Maritime Safety and Security Law Journal

# Current Development

## Comment to Directive (EU) 959/2023 establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 1814/2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas Emission Trading System

### 1. The Extension of the European Trading System to Maritime Navigation: a Strengthening or Weakening of the Shipping sector?

With the adoption of EU Directive 959/2023,[1] international maritime transport has been included among the activities covered by the Emission Trading System (hereinafter ETS) of the European Union. This decision, grounded in the necessity to cover the only means of transport so far excluded from emission reduction commitments and in the risk to jeopardize results achieved in other areas, has been on the agenda since 2013, when the Commission adopted a strategy aimed at monitoring, reporting and verifying emissions from this sector, resulting in the adoption of Regulation 757/2015.[2]

Directive 87/2003, as amended[3] by Directive 959/2023, establishes a relatively straightforward roadmap for the progressive decarbonization of shipping, i.e., the obligation for companies to surrender a growing quantity of allowances, namely 40% of verified emissions for 2024, 70% for 2025 and 100% for 2026.[4] As with the aviation sector, one of the most challenging problem for this kind of regulation lies in the need to apply the ETS to those situations where just one of the two ports involved in the voyage is a European one. Given the lack of a cap or price on maritime transport emissions, the European legislator decided to cover, through the ETS, only a share of those emissions, while waiting for the adoption by the International Maritime Organization (IMO) of a global market-based measure (hereinafter MBM) with this purpose.[5] Based on this approach, Article 3ga of Directive 87/2003 provides that both the allocation of allowances and the surrender requirements apply to 50% of the emissions from ships undertaking voyages that either depart from a port of call under the jurisdiction of a member state and arrive at a port of call outside the jurisdiction of a Member State, or vice versa, and to 100% of the emissions from voyages between two Member States.

1 Council Directive 959/2023 [2023] amending Directive (EC) 87/2003 establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 1814/2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system [2023] OJ L130/134 (hereinafter Dir 959/2023).

2 Council Regulation (EC) 757/2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport [2015], and amending Directive (EC) 16/2009 [2015] OJ L123/55 (hereinafter Dir 757/2015).

3 Council Directive 2003/87 of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC [2003] OJ L275/32 (hereinafter Dir 87/2003).

4 Directive 87/2003 (n 3) art 3gb.

5 Directive 959/2023 (n 1) recital 20.

As noted by recital 20 of Directive 959/2023, this method offers a 'practical solution' to common but differentiated responsibilities issues, while preserving the effectiveness of the ETS. At the same time, the evolving regulatory landscape prompted the EU to enshrine an obligation, for the Commission, to report to the Parliament and to the Council in the event of the adoption by the IMO of a global MBM to reduce greenhouse gas emissions from maritime transport (art 3 gg para 1). Furthermore, in the event that this type of scheme – more precisely, a scheme 'in line with the objectives of the Paris Agreement and at least to a level comparable to that resulting from the Union measures taken under [the] Directive' – were not. to be adopted within 2028, the possibility is open to apply the surrender of allowances under the ETS to the remaining quota of the emissions from ships having as their origin or destination a third state (art 3 gg para 2). In this respect, it is interesting to note the resemblance with the language employed by the EU legislator when drafting Directive 29/2009 updating the ETS,[6] where the comparability of efforts undertaken by third states was explicitly considered as a decisive element in the free allocation of allowances to energy-intensive industries.

If the above-mentioned considerations and measures find their basis in the need of preserving and enhancing the integrity and effectiveness of climate legislation and of the ETS, it is evident that another relevant, underlying driver is the rise of costs that, as with any other economic activity, will damage the maritime sector, and the ensuing loss of competitiveness. Based on these considerations, Directive 87/2003 allows the allocation of an additional share of allowances, until the end of 2030, to those states whose economies have a high reliance on shipping, with the possibility of extending such an option beyond that date.[7]

Besides this solution, the concern for unfair competition by other fleets to which no carbon limitations apply, especially 'in the absence of a global market-based measure',[8] also lead the EU legislator to focus attention on the use of evasive port calls outside the EU and to the relocation of transhipment activities. In order to cope with these risks, Dir 2003/87 excludes from the definition of 'port calls' those located outside the Union, but less than 300 nautical miles from a port under the jurisdiction of a member state.[9] The concern for elusion and the corresponding intention to detect evasive behaviour may even justify increased surrender requirements for voyages where the evasion risk is higher, such as those to and from a port that is located in the Union's vicinity, when the third country has not adopted comparable measures.[10] For the time being, however, such a possibility is only formulated in the framework of the revision of the functioning of Directive 87/2003 that the Commission will perform biannually starting from 2024.[11]

Along the same lines, precise definitions and criteria are set with respect to administrative control on compliance with the new *régime*, with the purpose to mitigate the complexities that characterize,

6 Council Directive 2009/29 of 23 April 2009 amending Directive (EC) 87/2003 so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L140/63 recital 24.

7 Directive 87/2003 (n 3) ga para 3; art 3 gg paras 3-4.

8 Directive 959/2023 (n 1) recital 28.

9 Directive 87/2003 (n 3) art 3 ga para 2.

10 Directive 959/2023 (n 1) recital 29.

11 Directive 87/2003 (n 3) art 3 gg 3.

especially in the maritime sector, the identification of relevant legal persons and their connection to a national legal order. Consistently with Regulation 757/2015,[12] it is clarified that the person or organization responsible for compliance with the ETS should be the shipping company, defined as the shipowner or any other organization or person that has assumed from this latter the responsibility for the operation of the ship.[13] The shipping company operates, in turn, under the control of an administrative authority (i.e. a state), coinciding with the EU member where the company is registered if this is the case, or with third states identified based on the number of port calls or on the voyages trajectory of the ships concerned.[14] Failure by both entities to ensure compliance with the requirements set by the Directive should trigger a reaction 'in solidarity'[15] and imply, as a last resort measure, the ability of member states to refuse entry to these ships. As in the provision about elusive port calls, this hypothesis has not translated, at least until now, into an actual provision.

## 2. Emission Trading and IMO: a 'Global Market-Based Measure' or an Offsetting Device?

As mentioned in the preceding paragraph, one of the main concerns of the EU legislator regarding the extension of the ETS system to maritime transport relates to future action by the IMO in this area, which, as indicated in the provisions of Directive 959/2023, may require a revision of the ETS itself. IMO involvement in this regard can be traced back to the first decade of the new millennium, when the Marine Environment Protection Committee (hereinafter MEPC) started a reflection on emission reduction, also based on the exclusive competence of this organization to set global standards for shipping.[16] Since the inception of the debate, MBMs have been the subject of mixed attitudes: while recognizing their potential effectiveness, IMO members generally seemed to consider them as merely complementary to technical and operational reduction measures, whose level of development is higher.[17] Moreover, concerns have been raised regarding possible conflicts between the application of MBMs and the principle of no more favourable treatment – one of the main pillars of IMO Conventions and of port state control – and, at the same time, regarding the principle of common but differentiated responsibilities[18]. The latter concerns not only the scope of obligations and their possible differentiation according to categories of states, but also the use of revenues generated by MBMs which, according to a certain number of delegations, should be used for mitigation or adaptation activities in developing countries 'through existing or new funding mechanisms under

12 Directive 757/2015 (n 2) art 3 lett d).

13 Directive 87/2003 (n 3) art 3 lett w).

14 ibid art 3 gf para 1.

15 Directive 959/2023 (n 1) recital 34.

16 International Maritime Organization (Assembly), 'IMO Policies and Practices Related to the Reduction of Greenhouse Gas Emissions from Ships' (5 December 2003) A 23/Res.963, para 1 (d); however, the text only refers to an 'evaluation' the Assembly entrusts to the MEPC.

17 International Maritime Organization (Marine Environment Protection Committee), 'Report of the Marine Environment Protection Committee on its Fifty-Ninth Session' (29 July 2009) MEPC 59/24 para 4.119.

18 ibid para 4.117.

the UNFCCC'.[19]

The debate on the use of revenues of possible MBMs represents, in turn, a sort of litmus test for what is perhaps the most controversial aspect of the future system, i.e., its rationale: revenues have been mentioned as one of the possible purposes of a global levy or trading scheme, together with the offsetting of growing ship emissions in other contexts, and the provision of incentives to invest in more fuel-efficient ships.[20] The lack of a uniform approach as to the ultimate aim of an MBM more specifically emerged in a document submitted to the MEPC by the Clean Shipping Coalition (CSC) in 2021, setting out suggested principles for market-based measures,[21] including a flat refusal of exemptions and offsetting. According to this view, if the former (e.g. the exemption of a state or of a route) clearly jeopardizes the integrity of commitments, the latter, in the form of the use of financial resources to purchase permits or 'cheap project-based offsetting credits', would bring to windfall profits and climate loopholes.[22] With specific reference to the ETS, the document further emphasized how this zero-sum kind of logic is problematic in terms of integrity and additionality and tends to frustrate what should represent the real purpose of an MBM, i.e., the genuine reduction of emissions in that sector.[23]

The concern for the logic of offsetting that inspires this document is, of course, not surprising if one considers that it has been submitted by a global environmental organization focussing on shipping; at the same time, this issue has always been considered as a problematic aspect of Joint Implementation (JI) and Clean Development Mechanism (CDM). As it also results a from specialised study referenced by the same document, emission reductions resulting from the CDM (defined as an 'offsetting scheme') were not additional to existing commitments, with the result that certified emission reduction units obtained through it led to a global increase of emissions.[24] This conclusion is strengthened by at least two elements of the current international legal framework on climate change: on the one hand, 'crediting mechanisms' under Article 6 of the Paris Agreement[25] designed to replace CMD and JI, besides not being fully operationalized yet, do not rule out offsetting; on the other hand, offsetting is at the basis of the scheme that, within the International Civil Aviation Organization, has been identified to tackle GHG emissions.[26]

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19 ibid para 4.128-129. United Nations Framework Convention on Climate Change (New York, 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.

20 ibid para 4.93.

21 International Maritime Organization (Marine Environment Protection Committee), 'Reduction of GHG Emissions From Ships' (17 September 2021) MEPC 77/7/17.

22 ibid para 14.

23 ibid para 15.

24 ibid.

25 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.

26 The Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) established within ICAO is based on the offsetting of emissions in the aviation sector through credits obtained by emission savings in other sectors. <www.icao.int/environmental-protection/CORSIA/Pages/default.aspx> accessed 24 March 2025.

In the light of these uncertainties, it is no surprise that the first official strategy[27] drafted by IMO in 2018 limited itself to mention, among mid-term candidate measures to reduce GHG from shipping, 'new/innovative emission reduction mechanism(s), possibly including market-based measures'. An equally cautious approach characterizes the current strategy,[28] valid until 2030, encouraging the adoption of GHG reduction measures composed of a technical element (i.e. a goal-based marine fuel standard) and an 'economic element', built upon a 'maritime GHG emissions pricing mechanism', to be assessed in the light of specific criteria. The mistrust showed by the MEPC in respect of market-based measures is perhaps indicative of the awareness of the complexities inherent in balancing the need for non-discrimination with different historical responsibilities for climate change, but also in coping with existing schemes, such as the ETS, and with the expectations they place on third states so far exempted from emission reduction commitments.

## 3. Emission Reduction for Shipping: Navigating the Dire Straits of 'Comparable Commitments'

Based on the elements gathered above, it is possible to sketch some remarks on the extension of the ETS to the maritime sector and, under a broader perspective, on the viability of a hypothetical market-based measure adopted under the auspices of the IMO. In its current form, the application of the EU cap-and-trade system to shipping follows the overall underlying logic of the ETS, i.e., that of being a system inspired by an environmental imperative and adopted in pursuance of international obligations on carbon reduction, but dominated by a strong competitiveness concern that, at least in some circumstances, tends to become the predominant aspect.

This feature emerges, primarily, from the attention devoted by Directive 959/2023 to anti-circumvention provisions, and notably to those relating to elusive port calls and compliance. The defensive nature of these legal tools emerges not only from the explicit reference in the recitals to the current absence of a global MBM, but also from the prospect of sanctions or other coercive measures intended to enforce emission reductions. If the possibility of refusing entry to ships not in compliance with the new rules finds its basis in the need to preserve the effectiveness of the ETS (in line with the logic of port state control), the same does apply to the imposition of additional emission reductions to those voyages at greater 'risk of evasion', as it would be very hard to justify a more severe financial burden based on a speculative approach – and, to some extent, on an adverse presumption *vis-à-vis* other states.

In addition, it is particularly in the provisions concerning voyages to and from third states that the defensive approach becomes evident: aware, in light of the experience gained in the aviation sector, of the opposition that any attempt to apply emission reductions to the entire voyage would encounter,

27 IMO (Marine Environment Protection Committee), 'Initial IMO Strategy on Reduction of GHG Emissions from Ships' Resolution (13 April 2018) MEPC.304(72) para 4.8 3.

28 IMO (Marine Environment Protection Committee), '2023 IMO Strategy on Reduction of GHG Emissions from Ships' (7 July 2023) MEPC.377(80) para 4.5 2.

the EU legislator directly adopted the 50% reduction option. However, this approach, meaningfully defined as a 'practical compromise', is a temporary solution contingent on the adoption of an MBM realizing a *comparable* commitment by third states, in the absence of which the integral application of emission reductions would come into play.

That said, the analysis of the documents and the emerging practice within the IMO in this area raises several doubts about the compatibility between the two models, primarily due to the different nature of the two organisations involved. The IMO is an international organization whose choices, though not immune from economic considerations, must reflect its global membership and, as a consequence, translate into a more nuanced position regarding issues of historical responsibilities for climate change, as well as those of competitiveness. Such an attitude is consistent with the pivotal role traditionally played within the IMO by the principles of non-discrimination and no more favourable treatment, which, although originally designed to apply to compliance with technical requirements, have now been extended to the organisation's progressively assumed environmental mandate, ensuring that its policies are primarily guided by the principle of the integrity of obligations.

Conversely, the EU is a regional integration area whose predominant aspect is still the preservation of an internal market and is formed by states that, according to the principle of common but differentiated responsibilities, have been bearing the cost of the transition to a low-carbon world. At the intersection of the organisation's environmental and trade policies, a system has been established - the ETS - which relies heavily on a market-based approach and has progressively evolved into a defensive mechanism, ultimately founded on the notion that any loss of competitiveness is not an unavoidable consequence of transition, but rather the result of the absence of 'comparable commitments' by third states. In addition to the elements and provisions mentioned above, this latter feature is further supported by the fact that, since 2021, the effectiveness of the ETS has been complemented by the Carbon Border Adjustment Mechanism, which replaced the free allocation of allowances to sensitive industrial sectors as a form of economic pressure on third states unwilling to undertake comparable commitments.

In the light of these elements, it is difficult to imagine the application of a global MBM measure genuinely pursuing emission reductions and based on the elimination of exemptions and offsets, especially if this result is sought in an area – maritime navigation – exposed to international competition and where, more specifically, national interests might be severely harmed by the de-flagging and re-flagging of ships. Future practice, together with developments within the international organization that holds the main competence *ratione materiae*, will tell if the awareness of the climate emergency will prevail over a zero-sum logic.

**First published online:** 23 July 2025

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