

THE COMMON MARITIME TRANSPORT POLICY OF THE EUROPEAN UNION – THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

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The Paper reviews the impact of the Common Maritime Transport Policy of the European Union on the development of the European Union Environmental Policy. An inter-relationship between the economic needs of the Member States and the overall attempt of the European Community to protect and preserve the marine environment is examined. The European Union makes continuous significant contributions to the worldwide efforts in protecting the environment, especially in the maritime field, through a strict adherence to the internationally set standards, as well as the enforcement of the Community measures that often go beyond the minimal criteria set by the international and multilateral treaties. Such additional criteria might bring the European shipowners and the connected maritime industry into an unfavorable competitiveness position on the world market. Additionally, a detailed overview of the international, regional and Community legislation in the marine environmental field is provided, with a special focus on the measures aimed at preventing oil pollution. Finally, a general assessment of the Community's efforts is given, bearing in mind the current legislation and its impact, and the short-term and long-term goals of the European Union Environmental Policy.

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INTRODUCTION

The European Union (EU) Common Maritime Transport Policy (CMTP), although not individually recognized in the early legislative actions formulating the Common Transport Policy (CTP), gradually achieved its recognized status through the economic impact it creates for the Member States. The EU owns a strong portion of the World shipping fleet, and stands out in the quality of its shipping, safety of navigation standards, and security measures it promotes. At the same time, the EU has a strong import and export trade market, thus requiring a constant flow of maritime traffic to satisfy the needs of such a market, making the European waters the world's most congested maritime traffic area. These factors accelerated the evolution of the EU maritime policy sector. However, the development of maritime industry generates a growing concern for the marine environment. Whereas the interests of the maritime industry and general trade are mainly represented by the Member States, the European Union (Community¹) takes charge of the maritime safety and marine environmental issues. Having in mind the division of competences in the EU law, a comprehensive maritime policy faces serious obstacles to be overcome before it can be adopted and implemented. The Union's approach is based on the referral to the international and multilateral standards previously adopted by the majority of the Member States. Once this basis is fully implemented and enforced in the Member States' national legislation, further steps can be taken in enhancing and tightening the norms regulating the protection and preservation of the marine environment. The Paper analyses the international, multilateral and Union measures designed to protect and preserve the marine environment, with a special focus on the oil pollution, and examines the prospects of further developments, keeping in mind the needs

¹ The Lisbon Treaty abolishes the European Community as a legal entity and imports changes into two of the founding treaties; The 'Treaty establishing the European Community' is replaced by 'Treaty on the Functioning of the European Union' (TFEU), and as stated in the Consolidated Version of the Treaty on European Union (TEU) in Article 1: "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community*". Depending on the historical context, the author will hereinafter use the terms 'Union' or "Community"; for more information, see: <http://eur-lex.europa.eu/en/treaties/index.htm>, last visited on 25 September 2011.

of the maritime industry and related sectors, whose interests could be easily undermined by a single-minded environmental legislation.

The first chapter (*The Common EU Maritime Transport Policy*) examines the role and relevance of the CMTP at the European and world level, stressing out a number of positive effects it has produced. A correlation with, and effect on maritime and related industries that the CMTP produces is undeniable, especially considering the economic and social impact that the maritime sector produces within the European Union. Through a historic overview of the CMTP establishment, an emphasis is made on the effort and devotion of the Union and the Member States to regulate the maritime sector, both regarding specific issues, and through a sectoral approach.

One of the specific CMPT sectors, the marine environmental protection, is the subject of the next chapter (*The Protection and Preservation of the Marine Environment*). Being thoroughly regulated at an international level, the international marine environmental regulation is the first part of examination, especially taking into consideration that most of the Member States are usually the contracting parties to such conventions and treaties. The next step is a detailed overview of the EU marine environmental legislation, the problems it faces in producing binding regulation, and the prospects of further enactments.

Whereas the previous chapter looks at the EU marine environmental legislation on the whole, this chapter focuses on the problem of oil pollution (*Oil Pollution*). The Union has enacted a number of security packages aimed at preventing both major maritime disasters, such as *Erika* and *Prestige*, and small and frequent oil discharges in European waters. Since such measures place considerable strain on the shipowner industry, a conflict of interests is observed between the Member States hosting big maritime players (who are less attracted to maintain their fleets under “*expensive*” European flags), and other Member States that have experienced maritime accidents of huge magnitude (and paid a high price of compensation for damages). As an example of the EU devotion to the protection of the marine environment, a special emphasis is placed on the recent legislation introducing criminal penalties for the ship-source pollution. Keeping in mind the previously mentioned conflict of interests, this piece of legislation has ignited a severe debate in European circles on how far can the environmental policy go before it starts affecting the economic prosperity.

The concluding remarks summarize the crucial points of the analysis and give estimates on how successful has the CMTP been in promoting the marine environmental protection. A distinct consideration is given to the dual conflict of interests, one existing among the Member States and the Union (shared competences issue), and the other among the Member States themselves (those supporting the maritime industry versus those supporting a tightened marine environmental protection legis-

lation). Finally, a question is raised whether the Integrated Maritime Policy (IMP) plans can meet the needs of what a separate EU Environmental Policy would require: sustainable development that respects the requirements necessary to achieve a safe, secure and healthy marine environment.

1 THE COMMON EU MARITIME TRANSPORT POLICY

A. The Role of the Common Maritime Transport Policy

Maritime transport holds a significant role in the European economy. The EU is a strong trading power, having many overseas import and export trade partners. Bearing this in mind, it is understandable why the overall EU economy depends on the success and quality of maritime transport. As evidence of this interdependence, over 90% of external trade and 40% of the intra-Union trade is carried by sea², marking the EU irrevocably as a giant consumer of maritime transport services. Further economic indicators include an average of 400 million passengers transported annually through the European ports, over 3 million people directly employed in the maritime sector (out of which around 70% work “*on-shore*”), over 41% of the World shipping fleet owned by the European owners, and an annual turnover of around € 300 billion³. As it is likely that the economic growth of the EU will expand progressively, it is to be expected that a demand for transport services will increase even further.

To maintain a satisfactory level of participation in the international trade, it is very important to protect and strengthen the transport policy and infrastructure, thereby lowering the pressure exerted by competitive international trade powers. For further development and survival of the EU, it is vital to possess its own fleet of ships under its sovereign control and rules. As Farantouris remarks, maritime transport is not a single industry, but a sector comprised of many different economic activities. Therefore it is essential to avoid dependence on other world trade powers and their shipping fleets⁴. Otherwise, the consequences could be disastrous in a variety of fields⁵.

² For more data visit: http://ec.europa.eu/transport/maritime/index_en.htm, last visited on 25 September 2011.

³ Data available at: http://ec.europa.eu/research/transport/index_en.htm, last visited on 25 September 2011.

⁴ Farantouris, *European Integration and Maritime Transport*, p. 82.

⁵ Farantouris, *Ibid.*, p. 78; As the same author remarks, the CMTP is “... *seen as an integral part of the social infrastructure...*”, thus having a huge impact on, amongst other things, employment, making the economic cohesion also a social one, *Ibid.*, p. 86.

The Common Maritime Transport Policy is a part of a larger European effort to formulate and unify the maritime transport laws of its Member States through a system of the Common Transport Policy. The task of the CMTP is to determine the basic principles of carriage by sea services, identify the participants in the maritime transport sector and their interests, and devise ways to pursue those interests. An attempt is made to protect the rights and interests of shipowners and shippers, carriers, seamen, passengers and other persons involved in the transport of goods and services, identify their needs, and ensure an effective business environment.

At the same time, a mayor concern is placed on the interests of States, having in mind the activities that Governments conduct in the maritime sector, and the benefits that States derive from the maritime transport of goods and passengers⁶. State investments in maritime port and supporting infrastructure, environmental and wildlife protection, the economic impact of the maritime sector on employment and the economic growth of the country, are all factors of paramount importance for economic and political stability.

A broader understanding of public interest is also recognized, having in mind different interest groups that logically or in exceptional cases become indirectly related to the maritime sector. When it comes to issues such as environmental pollution resulting from maritime accidents and its adverse impact on the environment, public health, wildlife and a number of other phenomena, small groups or the general public expect the CMTP to meet such challenges and establish a well-functioning protection and prevention systems.

As the maritime transport of passengers and goods for many of the EU countries constitutes a relevant factor of their economy and growth, it is understandable why this sector bears significance for the national strategy and security. States, on the one hand, work hard to harmonize their legislation with regional or international norms in order to facilitate and expedite regular maritime trade. On the other hand, however, they insist to protect their own interests, which are often in conflict with the interests of other States. Thus, whereas some States prefer a liberal approach to shipping, other States prefer a protectionism approach. At the same time, one has to bear in mind that it may prove difficult to find a proper balance between the Member States, as some countries focus on the social aspects of the maritime industry, whereas others direct their attention to commercial outputs and profit. These differences proved to be a difficult obstacle to overcome in the early stages of the CMTP formation (as will be shown in the further text), and some of them continue, to this day, to obstruct the transfer of competences from the State to the Union level. This

⁶ *Stevens*, *Transport Policy in the European Union*, p. 126.

issue is particularly visible in the marine environmental policy field, which will be addressed in the next chapter.

B. Historic Overview

The process of “*Europeanization*” of the maritime transport institutional and regulatory system was enabled by the inclusion of the Transport Policy as one of the Common Policies in the 1957 Rome Treaty. The four freedoms⁷ are, as Pallis reminds, highly dependent on the movement through space in which an irreplaceable role is held by the transport capabilities⁸.

Article 2 of the Rome Treaty determines the objectives to be achieved by the European Community. One of the methods to achieve these objectives is the establishment of a separate CTP, as provided by the Article 3(f) of the Rome Treaty. However, the Rome Treaty norms concerning transport have little practical utilization capability. Although Article 3 of the Rome Treaty does not provide any reference to the particular modes of transport, Article 84(1) of the Rome Treaty states that: “*The provisions of this Title shall apply to transport by rail, road, and inland waterways*”. Maritime transport was briefly mentioned in Article 84(2) of the Rome Treaty: “*The Council may, acting unanimously, decide whether, to what extent, and by what procedure, appropriate provisions may be laid down for sea and air transport*”. Therefore, it was very clear that maritime transport, together with air transport, is not included within the sphere of the CTP. As a result, this Article excludes the application of transport provisions to the maritime sector, a fact that made a separate regulation of a maritime transport policy necessary. To be precise, it was left to the will of the Member States to decide whether they wish to move towards the creation of the CMTP. Such a drive would indicate a step forward from the traditional concept of maritime transport regulation, located in the domain of private law. At the same time, it would signify a major progress in bringing the different political interests into a common perspective, thus leveling the standards and proclaiming joint goals to be achieved.

At first, the European institutions did not recognize the CMTP, as it had not represented the interests of the original six Member States. Cafruny⁹ underlines that even if there was willingness and interest in the development of maritime transport,

⁷ Free movement of goods and persons, and free circulation of services and capital.

⁸ Pallis, *The Common EU Maritime Transport Policy*, p. 61.

⁹ Cafruny, in: *Hurwitz/Lequesne*, *The State of the European Communities*, vol. 1, policies, institutions and debates in the transition years, pp. 285-299.

the shipping industry has shown very high resistance against the transfer of power from the national level to the level of the EU institutions.

The enlargement policy, starting with the entrance of Denmark, Ireland and the United Kingdom to the EU- three maritime nations¹⁰, had a major impact on the CMTP. The importance of this sector was recognized, especially due to the fact that the trade among the old and new members was realized through maritime routes. The importance of this sector was further confirmed through the accession of Greece in 1981, another significant maritime nation, enlarging the EU maritime industry and fostering maritime transportation. However, parallel to the economic factors contributing to the development of the CMPT, the legal aspects, starting with an important judgment of the European Court of Justice (ECJ)¹¹ to be discussed in the following paragraph, gave an additional push to the CMTP creation.

i. Landmark Decision and Institutional Momentum

Under these circumstances the *French Seamen case*¹² brought a landmark decision in the creation of the CMTP. The Court of Justice reviewed the French maritime administrative policy that made it obligatory for ships under the French flag to employ, in most part, and in some cases exclusively, French nationals. The Commission pointed out that this was a violation of the freedom of movement of workers, thereby undermining the achievements of the European integration. This was a fundamentally important case, because the Court had for the first time formally examined and determined the legal relevance and application of the General Provisions of the Treaty to the specific parts, specifically; the maritime transport sector¹³. Until that point, there was no interpretation of the relationship between the General Provisions of the Treaty and the provisions relating to the maritime transport. The Court clearly stated that the substantive provisions of the Treaty were to be exercised in the field of maritime transport. Specifically, although the Treaty defines some sectors that require special regulation due to their specific nature, the General Provisions of the Treaty that are intended to achieve integration (and the freedom of movement of workers is of great importance for the integration process) must be equally applied to all spe-

¹⁰ The entrance of the insular countries into the Community increased the pressure to create a common policy in the maritime transport sector.

¹¹ The Treaty of Lisbon changed the name of the European Court of Justice, ECJ into “Court of Justice”, see: *supra note 1*.

¹² Case C-167/73, *Commission v France*, [1974] ECR 359, [1974] 2 CMLR 216.

¹³ *Stevens*, *supra note 6*, p.. 126.

cial sectors. Exceptions are possible, but only provided that they are explicitly mentioned. Although the decision had not proposed anything in concrete, such as an inclusion of a specific provision of the common maritime transport policy, and although during that period, the Member States continued with individual maritime transport policies, from that moment on, every activity of the Member States in practicing the maritime transport policy was subject to compatibility with the General Provisions of the Treaty. Any practices within the sector of the maritime transport policy, whether they concerned the common acts of the EU or individual acts of the Member States, had to comply with the requirements specified in the General Provisions of the Treaty.

Another crucial moment in the creation of the CMTP occurred in the Case 13/83¹⁴, where the European Parliament, prompted by the failure to achieve the CTP, and with the consent of the Commission, filed a claim against the Council before the Court of Justice, an action that represents a benchmark in the relationship between the two bodies. The verdict brought two fundamental conclusions. First, the Council was not held responsible for the failure to achieve a common maritime transport policy since such a policy is not defined in the Treaty. Secondly, the Council was made responsible for the failure to ensure freedom to provide services within the Community, including cabotage services. A direct consequence of this decision was reflected in the imposition of an obligation on the Council to formulate, as soon as possible, a basis for the CMTP. At the same time, the Commission was asked to propose concrete measures for the improvement of the transport sector.

ii. Policy Packages

The direct result of the previously mentioned judgment was the *1985 First Package of Commission's Proposals*, bringing forward a set of directives and regulations aimed at regulating the transport sector. A focus was placed on the liberalization of the transport sector and the measures against the disloyal competition in the maritime sector. A close follow-up to the First Package was the so-called *1986 Bruxelles Package*, in which some of the previously mentioned proposals were adopted in the form of four regulations, dealing with the liberalization of navigation and carriage of cargo (the cabotage was not included in that package), measures made available to the Member States to tackle the problem of disloyal competition, and restriction measures made available against the third countries, whose shippers and shipowners enjoy exclusive protectionism in their waters (the liner

¹⁴ Case C- 13/83, *Parliament v Council*, [1985] ECR 1513, [1986] 1 CMLR 138.

conferences were excluded). The *1989 Second Package of Commission's Proposals* focused on the attempt to establish a *Euros Ship Registry* (never successfully adopted), and the opening of the sea cabotage (carriage of passengers by sea), the later proposal being adopted in 1992, with specific postponements from the application for individual countries (the last postponement, approved for the Greek islands, ended in 2004)¹⁵.

iii. Horizontal Approach

Up to this point, the EU efforts in formulating the CMTP had addressed specific issues, which were deemed necessary to tackle. However, the overall success in adopting and enforcing the aforementioned measures provided a new incentive to approach the CMTP from a different angle, looking at the overall strategy of the European maritime industry development. A new, horizontal approach was adopted, aiming at regulating specific maritime sectors, yet keeping in mind the common goals and perspectives for the future. The EU has undertaken to specifically formulate, regulate, and where possible harmonize, the following areas: safety of navigation; Port State Control and European Port Policy; the protection and preservation of

¹⁵ The list of the measures from aforementioned period: Council Regulation 4055/86 applying the principle of freedom to provide maritime transport services between Member States and between Member States and third countries [1986] OJ L 378/1; Council Regulation 4056/86 applying Articles 85 and 86 of the Treaty to maritime transport [1986] OJ L 378/4; Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport. OJ 1986 L 378/14; Council Regulation 4058/86 on co-ordinating actions to safeguard free access to cargoes in ocean trades [1986] OJ L 378/21; Commission Proposal for a Council Regulation establishing a Community ship register and providing for the flying of the Community flag by sea-going vessels [1989] OJ C263/11; Commission Proposal for a Council Regulation on a common definition of a Community Shipowner [1989] OJ C263/16; Commission Proposal on a Council Regulation applying the freedom to provide services to maritime transport within Member States [1989] OJ C263/17; Council Regulation 613/91 on the transfer of ships from one register to another within the Community [1991] OJ L 168/1; Council Regulation 479/92 enabling the Commission to grant a group exemption to liner consortia [1992] OJ L 53/3; Council Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (cabotage) [1992] OJ L 264/7; Commission Regulation 870/95 on the application of Article 85(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) pursuant to Council Regulation 823/2000 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) [2000] OJ L 100/24; Commission Communication and Proposals - Progress towards a Common Transport Policy - Maritime Transport, COM(85)90 final, 19th March [1985] OJ C212/2; COM(85)90 - First Package of EU Measures; Commission Communication - A Future for the Community Shipping Industry: Measures to Improve the Operating Conditions of Community Shipping, COM(89)266 final, 3rd August [1989] OJ C263/11-18; COM(89)266 - Second Package of EU Measures.

the marine environment, measures to prevent and fight terrorism and piracy at sea; health and working conditions of maritime labor, rights of passengers carried by sea; the abolishment of liner conferences; sea cabotage; the promotion of carriage by sea; regulation of State Aid in the maritime sector; and other important issues.

C. Current Perspectives

All the previously mentioned measures were preceded by so-called “*strategic documents*” that formulate the goals to be achieved within a certain period of time, and specify the means of achieving those goals. For example, in 1996, the Commission published two such documents¹⁶ that announced strengthened regulation in the field of safety of navigation, a further liberalization of the maritime market, the regulation of State Aid in the maritime sector, the continuation of the Port Policy regulation, and the introduction of the so-called “*Short Sea Shipping*”. In 2001, the “*White Paper – European Transport Policy for 2010*”¹⁷ provided a complex system of around 60 measures aimed at the general improvement of the European transport system, including the maritime sector. The White Paper emphasized the need for strengthened rules on maritime safety, called for enhanced cooperation with the International Maritime Organization and the International Labor Organization concerning minimum labor rules, encouraged the development of the genuine “*European Maritime Traffic Management System*”, and expressed the need for the development of the “*Motorways of the Sea*” program, that would promote the European sea transport as a competitive alternative to the European land transport.

The latest strategic objectives for the European maritime sector are presented in the “*Communication from the Commission setting the goals to be achieved by the 2018*”¹⁸. Having in mind the steady increase in the volume of transport of cargo and passengers by sea, it is vital to ensure safe navigation, quality of ships that enter the European

¹⁶ Commission, *Towards a New Maritime Strategy*, available at: ftp://ftp.cordis.europa.eu/pub/transport/docs/strategy_en.pdf - last visited on the 19th of September 2011; *Shaping Europe’s Maritime Future - A Contribution to the Competitiveness of Europe’s Maritime Industries*, available at: http://aei.pitt.edu/3988/01/000094_1.pdf, last visited on 25 September 2011.

¹⁷ Commission, *White Paper - European Transport Policy for 2010: time to decide*, available at: http://ec.europa.eu/transport/strategies/2001_white_paper_en.htm, last visited on 25 September 2011.

¹⁸ Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Strategic goals and recommendations for the EU’s maritime transport policy until 2018*, available at: http://ec.europa.eu/transport/strategies/2018_maritime_transport_strategy_en.htm, last visited on 25 September 2011.

waters, competitiveness of the European shipowners, and international cooperation in achieving common goals. The proposed measures, “... *based on the core values of sustainable development, economic growth and open markets in fair competition and high environmental and social standards*”¹⁹, are set to meet the challenges of the 21st century.

Bearing in mind the figures mentioned at the beginning of this chapter, it is obvious how important the maritime transport is for the successful realization of the global trade. It necessitates constant improvement in the quality of navigation and transport services and technology, to meet market expectations. At the same time, constant increase in the density of maritime traffic increases the marine environmental risks. These risks and measures aimed to prevent them, or reduce their negative effects, are the focal point of the next chapter.

2 THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

Having in mind the overall pollution of the environment and negative effects that human activities cause to the fragile eco-system, it is not the least surprising that the protection of environment is reaching its momentum as a top priority of the international community. Negative impacts to the marine eco-systems have particularly increased in the last few decades. Large tanker and bunker ship disasters create a number of negative results²⁰, including the pollution of the sea and seabed from oil (and hazardous and noxious substances’) spills. Other vessel-source types of marine pollution include discharges of oil, dumping of ship waste, ballast waters, and hazardous and noxious substances’ discharges. Apart from the vessel-source pollution, a considerable marine pollution is derived from the land-based pollutant sources, fisheries, ocean dumping, and other. The overall negative impacts on the marine flora and fauna are considerable, and, unfortunately, the consequences remain, in great part, irreversible.

This section of the Paper examines the CMTP’s capability to secure and protect the European waters. The aim is to determine how successful the CMTP is in fulfilling the set goals, what sort of obstacles are to be expected, and how this European effort corresponds to the international and multilateral framework of environmental

¹⁹ *Commission, supra note 18*, p. 13.

²⁰ Other negative results include: human injury or death (crew and passengers), damage to the ship and cargo, third party losses (collisions, negative impacts for tourism and fishing, etc.), and insurance issues.

protection. A special focus is directed towards the norms that regulate the protection of the marine environment from pollution by the spills.

A. The International Legal Framework of the Marine Environment Protection

The Union's competence in regulating the maritime sector is limited due to the Member States' desire to keep the autonomy in this field, coupled with an inherent fear that too much regulation could bring upon negative effects to the EU shipping industry²¹. Therefore, an emphasis has to be put on the existing international regulation in these matters, out of which the 1982 United Nations Convention on the Law of the Sea (UNCLOS)²² plays a crucial role.

UNCLOS, as Frank states, "... *established the environmental regime based on the combination of the jurisdictional rules of the law of sea with objectives, principles and approaches of international environmental law*"²³. Part XII of UNCLOS defines the rights and obligations of States in cases of marine pollution. States are bound to protect and preserve the marine environment (Article 192 of UNCLOS), but are at the same time given sovereign rights of exploitation of natural resources in specific maritime zones (Article 193 of UNCLOS). Emphasis is placed on the cooperation of States in order to successfully tackle the threats to the marine environment (Article 197 [and 123 – regional cooperation] of UNCLOS). The European Union became a party to the UNCLOS in 1998²⁴.

International law achieved significant progress in the protection and preservation of marine environment in the past 30 years. Prior to the UNCLOS, the 1972 Declaration of the United Nations Conference on the Human Environment²⁵ stipulated the State responsibility in the prevention of marine pollution. As a direct result of this Declaration, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter²⁶, which deals with ocean dumping and other

²¹ Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea*, pp. 2 and 5.

²² <http://www.un.org/Depts/los/index.htm>, last visited on 25 September 2011.

²³ Frank, *supra note 21*, p. 16.

²⁴ For more information on the subject, see: http://ec.europa.eu/maritimeaffairs/speeches/speech76_en.html, last visited on 25 September 2011.

²⁵ Text available at: <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>, last visited on 25 September 2011.

²⁶ More information on the subject available at: <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-the-Prevention-of-Marine-Pollution-by-Dumping-of-Wastes-and-Other-Matter.aspx>, last visited on 25 September 2011.

sea pollutants, came into existence (later to be merged into the OSPAR Convention [see below]). Another significant international instrument is the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL)²⁷, which represents the most important international effort to combat the vessel-source pollution. Its broad global acceptance is additionally supported by the fact that all the EU Member States are signatories. However, unlike the UNCLOS, the Union is not a contracting party to this Convention (for more on this subject, see the next chapter). In close connection is the 1974 International Convention for the Safety of Life at Sea (SOLAS)²⁸, another major international instrument, dealing with the safety of navigation of merchant fleets. Other important international treaties include the 1992 International Convention on Civil Liability for Oil Pollution Damage (CLC)²⁹; the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention)³⁰; the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention – not in force)³¹; the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage

²⁷ More information on the subject available at: [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx), last visited on 25 September 2011.; For more on MARPOL see *Rothenberg/Nicksin*, Latest Developments in International Maritime Environmental Regulation, pp. 138-140.

²⁸ More information on the subject available at: [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-\(solas\)-1974.aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas)-1974.aspx), last visited on 25 September 2011.

²⁹ More information on the subject available at: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx), last visited on 25 September 2011. For more on the connection of the CLC and the marine environmental protection, see: *Foley/Nolan*, The Erika Judgment – Environmental Liability and Places of Refuge: A Sea Change in Civil and Criminal Responsibility that the Maritime Community Must Heed, pp. 43-47; CLC definition of pollution damage: “*Article I(6): (a) loss or damage caused outside the ship by contamination resulting from the discharge from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than losses of profit from such impairment shall be limited to costs or reasonable measures of reinstatement actually undertaken or to be undertaken; (b) the costs of preventive measures and further loss or damage caused by preventive measures*”.

³⁰ More information on the subject available at: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-\(FUND\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-the-Establishment-of-an-International-Fund-for-Compensation-for-Oil-Pollution-Damage-(FUND).aspx), last visited on 25 September 2011.

³¹ More information on the subject available at: <http://www.imo.org/about/conventions/listofconventions/pages/international-convention-on-liability-and-compensation-for-damage-in-connection-with-the-carriage-of-hazardous-and-noxious-.aspx>, last visited on 25 September 2011.

(Bunkers Convention)³²; and the 1976 International Convention on Limitation of Liability for Maritime Claims (LLMC)³³, as amended by the 1996 Protocol. These last mentioned Conventions primarily deal with compensation issues, but they also serve as a deterrent against a behavior that leads to polluting activities³⁴.

The multilateral approach, applied in the regional context, plays an additional important role in regulating the European system of marine environment protection and preservation. The 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources³⁵, which regulated the marine pollution from land-based sources, was fully replaced, together with the 1972 Dumping Convention (as stated above), by the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)³⁶. The Union is a contracting party to the Convention. Another important regional treaty is the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention)³⁷, a prime marine protection tool for the Baltic Sea area. The Union is one of the contracting parties. Finally, the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention)³⁸ deals with the same matter, but in the Mediterranean Sea. The Union is also one of the contracting parties, and additionally, this Convention represents the first United Nations Environment Programme Regional Seas Programme.

The Union approach towards the implementation of different layers of international legislation depends on the subject of regulation. When it comes to the ques-

³² More information on the subject available at: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-\(BUNKER\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Bunker-Oil-Pollution-Damage-(BUNKER).aspx), last visited on 25 September 2011.

³³ More information on the subject available at: [http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-\(LLMC\).aspx](http://www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-Limitation-of-Liability-for-Maritime-Claims-(LLMC).aspx), last visited on 25 September 2011.

³⁴ For more on the subject, see: *Smeele*, International Civil Litigation and the Pollution of the Marine Environment, pp. 77 – 118.

³⁵ Text available at: <http://www.opcw.org/chemical-weapons-convention/related-international-agreements/toxic-chemicals-and-the-environment/marine-pollution-from-land-based-sources/>, last visited on 25 September 2011.

³⁶ 98/249/EC: Council Decision of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic, OJ L 104.

³⁷ 94/157/EC: Council Decision of 21 february 1994 on the conclusion, on behalf of the Community, of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention as revised in 1992), OJ L 73.

³⁸ 1999/800/EC: Council Decision of 22 October 1999 on concluding the Protocol concerning specially protected areas and biological diversity in the Mediterranean, and on accepting the annexes to that Protocol (Barcelona Convention), OJ L 322.

tion of the vessel-source pollution, the Union and the Member States rely on the International Maritime Organization (IMO) standards as set through the MARPOL, SOLAS, CLC and Bunker Conventions. The regional approach applies in the European waters, where the Member States prefer cooperation among the adjunct coastal states (as was demonstrated in the previous paragraph, the Union applied the regional approach to each of the three significant maritime clusters surrounding the EU, namely, the Baltic Sea, the North Atlantic Ocean, and the Mediterranean Sea). Since the adoption of international instruments usually implies the ratification and the subsequent inclusion/specification in the specific national legislation, the international standards usually represent minimal criteria or maximal penalty imposition to be adhered to. A specific Union regulation can be observed in particular fields where the EU deems necessary to adopt specific EU regulation, such as is the example of the marine habitats protection. Some of the aforementioned treaties will be examined in more detail in the later text.

B. The EC Legal Framework of the Marine Environment Protection

Although the Environmental Policy as such has not found its place in the 1957 Treaty of Rome, a number of initiatives in the 1970s strengthened its position among the Member States. This effort was conducted through a series of directives, as the most commonly used instrument in the EU environmental law. Council Directive 67/548/EEC on Dangerous Substances³⁹ was the first environmental directive of the EU. Maritime pollution was recognized as a major environmental threat in the 1973 *First Environmental Action Program*⁴⁰. The 1977 *Second Environmental Action Program*⁴¹ states actions necessary for controlling the pollution. In the 1983 *Third⁴² Environmental Action Program*, attention was focused on the pollution prevention. However, it was still difficult to establish a legal basis for the Union environmental protection.

An obstacle to further development in this direction was the confrontation between the national law and the EC policy competences. This problem requires further explanation. According to Article 5(1) EC, the Community may act within the

³⁹ Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances, OJ L 196.

⁴⁰ First Environmental Action Program, 22.11.1973, OJ C112.

⁴¹ Second Environmental Action Program, 17.5.1977, OJ C139.

⁴² Third Environmental Action Program, 17.2.1983, OJ C46/1.

limits of the powers conferred upon it by the Treaty, meaning that the Community has competence within the area of granted power. The principle of subsidiarity will be applied in areas that do not fall within the Community's exclusive competences. The Community may take legislative action only if the objective of that action cannot be sufficiently achieved by the Member States, and can thus be better achieved at the Community level. The principle of proportionality, Article 5(3) EC, defines the limits of the Community action⁴³. In the area of environment, Community does not have exclusive competences. The competences are shared in the area of the marine environmental protection. Both the Community and the Member States are entitled to act at the international level, (e.g. in accordance with Article 174(4), to negotiate in international bodies and to conclude international agreements). According to the Article 300(7) EC, the conclusion of international agreements among the Community and one or more States or international organizations under the conditions laid down in the EC Treaty are binding to both, the institutions of the Community and the Member States. Upon ratification, an international agreement becomes an integral part of the Community's legal order. The Member States cannot operate independently, but rather in conformity with the EC law under requirements stated in Article 10 EC. The Member States are obliged to cooperate with the Community institutions and coordinate their actions in international organizations and at international conferences, as stated in Article 19 EU. Regardless of a number of ambiguities regarding the shared competences issue, and although the shared competence institution gives great freedom of action to the Member States, the Community is responsible for most of the environmental issues. Having this in mind, the leading maritime European nations attempted to maintain independence at the international level, and at the same time obstructed the establishment of a comprehensive policy under which the Community would be involved in the maritime matters (they have been using the subsidiarity and proportionality principles)⁴⁴. In order to circumvent conflicts with its Member States, the Commission decided to rely on the "... *existing international instruments for the protection and preservation of the marine environment*"⁴⁵.

A further important step in the establishment of the EC environmental policy was the introduction of the qualified majority voting in the 1987 *The Single Euro-*

⁴³ Article 5 (3): "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

⁴⁴ There are other reasons for the lack of comprehensive rules in the field of the marine environmental protection, such as the institutional fragmentation resulting from a low level of cooperation, which slows down the work. Both the multilateral and the sectoral approach contributed to a specific disorder in ocean preservation, due to the circumvention of an integrated approach.

⁴⁵ Frank, *supra* note 21, p. 412.

pean Act⁴⁶, a change that made the introduction of new acts much simpler than the previous unanimous vote qualification, thus making it easier to implement, inter alia, the environmental legislation. The *1992 Maastricht Treaty*⁴⁷ emphasizes the promotion of the sustainable growth and high level of environmental protection (Article 2). The co-decision procedure was introduced in the area of environmental protection (Article 251). However, the tensions between the supranational and national policy competences were not eliminated. The *1997 Treaty of Amsterdam*⁴⁸ added a task of ensuring a “... high level of protection and improvement of the quality of the environment” to Article 2, and introduced (Article 6) an environmental “integration clause”, according to which the environmental protection requirements should be integrated into the definition and implementation of other Community policies. The *2009 Treaty of Lisbon*⁴⁹ fully recognizes the importance of the environmental protection and highlights the need for a constant enhancement of the protection agenda quality. It marks a significant shift from previous objectives that have only concentrated on the preservation of environment.

In the recent years, a visible movement towards the acceptance of an Integrated Ocean (Maritime) Policy may be observed. *Sixth Environmental Action Program*⁵⁰, in a comprehensive program from 2001 to 2012, provides for an enhanced care of the marine environment⁵¹. In 2002, the Commission delivered a Communication “*Towards a strategy to protect and conserve the marine environment*”⁵², with the main objective to promote sustainable development of the World’s oceans, as well as the protection of their biodiversity. In 2005, the Commission announced the European Marine Strategy⁵³ aiming at preventing further human adverse effects on the environment, ensure the preservation of clean oceans and seas for fu-

⁴⁶ Single European Act (SEA), OJ L 169; For more on the subject, see: *Cichowski*, in: Max-Planck-Projektgruppe, p. 4.

⁴⁷ Treaty on European Union (Maastricht Treaty) OJ C 191.

⁴⁸ Treaty of Amsterdam, OJ C 340.

⁴⁹ Treaty of Lisbon, OJ C 306.

⁵⁰ Sixth Environmental Action Program “*Environment 2010: Our Future, Our Choice*” OJ L 242.

⁵¹ For the progress of the Program, see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/996&format=HTML&aged=0&language=EN&guiLanguage=en>, last visited on 25 September 2011.

⁵² Communication from the Commission to the Council and the European Parliament of 2 October 2002, “*Towards a strategy to protect and conserve the marine environment*” [COM(2002) 539 final – Not published in the Official Journal].

⁵³ Proposal for a Directive of the European Parliament and of the Council establishing a Framework for Community Action in the field of Marine Environmental Policy (Marine Strategy Directive), COM(2005) 505 final, SEC 2005/0211 (COD).

ture generations, and encourage the Member States to further implement the international maritime conventions. These developments influenced the shift from the earlier restrained attitude of the Member States towards more harmonized Community rules, and contributed to the establishment of a comprehensive Maritime Policy. In 2007, the European Parliament approved the *Strategy for Protection and Conservation of the Marine Environment*⁵⁴, better known as the *Integrated Maritime Policy* (IMP)⁵⁵. The IMP aims to establishing by the year 2020 - marine regions and sub-regions managed by the Member States, in accordance with the specifically designed environmental safety criteria. In order to support this effort, a comprehensive set of new legislation is expected, including the provisions on the control of the greenhouse gas emission and air emissions, the dismantling of ships and the disposal of hazardous waste, fisheries controls, coastal zone management, and a coordinated enforcement plan⁵⁶.

i. Environmental Liability

After the Erika disaster⁵⁷, the issue of responsibility and liability for the environmental damages was further intensified. The main objective of the Commission was to increase vigilance and impose greater accountability in an effort to avoid adverse consequences for the environment. The *White Paper on Environmental Liability*⁵⁸, published by the Commission, reaffirmed the “polluter pays” principle of compensation for the damage to persons and goods, damage from pollution, and damage caused to nature. Having in mind Article 174 of the EC Treaty, its endorsement of the “polluter pays”, and other adopted preventive and precautionary principles, the Commission endeavored to propose the establishment of a system that would successfully improve the chances of avoiding environmental damage. The Paper analyzed different ways to create an EC environmental liability regime,

⁵⁴ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine, OJ L 164/19. For more information see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0540:FIN:EN:PDF>, last visited on 25 September 2011.

⁵⁵ For more on the Integrated Maritime Policy, see *Rothenberg/Nicksin, supra note 27*, pp. 157 – 160.

⁵⁶ For more on the subject, see: *Rothenberg/Nicksin, Ibid.*, p. 137. For more concrete measures, see: White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0144:FIN:EN:PDF>, last visited on 25 September 2011.

⁵⁷ *Foley/Nolan, supra note 29*, pp. 41-78.

⁵⁸ Commission, White Paper on environmental liability, COM(2000) 66 final; available at: http://ec.europa.eu/environment/legal/liability/white_paper.htm, last visited on 25 September 2011.

with the emphasis on improving the environment and an enhanced application of environmental principles in the EC Treaty. The importance of this document is that it emphasized the need to impose the responsibility of the polluters, which need to bear the financial consequences. Such an EC environmental liability regime, according to the Commission, should cover various forms of damage - damage caused to the individual, environment, cargo, protected animals and protected areas. What the Commission saw as a serious issue was the lack of awareness of the need for environmental protection, both on an individual, as well as on the collective awareness basis. If changes are to be successfully implemented, the introduction of liability for causing threat to the environment should produce changes in the behavior of the people, resulting in increased vigilance. The White Paper proposed two types of liability: fault-based liability, which refers to the damage to biodiversity caused by a non-dangerous activity; and strict liability, which refers to the damage resulting from dangerous activities. The following conditions were proposed as necessary in order to establish the liability of the perpetrator: the identification of the polluter, quantifiable damage, and casual link between the polluter and the damage⁵⁹.

The Paper highlighted the importance of the engagement of the Member States to ensure the decontamination and restoration of the environment. At that time, the legal systems of the Member States contained no direct provisions on environmental liability. The existent individual norms applied only to the damage caused to property or human health. It was therefore deemed necessary to establish an environmental liability regime within the national legal system of the Member States, which would cover at least the damage to natural resources that are protected by the Community legislation such as “*Wild Birds*” and “*Habitats*” Directives⁶⁰. According to the Commission, the Community regime should keep in mind the following criteria: no retroactivity, coverage of the environmental damage (damage to biodiversity and damage in the form of contamination of sites), coverage of the traditional types of damage, including damage to health that is closely linked to environmental protection. The Commission however warned that the Community liability regime should avoid having negative impact on the EC’s external market competitiveness of the Member States’ industry. Having in mind the specific needs of the maritime industry, it is possible to imagine negative effects on the Member States’ shipping

⁵⁹ *Commission, Ibid.*, p. 2.2.

⁶⁰ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, OJ L 103, and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206.

industry, imposing on the European shipowners financial burdens that could make them less competitive on the market (more on this subject will be discussed in the later text).

The most important outcome of the Paper, recognizing the effects of the increased awareness of environmental liability in the European Community, was the adoption of Directive 2004/35 on Environmental Liability⁶¹. The Directive is applicable in cases of “*environmental damage*” (defined in Article 2⁶²) caused by one of the activities listed in Annex III. The Directive focuses on the “*polluter pays*” principle, defining the polluter as the operator of the economic activity. A competent authority, determined by a Member State, is responsible for the enforcement of the Directive in each Member State. Its task is to find the perpetrators of damage, take (or demand from the polluter to take) appropriate preventive and/or remedial measures and oversee their implementation. Such a body can file a civil liability claim against the polluter (shipowner, charterer or a vessel operator)⁶³. The polluter is obliged to take such preventive and/or remedial measures in case of an imminent threat, and to inform the competent authority about such actions. In case of environmental damage, remedial measures have to be taken. The polluter is required to present to the competent authority a plan of potential remedial measures, so that the competent authority can decide which measures are most appropriate to be taken.

The Member States have to present reports to the Commission by the end of April 2013; the reports should highlight the experience gathered through the application of the Directive. This is seen as a key moment in the further Union legislation. Should the Member States’ responses be favorable towards the proposed measures, the Union might propose a regulation that would be directly applicable in the Member States’ national legislation, thus creating the exact legal order as envisaged by the Union legislators.

⁶¹ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143; For more on the Directive, see: *Carbone/di Pepe*, Uniform Law and Conflicts in private Enforcement of Environmental Law: the Maritime Sector and Beyond, pp. 21-51, 42-46.

⁶² “*Environmental damage*” regarding the maritime context: “(a) *damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favorable conservation status of such habitats or species*”; For more on the impact of the Directive, see: *Nesterowicz*, The application of the Environmental Liability Directive to damage caused by pollution from ships, pp. 107 – 118.

⁶³ For a good study of the compensation for environmental damage, see: *La Fayette*, Compensation for Environmental Damage in Maritime Liability Regimes, pp. 231 – 265.

3 OIL POLLUTION

The main objective of this chapter is to identify legal options available in the European legislation to protect the European coasts against pollution caused by ships, especially those transporting oil as cargo.

Pollution resulting from oil and/or hazardous and toxic substances in the event of maritime accidents, discharges of dangerous substances through the routine operation of the ship (including the risk of ballast waters transporting invasive species that threaten marine habitats), and other forms of pollution of the marine environment, are a subject of constant review by the international and the European Community. The aim is to reduce harmful effects to the environment, usually through enhancing the safety rules of navigation, but also through the use of modern technology that significantly reduces the various forms of risks to the environment.

The events like great tanker disasters of *Torrey Canyon*, *Amoco Cadiz*, *Exxon Valdez*, *Erika* and *Prestige*, or similar catastrophes, such as the Deepwater Horizon spill, steer the public opinion towards greater expectations from politics to derive new and better policies in tackling oil pollution issues. Given the drastic natural and financial consequences that follow these accidents, such a high level threat requires a set of comprehensive legislation at the national, supranational and international level. But despite both the quantity and quality of the legislation, sub-standard shipping, hazards of the sea, and human errors demand an ever-present watchfulness.

The central focus of regulation in this field is placed on improving the maritime safety legislation and promotion of high-quality standards necessary to be adhered to. A problem remains with individual shipowners and ship operators, who do not respect the rules, and whose irresponsible behavior places others in danger. Such a behavior (disregarding general rules in order to realize greater profits, neglecting at the same time the protection of the environment and endangering others) is a major threat. Additionally, the high congestion of the European waters includes many ships flying third-country flags that do not match the legislation standards of their European counterparts.

A. Security Packages

In December 1999, the tanker *Erika* became a shipwreck, resulting in 19,800 tons of spilled oil that caused a substantial material damage in several European coastal countries. This occurrence inscribed a lasting mark over the necessity of continuous efforts to enhance navigation security measures. The analysis, conducted

after the catastrophe, demonstrated that the European coastal states had inadequately implemented measures aimed at the control of the ship's operational and security capabilities, and that too much reliance was placed on the work of the classification societies.

Soon after the disaster, the Commission had proposed the first “*security package*” set of directives and regulations, called *Erika I Package*⁶⁴, that introduced the enhancement of control and testing performed by the Port State, established a stricter system of supervision over the work of classification societies and determined a deadline for the termination of the use of tankers with a single plating.

This was, however, only the beginning of the security norms enhancement. *Erika II Package*⁶⁵ followed, with an emphasis on the establishment of the *European Maritime Safety Agency* (EMSA). Further novelties included a proposal for the establishment of an additional (regional) European fund to cover damages resulting from oil spills at sea (the proposal was dropped after the appropriate changes in the CLC system), voluntary agreement of oil companies on the maximum age of ships that are chartered, and a system of detection and monitoring of ships carrying dangerous cargo. Regulation 1406/2002 established EMSA. EMSA monitors the technical, legal and scientific aspects of navigation safety in the European waters. Additionally, EMSA oversees the implementation of European standards on the safety of navigation in the Member States, advises the Commission on technical and scientific aspects of maritime safety, and organizes training projects and the training for the staff responsible for the implementation of security measures. Frank reminds that EMSA proved to be a very effective instrument in the implementation of the EC maritime safety rules⁶⁶.

⁶⁴ Directive 2001/106/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 95/21/EC concerning the enforcement in respect of shipping, using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (Port State Control Directive), OJ L 19/17; Directive 2001/105/EC of the European Parliament and of the Council of 19 December 2001 amending Council Directive 94/57/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations (Text with EEA relevance), OJ L 19; Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94 OJ L 64.

⁶⁵ Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (Text with EEA relevance), OJ L 208.

⁶⁶ Frank, *supra* note 21, p. 248.

In March 2009, the final, third maritime safety package, *Erika III Package*⁶⁷, was adopted. The Member States are required to implement, by the end of 2010, provisions concerning: the Flag Ship quality standards; the standards for classification societies; the Port State Control norms; traffic monitoring; accident investigation at sea; the carrier's liability (in accordance with the 2002 Protocol to the Athens Convention), and the shipowner's insurance provisions. Having in mind that the proposed measures are the most recent measures to be adopted by the EU, and that all of them directly influence the safety of shipping and thus decrease a possibility of further oil spills, a brief overview of most of the measures follows.

Directive 2009/21 on compliance with the Flag State requires that the ships under the European flag comply with international standards. More specifically, this primarily reflects the availability of information about the vessel; the compliance with international rules over the detention of the vessel; the inspection of ships in accordance with IMO standards; and a necessity of reporting to the Commission in a case of two-year consecutive appearance of flags on the so-called “black” and “gray” lists.

Directive 2009/15 and Regulation 391/2009 deal with the issue of classification societies. The Directive requires cooperation among the Member States and classification societies regarding the standards of classification and review of the ships, while the Regulation requires the fulfillment of minimum requirements for the

⁶⁷ 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; 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 organizations and for the relevant activities of marine administrations, OJ L 131/47; 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 organizations (Text with EEA relevance), OJ L 131; Directive 2009/17/EC of 23 April 2009 amending Directive 2002/59/EC establishing a Union vessel traffic monitoring and information system, OJ L 131; Directive 2009/18/EC of the European Parliament and of the Council of 28 May 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; Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on Port State Control, OJ, L 131; Directive 2009/18/EC of the European Parliament and of the Council of 28 May 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; 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 organizations (Text with EEA relevance), OJ L 131; Directive 2009/20/EC of 23 April 2009 on the insurance of shipowners for maritime claims, OJ L 131; Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents, OJ L 131/24; For more on the Package, see: *Chuah, The Third EU Maritime Safety Package - Objectives and Challenges*, pp. 271-273.

quality of operation of classification societies (the Regulation introduces criminal sanctions in case of violation of these provisions by classification societies).

Directive 2009/16 amends the current regime of the Port State Control. A more stringent control of ships is required, including the control of ships that enter a specific harbor on random occasions. Prohibition is imposed on all ships that do not meet the security standards (the owners of such ships are automatically placed on the “*blacklist*”, which implies a more frequent and strict control of other ships of the same shipowner or operator). Finally, a system of training for ship security supervisors is introduced.

Directive 2009/17 builds on the existing Directive 2002/59 on establishment of a marine traffic monitoring and information system, which requires a determination of the so-called “*Ports of Refuge*”⁶⁸, specially defined places on the coast (or, in the case of the UK, the whole coast), where the vessels that are threatened by a possibility of a marine distress, can be positioned, in order to suppress or limit possible pollution of the marine environment⁶⁹. The novelty lies in the application of the standardization of financial guarantees and system design liability with regards to vessels that are found in such places.

Parallel to this, it is expected from the Member States to establish an independent body, whose task is to manage the operations of assistance to distressed ships at sea. Regarding the competences that such a body should possess, the following proposals are mentioned: restrictions on the movement of such a ship, directing the movement route of such a ship; determining the towing or pilotage; directing the ship to the “*Port of Refuge*”, the placement of an expert team on board for evaluation of possible risk of damage; and the issuance of a warning to the ship master to stop or prevent the pollution of the environment or endangering the safety at sea.

Other novelties are related to: a request of the installation of automatic identification systems on fishing boats longer than 15 meters (fully implementing the project “*The Network of Safe Sea*”), the establishment of a “*European Centre for a Long-Range Observation and Monitoring*”, in order to track and monitor vessels at further distances, and the establishment of a system of monitoring ice on the sea. The ability to monitor vessels increases the possibility of the coastal state to tack the polluters and impose liability and compensation for damages, thus making a huge impact as a further deterrent against irresponsible behavior.

Directive 2009/18 calls on the Member States to comply with the rules established by the IMO Code regarding investigations of accidents at sea, and the establishment of a EU database on accidents and incidents at sea.

⁶⁸ For more on the “*Ports of refuge*”, see: *Foley/Nolan, supra note 29*, pp. 41-78.

⁶⁹ For more on the subject, see: *Foley/Nolan, Ibid.*, pp. 55 - 60.

Directive 2009/20 binds all owners of ships above 300 gross tons to secure their vessels in accordance with the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims. Furthermore, an option of detaining the ships that are not able to produce insurance documents is introduced. The Directive comes into force in January 2012, when it is expected from all the Member States to ratify the mentioned Protocol.

Having in mind that the majority of the previously described norms are situated within the instrument of “*directive*” framework, it is up to the Member States to implement the agreed novelties. As Chuah remarks⁷⁰, the division of responsibilities between the EU and the Member States clearly indicates that the focal point of maritime sector’s safety and security still relies on the will and effort of individual Member States.

B. Penalties for Infringement – Directive 2005/35 on Ship Source Pollution

Following another major European tanker disaster in 2002, the *Prestige*, resulting in 30,000 tons of spilled oil, the Commission decided to strengthen the anti-pollution legislation by introducing criminal penalties for the pollution infringements. Despite a significant resistance from the maritime industry, the Directive 2005/35/EC on Ship-source pollution and on the introduction of penalties for infringements⁷¹ was adopted. This Directive regulates the pollution from ships through an introduction of criminal (or administrative) sanctions against legal and natural persons (as finally resolved by the 2009 amendment⁷²) who, with intent, recklessly or by serious negligence, cause the pollution from ships⁷³. Although MARPOL regulates the same field, the lack of clear EC discharge standards (the Union is not a Contracting Party

⁷⁰ Chuah, *supra* note 67, p. 273.

⁷¹ Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on oil pollution and on the introduction of penalties for infringements, OJ L 255/11.

⁷² Regarding the implementation of the Directive, the Council adopted a Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of law against ship-source pollution, OJ No. L 255/164, which intended to further regulate the criminal law sanctions. However, the ECJ declared the Decision void; Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements, OJ L 280/52 obliges the Member States to provide criminal sanctions for polluters under their own legislation.

⁷³ The Directive applies to discharges of polluting substances from any ship that includes various types of movable and immovable vessels, excluding only the military ships and state-owned vessels not used for commercial purpose.

to MARPOL) and the absence of a clear enforcement mechanism of the MARPOL conditions (for those European countries that are Contracting Parties to the Convention) impelled the Commission to attempt to regulate this field more thoroughly.

As previously stated, the maritime industry reacted sharply against the adoption of the Directive. In the case *Intertanko and Others v. Secretary of State for Transport*⁷⁴, the ECJ was to determine whether the provisions of the Directive were contrary to the provisions of MARPOL and UNCLOS, and whether the introduction of the term “*serious negligence*” lead to legal uncertainty (according to the Prosecution, the English legal system does not recognize the term). However, the ECJ argued that the legal validity of the Directive could not be affirmed by a comparison with MARPOL because the European Union was not bound to MARPOL⁷⁵. Additionally, the Directive cannot be compared in such a manner with the provision of UNCLOS either, since UNCLOS has no specific provisions relating to the above questions. The reason behind the opposition to the Directive lies in the expressed opinion that the normal functioning of the shipping industry might face a serious jeopardy with the introduction of criminal penalties. The *Prestige* case suggests that there is a reason to worry (the automatic apprehension of the captain and the crew members, due to public pressures on the local government to quickly name and punish the culprits for the disaster). On the other hand, the case law, particularly the one before the English courts, clearly indicates a strict set of criteria necessary to be complied with in order to prove a certain degree of negligence or fault. Despite the rejection of the Court of Justice to pursue the rationale of the claimants, certain members of the maritime industry, such as the International Salvage Union, still continue to oppose and lobby against the implementation of the Directive⁷⁶.

In conclusion, the Directive, perceived from the perspective of protection of the marine environment and prevention of accidents at sea, marks a significant step forward in creating a safe and secure navigation. However, the Directive is limited in terms of possible partial application. MARPOL sets minimum standards for the Flag States, but if the Member States adopt more stringent rules in implementing the Directive, such rules will be valid only for ships flying their flag (due to the provisions of Article 307 of the EU Treaty, the Union regulations that are, in this case, stricter than MARPOL can not be applied to the non-EU members that are contract-

⁷⁴ Case C-308/06, *International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, [2008] ECR I-4057.

⁷⁵ For differences between MARPOL and UNCLOS, see: *Osante*, Competition and the European Union Directive on Criminal Penalties for Ship-Source Pollution, pp. 146-147.

⁷⁶ For an official ISU standpoint on the issue, visit: <http://www.marine-salvage.com/>, last visited on 25 September 2011.

ing parties to MARPOL). Thus, should the national implementation decide to make a step forward in comparison with the MARPOL rules, it will significantly reduce its scope of subject application. Having in mind the congestion of maritime traffic in the European waters, it is doubtful whether the Directive will provide enough coverage in order to assume a step forward in the actual marine environment and protection. At the same time, those affected by the rule of the Directive will find themselves in a detrimental competitive position as opposed to those whose ships sail under the original MARPOL rules. Having this in mind, there is a possibility that the number of ships flying the EU might decline, as the shipowners might embark to seek out the “*Flags of Convenience*”, or such flags that offer better business conditions.

4 CONCLUSION

The lack of experience and financial assets are the main reasons why some ships do not satisfy the safety and technical requirements. Some shipowners and ship operators willingly circumnavigate the requirements in order to save spending, and increase their profit. Such a behavior is both morally and legally corrupted. However, when safety and technical standards differ significantly from one Flag State to another, and the ships flying different flags navigate through the same maritime corridors, the financial burdens vary from one flag to another, thus creating a significant financial leverage on the side of those adhering to less-demanding requirements. Due to this reason, the phenomena of the “*Flags of Convenience*” continue to produce sub-standard shipping, and an increased risk of maritime accidents. The international law created a good basis of minimum criteria to be enforced on the World fleet, but the practical implementation of these rules lacks behind. Recognizing this, the European Union made a great effort to harmonize the implementation of international rules through the European law requirements, making sure that all of the Members States’ flag standards adhere to the same minimal standards, and that all ships passing through the European waters fulfill the same criteria. Once such rules are fully implemented, those who continue to avoid the legal requirements will face full responsibility and liability sanctions, including criminal penalties. This is not an economical or environmental question, but a product of legal logic inherent in every legal system. However, and going back to the previously stressed discrepancy, in situations where the European law imposes more demanding standards (requiring more investment and therefore more spending) than are those in the international regulation, the non-EU flags’ ships stand in comparative business advantage when competing with the EU flags’ ships in the European waters. It would be naive to

expect from one part of the shipping industry to disavow an allotment of its profit in the name of the marine environmental protection, whereas at the same, time the other part of the same industry collects higher income. Few examples, where (maritime) industry participates in public spending (such as is the example of the Fund Convention, where the oil industry contributes to the international funds for civil liability in case of an oil spill), imply the same level of engagement of all the concerned subjects.

At the same time, the political pressure arising from great tanker disasters, coupled with the common perception of the deteriorating global environmental conditions, made an impressive thrust towards strengthening the environmental legal and technical safeguards, marking the European law as one of the fore guards of the marine environmental protection.

Whereas the EU Member States like Spain and Portugal (which have experienced great maritime calamities and suffered serious financial compensation claims) tend to support the previously described thrust towards the establishment of a clear EC environmental policy, other Member States, like Greece and Denmark (which are a residential seat of numerous shipowner and related maritime companies) strive to secure best possible business environment for its “*clients*”.

The EC marine environmental policy needs to take both interests into account when considering what sort of measures to adopt. Having this in mind, the Commission has so far restrained itself from using the instrument of “*regulations*” when dealing with “*sensitive*” issues such as the ones described in the previous text. The preferred method is the instrument of “*directives*”, implementing the previously established international norms into the European law, and opening up the possibility of stricter rules and sanctions, should the individual Member States decide to enforce them in their respective national legislations. In this way, it is the Member States who have the final say in whether a more strengthened system of environmental legislation will find its way in the European national legislations. If strengthened measures prevail, a clear signal is given that the maritime industry is capable of bearing additional costs. However, the negative side of this method is the lack of the Union’s capability to enforce the environmental legislation in the exact manner as envisaged, since each Member State has an opportunity to enforce such measures in its national legislation, “*tailored*” to its own needs. Therefore, the “*shared competences*” issue could continue to prove to be a serious obstacle to further implementation of the EC marine environmental policy.

In the recent years however, it seems that the Member States and the Union have managed to cooperate successfully, the main outcome of this cooperation being the Integrated Maritime Policy, which aims at harmonizing economic needs with environmental requirements. As the “*European Maritime (Environmental) Law and*

Law of the Sea” is inter-crossed with numerous international, regional, EC and national legislations, it is of no surprise that a lot of issues remain open, and that legal uncertainty creates serious problems for all the concerned parties. The Integrated Maritime Policy marks a serious attempt to integrate all of the above-mentioned rules into a meaningful and unified entity of law, setting clear and uniformed rules and sanctions. With an exception of the Ship-Source Directive, it seems that the Member States are becoming more tolerable to an increased Union activity (mainly the Commission) in the field of maritime legislation, reaffirming the “*directive*” approach the Commission has chosen. The cooperation also proves that the Union proposals include serious consideration of the Member States’ and the industry stakeholders’ interests and needs.

If this new era of “*joint-venture*” of the Member States and the Union in creating the EC marine environmental policy continues, especially under the auspices of the Integrated Maritime Policy program, the EC marine environmental policy will surely take the leading position in the global efforts of the protection and preservation of the marine environment, and set standards to be adhered to when considering the future international harmonization of the environmental policy.

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Sažetak:

**ZAJEDNIČKA POMORSKA TRANSPORTNA POLITIKA EUROPSKE UNIJE
– ZAŠTITA I OČUVANJE MORSKOG OKOLIŠA**

Članak promišlja o utjecaju Zajedničke pomorske transportne politike Europske unije na razvoj Politike zaštite okoliša Europske unije. Proučava se međusoban odnos ekonomskih potreba država članica i sveobuhvatnog nastojanja Europske unije u zaštiti i očuvanju morskog okoliša. Europska unija kontinuirano značajno doprinosi svjetskim nastojanjima u zaštiti okoliša, što se posebno odražava u pomorskom sektoru kroz strogo pridržavanje međunarodno zadanih standarda, kao i kroz izvršavanje mjera koje često nadilaze minimalne kriterije postavljene međunarodnim i multilateralnim ugovorima. Takvi dodatni kriteriji mogu dovesti europske brodovlasnike i povezanu pomorsku industriju u nepovoljan kompetitivan položaj na svjetskom tržištu. Nadalje, omogućen je detaljni pregled međunarodnog, regionalnog i europskog zakonodavstva u zaštiti morskog okoliša s posebnim naglaskom na mjere usmjerene na sprječavanje onečišćenja uljem. Konačno, daje se opća ocjena uloženog napora Europske unije, imajući na umu trenutno zakonodavstvo i njegov utjecaj, kao i kratkoročne i dugoročne ciljeve politike zaštite okoliša Europske unije.

Ključne riječi: zajednička pomorska transportna politika Europske unije, politika zaštite okoliša Europske unije, zaštita i očuvanje morskog okoliša, onečišćenje uljem.