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# Can shipping chart a green course in a post-coronavirus climate?

*The European Union cannot afford to continue to exempt shipping from the its European Trading System for much longer, as the quantity of its CO2 emissions is simply too great. Carriers should prepare themselves*

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by August Braakman |

An EU regulation covering the period 2020-2030 determines both the percentage by which the member states must collectively have restricted their greenhouse gas emissions in the next decade, and the annual linear limit value to be achieved by each individual member state



GREENHOUSE GAS EMISSIONS FROM MARITIME TRANSPORT ARE PROJECTED TO INCREASE SIGNIFICANTLY IF MITIGATION MEASURES ARE NOT PUT IN PLACE SWIFTLY.

THE European Union has taken measures aimed at the collective reduction of greenhouse gases to zero by 2050. Box carriers are responsible for emissions that damage the environment.

Its regulation covering the period 2020-2030 determines both the percentage by which the member states must collectively have restricted their GHG emissions in the next decade and the annual linear limit value to be achieved by each individual member state.

In 2018, the collective percentage was set at 40% compared with 1990 emission levels. In the course of 2020, the EU will issue a proposal on increasing this target, likely to arrive at 50% to 55%.

The regulation does not provide for specific penal sanctions as might compel a member state to achieve its annual linear limit value.

Regulations are legal acts that apply automatically and uniformly to all EU member states as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety. Therefore, in default of specific penal sanctions, the European Commission may where appropriate revert to the general sanctions prescribed by the Treaty on the Functioning of the European Union.

Parallel to the EU measures at governmental level, the commission has put in place the EU European Trading System, which limits emissions from some of the most important energy-intensive sectors, such as power stations, industrial plants and commercial aviation. The system covers around 45% of the bloc's GHG emissions.

The system works on the "cap and trade" principle. A single EU-wide cap is set on the total amount of GHG emissions covered by the system. Within the cap, companies receive free of charge or can buy European Emission Allowances, known as EEAs, which they can trade with one another as needed.

An allowance is like a voucher that allows the holder to emit one tonne of GHG emissions within one calendar year. The price for one is currently around €25 (\$28). The expectation is that this price will increase over the years, since the total quantity of EEAs decreases each year. During the period 2021-2030, the decrease will be subject to an annual linear factor of 2.2 %.

Companies that are active in sectors covered by the European Trading System are required to participate. Failure to comply with European Emission Allowance could lead to the imposition of heavy fines.

Maritime transport is responsible for around 940m tonnes of CO2 emissions annually and for about 2.5% of global CO2 emissions. These emissions are projected to increase significantly if mitigation measures are not put in place swiftly.

According to the International Maritime Organization, shipping emissions could under a business-as-usual scenario increase by between 50% and 250% by 2050.

Maritime transport is currently exempt from the European Trading System. The EU cannot afford to continue this exemption much longer. The quantity of the CO2 emissions is simply too great. Therefore, carriers should prepare themselves.

### **Support for economies**

The International Monetary Fund sketches a pitch-black picture of the European economies as a result of the coronavirus outbreak.

In March, the European Commission adopted a new State aid Temporary Framework to support the economies of the member states. The framework, which was amended in April, enables member states to adopt aid measures to remedy a serious disturbance in the whole of, or an important part of, their economy.

Member states must show the commission that the measures are necessary, appropriate and proportionate to remedy the effects of the outbreak. The litmus test is whether they are of a kind as to be useful in the making good of damage caused by the outbreak or instead are general measures unconnected with the alleged damage. Therefore, the test must be carried out from the perspective of the overall financial position of the beneficiary enterprise, which existed before the health crisis.

The impact of the pandemic on the economies of the member states is such that due consideration should be paid to the situation where a member state contends that its annual linear limit value of the collective reduction of GHG emissions at EU level — even without being increased — cannot be achieved.

This viewpoint is likely to be underpinned with the argument that the financial support given to its economy apart from healthcare support — if such extension of financial support were to be decided on anyhow — is inadequate for it to be able to (continue to) comply with its community obligations.

In the occurring event, the commission is required to apply the general sanctions prescribed by the Treaty on the Functioning of the European Union. Failure to do so is likely to induce member states to lodge a complaint, stating that the member state concerned infringes directly applicable EU law. The commission cannot but deal with the complaint. The GHG emission obligations having been set out in an EU regulation there seems to be little scope for the Commission for not concurring with the complaint.

Apart from member states also enterprises, which qualify as interested parties, have a right to lodge a complaint with the commission, stating that the non-compliance of a member state with its obligations under the regulation has caused them, and will continue to cause them, to suffer severe and irreparable damage during the period from 2020 to 2030. For the same reasons as stated above, the commission cannot but deal with the complaint.

If the commission concurs with a complaint lodged by a member state and/or an enterprise that qualifies as an interested party, the member state in default will be severely fined.

Once maritime transport has been included in the European Trading System, carriers that are found not to meet their EEAs will also be subject to heavy fines. However, the nature of both fines is that they pertain to public law and as such do not constitute compensation for damage suffered.

Enterprises may consider instituting proceedings under private law to determine compensation for the harm that has been suffered. Consistent case law by the court ensures that a member state is obliged to compensate for damage that has been incurred as a result of an infringement of directly applicable EU law it has committed.

Non-compliance by member states and/or enterprises with their GHG emission reduction obligations as a result of the coronavirus crisis may well have serious effects on fair and undistorted competition in the market of containerised liner shipping services.

These effects are aggravated by the ever-increasing use of logistics solutions with very advanced state-of-the-art features and the ensuing lack of up-to-date and reliable concepts for addressing competition issues in this market, being the definition of the relevant market and the Consortia Block Exemption Regulation.

It is up to the European institutions to create both the juristic scope and the atmosphere required in order to induce both member states and enterprises to make the proper choices.

If either this scope and/or atmosphere are wanting or inadequate, the lack of the right balance between climate and coronavirus resulting therefrom just might prove to herald the armageddon of a climate-neutral EU.

May Thetis guide it on its passage between this Scylla and Charybdis.

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