

## THE REFORM OF THE ITALIAN YACHTING CODE

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*The purpose of this paper is to address the legislative reform of the recreational boating legislation currently pending in Italy (Law 167/2015, which has delegated the power to reform the Yachting Code to the Italian Government) with a specific focus on the relationship between the Yachting Code and the Navigation Code. The issue will be addressed through an analysis of the history of the relationship between the rules governing recreational boating and the general navigation legislation in Italy. Starting with an analysis of the first few rules of the Navigation Code devoted to recreational boating, which had been regulated together with the forms of operation of the ship for economic purposes, the discussion will then review the contents of Law 50/1971 (s.c. "piccolo codice della nautica da diporto"), which led to the first division between recreational boating and general navigation legislation. Law 172/2003 – a piece of legislation which was intended to reorganize and boost recreational boating and nautical tourism – will also be mentioned, considering the legislator's attempt to make the rules governing recreational boating fully autonomous from the general maritime legislation. Law 171/2005 (s.c. "codice della nautica da diporto") will then be briefly reviewed, with particular emphasis on the legislator's choice to recognize that recreational boating rules have a special nature in relation to general navigation legislation, but are not fully autonomous from it. The paper will finally focus on the choice made by the legislator through Law 167/2015 – an act which delegates the Government to reform the Yachting Code – which confirms the approach chosen by the "codice della nautica da diporto", and on the consequences of such choice on legal institutions such as the shipowner's limitation of liability.*

**Keywords:** *Navigation Code; Yachting Code; Italy; Italian marine legislation; recreational boating; yachting; nautical tourism.*

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I have been offered the chance to share some thoughts on the reform of the legislation governing recreational boating currently pending in Italy. In fact, in 2015 the Italian Parliament<sup>1</sup> delegated the Government to reform the Yachting Code.

I believe the most interesting issue concerning the topic regards the relationship between the Yachting Code and the Navigation Code. Therefore, I will focus on this relationship. To understand it better, it is useful to examine how the sources which regulated the field in the last sixty years governed it.

### THE NAVIGATION CODE (*CODICE DELLA NAVIGAZIONE*)

Recreational navigation was first regulated by the Navigation Code along with the forms of operation of the ship for economic purposes, based on the consideration that also the operation of craft intended for recreational navigation amounted to a form of operation of the ship<sup>2</sup>.

The Navigation Code dedicated few provisions to it<sup>3</sup>. They regulated some details concerning the command and the steering of recreational ships, the possibility to embark room and family staff not belonging to seafarers, constructions and fishing.

However, those provisions left unprejudiced the applicability of the rules set forth for ships<sup>4</sup> to recreational ships and small recreational boats.

The application of new technical findings, the serial production of some types of recreational craft, the substantial decrease of production costs and the increased social life standards led to the premature ageing of the legislation, which had been drafted to face the needs of much lesser breadth<sup>5</sup>.

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<sup>1</sup> Law 7 October 2015, no. 167.

<sup>2</sup> Spasiano, *L'esercizio della nave da diporto*, in Riv. Dir. Nav. 1969, I, 274, according to whom "indeed the operation is the use of the ship, both for an economic activity, and for recreational boating or other analogous activity (for example scientific expedition). Therefore, the regime must be the same, as long as the needs are identical"; see though Righetti, *Sulla responsabilità del proprietario di nave da diporto per danni a terzi causati dalla sua circolazione*, in Dir. Mar. 1969, 304, who does not recognize in the use of small boats an organizational core of goods and persons sufficient to equate it with the naval one.

<sup>3</sup> Besides article 136, which included also craft intended for recreational navigation in the notion of ship, articles 213-218 and 1212. Articles from 401 to 407 of the Regulation for Maritime Navigation and 96-98 of the Regulation for Internal Navigation were later added.

<sup>4</sup> Ferrarini, *Le nuove norme sulla navigazione da diporto*, in Dir. Mar. 1970, 425; Gaeta, *Il nuovo ordinamento della navigazione da diporto*, in Dir. Mar. 1992, 339-341, and therein a critical analysis of the relevant provisions.

<sup>5</sup> Gaeta, *L'ordinamento della navigazione da diporto*, in Riv. Dir. Nav. 1972, I, 21.

## THE “SMALL YACHTING CODE” (“PICCOLO CODICE DELLA NAUTICA DA DIPORTO”)

Therefore, in 1971 Law n. 50<sup>6</sup> was issued bearing “*rules on recreational boating*”.

It was eloquently commonly defined as the “*small yachting code*” and was made up of a systematic body of provisions regulating the construction of recreational boats, the administrative regime as well as the command and steering of recreational boats and ships, the figures of the master and of the crew, and also included some criminal and tax provisions concerning recreational boating.

Article 46 expressly excluded the application to recreational boats of the provisions of the Navigation Code concerning the shipowner’s liability and its limitation.

With reference to small recreational boats (*natanti*) such exclusion was even wider, spreading to the rules concerning shipbuilding, ownership and co-ownership, shipping companies, ship’s agents, shipmasters, crew, recruitment and maritime labour.

Therefore, ownership of recreational boats remained subject to the rules of the Navigation Code on ownership resulting from the changes brought by Law 50/1971, but an exception was created with regard to the liability and relevant limitation, which were regulated – with regard to recreational boats (*imbarcazioni*) and small recreational boats – by the Civil Code<sup>7</sup>.

The substantial change of the liability regime was accompanied by the duty to take out insurance.

With regard to the relationship between recreational boating and navigation law, the first three paragraphs of article 1 of the mentioned law led to the first significant step towards the release of recreational boating from the legal regime of ships.

In particular, pursuant to its third paragraph, the provisions contained in the Navigation Code, in the relevant implementing regulations and in the other special laws had to be applied in the field of recreational boating to any matter which was not expressly provided by Law 50 of 1971.

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<sup>6</sup> Law 11 February 1971, no. 50.

<sup>7</sup> Art. 2054 Italian Civil Code.

The coming into force of such Law raised a heated debate between those who welcomed it<sup>8</sup> and those who criticized the creation of a legislation which was autonomous from the Code<sup>9</sup>.

As regards the relationship between the provisions of Law no. 50 and the Navigation Code, the scholars were divided between those who accepted the analogic application of the rules brought to recreational boating by the mentioned Law<sup>10</sup> and those who excluded it<sup>11</sup>.

### LAW 8 JULY 2003, NO. 172 (PROVISIONS CONCERNING THE REORGANIZATION AND THE REVIVAL OF RECREATIONAL BOATING AND OF NAUTICAL TOURISM)

In 2003 a new Law<sup>12</sup> entered such heated debate, aiming at reorganizing and boosting recreational boating and nautical tourism.

Art. 1, lett. a) repealed art. 1, paragraph 3 of the 1971 Law, since – as stated in the report attached to the bill – *“the Navigation Code was created to regulate commercial navigation and to safeguard third party rights inherent in commercial activities, with particular regard to passenger and cargo transport and to maritime labour. These activities are not present in recreational boating which is per se a special navigation recognized as such also by international treaties”*<sup>13</sup>.

<sup>8</sup> Ferrarini, *Le nuove norme sulla navigazione da diporto*, in Dir. Mar. 1970, 425 deemed in particular that, thanks to the new regime coming into force, the hope expressed by the economic categories interested in the sector, of having their main needs met, would be fulfilled. Gaeta, *L'ordinamento della navigazione da diporto*, in Riv. Dir. Nav. 1972, I, 21 gave the law credit for having finally given a more modern and adequate set-up to recreational boating.

<sup>9</sup> Spasiano, *Le nuove norme sul diporto*, in Dir e giur. 1977, 643. Even though pointing out the usefulness of Law 50/71, due to the fact it offered recreational boating a regime which was easier and better suited to its actual needs, separate from the Navigation Code, Querci (*Responsabilità per l'esercizio delle imbarcazioni da diporto e responsabilità obbligatoria*, in Riv. Dir. Nav. 1971, 144), dissented from the choice of disapplying some institutions of navigation law, among which, and above all, the institution of limitation of liability.

<sup>10</sup> Grigoli, *Contributo alla disciplina della nautica da diporto*, Padova, 1974, 6; in favour Rossi, *Navigazione da diporto*, in EdD Vol. XXVII, 744.

<sup>11</sup> Attributing to the adverb *“expressly”* the effect of excluding that such analogy could be drawn with regard to recreational boating: Gaeta, *L'ordinamento della navigazione da diporto*, in Riv. dir. nav. 1972, I, 27; Angelone, *Il nuovo regime giuridico della navigazione da diporto*, Milan, 1987, 16; Fanara, *La disciplina della navigazione da diporto e la riforma del codice della navigazione*, in Dir. tras-p. I/1989, 101; Lefebvre D'Ovidio – Pescatore – Tullio, *Manuale di Diritto della Navigazione*, Milan 2004, 221 draw the same conclusions.

<sup>12</sup> Law 8 July 2003, no. 172.

<sup>13</sup> Report to bill no. 1574 submitted at the Camera dei Deputati – Camera dei Deputati, Atto Camera n. 1574, Proposta di legge d'iniziativa dei deputati, Muratori, Germanà, *“Disposizioni per il riordino e il rilancio della nautica da diporto e del turismo nautico”*, 13 settembre 2001.

In another passage of the report there is a clear reference to the fact that by repealing art. 1 par. 3 the umbilical cord with the Navigation Code was being sharply severed.

It was thus correctly deduced that the legislator's intent was that of making the recreational boating rules autonomous in relation to the Navigation Code<sup>14</sup>.

### **THE YACHTING CODE (*CODICE DELLA NAUTICA DA DIPORTO*)**

Law 172 of 2003 also delegated the Italian Government to issue a code which would regulate recreational boating.

The Code – issued in 2005<sup>15</sup> and still in force – is made up of sixty-nine articles and sixteen technical attachments and aims at gathering and organizing several provisions on recreational boating which have stratified throughout the years, in order to facilitate its knowledge, to simplify its administrative procedures and to introduce institutions which were previously missing.

The most significant change introduced by the Code consists in expressly providing the commercial use of recreational craft for the first time.

There are several technical changes besides this, due to the fact that the aim of the Code was to implement in Italy the technical rules provided at Community level regarding the design and production of recreational craft.

Therefore, it regulated the design, construction and introduction onto the market of recreational craft; their administrative regime, namely the recreational craft registration and the navigation certificate; the number of transportable persons and crew; the provisions governing nautical licenses, liability arising from the navigation of recreational craft, lease and charter agreements, seafaring training and fines.

Through its adoption, the path which had been traced two years before by the legislator with concern to the relation between recreational boating legislation and commercial navigation rules, underwent a clear-cut correction.

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<sup>14</sup> Zunarelli – Comenale Pinto, *Manuale di diritto della navigazione e dei trasporti*, Vol. 1 Vicenza 2016, 98, and references therein.

<sup>15</sup> Legislative Decree of 18 July 2005, no. 171, still in force, repeatedly amended through several changes in the legislation, the last of which was made by the Legislative Decree of 11 January 2016, no. 5 implementing Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013, regarding recreational craft and personal watercraft, and which repeals Directive 94/25/EC.

In fact, by virtue of the new text of art. 1, par. 3 the legislator has set forth that the rules brought by the sources specifically dedicated to recreational boating are to be applied extensively to the institutions which are not regulated by a specific provision of the Yachting Code. As a consequence, the provisions of the Navigation Code can be invoked only when there is no specific (primary or secondary) legislation dedicated to the sector. However, the latter is not applicable by analogy to institutions not expressly governed by it<sup>16</sup>, in witness of the fact that the legislator's intent was not that of creating a second sectorial Navigation Code besides the general one<sup>17</sup>, a choice which is evidently much less radical than the one of 2003 which aimed at the full autonomy of recreational boating.

However, the Yachting Code did not include the provisions of the 1971 Law which excluded the application (i) to all recreational boats of the most relevant general rules on liability and on limitation and (ii) to small recreational boats of the whole II book of part one of the Navigation Code devoted to regulating ownership.

This suggests some considerations I will discuss at the end of this paper.

## LAW 7 OCTOBER 2015, NO. 167: GOVERNMENT DELEGATED TO REFORM THE YACHTING CODE

Ten years after the adoption of the Yachting Code – in order to guarantee the competitiveness of the sector within the European strategy for increased growth and employment in coastal and maritime tourism<sup>18</sup>, which had suffered a severe economic and occupational crisis – the Italian legislator decided to renew its contents, by putting the legislation in line with the European and international standards, compared to which it often seemed anachronistic and more bureaucratic.

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<sup>16</sup> Mastrandrea, *Il regime giuridico della navigazione da diporto*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente* 2008, in [http://www.giureta.unipa.it/phpfusion/readarticle.php?article\\_id=186](http://www.giureta.unipa.it/phpfusion/readarticle.php?article_id=186).

<sup>17</sup> Mastrandrea, *Il regime giuridico della navigazione da diporto*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente* 2008, in [http://www.giureta.unipa.it/phpfusion/readarticle.php?article\\_id=186](http://www.giureta.unipa.it/phpfusion/readarticle.php?article_id=186). A "sort of special autonomy of recreational navigation in the more general context of maritime navigation" according to Lefebvre D'Ovidio – Pescatore – Tullio, *Manuale di Diritto della Navigazione*, Milano 2011, 213; specialty in relation to navigation law and subspecialty in relation to general law according to Antonini, *La responsabilità nella circolazione delle unità da diporto*, in *Dir. trasp.* I/2007, 74.

<sup>18</sup> In line with what laid down by the communication of the European Commission on the strategy for more Growth and Jobs in Coastal and Maritime Tourism (COM(2014)86), 20 February 2014.

The delegation to the Government, brought by art. 1 of Law n. 167 of 2015, mainly contains provisions pertaining to the administrative regime of recreational boating and to its safety. It also deals with the regulation of port areas (art. 1, para. 2, lett. f) and with the training requirements of the new figure of the sailing instructor (art. 1, co. 2, lett. t) number 2).

I think the most interesting aspect of the delegation consists in the fact that it does not contain any indication to the Government to intervene on the relationship between the Yachting Code and the other sources of the Italian legal system, above all the Navigation Code.

Therefore, the attempt – which had started in 2003 and then restrained in 2005 – to make recreational boating fully autonomous, seems to have been abandoned in favor of a more prudent approach which assimilates the recreational boating sector to the general principle of “specialty” in relation to commercial navigation.

The legislator’s choice seems to be that – in case of a regulatory gap in the Yachting Code – the laws, regulations and usages or, in the absence thereof, the provisions of the Navigation Code will apply extensively, without the possibility of analogically applying the contents of the Yachting Code to institutions not expressly regulated by it.

The reversal from full autonomy to specialty of recreational boating seems even more appropriate if we consider the emphasis put by the Legislator on preserving navigation safety. Indeed, according to *Scialoja*, the risk of navigation is the first of the elements in which the specialty of navigation law has its roots. Therefore, putting the safety of navigation at the center of the rules on recreational boating fully justifies the repeal of full autonomy, and makes the choice of specialty the most appropriate option.

The current arrangement has significant implications.

Consider for example the shipowner’s limitation of liability<sup>19</sup>.

Indeed, in my opinion, failing to include in the text of the Yachting Code also the provisions of Law n. 50 of 1971 which excluded the applicability to recreational boating of the most relevant rules concerning liability and limitation,

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<sup>19</sup> The shipowner is also the person who takes on the operation of recreational craft, according to Spasiano, *L’esercizio della nave da diporto*, in Riv. Dir. Nav. 1969, I 277, who had acutely stressed the fact that the operation of the ship – necessary to attribute the capacity as shipowner – may be recognized both when it aims at an economic activity, and when it occurs for recreational boating or for analogous activities (for example for scientific expeditions).



should not necessarily be deemed to be – as I think has been suggested – the result of forgetfulness.

The Yachting Code has in fact limited itself to acknowledge the possible division between the operation of recreational craft, which may well have commercial purposes, and recreational navigation, which by definition<sup>20</sup> must necessarily have recreational purposes.

Since the use of recreational craft for commercial purposes is now allowed, it becomes possible not only to definitively ascribe the capacity as shipowner<sup>21</sup> to the person who takes on the operation of recreational craft, but also to extend the limitation of liability to that person.

In fact the limitation had been denied in the past based on the assumption that such benefit was intended to encourage to carry out an economic activity and that the operation of a recreational craft was not of a commercial nature<sup>22</sup>.

The choice not to extend the benefit of limitation of shipowner's liability to recreational navigation was originally also justified by the limited value of recreational craft, argument which could perhaps be considered reasonable in the past century but which – given the exponential increase of value of recreational craft employed for commercial purposes – seems now largely outdated.

The incisive role of the commercial use of recreational craft in maritime economy in the last decades – first with the affirmation of summer charters, and in more recent times with the rise of new uses such as cabin charters – seems to justify the extension of the limitation of liability also to the owners of recreational craft, at least in those situations in which the operation is aimed at an economic activity and the extension of the benefit fulfils its original purpose.

Ultimately the choice made by the delegation of confirming a limited autonomy to recreational boating seems to be the most balanced one, since it allows to apply the principles of navigation law, where not expressly derogated, to recreational boating.

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<sup>20</sup> Except for the indicated legislative exceptions, i.e. when the craft is used for professional teaching of recreational boating or as support to underwater activity.

<sup>21</sup> See, with regard to this, art. 24.4 DPR 146/2008, which subordinates the commercial use of the craft by the user under lease to the prior declaration of shipowner pursuant to art. 265 of the Navigation Code.

<sup>22</sup> Spasiano, *L'esercizio della nave da diporto*, in Riv. Dir. Nav. 1969, I, 277.



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2. Law 11 February 1971, no. 50.
3. Law 8 July 2003, no. 172.
4. Legislative Decree 18 July 2005, no. 17.1
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### Sažetak:

#### REFORMA TALIJANSKOG ZAKONA O REKREACIJSKOJ PLOVIDBI

Svrha ovog članka jest dati pregled reforme zakonodavstva koje uređuje rekreacijsku plovidbu, a koji je u tijeku u Italiji (Zakon 167/2015, kojim se ovlaštenje za reformu Zakona o rekreacijskoj plovidbi delegira talijanskoj Vladi), s posebnim osvrtom na odnos između Zakona o rekreacijskoj plovidbi i Pomorskog zakonika. Predmetu se pristupa kroz povijesnu analizu odnosa između pravnih pravila koja uređuju rekreacijsku plovidbu te pravila općeg pomorskog prava u Italiji. Počevši od analize najranijih nekoliko pravila Pomorskog zakonika posvećenih rekreacijskoj plovidbi, koja je tada bila uređena u sklopu zajedničkog općeg pomorskog prava za trgovačke brodove, rasprava se nastavlja kroz pregled sadržaja Zakona 50/1971 (tzv. “mali zakon o rekreacijskoj plovidbi”), koji je doveo do prvog razdvajanja zakonodavstva o rekreacijskoj plovidbi i općeg pomorskog zakonodavstva. Zakon 172/2003 – propis kojim se namjeravalo reorganizirati i poduprijeti razvoj rekreacijske plovidbe i nautičkog turizma – također će se spomenuti u ovom kontekstu, s obzirom na zakonodavčev pokušaj da pravila o rekreacijskoj plovidbi učini potpuno autonomnima u odnosu na opće pomorsko zakonodavstvo. Zakon 171/2005 (tzv. “zakon o rekreacijskoj plovidbi”) kratko će se analizirati, s posebnim naglaskom na zakonodavčevo uvažavanje posebne prirode pravila koja uređuju rekreacijsku plovidbu u odnosu na opće pomorskopravne propise, premda ona nisu posve autonomna u tom zajedničkom pravnom okviru. Konačno, usredotočit ćemo se na zakonsko rješenje usvojeno Zakonom 167/2015 – a to je propis kojim se Vladi delegira reforma Zakona o rekreacijskoj plovidbi – koji potvrđuje pristup usvojen Zakonom o rekreacijskoj plovidbi iz 2005., te na reperkusije koje takav pristup ima na pravne institute poput ograničenja odgovornosti brodarka.

**Ključne riječi:** Pomorski zakonik; Zakon o rekreacijskoj plovidbi; Italija; talijansko pomorsko pravo; rekreacijska plovidba; nautika; nautički turizam.