

**5th INTERNATIONAL SCIENTIFIC
CONFERENCE ON MARITIME LAW:
MODERN CHALLENGES OF MARINE NAVIGATION
SPLIT, CROATIA, 9-11 April 2025
(ISCML Split 2025)**



**BOOK OF PROCEEDINGS OF THE 5th INTERNATIONAL
SCIENTIFIC CONFERENCE
ON MARITIME LAW – ISCML Split 2025**

Split, 2025

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PREFACE

Faculty of Law – University of Split and the Adriatic Institute of the Croatian Academy of Sciences and Arts organised the 5th International Scientific Conference on Maritime Law (ISCML Split 2025), which took place in Split, Croatia from 9th to 11th April 2025. Over the years, our conference has become an academic event recognized by renowned scholars and practitioners of maritime law from Croatia and abroad. The 5th ISCML Split 2025 offered a possibility to hear interesting presentations from participants coming from 15 countries (Italy, Malta, Germany, the United Kingdom, Canada, USA, Norway, Spain, Sweden, Poland, the Netherlands, Slovenia, Serbia, Turkey and Croatia), but also provided an opportunity for maritime law scholars and professionals to share their opinions on novelties and challenges of contemporary maritime law, that is featured with constant modification and improvements.

The Book of Proceedings comprises selected conference papers that underwent an anonymous double peer-review procedure and academic categorisation. The contents of each paper, including the quality of the research, the accuracy of facts, as well as the correctness of language and proofreading, are the sole responsibility of the individual authors. The views expressed in the conference papers are those of the authors and do not necessarily reflect the views of the conference organisers, peer-reviewers, or affiliated institutions.

We extend our gratitude to all contributors, and we hope that the proceedings will serve as a valuable resource for researchers and practitioners alike.

Finally, we would like to express our appreciation to Tankerska plovidba d.d. Zadar for their support in the preparation of this Book of Proceedings of the 5th ISCML Split 2025.

President of the Organising Committee of the 5th ISCML Split 2025
Dr Petra Amižić Jelovčić, Full Professor with Tenure
Faculty of Law, University of Split (Croatia)

*We dedicate this publication to
Professor Emeritus Ivo Grabovac
in celebration of his 90th birthday.*

IVO GRABOVAC
Professor Emeritus
FACULTY OF LAW, UNIVERSITY OF SPLIT



SPLIT (CROATIA)

Ivo Grabovac was born in Split in 1934. He graduated from the Faculty of Law at the University of Zagreb in 1960, earned his LL.M. degree in 1965, and received his Ph.D. in 1967. He is a specialist in Maritime Law and Transport Law. From 1955 to 1961, he worked as a clerk at the Harbourmaster's Office in Split, and subsequently joined the Faculty of Law at Split University upon its founding in 1961. He became a Full Professor in 1976 and served as the Dean of the Faculty of Law in Split from 1978 to 1980 and again from 1994 to 1996. He founded the Postgraduate Studies in Maritime Law and Law of the Sea at the Faculty in Split in 1979 and served as the Head of that program several times. He is an Associate Member of the Croatian Academy of Sciences and Arts and a Titulary Member of the Comité Maritime International. He has authored 36 books, including monographs, textbooks, commentaries, and encyclopaedias, as well as approximately 1,000 scientific and professional articles in various journals and papers in Croatia and abroad. As a recognised professional in his field, he has received several awards, including five lifetime achievement awards, notably the National Lifetime Achievement Award for Science in 2006.

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ISCML SPLIT 2025

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CONTRACTUAL LEGAL ASPECTS OF TRANSFORMATION OF FREIGHT FORWARDERS INTO LOGISTICS SERVICES PROVIDERS

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Review scientific paper

This paper examines main contractual legal aspects of transformation of Freight Forwarders into Logistics Services Providers from the perspective of Croatian national law (Obligations Act) and the shift of the traditional role of Freight Forwarders as intermediaries (agents). Freight Forwarders emerge as entrepreneurs committed to providing various logistics services related to the shipment of goods for their clients which include organization of transportation of goods, storage/warehousing of goods, and other services that can be, in broad strokes, described as standard logistics activities.

The paper seeks, as far as possible, to clarify the concepts of logistics and logistics services in legal terms, as well as the economic basis for the emergence of this legal change such as globalization of trade and tech advancements. The key differences between standard freight forwarding agreements and logistics contracts are being analysed and the stance is taken that logistics contracts are best described as so-called mixed contracts of autonomous commercial law.

Therefore, the rights and obligations of the contracting parties, in cases where a specific issue is not addressed in the contract itself, should be governed by default rules of those contracts whose obligations are characteristic or typical of the logistics services provided. This approach sharply differs from a concept of Freight Forwarders as entrepreneurs who merely contract and act on behalf of and for the account of their clients.

Key words: *freight forwarding, logistics, logistics contracts, logistics service providers*

1. Introduction

Modern industrial, post-industrial and consumer society is impossible to imagine without developed and efficient supply chains and constant and predictable supply of raw materials, industrial products and semi-products, food, consumer goods. The world has learned about the importance of efficient supply chains during the COVID pandemic, and is learning still whenever an obstacle in the chain appears. In the basis of efficient supply chains and the world trade in general, there is a need for the organization of the transportation of goods, their storage and preservation in certain condition, packaging, repackaging and finishing of goods, undertaking various actions in order to satisfy the regulations of international and national public authorities in the circulation of goods, by creating, transferring and handing over various documents that accompany the goods on their way from the seller to the buyer or the end user. In recent years, in business practice, the term “logistics” has been used collectively for all the above activities, somewhat indiscriminately and uncritically, in economic, transport, legal, political, and wider social discourse.

It should be noted that, both in national, foreign or supranational economies, more and more entrepreneurs who performed traditional services related to the transportation of goods, such as pure carriage of goods, storage (warehousing) of goods or freight forwarding are collectively being referred to as logistics services providers. Analogously, such undertakings in the provision of the services in question begin to enter into logistics contracts with their principals, that is contracts in which they undertake to provide logistics services.

Among those undertakings freight forwarders emerge as entrepreneurs which are well adjusted to transform their business activities to new circumstances. Therefore, to remain competitive, traditional freight forwarders have evolved into comprehensive logistics service providers, integrating transportation, storage, and supply chain management. The need to offer and provide such an integrated service has led to the development of the logistics contract in which logistics services provider undertakes to the principal to perform certain logistical activities in relation to the principal's goods, which actions are commonly the carriage of goods, storage/warehousing and safekeeping of goods and some other activities related to or in connection with the transport of goods such packing, pre-packing, assembling etc. Therefore, legal implications of the integration of such activities should be addressed, especially due to the fact the mentioned activities are regulated separately by the provisions of national (e.g. Croatian) laws and regulations.

2. The Notion and Legal Nature of Freight Forwarding Contract Under Croatian Obligations Act

The freight forwarding contract obliges the freight forwarder to conclude, in his own name and for the account of the principal (consignor), a contract of carriage (transportation) of goods and other contracts necessary for the execution of transport and to perform other customary tasks and actions, while the principal undertakes to pay the freight forwarder certain remuneration, and if it is so stipulated in the contract, the freight forwarder can enter into a transport contract and take other legal actions in the name and on behalf of the principal.¹ The freight forwarding contract is a bilaterally binding (synalagmatic) and a consensual contract, which is entered into by the mere agreement of the contracting parties, for the conclusion and validity of which no special form is required and a unanimous point of view of the relevant legal doctrine is that the organization of the transportation of goods (which we can also call the shipment of goods) is the key obligation of the freight forwarder.²

When considering the concept of freight forwarding contracts, the method of concluding legal transactions needed for forwarding of goods (transportation contracts, warehousing etc.) arises as one of the most important issues, especially since in both cases the freight forwarder acts “on behalf of/for the account of” the principal. Obligations Act emphasizes the conclusion of contracts “in its own name” as a regular mode of operation of freight forwarders. The conclusion of the contract “in the name of” the principal is prescribed as a secondary possibility. This is the result of the historical development of the freight forwarding contract from the commission contract, the basic feature of which is the action of the commission agent in his own name.

The freight forwarder’s action “in his own name” is a fundamental way of acting in comparative law as well.³ The exception is certainly the English legal

¹ Art. 489, Obligations Act, Official Gazette, 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22.

² From the perspective of the freight forwarding contract in Croatian law and under Obligations Act see: Blagojević, Borislav, u Blagojević, Borislav, Krulj, Vrleta, *Komentar Zakona o obligacionim odnosima*, drugo izdanje, Savremena administracija, Beograd, 1983., pgs. 1796. – 1825., Bukljaš, Ivan u: Bukljaš, Ivan, Vizner, Boris, *Komentar Zakona o obveznim (obligacionim) odnosima*, Posebni dio, knjiga 4., Zagreb, 1979., pgs. 2447. - 2481., Carić, Slavko, *Pravni odnosi između komitenta i špeditera iz ugovora o špediciji*, (doktorska disertacija, neobjavljeno), Beograd, 1964., pg. 2., Eraković, Andrija, *Pravni položaj i odgovornost špeditera* (magistarski rad, neobjavljeno), Zagreb, 1985., pg. 2., Gorenc, Vilim, u: Gorenc, V. (ured.), *Komentar Zakona o obveznim odnosima*, Zagreb, 2014. pgs. 1313. - 1345; Zelenika, Ratko, *Špediterovo pravo*, četvrto izmijenjeno i dopunjeno izdanje, Ekonomski fakultet u Rijeci, Rijeka, 2001.

³ This is especially so in French and Swiss law, where the forwarding contract is a subtype of the commission contract. In German law, the possibility of freight forwarders acting on behalf of the principal is prescribed by the *Transportreformgesetz* in 1998., while in Austrian law such a possibility is not prescribed by law.

system, where the freight forwarder basically acts “in the name of and on behalf” of his principal, although it would not be forbidden to contract “in his own name” as well.⁴ If from the freight forwarding contract it does not clearly follow in which manner and capacity the freight forwarder is authorized and obliged to act, it is considered that the contracted action is “in his own name”.⁵ If the freight forwarder acts in his own name, the rules of the commission contract are applied to the freight forwarding contract and if the freight forwarder acts in the name of the principal, the rules of the commercial agency contract are applied to the freight forwarding contract accordingly.⁶ Therefore, the traditional role of the freight forwarder is one of an agent, and it could be concluded that the legal nature of the traditional freight forwarding contract is one of agency.

Although the freight forwarding contract obliges the freight forwarder to conclude (as a default rule in his own name and for the account of the principal) transport contracts and other contracts necessary for the execution of the transport and for the purpose of transporting goods, the law stipulates that the freight forwarder can carry out the transport of the entrusted goods that are being shipped by him in whole or partially, unless otherwise agreed.⁷ This is a direct consequence of the freight forwarder’s role as transport organizer, an expert who by the very nature of its business must understand all aspects of transportation of goods.

Therefore, in practice, in recent years, more and more freight forwarding entrepreneurs make use of this possibility, thus simplifying the legal relations between freight forwarders and principals. Namely, if the freight forwarder also performed the transport or a part of the transport, he has the rights and obligations of the carrier and in that case he is also entitled to the appropriate compensation (remuneration) for the transport in addition to the compensation based on the organization of shipment and compensation for costs related to the shipment, and the same applies to other tasks included in the principal’s order or general terms and conditions or if it is customary do act in such manner.⁸ The aforementioned means that in the event that the freight forwarder performs

⁴ Eraković, pg. 34.

⁵ Blagojević, pg. 1800., and from the standpoint of comparable German law, Koller, Ingo, *Transportrecht*, 7. amended edition, Verlag C.H. Beck, München, 2010., § 453 Rbr. 4. The Commercial Court of SRH also concludes in the same way in the judgment Pž 2204/89 of April 24, 1990, in which it concludes: “It is assumed that the freight forwarder acts in his own name and on behalf of the principal towards third parties, but the contract may stipulate that he acts in the name and on behalf of the principal.” Available in: Slakoper, Zvonimir (et. al.), *Sudska praksa 1980. – 2005. i bibliografija radova uz Zakon o obveznim odnosima*, RRIF, Zagreb, 2005., pg. 604.

⁶ Art. 851, Obligations Act.

⁷ Art. 858 para. 1, Obligations Act.

⁸ Compare Art. 858 paras. 2 and 3 of the Obligations Act.

the service of transporting goods himself or, for example, the storage of goods entrusted to him in his own storage facilities (warehouses), he has, in addition to the remuneration due on the basis of the performance of freight forwarding services, also the right to remuneration arising from the transport contract, the warehousing contract (storage fee) etc.

It needs to be noted that in these cases, the freight forwarder is liable as a carrier or a warehouse, and not on the basis of the customary responsibility of the freight forwarder as a specific consignee. Namely, it is stipulated in the Obligations Act that the freight forwarder is responsible only for the selection of the carrier and for the selection of other persons with whom he has entered into a contract of the execution of the order (storage of goods, etc.), but he is not responsible for their work or their results (*culpa in eligendo*), unless he has specially assumed this responsibility by contract.⁹ This kind of default responsibility which is prescribed in traditional freight forwarding business is not surprising, since the traditional freight forwarder is acting on behalf of the principal (regardless of acting in his or in the principals name), keeping the economic benefits of the transaction fully in the principals realm, leaving the freight forwarder with the remuneration for his services as a specialized intermediary in the area of transportation and handling of goods.

On the other hand, there are some situations where the freight forwarder assumes responsibility for the results of the transactions entered into for the purposes of transportation of goods, fully or partially. First of all, it goes without saying that this kind of responsibility could be assumed contractually, whereby the freight forwarder would, in turn, charge additional fees for the services provided. Furthermore, it is prescribed that a freight forwarder who entrusted the execution of the order to another freight forwarder (the so-called sub-forwarder) instead of executing it himself, is responsible for work of the sub-forwarder, and if the order contains an express or tacit authorization for the freight forwarder to entrust the execution of the order to another freight forwarder or if this is clearly in the interest of the principal, he is liable only for his selection, unless he expressly assumed responsibility for his work.¹⁰

From the perspective of their business importance in the context of broadening the responsibility of the freight forwarder two special types of freight forwarding need to be mentioned – collective consignment or forwarding (*zbirna špedicija*) and forwarding at fixed costs (*špedicija sa fiksnom naknadom*). Collective forwarding is the organization of the transport of goods in such a

⁹ Art. 856 para. 1 of the Obligations Act.

¹⁰ Art. 856 paras. 2 and 3 of the Obligations Act.

way that the freight forwarder collects a large number of shipments, i.e. goods belonging to different principals, and does not send the shipments individually, but hands them over to the carrier together. Under the rules of the Obligations Act, the freight forwarder can always arrange for collective shipping in the execution of received orders, unless this is excluded by the contract, in which case he has the right to a special additional remuneration if a difference in the freight rate in favour of the principal with collective shipping was achieved.¹¹

The reasoning behind this transaction is in the fact that the freight forwarder essentially shares the compensation that should be paid for the transport with a larger number of principals, while on the other hand, freight forwarders enable carriers to use their own transport capacities more economically, and in return the carriers give certain privileges (more acceptable rates) for the transport of goods.¹² The rights of the principal are protected by the rule according to which the freight forwarder is liable for the loss or damage of the goods caused during transport that would not have occurred if there had been no collective shipment.¹³

Even more common in practice is the forwarding at fixed costs by which the freight forwarder is obliged to execute the order on the shipment of the goods with the payment of the fixed (total) amount, which includes fees for shipping, transportation, and all other costs, unless otherwise agreed. The main feature of this transaction is that, in this case, the freight forwarder is responsible for the work of the carrier and other persons used for the execution of the forwarding of the goods.¹⁴ In pure economic terms, the principal can calculate exactly how much it will cost to ship the goods and deliver them to the customer, whereby the purpose of fixing is also in the responsibility of the freight forwarder for the contracted remuneration. The remuneration will not be higher than what was agreed upon, which facilitates the calculation of the principal's total business expenses of the forwarding with the implied increased responsibility of the freight forwarder.

Furthermore, in the case of the forwarding at fixed costs (and the aforementioned cases) the freight forwarder is not obliged to enter into contracts necessary for the shipment of goods on behalf of the principal, so that as a result, there is no obligation to submit invoices, receive advances or

¹¹ Art. 867 paras. 1 and 2 of the Obligations Act.

¹² Gorenc, pg. 1343.

¹³ Art. 867 para. 3 of the Obligations Act. From the standpoint of comparable German law, the responsibility of the freight forwarder is also shifted by the rule that the freight forwarder in this case has rights and responsibilities of a carrier – Art. 458 of German Handelsgesetzbuch.

¹⁴ Art. 866 of the Obligations Act.

transfer rights from these contracts to the principal, because the economic risk of the freight forwarding contract rests with the freight forwarder which in these cases provides services for its own account. In other words, the freight forwarder becomes a direct service provider, rather than an agent or a mere organizer of the shipping.

3. The Notion of Logistics

It is rather difficult to provide a precise definition of logistics, even in broad terms, especially when it comes to the legal application of the term 'logistics'. In domestic and comparative economic and legal literature, and the literature dealing with transport issues, there are many different explanations of the concept and content of logistics. Since logistics as an activity is extremely difficult to define precisely, a single and generally accepted definition does not actually exist.¹⁵ It seems that originally the term logistics was often associated with military terminology, where it is described as the preparation and implementation of activities necessary for the deployment and supply of military units with food, clothing, weapons and ammunition.¹⁶ Even in colloquial terms, it can be noted that in military conflicts, the side that usually wins is not the side that has the most weapons or military personnel, but the side that has more efficient supply chains – or, in one word, logistics.¹⁷

Numerous and different definitions of logistics are grouped by some authors into three groups of definitions that have common characteristics.¹⁸ In the first

¹⁵ For the definition of the notion of logistics see, for example, Bloomberg, David J., LeMay, Stephen, Hanna, Joe B., *Logistika*, Prentice Hall, 2002., hrvatsko izdanje Mate d.o.o., 2006., Ceronja, Petar, *Ugovor o logistici*, Zbornik ... susreta pravnika / Hrvatski savez udruga pravnika u gospodarstvu, (2022); pgs. 227-268, Gass, Wolfram, *Die Bedeutung der Logistik für Speditionunternehmen im Rahmen moderner Hersteller-Zulieferbeziehungen*, *Transportrecht* 5(2000), pgs. 203. – 213., Jerman, Boris, *Vprašanje logističnega prava*, Uradni list Republike Slovenije, Ljubljana, 2009., Joan, Jane; de Ochoa, Alfonso, *The Handbook of Logistics Contracts*, Palgrave Macmillan, New York, 2006., pg. 11., Kollatz, Peter, in: Knorre Jürgen; Demuth, Klaus; Schmid Reinhardt, *Handbuch des Transportrechts*, Verlag C.H. Beck, München 2008., pg. 12., Lommatzsch, Jutta, *Transportrecht*, Verlag W. Kohlhammer, Stuttgart, 2012., pg. 1., Müglich, Andreas, *Transport und Logistikrecht*, Verlag Vahlen, München, 2002., pgs. 165. – 178., Pokrant, Günther; Gran, Andreas, *Transport und Logistikrecht*, RWS Verlag, Köln, 2009., pg. 146., Wieske, Thomas, *Praktische Probleme bei Logistikverträgen*, *Transportrecht* 5(2002), pgs. 177. – 181., Zelenika, Ratko, *Špediterovo pravo*, četvrto izmijenjeno i dopunjeno izdanje, Ekonomski fakultet u Rijeci, Rijeka, 2001., pgs. 125. – 285., Zelenika, Ratko, *Logistički sustavi*, Ekonomski fakultet u Rijeci, Rijeka, 2005.

¹⁶ Jerman, pg. 15.

¹⁷ Ceronja, pg. 230.

¹⁸ Primarily Pfohl, Hans-Christian, *Logistiksysteme*, 8. amended edition, Springer, Berlin-Heidelberg, 2010., pgs. 12. – 14. Pfohl's systematization of various and numerous definitions of logistics is taken over by Zelenika as the most precise and comprehensive.

group, at the center of the concept of logistics are flows, processes - therefore logistics includes "all activities that plan, manage, realize and control the space-time transformation of goods and all transformations related to the quantity, type and characteristics of goods, handling of goods, as well as logistic determination of goods."¹⁹ The second group of definitions places the life cycle of a product or service in the center of logistics, divided into the stages of market introduction, market growth, market maturity and decline of the product or service from the market.²⁰ The third group puts services at the center of the concept of logistics, that is "the process of coordinating all intangible activities that need to be completed in order to provide a service in an effective way in terms of cost and in relation to the user".²¹ Whichever group one of the definitions of logistics belongs to, it seems that its basic characteristic is excessive breadth. This is the result of a large number of activities that are considered part of logistics in modern production-consumer relations which make it border line impossible to provide a comprehensive definition.

Therefore, to the extent needed for the legal analysis of the issue, the description of logistics that dominates German legal literature seems most appropriate. To that extent, logistics is defined as a set of activities for the fulfilment of which a logistics contract is entered into, that is the process of delivering exactly the right goods, to the right place, in the right amount, with the right information, at the right time, of the right quality at the right cost.²²

4. The Economic Background of Transformation

In the literature that mainly deals with freight forwarding as a business activity, the transformation of traditional freight forwarding into providing of logistics services has been determined and analysed.²³ The transformation basically consists in expanding the number and type of services that freight forwarders offer and perform for their principals, which has an economic explanation and justification. The fundamental task of traditional freight forwarding is the organization of transport of goods, whereby the freight forwarder is basically in charge of choosing the transport route and means of transport, as well as undertaking other

¹⁹ Zelenika, Špediterovo pravo, pg. 40.

²⁰ Ibid.

²¹ Ibid.

²² Kollatz, pg. 12. This would be the famous German 7R definition: *die richtige Ware, am richtigen Ort, in der richtigen Menge, mit der richtigen Information, zum richtigen Zeitpunkt, in der richtigen Qualität, zu den richtigen Kosten liefern.*

²³ Zelenika, Špediterovo pravo, pgs. 309. – 431. Zelenika, Ratko, Pupovac, Drago, Rudić, Dušan, Špediter u funkciji logističkoga operatora, Pomorski zbornik, knjiga 38, 2000, 1, pgs. 143. – 157., pg. 144.

tasks related to the transport of goods. Under the influence of modern trends in industry and trade, freight forwarders are faced with demands that go beyond the mere organization of goods transportation and the performance of secondary tasks related to shipping.²⁴

These contemporary trends can be recognized in concepts and processes such as *Supply Chain Management*, *Make-it-or-buy-it* or *Just in time/Just in sequence* production or service provision systems. *Supply Chain Management* is an economic term that can be broadly defined as a set of activities that create goods and services by transforming inputs into outputs through supply chain management with a purpose to procure the necessary raw materials and services for the company's needs as quickly, efficiently and cheaply as possible.²⁵ *Just in time/Just in sequence* systems of production or procurement are terms that denote such organized procurement or production where the aim is to deliver raw materials or products on time while minimizing inventory.²⁶ Since the basic feature of the aforementioned processes is the performance of several different diverse activities at the same time, such processes are called integrated activities, i.e. integrated (integral) logistics.²⁷

Entrepreneurs can implement and apply modern processes of production and service provision independently or entrust them to other entrepreneurs. In doing so, it is important to recognize which activities represent their core competence.²⁸ The latter in essence means that undertakings should concentrate on their main business activities rather than invest (financially, materially, through investing in significant human resources etc.) in activities which only have secondary purpose for the undertaking. It is more often than not that in business practice entrepreneurs usually single out the activities of transportation, storage of goods as well as various other activities related to goods needed for the main business activity of the undertaking. In the economic discourse, these activities are called by the generic name of "logistics activities", "logistic services" (or simply "logistics") - thus entrusting transportation, storage, various activities of handling goods to third

²⁴ Ceronja, pg. 231.

²⁵ Bloomberg, LeMay, Hanna, pgs. 4. - 5.

²⁶ Ibid, pgs. 31. - 33.

²⁷ Ibid, pg. 6., Sink, Harry L., Langley, John C., *A managerial framework for the acquisition of third-party logistic services*, Journal of Busines Logistics, Vol. 18, No 2., 1997., pgs. 163. - 189., pg. 170.

²⁸ Ogorelc, Anton, *Outsourcing of Transport and Logistics Services*, Promet – Traffic&Transportation, Vol. 19., 2007, No 6, 371. - 380., pg. 373.

parties is called outsourcing of logistics or logistics services. The key of outsourcing is to separate the main from secondary business activities of the undertaking.²⁹

In addition to the concentration on the performance of core activities, several reasons could be enumerated in support of entrusting the performance of logistics services to third parties. First, by separating some or all logistics activities, the entrepreneur reduces the operating costs of business, leaving the determination of the price for the logistics service to market competition between logistics services providers, which, it is assumed, will be lower than if the entrepreneur performs the same tasks through its own means.³⁰ Secondly, the quality of logistics activities necessary for the entrepreneur's activity is increased because the assumption is that even an entrepreneur who separates logistics services into a separate entity in his own plants will achieve savings and increase the quality of the activities performed. However, it is unrealistic to expect that the savings and quality will be the same as when entrusting this service to third parties specialized in logistics and it is unlikely to create economically applicable logistics innovations within entrepreneurial systems where logistics activities are not the primary activity of an undertaking.³¹ Thirdly, the level of innovation increases and new logistics services are designed and created.³²

5. The Freight Forwarder as the Logistics Services Provider

5.1. General Considerations

As a consequence of the above mentioned economic and business reasons for the transformation of traditional freight forwarding services into the business of providing logistics services freight forwarders are at the heart of the transformation. Their task is to find answers to the changes on the market, which demands that as many services as possible related to transportation and handling of goods are performed in an integrated manner. In doing this, they

²⁹ Ogorelc, pgs. 374. – 375. Ogorelc systematizes five levels of allocation of logistics services, some of which (the lower ones) entrepreneurs can perform on their own. The first one is *In-house party logistics* (1PL) - logistics that the entrepreneur performs independently, within his own company, and is suitable for smaller undertakings. The next level is *Asset-based party logistics* (2 PL), which is explained as the management of the so-called traditional logistics activities (storage, transport, etc.). *Third party logistics* (3 PL) means entrusting the management of all or part of logistics activities to another undertaking. *Fourth party logistics* (4 PL) which is also called supply chain logistics or lead logistics, is a more complex version of 3 PL logistics, and consists in designing and managing a complete supply chain for a certain undertaking. *Fifth party logistics* (5 PL) is the highest level of allocation of logistics activities that can be carried out by either 3 PL or 4 PL logistic providers, and consists of supply chain management through modern IT solutions.

³⁰ Ceronja, pg. 233.

³¹ Ibid.

³² Ogorelc, pg. 373.

encounter fierce competition from entrepreneurs who exclusively deal with warehousing, transportation or trade of goods in general.

The position of the freight forwarder in relation to the competition (traditional carriers or warehousing undertakings) has certain weaknesses. As a rule, traditional freight forwarders do not have their own means of transport and storage facilities. If they do have them, they are mainly means of transporting goods by road and warehouses that are not specialized in the manipulation of various goods. In addition, the processes of globalization, fast and easy circulation of information make it easier for potential clients to have direct access to carriers, warehousemen, and other logistics operators.

On the other hand, the position of the freight forwarder in relation to the competition on the logistics market has certain advantages. They primarily arise from the content of their core activity. Being an organizer of goods transportation entails certain experience resulting in recognizing well the opportunities in the markets of transport, storage and general trade services. In this sense, the freight forwarder rightly deserves the title of general entrepreneur of traffic of goods.³³ In the nature of freight forwarding activity is the performance of all tasks related to the shipping (transportation) of goods and traditional freight forwarders have certain material resources and knowledge that would be applicable in providing an integrated logistics service.

The transformation of a traditional freight forwarder into logistics services provider (logistics operator) occurs primarily in developed economies. Moreover, there are opinions that traditional freight forwarders in highly developed countries are now a historical category and have completely transformed into modern logistics operators as a result of the described changes in the organization of production of goods and provision of services. On the other hand, in underdeveloped and transitional countries, traditional freight forwarders still exist, and their transformation into logistics operators has yet to begin.³⁴

FIATA, the International Federation of Freight Forwarders Associations (*Fédération Internationale des Associations de Transitaires et Assimilés*) also recognized the transformation processes of freight forwarding and the opportunity for freight forwarders globally. Together with the European Association for Forwarding, Transport, Logistics and Customs (CLECAT) it adopted the official definition of "freight forwarding and logistics services" in 2005. "*Freight forwarding and logistic services*" are services of any kind relating to the carriage (performed by single mode or multimodal transport means),

³³ Schmidt, Karsten, *Handelsrecht*, 4. amended edition, Köln, 1994., § 33, pg. 984. naming the freight forwarder *Allround Unternehmer des Warenumschlags*.

³⁴ Zelenika, Pupovac, Rudić, pg. 151.

consolidation, storage, handling, packing or distribution of goods, as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the goods for official purposes, procuring insurance of the goods and collecting or procuring payment or documents relating to the goods. Freight forwarding services also include logistics services with modern information and communication technology in connection with the carriage, handling or storage of the goods, and *de facto* total supply chain management. These services can be tailored to meet the flexible application of the services provided.

Therefore, FIATA binds freight forwarding and the providing of logistics services into a unified, interchangeable service, opening up space for modifications in the legal position of the freight forwarder depending on the type of service provide. The description of the activity is broad enough to include the performance of traditional freight forwarding as well as all other logistics operations and services, making it one of the goals of this international association to position freight forwarders as main providers of logistics services.

5.2. The Notion of the Logistics Contract

Logistics contract is an agreement which is not regulated under that name by laws and regulations in both domestic and relevant comparative law, but it is clear and well-known that such a contract exists in business and legal practice. Wide use of such an agreement in business practice has encouraged mainly German legal theory to try to explain the notion and legal nature of this contract and to place it in the commercial contract law universe.³⁵

There is no definition that could both accurately and comprehensively describe the concept of a logistics contract which is a natural consequence of the absence of a clear definition of the legal meaning of the term logistics.³⁶ An extremely large number of activities that in business practice are considered logistics activities or services makes it impossible, even broadly, to establish the

³⁵ Forexample see Czerwenka, Beate in Schmidt, Karsten, (et. al.), *Münchener Kommentar, Handelsgesetzbuch, Band 7., Transportrecht*, Verlag C.H. Beck, Verlag Vahlen, München, 2009., § 407, Rbr. 82., Gass, ft. 15., Jane/de Ochoa, ft. 15., Knorre/Demuth/Schmid, ft. 15., Koller, Ingo, *Transportrecht*, 7. amended edition, Verlag C.H. Beck, München, 2010., § 453, Rbr. 25a, § 454, Rbr. 37., Krins, Sarah, *Haftung und Versicherung in der Kontraktlogistik: Ein Überblick*, *Transportrecht*, 7/8(2007), pgs. 269. – 279., Lommatsch, ft. 15., Möglich, ft. 15., pgs. 165. – 178., Pokrant/Gran, ft. 15., pgs. 146. – 257., Reuschle, in Ebenroth, Boujong, Joost, Strohn, *Handelsgesetzbuch, Kommentar*, Band 2, *Transportrecht, Bank und Borsenrecht*, 2. izdanje, Verlag C.H. Beck, Verlag Vahlen, München, 2009. Vor § 407, Rbr. 139. – 203., Wieske, ft. 15.

³⁶ Heuer, Klaus, *Brauchen wir Logistik-AGB für die Spedition*, *Transportrecht* 3(2006), pgs. 89. – 91., pg. 89. ultimately concludes that logistics contract is primarily a “marketing term” which has no particular legal significance.

legal concept of logistics in the context of logistics contracts.³⁷ For example, the contract could be described as a contract in which one contracting party undertakes to fulfil the obligation not only of transporting the goods, but also undertakes to fulfil numerous other actions such as packaging, assembly before and after transport, development of the goods, labelling, etc.³⁸

The logistics contract is perhaps accurately described as a contract in which the logistics services provider (logistics operator) undertakes to the principal to perform certain logistical actions in relation to the principal's goods.³⁹ The common feature of logistics activities is their connection with the client's goods, their movement, maintenance, processing, etc. Logistics activities in business practice in the broadest sense are considered to be the transportation of goods, their storage and obligations related to safekeeping of goods, all main and secondary freight forwarding obligations and all other customary logistics activities in connection with the transportation and storage of goods.⁴⁰

When it comes to the discussion of the legal nature of a logistics contract, it is worth noticing that German legal theory has gone the farthest in its analysis of *Logistikvertrag*. The nature of the main obligations of the logistics services provider and the economic purpose of the contract point to the conclusion that this contract primarily has the characteristics of a so called mixed contract, which essentially means that it has the characteristics of several different types of contracts. Therefore, in German legal literature regarding logistics contracts, there is a unanimous point of view that this contract, by its content, falls within the scope of a number of contracts regulated in the Commercial Code (HGB) or the Civil Code (BGB). Thus, the application of the provisions of contract of carriage of goods (§§ 407 – 452d HGB), freight forwarding contracts (§§ 453 – 466 HGB), warehousing contracts (§§ 467 – 475h HGB), service contract (§§ 611 – 630 BGB), contract to produce a work (§§ 631 – 651 BGB).⁴¹

The views and conclusions of German legal theory could be applicable to the logistics contract concluded under Croatian national legislation and the provisions of the Obligations Act – arguably, with needed modifications. First of all, Croatia does not have a specialized Commercial Code which, in turn means, that the area of obligations as a whole is regulated through a single act

³⁷ Krins, pg. 271, emphasizing certain senselessness of the statutory regulation of this contract precisely because of the diversity of actions that the logistics operator must fulfill.

³⁸ Czerwenka, § 407, Rbr. 82.

³⁹ See for example Kl. 1.3. *Logistik-AGB-a*.

⁴⁰ Ceronja, pg. 240.

⁴¹ Gass, pgs. 209. – 211., Kollatz, pg. 12., Rbr. 50, Müglich, pgs. 165 – 178., Pokrant/Gran, pg. 147., Rbr. 631., Wieske, pg. 178.

(mono-system of obligations regulation). Thus, all of the contracts regulated in the Obligations Act can be civil contracts, consumer contracts or commercial contracts, depending on the parties to the contract.⁴² Also, Croatian legal system is not familiar with the service contract regulated in §§ 611 – 630 of the German Civil Code (BGB). Therefore, by analysing the obligations customarily assumed by the logistics services providers, as well as the economic purpose of this contract, from the perspective of the Croatian national law and the Obligations Act it can be concluded that the dispositive provisions governing the freight forwarding contract (Arts. 849 – 868 of the Obligations Act), the contract of carriage of goods (Arts. 661 – 698 of the Obligations Act), the warehousing contract (Arts. 744 – 762 of the Obligations Act) and the contract to produce a work (Arts. 590 – 619 of the Obligations Act) would be applied subordinately to the logistics contract. To that matter, logistics contracts are best to be considered as mixed contracts of autonomous commercial law.⁴³

5.3. Main Obligations of a Freight Forwarder as a Logistics Services Provider

Preliminary, it should be explained that the term “freight forwarder” is used in its economic meaning as an undertaking customarily providing freight forwarding services – the organization of transport of goods being the main service – and not as a pure contractual legal term. Surely, when an undertaking assumes the obligations of a logistics services provider, in legal terms the undertaking is considered to be a logistics services provider regardless of its standard business activities as a freight forwarder (or a carrier, warehouse undertaking, distributor or else).

Since the need for a logistics contract emerged from the entrepreneurs focusing on their primary business activities (core competences) while entrusting shipping/delivery/manipulation of goods to logistics services providers, it can be concluded that longer-term business and contractual relations are established between such entrepreneurs and logistics services providers, the establishment of which entails a certain amount of trust between the contracting parties. Additionally, the logistics contract also contains an emphasized organizational component, which is particularly evident in the pre-contractual period, i.e. in designing the whole enterprise of transportation and/or handling the goods. Therefore, even certain precontractual obligations arise which stem out of the

⁴² See Art. 14 of the Obligations Act.

⁴³ Ceronja, pg. 243.

good faith principle.⁴⁴ To that matter, it would not be unusual for the principal to hand over the goods to the logistics services provider for shipment even before the formal conclusion of the contract.⁴⁵ In that case, the logistics services provider has the obligation to keep the goods in the condition in which they were handed over to him and to take all necessary measures to prevent loss or damage to the goods.⁴⁶ Furthermore, logistics services provider has a pre-contractual obligation to properly, accurately and comprehensively advise and inform the principal to be (for example, assess whether it is at all possible to organize transport and perform other necessary actions according to the instructions of the principal and inform him of the assessment in a timely manner, to inform the client of all significant information, risks and circumstances that he, as an expert, is aware of, and which are important for making the client's business decision, consider the expediency of the principal's instructions, even their economic justification).⁴⁷

Logistics services providers and their principals agree on the main obligations of the parties in the respective agreements, entered into in written form, usually with great detail and with the application of various general terms and conditions, drawn by the parties themselves or by different national or supranational business organizations in the area of freight forwarding or transport of goods. To that extent, it could be argued that logistics contracts have a certain tailor-made quality, but nevertheless there are obligations which are almost a natural part of such agreements.

First of all, the obligation to protect the best interests of the principal and advise and inform the principal should be mentioned. The logistics services provider must in all situations act in the best interest of its principal, regardless of which specific contract obligation is being fulfilled which is the consequence of deepened and additionally emphasized relationship of trust that occurs even in the pre-contractual period.⁴⁸ Protecting the principal's interests basically means adapting one's own interests in fulfilling the contract to the principal's interests. If the interests of a logistics services provider regarding the fulfilment of the contractual provisions are in conflict with the interests of his client, he must act in accordance with the client's interests, and if there is doubt about

⁴⁴ See Art. 4 of the Obligations Act. Acting contrary to the principle of good faith in the time before the conclusion of the contract (time of the negotiations) may result in the responsibility for precontractual damages (*culpa in contrahendo*). See Art. 251 of the Obligations Act.

⁴⁵ Koller, § 453, Rbr. 42., Rinkler, Axel, in: Ebenroth, Boujong, Joost, Strohn, *Handelsgesetzbuch, Kommentar*, Band 2, Transportrecht, Bank und Borsenrecht, 2. izdanje, Verlag C.H. Beck, Verlag Vahlen, München, 2009., § 453, Rbr. 128.

⁴⁶ Koller, § 453, Rbr. 42., Rinkler, § 453, Rbr. 128., for freight forwarding activities, based on the stance that this kind of relationships could fall under the the category of "business of trust" (*Vertrauensgeschäft*).

⁴⁷ Koller, § 453, Rbr. 42.

⁴⁸ Ceronja, pg. 251.

what is in the client's interest in a specific situation, it should be communicated with the principal (client) to remove those doubts.⁴⁹

The obligation to advise the principal derives from the obligation to protect the principal's interests and is inseparably connected with it. Logistics services provider is expected to provide expert advice on all actions and services agreed upon, which form a unity with the organization of the transportation of goods. In addition, as an expert in the field of shipping and handling of goods, he is obliged to provide advice on all issues that he could or should assume may be of importance to the principal's business decisions related to the goods.⁵⁰ The obligation to advise the client should certainly include the duty to warn the principal about the shortcomings of the order and the duty to warn about packaging defects, if the obligation to pack the shipment was not undertaken by the logistics services provider.⁵¹

The obligation of the logistics service provider to inform the principal of all circumstances relevant to the shipment and handling of the goods follows from the general obligation to protect the principal's interests. There is an obligation to inform the principal without delay about the damages caused to the goods as well as about the circumstances that indicate the possibility of damage or perish of the goods.⁵² To that matter it is irrelevant whether the goods are under the care of the logistics services provider or the persons used in fulfilling contractual obligations.⁵³ Additionally, there is an obligation to inform the principal of all unusual, atypical events related to the shipment and manipulation of goods. We are not talking about the obligation to regularly inform the principal about the condition of goods, only when the shipment and handling of the goods are hampered by certain difficulties, problems, unforeseen and unusual situations and events.⁵⁴

The obligation to organize the transport (carriage) of goods is in the heart of the duties of the logistics services provider and the logistics contract, usually combined with the obligations to store the goods, and to perform other logistical activities necessary so that the goods can fulfil its economic purpose with as little

⁴⁹ Bahnßen, in Ebenroth, Boujong, Joost, Strohn, *Handelsgesetzbuch, Kommentar*, Band 2, Transportrecht, Bank und Borsenrecht, 2. ed., Verlag C.H. Beck, Verlag Vahlen, München, 2009. ADSp Ziff. 1 Rbr. 3.

⁵⁰ To that extent see Zelenika, Ratko, Pavlić Helga, *Obveze špeditera iz ugovora o špediciji*, Hrvatska pravna revija, 2(2002), 6 pgs. 37. – 47.

⁵¹ See Arts. 852 and 853 of the Obligations Act.

⁵² Koller, § 454, Rbr. 16.

⁵³ Ibid; Rinkler, § 453, Rbr. 102.

⁵⁴ Helm, Johann Georg, in: Canaris, Claus-Wilhelm, Schilling, Wolfgang, Ulmer, Peter (eds.), *HGB Staub Großkommentar, Speditionsgeschäft*, §§ 407 – 415, Walter de Gruyter, Berlin, 1986., §§ 407 – 409, Rbr. 122.

cost as possible in the shortest possible time. At the same time, it is important to emphasize that the logistics services provider assumes responsibility for the carriage of goods towards the principal, either by transporting the goods with its own means of transport or by engaging various carriers.⁵⁵

In the traditional freight forwarding the freight forwarder is obliged to adhere to the instructions on the route, means, and method of transportation and other instructions received from the principal.⁵⁶ This rule is, however, applicable in situations where the freight forwarder acts on behalf (for the account) of the principal. To the contrary, logistics services provider is obliged to follow the principal's instructions to the extent that this does not affect the result of the fulfilment of the obligations assumed for a certain fee. The logistics service provider is the one who assumes the risk for failed shipment of goods and for the defective execution of the standard logistics activities connected with the shipment. This position is completely in line with the position taken on the principal's instructions being non-mandatory in contracts in which the freight forwarder acts for his own account.⁵⁷

If the principal has not specified the route, the means of transport, or the mode of transport, the logistics services provider will determine it as required by the best interests of the principal in the given circumstances.⁵⁸ This provision will equally be applicable for all other actions or tasks that must be performed in the fulfilment of the contract which the principal has not specified and has not given any instructions.⁵⁹ German legal theory, with regards to the discussions on freight forwarding, divides the obligation on the organization of transport into three phases: conception and design (*Konzeptionsphase*), implementation (*Ausführungsphase*) and post-implementation (*Nachphase*).⁶⁰ The legal nature of the logistics contract suggests that the phase of the designing the service of transport of goods along with the other logistics activities would be especially important for this kind of agreement. Finding the most affordable transport option is of particular interest to the logistics services provider, since the economic benefit of the service basically derives from the difference in the remuneration (fee) paid by the principal and the price at which the goods is being transported, without jeopardizing the safety and speed of transportation or the interest of the principal in general, since the logistics services provider

⁵⁵ The same as the traditional freight forwarder in certain cases, as explained earlier.

⁵⁶ Art. 855 para. 1 of the Obligations Act.

⁵⁷ Koller, § 459, Rbr. 31.

⁵⁸ See Art. 855 para. 4 of the Obligations Act.

⁵⁹ Zelenika, Pavlić, pg. 39.

⁶⁰ Rinkler, § 454 Rbr. 6.

assumes responsibility for the work of all participants in the transportation and logistics enterprise.⁶¹

Surely, the logistics services provider can transport the goods using his own transport capacities (means of transport). In fulfilling obligations of the contract, the logistics services provider acts on his own account, therefore, the principal could claim compensation for loss or damage to the goods directly from the provider. To that matter, strictly economically speaking, the logistics service provider is free to assess will a greater economic benefit come out of entering into carriage contracts with other carriers as its subcontractors or maintaining own transport capacities.⁶² If the logistics service provider independently carries out the transport or part of the transport of goods, he has the rights and obligations of the carrier and in that case he is also entitled to the appropriate fee for the transport, which will be included in the total remuneration for the execution of the contract.⁶³ In this case logistics service provider has the rights and obligations of the carrier regarding the transportation of goods, which does not affect his other obligations from the contract, in accordance with the mixed legal nature of this contract. Therefore, the appropriate provisions of the rules and regulations governing a particular branch of transport are applied strictly to the carriage of the goods by own transport capacities of logistics services providers.

The obligation to store (warehouse) and preserve the goods is one of the typical obligations in a logistics contract. In accordance with the mixed legal nature of this contract, the provisions governing the warehousing contract as a regulated contract of commercial law will be applied to this obligation.⁶⁴ To that matter, the logistics services provider undertakes to the principal to receive and store certain goods and to take the necessary or contracted measures to preserve them in a certain condition, as part of his wider obligation to organize the transportation of goods and provide other logistical activities.⁶⁵

Primarily, this means that the logistics services provider is obliged to provide suitable accommodation capacities for the storage of goods (warehousing facilities) so that the goods that is being stored must be protected from risks and perils that may threaten it, which also includes illegal interventions by third

⁶¹ Rinkler, § 454 Rbr. 9., with regards to the freight forwarding at fixed costs.

⁶² Ceronja, pg. 251.

⁶³ See Art. 858 para. 2 of the Obligations Act.

⁶⁴ Arts. 744 – 762 of the Obligations Act.

⁶⁵ Compare Art. 744 para. 1 of the Obligations Act.

parties on the principal's goods.⁶⁶ Modern logistics services providers operate with sufficient and appropriate accommodation facilities and warehouses in which they store the goods of their principals. However, in the absence of the latter, the logistics services provider is obliged to ensure adequate warehousing capacities with third parties either by renting suitable warehouses or by entering into a warehousing contract with professional warehouses which can provide the service of suitable storing of goods.⁶⁷

Logistics services provider would be obliged to warn the principal about the defects of the goods, the natural properties of the goods, and about faulty packaging which may cause damages to the goods, as soon as he noticed it or had to notice the said defects.⁶⁸ Furthermore, the principal should be notified of the appearance of irreversible changes to the goods if there is a risk that the goods will be damaged or destroyed due to these changes without delay, given that he is a professional who, in fulfilling his obligations under the contract, is obliged to apply due care of a good expert.⁶⁹ Especially in cases of longer-term safekeeping of goods the logistics services provider is obliged to allow authorized personnel and representatives of the principal to inspect stored goods and take samples and should be particularly careful not to allow unauthorized third parties to inspect or access the principal's goods due to possible disclosure of confidential information which could lead to damages.⁷⁰

When entering into a logistics contract the logistics services provider assumes various obligations to perform different logistic services or activities in connection with the transport of goods. It would be hard to imagine a logistics provider running partially or in total a supply chain for its principal without the obligation to take care of ancillary logistics activities. It is hardly possible to determine precisely what those common logistics services or activities would be. However, the general terms and conditions, which forwarders and logistics services providers regularly apply in their contracts help to define and enumerate the usual logistics services and activities more precisely. For example, General Terms and Conditions of Croatian Forwarders Organization define that the goods to be shipped must be loaded, unloaded, reloaded, sorted or packed, live animals should be fed and watered, and perishable food should be frosted or

⁶⁶ Ceronja, Petar, *Ugovor o uskladištenju u hrvatskom i makedonskom pravu*, Zbornik Pravnog fakulteta u Zagrebu, 2(2011), pgs. 821. – 847., pg. 832., Koller, § 467, Rbr. 2.

⁶⁷ Koller, ADSp Ziff. 15 Rbr. 2.

⁶⁸ See Art. 745 para. 2 of the Obligations Act.

⁶⁹ Compare Art. 745 para. 3 and Art. 787 para. 3 of the Obligations Act.

⁷⁰ See Art. 749 of the Obligations Act. Also, Ceronja, ft. 66, pg. 842.

re-frosted.⁷¹ Legal doctrine enumerates certain activities such as packaging and labelling, marking of goods, loading, unloading, packaging, labelling and declaring goods, weighing, stacking etc. as actions usually associated with the shipment of goods, i.e. as logistics activities.⁷² All of the enumerated activities could fall under the provisions of the contract to produce a work, which would also be in line with the legal nature of logistics contract as a mixed contract of autonomous commercial law.

Through the contract to produce a work the contractor undertakes to perform certain work, such as making or repairing something, performing physical or mental work, etc., and the principal undertakes to pay compensation for such work.⁷³ The analysis of actions that can be considered doctrinally as standard logistics activities leads to the conclusion that each of these actions and activities contracted for in an independent contract would actually represent the main obligation of the contractor on the basis of the contract to produce a work. To simplify – if the principal procures solely for a service of packaging, re-packaging and loading the goods, those services would ultimately fall under the scope of the contract to produce a work.

It is beyond the aim of this paper to go into detail about the application of the rules of this contract to logistics activities, but it must be concluded that the obligation of the logistics services provider in the fulfilment of these actions will be considered fulfilled if both the contractual performance criteria and the professional criteria for their performance according to the standards of the profession are met.⁷⁴ The logistics services provider is obliged to carry out logistics activities at a certain time or for a certain amount of time, and if the time is not set in the contract or otherwise, then within the time that is reasonably necessary for such tasks.⁷⁵ The logistics services provider is not obliged to perform the actions undertaken by the contract personally, which is a rule stemming out of the appropriate application of the provisions governing the contract to produce a work, but also out of the economic purpose of the logistics services contract and the position of the logistics service provider as a party fully responsible for the engagement of its subcontractors.⁷⁶

⁷¹ Arts. 2 and 19 of General Terms.

⁷² For example Koller and Rinkler when analysing § 454 Abs. 2 HGB.

⁷³ Art. 590 of the Obligations Act.

⁷⁴ Gorenc, pg. 889. with reference to the Supreme Court judgement VSH Rev 841/84 from 31. October 1984.

⁷⁵ Art. 597 para. 2 of the Obligations Act.

⁷⁶ See Art. 600 of the Obligations Act.

6. Conclusion

The freight forwarding contract requires the freight forwarder to organize transportation and enter into related contracts on behalf of the principal, usually acting in his own name unless otherwise specified. Freight forwarders may also directly perform transportation or storage services, in which case they assume additional responsibilities and are entitled to extra compensation beyond their usual remuneration. The default liability of a traditional freight forwarder is limited to selecting competent carriers and subcontractors, though they can assume greater responsibility contractually or by employing sub-forwarders. Special types of freight forwarding, such as collective consignment and forwarding at fixed costs, allow freight forwarders to optimize shipping costs and responsibilities, with fixed-cost forwarding placing the economic risk on the freight forwarder rather than the principal. The latter gives a sound legal base for the emergence of logistics services providers and logistics contracts.

Purely economically, the transformation of traditional freight forwarding into providing of logistics services involves expanding the range of services offered beyond organization of transport to meet modern industry demands. Concepts like Supply Chain Management and Just in Time/Just in Sequence systems drive the need for integrated logistics, leading businesses to outsource logistics activities to specialized providers. Outsourcing logistics activities reduces costs, enhances service quality, and fosters innovation, as third-party logistics providers are more efficient and better equipped to develop new logistics solution.

In view of all the above, the logistics contract has emerged and as a rule such a contract contains the obligations of a logistics services provider, which are basically mandatory or natural components of already known, regulated contracts of commercial law. These are freight forwarding contracts, carriage of goods contracts, warehousing contracts and contracts to produce a work. Therefore, on the basis of German legal doctrine (applicable on Croatian commercial law) it should be concluded that the logistics contract is a typical example of the mixed contract of commercial law. Instead of a principal concluding several different contracts with one or more service providers one contract with interconnected obligations of a logistics service provider is concluded. Only through the unity of obligations and synergistic effect can the principal achieve the desired economic advantage which is efficient shipping and delivery of goods with the lowest possible cost and reduced need for the engagement of its own financial and working capital.

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LEGAL PERSPECTIVE OF REDUCING CARBON EMISSIONS IN MARITIME TRANSPORT

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Review scientific paper

While maritime transport is vital to the European Union's economy and is among the most energy-efficient transportation modes, it remains a significant and increasing contributor to greenhouse gas emissions. Therefore, it is necessary to reduce emissions from maritime transport.

The International Maritime Organization (IMO) adopted an Initial Strategy in 2018 aimed at reducing total annual greenhouse gas emissions from shipping. However, since the strategy's release, no binding regulations have been introduced. In July 2023, the IMO adopted the Strategy on Reduction of GHG Emissions from Ships, which represents the continuation of the IMO's efforts to reduce greenhouse gas (GHG) emissions from international shipping.

Due to the IMO's limited progress, the European Union (EU) decided to take a leadership role in advancing the reduction of CO₂ emissions in the maritime sector.

The European Union aims to achieve climate neutrality by 2050, requiring significant emission reductions, as prescribed by Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality – ‘European Climate Law’. Observing the transport sector, through measures such as adopting new technologies, alternative fuels, and appropriate legal rules, it is possible to contribute to the EU's environmental goals.

Maritime transport was, until recently, exempted from the European Trading System (ETS). However, with the growing awareness of the significant share of shipping in global greenhouse gas emissions, a decision was made to include that sector in the ETS.

Alongside integrating shipping into the EU ETS, the legislation also introduces the FuelEU Maritime Regulation (Regulation (EU) 2023/1805 of the European Parliament and Council, dated 13 September 2023), which encourages the use of renewable and low-carbon fuels, as well as clean energy technologies for ships. This Regulation is essential for advancing decarbonisation in the maritime sector. Including shipping in the ETS could stimulate innovation within the industry and enhance energy efficiency. However, potential challenges such as complexity in implementation, costs, and technological adaptation should not be overlooked. These challenges require careful policy planning, but the achievement of the environmental goals of the European Union must be taken into account. The paper analyses

the relevant provisions of International and European legal frameworks aimed at reducing carbon emissions in maritime transport, as well as the associated challenges.

Key words: *climate neutrality, decarbonisation, EU legislation, greenhouse gas, IMO strategy, maritime transport, European Trading System*

1. Introduction - Environmental Impact of Maritime Transport and Sustainability Concept

The transport industry serves as the foundation for social and economic activities, with demand for transportation steadily increasing throughout history. While it has positive impacts, it also poses significant challenges, particularly concerning environmental degradation. Transportation contributes to air, water, and soil pollution, as well as noise and vibration pollution.¹ The transport sector is responsible for more than 25% of CO₂ emissions within the European Union, with road transport being the primary contributor. Although one of the most energy-efficient modes, Maritime transport still emits harmful gases. Since approximately 80% of global cargo is transported by sea and represents 10 billion tons of cargo annually, ensuring maritime transport's sustainability is essential. As an international industry, the effectiveness of legal measures in maritime transport relies on their global adoption. Transportation, industry, and urbanization further worsen environmental pollution, driven by rapid population growth and technological advancements. The necessity for transportation is continuously increasing, as evidenced by the 4400% trade growth between 1960 and 2023.² Maritime transport has an essential role in the European Union economy. It transports 75% of the EU's external trade, 36% of trade flows within the EU, and over 400 million passengers annually at EU ports. However, this growth has substantial negative consequences, including significant harm to human health and the environment.

¹ Herceg, Nevenko, Okoliš i održivi razvoj, Synopsis d.o.o., Zagreb, 2013, pp. 280–281.

² WTO, Evolution of trade under the WTO: handy statistics, https://www.wto.org/english/res_e/statis_e/trade_evolution_e/evolution_trade_wto_e.htm, 21. 12. 2024.

At the global level, according to data from 2000, maritime transport accounted for 1.8% of total global CO₂ emissions in 1996.³ A relatively constant share of CO₂ emissions of around 2% is observed between 2014 and 2020. In 2024, the share of harmful gases from maritime transport in the world's total CO₂ emissions was 3%.⁴

In 2021, transport accounted for 29.2%⁵ of the European Union's total CO₂ emissions, with road transport contributing 76.3% (747.9 145.1 million tonnes CO₂) and total navigation 14.8% (145.1 million tonnes CO₂)⁶ of that figure. In 2021, the total navigation sector accounted for 14.8% of all EU's greenhouse gas (GHG) emissions from transportation.⁷ European Maritime Transport Environmental Report of 2021 highlighted that maritime transport significantly contributes to air and water pollution, including waste, underwater noise, and greenhouse gas emissions.⁸ The most recent Report from the Commission⁹ of 2024 covered data from 2018 to 2022. "The monitored voyages for the 2022 reporting year emitted 135.5 million tonnes of CO₂."¹⁰ Between 2018 and 2019, emissions increased by 1.6%, making 2019 the year with the highest recorded CO₂ emissions. However, a 12% reduction was observed between 2019 and 2020, with emissions reaching their lowest levels in 2020. A further decrease of 2.2% occurred between 2020 and 2021. On the contrary, emissions rose by 7.1% from 2021 to 2022. The sharp decline in 2020 and 2021 was attributed mainly

³ IMO, Study of Greenhouse Gas Emissions from ships, 2000, <https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/First%20IMO%20GHG%20study.pdf>, p. 9. For other statistical data see: IMO, Second IMO GHG Study 2009, <https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/SecondIMOGHGStudy2009.pdf>, p. 1; IMO, Third IMO Greenhouse Gas Study 2014, 2014, <https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/Third%20Greenhouse%20Gas%20Study/GHG3%20Executive%20Summary%20and%20Report.pdf>, p. 58; IMO, Fourth IMO Greenhouse Gas Study 2020, <https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/Fourth%20IMO%20GHG%20Study%202020%20Executive-Summary.pdf>, p. 29.

⁴ Transport & Environment, Ships, <https://www.transportenvironment.org/topics/ships>, 3. 1. 2025.

⁵ European Commission, EU Transport in Figures - Statistical Pocketbook 2023, Publications Office, 2023, p. 143. <https://op.europa.eu/en/publication-detail/-/publication/493b2403-7157-11ee-9220-01aa75ed71a1/language-en>, 20. 12. 2024.

⁶ European Commission, EU Transport in Figures - Statistical Pocketbook 2023, Publications Office, 2023, p. 151. <https://op.europa.eu/en/publication-detail/-/publication/493b2403-7157-11ee-9220-01aa75ed71a1/language-en>, 20. 12. 2024.

⁷ European Commission, EU Transport in Figures - Statistical Pocketbook 2023, Publications Office, 2023, p. 135. <https://op.europa.eu/en/publication-detail/-/publication/493b2403-7157-11ee-9220-01aa75ed71a1/language-en>, 20. 12. 2024.

⁸ European Maritime Safety Agency and European Environment Agency, European Maritime Transport – Environmental Report 2021, Publications Office of the European Union, Luxembourg, 2021, p. 40.

⁹ Report from the Commission, 2023 Report from the European Commission on CO₂ Emissions from Maritime Transport, COM (2024) 151 final.

¹⁰ Report from the Commission 2023, Report from the European Commission on CO₂ Emissions from Maritime Transport, COM (2024) 151 final, p. 2.

to the COVID-19 pandemic and the United Kingdom's exit from the European Union. This is confirmed by the fact that emissions increased again by 7.1% in 2022 year than those reported in 2021.¹¹

Considering the above data, it is necessary to develop maritime transport according to the principles of sustainable development and the concept of sustainable transport. The concept of sustainable development is an integral part of policy and legislation creation in the modern world, and it implies long-term and comprehensive planning by decision-making bodies. Sustainable development is a development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."¹² Sustainability in the context of maritime transport encompasses social, economic, and environmental aspects of maritime navigation. The current view is that there is no balance between these elements.¹³ Maritime transport sustainability includes reducing greenhouse gas, energy efficiency, waste management, innovation, and technology. The role of maritime transport in global decarbonisation efforts is increasingly important. It is necessary to achieve a balance between sustainability and economic growth to exploit the potential of maritime transport in achieving sustainability. This requires careful planning of maritime and environmental policies and the development of a legislative framework.

The problem of marine pollution is being addressed both at the global level, within the International Maritime Organization, and at the regional level, within the European Union. The paper provides an overview of the role of the International Maritime Organization (IMO), the leading international body addressing the environmental impact of maritime transport. It analyses the Initial IMO Strategy for the Reduction of Greenhouse Gas Emissions from Ships from 2018 and 2023 to evaluate their importance in establishing international standards for CO₂ reduction. The European Union plays a crucial role in reducing CO₂ emissions, particularly in the maritime transport sector. Key regulations are Directive (EU) 2023/959 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within

¹¹ Report from the Commission, 2023 Report from the European Commission on CO₂ Emissions from Maritime Transport, COM (2024) 151 final, p. 2.

¹² World Commission on Environment and Development, *Our Common Future*, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>, 20. 12. 2024.

¹³ Sciberras, Lawrence; Ramos Silva, Joaquim, *The UN's 2030 Agenda for sustainable development and the maritime transport domain: the role and challenges of IMO and its stakeholders through a grounded theory perspective*, *WMU Journal of Maritime Affairs*, Vol. 17, 2018, p. 13.

the Union,¹⁴ Regulation (EU) 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport amended with Regulation (EU) 2023/957¹⁵ and Regulation (EU) 2023/1805 on the use of renewable and low-carbon fuels in maritime transport.¹⁶ These measures are critically analysed and discussed in the paper.

2. The Role of the International Maritime Organization in Maritime Environment Protection

The International Maritime Organization (IMO), a specialized agency of the United Nations, is dedicated to managing international maritime transport, focusing on safety at sea, efficient navigation, and mitigating the environmental impact of maritime activities. Initially, its primary objectives were maritime safety, efficiency of navigation and suppression of discrimination and restrictions introduced by the governments of traditionally maritime countries.¹⁷ Over time, environmental concerns have become a central focus of the IMO. With 176 member states, three associate members, collaboration with 66 intergovernmental organizations in observer status and 89 international non-governmental organizations in consultative status,¹⁸ it is clear that the IMO has a global reach and a key role in fostering international cooperation in the implementation of sustainable maritime policies. The IMO has been instrumental in establishing high standards and adopting legal frameworks to address environmental challenges in maritime transport.

Due to the increase in the share of oil transportation by sea and the ecological disaster of the oil spill in the Torrey Canyon in 1967, the IMO directed its attention to the problem of environmental pollution. Over the years, the IMO

¹⁴ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16. 5. 2023, pp. 134–202.

¹⁵ Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types, OJ L 130, 16. 5. 2023, pp. 105–114.

¹⁶ Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC, OJ L 234, 22. 9. 2023, pp. 48–100.

¹⁷ IMO, Brief History of IMO, <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, 18. 12. 2024.

¹⁸ IMO, Member States, IGOs and NGOs, <https://www.imo.org/en/About/Membership/Pages/Default.aspx>, 18. 12. 2024.

has adopted numerous measures to prevent environmental pollution. The most important among them is the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978¹⁹ (MARPOL)²⁰ whose provisions regulate the issue of environmental pollution as a consequence of maritime transport. MARPOL Annex VI Prevention of Air Pollution from Ships²¹ of 2011, established binding provisions regulating emissions of harmful gases in international shipping. It also sets limits on the release of harmful gases and sets strict control standards.²² The IMO has implemented technical and operational measures to enhance energy efficiency and reduce greenhouse gas: the Energy Efficiency Design Index (EEDI) and the Ship Energy Efficiency Management Plan (SEEMP), both of which have been mandatory for all vessels over 400 GT since January 2013.²³ In 2016, the IMO Maritime Environment Protection Committee adopted Resolution 278(70),²⁴ Amendment VI to MARPOL, requiring ships subject to the Convention to prepare and implement the Ship Fuel Consumption Data Collection Plan (DCS).

Although maritime transport is one of the most energy-efficient modes of transport, it continues to contribute significantly to the increase in greenhouse gas emissions. As transport has been identified as a key element in achieving sustainability,²⁵ the international community has increasingly focused on reducing greenhouse gas emissions from all transport sectors, including maritime transport. Still, IMO is committed to taking action to reduce greenhouse gas emissions, which is in line with the 2015 Paris Agreement on Climate Change. Further efforts to create a legal framework that will direct the environmental policy of international maritime transport resulted in the

¹⁹ International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of the 1978 relating thereto and by the Protocol of 1997 (MARPOL), United Nations, Rn. 22484.

²⁰ It is significant because, in addition to pollution by oil, chemicals and waste, it also emphasises air pollution. IMO, Brief History of IMO, <https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>, 18. 12. 2024.

²¹ MARPOL Annex VI Regulations for the prevention of air pollution from ships, United Nations, MEPC 76/15.

²² International Convention for the Prevention of Pollution from Ships (MARPOL), [https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-\(MARPOL\).aspx](https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx), 18. 12. 2024. See also Dong, Junjie; Zeng, Jia; Yang, Yanbin; Wang, Hua, A review of law and policy on decarbonization of shipping, *Frontiers in Marine Science*, Vol. 9, 2022., 1076352, p. 4.

²³ Christodoulou, Anastasia; Cullinane, Kevin, The prospects for, and implications of, emissions trading in shipping, *Maritime Economics & Logistics*, 26, 2024, p. 169.

²⁴ Resolution MEPC.278(70), adopted on 28 October 2016, Amendments to MARPOL Annex VI, [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.278\(70\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.278(70).pdf).

²⁵ United Nations, SDGS, Sustainable transport, <https://sdgs.un.org/topics/sustainable-transport>, 19. 12. 2024.

adoption of the Initial IMO Strategy on reduction of GHG emissions from ships²⁶ in 2018 (hereinafter: Initial IMO GHG Strategy). Global institutional action to decarbonise maritime traffic continued, and in the year 2023, the 2023 IMO Strategy on reduction of GHG emissions from ships²⁷ (hereinafter: 2023 IMO GHG Strategy) was adopted.

2.1. Initial IMO Strategy on Reduction of GHG Emissions from Ships

Within the framework of the IMO, the Marine Environment Protection Committee adopted the Initial IMO GHG Strategy in 2018. The fundamental goal is to reduce emissions of harmful gases and particles that are a product of international maritime transport and then to eliminate them entirely. It defines the goals, measures for their achievement and principles for the decarbonisation of maritime transport. It is a kind of instrument that supports Member States in achieving energy efficiency in international maritime transport. By adopting the Initial IMO GHG Strategy, the IMO supported the Sustainable Development Goals and thus the United Nations' vision of sustainable development.²⁸ The impetus for adopting the Initial IMO GHG Strategy is the projection from the Third IMO Greenhouse Gas Study 2014, according to which greenhouse gas emissions could increase between 50% and 250% by 2050.²⁹

The Initial IMO GHG Strategy's objectives are divided into three categories - to increase the IMO's global influence in the decarbonisation of maritime transport, to identify actions to be taken by the international shipping sector and the measures to achieve this. The fundamental goal is to reduce greenhouse gas emissions from international maritime transport and then eliminate them completely.^{30, 31} The Initial IMO GHG Strategy sets several levels of ambition. The first is to design energy-efficient ships, using the latest technologies,

²⁶ Initial IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 72/17, https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Resolution%20MEPC.304%2872%29_E.pdf.

²⁷ 2023 IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 80/17, <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/annex/MEPC%2080/Annex%202015.pdf>.

²⁸ 2018 Initial IMO Strategy, <https://www.imo.org/en/OurWork/Environment/Pages/Vision-and-level-of-ambition-of-the-Initial-IMO-Strategy.aspx>, 4. 1. 2025.

²⁹ IMO, Third IMO Greenhouse Gas Study 2014, 2014, p. 35, <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Third%20Greenhouse%20Gas%20Study/GHG%20Executive%20Summary%20and%20Report>.

³⁰ Chircop, Aldo, The IMO Initial Strategy for the Reduction of GHGs from International Shipping: A Commentary, *The International Journal of Marine and Coastal Law*, Vol. 34, issue 3, 2019, p. 493.

³¹ Jung, Tae-Hwan; Kang, Seong-Gil; Lee, Jong-Kap; Ahn, Junkeon, The IMO initial strategy for reducing Greenhouse Gas (GHG) emissions, and its follow-up actions towards 2050, *Journal of international maritime safety, environmental affairs, and shipping*, Vol. 4, No. 1, 2020, p. 2.

knowledge and parameters. The next is to reduce CO₂ emissions in international maritime transport by 40% by 2030. An additional target is a 70% reduction by 2050 compared to 2008.³² The last ambition is to reduce total annual greenhouse gas emissions by 50% by 2050, compared to 2008. The measures planned to achieve the set goals are divided into short-term, medium-term and long-term. The Initial IMO GHG Strategy predicted that agreement on short-term measures would be reached between 2018 and 2023 and on medium-term measures between 2023 and 2030.³³ Also, possible barriers to achieving the goals are foreseen, as well as measures that will help overcome them.³⁴

The Initial IMO GHG Strategy includes reporting obligation on fuel consumption which came into force in 2019.³⁵ Namely, the IMO Marine Environmental Protection Committee (MEPC) adopted its own mandatory global data collection scheme (DCS) for CO₂ emissions as an amendment to Annex VI of MARPOL.³⁶ As of 1 January 2019, the IMO DCS obliges ships above 5,000 gross tonnage and above to monitor and report fuel consumption to their Administration (flag state). "In June 2021, IMO adopted key short-term measures aimed at reducing the carbon intensity of all ships by at least 40% by 2030, which is in line with the IMO's initial strategic objectives. These measures combine technical methods with operational methods to improve ship's energy efficiency."³⁷ All ships must calculate their Energy Efficiency Existing Ship Index, and ships with more than 5000 gross tonnage will establish their annual operational carbon intensity index and carbon intensity rating mechanism.

Initial IMO GHG Strategy is not legally binding for IMO member states. It serves as a policy framework and a set of voluntary guidelines to reduce greenhouse gas emissions from international shipping. However, member states are encouraged to implement its measures through national legislation or by supporting amendments to existing legally binding instruments, such

³² Initial IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 72/17, paragraph 3.1.

³³ Agreement on long-term measures is expected after 2030. Schnurr, Riley E. J.; Walker, Tony Robert, *Marine Transportation and Energy Use*, Environmental Earth Sciences, 2019, p. 6.

³⁴ Initial IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 72/17, pp. 9–10.

³⁵ UN System of Environmental Economic Accounting, Annex B: Greenhouse Gas (GHG) Emissions from Maritime Transport for Global Air emissions, Accounts (AEAs), Area C Report to 15th UNCEEA, https://sea.un.org/sites/sea.un.org/files/annex_b_ghgs_from_maritime_transport_final.pdf.

³⁶ Resolution MEPC.278(70), adopted on 28 October 2016, Amendments to MARPOL Annex VI, [https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.278\(70\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/MEPCDocuments/MEPC.278(70).pdf).

³⁷ Dong, Junjie; Zeng, Jia; Yang, Yanbin; Wang, Hua, A review of law and policy on decarbonization of shipping, *Frontiers in Marine Science*, Vol. 9, 2022., 1076352, p. 5.

as MARPOL Annex VI. The strategy relies on international cooperation and commitment from member states to achieve its goals.

The Initial IMO GHG Strategy can be understood as a kind of incentive for countries to develop national action plans that will contain strategic measures and policies for the decarbonisation of the maritime sector. However, the question of the effectiveness of adopting national action plans is raised, given that the maritime sector is international in nature, i.e. it goes beyond national borders. Despite this, the importance of national action plans can be reflected in the guidance and coordination of national policies and legislation regarding energy efficiency in maritime transport.³⁸

2.2. The 2023 IMO Strategy on Reduction of GHG Emissions from Ships

The 2023 IMO GHG Strategy was adopted within the framework of the IMO in 2023 as an even more ambitious plan to achieve zero emissions of harmful gases in international maritime traffic. The importance of switching from fossil fuels to alternative fuels was additionally emphasized. The vision of ecological shipping, additional ambitions for decarbonisation and the basic principles of operation were presented. After short-term measures between 2018 and 2023, with the adoption of the 2023 IMO GHG Strategy, the transition to the medium- and long-term goals phase was achieved. The deadlines for achieving the goals and the expected effects are stated.³⁹ Some authors believe the technical requirements for achieving the goals are more demanding than initially expected.⁴⁰

An ultimate timeline for the use of fossil fuels in maritime transport has been agreed upon by setting a target for net-zero greenhouse gas emissions by or around 2050.⁴¹ An additional level of ambition implies the uptake of zero or near-zero GHG emission technologies, fuels and/or energy sources to represent at least 5%, striving for 10% of the energy used by international shipping by

³⁸ The United Kingdom and Norway stand out as examples of good practice, which adopted national action plans in 2019 - Clean Maritime Plan and Action Plan for Green Shipping. Garcia, Beatriz; Foerster, Anita; Lin, Jolene, *The Shipping Sector And GHG Emissions: The Initial Strategy For A Zero-Carbon Pathway*, NUS Asia-Pacific Centre for Environment Law Working Paper, 20/01, 2020, p. 9.

³⁹ 2023 IMO Strategy on Reduction of GHG Emissions from Ships, <https://www.imo.org/en/OurWork/Environment/Pages/2023-IMO-Strategy-on-Reduction-of-GHG-Emissions-from-Ships.aspx>, 29. 12. 2024.

⁴⁰ Zhang, Chunchang; Zhu, Jia; Guo, Huiru; Xue, Shuye; Wang, Xian; Wang, Zhihuan; Chen, Taishan; Yang, Liu; Zeng, Xiangming; Su, Penghao, *Technical Requirements for 2023 IMO GHG Strategy, Sustainability*, 16, 2024, 2766, pp. 2–3.

⁴¹ 2023 IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 80/17, paragraph 3.3.4.

2030.⁴² In addition, indicative checkpoints have been set through which it is possible to monitor the progress in the implementation of measures - a reduction of 20% - 30% by 2030 compared to 2008 and 70% - 80% by 2040 compared to 2008.⁴³ The levels of ambition and indicative checkpoints should take into account the well-to-wake GHG emissions of marine fuels.⁴⁴ The above means that achieving the goals implies significant financial resources and investment in technology with zero greenhouse gas emissions, which can be difficult for economically less developed countries. Fulfilling the obligation to reduce CO₂ emissions and comply with IMO regulations is very expensive. Also, some authors warn of progress in climate science and state that the goal of reducing CO₂ by 20% - 30% by 2030 must be even more ambitious.⁴⁵ This points to the need for even more efficient action on the decarbonisation of the maritime and all other industries. A further increase in ambitions for decarbonising maritime transport is foreseen in 2028 when the IMO plans to adopt the 2028 revised strategy.⁴⁶

The international framework governing the issue of environmental pollution resulting from maritime transport includes numerous legal acts and policy documents. There is a visible commitment to the decarbonisation of maritime transport. Maritime transport is an international industry in which the achievement of IMO objectives depends on implementing international standards in the national legal framework.⁴⁷ The IMO's activities in environmental protection are meaningless if they do not work towards fulfilling the goals from the 2023 IMO GHG Strategy. The mere existence of the 2023 IMO GHG Strategy is not enough to achieve zero greenhouse gas emissions from maritime transport. Achieving revised IMO goals will also depend on additional efforts by individual member states and the implementation of further IMO policies. The IMO has adopted short-term measures targeting the energy efficiency of ships: the Energy Efficiency Design Index (EEDI), the Energy Efficiency Index for Existing Ships (EEXI), the Carbon Intensity Indicator (CII), and the

⁴² 2023 IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 80/17, paragraph 3.3.3.

⁴³ Laffineur, Ludovic; Spiegelberg, Femke; Sidenvall Jegou, Ingrid; Smith, Tristan; Bonello, Jean-Marc, The implications of the IMO Revised GHG Strategy for shipping, Global Maritime Forum, 2023, p. 2 - 3.

⁴⁴ 2023 IMO Strategy on reduction of GHG emissions from ships, United Nations, MEPC 80/17, paragraph 3.2.

⁴⁵ Bullock, Simon; Mason, James; Larkin, Alice, Are the IMO's new targets for international shipping compatible with the Paris Climate Agreement?, Climate Policy, Vol. 24, No. 7, 2024, p. 967.

⁴⁶ IMO, IMO's work to cut GHG emissions from ships, <https://www.imo.org/en/MediaCentre/HotTopics/Pages/Cutting-GHG-emissions.aspx>, 30. 12. 2024.

⁴⁷ Aiken, Deniece, Maritime governance: contextual factors affecting implementation of IMO instruments, World Maritime University, Sweden, 2023, p. 68.

Ship Energy Efficiency Management Plan (SEEMP). Unfortunately, they have not been successful in reducing emissions and will not be sufficient to reach the 2050 goal. Since the agreement on and implementation of measures at the IMO take time, the EU has taken the initiative by addressing international maritime transport through several new or amended legislation as part of the 'Fit for 55' package.

Table 1. Comparison of Initial IMO Strategy on Reduction of GHG Emissions from Ships of 2018 and 2023 IMO GHG Strategy

	Initial IMO GHG Strategy	2023 IMO GHG Strategy
GHG emission reduction	50% by 2050 compared to 2008 (paragraph 3.1.3.)	net-zero GHG emissions by or around 2050 (paragraph 3.3.4.) at least 20%, striving for 30% by 2030, compared to 2008 (paragraph 3.4.1.) at least 70%, striving for 80% by 2040, compared to 2008 (paragraph 3.4.2.)
CO ₂ reduction	40% by 2030, compared to 2008 70% by 2050, compared to 2008 (paragraph 3.1.2.)	40% by 2030, compared to 2008 (paragraph 3.3.2.)
Uptake of zero or near-zero GHG emission technologies, fuels and/or energy sources	-	at least 5%, striving for 10% by 2030 (paragraph 3.3.3.)
Life cycle GHG intensity of marine fuels	Tank-to-wake carbon emissions (paragraph 1.3.3.)	Well-to-wake GHG emissions (paragraph 3.2.; 4.7.)

Source: Authors.

3. European Legislation on Decarbonisation in the Maritime Sector

Although climate change remains one of the most pressing challenges confronting the world today, maritime transport continues to rely heavily on fossil fuels as the primary energy source for vessels. Furthermore, the maritime transport's share of global CO₂ emissions is increasing yearly. Therefore, various regulations have been introduced and adopted also at the European Union level. Decarbonisation in the maritime sector is linked to these key documents: Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system,⁴⁸ Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757⁴⁹ in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types⁵⁰ (MRV Regulation) and Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC (Fuel EU Maritime Regulation)⁵¹ which are further analysed in the paper.

3.1. European Climate Law and other Legislation Aiming at Achieving Climate Neutrality with Special Reference to the EU Emissions Trading System (ETS)

In order to achieve net zero greenhouse gas emissions in the European Union by 2050, in 2021 Regulation (EU) 2021/1119 establishing the framework for

⁴⁸ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16. 5. 2023, pp. 134–202.

⁴⁹ Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, OJ L 123, 19. 5. 2015, pp. 55–76.

⁵⁰ Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types, OJ L 130, 16. 5. 2023, pp. 105–114.

⁵¹ Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC, OJ L 234, 22. 9. 2023, pp. 48–100.

achieving climate neutrality – ‘European Climate Law’ was adopted.⁵² Unlike numerous non-binding documents such as the European Green Deal, the Regulation sets out a binding objective of climate neutrality.⁵³ This goal is sought to be achieved by regulating union-wide greenhouse gas emissions and removals, investing in green technologies and protecting the natural environment.⁵⁴

The ‘European Climate Law’ outlines key responsibilities and actions for the European Union and its Member States regarding climate change adaptation. Therefore, as stated in Art. 5, continuous progress is required to improve adaptive capacity, resilience, and reduce vulnerability to climate change, aligning with the Paris Agreement. Furthermore, adaptation policies across the European Union and Member States should be coherent, mutually supportive, and integrated across all policy areas. In the context of the topic of this paper, point 13 of the Preamble states that: “the EU ETS is a cornerstone of the Union’s climate policy and constitutes its key tool for reducing greenhouse gas emissions in a cost-effective way.”

Emissions Trading Systems (ETS) are market-based measures that establish an annual limit on the total greenhouse gas (GHG) or CO₂ emissions permitted for the industries required to participate. Companies within the system can trade emission allowances, either purchasing additional rights to emit or selling surplus allowances, depending on their production levels and capacity to enhance energy efficiency or lower their carbon emissions. This approach incentivises cleaner operations, as companies with lower emissions can profit by selling excess allowances to those for whom purchasing rights is more cost-effective than investing in emission-reduction measures. Talking about ETS history, Christodoulou and Cullinane state that “inclusion of shipping in the EU ETS forms part of the European Green Deal and is adopted prior to any developments or advances at the global level have taken place.”⁵⁵ The

⁵² Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’), OJ L 243, 9.7.2021, pp. 1–17.

⁵³ The Regulation commits the European Union to an enhanced target of greenhouse-gas emissions reduction by at least 55% (compared to 1990 levels) by 2030 (Art. 4(1)) and to climate neutrality by 2050 (art. 2(1)).

⁵⁴ FAOLEX Database, European Union Regulation (EU) 2021/1119 for achieving climate neutrality (European Climate Law), <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC204009/>, 19. 12. 2024.

⁵⁵ Christodoulou, Anastasia; Cullinane, Kevin, The prospects for, and implications of, emissions trading in shipping, *Maritime Economics & Logistics*, 26, 2024, p. 170. It should be noted that regional emission trading schemes include the EU ETS and China ETS. Wu, Min; Li, Kevin X.; Xiao, Yi; Yuen, Kum Fai, Carbon Emission Trading Scheme in the shipping sector: Drivers, challenges, and impacts, *Marine Policy*, Vol. 138, April 2022, 104989.

EU Emissions Trading System (ETS) has been in force since 2005,⁵⁶ it is the earliest carbon market in the world,⁵⁷ and has been periodically revised and updated. An ETS can be either “open” or “closed”. In the open system, shipping companies can trade emission permits with other industries, while in a closed ETS, shipping companies can only trade among themselves.⁵⁸ As Lagouvardou and Psarftis correctly conclude, the EU ETS, as a market-based measure, aims to enforce the “polluter-pays principle” and provide monetary incentives to stakeholders to reduce their carbon footprint.⁵⁹

On 14 July 2021, the European Commission adopted a Communication ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality⁶⁰ - a set of proposals⁶¹ to reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels through climate, energy, transport, land use and taxation policies and to achieve the goals of the ‘European Climate Law’. The ‘Fit for 55’ package includes several proposals related to the maritime industry: the updated EU Emissions Trading System (EU ETS), Monitoring, Reporting and Verification (MRV) Maritime Regulation, Alternative Fuels Infrastructure Regulation (AFIR), the introduction of the FuelEU Maritime Regulation, revision of the Renewable Energy Directive (RED), and revision of the Energy Taxation Directive (ETD).

The Communication ‘Fit for 55’ states that to strengthen the role of carbon pricing in the transport sector, the current EU ETS should extend to the maritime sector from 2023 to 2025.⁶²

⁵⁶ Christodoulou, Anastasia; Cullinane, Kevin, The prospects for, and implications of, emissions trading in shipping, *Maritime Economics & Logistics*, 26, 2024, p. 173.

⁵⁷ Dong, Junjie; Zeng, Jia; Yang, Yanbin; Wang, Hua, A review of law and policy on decarbonization of shipping, *Frontiers in Marine Science*, Vol. 9, 2022., 1076352., p. 5.

⁵⁸ Wang, Kun; Fu, Xiaowen; Luo, Meifeng, Modelling the impacts of alternative emission trading schemes on international shipping, *Transportation Research Part A*, 77, 2015, p. 36.

⁵⁹ Lagouvardou, Sotiria; Psarftis, Harilaos N., Implications of the EU Emissions Trading System (ETS) on European container routes: A carbon leakage case study, *Maritime Transport Research* 3, 2022, 100059.

⁶⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final.

⁶¹ Summary of the legal changes and key policy options proposed by ‘Fit for 55’ see in Schlacke, Sabine; Wentzien, Helen; Thierjung, Eva-Maria; Köster, Miriam, Implementing the EU Climate Law via the ‘Fit for 55’ package, *Oxford Open Energy*, Volume 1, 2022.

⁶² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final.

“The Commission is also proposing to promote the uptake of sustainable fuels in the aviation and maritime sectors complementing the ETS for the aviation and maritime sectors which makes polluting fuels more expensive for suppliers.”

In 2023 Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system⁶³ was adopted. This Directive “applies to ships of 5000 gross tonnage and above in respect of the greenhouse gas emissions released during their voyages for transporting for commercial purposes cargo or passengers from such ships”⁶⁴ from 1 January 2024. From 1 January 2027, it will also apply to offshore ships of or above 5000 gross tonnage.

According to Art. 3ga: the allocation of allowances⁶⁵ and the application of surrender requirements in respect of maritime transport activities shall apply in respect of:

- a) 50% of the emissions from ships performing voyages departing or arriving outside of the European Union
- b) 100% of emissions from ships performing voyages departing and arriving port of a Member State
- c) 100% of emissions from ships within a port under the jurisdiction of a Member State.
- d) The EU ETS covers CO₂ (carbon dioxide) and from 1 January 2026 it will also cover CH₄ (methane) and N₂O (nitrous oxide) emissions.⁶⁶

Shipping companies will have to monitor and report their emissions and purchase and surrender ETS emission allowances for each tonne of reported

⁶³ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16. 5. 2023, pp. 134–202.

⁶⁴ Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, OJ L 123, 19. 5. 2015, pp. 55–76, Art. 2(1).

⁶⁵ According to Art. 3, point a: “allowance means an allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive“.

⁶⁶ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16. 5. 2023, Annex I.

CO₂ emissions in the scope of the system.⁶⁷ In Art. 3gb, it is prescribed that shipping companies have to surrender allowances according to the following schedule:

- a) in 2025 - 40% of verified emissions reported for 2024;
- b) in 2026 - 70% of verified emissions reported for 2025;
- c) from 2027 - 100% of verified emissions reported.

There is no separate EU ETS cap for the maritime sector nor specific shipping allowances. The joint cap was increased in 2024 by 78.4 million allowances to reflect the inclusion of maritime transport.⁶⁸

Each shipping company will be associated with an administering authority of a Member State to ensure compliance with the system. Regarding emissions from maritime transport activities, the administering authority in respect of a shipping company ensures that a shipping company under its responsibility monitors and reports the relevant parameters during a reporting period, and submits to it aggregated emissions data at company level (Art. 3gd). The administering authority in respect of a shipping company also ensures that the reporting of aggregated emissions data at shipping company level submitted by a shipping company is verified in accordance with the verification and accreditation rules (Art. 3ge).

The legislation on the inclusion of maritime emissions in the EU ETS has been supplemented by several implementing and delegated acts that cover the following topics: the administration of shipping companies by Member

⁶⁷ The EU Emissions Trading System (ETS) is a 'cap-and-trade' system. A cap is a maximum, defining the total amount of greenhouse gases that can be emitted by the operators covered by the system. It is reduced annually. The cap is expressed in emission allowances, where one allowance gives the right to emit one tonne of CO₂eq (carbon dioxide equivalent). Operators are not allowed to generate more greenhouse gas emissions than their allowances can cover. Companies covered by the EU ETS must surrender (use) EU allowances corresponding to their emissions in the Union Registry. Emission allowances are auctioned, and companies can buy and sell them through secondary markets. Shipping companies covered by the EU ETS are required to have an approved monitoring plan for monitoring and reporting annual emissions. Every year, companies must submit an emissions report for each of the ship under their responsibility, as well as an emissions report at company. The data for a given year must be verified by an accredited verifier. Once verified, companies must surrender (use) the equivalent number of allowances by 30 September of that year. EMSA, FAQ – Maritime transport in EU Emissions Trading System (ETS), <https://emsa.europa.eu/reducing-emissions/extension-ets/faq-extension-ets.html>, 21. 12. 2024.

⁶⁸ Commission Decision (EU) 2023/1575 of 27 July 2023 on the Union-wide quantity of allowances to be issued under the EU Emissions Trading System for 2024 (Text with EEA relevance), OJ L 192, 31. 7. 2023, pp. 30–31.

States;⁶⁹ the submission of aggregated emissions data at the shipping company level;⁷⁰ rules for the monitoring of greenhouse gas emissions;⁷¹ updates of the relevant templates;⁷² verification and accreditation procedures;⁷³ identification of neighbouring container transshipment ports;⁷⁴ small islands and transnational routes under public service obligation or contract subject⁷⁵ to specific provisions under the ETS Directive.⁷⁶ Based on the reported emissions data at the company level, companies are required to surrender (use) a corresponding amount of EU allowances in the Union Registry. Emission allowances can be purchased in the primary market through auctions on the European Energy Exchange (contracted by the EU and Member States) or a secondary market in which allowances can be sold bilaterally or through various derivatives provided by financial institutions.⁷⁷

⁶⁹ Commission Implementing Regulation (EU) 2023/2599 of 22 November 2023 laying down rules for the application of Directive 2003/87/EC of the European Parliament and of the Council as regards the administration of shipping companies by administering authorities in respect of a shipping company, OJ L, 2023/2599, 23. 11. 2023.

Commission Implementing Decision (EU) 2024/411 of 30 January 2024 on the list of shipping companies specifying the administering authority in respect of a shipping company in accordance with Directive 2003/87/EC of the European Parliament and of the Council, OJ L, 2024/411, 31. 1. 2024.

⁷⁰ Commission Delegated Regulation (EU) 2023/2849 of 12 October 2023 supplementing Regulation (EU) 2015/757 of the European Parliament and of the Council as regards the rules for reporting and submission of the aggregated emissions data at company level, OJ L, 2023/2849, 15. 12. 2023, pp. 15. 12. 2023.

⁷¹ Commission Implementing Regulation (EU) 2023/2449 of 6 November 2023 laying down rules for the application of Regulation (EU) 2015/757 of the European Parliament and of the Council as regards templates for monitoring plans, emissions reports, partial emissions reports, documents of compliance, and reports at company level, and repealing Commission Implementing Regulation (EU) 2016/1927, OJ L, 2023/2449, 7. 11. 2023.

⁷² Commission Implementing Regulation (EU) 2023/2449 of 6 November 2023 laying down rules for the application of Regulation (EU) 2015/757 of the European Parliament and of the Council as regards templates for monitoring plans, emissions reports, partial emissions reports, documents of compliance, and reports at company level, and repealing Commission Implementing Regulation (EU) 2016/1927, OJ L, 2023/2449, 7. 11. 2023.

⁷³ Commission Delegated Regulation (EU) 2023/2917 of 20 October 2023 on the verification activities, accreditation of verifiers and approval of monitoring plans by administering authorities pursuant to Regulation (EU) 2015/757 of the European Parliament and of the Council on the monitoring, reporting and verification of greenhouse gas emissions from maritime transport, and repealing Commission Delegated Regulation (EU) 2016/2072, OJ L, 2023/2917, 29. 12. 2023.

⁷⁴ Commission Implementing Regulation (EU) 2023/2297 of 26 October 2023 identifying neighbouring container transshipment ports pursuant to Directive 2003/87/EC of the European Parliament and of the Council, OJ L, 2023/2297, 27. 10. 2023.

⁷⁵ Commission Implementing Decision (EU) 2023/2895 of 19 December 2023 laying down the list of islands and ports referred to in Article 12(3-d) of Directive 2003/87/EC of the European Parliament and of the Council and the list of transnational public service contracts or transnational public service obligations referred to in Article 12(3-c) of that Directive, OJ L, 2023/2895, 22. 12. 2023.

⁷⁶ European Commission, Reducing emissions from the shipping sector, https://climate.ec.europa.eu/eu-action/transport/reducing-emissions-shipping-sector_en, 27. 12. 2024.

⁷⁷ EMSA, FAQ – Maritime transport in EU Emissions Trading System (ETS), <https://emsa.europa.eu/reducing-emissions/extension-ets/faq-extension-ets.html>, 21. 12. 2024.

A carbon pricing policy instrument is still missing at global level. As was prescribed in Art. 3gg of the Directive (EU) 2023/959 when the IMO adopts a global market-based measure, the maritime EU ETS will be reviewed. Within 18 months of adopting such a measure, the European Commission must submit a report to the European Parliament and the Council. This report shall examine the IMO measure regarding its ambition in light of the objectives of the Paris Agreement, its environmental integrity, and the coherence between the EU ETS and that measure. If appropriate, the Commission may propose amendments to the Emissions Trading Directive in a manner that is consistent with the EU climate objective and the aim to preserve environmental integrity and effectiveness of the Union's climate action.⁷⁸

In case the IMO does not adopt a global market-based measure by 2028, which is in line with the ambitions of the Paris Agreement, the Commission shall then provide a report to the European Parliament and to the Council in which examines the need to to apply the allocation of allowances and surrender requirements in respect of more than fifty percent (50%) of the emissions from ships performing voyages between a port of call under the jurisdiction of a Member State and a port of call outside the jurisdiction of a Member State, in light of the objectives of the Paris Agreement. Where appropriate, the report shall be accompanied by a legislative proposal.⁷⁹

Introducing an ETS for shipping aims to speed up investments in green technologies and alternative fuels. Operational costs from acquiring emissions allowances would encourage companies to invest in energy efficiency and alternative fuels. The progressive tightening of the emissions cap and rising allowance prices would push shipping companies toward long-term sustainability strategies, significantly reducing CO₂ emissions. However, the success of these environmental outcomes depends on market conditions. In periods of high fuel prices, low charter rates or expensive fees, shipping companies may reduce services or pass costs to customers through higher charter rates, potentially affecting demand, especially for short-sea shipping that faces competition from other modes of transport.⁸⁰

The inclusion of maritime transport in the ETS adds financial burdens on shipping companies, particularly small and medium-sized operators, as they must purchase emission allowances for their CO₂ emissions. The Directive could disadvantage EU-based shipping companies compared to non-EU

⁷⁸ Directive (EU) 2023/959, Art. 3gg(1).

⁷⁹ Directive (EU) 2023/959, Art. 3gg(2).

⁸⁰ Christodoulou, Anastasia; Cullinane, Kevin, The prospects for, and implications of, emissions trading in shipping, *Maritime Economics & Logistics*, 26, 2024, pp. 180–181.

competitors, especially for routes that partially involve EU ports. This may result in “carbon leakage” where shipping activity shifts to ports outside the EU. The Directive applies only to emissions from voyages within the EU and half of the emissions from voyages to or from an EU port. This partial coverage might limit its effectiveness in addressing the global nature of maritime emissions, leading to fragmented regulation.

3.2. Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport and Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757

Due to the limited progress the International Maritime Organization (IMO) achieved, the European Union took the initiative to lead efforts in reducing CO₂ emissions from maritime transport. In 2015, the European Union adopted Regulation (EU) No 2015/757 on the monitoring, reporting and verification of CO₂ emissions (MRV Regulation). The Regulation (EU) No 2015/757 was amended by Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU ETS and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types. According to Art. 1, the Regulation lays down rules: “for the accurate monitoring, reporting and verification of greenhouse gas emissions and of other relevant information from ships arriving at, within or departing from ports under the jurisdiction of a Member State, in order to promote the reduction of greenhouse gas emissions from maritime transport in a cost-effective manner.” It applies to ships of 5000 gross tonnage and above in respect of the greenhouse gas emissions released during their voyages for transporting for commercial purposes cargo or passengers from such ships’ last port of call to a port of call under the jurisdiction of a Member State and from a port of call under the jurisdiction of a Member State to their next port of call, as well as within ports of call under the jurisdiction of a Member State (Art. 2(1)). From 1 January 2025, the MRV Regulation also applies to offshore ships of 5000 gross tonnage and above, as well as offshore ships and general cargo ships below 5000 gross tonnage but not below 400 gross tonnage. As prescribed in Art. 2(1c) the greenhouse gases covered by this Regulation are: carbon dioxide (CO₂), methane (CH₄) and nitrous oxide (N₂O).

Companies must monitor emissions and other relevant information for each of their vessels covered by the Regulation. They carry out that monitoring and reporting within all ports under the jurisdiction of a Member State and for any voyages to or from a port under the jurisdiction of a Member State (Art. 4). Additionally, companies must submit an externally verified⁸¹ emissions report to the Commission, administering authority responsible, and to the authorities of the flag states concerned (Art. 11). From 2025, for ships falling within the scope of the Directive (EU) 2023/959 of the European Parliament and of the Council, shipping companies must also submit an emissions report at company level (aggregating the data to be reported for ETS purposes at company level), which have been verified as satisfactory by a verifier (Art. 11a). Where the emissions report fulfils the requirements regarding reporting and verification, the verifier issues, based on the verification report, a document of compliance for the ship concerned (Art. 17(1)). Ships must carry on board a valid document of compliance.

The solutions of Regulation (EU) 2015/757 represent a European standard that is not globally accepted, and it is a complex process of registration, reporting and verification of CO₂ emissions from ships. Primorac warns that since the provisions of Regulation (EU) 2015/757 apply to ships weighing more than 5000 gross tonnage that enter a port under the jurisdiction of a Member State of the European Union, depart from a port of a Member State of the European Union, or are in a port under the jurisdiction of a Member State of the European Union, regardless of the flag that the ship flies, for the reasons mentioned, the competitiveness of European shipping companies in international maritime traffic is called into question. Namely, the companies are obliged to collect data on fuel consumption, create a Monitoring Plan and bear the costs of verification of the Emissions Report by accredited verifiers, which represents an additional administrative and financial burden for them.⁸² She therefore justifiably concludes, and with what we agree, that shipping as a global activity requires global solutions and international uniformity.

⁸¹ About the complex procedure of verification, see more in Primorac, Željka, *Europska perspektiva provođenja postupaka verifikacije CO₂ emisija iz Pomorskog prometa*, Zbornik radova 2. međunarodne znanstvene konferencije iz pomorskog prava – MZKPP, Split, 2018.

⁸² Primorac, Željka, *Europska perspektiva provođenja postupaka verifikacije CO₂ emisija iz Pomorskog prometa*, Zbornik radova 2. međunarodne znanstvene konferencije iz pomorskog prava – MZKPP, Split, 2018. pp. 306-307.

3.3. Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC

As part of the ‘Fit for 55’⁸³ legislative package, the FuelEU Maritime Regulation (Regulation (EU) 2023/1805) was adopted in 2023 and entered into force on 1 January 2025. It promotes using renewable, low-carbon fuels and clean energy technologies for ships and is a complementary regulation to the EU ETS. This Regulation establishes uniform rules on: “a) a limit on the greenhouse gas (GHG) intensity of energy used on board by a ship arriving at, staying within or departing from ports under the jurisdiction of a Member State; and b) an obligation to use on-shore power supply (OPS) or zero-emission technology⁸⁴ in ports under the jurisdiction of a Member State.”⁸⁵ The regulations established aim to progressively reduce the greenhouse gas intensity of fuels used in the shipping industry, starting with a 2% decrease in 2025 and reaching up to 80% by 2050.

Regulation (EU) 2023/1805 applies to all ships of above 5000 gross tonnage that serve the purpose of transporting passengers or cargo for commercial purposes, regardless of their flag, in respect of:

- “a) the energy used during their stay within a port of call under the jurisdiction of a Member State;
- b) the entirety of the energy used on voyages from a port of call under the jurisdiction of a Member State to a port of call under the jurisdiction of a Member State;
- c) one half of the energy used on voyages arriving at or departing from a port of call located in an outermost region under the jurisdiction of a Member State; and

⁸³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality, COM(2021) 550 final.

⁸⁴ Zero-emission technology is a technology that, when used to provide energy, does not result in the release of the carbon dioxide, methane, nitrous oxide, sulphur oxides, nitrogen oxides and particulate matter.

⁸⁵ Art. 1(1) Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC.

d) one half of the energy used on voyages arriving at or departing from a port of call under the jurisdiction of a Member State, where the previous or the next port of call is under the jurisdiction of a third country.”⁸⁶

So it has the same scope as the EU ETS: it will apply to all of the energy used at EU ports, on voyages between EU ports, and 50% of the energy used on voyages between EU ports and third countries.

The targets cover not only CO₂ but also CH₄ and N₂O emissions over the full lifecycle of the fuels used onboard on a Well-to-Wake⁸⁷ (WtW) basis (Art. 2). The Regulation also prescribes the additional zero-emission requirements for energy used at berth. In accordance with Art. 6 of the Regulation (EU) 2023/1805, to reduce air pollution in ports, passenger and container ships moored at the quayside in a port of call must use on-shore power supply (OPS) for all its electrical power demand at berth from 1 January 2030 onwards in ports covered under Article 9 of the Alternative Fuels Infrastructure Regulation,⁸⁸ and from 1 January 2035 in all EU ports equipped with OPS. Member States may choose to apply the obligation to ports not covered by Article 9 of Alternative Fuels Infrastructure Regulation, from 1 January 2030.

For each of their ships, companies monitor and report on the relevant data within all ports under the jurisdiction of a Member State and for voyages referred to in Article 2(1). Monitoring and reporting cover the energy used on board by ships at any time. According to Art. 8(1) companies submit a monitoring plan for each of their ships to the verifiers. Based on the monitoring plan and following the assessment of that plan by the verifier, companies monitor and record, for each ship arriving at or departing from a port of call, and for each voyage referred to in Article 2(1), a whole series of different information, e.g. the amount of each type of fuel consumed at berth and at sea; the amount of electricity delivered to the ship through OPS; the amount of each type of substitute source of energy consumed at berth and at sea, etc.⁸⁹ Companies provide a ship-specific report (the “FuelEU report”) to the verifier containing all these information. After verification, the verifier assesses the quality, completeness and accuracy of the “FuelEU report”. If there are no significant misstatements or inconsistencies

⁸⁶ Art. 2(1) Regulation (EU) 2023/1805 of the European Parliament and of the Council of 13 September 2023 on the use of renewable and low-carbon fuels in maritime transport, and amending Directive 2009/16/EC.

⁸⁷ As defined in Art. 3, point 18, it is a: “method for calculating emissions that takes into account the GHG impact of energy production, transport, distribution and use on board, including during combustion.”

⁸⁸ Regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, OJ L 234, 22. 9. 2023, pp. 1–47.

⁸⁹ See Art. 15 of the Regulation (EU) 2023/1805.

in the “FuelEU report“, the verifier shall submit a verification report to the company, stating that the “FuelEU report“ is in compliance with Regulation.⁹⁰ The competent authority of the administering State in respect of the company may carry out additional checks on the “FuelEU report“, the verification report and the calculations carried out by the verifier. If the additional checks report identifies misstatements, non-conformities or miscalculations, the company responsible for the ship pays a FuelEU penalty (Art. 17). The verifier issues a document of compliance to the ship under the FuelEU system, provided that the ship has no compliance deficiencies and no non-compliant port calls. In Art. 24, it is prescribed that the FuelEU document of compliance issued for the ship is evidence of compliance with the Regulation for a specific reporting period.

Maritime transport relies on the use of conventional fossil fuels, however there is a variety of alternative fuel types available for shipping. Methanol, hydrogen, ethanol, ammonia, biofuels, liquefied natural gas, electricity, wind, nuclear power, e-fuels, etc. How environmentally friendly they are depends on, among other things, how they are produced. “Each type of alternative fuel requires specific infrastructure for its production, storage, delivery and combustion at port, terminals and ships.”⁹¹ “The lack of infrastructure for alternative fuels is the main obstacle to the development of alternative fuel-powered maritime transportation.⁹² Furthermore, all alternative fuels have “certain merits, limitations, different costs, and many solutions are not mature yet and there is no obvious ‘one fuel’ choice for the global fleet.”⁹³

⁹⁰ Art. 16 of the Regulation (EU) 2023/1805.

⁹¹ Popek, M., *Alternative Fuels – Prospects for the Shipping Industry*, TRANSSNAV - the International Journal on Marine Navigation and Safety of Sea Transportation, Volume 18, Number 1, March 2024, p. 31.

⁹² Popek, M., *Alternative Fuels – Prospects for the Shipping Industry*, TRANSSNAV - the International Journal on Marine Navigation and Safety of Sea Transportation, Volume 18, Number 1, March 2024, p. 31

About alternative fuels in maritime transport see also Xing, Hui; Stuart, Charles; Spence, Stephen; Chen, Hua, *Alternative fuel options for low carbon maritime transportation: Pathways to 2050*, *Journal of Cleaner Production* 297, 2021, 126651. The authors conclude that zero carbon synthetic fuels including hydrogen and ammonia accompanied by clean production could play a vital role in domestic and short sea shipping, though current costs and infrastructure are not commercially feasible. Methanol appears to be the most promising alternative fuel for global shipping, and hydrogen, ammonia, bioethanol and biodiesels from renewable energy sources for domestic and short sea shipping. Ingwersen et al. based on analyses conclude that e-ammonia, e-FT diesel, and e-methanol could meet the 2050 FuelEU Maritime target. Ingwersen, Anna; Hahn Menacho, Alvaro J.; Pfister, Stephan; Peel, Jonathan N.; Sacchi, Romain; Moretti, Christian, *Prospective life cycle assessment of cost-effective pathways for achieving the FuelEU Maritime Regulation targets*, *Science of The Total Environment*, Volume 958, 2025, 177880.

⁹³ von Malmberg, Fredrik, *Advocacy coalitions and policy change for decarbonisation of international maritime transport: The case of FuelEU maritime*, *Maritime Transport Research*, Volume 4, 2023, 100091, p. 2.

FuelEU Maritime Regulation should be consistent with Directive (EU) 2023/959 establishing a system for greenhouse gas emission allowance trading within the Union, Regulation (EU) 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. Directive (EU) 2018/2001 establishes a common framework for the promotion of energy from renewable sources.⁹⁴ According to Art. 3(1) of this Directive, binding overall European Union target for 2030 is that share of energy from renewable sources in the Union's gross final consumption of energy is at least 42.5% with specific rules for the transport sector (share of renewable energy within the final consumption of energy in the transport sector should be of at least 29% by 2030).

Table 2. Comparison of European legislation on decarbonisation in the maritime sector

	Ship application	Greenhouse gases covered	Emissions application
ETS - Directive 2003/87/EC	-	-	-
ETS - Directive (EU) 2023/959	From 2024: Cargo and passenger ships of or above 5000 GT From 2027: Offshore ships of or above 5000 GT	CO ₂ (carbon dioxide) from 1 January 2026 CH ₄ (methane) N ₂ O (nitrous oxide)	a) 50% of the emissions from ships performing voyages departing or arriving outside of the European Union b) 100% of emissions from ships performing voyages departing and arriving port of a Member State c) 100% of emissions from ships within a port under the jurisdiction of a Member State.

⁹⁴ Energy from renewable sources is “energy from renewable non-fossil sources, namely wind, solar (solar thermal and solar photovoltaic) and geothermal energy, osmotic energy, ambient energy, tide, wave and other ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas, and biogas”, Art. 2, point 1, Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources OJ L 328, 21.12.2018, pp. 82–209 and Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L, 2023/2413, 31. 10. 2023.

Regulation (EU) 2015/757	Ships above 5000 GT	CO ₂ (carbon dioxide)	emissions released during ship voyages from their last port of call to a port of call under the jurisdiction of a Member State and from a port of call under the jurisdiction of a Member State to their next port of call, as well as within ports of call under the jurisdiction of a Member State.
MRV Regulation (EU) 2023/957	EUEFrom 2025: Cargo and passenger ships of or above 5000 GT Offshore ships of or above 5000 GT Offshore ships and general cargo ships below 5000 GT but not below 400 GT	CO ₂ (carbon dioxide) CH ₄ (methane) N ₂ O (nitrous oxide)	emissions released during their voyages from their last port of call to a port of call under the jurisdiction of a Member State and from a port of call under the jurisdiction of a Member State to their next port of call, as well as within ports of call under the jurisdiction of a Member State
ReFuel Maritime Regulation - Regulation (EU) 2023/1805	Passengers or cargo ships of above 5000 GT	CO ₂ (carbon dioxide) CH ₄ (methane) N ₂ O (nitrous oxide)	a) the entirety of the energy used on voyages from a port of call under the jurisdiction of a Member State to a port of call under the jurisdiction of a Member State; energy used during their stay within a port of call under the jurisdiction of a Member State; b) one half of the energy used on voyages arriving at or departing from a port of call located in an outermost region under the jurisdiction of a Member State; and c) one half of the energy used on voyages arriving at or departing from a port of call under the jurisdiction of a Member State, where the previous or the next port of call is under the jurisdiction of a third country.

Source: Authors.

4. Conclusion

Shipping is a highly globalized and international sector, with most emissions originating from international voyages. Although the IMO is committed to taking action to reduce greenhouse gas emissions, in line with the 2015 Paris Agreement on Climate Change, significant results have been absent. Efforts to create a legal framework for reducing greenhouse gas emissions from ships and decarbonising maritime transport resulted in the adoption of the Initial IMO Strategy on reduction of GHG emissions from ships in 2018. This Initial Strategy was amended in 2023. The 2023 IMO GHG Strategy sets the target of net-zero GHG emissions by or around 2050 and accelerating the transition to zero-emission fuels. Since the Strategy is not legally binding, it serves as a policy framework and a set of voluntary guidelines to reduce greenhouse gas emissions from international shipping. It relies on international cooperation and commitment from member states to achieve its goals. However, member states can implement measures through national legislation or by supporting amendments to existing legally binding instruments (e. g. MARPOL Annex VI).

Although global policies are more suitable for a global sector, the European Union could not wait for binding and serious solutions from the IMO and went its own way to achieve decarbonisation in maritime transport. As shown in the paper, the most important European regulations, regarding the achievement of climate neutrality, have been changed in the last few years or new ones have been adopted. Regulations related to the reduction of emissions from maritime transport as well. As can be seen in Table 2, new rules have been adopted or existing ones have expanded the scope of application (territorially or to additional types of ships).

However, there are certain criticisms of the existing regulation. Regulation (EU) No 2015/757, also known as the Monitoring, Reporting, and Verification (MRV) Regulation, as amended by Regulation (EU) 2023/957, is primarily regional, it applies only to voyages to, from, or between EU ports. MRV Regulation is primarily a data collection tool. Furthermore, it imposes significant reporting and verification requirements, which the shipping industry considers overly bureaucratic and costly, especially for smaller operators.

Directive (EU) 2023/959, which amends Directive 2003/87/EC by which maritime transport is incorporated in the EU Emissions Trading System, also applies only to emissions from voyages within the EU, as well as half of the emissions from voyages to or from an EU port. This partial coverage might limit its effectiveness in addressing the global nature of maritime emissions,

leading to fragmented regulation. Just like the MRV Regulation, Directive (EU) 2023/959 represents an administrative burden for shipping companies. It also has an economic impact on shipping companies since the inclusion of maritime transport in the ETS adds financial burdens.

Regulation (EU) 2023/1805 (FuelEU Maritime Regulation) has significant potential in driving the critical shift towards zero-carbon fuels. As the first regulation of its kind, it aims to stimulate demand for sustainable marine fuels by enforcing a gradual decrease in the greenhouse gas (GHG) intensity of shipping fuels over time. However, this Regulation also has implementation challenges since it is applied to passengers or cargo ships of or above 5000 GT, and companies must fill in comprehensive monitoring and reporting data for all their ships. It is questionable whether the penalties provided for non-compliance in the FuelEU Maritime Regulation are sufficient to force companies to switch to fuel cleaning. Namely, there is a possibility that they decide to pay fines and not invest in sustainable fuels. The transition to renewable and low-carbon fuels depends on the availability of suitable technologies, fuels and infrastructure. There is currently no adequate infrastructure for alternative fuels. Additionally, large amount of European emissions remain unregulated by EU ETS and FuelEU Maritime Regulation since they do not apply to different types of vessels (see Table 2). Therefore, it will be necessary to expand their application.

Although criticisms of this European legal system have been mentioned, it is still an initial direction for achieving environmental goals and a move towards decarbonisation in maritime transport, which will undoubtedly be revised.

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MANAGEMENT OF SHIP GENERATED WASTE: ENVIRONMENTAL PROTECTION REGULATIONS AND THE ITALIAN PORT REGULATORY FRAMEWORK*

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Review scientific paper

Sustainable maritime transport activities represent a primary component of the EU policies on “zero impact” mobility models. Maritime transport plays a pivotal role in the international movement of goods, boasting dominant shares in the foreign trade of the EU countries. Its strategic importance for access to primary resources and competitiveness of the EU emerged, with force, both during the COVID pandemic and following the geopolitical circumstances triggered by the Russia-Ukraine war.

In the context of the EU policies aimed at the ecological transition, the EU legislator has paid due attention to the management of waste produced by ships, along with cargo residues, outlining a special regime, which is governed by the fundamental principles of environmental law and open to the concrete objectives of the circular economy.

In this context, some legislation on the treatment of waste produced by nautical activity has assumed pivotal importance in the perspective of containing environmental risk at a global level. Providing for the safe management of waste produced on-board but capable of contaminating very distant areas or rapidly spreading pathogens in different parts of the world, due to its origins in diverse contexts and countries (during the voyage), emerged forcefully as an urgent topic during the pandemic crisis. However, it had already been present on the European agenda for some time. The EU requires Member States to take the necessary measures to enact a management strategy that ensures, first and foremost, the protection of human health, as well as the environment in all its components, including the landscape and sites of particular interest. The paper highlights the EU special regime for management of waste produced by ships in the framework of the general legislation on waste management, with special reference to the state of the art in Italy.

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1. Maritime Transport and Sustainability Strategies in the European Union

The sustainable activity of maritime transport constitutes a fundamental pillar of the European Union's policies on smart mobility and the implementation of "zero-impact" models¹. The sector is pivotal for the international movement of goods², holding a dominant share in the foreign trade of European states. Its strategic relevance for access to primary resources and the Union's competitiveness has been strongly reaffirmed in the wake of the health crisis and the geopolitical contingencies arising from the Russia-Ukraine conflict³.

The objective of ensuring safe and environmentally sustainable maritime transport is pursued through a systemic approach encompassing a range of preventive measures. These measures pertain not only to the intrinsic characteristics of the vessel but also to crew training, navigation conduct, and the organization of both on-board and onshore services, all of which are instrumental in maintaining navigational risks and related environmental pollution within acceptable thresholds⁴.

¹ See the EU Action Plan for "Zero" Pollution, as outlined in the European Commission Communications COM (2019) 640 final on "The European Green Deal" and the EU "Pathway to a Healthier Planet for All – EU Action Plan: Towards Zero Pollution for Air, Water, and Soil" COM (2021) 400 final, which set the ambitious goal of achieving zero accidents, zero waste, and zero pollution by 2025, including through decarbonized, smart, and resilient maritime transport. For comments, L. Colella, *La strategia "plastic free" e i principi della direttiva europea 2019/904. Tra economia circolare, diritto dell'ambiente ed ecologia integrale*, in *ambientediritto.it*, 2020 fasc. 4, p. 73 - 95

² Maritime transport is the primary vehicle of international trade, according to an ISTAT survey for 2021, which confirms that 90% of goods are transported by sea. Maritime transport and logistics account for approximately 12% of global GDP, while container handling worldwide is expected to grow at an average annual rate of 4.8% by 2025, reaching one billion TEUs (Europe +3.9%, Africa +4.9%, Far East +5.3%, Middle East +4%, and North America +3.6%). According to a Bank of Italy survey on international freight transport for the year 2020, the pandemic had a significant impact on unit costs in the sector, which remained fully operational even during the most critical phases of the health emergency. In the reference year, the share of transport costs in the value of goods exported and imported by Italy increased overall to 3.1% and 4.3%, respectively (up from 2.9% and 3.9% in 2019), reversing the downward trend of previous years. For further insights, see <https://www.istat.it/it/archivio/14330>; https://www.bancaditalia.it/pubblicazioni/indagine-trasporti-internazionali/2021-indagine-trasporti-internazionali/statistiche_ITM_14062021.pdf.

³ See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on "*Maritime Security: At the Heart of a Clean and Modern Maritime Transport*" COM (2023) 268 final, June 2023.

⁴ The bibliography on the subject is vast. Limiting to volumes that address the topic with a systematic approach, both at the national and international level, v. *Il controllo del traffico nella navigazione. Stato dell'arte e evoluzione*, edited by C. Ingratoci, A. Marino, ESI, Napoli, 2022; *Sicurezza e libertà nell'esercizio della navigazione*, edited by C. Ingratoci, M.P. Rizzo, Milano, 2013; *Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo*, edited by F. Pellegrino, Napoli, 2013; *La sicurezza nel trasporto e nelle infrastrutture della navigazione marittima e aerea*, edited by di U. La Torre, A.M.L. Sia, Catanzaro, Rubettino editore, 2011; F. Pellegrino, *Lo sviluppo sostenibile dei trasporti marittimi comunitari*, Milano, 2009; *Sicurezza, navigazione e trasporto*, edited by R. Tranquilli-Leali, E.G. Rosafo, Milano, 2008.

The enforcement of such measures falls within the purview of the primary actors responsible for safety oversight under international maritime law⁵, namely the flag State and the port State. However, where required by navigational risk conditions, coastal States are increasingly called upon to ensure the provision of vessel traffic services (VTS) and maritime surveillance systems capable of tracking ship movements from port to port and monitoring navigational conduct through the application of advanced digital technologies⁶.

In this framework, the regulation of ship-generated waste management is assuming growing significance, particularly concerning the imperative to mitigate sanitary risks. The need to ensure the safe handling of waste produced within a single confined environment (the vessel) but originating from multiple operational contexts (throughout the voyage) is of paramount importance, as such waste may contribute to cross-border contamination or facilitate the rapid dissemination of pathogens across multiple jurisdictions. The urgency of this issue was accentuated during the COVID-19 pandemic, yet it had already been addressed in EU regulatory instruments. Notably, Article 13 of Directive 2008/98/EC⁷ on waste mandates Member States to adopt the necessary measures to ensure that waste management prioritizes the protection of human health and the environment, including landscapes and areas of particular interest.

In the broader context of ecological transition policies, the European legislator has devoted specific attention to the regulation of ship-generated waste and cargo residues, establishing a special regime⁸ that, while rooted in

⁵ See C. Ingratoci, *Obblighi e responsabilità dello Stato di bandiera*, in *Riv. dir. nav.* 2013, 791 ss.

⁶ The reference is to the strategy for sustainable and smart mobility, most recently mentioned in the European Commission's Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on "Maritime Security: At the Heart of a Clean and Modern Maritime Transport" cited in footnote 2. See also C. Ingratoci, *Considerazioni sul regime dei servizi del traffico nella navigazione. Fonti, strumenti, responsabilità*, in *Il controllo del traffico nella navigazione. Stato dell'arte e evoluzione*, cit., 2022, 3-60.

⁷ Dir. 2008/98/EC, the "Waste Framework Directive" as amended by Dir. 2018/851/EU, establishes a common legal framework at the European level for waste management and treatment.

⁸ On the special nature of Italian Maritime Law see S. Pugliatti, *Codice della navigazione e codice civile*, in *Riv. dir. nav.* 1943-48, Parte I, p.13 ss.; D. Gaeta, *Nozione, oggetto e caratteri del diritto della navigazione*, in *Riv. dir. nav.* 1963, p.114 ss.

fundamental environmental principles⁹, aligns with contemporary circular economy objectives¹⁰.

Ship-generated waste exhibits unique characteristics that necessitate dedicated regulatory provisions. These include the “remote provenance” of waste materials, their heterogeneous composition relative to territorial or sector-specific production systems, and their susceptibility to alteration due to production and storage conditions. Regulatory frameworks must not only address the correct collection and treatment of increasingly voluminous and diversified waste streams generated by ever-larger vessels but must also safeguard the bacteriological integrity of transported goods¹¹, including perishable commodities and medical supplies.

Given these considerations, the oversight of globally transported substances is – and will continue to be – an essential factor in shaping a safe and resilient

⁹ The reference is to the E.U. principles of precaution, prevention, sustainability, proportionality, and the “polluter pays” principle, all of which are collectively mentioned in Article 178 of Italian Legislative Decree 152/2006, as cited below in footnote 23. The bibliography on this topic is extensive: in this context, we limit to citing the recent *Codice dell'ambiente*, edited by S. Necci e L. Ramacci, *Le fonti del diritto italiano*, Milano, 2022, and E. Orlando, *I principi del diritto ambientale dell'Unione Europea*, 23 ff., and F. Peres, *Rifiuti e economia circolare. Profili generali*, 2483 ff. For further bibliographic references see also M. Antonioli, *Sviluppo sostenibile e giudice amministrativo tra tutela ambientale e governo del territorio* in *Riv. it. dir. pubbl. comun.*, 2019, fasc. 2, 219 ff. For an in-depth analysis of the legal aspects of the circular economy, with a view to overcoming the “waste hierarchy” principle in pursuit of the full reutilization of these resources see F. De Leonardis, *Economia circolare: saggio sui suoi tre diversi aspetti giuridici. Verso uno Stato circolare*, in *Dir. amm.* 2017, 163 ff.; M. Meli, *Oltre il principio chi inquina paga: verso un'economia circolare*, in *Riv. critica dir. privato*, 2017, 63 ff.; M. T. Stile, *Da economia lineare ad economia circolare: un percorso in salita*, in *Dir. com. scambi int.*, 2015, 263 ff.; C. Bovino, *Verso un'economia circolare: la revisione delle direttive sui rifiuti*, in *Ambiente*, 2014, 682 ff.; P. Dell'Anno, *Disciplina della gestione dei rifiuti*, in AA.VV., *Trattato di diritto dell'ambiente*, a cura di P. Dell'Anno-E. Picozza, vol. II, Padova, 2013, 162 ff.; M. Pernice-Mininni, *Il sistema normativo e tecnico in materia di rifiuti*, Milano, 2008. See also the Commission Communication on “Implementation of the Circular Economy Package: Options to Address the Interface Between Chemical, Product, and Waste Legislation” COM (2018) 32 final.

¹⁰ See, in this regard, the Commission Communication of December 2, 2015, COM (2015) 614 final, “Closing the Loop – An EU Action Plan for the Circular Economy”, which sets out sustainability objectives in terms of increasing the percentage of recycled waste and reducing landfill disposal, based on the traditional waste hierarchy principle. See also the Commission Communication on “Implementation of the circular economy package: options to address the interface between chemical, product and waste legislation” COM (2018) 32 def. See M. Antonioli, *Sviluppo sostenibile e giudice amministrativo tra tutela ambientale e governo del territorio* cit., 219 ff.

¹¹ See Regulation (EC) No. 1069/2009 of the European Parliament and the Council, which mandates the disposal of catering waste from means of transport engaged in international journeys—including waste from ships calling at EU ports that may have come into contact on board with animal by-products—through authorized landfill, incineration, or burial. To ensure that this requirement does not hinder the preparation for reuse and recycling of ship-generated waste, the IMO Consolidated Guidance introduces rules aimed at separating waste to prevent potential contamination, such as that of packaging waste.

model of territorial access through ports (and airports too)¹². This regulatory dimension is poised to emerge as a critical determinant in route planning, alongside traditional factors such as the availability of port-based services tailored to cargo and vessel operations. Furthermore, ship-generated waste – including cargo residues, materials of medical and alimentary interest, packaging, bilge and ballast water, and marine biofouling – possesses high energy conversion potential. As such, these waste streams can be integrated into economic valorisation processes, a trajectory reinforced by recent EU legislative developments in this domain.

It follows that, in pursuit of sustainability objectives predicated on circular economy principles and resilience against systemic crises, a central issue in the EU's common policy framework is the efficiency of waste management procedures associated with maritime transport.

Accordingly, a legal analysis of the objectives and regulatory mechanisms governing waste management within ports appears warranted, with special reference to the category of “ship-generated waste”. The relevant legal provisions are characterized not only by a multi-tiered regulatory structure – reflecting the inherently international nature of the issue – but also by their intersection with distinct normative domains. These include both specialized maritime and port regulations, as well as the broader legal framework governing waste management, which remains subject to the overarching principles of environmental law.

2. Directive 2019/883/EU: General Principles and Scope of Application

The most recent intervention by the European legislator in defining a special regime for waste generated by maritime navigation activities can be traced to the adoption of Directive 2019/883/EU¹³ on port reception facilities for the delivery and collection of such waste¹⁴. This legislative framework is part of broader measures imposed on ships arriving at and departing from European ports¹⁵,

¹² C. Ingratoci, *L'impatto della legislazione di emergenza sul settore portuale*, in *Rivista italiana di Diritto del turismo*, 30/2020, 185-210; Id., *Misure di emergenza sanitaria da Covid-19 e trasporto marittimo*, in *Diritti fondamentali ai tempi della pandemia da Covid-19*, ESI, Napoli, 2021, 85-105.

¹³ Directive (EU) 2019/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of waste from ships, amending Directive 2010/65/EU and repealing Directive 2000/59/EC.

¹⁴ The directive repeals the previous Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues.

¹⁵ Cf. Directive 2010/65/EU of the European Parliament and of the Council of 20 October 2010 on reporting formalities for ships arriving in and departing from ports of the Member States.

with the objective of mitigating the harmful effects of maritime operations on the marine environment and the conservation of its resources. It also considers socio-economic, health, and security externalities on a global scale, along with associated financial risks.

Unlike the pre-2000 legislation, the recent directive aims to significantly reduce pollution while simultaneously enhancing European shipping routes within a sustainability framework linked to the quality of port services¹⁶, regarded as a market capable of generating utilities of evident economic and environmental value.

To this end, the current legislative text aligns EU law with the provisions of the International Convention for the Prevention of Pollution from Ships (MARPOL)¹⁷, deemed central to European circular economy policies and the Commission's recent plastic strategy¹⁸.

At the same time, it incorporates recommendations contained in the "International Maritime Organization (IMO) Consolidated Guide"¹⁹ for port facility managers and users, introducing a standardized format for waste delivery notifications and receipts, reporting on the location and characteristics of port reception facilities, and denouncing any inadequacies observed by users. These provisions reduce the risk of differing interpretations by individual Member States regarding essential aspects of the directive's correct application, such as the concept of "adequacy of facilities", the "sufficient storage capacity" of ships, the requirements for the obligation to deliver waste, and possible exemptions for ships on scheduled services.

The directive thus achieves greater harmonization, facilitating the proper implementation of the measures indicated and full alignment with MARPOL rules. This also serves to prevent redundant administrative burdens for both ports and ship operators, leveraging the benefits of the port reception facility database integrated into the IMO's Global Integrated Shipping Information System (GISIS).

¹⁶ Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017, establishing a framework for the provision of port services and common rules on the financial transparency of ports. This EU Regulation considers the provision of port reception facilities as a service falling within its scope.

¹⁷ International Convention for the Prevention of Pollution from Ships (MARPOL). The Convention was adopted on 2 November 1973 under the auspices of the IMO. The 1978 Protocol was adopted in response to incidents in the oil transport sector between 1976 and 1977. Both instruments entered into force internationally on 2 October 1983.

¹⁸ Cfr. Communication of Commission on "Implementation of the circular economy package: options to address the interface between chemical, product and waste legislation" COM (2018) 32 def., cit.

¹⁹ IMO - MEPC.1/Circ. 834/Rev.1.

The legal regime introduced is founded on environmental protection principles, namely prevention, elimination at source of environmental damage, and, in terms of liability, the polluter pays principle. In particular, the directive applies the extended producer responsibility principle, whereby the producer remains accountable for the environmental impact of its products throughout their entire lifecycle.

According to Art. 3, the directive applies to: (a) all ships, regardless of their flag, that call at or operate in a Member State's port, except for service vessels as defined in Article 1(2) of the so-called Regulation (EU) 2017/352, and excluding warships, naval auxiliaries, or other state-owned or state-operated vessels used exclusively for non-commercial government services; (b) all ports of Member States that are regularly used by ships covered under point (a).

The directive's effectiveness concerns Member States in their dual capacity as flag state administrations and port authorities. This legitimizes a strict interpretation of compliance with the obligations imposed, not only regarding the manner and conditions of waste delivery (by the ship) but also concerning the provision of adequate facilities and services in ports across the Union's coastlines²⁰.

The imperative obligation under Article 4 of the directive requires Member States to ensure the availability of port reception facilities that are adequate to meet the needs of ships using the port regularly, without causing undue delays. This obligation reflects fundamental principles of international maritime law, codified in the United Nations Convention on the Law of the Sea (UNCLOS): the duty to contribute to marine environmental protection in the interest of the international community, and the right of all coastal and landlocked states to freedom of navigation, which would be undermined if ships were unable to access necessary facilities for lawful navigation, including proper waste management.

Facilities are deemed adequate if they can meet the needs of ships using the port without causing unjustified delays, in full compliance with EU and international regulations. Structural deficiencies in these facilities must be reported by flag states (Article 4(3)), while the "denounced" port state is required to conduct an investigation and notify IMO and the flag state of its findings.

²⁰ In this regard, see also Articles 3, §§ 2 and 3, of Directive 2019/883/EU. The duty to adequately train the personnel responsible for the facilities and the waste management system also falls within the scope of these obligations, as outlined in Article 15 of Directive 2019/883/EU.

2.1. Waste Management Planning and Cost Recovery

The organization of waste collection and management activities is subject to planning conducted (and periodically updated) by the relevant port authority²¹, based on directive criteria and in consultation with public authorities (local administrations) and private stakeholders (users, port facility operators)²².

Member States are also required to ensure that adequate information is provided on the availability, location, operational procedures, and costs of port reception facilities²³.

The directive places particular emphasis on incentivizing proactive waste management systems, in line with the “National Waste Prevention Program” under Directive 2008/98/EC and the EU Circular Economy Package (2015).

A key instrument in this regard is an indirect fee system, payable by ships regardless of actual waste delivery at a given port. This system also covers the fishing and recreational boating sectors, due to their significant contribution to marine waste generation. Fees are set according to economically incentivizing criteria, covering administrative overheads and at least 30% of direct operational costs (Article 8). If the waste delivered exceeds the vessel’s maximum storage capacity for waste listed in Annex V of the MARPOL Convention, a direct additional fee may be levied. Consequently, a ship incurs additional charges only if the volume delivered exceeds specific limits (Article 8).

Further economic incentives include reduced fees for ships designed to minimize waste production (green ships), those engaged in regular services contributing systematically to financing facilities through indirect fees, or those operating short-sea shipping routes in line with EU maritime transport policies.

Small non-commercial ports, which primarily host limited numbers of recreational vessels, may be exempted from planning requirements if their reception facilities are integrated into the urban waste management system and relevant information is made available to port users.

²¹ For reasons of efficiency, waste collection and management plans may also be developed jointly by two or more neighbouring ports within the same geographical region, with the adequate participation of each port, provided that the need for and availability of port reception facilities are specified for each individual port.

²² See Art. 5 and Annex 1, Dir. 2019/883/EU.

²³ The information is also made available electronically and updated in the part of the information, monitoring, and enforcement system referred to in Article 13 of Directive 2019/883/EU.

2.2. Enforcement and Inspections

Member States are responsible for ensuring compliance as flag state administrations. All ships bound for an EU port that are subject to the European ship reporting system²⁴ must submit a “waste notification” in advance²⁵, following the deadlines stipulated in Article 6. This notification must contain all required information and be transmitted electronically to the competent authority or body designated by the Member State where the port is located²⁶.

The ship’s master is obliged to deliver waste to a port reception facility in accordance with MARPOL provisions and may only depart upon obtaining a waste delivery receipt²⁷. The directive requires the master, together with the operator and shipping agent, to electronically transmit the waste delivery receipt before departure and maintain a copy onboard for at least two years for inspection by Member State authorities.

Exemptions from the delivery obligation apply only under Article 7(4)²⁸ if the ship can demonstrate sufficient onboard storage capacity to accommodate the waste generated until the next port of call, provided that this next port has adequate reception facilities and is known in advance. The obligation is also waived in case of extreme weather conditions or if the vessel’s port stay does not exceed 24 hours.

²⁴ Directive 2002/59/EC of the European Parliament and of the Council, of 27 June 2002, establishing an EU vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC. The directive applies to all ships accessing European ports with a gross tonnage of 300 or more, with the exception of warships, fishing vessels, traditional or recreational vessels less than 45 meters in length, and bunker vessels up to 5,000 tons. For the EU traffic vessels monitoring system see *Il controllo del traffico nella navigazione. Stato dell’arte e evoluzione*, edited by C. Ingratoci, A. Marino, Milano, 2022.

²⁵ The notification must be made 24 hours before arrival or the shortest available time if the port of call is announced less than 24 hours before arrival. The notification must be made at the time of departure from the previous port if the duration of the journey to the port of call is less than 24 hours. The information from the advance waste notification is electronically recorded in the information, monitoring, and enforcement system referred to in Article 13 of this Directive, in accordance with Directives 2002/59/EC and 2010/65/EU. The communication and exchange of information are based on the Union’s maritime data exchange system (“SafeSeaNet”) as outlined in Article 22b, paragraph 3, and Annex III of Directive 2002/59/EC.

²⁶ The information that must be provided is specified in the notification form contained in Annex 2 of the Directive. Similarly, at the time of disposal, the operator of the port reception facility or the port authority to which the waste has been delivered must complete the form in Annex 3 (“waste delivery receipt”) in an authentic and accurate manner and provide, without undue delay, the waste delivery receipt to the ship’s master (see Article 6, § 2 and Article 7, § 3 of Directive 2019/883/EU).

²⁷ The obligation to deliver waste is not required in small ports or those located in remote areas, provided that the competent Member State has electronically notified the name and location of these ports in the relevant section of the information, monitoring, and enforcement system referred to in Article 13 of Directive 2019/883/EU. Article 7, § 2 of Directive 2019/883/EU.

²⁸ The methods to be used for calculating sufficient storage capacity are defined by the European Commission through implementing acts adopted in accordance with the examination procedure set out in Article 20, paragraph 2, of Directive 2019/883/EU.

Port states must conduct random inspections covering at least 15% of ships calling at their ports annually, based on a risk-based selection mechanism established by the European Commission. The Commission also maintains and updates an inspection database, accessible to all Member States, containing information essential for enforcing inspection regimes.

If an inspection yields unsatisfactory results, authorities may impose sanctions under Article 16 and detain the vessel in port until it has disposed of its waste in compliance with the directive (Article 11).

3. The Italian Legal Regime. Scope of Application of Special Rules on the Management of Ship-Generated Waste and Cargo Residues

The reconstruction of national regulations on the management of ship-generated waste and cargo residues can be methodologically initiated by referring to the most recent legislation on port reception facilities for the delivery of such waste, as established by Legislative Decree No. 197 of November 8, 2021²⁹, which implements Directive 2019/883/EU. These are not entirely new rules, as the legislator had already addressed the matter with Legislative Decree No. 182 of June 26, 2003³⁰ (implementing the previous Directive 2000/59/EC³¹), acknowledging the necessity of introducing a special regime³² for this category of waste. This necessity arises from the required coordination between the exercise of legal prerogatives granted to different levels of government, both national and

²⁹ Legislative Decree No. 197 of 8 November 2021 (in S.O. No. 41 to the Official Gazette No. 285 of 30 November 2021), as amended and supplemented by Legislative Decree No. 46 of 8 March 2024, Supplementary and Corrective Provisions to Legislative Decree No. 197 of 8 November 2021, implementing Directive (EU) 2019/883 of the European Parliament and of the Council, of 17 April 2019, on port reception facilities for the delivery of ship-generated waste, which amends Directive 2010/65/EU and repeals Directive 2000/59/EC.

³⁰ Legislative Decree No. 182 of 24 June 2003. Implementation of Directive 2000/59/EC on port reception facilities for waste generated by ships and cargo residues, repealed by Legislative Decree No. 197/2021, as referred to in note 3.

³¹ Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for waste generated by ships and cargo residues, repealed by Directive (EU) 2021/883 of the European Parliament and of the Council of 17 April 2019 on port reception facilities for the delivery of ship-generated waste, as referenced in the previous note.

³² The bibliography on the subject is not extensive. A first detailed examination of the previous regime for the disposal of waste generated by ships is contained in the Volume *Raccolta e gestione nei porti dei rifiuti prodotti da navi*, Proceedings of the Civitavecchia Conference edited by M. Deiana, Cagliari, 2008. See also N. Carnimeo, G. Delle Foglie, *Management of Waste generated by Ships in the Port Area. Prevention Activities and Measures to combat Plastic Pollution at Sea*, in *Rivista del Diritto della Navigazione*, 2022 fasc. 2, pp. 615 ff.; A. Claroni, *Alcune riflessioni in ordine alla gestione dei rifiuti in ambito portuale alla luce della disciplina di cui alla l. n. 84/94 ed al d.lgs. n. 182/2003*, in *Riv. dir. nav.*, 2017, 95 ff.; G. Duca, A. Versolato, *L'attuazione della direttiva 2000/59/Ce relativa agli impianti portuali di raccolta dei rifiuti prodotti dalle navi ed i residui di carico*, in *Dir. mar.* 2003, 1558 ff.; D. Bocchese, *Il servizio di presidio antinquinamento alla luce della riforma portuale*, in *Dir. trasp.* 1997, 823ff.

local, and the management functions of ports and port services assigned to the relevant sectoral authorities (Maritime Authority and Port System Authority).

Regarding the scope of application, the current Decree No. 197/2021, in compliance with the directive it implements, defines “ship-generated waste” as a broad category that includes “cargo residues, bilge water, sewage, and sediments produced during service operations or loading, unloading, and cleaning operations” as well as various substances listed in Annexes I, II, IV, V, and VI of the MARPOL Convention³³. In addition to these types of waste, which fall within the scope of special regulations as they are “generated by the ship”, there is also waste accidentally retrieved from the sea³⁴. In this regard, the decree specifies that this category includes substances collected in fishing nets during operations and brought on board. These substances were already present in the sea (it is not necessarily waste in the sense that the original producer/holder³⁵ intended to dispose of it, but the objective of the recovering ship must be disposal). Cargo residues are defined as “remnants of any material constituting cargo that remains on board” and “left on the deck, in the hold, or in tanks” after loading and unloading operations, including surpluses and spills of any kind that come into contact with the cargo and its residues. An exception is made for dust that remains attached to certain areas of the ship’s hull³⁶.

From an objective standpoint, therefore, waste produced by ships is a discarded substance resulting from actions and events related to the use of the vessel itself (navigation, consumption, onboard life) or the benefits it provides as a means of transport. In the case of waste fished from the sea, the legal provision requires the captain to keep such substances on board for subsequent lawful disposal, thus defining a model of necessary public-private cooperation in activities aimed at reducing marine pollution levels³⁷.

³³ Thus, Article 2, paragraph 1, letter c). The annexes referred to concern, in particular, regulations for pollution from hydrocarbons (I); regulations for the prevention of pollution from harmful liquid substances carried in bulk (II); regulations for the prevention of pollution from ship wastewater (IV); regulations for the prevention of pollution from solid waste discharged by ships (V); regulations for the prevention of air pollution from SO_x and NO_x emissions from engine exhausts (VI).

³⁴ Article 2, paragraph 1, letter d), Legislative Decree No. 197/2021.

³⁵ For the definitions of “producer” and “holder” according to the current waste management regulations, see below in note 39.

³⁶ Article 2, paragraph 1, letter e), Legislative Decree No. 197/2021.

³⁷ See Article 16 of Legislative Decree 197/2021 regarding the sanctions imposed on the ship’s master in the case of non-compliance with the provisions related to the disposal of waste.

Decree No. 197/2021 further clarifies that ship-generated waste falls within the general definition of “waste” under Legislative Decree No. 152/2006³⁸, which contains environmental regulations. As a result, such waste, like waste in general, is considered “a substance or object that the holder discards, intends to discard, or is required to discard”³⁹. Additionally, it is typically classified as “special waste” produced as part of service activities under Article 184, paragraph 3, letter f) of Legislative Decree No. 152/2006, with the exception of waste produced by passengers and crew, as well as waste accidentally fished from the sea, which are considered “municipal waste” under Article 183, paragraph 1, letter b-ter) of the same environmental legislation⁴⁰.

The definition of waste, under Article 2 of Legislative Decree No. 197/2021 thus requires the presence of three fundamental elements:

1. The substance must conform to the general notion of waste under both domestic and EU law.
2. The substance must fall within the categories identified by the special regulations (ship-generated waste, cargo residue, fished waste).
3. The substance must be attributable to the categories covered by the annexes to the MARPOL Convention.

Regarding point (1), waste is legally defined by the intentional element of the holder seeking to dispose of it, which constitutes its defining characteristic

³⁸ Legislative Decree No. 152 of 3 April 2006, in the Official Gazette No. 88 of 14 April 2006 - Ordinary Supplement No. 96, as amended by Legislative Decree No. 116 of 3 September 2020 (Official Gazette No. 226 of 11 September 2020). The bibliography on waste regulations is extensive; see among others, F. De Leonardis, *I rifiuti: dallo smaltimento alla prevenzione*, in AA.VV., *Diritto dell'ambiente*, edited by Giampaolo Rossi, IV ed., Torino, 2017, 296 ss.; P. dell'Anno, *Disciplina della gestione dei rifiuti*, in AA.VV., *Trattato di diritto dell'ambiente*, edited by P. Dell'Anno-E. Picozza, vol. II, Padova, 2013, 162 ss.; AA.VV., *La nuova disciplina dei rifiuti*, edited by F. Giampietro, Milano, 2011; M. Pernice-Mininni, *Il sistema normativo e tecnico in materia di rifiuti*, cit.

³⁹ Thus, Article 183, paragraph 1, letter a) of Legislative Decree 152/2006. The definition follows, word for word, the one provided in Article 3, paragraph 1, of Directive 2008/98/EC as amended by Directive 2018/851/EU. The same provision defines, in letter f), the “waste producer” as “the entity whose activity produces waste and the entity to whom the production of such waste is legally attributable (initial producer), or anyone who carries out operations of pretreatment, mixing, or other operations that have modified the nature or composition of the waste (new producer)”, while the “holder” (letter h) is the waste producer or the natural or legal person who holds the waste. M. Di Lullo, *La nozione e la disciplina (pubblicistica) dei rifiuti: beni da valorizzare?* in *Il diritto dell'economia*, 2020, fasc. 3, 555 ff.; M.F. Tommasini, *La fenomenologia del rifiuto tra atti di dismissione e tutela del bene ambiente*, in *Contratto e impresa*, 2018, fasc. 1, 413 ff.; F. De Leonardis, *I rifiuti: dallo smaltimento alla prevenzione*, cit., 296 ff.

⁴⁰ The special legislation thus defines a specific category of waste, implementing the provisions introduced at the EU level, which take precedence over the general regulatory framework while still being part of it. See also Article 177, paragraph 3, of Legislative Decree 152/2006.

from a legal-technical perspective⁴¹. The legal analysis of the term “discard” has been extensively debated in case law, which has concluded that it indicates the subjective attitude of the holder towards a production residue lacking a high probability of reuse in the same production process in an economically viable manner⁴². Given the values protected by the law, this notion cannot be interpreted restrictively⁴³.

The presumed uselessness of the substance, which underlies the holder’s intention to discard it, is therefore not an intrinsic characteristic of the good, which can (and should, where possible) be managed as a “resource”. This principle is evident in the treatment methods prescribed by the so-called “waste hierarchy”⁴⁴ which prioritizes reuse and recycling over disposal, considered the last resort by law⁴⁵. The latest regulations on waste management cycles promote integrated models where production—and even the design of production systems—must be geared towards increasing the reusability of waste products from different phases⁴⁶.

Regarding point (2), within the general definition framework, the waste subject to special regulation is that produced during service operations, loading/

⁴¹ The reference is to Part IV of Legislative Decree 152/2006, *Regulations on Waste Management and Remediation of Contaminated Sites*, specifically Title I on *Waste Management*, which partially implements the Directive 2008/98/EC. The directive was transposed into national law through Legislative Decree No. 205 of 3 December 2010 – Implementation Provisions of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives (Official Gazette No. 288 of 10 December 2010, Ordinary Supplement No. 269).

⁴² See, most recently, Italian Cass. civ., II, 2 September 2022, No. 25929, in the Iusexplorer database, also for the referenced precedents.

⁴³ Court of Justice EU, Chamber II, Judgment of 14 October 2020, No. 629, available in the Iusexplorer database. As for legal doctrine cfr. V. Rubino, *Ai confini della nozione di rifiuto: la disciplina dei sottoprodotti dopo la direttiva 2008/98/CE*, in *Studi sull’integrazione europea*, 2013, fasc. 2, 393 ff.

⁴⁴ The reference is to Article 179 of Legislative Decree 152/2006, which, in establishing the hierarchy of waste management criteria, prioritizes prevention, preparation for reuse, recycling, other forms of recovery—including energy recovery—and, lastly, disposal. The provision clarifies that the hierarchy generally establishes an order of priority for what constitutes the best environmental option in waste treatment. Furthermore, in compliance with this hierarchy, measures must be adopted to encourage options that ensure the best overall outcome, regarding health, social, and economic impacts, including technical feasibility and economic viability.

⁴⁵ F. Bocchini, *Gestione dei rifiuti ed economia circolare nella giurisprudenza della Corte Costituzionale*, in *Giur. Cost.* 2022, p. 1805 – 1822. Therein, the Author underscores the legal significance of waste, not only as a factor of environmental pollution but also as a valuable resource, in line with the European Union’s approach to implementing a circular economy that transcends the very notion of waste. Within this framework, the definition of waste inferred from Constitutional Court rulings and the Environmental Code (Article 183), being an objective concept, would be consistent with the dual legal nature of substances—as both a pollutant and a resource. In the same vein, the aforementioned Communication from the EU Commission of 2 December 2015, COM (2015) 614 final, highlights how waste and its potential reuse as “secondary raw materials” constitute a fundamental element in ensuring the Union’s access to the raw materials it will require in the near future.

⁴⁶ F. De Leonardis, *Economia circolare*, cit., 163 ff.

unloading, or cleaning of a ship. A “ship” is defined as “any type of vessel operating in the marine environment, including fishing vessels, recreational boats, hydrofoils, hovercraft, submarines, and floating structures” (Article 2, paragraph 1, letter a) of Legislative Decree No. 197/2021)⁴⁷.

Waste produced by offshore platforms is not covered by this regulation, despite the reference to the MARPOL Convention, which, in Article 2, states that the term “ships” includes fixed or floating offshore platforms. Case law under the previous regulatory framework has correctly clarified that definitions in international law are binding when the provisions of the Convention are directly applicable within their own scope but do not extend to cases where internal and EU laws refer only to specific rules or annexes of the Convention⁴⁸. When interpreting the notion of a ship under the domestic legal system, based on Article 136 of the Navigation Code, waste produced by offshore platforms does not fall within the scope of the decree.

The reference to the ship as the entity responsible for waste production and management allows for identifying the “producer” and/or “holder” as the legal entity responsible for navigation⁴⁹.

The disposal obligation applies to all ships calling at or operating in a port of a Member State, regardless of their flag, with the exceptions outlined in the implemented directive and some additional specifications⁵⁰. Port service vessels are exempt from these obligations⁵¹, meaning those engaged in activities specified in Regulation (EU) 2017/352 of the European Parliament and

⁴⁷ In legal scholarship, on the notion of a ship, see, among others, M. Musi, *La nozione di nave*, Libreria Bonomo Editore, Bologna, 2020, also for further bibliographic references.

⁴⁸ TAR Bologna, Judgment of 20 January 2002, No. 183, available in the Iusexplorer database.

⁴⁹ The reference is to the shipowner and the master of the vessel, the latter acting as the former’s representative. See Article 6, paragraph 1, of Legislative Decree No. 197/2021.

⁵⁰ Military and warships, as well as those used by police forces under civilian law, auxiliary ships, or other vessels owned or operated by a state, if used solely for non-commercial state services, are excluded (Article 3, paragraph 1, letter a). A special regime for such ships is provided, established by decree of the Minister of Defence, in consultation with the Ministers of Economy and Finance, Environment and Energy Security, Infrastructure and Transport, and Health, in accordance with paragraphs 3 and 4.

⁵¹ Thus, Article 3, paragraph 1, letter a) of Legislative Decree No. 197/2021. Regarding the concept of “port services,” the provision refers to Regulation (EU) 2017/352 of the European Parliament and the Council of 15 February 2017, which establishes a regulatory framework for the provision of port services and common rules on financial transparency of ports. The specification of such services is further clarified by reference to Article 3, paragraph 1, of the Ministry of Infrastructure and Transport Decree of 27 April 2017, which includes units dedicated to bunkering services, tug services under concession, ecological services, offshore platform assistance, units used for activities related to ship-to-ship operations, dredgers, floating cranes, barges, pontoons, units dedicated to technical-nautical services, and units employed for port services under Article 66 of the Navigation Code and Article 60 of the Regulation for the implementation of the maritime part of the Navigation Code. A special regime for such vessels is established by decree of the Minister of Defence, in consultation with the Ministers of Economy and Finance, Environment and Energy Security, Infrastructure and Transport, and Health, in accordance with paragraphs 3 and 4.

Council of February 15, 2017, which establishes a regulatory framework for the provision of port services and financial transparency of ports⁵².

The competent authority may exempt ships engaged in scheduled services with frequent and regular calls from some disposal obligations by issuing a specific exemption certificate, provided that the vessel delivers its waste at a port along its route and pays the corresponding fee under a formal agreement⁵³. However, such exemption must not compromise maritime safety, health, working and living conditions on board, or the marine environment.

Regarding exemption conditions, scheduled traffic is defined in the same decree as “traffic carried out according to a published or planned schedule of departures and arrivals between specific ports or in recurring crossings according to a schedule recognized by the competent authority”⁵⁴. A ship making stops at least every two weeks in the same port is also considered to have “frequent calls”⁵⁵. Based on these definitions, even a cruise ship calling at the same ports on a predetermined itinerary qualifies for an exemption certificate⁵⁶.

Possession of the certificate does not prevent the competent authority from requiring waste disposal before departure if inspections indicate that the vessel’s storage capacity is insufficient for the waste already on board and that expected to accumulate before reaching the designated disposal port.

Regarding point (3), the substance in question must fall within the scope of the MARPOL 73/78 Convention annexes, which set internationally accepted rules for preventing pollution from ships, implying that the substance represents a potential environmental hazard.

⁵² Thus, Article 3, paragraph 1, letter b) of Legislative Decree No. 197/2021. In order to avoid unjustified delays, the Port System Authority or, where not established, the Maritime Authority may exclude the anchorage area from the application of certain provisions of the decree, particularly those related to the advance notification of waste, waste delivery, and cost recovery.

⁵³ Article 9, Legislative Decree No. 197/2021. Waste delivery must be substantiated through the conclusion of a contract with a managing company operating in the considered port and evidenced by delivery receipts. It is also required that the agreement be notified to all ports along the route and accepted by the port where the delivery takes place.

⁵⁴ Article 2, paragraph 1, letter n) of Legislative Decree No. 197/2021.

⁵⁵ Article 2, paragraph 1, letter o) and p) of Legislative Decree No. 197/2021.

⁵⁶ On the cruise traffic as a regular service cfr. F. Franchina, *Crociera turistica e servizio di linea in Il diritto marittimo*, 2020, 478 ff.

4. Competent Authorities and Implementation Tools: Waste Collection and Management Plans and Ship Delivery Obligations

The regulation of ports and port activities⁵⁷ has historically influenced the responsibilities related to the management of waste produced or otherwise collected within these territorial areas.

As early as the Ronchi Decree⁵⁸, the obligation to manage waste produced by ships was assigned to port authorities, where established, or to maritime authorities, responsible for fulfilling the obligations set out in Articles 11 and 12 (Article 19, paragraph 4-bis).

The subsequent Legislative Decree 182/2003 transferred this obligation to the waste collection concessionaire, responsible for carrying out the service and managing the related facilities. The operator was selected through a public procurement procedure, a model confirmed today by Article 4, §7 of the current Legislative Decree No. 197/2021.

Moreover, pursuant to the provisions of Regulation 352/2017, waste management is included, as a whole, within the framework of a comprehensive service provided to ships, covering the entire cycle: from collection to sterilization, from transportation to recovery and disposal⁵⁹. This clear regulatory framework puts an end to the uncertainty that characterized the previous system regarding the organization of the service, by classifying it within the scope of port services as defined by Regulation (EU) No. 352/2017, which establishes a legal framework for the provision of port services and common rules on financial transparency in ports⁶⁰. Indeed, “the collection of waste generated by ships and cargo residues” is expressly included among port services. Furthermore, Legislative Decree 197/2021 clarifies that the service contract, including the construction of collection facilities⁶¹, must be awarded “in compliance with the national and EU legislation in force on public procurement, contracting, and concessions, with particular reference to Regulation (EU) 352/2017”.

⁵⁷ Already contained in the Navigation Code, Articles 108 et seq., and in the corresponding provisions of the implementing regulations for the maritime part, now repealed, it is now established by Law No. 84 of January 28, 1994, as amended.

⁵⁸ Legislative Decree No. 22 of February 5, 1997, Implementation of Directives 91/156/EEC on Waste, 91/689/EEC on Hazardous Waste, and 94/62/EC on Packaging and Packaging Waste.

⁵⁹ Tar Bologna ruling on February 20, 2020, n. 181, can be found in the *Iusexplorer*.

⁶⁰ Regulation (EU) 2017/352, Article 1, paragraph 1, letter (e).

⁶¹ Article 4, paragraphs 1 and 7 of Legislative Decree No. 197/2021

The process involves collection, sterilization (where required), and either on-site thermal destruction or transportation, storage, treatment, recovery, or final disposal at facilities established within the port, in accordance with sector-specific legislation and authorized in compliance with general waste management regulations.

Under the previous Legislative Decree 182/2003, Article 5, paragraph 4 (as amended by Law 135/2009), the Regions were assigned several implementation tasks concerning the Waste and Cargo Residue Collection Plans.

Today, the planning and management of waste produced by ships (and cargo residues) fall within the functions of the port governing authority, identified as the Port System Authority, where established, or the Maritime Authority⁶². The different organizational structures of ports in these two cases are not insignificant in terms of service delivery methods. In ports governed by a Port System Authority, responsibilities are centralized within a single governing body, which handles all administrative functions (strategic planning, programming, and management of public domain areas), including waste management for ships and cargo residues. In other ports, the Maritime Authority performs corresponding administrative functions within a more structured coordination model, where decision-making power remains with the relevant local autonomies.

In other words, within the port domain, the functions related to the provision of waste disposal services – both from land and sea – fall under the jurisdiction of Port System Authorities, which have the right to request payment for the service provided⁶³. In the absence of such authorities, jurisdiction remains with the local entity, which is also responsible for determining service fees in consultation with the Maritime Authority⁶⁴. At the same time, the Regions are tasked with identifying the competent authorities within their territorial scope, which may or may not coincide with municipalities. Given this level of flexibility, there is a risk that the waste collection system may become excessively fragmented at the national level.

Accordingly, Article 208, paragraph 14, of Legislative Decree 152/2006 states that “the control and execution of loading, unloading, transshipment, storage, and handling of waste in port areas are governed by the specific provisions of Law No. 84 of 1994 and Legislative Decree No. 182 of June 24, 2003, implementing Directive 2009/50/EC” (the reference should now be understood as Legislative Decree No. 197/2021 implementing Directive 883/2019/EC on

⁶² Article 2, paragraphs 1, lett. l) of Legislative Decree No. 197/2021.

⁶³ Court of Justice, Lazio Regional Court, II degree, April 26, 2023, No. 2462, in the Iusexplorer database.

⁶⁴ Article 8 §2, Legislative Decree No. 197/2021. Also see Cass. Court of Cassation, Tax Section, February 23, 2023, No. 5667, in Giust. civ. Mass. 2023.

waste generated on ships) and by other provisions of the applicable legislation. In the case of transboundary waste transport, authorization for loading and unloading operations cannot be granted unless the applicant demonstrates compliance with the requirements of Article 193, paragraph 1, of this decree (Waste Identification Form - FIR) for environmental protection.

The Maritime Authority retains functions related to navigation safety and marine environmental protection under Article 3 of Law No. 84 of January 28, 1994.

The competent authority must activate the relevant service by preparing, approving, and implementing the “waste collection and management plan”, after consulting all interested parties (users, local authority representatives, operators, civil society). The plan must be updated at least every five years or whenever “significant operational changes in port management” occur⁶⁵.

Planning authority is removed from the Regions⁶⁶ and entrusted to the port management body when a Port System Authority is in place. In this case, the regional authority retains only supervisory powers to assess the compatibility of the document with the Regional Plan under Article 199 of Legislative Decree 152/2006 and to conduct environmental impact assessments (EIA). If the competent authority under special legislation is instead the Maritime Authority, it operates in agreement with the relevant Region, issuing its own ordinance to supplement the regional planning document, which constitutes the Port Waste Management Plan. In both cases, the Region exercises substitute powers in the event of failure to adopt the required measures⁶⁷.

The Plan defines the obligations and operational procedures for using port collection facilities⁶⁸, as well as the criteria for determining waste delivery fees, which “must not create a disincentive to the use of facilities”. For this

⁶⁵ Article 5 § 6, Legislative Decree No. 197/2021.

⁶⁶ The general legislation on waste management assigns planning competences to the Regions, pursuant to Article 196 of Legislative Decree No. 152/2006.

⁶⁷ Art. 5, § 3, Legislative Decree No. 197/2021.

⁶⁸ Referring to the provisions of Legislative Decree No. 152/2006, Article 4, paragraph 4, of Legislative Decree No. 197/2021 provides for the separate collection of kitchen and catering waste from ships engaged in international voyages, in order to facilitate their reuse and recycling in accordance with the categories established by the MARPOL Convention and taking into account the guidelines issued by the IMO on the matter.

reason, these fees are structured as “indirect fees”⁶⁹ in accordance with the new rules introduced by Directive (EU) 2019/883 on this matter. The competent authority must ensure that maritime operators are adequately informed about the availability of facilities, applicable fees, and collection procedures (Article 8, §7).

The responsibilities of municipalities, as Optimal Territorial Area Authorities under Article 200 of Legislative Decree 152/2006, are assigned by the decree under review to the Port System Authorities, both regarding tariff aspects and the conduct of tender procedures. In the case of ports that are not home to a Port System Authority, the municipality or the area authority (if established) instead oversees the awarding procedures, in agreement with the Maritime Authority for relevant purposes⁷⁰.

In smaller, non-commercial ports, waste management consists simply of integrating ship-generated waste into the municipal waste stream⁷¹.

The facility, whose definition now also includes offshore structures, is deemed adequate if it meets the needs of the ships using it regularly without causing delays, both in operational terms and in the proper environmental management of waste. In this context, the overall activity becomes the provision of a complete service to ships, encompassing the entire cycle: from collection to sterilization, transport, recovery, and disposal⁷².

While the port State is required to prepare and implement a plan for collecting ship-generated waste by equipping itself with adequate port reception facilities, the ship, in turn, is obliged to deliver its waste in compliance with a range of ancillary obligations established by sector regulations.

Waste delivery is structured as a mandatory requirement (Article 7 of Legislative Decree 197/2021) for any ship calling at a national (or EU) port,

⁶⁹ The indirect fee is structured in such a way as to cover the costs of the facilities and the waste disposal system, and it applies to all ships calling at the port in question, regardless of whether waste is actually disposed of. The goal is to encourage the activity, and for this purpose, the fee also applies to fishing vessels and pleasure boats to prevent the discharge of nets or accidentally caught waste into the sea. The fees can be differentiated based on the type, size, and type of traffic the ship is engaged in, while a reduction is provided for green ships. The waste management plan may also include supplementary direct fees if excessive quantities are disposed of that impact the standard costs of the facility.

⁷⁰ See Article 5, paragraph 4, of Legislative Decree 197/2021

⁷¹ See Article 5, paragraph 8, of Legislative Decree 197/2021.

⁷² Tar Bologna, February 20, 2020, n. 181 in the Iusexplorer database.

subject to the exceptions outlined in Article 7(4)⁷³ and the intervention authority provided in Article 7(5)⁷⁴.

These obligations have a long-standing legal foundation: Article 71 of the Navigation Code already prohibits the discharge of any materials in ports, while Article 77 of the implementing regulation (maritime section) forbids storing accumulated waste on board or discharging it into open sea within a distance set by the port commander. However, these prohibitions were primarily aimed at preserving the cleanliness and health of port waters for navigational safety reasons rather than broader environmental protection objectives.

In this regard, the issue of waste delivery has also been linked to Article 83 of the Navigation Code, which allows the Minister of Transport to limit or prohibit the transit and mooring of merchant vessels in territorial waters for reasons of public order, navigation safety, and marine environmental protection, specifying the areas subject to such restrictions.

The current regulation, however, imposes a series of obligations on ships that extend far beyond mere waste delivery, involving the internal organization of waste management services, the communication of various data, and functional elements to ensure full integration of waste into the appropriate treatment cycle.

First of all, onboard waste segregation is requested, aimed to reduce waste and promote recycling in accordance with MARPOL categories (Article 4, paragraph 2), particularly concerning food waste from ships engaged in international voyages.

The waste disposal process begins with the “advance waste notification” (Article 6, Legislative Decree 197/2021)⁷⁵, a pre-delivery notice required from the ship’s operator (agent or master) for vessels subject to the EU monitoring system under Legislative Decree 196/2005⁷⁶, implementing Directive 2002/59/

⁷³ The ship may proceed to the next port of call without having disposed of the waste, subject to authorization from the Maritime Authority, which, with the assistance of the Maritime Health Authority and the port chemist, verifies that there is sufficient storage capacity on board for all the waste that has accumulated and will accumulate until the next port of discharge; or that the ship docks in the anchorage area for less than 24 hours or under adverse weather conditions.

⁷⁴ An exemption authorization cannot be granted, and the Authority must require the disposal of waste, when, based on the available information – including that found in the monitoring and information exchange system SafeSeaNet or in Gisis – it cannot be ascertained that there are collection facilities in the next port of call, or the next port of call is unknown.

⁷⁵ The notice period is 24 hours if the port of call is known, otherwise as soon as the port of call is known and, at the latest, at the time of departure from the previous port: as per Article 6, paragraph 1, letters a) and b).

⁷⁶ Under Article 3 of Legislative Decree 196/2005, this refers to ships with a gross tonnage of 300 tons or more.

EC. This information is electronically recorded in the SafeSeaNet information system.

The facility operator organizes the service, and upon collection, the environmental worker issues the ship's master a "daily service receipt", which, once signed, certifies the delivery of waste in the specified quantity and type. To comply with waste delivery obligations, the ship's master must declare the quantity and type of waste produced, including wastewater.

Once delivered to the operator, the waste is logged in the loading/unloading register for temporary storage traceability and then transported to an authorized final disposal site, accompanied by a Waste Identification Form (FIR). All data is recorded in a chronological waste delivery register. The waste traceability document accompanies the waste from the ship to temporary storage.

Infectious medical waste is subject to a separate treatment process, requiring proper segregation onboard to prevent contamination. Additionally, meal residues from migrants (Article 7(7))⁷⁷ have been classified as hazardous medical waste.

The costs of port reception and treatment facilities for ship-generated waste (excluding cargo residues) are recovered through the collection of indirect fees, charged to all ships calling at the port regardless of whether they deliver waste (Article 8(1))⁷⁸.

The introduction of indirect fees represents a significant development, as the obligation to pay fees to the service concessionaire has historically been tied to the actual use of waste reception facilities⁷⁹. This system contributes to covering the costs of constructing and maintaining waste management infrastructure, including mitigating health risks associated with highly transmissible pathogens. A direct fee applies only when waste deliveries exceed specific standard quantities.

Additional incentive mechanisms focus on the capacity of individual ships to minimize waste production. Specific fee reductions are available for "green ships", which implement sustainable onboard waste management practices, and for certain types of vessels based on their size and operational traffic characteristics.

⁷⁷ Regulation 1069/2009 already prescribes the disposal in authorized landfills through incineration or burial of kitchen and catering waste originating from means of transport engaged in international journeys, including waste from ships that have potentially been in contact on board with animal-origin subtypes. However, the regulation does not apply to intra-EU journeys, which, according to the MARPOL convention, are considered international voyages.

⁷⁸ See also TAR Sardinia, September 14, 2022, no. 909 in the *Iusexplorer* database.

⁷⁹ Italian Cass., sez. III, 4 February 2004, No. 2065 in *Iusexplorer* databank.

Articles 14 and 15(1) of Directive 2008/98/EC do not preclude national regulations that, for the purpose of financing a waste management and disposal service, establish a fee based on an estimated volume of waste generated by service users rather than the actual quantity of waste they produce and deliver. Such regulations may also require users, in their capacity as waste holders, to pay an additional contribution aimed at funding capital investments necessary for waste treatment, including recycling.

As the EU Court of Justice has observed, “using billing criteria based on the volume of the container made available to users—considering, for example, the size and designated use of the properties they occupy—can help calculate waste disposal costs and fairly distribute them among various waste holders, in accordance with the ‘polluter pays’ principle, as such parameters directly influence cost estimates”. Furthermore, under Article 15(1) of the Directive, “Member States must ensure that waste producers collectively contribute to the investments necessary to achieve the Directive’s objectives, proportionate to their role in waste generation. However, the national court must verify that this does not result in the imposition of manifestly disproportionate costs on certain waste holders relative to the volumes or nature of the waste they generate. To do this, the court may consider criteria related to property type, size, designated use, waste holders’ production capacity, container volume, and collection frequency, insofar as these parameters directly impact waste management costs”. In other words, “the basis for waste fee application is the potential for waste production due to the presence (even temporary) of a community of people who naturally generate ‘urban’ waste requiring disposal. The alleged sporadic and occasional human presence in dock shelters; the fact that the boats used are small, without toilets or cabins; and the absence of services available in tourist ports do not eliminate the appreciable waste production capacity of dock users, which justifies the application of the waste collection fee”⁸⁰.

Responsibility for waste management services lies with the Port System Authority or, where none exists, with the local entity responsible for awarding the waste collection service contract, in consultation with the Maritime Authority.

The tariffs are proportional and appropriate, designed to establish cost recovery systems that incentivize ships to avoid discharging waste at sea⁸¹. Exemptions from these tariff obligations apply to waste categories listed in Annex V of the MARPOL Convention (excluding cargo residues) and to the

⁸⁰ EU Court of Justice, Section VI, 30/03/2017, no. 335, *Foro Amministrativo* (The) 2017, 3, 524.

⁸¹ T.A.R. Venice (Veneto), Section III, 08/10/2019, no. 1050, *Rivista Giuridica dell’Edilizia* 2019, 6, I, 1618.

collection and treatment of accidentally caught waste, for which no direct fee is charged unless the volume exceeds the maximum dedicated storage capacity.

To ensure that tariffs are fair, transparent, easily identifiable, and non-discriminatory, reflecting the costs of facilities and services provided or potentially used, tariff amount and calculation bases are made available to port users in waste collection and management plans in Italian and, where applicable, an internationally used language.

Integrated urban waste management service providers obtain monitoring data from port waste reception facility operators on the volume and quantity of accidentally caught waste from the previous calendar year and submit annual reports using the single environmental declaration model⁸².

If a ship makes frequent and regular port calls, the Port System Authority or, if not established, the local entity responsible for awarding the waste collection service contract, in consultation with the Maritime Authority, may reduce the fee. The same applies for specific circumstances related to the serviced port, vessel type, or operational service.

For fishing vessels and recreational boats certified for a maximum of twelve passengers, the Port System Authority or, where none exists, the relevant local entity defines a more favourable fee not directly linked to waste quantities, considering the vessel's category, type, size, and the limited nature of its waste production.

This provision also applies to port service vessels and those engaged in long-term construction or infrastructure projects (lasting at least one month).

The legislative decree establishes only the minimum fixed tariff quota, leaving the maximum amount at the discretion of the Port System Authority.

In accordance with the polluter pays principle, small non-commercial ports, exempt from the obligation to prepare a waste collection and management plan if their port reception facilities are integrated into the municipal waste system, benefit from differentiated tariffs⁸³.

⁸² According to Law No. 70 of January 25, 1994. To this end, with the decree referred to in Article 1, paragraph 3, of the abovementioned Law No. 70 of 1994.

⁸³ The subjecting of marinas and commercial ports to the single municipal tax (i.u.c.) and the waste tax (t.a.r.i.) without a justified differentiated tariff is grounds for the illegitimacy of the administrative act determining the tax, as the greater structural complexity of a commercial port, compared to a marina, leads to the reasonable conclusion that the activities carried out in the commercial port are characterized by a higher potential for waste generation compared to the marina. Therefore, the greater capacity for waste production must correspond to higher taxation, according to the more general and inherent principle of Community law that 'the polluter pays,' the corollary of which is the principle of proportionality of the tariff: thus, Council of State, Section I, 23/10/2019, No. 2754 in *Rivista Giuridica dell'Edilizia* 2019, 6, 1608.

5. Final Considerations on the Objectives and Effectiveness of the European Regime for the Delivery of Ship-Generated Waste

The EU and national legislation governing the disposal of waste produced by ships aim to “protect the marine environment from the negative effects of ship discharges” (Article 1, Dir. 2019/883/CE and Article 1, Legislative Decree 197/2021), aligning with the environmental protection objectives of the MARPOL Convention, which is frequently referenced in the text to define its scope of application.

Furthermore, among its objectives, the national decree explicitly includes the goal of “ensuring the proper functioning of maritime traffic by improving the availability and use of adequate port reception facilities and the delivery of waste to such facilities” (Article 1). This aligns with the national port sector’s development and competitiveness objectives and European policies on sustainability and circular resource management.

Thus, the regulatory framework follows both an environmental and an economic logic, integrating into a resource circularization model that seeks to protect maritime transport by reducing its external costs while prioritizing its logistical and functional needs⁸⁴.

The transition from waste to a resource⁸⁵, requiring disposal control, to a productive resource broadens the scope of protection, which extends beyond environmental matters (which remain a priority to the extent that environmental harm may result from waste treatment activities) to include economic, social cohesion, and territorial development aspects. This necessitates the establishment of processes, including those of local relevance, that can intervene in the lifecycle of a good from creation to disposal and reuse as strategic factors in a sustainable model⁸⁶.

These objectives reinforce the prerogatives of port governing authorities in managing ship-generated waste. These authorities are responsible both for enhancing the attractiveness of port services within their jurisdictions and for

⁸⁴ V. R. Leonardi, *La qualifica dei residui di produzione ai sensi del decreto ministeriale n. 264/2016: rifiuto o sottoprodotto?* in *Riv. giuridica edilizia* 2017, 89 ff.

⁸⁵ F. Bocchini, *Gestione dei rifiuti ed economia circolare nella giurisprudenza della Corte Costituzionale*, cit., 1807. On the issues related to the cessation of the status of waste in the perspective of the so-called circular economy, M. Di Lullo, *La nozione e la disciplina (pubblicistica) dei rifiuti: beni da valorizzare?* cit., 555-597; M.F. Tommasini, *La fenomenologia del rifiuto tra atti di dismissione e tutela del bene ambiente*, cit. 413-443.

⁸⁶ M. Antonioli, *La sostenibilità dello sviluppo tra principi del diritto, proceduralizzazione, eticità e crescita economica*, in questa *Rivista*, 2017, pp. 17 ff.

leading the ecological transition of energy-intensive infrastructures, particularly within the framework of developing energy communities⁸⁷.

Such results reconcile the strategic interests of individual port systems with the needs of their respective territories while transcending local boundaries. They call for national-level policy direction and support to establish an effective and shared “productive management” (or reuse) model for maritime sector-generated waste⁸⁸.

The special legislation under analysis is embedded within this context, considering all these aspects and providing instruments to integrate ports into the sustainability cycle of production. It enhances the quality of port services in terms of comprehensiveness, cost-effectiveness (energy efficiency), and reception capacity, facilitating the increasing integration of national port infrastructures into international maritime transport routes.

To this end, regulations focus on strengthening communication services and data-sharing mechanisms related to ship waste disposal, starting with the above mentioned “advance waste notification”, which serves to schedule port entries to expedite waste collection operations (Article 6, Legislative Decree 197/2021). Similarly, measures such as the organization of onboard waste segregation (Article 4, paragraph 4, Legislative Decree 197/2021) and the incentivization of waste and cargo residue delivery at every port visited by a vessel through an indirect fee system (Article 8, Legislative Decree 197/2021) contribute to streamlining port operations.

The added value of harmonizing waste management systems and procedures at the European level lies in the simplification and acceleration of operations, facilitated by the European Maritime Single Window environment (EMSWe). This system ensures electronic transmission and real-time sharing of ship

⁸⁷ Decree Law No. 50 of 2022, known as the “Aid Decree,” converted into law in July 2022, introduces the possibility for the Port System Authority to establish one or more renewable energy communities (RECs, as per EU Directive 2018/2001, RED II). This facilitates the transition to the use of renewable energy sources, even within port areas that are heavily energy-intensive. Therefore, it is possible to install renewable energy plants in ports and surrounding areas and access incentives by establishing one or more RECs under Legislative Decree No. 199/2021.

⁸⁸ In this context, it would be advisable to avoid, in defining the collection and treatment plans, the Authorities establish – as was the case during the validity of the repealed Legislative Decree No. 182/2003 – different procedures, sometimes significantly so, for the disposal and collection of port waste, with varying levels of involvement of the relevant local authorities.

declaration data within EU ports⁸⁹. Since June 2015, this infrastructure has allowed vessels to provide a range of data accessible to all competent authorities in Member State ports, including information on hazardous or polluting cargo and waste production. Concurrently, the IMO's GISIS provides details on available port facilities. These communication and data-sharing services bolster the monitoring and enforcement functions of port and coastal state authorities while optimizing traffic flows in compliance with legal requirements, limiting port inspections to vessels selected based on specific risk indices (Article 10, Legislative Decree 197/2021)⁹⁰.

In conclusion, the EU legal framework governing the management of ship-generated waste constitutes an additional mechanism aimed at enhancing cooperation among Member States for the protection of the Union's maritime and coastal environment.

By exercising the prerogatives conferred by international law, Member States are required to act in their respective capacities as flag States, coastal States, or port States to ensure more extensive and systematic oversight of ship activities that pose a risk to the safety and preservation of the marine environment, reinforcing environmental protection as a global issue and going well beyond the interests of single Member States in safeguarding their maritime zones.

In this regard, the EU actively and effectively contributes to the implementation of the principle of the protection of the seas as the common heritage of mankind principle, as enshrined in the United Nations Convention on the Law of the Sea (UNCLOS). This principle is increasingly prevailing over the principle of freedom of navigation in the face of unsustainable threats to the marine environment as a global common.

⁸⁹ Regulation (EU) 2019/1239 of the European Parliament and of the Council, of June 20, 2019, establishing a European Maritime Single Window system and repealing Directive 2010/65/EU. The system consists of a network of national maritime single windows equipped with harmonized systems for the reception and storage of declarations, with the possibility of exchanging data through the SafeSeaNet database and other relevant systems, as well as common services for managing user registration and access, ship identification, site codes, and information on dangerous and polluting goods and health. The Commission provides a common database of health measures on board ships (Article 17), capable of receiving and storing maritime health declarations in accordance with Article 37 of the International Health Regulations 2005 (IHR). Personal data related to sick persons on board the ship are not stored in this database. The competent health authorities of the Member States have access to the database for the purpose of receiving and exchanging data.

⁹⁰ The monitoring system integrates the information collected and exchanged within maritime traffic control procedures (SafeSeaNet) with data from other detection systems, such as CleanSeaNet, and from onboard receivers, such as AIS (Article 13). Ships with a tonnage of over 300 tons calling at European ports must be equipped with these receivers. Authorities carry out inspections (for at least 15% of the ships that call at their port) based on the target factor of the vessel, meaning selecting the ship according to its risk profile. In the case of marine pollution, tracking allows the incident to be potentially linked to the ships whose routes have passed through that specific location within a reasonable period beforehand.

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CHANNELLING OF LIABILITY FOR OIL POLLUTION DAMAGE IN THE SEA

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Original scientific paper

Compensation for oil pollution damage, resulting from spills of persistent oil from tankers is governed by an international regime developed under the auspices of the International Maritime Organization (IMO). Originally, this regime was based on the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund Convention), but the initial framework was amended by two Protocols in 1992. Channelling of liability, developed from the polluter pays principle, is one of the key characteristics of the CLC system. It means that victims have the right to bring action for compensation only against the registered ship owner, who is subject to a strict liability system for damage caused by pollution caused by oil spills.

Key words: *channelling, liability, oil, pollution, damage*

1. Introduction

Since the middle of the last century, international standards have been developed to protect the sea from pollution and compensate for damage to the marine environment, as a result of the increased traffic in oil tankers.

International legislation in this area has therefore been developed in two lines, one aimed at preventing, through *ex ante* measures, oil spills at sea (and the resulting pollution) and the other aimed at paying, from an *ex post* approach (after the incident), damage caused by releases of oil and other toxic and harmful substances.

In fact, the first international instrument for the prevention of marine pollution by ships was the International Convention for the Prevention of

Pollution of the Sea by Oil (OILPOL), adopted in London on 12 May 1954, which only applied to non-accidental discharges of oil or oily mixtures into the sea, as a result of common oil tanker cleaning procedures.

In addition, this Convention banned any discharge of oil spills, but only in protected areas.

The subsequent Convention on the High Seas, done at Geneva on 29 April 1958, introduced provisions for the conservation of marine resources (Articles 24 and 25), in order to ensure a balance between their exploitation and the need to protect nature's regenerative capacity. Actually, this Convention contained mere declarations of intent.

OILPOL was replaced by the International Convention for the Prevention of Pollution from Ships (MARPOL), held in London on 2 November 1973 and amended in 1978¹. MARPOL 73/78 is the main international Convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. In 1992 MARPOL was amended to make it mandatory for tankers of 5,000 DWT² and more (ordered after 6 July 1993) to be fitted with double hulls, or an alternative design approved by International Maritime Organization (IMO).

This regulatory framework was then enriched – at regional level – by the Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention)³, adopted on 16 February 1976 and amended in 1995 in order to reduce pollution in the Mediterranean Sea, protect and improve the marine environment in this area, thereby contributing to its sustainable development and – at international level – by the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982⁴. The latter establishes

¹ For a commentary, see J. M. Martin Osante, *Penalties for discharges of polluting substances from ships*, in *Rivista del diritto della navigazione*, 2/2016, 543 ff.; S. Magnosi, *Emissioni da grandi navi: recenti orientamenti normativi e prospettive*, in *Rivista del Diritto della Navigazione*, 2/2016, 587 ff.

² DWT is an acronym for Dead Weight Tonnage, a measure of how much weight a ship can carry.

³ See F. Pellegrino, *Sviluppo sostenibile dei trasporti marittimi comunitari*, Milano, 2009, 92 ff.; F. Pellegrino (ed.), *Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo*, Napoli, 2013, 19. See also G. Tesaro, *L'inquinamento marino nel diritto internazionale*, Milano, 1971, 39 s.; T. Scovazzi, *L'inquinamento da navi nel diritto internazionale*, in *Rivista giuridica dell'ambiente*, 1988, 75 f.; U. Leanza, *Le Convenzioni internazionali sulla protezione del Mediterraneo contro l'inquinamento*, Napoli, 1992; P. Ivaldi, *Inquinamento marino e regole internazionali di responsabilità*, Padova, 1996; M. C. Ciciriello, *La protezione del Mare Mediterraneo dall'inquinamento: problemi vecchi e nuovi*, Napoli, 2003, 16; A. Carpenter, A. G. Kostianoy (eds.), *Oil Pollution in the Mediterranean Sea*, Springer, Berlin, 2018, 129 ff.

⁴ Signed at Montego Bay (Jamaica), on 10 December 1982 and entered into force on 16 November 1994. For a commentary see, *inter alia*, M. H. Nordquist, S. Rosenne, L.B. Sohn (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht, Boston, London, 1989; J. Barrett, R. Barnes (eds.), *Law of the Sea: UNCLOS as a Living Treaty*, British Institute of International and Comparative Law, 2017; R. Beckman, Z. Sun, *The Relationship between UNCLOS and IMO Instruments*, 2017, in *Asia-Pacific Journal of Ocean Law and Policy*, 2, 2017, 201.

obligation of States to take all necessary measures to prevent, reduce and control pollution of the marine environment.

As regards the second line, concerning compensation for damages, the first ecological disasters at sea attracted the world community's attention and required the introduction of more effective rules.

On 18 March 1967, the Liberian-flagged oil tanker *Torrey Canyon* ran aground on rocks off the coast of Cornwall, spilling over 100,000 tonnes of crude oil into the sea and causing significant pollution of the south-west coast of the United Kingdom⁵.

This was the world's first major oil tanker disaster, that highlighted the lack of an international compensation legal regime for pollution damage.

No "efficient and sustainable" shipping may exist without establishing a system of liability of the transport operators which compensate damages for pollution generated by their activity.

This shipwreck led to many changes in international regulations, such as the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969⁶, renewed in 1992⁷, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (INTERVENTION Convention)⁸ 1969 (and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND)

⁵ About the accident, see D. P. Hout, *Oil on the Sea*, Springer, Berlin, 1969, 1 ff. For a commentary, see M. Spinedi, *Problemi di diritto internazionale sollevati dal naufragio della Torrey Canyon*, in *Rivista di diritto internazionale* 1967, 655 ff.; E. D. Brown, *The Lesson of the Torrey Canyon*, *International Law Aspects*, in *Current Legal Problems*, 1968, 113 ff.; E. Du Pontavice, *La pollution des mers par les hydrocarbures (A propos de l'Affaire du "Torrey Canyon")*, Paris, 1968.

⁶ International Convention on Civil Liability for Oil Pollution Damage adopted on 29 November 1969 and entered into force on 19 June 1975. See D. Abecassis, *The Law and Practice Relating to Oil Pollution from Ships*, Butterworth & Co, London, 1978; D. Abecassis, *IMO and Liability for Oil Pollution from Ships. A Retrospective*, in *Lloyd's Maritime and Commercial Law Quarterly*, 1983, 45 ff.; F. Pellegrino, *La risarcibilità allo Stato del danno da inquinamento del mare territoriale: tra esperienza italiana e normativa internazionale*, in *Diritto dei trasporti*, II/1990, 248 ff.

⁷ Protocol adopted on 27 November 1992, entered into force on 30 May 1996. For a commentary, see M. M. Comenale Pinto, *La responsabilità per inquinamento da idrocarburi nel sistema della CLC 1969*, Padova, 1993, 94; C. de la Rue, C. Anderson, J. Hare, *Shipping and the Environment: Law and Practice*, Informa Law from Routledge, III ed., London, 2022.

⁸ 1992 Protocol to amend the international Convention on Civil Liability for Oil Pollution Damage, 1969, adopted on 29 novembre 1969 and entered into force on 5 May 1975. This Convention enables coastal States to enact the necessary and reasonable measures to "prevent, mitigate, or eliminate danger" that could affect its coastline or other related interests, resulting from oil pollution (or potential oil pollution) following a maritime casualty. See E. Brans, *Liability for Ecological Damages Under the 1992 Protocols to the Civil Liability Convention and the Fund Convention*, in *Environmental Liability*, 65, 1995, 61 ff.; E. Brans, *The Braer and the Admissibility of Claims for Pollution Damage under the 1992 Protocols to the Civil Liability Convention and the Fund Convention*, in *Tijdschrift voor Milieuschade en Aansprakelijkheidsrecht*, 4, vol. 9, 1995, 61 ff.

1971⁹, amended in 1992¹⁰, adopted to ensure adequate compensation to persons who suffer oil pollution damage resulting from maritime casualties¹¹.

The scope of application of these instruments is limited “to pollution damage caused on the territory including the territorial sea of a Contracting State and to preventive measures taken to prevent or minimize such damage” (Articles II CLC and 3.1 FUND).

2. The CLC/Fund System

The CLC has introduced a complex regime whereby the shipowner’s liability is “strict”, “non-contractual”, “limited” to a maximum amount¹², “channelled” to the registered owner, covered by both “compulsory insurance”¹³ and “direct claim” against the insurer.

Notably, the CLC has introduced a strict (objective or at least aggravated¹⁴) liability of the registered shipowner for pollution damage caused by the escape or discharge of persistent oil from his ship, due solely to the existence of damage, regardless of his fault (intentional or negligent conduct)¹⁵ and the circumstances that led to the accident.

Unlike other strict liability regimes that are normally based on enterprise risk, imposing liability on the operators, the CLC does not take account of the party/entity carrying out the polluting activity.

According to the imputation method adopted by CLC, the assessment of the operator’s conduct is not relevant, considering that liability is placed on the registered shipowner, as an owner of the vessel involved.

⁹ Adopted on 18 December 1971 and entered into force on 16 October 1978. It is superseded by the 1992 Protocol, adopted on 27 November 1992 and entered into force on 30 May 1996. It is supplementary to the International Convention on Civil Liability for Oil Pollution Damage, 1969.

¹⁰ Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention 1992). E. Brans, *The Braer and the Admissibility of Claims*, *supra cit.*, 61 ff.

¹¹ A. Ferone, *Le Convenzioni internazionali sull'inquinamento del mare da idrocarburi*, in *Rivista di diritto della internazionale*, 1972, 111 f.

¹² The unit of account in the Convention is the Special Drawing Right (SDR) as defined by the International Monetary Fund.

¹³ P.J. Jost, *Limited Liability and the Requirement to Purchase Insurance*, in *International Review of Law and Economics*, 16, 1996, 259 ff.; L. Zhu, *Compulsory Insurance and Compensation for Bunker Oil Pollution Damage*, Springer, Berlin, Heidelberg, New York, 2007, 49.

¹⁴ M.M. Comenale Pinto, *La responsabilità per inquinamento da idrocarburi nel sistema della CLC 1969*, *cit.*, 36.

¹⁵ S. Bergman, *No-fault Liability for Oil Pollution Damage*, in *Journal of Maritime Law and Commerce*, 5, no. 1, 1973, 1 ff.

The legal foundations of this solution is based on practical reasons, namely the fact that ownership is more readily identified than the operator. The objective is to simplify compensation procedures, addressing them to a single legal entity.

In other words, this mechanism aims to ensure certainty and speed of compensation, in line with the compensatory (and non-punitive) nature of the liability regime introduced by the CLC¹⁶.

This liability only applies to loss or damage (or threat thereof) outside the tanker, caused by oil pollution from ships

In fact, the expression “pollution damage”¹⁷ is defined in article I.6 of the CLC as follows: “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of 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”¹⁸.

This liability is not absolute. In any case, the shipowner may be exonerated wholly or totally from his liability if he “proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person” (Article III.3).

He is also released from liability only if he proves that:

- the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- the damage was wholly caused by an act or omission done with the intent to cause damage by a third party, or
- the damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids, in the exercise of that function (Article III.2).

¹⁶ M.M. Comenale Pinto, *Il meccanismo dei Fondi nel risarcimento del danno ambientale marino*, in *Rivista di diritto della navigazione*, 2013, 568.

¹⁷ M. Jacobsson, N. Trots, *The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the Fund Convention 1971*, in *Journal of Maritime Law and Commerce*, 17, no. 4, 1986, 467 ff.

¹⁸ Article I.6 of the 1992 CLC states as follows: “Pollution damage’ means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures”.

This is a non-contractual (*i.e.* extra-contractual) liability because the shipowner and the injured party have no contractual relationship. The victim is a third party.

In addition, it is a channelled liability. Any claims for pollution damage under the CLC can be made only against the registered owner of the ship concerned.

In fact, the CLC precludes victims from claiming compensation under this Convention from persons other than the shipowner.

But this does not, in principle, preclude victims from claiming compensation outside the Convention from persons other than the shipowner.

The latter is entitled to limit his liability to an amount determined by the size (tonnage) of the ship (Article V.1).

Limitation of liability is, however, subject to an exception: the shipowner may not benefit from the limitation of liability if the incident occurred as a result of his actual “fault or privity” (Article V.2).

Particular importance shall be ascribed to the shipowner’s conduct for this purpose.

Despite an evolution in the regulatory framework determined by this liability system, it has proven to be non-compliant with the adequacy criterion in the event that the concrete amount of material damage exceeds the compensation limits or if the shipowner is insolvent.

Therefore, this regime has been integrated by the supplementary compensation, introduced by the above-mentioned FUND Convention.

The last instrument established a supplementary regime for compensating victims when compensation under the CLC is not available or inadequate.

This double system was proposed once again by the most recent International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS)¹⁹.

¹⁹ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances By Sea, 1996 (HNS Convention), adopted in London on 3 May 1996 during a Diplomatic Conference held under the auspices of the International Maritime Organization (IMO). In April 2010, during an international Conference on the revision of the HNS Convention, the Protocol of 2010 to the HNS Convention (2010 HNS Protocol) was adopted. See R. Clenton, *Damage caused during the carriage of hazardous and noxious substances by sea*, in *Diritto marittimo*, 4/1992, 998 ff.; P. Griggs, R. Shaw, *The IMO Legal Committee concedes the Adoption of a Protocol to the HNS Convention and the Problem of fair Treatment of Seafarers*, in *Diritto marittimo* 1/2009, 277 ff.; M. Brignardello, *I tentativi di regolamentazione internazionale del risarcimento dei danni provocati da sostanze pericolose e nocive trasportate via mare: la Convenzione HNS 1996 ed il Protocollo 2010*, in *Rivista di diritto della navigazione*, 1/2016, 3 ff.

For ships carrying more than 2,000 tonnes of persistent oil as cargo in bulk, the shipowner is obliged to cover his liability under the CLC through an insurance policy. Claimants have a right of direct action against the insurer.

3. The Channelling of Liability

The channelling of liability is the solution adopted at international level in order to consider strictly liable for damages only one person, while other parties involved in the activities are exempted from liability.

This system, as mentioned above, is mostly evident in Article III.1 of CLC, whereby claims for oil pollution damage could be made only against the owner of the ship from which the polluting oil escaped or was discharged²⁰.

Article III.4 of the 1969 CLC confirmed this regime, stating that “No claim for pollution damage under this Convention or otherwise may be made against the servants or agents of the owner”.

The consolidated text adopted following the 1992 amendments has strengthened the “channelling system” against the owner of the ship, by expressly prohibiting claims not only against the servants or agents of the shipowner, but also against the members of the crew, the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures”, who could be potentially liable, “unless the pollution damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result” (Article III.4 lett. c).

Therefore, in the light of this last exception, although any action against - among others - charterers for compensation is excluded in principle, however, the possibility to claim damages is not precluded where the damage is caused from their actions/omissions committed with the intention of causing such harm, or recklessly, with the awareness that such damage is expected to occur. In this case, the shipowner is exempted from liability.

In other words, claims for damage could normally be made only against the shipowner, but an action to obtain relief in respect of such operators can be exercised by the owner.

In addition, the owner has the right of recourse against a third party claimant (Article III.5).

²⁰ For a commentary, see L. Mattioni, *La canalizzazione della responsabilità per inquinamento da idrocarburi*, in *Rivista diritto, economia, trasporti e ambiente*, *Giureta*, XIII/2015, 143 ff.

As mentioned above, CLC and FUND Conventions introduced a two-tier system for compensation to be paid in the event of accidents at sea.

In fact, if the damage exceeds the limitation amount established by CLC or if the shipowner is exempt from liability, additional funding to the claimants are provided by an international fund, financed by contributions from companies importing more than 150 000 tonnes of crude oil and heavy fuel oil a year.

Therefore, as argued by the doctrine²¹, a double channelling system has been adopted, the first tier characterized by the channelling of liability to the shipowners and the second tier characterized by the channelling of liability to the oil companies.

This mechanism allowed to improve the implementation of the 'polluter pays' principle²², sharing the cost of pollution between the ownerships and the oil industry. In fact, the question was 'Who pays for oil pollution at sea?'

Likewise, the liability of this Fund is limited. For damages exceeding the limit provided for in the Fund Convention, the Protocol of London, dated 16 May 2003²³, established an international supplementary fund, which constitutes a third tier of compensation.

The same regime of channelling of liability recognized by the CLC was adopted in 1996 by the HNS Convention to ensure compensation for damage from hazardous and noxious substances carried by ships.

Under this Convention, claims for damage caused by dangerous substances can be pursued by the injured parties only against the registered owner of the ship and his insurer.

According to Article 7.5 of this international instrument "no claim for compensation for damage under this Convention or otherwise may be made against: (a) the servants or agents of the owner or the members of the crew; (b) the pilot or any other person who, without being a member of the crew, performs services for the ship; (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship; (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority; (e) any person taking preventive measures; and (f) the servants or agents of persons mentioned in (c), (d) and (e); unless the damage resulted from their personal act or omission, committed with the intent to cause such

²¹ M.M. Comenale Pinto, *La responsabilità per inquinamento da idrocarburi*, cit., 36.

²² V. Meli, *Le origini del principio "chi inquina paga" e il suo accoglimento da parte della comunità europea*, in *Rivista giuridica dell'ambiente*, 1989, 217; M. Palombini, *Il significato del principio "chi inquina paga" nel diritto internazionale*, in *Rivista giuridica dell'ambiente*, 2003, 871.

²³ Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage.

damage, or recklessly and with knowledge that such damage would probably result”.

The HNS Convention prohibits claims against servants or agents of the shipowner as well as against the pilot or any other person who, without being a member of the crew, performs services for the ship, or any charterer (including a bareboat charterer), manager or operator of the ship, or any person performing salvage operations with the consent of the shipowner or under the instructions of a competent public authority, and against any person taking preventive measures.

As already set out in CLC, this prohibition does not apply if the damage resulted from the personal act or omission of the person concerned, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

This channelling of liability does not in principle prevent from claiming compensation from persons other than the owner under the applicable national law.

Unlike the CLC, the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER)²⁴, 2001, introducing a strict liability²⁵ system for damage caused by spills of oil carried as fuel in ships’ bunkers, does not establish a liability regime channelled on the owner of the ship, since that it not exclude to claim compensation against parties other than the shipowner²⁶.

What is the reason for not including the channelling system in the last instrument? Probably it was designed to allow the injured parties to seek and get compensation from different sources.

4. The Application of the Channelling of Liability to the Erika Case

The Erika case is one of the major environmental disasters of recent years. On 12 December 1999, the 25 year-old single-hull oil tanker *Erika* broke into two and sank off the coast of Brittany (Finistère, France), due to a structural failure. Following this accident, 20,000 tonnes of fuel escaped from the ship’s tanks. The oil spill reached and spread along the French coast within a few days, polluting almost 400 km of coastline.

²⁴ Adopted by a Diplomatic Conference held at the IMO Headquarters in London on 23 March 2001.

²⁵ Another key provision is the requirement for direct action, according to which any claim for compensation for pollution damage may be brought directly against the insurer.

²⁶ Defined as the owner, including the registered owner, bareboat charterer, manager and operator of the ship.

The Erika, at the time of the spill, was flying the Maltese flag. It was owned – through 12 off shore companies – by the Maltese company Tevere Shipping and chartered by the oil major TOTAL SA (Total Fina) for a voyage from Dunkirk (France) to Livorno (Italy). This oil tanker had been classified by the classification society RINA S.p.A. and managed by the Italian company Panship Management Services.

This disaster resulted in serious losses of crude oil and substantial damage, as well as consequential damage for the local economies.

A few years later, in November 2002, the *Prestige*, an oil tanker operating under Bahamas flag, sank off the coast of Galicia, in north-west Spain, causing another environmental disaster in European waters.

The MV *Prestige* was a ship owned by a Greek company based in Athens. It was carrying 77,000 tonnes of heavy fuel oil. During a storm, due for structural problems, suffered heavy damages, but French, Spanish, and Portuguese governments refused to allow the ship to dock. Subsequently, the vessel sank about 210 kilometres from the coast of Galicia, causing a huge environmental disaster²⁷.

These two disasters had a major impact in the media.

After the Erika accident, a number of public and private parties brought actions before several courts and tribunals²⁸.

In this perspective, the Erika case gave rise to several decisions issued by the French criminal courts and the Court of Justice of the European Community (ECJ).

In particular, contradictory arguments over the fundamental principles of liability for oil pollution at sea emerged from the decisions of the French criminal courts, especially with regard to the ‘canalization’ of liability on the shipowner and its limits.

The Erika case revealed difficulties in responding to this fundamental question.

On February 12, 2007, a trial started in the French Tribunal of First Instance in Paris to establish the existence of an ecological damage, the liability of the parties involved, and the amount to be paid by them.

²⁷ About the *Prestige* case see I. Arroyo, *Problemi giuridici relativi alla sicurezza della navigazione marittima (con particolare riferimento al caso Prestige)*, in *Diritto marittimo*, 2003, 1201 f.

²⁸ M. Lopez De Gonzalo, *La responsabilità delle società di classifica; dal caso “Nicolas H” ai casi “Erika” e “Prestige”*, in *Scritti in onore di F. Berlingieri*, II, Genova, 2010, 720; A. La Mattina, *Judicial developments in the Erika case: liability for oil pollution at sea and unpredictability*, in *Diritto del commercio internazionale*, 2015, 651 ff.

On January 16, 2008, the French Tribunal issued a decision in which it found the liability of the shipowner, the classification society (RINA), the management company as well as the charterer (TOTAL) and ordered them to pay 192 million euro to the plaintiffs. In addition RINA has been fined the penalty of 175,000 euro. The owner and manager received the maximum penalty of 75,000 euro (each) for blatant negligence. According to the judge's opinion, not making structural repairs to the ship, they had aware that they were putting the community at a 'risk of particular gravity'.

Total SA was also fined the penalty of 375,000 euros.

It was the first time that a French court has held an entity other than the ownership liable for environmental damage to the sea.

This court attempted to also involve the Malta Maritime Authority (MMA) without success considering that the MMA²⁹ is an extension of the Maltese State, covered by 'immunity of jurisdiction'³⁰.

The Italian classification society tried to argue that it should benefit from immunity from liability on a par with the flag State (Malta), since its actions formed part of the statutory certification duties that it carried out on behalf of the flag State, but the experts proved that RINA should not have issued certificates authorizing the tanker to navigate, considering the corrosion levels.

Despite the oil tanker was 23 years old, had changed flag and names, had been classified by four different classification societies, and was in an extremely poor state of repair, many inspections found it acceptable and have not found any deficiency.

The Paris Tribunal ruling found TOTAL guilty of gross negligence which led to the disaster. The positive vetting procedure of this old ship has been considered as a reckless conduct, with consequent criminal liability of the oil company. This 'carelessness' had a 'causal role in the sinking and as such provoked the accident'.

Given that both the CLC and the Fund Conventions exempt charterers from liability, the judge did not incriminate TOTAL as a charterer (voyage charter, to be exact) but rather as a cargo owner. In fact, the court held this big oil company liable for the vetting procedures of the vessel for overlooking both the age of

²⁹ In September 2002, the French judge held the MMA and its Director responsible as 'an accomplice in pollution' for 'endangering the lives of others'. However, efforts to hold the MMA accountable failed as a result of the fact that the MMA is a public entity and thus enjoys immunity from prosecution under national laws.

³⁰ The case against the Erika highlighted the chance of the flag State to discharge itself of liability, thanks to the virtual impunity, under international law. However, France could have the possibility to file a complaint against Malta in the International Tribunal for the Law of the Sea (ITLOS).

the ship and blatant shortcomings in technical maintenance³¹. The vetting procedures and the inspections carried out before the voyage demonstrated that the oil company exercised a “power of control” over the ship.

In 2010, the 2008 judgment was appealed to the French *Cour d’Appel*³², that revisited all the fundamental considerations. It considered this a process under criminal law, in particular under the French law of July 1983³³, which establishes that harmful environmental damage caused willingly, or by acts and omissions or negligence, is a criminal offence.

The Court also confirmed that the 1992 CLC provides coverage for civil liability, including “channelling” of liability to the shipowner, with the consequent exemption of TOTAL from civil liability under the terms of this Convention, but it concluded that the parties involved were not protected for its role under criminal law. The owner, the operator of the ship, RINA and TOTAL have been found guilty of “environmental crime”: both were aware of the poor condition of the tanker. They were conscious that, by acting in this way, pollution damage could have been caused.

In particular, despite the position of a charterer is protected by Article III.4, letter c, of the CLC, according to the Court’s opinion, this major oil company was not exempt from liability, due to its reckless conduct during the vetting inspections.

Therefore the Court fixed the fines in the total amount of 200 million euros, slightly above the previous judgment.

The ruling of the French Court of Cassation of 25 September 2012 held all the parties criminally liable for a criminal offence for having caused oil pollution resulting by the oil tanker Erika. Issues connected to the position of different kind of operators arose.

The Court held the four parties also civilly liable, jointly and severally, for the oil pollution. According its view, it is true that the 1992 CLC bears liability solely on the shipowner, while parties other than the owner benefit of the exemption, but the last will be lost if the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

On this point, the Court of the Appeal ruled that TOTAL could not benefit of the channelling system for damages caused by this company’s reckless conduct.

³¹ Even though TOTAL was believed that cannot be held responsible for a procedure voluntarily followed for improving its shipping safety standards.

³² The arrest of the Court was published on March 30, 2010.

³³ *Loi n° 83-630 du 12 juillet 1983 relative à la démocratisation des enquêtes publiques et à la protection de l’environnement.*

The Cour de Cassation recognized that a classification society can in general obtain exclusion from liability³⁴ under Article III.4 of CLC, but in this case the RINA's reckless conduct resulted in loss of such benefit.

On 24 June 2008, within the framework of the Erika case, the channelling principle had been addressed by the Court of Justice of the European Union.

Let us summarize the facts.

In 2000, the French Municipality of Mesquer started legal proceedings against the TOTAL Group before the Tribunal de Commerce de Saint-Nazaire, to hold them liable for damage caused by the waste spillage occurred within its area of jurisdiction.

The Tribunal dismissed the case, considering that heavy fuel oil is not a waste, but just combustible material for energy production.

The Paris Court of Appeal, reviewing the first-instance judgment, stated that the heavy fuel oil that had spilled and mixed with water must be considered as a waste. But it excluded the liability of the oil company, not considered the producer or holder of the waste.

This Municipality appealed this ruling to the Cour de Cassation, which in turn referred a preliminary question to the Court of Justice of the European Union.

The decision of the Court of Justice³⁵ may be read as the statement of the potential application of both the international liability regime for oil pollution at sea and the European Framework Directive 75/442/EEC of 15 July 1975 of 1975³⁶ on waste.

First of all, the European Court of Justice has been concerned with the definition of "waste" under European legislation³⁷, stating that, under this Directive, a substance or product such as oil, when accidentally spilled and lost during transport, could become "waste". In this case, the "polluter pays" principle would be applicable to the "owner" or "producer" of the "waste".

³⁴ See D. Micallef, *A legal analysis of the limitation of liability of classification societies*, in *CMI Yearbook*, 2014, 226 ff.

³⁵ Judgment of the Court (Grand Chamber) of 24 June 2008, case C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd*. For a commentary, see G. Landi, *Il caso Erika alla Corte di Giustizia, ovvero un caso di interpretazione estensiva della nozione di rifiuto servito su un piatto d'argento*, in *Rivista giuridica dell'ambiente*, 6/2008, 986 ff.; A. Rella, *Il caso "Erika" al vaglio della Corte di Giustizia*, in *Rivista diritto, economia, trasporti e ambiente, Giureta*, Vol. VII, 2009, 8 ff.; F. Pellegrino, *La Corte di giustizia europea si pronuncia sul caso dell'Erika*, in *Diritto dei trasporti.*, 1/2009, 133 ff.; F. Pellegrino, *Il caso "Erika" al vaglio della Corte di Giustizia UE*, in U. La Torre, A. M. Sia (a cura di), *La sicurezza nel trasporto e nelle infrastrutture della navigazione marittima ed aerea*, Soveria Mannelli, 2011, 167 ff.

³⁶ Council Directive 75/442/EEC of 15 July 1975 on waste (O.J. L 194, 25 July 1975, 47-49).

³⁷ B. Di Giannatale, *La nozione di "rifiuto": profili di diritto comunitario e interno*, in *Nuova rassegna di legislazione, dottrina e giurisprudenza*, 6/2005, 725 ff.

The Court of Justice judgment had a relevant impact on the CLC channelling system, altering the balance of risk and liabilities introduced by the Convention. The principle that liability for oil pollution shall be exclusively regulated by CLC has been surpassed by this ruling, that adopted a very broader interpretation of the 'polluter pays' principle, expanding the notion of producer of waste under Directive 75/442 to also include the oil company involved.

The ECJ ruled that spillage of persistent oil in EU territorial waters, that cause environmental and economic damage, is illegal if it is clear that such an accident could have been avoided by adequate preventive measures.

In other words, this ruling has based the charterer's liability on the contribution to the accident for not having taken the necessary preventive measures. It is the development of the more general theory of risk, based on a close connection between the behaviour which may create unacceptable risks, and the occurrence of the disaster.

In this case, liability is not linked to the "safety position" of first-line operators, pertaining to their safety functions. It seems rather the consequence of a violation of the general safety obligation to adopt preventive measures on the part of those who are involved in activities potentially able to cause environmental damage.

5. Final Remarks

In conclusion, faced with the high risk of oil spills, the ECJs broad interpretation of the European legislation in the Erika case demonstrated the need to reform the strict and channelled liability system resulting from the CLC-FUND Conventions, whose provisions do not meet legitimate expectations of society.

The "*Erika*" and "*Prestige*" disasters highlighted the serious implementation gaps affecting the international civil liability regime, that was subject to widespread criticism, mainly focused on the lack of deterrent effects³⁸.

Because of the limited liability system, the shipowner, is not encouraged to take preventive measures.

Despite an adjustment to the compensation limits following the entry into force of the 1992 Protocols, the amount is not adequate to meet the needs of the victims.

³⁸ See L. Mattioni, *La canalizzazione della responsabilità*, cit., 150

In addition, he is able to pass on insurance costs to the end users, increasing freight.

If the CLC/FUND system should not be applicable, private agreements³⁹ may be applied. The last have been created by the world's major oil companies as owners of oil tankers or of the crude oil transported by them,

But contractual or private instruments per se are unable to guarantee an uniform and universally applicable regime without a suitable regulatory framework adopted at international level in order to ensure a reasonable and harmonized compensation to victims⁴⁰.

In a world risk society, like today, human perception of the capability to dominate negative events caused by human behaviour arises. In this context, societal expectations or rather demands arise toward those who are able to adopt appropriate preventive measures to avoid environmental disasters or reduce their harmful consequences.

In other words, this judgment aims to ensure protection of the right to safety, not only understood according to the traditional meaning of safety/security, but also including the concept of sustainable development, in order to balance market/social needs and environmental protection.

Pollution can no longer be considered as a by-product of industrial development⁴¹, but must be avoided by appropriate preventive measures⁴², in order to meet the needs of present and future generations.

In this context, the prevention, precautionary and "polluter pays" principles (art. 191, para 2, of the Treaty on the Functioning of the EU), and the shared responsibility model, must all be seen as means of implementing sustainable transport systems.

³⁹ Such as "Tovalop" (*Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution*) and "Cristal" (*Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution*), two voluntary agreements concluded from 1960s and 1970s and no longer in force since 1997. See L. Zhu, *Compulsory Insurance and Compensation*, cit., 8; S. Bloodworth, *Death on the High Seas: The Demise of TOVALOP and CRISTAL* *Death on the High Seas: The Demise of TOVALOP and CRISTAL*, in *Florida State University Journal of Land Use and Environmental Law*, Vol. 13, Number 2, 2018, 443 ff.; M. Alberton, *La quantificazione e la riparazione del danno ambientale nel diritto internazionale e dell'Unione europea*, Milano, Giuffrè, 2011, 111.

⁴⁰ See G. Kojanec, *Équilibre écologique et pollution de la mer données d'une réglementation internationale*, in *Comunità internazionale*, 3/1971, 384 ff.; S. M. Carbone, *Strumenti internazionalistici e privatistici-internazionali relativi al risarcimento dei danni provocati da idrocarburi all'ambiente marino*, in *Rivista diritto internazionale privato e processuale*, 3/2006, 623 ff.

⁴¹ E. Pomini, *Nuova apertura della Corte di Giustizia all'esclusione dei "sottoprodotti" dalla nozione comunitaria di "rifiuto": legittimato il "riutilizzo ovunque"*, in *Rivista giuridica dell'ambiente*, 1/2006, 51 ff.

⁴² See M. Gunasekera, *Civil Liability for Bunker Oil Pollution Damage*, Peter Lang, Hamburg, 2010, 76.

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ANALYSIS OF THE LABOUR STATUS OF SEAFARER AND INLAND WATERWAY BOATMAN IN THE LEGISLATION OF THE REPUBLIC OF CROATIA

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Original scientific paper

The aim of this paper is to present the specific labour status of seafarer and inland waterway boatman in the legislation of the Republic of Croatia. In Croatia, two types of navigation are distinguished: maritime and inland. Maritime navigation refers to activities conducted at sea and on rivers within the Adriatic basin up to the navigable limit from the sea, while inland navigation covers those activities carried out on internal waters such as rivers, lakes, and canals. Maritime navigation is regulated by the Maritime Code, while inland navigation is governed by the Law on Navigation and Ports on Inland Waters. Person working in any capacity aboard a vessel engaged in maritime navigation is referred to as seafarer, whereas the one employed on vessel in inland navigation is known as inland waterway boatman. Seafarers and inland waterway boatmen differ significantly from land-based workers in many aspects of their labour status. This paper delves into the specific legal provisions governing their employment. In addition to the Maritime Code and the Law on Navigation and Ports on Inland Waters, the paper also analyses the Labour Act, the National Collective Agreement for Seafarers on Ships Engaged in Coastal Maritime Transport, the National Collective Agreement for Croatian Seafarers on Board Ships in the International Shipping Trade (2023–2024), and the Regulation on the Crews of Inland Waterway Vessels and Floating Objects. Through a comparative analysis of these legal frameworks, the authors propose *de lege ferenda* solutions aimed at improving the labour status of inland waterway boatmen, drawing from the legal framework established for seafarers.

Key words: *labour status, seafarer, inland waterway boatman, Maritime Code, Law on Navigation and Ports on Inland Waters.*

1. Introduction

In the Republic of Croatia, there are two types of navigation: maritime and inland. Maritime navigation is conducted at sea and on rivers within the Croatian Adriatic basin up to the navigable boundary from the sea side.¹ Inland navigation, on the other hand, refers to navigation carried out on inland waters.² Inland waters include all standing and flowing bodies of water, such as rivers, canals, and lakes, except for rivers in the Adriatic basin up to the navigable boundary from the sea side.³

Inland navigation is necessarily compared to maritime navigation. This is understandable, as both types of navigation are conducted by ships, and the technical conditions, as well as the economic and legal relations arising from this navigation, are almost identical.⁴ Although inland navigation is the most economical mode of transport, it does not achieve nearly the same volume of transport as maritime navigation.⁵ The primary reason for this is the limited quality and extent of the waterway network. Additionally, the capacity of inland vessels is significantly smaller than that of maritime vessels.⁶

Accordingly, the legal regulations in the Republic of Croatia define the concept of a maritime and an inland navigation vessel differently. In maritime navigation, a ship is defined as a vessel intended for sea navigation, with a hull length greater than 15 meters or authorized to carry more than 12 passengers. Ships can be classified as passenger, cargo, technical vessels, fishing, public, or research vessels.⁷ On the other hand, in inland navigation, a ship is considered a vessel intended exclusively or predominantly for navigation on inland waters, with a length of 20 meters or more, or a product of length, width, and draft amounting to a volume of 100 m³ or more. It can also be a vessel authorized to carry more than 12 passengers or used for towing (tug), pushing (pusher), or

¹ *Pomorski Zakonik*, Official Gazette, No. 181/04, 76/07, 146/08, 61/11, 56/13, 26/15 and 17/19, article 5, point 30.

² *Zakon o plovidbi i lukama unutarnjih voda*, Official Gazette, No. 144/21, article 5, point 78.

³ *Ibidem*, article 5, point 79.

⁴ Grabovac, I., *Pomorska i unutarnja plovidba – povezani sustav odgovornosti u prijevozu stvari u europskim okvirima*, Comparative Maritime Law, Vol. 54 (2015), No. 169, p. 237

⁵ Dundović, Č., Vilke, S., *Izgradnja višenamjenskog kanala Dunav – Sava u funkciji prometne integracije podunavlja i Jadrana*, Pomorstvo, Vol. 23 (2009), No. 2, pp. 590 (589-608)

⁶ Precisely because of modern high-capacity ships and the sea as a natural resource requiring minimal infrastructural investment, 80% of global trade is conducted by sea today. Freight rates in maritime transport cover as much as 5% of the global economy.

⁷ *Pomorski Zakonik*, article 5, point 2.

propelling side formations on inland waters regardless of length or volume, as well as floating installations.⁸

In maritime navigation, the ship's crew consists of the master and other individuals boarded to perform duties on the ship, as listed in the crew register.⁹ In inland navigation, the crew includes the master and other individuals performing duties on the ship, as recorded in the ship's logbook.¹⁰ A member of the crew of a maritime ship is commonly referred to as a seafarer, while a person employed on an inland navigation vessel in any capacity is called an inland waterway boatman.

According to annual statistical data published by the European Maritime Safety Agency (EMSA),¹¹ 20,608 Croatian nationals are registered as active seafarers.¹² On the other hand, similar statistical data for inland waterway boatmen does not exist, making it impossible to determine the exact number of Croatian nationals serving on inland navigation vessels flying either the Croatian or foreign flag. One reason for the absence of such data is that the certificates of competency for inland waterway boatmen are valid for much longer than those for seafarers, making it difficult to conduct an analysis based on issued certificates.

2. Specifics of the Employment Status of Seafarers and Inland Waterway Boatmen

The professions of seafarers and inland waterway boatmen require specific skills and qualifications. They must be trained in navigation, ship operation, ensuring safety at sea and on inland waterways, cargo management, and addressing numerous other aspects of onboard work.¹³ Furthermore, a ship serves as both a workplace and living environment for seafarers and inland waterway boatmen during navigation. As a result, their living and working conditions

⁸ *Zakon o plovidbi i lukama unutarnjih voda*, article 5, point 3.

⁹ *Pomorski Zakonik*, article 125, paragraph 1

¹⁰ *Zakon o plovidbi i lukama unutarnjih voda*, article 70, paragraph 2

¹¹ EMSA is the European Union agency which purpose is to ensure a high, uniform, and effective level of maritime safety and marine environmental protection. It was established on June 27, 2002, and is headquartered in Lisbon. Its main task is to monitor the implementation of specific laws and assess their effectiveness. Additionally, in the event of a major oil spill at sea, it provides vessels for oil recovery and detects marine pollution through satellite surveillance.

¹² <https://portal.emsa.europa.eu/web/stcw/seafarers-stats> (accessed on 13.12.2024)

¹³ Vuković, T., Petrinović, R., Sirišević, E., *Comparative Analysis of the Labour Act Status of Seafarers in the Republic of Croatia and the Surrounding Countries of the Adriatic Sea*, Transactions on Maritime Science, Faculty of Maritime Studies in Split, Vol. 13 (2024.), No. 1, pp. 204-205.

differ significantly from those of workers in other economic sectors conducted on land.¹⁴

Due to the specific nature of their workplace, they are separated from their families and social communities for extended periods. Additionally, they are exposed to significant pressure and stress as they face various challenges and dangers during navigation (e.g., unfavourable weather conditions), sometimes poor nutrition and accommodation, shift and overtime work, as well as financial pressure due to employers' non-compliance with employment contract provisions.¹⁵

Furthermore, there is a need for specific regulation of working hours, as shift work can affect sleep, daily rhythms, and the balance between work and rest. In addition to working hours, the work environment is also unique, as seafarers and inland waterway boatmen must strictly adhere to navigation rules to ensure their personal safety, as well as the safety of the vessel and the environment.¹⁶

The labour status of seafarers and inland waterway boatmen is unique due to dual subordination, as they are not only subordinate to their employer but also to the ship's master, who is the main responsible person on board. In addition to the aforementioned specifics of their employment relationship, they also face issues related to repatriation¹⁷ and leaving the crew. From all of the above, it is clear that seafarers and inland waterway boatmen belong to a special category of workers, and their labour relations cannot be framed within the legal framework of a so-called *classic employment relationship*. Due to the dynamic and specific nature of their work, the labour relations of seafarers and inland waterway boatmen must have a special *sui generis status*, requiring specific regulation.¹⁸

Therefore, the labour status of seafarers and inland waterway boatmen in Croatia is regulated by several regulations. The most important for regulating the employment status of seafarers are the *Maritime Code* (hereinafter: MC),¹⁹

¹⁴ Rozić, I., Vuković, T., Božiković, N., *Kolektivni ugovori kao izvor prava za reguliranje radnog statusa pomoraca u Republici Hrvatskoj*, Proceedings of the Faculty of Law, University of Rijeka, Vol. 42 (2021), No. 3, p. 696.

¹⁵ Liselotte Fotteler, M., Andriotti Bygvraa, D., Chresten Jensen, O., *The impact of the Maritime Labour Convention on seafarers' working and living condition: an analysis of port state control statistics*, BMC Public Health, 2020, p. 2.

¹⁶ Vuković, T., Petrinović, R., Sirišćević, E., *Comparative Analysis of the Labour Act Status of Seafarers in the Republic of Croatia and the Surrounding Countries of the Adriatic Sea*, p. 206.

¹⁷ Repatriation in accordance with the provisions of the MLC Convention includes the costs of returning a seafarer to their place of residence (the place where the employment contract was signed), which are borne by the employer and consist of the basic salary and daily allowance.

¹⁸ Učur, Đ. M., Smokvina, V., *The Issue of the Labor Status of Seafarers and Fishermen in Maritime Navigation in the Republic of Croatia, with Special Focus on the Registration of Employment Contracts*, Naše More, vol. 62 (2015), no. 4, p. 104.

¹⁹ *Pomorski Zakonik*, Official Gazette, No 181/04, 76/07, 146/08, 61/11, 56/13, 26/15 and 17/19.

the Collective Agreement for Croatian Seafarers on Ships in International Shipping (2023–2024) (hereinafter: *Collective Agreement for Seafarers in International Shipping*),²⁰ and *the Collective Agreement for Seafarers on Ships Engaged in Coastal Line Shipping* (hereinafter: *Collective Agreement for Seafarers in Coastal Shipping*).²¹ It is also important to mention *the Labour Act of the Republic of Croatia* (hereinafter: LA),²² as the main regulation governing the status of all workers in Croatia, including seafarers. *The Labour Act* also recognizes the specificity of the employment status of seafarers, particularly in Articles 14, paragraphs 7 and 8, which stipulate that employment contracts for seafarers and workers on fishing vessels must be registered with the state administration office in the county (or the City of Zagreb) responsible for labour affairs. This registration process, along with the content of the register, is detailed in *the Regulation on the Procedure for Registration and the Content of the Register of Employment Contracts for Seafarers and Workers on Fishing Vessels*.²³ Furthermore, *the Labour Act* provides the possibility of different arrangements regarding working hours, night work, and rest for certain categories of workers. Thus, the provisions of *the Labour Act* regulating working hours, breaks, and daily and weekly rest do not apply to seafarers, technical and other workers on maritime facilities.²⁴

For regulating the employment status of inland waterway boatmen, the most important regulations are *the Navigation and Inland Waterways Act* and *the Regulation on the Crew of Vessels and Floating Objects of Inland Navigation*.²⁵ It is interesting to note that in Croatia, no collective agreement has yet been adopted for inland waterway boatmen to regulate their employment status.

3. Legal Framework for Regulating the Employment Status of Seafarers

Labour law for seafarers is primarily regulated by international conventions, which are then implemented and adapted by each country through its national

²⁰ *Kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2023.–2024.)*, Official Gazette, No. 21/23

²¹ *Kolektivni ugovor za pomorce na brodovima koji obavljaju prijevoz u linijskom obalnom pomorskom prometu*, Official Gazette, No. 93/23

²² *Zakon o radu*, Official Gazette, No. 93/14, 127/17, 98/19, 151/22 and 64/23.

²³ *Pravilnikom o postupku registracije i sadržaju registra ugovora o radu pomoraca i radnika na pomorskim ribarskim plovilima*, Official Gazette, No. 32/15, 109/19 and 13/20.

²⁴ *Zakon o radu*, article 88, paragraph 1

²⁵ *Pravilnik o posadi plovila i plutajućih objekata unutarnje plovidbe*, Official Gazette, No. 116/22

legislation.²⁶ Among the international organizations that regulate and establish the employment status of seafarers, the most important are the *International Labour Organization*; hereinafter: ILO and *International Maritime Organization*; hereinafter: IMO. The ILO, through its normative activities, has adopted numerous conventions and recommendations specifically regarding the work and status of seafarers. On the other hand, the IMO is responsible for creating a globally accepted and applicable regulatory framework for the maritime sector.²⁷

Both international organizations played an important role in the creation of the *Maritime Labour Convention* (hereinafter: *MLC Convention*)²⁸ which marked a turning point in the regulation of the working and social status of seafarers. For this reason, it is also referred to as the *Seafarers' Bill of Rights*.²⁹ *The MLC Convention* is the first comprehensive international instrument that regulates the rights and working conditions of seafarers on ships worldwide, regardless of the flag that these ships fly. *The Convention* consolidated existing rules and modernized standards that were contained in 68 documents³⁰ adopted prior to its establishment.³¹ *The Maritime Labour Convention (MLC)* was adopted in February 2006, but it only came into force in 2013.³² Croatia ratified the *MLC Convention* in 2010, and subsequently aligned its national legislation with its provisions.

Although the *MLC Convention* provides solutions for a wide range of labour and social issues in the maritime sector, it is important to note that it offers only guidelines for regulating the working, living, and social conditions of seafarers. Individual countries regulate the seafarers' status in more detail through their own national laws and are responsible for the inspection and enforcement of labour provisions. Therefore, the correct implementation and enforcement of

²⁶ Ivošević, B. V., Pejović, Č., *Pomorsko pravo (usporednopravna studija)*, Faculty of Law at the University of Belgrade, Belgrade. 2019, p. 39

²⁷ Rozić, I., Vuković, T., *Analiza radnopravnog statusa pomoraca u Bosni i Hercegovini i Republici Hrvatskoj*, Proceedings of the 21st International Conference – Current Issues in Civil and Commercial Legislation and Legal Practice, Faculty of Law at the University of Mostar, Neum, 2024, p. 211.

²⁸ *Konvencija o radu pomoraca*, Official Gazette, international treaties, No. 11/09; *Konvencija o radu pomoraca*, Pomorski glasnik, Ministry of the Sea, Tourism, Transport, and Development, Zagreb, 2006.

²⁹ Petrinović, R., Lovrić, I., *Novo pravo o pravu pomoraca za slučaj napuštanja i repatrijacije*, Proceedings of the 1st International Scientific Conference on Maritime Law - ISCML 2016, Faculty of Law, University of Split, p. 281

³⁰ 37 are conventions and 31 are recommendations

³¹ Rukavina B., *Radni, životni i socijalni uvjeti pomoraca u kontekstu rješenja Konvencije o radu pomoraca i nacionalnog prava*, Pomorstvo, Faculty of maritime Studies, University of Rijeka, Vol. 21 (2007), No. 1, p. 166

³² *The MLC Convention* came into force seven years after it was adopted because the International Maritime Organization (IMO) set a condition that it could only take effect once at least 30 countries ratified it, and these countries needed to represent at least 33% of the total gross tonnage of the global commercial fleet.

the *MLC Convention* are of crucial importance. The labour status of seafarers can vary depending on the flag state under which the ship is registered, its regulations, and the type of employment.³³

In addition to the two international organizations, *the International Transport Workers' Federation* (hereinafter: ITF) plays a significant role in protecting the labour rights of seafarers. The ITF is a global trade union organization representing millions of transport workers, including seafarers. In collaboration with the ILO and IMO, the ITF participates in the development of all essential international conventions related to transport workers. *The Uniform Total Crew Cost Collective Agreement* sets minimum working and living standards for seafarers on board and serves as a foundation for national collective agreements for transport workers in countries whose unions are its members.³⁴ These standards are also adhered to by the Seafarers' Union of Croatia when drafting *the Collective Agreement for Seafarers in International Shipping* and *the Collective Agreement for Seafarers in Coastal Shipping*. *The Maritime Code* and these collective agreements are the most important regulations for regulating the labour status of seafarers in the Republic of Croatia.

3.1. The Maritime Code

The first *Maritime Code* in Croatia was adopted in 1994,³⁵ and it was replaced by a new *Maritime Code* ten years later, in 2004. The 2004 MC forms the basis of current Croatian maritime law and is undoubtedly the most important legal act in Croatia related to maritime affairs.

This *Code*, along with numerous amendments and additions, further harmonizes Croatian legislation with international conventions and European Union directives. It also aligns the terminology with other Croatian laws, particularly those that serve as subsidiary legal sources for maritime law. By doing so, it creates a more favourable environment for the development of the shipping and nautical sectors, enhancing their competitiveness, as well as improving the working and social status of Croatian seafarers.³⁶

The Maritime Code contains 1032 articles, regulating all significant public and property law relations related to the sea, maritime shipping activities, and

³³ Rozić, I., Vuković, T., *op. cit.*, p. 218

³⁴ Ivošević, B. V., Pejović, Č., *op. cit.*, p. 182.

³⁵ *Pomorski Zakonik*, Official Gazette No. 17/94

³⁶ Bolanča, D., Amižić, P., *Novi Pomorski zakonik Republike Hrvatske i pitanje unifikacije pomorskog prava*, Proceedings of the Faculty of Law in Split, year 44 (2007), No 1, p. 41 – 42

maritime vessels.³⁷ The labour rights of seafarers, including their employment and the protection of their rights in the employment relationship, are regulated in Chapter VIII of the *Maritime Code*, titled *Ship's Crew*, which consists of 39 articles.³⁸ According to the MC, the Croatian Employment Service is responsible for mediating seafarers' employment in Croatia, although legal entities that meet the requirements outlined in a special regulation and have been issued a permit by the Ministry of the Sea, Transport, and Infrastructure (hereinafter: Ministry of Maritime Affairs) can also perform this function.³⁹ The regulation that specifies the conditions legal entities must meet, as well as the procedure and manner of their authorization and the oversight of their activities, is *the Regulation on Mediation in Seafarer and/or Shipowner Employment*.⁴⁰ As the title of the regulation suggests, it applies not only to seafarers but also to inland waterway boatmen. It is important to note that the mediator⁴¹ may charge a fee for services related to employment mediation only from the shipowner, and may not charge the seafarer and/or inland waterway boatman for this service.⁴²

Regarding the protection of seafarers' labour rights, any seafarer who believes that their rights concerning living and working conditions on board have been violated has the right to submit oral and written complaints to their superior officer, the ship's master, the shipowner, the ship operator (shipping company), or the Ministry of Maritime Affairs.⁴³ On the other hand, the shipowner, shipper, and company are obliged to ensure that every seafarer is provided with a copy of the grievance procedure applicable on that vessel when boarding the ship. This must include information on the relevant authorities of the country which flag the ship flies, as well as the names of the crew members who will aid in the process.⁴⁴

For all disputes between seafarers, the ship's master, and the shipowner, ship operator, or company, the Commercial Courts in Croatia, which handle maritime disputes, are deemed competent under the provisions of the MC.⁴⁵

³⁷ Ćorić, D., *Novi Pomorski zakonik*, Proceedings – Conference on the Maritime Code of the Republic of Croatia and Other Developments in Maritime and Transport Law, Rijeka, 2005, p. 9.

³⁸ *Pomorski Zakonik*, Chapter VIII. Ship's Crew, Articles 125 - 164

³⁹ *Ibidem* article 125.a.

⁴⁰ *Pravilnik o posredovanju pri zapošljavanju pomoraca i/ili brodaraca*, Official Gazette No. 21/24

⁴¹ According to Article 2, Item 5 of the *Regulation on Mediation in the Employment of Seafarers and/or Shipowners*, an intermediary is a legal entity that has obtained a license to perform mediation services for the employment of seafarers and/or inland waterway boatmen.

⁴² *Ibidem*, article 13

⁴³ *Pomorski Zakonik*, article 133 a, paragraph 1

⁴⁴ *Ibidem*, article 133 a, paragraph 3

⁴⁵ *Ibidem*, article 164

However, this provision is not seen as the best solution, because commercial courts, as specialized courts, do not apply maritime regulations when deciding on the labour rights of seafarers. Instead, they apply labour laws, which are not fully compatible with the nature of work on board a ship.⁴⁶ On the other hand, this provision makes it easier for seafarers, as they are directed to a single court for resolving such disputes. An important provision for the protection of seafarers' labour rights is that, in disputes concerning compensation for damages due to bodily injury, the death of a crew member, or the deterioration of a seafarer's health caused by or related to work on the ship, Croatian courts have exclusive international jurisdiction if the claimant resides in the territory of the Republic of Croatia.⁴⁷ This means that in cases with an international element, Croatian seafarers are granted exclusive jurisdiction of Croatian courts.

In addition to the provisions related to employment and the protection of their labour rights, Article 128 of the MC is particularly important for seafarers. This article stipulates that a crew member of a ship engaged in international shipping, who resides in Croatia, is exempt from the obligation to pay income tax if they have sailed for at least 183 days in the tax year in question. According to this article, the 183-day condition is calculated not only by the days spent sailing but also includes the following; days spent traveling during repatriation, days spent receiving medical treatment due to illness or injury incurred while working or related to work, days spent on professional training, either in Croatia or abroad, days remaining on the employment contract that were not fulfilled due to the seafarer's abandonment by the shipowner or termination of the contract for business-related reasons. The 183-day condition will also be considered fulfilled if the seafarer dies, retires, or becomes a victim of a hijacking during the tax year.⁴⁸

According to the MC, a seafarer embarked on a ship flying the Croatian flag in international navigation is obligated to pay contributions for pension and health insurance.⁴⁹ This provision was introduced with the aim of equalizing the employment conditions for Croatian seafarers on both domestic and foreign ships, and consequently, equalizing the business conditions for Croatian and

⁴⁶ See more: Šimac, S., *The actual jurisdiction of the court under Article 161, paragraph 4 of the Maritime Code, as well as the terms seafarer and crew member of a ship, can be found in the Collection of Papers of the Faculty of Law in Split*, year. 36 (1999), No 3-4, pp. 607-618

⁴⁷ See more: Kragić, P., Jerolimov, D., *Responsibility for the Death and Bodily Injury of a Crew Member – Development of Croatian Legal Solutions*, *Comparative Maritime Law*, Vol. 54 (2015), Issue 169, pp. 183-189; Stanković, G., *Some Issues of Actual Jurisdiction of Courts in Maritime Matters*, *Maritime Journal*, Vol. 34 (1996), No. 1, pp. 220-221

⁴⁸ *Pomorski Zakonik*, article 128, paragraph 2

⁴⁹ *Ibidem*, article 129

foreign shipowners. Thus, all Croatian seafarers who are members of the crew on ships in international navigation, regardless of the ship's flag state, are compulsory insured persons in the mandatory pension insurance if they have a residence or habitual residence (resident),⁵⁰ in Croatia, and similarly in the compulsory health insurance and health protection insurance at work if they have residence or approved permanent stay in Croatia.⁵¹ The period during which seafarers are obligated to pay contributions refers to the period from the day of embarkation to the day of disembarkation from the ship, in accordance with the data from the seaman's book.⁵² Members of the crew on ships in international navigation are required to pay contributions for insurance with extended duration (benefited work experience).⁵³

Furthermore, the MC stipulates that multiple consecutive fixed-term employment contracts can be concluded with a ship's crew member for a continuous period longer than the duration established by *the Labour Act*,⁵⁴ which means that a seafarer's employment contract represents a special form of employment contract.⁵⁵ It is also important to emphasize that, for better protection of seafarers, the MC prescribes joint liability of the shipowner, the ship's master, the company, and the employer for the death, bodily injury, or deterioration of the health of a crew member.⁵⁶

3.2. The Collective Agreement for Croatian Seafarers on Ships in International Navigation (2023 - 2024)

In addition to the MC, an important source of labour and social rights for Croatian seafarers are collective agreements. Collective agreements that apply to seafarers serve as the direct legal basis for the realization and protection of seafarers' rights, obligations, and responsibilities with a particular shipowner.⁵⁷ These collective agreements regulate specific rights, such as the

⁵⁰ A resident is a person who has a residence or habitual residence in Croatia. It is considered that a taxpayer has residence in a place where they own or possess a home for at least 183 days continuously within one or two calendar years.

⁵¹ Seafarers' Union of Croatia, *Vodič kroz prava i obveze pomoraca u Republici Hrvatskoj*, 2nd revised and expanded edition, Rijeka, 2022, p. 20

⁵² This includes deck, engine, and electrical engineering trainees.

⁵³ *Pomorski Zakonik*, articles 128–129 a. For a seafarer, every 12 months spent in international or national navigation is counted as 15 months of insurance service.

⁵⁴ *Zakon o radu*, article 12

⁵⁵ *Pomorski Zakonik*, article 127, paragraph 1

⁵⁶ Rozić, I., Vuković, T., *op. cit.*, p. 226

⁵⁷ Učur, M. Đ., *Nacionalni kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2013. – 2015.)*, Naše More, Vol. 61 (2014), No. 5-6, p. 118.

right to repatriation, food and accommodation, healthcare onboard, and similar provisions. As such, they differ from other collective agreements. They provide a minimum guaranteed set of rights for seafarers, meaning that shipowners cannot reduce the rights outlined in the collective agreement through their internal regulations.⁵⁸

The Collective Agreement for Seafarers in International Navigation has been in effect since January 1, 2023. This collective agreement was concluded with a two-year validity period, meaning it expired on December 31, 2024.⁵⁹ However, due to the fact that neither party terminated the agreement after its expiration, its validity has been extended until a new collective agreement is concluded.⁶⁰ This agreement was signed between the Seafarers' Union of Croatia and the Croatian Shipowners' Association Mare Nostrum (hereinafter: The Association), which includes the largest Croatian shipowners. This collective agreement is a continuation of the long and complex cooperation between the Union and the Association, as they conclude corresponding collective agreements for seafarers in international navigation approximately every two years. As a result, a new collective agreement for seafarers in international navigation is expected to be concluded soon, which will be aligned with the latest amendments to the *MLC Convention*.⁶¹ Through the continuous conclusion of collective agreements, these two parties are constantly adapting to the changes occurring in the maritime industry and thus arriving at the best solutions for both seafarers as workers and shipowners as employers.⁶²

The Collective Agreement for Seafarers in International Navigation is an autonomous source of law for Croatian seafarers and seafarers who are Croatian nationals with residence or habitual residence in Croatia, and who sail on ships registered in Croatia or any other ship registry.⁶³ It also applies to seafarers who are nationals of other EU member states.⁶⁴ *The Collective Agreement* consists

⁵⁸ Rozić, I., Vuković, T., Božiković, N., *op. cit.*, p. 702.

⁵⁹ *Kolektivni ugovor za pomorce na brodovima koji obavljaju prijevoz u linijskom obalnom pomorskom prometu*, article 43

⁶⁰ *Ibidem*, article 39, paragraph 2

⁶¹ The latest amendments to the *MLC Convention* were adopted in June 2022 and came into force on December 23, 2024. The *MLC Convention* has undergone a total of four amendments: in 2014, 2018, 2020, and 2022.

⁶² Vuković, T., Petrinović, R., Sirišević, E., *op. cit.*, pp. 211-212

⁶³ *Kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2023.-2024.)*, article 2

⁶⁴ As of January 1, 2023, the *Collective Agreement for Seafarers from Third Countries on Ships in International Navigation of Croatian Nationality (2023-2024)* is in effect in the Republic of Croatia. This agreement regulates the labor rights of seafarers from third countries who sail on ships engaged in international navigation and registered in the Croatian ship registry. The labour rights of these seafarers are regulated in the same manner as the labor rights of Croatian seafarers and seafarers who are nationals of the European Union and European Economic Area (EEA) member states.

of 43 articles and includes both general and specific supplements. There are eight *general supplements*,⁶⁵ which bind all member signatories of *the Collective Agreement* and all employers.⁶⁶ *The specific supplement* binds only the signatory member of the *specific supplement* and the employer.⁶⁷

Unlike the *Maritime Code*, where the term employment contract is used, this *Collective Agreement* uses the term employment contract. However, despite the different terminology, the concepts are equivalent. This means that the employment contract for Croatian seafarers in international navigation is based on *the MLC Convention, the Maritime Code, the Labour Act*, and this *Collective Agreement*.⁶⁸ The employment of seafarers, as well as everything related to their employment contracts, is regulated by Article 3 of the agreement.

Under the terms of the *Collective Agreement*, an employment contract can be concluded for both an indefinite and a fixed period.⁶⁹ Once the employment contract is concluded, the procedure for the seafarer's embarkation on a specific ship follows. The embarkation and the duration of the embarkation are regulated by Article 6. From the moment of embarkation, the rights and obligations between the employer and the seafarer take effect, i.e., from the day (or hour) the voyage begins, if the ship the seafarer is to embark on is located outside the territorial waters of Croatia. Therefore, from the moment the journey begins, the seafarer is entitled to a salary and a daily allowance.⁷⁰

When the employment contract is concluded for a fixed term, it is determined by *Special Supplement* (3), and it cannot exceed six months. However, at the employer's discretion, the term can be shortened to five months or extended to seven months. The contract can be concluded for one or more voyages, which cannot last longer than a total of seven months, except for trainees, for whom the employment contract can be concluded for a term of up to 12 months.⁷¹ The conclusion of such an employment contract is an exception to the general provisions of fixed-term employment contracts under *the Labour Act*.⁷²

⁶⁵ The general supplements are: *salary scales, national holidays, a list of financial allowances, the percentage of compensation for bodily injury, the seafarer's employment contract, a list of mediators, a list of arbitrators, and the appeal procedure.*

⁶⁶ *Kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2023.-2024.)*, article 1 e

⁶⁷ *Ibidem*, article 1 f

⁶⁸ Rozić, I., Vuković, T., Božiković, N., *op. cit.*, p. 705

⁶⁹ *Kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2023.-2024.)*, article 4, point 3

⁷⁰ *Ibidem*, article 6

⁷¹ *Ibidem*, article 3, paragraph 3

⁷² Učur, M.Đ., *Radnopravni status pomoraca*, Faculty of Law, University of Rijeka, Rijeka, 2003, pp. 98-99

In addition to the employment of seafarers, the *Collective Agreement* also regulates other essential matters concerning the crew members of the ship, such as: salary, overtime, determination of working hours and annual leave, composition and number of crew members, navigation in war zones, repatriation, and so on. Furthermore, the *Collective Agreement* addresses specific and important social-legal issues related to medical assistance, treatment, and sick leave for seafarers. For example, the employer covers the costs of medical treatment, including hospital and dental treatment in emergency situations abroad. The employer bears the costs of the seafarer's treatment until complete recovery, provided these costs are not covered by regular health insurance, but no longer than 130 days after repatriation. In case of illness, the seafarer is entitled to sickness benefits in the amount of their base salary for the duration of the illness, or up to a maximum of 130 days after repatriation.⁷³

Under this *Collective Agreement*, the employment of seafarers ends in four cases:

- expiration of the employment contract
- when disembarkation occurs due to illness or injury after a medical examination
- if the seafarer voluntarily abandons the ship or his duties on the ship
- due to termination of the employment contract by either the seafarer or the employer.⁷⁴

The Collective Agreement for Seafarers in International Shipping Trade, along with all its supplements, is fully aligned with international conventions in the field of maritime law.

3.3. The Collective Agreement for Seafarers on Board Ships in the International Shipping Trade

The Collective Agreement for Seafarers on Board Ships in the International Shipping Trade has been in effect since September 1, 2023, and represents a significant step in protecting Croatian seafarers and shipowners in coastal shipping. This Collective Agreement replaced the *National Collective Agreement for Croatian Seafarers on Passenger Ships and Ferries*, which was concluded in 1998 and had been in force for 25 years.⁷⁵ After the expiration of the term for

⁷³ For information on hospital treatment, sick leave compensation for seafarers, and employer obligations, see: *Kolektivni ugovor za hrvatske pomorce na brodovima u međunarodnoj plovidbi (2023.-2024.)*, articles 23 and 24

⁷⁴ For the methods of termination of employment, see *ibidem*, article 19

⁷⁵ *Nacionalni kolektivni ugovor za hrvatske pomorce na putničkim brodovima i trajektima*, Independent Seafarers' Union of Croatian Passenger Ships, <http://www.nspdbh.hr/cms>

which the original agreement was concluded, neither party terminated it nor adopted a new agreement, so its validity was extended until the introduction of the new *Collective Agreement for Coastal Shipping*.⁷⁶

In addition to the Seafarers' Union of Croatia and the Association, the Independent Seafarers' Union of Croatian Passenger Ships also participated in the development of the *Collective Agreement for Seafarers in Coastal Shipping*. This collective agreement contains 46 articles and includes two general and two special supplements.⁷⁷ The general supplement applies to all members of the Association; the special supplement is binding only on the individual employer who has concluded it with the representative union where the seafarers employed by that employer are members.⁷⁸

This *Collective Agreement* also contains numerous specific provisions typically found in collective agreements for seafarers, such as the right to repatriation, food and accommodation, bedding and sanitary equipment on board, as well as those relating to the public law nature of the employment relationship of seafarers, such as employment, salary, healthcare protection on board, occupational safety, etc.⁷⁹

This *Collective Agreement* applies to Croatian seafarers as well as seafarers from other countries that are members of *the European Economic Area (EEA)*, who work on ships engaged in coastal shipping transport in Croatia.⁸⁰ It regulates labour and social standards based on which employment contracts for seafarers are concluded with shipowners, as prescribed by the *Maritime Transport Act for Regular and Occasional Coastal Shipping*.⁸¹ More specifically, it regulates probation periods, assignment of seafarers, the status of trainees, working hours, overtime, shift changes and rotations, compensation for night work and Sunday work, rest periods and leave, as well as many other specific issues related to working on board.

The aim of the *Collective Agreement for Coastal Shipping* is to ensure the same starting points and the same level of labour and social rights for all seafarers working on ships engaged in coastal shipping in Croatia, in order to ensure fair

⁷⁶ *Ibidem* article 115, paragraph 3

⁷⁷ The mentioned supplements refer to minimum wages by rank and the amount of the maritime allowance.

⁷⁸ *Kolektivni ugovor za pomorce na brodovima koji obavljaju prijevoz u linijskom obalnom pomorskom prometu*, article 1

⁷⁹ Rozić, I., Vuković, T., *Analiza radnopravnog statusa pomoraca u Bosni i Hercegovini i Republici Hrvatskoj*, p. 227

⁸⁰ *Kolektivni ugovor za pomorce na brodovima koji obavljaju prijevoz u linijskom obalnom pomorskom prometu*, article 2

⁸¹ *Zakon o prijevozu u linijskom i povremenom obalnom pomorskom prometu*, Official Gazette No. 19/22

market competition. Therefore, the goal is to expand this collective agreement to cover the entire coastal shipping sector, so that it applies to seafarers from other EEA shipowners operating in Croatia's coastal transport.

Although the provisions of the *National Collective Agreement for Croatian Seafarers on Passenger Ships and Ferries* from 1998 are more favourable in some aspects, particularly regarding working hours, annual leave days, Saturdays as a non-working day, and vacation pay, the *Collective Agreement for Coastal Shipping* has improved the material rights of seafarers. Specifically, the maritime allowance and food allowance have been significantly increased, and most importantly, seafarers' salaries have risen by approximately 20% net in total. In addition to increasing the material rights of seafarers, it is important to note that this agreement has also protected the Croatian market from potential unfair competition, which in turn helps preserve the jobs of Croatian seafarers.⁸²

4. Legal Framework for Regulating the Employment Status of Inland Waterway Boatmen

For inland waterway boatmen, just like seafarers, the ship is both a place of work and a place of residence during the voyage. This implies that shipowners are also a special category of workers, and that the specificities that apply to seafarers' employment status are also relevant to them. Therefore, it is not surprising that there is a great similarity between the general provisions regulating the legal status of the ship's crew in the *Maritime Code* and those in the *Law on Navigation and Inland Waterways*.⁸³

However, there are also some differences, often terminological, such as the fact that a shipowner can only embark on the ship if they possess a valid shipowner's book, while a seafarer must have a valid seafarer's book for embarkation.

The most significant difference between the employment relationship of seafarers and inland waterway boatmen relates to the conclusion of fixed-term employment contracts. In this case, an employer can enter into multiple consecutive fixed-term contracts with an inland waterway boatman, based on which the employment relationship is established for the same duties over an uninterrupted period, but not longer than the period defined by general labour regulations.⁸⁴ On the other hand, a seafarer can enter into multiple consecutive fixed-term contracts with their employer for a period longer than the one

⁸² Rozić, I., Vuković, T., *op. cit.*, str. 228.

⁸³ Grabovac, I., *Plovidbeno pravo Republike Hrvatske*, Književni krug, Split, 2003, p. 411

⁸⁴ *Zakon o plovidbi i lukama unutarnjih voda*, article 83, paragraph 2

defined by *the Labour Act*.⁸⁵ It should also be emphasized that, unlike seafarers, inland waterway boatmen are not recognized as a special category of workers in the provisions of the *Labour Act*. Specifically, there is no requirement for the registration of their employment contract with the state administration office in the counties, nor are there provisions for shipowners regarding the possibility of different regulations for working hours, night work, and rest.

Since there is no collective agreement in the Republic of Croatia that specifically applies to inland waterway boatmen, the regulation of their labour status, in addition to *the Law on Navigation and Ports on Internal Waters*, is also governed by *the Regulation on the Crew of Vessels and Floating Objects of Inland Navigation*.

4.1. The Law on Navigation and Ports on Inland Waters

The Law on Navigation and Ports on Inland Waters came into force in January 2022, and with its implementation, the previous *Law on Navigation and Ports on Inland Waters* from 2007 was repealed.⁸⁶ The currently applicable law is significantly more comprehensive than its predecessor. It is divided into ten sections, comprising a total of 376 articles, which regulate water traffic on inland waters in Croatia, the safety of navigation on inland waters, the protection of water quality from pollution by vessels, the management of waterways, ports, and terminals on inland waters, material legal relations concerning all objects of inland navigation, procedures for the registration of vessels and floating objects, transport services and the contracting of transport, inspection supervision, and other issues related to inland navigation and ports.⁸⁷

The employment status of inland waterway boatmen is regulated in Chapter VII, titled *Ship's Crew*, which contains a total of 39 articles.⁸⁸ According to this law, an inland waterway boatman is considered any person employed, engaged, or working in any capacity on an inland navigation vessel.⁸⁹ The crew of a vessel consists of the master and other individuals onboard for performing duties, who are recorded in the ship's logbook. Each vessel must have a prescribed number of professionally trained crew members to ensure safe navigation.⁹⁰ A person can be employed on an inland navigation vessel as a crew member if they are

⁸⁵ *Pomorski Zakonik*, article 127, paragraph 1

⁸⁶ *Zakon o plovidbi i lukama unutarnjih voda*, Official Gazette, No. 109/07., 132/07, 51A/13, 152/14 and 118/18

⁸⁷ *Ibidem*, article 1, paragraph 1

⁸⁸ *Ibidem*, Chapter VII: Ship's Crew, articles 70-108

⁸⁹ *Ibidem*, article 5, point 8

⁹⁰ *Ibidem*, article 70, paragraph 1 and 2

medically fit, at least 16 years old, and professionally trained for specific duties on the ship.⁹¹

Inland waterway boatmen prove their physical and mental fitness by undergoing medical examinations in specially authorized healthcare institutions.⁹² The professional and supplementary qualifications for performing duties on the vessel are acquired by passing the relevant professional exams and/or completing the required maritime service, the duration of which is confirmed by the competent authorities. The professional and supplementary qualifications are recorded in their boatman's book, which serves as proof of their qualifications.⁹³

The inland waterway boatman's book is a personal document issued to an individual. He uses the book to prove his role as a crew member on a vessel and the duration of his maritime service. The book must be held by all Croatian citizens who are employed as crew members on either domestic or foreign vessels or floating objects. Additionally, foreign nationals and stateless persons who are employed as crew members on an inland navigation vessel of Croatian nationality must also possess the book.⁹⁴ The conditions for obtaining, the content, and the appearance of the inland waterway boatman's book, as well as the procedures for registration and deregistration for mandatory pension and health insurance for inland waterway boatmen, are more specifically regulated by the *Regulation on Seaman's and Boatman's Books and the procedures for registration and deregistration for compulsory pension and health insurance*. This regulation was enacted in February 2024.⁹⁵ The title of the Regulation clearly indicates that it governs the content, appearance, and conditions for obtaining the seafarer's book, as well as the registration and deregistration for mandatory pension and health insurance for seafarers. This *Regulation* further confirms the direction in which Croatian legislators are moving, aiming to fully equalize the labour status of seafarers and inland waterway boatmen by regulating their labour rights, employment, and pension and health insurance under the same regulations.

The Ministry of Maritime Affairs has established a central registry for inland waterway boatmen, where records of issued certificates of professional qualifications are kept, and the seafaring service time of shipowners is recorded

⁹¹ *Ibidem*, article 70, paragraph 1 and 2

⁹² *Ibidem*, article 72

⁹³ *Ibidem*, article 74

⁹⁴ *Ibidem*, article 78

⁹⁵ *Pravilnik o pomorskim i brodarskim knjižicama te postupcima i načinu prijave i odjave na obvezno mirovinsko i obvezno zdravstveno osiguranje*, Official Gazette, No. 21/24, article 1

for the purpose of determining the obligation to pay income tax.⁹⁶ Inland waterway boatmen, like seafarers, are exempt from the obligation to pay income tax if they have sailed for 183 days or more within a calendar year. The provision also applies to shipowners, and the 183-day period does not have to be continuous.⁹⁷ It is interesting to note that *the Law on Navigation and Ports on Inland Waters* stipulates that for the labour rights and obligations of inland waterway boatmen are not regulated by this law, the provisions of the Maritime Code apply, except for those that regulate the insured service with an extended duration (beneficial working years).⁹⁸

Article 84 regulates the working hours of inland waterway boatmen, stipulating that their maximum annual workload must not exceed 2,304 hours. It is also specified that the daily working time can last up to 14 hours, while the weekly working time must not exceed 72 hours. Additionally, the inland waterway boatman has the right to a minimum of 10 hours of daily rest. The responsibility for organizing working hours, the schedule of crew members' rest periods, and keeping records of this lies with the shipowner.⁹⁹

The shipowner is obligated to provide inland waterway boatmen with return travel (repatriation) and bear the costs of repatriation to their place of residence or stay. The repatriation is regulated in the same way as the repatriation of seafarers, in accordance with the provisions of the MC.¹⁰⁰

Inland waterway boatmen have the right to compensation for damage that occurred to items intended for their personal use.¹⁰¹ Additionally, in the event of a shipwreck, they are entitled to compensation for their salary for each day of actual unemployment, up to a maximum amount equal to two months' salary.¹⁰² Regarding damage caused by bodily injury or death of a ship's crew member due to a dangerous item or activity, the shipowner is liable according to the general provisions on liability for damage caused by dangerous things or activities. However, if the bodily injury, death, or health deterioration of a crew member occurred directly or indirectly as a result of a shipwreck, collision, grounding, explosion, fire, or defects in the ship, the shipowner is liable based on presumed fault, unless proven otherwise. For all disputes between the crew member and the shipowner, as well as disputes between the ship's master and

⁹⁶ *Zakon o plovidbi i lukama unutar njih voda*, article 78

⁹⁷ *Ibidem*, article 85, paragraph 1

⁹⁸ *Ibidem*

⁹⁹ For more information on the working hours of seafarers, see: *ibidem*, Article 84

¹⁰⁰ For more information on the repatriation of seafarers, see: *ibidem*, Articles 87-90

¹⁰¹ *Ibidem*, article 91, paragraph 1

¹⁰² *Ibidem*, article 91, paragraph 2

the shipowner, commercial courts have jurisdiction.¹⁰³ The solutions established in the provisions of *the Law on Navigation and Ports on Inland Waters* clearly reflect the alignment with the legal provisions applied to seafarers within the framework of *the Maritime Code*.

According to the provisions of Article 93, the main duty of the seafarer is, in accordance with their responsibilities prescribed by this *Law*, as well as other regulations related to navigation, to ensure that they do not jeopardize the safety of navigation, do not damage the ship or its belongings, do not endanger the safety of passengers or other crew members, and do not pollute the environment with dangerous or harmful substances from the ship.

The rights, obligations, and public functions (authorities) of the master of an inland navigation vessel are regulated by Articles 94-108, and they are almost identical to the provisions of the MC regarding the master of a maritime vessel. Thus, the master of the vessel must be professionally trained to perform the duties of a master, has the right to embark and disembark crew members, and is appointed and dismissed by the shipowner.¹⁰⁴ The master is responsible for the supply of the ship, keeping records, maintaining the hull, engines, equipment, and machinery, boarding and disembarking passengers, loading and unloading cargo, as well as performing all other tasks related to safe navigation.¹⁰⁵

Regarding the public authorities of the ship's master, they are regulated by Articles 103 and 104. The ship's master is obliged to prepare a report on the birth and death of a person on board, as well as a will, in the prescribed manner, and is required to submit such a report to the competent authority at the first domestic port or to the nearest Croatian consular representative abroad. The ship's master has the right to restrict the freedom of movement on the ship of any person who seriously endangers the safety of the vessel.¹⁰⁶

The inspection oversight of the implementation of this *Law* and regulations in the field of navigation safety on inland waters is carried out by the maritime safety inspectors of the Ministry of Maritime Affairs and port authorities. Article 247 provides detailed regulations on what is included in the inspection oversight, specifically monitoring the living and working conditions of inland waterway boatmen, their working hours on board, as well as all activities related to their employment mediation.¹⁰⁷

¹⁰³ *Ibidem*, article 92

¹⁰⁴ *Ibidem*, article 95

¹⁰⁵ *Ibidem*, article 97

¹⁰⁶ For more information on the public functions of the ship's master, see: *ibidem*, articles 103-104

¹⁰⁷ *Ibidem*, article 247, paragraph 1, points 7 and 13

4.2. Regulation on the Crew of Vessels and Floating Objects for Inland Navigation

This *Regulation* entered into force in October 2022, and with its enactment, the *Regulation on the Crew of Inland Navigation Vessels* ceased to be valid.¹⁰⁸ It is a comprehensive regulation consisting of 135 articles, which are divided into seven parts. *The Regulation* also includes seven annexes that prescribe and regulate the standards of qualification by rank, programs for professional and practical exams, forms for issuing and the appearance of certificates of competence and additional qualifications, as well as health standards. *The Regulation on the Crew of Vessels and Floating Objects for Inland Navigation* governs the conditions and procedures for acquiring the competence of inland navigation vessel crew members, the minimum number of crew members, everything related to the central register of inland waterway boatmen, working hours and rest periods, as well as all matters related to the education and training of inland waterway boatmen.¹⁰⁹

The Regulation specifies in detail the conditions that an inland waterway boatman must meet to obtain certificates for performing certain duties. It also prescribes the procedure and conditions for recognizing foreign certificates of competency. Furthermore, *the Regulation* outlines the process for taking professional exams and maintaining official records of individuals who have passed the exams. It is stipulated that professional exams for obtaining professional and supplementary qualifications, as well as for the renewal of certificates according to the provisions of this regulation, must be taken before examination committees established at port authorities.¹¹⁰

The Ministry of Maritime Affairs, in accordance with the provisions of this *Regulation*, has established and maintains the Central Register of inland waterway boatmen. This is a public register kept in electronic form, containing information about them, issued Certificates of Examination, Certificates of Competence, and similar documents.¹¹¹ It is important to note that the data from the Central Register of inland waterway boatmen can be used and processed only with the obligation to protect personal data in accordance with the regulations governing the protection and processing of personal data.¹¹² Despite the establishment of the Central Register of inland waterway boatmen,

¹⁰⁸ *Pravilnik o posadi plovila unutarnje plovidbe*, Official Gazette, No. 105/16, 32/18 and 47/20

¹⁰⁹ *Pravilnik o posadi plovila i plutajućih objekata unutarnje plovidbe*, article 1, paragraph 1

¹¹⁰ *Ibidem*, article 57, paragraph 1

¹¹¹ *Ibidem*, article 72, paragraph 1

¹¹² *Ibidem*, article 75, paragraph 1

the Ministry of Maritime Affairs has not yet determined the exact number of them. The reason for this is that certificates of competence for inland waterway boatmen are valid for much longer than for seafarers, making it impossible to conduct an accurate analysis based solely on the certificates issued.

Regarding working hours, the inland waterway boatman or master must organize them based on the type and demands of the job to ensure the safety of navigation and protect the health of the crew members.¹¹³ In cases where the safety of the vessel, persons, or cargo is at risk, or when helping other vessels, extended working hours may exceptionally be organized. The maximum duration of annual, daily, and weekly working hours, as well as rest periods, is regulated in the same way as *the Law on Navigation and Ports on Internal Waters*.¹¹⁴

Article 93 stipulates the minimum number of crew members for cargo motor vessels, pushers, and tugboats, while Article 96 specifies the minimum crew for passenger ships used for day trips without passenger cabins.¹¹⁵ In the event that, during the voyage, due to unforeseen exceptional circumstances such as illness, accident, orders from competent authorities, or other similar situations, the number of crew members is reduced, the ship may continue its voyage to the nearest port or harbour. However, such navigation will only be permitted if, in addition to the master, there is at least one more crew member on board and if uninterrupted communication with the competent harbour master's office is ensured through the prescribed communication means.¹¹⁶

5. Conclusion

By comparing the labour rights status of seafarers and inland waterway boatmen, many similarities, as well as significant differences, can be identified. Namely, both seafarers and inland waterway boatmen represent a specific category of workers, as the ship is not only their place of work but also their living space during the voyage. This specific working environment leads to special and difficult working conditions, as well as an increased risk of accidents. Furthermore, both categories of workers must have the necessary qualifications, professional education, and health capacity to be able to board the ship and sign an employment contract.

¹¹³ *Ibidem*, article 77, paragraph 1

¹¹⁴ For more information on the duration of working hours and rest periods, see: *ibidem*, Part V, Chapter I, Articles 78-87.

¹¹⁵ For more information on the minimum number of crew members, see: *ibidem*, articles 93 and 96.

¹¹⁶ *Ibidem*, article 91, paragraphs 1 and 2

For seafarers, the ratification and entry into force of the *MLC Convention* has been crucial. Its provisions cover almost all aspects of their life and work and, importantly, have achieved nearly universal ratification to date. The Republic of Croatia ratified the *MLC Convention* in 2010 and harmonized its legislation with its provisions. The harmonization was primarily done through amendments to the MC, significantly improving the labour status of 20,000 Croatian seafarers in international navigation.

Additional protection for seafarers is provided by the collective agreements that, on average every two years, are concluded between the Croatian Seafarers' Union and the Croatian Shipowners' Association Mare Nostrum. These agreements regulate specific rights of seafarers in detail, including the right to repatriation, guaranteed food and accommodation, medical care on board, and more, further improving their labour status.

On the other hand, no international convention has been adopted for inland waterway boatmen that would regulate their labour status in the same way as *the MLC Convention* does for seafarers. It is interesting to note that the EU has not adopted any regulation or directive specifically addressing the labour rights of inland waterway boatmen. Additionally, the Croatian Seafarers' Union has yet to adopt a collective agreement specifically for inland waterway boatmen. An aggravating factor for them is the fact that, unlike seafarers, they are not recognized as a special category of workers under the *Labour Act*.

From all the above, it is clear that the labour status of seafarers is better regulated in Croatian legislation. However, in recent years, progress in regulating the labour rights of inland waterway boatmen is visible, which can be attributed to the adoption of several secondary regulations that concern both categories of workers. These regulations address key issues such as employment on ships and the registration and de-registration for pension and health insurance. This indicates the Croatian legislator's intent to regulate and protect the labour rights of both seafarers and inland waterway boatmen in an equally quality manner.

An additional step forward in protecting inland waterway boatmen labour rights was achieved with *the Law on Navigation and Inland Ports*, which regulates the institute of return travel, compensation for unemployment, and the responsibility of shipowners as employers for the death, bodily injury, and health deterioration of inland waterway boatmen. These institutes are regulated in the same manner as in the *Maritime Code*, meaning they are aligned with the international standards of the *MLC Convention*. This has also contributed to improving the labour status of inland waterway boatmen in Croatia. However, this is not enough, and their labour rights status must be further strengthened. Therefore, as a *de lege ferenda* solution, the adoption of a collective agreement

specifically for inland waterway boatmen is proposed. Such an agreement, in which the Croatian Seafarers' Union would participate together with the Ministry of Maritime Affairs, would certainly further enhance their labour status. Furthermore, it would be of exceptional importance for them to adopt a special international agreement that would regulate the status globally, similar to how the *MLC Convention* does for seafarers. Only with the adoption of such an international convention would inland waterway boatmen labour rights be fully equalized with those of seafarers.

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MASS AND THE ROLE OF THE SHIP'S MASTER

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Review scientific paper

The future of shipping includes autonomous and remote-controlled ships. In recent years, the IMO has classified four different levels of MASS (Maritime Autonomous Surface Ship) in order to develop regulations and safety standards in line with technological advancements in the maritime industry.

In this context, the present paper aims to assess if the current legal framework is adequate to regulate MASS operations or if it is required to integrate it in order to take account of the emerging automation needs in this field.

In particular, one of the key issues to investigate is the role of the shipmaster in order to understand whether the current regulatory framework needs to be amended, considering that the most important maritime instruments – such as SOLAS and UNCLOS – seem to require the presence of the master on board. To this effect it is important to establish whether a remote operator can assume the same safety duties as a traditional shipmaster.

Key words: *MASS, shipmaster, master's duties, remote operator, IMO*

1. A New Way to Navigate at Sea: Historical Evolution

“Autonomous shipping is the future of the maritime industry. As disruptive as the smartphone, the smart ship will revolutionise the landscape of ship design and operations”. With these words, in 2016, the President of the Marine Department of Rolls-Royce presented the project called the “Advanced Autonomous Waterborne Applications Initiative-AAWA” which delivered a vision of how autonomous shipping can become relevant in the near future¹.

Over the centuries, it changed the way to navigate the sea. The transition from sailing ships to steamships was a lengthy progressive process, different

¹ The Advanced Autonomous Waterborne Applications Initiative (AAWA) project which was also launched by Rolls-Royce in 2015. The AAWA consortium was composed by ship designers, universities and classification societies with the aim to address legal, regulatory, socioeconomic, and technological aspects. Rolls-Royce and Finferries have also collaborated on a research project titled “Safer Vessel with Autonomous Navigation (SVAN)”, to continue to develop the outcomes of the AAWA project.

from one country to another, but characterized by a constant evolution of naval technology. Tonnage, size and power of vessels have gradually increased thanks to the advancement in propulsion and satellite-based communication technology as well as navigational skills.

The main objective of the International Community is to ensure navigation safety. In this context, autopilot², Electronic Chart Display and Information System (ECDIS)³, VTS⁴ and Dynamic Positioning (DP), play a pivotal role as they allow continuous monitoring of the ship.

One thing is certain, autonomous ships must be at least as safe as traditional vessels. There appear to be several advantages to increasing the degree of ship automation regarding safety-related matters. It is often recognized that by eliminating the human factor and human error, unmanned ships may be safer⁵.

In this respect, it is noteworthy that the European Maritime Safety Agency (EMSA)⁶ found that 89.5% of total accidental events occurred between 2014 and 2020 were actually related to human failures⁷.

² L. Tetley, D. Calcutt, *Electronic Navigation Systems*, Milton Park, 2015.

³ An Electronic Chart Display and Information System (ECDIS) is a geographic information system used for nautical navigation that complies with International Maritime Organization (IMO) regulations as an alternative to paper nautical charts. For further information about ECDIS, see A. Weintrit, *International Recent Issues about ECDIS, E-Navigation and Safety at Sea*. Marine Navigation and Safety of Sea Transportation, Boca Raton, 2017; Id., *The Electronic Chart Display and Information System (ECDIS): An Operational Handbook*, Boca Raton, 2009; Aa.Vv., *Human Factors Evaluation of Electronics Chart Display and Information Systems (ECDIS)*, Evanston, 1995.

⁴ Vessel traffic services (VTS) are shore-side systems which range from the provision of simple information messages to ships, such as position of other traffic or meteorological hazard warnings, to extensive management of traffic within a port or waterway. In 1985, IMO adopted resolution A.578 (14) - Guidelines for Vessel Traffic Services, which said that VTS was particularly appropriate in the approaches and access channels of a port and in areas having high traffic density, movements of noxious or dangerous cargoes, navigational difficulties, narrow channels, or environmental sensitivity. On VTS see, V. Berlingò, *Per una rilettura dei servizi di "Vessel Traffic Service" (VTS) e di pilotaggio alla luce delle implicazioni giuridiche del metodo matematico dell'HITL ("Human in the Loop")*, in *Il Diritto marittimo*, 2022, 694 ff.; M. Landi, *"VTS behind Traditions". L'evoluzione dei servizi di assistenza al traffico marittimo verso un modello di controllo da terra*, in *Rivista di diritto della navigazione*, 2022, 817 ff.; Id., *Tipologie e funzioni del VTS in Italia: stato dell'arte ed evoluzione*, in *Rivista di diritto della navigazione*, 2021, 271 ff.; U. La Torre, *Prerogative del comandante e servizi VTS: incrocio di competenze*, in *Rivista di diritto della navigazione*, 2021, 77 ff.

⁵ For further information about human factor, see ex multis T. Ahrm, W. Karwowski, *Human Factors in Robots, Drones and Unmanned Systems*, Orlando, 2023; A. Chialastri, *Human factor*, Roma, 2012.

⁶ European Maritime Safety Agency, <http://www.emsa.europa.eu/publications/technical-reports-studies-and-plans/download/3833/2551/23.html> accessed 5 April 2020; Safety for Sea, <https://safety4sea.com/emsa-466-less-casualties-in-2020-compared-to-2019/> accessed 6 May 2022.

⁷ Similarly, according to Allianz Global, most of the marine accidents that occurred between 1912 and 2012, from the Titanic to the Costa Concordia disasters, can be attributed to human error. For further information, see Allianz Insurance, <https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-Safety Shipping-Review-2012.pdf> accessed, 20 April 2020.

Remarkably, advancements in automated shipping have required the redefinition of operational task division between the human factor and ship technical system. In this sense, it is interesting to note that the distribution of tasks depends on the degree of automation of the ship, because – as will be described below – there are varying degrees of automation ranging from partially to fully autonomous systems.

So, is better to say that MASS (Maritime Autonomous Surface Ship) is not a new type of vessel, but it is a new navigation system, additional to the traditional navigation. The same vessel could use both assets – unmanned and manned – in a single voyage.

Currently, the use of autonomous ships is still largely confined to marine scientific research, surveying activities, offshore hydrocarbon resources exploration and exploitation, environmental monitoring missions, law enforcement operations of Coast guard, military activities, etc⁸.

However, in the near future, a heavier use of autonomous ships is expected. Therefore, it is important to understand whether the current regulatory framework – that includes, above all, UNCLOS⁹ and SOLAS¹⁰ Conventions – is applicable to MASS operations or if it is necessary to integrate it in order to take into account the emerging needs in this field.

In this perspective, it is considered appropriate to focus on the ship's master, in order to determine who is responsible for safety of remote-operated vessels

⁸ A. Pastra, D. Dalaklis, J. A. Skinner, J. Echebarria Fernández, T. M. Johansson, *Autonomous Vessels in Maritime Affairs. Law and Governance Implications*, Springer, Berlin, 2024; M. M. Graham, 'Unmanned Surface Vehicles: an Operational Commander's Tool for Maritime Security' (Faculty of Naval War College 31 October 2008) available at: https://ia803106.us.archive.org/13/items/DTIC_ADA494165/DTIC_ADA494165.pdf, 3 ff.; H. Ringbom, R. Veal, 'Unmanned ships and the international regulatory framework', 23 *Journal of International Maritime Law* 2, 2017, 100 ff.

⁹ The United Nations Convention on the Law of the Sea (UNCLOS) was adopted by the Third United Nations Conference on the Law of the Sea and opened for signature, together with the Final Act of the Conference, at Montego Bay, Jamaica, on 10 December 1982. The Conference was convened pursuant to resolution 3067 (XXVIII)2 adopted by the General Assembly on 16 November 1973. See, ex multis, L. A. T. Nguyen, *Viability of UNCLOS amid Emerging Global Maritime Challenges*, Springer Nature, 2024; R. Virzo, A. Del Vecchio, *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Berlino, 2019.

¹⁰ The SOLAS Convention is generally regarded as the most important of all international treaties concerning safety of merchant ships. The first version was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960. The 1974 version includes the tacit acceptance procedure - which provides that an amendment shall enter into force on a specified date unless, before that date, objections to the amendment are received from an agreed number of Parties. As a result, the 1974 Convention has been updated and amended several times. The Convention in force today is sometimes referred to as SOLAS 1974, as amended. See, ex multis, D. Mandrioli, *The rise of autonomous ships: towards an evolutionary interpretation of the IMO treaties on safety of navigation?*, in *Il Diritto marittimo*, 2022, 159 ff.; M. P. Rizzo, *Soccorso in mare di persone in pericolo tra norme consolidate e problematiche ancora aperte*, in *Rivista di diritto della navigazione*, 2020, 949 ff.

and whether remote operator of MASS can be regarded as a traditional ship's master.

2. Definition of 'Maritime Autonomy' and Types of Maritime Autonomous Surface Ships (MASS)

The concept of autonomous ships dates back to 19th century. Actually, the development of MASS preceded unmanned land or air vehicles¹¹ in modern history: indeed, the first remotely controlled ship was named 'Teleautomaton' developed and remotely steered in a pool in New York by its inventor Nikola Tesla in 1898¹².

There is no any regulatory framework for remotely controlled shipping in international maritime law, unlike in international air law. Indeed, there is not an international provision, like Article 8 of the 1944 Chicago Convention¹³, that qualifies an unmanned ship as a 'vessel'.

Currently, there is no legal definition of 'autonomous ship', maybe because there are several different types of autonomous vessels, depending on whether they are able to navigate on surface or underwater or whether they are employed for military or commercial use and considering their degree of automation.

¹¹ R. Abeyratne, Unmanned Aircraft Systems. The Civil Aviation (Revised) Perspective, in *European Transport Law*, 2011, 239; D. Ragazzoni, Sistemi aerei a pilotaggio remoto: spunti di qualificazione, in *Revista Latino Americana de Derecho Aeronáutico*, 2016, 412 ff.; S. Panzeri, I sistemi aerei a pilotaggio remoto (SAPR): profili giuridici, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2016, 42 ff.; B. Franchi, Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità – I parte, in *Responsabilità civile e previdenziale*, 2010, 738 ff.; Id., Aeromobili senza pilota (UAV): inquadramento giuridico e profili di responsabilità-II parte, in *Responsabilità civile e previdenziale* 2010, 1213 ff.; Id., Gli aeromobili a pilotaggio remoto: profili normativi ed assicurativi, in *Responsabilità civile e previdenziale*, 2014, 1770 ff.; A. Masutti, N. Tomasello, International Regulation of Non-Military Drones, Cheltenham (UK), 2018, 44 ff.; L. F. Fialloz Pazmiño, *The International Civil Operations of Unmanned Aircraft Systems under Air Law*, The Netherlands, 2021, 25 ff.

¹² See S. Pribyl, A. Weigel, 'Autonomous Vessels: How an Emerging Disruptive Technology Is Poised to Impact the Maritime Industry Much Sooner Than Anticipated', in *The Journal of Robotics, Artificial Intelligence & Law* 1, 2018, 17 ff.

¹³ Convention on International Civil Aviation (also known as Chicago Convention), was signed on 7 December 1944 by 52 States. Pending ratification of the Convention by 26 States, the Provisional International Civil Aviation Organization (PICAO) was established. It functioned from 6 June 1945 until 4 April 1947.

The 'Maritime Unmanned Navigation through Intelligence in Networks'(MUNIN)¹⁴ – one of the most important projects in this field¹⁵– defines 'autonomous' the ship operated by new systems on board the vessel, but monitored and controlled by an operator ashore.

The terms 'autonomous' and 'unmanned' are used interchangeably, although do not have necessarily the same meaning.

'Autonomous ships' are defined as vessels able of self-propelled movement by the sea, with no master or crew on board, while 'unmanned ships' are defined as ships operating without any human intervention¹⁶.

These definitions have been provided in a document submitted during the 100th session of the MSC by the International Organization for Standardization (ISO)¹⁷. The ISO broadly defined 'autonomy' as a concept for the automation of operational processes which can be performed without the supervision of the human element. It defined 'unmanned ship' as a vessel without human element on board to operate or control the tasks. Finally, it defined 'human presence' as presence of operators including their role and location.

¹⁴ For civil navigation of unmanned ships, the European Commission funded the 'Maritime Unmanned Navigation project through Intelligence in Networks', known as MUNIN Project, with a partnership between public and private actors. It is a study that was carried out – during the period between 2012 and 2015 – by lawyers and experts from several States (Germany, Ireland, Iceland, Norway and Sweden). See <http://www.unmanned-ship.org/munin/> accessed 10 March 2020.

¹⁵ Among others, such as, also the Yara Birkeland demonstrator. This project was developed by Yara (Agricultural products company) and Kongsberg (one of the major players in maritime autonomous technology field). In 2017, they agreed to work together in build the first fully electric battery-powered and autonomous container ship, with zero emissions (120 TEU, 79.5m length, 14.8m width and 6m draught) named Yara Birkeland. Yara Birkeland was planned to be gradually fully autonomous; initially as a crewed/remote-controlled ship and later is expected to be capable of navigating on fully autonomous mode. However, due to the COVID-19 pandemic, which has had significant impacts on the shipping industry, the Yara Birkeland project was suspended hold by the project's partners in 2020. The project was resumed in 2021 and made its first voyage to Oslo, Norway. Yara Birkeland will be in service in Norwegian territorial waters, will connect a few ports in Norway. See, <https://www.yara.com/news-and-media/press-kits/yara-birkeland-press-kit/>; Kongsberg Maritime, <https://www.kongsberg.com/maritime/about-us/news-andmedia/news-archive/2017/yara-and-kongsberg-enter-into-partnership-to-build-worlds-first-autonomousand/?OpenDocument>.

¹⁶ See P. Zampella, *Navi autonome e navi pilotate da remoto: spunti per una riflessione*, in *Diritto dei trasporti*, 2019, 583 ff.; Z. Liu and others, 'Unmanned surface vehicles: An overview of developments and challenges', in *Annual Reviews in Control*, 2016, 71 ff.

¹⁷ IMO Repository, MSC 100th session, Proposal for a Classification Scheme for Degrees of Autonomy – Proposed Characterization of Ship Autonomy, submitted by ISO, IMO Docs. MSC 100/5/1 (31 August 2018).

Furthermore, IMO – at its 99th meeting in May 2018 – defined MASS as “ships which, to a varying degree, can operate independently of human interaction”¹⁸.

This definition was confirmed during the 101st session of MSC¹⁹, which – in accordance with the above-mentioned ISO document²⁰ – has identified four degrees of ship’s automation: 1) ship with automated process and control shipboard systems and functions; 2) remotely controlled ship with seafarers on board; 3) remotely controlled ship without seafarers on board; 4) fully autonomous ships.

The first degree includes vessels with automated processes and decision support, in which crew is on board to manage and control shipboard systems, ready to take control of the ship. In this case some operations may be automated.

The second degree of automation includes remotely controlled vessels, operated from another location with crew on board.

The third level, instead, includes unmanned ships, remotely controlled, without seafarers on board. They are piloted and managed from a remote station.

The fourth degree of automation is the most advanced automation level, since the vessel is fully autonomous, and its operating system is capable to make decisions and determine actions by itself.

¹⁸ IMO found that MASS is an acronym that includes ships with different levels of automation, from partially automated systems, which assisted the human crew, to fully autonomous systems, which are able to undertake all aspects of a ship’s operation without the need for human intervention. According to the more recent MSC 108/4, 13 February 2024, Development of a goal-based instrument for Maritime Autonomous Surface Ships (MASS), providing a report of the Correspondence Group on Development of a goal-based instrument for MASS, “The term ‘MASS’ is used extensively when referring to a ship with remotely operated or autonomous functions. If the term is to be used in this way, it was felt that it should be understood that a ‘MASS’, in this case, is a ship to which the MASS Code is applied in part or in whole”.

¹⁹ According to Annex 1 of the 101st session MSC Report 101/5/4 of 2 April 2019, the “Autonomous ship” is characterized by the capabilities of the ship operating system, which can make decisions and determine actions on his own. In this way, it carries out activities related to the functioning and navigating independently and self-sufficiently and is clarified that the word autonomous is reserved for vessels conforming to grade 4, i.e. the most advanced automation. An “Automation system”, states the same Annex, can be composed of various types of devices: mechanical, electrical, digital, electronic, magnetic, hydraulic or other. An automation system can be used, e.g. for control, protection, display, logging or monitoring functions. It consists of devices that use on-board systems capable of performing tasks inherent in the operation of the vehicle. Smart ships can be controlled by both seamen and on board, or remotely by operators who are not on the ship, or by automation systems with or without human interaction. On this point we will be able to resume the discussion in the continuation of this work. The “conventional vessel” is equipped of automated systems on board, but they are always under human control from the ship and they do not have decision-making ability that instead characterizes artificial intelligence.

²⁰ IMO Repository, MSC 100th session, Proposal for a Classification Scheme for Degrees of Autonomy – Proposed Characterization of Ship Autonomy, submitted by ISO, IMO Docs. MSC 100/5/1 (31 August 2018).

Thus, the presence on board of the master and the crew is one of the fundamental element in order to identify the degree of autonomy of MASS operations.

3. The Role of the Autonomous Ship's Master

The fundamental aspect that must be considered is the liability and the responsibility of the master and crew in relation to MASS ships²¹.

Historically, there is no doubt that the master has been always aboard his ship²².

In maritime law²³ the master had and still has a number of shipboard duties. Subsequently, international maritime conventions have been drafted, based on the assumption that the master is onboard with the task to control and command his ship.

According to the current international framework, the first two degrees require the human element on board. It is clear that the master who is physically present onboard has complete control of his ship. On the contrary, a remotely controlled ship, without seafarers on board, requires greater attention.

In this context, first of all it is interesting to define the term 'master', who has always been one of the most important pillars of shipping.

Nevertheless, there is no definition of master in UNCLOS nor in SOLAS and even the context of these conventions provides further guidance. Anyway, national laws contain definitions according to which the master is a person who have command or charge of a ship, without any reference to his allocation.

In common law legal systems, the master holds a position of authority over other crew members, but his presence on board is not necessarily required. According to this, the UK Merchant Shipping Acts (1984) defined the master as follows: "*Master includes every person (except a pilot) having command or charge of*

²¹ M. Musi, The Phenomenon of "Mass": Is it Time to Rethink the Current Maritime Liability Regime?, in *Rivista di diritto della navigazione*, 2021, 763 ff.; F. Siccardi, Le navi autonome. "Maritime Autonomous Surface Ships" (MAAS), in *Il Diritto marittimo*, 2019, 848 ff.

²² The Code of Hammurabi (written between 1755-1750 BC, during the Babylonian Empire) and Roman law already regulated the role of the ship's master.

²³ G. Vojković, M. Milenković, Autonomous Ships and Legal Authorities of the Ship Master, in *Case Studies on Transport Policy*, 8/2021, 333 ff.

*any ship*²⁴. On the contrary, some provisions contained in the Italian Navigation Code (1942) assumed that the master is on board²⁵.

The fact that his physical presence on board is not emphasized as one of the requirements to identify the shipmaster, can facilitate further legal interpretation and regulatory action.

Considering that, it is necessary to focus attention on traditional duties of the master under UNCLOS and SOLAS, in order to understand whether a remote operator can assume the some responsibilities as the master in the command and control of the ship.

Preliminarily it is, however, important to clarify that the expression 'remote operator' indicates the person who is responsible for remotely controlling the movements of the autonomous ship, operating from a 'remote control centre' (RCC) or remote station.

Article 94 UNCLOS sets out the flag State's obligations concerning the master. In particular, Article 94.4-b explicitly requires that masters and officers have the necessary qualifications and certifications. According to this provision, flag States must ensure that each ship is under the charge of a competent master and crew, composed seafarers. Secondly, the crew must be appropriate in qualifications and numbers of members regarding the vessel's type, size, machinery, and equipment.

This requirement clearly demonstrates that UNCLOS assumes that vessels have to be controlled by humans. It appears that this obligation may be met when the level of autonomy of the ship corresponds to the degrees I, II and III, except when the vessel is fully autonomous.

To doubt about the possibility of extending this provision to every kind of autonomous ship, it is appropriate to recall Article 94.5, that states as follows: "*in taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance*".

Given that Article 94.4 UNCLOS requires that ships must have a master in charge and this requirement could be also fulfilled by a remote operator (degrees II and III MASS) who ensures remote supervision of the ship, it is necessary

²⁴ B. Soyer, A. Tettenborn, G. Leloudas, Remote controlled and Autonomous Shipping: UK based case study, p. 39.

²⁵ See, for example, Artt. 295 ("Al comandante della nave, in modo esclusivo, spetta la direzione della manovra e della navigazione [...]"), 296 ("Il comandante della nave marittima esercita le funzioni di ufficiale di stato civile previste dal presente codice e riceve i testamenti indicati nell'articolo 611 del Codice civile"), 297 ("prima della partenza il comandante, oltre a promuovere la visita nei modi previsti dal presente codice, deve di persona accertarsi che la nave sia idonea al viaggio da intraprendere [...]"), 303 ("il comandante deve abbandonare la nave per ultimo [...]") c. nav.

to understand whether this interpretation can be extended to fully autonomous vessels.

Provided that is desirable to amend UNCLOS so as to include MASS, an interpretation of the existing provision can clarify the matter further. Moreover, Article 94.5 supports a broader interpretation stating that Article 94.4-b can be interpreted according to the rules and standards set forth by IMO regarding MASS, and allows us to believe that duties of the master can be satisfied by a remote operator. So, Article 94 should not be interpreted as preventing its application to novel shipping technologies.

Another important responsibility of the master, under international law, is the duty to assist any persons found in distress at sea, pursuant to Article 98.1 UNCLOS and Chapter V²⁶ SOLAS. Indeed, this obligation is one of the fundamental principles of international maritime law, based on an ancient customary rule.

Therefore, it is of pivotal importance to determine whether a Designed Remote Operator (DRO) could assume the same duty of the master and whether and how such ship can provide assistance to persons in distress at sea²⁷. In this regard, the degree of autonomy, the type and size of vessel, and the presence of seafarers onboard will be significant.

Indeed, this duty can be met in the first two degrees, since they include seafarers onboard as in traditional vessels. It seems complicate to carry out salvage operations using remotely controlled ships, without seafarers onboard (degree III) and fully autonomous ships (degree IV).

It is argued²⁸ that even if degree III and degree IV ships are in the vicinity of persons in distress at sea, the remote operators are not able to render physical assistance, following the alert launched by search and rescue (SAR) authorities or other vessels. Conventionally, ships carrying out such operations are equipped with master and crew onboard.

²⁶ In particular, see Regulation 31 of Chapter V, entitled “danger messages”, that takes on the master responsibility to pass on information about navigation dangers to the coastguard by any means possible, without stipulating any obligatory specific form or detail; Regulation 32 under the same Chapter concerning the information required in danger messages does not refer to the physical location of the master, but stipulates the nature of the information, such as the kind/time/date of navigational danger observed; Regulation 33 sets out the obligations of the master and procedures in distress situations. See *ex multis*, G. Asta, *Navi-drone e obbligo internazionale di prestare soccorso in mare*, in *Rivista di diritto della navigazione*, 2021, 243 ff.

²⁷ U. La Torre, *Navi senza equipaggio e “shore control operator”*, in *Diritto dei trasporti*, 2019, 487 ff.

²⁸ C. Chae, R. Baumler, *Maritime Autonomous Surface Ships (MASS) - Regulation, Technology, and Policy. Three Dimensions of Effective Implementation*, Springer, 2024; M. Sümer, *Overcoming the Legal Challenges of Maritime Autonomous Surface Ships (MASS) and Compliance with UNCLOS and SOLAS: Designation of a Remote Master to Assume the Safety Duties of a Master*, Metro (Institute for transnational legal research), Maastricht University, 2023.

For this reason, Denmark, for example, claimed that the obligation of the master to provide assistance at sea cannot be extended beyond the technical capabilities of the MASS²⁹.

It seems clear the absence of seafarers onboard makes it impossible to carry out some typical master's tasks, such as the obligation arising from Regulation 33 of Chapter V SOLAS in distress situations.

However, it is worth noting that the UK Maritime Autonomous Systems Regulatory Working Group (MASRWG) prepared the first version of the 'Maritime Autonomous Ship Systems (MASS) UK Industry Conduct Principles and Code of Practice'³⁰, which was published in 2017 by the Maritime UK³¹ and, subsequently, revised in 2021. It defines the 'master' as follows: "*For the purposes of this Code, the term "master" should mean a specific person officially designated by the owner of the MASS as discharging the responsibilities of the Master of the MASS. This will be an employee of the company who has been assessed as competent to discharge these responsibilities in accordance with the provisions of this Code. This person may be located anywhere provided that the required level of command, control and communication can be maintained to discharge these duties*".

For the first time, this document has adopted a definition of master adapted to new technologies, providing guidance to relevant stakeholders. The sole question relating to the role of the master in the case of IV degree MASS remains unresolved.

4. Conclusions

There is a growing awareness that technological progress will bring great opportunities to the shipping industry, simplifying processes and creating greater automation. It is clear that "*new, emerging and advancing technologies will foster a more digitalized, interconnected and efficient industry closely integrated with the global supply chain*"³².

²⁹ See, Danish Maritime Authority, Final Report: Analysis of Regulatory Barriers to the use of Autonomous Ships, (Denmark, 18 January 2018) available at: www.dma.dk/Documents/Publikationer/Analysis%20of%20Regulatory%20Barriers%20to%20the%20Use%20of%20Autonomous%20Ships.pdf.

³⁰ Although the Code is not a legal document, it still provides some guidance on the operation of MASS to relevant stakeholders.

³¹ Maritime UK is the umbrella body for the maritime sector, bringing together the shipping, ports, services, engineering and leisure marine industries. More information is available at: <https://www.maritimeuk.org/about/about-us/>.

³² In this regard, see the IMO Assembly Resolution A.1173(33), adopted on 6 December 2023 (Agenda item 8), Strategic Plan for the Organization for the Six-Year Period 2024 to 2029, 11 December 2023, 6.

According to the European Parliament the 'autonomous transports' "covers all forms of remotely piloted, automated, connected and autonomous ways of road, rail, waterborne and air transport"³³.

In the MASS context, the IMO has distinguished four degrees of autonomy of ships³⁴. As we have seen above, the first three categories of autonomy, which actively involve the human element, require a person in charge who is appropriately qualified as a master/officer and who has control of the vessel, irrespective of his location. Instead, the fourth degree (fully autonomous ship) does not involve the human element at all.

This difference has regulatory implications. Therefore, the responsibilities and safety duties of the master under UNCLOS and SOLAS could be assumed, *mutadis mutandis*, by a remote operator who can replace the traditional master³⁵.

Instead, fully autonomous ships, equipped with operating system able to make decisions and determine actions by itself, cannot be governed by the current international regulatory framework. So, in this last case, it will be necessary to put in place a new *ad hoc* regime probably based on the principle of producer responsibility.

³³ European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), point 24.

³⁴ See IMO Maritime Safety Committee, 108th session, Agenda item 4, Development of a goal-based instrument for maritime autonomous surface ships (MASS), Report of the Correspondence Group Submitted by Marshall Islands, MSC 108/4 13 February 2024.

³⁵ See D. Mandrioli, L'applicazione degli obblighi sul soccorso in mare rispetto alla navigazione a guida autonoma, in *Rivista di diritto internazionale*, 2023, 341 ff.; C. Severoni, *Salvage and Autonomous Maritime Navigation, The Regulation of Automated and Autonomous Transport*, Springer, Berlin, 2022, 167 ff.

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PUBLIC HEALTH THREATS WITH SPECIAL REGARD TO THE LEGAL ISSUES OF THE TRAVEL AUTHORISATION/RESTRICTION*

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Original scientific paper

In this paper, the author points out and analyses the European legal solutions that initiated the process of creating a legal framework that aims to respond in a timely and appropriate manner to the specific threats to the public health of the EU citizens. Based on the experience of threats to public health (caused by COVID-19), which required the application of ad hoc measures (including travel restriction) for travel to the Schengen Area, the author points to the necessity of forming uniform legal norms, the application of which would contribute to a quick and high-quality reaction in relation to crisis situations at the external borders of the Schengen Area which may arise from the aspects of third country (visa exempt) nationals, non-EU citizens, whose diseases can pose a public health threat. Also, the author points to European solutions on extraterritorial pre-screening risk assessment control and broadly definition of the “high epidemic risk” as a reason for denying travel authorisation to third-country nationals (according to Regulation (EU) 2018/1240). At the same time, the author analyses the latest solutions that define and specify the term “high epidemic risks” in more detail (according to Commission Delegated Decision from 2021 on further defining security, illegal immigration or high epidemic risks) and solutions on temporary restrictions on travel to the Union in case of the “public health emergency” (Regulation (EU) 2024/1717 which amends Regulation (EU) 2016/399).

Key words: *public health threats, travel authorisation, travel restriction, legal solutions*

1. Introduction

According to official data, every year there are about 200 million of visa-exempt third country nationals (non-EU citizens, often migrants and asylum

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seekers) crossing of the Schengen border.¹ The fight against illegal migration and the effectiveness of monitoring the external borders of the EU are postulates of the European migration policy, which comes to the fore in terms of preventing threats to public health. In this paper, the author analyses appropriate solutions regarding the possible threat to public health that may be posed by visa-exempt third country nationals when crossing the external borders of the Schengen Area² - area without controls³ at internal borders which is also and one of the biggest achievements of European integration.⁴ In particular, in paper author analyses the legal solutions of the newly formed European legal framework, which enabled adequate compliance with the free movement regime in the Schengen Area, as well as timely protection of public health according to the current norms on European travel authorisation for these type of “travellers”. Although the solutions in question are still not in use (more than 6 years since their adoption), the paper points out the importance of viruses and epidemic events⁵ that do not know borders and which can pose public health emergency.⁶ Taking into consideration that visa-exempt third country nationals, if considered a high epidemic risk, would not be able to enter into the Schengen Area – author points to the problem defining of public health threats, high epidemic risks or public health emergency of international concern⁷ (which was declared

¹ Explanatory Memorandum to COM(2016)731 – European Travel Information and Authorisation System (ETIAS), November 2016, available at: https://www.eumonitor.eu/9353000/1/j4nvhdjdk3hydzc_j9vvik7m1c3gyxp/vk9bd6mxr5zn, accessed 19 October 2024.

² More on Schengen Area territory see VOYNIKOV, V. V.: The 25th Anniversary of the Schengen Area and the impact of COVID-19, *Bialystok Legal Studies*, Vol. 26, No. 1, 2021, p. 38-40.

³ More on “regular“ travellers control see more HANSEN, F.; PETTERSSON, J.: Contradictory migration management? Differentiated security approaches to visa overstay and irregular border crossing in the European Union, *European Security*, Vol. 31, No. 1, 2022, p. 129.

⁴ Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, COM/2021/891 final, 14.12.2021., p. 1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A891%3AFIN>, accessed 20 October 2024, (further: *Proposla 2021*). More on Schengen Area as a “significant cornerstone of European integration” see GÜLZAU, F.: A “New Normal” for the Schengen Area. When, Where and Why Member States Reintroduce Temporary Border Controls? *Journal of Borderlands Studies*, Vol. 38, No. 5, 2023, p. 785.

⁵ More on epidemic crises over the last three decades (SARS, influenza pandemic in 2009 - H1N1 virus, Ebola) see MONTALDO, S.: Internal Border Control in the Schengen Area and Health Threats: Any Lessons from the COVID-19 Pandemic?, *European Journal of Migration*, Vol. 23, No. 4, 2021, p. 410. More on epidemic events reported from 2011 to 2017 see KAMALRATHNE, T.; AMARATUNGA, D.; HAIGH, R.; KODITUWAKKU, L.: Need for effective detection and early warnings for epidemic and pandemic preparedness planning in the context of multi-hazards: Lessons from the COVID-19 pandemic, *International Journal of Disaster Risk Reduction*, Vol. 92, 2023, p. 4.

⁶ More on public health emergency as an unexpected emergency event in the risk society, which causes great damage to all aspects of social life see XIÖNG, L.; HÜ, P.; WANG, H.: Establishment of epidemic early warning index system and optimization of infectious disease model: Analysis on monitoring data of public health emergencies, *International Journal of Disaster Risk Reduction*, Vol. 65, 2021, p. 1.

⁷ See more LEE, A.: Public health actions against COVID-19 to protect our rights to health, *Medicine and Law*, *World Association for Medical Law*, Vol. 39, No. 2, 2020, p. 205-221.

by the World Health Organization⁸ on 30 January 2020 for the coronavirus disease i.e. COVID-19).⁹ Epidemics grow exponentially and often spread by the time health authorities become aware of them.¹⁰ The first COVID-19 cases were officially reported in China (at the beginning of December 2019), in Spain was officially reported at the end of February 2020 but the virus was detected in sewage water in Barcelona 41 days before that date.¹¹

It is particularly important to note that the transport sector contributed to the easier spread of COVID-19 on a global level, so after less than 40 days, from the declaration of COVID-19 as a public health emergency of international concern,¹² on 11 March 2020 – WHO declared COVID-19 as a pandemic.¹³ This influenced the adoption of numerous restrictive measures (travel restrictions and reduction of transportation activities) at the European and global level, which were aimed at suppressing the spread of COVID-19, directly affecting all transport modes, including air transport, which was the most affected, suffering severe financial losses. For fight against future public health threats we need to be prepared to react on time.

2. Influence of the ETIAS in Fighting Against Public Health Threats or High Epidemic Risk

Fight against public health threats or high epidemic risk inevitably include the issue of the border controls of persons. Main EU principles on border controls of persons are prescribed in Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).¹⁴

⁸ World Health Organization (further: WHO), see more: <https://www.who.int>

⁹ World Health Organization, Coronavirus disease (COVID-19) pandemic, available at: <https://www.who.int/europe/emergencies/situations/covid-19>, accessed 19 October 2024.

¹⁰ MACLNTYRE, C. R.; CHEN, X.; KUNASEKARAN, M.; QUIGLEY, A.; LIM, S.; STONE, H.; PAIK, H.; YAO, L.; HESLOP, D.; WEI, W.; SARMIENTO, I.; GURDASANI, D.: Artificial intelligence in public health: the potential of epidemic early warning systems, *Journal of International Medical Research*, Vol. 51, No. 3, 2023, p. 2.

¹¹ MACLNTYRE, C. R.; CHEN, X.; KUNASEKARAN, M.; QUIGLEY, A.; LIM, S.; STONE, H.; PAIK, H.; YAO, L.; HESLOP, D.; WEI, W.; SARMIENTO, I.; GURDASANI, D., *op. cit.*, p. 4.

¹² More on public health emergency of international concern (further: PHEIC) see WILDER-SMITH, A.; OSMAN, S.: Public health emergencies of international concern: a historic overview, *Journal of Travel Medicine*, Vol. 27, No. 8, 2020, p. 1-13.

¹³ World Health Organization, COVID-19 Public Health Emergency of International Concern, available at: [https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-\(pheic\)-global-research-and-innovation-forum](https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum), accessed 19 October 2024.

¹⁴ Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ L 77, 23.3.2016, p. 1–52, further: Regulation (EU) 2016/399*.

These solutions prescribe the absence of border control of persons crossing the internal borders¹⁵ between the EU Member States,¹⁶ but also lay down rules governing border control of persons crossing the external borders¹⁷ (Art. 1 of the Regulation (EU) 2016/399). Border checks of all persons at external borders include a minimum check for persons enjoying the right of free movement under Union law, but border guards may consult national and European databases in order to ensure that such persons do not represent a genuine, present and sufficiently serious threat to the internal security, public policy, international relations of the Member States or a threat to the public health (Art. 8(2) of the Regulation (EU) 2016/399). Entry conditions for third-country nationals are set down in Art. 6 of the Regulation (EU) 2016/399 and one of them is that third-country nationals “are not considered to be a threat to public health”¹⁸ e.g. that third-country nationals are not considered to have any disease with epidemic potential as defined by the International Health Regulations¹⁹ of the WHO and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States (Art. 2(21) of the Regulation (EU) 2016/399).²⁰ In case of threat to the public health, third-country nationals should be checked at external border to verify that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardise the public policy, internal security, public health or international relations of any of the Member States (Art. 8(3) point a) on vi) of the Regulation (EU) 2016/399).

Public health issues are also subject of concern for passengers (travellers) if they are to be considered as visa-free third-country nationals. Namely, prior travelling to the Schengen Area, which is the largest area of free movement without internal border controls in the world and the most attractive and

¹⁵ Internal borders means: a) the common land borders, including river and lake borders, of the Member States; b) the airports of the Member States for internal flights; c) sea, river and lake ports of the Member States for regular internal ferry connections (Art. 2(1) point 1 of the Regulation (EU) 2016/399).

¹⁶ More on temporary internal border controls in the Schengen Area see GÜLZAU, F., *op. cit.*, p. 787-790; PETTERSSON FÜRST, J.: Defensive integration through cooperative re-bordering? How member states use internal border controls in Schengen, *Journal of European Public Policy*, Vol. 31, No. 2, 2024, p. 487-496.

¹⁷ External borders means the Member States' land borders, including river and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal border (Art. 2(2) of the Regulation (EU) 2016/399).

¹⁸ Art. 6(1) point e) of the Regulation (EU) 2016/399.

¹⁹ International Health Regulations (further: IHR). See more: <https://www.who.int/news-room/questions-and-answers/item/emergencies-international-health-regulations-and-emergency-committees>.

²⁰ See more MONTALDO, S., *op. cit.*, p. 419.

most visited area in the world,²¹ visa-free third-country nationals must take to consideration new European rules on European travel authorisation. According to the provisions of the Regulation (EU) 2018/1240,²² European Travel Information and Authorisation System (ETIAS) was established. So, passengers (visa-free third-country nationals/visa-exempt non-EU citizens)²³ must in advance of any intended travel to the Schengen Area, make online application for travel authorisation.²⁴ According to *Borges Fortes et al.*, as part of the global mobile infrastructure, ETIAS could be interpreted as an instrument of selective and differentiated inclusion that regulates the mobility of some categories of people and restricts the rights of entry of other people through an algorithm designed for visa allocation according to political priorities.²⁵ Once it receives a new application and records the applicant's data, the ETIAS Central System will verify, through the interoperability components, whether the applicant's data match (in full or in part) data stored in other information systems and databases, including databases on convicted criminals and security alerts on specific persons, analysing the applicant's replies to the ETIAS application form.²⁶ Each application is automatically cross-checked to determine whether there are grounds for refusing to issue a travel authorisation.²⁷ This prior verification of visa exempt non-EU citizens will facilitate border checks; avoid bureaucracy and delays for travellers when presenting themselves at the borders; ensure a coordinated and harmonised risk assessment of third-country nationals; and substantially reduce the number of refusals of entry at border crossing points.²⁸

²¹ European Commission, State of Schengen report 2023, COM(2023) 274 final, 16.5.2023., p. 5, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023DC0274>, accessed 19 October 2024.

²² Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, *OJ L236*, 19.9.2018, p. 1-71 (*further: Regulation (EU) 2018/1240*).

²³ More on ETIAS and securitisation of visa-exempt travellers see HANSEN, F.; PETTERSSON, J., *op. cit.*, p. 129.

²⁴ See more BROUWER, E.: Schengen and the Administration of Exclusion: Legal Remedies Caught in between Entry Bans, Risk Assessment and Artificial Intelligence, *European Journal of Migration and Law*, vol. 23, 2021, p. 494.

²⁵ BORGES FORTES, P. R.; BAQUERO, P. M.; AMARILES, D. R.: Artificial Intelligence Risks and Algorithmic Regulation, *European Journal of Risk Regulation*, Vol. 13, 2022, p. 371.

²⁶ GUGLIOTTA, L.; ELBI, A.: Will AI "subtly" take over decision-making in the EU migration context? Warnings and lessons from ETIAS and VIS, p. 5, available at: <https://jmn-eulen.nl/wp-content/uploads/sites/575/2023/06/7.-WP-Gugliotta-Elbi.pdf>, accessed 7 October 2024.

²⁷ CESARZ, M.: A new type of visa? The legal nature of a travel permit issued under the European Travel Information and Authorization System (ETIAS), *Studia Prawnicze Kul*, vol. 4, 2021, p. 18.

²⁸ European Commission, Migration and Home Affairs, European Travel Information and Authorisation System (ETIAS), p. 1, available at: https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/smart-borders/european-travel-information-authorisation-system_en, accessed 9 October 2024.

Digital surveillance, pre-entry screening²⁹ and pre-authorisation through ETIAS represent collection and sharing of numerous visa-exempt non-EU citizens personal data (more than 30 category of personal data)³⁰ and security database³¹ check through numerous EU electronic databases (IT systems).³² As a automated IT border control system which involves improved security actions through algorithm profiling,³³ ETIAS helps to estimate whether the presence of those third-country nationals in the territory of the EU Member States would pose a security risk,³⁴ illegal immigration risk³⁵ or high epidemic risk³⁶ (Art.1(1) Regulation (EU) 2018/1240) before they come to the external borders of Schengen Area.³⁷ Its purpose is to mitigate these risks and enhance the effectiveness of border checks.³⁸ ETIAS will represent a massive infrastructure of surveillance and serve as a tool of differential exclusion and individualisation of travel restrictions.³⁹ One of the objective of ETIAS is that it shall contribute

²⁹ More on ETIAS as a tool of extraterritorial control see VAVOULA, N.: The “Puzzle” of EU Large-Scale Information Systems for Third-Country Nationals: Surveillance of Movement and its Challenges for Privacy and Personal Data Protection, *European Law Review*, 2019, p. 14.

³⁰ See more Art. 17 Regulation (EU) 2018/1240.

³¹ More on databases as digital borders see QUINTEL, T.: Connecting personal data of Third Country Nationals – Interoperability of EU databases in the light of the CJEU’s case law on data retention, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132506#, p. 5-10, accessed 25 September 2024.

³² See more BROUWER, E., *op. cit.*, p. 494.; PRIMORAC, Ž.: BULUM, B.; PIJACA, M.: New European Approach on Passengers’ Digital Surveillance through Electronic Platform (ETIAS) - Passengers’ and Carriers’ Perspective, *EU and Comparative Law Issues and Challenges Series (ECLIC) – Issue 7, Conference Book of Proceedings “Digitalization and Green Transformation of the EU”*, 2023, p. 277-281.

³³ More about uncertainty whether the screening rule of ETIAS and their profiling algorithm will indeed rely on AI technology see VELASCO RICO, C. I.; LAUKYTE, M.: ETIAS system and new proposals to advance the use of AI in public services, *Computer Law & Security Review*, vol. 54, 2024., p. 2-3.

³⁴ “Security risk” means the risk of a threat to public policy, internal security or international relations for any of the Member States (Art. 3(1) point 6 of the Regulation (EU) 2018/1240).

³⁵ “Illegal immigration risk” means the risk of a third-country national not fulfilling the conditions of entry and stay as set out in Art. 6 of Regulation (EU) 2016/399 (Art. 3(1) point 7 of the Regulation (EU) 2018/1240).

³⁶ “High epidemic risk” means any disease with epidemic potential as defined by the IHR of WHO or the European Centre for Disease Prevention and Control (ECDC) and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States (Art. 3(1) point 8 of the Regulation (EU) 2018/1240).

³⁷ See more MUSCO EKLUND, A.: Limits to discretion and automated risk assessments in EU border control: Recognising the political in the technical, *European Law Review*, Vol. 30, No. 1-2, 2024, p. 104.

³⁸ MUSCO EKLUND, A.: Rule of Law Challenges of “Algorithmic Discretion” & Automation in EU Border Control – A Case Study of ETIAS Through the Lens of Legality, *European Journal of Migration and Law*, Vol. 25, 2023, p. 251.

³⁹ BORGES FORTES, P. R.; BAQUERO, P. M., *op. cit.*, p. 371.

to the protection of public health⁴⁰ by providing for an assessment of whether the applicant poses a high epidemic risk prior to his or her arrival at external border crossing points.⁴¹ The necessity of the ETIAS has been based on the perceived risk posed by visa-exempt travellers, without, however, substantiating the existence of that risk.⁴² However, considering that one of the goals of ETIAS is to reduce the possibility of the potential development of an epidemic in the territory of EU Member States, it is important to point out in more detail the assumptions that must be met in order to realize high epidemic risk, i.e. to what extent the realization of its characteristics can represent threat to public health. Still in 2018 it was predicted that the ETIAS application form would be able to include questions related to health history of the applicants e.g. questions on their serious transmittable diseases (if they have them or had them): Hepatitis A or B; Rabies; Tuberculosis, HIV/Aids; Hantavirus.⁴³ Although the application form may not name specific diseases the applicant will be asked to supply details regarding past history of serious parasitic, transmittable or contagious diseases.⁴⁴ Subject data will be important to identify third country visa-exempt travellers who can present potential high epidemic risks and public health threats.

According to Regulation (EU) 2018/1240, grounds for refusal (security, illegal immigration, high epidemic risk) are broadly defined but a “public health risk” has been defined most clearly.⁴⁵ Comparing the concept of the “threat to public health” according to Art. 2(21) of the Regulation (EU) 2016/399, we can see that a similar definition is contained in the solutions of Regulation (EU) 2018/1240⁴⁶ which refers to the definition provided in the Regulation (EU) 2016/399.⁴⁷ However, the difference is that in Regulation (EU) 2016/399 the term “any disease with epidemic potential as defined by the IHR of the WHO” refers to the definition of “threat to public health”, but in Regulation (EU) 2018/1240 subject concept refers to “high epidemic risk”. At the same time, it is

⁴⁰ More on upholding public health as a objective of ETIAS see CSATLÓS, E.: Prospective implementation of AI for enhancing European (in)security: Challenges in reasoning of automated travel authorization decisions, *Computer Law & Security Review*, Vol. 54, 2024, p. 3.

⁴¹ Art. 4(c) of the Regulation (EU) 2018/1240.

⁴² VAVOULA, N., *op.cit.*, p. 23.

⁴³ How ETIAS will help protect public health, 3 August 2021, available at: <https://etias.com/articles/how-etias-will-help-protect-public-health>, accessed 26 September 2024.

⁴⁴ How ETIAS will help protect public health, *op. cit.*

⁴⁵ TIEKSTRA, W.: Free movement threatened by terrorism: an analysis of measures proposed to improve EU border management, International Centre for Counter-Terrorism-The Hague, October 2019, p.7, available at: <https://www.icct.nl/sites/default/files/import/publication/Free-movement-threatened-by-terrorism.pdf>, accessed 19 October 2024.

⁴⁶ See more footnote 36.

⁴⁷ TIEKSTRA, W., *op. cit.*, p. 7.

important to note that in Regulation (EU) 2018/1240 the definition has been expanded since it is prescribed that “high epidemic risk” means any disease with epidemic potential defined also by the European Centre for Disease Prevention and Control (ECDC) – not only by the IHR of the WHO (like in Regulation (EU) 2016/399).

Although Regulation (EU) 2018/1240 was adopted in September 2018, until today (end of 2024) - ETIAS is not yet operational but it is estimated that it will be operational in May 2025. When fully operational, ETIAS will be mandatory, pre-screening millions of visa-free third country nationals entering Schengen.⁴⁸ Namely, ETIAS will apply to a population of around 1,4 billion people who are eligible for visa-free travel⁴⁹ and whose inflow into the EU is constantly increasing.⁵⁰ Also, ETIAS will become the first European automated risk-profiling system used in migration management.⁵¹

2.1. ETIAS and pre-COVID-19 and post-COVID-19

“High epidemic risk” as a ground for refusal European travel authorisation to visa exempt third country nationals means that the tracking of the health status of this category of travellers could be some kind of tool for preventing public health threats in future, before their arrival at the Schengen Area border. There will be some questions in ETIAS application form about serious infections, parasites, or contagious viruses that may pose serious risks to the health and wellness of European citizens and provided information will be screened against a security database for any health risk and also through the medical database.⁵² So, we can say that nationality of the travellers can also be considered a significant circumstance if we connect this data with the identification of “those coming from areas experiencing an outbreak of a particular disease or illness”.⁵³ Namely, EU member states would have been aware of a traveller’s country of origin and whether or not that country was deemed to be a high health risk.⁵⁴ It is

⁴⁸ Center for Immigration Studies, *Entry-Exit Biometric Controls Are Coming to Schengen; EU “Smart Borders” Poised to Surpass U.S.*, June 2022, available at: <https://cis.org/Linderman/EntryExit-Biometric-Controls-Are-Coming-Schengen-EU-Smart-Borders-Poised-Surpass-US>, accessed 1 October 2024.

⁴⁹ This population are people from more than 60 countries worldwide.

⁵⁰ CESARZ, M., *op. cit.*, p. 17-18.

⁵¹ BORGES FORTES, P. R.; BAQUERO, P. M.; AMARILES, D. R., *op. cit.*, p. 370.

⁵² ETIAS health questions, 18 April 2023, available at: <https://www.visahq.com/etias/etias-health-questions>, accessed 26 September 2024.

⁵³ ETIAS and Its Role in Protecting Public Health, 2.6.2021, available at: <https://www.etiasvisa.com/etias-news/etias-role-protecting-public-health>, accessed 26 September 2024.

⁵⁴ How ETIAS will help protect public health, *op. cit.*

important to note that in ETIAS application form visa exempt third country nationals, as travellers, “are not asked for medical information (information about existing health conditions) while health questions are not included”.⁵⁵

We can say that when ETIAS will be operational, we would have much earlier data on travellers (visa exempt third country nationals) coming to Schengern Area, but we can not be sure that this would be a life-saving solution that, in itself, will contribute prevention of the spread of epidemic and pandemic threats in the future. ETIAS, in collaboration with emerging new technologies, will certainly be able to play a large part in reducing the spread of COVID-19.⁵⁶ This is particularly significant in the context of COVID-19, which many EU Member States perceived as “a serious threat to public policy which requires immediate action to be taken, on an exceptional basis” according to Art. 28(1) of the Regulation (EU) 2016/399, reintroducing internal border control.⁵⁷ In the spring 2020, the coronavirus began to spread rapidly and, as a response, 17 Schengen states introduced internal border control checks as one of their measures to reduce the spread of the virus.⁵⁸ Most of the EU Member States introduced restrictions on modes of international passenger transportation and such restrictions applied to air, rail, road, sea, and inland waterway transport.⁵⁹ The COVID-19 pandemic is the first time in the EU history that public health has been simultaneously used by all EU Member States to justify free movement restrictions and this is what makes the reliance on this value and a national value used to restrict another important EU value – points to the balancing exercise that is taking place in the context of the pandemic.⁶⁰ Following a familiar pattern in the history of contagious diseases, countries across the globe have responded with travel restrictions and entry bans.⁶¹ European countries closed their border, i.e., introduced restrictions on all entries to their respective state territories.⁶²

⁵⁵ ETIAS and Its Role in Protecting Public Health, *op. cit.*

⁵⁶ How ETIAS will help protect public health, *op. cit.*

⁵⁷ More on temporary introduction of border control see MONTALDO, S., *op. cit.*, p. 405-430; SALOMON, S.; RIJPMAN, J.: A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship, *German Law Journal*, Vol. 24, 2023, p. 284-288.

⁵⁸ PETERSSON FÜRST, J., *op. cit.*, p. 492.

⁵⁹ VOYNIKOV, V. V., *op. cit.*, p. 42.

⁶⁰ GOLDNER LANG, I.: “Laws of Fear” in the EU: Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19, *European Journal of Risk Regulation*, Vol. 14, No. 1, 2023, p. 6.

⁶¹ VAN EIJKEN, H.; RIJPMAN, J. J.: Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona, *Utrecht Law Review*, Vol. 17, No. 3, 2021, p. 34. See more GOLDNER LANG, I., *op. cit.*, p. 3.

⁶² DUIĆ D.; SUDAR, V.: The Impact of COVID-19 on the Free Movement of Persons in the EU, *Book of Proceedings – EU and Comparative Law Issues and Challenges Series (ECLIC)*, Vol. 5, 2021, p. 35.

It is important to note that before the COVID-19 pandemic, the EU and Schengen Area did not require mandatory vaccinations for travellers, except for those individuals traveling from countries with high risks of particular infectious diseases: a) Yellow Fever - for travellers from or transiting through countries where yellow fever is endemic, a yellow fever vaccination certificate was required; b) Tuberculosis, Polio and Other Diseases - specific vaccines might be recommended depending on the health situation in the travellers' home country or the EU/Schengen Area member state they intend to visit.⁶³ The pre-COVID-19 vaccination recommendations mostly cantered around individual health protection rather than public health security at large.⁶⁴ To facilitate free movement during the COVID-19 pandemic it was adopted Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate)⁶⁵ which also contribute to facilitating the gradual lifting of restrictions to free movement put in place by the EU Member States (Art. 1. of the Regulation (EU) 2021/953). From the beginning of January 2023, for entering in all EU Member States it was required that passengers have an EU Digital COVID Certificate or COVID-19 vaccination certificate.⁶⁶

3. Commission Delegated Decision on Further Defining Security, Illegal Immigration and High Epidemic Risks From 2021

According to the Art. 33(2) of the Regulation (EU) 2018/1240, European Commission was obliged (in a 5-year period, counting from 9 October 2018)⁶⁷ to adopt delegated act which refer on further defining, among others and “high epidemic risk”. The execution of the subject task should have been based on the application of ETIAS screening rules on the basis of statistics and information referred to in Art. 33(2) of the Regulation (EU) 2018/1240. As a basis for the pre-determined risk criteria, the European Commission was supposed to define risks by analysing certain statistics and information, which should result in “sets

⁶³ What are the vaccine requirements for European travel?, 1 September 2023, available at: <https://etias.com/articles/vaccine-requirements-for-europe>, accessed 16 October 2024.

⁶⁴ What are the vaccine requirements for European travel?, *op. cit.*

⁶⁵ Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate), *OJ L 211, 15.6.2021, p. 1–22, further: Regulation (EU) 2021/953 (applied from July 1, 2021 until June 30, 2022).*

⁶⁶ See more What are the vaccine requirements for European travel?, *op. cit.*

⁶⁷ Art. 89(2) of the Regulation (EU) 2018/1240.

of characteristics of specific groups of travellers associated with these risks”.⁶⁸ It appears that instead of further defining the risks we have merely detail additional parameters for statistical analysis.⁶⁹ According to the 4 group of the data which are prescribed in Art. 33(4) of the Regulation (EU) 2018/1240,⁷⁰ we can assume which combination of data can pose a potential specific risk indicator,⁷¹ from the ETIAS aspects. Combination of data including age range, gender, country and city residence or current occupation (job group) of travel authorisation applicants can present specific risk indicators for a “high epidemic risk”.

According to Art. 26(6) of the Regulation (EU) 2018/1240, although ETIAS relies on automated processing, the decision on travel authorisation can not be made automatically⁷² on the basis of a hit based on specific risk indicators which means that ETIAS National Unit⁷³ shall in all cases, individually assess the security, illegal immigration and high epidemic risks and decide whether to issue or refuse a travel authorisation. Applying the general principle that all applicants for travel authorisation must be subject to screening rules controls that will include, among other things, the collection and processing of personal data related to a specific risk indicator (high epidemic risk), in November 2021, European Commission has adopted the delegated act - Commission Delegated Decision on further defining security, illegal immigration or high epidemic risks.⁷⁴ The most important to note is that Commission Delegated Decision 2021 did not define what is considered high epidemic risk. However, in connection with this, it is expressly prescribed what the decision of the ETIAS Central Unit⁷⁵ must be based on and what ETIAS Central Unit shall take into consideration. According to Art. 6(1) of the Commission Delegated Decision

⁶⁸ MUSCO EKLUND, A.: Limits to discretion and automated risk assessments in EU border control: Recognising the political in the technical, *op. cit.*, p.107.

⁶⁹ GUGLIOTTA, L.; ELBI, A., *op. cit.*, p.8.

⁷⁰ These are: a) age range, sex, nationality; b) country and city of residence; c) level of education (primary, secondary, higher or none); d) current occupation (job group).

⁷¹ European regulator clearly prescribes that specific risk indicators shall not be based solely on a person's sex or age and that specific risk indicators shall in no circumstances be based on information revealing a person's colour, race, ethnic or social origin, genetic features, language, political or any other opinion, religion or philosophical belief, trade union membership, membership of a national minority, property, birth, disability or sexual orientation (Art. 33(5) of the Regulation (EU) 2018/1240).

⁷² More on fundamental rights risks of the ETIAS automated processing see GUGLIOTTA, L.; ELBI, A., *op. cit.*, p.19.

⁷³ See more Art. 8 of the Regulation (EU) 2018/1240.

⁷⁴ Commission Delegated Decision on further defining security, illegal immigration or high epidemic risks, C/2021/4981 final, 23.11.2021, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C\(2021\)4981](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C(2021)4981), accessed 7 October 2024 (further: Commission Delegated Decision 2021).

⁷⁵ More on responsibilities of the ETIAS Central Unit see Art. 7 of the Regulation (EU) 2018/1240.

2021, the ETIAS Central Unit shall base its further defining of specific high epidemic risks on:

- a) information provided by Member States concerning cases of high epidemic risks in particular where posing a serious cross-border threat to health⁷⁶ in the Union provided through the epidemiological surveillance and control of communicable diseases⁷⁷ network and the Early Warning and Response System⁷⁸ in accordance with Art. 6, 8 and 9 of Decision No 1082/2013/EU⁷⁹;
- b) information provided by the European Centre for Disease Prevention and Control⁸⁰ concerning epidemiological surveillance⁸¹ information and

⁷⁶ Serious cross-border threat to health means, in accordance with Art. 3 of Decision No 1082/2013/EU, a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin which spreads or entails a significant risk of spreading across the external borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection (Art. 2 (c) of the Commission Delegated Decision 2021).

⁷⁷ Communicable disease means, in accordance with Art. 3 of Decision No 1082/2013/EU, an infectious disease caused by a contagious agent which is transmitted from person to person by direct contact with an infected individual or by indirect means such as exposure to a vector, animal, fomite, product or environment, or exchange of fluid, which is contaminated with the contagious agent (Art. 2 (d) of the Commission Delegated Decision 2021).

⁷⁸ Early Warning and Response System of the European Union (further: EWRS). More on progressively expanded scope of the EWRS see BENGTTSSON, I.; BORG, S.; RHINARD, M.: European security and early warning systems: from risks to threats in the European Union's health security sector, *European Security*, vol. 27, No. 1, 2018, p. 30. More on EWRS see: <https://www.ecdc.europa.eu/en/publications-data/early-warning-and-response-system-european-union-ewrs>

⁷⁹ Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC, *OJ L 293, 5.11.2013, p. 1–15., dalje: Decision No 1082/2013. According to the Art. 1(1) of the Decision No 1082/2013, this Decision lays down rules on epidemiological surveillance, monitoring, early warning of, and combating serious cross-border threats to health, including preparedness and response planning related to those activities, in order to coordinate and complement national policies. The solutions referred to in the Commission Delegated Decision 2021 refer to: epidemiological surveillance (Art. 6), establishment of an early warning and response system (Art. 8.) and alert notification (Art. 9) according to Decision No 1082/2013/EU. More on implementation activities and key achievements of the Decision No 1082/2013 see European Commission, *Report on the implementation of Decision No 1082/2013/EU, COM(2015)617 final, 7 December 2015, p. 4–10, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0617, accessed 19 October 2024. Decision No 1082/2013/EU is not in force from 25 November 2022. More on Decision No 1082/2013/EU as the primary tool to manage health crisis in the EU see: BEAUSSIER, A.-L.; CABANE, L.: Strengthening the EU's Response Capacity to Health Emergencies: Insights from EU Crisis Management Mechanisms, *European Journal of Risk Regulation*, Vol. 11, No. 4, 2020, p. 809; FERRI, F.: Regional Perspective: Obligations under EU Law as Applicable to Naturally Occurring CBRN Events, 2022, p. 308–321, available at: <https://brill.com/display/book/edcoll/9789004507999/BP000027.xml>, accessed 15 October 2024.**

⁸⁰ European Centre for Disease Prevention and Control (further: ECDC). More on ECDC see: <https://www.ecdc.europa.eu/en>

⁸¹ Epidemiologic surveillance means, in accordance with Art. 3 of Decision No 1082/2013/EU, the systematic collection, recording, analysis, interpretation and dissemination of data and analysis on communicable diseases and related special health (Art. 2 (e) of the Commission Delegated Decision 2021).

risk assessment of the potential severity of the threat to public health in accordance with Art. 10(1)(a) of Decision No 1082/2013/EU⁸²;

- c) disease outbreaks reported by the WHO through the IHR protocols and the Disease Outbreak News.⁸³

Decision No 1082/2013/EU appeared to be too light on states' duties to coordinate in a situation in which human lives are at stakes.⁸⁴ Therefore, it is important to note that, in order to strengthen cooperation among EU Member States in relation to epidemics and other similar threats,⁸⁵ from 26 November 2022 are in force solutions of the new Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health⁸⁶ which created a new legal framework that constitutes an upgrade of the solutions of the Decision No 1082/2013/EU which is repealed. According to the Art. 2(1) point e) of the Regulation (EU) 2022/2371, this Regulation apply to public health measures in relation to five categories of serious cross-border threats to health,⁸⁷ including events which may constitute "public health emergencies of international concern" under the IHR, provided that they fall under one of four categories of threats: a) threats of biological origin; b) threats to chemical origin; c) threats to environmental origin – including those due to the climate; d) threats to unknown origin. In case of serious cross-border threats to health, the Commission may, after considering any expert opinion issued by the ECDC, any other relevant Union agencies or bodies or the Advisory Committee on public health emergencies (according to the Art. 24 of the Regulation (EU) 2022/2371), formally recognise a public health emergency at Union level, including pandemic situations where the serious cross-border threat to health in question endangers public health

⁸² The solution in question, referred to in Commission Delegated Decision 2021, was about standardized questions of the public health risk assessment according to Decision No 1082/2013/EU.

⁸³ Disease Outbreak News (further: DONs). See more: <https://www.who.int/emergencies/disease-outbreak-news>

⁸⁴ *BEAUSSIER, A.-L.; CABANE, L., op. cit., p. 819.*

⁸⁵ KREPELKA, F.: Reform of Epidemic Surveillance Exposing "Standardising" Decisions and Their Replacements by Regulations, *European Papers*, Vol. 8, No. 3, 2023, p. 1600.

⁸⁶ Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU, OJ L 314, 6.12.2022, p. 26–63 (further: Regulation (EU) 2022/2371). More on public health measures in relation to different categories of serious cross-border threats to health see Art. 2 of the Regulation (EU) 2022/2371. More on difference between Decision No. 1082/2013/EU and Regulation (EU) 2022/2371 see KREPELKA, F., *op. cit.*, p. 1602-1604.

⁸⁷ Serious cross-border threat to health means a life-threatening or otherwise serious hazard to health of biological, chemical, environmental or unknown origin, as referred to in Art. 2(1), which spreads or entails a significant risk of spreading across the national borders of Member States, and which may necessitate coordination at Union level in order to ensure a high level of human health protection – Art. 3(1) of the Regulation (EU) 2022/2371.

at Union level.⁸⁸ On duly justified imperative grounds of urgency related to the severity of a serious cross-border threat to health or to the rapidity of its spread among Member States, the Commission may recognise a public health emergency at Union level through immediately applicable implementing acts.⁸⁹

According to the Art. 6(2) of the Commission Delegated Decision 2021, ETIAS Central Unit shall take into consideration: a) the recognition of a public health emergency in accordance with Art. 12 of Decision No 1082/2013/EU; b) a coordinated response in accordance with Art. 11 of Decision No 1082/2013/EU; c) the WHO declaration of a PHEIC. In cases where the information referred to in Art. 6(2) of the Commission Delegated Decision 2021 concerns any of the communicable diseases referred to in Annex I of Commission Implementing Decision (EU) 2018/945,⁹⁰ the specific criteria and case definitions in Annex II shall apply.⁹¹ According to the Art. 6(2) of the Commission Delegated Decision 2021, the analysis shall be carried out by the ETIAS Central Unit, in consultation with the ETIAS National Units of the Member State(s) in question and the European Centre for Disease Prevention and Control, and it shall at least include the identification of the sets of characteristics of specific groups of travellers⁹² associated with the risk identified.

4. Regulation (EU) 2024/1717 Amending Regulation (EU) 2016/399

Most of the actions in response to COVID-19 were carried out at the international level.⁹³ A series of challenges and crises have highlighted the deficit of the Schengen Area both regarding its external and internal borders.⁹⁴ This was further emphasized during the COVID-19 pandemic. National measures

⁸⁸ Art. 23(1) of the Regulation (EU) 2022/2371.

⁸⁹ Art. 23(4) of the Regulation (EU) 2022/2371.

⁹⁰ Commission Implementing Decision (EU) 2018/945 of 22 June 2018 on the communicable diseases and related special health issues to be covered by epidemiological surveillance as well as relevant case definitions, OJ L 170, 6.7.2018, p. 1–74 (further: Commission Implementing Decision). In Annex I are listed communicable diseases and related special health issues to be covered by the epidemiological surveillance network and Annex II has specified case definition for the purposes of submitting data for the epidemiological surveillance of the communicable diseases and related special health issues listed in Annex I (Art. 1-2 of the Commission Implementing Decision).

⁹¹ Art. 6(2) of the Commission Delegated Decision 2021.

⁹² Specific group of travellers means a group of third-country nationals of a known size and composition attributed particular sets of characteristics (Art. 2 (a) of the Commission Delegated Decision 2021).

⁹³ VOYNIKOV, V. V., *op. cit.*, p. 44.

⁹⁴ APATZIDOU, V.: Schengen Reform: “Alternatives” to Border Controls to Curb “Secondary Movements”, European Papers, Vol. 7, 2022, p. 573.

in response to COVID-19 were not consistent and homogeneous.⁹⁵ Namely, during the COVID-19 pandemic, the EU could only suggest travel restrictions to EU member states⁹⁶ i.e. give non-binding recommendations regarding travel restrictions to EU member states.⁹⁷ COVID-19 pandemic showed an uncoordinated response by national governments so it was clear why new rules governing the Schengen area are needed.⁹⁸ Namely, Schengen Border Code (Regulation (EU) 2016/399), the principal legislative instrument that governs border management in the EU permitted only a temporary reinstatement of controls at internal borders.⁹⁹ It does not foresee a threat to public health as grounds for reintroduction of internal border controls.¹⁰⁰ It provides only for public order and public safety as grounds for closing borders, and not public health.¹⁰¹ Nevertheless, the European Commission seems to suggest that in an extremely critical situation, a risk posed by a contagious disease can be equated to a public policy or internal security threat.¹⁰²

While a well-functioning Schengen area requires rules to be applied in a uniform way, both at the external and internal borders, in December 2021 it was submitted Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399.¹⁰³ Proposal 2021 aims to establish a new mechanism of travel restrictions which will apply uniformly in all Member States for as long as the threat to public health persists in the EU.¹⁰⁴ In June 2024, European Parliament and of the Council adopted Regulation (EU) 2024/1717 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders.¹⁰⁵ Established new mechanism at the external border should be applied in the event of a large-

⁹⁵ VOYNIKOV, V. V., *op. cit.*, p. 42.

⁹⁶ EU Council Adopts Update of Schengen Borders Code, 30 May 2024, available on: <https://etias.com/articles/eu-council-adopts-update-schengen-borders-code>, accessed on 9 October 2024.

⁹⁷ The European Council adopted the updated Schengen Borders Code, 26 May 2024, available at: <https://hrturizam.hr/en/the-european-council-adopted-the-updated-code-on-schengen-borders>, accessed 9 October 2024.

⁹⁸ RHAWI, C.: Schengen Border Code: new rules to preserve the free movement, 20 Septembre 2023, available at: <https://www.reneweuropiegroupp.eu/news/2023-09-20/schengen-border-code-new-rules-to-preserve-the-free-movement>, accessed 9 October 2024.

⁹⁹ SALOMON, S.; RIJPMAN, J., *op. cit.*, p. 282.

¹⁰⁰ VOYNIKOV, V. V., *op. cit.*, p. 41. See also DUIĆ D.; SUDAR, V., *op. cit.*, p. 40.

¹⁰¹ DUIĆ D.; SUDAR, V., *op. cit.*, p. 50.

¹⁰² GOLDNER LANG, I., *op. cit.*, p. 5.

¹⁰³ Proposal 2021, p. 2. (see more footnote 3).

¹⁰⁴ Proposal 2021, p. 5.

¹⁰⁵ Regulation (EU) 2024/1717 of the European Parliament and of the Council of 13 June 2024 amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, OJ L, 2024/1717, 20.6.2024. (further: Regulation (EU) 2024/1717).

scale public health emergency¹⁰⁶ with a serious cross-border threat to health.¹⁰⁷ Temporary restrictions on travel to the Union regulate new Art. 21a (which is applying to large-scale public health emergencies) in which are stated that they shall be proportionate and non-discriminatory and that they may include: a) temporary restrictions on entry to the EU Member States;¹⁰⁸ and b) temporary health-related restrictions that are necessary for the protection of public health in the area without internal border control (they may include testing, quarantine and self-isolation).¹⁰⁹ We can see that this solutions are much broader. Except travel restriction, now the Council can also require testing, quarantine, and other health measures for non-EU citizens entering the EU.¹¹⁰

Special norms in Art. 28 regulate specific mechanism where a large public health emergency puts at risk the overall functioning of the area without internal border control. Where the Commission establishes that there is a large-scale public health emergency that affects several Member States, putting at risk the overall functioning of the area without internal border control, it may make a proposal to the Council to adopt an implementing decision (covering a period of up to 6 months and may be renewed, upon proposal from the Commission, for further periods of up to 6 months as long as the large-scale public health emergency persists)¹¹¹ authorising the reintroduction of border control by Member States, including any appropriate mitigating measures to be established at national and Union level, where the available measures referred to in Art. 21a and 23 are not sufficient to address the large-scale public health emergency.¹¹²

5. Conclusion

Pointing to legal provisions that regulate fighting against public health threats of high epidemic risk from the aspect of borders control of visa-exempt third country nationals (non-EU citizens) when they are crossing the external borders of the Schengen Area, the valid provisions of the Schengen Borders

¹⁰⁶ Regulation (EU) 2024/1717 amended Regulation (EU) 2016/399 adding definition of the “large-scale public health emergency” as a public health emergency, that is recognised at Union level by the Commission, taking into account information from competent national authorities, where a serious cross-border threat to health could have large-scale repercussions on the exercise of the right to free movement (Art. 1(1)b)27)) Regulation (EU) 2016/399).

¹⁰⁷ Preamble point 7, Regulation (EU) 2024/1717.

¹⁰⁸ More about categories of persons that shall be exempted from the restriction see Art. 21a(3-5) Regulation (EU) 2024/1717.

¹⁰⁹ Art. 21a(2) Regulation (EU) 2024/1717.

¹¹⁰ EU Council Adopts Update of Schengen Borders Code, *op. cit.*

¹¹¹ Art. 28(3) Regulation (EU) 2024/1717. See more RHAWI, C., *op. cit.*

¹¹² Art. 28(2) Regulation (EU) 2024/1717.

Code have been analysed. The said provisions prescribe that in case of threat to public health, third-country nationals should be checked at the external border to verify that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardise, among other things, public health of any of the EU Member States. Epidemic crises/pandemics as a public health emergency event/public health threat (with special emphasis on COVID-19) showed that transport sector contributed to the easier spread of COVID-19 on a global level. In relation to the EU we can say that the application of then valid legal provisions did not enable a better protection of public health. More precisely, there was no adequate, uniform reaction regarding travel restriction on the grounds of protection of public health. Considering that public health issues are also subject of concern for passengers (travellers to 30 European countries) if they are to be considered as visa-free third-country nationals – the main act which was analysed was Regulation (EU) 2018/1240 on ETIAS which does not apply to EU citizens but it presents new rules for travelling to the Schengen Area. Specifically, prior travelling to the Schengen Area, visa-free third-country nationals (visa-exempt non-EU citizens from more than 60 countries) must make online application for travel authorisation, which means that they need to pass pre-entry screening, e.g. to have electronic authorisation. If they pose a high epidemic risk, European travel authorisation will be denied.

Comparing the concept of the “threat to public health” according to the provisions of Regulation (EU) 2016/399, we can see that a similar definition is contained in the provisions of Regulation (EU) 2018/1240. In Regulation (EU) 2016/399 the term “any disease with epidemic potential as defined by the IHR of the WHO” refers to the definition of “threat to public health”, but in Regulation (EU) 2018/1240 the said concept refers to “high epidemic risk”. At the same time, it is important to note that in Regulation (EU) 2018/1240 the definition has been expanded since it is prescribed that “high epidemic risk” means any disease with epidemic potential defined also by the European Centre for Disease Prevention and Control (ECDC) – not only by the IHR of the WHO (like in Regulation (EU) 2016/399). Taking into account that at the time of COVID-19 pandemics ETIAS was not operational (it is estimated that it will be in May 2025!), it was made impossible to prohibit the entry into the Schengen Area of visa-exempt third country nationals (if considered a high epidemic risk).

Analysing the provisions of the Commission Delegated Decision 2021, it has been observed that it did not define what is to be considered a high epidemic risk but, it prescribed that ETIAS Central Unit shall base its analysis on specific high

epidemic risks. In order to strengthen cooperation among EU Member States in relation to epidemics and other similar threats – Regulation (EU) 2022/2371 created a new legal framework divided into five categories of serious cross-border threats to health (including events which may constitute “public health emergencies of international concern” under the IHR). While Schengen Borders Code did not foresee a threat to public health as grounds for reintroduction of internal border controls, provisions of Regulation (EU) 2024/1717, which amends Schengen Borders Code, established a new mechanism of temporary travel restrictions; testing, quarantine, and other health measures for non-EU citizens entering the EU (which can be required by the Council). This new mechanism will apply at the external border in the event of a large-scale public health emergency with a serious cross-border threat to health. It is important to note that it will be applied uniformly in all EU Member States for as long as the threat to public health persists in the EU.

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SECONDARY ACTIVITIES IN PORTS OF SPECIAL PURPOSE

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Review scientific paper

1. Introduction

The maritime domain is a general domain of special interest to the Republic of Croatia and enjoys its special protection. It can be excluded from general use and given on commercial exploitation by the concession contract. Article 48, paragraph 2 of the Maritime Domain and Seaports Act¹ prescribes that a concession on the maritime domain is a time-limited and restricted right to commercial use of the maritime domain, with or without the right to build. Such right to build is acquired by concession contract. Besides the activities which are the subject of the concession and which can be performed only by the concessionaire within the concession area and in ports of special purpose even as a duty, there is a need for other commercial activities related and complementary to the essential purpose of the concession. These types of activities may include various fuel supplies, services, maintenance services, repairs, security protection of the port, various types of cleaning, catering activities, etc. The primary purpose of these types of activities is to improve the exploitation of the maritime domain². They differ depending on whether they include commercial exploitations of the part of the maritime domain encompassed by the concession with the activities including construction of buildings or those without construction of the buildings. If the activities include construction of buildings and commercial

¹ Maritime Domain and Seaports Act, 'Official Gazette', number 83/23.

² The Regulation on Classification and Categorization of Ports for Nautical Tourism and the Classification of Other Facilities for the Provision of Mooring Services and Accommodation of Vessels, 'Official Gazette', number 120/19, for marinas of specific categories requires the provision of washing and cleaning services for goods, dry cleaning services, preparation and serving of drinks, beverages and food, commercial and sports services (tennis courts within a certain distance), service, fuel supply, sail repairs, boat cleaning services, etc.

exploitation of the part of the maritime domain under the concession area, the concessionaire is obligated to conclude a sub-concession contract with the economic operator. In another situation, there are secondary activities for which the concessionaire is obliged to conclude a business cooperation contract with an economic operator. This paper focuses on secondary activities.

2. Historical View on Models of Performing Secondary Activities in Ports of Special Purpose

Historically, before the concession institute for commercial exploitation of maritime domain was introduced, state decisions regulated various types of contracts for commercial exploitation of maritime domain, such as the lease of the seashore, etc.³ Up to the past ten years ago, national authorities did not pay much attention to the illegitimacy of certain types of maritime domain contracts. The reason may be found in the fact that ports of nautical tourism were treated like tourism activities, and service contracts were concluded under the Tourism Industry Law⁴ and Civil Obligations Act⁵ (hereinafter: COA). Regulation on Classification and Categorization of Ports for Nautical Tourism from 1999 prescribed that in ports of nautical tourism, any economic operator can serve nautical tourists' additional services under special laws for the given service if they have concluded a contract with the legal entity or natural person (concessionaire)⁶. That is probably why the concessionaire continued to use the lease contract with some modifications for better commercial exploitation of the port. For the first time, secondary activity was regulated by the Maritime Domain and Seaports Act in 2003⁷ (hereinafter MDSPA/03). The Act prescribed that the concessionaire who obtained the concession for commercial exploitation of the maritime domain may confine secondary activities to be carried out, to a

³ More can be found: Bodul, Dejan, Nakić, Jakob, Bankruptcy of a shipyard - some legal disputes, Part I, available at: IUS INFO; file:///C:/Users/Korisnik/Downloads/stecaj-brodogradilista%20(v1).pdf, May 30, 2019.

⁴ Tourism Industry Law, 'Official Gazette', number 8/96,76/98

⁵ Civil Obligations Act, 'Official Gazette', number 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23.

⁶ Regulation on Classification and Categorization of Ports for Nautical Tourism 'Official Gazette', number 142/99. Article 2, paragraphs 4 and 5 prescribe that (4) *based on a contract with a legal entity or natural person from paragraph 3 of this article, additional services to tourists-navigators in the port of nautical tourism may be provided by other legal entities or natural persons.* (5) *Additional services from paragraph 2 of this article must be provided according to the profession's rules and under special regulations related to the provision of each service.* Also, Article 10, paragraph 3, prescribes that there is a special minimum condition for certain ports of nautical tourism, that they are required to meet the minimum of additional services (trade, catering and others), which the port is obliged to provide to tourists.

⁷ Maritime Domain and Seaports Act, 'Official Gazette', number 158/03, 100/04, 141/06, 38/09, 123/11, 56/16, 98/19.;

lesser extent, in the field of services to the legal entity or natural person if there is an existing consent of the concession grantor in order of better exploitation of the maritime domain. The above-mentioned Regulation on Classification and Categorization of Ports for Nautical Tourism from 2008⁸ prescribed that a legal entity or natural person can provide services in nautical tourism ports who does business with the port, or other legal entity or natural person authorised with special regulation - MDSPA/03. However, it was still unclear which contract could be used to offer services, which is why the concessionaires were still using lease contracts or other types of contracts with the basic characteristics of a lease contract. According to MDSPA/03, the concessionaire was obliged to ensure that any legal entity or natural person performing secondary activities and third parties with whom they are entering legal relations, having in mind the mentioned concession, do not use or economically exploit the maritime domain contrary to the conditions under which the concession was granted. The Concession Act from 2012⁹ and 2017¹⁰ (hereinafter: CA) only briefly and almost without a notice defines secondary activity in Article 5, point 24 as any activity that is not the subject of the concession but relates to the subject-matter of the concession in a way that serves its performance or is necessary for its successful completion. By regulating the institution of secondary activities according to the provisions of MDSPA/03 and CA, it was realised after time that it is not possible to conclude a lease contract in the maritime domain because the maritime domain cannot be the subject of the right of ownership or any other property right on any basis¹¹, there was still an opened a question, which contract can be applicable for secondary activities? Article 82. MDSPA/03 prescribed a provision that on any question relating to ports of special purpose, which are not regulated under articles 80 and 81 MDSPA/03, provisions on concessions on a maritime domain must be applied. Accordingly, the first step was comprehending Article 81, paragraph 4 MDSPA/03. It is prescribed that the concessionaire in a special purpose port shall use the port under the concession decision and concession contract and maintain the port according to its purpose and navigation safety. But at the time when concession contracts were concluded for most of today's special purpose ports of national importance,

⁸ Regulation on Classification and Categorization of Ports for Nautical Tourism, 'Official Gazette', number 72/08 in article 19, paragraph 1 prescribes that *(1) Services: drinks, beverages, food, commercial, sports, service, fuel supply, etc. can be provided in the nautical tourism port by a person who operates with the port or by another person in accordance with a special regulation.*

⁹ Article 43, paragraph 2 of Concession Act 'Official Gazette', number 125/08.

¹⁰ Concession Act, 'Official Gazette', number 69/17, 107/20;

¹¹ Article 5, paragraph 2 MDSPA/03, Article 5, paragraph 1. MDSPA/23; Also, a legislator in Article 5, paragraph 2 MDSPA/23 prescribes that maritime domain cannot be subject to the lease or rent contract.

in the contracts there may still be found provisions that ‘*The concessionaire must perform all activities independently and use of substructure and superstructure facilities in the concession area independently*’, which clause is counterproductive both for the concessionaire and the concession grantor. Therefore, regarding the regulation of the secondary activity institute and the provisions of Article 82 MDSPA/03, as well as the fact that some legal theorists considered that CA should be applied as *lex posterior derogat legi priori*¹², the answer to the question of which contract shall be applicable was found in CA. Article 68 of the CA prescribed that during the concession period, the concessionaire may conclude a subcontract with third parties unless otherwise provided by special regulations. As MDSPA/03, as a special regulation, did not prescribe what type of contract a concessionaire may conclude with economic operators who will perform secondary activities, this provision initially seemed to be a convenient solution. But paragraph 2 of the same article of CA prescribes that if the status of the real estate as the subject matter of the concession is such that the real estate cannot be the subject-matter of ownership and other property rights, it is not possible to conclude a subcontract, but only the sub-concession contract¹³. This means that the concessionaire in the port of special purpose can only conclude the sub-concession contract and has no other alternative for some other contract. Due to the prior actions that had to be fulfilled¹⁴, and the duration of all the processes required for the sub-concession (such as the approval of various Ministries, approval of the State Attorney’s Office, etc.), which could take several years, this option was not acceptable for the concessionaire. Considering the demands of the market, the customers who are looking for fast and efficient services, especially in the ports of nautical tourism, the number of different economic operators who provide services through secondary activities, occasionally or permanently, the fluctuation of these economic operators, the concessionaire needs fast and efficient solutions whose procedure must not last more than a few days. To recognise these problems, the Croatian Ministry of the Sea, Transport and Infrastructure has sent an instruction to nautical tourist ports on concluding business cooperation contracts for the performing secondary activities and

¹² Jelčić, Olga, Disposal of Concessions Under the New Concessions Act, available at: <https://www.pomorskodobro.com/fokus-jelcic-rujan-2017/>, September 2017.

About the complex relation between MDSPA and CA, read: Tuhtan – Grgić, Iva, Bulum, Božena, The Issue of Valorisation of Legitimate Investments in Nautical Tourism Ports in the Republic of Croatia, Maritime Law Collection of the Adriatic Institute of the Croatian Academy of Sciences and Arts, 2018

¹³ Considering that the existence of a lease contract requires prior ownership of the property.

¹⁴ Article 69 of CA proscribes that (1) *The concession grantor foresees the possibility of concluding subcontracts and sub-concession contracts in the feasibility study of granting concession, the tender documentation, the notification of the intention to grant the concession, and the concession contract within the scope of which it may be granted.*

on delivering business cooperation contracts to the Ministry to prepare the Decision on granting consent for the performance of secondary activities in special purpose ports - nautical tourism ports. Such practice was included in the legal text of MDSPA/23, including certain requirements for excluding an economic operator from the process of awarding a concession or sub-concession. In addition, MDSPA/23 finally resolved the doubt between general and special law. It defined its provisions as applicable to *lex specialis*, impacting secondary activities in special purpose ports. However, concessionaires face many doubts and problems when concluding a business cooperation contract to perform secondary activities, as described in this paper.

3. Relation Between Sub-Concession and Secondary Activities

While preparing the feasibility studies for granting a concession, attention is paid to the sub-concession and the transfer of the concession contract. Still, very little attention is paid to secondary activities. One of the possible reasons for omitting regulations regarding secondary activities in such feasibility Studies for granting a concession can be found in Article 2, paragraph 1 of MDSPA/23, which prescribes that all issues related to preparatory actions, the procedure for granting a concession, a concession contract, an amendment to a concession contract, etc., shall be applied under the provisions of the regulations governing concessions. The above provision, therefore, refers to CA, which does not regulate the question of secondary activities. Given the above, it is not surprising to find in concession contracts a provision that all activities on the maritime domain may be performed exclusively by the concessionaire. The concessionaire is obliged to perform all activities that are the subject matter of the concession but not those that are complementary and related to the primary purpose of the concession. After all, when tendering for the concession award procedure, the concessionaire is only required to be registered for the activity that is the subject matter of the concession or for the activity anticipated by the spatial planning documentation¹⁵, but not for all possible activities in the field of works and/or services that may be needed in the port at any time or that are required by special secondary legislation. Such exclusive provisions are harmful not only for the operations of the concessionaires, especially during the inspection controls, but also for the better economic exploitation of the port, which then affects the

¹⁵ For example, the main activity of a nautical tourism port is providing mooring contracts, but not the performance of all accompanying activities such as service, trade, pharmacy, catering, provision of fuel supply services, repairs of marine and outboard engines, carpentry on the vessel, etc.

variable part of the concession fee that fills the national budget¹⁶. The provisions' similarity in the performance of secondary activities and sub-concessions is apparent from their legal definition, so both should be considered in their wholeness wherever possible. But again, their essential differences should be noted. Article 61, paragraph 1 of MDSPA/23 prescribes that secondary activity is an activity in the concession area in the field of services carried out by legal entities or craftsmen as complementary activity and related to the primary purpose of the concession, which does not require the construction of buildings and is regulated by a business cooperation contract. On the other hand, if the secondary activity exploits a part of the port and requires the construction of buildings to perform the related activities for which the concession has been granted, then we are dealing with the sub-concession. This is also logical since any intervention in the space requires a location permit, which includes declarations from various competent authorities¹⁷. Therefore, it is not surprising that the legislator prescribed that the possibility of granting a sub-concession must be provided in the Feasibility Study of granting a concession, the tender documentation, the notification of the intention to grant the concession and the concession contract. The aforementioned is not required to perform secondary activities. The similarity between the sub-concession contract¹⁸ and the business cooperation contract for doing secondary activities can also be found in the fact that the concessionaire, after concluding the contracts, must obtain the consent of the concession grantor¹⁹. The fact that the competent Ministry, as the concession grantor, has a very similar approach to sub-concession and secondary activities is

¹⁶ For example, in the shipyard port, economic operators are engaged in equipping the ship or building a part of it; in the port of nautical tourism, economic operators provide services such as catering, service, charter, shops, etc.

¹⁷ The occupation of the area must be planned. The location permit is obtained, most often, by the date of notification of the intention to grant a concession on the maritime property in accordance with Article 57, paragraph 1 of the MDSPA/23. However, it is possible to obtain the same later, for example, due to an investment that was not foreseen in the documentation for bidding in accordance with Article 59 MDSPA/23.

¹⁸ Article 60, paragraphs 1 and 2 MDSPA/23 prescribe (1) *A sub - concession is a legal relationship that arises between the concessionaire and a third party for economic use of a part of the maritime domain covered by the concession, and for which the construction of buildings is required for the performance of related activities to those for which the concession was granted, which the concessionaire itself cannot perform or considers that performance of such activities in the concession area would be more effective by granting the right to build and perform related activities by a third party.* (2) *The sub-concession contract may be concluded only based on the prior consent of the grantor of the concession.*

¹⁹ It should be considered that in accordance with Article 60, paragraphs 5 and 6 of CA, it is prescribed that (5) *The possibility of granting a sub-concession must be foreseen in the Feasibility Study of granting a concession, the documentation for the tender, the notification of the intention to grant the concession, and in the concession contract. Otherwise, concluding a sub-concession contract on maritime domain is impossible. Also, paragraph 6 of the article in question stipulates that a sub-concession cannot be granted for the main activity of the concession, as determined based on the data from the Feasibility Study of the justification of granting the concession and all other relevant information about the main activity of the concession.*

also visible in the fact that its Decisions on granting permission for performing secondary activities for each nautical tourism port²⁰, prescribed the obligation to submit a business cooperation contract to the Ministry within ten days²¹ from the date of its conclusion. However, the provision mentioned above is only prescribed by the provisions of Article 69, paragraph 6 of CA for the delivery of sub-concession contracts. Similarities are also evident in the requirements that must be met by the sub-concessionaire and the economic entity that will carry out secondary activities in the maritime domain, as well as in the actions of the competent authorities, namely the refusal of consent to the contract in the event of grounds for exclusion from the concession award procedure, or this case, from the procedure for entrusting the performance of secondary activities. However, the similarity of specific provisions proved problematic when a single, identical Decision is made, whether it involves one sub-concessionaire or fifty or more economic operators that will perform secondary activities under one concession area governed by one concessionaire. This significantly impacts the procedure's length, especially considering that the Republic of Croatia has more than 224 nautical tourist ports, not counting other special-purpose ports²². Although the competent authority as the concession grantor tries for practical reasons²³ to make one single decision for all economic operators who will perform secondary activities in the concession area, this decision is not helpful for the concessionaire and for economic operators who want to start performing activities immediately after concluding the contract.

²⁰ To write this paper, an overview was made of certain Decisions on granting consent for entrusting the performance of secondary activities in ports of special purpose - ports of nautical tourism issued by the Ministry of the Sea, Transport and Infrastructure, issued on the basis of Article 26 of the MDSPA/03, which prescribe that *'The authorized concession holder is obliged to inform the Ministry of the Sea, Transport and Infrastructure about any change in the data from point I of this Decision within 10 days of the change.'*

²¹ The provisions of Article 60, paragraph 4 of the MDSPA/23 prescribe the delivery of the sub-concession contract within 30 days from the day of its conclusion, while the provisions of Article 69, paragraph 6 of the CA prescribe the obligation to deliver within 10 days from the date of conclusion of the contract.

²² NAUTICAL TOURISM – Capacity and Turnover of Ports, 2023, Croatian Bureau of Statistics, available at: <https://podaci.dzs.hr/2023/hr/58173>, April 26, 2024.

Also, if only about 30 nautical tourism ports in the ACI group were taken into account as ports of national importance and whose consent is given by the Ministry of the Sea, Transport and Infrastructure, it is logical that the Ministry will not issue an individual Decision - consent for each business entity, as this would significantly complicate the work process of the Ministry itself. Source: Aci d.d. annual report completed for December 31, 2023. With the independent audit report, <https://corporate.aci-marinas.com/wp-content/uploads/2024/04/Godisnje-izvjesce-za-godinu-završenu-31.-prosina-2023.-godine-.pdf>, December 31, 2023.

²³ As it follows from the name of the Ministry of the Sea, Transport and Infrastructure, it is responsible for a large scope of activities that take place not only in the maritime sector, but also in other sectors, which is why it is not logical to expect that someone within the Ministry will be responsible only for solving individual request of the concessionaire, as well as that the competent minister or his assistant will make the decision in each particular case.

4. Reasons for Excluding an Economic Operator

Once the need for the concessionaire to perform secondary activities in ports of special purpose has been established and determined, the economic operator intending to perform these activities per MDSPA/23 must fulfil the conditions provided for this purpose. Concessionaires in special purpose ports, especially those of national importance, are usually medium or large companies in the sense of financial reporting and an established corporate structure. Such concessionaires are increasingly bound by the regulations on sustainable business, which are in a cause-and-effect relationship with the performance of secondary activities in the maritime domain²⁴. As a result, concessionaires will be forced to examine the supply chain and carefully consider which economic operator is adequate for business cooperation to avoid sanctions and the possible loss of the concession. One of the ways the concessionaires shall fulfil their obligations under the provisions on sustainable business is by examining the reasons for excluding the economic operator. MDSPA/03 did not specify the conditions which must be fulfilled by the economic operator with whom the concessionaire intends to enter a business cooperation contract. However, the concessionaire was obliged to ensure that all legal entities, natural persons, and third parties with whom it enters legal relations in the concession area do not use or economically exploit the maritime domain contrary to the conditions under which the concession was granted. The focus of MDSPA/03 was on protecting the maritime domain, while no attention was paid to the analysis of an economic operator performing secondary activities. MDSPA/23 now requires the concessionaire to pay a greater degree of attention to the economic operators that it introduces into the scope of the concession area. That means that the concessionaire must select only the best economic operators who are able to develop and contribute to better economic exploitation of the maritime domain through a selection process. Before concluding a business cooperation contract, the concessionaire is obliged to perform a minor examination procedure similar to the procedure for awarding concessions and sub - concessions and to verify whether there are reasons for excluding the economic operator from the concession award procedure, i.e., in this case, we can call it the exclusion of the economic operator from the procedure for entrusting the performance of secondary activities under Article 61, paragraph 2 of MDSPA/23. The answer to the question of how the concessionaire should examine the reasons for the

²⁴ For example, The Corporate Sustainability Reporting Directive (abbreviated CSRD Directive) 2022/2064/EU from December 16, 2022., available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2464> and Corporate Sustainability Due Diligence Directive 2024/1760/EU from June 13, 2024; Companies who are entering in personal scope of Directive are obliged to apply the directive directly, available at: <https://eur-lex.europa.eu/eli/dir/2024/1760/oj>

exclusion of the economic operator from the procedure for the award of the concession, i.e., from the procedure for entrusting the performance of secondary activities, should be found precisely in the provisions of Articles 24 and 25 of the CA. CA provides two types of reasons for the exclusion of an economic operator, namely mandatory reasons and other reasons for exclusion²⁵. Based on the fact that the legislator has prescribed that the concessionaire is obliged to examine only the mandatory reasons for exclusion of the economic operator and did not expressly prescribe whether the concessionaire is obliged to examine only the mandatory reasons for exclusion from Article 24 or additionally the other reasons for exclusion from Article 25, and considering the similarity of the provisions between reasons for exclusion regarding sub-concession and secondary activities, the solution should be found in the provision of Article 69, paragraph 4 of CA. It prescribes that after the contract is concluded with the sub-concessionaire and after it is delivered to the concession grantor, the concession grantor may verify the existence of reasons for exclusion from Articles 24 and 25 of the CA and may request the concessionaire to replace the specified sub-concessionaire. In the same way, the concession grantor may verify the reasons for exclusion from Articles 24 and 25 of CA for the economic operator contracted to perform secondary activities. If there are reasons for exclusion, it will ask the concessionaire to change the economic operator or give a ban on concluding a business cooperation contract with the economic operator. If there are mandatory reasons for exclusion, the concessionaire shall not allow the applicant to perform secondary activities in the maritime domain in any way. The above is also prescribed by Article 61, paragraph 4 of MDSPA/23, according to which the performance of secondary activities cannot be entrusted to an economic operator with outstanding due debts to the Republic of Croatia. If the concessionaire finds the existence of other reasons for exclusion from Article 25 of CA, it may conclude a business cooperation contract. But if, for example, the economic operator tends to violate obligations in the field of environmental law from Article 25, paragraph 1, item 1 of CA, which is the subject of other reasons for the exclusion, the responsibility for damage caused within the concession area will also be on the concessionaire²⁶, even though the concession grantor may have given its consent to the business cooperation contract.

²⁵ It is about the assumed reasons for the exclusion of the economic operator from the concession award procedure in accordance with Article 38 of the Directive 2014/23/EU on the award of concession contract, which is implemented in CA from 2017, available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A32014L0023>, February 26, 2014.

²⁶ Also, the question arises of the concessionaire's exposure to the unilateral termination of the concession contract based on certain provisions that prescribe the unilateral termination of the contract in accordance with the provisions of Article 73 of CA.

5. Business Cooperation Contract

After the concessionaire has found that there are no reasons for excluding the economic operator, it will proceed to the conclusion of a business cooperation contract. A business cooperation contract is a specific innominate contract adapted to the concessionaire's needs in each case. For this reason, it is impossible to speak about the standardisation of such a contract or define its essential characteristics as in the case of other nominate contracts. First, it depends on whether the concessionaire wants the economic operator to perform permanent or temporary secondary activity²⁷. For example, suppose the concessionaire allows an economic operator to have its registered seat within the concession area in a special-purpose port. It will likely perform some permanent secondary activity in the maritime domain using its land and/or sea part²⁸. In this case, the business cooperation contract will inevitably have the characteristics of a lease contract and other characteristics agreed upon by the concessionaire and the economic operator providing a particular service²⁹. In this case, we can speak about the existence of some mixed contract. Another characteristic of this type of contract is that it is a commercial contract concluded by merchants, where at least one is registered for performing the required secondary or related activities. Article 14, paragraphs 1 and 2 of the Civil Obligations Act prescribe that its provisions referring to contracts should apply to all types of contracts unless expressly specified otherwise for commercial contracts. Article 250 of the Civil Obligations Act proscribes that if the conclusion of a contract requires the consent of a third party (in this case, the concession grantor), such consent may be given before the conclusion of the contract, as an accordance or after the conclusion of the contract, as approval, unless otherwise is provided by law. Furthermore, paragraph 2 prescribes that consent or approval must be given in the same form prescribed for the contracts for the conclusion of which it is given. Article 61, paragraph 3 of MDSPA/23 clearly prescribes that the entry

²⁷ The concessionaire of a marina that is categorised with a larger number of anchors will not allow short-term services that may lead to the departure of the economic operator from the marina and the loss of these services, all so that its marina does not lose its categorization, that is, fall into a lower class. Therefore, the long-term continuity of the provision of individual services is important to the concessionaire due to the categorisation of the marina.

²⁸ For example, the provision of trade, catering services and the like. The registered activity is then required to comply with the minimum technical requirements from the Regulation on classification and the minimum requirements for catering facilities from the group's 'restaurants', 'bars', 'catering facilities', and 'simple service facilities', 'Official Gazette', number 82/07, 82/09, 75/12, 69/13, 150/14.

²⁹ For example, in the case of the provision of catering services, the contract will additionally contain the obligations of the economic operator with regard to the disposal of waste, especially bio-waste, pumping out, cleaning and disposal of kitchen grease, ensuring the performance of disinfection and pest control, testing of various tanks, electrical and gas installations, periodic servicing of fire extinguishers, testing of machines and devices with increased danger, etc.

into force of the contract requires the fulfilment of precisely specified additional conditions, namely the consent of the competent authority and that the business cooperation contract for the performance of secondary activities may not be concluded for a period longer than the term of the concession contract. The same provision can also be found in Article 69, paragraph 7 of CA³⁰, referred to in Article 60, paragraph 7 of MDSPA/23. The above shows that it is also a formal contract submitted to the competent authority as a concession grantor. The business cooperation contract is a bilateral binding contract which demands performance and consideration. With the expiry of the concession, due to the non-existence of the concessionaire based on the concession contract, the contractual relationship also ends. Otherwise, upon the expiration of the concession contract, there would be a situation with unauthorised use of maritime domain by third parties and acquisition without legal basis/unjust enrichment, in which case the Republic of Croatia is authorised to initiate and take all legal measures for the protection of maritime domain based on Article 9, paragraph 7 MDSPA/23.

6. Consent of the Competent Authority and Contract's Entry Into Force

The concessionaire must submit the business cooperation contract to the competent authority for consent, together with the evidence that there are no reasons for excluding the economic operator from the concession procedure, all under Article 61, paragraph 2 of MDSPA/23. The Ministry of Sea, Transport and Infrastructure is the competent authority for business cooperation contracts concluded in unique purpose ports of national interest and importance from Article 52, paragraph 7 of MDSPA/23. In contrast, the competent administrative authority of a local (regional) self-government unit is competent for business cooperation contracts concluded in special purpose ports of interest and importance for that unit. Failure to submit the contract to the competent authority, together with the relevant evidence, shall be considered a maritime law misdemeanour, breaching Article 203, paragraph 2 of MDSPA/23 and shall be subject to a financial penalty of the concessionaire. The consent of the competent authority on the concluded business cooperation contract is provided to protect the general interest, i.e., the protection of the maritime domain. It is also used as some kind of correction of the concessionaire, forcing it to determine that the economic operator is suitable for performing activities in the maritime domain

³⁰ A sub-concession contract may not be concluded for a period longer than the term of the concession contract.

protected by the state. The consent, i.e., approval (under the provisions of the Civil Obligations Act), is issued by a national authority. Such an act does not have the characteristic of a legal transaction in the sense of the provisions of civil and commercial law but is an act of government subjected to administrative law rules.

Considering the consent of the competent authority and the entry into force of the business cooperation contract, in practice, we can find several possible scenarios, both in the capacity of the competent authority as the concession grantor and on the part of the concessionaire: one is that the competent authority promptly issues the consent and that the contract begins to produce legal effects immediately; second is that the competent authority denies consent on business cooperation contract, i.e., requests the replacement of the existing economic operator; and the third is that the competent authority does not give the consent within the legal deadlines provided for the consent, in which case we have silence of the administration. On the other hand, in case the competent authority withheld consent, i.e., requested the replacement of the existing economic operator with another, if the competent authority has not given any statement about the request for a long time, or if the concessionaire has not requested the consent of the competent authority at all, but started with the contract consumption, in all these situations, the concessionaire may find itself in a very unfavourable position. Whether the competent authority consents to the business cooperation contract or denies it in such a way that requests the replacement of the economic operator or does not express itself within the prescribed period, the contract remains an obligational legal transaction with appropriate legal effects³¹.

The contract enters into force and produces legal effects when the competent authority consents to the contract by its decision. Requesting the consent of the competent authority for the approval of the concluded business cooperation contract for the performance of secondary activities represents a limitation of the autonomy of the will of the contracting parties. At the same time, it should be considered that even though the contract has not been entered into force, the contractual parties are bound by it, but it postpones the effect of the concluded contract until the approval is issued³². If the competent authority denies consent to the concluded business cooperation contract in a way that it requests the replacement of the economic operator, the opposite situation arises, and the denial of consent results in the legal consequences of termination of

³¹ Pavlović, Mladen, Conclusion of a Contract and its Entry into Force at: IUS INFO <https://www.iusinfo.hr/strucni-clanci/sklapanje-ugovora-i-njegovo-stupanje-na-snagu>, September 30, 2021.

³² A precedent (suspensive) condition.

the concluded contract³³. Until the business cooperation contract has not enter into force yet because the competent authority has not give its consent, the concessionaire has not submitted a request to the competent authority, or has not (based on the request of the competent authority) replaced the economic operator with another, and at the same time the contract is being consumed with the economic operator, it is considered as an unauthorised use of the maritime domain by a third party. However, the question arises as to what would happen if the competent authority did not respond to the concessionaire's request for a long time, in which case we are talking about the administration's silence. It is also necessary to consider the consequences of such behaviour.

7. The Consequences of the Administration's Silence and Withholding of Consent - Some Open Issues

Due to the labour shortage and the competition among the ports in the area, there is an intense interest and struggle for every economic operator that would generate income for the concessionaire through the business cooperation contract. For this reason, the concessionaire tries to conclude a business cooperation contract with the operator mentioned above as soon as possible so that the concessionaire would not start operating in a competing port. For most nautical tourism ports of national importance, the competent ministry issued the last consents for performing secondary activities for all submitted business cooperation contracts in 2018 and 2019. However, at the time of the issuance of the consents, some of the economic operators had already stopped performing their activities in the maritime domain long time ago or no longer expressed interest in consuming the contract. As a result of the above practice, at the time of approval of business cooperation contracts, certain economic operators were also deleted from the court register due to bankruptcy or liquidation. It is in the concessionaire's interest, and very often necessity, that by concluding a business cooperation contract, it immediately produces legal effects between the contracting parties and that the concessionaire does not have to wait for the consent of the competent authority for each contract, which consents will not be approved, or which consents may be approved only once a year for a larger group of contracts. Even though concessionaires continue to submit business cooperation contracts to the relevant authorities, it is unknown whether the

³³ A resolutive condition.

Ministry of Sea, Transport and Infrastructure has issued new approvals³⁴ for ports of special purpose - nautical tourism ports. In the meantime, economic operators that perform secondary activities in ports have changed significantly.

Regarding the points mentioned above, the consequences of the administration's silence in its capacity of participating as the concession grantor are as follows: if the business cooperation contract has not entered into force, the economic operator is actually not required to pay fees to the concessionaire for performing secondary activity or providing some other service. This is because the contract between the parties has not yet started to be consummated, and the rights and obligations of the contracting parties are in a state of repose. The concessionaire cannot sue its claim in court or charge the submitted debt from the payment instrument, which is used as insurance that the contract will be fulfilled. If the concessionaire takes these actions anyway, the economic operator has the right to regress the claim. The same is the case if the economic operator paid some fees to the concessionaire for using the maritime domain for performing a secondary activity, and the competent authority withheld consent on a business cooperation contract or requested the concessionaire to replace the existing economic operator with another. In that case, we can speak of a contract with a resolutive condition. In such a scenario, the concessionaire must return the charged fees, as prescribed in provision 368, paragraph 5 of the Civil Obligations Act. This provision prescribes that the party returning the fees is responsible for paying default interest from the date the payments were received. Additionally, the state reserves the right to seek compensation for damages incurred based on acquisition without legal basis/unjust enrichment. Another issue that arises is the responsibility for damage, i.e., who is responsible for damage caused to persons, vehicles, and property by the illegal performance of secondary activities. In nautical tourism ports, the injured party can often be compensated for damages caused by boats and yachts from the marina's liability insurance policy based on the mooring contract. Through research for this paper, from insurance intermediaries who often act in the interests of the insured person/policyholder, there was obtained the information that under the terms of liability of the marina, there is the possibility of contracting coverage for activities related to activities in the marina, which would be a kind of counterpart to secondary activities. However, it remains an open issue how the insurer would proceed if it discovered that the consent of the relevant authorities was not obtained, especially if it was denied based on a reason for exclusion. Moreover, whether the consent in

³⁴ Article 101 of the General Administrative Procedure Act 'Official Gazette', 47/09,110/21, prescribes that the authorised person is obliged to issue a decision within 30 days from the date of submission of the formal request of the party in cases of direct resolution, and in the case of conducting an investigation procedure, within 60 days from the date of submission of the formal request.

question is essential to conclude a liability insurance policy remains unclear³⁵. If the business cooperation contract is not submitted to the concession grantor as the competent authority, MDSPA/23 treats this situation as a misdemeanour of the concessionaire. In the event of causing damage, the question arises as to whether there were conditions for excluding the economic operator from the concession award procedure. Additionally, if the concessionaire has debts to the Republic of Croatia as prescribed in Article 61, paragraph 4 of the MDSPA/23, could the concession contract be terminated unilaterally by the concession grantor under the provisions outlined in Article 73 of the CA? In conclusion, the answer should also be given to the question whether the concessionaire is obliged to submit to the concession grantor all business cooperation contracts with evidence that there are no reasons for exclusion under the provisions of Article 61, paragraph 2 MDSPA/23, including those for which the competent authority has already given consent under earlier regulations or only for contracts for which the consent of the competent authority was not given? The Ministry has previously issued instructions emphasising that contracts for which it has already granted consent via its decision are not required to be submitted again. Therefore, the provisions of Article 61 MDSPA/23 should be applied only to contracts concluded after July 29, 2023, when MDSPA/23 entered into force, as well as to contracts that were possibly concluded earlier but for which consent was not obtained from the competent authority, considering that the request for issuing of the approval must be submitted under the provisions of MDSPA/23.

8. *De Lege Ferenda* Proposals

One of the key proposals (although the above is not an obligation) is to consider secondary activities in the Feasibility Study for granting a concession and, subsequently, in the concession contracts. To avoid misdemeanour sanctions in existing concession contracts, which prescribe that all maritime domain activities must be performed only by the concessionaire, it would be necessary to create annexes of existing contracts to harmonise them with the existing legal regulations. Alternatively, the authorised Ministry could coordinate with other ministries³⁶ to unify rights and take a common standpoint, ensuring that there is no different interpretation of the exclusion between MDSPA/23 and CA provisions. Furthermore, because the state's administrative system is slow and

³⁵ The question is whether the insurer would have the right to raise objections against the insured person in the event of a claim for compensation by the insured person under the insurance contract in accordance with Article 945, paragraph 1 of the Civil Obligations Act.

³⁶ For example, Ministry of Finance is responsible for the competent inspection bodies of the customs administrations that perform inspections in the ports.

bureaucratic, criticism is directed to the legal text regarding obtaining consent because the text should be arranged differently. The concession is granted for a period during which the concessionaire is expected to amortise the investment and return the capital under normal operating conditions. The responsibility for such financial and economic indicators lies with the concession grantor, who prepares the feasibility Study to grant a concession. The Feasibility Study of economic justification includes the average indicators for the performance of secondary activities. These indicators calculate the permanent and variable parts of the concession fee. Based on the mentioned study and the published call for tenders, the concessionaire starts creating the Feasibility Study to obtain a concession by considering the concession grantor's data. On the one hand, the authors assert that the concession grantor's failure to promptly consent to the business cooperation contract and its silence on the subject represent a disruption of the economic balance between the contracting parties and a one-sided violation of the concession contract by the concession grantor. On the other hand, by violating the provisions of executing the reasons for excluding an economic operator from the concession award procedure, the concessionaire exposes itself to the risk of one-sided termination of the concession contract. Therefore, there is no justification for the concession grantor to intervene in each business cooperation contract. The solution mentioned above is not the only option; the alternative is a model of joint decision-making in an administrative matter. This model is based on Article 21 of the General Administrative Procedure Act. The resolution of administrative issues, i.e., obtaining consent for a business cooperation contract for the performance of secondary activities, involves the participation of the concessionaire and a public law body in the capacity of concession grantor. By concluding the concession contract, the state, through a public law body in the capacity of the concession grantor, granted the concessionaire the right to do or not do something to achieve its interest. The concessionaire's interest is clear: to exploit the maritime domain for profit. However, the subjective right gives the concessionaire double rights over another party: first, the right to demand performance, providing or non-performance, and second, the right to exclude the other party from the business cooperation contract for secondary activities if they do not comply with its request. In that case, it is appropriate to apply the provision of paragraph 2 of Article 21 of the General Administrative Procedure Act. This article prescribes when the concession grantor, as a public law body, decides based on the consent, confirmation, approval or opinion of another public law body, which in this case would be assumed to be the concessionaire, the concession grantor is obliged to give its consent or refuse it within thirty days from the

date of delivery of the proper request for consent. Paragraph 3 of the article prescribes that if the concession grantor does not decide on the request for approval, i.e., consent, certificate, or opinion, within the specified period, then the approval, i.e., consent, is automatically given. In that case, the concessionaire is responsible for noncompliance with the reasons for exclusion. To conclude, it is essential to determine in business cooperation contracts that the contract is lawfully terminated if the concession grantor refuses to consent or requests the replacement of the economic operator by another. This additional protection for the concessionaire is crucial.

9. Conclusion

The rapid growth of special purpose ports, particularly nautical tourism ports, small shipyards, and sports ports, has created an urgent need for additional services directly related to the fundamental purpose of the concession. One of the biggest reasons for reaching out for additional services is the increasingly demanding clients who demand fast and efficient services from the concessionaires of these ports. The primary goal of the concession grantor is to protect the maritime domain and ensure that only the best economic operators will work on it. However, the new provisions of MDSPA/23 have placed the burden of protection of the maritime domain and selection of adequate economic operators on the concessionaire; the state has confided the maritime domain to it by the concession contract. Directive 2014/23/EU on the award of concession contracts, as well as the CA itself, clearly prescribes that the essential purpose of the concession is to enable the concessionaire to receive investment compensation and capital return under normal operating conditions. Therefore, from an economic point of view, the labour shortage, even the shortage of economic operators who provide specific services, requires urgent action by concessionaires. There are many reasons for such behaviour: fear of losing the market, fighting with competition, etc. In such circumstances, the concessionaire's primary objective is to initiate the contract's legal effects immediately. This requires the active involvement of all parties involved in the process. The concessionaire must find an adequate business operator as a service provider and agree on business terms with him. The economic operator must prove it is not eligible for exclusion from the concession awarding procedure. Only after defining these conditions is it permitted to enter into a business cooperation contract. At that moment, the contract had not yet been entered into force and had not produced legal effects; the legislator limited the autonomous will of the contracting parties and reserved the right to withhold consent.

Considering the procedure's long duration, the existing legal solutions provided by the legislator do not satisfy market conditions. The competent ministry or unit of local (regional) self-government as a concession grantor cannot respond to every request of the concessionaire within an appropriate period, which is logical and understandable. This paralyzes the concessionaire's business and makes it impossible for it to amortise investments, return capital, and effectuate profit under normal working conditions. This contradicts the basic meaning of the concession contract. The authors' standpoint says that with the conclusion of the concession contract, the concession grantor has transferred all its rights in the maritime domain to the concessionaire. The concessionaire is obligated to care for a maritime domain, which is the subject of the concession. Also, the concessionaire is compelled to operate under the terms and obligations of the concession contract and legal regulations. Therefore, there should not be a subsequent intervention by the state to decide on entering the concession contract and business of the concessionaire as long as the concessionaire's business respects legal regulations. This is also stated because the concessionaire must take care of the maritime domain. Suppose the concession grantor believes the concessionaire is not doing enough to protect the maritime domain. In that case, the concession grantors have mechanisms that authorise them to force the concessionaire on that under the threat of losing the concession. One proposed solution would be to implement joint decision-making in an administrative matter according to the General Administrative Procedure Act model. Under this model, the concession grantor must issue the consent or refuse to issue the consent within a certain period from the delivery date of the concessionaire's proper request. If the concession grantor does not decide on the request within the period prescribed by law, then it is considered that the consent has been given. However, the concessionaire remains obligated and liable for violating regulations and noncompliance with the concession contract due to failure to examine the reasons for excluding an economic operator from the procedure concession award. This approach will undoubtedly result in numerous advantages, including more efficient service delivery by concessionaires and third parties, which positively affects the collection of fees from economic operators and will consequently impact the variable part of the concession fee. Additionally, it will reduce the administrative burden on all participants in the procedure.

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4. Concession Act, 'Official Gazette', number 69/17, 107/20
5. Maritime Domain and Seaports Act, 'Official Gazette', number 83/23
6. Civil Obligations Act, 'Official Gazette', number 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23.
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REGULATORY APPROACH TO MARINE AND LAND-BASED AIR POLLUTION IN COASTAL AREAS

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Original scientific paper

Ships generally use low-quality high-emissions fuel and their emissions to air have only recently become the object of regulation by International Maritime Organization. The system of environmental permits which applies to stationary technical units under the Directive on industrial and livestock rearing emissions (integrated pollution prevention and control), known as IED, specifically excludes any technical apparatus used in the propulsion of the ship. The result is that many communities in coastal regions are exposed to the threat of air pollution emitted from shipping, cruise ships in particular, which very often stay outside the port area while burning the fuel to meet their power requirements on board. The authors analyse different regulatory and policy frameworks applicable to pollution from vessels on one part and land-based units on the other urging for the necessity of harmonized approach to air emissions abatement in coastal areas.

Keywords: *air pollution, coastal areas, vessels, land-based installations, environmental permits*

1. Introduction

Although pollution of the oceans and the seas originating from land-based sources is justifiably studied and analysed, insufficiently addressed is the contribution to air pollution of coastal areas and the communities living therein from seaborne sources, particularly shipping and boating. Furthermore, although marine and land-based activities that exert pressures on marine environment are subject to various regulations and policies, ranging from local to international level, they are seldom coordinated so as to reduce impacts on the oceans and to achieve a consistent policy approach, which is due to the fact that policies are

mainly structured by sectors as opposed to the media affected¹. Consequently, there is a sort of regulatory gap when it comes to coastal area pollution since different regulatory level and approach is applicable to land-based sources on one side and the sources at sea on the other.

The paper elaborates the issues of coastal regions, particularly the threat to coastal communities due to air pollution originating from vessels, analyses current regulatory approaches applicable to sources of pollution at the sea and on land pointing to differences among them, and proposes the solutions.

2. Air Pollution from Ship Operations

Onboard combustion and energy transformation processes for propulsion and energy production on board the ships result in the emission of various air pollutants, including sulphur oxides (SO_x), nitrogen oxides (NO_x), particulate matter (PM), carbon monoxide (CO), non-methane volatile organic compounds (NMVO-Cs), and ozone depleting substances (ODSs). Main air pollutants associated with health impacts are SO_x, NO_x, PM, including black carbon, and ozone. Air quality impacts are more pronounced along the coastline, as up to one third of all ship emissions arise within 12 nautical miles of the shoreline and a substantial part of the remaining two thirds from shipping corridors within 200 nautical miles of the shoreline. Also, a share of emissions from shipping comes from ports, which are particularly significant in large port cities².

The main SO_x emitted from ships is SO₂ which results from the use of marine fuels in the main and auxiliary engines and other combustion machinery on board. It can affect the respiratory system and the functions of the lungs, it causes irritation of the eyes³ and contributes to acid deposition, leading to potential changes in soil and water quality, with acid rain also causing significant damage to buildings and the architectural heritage. SO₂ also contributes to the formation of particulate aerosols in the atmosphere, as does NO_x formed from nitrogen and oxygen precursors during the combustion process in the ship's main engines. It is to be noted that sea-based source nitrogen oxides emissions are expected to increase, which, combined with a projected decrease in land-based source emissions, means that maritime nitrogen oxides emissions will exceed land-based emissions after 2030⁴.

¹ Salomon, M., Dross, M., 2018. Integrating Sectoral Ocean Policies. In: Salomon, M. & Markus T. (eds.) Handbook on Marine Environment Protection, Springer, pp. 919-931

² EMSA, 2021. European Maritime Transport Environmental Report 2021. doi: 10.2800/3525

³ WHO, 2024. Ambient (outdoor) air pollution. Available at: [https://www.who.int/news-room/fact-sheets/detail/ambient-\(outdoor\)-air-quality-and-health](https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health)

⁴ EMSA, *supra* note 2

An analysis of data also reveals that, excluding ballast water, in terms of volume the largest water discharges from ships come from open-loop exhaust gas cleaning systems, EGCSs (77 %), followed by grey waters (16 %) sewage, bilge waters and other discharges, meaning that the pollution is simply diverted from air to water⁵.

PM_{2.5} from shipping forms during the various combustion processes on board. In ports an increase in PM₁₀ (PM with a diameter of 10 µm or less) and PM_{2.5} concentrations can also be observed due to loading, unloading and bunkering operations. There is a direct relationship between the SO_x and NO_x emitted by ships and the resulting PM. Low air quality due to international maritime transport globally contributes to approximately 60 000 deaths annually, with the highest mortality rates associated with high concentrations of shipping-related PM, are seen in Asia and Europe⁶. One component of PM_{2.5} is black carbon (BC), a strongly light-absorbing dark particle emitted following the incomplete combustion of organic carbon-based fuels. BC also contributes to the adverse impacts of PM on human health⁷. When BC settles on snow or ice, it darkens them and reduces their ability to reflect sunlight, leading to increased heat absorption and melting. Container ships, which make up 7 % of the global fleet, emit most BC (26 % of the global total). Cruise ships account for 6 % of BC emissions despite accounting for less than 1 % of the global fleet⁸.

Energy pollution such as noise from ships' activities in ports and ports activities themselves has a negative impact on health and well-being. Although the levels of noise generated are generally too low to cause biological damage to the ear, noise can lead to non-auditory health effects if exposure is long term and exceeds certain levels, manifesting itself in increased stress and annoyance, anger, sleep disturbance, lack of concentration, reduced efficiency, obesity, negative effects on the cardiovascular and metabolic system, and cognitive impairment in children⁹. Most nuisance perceived by residents living near ports is caused by

⁵ *Id.*

⁶ Corbett, J. J., et al., 2007. Mortality from ship emissions: a global assessment. *Environmental Science & Technology* 41(24), pp. 8512-8518

⁷ IPCC, 2013. Summary for policymakers. In: Stocker, T. F. et al. (eds). *Climate change 2013: The physical science basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, UK

⁸ Comer, B., et al., 2017. Black carbon emissions and fuel use in global shipping, 2015. International Council on Clean Transportation. Available at: <https://theicct.org/publications/blackcarbon-emissions-global-shipping-2015>

⁹ Runko Luttenberger, L., Gudelj, I., 2024. Impact and Control of Environmental Noise. In: Grgurić, D. & Runko Luttenberger, L. (eds.) *Aural Experience and Soundscape Management*, Jenny Stanford Publishing, pp. 33-77

low-frequency noise caused by the funnel exhaust from the auxiliary engines unless they are fitted with effective silencers^{10,11}.

3. Regulatory Approach – Pollution from Vessels

Neminem laedere or no-harm rule is an important facet of the United Nations Convention of the Law of the Sea (UNCLOS)¹², although with a focus on marine pollution and fisheries. The transparency and public participation which widely lack as a concern of UNCLOS may on the other hand develop into a general principle of law based on a generalization from the regional Aarhus Convention¹³.

The importance of an integrated coastal and ocean management was prominently singled out in 1992 by Chapter 17 of the Agenda 21 of the UN Conference on Environment and Development¹⁴ with new approaches being required to marine and coastal area management and development. Integrated coastal zone management, as also stipulated in the 2002 EU Integrated Coastal Zone Management (ICZM) Recommendation¹⁵ has however not been sufficiently implemented to date.

International Convention for the Prevention of Pollution from Ships is the main international convention covering prevention of operational or accidental pollution of the marine environment by ships. Annex VI entitled Regulations for the Prevention of Air Pollution from Ships was adopted in 1997 through adding a Protocol to MARPOL 73/78 and it entered in force in 2005, with revisions that followed¹⁶. It sets the limits on sulphur oxide and nitrogen oxide emissions from ship exhausts and prohibits deliberate emissions of ozone

¹⁰ EMSA, *supra* note 2

¹¹ Slišković, M., Ukić Boljat, H., Ančić, I., 2024. Marine Soundscape. In: Grgurić, D. & Runko Luttenberger, L. (eds.) *Aural Experience and Soundscape Management*, Jenny Stanford Publishing, pp. 79-114

¹² United Nations Conference of the Law of the Sea (UNCLOS), 1982, UNTS 1833 f

¹³ Winter, G., 2018. International Principles of Marine Environmental Protection. In: Salomon, M. & Markus T. (eds.) *Handbook on Marine Environment Protection*, Springer, pp. 585-605

¹⁴ UN, 1992. Chapter 17 Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources. Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. II). Available at: https://www.un.org/depts/los/consultative_process/documents/A21-Ch17.htm

¹⁵ European Union, 2002. Recommendation of the European Parliament and of the Council of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe. OJ L 148 , 06/06/2002 p. 0024 - 0027

¹⁶ IMO, 2025. Index of MEPC Resolutions and Guidelines related to MARPOL Annex VI. Available at: <https://www.imo.org/en/OurWork/Environment/Pages/Index-of-MEPC-Resolutions-and-Guidelines-related-to-MARPOL-Annex-VI.aspx>

depleting substances. Thus, one of the main certificates a vessel of 400 gross tonnage or above shall carry to show compliance with MARPOL Annex VI is the International Air Pollution Prevention Certificate (IAPP). Chapter 4 on Energy Efficiency was adopted in 2011 and entered into force in 2013.

NO_x control requirements are introduced on ships with marine diesel engines of over 130 kW output power. The specific controls are applied in three levels (tiers), based on the ship's construction date and operation area. Within a tier, the actual NO_x limit value is determined based on the specific engine's rated speed. Tier III represents almost an 80 % reduction in NO_x emissions compared with tier I limits but only applies to ships built after 2016 and in restricted sea areas¹⁷.

Emission control areas (ECAs) designated under MARPOL Annex VI are sea areas which can apply limits to reduce sulphur oxides or nitrogen oxides emissions or both. Domestic emission control areas can also be set up by states to improve the air quality of coastal areas and inland rivers. In Europe, regional seas conventions such as Helsinki Convention¹⁸ and OSPAR¹⁹ contributed to the IMO designation of the Baltic and North Seas as emission control areas for sulphur oxides (SO_x) and nitrogen oxides (NO_x). Mediterranean will only now become the sulphur emission control area (SECA)²⁰ following a successful multilateral process led by the Mediterranean Action Plan of the United Nations Environment Programme (UNEP-MAP) following the Barcelona Convention²¹. Thus all ships operating in the area will be required to use fuel with a sulphur content of no more than 0.1 %, that being five times lower than the international standard in areas outside the SECAs. NO_x emissions in the Mediterranean are to be addressed in the next stage, for which a roadmap was agreed in December 2019 by the Contracting Parties²².

¹⁷ IMO, 2025. Nitrogen Oxides (NO_x) – Regulation 13. Available at: [https://www.imo.org/en/OurWork/Environment/Pages/Nitrogen-oxides-\(NOx\)-%E2%80%93-Regulation-13.aspx](https://www.imo.org/en/OurWork/Environment/Pages/Nitrogen-oxides-(NOx)-%E2%80%93-Regulation-13.aspx)

¹⁸ Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention), 1974

¹⁹ Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992

²⁰ IMO, 2022. Marine Environment Protection Committee (MEPC) – 79th session. Available at: <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MEPC-79th-session.aspx> [https://www.imo.org/en/OurWork/Environment/Pages/Nitrogen-oxides-\(NOx\)-Regulation-13.aspx](https://www.imo.org/en/OurWork/Environment/Pages/Nitrogen-oxides-(NOx)-Regulation-13.aspx)

²¹ Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona Convention), 1976

²² Rempec, 2019. Technical and feasibility study to examine the possibility of designating the Mediterranean Sea, or parts thereof, as SO_x ECA(S) under Marpol Annex VI, Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea. Available at: <https://www.rempec.org/en/knowledge-centre/online-catalogue/2019/rempec-wg-45-inf-9-technical-andfeasibility-study-to-examine-the-possibility-of-designatingthe-mediterranean-sea-or-parts-thereof-as-sox-eca-s-undermarpol-annex-vi-english-only>

EU Member States must calculate the national emissions of several air pollutants and report them under the National Emission reduction Commitments (NEC) Directive²³, while the EU then reports to the Convention on Long-range Transboundary Air Pollution (LRTAP Convention)²⁴. Emissions from international maritime transport are, however, not added to the national totals²⁵. In 2018, the proportion of emissions produced by the waterborne transport sector, including international, domestic and inland water navigation, represented 24 % for NO_x, 24 % for SO_x and 9 % of PM_{2.5} (PM with a diameter of less than 2.5 µm) of the emissions from all the sectors considered²⁶.

EU Member States draw up national air pollution control programmes, which should contribute to the successful implementation of air quality plans established under the Ambient Air Quality Directive²⁷, Sulphur Directive²⁸ relating to a reduction in the sulphur content of certain liquid fuels, and Regulation on the deployment of alternative fuels infrastructure²⁹. Shipping, road traffic and non-road traffic, inland and domestic maritime transport, are sectors for which emissions are estimated and reported and reflected in national emissions inventories. However, disaggregation problem is encountered, to quantify those related to maritime transport only.

To reduce SO₂ emissions from ships, the sulphur content of marine fuels has been regulated in the EU since 1999 and continuously reduced since then. In a significant step forward, since 2010 ships at European berths have been required to use fuels with a maximum sulphur content of 0.1 % m/m (mass by mass) and passenger ships operating under regular service fuel with a maximum sulphur content of 1.50 % m/m (the regular maximum content is 3.50 % m/m)³⁰.

²³ EU, 2016. Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC. OJ L 344, 17.12.2016, p. 1–31

²⁴ UNECE, 1979. Convention on Long-range Transboundary Air Pollution (LRTAP). Available at: <https://unece.org/sites/default/files/2021-05/1979%20CLRTAPe.pdf>

²⁵ EMSA, *supra* note 2

²⁶ EEA, 2024. Air pollutant emissions data viewer (Gothenburg Protocol, LRTAP Convention). Available at: <https://www.eea.europa.eu/en/topics/in-depth/air-pollution/air-pollutant-emissions-data-viewer-1990-2022>

²⁷ Directive (EU) 2024/2881 of the European Parliament and of the Council of 23 October 2024 on ambient air quality and cleaner air for Europe, OJ L, 2024/2881, 20.11.2024

²⁸ Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels, OJ L 132, 21/05/2016, p. 58–78

²⁹ Regulation 2023/1804 of the European Parliament and of the Council of 13 September 2023 on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, OJ L 234, 22.9.2023, p. 1–47

³⁰ EMSA, *supra* note 2

Apart from the Marine Strategy Framework Directive (MSFD)³¹ and Water Framework Directive (WFD)³² aimed at achieving good environmental status in EU marine waters and good ecological and chemical status of waters including transitional and coastal waters respectively, there are two other European ecosystem-based laws with high relevance for coastal areas and the protection of natural capital. One is the Habitats Directive³³ which considers shipping lanes and related maritime infrastructure as pressures or threats that can affect the conservation status of marine habitats. Coastal habitats which may be affected by port development constitute the most productive and vulnerable ecosystems, as they represent the interface between freshwater and marine waters. Another one is the 2014 Marine Spatial Planning Directive³⁴ stipulating that Member States must have approved maritime spatial plans for their waters by 2021, including the maritime transport routes and traffic flows. It requires the states to identify potential conflicts between sectors, including environmental protection and nature conservation. This is applicable to shipping and the environment, where the maritime spatial plans can define concrete zones for shipping to reduce potential impacts on sensitive areas or vulnerable species/habitats. Some of the zones related to shipping and port activities that can be included in the plans are IMO traffic routing systems, inshore traffic zones, areas where shipping is restricted (e.g. acoustic refuges for noise-sensitive animals), port areas, port waiting areas, areas of future port development, and sites of disposal of dredged material (dumping sites)³⁵. The adoption of marine spatial plan also calls for strategic environmental assessment which as well involves the production of environmental report, public consultation and participation³⁶.

³¹ 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 environmental policy (Marine Strategy Framework Directive), OJ L 164, 25.6.2008, p. 19–40

³² Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1–73

³³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora. Consolidated text available at: <https://eur-lex.europa.eu/eli/dir/1992/43/2013-07-01>

³⁴ Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning, OJ L 257, 28.8.2014, p. 135–145

³⁵ EMSA, *supra* note 2

³⁶ Runko Luttenberger, L., Luttenberger, A., Ančić, I., Kosovac, I. Preserving Natural Resources of the Croatian Adriatic through Maritime Spatial Planning. 10th International Maritime Conference 2003 Book of Proceedings, pp. 431–439. <https://imsc.pfst.hr/wp-content/uploads/IMSC%202023%20-%20Book%20of%20Proceedings.pdf>

The 2021 EU Action Plan ‘Towards Zero Pollution for Air, Water and Soil’³⁷, one of the pillars of the European Green Deal³⁸ states among others that the Commission will continue promoting the creation of Emission Control Areas across all EU seas to improve the air breathed on ships and in port cities and coastal areas.

4. Regulatory Approach – Land-Based Activities

Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) as amended by Directive 2024/1785³⁹, now entitled Directive 2010/75/EU on industrial and livestock rearing emissions (integrated pollution prevention and control), hereinafter IED, is the main EU instrument to reduce the emissions into air, water and land, and to prevent waste generation from large industrial installations and intensive livestock farms. Under IED, environmental permits are granted to the concerned installations and farms by national permitting authorities. IED applies to the activities set out in its Annex I which among others specifies the combustion of fuels in installations with a total rated thermal input of 50 MW or more. Special provisions on combustion plants are laid down in its Chapter III which specifically exempts any technical apparatus used in the propulsion of a vehicle, ship or aircraft. Permits must also contain binding quantitative resource efficiency requirements for materials, water and energy, as appropriate, to better address water scarcity challenges and waste generation. To ensure compliance, harmonized environmental inspections take place on site at least every one to three years by competent authorities, depending on the risks of the concerned activities.

One of the key elements of the IED is that it requires environmental permit conditions to be based on best available techniques (BAT). These are the most environmentally effective and economically viable proven techniques within each industrial sector covered by the law and are agreed in a procedure known as the Sevilla process led by the European Commission’s Joint Research Centre in Seville, Spain. This is an information exchange process involving experts from

³⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Pathway to a Healthy Planet for All EU Action Plan: ‘Towards Zero Pollution for Air, Water and Soil’ COM/2021/400 final

³⁸ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions — The European Green Deal (COM(2019) 640 final, 11.12.2019)

³⁹ Directive (EU) 2024/1785 of the European Parliament and of the Council of 24 April 2024 amending Directive 2010/75/EU of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) and Council Directive 1999/31/EC on the landfill of waste, OJ L, 2024/1785, 15.7.2024

EU Member States, industry, NGOs and the European Commission. For each sector, BAT Reference Documents (known as BREFs)⁴⁰ are drafted with the aim of establishing best available techniques for all relevant industrial processes, as well as the associated emission levels, operating conditions and monitoring requirements for minimizing industrial waste and pollution to air, water and land. A chapter of these BREFs (the so-called BAT conclusions) is legally binding within four years of their adoption. A specific BREF was developed for the monitoring of emissions to air and water from installations under IED⁴¹.

Revised IED which came into force in August 2024 is brought in line with Zero Pollution ambition of the 2019 European Green Deal (EGD). Its implementation is expected to reduce emissions of key air pollutants (PM_{2.5}, SO₂, NO_x and NMVOC (non-methane volatile organic compounds)) by up to 40% compared to 2020 levels. EGD formulates the ambition to ramp up the production and deployment of sustainable alternative fuels and the need to have cleaner transport, including requiring the use of onshore power supply at berth and potentially limiting the access of the most polluting ships⁴².

It is also the first EU environmental law to enshrine the right of people to seek compensation for damage to their health caused by illegal pollution. Accountability is also increased through greater public participation in the permitting process, improved access to justice, and better access to information. Furthermore, new Industrial Emissions Portal Regulation (IEPR)⁴³ will enhance access to environmental data, allowing citizens to gain insight into permits issued in the EU and on polluting activities in their immediate surroundings. The Portal website⁴⁴ is to provide more comprehensive information on industrial installations, streamline electronic reporting by IED operators and improve the geolocated monitoring of emissions and resource use⁴⁵.

⁴⁰ EC, 2025. BAT reference documents. Available at: <https://eippcb.jrc.ec.europa.eu/reference/>

⁴¹ EC, 2018. JRC Reference Report on Monitoring of Emissions to Air and Water from IED Installations, Available at: <https://eippcb.jrc.ec.europa.eu/reference/monitoring-emissions-air-and-water-ied-installations-0>

⁴² The European Green Deal, *supra* note 38

⁴³ Regulation (EU) 2024/1244 of the European Parliament and of the Council of 24 April 2024 on reporting of environmental data from industrial installations, establishing an Industrial Emissions Portal and repealing Regulation (EC) No 166/2006, OJ L, 2024/1244, 2.5.2024

⁴⁴ European Industrial Emissions Portal. Available at: <https://industry.eea.europa.eu/explore/explore-data-map/map>

⁴⁵ EC, 2024. Zero Pollution: Modernised rules on industrial and livestock rearing emissions come into effect. Available at: https://environment.ec.europa.eu/news/revised-industrial-emissions-directive-comes-effect-2024-08-02_en

Another instrument applied for land-based industrial installations are ex-ante environmental impact assessments⁴⁶. Namely, assessing the likely significant environmental effect of certain large infrastructure projects, public plans and programmes ensures that environmental assessments take place before plans, programmes and projects are approved or authorized. Public participation in decision-making is a key aspect in that process. Environmental impact assessment (EIA) instrument ensues from international commitments, more precisely the Espoo Convention⁴⁷ and SEA Protocol⁴⁸ and Aarhus Convention⁴⁹. The projects subject to EIA under European EIA Directive⁵⁰ are among others the trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tonnes. The construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I) must undergo the screening procedure.

Coming however to EIA implementation, the authors single out two port development cases in Croatia where the threat of pollution has not been appropriately taken into account in respective environmental reports. One is new Porto Baroš in the centre of the City of Rijeka, Croatia. Environmental report for proposed project contains the following text: "...The location itself may be defined as a place within which there exists no significant pollution nor sources of air pollution. The only polluters are vessels that use wider aquatorium, meaning that it is the matter of minimum and short-term pollution, as well as personal cars which pass through the edge zone of the future intervention."⁵¹. Another case involves the construction of Komiža fishing port on the Island

⁴⁶ Runko Luttenberger, L. et al., 2020. Environmental impact assessment procedures for projects in marine environment – evaluation analysis. Pomorstvo, vol. 34, pp 65-73. Available at: <https://doi.org/10.31217/p.34.1.8>

⁴⁷ UN, 1992. Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). Available at: https://unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf

⁴⁸ UNECE Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (Kyiv, 2003). Available at: <https://unece.org/DAM/env/eia/documents/legaltexts/protocolenglish.pdf>

⁴⁹ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), n 1998. Available at: <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

⁵⁰ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment. Consolidated text available at: <http://data.europa.eu/eli/dir/2011/92/2014-05-15>

⁵¹ Ministarstvo zaštite okoliša i zelene tranzicije Republike Hrvatske, 2022. Studija utjecaja na okoliš Luka nautičkog turizma Porto Baroš – Studija utjecaja na okoliš: Available at: https://mzozt.gov.hr/UserDocsImages/UPRAVA-ZA-PROCJENU-UTJECAJA-NA-OKOLIS-ODRZIVO-GOSPODARENJE-OTPADOM/Puo/02_12_2022_Studija_LNT_Porto_Baros.pdf

of Vis where the environmental report contains no mention of the possible number of ships⁵².

5. Marine Pollution Challenges

Coastal air quality is a dynamic category, shaped by a combination of meteorological, geographical, and human factors. With current air quality monitoring system, it is not possible to establish specific contribution by shipping and port-related activities to air quality in the vicinity of the ports. Namely, monitoring stations are classified either as industrial (measuring pollution emitted from a single industrial source such as the port), traffic stations located near a major road, or background stations representative of a wider area where the level of pollution is not dominated by a single source. Comparing the three levels measured within 2 km of a port is insufficient for achieving sufficient discrimination between the different sources of air pollution⁵³.

Presently the exposure of coastal areas to air pollution is insufficiently regulated. While land-based polluters are subject to formal control, the pollution originating from operations at sea is still for the most part outside the regulatory control.

As Croatian ports are increasingly hosting cruise ships, the authors find it necessary to emphasize the impact of that segment of shipping. Cruise ships sometimes moor in ports, but very often they anchor outside the ports and in vicinity of the coast. Cruise ships must satisfy their significant power demands, in particular air conditioning and other services while in port, and for that purpose they use their own engines and consequently low-quality fuel which generates pollution. In such a way, the cities, towns, and other sites with no manufacturing activities become highly polluted, failing proper regulation^{54, 55}. For instance, annual deposition of sulfur in Dubrovnik has for years been by far

⁵² Ministarstvo zaštite okoliša i zelene tranzicije Republike Hrvatske, 2020. Studija utjecaja na okoliš Uređenje ribarske luke Komiza, Vis. Available at: https://mzozt.gov.hr/UserDocsImages/UPRAVA-ZA-PROCJENU-UTJECAJA-NA-OKOLIS-ODRZIVO-GOSPODARENJE-OTPADOM/Puo/10_08_2020_Studija_Ribarska_luka_Komiza.pdf

⁵³ EMSA, *supra* note 2

⁵⁴ How are cruise ships powered, 2021. Marine insight. Available at: https://www.marineinsight.com/tech/cruise-ships-powered/#google_vignette

⁵⁵ The world's largest cruise ship and its supersized pollution problem, 2016. Guardian. Available at: <https://www.theguardian.com/environment/2016/may/21/the-worlds-largest-cruise-ship-and-its-supersized-pollution-problem>

the highest in Croatia, probably as the result of its being a popular port of call for cruise ships^{56,57}.

Near Rijeka port (Croatia), on the coastline and adjacent to the refinery, there is an oil-fired thermal power plant. It has one generation unit with maximum capacity of 320 MW and holds the environmental permit which is obligatory for any plant exceeding 50 MW capacity⁵⁸. On the other hand, there is no system in place for controlling the pollution emitted by ships moored within and anchored near adjacent port, which could by far exceed the land-based emissions. Considering that in this particular case similar fuel is used in combustion, we deal with cumulative emissions from IED regulated facility (minimum 50 MW) and those from combustion on board ships in and around the port in immediate proximity but seawards, each with installed power of around 100 MW and operational power ranging from 5–20 MW^{59,60}.

Depending on the number of ships in port, the share of air pollution coming from marine sources can easily outweigh that originating from land-based ones, if any. Clearly, in cases where there is no major emission source on land, such as in smaller communities or pristine places a cruise ship or several big yachts cause significant disturbance regarding the quality of life - public health and that of the ecosystems.

6. Conclusion

Resolution 2286 (2019) of the Council of Europe⁶¹ states that clean air is a basic human right. Wherever we live, we need air that is breathable and that does not shorten or impair our lives. Public authorities bear direct responsibility for putting in place effective regulatory policies to reduce air pollution.

In order to improve the quality of air in coastal areas which are exposed to pollution from the sources on land, but also increasingly from sources at

⁵⁶ Runko Luttenberger, L, Ančić, I., Šestan, A., 2013. The viability of short-sea shipping in Croatia. *Brodogradnja* vol. 64, no. 4, pp. 472-481

⁵⁷ Ministarstvo zaštite okoliša i zelene tranzicija, 2025. Kvaliteta zraka u Republici Hrvatskoj. Available at: <https://iszz.azo.hr/iskzl/index.html>

⁵⁸ Ministarstvo zaštite okoliša i zelene tranzicije Republike Hrvatske, 2019. Rješenje o izmjeni i dopuni uvjeta okolišne dozvole. Available at: [https://mzozt.gov.hr/UserDocsImages/Okoli%C5%A1na%20dozvola/OD-postoje%C4%87e/28.01.2021.%20-%20RJE%C5%A0ENJE%20Ministarstva%20od%2021.%20velja%C4%8De%202019.%20godine%20\(TE%20RIjeka\).pdf](https://mzozt.gov.hr/UserDocsImages/Okoli%C5%A1na%20dozvola/OD-postoje%C4%87e/28.01.2021.%20-%20RJE%C5%A0ENJE%20Ministarstva%20od%2021.%20velja%C4%8De%202019.%20godine%20(TE%20RIjeka).pdf)

⁵⁹ Knežević, V. et al., 2018. *Pomorstvo*, vol. 32, pp. 239-244. Available at: <https://doi.org/10.31217/p.32.2.9>

⁶⁰ Connecting passenger ships to the future, 2014. *Port Technology*, edition 62. Available at: https://www.porttechnology.org/wp-content/uploads/2019/05/Schneider_Electric.pdf

⁶¹ Resolution 2286 (2019) of the Council of Europe. Air pollution: a challenge for public health in Europe. Available at: <https://pace.coe.int/en/files/27716/html>

the sea which are either insufficiently regulated or the pace of adoption and enforcement of regulatory measures is unbecoming, the authors propose several measures to be taken.

Of utmost importance is further and faster adoption of emission control areas. Sustainable energy technologies should be used for ship propulsion and services, as well as low-sulphur fuels and onshore power supply. Also, port call optimization should be practiced reducing vessel waiting times.

Proper maritime spatial planning should be implemented that takes in consideration land-sea interactions. It is of crucial importance to consult and endeavour to effectively implement the provisions of 1992 Agenda 21 Chapter 17 declaring that the marine environment - including the oceans and all seas and adjacent coastal areas - forms an integrated whole that is an essential component of the global life-support system and a positive asset that presents opportunities for sustainable development. Another important reference is the 2002 EU Integrated Coastal Zone Management (ICZM) Recommendation.

The authors are urging that proper environmental impact assessment in port development should be performed, which accounts for the impacts of ships entering, leaving, and staying in the port and at nearby anchor.

Also, applying certain pollution control solutions presently used for land-based installations to marine polluters would be beneficial.

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CASTAWAYS AND MIGRANTS

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1. Introduction

In maritime law, the duty to rescue has always been conceived in terms of safeguarding life; the prerequisite for its operation is the mere necessity of the shipwrecked person. However, the intensification of the migratory phenomenon has led to the emergence of heterogeneous hypotheses of danger with respect to the traditional ones, since the state of necessity is often accepted and, in part, provoked by the shipwrecked and the activity carried out by rescuers is frequently continuous. The duty cannot be conceived as selective and it would be unlawful not to come to the rescue in the event of the voluntary creation of danger. The duty is general in nature; indeed, the salvation of the person cannot be the object of a conditional duty.

In Italy the issue of containing migration flows has been superimposed on the issue of the duty to rescue. In fact, in an attempt to regulate migration, recent legislative interventions have considered profiles relating to search and rescue activities, performed systematically by foreign - flagged vessels. This would be at odds with an evolutionary reading of the SAR Convention and the notion of safe harbour.

Conceived at a time when rescue was only occasional, the SAR Convention must be reread in the light of the current, different notion, resulting from the intensification of the migratory phenomenon, since anyone who is shipwrecked must be rescued. Therefore, as has often been the case in Italy, justifying the failure to indicate a safe harbour on the basis of the lack of jurisdiction of the State involved means interpreting the Convention against its spirit. Its purpose is to create international cooperation so that effective intervention is guaranteed, not to favour selective intervention, *i. e.* due only if it is consistent with the planned organisational scheme.

2. The Obligation to Render Assistance at Sea

In recent months, the debate on so-called illegal migration by sea has intensified; the phenomenon, which has always existed, has taken on tragic connotations. The number of victims who, in order to escape persecution or war, have embarked on long journeys on unsafe boats in an attempt to reach the Italian coasts and those of other Mediterranean Countries is gradually increasing. Without prejudice to the traditional duty to rescue, the need to adopt policies to contain migratory flows and to regulate the search activity carried out by non-governmental organisations is discussed. The overlapping of these issues does not facilitate discipline.

If one considers “*the assistance given (...) to persons in danger of losing their lives at sea, one is faced with the most important expression of the general principle*” of maritime solidarity, so much so that “*this concretisation (...) transcends the legal field*” and arises on the ethical and religious one¹; therefore, out of a humanitarian spirit, even before being obliged, the master of ships must render aid. Then, the subject has been regulated in several international conventions. The oldest is the one signed in Brussels on 23 September 1910²; according to Article 11, when there is no serious danger to his ship, its crew or its passengers, the master must offer assistance to any person found to be in danger of life.

Similarly, for Article 10 of the Convention concluded in London on 28 April 1989 (the so-called *Salvage Convention*), which entered into force on 14 July 1996³, provided there is no risk of serious injury to his ship and the persons on board, the master must come to the rescue of anyone in distress. Apart from some differences in the wording of the provisions⁴, for both the risk in itself requires action.

¹ See Righetti, *Trattato di diritto marittimo*, Milan, 1994, 3rd vol., 457 ff.

² Cf. Wildeboer, *The Brussels Salvage Convention*, Leiden, 1965, 275 ff.; Russo, *Assistenza e salvataggio (dir. nav.)*, in *Enc. dir.*, 3rd vol., 799 ff.; S. Ferrarini, *Il soccorso in mare (assistenza - salvataggio - recupero)*, Milan, 1964, 6 ff.; E. Vincenzini, *Profili internazionali del soccorso in mare*, Milan, 1985, 20 ff.; G. Berlingieri, *Salvataggio, assistenza, ricupero e ritrovamento di relitti della navigazione*, in *Noviss. dig. it.*, 16th vol., 342 ff.; Lefebvre D'Ovidio, *Assistenza, salvataggio, recupero e ritrovamento di relitti*, in *Enc. giur. it.*, 3rd vol., 1 ff. (from the abstract); Rizzo, *La nuova disciplina internazionale del soccorso in acqua e il Codice della navigazione*, Naples, 1996, 10 ff.

³ The 1989 London Convention replaced the 1910 Brussels Convention. The former has been in force in respect of Italy since 1 July 1996.

⁴ Cf. Rizzo, *La nuova disciplina internazionale del soccorso in acqua e il Codice della navigazione*, cit., 956 ff., nt. 16, according to whom the 1989 London Convention did not reiterate the need to rescue the enemy person as well, perhaps because the Convention considered this specification no longer necessary.

The principle was reaffirmed by the Convention for the Safety of Life at Sea, the so-called SOLAS Convention⁵, signed in London in 1974; in fact, according to Rule 33, Chapter V, “*the master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so*”. The provision refers to a simple situation of “*distress*” and, therefore, operates despite the fact that the shipwrecked person is not in actual danger, but in a difficult, albeit critical, position. At the same time, the master may decide not to proceed if he considers his intervention “*unreasonable or unnecessary*”⁶; in such a case, he has a wider power than that recognised by the 1989 *Salvage* Convention and, even earlier, by the 1910 Brussels Convention. Thus, he could interrupt operations if, for example, he judges the activity of others to be adequate and effective.

In turn, the Convention on Search and Rescue at Sea, adopted in Hamburg on 27 April 1979⁷ (the so-called SAR Convention), with which the SOLAS Convention must be coordinated, reaffirms the duty to rescue and clarifies how it must be fulfilled regardless of the nationality or status of the shipwrecked person; in fact, according to the Annex to the SAR Convention 2. 1. 10, “*Parties shall ensure that assistance is provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that person is found*”. Resolution MSC 153 (78) adopted on 20 May 2004 inserted this clause into the SOLAS Convention with an amendment to Regulation 33, Chapter V, paragraph 1⁸. Therefore, anyone who is in danger, whether an irregular migrant, as a political refugee, must be rescued, because the objective is the preservation of life as such.

⁵ The 1974 SOLAS Convention was amended by the 1978 SOLAS Protocol and numerous further amendments. Regulation 33, Chapter V was amended by Resolution of the International maritime organisation No. 153 / 78. See Rizzo, *Sicurezza della vita umana in mare*, in Aa. Vv., *Sviluppo sostenibile dei trasporti nel Mediterraneo*, edited by Pellegrino, Naples, 2013, 183 ff.; Comenale - Pinto, *Immigrazione clandestina e salvaguardia della vita umana in mare*, in *Riv. dir. nav.*, 2011, I, 585 ff.

⁶ Regulation 33(1) reads as follows: “*if the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log - book the reason for failing to proceed to the assistance of the persons in distress*”.

⁷ The International Convention on Maritime Search and Rescue was signed in Hamburg on 27 April 1979 and made enforceable in Italy by Law No. 47 of 1989. It was amended for the first time in 1998 by Resolution MSC 70 (69), and a second time in 2004 by Resolution MSC 155 (78). See Leanza - Caffio, *L'applicazione della convenzione di Amburgo del 1979 sul SAR*, in *Riv. dir. nav.*, 2015, I, 319 ff.; C. Bova - G. Bova, *Sulle convenzioni internazionali in materia di soccorso alle persone in mare*, in *Dir. trasp.*, 2017, 11 ff.

⁸ See Rule 33, Chapter V, paragraph 1, according to which: “*this obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found*”.

Then, the SAR Convention defines a “*distress phase a situation wherein there is a reasonable certainty that a vessel or a person is threatened by grave and imminent danger and requires immediate assistance*”⁹. In this way, by requiring the prerequisite of serious and imminent threat, the Convention gives a restrictive connotation to the notion of “*distress*”, which does not cover any risk, but only that of imminent and serious injury. Therefore, in order to ensure greater consistency between the two texts (the SOLAS Convention and the SAR one), the former’s reference to “*distress*” could be interpreted in a selective sense, with the consequent delimitation of its scope of application to the occurrence of a serious and imminent threat.

Then, the duty to rescue finds a more articulate definition in Article 98(1) (a) of the Montego Bay Convention¹⁰, according to which every State shall require the master of a ship flying its flag, when it is possible for him to do so without endangering the ship, its crew or passengers, to render assistance to any person in distress. This principle is reinforced by Article 18, according to which the transit of foreign ships in the territorial sea must be continuous and swift, but stopping and anchoring are permitted if necessary for rescue purposes¹¹. With Regulation (EU) No. 656 of 2014, the European Union also imposes “*the obligation to render assistance to any (...) person in distress at sea and, during an operation*”, to ensure “*that the respective participating units comply with this obligation, in accordance with international law and with respect for fundamental rights, regardless of the nationality or situation (...) of the person concerned or the circumstances*”¹².

⁹ See Annex to the SAR Convention, Chapter 1. 11. See Papanicolopulu, *The duty to rescue at sea, in peacetime and in war: a general overview*, in *Int. rev. red cross*, 2016, 98, 2, 491 ff.

¹⁰ Cf. Scovazzi, *Elementi di diritto internazionale del mare*, Milan, 2002, 5 ff., and the same Author, *La tutela della vita umana in mare, con particolare riferimento agli immigrati clandestini verso l’Italia*, in *Riv. dir. int.*, 2005, 106 ff.; Angeloni - Senesi, *Profili applicativi dei principali istituti del nuovo diritto del mare*, Bari, 2001, 12 ff.

¹¹ Cf. Rizzo, *Soccorso in mare di persone in pericolo tra norme consolidate e problematiche ancora aperte*, *Riv. dir. nav.*, 2020, 961 ff., according to whom, if the location of Article 98 in the part devoted to the high seas would lead one to think of an application limited to that area, the provision is “*detached from spatial references and must be read in the light of Article 18 of the Convention, which (...) allows the stopping and anchoring of ships in transit*” if aimed at rescue operations, “*which leads one to presume the persistence of such an obligation also in this area*”.

¹² See Article 9(1) of Regulation (EU) No. 656 of 2014, laying down rules for the surveillance of the external maritime borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. In addition, the aforementioned Article 9(1) imposes on Member States a rescue obligation also in respect of vessels, a profile never considered by international conventions.

3. The Objectives of Maritime Law and the Protection of Shipwrecked Persons

In maritime law, the duty to rescue has always been conceived in terms of safeguarding life¹³; its premise is the mere necessity of the shipwrecked person. The consolidation of certain of its features has led some¹⁴ to consider them necessary for its identification; think of reciprocity. Indeed, traditionally, shipping has been considered a dangerous activity and the spirit of solidarity has translated into a reliance on the help of others at the occurrence of danger. In turn, the latter was almost always an occasional event, linked to the risk inherent in navigation. However, the eventual character, like the mutualistic one, is not a structural element of the duty. If it has been shaped in the past on the basis of recurring traits, they do not contribute to its qualification, thus narrowing its scope of operation.

The obligation is of a general nature¹⁵; indeed, the salvation of the person cannot be the object of a conditional duty. However, the intensification of the migratory phenomenon has led to the emergence of heterogeneous hypotheses of danger compared to the traditional ones, since the state of necessity is often accepted and, in part, provoked by the shipwrecked persons and the activity carried out by rescuers is frequently continuous. The duty cannot be conceived as selective and it would be unlawful not to come to the rescue in the event of the voluntary creation of danger; thus, the migrant who does not refuse the risk, because he tries to reach a hospitable country, must be rescued in the same way as anyone else.

Therefore, a ship carrying many persons cannot be denied a port of safety; indeed, the duty to rescue is binding not only regardless of the voluntariness of the danger, but also of the number of persons involved. On the contrary, maritime law is concerned with rescue in itself¹⁶ and has the preservation of life as its objective; hence, it considers the shipwrecked person as such. Therefore, the duty cannot be bent to the containment of migratory flows, *i. e.* to the regulation of issues subsequent to the rescue and completely independent from it. Moreover, in the well-known affair involving the vessel of a non-governmental organisation, the *Sea Watch 3*, in confirming the decision not to validate the arrest

¹³ See Righetti, *Trattato di diritto marittimo, cit.*, 457 ff.; S. Ferrarini, *Il soccorso in mare (assistenza - salvataggio - recupero), cit.*, 6 ff.; Vincenzini, *Profili internazionali del soccorso in mare, cit.*, 20 ff.

¹⁴ Cf. Munari, *Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana*, in *Dir. mar.*, 2020, 340 ff.

¹⁵ See Starita, *Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave pirata*, in *Dir. um. dir. int.*, 2019, 5 ff.

¹⁶ See Righetti, *Trattato di diritto marittimo, cit.*, 457 ff.

in *flagrante delicto* of the master, the Supreme Court¹⁷ recognised the existence of the cause of justification of the fulfilment of the duty to rescue.

Even before the international conventions¹⁸, for the decision¹⁹ there is a “customary obligation”, understood as a “generally recognised rule of international law and, therefore, directly applicable”. Thus, “from an analysis of International conventions and (...) of customary law itself, it is clear that States have an obligation to protect human life at sea and to provide assistance to persons in distress”, an obligation fulfilled “through the masters of public and private ships flying their flag”²⁰. Since we are discussing the right to life²¹, the obligation, as a mandatory duty of solidarity, has direct relevance in the Italian legal system, by virtue of Article 2 of the Constitution.

However, recent legislative interventions have overlapped different themes and, in an attempt to regulate migration, have disciplined profiles pertaining to search and rescue activities, carried out systematically by foreign-flagged vessels. In particular, Decree - Law No. 1 of 2023, converted with amendments by Law No. 15 of 2023, redefined Article 1, second paragraph, of Decree - Law No. 130 of 2020, converted with amendments by Law No. 173 of 2020. For Article 1, second paragraph, of Decree - Law No. 130 of 2020, for reasons of public security, the Minister of the Interior, in consultation with the Minister of Infrastructure and Transport and the Minister of Defence, after informing the President of the Council of Ministers, may restrict and prohibit transit and stopover in the territorial sea with the exception of military vessels or vessels carrying out a non-governmental service for non-commercial purposes; however, the intervention must be necessary and functional to regulate migratory flows. For the second and third paragraphs, now deleted by Decree - Law No. 1 of 2023, an exception was provided for in the hypothesis of operations communicated to

¹⁷ See Cass. pen. 16 January 2020, no. 6626, in *Giur. it. rep.*, 2020.

¹⁸ Cf. Papanicolopulu, *The duty to rescue at sea, in peacetime and in war: a general overview*, loc. cit., 492 ff.; Del Guercio, *Il caso della “Sea Watch 3” tra obblighi di diritto del mare, diritti umani e tutela dell’infanzia*, in *Dir. um. dir. int.*, 2019, 334 ff., according to whom the duty to rescue is “a well-established obligation of general international law, an expression of the general principle of solidarity at sea that has acquired a customary nature over time”.

¹⁹ See Cass. pen. 16 January 2020, no. 6626, cit. Cf. Zaumer, *Search and rescue of migrants in the Mediterranean Sea between public responsibility and private engagements; international and European Union law perspective*, in *Ord. int. dir. um.*, 2019, 960 ff., according to which the obligation to rescue is provided for by a rule of customary law, codified by the Montego Bay Convention, the SOLAS Convention and the SAR.

²⁰ See Rizzo, *Soccorso in mare di persone in pericolo tra norme consolidate e problematiche ancora aperte*, loc. cit., 33 ff.; Starita, *I doveri di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave pirata*, loc. cit., 5 ff.; Scovazzi, *La tutela della vita umana in mare, con particolare riferimento agli immigrati clandestini verso l’Italia*, loc. cit., 106 ff.

²¹ See Scovazzi, *La tutela della vita umana in mare, con particolare riferimento agli immigrati clandestini verso l’Italia*, loc. cit., 106 ff.

the competent coordination centre and to the flag State; therefore, in such cases, measures restricting entry into the territorial sea could not be adopted.

Article 1 of Decree - Law No. 1 of 2023 reformulated the two aforementioned subparagraphs, with a second *bis*, as well as inserting further articulations of the second subparagraph up to *septies*. According to Article 1, second paragraph *bis*, letter a), it is now possible to restrict or prohibit the entry of a ship that systematically carries out search and rescue operations if it does not operate in accordance with the certificates and documents issued by the competent authorities of the flag State. The rule could be contrary to Directive (EC) No. 16 of 2009, which grants the port State an additional inspection power where there is a danger to health, safety or working conditions on board, and a power to detain until deficiencies preventing safe navigation are rectified. It could therefore be in breach of European Union law to allow entry into the territorial sea only to vessels operating in accordance with the authorisations or ratings issued by the flag State.

Then, according to the aforementioned Decree - Law, vessels engaged in continuous rescues must have taken timely “*steps to inform the persons taken on board of the possibility of applying for international protection*”²² and must have requested, in the immediacy of the event, the assignment of the port of arrival. Once identified, it must be reached without delay and the arrangements must neither create danger nor prevent timely arrival. Limits to the duty to rescue are thus introduced, in violation of international conventions, which enshrine an unconditional and general obligation. A ship is denied disembarkation if it carries too many shipwrecked persons compared to the capacity declared by the certification, if this creates a risk. Only those on safe boats deserve to be rescued?

The same Decree - Law No. 1 of 2023 was criticised by the Council of Europe²³. In particular, it objected that, after each operation, the vessel must reach the assigned port without delay, notwithstanding the fact that this would preclude multiple rescues; thus, intent on landing, ships would be forced to ignore further requests, in violation of the duty enshrined in international conventions, which consider the shipwrecked person as such, without any distinction²⁴. Similarly, the Italian Government’s practice of identifying distant ports, unnecessarily

²² See Article 1 of Decree - Law No. 1 of 2023, converted with amendments by Law No. 15 of 2023.

²³ See the Report prepared by the expert Council on NGO law of the Conference of Ingos of the Council of Europe of 30 January 2023.

²⁴ See the Report prepared by the expert Council on NGO law of the Conference of Ingos of the Council of Europe of 30 January 2023, according to which “*should authorities instruct search and rescue Ngos to proceed immediately to a port, irrespective of whether there are other people in distress at sea in the immediate vicinity, this would contradict the captain’s obligation to render immediate assistance to people in distress, as enshrined in the Un Convention on the law of the sea and the Palermo Protocol against the smuggling of migrants*”.

prolonging suffering²⁵, has been questioned²⁶, especially in case of bad weather conditions, as Italy could redistribute migrants after landing.

The criticism levelled at Italy by the Council of Europe was inevitable; Italy's search for the most appropriate location for shipwrecked persons violates its international obligations with regard to rescue, obligations whose purpose is to safeguard life, so that every phase of the operation and, in particular, the last one, must be functional to that purpose. If, on the one hand, the regulation of the use of ports falls within the scope of administrative activity, on the other hand, the organisation must be consistent with international commitments, all the more so since Italy could well provide for a rational subdivision after landing, with the use of normal means of transport.

In essence, Decree - Law No. 1 of 2023 is objectionable because it postulates selective rescue for the containment of migratory flows and the overlapping distorts the institution and bends it to the regulation of illegal immigration, while maritime law is concerned with the shipwrecked, makes no distinction according to who is rescued and does not set different preconditions if the intervention is in favour of migrants. Thus, while it is desirable that ships intended for continued rescue comply with the protection of safety, it would be serious to allow entry only to those suitable for this activity.

Recently, a question was raised on the constitutionality of Article 1, paragraph 2 *sexties*, of Decree - Law No. 130 of 2020, converted with amendments by Law No. 173 of 2020, as formulated by Decree - Law No. 1 of 2023²⁷. In particular, the dispute concerned a Norwegian-flagged vessel engaged in a continuous search and rescue activity. After carrying out rescue operations in the Mediterranean Sea, the last of which in the Libyan SAR zone, disregarding the instructions of the competent Libyan authority, the master headed for the port of Brindisi, where disembarkation took place. On arrival, the Italian authorities applied the pecuniary administrative sanction provided for by Article 1, paragraph 2 *sexties*, and, automatically, the accessory sanction of administrative detention, since the

²⁵ The issue had already been raised by the Human Rights Commissioner of the Council of Europe, who, in a letter of 26 January 2023 addressed to the Italian Minister of the Interior, stated: *"I also note with concern that, in practice, NGO vessels have been assigned distant places of safety, such as ports in Central and Northern Italy. This prolongs the suffering of people saved at sea and unduly delays the provisions of adequate assistance to meet their basic needs. It unnecessarily exposes the people onboard to the potential dangers of adverse weather conditions. Prolonged stay onboard tends to lead to the rapid deterioration of the health situation of all involved and risks exacerbating the condition of vulnerable individuals onboard"*.

²⁶ Cf. the Report prepared by the expert Council on NGO law of the Conference of Ingos of the Council of Europe of 30 January 2023, according to which *"Decree - Law No. 1 of 2023 has the effect of prohibiting vessels from carrying out more than one rescue mission prior to returning to port. This, coupled with the recent practice of the Italian government of assigning ports far away from the vessels' location (...), means the vessels time at sea carrying out vital search and rescue work is minimised"*.

²⁷ See Trib. Brindisi 10 October 2024, no. 205, ord., in *Giur. it. rep.*, 2024.

master had not complied with the instructions given by the competent Libyan authority.

The Italian judge highlighted the possible conflict between the provision and customary and conventional international law, which imposes a life-saving obligation to rescue at sea. The Libyan State is not a safe port due to the “*inhuman and degrading conditions in the detention centres for migrants*”²⁸. Complying with the order issued by this authority to avoid administrative detention would have entailed a breach of the duty to rescue. The issue has lost its importance following the reformulation of Article 1, paragraph 2 *sexies*, of Decree - Law No. 130 of 2020, converted with amendments by Law No. 173 of 2020, by the recent Decree - Law No. 145 of 2024, converted by Law No. 187 of 2024, which excluded the application of this provision if the rescue is carried out on a continuous basis.

4. The SAR Convention and the Notion of a Safe Port

In accordance with the SAR Convention²⁹, States must identify a specific area of responsibility and the maritime rescue coordination centre that receives news of an emergency must take the first, immediate action, even if the event does not fall within its area and until the competent one intervenes³⁰. The International Maritime Organisation’s Resolution No. 155 (78) of 20 May 2004 amended the SAR Convention. In particular, cooperation between the member States was strengthened so that “*the masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea*”³¹. Occasional rescue has been considered and a balance has been struck between the interest of the rescuing ship in reducing the damage resulting from any prolonged deviation from the original route and its duty, with a strengthening of the coordination of

²⁸ See Cass. 17 February 2024, no. 4557, in *Giur. it. rep.*, 2024.

²⁹ See Chapter 3 of the SAR Convention.

³⁰ Cf. Magnosi, *Operazioni di ricerca e salvataggio in mare e traffico di migranti*, in Aa. Vv., *Immigrazione, marginalizzazione, integrazione*, edited by Amato Mangiameli - Daniele - Di Simone - Turco Bulgherini, Turin, 2018, 175 ff.; Turco Bulgherini, *In mare aperto. Obbligo di soccorso e traffico dei clandestini*, in Aa. Vv., *Immigrazione, marginalizzazione, integrazione*, cit., 140 ff.

³¹ See Article 3 of IMO Resolution No. 155 / 78.

the States involved, which must promptly provide disembarkation, after a safe place is found³².

Further guidance is provided by the Guidelines on the treatment of persons rescued at sea³³, adopted by the International Maritime Organisation. Thus, a port is safe when basic rights are guaranteed and the nearest port is not always safe. Staying on board can also be considered a place of safety, as long as the shipwrecked persons are not exposed to a present danger³⁴.

This concept of a “place of safety” was taken up by Council of Europe Resolution 1821 of 21 June 2011, according to which fundamental rights must be respected in a reliable port³⁵. More generally, for the aforementioned Guidelines, paragraph 3.1.9 of the Annex to the SAR Convention, as amended by Resolution MSC 155 (78), is intended to ensure “*that in every case a place of safety is provided within a reasonable time. It is further intended that the responsibility to provide a place of safety, or to ensure that a place of safety is provided, falls on the Contracting Government / Party responsible for the SAR region in which the survivors were recovered*”³⁶. Finally, the master’s obligation to provide assistance is to be supplemented by that assumed by States to coordinate operations³⁷.

Regulation (EU) No. 656 of 2014 also defines the safe place as one where operations “*are to be concluded and where the safety for the lives of the survivors is not threatened, where basic human needs can be met and transport arrangements (...) to the next or final destination can be determined taking into account the protection of (...) fundamental rights while respecting the principle of non-refoulement*”³⁸. Finally,

³² See Article 3 of IMO Resolution No. 155 / 78, according to which “*the Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that assisted survivors are disembarked from the assisting ship and delivered to a place of safety*”.

³³ See Resolution MSC 167 / 78. See Danisi, *La nozione di “place of safety” e l’applicazione di garanzie procedurali a tutela dell’individuo soccorso in mare*, in *Riv. dir. int.*, 2021, 395 ff.

³⁴ Cf. art. 6.13 of resolution MSC 167 / 78, according to which “*an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship*”.

³⁵ See Pinto De Albuquerque, *I diritti umani in una prospettiva europea: opinioni consenzienti e dissenzienti, 2011 - 2015*, Turin, 2015, 65 ff.; Pizzolante, *Diritto di asilo e nuove esigenze di protezione internazionale nell’Unione europea*, Bari, 2012, 34 ff.; Moschella, *Immigrazione e tutela costituzionale dei diritti fondamentali*, in Aa. Vv., *Immigrazione e condizione giuridica dello straniero*, edited by Moschella - Buscema, Rome, 2016, 13 ff.

³⁶ See the preamble to Resolution MSC 167 / 78.

³⁷ Thus expresses Article 1.2 of Resolution MSC 167 / 78.

³⁸ See Article 2(12) of Regulation (EU) No. 656 of 2014. At the same time, point (a) of the second paragraph of Article 9 of Regulation (EU) No. 656 of 2014, according to which, if, “*in the course of a maritime operation, participating units have reason to believe that they are faced with a situation of uncertainty, alarm or danger to a vessel or any person on board, they shall promptly transmit all available information to the rescue coordination centre competent for the search and rescue region in which the situation has arisen and make themselves available to that rescue coordination centre*”.

Member States participating “*in operations must cooperate with the relevant rescue coordination centre to identify a safe place*” and, once the host State “*has determined it, must ensure that disembarkation takes place quickly and effectively*”³⁹. A combined reading of the different sources shows how the objective is rescue and how transnational cooperation must be integrated with the master’s duty to rescue.

The SAR Convention requires the signatory States to delineate a so-called SAR zone and to establish the maritime rescue coordination centre, which must direct search and rescue operations and coordinate with centres in neighbouring States if the ship to be rescued is moving in different areas. In addition, it may accept coordination if requested to do so by another State and may intervene outside its sphere if it first becomes aware of the alert, pending the moment when the maritime rescue coordination centre of the Country where the danger occurred takes over. At the same time, it may proceed to the assignment of the safe port even if the competence lies with another State, if this is functional to the success of the intervention.

The SAR Convention specifies the provisions of Article 98(2) of the Montego Bay Convention⁴⁰. In essence, both impose an obligation of functional control to safeguard safety and, within the scope of their respective competences, each State must ensure that no danger exists. The public authority does not have as its objective the search for shipwrecked persons and does not perform a preventive service, but a control in accordance with international obligations. Outside of these, nothing can be claimed. Therefore, a distinction must be made between the duty to rescue and the one of vigilance; the former is unconditional, as it is functional to safeguarding life, the latter is limited in its object, because it is defined by the SAR Convention.

5. The SAR Convention and Migrants’ Rights

If, during monitoring, the public authorities become aware of a danger, they must intervene; initiatives are regulated by the SAR Convention, which requires coordination between the coastal States involved, so that their area of intervention is guaranteed. This does not exclude that each Country may take further initiatives if necessary to complete the rescue; in fact, the duty to rescue pertains to both public and private subjects and is considered fulfilled when the

³⁹ See Article 10(1)(c) of Regulation (EU) No. 656 of 2014.

⁴⁰ Article 98(2) of the Montego Bay Convention reads as follows: “*each coastal State shall promote the establishment and permanent operation of an adequate and effective search and rescue service for the protection of maritime safety (...), and when circumstances require, shall co-operate to this end with adjacent States through regional arrangements*”.

shipwrecked persons land in a safe place. The assertion that the SAR Convention envisages “an obligation for States to provide a place of safety insofar as the SAR operation takes place in an area (...) established by them, and on the assumption that this State has coordinated the operation itself, or has accepted the coordination of another State that would be competent”⁴¹ is not acceptable. The regulation of safe port arrangements cannot lead to a breach of the duty to rescue.

Conceived at a time when rescue was occasional and based on reciprocity, the SAR Convention must be reinterpreted in the light of today’s different notion, resulting from the intensification of the migratory phenomenon, so that anyone who is a shipwrecked person must be rescued, regardless of his nationality. To justify the failure to provide a safe port on the basis of the incompetence of the State involved is to interpret the Convention against its spirit. Its purpose is to create international cooperation so that effective intervention is guaranteed, not to favour selective intervention, *i. e.* due only if it is consistent with the planned organisational scheme.

Without prejudice to the detailed regulation of the powers of Countries in their respective areas, it must be established whether, in cases of necessity, the duty to rescue can go so far as to oblige the master to disembark without the authorisation of the competent authority. In many episodes, after having helped migrants in danger and waited in vain for indications of a safe port, ships of non - governmental organisations land without waiting for further instructions, as a last resort to protect the psycho-physical conditions of the shipwrecked, conditions that are often progressively worsening⁴².

6. Conclusions on the Case of the *Sea Watch 3*

The well-known case of the *Sea Watch 3* highlighted the importance of considering the migrant’s rights in the perspective of the duty of rescue. In fact, after collecting fifty-three people in the so-called Libyan SAR zone, the master of the *Sea Watch 3* requested the coordination of operations and the indication of a safe port from the centres of Holland, since the ship was flying that flag, Libya, Italy and Malta. The Libyan coast guard indicated the port of Tripoli. The

⁴¹ See Munari, *Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana*, *loc. cit.*, 354 ff.

⁴² See F. De Marinis, *Il caso Alan Kurdi: tra obblighi internazionali di salvataggio in mare e profili di diritto in mare e profili di diritto penale interno*, in www.adimblog.com, 2019.

master did not comply⁴³, because it was not and is not considered a place of safety and, at the same time, the master excluded those of Malta, because they are far away. Therefore, the vessel headed towards Italian territorial waters, specifically Lampedusa, believing it to be the nearest useful landing place. The master asked the competent authorities in vain for permission to enter territorial waters. Faced with the gradual worsening of the shipwrecked people's psycho-physical conditions, she decided to proceed towards Lampedusa without authorisation. On her own initiative, claiming to be acting in an alleged state of necessity, on the basis of a legal opinion received by e-mail⁴⁴, the master herself entered the port of Lampedusa. A *Guardia di Finanza* motor vessel headed towards the commercial quay, with the intention of preventing docking. The *Sea Watch 3* collided with the *Guardia di Finanza* unit, but the latter managed to slip away and moor nearby. The master of the *Sea Watch 3* was subjected to a precautionary measure restricting her personal liberty, because she allegedly committed the crime of resisting a public official.

In addition to the Tribunal of Agrigento's decision⁴⁵, the Italian Supreme Court⁴⁶ recognised the existence of the cause of justification for the performance of a duty; in fact, rescue "*does not end with the act of saving shipwrecked persons from the danger of being lost at sea, but entails the accessory and consequent obligation to disembark them in a safe place*"⁴⁷. The solution is consistent with the reconstruction of the duty as functional to safeguarding life, so that its fulfilment cannot be hindered by either private individuals or States, except for the master's obligation to comply with legitimate orders received from the coordinating authorities⁴⁸. Although the issue does not appear in either of the two decisions, justification can be putative and, in the present case, there appears to have been legal advice provided by e-mail.

The thesis that denies the operation of the cause of justification of the fulfilment of a duty is not convincing, because "*the obligation to render assistance*" would not imply "*the further (...) obligation to ensure (...) disembarkation in a place*

⁴³ Cf. Danisi, *La nozione di "place of safety" e l'applicazione di garanzie procedurali a tutela dell'individuo soccorso in mare*, loc. cit., 424 ff., according to which, "*if he does not agree with the assessment of the Pos made by the Maritime rescue coordination centre (...), the captain seems to be able to exempt himself from observing the instructions received*".

⁴⁴ See Trib. Agrigento 2 July 2019, in *Dir. mar.*, 2020, 518 ff.

⁴⁵ See Trib. Agrigento 2 July 2019, *cit.*

⁴⁶ Cf. Cass. pen. 16 January 2020, no. 6626, *cit.*

⁴⁷ Cf. Cass. pen. 16 January 2020, no. 6626, *cit.*

⁴⁸ See Starita, *Il dovere di soccorso in mare e il diritto di obbedire al diritto (internazionale) del comandante della nave pirata*, loc. cit., 42.

of safety”⁴⁹ and such an indication would be up to the States, the sole recipients of the provisions of the SAR Convention. This would amount to a duty of the master subject to “a sort of merely contingent condition precedent to the prior identification of a place of safety by the States”⁵⁰. Certainly, the master must await instructions from the public authority, the only one empowered to assign a place of safety, and cannot decide autonomously where to disembark. However, if there is a progressive deterioration of the psycho-physical conditions of the persons on board and the lack of initiative of the administrative structure, if it is incapable of taking a decision, it is necessary to proceed without authorisation. This is an extreme remedy, to which the master may resort when faced with obstructive conduct. One cannot transform the request for the assignment of a safe port regulated by the SAR Convention into an unconditional power of choice of port by the rescuer⁵¹. However, the obligation incumbent on him must be fully realised, as case law has rightly pointed out⁵².

The conduct of the *Sea Watch 3* master was said to be a state of necessity⁵³. In this case, the situation was not involuntary and, therefore, the state of necessity could not have been discussed under Italian law. Like many non-governmental organisations, *Sea Watch* employs unseaworthy vessels for continuous surveillance and, above all, the people rescued originally embarked in the knowledge of the danger they were creating. The presence of a conspicuous number of shipwrecked persons, forced to share with the crew the limited spaces and the use of toilets, prevents the ship from being considered a safe place⁵⁴. Therefore, without invoking the state of necessity, if an offence is configured in the abstract, the cause of justification of the performance of a duty can be invoked, precisely in relation to the obligation that exists for each phase of the operation, *a fortiori* for the last⁵⁵.

For a part of the literature⁵⁶, in the hypothesis of the *Sea Watch 3*, neither the justification of the state of necessity nor that of the fulfilment of a duty would have existed. The master would have had to ascertain “*that even for the*

⁴⁹ Cf. Rizzo, *Soccorso in mare di persone in pericolo tra norme consolidate e problematiche ancora aperte*, cit.

⁵⁰ Ibid.

⁵¹ See P. Rossi, *Politica dei “porti chiusi” e diritto internazionale: il caso della Sea Watch 3*, in *Oss. cost.*, 2019, 66 ff.; Goodwin - Gill - McAdam, *The refugee in international law*, Oxford, 2007, 3rd ed., 215 ff.

⁵² Cf. Cass. pen. 16 January 2020, no. 6626, cit.

⁵³ Cf. Rizzo, *Soccorso in mare di persone in pericolo tra norme consolidate e problematiche ancora aperte*, cit.

⁵⁴ Cf. Article 6.13 of Resolution MSC 167 / 78, according to which a ship with adequate accommodation can be considered as “a temporary place of safety”.

⁵⁵ Cf. Cass. pen. 16 January 2020, no. 6626, cit.

⁵⁶ See Munari, *Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana*, loc. cit., 359 ff.

authorities of the flag State Libya” would not have been suitable, “*having obtained confirmation, request that*” contacts be “*activated with the corresponding authorities of other States*” and, failing that, “*head for the ports of his State (...) obliged to let her enter*”⁵⁷. The argument cannot be accepted; the Country not involved on the basis of the SAR Convention is obliged to act once it becomes aware of the danger. The Convention itself regulates the powers of intervention, but does not exclude further obligations, if they are functional to the rescue. This duty is unconditional, as it is aimed at safeguarding life; therefore, not only the master, but also the State must cooperate so that the shipwrecked persons are rescued. At the same time, the ship must turn to the coastal Country next to the event, because its objective is to ensure an adequate solution to the emergency in a short time.

Moreover, when deciding on appeals against decrees not upholding the opposition to the denial of recognition of international protection, thus in a different matter, the Italian Supreme Court has repeatedly pointed out that Libya does not protect fundamental rights⁵⁸. Therefore, although not obliged to do so on the basis of the SAR Convention and in the *inertia* of neighbouring coastal Countries, Italy should have intervened; it could not have avoided waiting for the moment when the master had carried out a check with his flag State. According to a now constant jurisprudential orientation⁵⁹, Italy does not consider Libya to be a place of effective protection of personal rights and, regardless of the different subjects, this conclusion must be relevant for the purposes of applying the SAR Convention, in the name of the overall coherence of the system.

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⁵⁷ See Munari, *Migrazioni, SAR, ruolo e responsabilità delle ONG, degli Stati e dei funzionari delle competenti amministrazioni nella recente giurisprudenza italiana*, loc. cit., 359 ff.

⁵⁸ See Cass. 1 June 2023, no. 15597, in *Giur. it. rep.*, 2023; Cass. 6 March 2023, no. 6658, *ibid.*, 2023; Cass. 10 November 2022, no. 33218, *ibid.*, 2022.

⁵⁹ See Cass. 1 June 2023, no. 15597, *cit.*; Cass. 6 March 2023, no. 6658, *cit.*; Cass. 10 November 2022, no. 33218, *cit.*

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NEW CHALLENGES FOR ITALIAN PORTS IN EUROPEAN MARITIME SPACE

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According to the new Regulation (EU) 2024/1679 of the European Parliament and of the Council of June 13, 2024, on Union guidelines for the development of the trans-European transport network, maritime ports “play an important role as multimodal nodes that serve not only as transport hubs but also as gateways for trade, industrial clusters, military mobility, and energy hubs.”

This act highlights that maritime ports can also “contribute to accelerating the rollout of renewable energy through the deployment of offshore wind installations, the production of green hydrogen, and the transport and storage of liquefied natural gas.”

Recognizing the importance of European maritime ports, the European Union also aims to create a sustainable, smart, seamless, and resilient European Maritime Space, where the land-side infrastructure network is closely integrated with the maritime dimension of the trans-European transport network.

This new concept of the European Maritime Space focuses on developing maritime ports and their hinterland connections to ensure efficient and sustainable integration with other modes of transport.

Within this framework, it is interesting to observe how Italian legislation has redefined the concept of ports, moving beyond the traditional state-owned asset model to implement a new vision of infrastructure.

Sustainable maritime transport policies are also crucial at the national level, emphasizing the functional role of public governance in shaping port management models and objectives. This appears to be the new social function of maritime infrastructure: to create a green transport system and/or resilient infrastructure in the interest of today’s users and future generations.

1. The Evolving Role of Italian Maritime Infrastructure

In order to understand how Italian ports are currently integrated into the new concept of the European maritime space, it is first necessary to provide a brief historical and regulatory overview of the port. The notion of the port, in relation to the subject of this analysis, has ‘evolved’ from being considered a

public good in a static sense to being recognized as infrastructure, a network, a system, and ultimately an integral part of the European maritime space.

1.1. From Civil Code to the Law n.84 of 1994

The port is classified as part of the so-called necessary state property.¹

The Civil Code, adopted in 1942, classifies ports as part of the state property necessarily belonging to the State and entrusted to the care of a public authority (maritime), the only entity capable of ensuring the so-called public uses of the sea², for which ports and other maritime assets are designated.

The nature of assets intended for navigation thus leads to their classification as necessary state property, which the public authority is obliged to safeguard and manage.

This entails the delegation of policing and administrative functions to the competent authority for the management of public port services, aimed at fostering maritime communications.

Within the Civil Code, the key element is the notion of public ownership, emphasized by the legal regime governing state property. Conversely, in the Navigation Code, adopted also in 1942, the regulation of port property already adopts a functional approach: maritime property is conceived as a set of assets whose use must be regulated by a public authority to meet the demands of public uses of the sea.

The use of maritime public property for navigation, as regulated in Title II of the first book of the Navigation Code, further defines these assets. Unless reserved for military defence and security purposes, they are *ex lege* intended for the exercise of a specific economic and productive activity: free navigation.

¹ On the subject of maritime public domain, see, among many others: G. PESCATORE, *On the Regulation of the Maritime Public Domain*, in *Studies for the Codification of Navigation Law*, III, Rome, 1941, p. 870. For an overview of the debate, see F. MORANDI, *The Protection of the Sea as a Public Asset*, Milan, 1998, p. 128 et seq.; D. GAETA, *The Maritime Public Domain*, Milan, 1965; F. BENVENUTI, *The Maritime Public Domain Between Past and Future*, in *Riv. Dir. Nav.*, II, 1965, p. 154; L. ACQUARONE, *Maritime Public Domain and Ports*, in *Dir. Mar.*, 1983, p. 81 et seq.; M. CASANOVA, *Maritime Public Domain and Local Authorities*, Milan, 1986; L. CORBINO, *The Maritime Public Domain*, Milan, 1990; ID., *Coastal Public Domain and Port Public Domain: Current Concession System and Prospects for Reform*, in *Studies in Honor of Romanelli*, Milan, 1997, p. 377; C. ANGELONE – G. SILINGARDI, *The Maritime Public Domain*, Milan, 1999; M. CASANOVA, *The Maritime Public Domain*, in *Short Treatise on Maritime Law*, edited by A. ANTONINI, I, Milan, 2007, p. 201 et seq.; R. TRANQUILLI LEALI, *Tourist Ports (Structure and Functions)*, Milan, 1996, p. 29 et seq.; L. ANCIS, *New Qualification Perspectives of the Beach, Lagoons, and Basins of Salt or Brackish Water*, in L. TULLIO – M. DEIANA (eds.), *Maritime Public Domain and Ports*, Cagliari, 2014, p. 9 et seq.

² P. D'ALBERTON, *Current Unsuitability of the Asset for Public Uses of the Sea: Principle or Limitation in Recent Case Law?* (Commentary on Cass. Sez. II, June 6, 2012, No. 9118), in *Dir. mar.*, 2013, 2, pp. 451–453.

However, the special regime established by the Navigation Code grants broad discretionary powers to the competent authority, not only in identifying state-owned areas deemed suitable for public uses of the sea but also in determining what constitutes such public uses, as they are not explicitly defined by the legislator.

With the advent of the Constitution in 1948, private property was integrated into the social function referred to in Article 42. Simultaneously, the public ownership of maritime property gradually began to be reinterpreted from the perspective of broader collective utilization, moving beyond strict requirements related to maritime circulation and considering other public interests such as leisure, tourism, and recreation.

Greater emphasis was placed on the planning function of public use of the sea, understood as coastal planning authority, entrusted to the Maritime Authority.

The management of state-owned ports, centralized within the competent ministry, pursued the objective of developing maritime communications in accordance with the prevailing types of traffic at each port and within established models of public service management.

Thus, it was a central state administration that directly managed its assets of specific interest to transport needs, either through state-owned enterprises or public economic entities.

However, the direct and indirect administration of navigation—concentrating port policing, infrastructure development, and management within central and local ministerial bodies, as well as in monopolies or related services—soon proved inadequate in the face of European liberalization pressures. The rapid changes and radical innovations introduced in the second half of the twentieth century, including advancements in vessel technology and new techniques for transporting goods and passengers by sea, further underscored the need for reform.³

³ Regarding Law No. 84/94 in its pre-reform version, see, among many others, F. BERLINGIERI, *Notes on Law No. 84 of January 28, 1994, on the Reorganization of Port Legislation*, in *Dir. mar.*, 1994, p. 238 et seq.; F. D'ANIELLO, *Outlines of the New Italian Port System*, in *Studies for Lefebvre d'Ovidio*, 1995, p. 417 et seq.; R. LONGOBARDI, *Maritime Ports*, Milan, 1997; G. FALZEA, *Ports and Port Functions*, Milan, 1998; A. XERRI, *The Legal System of Italian Ports*, Milan, 1998; G. TACCOGNA, *Port Operations in the New Public Economic Law*, Milan, 2000; E. MINALE COSTA, *Labor Law in Ports: Port Labor Between Legal and Contractual Regulation*, Turin, 2000; D. MARESCA, *Port Regulation Between Domestic and EU Law*, Turin, 2001; G. VERMIGLIO, *Port Authority*, in *Enc. Dir.*, Suppl. VI, 2002, p. 192 et seq.; A. ROMAGNOLI, *Port Authority: Structural and Functional Profiles*, Bologna, 2003; A. CITRIGNO, *Port Authority: Organizational and Managerial Profiles*, Milan, 2003; F. MANGANARO, *The Port: From Public Domain Asset to Enterprise*, in *Dir. dell'ec.*, 2008, pp. 257–275; G. ACQUARONE, *The Regulatory Plan of Port Authorities*, Milan, 2009.

This, in broad terms, represents the archetype of navigation administration that remained in place until the enactment of Law No. 84/94, which marked the beginning of a gradual process of reform and reorganization of port legislation. The legislator's perspective was expanded with the introduction of Law No. 84/94.⁴

In Article 4, by classifying ports, the law emphasized their economic significance at the international, national, and regional levels. Consequently, it introduced a European-inspired principle that separated administrative activities from asset management and the entrepreneurial provision of services. The Port Authority, established under this law, was assigned functions of governance, planning, coordination, promotion, and oversight of port operations and other commercial activities conducted within the port area, including risk management and safety measures associated with these activities.

Fundamentally, this law reorganized the state administration of navigation, designating the Maritime Authorities as the entities responsible for overseeing the port districts into which the Republic's coastline is divided (zones, compartments, and districts, as outlined in Article 16 of the Navigation Code). It introduced innovations in administrative structures but limited these to only twenty-four ports, which had previously been managed by port authorities, consortia, autonomous entities, and companies operating mechanical means. The law thus formally introduced the new entity of the Port Authority.

For classification purposes, the legal definition of a port encompasses not only its structural unity but also the functional articulation of its specific areas (Article 4, paragraph 1, Law No. 84/94). Consequently, ports and their designated areas can fall into different categories.

Beyond the broad distinction between ports and specific military port areas, the classification of remaining ports and second-category port areas follows a three-tiered system based on their economic importance - international, national, regional - assessed according to their commercial, passenger, industrial, oil, fishing, tourism, and recreational functions.

This framework underscores the concept of the port as a complex unit, not only in terms of its property structure but also concerning the economic

⁴ The reference is to Law No. 84 of January 28, 1994, *Reorganization of Port Legislation*, published in *Official Gazette No. 28 of February 4, 1994 – Ordinary Supplement No. 21*. Article 4 of Law No. 84/94, in its original version (no longer in force), provided as follows: (Port Classification) National maritime ports are classified into the following categories and classes: a) Category I: ports or specific port areas designated for military defense and national security; b) Category II, Class I: ports or specific port areas of international economic relevance; c) Category II, Class II: ports or specific port areas of national economic relevance; d) Category II, Class III: ports or specific port areas of regional and interregional economic relevance.

significance of the functions it performs as a whole and within its individual operational areas.

To ensure coordination and harmonization of policies and multilevel regulations, and to achieve the goal of integrating the port as a key node within both linear infrastructure networks and the surrounding industrial and urban structures, Law No. 84/94 established an innovative governance entity.

This new structure opened port management to the participation of representatives of the workforce, entrepreneurs, and service operators active in the port, ensuring a balanced distribution of decision-making power among the State, local authorities, and the productive sector.

The reorganization of port administration and activities was not solely aimed at adapting infrastructure to facilitate the development of multimodal corridors, as envisioned by European transport network policies. It also sought to contribute to the broader restructuring of maritime service administration, in accordance with the principles of subsidiarity and participation, free competition, and the regulation of liberalization and privatization processes in emerging markets at the European “constitutional” level⁵.

This model, by distinguishing the exercise of public functions related to the planning and regulation of port activities from the economic and commercial management of infrastructure and services, underscores the distinct nature of the Port Authority in comparison to private ports (where the asset is removed from the public domain and transferred to private ownership) or tool ports (where the public entity operates as a public or private joint-stock company, managing infrastructure development directly or outsourcing the operation of commercial services).⁶

⁵ The liberalization of port operations and services—public services with a predominantly economic nature—has entailed a transition from monopolistic management to market regulation in compliance with competition rules. This strategic choice has affected the entire sector of public services of economic interest, which were previously managed under a public monopoly regime.

On this topic, see, among others: E. BRUTI LIBERATI, *The Independent Regulation of Markets: Technique, Politics, and Democracy*, Torino, 2019; ID., *Public Services and Services of General Economic Interest in the Reflections of Domenico Sorace*, in *Rivista Italiana di Diritto Pubblico Comunitario*, 5/2020; M. CALCAGNILE, *Monopolies and Exclusive Rights in Services of General Economic Interest*, in *Giornale di Diritto Amministrativo*, 5, 2017, p. 634; L. DELLI PRISCOLI, *The Limit of Social Utility in Liberalization Processes*, in *Giurisprudenza Commerciale*, 2014, 2, p. 377; G. NAPOLITANO, *Liberalization and Good Administration*, in *Giornale di Diritto Amministrativo*, 2015, 3, p. 293 ff.; L. BERTONAZZI, R. VILLATA, *Services of General Economic Interest*, in G. Greco and M.P. Chiti (eds.), *Treatise on European Administrative Law*, IV, Milano, 2007, p. 1791 ff.; F. CINTIOLI, *Public Services and Competition: Services of General Economic Interest, Promotion, and Protection of Competition*, in *Il Diritto dell'Unione Europea*, 2006, p. 453 ff.

⁶ For an analysis of port management models, see, among others: S. CARBONE, F. MUNARI, *Italian Ports and Europe*, Milano, 2019.

This organizational model - commonly referred to as the landlord port - preserves public ownership and governance of infrastructure while liberalizing commercial services and economic activities.

In addition to the Maritime Authority's duty to manage the maritime public domain in order to guarantee its use for public purposes, Law No. 84/94 assigned to the twenty-four ports designated as the headquarters of a Port Authority the task of structurally and functionally transforming port assets. Ports would no longer serve merely as locations for loading, unloading, handling, and storage; instead, they would become multipurpose terminals and passenger hubs, integrated as key nodes within a multimodal transport corridor.

As essential nodes facilitating the continuous flow of goods and passengers (including accompanied vehicles) without breaking bulk, ports were envisioned as integral components of an organized and evolving infrastructure network.

This objective is clearly reflected in the regulatory framework concerning the spatial "design" of port areas, particularly in the original text of Article 5 of Law No. 84/94, titled *Planning and Execution of Works. Port Urban Development Plan*. This provision explicitly states that the characteristics and functional designation of the port and its specific areas are defined by the port urban planning instrument, which establishes the boundaries and overall layout of the port, including areas designated for industrial production, shipbuilding, and road and rail infrastructure."⁷

The modern concept of the port, as state property intended for public maritime uses, encompasses not only structures and equipment but also *hinterland* areas, all of which are functionally interrelated. These elements legally define the port as a system subject to a specific regulatory framework, requiring spatial planning that integrates linear infrastructures (roads and railways) with maritime transport, production zones, and urban areas.

Port infrastructure is thus the result of a coordinated planning and programming effort, managed through the interaction of its various components.

⁷ In its original 1994 version, Article 5 of Law No. 84/94 provided that: "In ports falling under Category II, Classes I, II, and III, with the exception of those performing the functions referred to in Article 4, paragraph 3, letter e), the scope and overall layout of the port - including areas designated for industrial production, shipbuilding activities, and road and rail infrastructure - shall be respectively delimited and outlined by the port master plan, which also determines the characteristics and functional designation of the relevant areas. The provisions of the port master plan must not conflict with the applicable urban planning instruments."

Accordingly, the scope and overall layout of the port serve as the fundamental reference framework for the authority tasked with planning port territory and programming its development - a function entrusted to the newly established Port Authorities⁸.

⁸ On the legal nature of this entity, there was a jurisprudential conflict. In particular, the Civil Court of Cassation, Labor Section, ruling of 14/10/2000, No. 13729, in *Giust. civ. Mass.* 2000, 2142, held that “*The Port Authorities referred to in Law No. 84 of 1994 fall under the category of public economic entities, with the consequence that this qualification affects not only the economic and organizational structure of the entity, but also the substantive and procedural regime of the employment relationships of the staff.*” In contrast, the Council of State, Section II, ruling of 25/07/2008, No. 2361, in *Riv. giur. edilizia* 2009, 1, I, 293, stated that “*as to the legal nature of the Port Authorities, while it is not possible to refer them to the traditional figure of the public entrepreneur, i.e., a structure having characteristics that allow for its immediate and easy classification as an enterprise according to the classical notion of a public economic entity, it cannot be affirmed that the Port Authorities are public administrations in the strictly subjective and objective sense, as they are exclusively endowed with public powers of regulation or provision of ‘administrative’ services and activities to meet general, non-industrial, non-commercial interests, according to the European terminology referring to public law entities; essentially, however, they are entities that certainly pursue the satisfaction of ‘industrial and commercial needs,’ such as, for example: direction, planning, coordination, promotion, and control of port operations and other commercial and industrial activities conducted in ports, regular and extraordinary maintenance of common areas within the port, assignment and control of activities aimed at the provision of services of general interest to port users for a fee, which are neither identical nor strictly related to port operations. Therefore, Port Authorities are entities that, while not possessing the classical formal requirements of public economic entities (acting for profit, pursuing exclusively economic purposes, i.e., operating on the basis of economic efficiency, being subject to special bankruptcy procedures, etc.), nonetheless have a strong economic connotation that in many respects does not differ from that of public economic entities.*” More recent decisions in administrative jurisprudence have consolidated the approach that “*The Port Authority, due to the absolute predominance of the public duties entrusted to it by law and the manner in which it pursues them, is a public non-economic entity.*” Thus, T.A.R. Lecce (Puglia), Section I, ruling of 26/06/2012, No. 1138, in *Diritto dei trasporti* 2013, 3, 960. Despite the subsequent legislative amendment in 2016 that expressly qualified this entity as non-economic, the most recent ruling, the Tribunal of European Union, (Extended Tenth Section), of 20 December 2023, states that “*The fact that an entity possesses, for the exercise of part of its activities, prerogatives of public powers does not, by itself, prevent it from being classified as a business insofar as it engages in other economic activities (see, in this sense, rulings of 24 October 2002, *Aéroports de Paris/Commission*, C 82/01 P, EU:C:2002:617, paragraphs 74 and 75, and of 12 July 2012, *Compass-Datenbank*, C 138/11, EU:C:2012:449, paragraph 37). To the extent that a public entity engages in an economic activity that can be dissociated from the exercise of its public powers, in relation to such activity, that entity acts as a business (see judgments of 7 November 2019, *Aanbestedingskalender and others/Commission*, C 687/17 P, unpublished, EU:C:2019:932, paragraph 18, and of 30 April 2019, *UPF/Commission*, T 747/17, EU:T:2019:271, paragraph 82). Therefore, in the matter of State aid, the legal status of an entity under national law is irrelevant to its qualification as a business. Even an organ that is part of the state administration and shares its legal personality may be qualified as a business (see, in this sense, judgment of 16 June 1987, *Commission/Italy*, 118/85, EU:C:1987:283, paragraph 13). Furthermore, the fact that an entity cannot go bankrupt, due to, for example, an unlimited state guarantee, does not deprive it of the business qualification. Similarly, the fact that the provision of goods or services is made without profit motive does not preclude such operations on the market from being considered economic activities, once this offer competes with that of other operators pursuing a profit motive (see judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C 74/16, EU:C:2017:496, paragraph 46 and case law cited therein).”*

1.2. The European Transport Network in Regulation no. 1315/2013

Having established these premises, we now proceed to analyze the concept of the port as an infrastructure within a network system, in accordance with the framework established by Regulation No. 1315/2013⁹ for the development of the trans-European transport network, and subsequently reaffirmed by the new European Regulation No. 1679/2024, which repeals and replaces the former¹⁰.

Historically, the relationship between urban planning and port infrastructure was an indirect outcome of coordination between two levels of territorial governance: the alignment of municipal and port development plans.

With the adoption of the Constitution, which recognizes local autonomy and promotes administrative decentralization, and later with the Treaty of Rome, which classified transport as a shared competence between Member States and the European Community in the context of the common market, governance levels multiplied, making the system increasingly complex.

The Maastricht Treaty further reinforced the legal significance of maritime communications, extending their role from that of urban port hubs and port-city infrastructures to components of a broader maritime infrastructure network within the trans-European transport system¹¹.

The approach to maritime communications has thus evolved from a merely functional perspective to one centered on the effective realization of European citizens' right to mobility, encompassing not only ports and point-to-point shipping routes but also the connectivity of a global transport network¹².

The planning of a comprehensive transport infrastructure network aligned with the political imperative to ensure territorial cohesion within an expanding

⁹ Regulation (EU) No. 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network, repealing Decision No. 661/2010/EU, published in the *Official Journal of the European Union*, L 348/1. This regulation was recently repealed and replaced by Regulation (EU) 2024/1679 of the European Parliament and of the Council of 13 June 2024 on Union guidelines for the development of the trans-European transport network, published in the *O.J.E.U.* on 28 June 2024.

¹⁰ Regulation (EU) 2024/1679 of the European Parliament and the Council of June 13, 2024, on Union guidelines for the development of the trans-European transport network, has amended Regulation (EU) 2021/1153 and Regulation (EU) No. 913/2010, while repealing Regulation (EU) No. 1315/2013, which had previously defined the guidelines for the development of the trans-European transport network.

¹¹ The Maastricht Treaty of 1991 assigned to the European Union the task of developing a comprehensive plan for major trans-European infrastructures aimed at enhancing cohesion and development. This plan was designed at the national level, implemented with the participation of local government authorities, and open to private capital within the global market.

¹² Decision No. 1692/96/EC of the European Parliament and of the Council, later reiterated in Decision No. 661/2010/EU, was repealed by Regulation No. 1315/2013, which has now been abrogated and replaced by Regulation No. 1679/2024.

European Union, guaranteeing all citizens the right to free movement across the European area.

The evolution of the maritime transport market, along with the expansion of the blue economy, has been driven by several key factors: the widespread adoption of containers as intermodal transport units for long-distance maritime freight; the increasing importance of RO-RO and RO-Pax ferries for short-sea shipping; and the growing economic significance of yachting and cruise tourism. These developments have highlighted the emergence of legally relevant interests that extend beyond traditional maritime transport concerns.

At the European level, the EU guidelines for the TEN-T project specify that the trans-European network includes not only *transport infrastructure* but also *traffic management systems, positioning, and navigation systems*.¹³

Regulation No. 1315/2013 - now replaced by the new 2024 regulation - provided the legislative framework guiding the European Union's infrastructure and transport policy, defining and listing the network's key components: roads, railways, inland waterways (linear infrastructure), seaports and inland ports, airports, and other interconnection points (infrastructure nodes)¹⁴.

The port is thus conceived as a system of infrastructures essential for transport operations within the port area, along with *equipment related to infrastructure*, which may include systems for traffic management and cargo handling, mechanisms for mitigating environmental impacts, facilities for the use of alternative fuels, and infrastructure ensuring year-round navigability - such as breakwaters and hydrogeological research equipment for dredging, maintenance, and port protection.

The regulation initially included among its infrastructure networks the so-called *motorways of the sea* (which have since been removed from the latest

¹³ For a commentary, see A. MARINO, *Maritime Infrastructure and the Port System in the Planning of TEN-T Networks: The Port System Authority*, in *Rivista del Diritto della Navigazione*, 2020, Issue 1, pp. 23–54.

¹⁴ This concept, already introduced in the 2013 Regulation, has now been further reinforced in the new 2024 Regulation. Recital 55 of the latter states: “Short sea shipping can make a substantial contribution to the decarbonisation of transport by carrying more freight and passengers by sea, particularly to reduce road congestion within the Union and to improve accessibility for peripheral and island regions and Member States. However, better integration of short sea shipping links, which constitute the maritime dimension of the trans-European transport network, with the land network is needed, along with a greater emphasis on the entire transport and logistics chain, both seaward and inland. The new comprehensive concept of the European Maritime Space should be promoted by establishing or enhancing short sea shipping routes and by developing seaports and their hinterland connections in a way that ensures efficient and sustainable integration with other modes of transport. Furthermore, this new concept should promote sustainable short sea shipping connections with the objective of concentrating freight flows on maritime logistics routes to improve existing maritime links or establish new, profitable, regular, and frequent maritime connections.”

legal text) as well as maritime multimodal infrastructures¹⁵. These networks are not concerned with terminal structures in their entirety (such as freight hubs, logistics platforms, or passenger terminals) but rather with interconnecting transport networks.

The socio-economic development of maritime connectivity in Europe and its Member States is largely shaped by the adaptation of transport networks to the logistical demands of multimodal freight transport for long-distance navigation. The *motorways of the sea* alone account for 75% of all short-sea shipping traffic between ports within the global network.

In this context, ensuring port connectivity to the global transport network is particularly crucial for essential maritime links between islands and ultra-peripheral regions. The integration of road and rail networks, where available, allows short-sea shipping to leverage multimodal logistics, combining land and sea transport through the use of ferries, RO-RO, and RO-Pax vessels.

Accordingly, the planning of the European transport infrastructure network evolves in line with innovations in integrated logistics systems, pursuing both the strategic objective of enhancing economic competitiveness and the social goal of ensuring territorial cohesion—particularly in maritime connections with peripheral and ultra-peripheral islands.

The dual imperatives of *economic competitiveness* and a *minimum service guarantee* for maritime links serve as the guiding principles for European policy and national interventions in infrastructure networks, ensuring the necessary adaptations to the logistics framework of the integrated transport system.

2. The Port System Management Models

Within this framework, Law No. 124 of August 7, 2015, which included, among other provisions, a delegation to the Government for the reorganization, rationalization, and simplification of the regulations governing the Port Authorities (as established by Law No. 84/94), aimed at creating a structured port system. The reform sought to redesign its governance with the objective of optimizing the logistics function at the national level, integrating customs and administrative procedures related to ports.

¹⁵ Article 21 of Regulation No. 1315/2013 defined the “motorways of the sea” as “*the maritime dimension of the trans-European transport networks (...). The motorways of the sea consist of short sea shipping routes, ports, related maritime equipment and infrastructure, as well as facilities, including simplified administrative formalities enabling short sea shipping or sea-river services between at least two ports, including connections with the hinterland.*” However, this concept has been removed from the new 2024 Regulation, which, as mentioned, replaces it with the concept of the *European Single Maritime Space*.

As part of this organizational restructuring, a specific reform introduced the new entity of the Port System Authority, into which the ports previously governed by the abolished Port Authorities, along with other minor ports, were incorporated.

The primary directive criterion established by the enabling law, concerning the number and identification of Port System Authorities, served as the focal point guiding the intervention of the delegated legislator. However, the reform was not limited to a mere reduction in the number of existing Port Authorities - some of which were already under special administration - but rather pursued broader objectives.

As previously mentioned, the delegation to reorganize the Port Authorities was part of the wider reform of Public Administration, known as the “Madia Reform.”¹⁶

The legal framework governing the port system and its activities, established in 1994 on the premise of granting broader autonomy to Port Authorities - bordering on independence from the port-city relationship - required a reassessment in light of the evolving European transport policy. This policy increasingly viewed ports as integral components of maritime infrastructure, serving as strategic links between maritime and land-based transport within a unified multimodal system. Consequently, the reform aimed to curtail the autonomy of Port Authorities while reinforcing the central coordination role of the national government.

¹⁶ As a consequence of delays in the implementation of the country’s infrastructure development programs, the legislator enacted Decree-Law No. 133/2014 (the so-called *Sblocca Italia*), which was converted into Law No. 164 of November 11, 2014, titled *Urgent Measures for the Reopening of Construction Sites*. Article 29, paragraph 1, of this law delegated the Government to draft a Strategic Plan for Ports and Logistics. The plan was submitted to Parliament on August 5, 2015, and subsequently approved by Decree of the President of the Council of Ministers (DPCM) on August 26, 2015. Two days later, Law No. 124 of August 7, 2015, was enacted, delegating powers to the Government in the field of administrative reorganization. Specifically, Article 8 of this law granted the Government the authority to issue a delegated decree aimed at the reorganization, rationalization, and simplification of Law No. 84/94. The Strategic Plan for Ports and Logistics serves as the sector’s strategic planning instrument, designed to enhance the overall competitiveness of the port and logistics system, facilitate traffic growth, promote intermodality in freight transport, and reform port governance.

The most evident innovations introduced by Legislative Decree No. 169/2016¹⁷, include the reduction in the number of Port Authorities and the expansion of the territorial jurisdiction of the newly established Port System Authorities from individual ports to broader port systems. However, these were not necessarily the most significant changes.

The objectives and functions assigned to the newly constituted Port System Authorities remained largely consistent with those of the abolished Port Authorities. Nonetheless, the reform explicitly recognized the regulatory function of the Port System Authorities and strengthened the role of its President. A fundamental shift in the governance structure emerged: the territorial reference point was no longer the single port-city jurisdiction of an individual Port Authority but rather the broader, more complex territorial

¹⁷ Legislative Decree No. 169 of August 4, 2016, titled *Reorganization, Rationalization, and Simplification of Law No. 84 of January 28, 1994*, was issued in implementation of Article 8 of the Delegation Law No. 124 of August 7, 2015. This decree was later supplemented by Legislative Decree No. 232 of December 13, 2017, titled *Supplementary and Corrective Provisions to Legislative Decree No. 169 of August 4, 2016*, and by Law No. 136 of December 17, 2018, which converted Decree-Law No. 119 of October 23, 2018, titled *Urgent Provisions on Tax and Financial Matters*. Article 23-bis of this law established the Port System Authority of the Strait.

On the subject of port reform from Law No. 84/94 as amended by Legislative Decree No. 169/2016, see, among the most recent writings: E. VERMIGLIO, *The Port System Authority: Legal Nature of the Entity and Qualification of Its Activities in Light of EU Positions on Italian Port Taxation*, in *Eurojus*, 4/2022; C. MELLEA, *The Legal and Tax Framework of Port Dues*, in *Il Diritto Marittimo*, 4/2021, pp. 714–735; A. LAZZARO, *Port Authority and Public Service Concession*, in *Il Diritto Marittimo*, 4/2021, pp. 866–880; A. PANARELLA, *Further Considerations on the Legal Classification of Public Entities as Enterprises in EU Law: Reflections on the Recent Positions of the European Commission on Italian Port System Authorities*, in *Il Diritto dell'Economia*, 3/2021, pp. 535–558; D. MARESCA, *Is the Port System Authority a Public Administration or an Enterprise? Brief Notes on the Recent SA (38399) 2018/E Procedure of the European Commission*, in *Il Diritto Marittimo*, 2/2020, pp. 309–327; F. MUNARI, *The Reform of Law No. 84/94: Initial Reflections*, in *Diritto Marittimo*, 2/2017, pp. 581–589; U. LA TORRE, *Technical-Nautical Services After the Law Establishing the Port System Authority*, in *Diritto della Navigazione*, 2/2017, p. 449; M. RAGUSA, *A New Legal Framework for Italian Port Operators—Or Perhaps Two? The Diverging Approaches Between Legislative Decree No. 169 of 2016 and Regulation (EU) No. 2017/352*, in *Diritto Sociale*, 2/2017, p. 223; M. BRIGNARDELLO, *The Regulation of Port Operations and Specialized Port Services Under Law No. 84/94: Reasons for a Missed Reform*, in *Rivista di Diritto della Navigazione*, 1/2017, p. 3; F. FOLLIERI, *The Economic Regulation of Ports and Airports*, in *Diritto dell'Economia*, 3/2017, pp. 675–710; A. ROMAGNOLI, *Italian Port Sector: Governance and Services*, in S. Zunarelli, A. Romagnoli, A. Claroni (eds.), *Cases and Materials on Public Transport Law*, Bologna, 2018; G. VERMIGLIO, *Maritime Authority and Port System Authority Under Legislative Decree No. 169/2016*, in *Rivista del Diritto della Navigazione*, 2/2020, pp. 1127–1182; E. VERMIGLIO, *From Port Authority to Port System Authority: Continuity and Discontinuity*, in *Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente*, 2020, pp. 1–20.

scope of a port system, which is part of the country's overarching maritime infrastructure¹⁸.

At least four key innovations mark a clear discontinuity from the previous governance model, without radically altering the foundational Authority structure:

- a) The exclusively institutional composition of the Management Committee, with business and labour representatives relocated to a newly established Partnership Body.
- b) A clear distinction between the Partnership Body and the decision-making entity.
- c) A variable number of Management Committee members, depending on whether the system includes a single core port or both a core port and an additional port previously hosting a Port Authority.
- d) The recognition of a purely technical role for the Maritime Authority within the Management Committee, with voting rights limited to matters within its competence.

The restructuring of the Management Committee - replacing the Port Committee of the abolished Port Authorities - along with the introduction of the Partnership Body, reflects a necessary rationalization of the decision-making process.¹⁹

The previous structure, weighed down by the presence of numerous institutional and industry representatives within the Port Committees, had

¹⁸ For an overview of the state of port regulations nearly twenty years after Law No. 84/94, as well as the prospects for reform, see A. Xerri, *Port Regulations and the Transport Sector: Evolutionary Aspects*, in A. XERRI (ed.), *Enterprise and Labor in Port Services*, Milano, 2012, pp. 19–43. In the same volume, see also S. BUSTI, *Port and Airport Regulations: Analogies and Differences*, p. 45 ff.; M. BADAGLIACCA, *Port Sector and Transport Integration*, p. 63 ff.; S. ZUNARELLI, *Administrative Competences Related to Port Activities, the Role of the Port Authority, and the Principle of the One-Stop Shop*, p. 85 ff.; E. ORRÙ, *Services of General Interest: Substantive Profiles*, p. 111 ff.; A. ROMAGNOLI, *Services of General Interest: Maritime Stations*, p. 111; L. MANGANI AND A. CROLLA, *Public Interest in Safety in Technical-Nautical Services*, p. 163 ff.; M. BRIGNARDELLO, *Port Services for Goods: Authorized Enterprises for the Execution of Port Operations and "Port Services"*, p. 185 ff.; M. CASANOVA, *Port Services for Goods: Concessionary Enterprises Operating in Port Areas and on Docks for the Execution of Port Operations*, p. 213; M. M. COMENALE PINTO, *Port and Airport Services: Convergences and Divergences*, p. 229; G. VERMIGLIO, C. INGRATOCI, AND A. MARINO, *Reorganization of Legislation to Align Port Regulations and Activities with the Objectives of the General Transport Plan*, p. 387 ff.

¹⁹ In these terms, Article 11-ter of Law No. 84/94, as amended by Legislative Decree No. 169/2016, assigns coordination powers to the National Coordination Conference of Port System Authorities, chaired by the competent Minister. The Conference is established within the Ministry of Infrastructure and Transport and is tasked with coordinating and harmonizing, at the national level, strategic decisions related to major infrastructure investments, urban planning in port areas, concession policies for maritime state property, and marketing and promotion strategies for the national port system in international markets. Additionally, it is responsible for verifying port development plans through specific reports prepared by the individual Port System Authorities.

already shown signs of inefficiency. The Ministry of Infrastructure and Transport now not only oversees the acts of the authorities but also coordinates their administrative actions and overall management.

The key issue addressed by the reform of the Port Authorities goes beyond the challenges that initially prompted the enactment of Law No. 84/94, which first restructured port governance. The objective is no longer to consolidate the busiest state-run ports within cities as terminals of a trans-European land and rail transport network. Instead, the reform seeks to reorganize central port administration using innovative models that recognize the strategic role of territorial authorities and economic stakeholders in port management.

However, the current reform appears to pursue a different goal: rather than preserving the autonomous management of individual ports as nodes of terrestrial infrastructure networks, it seeks to reposition them within a broader “sea system” perspective, integrated into a unified European framework. This required limiting the decision-making autonomy of the previous Port Authority model, which fostered competition among port cities. The new approach shifts decision-making authority to a more centralized management level, constrained by the national government’s coordination powers. The reform thus aims to develop a unified infrastructure strategy that generates additional value, ultimately enhancing the country’s competitive advantage.

The regulatory framework, therefore, explicitly signals a highly innovative shift in port management architecture. The rapid transition undertaken outlines a more complex scenario than a mere structural reorganization or procedural simplification, which were also elements of the 2016 reform.²⁰

While the organizational and procedural streamlining introduced by Legislative Decree No. 169/2016 does not fundamentally alter the existing governance model for port management, it serves to enhance its operational efficiency. More significantly, the strategic objectives outlined in the National Port and Logistics Plan, along with the introduction of new governance mechanisms such as the coordination conference, represent a shift towards a more centralized decision-making framework. With the reduction in the number of

²⁰ The composition of the Conference underscores its role not only as a coordinating body for the Port System Authorities but also as a liaison with the State-Regions Conference and a collaborative entity involving trade unions, the unified representation of the Port System Authorities and the company Rete Autostrade Mediterranee S.p.A. The Conference is chaired by the Minister of Infrastructure and Transport and includes the Presidents of the Port System Authorities, along with five representatives appointed by the Unified Conference, comprising three from the Regions, one from the Metropolitan Cities, and one from the Municipalities.

The Minister may, by decree, appoint an expert with proven experience and professional qualifications in the fields of transport and port economics to provide support. This expert may, in carrying out their duties, make use of the relevant offices within the Ministry of Infrastructure and Transport.

authorities, the reform moves towards diminishing institutional autonomy and the role of local self-governments, reinforcing national government control over port policy and intervention.

3. Green Challenges: The Port System Authority as a “Necessary” Public Body

The distinctly public nature of the Port System Authority is particularly emphasized in the regulatory framework concerning “green ports”. This status derives not only from its institutional qualification but also from the functions and responsibilities assigned by law to facilitate the ecological transition of the port system under its jurisdiction.

This is evident in Article 4-bis of Law No. 84/94, which, under the principle of “environmental sustainability”, explicitly directs port system planning towards compliance with energy efficiency and environmental sustainability criteria.

Specifically, the law mandates that Port System Authorities draft an Energy and Environmental Planning Document aimed at reducing CO₂ emissions²¹.

This document, developed in accordance with ministerial guidelines, outlines the necessary interventions to enhance energy efficiency within port areas and promote the use of renewable energy sources.

Despite the progressive privatization of port activities introduced by Law No. 84/94, the contemporary emphasis on sustainability necessitates a renewed public intervention to achieve environmental objectives. These objectives include optimizing port operations, reducing CO₂ emissions, digitizing port-related activities, redeveloping and electrifying docks, and minimizing vessel waiting times, among others.

This shift requires a re-evaluation of public intervention in the economy, aligning with scholarly interpretations that highlight a transition from the entrepreneurial state to the regulatory state, ultimately evolving into what has

²¹ On this point, see A. CRISMANI, *Cooperative Competition Among Differentiated Port Models*, in *Rivista di Diritto della Navigazione*, 2015, 1, p. 161; R. LOMBARDI, *Green Ports and Sustainability in Maritime Transport*, in *Rivista Quadrimestrale di Diritto dell’Ambiente*, 2011, 2, p. 179; and F. MUNARI, *The Transformation of Ports from State-Owned Port Areas to Markets: Administration and Management of Port Areas Between Subsidiarity and Privatization*, in *Diritto Marittimo*, 2004, p. 374.

been described as the “necessary interventionist state”, acting as the guarantor of fundamental public interests²².

This perspective is further reinforced by the process of “re-entification” suggested by Decree-Law No. 50 of May 17, 2022 (the so-called “Aid Decree”)²³. According to Article 9, paragraph 2, Port System Authorities are authorized, “even in derogation of Article 6, paragraph 11, of Law No. 84 of January 28, 1994,” to establish one or more renewable energy communities. The objective is to contribute to the country’s sustainable development, support the decarbonization of the energy system, and enhance national energy resilience, in alignment with the Energy and Environmental Planning Document outlined in Article 4-bis of the same law.

It is evident that the “Aid Decree” further consolidates the centrality of the public role of Port System Authorities, reinforcing their institutional mission. This is particularly significant given their newly recognized capacity to produce renewable energy on-site and promote self-consumption within port areas. Such initiatives benefit not only traditional port activities but also the broader port ecosystem, aligning with national and European sustainability goals.²⁴

These considerations are further reinforced by a reassessment of the national regulatory framework in light of new European standards.

In the revised version of the Regulation on trans-European transport networks (TEN-T), approved in June 2024, the European Union has recognized the need for further reform. This acknowledgment stems from the inadequacy and fragmentation of the rules governing TEN-T infrastructure as defined in the 2013 Act, as well as from the failure to integrate these infrastructures

²² In these terms, G. BEFANI, in *The Administrative-Functional Regulation of Green Ports Between Competence Congestion, Energy Efficiency, and Ecological Transition*, in *Rivista Giuridica dell’Edilizia*, Issue 5, October 1, 2022, p. 425, states: “The administrative regulation of ports, at least with reference to the Italian legal system and the state property model provided for both in the Civil Code and in the Navigation Code, is no longer perfectly aligned with the new relational dynamics of logistics and sustainable mobility. These dynamics are no longer focused on the individual port, understood as an emporial monad bridging land and sea, but rather assume systemic relevance within a decentralized intermodal network. Within this framework, ports become integrated components of a more complex system, in which traditional loading-unloading-distribution operations take on a different economic significance, especially when considered in light of new requirements for reducing environmental impact and energy consumption.”

²³ Decree-Law No. 50/2022 (the so-called *Aid Decree*), in Article 9, paragraph 2, allows Port System Authorities to “establish one or more renewable energy communities, even in derogation of Article 6 of Law No. 84/94 on ports, pursuant to Legislative Decree No. 199/2021.” Moreover, Article 4-bis of Law No. 84 of January 28, 1994, states that “Port system planning must comply with energy and environmental sustainability criteria, in line with the policies promoted by current European directives on the matter. To this end, Port System Authorities promote the drafting of an energy and environmental planning document for the port system to pursue appropriate objectives, with particular reference to the reduction of CO₂ emissions.”

²⁴ See also A. CRISMANI AND B.A. MASSO, *Green Ports: Instruments and Measures*, in *Rivista Giuridica dell’Edilizia*, 2021, 5, p. 219.

into a broader framework of sustainable development - deficiencies that have negatively impacted both the climate and the environment.

Under this newly adopted regulatory framework, maritime infrastructure is assigned a clearly defined social function, which is articulated through four key objectives: sustainability, cohesion, efficiency, and the equitable distribution of benefits to all users.

In particular, the European legislator actively promotes zero-emission mobility, short sea shipping, and more efficient and sustainable transport solutions. The overarching aim is to foster social, economic, and territorial cohesion across all regions of the Union, including outermost and sparsely populated areas, by ensuring that transport infrastructure remains accessible - particularly to vulnerable users - while also supporting mobility strategies that account for climate change, natural hazards, and human-induced disruptions (Article 25).

According to the Regulation, the European Maritime Space serves as a crucial link between maritime components and the land transport network. This integration is achieved through the development and enhancement of short sea shipping routes, the modernization of seaports across Member States, and the improvement of their inland connections, including those extending to the Union's outermost regions. These measures aim to establish a more efficient, viable, and sustainable intermodal transport network.

The text of the new European law states:

“The European Maritime Space consists of: (a) the maritime transport infrastructure within the port area of the core network and comprehensive network, including hinterland connectivity; (b) wider benefit actions that are not linked to specific ports and that benefit the European Maritime Space and the maritime industry broadly, such as support for activities ensuring year-round navigability (e.g., icebreaking), facilitating the transition toward sustainable maritime transport, improving the synergies between transport and energy – inter alia by fostering the role of ports as energy hubs and supporting the energy transition – and developing ICT systems for transport and hydrographic surveys; and (c) the promotion of sustainable and resilient short-sea shipping links, particularly those that consolidate freight flows to mitigate negative externalities such as emissions and road congestion within the Union, as well as those improving access to outermost and other remote, insular, and peripheral regions through the establishment or enhancement of sustainable, regular, and frequent maritime services.”

Furthermore, the Regulation provides a detailed definition of maritime transport infrastructure, which includes:

- Maritime ports, including the infrastructure necessary for transport operations within the port area;
- Basic port infrastructure, such as internal basins, quay walls, berths, platforms, jetties, docks, dykes, backfills, and land reclamation;
- Sea canals, navigational aids, port approaches, fairways, locks, and breakwaters;
- Connectivity infrastructure linking ports to the trans-European transport network;
- ICT systems for transport, including EMSWe and VTMIS;
- Infrastructure related to alternative fuels;
- Associated equipment, such as traffic and cargo management tools, systems to reduce environmental impacts (e.g., zero-waste operations and circular economy measures), energy efficiency solutions, noise reduction technology, and alternative fuel facilities;
- Equipment ensuring year-round navigability, including icebreaking, hydrological surveys, dredging operations, and port protection measures;
- Infrastructure supporting port activities related to renewable energy, including offshore wind farms.

This framework establishes an expansive and holistic definition of maritime infrastructure—one that encompasses not only ports and port facilities but also a wide array of service provisions aimed at enhancing efficiency, safety, and, above all, environmental sustainability.

The new Regulation underscores the imperative to translate sustainable maritime transport into a tangible reality within the European framework. Environmental sustainability objectives are now fully integrated into the very definition of maritime infrastructure, explicitly shaping its conceptualization and implementation.

Consequently, this evolving definition of maritime infrastructure is paralleled by a reconfiguration of the role played by the entities exercising public authority over these assets. The longstanding debate on whether Port System Authorities should be regarded as private economic actors appears to have been conclusively settled: given the inherently public nature of the interests safeguarded by European legislation, national regulations now reaffirm the exercise of public authority in port governance.

Ultimately, the centralization of ministerial oversight in the coordination of national port systems emerges as a necessary condition for the establishment of a unified European maritime area. This shift reflects the growing imperative for state intervention not only in the regulation of maritime infrastructure but,

in certain respects, also in its direct management. The pursuit of new public interests - such as environmental and energy sustainability, the digitalization and automation of maritime transport, and the seamless integration of these advancements into the broader transport infrastructure - has begun to take precedence over competition, which, until now, was regarded as an absolute principle.

4. Conclusions

In the Italian regulatory landscape, maritime communications infrastructures have undergone a substantial conceptual evolution over time, which has translated into many management and market models. Due to the influence of European transport policies and the increasing level of services required by an increasingly central and strategic maritime sector in global freight movement.

Initially, ports - understood as places of docking and shelter for ships and as assets of the necessary public domain - were entrusted to the direct management of the maritime authority, with security as their sole purpose. However, the 1994 reform²⁵, through the establishment of Port Authorities, marked a shift towards a differentiated conceptualization of port infrastructure, based on the “utilities” required by the maritime market and the associated port functions.

The Port Authority model represents a form of administrative decentralization that remains within the framework of the traditional management bodies, while centring on the strategic decision-making autonomy of individual ports. At the same time, it distinguishes the role of the public entity (as regulator) from that of private operators (as market-driven entrepreneurs), aligning with the challenges posed by European liberalization and technological transformation.

From a governance perspective, the original version of the port reform introduced an innovative co-management mechanism by incorporating a strong entrepreneurial component into the decision-making body (the Port Committee), alongside institutional and local authority representatives. This structure effectively delegated the definition of competitive strategies and port development to market actors actively engaged in the relevant sector.

The subsequent transition to Port System Authorities reflects a new vision of port infrastructure - no longer regarded as individual ports but as integrated utilities whose significance is assessed within the broader framework of national and European transport networks. Their relevance is now directly linked to the

²⁵ The reference is to Law No. 84 of January 28, 1994, *Reorganization of Port Legislation*, published in *Official Gazette No. 28 of February 4, 1994 – Ordinary Supplement No. 21*.

quality and innovativeness of the services offered, in a maritime transport sector increasingly focused on achieving ecological and digital transition objectives.

In this dynamic and polycentric perspective, maritime infrastructure, as a “resource,” encompasses the entire range of functional components necessary for transport, including ships and other navigation systems that interact with it. The added value of a “port” - and the logistics systems it serves - is measured in terms of connectivity and the rating enjoyed by the maritime network within a given area, ensuring that users receive high-quality standards in terms of safety, environmental protection, and the sustainability of passenger and freight services.

Under this approach, maritime infrastructure becomes a central element of a “single maritime space,” as defined in the recent EU Regulation No. 1679/2024, where the port is conceptualized as an interconnected environment - linked not only to the vessels passing through it but also to other related infrastructures. This integration is facilitated by intelligent transport systems and digitalization, forming part of a unified strategic vision.

Ultimately, the most recent European regulatory developments outline an expansive definition of maritime infrastructure, encompassing ports, vessels, maritime spaces, and associated structures in a broad and inclusive manner. Their management is now uniformly oriented not only towards development but, above all, towards environmental sustainability. The European framework highlights the urgent need to implement truly sustainable maritime transport, positioning it at the core of both European and national policies. This objective necessitates a functional centralization and reaffirms the role of public governance, ultimately influencing both the model and objectives of port management.

It is within this context that the “new” social function of maritime communication infrastructure finds its substance: the creation of a green and/or resilient transport model, serving the interests of today’s users and the collective needs of future generations.

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THE LEGAL STATUS AND CONDUCT OF ECONOMIC ACTIVITIES ON SEABEACHES IN CROATIA

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Professional paper

In the summer of 2023, the Republic of Croatia enacted a new Maritime Domain and Seaports Act. This Act, among other provisions, regulates the concept and legal status of maritime domain, the protection of maritime domain, the determination of its boundaries, the registration and recording of maritime domain, property law issues, as well as the management and use of maritime domain. Additionally, the Act regulates concessions for the economic use of seabeaches and introduces the possibility of obtaining permits, which have replaced the previous concession approvals.

The legal regulation of seabeaches is notably extensive and includes elements that, under legal drafting techniques, would typically fall under secondary legislation; however, due to the sensitive nature of the subject matter, the legislator chose to address them within the primary legislative text. Furthermore, an exceptional provision allows for the awarding of a concession upon request for the use of a seabeach, which is a novelty in Croatian law.

The changes in the legal regulation of seabeaches, including the legal framework for concessions and the possibility of obtaining permits for numerous minor economic activities, are both significant and comprehensive. These changes may facilitate the more effective economic utilization of seabeaches, while ensuring their protection as a unique natural asset of the Republic of Croatia. This article outlines the new legal provisions and the potential legal and economic implications arising therefrom.

Key words: *maritime domain, concessions, seabeaches, economic use, legal framework*

1. Introductory Considerations

The Croatian Parliament enacted a new and comprehensive *Maritime Domain and Seaports Act*¹ (hereinafter: MDSPA) on July 14, 2023. The legal framework established by the new MDSPA, together with the subordinate regulations

¹ Zakon o pomorskom dobru i morskim lukama [Maritime Domain and Seaports Act], Official Gazette, No. 83/23.

adopted pursuant to this Act, introduces a higher standard of regulation for the maritime domain.

The MDSPA is nearly twice as extensive as its predecessor, the *Maritime Domain and Seaports Act*² of 2003 (the new MDSPA contains 236 articles, compared to the original 124 articles of the 2003 Act). It is significantly more precise and aligned with the European legal framework for awarding concessions. This has laid the foundation for the efficient performance of economic activities on the maritime domain, which is exceptionally vast in Croatia (internal sea waters spanning 12,498 km², territorial sea covering 18,981 km², and an extraordinarily indented coastline)³.

From a historical perspective, the MDSPA of 2023 represents the third major reform of the legal framework governing the maritime domain in the modern Republic of Croatia (further: Croatia). Following the declaration of independence in 1991, Croatia continued to apply the *Maritime and Water Domain, Ports, and Wharves Act*⁴ of the Socialist Republic of Croatia, enacted in 1974. It requires no detailed explanation to recognize that this legislation, despite certain beneficial provisions, was entirely inadequate for the new economic and political circumstances.

The maritime domain was first modernly regulated within the *Maritime Code*⁵ of 1994. Subsequently, in 2003, the maritime domain was addressed in a separate regulation—the *Maritime Domain and Seaports Act*. This Act underwent several amendments and supplements but failed to resolve critical issues that arose in practice. For instance, the Act was not harmonized with *Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts*⁶ (hereinafter: the *Concessions Directive*), nor with Croatia's *Concessions Act*⁷ of 2017, which was aligned with the directive.

² Zakon o pomorskom dobru i morskim lukama [Maritime Domain and Seaports Act], Official Gazette, No. 158/03 (no longer in force).

³ Vlada Republike Hrvatske. Strategija prometnog razvoja Republike Hrvatske za razdoblje od 2014. do 2030. godine. [Government of the Republic of Croatia. Transport Development Strategy of the Republic of Croatia for the Period 2014–2030.] Zagreb, October 2014. Available at: https://mmpi.gov.hr/UserDocsImages/arhiva/Strategija_prometnog_razvoja_VRH%201-studenii.pdf (accessed: January 8, 2025).

⁴ Zakon o pomorskom i vodnom dobru, lukama i pristaništima [Maritime and Water Domain, Ports, and Wharves Act], Official Gazette, Nos. 19/74, 39/75, 17/77 and 18/81.

⁵ Pomorski zakonik [Maritime Code], Official Gazette, No. 17/94.

⁶ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, ELI: <http://data.europa.eu/eli/dir/2014/23/oj>

⁷ Zakon o koncesijama [Concession Act], Official Gazette, Nos. 69/17 and 107/20

Additionally, concession approvals were issued upon request, leading to significant issues when multiple parties expressed interest in the same location.⁸ The maritime domain was also inadequately protected, with disputes arising each summer due to various forms of illegal privatization of segments of the coast, small piers, and seabeaches.

The new MDSPA addresses numerous unresolved issues related to the maritime domain, including its economic use, in a significantly more modern manner. The MDSPA has finally been harmonized with the Concessions Directive, replacing concession approvals with permits, and has provided a more precise regulation of the legal status of reclaimed land as well as the delineation of maritime domain boundaries.

The legal status, categorization, and forms of economic use of seabeaches are now regulated in a more detailed and precise manner than in previous regulations. Due to the exceptionally high level of public interest, the MDSPA has developed seabeaches to a degree typically reserved for subordinate implementing regulations.

Given the critical importance of the legal status of seabeaches, public access, and their economic utilization in Croatia—both from an economic and political perspective (with significant public attention)—this article highlights the changes introduced by the new legislative framework.

2. Categorisation of Seabeaches

To begin, we outline the new categorization of seabeaches as regulated by the MDSPA in Part Four of the Act, entitled “Seabeaches.” The explanatory memorandum accompanying the Draft Maritime Domain and Seaports Act states: “The existing Act did not thoroughly regulate the issue of seabeaches. (...) Considering the fact that seabeaches are the most important component of the tourist offering along our coastline, regulating the issue of seabeaches certainly deserves to be a key part of the Act governing the sea and the maritime coast.”⁹

According to Article 76, paragraph 1 of the MDSPA, seabeaches are divided into: **public seabeaches** and **seabeaches of special purpose**. Public seabeaches

⁸ Čović, S., “Sporni aspekti dodjele koncesijskih odobrenja na pomorskom dobru u upravnosudskoj praksi”, [“Disputed Aspects of Granting Concession Approvals on Maritime Domain in Administrative Court Practice”], *Zbornik radova Pravnog fakulteta u Splitu*, vol. 57, no. 1, 2020, pp. 211-237. <https://doi.org/10.31141/zrpf.2020.57.135.211>

⁹ Hrvatski sabor. Konačni prijedlog zakona o pomorskom dobru i morskim lukama [Croatian Parliament. Final Proposal of the Maritime Domain and Seaports Act], PZ No. 439 of July 6, 2023.

are further subdivided into **natural seabeaches** and **developed seabeaches** (Article 76, paragraph 2). Furthermore, it is stipulated (Article 76, paragraph 3) that seabeaches are managed by local self-government units or public institutions for protected natural areas, in accordance with the *Maritime Domain Management Plan* or the *Maritime Domain Management Plan within a protected natural area*. Concessionaires may also manage seabeaches, based on the decision on awarding the concession and the corresponding concession agreement.¹⁰ Local self-government units, public institutions for protected natural areas, and concessionaires are obligated to protect and maintain the seabeaches and ensure the fulfilment of public interest in their use (Article 76, paragraph 4).

The MDSPA further elaborates in Article 76 on the principle of general use of maritime domain, which was previously established in Article 11 of the MDSPA. Article 11, paragraph 1, stipulates that the maritime domain is primarily intended for general use¹¹ but may also be designated for special use or economic exploitation in accordance with the provisions of the MDSPA. The same article (Article 11, paragraph 2) defines general use of the maritime domain as the right of everyone to utilize the maritime domain in accordance with its nature and intended purpose.

Pursuant to Article 76, paragraph 5, seabeaches must be accessible to all under the same conditions, and Article 76, paragraph 6, explicitly stipulates that a seabeach cannot be excluded from general use. Furthermore, it is stated that a local self-government unit or a concessionaire managing a public seabeach is prohibited from enclosing the seabeach or otherwise restricting access to it (Article 76, paragraph 7), as well as charging an entry fee for the seabeach (Article 76, paragraph 8).

The above provisions clearly demonstrate redundancy, as they reiterate the regulations on the general use of seabeaches set out in Article 11 within Article 76 of the MDSPA. This redundancy constitutes a deliberate breach of mnemonic drafting rules, motivated by political considerations, to dispel any doubts regarding the privatization and enclosure of seabeaches - an issue to which the Croatian general public is particularly sensitive. Consequently, the legislator included in the MDSPA proposal a very clear and repetitive text emphasizing the obligation of general use. The MDSPA further defines, in a detailed and precise manner, the various types of seabeaches.

¹⁰ See infra 4.1.

¹¹ More on general use: Popovski, A., "Pravna priroda opće uporabe javnoga dobra" ["The Legal Nature of the General Use of Public Goods"], *Pravni vjesnik*, vol. 32, nos. 3-4, 2016, pp. 183-200. <https://hrcak.srce.hr/179268>; Nakić, J., "Pomorsko dobro – opće ili javno dobro?" ["Maritime Domain – Common or Public Good?"] *Zbornik radova Pravnog fakulteta u Splitu*, vol. 53, no. 3, 2016, pp. 797-832. <https://doi.org/10.31141/zrpf.2016.53.121.797>.

Article 78 of the MDSPA defines **natural seabeaches**. A natural seabeach is a beach located either within or outside a residential area, lacking infrastructure, and fully preserving its natural characteristics. The land area of such a seabeach consists of natural materials, including stone, sand, gravel, or their combinations (paragraph 1). The construction of structures is prohibited on natural seabeaches. Only interventions that, pursuant to special regulations governing construction, are not considered construction, and that comply with a specific regulation, are permitted (paragraph 2). A natural seabeach may not be enclosed, nor may access to it be restricted in any way (paragraph 3). Charging an entry fee for a natural seabeach is prohibited (paragraph 4). A natural seabeach cannot be excluded from general use (paragraph 5). Additionally, it is not permissible to award concessions for natural seabeaches located outside construction zones (paragraph 6).

Article 79 of the MDSPA defines **developed seabeaches**. A developed seabeach is described as a seabeach located either within or outside a residential area, accessible to everyone under equal conditions, including persons with reduced mobility. It is characterized by modified natural features and an infrastructurally and functionally developed land area directly connected to the sea (paragraph 1). The local self-government unit or concessionaire is required to mark and protect the maritime side of such a seabeach. They must also prominently display an information board with details regarding sea water quality for bathing, information on whether pets are allowed, details about the maritime and land sections of the seabeach, and information on potential extraordinary events on the seabeach. These requirements must comply with applicable implementing regulations issued by the state administration body responsible for environmental and nature protection (paragraph 2). A developed seabeach may not be enclosed, nor may access to it be otherwise restricted (paragraph 3). Charging an entry fee for a developed seabeach is prohibited (paragraph 4). Furthermore, a developed seabeach cannot be excluded from general use (paragraph 5).

A special category elaborated in Article 80 of the MDSPA pertains to **seabeaches designated for special purposes**. A seabeach designated for special purposes is defined as a seabeach that meets the requirements of specific user groups and their particular needs (paragraph 1). Furthermore, the MDSPA explicitly specifies that a seabeach designated for special purposes may be used based on a concession, which may be awarded to: 1. a public institution within the healthcare system established by Croatia or a regional self-government unit,

where the users of the institution are there for treatment and/or rehabilitation;¹² and 2. a legal entity holding a concession for a seabeach designated for naturalist tourists. Thus, under the MDSPA, only in these two instances can access to such a seabeach be restricted, meaning it may be excluded from general use.

Article 81 of the MDSPA addresses the principle of satisfying the public interest. It stipulates that the concession awarding authority for the commercial use of a public seabeach must, when determining the area of the seabeach where the concessionaire may perform commercial activities, ensure and protect the public interest in the use of the seabeach (paragraph 1). This article also includes two important provisions not present in previous regulations. It explicitly states that a concession for a public seabeach within a settlement must be awarded in such a way that the entire seabeach remains accessible for general use, and that the concessionaire may perform the activities for which the concession was awarded on no more than 40% of the land area and 20% of the sea area of the seabeach (paragraph 2). Furthermore, a concession for a public seabeach outside a settlement must also ensure that the entire seabeach is accessible for general use, with the concessionaire allowed to perform commercial activities on no more than 60% of the land area and 40% of the sea area of the seabeach (paragraph 3).

The protection of the public interest entails safeguarding general use,¹³ as stated in the Explanatory Memorandum to the MDSPA proposal. It explains that the issue of satisfying the public interest has been regulated “in such a way that the degree of restriction of general use is minimized, ensuring that seabeaches as maritime domain and common goods are genuinely accessible to all under equal conditions.”¹⁴ The legislator not only prescribed this principle but also explicitly limited public authorities - the concession awarding authority - by the percentages outlined. Precisely defining the public interest is crucial because, without such clarity, it can be interpreted broadly and variably. The legitimacy of an interest implies that there is widespread and genuine belief within the community regarding the acceptability of that interest and the

¹² For example, such a concession could be requested for the Therapeutic Seabeach of the Prim. Dr. Martin Horvat Hospital in Rovinj: “This is a unique therapeutic seabeach, designed and architecturally adapted as part of the entire hospital seabeach complex, including sports and recreational facilities, to accommodate individuals with health issues.” See: *Terapeutska plaža bolnice Prim. dr. Martin Horvat* [Therapeutic Seabeach of the Prim. Dr. Martin Horvat Hospital], <https://croatia.hr/hr-hr/plaze/terapeutska-plaza-bolnice-prim-dr-martin-horvat> (accessed: January 8, 2025).

¹³ Popovski, A., “Zaštita javnoga interesa u raspolaganju javnim dobrom u općoj uporabi” [“Protection of the Public Interest in the Management of Public Goods in General Use”], *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 38, no. 1, 2017, pp. 275-299. <https://doi.org/10.30925/zpfsr.38.1.9>.

¹⁴ Hrvatski sabor, *Konačni prijedlog zakona o pomorskom dobru i morskim lukama*, op. cit.

permissibility of efforts by interested parties to achieve it within established norms and rules.¹⁵

The MDSPA retains the existing legal concepts of seabeaches, with significantly more precise legal elaboration. A particularly positive development is the inclusion, for the first time, of provisions addressing the accessibility of seabeaches for persons with reduced mobility.¹⁶

Part IV of the Act, titled “Seabeaches,” also contains a highly noteworthy Article 77 on seabeach nourishment. While this topic would typically fall under subordinate legislation from a legislative drafting perspective, its importance warranted its inclusion in the Act. The explanatory memorandum accompanying the Act extensively justifies the inclusion of this article. It states: “The current Act does not provide a clear distinction between seabeach nourishment and seabeach restoration, which in practice can lead to significant sea reclamation under the guise of nourishment. Additionally, the Act does not regulate the type of materials used for seabeach nourishment or restoration, which is of great significance for the biodiversity of the Adriatic, the preservation of native species, and particularly the protection of the endangered species *Posidonia oceanica*. Numerous instances of seabeach restoration have negatively impacted marine flora and fauna. Therefore, addressing this issue is undoubtedly a duty of Croatia.”¹⁷

Under the guise of “seabeach restoration,” surplus construction stone was often disposed of,¹⁸ and at times, seabeach nourishment and restoration were conflated (despite the existence of clear instructions)¹⁹. In some instances, soil was used, which resulted in the creation of sediment. Croatia is rich in shorter gravel seabeaches (up to 200 meters in length), and according to research, such seabeaches are nourished nearly every other year with approximately 0.36 cubic

¹⁵ Petrovar, K. and Vujošević, M., “Koncept javnog interesa i javnog dobra u urbanističkom i prostornom planiranju” [“The Concept of Public Interest and Public Goods in Urban and Spatial Planning”], *Sociologija i prostor*, vol. 46, no. 179, 2008, pp. 23-51.

¹⁶ Novak, M., “Stvarnopravno uređenje plaža u Republici Hrvatskoj” [“Property Law Regulation of Seabeaches in the Republic of Croatia”], *Poredbeno pomorsko pravo*, vol. 63, no. 178, 2024, pp. 207-272. <https://doi.org/10.21857/9xn31cwqpy>.

¹⁷ Hrvatski sabor, Konačni prijedlog zakona o pomorskom dobru i morskim lukama, op. cit.

¹⁸ Morski.hr, “Nasipavanje plaža neprirodnim materijalima ozbiljno utječe na živi svijet mora - Evo i kako” [“Beach Replenishment with Artificial Materials Severely Affects Marine Life – Here’s How”] November 12, 2023. <https://www.morski.hr/nasipavanje-plaza-neprirodnim-materijalima-ozbiljno-utjece-na-zivi-svijet-mora-evo-i-kako/> (accessed: January 8, 2025).

¹⁹ See: AdriAdapt. “Dohranjivanje plaže.” [“Beach Nourishment”], February 2, 2022. <https://adriadapt.eu/hr/adaptation-options/dohranjivanje-plaze/> (accessed: January 8, 2025).

meters of material per meter of shoreline, accounting for 17% of sandy or gravel coastal areas.²⁰

Seabeach nourishment is regulated under Article 77 of the MDSPA. It first establishes that nourishing seabeaches with soil, waste, excavation material, or similar substances is prohibited. seabeaches may only be nourished with natural gravel and/or sand (paragraph 1). Furthermore, it explicitly stipulates that annual seabeach nourishment with more than 0.35 cubic meters of material per linear meter of shoreline is not permitted (paragraph 2). By exception, a seabeach may be restored with a larger quantity if it is necessary to preserve the average annual position of the shoreline, provided prior consent is obtained from the administrative body of the regional self-government unit responsible for environmental and nature protection (paragraph 3). Additionally, it is prescribed that a person managing a seabeach may restore a developed seabeach in a manner that does not alter the average annual position of the shoreline, the appearance of the seabeach, or its characteristics (paragraph 4).

These provisions aim to put an end to the creation of harmful and short-lived artificial seabeaches along the Croatian Adriatic coast—where, in areas with naturally rocky shores, the sea would inevitably erode the restored seabeach. As one author aptly noted: “For those unaware, seabeaches are created by waves, not excavators.”²¹

3. Concessions on Seabeaches

3.1. General Procedure for Awarding Concessions on Maritime Domain

As previously stated, maritime domain, including seabeaches, is primarily intended for general use but may be designated for special use or economic exploitation. Economic exploitation, i.e., the use of maritime domain, including seabeaches, for the purpose of conducting various economic, typically profit-driven activities, is carried out based on a concession. According to the terminology of the MDSPA, a **concession on the maritime domain** (hereinafter: concession) is the right to economically exploit the maritime domain, acquired through a concession agreement. A **concessionaire** is an economic entity with

²⁰ Bogovac, T., Carević, D., Bujak, D. and Novaković, V. „Analiza dohranjivanja i nasipavanja plaža u Hrvatskoj.” [“Analysis of Beach Nourishment and Replenishment in Croatia.”], *Gradevinar*, vol. 75, no. 4, 2023, pp. 355–365. <https://doi.org/10.14256/JCE.3470.2022>.

²¹ Kaić, B., “Umjetne plaže: Skupi promašaj za naivne i velika šteta za okoliš” [“Artificial beaches: An Expensive Mistake for the Naïve and a Major Environmental Hazard”], *Morski.hr*, October 8, 2022. <https://www.morski.hr/umjetne-plaze-skupi-promasaj-za-naivne/> (accessed: January 8, 2025).

which the awarding authority of the concession has concluded a concession agreement in accordance with the provisions of the MDSPA.

With the adoption of the new MDSPA, one of the most significant shortcomings of the previous legislative framework has been rectified—its lack of alignment with European and subsequently national general legal frameworks for concessions. As early as the end of 2012, the Government of Croatia submitted a “Report on Concessions”²² to the Parliament, stating that “the only act still not aligned with the Concessions Act is the Maritime Domain and Seaports Act.” This misalignment pertained to the *Concessions Act* of 2008, which was repealed in 2012. In the interim, a European legal framework—the *Concessions Directive*—was introduced, and Croatia aligned its *Concessions Act* with this directive in 2017. Given that the regulations governing the maritime domain, including the Maritime Domain and Seaports Act of 2003, contain important procedural provisions specific to the awarding of concessions on the maritime domain, legal practice over recent years has encountered numerous challenges. Specifically, there were recurring questions regarding which regulation should be applied. This lack of alignment created evident legal uncertainty for all participants in these relationships, along with the resulting consequences of such uncertainty.²³ This longstanding issue was only resolved with the adoption of the MDSPA, which is now finally aligned with the general European and Croatian concession regulations.

Concessions on maritime domain are governed by Article 48 of the MDSPA. The provision initially establishes that a concession on maritime domain, as defined by the MDSPA, constitutes a concession for the economic use of public goods (paragraph 1). A concession on maritime domain is defined as a time-limited right to economically exploit the maritime domain, with or without the right to construct, and is acquired through a concession contract (paragraph 2). The awarding of such concessions is generally carried out via public tender procedures (paragraph 3), although exceptions exist for specific cases explicitly prescribed by the MDSPA, where concessions may be awarded upon request (paragraph 4). This is consistent with both the Concessions Directive and the Concessions Act, as concessions are typically awarded through public tender

²² Vlada Republike Hrvatske: Izvješće o koncesijama u Republici Hrvatskoj [Government of the Republic of Croatia: Report on Concessions in the Republic of Croatia], Zagreb, November 2012.

²³ Staničić, F. and Bogović, M., “Koncesije na pomorskom dobru – odnos zakona o koncesijama i zakona o pomorskom dobru i morskim lukama” [“Concessions on Maritime Domain – The Relationship Between Croatian Concessions Act and the Maritime Domain and Seaports Act”], *Pravni vjesnik*, vol. 33, no. 1, 2017, pp. 73-104. <https://hrcak.srce.hr/180413>.

procedures in compliance with public procurement rules,²⁴ with exceptions allowed only in narrowly defined circumstances²⁵ (paragraph 4). It is expressly provided that a concession contract for maritime domain is an administrative contract (paragraph 5). This provision, aligned with the Concessions Act, resolved longstanding legal uncertainties regarding the legal nature of concession contracts following its adoption in 2017.²⁶ Furthermore, concessionaires are awarded the right to file lawsuits in connection with the maritime domain under concession, including claims for damages, specific performance, and other legal actions against individuals or entities interfering with the rights and obligations arising from the concession contract (paragraph 6). Finally, public institutions responsible for managing protected areas of nature are exempt from paying concession fees for concessions awarded on maritime domain for activities conducted within legally protected natural areas (paragraph 7).

Article 49 of the MDSPA stipulates that concessions on maritime domain are awarded for purposes designated in the spatial plan, explicitly listing seabeaches among the illustrative examples of concession purposes (Article 49, paragraph 1, item 8). A concession may be awarded for existing structures and/or interventions in the area that, under specific construction regulations, are not considered construction. It may also include the construction and economic use of structures on the maritime domain, as well as the execution and economic use of interventions in the area that, under specific construction regulations, are not classified as construction but are permitted within the maritime domain (paragraph 2).

Article 50 of the MDSPA regulates preparatory actions for awarding concessions, addressing only the specific provisions in relation to the general regulation, the Concessions Act. Preparatory actions, in addition to those outlined in the general regulation on concessions, encompass all actions undertaken by the competent authority defined by the MDSPA to determine the needs and interests for initiating the concession award procedure. These actions are primarily aimed at satisfying the demand for specific services, fostering private investment projects, assessing the financial impacts of awarding concessions,

²⁴ European Commission: Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Ramada, P., Meiske, D., Cannings, J., Tenge, E. et al. Study on the implementation of the Concessions Directive – Final report. Publications Office of the European Union, 2023. <https://data.europa.eu/doi/10.2873/026744>.

²⁵ Vojković, G., “Koncesije na zahtjev na pomorskom dobru – nova mogućnost u razvoju turizma” [“Concessions on Request on Maritime Domain – A New Opportunity in Tourism Development”] IUS-INFO. Zagreb: Lexpera, 2024. <https://www.iusinfo.hr/aktualno/u-sredistu/koncesije-na-zah-tjev-na-pomorskom-dobru-nova-mogucnost-u-razvoju-turizma-61452>.

²⁶ Šikić, M. and Staničić, F., “Pravna narav ugovora o koncesiji” [“The Legal Nature of the Concession Agreement”], Zbornik radova Pravnog fakulteta u Splitu, vol. 48, no. 2, 2011, pp. 419-441.

and addressing other relevant needs (paragraph 1). Preparatory actions may be initiated independently by the competent authority or based on an expression of interest by an interested economic operator (paragraph 2). In the latter case, the interested economic operator submits documentation demonstrating their interest in the economic use of the maritime domain (paragraph 3). This documentation must include information regarding the alignment of the concession award with spatial plans, the financial impacts, compliance with the principles of maritime domain management, and any other data necessary for deciding on the initiation of the concession award procedure (paragraph 4). The process of awarding concessions is overseen by a specialized body - the Expert Commission for Concessions - which must be established by every concession awarding authority (Article 51 of the MDSPA).²⁷

According to Article 52 of the MDSPA, concession awarding authority for areas outside ports open to public traffic (where the competent authority is the port authority) are the Government of the Croatia and regional self-government units. In a special case regional self-government units may transfer this authority to local self-government units. This possibility existed under the previous legal framework as well, but it was not adequately elaborated.

Concession grantors are obligated to prepare a *Feasibility Study for Awarding a Concession*, in accordance with the general regulations governing concessions. This study determines the duration of the concession, ensuring that the concession term does not restrict market competition. It also specifies the method of concession fee payment, considering the subject of the concession, the estimated concession value, risks and costs borne by the concessionaire, anticipated profit, the equipment and value of the assets, and the area of maritime domain being awarded under the concession (Article 57, paragraph 1, MDSPA).²⁸

The MDSPA introduces a significant provision regarding the determination of the maritime domain boundary in areas where a concession is planned. The general regulation, the Concession Act, stipulates in Article 31 that the grantor of the Concession shall announce its intention to award a concession by means of a public notice. This notice is mandatory, as it serves as the basis upon which bidders submit their offers to the grantor of the Concession (Concession Act, Art. 32).

²⁷ According to Article 54, paragraph 1 of the MDSPA, the representative body of a regional self-government unit, upon the proposal of the executive body of the regional self-government unit and at the request of a local self-government unit, may delegate the authority to award individual or all concessions within the area of that local self-government unit to the local self-government unit until the end of the current term of office of the representative body of the local self-government unit.

²⁸ More extensively: Vojković, G., "Novi model koncesija na pomorskom dobru" ["The New Model of Concessions on Maritime Domain"] *Pravo i porezi*, vol. XXXI, no. 10, 2023, pp. 19-28.

Article 10, paragraph 5 of the MDSPA prescribes that the registration of the maritime domain in the land register is a prerequisite for issuing the public notice of intent to award a concession and for rendering a decision on special use. Exceptionally, such registration is not required in cases of special use involving the construction of structures on the maritime domain for the needs of state administration bodies or legal entities vested with public authority (MDSPA, Art. 54, para. 1), particularly for defence, internal affairs, and maritime safety purposes.

The provision set forth in Article 10, paragraph 5 should not be contentious - as the awarding of a concession over the maritime domain necessarily requires its registration and the determination of its boundaries. Nor is the exception for certain public purposes controversial. However, subsequent provisions significantly relativize the obligation prescribed in Article 10, paragraph 5 of the MDSPA, with exceptions further outlined in the article.

Article 10, paragraph 7 of the MDSPA stipulates that, exceptionally, the registration of the maritime domain status in the land register is not a prerequisite for issuing a public notice of intent to award a concession or for rendering a decision on special use, provided that it is unequivocally established that the real estate subject to concession fall within the status of maritime domain as defined by the MDSPA.

Furthermore, paragraph 8 states that a concession over the maritime domain, as well as other rights, may be awarded even if the real estate is not registered in the land register as maritime domain, provided there is no doubt that it qualifies as maritime domain by virtue of the law itself. Additionally, paragraph 9 specifies that the provision of paragraph 8 applies particularly to existing ports, as well as to seabeaches, breakwaters, piers, quays, and other sections of the shoreline whose designated land use or purpose indicates that they constitute maritime domain by operation of law and are subject to general use, irrespective of their registration in the land register.

With respect to ports, this provision appears reasonable, as the boundary of the port area is *ex lege* the boundary of the maritime domain. However, in other cases, what does it mean that it is “unequivocally established that the real properties subject to concession fall within the status of maritime domain”? What does it mean that “there is no doubt that the property qualifies as maritime domain by virtue of the law itself” when the property is not registered in the land register as maritime domain?

The legislator was likely motivated by the fact that the boundary of the maritime domain has not been determined for a significant portion of the

Croatian coastline,²⁹ and that this circumstance could delay the concession-awarding process and investments in the maritime domain. However, this has opened a new Pandora's box—when discussing the boundary of the maritime domain, that is, the boundary of land subject to a special legal status that is recorded in the land register, it is highly questionable to assert that something is “unequivocal” if it is not recorded in the land register.

How, then, will oversight be conducted in such cases? What are the limits of the inspector's authority? How will a potential concessionaire even justify such an investment to creditors? Not to mention the potential for arbitrary decisions by various local and state authorities. This exception should not have been introduced; rather, it should have been ensured that the maritime domain boundary is determined in accordance with the prescribed procedure. Instead of an exception, the focus should have been on ensuring the efficiency of maritime domain boundary determination.

We must agree with the conclusion already expressed by Ante Vuković regarding this exception: “We believe that the established boundary of the maritime domain and its implementation in the land register, as a prerequisite for awarding a concession under Article 7, paragraph 4 of the 2003 MDSPA, represents a standard that has been seriously undermined by the highly confusing provisions on the determination of status and registration of the maritime domain in Article 10 of the 2023 MDSPA.”³⁰

3.2. Duration of Concession Awards

Determining the duration of a concession is a crucial aspect of the concession-awarding process, including those related to maritime domain. Limiting the duration of a concession is necessary to prevent market closure, restrict anti-competitive practices, and ensure the free flow of services.³¹

The concession duration is determined by spatial planning documents and the Feasibility Study for Awarding a Concession, while also adhering to principles provided by the European legal framework. The *Concession Directive*

²⁹ Vojković, G., “Utvrđivanje granice pomorskog dobra de lege lata i de lege ferenda” [“Determination of the Maritime Domain Boundary de lege lata and de lege ferenda”], *Poredbeno pomorsko pravo*, vol. 61, no. 176, 2022, pp. 527-558. <https://doi.org/10.21857/m16wjcnng9>

³⁰ Vuković, A. “Sadržaj, status i evidentiranje pomorskog dobra – korak naprijed i dva koraka unazad” [“Content, Status, and Registration of the Maritime Domain – One Step Forward and Two Steps Back”] *IUS-INFO*. Zagreb: Lexpera, 2024. <https://www.iusinfo.hr/aktualno/u-sredistu/sadrzaj-status-i-evidentiranje-pomorskog-dobra-korak-naprijed-i-dva-koraka-unazad-59471>.

³¹ Burnik, A., “Nova pravna uređitev sklepanja koncesijskih pogodb” [“The New Legal Framework for Concluding Concession Contracts”] 2017. <https://repozitorij.uni-lj.si/IzpisGradiva.php?lang=slv&id=97484>.

addresses the duration of concessions in Recital 52, from which the following is highlighted: “The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the duration should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users.” The provisions of the *Concession Directive* have been transposed into Article 55 of the MDSPA. Paragraph 2 specifies that a concession must be awarded in a manner that does not restrict market competition more than necessary to ensure the amortization of the actual value of the concessionaire’s investments and a reasonable return on invested capital, while also considering the costs and risks borne by the concessionaire during the concession period.

It is explicitly stipulated that concessions for natural seabeaches may be awarded for a maximum period of five years (Article 55, paragraph 3). This five-year limit appears to be derived directly from Recital 52 of the Concession Directive, as no structures may be built on natural seabeaches. Consequently, there is no need to award concessions for longer periods to compensate for investments in construction works.

The maximum durations for awarding concessions are also regulated under Article 52 of the MDSPA. The Government of Croatia, by decision, awards concessions for projects of interest and significance to Croatia, as well as for concessions in legally protected natural areas designated by the Croatian Parliament, for a period of up to 50 years (paragraph 3). When there are justified economic interests and the concession involves the construction of new structures requiring investments that cannot be amortized within the 50-year period, and the total economic benefits cannot, according to the Feasibility Study for Awarding a Concession, be realized within the same timeframe, the Croatian Government may award a concession exceeding 50 years. Such a concession requires prior approval from the Croatian Parliament regarding the notification of the intent to award the concession (paragraph 4).

Regional self-government units award concessions of interest and significance to the regional self-government unit, as well as concessions in other protected natural areas, for a maximum period of 20 years (paragraph 5). In the case of regional self-government units, the decision to award a concession is made by the representative body (paragraph 6). In practice, concessions for seabeaches are typically awarded by regional self-government units or, where the authority has been transferred, by local self-government units.³² In very specific cases, such as strategic investments or concessions in legally protected natural areas, the concession will be awarded by the Croatian Government.

Let us conclude by noting that in Croatia, a few seabeaches remain under concession awarded under previous regulations, allowing for enclosure and entrance fees. The number of such seabeaches is fewer than 20, some of which are designated for naturist tourism (where enclosure is permitted even under current regulations), while a few are “traditional” public seabeaches.³³ These seabeaches will remain under the existing legal regime (allowing restricted access and charging for entry) until the expiration of the current concessions. This solution was necessary to preserve the rights of existing concessionaires. The state could have legislated the termination of these concessions - but in that case, it would have been required to compensate the concessionaires for damages. Therefore, Croatia considered this transitional solution, as prescribed in Article 221, paragraph 2 of the MDSPA, to be an acceptable compromise.

3.3. Concessions Awarded upon Request

As previously noted, under Article 48, paragraph 3 of the MDSPA, concessions on maritime domain are generally awarded through public tender procedures. However, paragraph 4 provides an exception, allowing concessions to be awarded upon request in specific cases expressly defined by the MDSPA. This represents a novelty in the MDSPA, as previous regulations permitted concessions upon request only for port activities and the performance of other economic activities within ports that neither required exclusive use of existing structures nor the construction of new ones. Concessions awarded upon request

³² See, for example: Primorsko-goranska County, “Prijedlog odluke o davanju koncesije na pomorskom dobru za gospodarsko korištenje plaže ispred kampa Krk, Grad Krk” [“Proposal for a Decision on Awarding a Concession on Maritime Domain for the Commercial Use of the Beach in Front of Camp Krk, City of Krk”] Available at: https://www2.pgz.hr/pozivi_skupstina/21-25/024/TOCKA20-TAJNA.pdf.

³³ Morski.hr. “Samo ovih 18 plaža u Hrvatskoj imaju koncesije s mogućnošću ograđivanja i/ili naplate ulaza” [“Only these 18 seabeaches in Croatia have concessions with the possibility of enclosure and/or entrance fees”], 10. August 2021. <https://www.morski.hr/ekskluzivno-donosimo-samo-ovih-18-plaza-u-hrvatskoj-imaju-koncesije-s-mogucnoscu-ogradivanja-i-ili-naplate-ulaza/> (accessed: January 8, 2025).

are also permitted under the general regulation, the *Croatian Concessions Act* but they are similarly recognized as an exception. Article 30 of the Concessions Act stipulates that, exceptionally, a concession for the economic use of public or other goods may be awarded upon request.

Both the specific and general regulations define the awarding of concessions upon request as “exceptional,” representing a deviation from the general rule. In the case of concessions awarded upon request, it is particularly challenging to meet the requirements set forth in the principles for awarding concessions as outlined in Article 6 of the Concessions Act. This provision states: “In conducting the concession awarding process, the concession grantor is obligated, with respect to all economic operators, to observe the principle of the free movement of goods, the principle of freedom of establishment, the principle of the freedom to provide services, the principle of efficiency, as well as other fundamental principles from the Croatian Constitution and the Treaty on the Functioning of the European Union, such as the principle of market competition, the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality, and the principle of transparency.” Concessions awarded upon request should always be treated as exceptions, applying the legal principle “*Exceptio est strictissimae applicationis*” - exceptions must be interpreted narrowly.³⁴

Article 63, paragraph 1 of the MDSPA enumerates exhaustively (not illustratively) seven cases in which a concession for the economic use of maritime domain may be awarded upon request. Among these is the possibility of awarding a concession upon request for carrying out an economic activity on a public, developed seabeach, which must not be fenced off, must not charge entry fees, and cannot be excluded from general use. This activity is conducted by a hotel, campsite, or tourist resort with a minimum categorization of four stars or higher, constructed outside the maritime domain, and with which the developed seabeach is infrastructurally connected. Additionally, the hotel, campsite, or tourist resort must have invested in the infrastructure directly linked to the developed seabeach. This provision finds its basis in the Concessions Act, Article 39, paragraph 1, item 2, which states that a concession upon request may be awarded if the existing and/or planned economic activity of an economic operator at a specific location forms an inseparable technological or functional unit with the subject of the concession for which the request is submitted, and the concession exclusively serves the performance of that economic activity.

³⁴ Vojković, G., “Koncesije na zahtjev na pomorskom dobru – nova mogućnost u razvoju turizma”, op. cit.

The procedure for awarding a concession upon request and the content of such a request are governed by Article 64 of the MDSPA. According to this provision, the request for awarding a concession must be accompanied by documentation required under the general regulations governing concessions, as well as a feasibility study prepared by the applicant. This study must demonstrate the economic justification, profitability, and viability of the economic use of the maritime domain. It must also propose the amounts for the fixed and variable parts of the concession fee for the economic use of the maritime domain, specify the total proposed investment, including environmental protection measures, and include a business and financial plan. This documentation is submitted to the authority responsible for conducting preparatory actions for awarding the concession (paragraph 1). Based on the submitted request, the authority conducting the preparatory actions will prepare a Feasibility Study for Awarding the Concession. According to the findings of this study, the authority may fully or partially accept the request, or it may reject the request as unfounded, providing a reasoned decision (paragraph 3).

An intriguing provision is found in Article 64, paragraph 5 of the MDSPA, which explicitly stipulates that the concession fee for conducting economic activities on a public, developed seabeach is determined by the *Feasibility Study for Awarding the Concession*. However, the fee cannot be lower than twice the amount achieved through public tender for a similar or identical concession within five years preceding the submission of the request. This provision acts as a statutory “safeguard” designed to prevent potential abuses in the form of disproportionately low concession fees and to mitigate possible political or public criticism that a concession for a seabeach has been awarded at a “bargain price.” Nevertheless, a significant question remains open - at least until more such concessions are awarded - regarding how to define a “similar or identical concession.” The economic value of a concession can vary significantly depending on its specific micro-location, which adds complexity to the implementation of this provision.³⁵

This provision represents a significant opportunity for the development of high-quality tourism and hospitality services in front of high-category accommodation facilities (explicitly requiring a minimum categorization of four stars or higher). Hotels, campsites, or tourist resorts may obtain a concession upon request, provided they meet the necessary conditions, thereby extending their services to the maritime domain, specifically the seabeach in front of their property. This approach enables the development of more sophisticated and

³⁵ Ibid.

integrated services, allowing the accommodation provider to strategically plan activities while ensuring public access to the developed seabeach is preserved.

4. Permits for Maritime Domain

4.1. Replacing Concession Approvals with Permits for Maritime Domain

As outlined in the previous chapter, the economic use of maritime domain is conducted based on concessions. However, the concession process is one of the most complex administrative procedures.³⁶ It involves two legal acts - the decision on awarding the concession and the concession agreement - and requires the preparation of extensive documentation, with the procedure itself being precisely regulated. By the mid-1990s, legal practice had already demonstrated that the complex concession framework was unsuitable, overly intricate, and slow for addressing demands related to numerous simple activities on maritime domain that minimally or not at all interfere with general use.³⁷ After the first decision to award a concession on maritime domain under the then-current rules, it became evident that the procedure was too lengthy and inefficient to meet the requirements for carrying out straightforward economic activities on maritime domain (such as kiosks, stalls, rental of umbrellas and deckchairs, small boats, etc.).³⁸ As a result, concession approvals were introduced into the Croatian legal system in 1996. This significantly simplified procedure allowed for commercial activities on maritime domain without excluding or restricting its general use. This solution aligns with legal doctrine. For instance, Borković discussed “special use,” which expands the possibilities for utilizing certain public goods based on a specific authorization but must not alter the structure of the public good (*salva rerum superficie*). An example given is the installation of kiosks on a street, which does not prevent citizens from using the street.³⁹

The institution of concession approvals, introduced in 1996, remained largely unchanged until the entry into force of the new MDSPA. However, the procedure for awarding concession approvals was not without its shortcomings. A particular issue arose in cases where multiple economic operators expressed

³⁶ Vojković, G., “New legal framework of concessions in Croatia”, Zbornik radova Pravnog fakulteta u Splitu, vol. 51, no. 1, 2014, pp. 131-149.

³⁷ More extensively: Kundih, B., Pomorsko dobro i granice pomorskog dobra [Maritime Domain and its Boundaries], Zagreb: Edicija Božičević, 2000.

³⁸ Sobol, B. “Umjesto koncesije – koncesijsko odobrenje.” [“Instead of a Concession – a Concession Approval.”] Bilten – Primorsko-goranska County, Rijeka, 1996, p. 13. Cited in: Kundih, B. Pomorsko dobro i granice pomorskog dobra, op. cit.

³⁹ Borković, I., Upravno pravo [Administrative Law], Zagreb: Narodne novine, 2002, p. 599.

interest and submitted requests to use the same micro-location, which was often an attractive seabeach. In practice, no system for evaluating such requests existed. To address this, the competent Ministry issued guidelines and interpretations stipulating that, in such cases, approvals would be awarded based on the order in which requests were received.⁴⁰ This approach led to the implementation of a model colloquially referred to as “the fastest finger,” drawing its name from a popular quiz show and serving as a variation of the phrase “first come, first served.” Some economic operators, for instance, submitted their requests from distant border post offices open past midnight to ensure they were first in line. This method faced justified criticism from both economic stakeholders and local self-government units. It was seen as an inequitable and arbitrary system, particularly unsuitable for managing high-demand locations such as popular seabeaches.⁴¹

It is worth noting that, in practice, concession approvals were most often awarded for a period of one year, despite the law permitting their issuance for up to five years. This short duration soon revealed a significant drawback: users, lacking any guarantee of renewing their concession approval in subsequent years, and unable to engage in even medium-term business planning, showed little interest in the long-term development of economic activities. Additionally, the concession fees, regulated by a 2004 Decree, were particularly problematic. Over time, these fees became eroded by inflation, and on highly attractive locations, they were exceedingly low. This further discouraged meaningful investment and failed to reflect the true economic potential of the maritime domain in such prime areas.⁴²

The new MDSPA replaces concession approvals with maritime domain permits. According to the MDSPA glossary, a maritime domain permit is an administrative act that awards the permit holder a time-limited right to perform activities on the maritime domain without restricting or excluding its general use. The activities may involve only simple structures that, under construction regulations, are not considered construction. Additionally, the glossary defines

⁴⁰ “Namely, concession approvals are awarded upon request in accordance with the Regulation, and therefore, contrary to the provisions of the Regulation as a higher legal act, no tendering process or public bidding may be conducted for such approvals.” – Ministry of the Sea, Transport, and Infrastructure, Maritime Administration, Report on Irregularities in the Draft Management Plan for the Maritime Domain in the City of Split for 2022, KLASA: 342-22/22-01/152, URBROJ: 530-03-1-1-2-22-2, dated April 4, 2022.

⁴¹ Kundih, B., “Umjesto koncesijskih odobrenja uvedene dozvole” [“Permits Introduced Instead of Concession Approvals”], Stručni portal pomorsko dobro. <https://www.pomorskodobro.com/umjesto-koncesijskih-odobrenja-uvodne-dozvole/> (accessed: January 12, 2025).

⁴² Vojković, G., “Pomorsko dobro – dozvole umjesto koncesijskih odobrenja” [“Maritime Domain – Permits Instead of Concession Approvals”], Informator, Zagreb, 2023, no. 6800, pp. 11-15.

the economic operator awarded a maritime domain permit as the “permit holder for maritime domain.” This change aims to streamline the framework for managing activities on maritime domain, ensuring compatibility with public use while maintaining administrative clarity and efficiency.

The change from concession approvals to permits is not merely terminological but addresses numerous shortcomings of the previous regulatory framework. The Explanatory Memorandum to the MDSPA states: “Concession approvals are replaced by permits, which are awarded based on a public tender process for a period of two to five years. This approach ensures permit holders on maritime domain a sufficient time period for return on investment while encouraging greater investments in the resources used for the activities previously covered by concession approvals. The result will undoubtedly be an improved tourist offering along the coast and higher revenues from permit fees. As these revenues are earmarked funds that local self-government units are obliged to reinvest into the maritime domain, it is expected that our coastline will be cleaner and better maintained. Promenades ensuring access to the maritime domain will be constructed, and showers and sanitary facilities will be installed on seabeaches not under concession.”⁴³ Thus, the new legal framework for permits has been introduced, among other reasons, to promote investment in the maritime domain, particularly seabeaches, enhancing their development and usability.

This change was necessary also to ensure compliance with *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (Services Directive)*⁴⁴. The purpose of this Directive is to facilitate the freedom of establishment for service providers and the free movement of services within the European Union by eliminating unnecessary regulatory barriers and ensuring transparency and legal certainty.

Recital 2 of the Directive states: “A competitive market in services is essential in order to promote economic growth and create jobs in the European Union.” It is evident that this objective cannot be achieved if a potential service provider is required to queue from five in the morning at a local office to apply for Concession Approval or wait until midnight at the only post office in the country that remains open at that time.

The Services Directive applies to cases such as the awarding of concessions and permits for the commercial use of the maritime domain, including those concerning seabeaches. The Court of Justice of the European Union (CJEU) has

⁴³ Hrvatski sabor, Konačni prijedlog Zakona o pomorskom dobru i morskim lukama, op. cit.

⁴⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, ELL: <http://data.europa.eu/eli/dir/2006/123/oj>.

confirmed in its rulings (e.g., C-458/14 and C-67/15)⁴⁵ that the allocation of such concessions must comply with the principles of transparency, equal access, and non-discrimination: “The Court then states that the grant of authorisations relating to the economic exploitation of State-owned maritime and lakeside property must be subject to a selection procedure for potential candidates (...).”⁴⁶ While Concession Approvals do not constitute concessions in the legal sense, they share economic similarities, which is why the same procedural rules described in the Services Directive should apply to their allocation.

Therefore, the new solution - Permits for the Maritime Domain, featuring a transparent allocation model - is considered a significantly improved approach that aligns with both the European legal framework, The Services Directive, and the Croatian maritime domain legislation.⁴⁷

4.2. Maritime Domain Management Plan

The maritime domain, including seabeaches, may accommodate a wide range of activities, differing in both type and intensity. Local self-government units may, for certain seabeaches, prioritize the provision of “quieter” activities, such as the rental of sun loungers and umbrellas or the sale of cold beverages and ice cream. Conversely, other seabeaches may be deemed more suitable for “active” recreational activities, such as parasailing, banana boat rides, or the rental of paddleboards and sailboards. By tailoring the permitted activities to the specific characteristics of individual seabeaches, local authorities can effectively regulate the use of the maritime domain, balancing various interests while ensuring its optimal and sustainable utilization.

The legislator has thus anticipated that activities on the maritime domain should be planned in advance. Activities to be conducted on the maritime domain, including seabeaches, must be outlined in the *Maritime Domain Management Plan*. According to Article 39 of the MDSPA, the executive body of a local self-government unit or the director of a public institution managing protected natural areas is required to prepare, no later than September 1 of the current year, a *Proposal for the Maritime Domain Management Plan* or a *Proposal for the Management Plan for the Maritime Domain within the protected natural area* for the following five-year period. This plan must include the activities planned for the maritime domain, priorities for their implementation, sources of funding, a

⁴⁵ Court of Justice of the European Union, ‘Judgment in Cases C-458/14 and C-67/15: Italian Beach Concessions and EU Law’ (Press Release No. 36/16, 14 July 2016) https://curia.europa.eu/jcms/jcms/p1_215749/en/.

⁴⁶ Ibid.

⁴⁷ See *infra* 4.3.

maintenance and nourishment plan for seabeaches, plans for construction on the maritime domain, a plan for awarding permits for the maritime domain, and a plan for monitoring permit holders' compliance (paragraph 1). It is expressly stipulated that public consultation must be conducted before adopting the Plan (paragraph 1). Following the public consultation, the Maritime Domain Management Plan for a local self-government unit is adopted by the representative body of the local self-government unit, while the Management Plan for the Maritime Domain within a legally protected natural area is adopted by the management board of the public institution for protected natural areas. The Plan is then submitted to the regional self-government unit and the competent port authority for approval (paragraph 4). The Maritime Domain Management Plan is published in the official gazette of the local self-government unit, while the Management Plan for the Maritime Domain within a legally protected natural area is also published on the official website of the public institution managing the protected natural area (paragraph 7).⁴⁸

Pursuant to Article 39, paragraph 12 of the MDSPA, the *Ordinance on the Content of the Maritime Domain Management Plan*⁴⁹ was adopted. This Ordinance regulates the mandatory content of the Maritime Domain Management Plan and the Management Plan for the Maritime Domain within protected natural areas. These plans are adopted by the representative body of the regional self-government unit, the representative body of the local self-government unit, and the management board of the public institution responsible for protected natural areas.

The Maritime Domain Management Plan can serve as a tool to guide economic activities on the maritime domain. For example, certain hospitality and tourism-related activities on seabeaches may be carried out either based on a concession or a permit. The law does not explicitly determine which option is preferable, nor does it strictly separate them.

Therefore, local self-government units, which have the best understanding of their specific circumstances, should decide within their respective Maritime Domain Management Plans whether hospitality and tourism-related activities should be carried out under a concession or a permit. In making this determination, they should consider their specific natural and developmental conditions—such as the size and number of seabeaches, the seasonality of

⁴⁸ We welcome the unified publication of maritime domain management plans for local self-government units across the entire county in one place, along with an interactive map, as implemented by the Split-Dalmatia County within the framework of the project "Pomorsko je dobro" (*The Sea is a Public Good*). See: <https://www.pomorskodobro.dalmacija.hr/Dokumenti>

⁴⁹ Hrvatski sabor, Konačni prijedlog Zakona o pomorskom dobru i morskim lukama, op. cit.

tourism demand, and, importantly, the impact on the public interest and the development of the local economy.

4.3. Procedure for Awarding Permits

The new regulation governing the awarding of permits for the maritime domain represents a significant transformation of this legal institute compared to the previous concession approvals.

According to Article 71 of the MDSPA, the executive body of a local self-government unit is required, based on the Maritime Domain Management Plan, to publish a public call for awarding permits on the maritime domain by February 1 of the current year. This call must be published in the official gazette, on the notice board, on the official website of the local self-government unit, and in at least one daily newspaper (paragraph 1). The same obligation applies to the directors of public institutions managing legally protected natural areas. Additionally, directors of port authorities must follow the same procedure for permits within port areas; however, due to the scope of this text, permits for port areas will not be addressed here. It is important to note that the legislator has not provided detailed provisions regarding the content of such public calls. Clearer rules and practical criteria for evaluating applications and selecting among multiple candidates for maritime domain permits will need to be developed through the practice of conducting such calls. Due to specific business and legal circumstances, the elements of these public calls cannot fully align with existing legal provisions regulating public procurement.⁵⁰

It is explicitly stipulated that if the executive body of a local self-government unit or the director of a public institution responsible for protected natural areas fails to publish a public call within the prescribed timeframe outlined in this Article, it shall be deemed that no permits will be awarded for the maritime domain in the current year (paragraph 2). This explicit provision was likely introduced to prevent the publication of public calls “at the last minute” and to address potential abuses associated with such practices. It ensures transparency and predictability in the process, safeguarding against arbitrary or rushed decisions.

Based on the submitted bids from the public call, and pursuant to the decision of the representative body of the local self-government unit or the management board of the public institution for legally protected natural areas,

⁵⁰ Baće, M. “Dozvola na pomorskom dobru kao novi pomorskopravni institut u hrvatskom zakonodavstvu.” [“Permit for the Maritime Domain as a New Maritime Law Institute in Croatian Legislation.”] *Zbornik radova Pravnog fakulteta u Splitu*, vol. 60, no. 4, 2023, pp. 691-715. <https://doi.org/10.31141/zrpf.2023.60.150.691>.

the executive body of the local self-government unit or the director of the public institution issues a decision awarding the permit for the maritime domain to the most favourable bidder (paragraph 3). The explicit requirement for a public call resolves one of the major issues with the previous concession approval system – cases where multiple interested parties applied for the same activity at the same micro-location. In such scenarios, the permit is awarded to the bidder offering the highest fee. This approach prevents abuses and irregularities that were possible under the “fastest finger first” model. Additionally, this solution increases local government revenues, as economic operators will compete with higher bids for attractive locations, particularly on renowned and popular seabeaches. The increased income should enable local governments to better manage and maintain the maritime domain. A permit for the maritime domain may only be awarded to an economic operator registered to perform the economic activity for which they submitted a bid in the public call (paragraph 4).

Article 71 also contains several general provisions. It stipulates that a permit may only be issued for activities and the use of maritime domain deemed to be of minor significance (paragraph 5). Additionally, a permit cannot be awarded to a bidder who has previously used the maritime domain without a valid legal basis and/or caused damage to the maritime domain (paragraph 6).

Furthermore, it is explicitly prescribed that the decision awarding the permit for the maritime domain constitutes an administrative act that confers upon the economic operator the right to perform activities that do not restrict the general use of the maritime domain (paragraph 7). The operative part of the decision must include the following: 1. The activity for which the permit is issued; 2. The manner of performing the activity; 3. The scope of the maritime domain where the activity may be conducted; and 4. A prohibition against restricting or excluding the general use of the maritime domain for which the permit is awarded (paragraph 8). Permits for the maritime domain are awarded for a period of two to five years (paragraph 9). The extended duration of permits, as noted in the Explanatory Memorandum to the Act, is intended to encourage greater investment in the maritime domain. An exception is provided for very short-term permits. Permits may be awarded upon request for a period of up to 20 days to carry out temporary or occasional activities, such as cultural, commercial, or sports events, or the filming of commercial programs. This is allowed only once per calendar year and may include restrictions on general use, such as fencing off areas or charging entry fees (paragraph 9). This provision is particularly relevant for events like concerts, fishermen’s nights, and similar occasional activities on the coastline.

The MDSPA also provides for legal remedies. It states that appeals against decisions awarding or revoking permits on the maritime domain may be submitted to the competent ministry (Article 71, paragraph 11).

4.4. Rights and Obligations of Permit Holders and List of Activities

Article 72 of the MDSPA regulates the rights and obligations of permit holders on the maritime domain. A permit holder may perform activities on the maritime domain only to the extent and under the conditions specified in the permit (paragraph 1). The permit holder is not entitled to enter into contracts with third parties that would allow such third parties to perform the activity or part of the activity specified in the permit. Moreover, the permit issuer cannot authorize the permit holder to delegate such activities to third parties (paragraph 2). However, the Act explicitly states (paragraph 3) that this prohibition does not apply to renting, lending, or similar arrangements involving the equipment used to perform the activity specified in the permit. It is worth noting a terminological inaccuracy here - since the provision pertains to economic activities, the term “lease” (zakup) would be more appropriate than “rent” (najam). This provision likely reflects the legislator’s intention to prevent an overly narrow interpretation of paragraph 2, which could otherwise hinder the use of equipment acquired through lease, leasing arrangements, or other similar business models that are common in contemporary practice for acquiring operational equipment. By clarifying this aspect, the provision ensures that permit holders can utilize modern financing and procurement methods without violating the terms of the permit.

Article 72 of the MDSPA also outlines provisions concerning the obligations of the permit issuer. The permit issuer is required to ensure that the maritime domain is used strictly within the scope and boundaries specified in the permit (paragraph 4). Additionally, the permit issuer must ensure that the permit holder does not restrict the general use of the maritime domain (paragraph 5). If it is determined that the maritime domain is being used beyond the scope and conditions specified in the permit and/or that the permit holder is restricting general use, the permit issuer is obligated to issue a decision revoking the permit for the maritime domain (paragraph 6).

Article 72, paragraph 7 of the Maritime Domain and Seaports Act (MDSPA) awards the Croatian Government the authority to regulate, by decree, the types of activities and the minimum fee amounts for awarding permits on the maritime domain. Pursuant to this provision, the *Decree on the Types of Activities*

*and Minimum Fee Amounts for Awarding Permits on the Maritime Domain*⁵¹ (hereinafter: the Decree) was adopted in February 2024.

The Decree enumerates activities that may be conducted on the maritime domain under a permit, organized into eight categories with subcategories. These activities include:

1. Rental of Equipment for Recreation and Sports: Examples include rental of boats, seabeach equipment, and personal or electric-powered transportation devices.
2. Hospitality Activities: Preparation and serving of food and beverages from establishments, outdoor bars with taps, stationary or mobile vehicles, benches, carts, or similar devices.
3. Education, Training, and Guidance in Sports and Recreation: Examples include water polo schools, diving schools, sailing schools, and similar activities.
4. Retail Outside of Traditional Stores: Examples include sales via establishments, stationary or mobile vehicles, stands, benches, vending carts, mobile vendors, vending machines, and financial services such as ATMs.
5. Entertainment and Recreational Activities: Examples include towboat services for entertainment purposes (e.g., water skiing, parasailing), outdoor sports and amusement parks (e.g., seabeach volleyball, bocce courts, water or land playgrounds for children, trampolines, etc.).
6. Body Care and Maintenance Services: Examples include massage, tattooing, and similar services.
7. Temporary or Occasional Activities: Examples include weddings, fishermen's nights, concerts, and similar events.
8. Advertising Agency Activities: Placement of outdoor advertisements and operation of information kiosks.

As evident, most of these activities can be conducted on seabeaches, reflecting their multifunctional use. The Decree provides a comprehensive framework, ensuring that diverse economic and recreational activities on the maritime domain are regulated while maintaining accessibility and adherence to public interest.

According to the Decree, a permit for the maritime domain may cover multiple activities and include various means for conducting those activities at

⁵¹ Uredba o vrstama djelatnosti i visini minimalne naknade za dodjelu dozvola na pomorskom dobru, [Decree on Types of Activities and Minimum Fee for Issuing Permits on Maritime Domain.] Official Gazette, No. 16/04.

the same location. For each activity and means specified in the permit, the initial fee amount is determined in accordance with the provisions of the Decree. Certain activities are further detailed in the Decree. For example, a permit for the hospitality activity of preparing and serving food and beverages may include the installation of structures and/or an outdoor bar with a tap, terraces, and chemical toilets (each up to 2 m²).

The Decree also establishes minimum annual fees for awarding permits for specific activities. For instance: a minimum fee of €1,000 is set per jet-propelled watercraft; a minimum fee of €100 is set per human-powered vessel, windsurfing board, or surfboard. Additionally, the Decree stipulates that the minimum annual fee for awarding a permit on the maritime domain may be exceptionally reduced by 30% in a repeated public call if no offers were received for an activity deemed important to the permit issuer during the initial public call. This provision addresses situations where a particular location or activity fails to attract interest.

5. Conclusion

In July 2023, Croatia adopted the new *Maritime Domain and Seaports Act* (MDSPA), marking the third major reform of the legal framework governing the maritime domain in Croatia. In addition to improving the regulation of the maritime domain, the new MDSPA aligns Croatian legislation with the EU's 2014 *Concession Directive* and the Croatian *Concessions Act*. The updated law modernizes outdated provisions and eliminates previous regulatory shortcomings, enhancing legal certainty and laying the groundwork for long-term sustainability. Notably, the new Act is significantly more detailed, containing nearly twice as many articles as its predecessor.

One of the key innovations in the new law is the precise and detailed categorization of seabeaches. Seabeaches are now clearly divided into public seabeaches—further classified as natural or developed—and special-purpose seabeaches. This categorization facilitates more accurate regulation of management and use, with particular emphasis on safeguarding general public access, a principle highlighted throughout the Act in response to the strong public interest during its drafting.

Under the provisions of the MDSPA, natural seabeaches are preserved in their original state, with no construction permitted. In contrast, developed seabeaches are designed to accommodate larger numbers of visitors and are equipped with infrastructure, including facilities ensuring accessibility for persons with reduced mobility.

The Act explicitly stipulates that seabeaches must be accessible to everyone under equal conditions. Fencing and charging entry fees for public seabeaches are strictly prohibited. Local self-government units, concessionaires, and public institutions are required to maintain the seabeaches and safeguard the public interest. Seabeaches can only be fenced off and excluded from general use in two specific cases: 1. Seabeaches designated for special purposes under a concession awarded to a public healthcare institution, for use by patients undergoing treatment and/or rehabilitation; 2. Seabeaches under concession to entities serving naturalist tourists (*naturists*).

Long-term sustainability of seabeaches is further ensured through detailed regulations on seabeach nourishment and replenishment. The use of materials harmful to biodiversity, such as soil or waste, is prohibited. Only natural gravel and sand may be used for nourishment. This provision is particularly significant for preserving marine ecosystems and preventing coastal degradation, a frequent issue in the past due to inadequate replenishment practices.

The alignment of the legal framework for concessions on the maritime domain, including seabeaches, with the general concession framework is another critical innovation, enhancing legal certainty and improving economic utilization of seabeaches. The new Act addresses longstanding inconsistencies and discrepancies, ensuring compliance with the principles of equal treatment, transparency, and market competition. Previously, the lack of harmonization between the specific and general concession regulations created significant barriers to high-quality investments on the maritime domain. For over 15 years, this regulatory mismatch hindered effective and sustainable development, an issue now resolved by the new Act.

A significant innovation introduced by the new Act is the replacement of concession approvals with permits. While concession approvals were plagued by numerous issues, such as unclear selection criteria and inconsistent allocation practices, the new permit system enhances transparency and legal certainty. Permits are awarded through public tenders for periods ranging from two to five years, facilitating better business planning and encouraging greater investment by permit holders in the development of tourism offerings. At the same time, increased revenue from permit fees - previously "frozen" under the 2004 Decree - will enable local communities to improve the management and maintenance of the maritime domain.

The planning of maritime domain management, including seabeaches, has also been advanced through the requirement for local self-government units to develop five-year management plans. These plans provide comprehensive details on maintenance, oversight, and future activities on the maritime domain,

including those related to seabeach management. This modernized framework ensures a more structured and sustainable approach to utilizing and preserving maritime resources, benefiting both economic stakeholders and the broader public interest.

The new MDSPA represents a significant step forward in the protection and economic utilization of seabeaches in Croatia. By introducing modern legal solutions, it ensures a balance between economic interests, the preservation of natural resources, and the principle of general use, guaranteeing free access to seabeaches. These principles are emphasized to such an extent that the provisions prohibiting seabeach fencing and ensuring unrestricted access are repeated multiple times in the Act. While this repetition is technically a nomotechnical redundancy, it is politically expedient and does not detract from the clarity of the regulation.

In summary, the economic utilization models for seabeaches are precisely defined: the portion of the seabeach that can be awarded under concession, the types of concessions permitted, and their maximum duration are now clearly outlined. Furthermore, the entire concession framework has finally been aligned with the general concession legislation. For numerous smaller economic activities on seabeaches, specific provisions on permits and the accompanying subordinate legislation offer detailed regulation.

The new Act is undoubtedly a much-improved regulation compared to its predecessor. Not only does it define the types of seabeaches in a clearer and more structured manner, but it also provides a comprehensive framework for all forms of economic activities conducted on them, ensuring legal certainty and promoting sustainable development.

