

The European Union external competencies and maritime industry

PhD. Hamed ALAVI¹

Abstract

Maritime industry has deep roots in Europe. International ports and Inland water ways are in use by European merchants in the course of their trade all along the history. Formation of the European Union and Single European Market has increased the importance of maritime transport even more than before. Currently, industry is regulated at the Union level with body of law which intends to create a safe and predictable business environment for European and foreign enterprises. However, shared nature of the EU with her Member States in regulating Maritime Transport has created a big question mark for many external parties as well as European stock holders of Maritime industry. The question is who can represent EU maritime industry externally and where to draw the limits of Union and Member States Competencies in this industry? At the midst of the second decade of 21th Century, still many international businesses and even foreign governments wonder about limits of external competencies of the EU in maritime industry. Such confusion creates trouble for foreigners and even Europeans in determining where should they referee their matters to the Commission and where should they approach Member States? In this paper, author tries to answer above mentioned question by scrutinizing external and internal challenges facing the EU about its competencies to represent maritime industries outside of her boundaries. Paper is divided into five main sections. After introductory comments, second part will discuss maritime policy and its regulation in the EU. In third part with particular focus on the EU-IMO relations, paper will analyse external challenges facing the Union in representing her maritime industry in international organizations. Forth part will take a look at internal challenges and regulatory limits which affect the extremal representation of maritime industry by the Union. Final part is dedicated to concluding remarks.

Keywords: *the European Union law, maritime industry, external competencies, the European Union.*

JEL Classification: K23, K33

1. Introduction

The global trade is a dynamic area with an ever changing nature. Introduction of new technologies, political and economic developments, formation of economic unions, conclusion of bilateral and multilateral trade agreements at regional or cross continental level, among others, are factors which change global

¹ Hamed Alavi - Autonomous University of Barcelona, Spain; University of Kurdistan Hewlêr, Iraq, hamedalavi2000@gmail.com.

trade features constantly. Almost on the daily basis we hear news about developments political agreements, disagreements, imposition and lifting of sanctions, mergers, acquisitions different Motivational Companies which affect our lives even though, they might take place in other side of the globe. Formation and development of the European Union is one of such phenomena's which has affected many aspects of international trade from its inception till today.

The European Coal and Steel Society came into existence after end of the World War II, with six member states following the goal of economic integration among member states as a way for development in post war era. However, it continued development and turned into an international organization with 28 member states across Europe. Harmonization and development of intra community regulations among her Member States and active participation in international initiatives together or instead of her Member States are ways in which the EU follows further establishment of her role in global arena. As a result, the Union has developed exclusive and shared competences (with member states within the framework of European Law) which provide her with possibility to either fully represent Member States in process of international negotiations or make decision together with them in specific areas of shared competencies. Since the EU competencies are developing constantly, it might be difficult for external parties to clearly define areas where they should negotiate with the Union from ones which need direct approach to the Member States. European maritime industry is a good example of such gloomy areas. With substantial size of including 41% of the global maritime fleet I transports 90% of European export cargo in addition to transporting 400 million passengers annually². The registered tonnage of EEA area in 1010 was equal to 209 million tonnes on total 916 million tonne registered globally³ European Maritime industry is growing fast and embeds exclusive and shared areas of competence for the union and her Member States which might create lots of confusions for third parties. Therefore, current paper tries to answer question of who has the competency to represent the EU maritime industry in international arena (e.g. WTO, IMO...)? What is the legal basis for such representation? And what are external and international challenges for such representation?

Following the goal of answering research questions, paper is divided into five main parts: after the introductory section, second part explains developments of European Maritime regulations. Third part will look at external legal challenges on the way to represent European maritime industry globally. Forth part will discuss internal legal framework development and existing challenges for representation of European Maritime Industry. Finally, last part will provide concluding remarks on the subject matter discussion.

² European Community Ship-owners Association Annual Report 2009-2010.

³ *Ibid.*

2. Maritime policy and regulation in the European Union

As already mentioned, a huge proportion of European trade depends on maritime services. Transport of passengers, cargo inside and outside the EU is heavily dependent on smooth and efficient function of the maritime industry. In 2009 for the purpose of meeting its objectives ,in line with broad picture of the EU Transport Policy as well as the EU Integrated Maritime Policy, the European Commission published a communication to The European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions and described “strategic goals and recommendations for the EU’s maritime transport policy until 2018”⁴. In addition to presenting main strategic objectives of the European Maritime Transport System up to 2018, the communication defines key areas for action by the EU to improve the competitiveness of the maritime sector.⁵ Among others, section 5 of the communication, describes in detail the EU strategic objective towards “working together on the international scene”⁶. In this regard, it explains collaboration of the Union with international organizations active in field of maritime transport like IMO, ILO, WTO and WCO as well as collaboration in the framework of a network of bilateral maritime transport agreements as a way to achieve its objectives.⁷ Further, it invites the Commission and the Member States for establishing a comprehensive international regulatory framework for shipping which suites challenges and demands of the 21th Century by:

“- concerted action at European level is crucial in several fora, for example concerning: governance (UNCLOS), international trade (WTO and bilateral maritime transport dialogues and agreements, UNCITRAL), safety, security and environmental protection (IMO), labour (ILO) or customs (WCO).

– the Commission and the Member States should strive for and cooperate towards achieving all the objectives of the EU maritime safety and security policies by means of international instruments agreed through the IMO. If IMO negotiations should fail, however, then the EU should take the lead in implementing measures on matters that are of particular importance for the EU, as a first step, pending wider international agreement and taking the international competitive environment into consideration.

– for the EU Member States to act as an efficient team that can rely on strong individual players, requires enhancing the recognition and visibility of the EU within the IMO by formalising the EU coordination mechanism and granting formal observer status, if not full membership, to the EU within this organisation. This will not affect the rights and obligations of the EU Member States in their capacity as IMO contracting parties.

⁴ *Inter alia* COM(2006) 314, 22.6.2006; COM(2007) 575, 10.10.2007; COM(2009) 8 , 21.01.2009.

⁵ COM(2009) 8 , 21.01.2009, p. 3

⁶ *Ibid*, p. 9.

⁷ *Ibid*, p. 10.

– the Commission and the Member States should work towards a better mechanism for rapid ratification of IMO conventions at world level, including the examination of the possibility of replacing ratification based on flag by ratification based on the fleet as defined by the country of residence.

– the Commission and the Member States should work with shipping and trading partners to ensure a convergence of views in the IMO. EU international cooperation efforts should lead to the establishment of a mechanism to ensure actual enforcement of internationally agreed rules by all flag and coastal states in the world.

– the Commission's recent Communication on the Arctic Region presents suggestions for protecting and preserving this maritime basin and, in particular, for ensuring sustainable Arctic commercial navigation, which should be followed up⁸.

In fact, the proposal for EU to become a full member in IMO was given by the Commission to the Council of European Union in 2002.⁹ However still role of the EU is quiet limited in IMO. It has only observer status (given in 1974, currently European Commission has an appointee representative to the IMO) which does not even amount to full member status. The EU is not even a member to any of IMO conventions. This is quiet understandable as membership to IMO is only open to sovereign countries not Regional Economic Integration Organizations like the European Union. As result, by membership in IMO, the EU will overcome a strong challenge of improving its role in maritime sector outside of its bundies. Further implications of such challenge and possible options for the EU to achieve it policy objectives will be explained in the next chapter.

From internal perspective, it should be kept in mind that all competences of the EU are conferred to her by member states.¹⁰ From the inception on the European Community, European Court of Justice determined that Treaty of Rome has created a legal order under which Member States transfer part of their sovereign power to the community and deprive themselves from making decision in such areas. In other areas, the European Community enjoys either shared competency with member states or no competency to make decision. It is noteworthy that from those days, new areas have been entered in domain of the Community competences which also include external relations of the EU.

Historically, Article 3 of the EEC Treaty required formulating a Common Transport Policy (CPT) in favour of forming the Single European Market with specific provisions included in Title IV of Part Two of the Treaty.¹¹ Mandate of Woking within the framework of CPT has been emphasized in Article 74 of the EEC

⁸ *Ibid*, p. 10.

⁹ Nengye, L., & Maes, F. (2012). *Legal constraints to the European union's accession to the international maritime organization*. J. „Mar. L. & Com.”, 43, p. 279.

¹⁰ Treaty of European Union (TEU), Article 5.

¹¹ EEC Treaty, Articles 74-84; also visit: Greaves, Rosa (1992). *EC Maritime Transport Policy and Regulation*. „Duke J. Comp. & Int'l L.”, 3, p. 119.

Treaty. Article 75 (1) further requires Council to set “common rules” for international transport and “conditions under which non-resident carriers may operate transport services within a Member State” and “any other appropriate provisions.”¹² However, Treaty considers maritime and air transport different from other means of domestic and international transport.¹³ Deferent reasons are considered for special treatment of maritime transport by the Treaty, for example, Maritime Transport enjoys long history of international regulation including conventions which came into force long before formation of the EC with participation of its Member States. Therefore, it would not be logical for the EC to interfere in function of such regulations¹⁴. International nature of maritime transport, lack of possibility to act unilaterally in changing regulations and necessary to negotiate with all participants of in international treaties (whether or not the Member State of European Community) in such industry was other reason for receiving such special treatment.¹⁵

Main principles of CPT are namely:

- Formation of an efficient internal market working towards free movement of goods and people
- Establishing a coherent transport network which has been equipped with most proper technology
- Connecting national network of the Member States via trans-European transport network
- Environmental protection within the framework of transport system
- Improving safety up to the highest level
- Enactment of social policies in line with interest of active people in transport industry
- Developing relations with not-member states.

As it can be observed above, external competencies European Community in external relations were matter of concern from early days of establishment of the Common Transport Policy.

Establishment of Common Transport Policy can be divided into three distinctive time periods:

- Stage 1 (Pre 1985 Phase): Main focus was on inland transport; providing consultation to member states, elimination of quotas existing between Member States; Community expansion of 1973 which took place with accession of UK, Ireland and Denmark; development of working programmes during the 70s and early 80s including : Council Decision of 21 March 1962 which requires Member States to notify the Commission of potential measures that are likely to interfere with the achievement of the Common Transport Policy¹⁶.

¹² EEC Treaty, Article 75(1).

¹³ EEC Treaty, Article 84.

¹⁴ Greaves, Rosa, *op. cit.* (1992), p. 123.

¹⁵ *Ibid*, p. 123.

¹⁶ *Ibid*, p. 119.

- Stage 2 (between 1985-1992): Case 13/83 *European Parliament v EC Council*¹⁷ in which ECJ condemned passiveness of the Council in implementation of CTP; issuing white paper about the Completion of Internal Market¹⁸; 1986 Maritime package (The Council Regulation 4055/86, *Access to Shipping Routes With Third Countries*; Regulation 4058/86, *Access to Cargoes in Ocean Trade*; Regulation 4056/86 *Application of the Competition Rules*; Council Regulation 4057/86 *Unfair Practices of Third Countries*); 1987 Progress Towards CTP (Maritime Transport) – 1989 maritime package II – Occurrence of serious maritime accidents: 1987 *Herald of Free Enterprise*; 1990 *Scandinavian Star*; Directive 93/75 on minimum requirements for vessels bound or leaving EU ports (dangerous goods); Directive 94/58 on minimum training of seafarers; Maritime cabotage was introduced in Regulation 3577/92; Council Regulation 613/91 on the Transfer of Ships from One Register to Another Within the Community¹⁹.
- Stage 3 (post 1995): Emphasis on environment, safety, infrastructure; technical developments; Developing a working relationship with international maritime agencies; introduction of Directive 95/21 on Port State Control; Liberalisation of the industry including access to market (removal of restrictions); harmonisation of licences/authorizations to operate in the community.

Although, the path taken from early days of European Community until now is substantial in terms of developing a well-established communitywide maritime policy and regulations, still issue of division of competencies is a huge question which rises while dealing with non-member states and international organizations. On one hand, the EU is establishing itself as an international player in global arena²⁰. On the other hand, article 4(2) (g) TFEU expressly states that the EU has shared competence with the Member States in Transport. The first conclusion from statement above is that The EU has to overcome external and internal legal challenges to improve its position as a global actor in international maritime industry.

3. External legal challenges

International Maritime Organization is the most important organization which its membership intended by the EU since 2002. Although, such membership received support inside the Union it seems to be a challenging task.²¹ The Commission holds observer status with place for a representative at IMO. However, current situation seems unsatisfactory and the Union intends to improve it to full

¹⁷ *European Parliament v EC Council* [1985] ECR 1513.

¹⁸ SEM – COM(85)310 final.

¹⁹ Council Regulation 613/91 of 4 March 1991 on the Transfer of Ships from One Register to Another Within the Community, 1991 O. (L 68) 1.

²⁰ M. Cremona, *The Union as a global actor: roles, models and identity*, Common Market Law Review, 41 (2004), p. 553.

²¹ Recommendation from the Commission to the Council, in order to authorize the Commission to open and conduct negotiations with the International Maritime Organization (IMO) on the conditions and arrangements for accession by the European Community, SEC(2002)381 final.

membership status. It also should be mentioned that the EU is not only a non-member to IMO, she is not member of any of IMO conventions including MARPOL and SOLAS and etc.

A primary challenge for the EU on the way to membership in IMO is explicit text of IMO Convention which opens its membership only to states²². As a result, there is no possibility for a Regional Economic Integration Organization to become a member until the convention is amended and all member states have approved the amendment. Nengye and Frank Maes argue that such amendment is possible in theory as it has already happened in 1991 during the EU membership process in FAO.²³ The EU is now a full member of Food and Agricultural Organization (FAO). However, it should not be forgotten the in terms of common fisheries policy The Union has exclusive competences which do not apply to transport. Other very important challenge is that Convention can be amended only after approval of two third of member states²⁴. This simply means that among 171 members of IMO, 114 States should ratify membership of the EU. Scholars provide different reasons for interest other member states to welcome the EU in the IMO. It seems that existence of strong regulatory and enforcement system in the EU which will definitely result in strong implementation of IMO rules in European ports and waters can be a very good reason of the kind.²⁵

However, only membership in IMO will not be sufficient for the EU to extend its international presence. It is necessary to become an active member in different IMO conventions. Apart from legal challenges which is facing the EU in membership of the IMO, it is worth to mention that same problem exists on the way of the EU membership to each of conventions introduced by the IMO. In fact, none of the IMO conventions can accept a regional economic development organization as a member except the Athens Convention on Carriage of Passengers and their Luggage by Sea. The EU should amend all other conventions of the IMO by addition of a clause permitting her membership. The problem will arise as each convention has different area of focus and different criteria for membership. Therefore, it seems the EU to have a serious challenge in front to become a full member of different IMO conventions. For example, Article 16 (d) of International Convention for the Prevention of Pollution from Ships (MARPOL) requires any amendment to the convention to be effective after ratification by at least two third of the members. Further Article 16 (f) (i) emphasized that amendment to the convention will be accepted if it is accepted by two thirds of the parties whose combination of fleet does not stand for less than half of the gross tonnage of global merchant fleet.²⁶ Again it seems very difficult task for the EU to persuade other countries about her membership in IMO conventions.

In addition to membership problems, there are other legal challenges regarding intention of the EU to increase its external representation by membership

²² IMO LEGXII / 8 Annex II, 8.

²³ Nengye, L., & Maes, F. (2012). *Legal constraints to the European union's accession to the international maritime organization*, „J. Mar. L. & Com.”, 43, p. 279.

²⁴ <http://www.imo.org/About/Pages/FAQs.aspx> [visited 10 November 2016].

²⁵ V. Frank, *Consequence of the Prestige Sinking for European and International Law*, 20 „International Journal of Marine and Coastal Law”, 27 (2005).

²⁶ MARPOL, Article 16 (f)(i).

in IMO. To start with, a regular timeline for entry into force of the IMO conventions is about 8 to 10 years which is correctly considered as a systematic drawback in activities of the organization.²⁷ Situation becomes more complicated as any of IMO conventions have different terms and conditions in order to come into force. Therefore, from legal perspective, contribution of the EU might be nominal in this regard. For example, if the limit on aggregate tonnage is the precondition for entering into force of the convention, then the EU membership will have no positive effect of ratification of the convention as the Union does not have any ship registered under the EU flag. Additionally, there is a serious doubt about counting the ratification of the EU in addition to her Member States.²⁸

Furthermore, a valid question would be about arrangement of the EU vote and her Member States. This problem might have a solution with reference to current voting system which the EU has in practice in FAO. At the time of voting in FAO, a mixed voting system is in place which divides powers of the EU and Member States. The EU generally votes in areas of her exclusive competence instead of 28 Member States. However, in cases of Member State competence, votes would be delegated to the president of the Commission or Member States vote individually while the EU takes a silent position²⁹. In any event, it is still unclear whether or not allocation of an extra vote to the EU will be acceptable for other Member States to the IMO convention.

4. Internal framework development and exiting legal challenges

In 1963, the European Court of Justice confirmed that in the legal order established by treaty of Rome, Member States transfer some of their Sovereign Competences to the European Community. As a result, Member State will be prohibited from acting in such areas on her own. In other areas, the Community will have either shared competences Member States or no competence at all³⁰. Since those days many things have changed within the framework of the European Union and much more competences have been conferred to the Union (by those days' community) respectively. This makes confusion regarding internationally regulated domain of competency for the Union to enter agreement with external parties in general and within maritime sector in particular.

Expressed exclusive and shared competency to enter into international agreements has been given to the Union by the EC treaty (TFEU from 2009). A good example would be expressed exclusive competency of the Union in negotiating international agreements within the framework of Common Commercial Policy.³¹ In the format of EJC's interpretation of treaty, implied exclusive competencies also

²⁷ A. K. Tan, *Vessel-Source Marine Pollution, the Law and Politics of International Regulation* (Cambridge University Press, 2006) 348; SEC (2002)381 final, 35.

²⁸ This was the case when the EU ratified the Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal in 1997.

²⁹ F. Hoffmeister, *Outsider or frontrunner? Recent development under international and European law on the status of the European Union in international organizations and treaty bodies*, 44 „Common Market Law Review” 41-68 (2007), p. 57.

³⁰ Case 26/62 *Van Gend & Loos* [1963] ECR 1.

³¹ Article 133 of the EC and Article 207 of the TFEU.

have been provided to the Union. Such implied competencies include possibly for the Union to enter international agreements in areas which it already harmonized within the community and in the framework of its internal competences.

Opinion 1/76³² and decision of *Commission v Council* (ETRA Ruling)³³ are most famous examples of exclusive implied competency which will be discussed in current section. Concerning the regulation of navigation in the Rhine, Opinion 1/76 explains existence of implied exclusive competence of the Union (by the Community) in line with establishment of Common Transport Policy to regulate capacity of the Rhine via agreement with non-Member States. The ruling in Opinion 1/76 was confirmed by the ECJ in Opinion 1/03.

Other instance of implied exclusive competence is ruling of *Commission v Council*³⁴ which resulted in establishment of ERTA principle. Accordingly, upon adoption of common rules by the community it would not be possible for the Member States individually or collectively to enter any agreement with non-Member States for the purpose of any act which might affect such rules. As a result, adopting a regulation in any given area will enable community exclusively for concluding international agreements in that particular area.³⁵

Co-existence of express and implicit exclusive competences creates confusion for third party officials in with who should they start negotiations in the EU? It gets even more complex in cases where the Union has only exclusive competence in one aspect of agreement not all of it.

In *opinion 1/03* on the occasion of initiating negotiations with EFTA countries for adaptation of Lugano Convention, the ECJ was asked to determine competency of commission for conducting such negotiations. In fact, Treaty of Amsterdam conferred new powers to the community regarding judicial cooperation in civil cases. Therefore, after adoption of the Regulation 44/2001, on enforcement of foreign judgments, commission received authorization to negotiate similar terms with EFTA countries.

In Lugano Opinion the ECG provided that, while determining exclusive competency of the community, in addition to the field, nature and content of community rules should be considered as well as terms on international agreement on process. The most considerable issue is not harmonization of the field but the “uniform and consistent application of community rules and the proper functioning of the system which they establish in order preserve the full effectiveness of the community law”³⁶.

Therefore, for the purpose of determining external exclusive competence, a thorough analysis should be conducted on provisions of given international agreement and find out about the possibility for agreement to affect the Community rules and “undermining the uniform and consistent application of the community rules and the proper functioning of the system which they establish”.³⁷

³² [1977] ECR 741.

³³ Case 22/70 *Commission v Council* [1971] ECR 263.

³⁴ *Ibid.*

³⁵ *Ibid.*, Paragraph 17.

³⁶ Opinion 01/03, paragraph 128.

³⁷ *Ibid.*, paragraph 133.

The Court found that Lugano Convention covers the harmonized areas under the Regulation 44/2004 and it is capable of affecting the Community rules of jurisdiction³⁸. Therefore, explicit competency of the Commission in negotiating agreement with EFTA countries was established.

Other example is the case of *the Commission v Ireland*³⁹ which is also famous as *Mox Plant*. In that case, before the International Tribunal for the Law of the Sea the Republic of Ireland took action against England due to breach of the UNCLOS. On the facts of the case, Ireland complained that English Sellafield Mox plant was involved in increasing level of pollution in the Irish Sea while UK neglected its duties under the Convention. On the other hand, the Commission, while initiating the Article 236 of the EC Treaty accused Ireland for breaching article 292 EC Treaty due to rising matter of interpretation of EC directives in another forum. The basis of Commission's case was laid on the failure of Ireland to inform the Community before going to UNCLOS court rather than merits of the dispute per se.

The ECJ based its judgement on the fact that external competence in the case was shared between the Community and Member State due to conduction of convention by the Community (based on article 175 (1) EC Treaty)⁴⁰. Further, court referred to principle of "mixed agreements have the same status in the community legal order as purely community agreements as these are provisions coming within the community competence"⁴¹. Therefore, it was confirmed that provisions of UNCLOS were a part of the Community legal system due to membership of the Community in Convention⁴². The Court further emphasized that attribution of competence is more important than nature of competence and an international agreement would not be able to affect division responsibilities under the EC Treaty and autonomy of legal system of the Community⁴³. Therefore, the Court defined the extent in which membership in UNCLOS was exercising the external competences of the Community for protection of environment⁴⁴.

Finally, the court concluded that provisions of the convention which were relied on by the Republic of Ireland were „within the scope of Community competence which the community had elected to exercise by being a party to the Convention."⁴⁵ The Court indicated its jurisdiction over dispute on assessment of England's compliance with the Community undertakings is exclusive based on articles 220 and 292 of the EC Treaty.⁴⁶

Later, this issue was embedded within the doctrine of "duty of Loyalty" in cases of the *Commission v Greece*⁴⁷ and the *Commission v Sweden*⁴⁸, were on the

³⁸ *Ibid*, paragraph 151-153.

³⁹ *The Commission v Ireland* [2006] ECR I-1145.

⁴⁰ Case, paragraph 73.

⁴¹ *Ibid*, paragraph 84.

⁴² *Ibid*, paragraph 82.

⁴³ *Ibid*, paragraph 93.

⁴⁴ *Ibid*, paragraph 97-120.

⁴⁵ *Ibid*, paragraph 120.

⁴⁶ *Ibid*, paragraph 123.

⁴⁷ *The Commission v Greece* [2009] C-45/07.

⁴⁸ *The Commission v Sweden* [2010] C-246/07.

basis of the Article 4 (3) of the Treaty of European Union the Court and limited authority of Member States to act on their own in international arena.

5. Conclusion

Author in this paper used existing historical background, documents and the European Union's legislation in defining influencing factors in determination of competency of the Union in concluding external agreements with not-Member States and effect of such competencies on European maritime transport. Existence of exclusive and shared competences of the Union for negotiation of external agreements can create confusion for third parties as who should they approach during the negotiation process? For this purpose, paper analysed external and internal legal challenges which face the Union in concluding membership agreement with International Maritime Organization. From external perspective, it became clear that the Union should resolve different legal obstacles like amending IMO Convention and getting agreement of 114 member states to Convention in order to become a full member of the Organization. However, from internal perspective, it was described that treaty provisions provide exclusive and shared competences for the Union in dealing with external agreements. Due to substantial development of regularity body of the Union it might be difficult for third parties to define what type of competency applies to which area of trade? Analysis of documents in European Maritime Sector made it clear that determining factor in such conditions is different from case to case and not only existence of internal rules in the given area but also effect of agreement on future of uniform application of community law and effectiveness functioning of system they put in place.

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