

Welcome to the EMLO 26th Annual Conference in Copenhagen

20-21 November 2022



Introduction to conference

09.05 – 09.20

Keynote Speech

Jacob Meldgaard, Chair of Danish Shipping and CEO of TORM

09.20 – 09.50

EU Maritime Law – the past year in focus

Dr Vincent Power, Chair of the EMLO

09.50 – 10.20

Sale and purchase of vessels

Morten Berggreen, Gorrissen Federspiel

10.20 – 10.45

Coffee & Network

10.45 – 11.45

What is currently on the agenda for in-house shipping lawyers?

Chair: Martin André Dittmer, Secretary General of EMLO

Panel: Bitten Sørensen, Mærsk

Ole Færge, DFDS

Kaare Christoffersen, D S Norden

11.45 – 12.15

Judicial sale of ships

Dr Ann Fenech, President of the Comité Maritime International

12.15 – 13.00

Lunch

13.00 – 13.45

Sanctions in shipping

Jacob Skude Rasmussen, Gorrissen Federspiel

13.45 – 14.15

Decarbonization of shipping - regulatory frameworks in IMO and EU

Peter Appel and Thomas Edelgaard Christensen, Gorrissen Federspiel

14.15 – 14.45

BIMCO's Standard Carbon Clauses

Stinne Taiger Ivø, Director of Contracts and Support, BIMCO

14.45 – 15.15

Tea Break

15.15 – 15.45

Hot tax topics in International Shipping

Jesper Anker Howes, Gorrissen Federspiel

15.45 – 16.15

An ECJ perspective – Insight into how the Court operates

Henrik Saugmandsgaard Øe, former Advocate General in the European Court of Justice, now Gorrissen Federspiel

16.15 – 16.30

Q&A session and conclusions and close of the seminar

Dr Vincent Power, Chair of the EMLO



Keynote Speech

Jacob Meldgaard
Chair of Danish Shipping
and CEO of TORM



Placeholder for Dr. Vincent Power
EU Maritime Law – the past year in focus

Placeholder for Morten Berggreen
Sale and purchase of vessels



Let's take a break

A large white and blue cargo ship is being lifted by a yellow crane at a port. The ship has a blue hull and a white superstructure. The crane is a large yellow gantry crane. The ship is being moved from a barge or a dry dock. The background shows a blue sky with some clouds.

What is currently on the agenda for in-house shipping lawyers?

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Placeholder for Bitten Sørensen
(no slides confirmed)

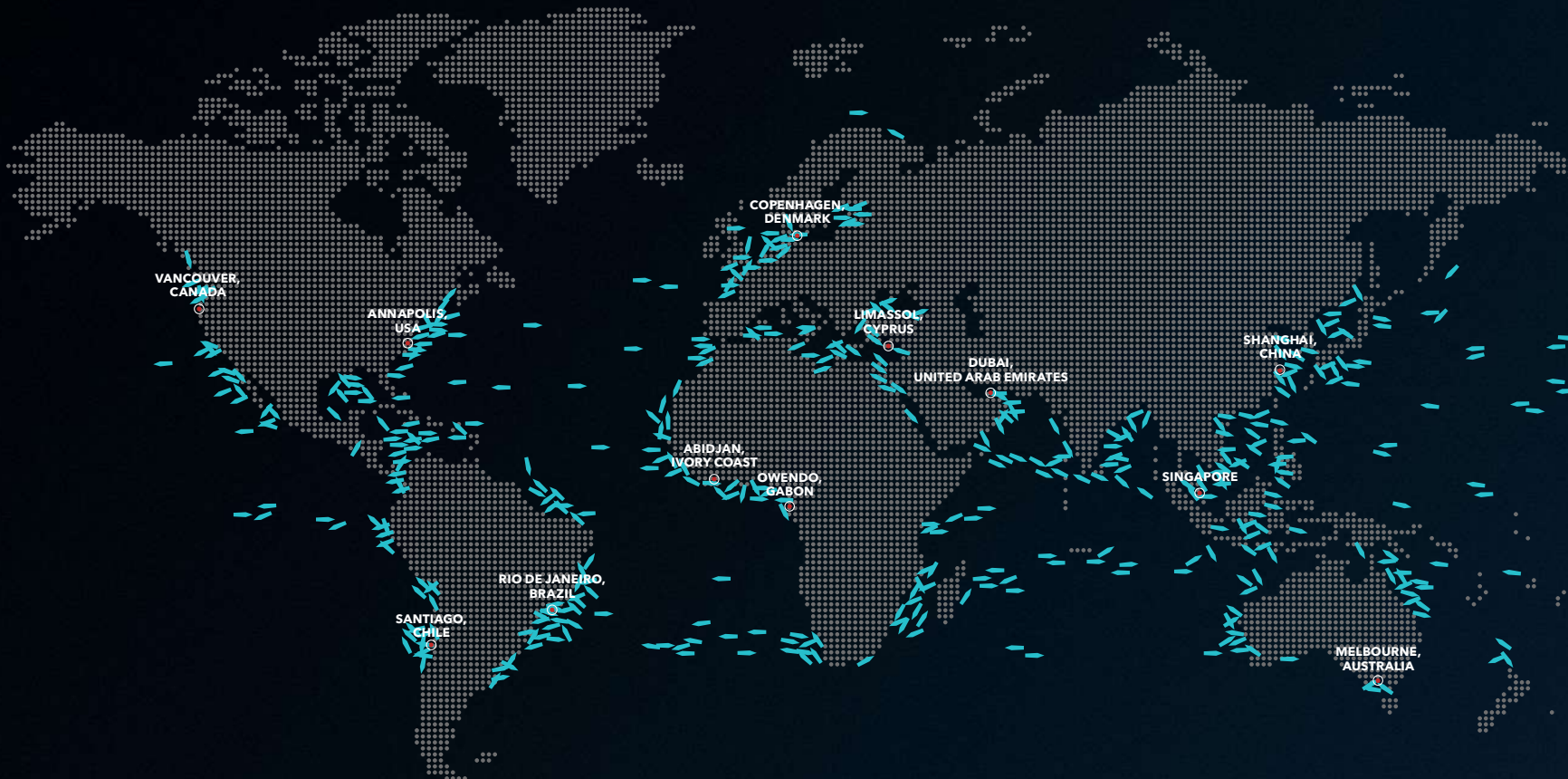
Placeholder for Ole Færge
(no slides confirmed)



INTRODUCTION TO NORDEN

We enable **smarter** global trade

With 13 offices across 6 continents, NORDEN operates at the heart of global trade, transporting dry cargo and product tanker commodities across the globe.



151

Years of rich
heritage

~500

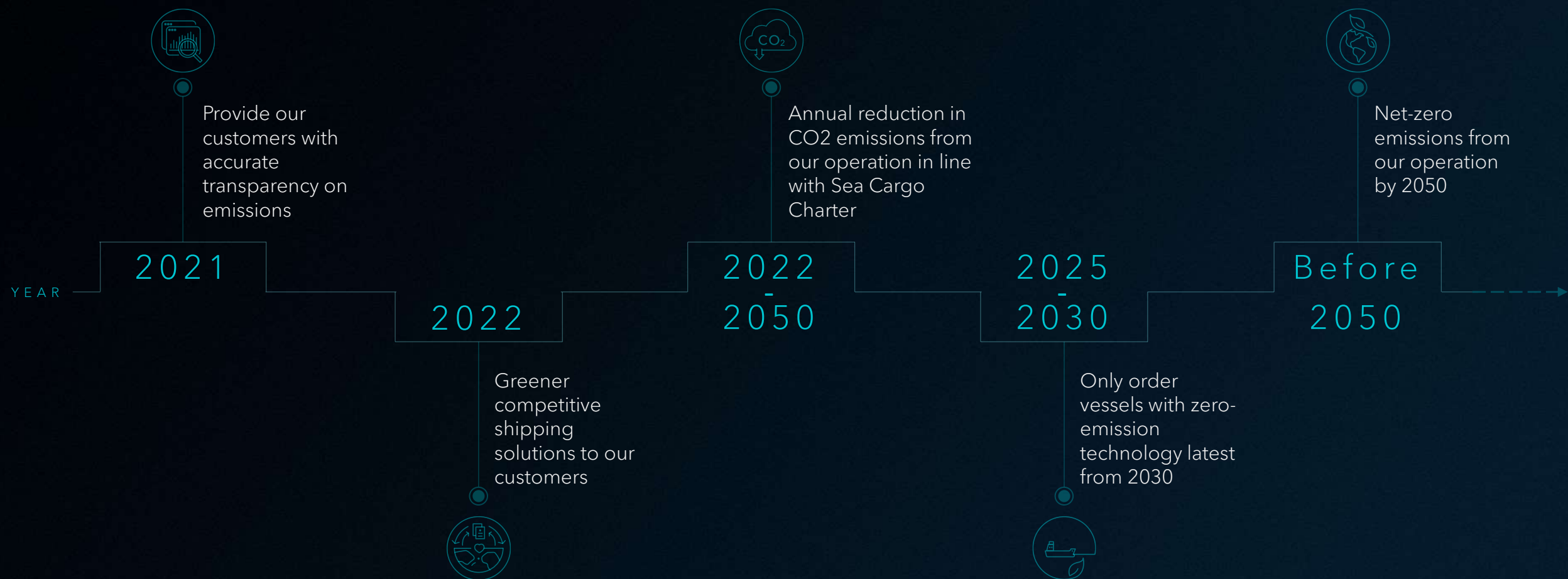
Operated
vessels

0

Net zero carbon
emissions by 2050

NORDEN DECARBONISATION AMBITIONS

Our ambition is to help our customers decarbonise their supply chains



Emission Reporting



Greener competitive shipping solutions

Biofuel

Max speed

Capped emissions

Best performing vessel



Sea Cargo Charter

- Sea Cargo Charter (SCC) uses the **EEOI*** to calculate climate alignment
- The selection of this single metric is guided by an ambition that the SCC use a **carbon intensity metric**, which produces the closest measures of a vessel's true carbon intensity in operation to a high level of granularity
- Here efficiencies in minimizing ballast or improving intake will have a positive effect on EEOI

Data required



Fuel consumption
for each fuel type in
Metric Tonnes



Emission factor
each fuel type



Distance travelled in
nautical miles



Cargo quantity in
metric tonnes

$$x_i = \frac{\text{Total voyage } CO_2}{\text{Total voyage transport work}} = \frac{C_i}{T_i D_i}$$

NOTE:

*EEOI: Energy Efficiency Operating Index - measure of operational carbon intensity based on activity

Measures to impact the SCC score

1

Vessel efficiency

- Hull cleaning and propeller polish
- Frequent underwater inspections
- Minimize bunker fraud
- Charter quality vessels
- Efficient designs, decent paint quality, no recent long port stays, well performing owners

2

Operational efficiency

- Minimizing ballast legs
- Optimize Cargo intake
- Reducing port congestion

3

Speed reduction

- Incorporate virtual arrival into CPs

4

Alternative fuels



THE RULES

Fora and Rules regulating decarbonization from shipping



Four angles of regulating shipping's carbon emissions



EU EMISSIONS TRADING SYSTEM (EU ETS)

In 2005, the EU's Emissions Trading Scheme was introduced and is today the world's leading carbon emissions trading scheme



EU's emission trading scheme

The EU's Emissions Trading Scheme is the world's largest carbon emissions trading scheme. It works under a "Cap and Trade" principle:

- Trade EU-allowances (EUAs), 1 EUA = 1 tCO₂

The system was setup in 2005 and was applied primarily to land based industrials and power plants



Emission conversion factors

Fixed conversion between bunker consumption and CO₂

- Gasoil (MGO/LSG): 3.206mt CO₂ per mt of fuel consumed
- Light fuel oil (VLR/LSF): 3.151mt CO₂ per mt of fuel consumed
- Heavy fuel oil (IFO): 3.114mt CO₂ per mt of fuel consumed

That means if you burn 100mts of LSG and 150mts of VLR

- $100 \times 3.206 + 150 \times 3.151 = 793.25\text{mts CO}_2$

EU ETS in Practice

Please note that the specifics are still being discussed; a conclusion should be reached later in the Fall of 2022*



Voyages are part of the regulation

- 50% of emissions on voyages with an EU load/discharge port and a non-EU load/discharge port, and 100% of voyage emissions on intra-EU voyages
 - Iceland, Norway and Liechtenstein also comply with this
 - In 2027 extra-EU voyage will be 100% if the non-EU country does not have a carbon pricing mechanism
- At berth emissions in EU is considered 100%, at berth outside EU is excluded
- A voyage is considered from cargo operation to cargo operation
- In order to avoid 'evasive port calls in neighbouring non-EU countries', it is suggested if the distance is less than 300 nautical miles between non-EU and EU port a 100% of emissions to be paid



Who will be liable (Subject to change)

- The DOC holder (technical manager) is responsible for surrendering allowances for the year, the following year April 30th, this will be based on the uploaded emission data in the MRV system
- The emission cost will likely be passed to the vessel operator to ensure 'the polluter pays principle'
- The expected ETS costs will likely be calculated as part of the freight rate towards voyage charterers, barring an agreement to transfer actual allowances or similar



Penalty for not complying

- 1st year a penalty of 100 EUR per EUA plus the surrender of the missing EUAs (adjusted for inflation)
- 2 consecutive years owners will face an expulsion order and can no longer trade in EU

NOTE:

*Shipping will most likely be included from 2024 companies likely to surrender 100% of verified emissions with potentially no phase-in period (still being discussed)

EU ETS Example Voyage – Panamax Norfolk/Rotterdam

How its calculated

- The pricing table shows full overview of the taxable CO2 emissions (including pre-ballast) based on regulation and phase in period
- 50% of the pre-ballast is considered, however this is technically on the previous voyage so will be seen how owners navigate this, i.e., include in this voyage or previous voyage
- At the bottom you can find voyage cost, impact on \$/mts and \$/day



Non-EU Load to EU discharge						
Emission Conversion factors	3,114	3,206	3,151			
Non-EU Load EU Disch	HSFO	LSGO	VLSFO	CO2	Tax %	Tax Co2 Mts
Pre Ballast mts of bunker		163	235	1.261	50%	631
Loading Port non-EU mts of bunker		12	2	44	0%	0,0
Laden Leg mts of bunker		194	230	1.345	50%	673
Discharge Port EU mts of bunker		0,7	11	37	100%	37
Total Mts CO2	0	369	478	2.688		1.341
Duration in days	31,82					
Cargo intake in Mts	80.000					

Emission price (covert EUR into USD 1st)	\$ 103.00	Voyage Cost	PMT of Cargo	TCE change
*Assumes a 100% phase-in from 2024	2023-	\$138.123	\$1,73	\$-4.341

EEXI / EEDI



EEXI / EEDI Overview

1

Both EEXI (Energy Efficiency Existing Ship Index) and EEDI (Energy Efficiency Design Index) refer to the design efficiency of a vessel and is a theoretical measure of CO₂ emitted per ton mile

2

The number is a static number unless an owner makes a design improvement onboard the ship, such as EPL (engine power limitation device), PBCF etc

3

EEXI is applicable for ships with building contract placed prior 2013

4

EEDI is applicable for any ships with building contract placed after 2013

5

The baseline required for a vessels EEXI/EEDI will likely change according to new vessel designs and means of propulsion

6

In general, a vessel's EEXI must be in line with current/new build vessel's EEDI minimum

7

The actual vessels performance is not measured; hence this should serve as a theoretical guide as to how the ship could perform under optimal conditions

8

The most common way to comply with EEXI is to cap (limit) the vessels top speed



CI

Carbon Intensity Indicator (CII) overview

CII is governed by the CII, the operational carbon intensity factor

$$CII = \frac{[AnnualFuelConsumption] \times [CO2emissionsfactor]}{TransportWork : [DistSailed] \times [Capacity]}$$

- 1 The ton mile (distance sailed x dwt capacity) is the driving force here
- 2 Amount of cargo carried, and efficiency of minimizing ballast do not influence CII, as ballast distance sailed is considered transport work
- 3 Long port stays will negatively impact a vessels CII and voyages to known ports with long waiting time may not be preferable to owners
- 4 The regulation is still subject to change / be adjusted in upcoming MEPC meetings
- 5 Correction factors for ice trading, consumption due to cargo discharge pumps/cargo heating and tanker STS exists, talks to incorporate port stay correction factors ongoing but not decided
- 6 The minimum CII rating will increase year over year, meaning a ship which is rated B in one year could become a C the following year (see above year-by-year reduction chart)

Required reduction YoY

Year	Z year	Phases
2020	1%	1
2021	2%	
2022	3%	
2023	5%	2
2024	7%	
2025	9%	
2026	11%	
2027		3
2028		
2029		
2030		

THANK YOU

Copenhagen, Denmark, 21st November 2022

NORD BELUGA KAMSARMAX

DEADWEIGHT

81841 mt

LENGTH

224.52 Meters

BEAM

32.26 Meters

DRAFT / MAX DRAFT

14.1 / 14.49 Meters

CURRENT LOCATION

22.284978, 114.119400



Placeholder for Dr. Ann Fenech
Judicial sale of ships
(will bring Monday)



Time for lunch

Placeholder for Jacob Skude Rasmussen
Sanctions in shipping

Decarbonisation of shipping

Regulatory framework in IMO & EU

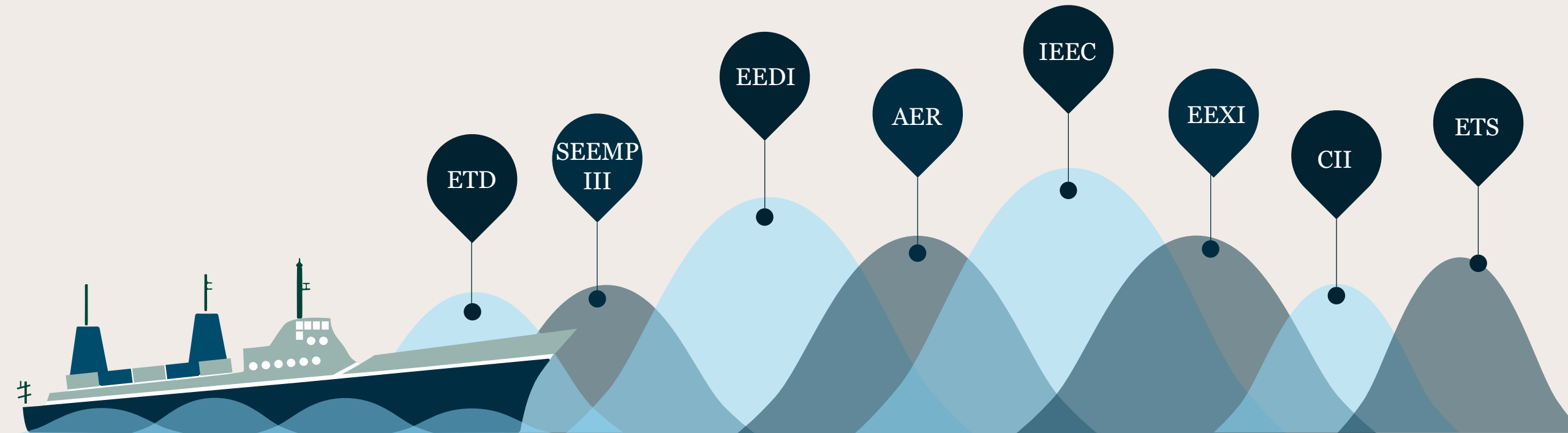


**The Twenty-Sixth Annual EMLO Conference
Copenhagen 20/21 November 2022**

Peter Appel, Partner, Gorrissen Federspiel

Thomas E. Christensen, Senior Legal Counsel, Gorrissen Federspiel

The rough sea of decarbonisation in shipping



Agenda



1

Abbreviations



2

Introduction to the regulatory framework in IMO and EU



3

New IMO regulations on EEXI and CII



4

EU's Fit for 55 Package with focus on EU ETS



5

Contractual implications



6

The competitive landscape

An aerial photograph of a large container ship sailing on a deep blue ocean. The ship is viewed from above, showing its deck loaded with numerous colorful shipping containers in shades of red, blue, and white. The ship's wake is visible in the water.

Abbreviations

EEDI

- 1 The Energy Efficiency Design Index provides a new building standard (adopted by IMO), assuring that ship designs achieve a certain level of efficiency and decrease carbon emissions.

EEXI

- 2 The Energy Efficiency Existing Ship Index is a retroactive application of the EEDI to all existing ships above 400 GT.

IEEC

- 3 The International Energy Efficiency Certificate certifies that the ship has been surveyed in accordance with MARPOL, Annex VI regulation.

CII

- 4 The Carbon Intensity Indicator (adopted by IMO) measures how efficiently a ship above 5,000 GT transports goods or passengers. The indicator is measured in grams of CO₂ emitted per cargo-carrying capacity and nautical mile.

SEMP III

- 5 The Ship Energy Efficiency Management Plan is a new version of an operation measure that establish a mechanism to improve the energy efficiency of a ship in a cost-effective manner.

AER

- 6 The Annual Efficiency Ratio (AER) stands for emission per DWT-mile and is the ratio of a ship's carbon emissions per actual capacity distance.

ETS

- 7 The European Union Emissions Trading System (ETS) is an existing cap and trade system for GHG emissions that will include the shipping industry.

IMO & Fit for 55

The maritime industry is facing significant regulatory developments relating to climate action such as:

- The IMO's amendments to MARPOL Annex VI introducing new measures that will enter into force very soon - on 1 January 2023:
 - 1. The Energy Efficiency Existing Ship Index (EEXI)
 - 2. The Carbon Intensity Indicator (CII)
 - The strategy is to reduce the carbon intensity of international shipping by at least 40% by 2030, pursuing efforts towards 70% by 2050.
-
- The EU has announced its Fit for 55 Strategy. Negotiations on the actual regulatory package to implement the strategy are ongoing.
 - The strategy sets a binding target to achieve climate neutrality by 2050.
 - Already by 2030, GHG is to be cut by at least 55% (hence the name). The package combines several initiatives also affecting the maritime sector.



IMO | The Energy Efficiency Existing Ship Index (EEXI)



A ship's attained EEXI indicates its energy efficiency compared to a baseline. It applies to most vessel types. Some vessel types not primarily concerned with transport such as dredgers are, however, excluded.



The Ships attained EEXI will then be compared to a required Energy Efficiency Existing Ship Index based on an applicable reduction factor expressed as a percentage relative to the Energy Efficiency Design Index (EEDI) baseline.



The EEXI must be calculated for ships of 400 GT and above, in accordance with the different values set for ship types and size categories.

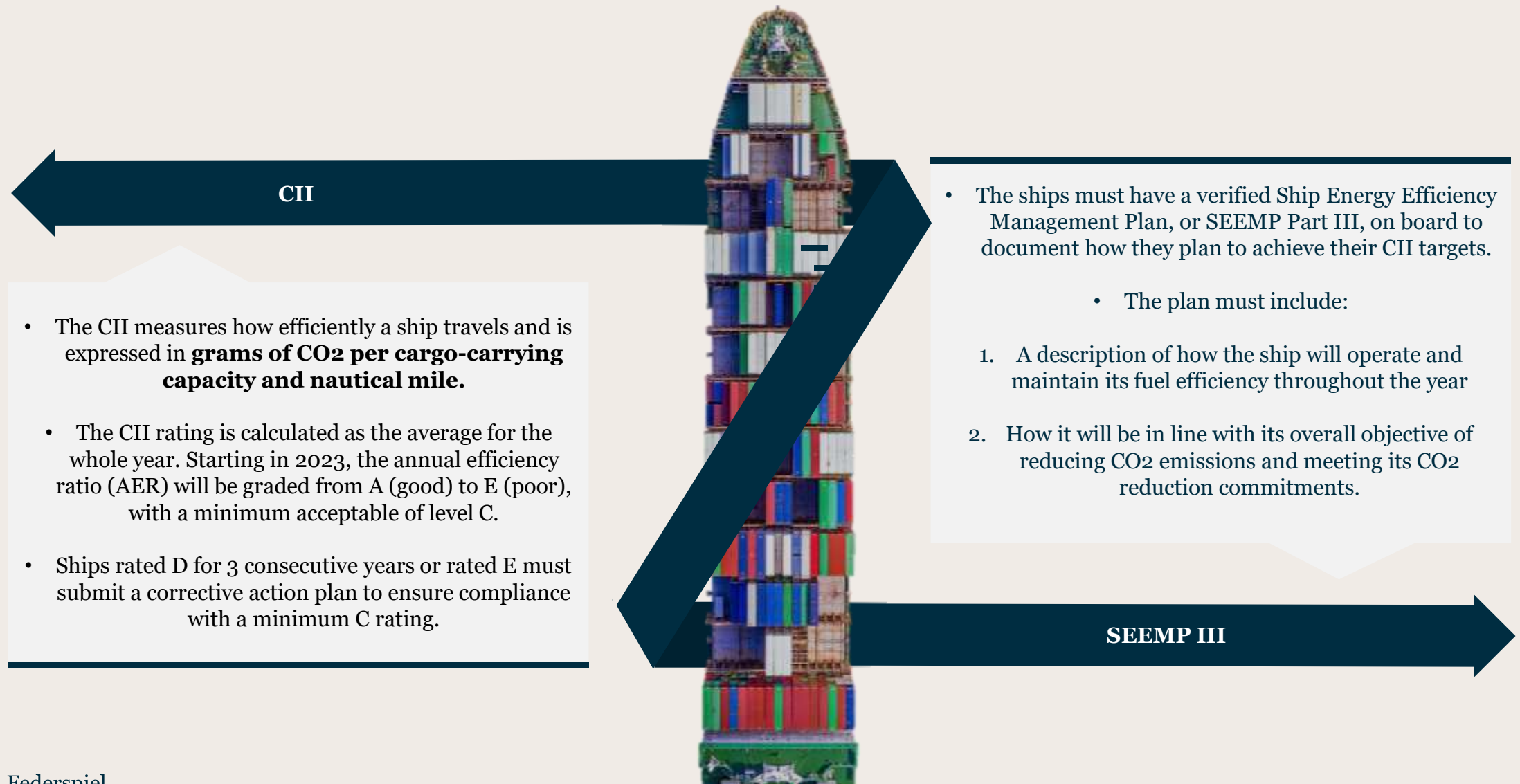


The calculated attained EEXI value for each individual ship must be *below* the required EEXI to ensure the ship meets a minimum energy efficiency standard.



Compliance with EEXI is documented by an IEE Certificate ("IEEC") and shall be issued for both new and existing ships.

IMO | The Carbon Intensity Indicator (CII)



The critical CII

CII is an operational index based on another measure, the Annual Efficiency Ratio (AER), which measures all the carbon emissions from all laden and ballast voyages, anchorage, port stays, all divided by the deadweight and distance sailed in a year (grams of CO₂ per DWT mile).

$$\text{AER} = \frac{\text{CO}_2 \text{ emissions}}{\text{Deadweight} \times \text{distance travelled}}$$



The IEE Certificate




**INTERNATIONAL ENERGY EFFICIENCY
CERTIFICATE**

Cert. No.: PHRSTEEC_FT/1362529779/11796250920

Issued under the provisions of the Protocol of 1997, as amended by resolution MEPC.203(62), to amend the International Convention for the Prevention of Pollution by Ships, 1973, as modified by the Protocol of 1978 related thereto (hereinafter referred to as "the Convention") under the authority of the Government of the
REPUBLIC OF PANAMA

By: **PANAMA REGISTER OF SHIPPING**

Name of Ship	Call Sign	Port of Registry	Gross Tonnage	IMO No. ¹
NABHA STAR	JEKO8	PANAMA	4081	9085388

THIS IS TO CERTIFY:

- That the ship has been surveyed in accordance with regulation 5.4 of Annex VI of the Convention; and
- That the survey shows that the ship complies with the applicable requirements in regulation 20, regulation 21 and regulation 22.

Completion date of the survey on which this certificate is based: **17 March 2012** *

Issued at Panama/Crossed, on 25 September 2020.

FULL TERM ☒
*Change of RO from DSR to PHRS carried out on annual basis.
8/10/2020 *



For the
PANAMA REGISTER OF SHIPPING
K.W. Arvanitakis / Technical Director

¹ Refer to the IMO Identification Number Scheme, in accordance with resolution A.800(13)
² Delete as appropriate

Date issued: 20/09/12
PANAMA REGISTER OF SHIPPING, 10-20 Avenida B-1, 101-01 Panama, Crossed Tel: +507 20112000, Fax: +507 20111100, E-mail: info@phrs.org URL: www.phrs.org

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Form PHRSTEEC_FT/Issue 1 - Rev 2

SEEMP

A SAMPLE FORM OF A SHIP EFFICIENCY ENERGY MANAGEMENT PLAN

Name of Vessel:		GT	
Vessel Type:		Capacity:	

Date of Development:		Developed by:	
Implementation Period:	From: Until:	Implemented by:	
Planned Date of Next Evaluation:			

1. Measures

Energy Efficiency Measures	Implementation (including the starting date)	Responsible Personnel
Weather Routing	<Example> Contracted with [Service providers] to use their weather routing system and start using on-trial basis as of 1 July 2012.	<Example> The master is responsible for selecting the optimum route based on the information provided by [Service providers].
Speed Optimization	While the design speed (85% MCR) is 19.0 kt, the maximum speed is set at 17.0 kt as of 1 July 2012.	The master is responsible for keeping the ship's speed. The log-book entry should be checked every day.

2. Monitoring

Description of monitoring tools	
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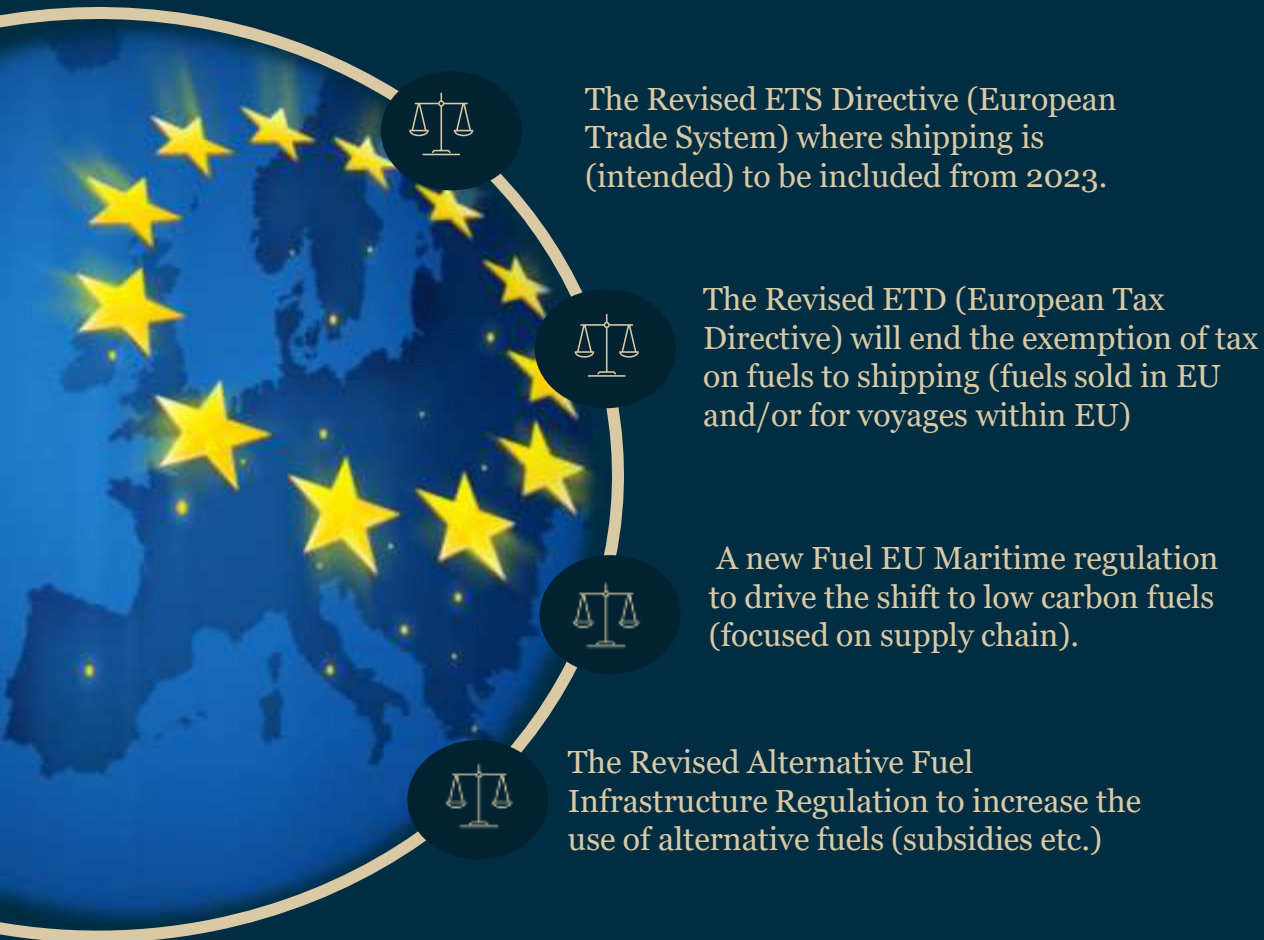
3. Goal

Measurable goals	
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4 EVALUATION

Procedures of evaluation	
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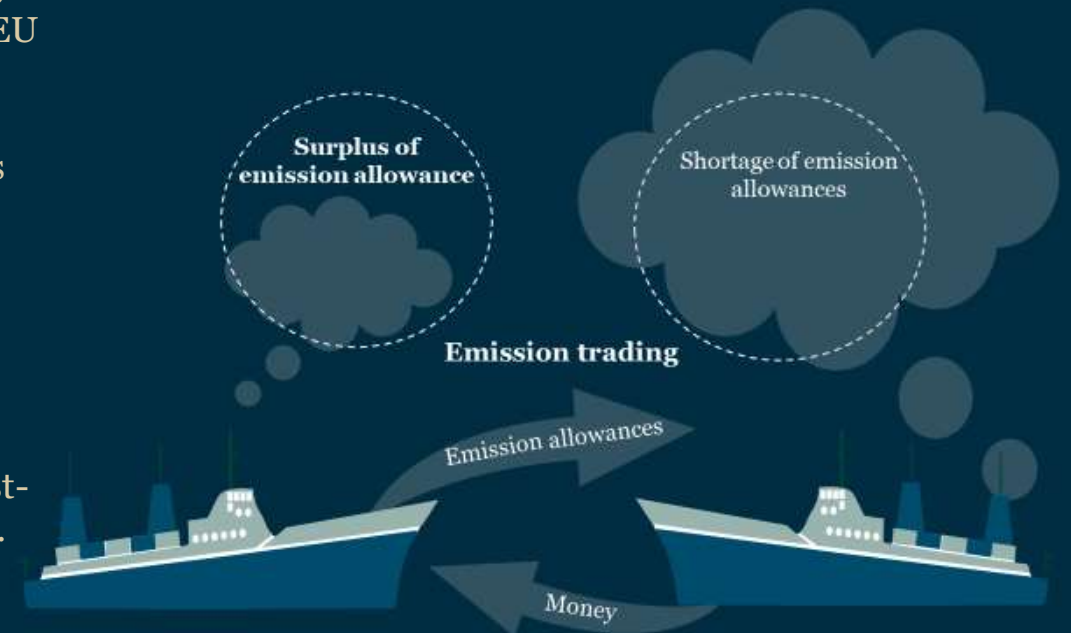
EU | Fit for 55



- Since 2015, shipowners have had to monitor, report and verify GHG emissions and related data calling/departing EU ports (MRV Regulation)
- On 14 July 2021, the European Commission adopted a package of legislative proposals "Fit for 55" as part of the European Green Deal, which aims to strengthen the EU's position as a global climate leader.
- The Fit for 55 package presents initiatives needed to align current climate, energy and transport related legislation with the 55 % reduction target.
- The package will consist of two revised EU directives and two new regulations which will affect shipping.
- At present, these bills that are being considered by EU Member states, EU Parliament and EU Council during 2022. Negotiations are ongoing and the final text and consequences are still somewhat unclear.

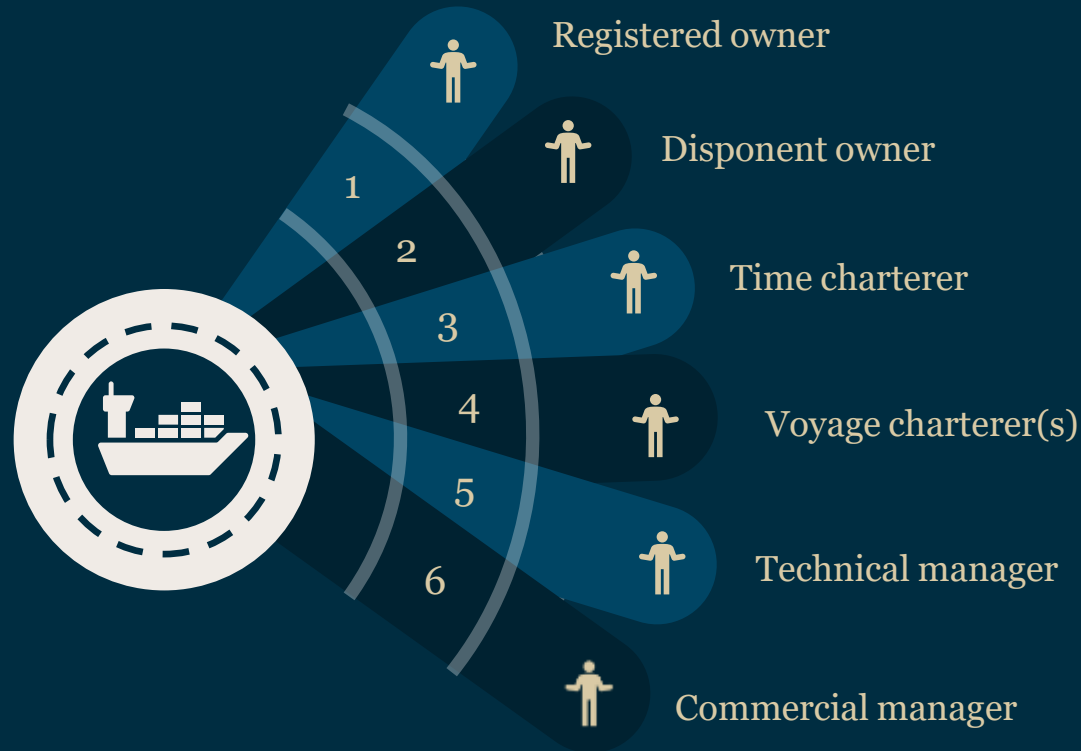
The European Emission Trading System (EU ETS) & Trade and Cap

- The aim of the negotiations is to maritime transport in the EU Emission Trading System which is already in place for other industries such as aviation.
- The EU ETS works on the principle of 'cap-and-trade':
 - It sets an absolute limit or 'cap' on the total amount of certain greenhouse gases that can be emitted each year and the cap decreases every year, ensuring that total emissions decreases.
 - Ships will have to purchase ETS allowances for each tonne of CO₂ emitted from ships operating between EU ports, at berth in EU ports, and 50% of CO₂ emissions from both incoming and outgoing global EU voyages. The allowances can thus be traded (at market value).
- To ensure a smooth transition, ships will only have to surrender allowances for a portion of their emissions during an initial phase-in period, reaching 100% after 3 years. The period will begin with 20% coverage in 2023.
- Ships in breach of the requirements will be subject to an excess emissions penalty of EUR 100 per metric ton of emitted CO₂.
- Compliance costs will depend on segment (MSC estimates costs for Far East-Europe per TEU at EUR 69 (dry)/208 (reefer) (assuming 100% obligation).



Contractual implications

In charter parties, who shall ensure CII compliance and bear the costs? Owner (responsible under regulations) or time charterer (making the operational decisions)?



Ways to improve CII score
(and to decrease GHG emissions?)



Using carbon-neutral fuels

Who to bear the costs? (NYPE, Cl. 7 (a))



Ballast voyages

Deviations / ballast voyages permitted and/or constituting off-hire? (NYPE, Cl. 17)



Slow steaming

Breach of 'utmost dispatch' obligation (NYPE 2015, Cl. 8 (a)) and speed warranties (NYPE 2015, Cl. 12)?



Retrofit modifications

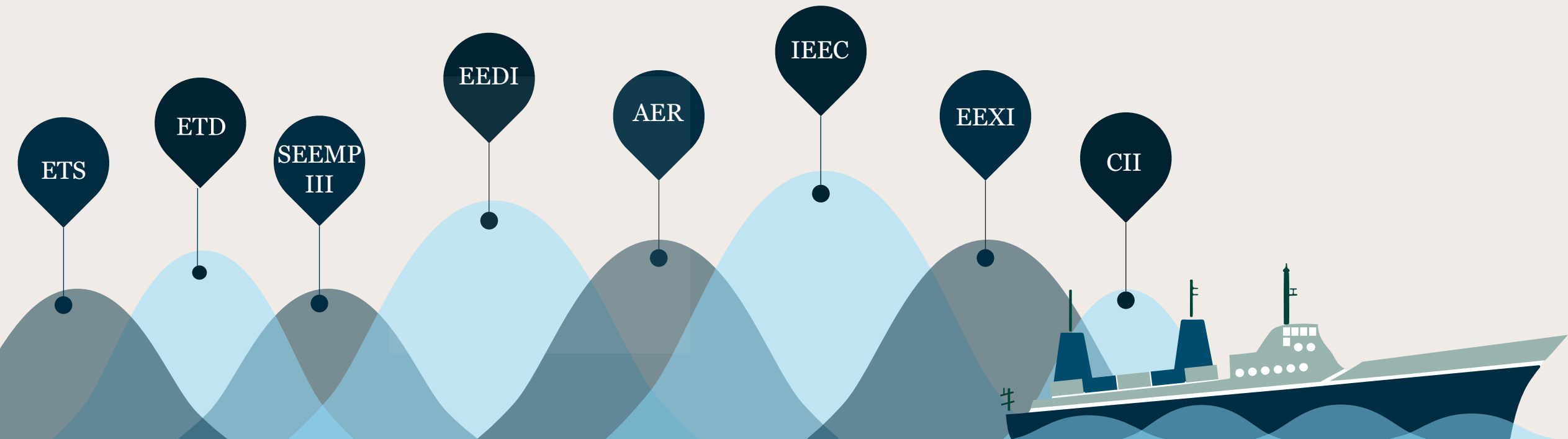
Drydocking for retrofit permitted and/or constituting off-hire? (NYPE 2015, Cl. 16/19/52 (b))

The competitive landscape

- New regulation will have an asymmetric impact across the competitive landscape.
- Tonnage providers may find it increasingly difficult to compete.
- The CII regulation will necessitate long-term planning and reward retrofits with long(er) repayment periods.
- Vessels financed by investments with long repayment periods are not likely to be candidates in a future asset play.
- The competitive landscape is likely to change when sister vessels' earnings potential becomes subject to individual owners' business models and operational profiles.



We will guide the industry safely through the storm





Peter Appel

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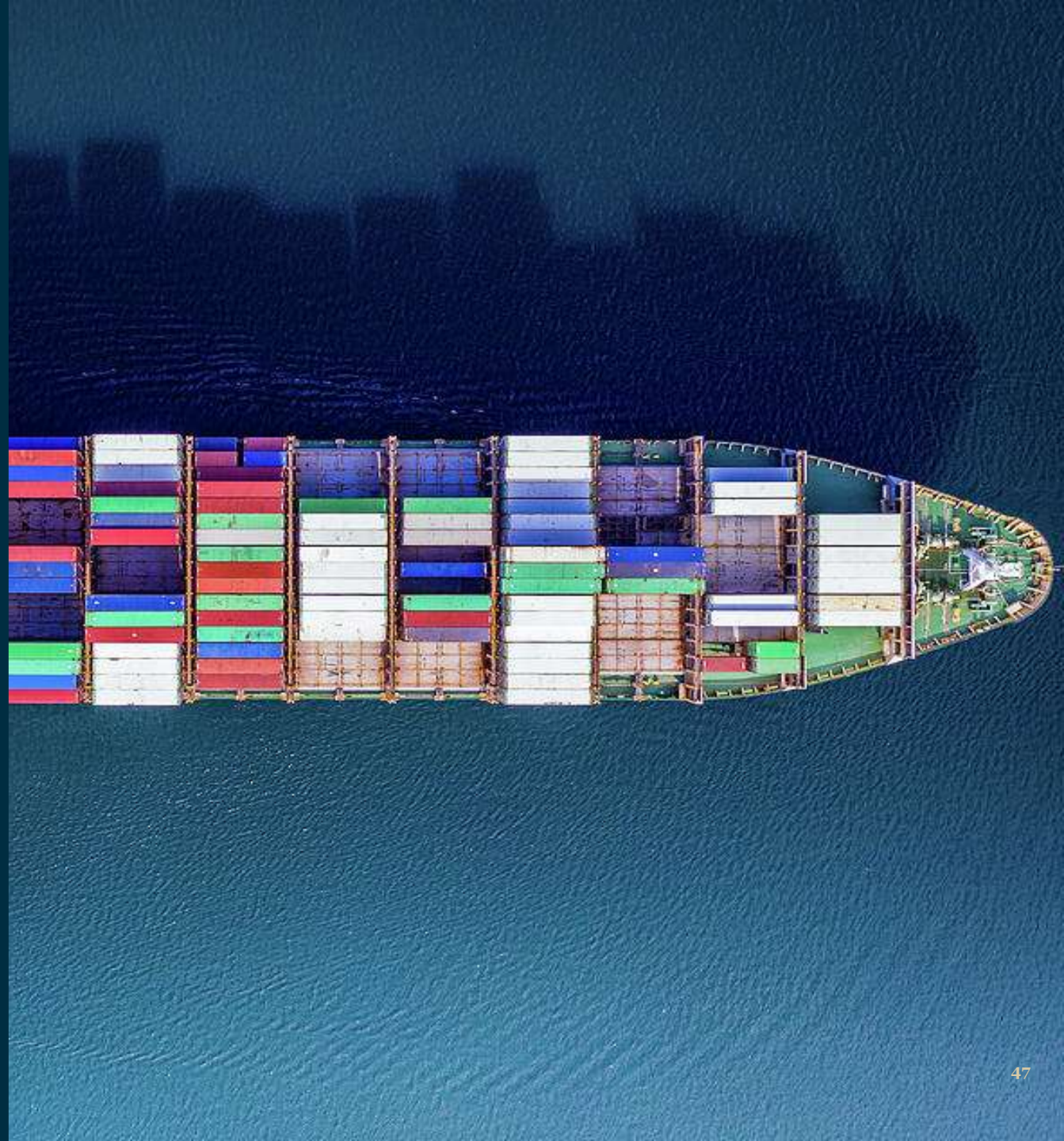
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BIMCO

Standard carbon clauses – from development to industry use

Stinne Taiger Ivø, Director Contracts & Support
EMLO Conference 21 November 2022

At a glance...

BIMCO is the world's largest international shipping organisation with more than 2,000 members in over 130 countries



Creating standard contracts & clauses



Subcommittee
work

Role of the
Documentary
Committee

EEXI Transition Clause for Time Charter Parties 2021



MARPOL Annex VI

Parties to acknowledge and accept the EEXI Regulations

EEXI modifications

SHAPOLI and EPL
Planning for the modifications

Owners' obligations

Costs to modify for Owners' account
To notify Charterers about the new maximum speed and consumption figures

CII Operations Clause Time Charter Parties 2022



MARPOL Annex VI

- Implementation plan and SEEMP
- Required CII
- Reporting and CII ratings

Managing carbon emissions

- Agree on emissions per nautical miles
- Exchange of data and monitor
- Collaboration and shared responsibility

CII Operations Clause Time Charter Parties 2022

- fundamental principles



- The CII Operations Clause is not a “compliance” clause
- Ensuring flexibility for the charterers in their operations of the ship
- Transparency, monitoring of emissions, and data exchange
- Maintaining the ship and increased focus on energy efficiency
- Cooperation to avoid breach of the agreed emission values
- Remedies

ETSA Clause for Time Charter Parties 2022



Regulatory
background and
purpose

Practical
considerations and
common goals

Content of the ETSA
Clause – Owners
and Charterers
perspective

Owners' viewpoint

**Monitor
and report**

Monitor and report
all the emissions for
verification to an
independent verifier

Notify

Notify the Charterers
about the quantity of
Emission Allowances

Nominate

Nominate an
Emissions Scheme
account

Charterers' viewpoint

Provide and pay for Emission Allowances

Off-hire can be set off

Remedies

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Come talk to us: www.bimco.org/events



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Let's take a break



Hot tax topics within International Shipping

EMLO 26th ANNUAL CONFERENCE IN COPENHAGEN

21 November 2022

Gorrissen Federspiel



“Hot” tax topics within the world of international shipping

- 1) “Windfall taxes”
- 2) EU black list
- 3) Carbon Tax
- 4) Global Pillar II

- Increasing complexity within the area of international tax law
- Environment is also on the agenda
- Battle of hearts and minds

1) Windfall taxes and tonnage tax

What are “windfall taxes”?

- No exact definition but can be described as:

One-off tax imposed on certain companies/industries which have benefitted from something they were not responsible for (wind fall taxes) for example oil crisis, war, pandemics etc.

- The purpose is to redistribute excess profits in one area to raise funds for the greater social good
- Mostly seen in the energy sector



Example on windfall tax

- On 14 September 2022 the EU commission proposed an EU wide “temporary solidarity contribution” (windfall tax) by fossil fuel companies as part of response to energy crisis
- This will windfall tax will apply for EU companies and branches performing activities within the field of oil, gas, coal and refinery sectors
- The windfall tax shall apply of taxable profits in the fiscal year starting on or after 1 January 2022 which are above 20 % increase of the average taxable profits of the three fiscal years calculated on or after 1 January 2019
- The rate will for the temporary solidarity contribution shall be at least 33 %
- Relevant for the shipping industry? – Shipping industry outside the scope. But what about the tonnage tax regime?

Windfall tax and tonnage tax

- However, TEFU 212:
*“Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in **the supply of certain products**, notably in the area of energy.”*
- How about tonnage tax regime? Financial Times, August 16, 2022:
“Container shipping’s tonnage tax trick - Soon may the taxman come”
- Public debate about the tonnage tax system in for example France, UK and Denmark




Tonnage tax debate

- The tonnage tax regime offers a very competitive taxation regime applicable to a list of shipping activities, and activities ancillary thereto, as ring-fenced by EU State Aid approval.
- Under the tonnage tax regime, tonnage tax replace ordinary corporate income taxation (CIT). Tonnage tax is computed as a notional (daily) tax levied on every 100 net-ton available to the taxpayer.
- Means that tax must be paid even in income years in which the taxpayer has actually incurred a loss, but may also result in a very low effective tax rate for income years, in which the taxpayer has actually incurred (substantial) profits.
- Due to State Aid nature, application of the regime is guarded by certain requirements related to keeping shipping in the EU. That could be for example flag requirement, and requirement of commercially and strategically management from an EU member state
- Public debate in for example UK, France and Denmark about the tonnage tax regimes fueled by very high profits and very low effective tax rates in 2022.
- What can shipping companies do?



The EU blacklist

2) The EU blacklist

-  • The European Union tax haven blacklist formally known as the EU list of non-cooperative jurisdictions for tax purposes (the “**blacklist**”) is published as Annex I to conclusions adopted by the Ecofin Council.
- Since its establishment in 2017, the blacklist has been revised regularly. The last update was on 4 October 2022, and the next revision will be in February 2023.
- A jurisdiction is removed from the Annex once it meets all its commitments.
- Annex II is the “**grey list**” comprising jurisdictions that do not yet comply with all international tax standards but have committed to implement reforms.

-  • Aim of the blacklist
- The blacklist is part of EU’s work to promote and strengthen tax good governance mechanisms, fair taxation, and global tax transparency in order to tackle tax fraud, evasion and avoidance.
- The aim of the blacklist is to encourage positive change in the jurisdictions’ tax legislation and practices through cooperation.

2) The EU blacklist, *continued*



Updating the list includes

- Updating criteria in line with international tax standards
- Screening countries against these criteria
- Engaging with countries that do not comply
- Listing and de-listing countries as they undertake (or not) reforms
- Monitoring developments to ensure that jurisdictions do not backtrack on previous reforms





Listing criteria

- ① Jurisdictions are screened on the following criteria to be considered cooperative for tax purposes:

Tax transparency

- Jurisdictions should exchange tax data with all EU member states through automatic exchange of tax information (AEOI), either through the common reporting system (CRS) established by the OECD or through equivalent arrangements.
- Jurisdictions should also be able to exchange tax information on request (EOIR).
- Jurisdictions should be party to the OECD multilateral convention on mutual administrative assistance in tax matters, or have a network of exchange arrangements in place that covers all EU member states.
- The aspect of beneficial ownership will be incorporated at a later stage.



Listing criteria, *continued*

② **Fair taxation**

- Jurisdictions should not have harmful preferential tax measures.
- Jurisdictions should not facilitate offshore structures or arrangements seeking to attract profits without any real economic activity.

③ **Anti-BEPS measures**

- Jurisdictions should commit to implementing the OECD anti-BEPS minimum standards, which concern harmful tax measures, treaty shopping, country-by-country reporting and dispute resolution.
- Jurisdictions should receive positive peer-review assessments for the effective implementation of the anti-BEPS minimum standard on country-by-country reporting.

Jurisdictions listed on the blacklist and the grey list

As of 4 October 2022, the blacklist is composed of the following 12 jurisdictions:

- American Samoa
- Anguilla (new)
- Bahamas (new)
- Fiji
- Guam
- Palau
- Panama
- Samoa
- Trinidad and Tobago
- Turks and Caicos Islands (new)
- US Virgin Islands
- Vanuatu

As of 4 October 2022, the grey list is composed of the following 22 jurisdictions:

- | | |
|--------------------------|-------------------|
| • Armenia | • Montserrat |
| • Barbados | • North Macedonia |
| • Belize | • Jamaica |
| • Botswana | • Jordan |
| • British Virgin Islands | • Qatar |
| • Costa Rica | • Seychelles |
| • Dominica | • Thailand |
| • Eswatini | • Turkey |
| • Hong Kong | • Uruguay |
| • Israel | • Vietnam |
| • Malaysia | • Russia |

Defensive measures



The EU member states are encouraged to implement defensive measures towards the blacklisted jurisdictions in order to help protect their tax revenues and to fight tax fraud, evasion, and abuse.

EU member states have agreed to apply at least one of the following administrative measures towards the blacklisted jurisdictions:

- Reinforced monitoring of transactions
- Increased risk audits for taxpayers who benefit from listed regimes
- Increased risk audits for taxpayers who use tax schemes involving listed regimes



Defensive measures, *continued*

EU member states have further committed to use the blacklist in the application of at least one of the following specific legislative measures:

- Non-deductibility of costs incurred in a listed jurisdiction
- Controlled foreign company (CFC) rules, to limit artificial deferral of tax to offshore, low-taxed entities
- Withholding tax measures (WHT), to tackle improper exemptions or refunds
- Limitation of the participation exemption on shareholder dividends

Non-tax area defensive measures relate to foreign policy, development cooperation, and economic relations.





Global Pillar II

3) Global Pillar II and (International) Shipping

In December 2021 OECD published the Model Rules on the Pillar Two Global Minimum Tax. Pillar Two sets out global minimum tax rules designed to ensure that large multinational businesses pay a minimum effective rate of tax of 15% on profits in all countries

- Generally, a multinational enterprise (MNE) Group and its Constituent Entities are in scope of the GloBE rules if the annual revenue in the Consolidated Financial Statements of the Ultimate Parent Entity (UPE) is €750 million or more in two out of the four Fiscal Years immediately preceding the tested Fiscal Year.
- A “Top up tax” will apply if the Effective Tax Rate of the MNE Group is less than 15 % (ETR calculated in accordance with the Model Rules). The Top-up tax is the difference between the ETR and 15 %.

On 22 December 2021 the European Commission published its proposal for directive implementing Pillar II within the Union effectively from January 1 2023.

- In line with the OECD Model Rules, the Directive excludes international shipping income and partly ancillary international shipping income from the application of the GloBE Model Rules. This exclusion follows the principle whereby in national tax systems, income from shipping is often taxed pursuant to a separate set of rules from those of the mainstream corporate tax system.

Article 16

For the purpose of this Article, the following definitions apply:

(a) ‘international shipping income’ means **net income** obtained by a constituent entity from the following activities:

- (i) Transportation of passengers or cargo by ship in **international traffic**, where such transportation is not carried out via inland waterways within the same jurisdiction, whether the ship is owned, leased or otherwise at the disposal of the constituent entity;
- (ii) Leasing of a ship used for the transportation of passengers or cargo in international traffic on charter fully equipped, crewed and supplied;
- (iii) Leasing of a ship used for the transportation of passengers or cargo in international traffic, on a bareboat charter basis, to another constituent entity;
- (iv) Participation in a pool, a joint business or an international operating agency for the transportation of passengers or cargo by ship in international traffic; and
- (v) A **sale of a ship** referred to in point (a) **provided that the ship has been held for use by the constituent entity for a minimum of one year.**

Article 16, *continued*

- (b) ‘Qualified ancillary international shipping income’ means net income obtained by a constituent entity from the following activities, provided that such activities are performed primarily in connection with the transportation of passengers or cargo by ships in international traffic:
- (i) Leasing of a ship, on a bareboat charter basis, to another shipping enterprise that is not a constituent entity, provided that the charter does not exceed three years;
 - (ii) Slot chartering arrangements;
 - (iii) Sale of tickets issued by other shipping enterprises for the domestic leg of an international voyage;
 - (iv) Leasing and short-term storage of containers or detention charges for the late return of containers;
 - (v) Provision of services to other shipping enterprises by engineers, maintenance staff, cargo handlers, catering staff, and customer services personnel; and
 - (vi) Investment income, where the investment that generates the income is made as an integral part of the carrying on the business of operating the ships in international traffic.

Article 16, Section 2-4

2. The international shipping income and qualified ancillary international shipping income of a constituent entity shall be excluded from the computation of its qualifying income or loss, **provided that the constituent entity demonstrates that the strategic or commercial management of all ships concerned is effectively carried on from within the jurisdiction where the constituent entity is located.**
3. Where the computation of a constituent entity's international shipping income and qualified ancillary international shipping income results in a loss, such loss shall be excluded from the computation of the constituent entity's qualifying income or loss.
4. To the extent that the total qualified **ancillary international shipping income** of the constituent entities located in a jurisdiction **exceeds 50% of their total international shipping income**, the excess income **shall be included in the computation of their qualifying income or loss.**



Carbon Tax

4) Carbon tax

- Shipping industry accounts for approx. 3 % emissions on global scale
- Moving towards “the polluter pays”
- Industry should (in my opinion) embrace any actions aiming at reducing emissions. Provided that the agenda of these actions is indeed creating initiative to reduce emissions and not primarily raising additional revenue

Two approaches:

- 1) Carbon tax – suggested by Japan earlier this year to IMO (worldwide tax of \$56 per tonne of CO₂ from shipping beginning in 2025. This would rise to \$135 per tonne in 2030, \$324 per tonne in 2035 and a staggering \$673 per tonne in 2040. (Since each tonne of bunker fuel produces about three tonnes of CO₂, the tax per tonne of bunkers would be about three times higher.)
- 2) Cap and trade – Suggested by EU - Including shipping in the European Union Emissions Trading System (ETS)

Carbon tax vs. cap-and-trade – two sides of the same coin but with differences

- A carbon tax sets the price of CO₂ emission
- A cap-and-trade system sets the quantity of emissions allowed
- A cap-and-trade system requires more bureaucracy but sets a cap on emissions
- A carbon tax is easier to implement and enforce but sets no cap on emissions

Strictly speaking cap-and-trade and a carbon tax can co-exists

Effectiveness depends on the design:

The cost should be so high it creates a competitive advantage for those investing in green technology (the cost cannot just be absorbed by the shipping company).



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The background image shows the exterior of a modern building at night. The building has a dark facade with large glass windows and a curved section on the right. The name 'Gorrissen Federspiel' is displayed in large, illuminated, serif capital letters above the entrance. Two people, a man in a dark suit and a woman in a dark dress and patterned jacket, are standing outside on a cobblestone path, facing each other. The lighting is warm, coming from the building's interior and the sign.

Gorrissen Federspiel

The Court of Justice How does the Court work to protect (fundamental) rights of companies?

Henrik Saugmandsgaard Øe, Partner – former Advocate General at the ECJ

EMLO, Copenhagen November 2022

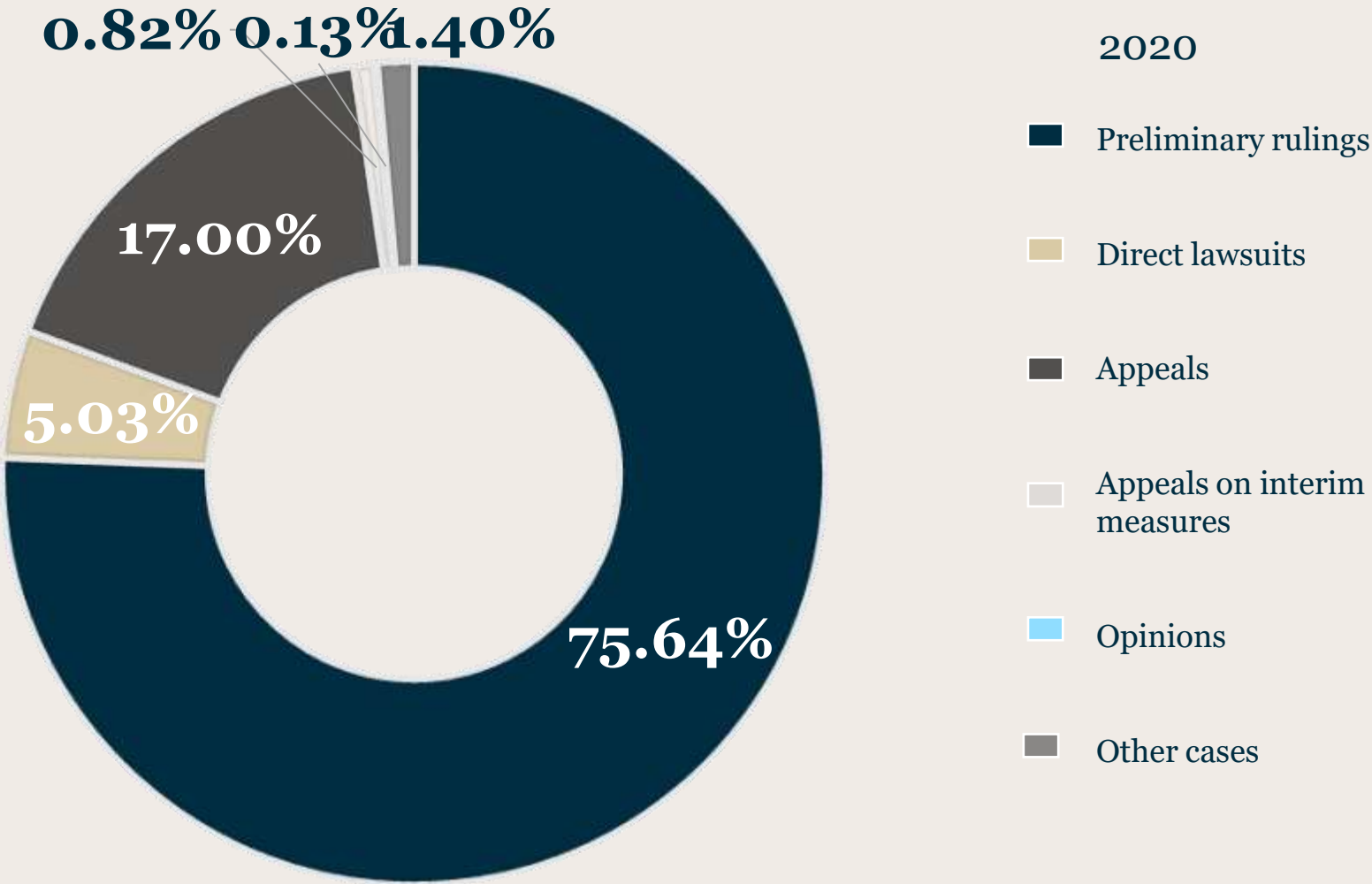
Composition of the European Court of Justice

European Court of Justice



- *Opinion of an Advocate General on new questions of law (Article 20 of the Statute)*
- ***“A second opinion that comes first”*** (Professor Hartley)

Distribution of cases



Cases at the Court of Justice

2020:

- 735 cases received, of which 556 for a preliminary ruling
- 792 closed cases
- Average processing time of a case is 15.4 months
- 1,045 pending cases as per 31 December 2020

Frequent case areas	Number of cases
Taxation	95
Consumer protection	56
Free movement, freedom of establishment and the internal market	96
Intellectual property	27
Agriculture	26
Environment	48
The area of freedom, security and justice	119
Social legislation	56
State aid and competition	104
Customs union	24
Transportation	86

Procedure before the ECJ (in preliminary rulings)

- The national court can ask questions of interpretation or validity
- Translation
- Working language is French
- Written observations (from parties, governments and EU institutions)
- *Rapport préalable*
- *Réunion Générale*
- Questions to the parties and the Commission
- Oral hearing
- AG opinion
- Judgment
- National judges must apply the interpretation in the specific case



A Fourth in the Court: Why are there Advocates General in the Court of Justice?

AG Bobek in Cambridge Yearbook of European Legal Studies, 2012, pp. 529-561

- ***Framer***
- ***Controller***
- ***Researcher***
- ***Innovator***
- ***Tester***
- ***Explainer and Dissenter***

The role of the Court of Justice

Joseph H.H. Weiler's quote from Henry Schermer's preface:

- “No court can fully escape policy-making. Constitutional Courts are more obliged than other Courts to make policy decisions, and the Court of Justice must do so on a relatively larger scale than most constitutional Courts”

Lord Howe (in P.J.G. Kapteyn, *Law of the European Union and the European Communities*, fourth edition, 2008):

- “The Court had no pre-existing legal system to work with. The treaty provisions it was called upon to interpret were often general in scope and silent on detail. The option of operating in a “non-activist” manner, merely interpreting the meaning of words, was simply not open to the Court of Justice”

Fundamental Rights

Previous case law

- Internationale Handelsgesellschaft (C-11/70)
- Nold (C-4/73)
- Rutili (C-36/75)
- Hauer (C-44/79)
- Reaction to the German “Solange” judgments

Development of general principles of Union law

- Defrenne (C-43/75)
- Johnston (C-222/84)
- Kadi (C-402/05 P og C-415/05 P)
- Mangold (C-144/04)

EU Charter of Fundamental Rights

- Addressed to EU institutions and Member States “when they are implementing Union law”
- Can be invoked when a provision in EU law is applicable
 - *Åkerberg Fransson* (C-617/10)
 - *Commission v Hungary* (C-235/17)
- Contains provisions which can be relied upon directly or as an important element of interpretation:
 - Article 11: The freedom of expression, including that of companies
 - Article 16: The freedom to conduct a business (on the internal market)
 - Article 17: Right to property, including intellectual property
 - Article 47-50: Effective judicial protection, the right of defence, principles of legality and proportionality and the right not to be tried or punished twice for the same offence

Articles 48-50

Interesting cases:

- C-205/20, *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld* (C-205/20)
 - on proportionality of national sanctions
- C-117/20, *bpost* (C-117/20)
 - on the principle *ne bis in idem*

Article 19 TEU and Article 47 of the Charter

- *C-64/16, Portuguese Judges*, a game changer
- National courts and the ECJ ensure **jointly** the correct interpretation and application of EU law (protecting the rights of individuals and undertakings)
- Must provide **sufficient remedies**
- Independence (and impartiality) is **inherent** in the task of adjudication (when having competence to **potentially** decide on EU law)

The Rule of Law, independence of the judiciary and the importance for the internal market

- C-619/18, Commission v. Poland (Supreme Court)
- C-791/19, Commission v. Poland (disciplinary regime applicable to judges)
 - Request for a preliminary ruling and the content of judicial decisions can be classified as a disciplinary offence
- C-132/20, *BN*, and the Opinion of AG Bobek
- Judgment of the ECtHR of 7 May 2021, *Xero Flor v. Poland* (the Constitutional Court is not a ‘tribunal established by law’)

“Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state”

(Plato, in John Cooper et al., *Complete Works by Plato*, p. 1402 (Hackett Publishing, 1997))

Why is the independence of the judiciary so important?

- **Hypothetical example:** Polish migrant workers in Belgium being discriminated against by a new (extreme) anti-immigrant Belgian government
- *Minister for Justice and Equality (deficiencies in the system of justice)* (C-216/18 PPU)
 - Could Ireland extradite a person to Poland for trial if it would take place within a system no longer operating within the rule of law (Article 7 - procedure pending)?
 - High Court: The threshold of a real risk that there will be a flagrant denial of a fair trial was not reached

Further development in case law

- Member States must prevent any regression of their laws on the organisation of justice and they may not adopt rules which would undermine the independence of the judiciary
 - *Repubblika*, C-896/19
- Need for additional remedies if court decisions remain ineffective to protect EU rights
 - *Torubarov*, C-556/17
 - *Deutsche Umwelthilfe*, C-752/18

The right (and obligation) to make a request for a preliminary ruling

- The national courts are often called upon to rule against the State (with potential significant financial implications)
- The *right* to ask the CJEU (“widest discretion” or “prerogative”)
- Criteria for the obligation to make a reference, C-561/19, *Consorzio Italian Management (CILFIT II)*
- Invited by AG Hogan to revise *Francovich* case-law to make it easier to obtain compensation in case of judicial failures (C-497/20, *Randstad Italia*)
 - “Manifest breach of the case-law of the Court” (C-224/01, *Köbler*)

Application of the Charter in Member States

- Article 51 (1):
 - “lorsqu’ils mettent en œuvre le droit de l’Union”
 - “when they are implementing Union Law”
- My Opinion and the judgment in C-235/17, *European Commission/Hungary* (the rights of usufruct over agricultural and forestry land)
- C-569/16 og C-570/16, *Bauer and Vilmeroth*
 - “Article 51(1) does not, however, address the question whether those individuals may, where appropriate, be directly required to comply with certain provisions of the Charter and cannot, accordingly, be interpreted as meaning that it would systematically preclude such a possibility”
- C-573/17, *Poplawski*
 - “On the other hand, a provision of EU law which does not have direct effect may not be relied on, as such, in a dispute coming under EU law in order to disapply a provision of national law that conflicts with it.
 - Thus the national court is not required, solely on the basis of EU law, to disapply a provision of national law which is incompatible with a provision of the Charter of Fundamental Rights of the European Union which, like Article 27, does not have direct effect”

Provisions with direct effect

- **Article 21**
 - C-414/16, Egenberger
 - C-193/17, Cresco Investigation
 - C-68/17, IR
 - C-441/14, DI (subsequently, the Ajos judgment from December 2016 by the Danish Supreme Court)
 - **Article 47**
 - C-414/16, Egenberger
 - **Article 31(2)**
 - C-684/16, Max-Planck-Gesellschaft zur Förderung der Wissenschaften
 - C-569/16 and C-570/16, Bauer and Vilmeroth
 - C-55/18, CCOO
 - **Article 49**
 - C-205/20, Bezirkshauptmannschaft Hartberg-Fürstenfeld
- Article 27 does *not* have direct effect (C-176/12, Association de médiation sociale)

Respect for private life and data protection

- Joined cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net*
 - Article 15(1) of Directive 2002/58/EC [...], read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter [...], must be interpreted as precluding legislative measures which, for the purposes laid down in Article 15(1), provide, as a preventive measure, for the general and indiscriminate retention of traffic and location data.
- Exceptions *i.a.*
 - Safeguarding national security
 - targeted retention of traffic and location data

Freedom of speech

- C-401/19, *Poland vs Parliament and Council*
- The internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information
- Risk of “overblocking” because of Article 17(4) of the DSM Directive
- It may prove necessary
 - in order to respect the freedom of those service providers to conduct a business, guaranteed in **Article 16 of the Charter**, and to respect the fair balance between that freedom, the right to freedom of expression and information of the users of their services, enshrined in **Article 11 of the Charter**, and the right to intellectual property of the rightholders, protected in **Article 17(2) of the Charter** – to leave those service providers to determine the specific measures to be taken in order to achieve the result sought; accordingly, **they can choose to put in place the measures which are best adapted to the resources and abilities available** to them and which are compatible with the other obligations and challenges which they will encounter in the exercise of their activity

Level of protection and self-restraint by the Court

- C-399/11, *Melloni* (Execution of a sentence pronounced in absentia — Possibility of review of the judgment)
- C-42/17, M.A.S. and M.B. (Taricco II)
- C-638/16 PPU, X and X vs Belgium:

“Article 1 of the Visa Code must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, **does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law.**”

Interesting articles written by members of the ECJ

- Marek Safjan, Dominik Düsterhaus and Antoine Guérin, *La Charte des droits fondamentaux de l'Union européenne et les ordres juridiques nationaux, de la mise en oeuvre à la mise en balance*, *Revue trimestrielle de droit européen*, 2016, p. 219
- Koen Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, *European Constitutional Law Review*, 2012, p. 375
- Prechal, S., *Horizontal direct effect of the Charter of Fundamental Rights of the EU*, *Revista de Derecho Comunitario Europeo*, 2022, 66, p. 407

Thank you for your time

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Q&A session and conclusions and close of the seminar

Dr. Vincent Power, Chair of the EMLO

