to port, flag and coastal State activities have been subject to a ‘Maritime Fitness Check’ in 2018¹⁹. This involved several independent consultants, and addressed a number of questions to the public, through an open public consultation. Targeted consultations with the relevant industry representatives and EU Member States’ administrations were also part of this exercise.

The key question of the Maritime Fitness Check was whether the EU legislative acts in question added value compared to the international rules. The Maritime Fitness Check came to the conclusion that effective and uniform enforcement of EU rules ensures a level playing field among and between Member States, and protects the economy and citizens within the EU²⁰. The overall conclusion based on all evaluation criteria²¹ was that the EU maritime safety policy and legislative framework have met the expectations of EU Member States, achieving EU-wide benefits.

More to the point, the EU plays a key role in implementing and enforcing IMO rules, regulations and standards. EU legislation mirrors international obligations, which are then enforceable through the EU legal order. The distinctive roles of flag State, as the first line of defence, port State, as the second line of defence, and coastal State, for traffic monitoring and intervention, are now interconnected and complementary in the EU. This contributes to a safe, secure and sustainable maritime transport.

¹⁶ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control - OJ L 131/57, 28.5.2009

¹⁷ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system - OJ L 208/10, 5.8.2002

¹⁸ Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector - OJ L 131/114, 28.5.2009

¹⁹ Commission Staff Working Document – SWD (2018) 229 final.

²⁰ SWD (2018) 229 final, page 45.

²¹ The five key criteria Better Regulation identifies for the evaluation of EU legislation are: i) relevance, ii) effectiveness, iii) efficiency, iv) coherence, and v) EU added value.

The benefit of the EU intervention also lies in the cooperation of EU Member States in finding sustainable solutions at international, EU, or regional level. This supports EU Member States in meeting their international obligations, and performing their duties in the maritime domain. In addition, cooperation in implementation ensures a level-playing field across the EU.

On the basis of the conclusions reached by the ‘Maritime Fitness Check’ in 2018, the European Commission is currently exploring the policy options for improving the legislation on flag State obligation²², port State control²³ and accident investigation²⁴.

3. The impact of the sustainability agenda

In 2018, the IMO adopted an initial strategy²⁵ on the reduction of greenhouse gas (GHG) emissions from ships, setting out a vision which confirmed IMO’s commitment to reducing GHG emissions from international shipping and to phasing them out as soon as possible. The initial IMO GHG strategy envisages, in particular, a reduction in carbon intensity of international shipping (to reduce CO₂ emissions per transport work, as an average across international shipping, by at least 40% by 2030, pursuing efforts towards 70% by 2050, compared to 2008); and that total annual GHG emissions from international shipping should be reduced by at least 50% by 2050 compared to 2008.

The current requirements are based on the Energy Efficiency Design Index (EEDI), for new build ships, which means they have to be built and designed to be more energy efficient than the baseline; and the mandatory Ship Energy Efficiency Management Plan (SEEMP), for all ships. The SEEMP provides for ship operators to have in place a plan to improve energy efficiency through a variety of ship specific measures.

As a result, the current approach at the IMO level in relation to the sustainability agenda and the tackle of the GHG emissions is based on the traditional role of the States as flag, port and coastal States. In this regard, MARPOL is currently the main instrument under which the international community is trying to contribute on the challenge of reducing the GHG emissions from shipping.

²² <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12640-Compliance-with-Flag-State-requirements-shipping> (Accessed on 15 March 2021)

²³ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12641-Port-State-control-Further-improving-safety-security-and-sustainability-of-maritime-transport> (Accessed on 15 March 2021)

²⁴ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12642-Maritime-Accident-Investigation> (Accessed on 15 March 2021)

²⁵ IMO Resolution MEPC.304(72)

This traditional approach is built mainly on the experience gained in the past in relation to the prevention of pollution of the marine environment under the general principle enshrined in Art. 194(1) and 194(4) of UNCLOS. Under this approach, States have refrained from using extraterritoriality measures, with the limited exception of port State control under Art. 218 of UNCLOS, or establishing international mechanisms to prevent ship source pollution affecting the interests of multiple States, as the 20th century oil spill accidents have demonstrated.

However, the focus of the 21st century on air emissions could also shift the traditional approach taken under Art. 211 of UNCLOS towards measures prescribed under para 6 of that article in combination with the possibilities provided under Article 220 of UNCLOS. The first test case towards this approach was the establishment of Sulphur Emission Control Areas (SECAs).

The measures required to achieve the targets set by the IMO strategy for the reduction of GHG emissions by at least 70% by 2050 may however create pressure on the traditional distinction of the role of the State. This is particularly relevant in order to avoid a possible distortion in the global playing field by flag States unwilling to impose any measures adopted at the international level resulting to further strengthening of the coastal State jurisdictions at the regional level.

4. Is global regulation of shipping seaworthy for the 21st century?

The new challenges posed by the measures required to tackle GHG emissions from shipping and the experience gained in the implementation of the safety regulations developed worldwide since 1914, in the aftermath of the Titanic disaster, renders the question of the lecture as pertinent and timely as ever before.

While the rulemaking in shipping is mainly international, the control and enforcement mechanisms are limited and essentially left to the individual States. It is widely acknowledged that lack of enforcement is the weak point of international maritime regulation since the International Maritime Organisation (IMO) is a decision making body but lacks any control and enforcement mandate.

The IMO Audit Scheme ²⁶, coupled with the entry into force of the IMO Instruments Implementation Code (III Code), has made some progress towards a more harmonised approach to implementation and enforcement of maritime safety rules worldwide. However, IMO States have very different levels of capacity to give full effect to the rules. This can

²⁶ IMO Assembly Resolution A.1067(28), adopted on 5 December 2013.

create distortion of fair competition. It may cost less for a shipowner to be registered under a certain flag State that does not or cannot fully enforce all the rules, while ships still compete for the same cargo and can sail anywhere in the world.

The IMO Secretariat in 2018 did an analysis of the first consolidated audit summary report (CASR) based on the 18 (Voluntary) IMO Member States Audit Scheme ((V)IMSAS) audits in 2016²⁷. This analysis gave a very clear indication of major areas of concern. The results of the analysis revealed that audit findings were predominantly related to flag State issues. The five major areas identified were related to implementation (also for coastal and port State), initial actions (legislation, promulgation), enforcement (also for coastal and port State), strategy and delegation of authority, in particular lack of oversight of recognised organisations.

This analysis points to a fundamental issue, that of ensuring that all IMO Member States actually promulgate and implement the Conventions into national law, to give them legal effect, and therefore to allow for any actions in situations where the rules have been breached. This is the underlying assumption for a level playing field for shipping internationally, which is the mantra of the IMO. However, even when 'failure' is established, there isn't an international body that is vested with the powers to follow up on the audit results and force, under the threat of an appropriate penalty regime, the necessary actions to uphold the level playing field between the States.

In addition to the push for greener shipping, the 21st century will most probably see new types of more autonomous ships and systems creating new challenges to our global legislative framework. The current scoping exercise being carried out under the IMO auspices aims to adapt the international legal framework to the new technologies. However, the level of standardization will be unprecedented, complementing the regulation of the ship under the flag, port and coastal State regime with possible global approval schemes for the types of autonomous ships that would sail in the global oceans.

In conclusion, the twin transition to greener and more autonomous ships put in stark focus the question of whether the tools of the 20th century could be fit for purpose for regulating shipping in the 21st century. Is the current international system under the IMO seaworthy to safely sail through the waves of the challenges ahead or we need new legislative vessels to navigate the journey ahead?

²⁷ Note by IMO SECR to 5th III sub-committee, documents III 5/7 and III 5/INF.3.