



## EU EMISSIONS TRADING SCHEME (EU ETS) – FULL STEAM AHEAD

Following the approval of the European Parliament and Council back in April 2023, the revised EU ETS Directive (2003/87/EC) to include maritime transport within the EU Emissions Trading Scheme (“EU ETS”) from 1 January 2024 has now come into force.

The deal on the reform of the EU ETS is one of the key pieces of legislation that form part of the “Fit for 55 in 2030 package” which plans to reduce GHG emissions by at least 55% compared to 1990 levels. Following on from our brief introduction to the EU ETS scheme in our [December 2022 edition](#), we set out some key aspects of the legislation of which our Members should be aware.



BY VICKI TARBET

Firstly, this is a Directive and not a Regulation. It is not directly enforceable but sets out the goals each Member State must achieve. How the Member State does that, is for them to decide via national law. As a result, there may be differences

across the EU and EEA-EFTA States (Iceland, Lichtenstein and Norway) to which the Directive applies.

### Legislative scope

The legislation applies to all ships over 5000GT from 1 January 2024. A future extension to ships between 400GT and 5000GT will be considered as part of the first review. The Commission is required to submit its report on the impact of including these ships within the EU ETA by 31 December 2026.

It applies to voyages between ports of call, which are defined as calls to load/unload cargo, embark/disembark passengers or specifically for offshore ships to relieve the crew. Stops for reasons that are incidental to maritime transport, including but not limited to, bunkering, obtaining supplies, repairs, crew changes (except offshore) and emergency situations are excluded. Stops at transshipment ports are also excluded from the definition.

Allowances must be surrendered in respect of (a) 50% of the emissions from ships performing a voyage from a port of call within the jurisdiction of a Mem-

ber State to a port of call outside the jurisdiction of a Member State (and vice versa) and (b) 100% of the emissions from ships for intra-EU voyages. A voyage that merely transits EU waters without stopping at a port of call is not caught.

Implementation is phased for the first 2 years, Shipping Companies are required to surrender allowances for 40% of verified emissions in 2024 and in 2025 70% of verified emissions. From 2026 onwards, allowances for 100% of verified emissions must be submitted.

The deadline for submission of allowances relating to the preceding calendar year is 30 September.

At present only CO<sub>2</sub> emissions are caught, but from 1 January 2026 NO<sub>x</sub> and methane will be included in the EU ETS. This has implications for the use of LNG as an alternative fuel.

### **Who is responsible for submitting the allowances?**

The entity liable to submit the allowances is the “Shipping Company”, defined as “*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 [ISM Code]*”.

This definition is as expected given that ship managers are already on the front line of reporting GHG emissions under the EU MRV legislation. This has been a concern amongst ship managers for some time given the possible costs exposure and administrative logistics involved, as well as ramifications of non-compliance (see further below). BIMCO are currently in the process of reviewing Shipman, which will include an EU ETS clause to deal with these concerns. The revised Shipman is expected to be published within this year.

Each Shipping Company will be administered by a Member State. If the Shipping Company is registered in a Member State, then that Member State will be the administering authority. For Shipping Companies registered outside the EU/EEA, the administering authority will either be the Member State in which the Shipping Company had the most port calls in the preceding four years or if no such voyages have been performed, the Member State where a

ship started or ended the first voyage caught by the Directive. This raises the possibility of forum shopping if some Member States are perceived as being less stringent in their enforcement or implementation than others.

A list of Shipping Companies that have performed a maritime transport activity within the scope of the EU ETS and their administering authority will be published by the Commission within 1 February 2024.

### **Application of the Polluter Pays Principle**

The Directive provides at Art.3gc for the transfer of the cost of compliance from the Shipping Company to the entity responsible for the “operation of the ship” and requires Member States to take necessary measures to ensure the Shipping Company is entitled to such reimbursement. The Recitals to the Directive recognise that whilst the mechanism of reimbursement may be subject to a contractual arrangement, Member States should provide a statutory entitlement to reimbursement under national law.

“Operation of the ship” is defined as determining the cargo carried, or the route and the speed of the ship. It clearly encompasses a time charterer but would also appear to catch a voyage charterer, as the party who determines the cargo carried, however this may be open to more debate.

Only the cost of compliance can be passed on. The Shipping Company remains responsible for submitting allowances and for overall compliance with the enacting legislation.

### **Preventing carbon leakage**

To prevent the possibility of evasion by container-ships discharging at a neighbouring non-EU port and then transshipping containers into the EU by way of a short transshipment voyage, the Commission will publish a list of transshipment ports located within 300NM of EU ports. Where transshipment takes place at a listed port(s), allowances will need to be surrendered for 50% of the emissions of the entire voyage from origin, to the final EU destination.

### **Enforcement**

There are clear and serious consequences of non-compliance for the Shipping Company set out in the Directive, including existing penalties. The existing

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penalties are (a) “name and shame” with Member States publishing lists of non-compliers, (b) an excess emissions penalty of EUR 100 per tonne of CO<sub>2</sub> for which an allowance has not been surrendered; and the missed allowances must still be surrendered.

In addition, and specific to shipping, for repeat offenders who have failed to submit allowances for two or more consecutive reporting periods and where other enforcement measures have failed, all ships under the responsibility of the Shipping Company can be denied entry to EU ports and/or a flag state detention order can be issued, until the Shipping Company submits its allowances. Where the Shipping Company is the ship manager, the impact of a fleet wide expulsion order could be particularly severe.

#### **How to obtain Allowances**

Allowances are auctioned via the European Energy Exchange (EEX). There is then a secondary market with allowances being traded via brokers and financial institutions etc. An allowance does not have an expiry date and unused allowances can be surrendered in later years.

#### **Final Thoughts**

The legislation is a clear sign to the industry in support of the “polluter pays” principle and will be welcomed by Owners. How it will be enforced, in

practice, by each of the Member States and how successful such enforcement will be, remains to be seen. Particularly since shipping is a global industry, with counterparts commonly registered outside of the EU/EEA-EFTA and where non-EU jurisdictions (such as US or England) remain the most commonly used governing law of choice in charterparties. Further and given the potentially large costs involved and severity of the consequences of non-compliance, counterpart risk and financial standing will be more important than ever.

Whilst the Directive suggests that the right to recover the cost of allowances will not be dependent on the parties including a clause in the contract allocating such risks, we would urge those Members who will be or may be caught by the EU ETS to include a suitable clause in their contracts rather than rely on the schemes put into place by each individual Member State. For those trading on time charter terms, the BIMCO Emission Trading Scheme Allowances Clause for Time Charters is a good starting point and provides an orderly scheme entitling an owner to collect allowances from its charterer. The clause can be downloaded from the [BIMCO website](#).





## FUELEU MARITIME INITIATIVE – NEXT PHASE OF THE FIT FOR 55 PACKAGE?

### Overview

In addition to the suite of IMO (EEXI and CII regimes) and European legislation (EU ETS) that Nordisk Members are already adapting to, the EU is now in the process of implementing another regulation as part of their “Fit for 55 Package”, aimed at reducing the GHG intensity in favour of sustainable maritime fuels.

The FuelEU Maritime Initiative was agreed as a provisional political agreement between the Council and the European Parliament on the 23 March 2023, and now only subject to formal approval by the two co-legislators.

### Specific measures in the FuelEU Maritime Initiative

The initiative seeks to establish a comprehensive regulatory framework to support the transition to cleaner fuels. By creating a level playing field and providing clear guidelines, the FuelEU Maritime initiative aims to encourage investment in sustain-

able technologies and incentivize shipowners to make the necessary changes to their fleets. This involves particularly (i) setting binding targets for the increase of low-carbon fuels in the maritime sector and (ii) implementing certain obligations to connect to onshore power supply or zero-emission technology in EU ports.

### 1. Maximum limits on the yearly GHG intensity of the energy used by a ship

The requirement to reduce the yearly greenhouse gas intensity will apply to commercial ships of 5,000 and above and covers all energy used on board when the ship is at an EU port and on voyages between EU ports, and 50% of the energy used on voyages departing from or arriving to an EU port, regardless of flag. All greenhouse gas emissions that a given fuel generates have to be



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taken into account (full lifecycle – well to wake), not just those used by the ship.

The initiative introduces increasingly stringent limits on carbon intensity of the energy used by ships from 2025 to stimulate and reflect the anticipated increase in production of renewable and low-carbon fuels and the expected developments in technology. The annual targets shall be determined against a reference value which corresponds to the fleet average greenhouse gas intensity of the energy used on-board by ships in 2020, and the initiative anticipates a reduction of 2% as of 2025, gradually increasing to 80% as of 2050.

### **2. Zero-emission requirement while at berth**

In addition, from 1 January 2030, a containership or passenger ship calling at an EU port shall connect to on-shore power supply and use it for its electrical power demand at berth, unless, among other exceptions, the ship already use zero-emission technologies for their on board power requirements.

### **Responsibility for compliance and consequences of non-compliance**

Similar to the EU ETS, the responsibility for compliance lies with the “shipping company”, defined as 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.

To ensure compliance with the regulations and track progress, the initiative proposes monitoring, reporting, and enforcement mechanisms. This therefore requires ships to report their fuel consumption, emissions, and other relevant data. It also establishes penalties for non-compliance and outlines the enforcement procedures to ensure the effectiveness of the initiative.

In our view, the objective of the initiative is good but there are some challenges connected to the proposal, for instance the current lack of low-GHG intensive fuels in the global market, as well as the practicalities of assessing the “well to wake” GHG emissions and data collection involved. Hopefully, the initiative will contribute to accelerate the switch to alternative fuels and consequently, reduce the overall GHG emissions from the maritime sector.

Regardless of what we may perceive the pitfalls to be, it is set to become legislation, so Members are encouraged to start preparing on how to comply with the anticipated requirements and be aware of the FuelEU Maritime Initiative for voyages touching the EU (and EEA) area going forward when entering into new charterparties that extend into 2025 and beyond. Nordisk will continue to monitor the developments and remains available to assist Members with any questions they may have.



## NORDISK NEWS

### New Nordisk lawyers (Oslo)

To further strengthen the Norwegian legal team, we are pleased to announce that Mina Walen Simensen (advokatfullmektig) and Oskar Vegheim will join Nordisk Oslo in August.

Mina recently graduated from the Universitetet



i Oslo, after finishing her thesis as research assistant at the Scandinavian Institute of Maritime Law (Nordisk institutt for sjørett, Det juridiske fakultet, UiO). Her thesis was on marine insurance, and more specifically on the duty of co-insurers to follow the lead.

Oskar, who graduated in 2021, brings experience from two years as a law clerk at the Supreme Court of Norway. He holds a BSc in Economics and Business Administration from the Copenhagen Business School, in addition to his law degree from the University of Bergen.



Welcome to Nordisk Mina and Oskar!

## NOR-SHIPPING - NORDISK PARTY 2023

