
The inclusion of the shipping sector in the European Emission Trading Scheme (EU ETS)

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1 Introduction

The European Union Emissions Trading Scheme (hereinafter referred to as 'ETS'), which has been in place since 2005¹, is the EU's main tool for reducing greenhouse gas emissions and combating climate change. It is estimated to have reduced greenhouse gas emissions in the territories of the EU countries by 42,8 % in the industry sectors which are covered so far thereby, such as:

(a) electricity and heat production plants, (b) energy-intensive industries and (c) aviation. The ETS, has already undergone several revisions², and is currently under the fourth phase of negotiation (2021-2030), in order to be consistent with the overall objectives of EU climate policy and the European Green Deal³.

In particular, as part of the 'Fit for 55' legislative package, the European Commission proposed on July 14, 2021⁴, to strengthen the ETS so that by 2030 the emissions cap from the industry sectors covered thereby is reduced by 62 % compared to 2005 levels. Beyond reducing carbon emissions, the stated purpose of the revision of the ETS is to create a long-term pricing strategy, while providing measures to create an effective monitoring, reporting and verification system.

¹Directive 2003/87/EC of the European Parliament and of the European Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0087>.

² Taking into account that the total number of allowances is limited and decreasing, the system of free allocation of allowances has been amended

by Directive (EU) 2018/410 (OJ 76/3), Delegated Decision (EU) 2020/1071 (OJ 234/16), Delegated Regulation (EU) 2021/1416 of 17 June 2021 (OJ 305/1), Delegated Decision (EU) 2023/136 of 18 January 2023 (OJ 19/1), Delegated Regulation (EU) 2023/435 of 27 February 2023 (OJ 130/115), and finally Directives 2023/958 and 2023/959 of 10 May 2023 (OJ 130/115 and 134).

³ COM (2019) 640 final, 11.12.2019.

⁴ COM (2021) 551 final 2021/0211 (COD)

In 2021 the **EU decided to extend the ETS to new industry sectors**, namely **shipping**, construction of **buildings**, **road transport** and others⁵. The European Commission's proposal to include the shipping industry in the ETS were approved by the European Parliament, which led to the **adoption of Regulation 2023/957/EU⁶ and Directive 2023/959/EU⁷** (hereinafter referred to as the "amending Directive") **on 10 May 2023**, which were published in the Official Journal of the EU on 16 May 2023 and entered into force in June 2023.

⁵ Those sectors corresponding to industrial activities that were not covered by Annex I of the amended Directive 2003/87/EC, such as heating of industrial installations ('buildings, road transport and additional sectors'). For these sectors a separate but parallel emissions trading scheme is established in order to avoid any disruption of the well-functioning emissions trading scheme for stationary installations and aviation.

⁶ 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 the maritime sector 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 (PE/10/2023/REV/1, OJ L 130, 16.5.2023, p. 105–114), available at <https://eur-lex.europa.eu/legal-content/EL/TXT/?uri=CELEX%3A32023R0957>

⁷ 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 (PE/9/2023/REV/1) OJ L 130, 16.5.2023, p. 134–202, available at: <http://data.europa.eu/eli/dir/2023/959/oj>.

The new measures of the revised EU ETS shall come into force and become applicable **as from January 1, 2024**.

2 New provisions for the inclusion of shipping companies⁸ in the European ETS

In order for the maritime industry to contribute to the achievement of the EU's greenhouse gas emission reduction targets⁹ (as is already the case for aviation¹⁰), the Commission has proposed, together with the **FuelEU Maritime¹¹** initiative, to extend the scope of the European ETS to cover CO₂ emissions from **large cargo and passenger**

⁸"Shipping company" is defined in the amending Directive: the shipowner or any other organisation or person, such as the manager or the bareboat charterer, that has assumed the responsibility for the operation of the ship from the shipowner and that, on assuming such responsibility, has agreed to take over all the duties and responsibilities imposed by the International Management Code for the Safe Operation of Ships and for Pollution Prevention, as set out in Annex I to Regulation 336/2006/EU of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 (OJ L 64, 4.3.2006, p. 1).

⁹See recitals 17-41 of the amending Directive (EU) 2023/959/EU.

¹⁰ See. Directive (EU) 2023/958 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC as regards the contribution of aviation to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure (OJ L 130, 16.5.2023, p. 115–133).

¹¹The new Regulation to reduce the carbon footprint of the shipping sector by adopting low-carbon alternative fuels was formally adopted by the Council on 25.07.2023 and will be published in the Official Journal of the EU after the summer.

commercial ships of more than 5 000 gross tonnage¹², irrespective of their flag. As a result, the commercial operator of the ship¹³ will be liable for compliance costs under the “polluter pays” principle, while the revenues from the auctioning of allowances earmarked for the Innovation Fund will be used from 1 January 2025 in accordance with the “no significant harm” principle of Article 17 of Regulation (EU) 2020/852¹⁴.

The above extension of the scope of the European ETS to the maritime sector will include **all emissions from ships calling at an EU port** for voyages within the EU and **50 %** of the emissions from voyages originating or terminating at an EU port, as well as all emissions occurring when ships are docked within the EU¹⁵. In practice, shipping companies will be required to monitor their

emissions and to purchase and surrender ETS allowances to the competent administering authority¹⁶ of the Member State. Non-compliance with the requirements of the ETS (e.g., the failure to surrender the necessary allowances by the responsible shipping company for two or more consecutive years) will lead to **sanctions**, such as a **ban on ships entering EU ports** and associated **notifications** (not only to the flag state concerned, but also to the relevant European bodies and other Member States)¹⁷. Member States have the discretion to design the sanctions in detail in order to ensure that they are effective, proportionate and dissuasive.

The **system of monitoring, reporting and verification of emissions** from the maritime sector is already applicable **as of 2018**, as foreseen in the revised **Regulation (EU)**

¹²Emissions from ships of less than 5,000 gross tonnage represent less than 15 % of ship emissions but are emitted by a large number of ships. For reasons of administrative practice, it was considered premature to include ships of less than 5,000 gross tonnage in the EU ETS from the start of the inclusion of the maritime sector, but, as indicated in recital 30 of the amending Directive, their inclusion in the future will improve the effectiveness of the EU ETS and potentially reduce avoidance behaviour by using ships of smaller gross tonnage. By 31 December 2026 at the latest, the Commission shall submit a report to the European Parliament and the Council examining the feasibility and the economic, environmental and social impacts of including in the amended Directive emissions from ships, including offshore activity ships, of less than 5 000 gross tonnage but not less than 400 gross tonnage, based, in particular, on the analysis accompanying the review of Regulation (EU) 2015/757, which is expected by 31 December 2024.

¹³The person or organisation responsible for compliance with the EU ETS should be the shipping company, defined as the shipowner or any other organisation or person, such as the

manager or charterer of a bare ship, to whom the shipowner has delegated the responsibility for the management of the ship and who, in assuming that responsibility, has agreed to take over all the duties and responsibilities imposed by the International Management Code for the safe operation of ships and the prevention of pollution. This definition is based on the definition of ‘company’ in Article 3(d) of Regulation (EU) 2015/757 and is in line with the global data collection system established in 2016 by IMO.

¹⁴Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088.

¹⁵As laid down in Article 3za, as amended by Directive (EU) 2023/949/EU.

¹⁶“Administering authority in respect of a shipping company” means the authority responsible for administering the EU ETS in respect of a shipping company in accordance with Article 3gf.

¹⁷ Ref. to paragraph 2. 23 of Article 1 of the amending Directive.

2015/757 of the European Parliament and of the Council¹⁸. By virtue of this, shipping companies were required to **monitor** and **submit externally verified reports** with their emissions data to the official European platform (**EU-MRV**)¹⁹, an obligation still imposed by the revised EU ETS.

A further possibility to **transfer the cost of the ETS from the shipping company to another entity** is provided for in Article 3gc of the amending Directive. In this way, responsibilities for fuel purchasing, waste management or more generally for operational services affecting carbon emissions can be allocated to entities other than the shipping company **on the basis of contractual arrangements between them**.

However, it is possible that during the negotiation of this contract, certain information (such as the cargo carried, the route and the speed of the ship) may not be known, making the final emissions from the ship uncertain as well as limiting the incentives to implement operational fuel saving measures.

In line with the “polluter pays” principle, the amending Directive requires Member States to take the necessary measures to ensure

that, where the **ultimate responsibility** for the purchase of fuel or the operation of the ship²⁰, or both, **is assumed by an entity other than the shipping company** under a contractual agreement, the shipping company is entitled **to receive compensation** from that entity for the costs incurred in surrendering those allowances.²¹. Thus, encouraging the adoption of energy efficiency measures and the use of cleaner fuels.

3 Time phases of adaptation to new requirements

In order to ensure a smooth transition of the maritime sector to the new EU ETS, Article 3gb of the amending Directive provides for the phased introduction of surrender requirements for their verified emissions based on the following timetable:

- (a) a **40 %** share of carbon dioxide emissions in **2024**,
- (b) **70 %** in **2025**; and finally
- (c) **100 %** of emissions, including additional gases, namely methane and nitrous oxide, in **2026** and thereafter.

¹⁸ See. 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, p. 55).

¹⁹ This online database and the downloadable spreadsheets are made available for information purposes only, in accordance with Article 21 of the

revised Regulation (EU) 2015/757, which can be accessed via the following link: emsa.europa.eu

²⁰ 'Operation of the ship' means the determination of the cargo carried or the route and speed of the ship. The shipping company remains the entity responsible for the surrender of rights, as required by Articles 3gb and 12, and for overall compliance with the provisions of national law transposing this Directive.

²¹ See recital 32 of the Directive.

It is provided that for the years **2024 and 2025** where a difference is found between the verified emissions and the surrendered allowances for each year, the value of the allowances corresponding to that difference should be cancelled instead of being auctioned.

4 Conclusion

The revision of the EU ETS is expected to contribute to the establishment of a **level playing field** and **legal certainty** for ship operators. Carbon pricing is not sufficient to reduce and eliminate emissions from shipping, yet it encourages **the market of sustainable marine fuels** and the use of **new technologies** and **innovation in port and in shipping services**²².

Nevertheless, in the view of the extension of Directive 2003/87/EU to the maritime industry sector, risks may arise for companies exposed to international competition, given that no such climate efforts are being made in other jurisdictions (notably the ports of third countries close to

the Union), leading to carbon leakage²³. To that end, the Directive includes provisions to ensure that the carbon leakage phenomenon is mitigated, such as: **(a)** a reporting and review clause to monitor the implementation of the relevant rules, in order to detect in due time any patterns of avoidance of the new requirements and subsequently to propose more effective measures²⁴; **(b)** a clause to establish lists of neighbouring container transshipment ports (Terminals) by means of implementing acts²⁵; and **(c)** a clause on reporting and reviewing new initiatives of the International Maritime Organization (IMO). Likewise, the European Commission, as the responsible body for the proper implementation of the TEN-T, is invited to monitor and examine the impact of the amending Directive on possible increases in transport costs, possible market distortions and changes in port traffic²⁶, the overall level of competitiveness of the maritime sector in the Member States, and in particular the impact on maritime services which are key

²²See the **European FuelEU Maritime Regulation**, which aims to increase low-carbon alternative fuels for the maritime sector.

²³'Carbon leakage' refers to the relocation of industrial activities outside the EU to avoid greenhouse gas emissions obligations. In the maritime sector in particular, carbon leakage can be seen as the avoidance of ports and transshipment terminals and hubs within the EU (regulatory arbitrage).

²⁴E.g. by imposing increased delivery requirements for voyages where the risk of avoidance is higher.

²⁵Such implementing acts would list ports as neighbouring container transshipment ports

when the share of container transshipment, measured in twenty-foot equivalent units, is exceeds 65 % of the total container traffic of that port during the most recent 12-month period for which relevant data are available and where those ports are located outside the Union but less than 300 nautical miles from a port under the jurisdiction of a Member State. Third country ports where effective measures equivalent to the new ETS are in place shall be excluded from these lists.

²⁶Such as port avoidance and relocation of transshipment hubs.

territorial continuity services (i.e. Logistics Service Providers).

Our Law Firm's team, one of the first law firms in Greece composed of legal and expert scientific associates (Innovation Engineers - Energy Transition Consultants), recognizing that the new requirements of the ETS and the related sustainability reports are at the top of the interest of many shipping and other involved companies, will be delighted to assist you in preparing you to adapt to the new demanding regulatory compliance requirements, providing you with high quality legal advice and support.

Contact us if you would like to discuss how we can help you via **energy-esg@fdmalaw.com**
