

ECSA POLICY PAPER ON THE EU ETS PROPOSAL

1. Introduction

Six months before the publication of the EU ETS proposal, ECSA made public [its position, the Framework Conditions for an EU MBM](#). Since then, the Framework Conditions have been updated twice with a new ECSA's position on the pass-through of the costs to the commercial operator as well as on the special conditions that should apply to ice-classed vessels.

This policy paper ascertains the introduction of certain elements of the ECSA position into the text of the EU ETS proposal. In particular, the concept paper examines (a) the reasons why a **sector-specific fund** should be set up under the EU ETS and (b) **two policy alternatives for passing through the EU ETS costs to the commercial operator**. Recommendations for the integration of a sector-specific fund into the text of the proposal are presented in the Annex.

ECSA advocates for a dedicated fund to be set up under the EU ETS to stabilise the carbon price. Importantly, generated revenues should support the sector's energy transition. Aiming to properly implement the 'polluter pays' principle in the new EU ETS provisions on shipping, ECSA has identified two policy alternatives. The first policy alternative implies the change of the entity responsible for compliance (company definition) in conjunction with the introduction of a compliance guarantee. The second policy alternative implies the introduction of a binding/public law requirement for passing through the costs to


the commercial operator in the context of a contractual agreement. The advantages and disadvantages of the two policy alternatives are presented in this paper in a transparent way. Considering all pros and cons, **ECSA expresses a preference for the second policy alternative**, i.e. the introduction of a binding requirement to pass through the costs of the EU ETS from the shipping companies to the commercial operators in the context of a contractual agreement.

2. Technical implementation of ECSA position on EU ETS

(a) Introduction of a fund under the EU ETS

The introduction of a fund under the EU ETS has been an essential element of the position of ECSA. ECSA firmly supports a dedicated fund to be set up under the EU ETS to stabilise the carbon price, which is especially important for the many shipping SMEs. In addition, any revenues generated under the EU ETS should be used to financially support the energy transition of the sector and should contribute to lowering the price differential between cleaner and conventional fuels. The EU ETS proposal makes a reference in Recitals 33 and 35 to the financing of the decarbonisation of the sector under the innovation fund, including through the carbon contracts for difference. However, there is no legally binding requirement in the articles of the proposal.

The concept of a fund is strongly supported by the European Parliament in its [position on the revision](#) of the EU MRV Regulation. It was also addressed by the Impact Assessment of



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the Commission on the EU ETS¹. **The recommendations for a concrete legal text are included in the Annex of this paper.**

(b) Pass-through of the costs to the commercial operator

The legal basis of the EU ETS proposal are articles 192(1) and 191 of the TFEU where the 'polluter pays' principle is enshrined as one of the overarching principles of the EU law. Applying the 'polluter pays' principle to shipping is critical for taking further efficiency measures and for the uptake of cleaner fuels in the sector. ECSA has supported that the commercial operator should bear the costs of the EU ETS. This position is consistent with the implementation of the 'polluter pays' principle in the EU ETS for aviation. The Impact Assessment of the Commission already recognises the role of the commercial operator in implementing the 'polluter pays' principle². Recital 20 of the EU ETS proposal makes a reference to the party responsible for bearing the costs of the EU ETS. The Recital reads as following:

"[...] In line with the polluter pays principle, the shipping company could, by means of a contractual arrangement, hold the entity that is directly responsible for the decisions affecting the CO2 emissions of the ship accountable for the compliance costs under this Directive. This entity would normally be the entity that is responsible for the choice of fuel, route and speed of the ship".

Notwithstanding this clear political message, no binding requirements are introduced and the pass-through of the costs is instead left to the devices of the market. The EU ETS proposal currently addresses only the shipping company but not the commercial operator. Thus, the 'polluter pays' principle

has not been fully applied to EU ETS for shipping yet.


Two main policy alternatives are presented below with regard to ECSA's position and the way it could be translated into a legally binding text: **Policy alternative A** - change of the entity responsible for compliance (company definition) in conjunction with the introduction of a compliance guarantee and **Policy alternative B** - introduction of a binding/public law requirement for passing through the costs of the EU ETS from the shipping companies to the commercial operators in the context of a contractual agreement. Each option comes with certain legal and political advantages and disadvantages.

Policy alternative A – change of the entity responsible for compliance & compliance guarantee

Although the default option of the EU ETS Directive for land-based installations and for aviation is to make the operator responsible for compliance, it could be argued that such an option in shipping would create enforcement uncertainty. It could be challenging for the competent authorities to trace down a commercial operator, especially for such companies based outside the EU. Contrary to the aviation sector, there is no international registry of commercial operators in shipping. On the other hand, a change of the company definition does not require further amendments to the EU MRV Regulation as the EU ETS changes the architecture of the system by shifting verification of the emissions from a ship level to a company level. Making the commercial operator responsible for compliance would also provide more certainty to shipping companies and would not entail any litigation for passing through the costs.

¹ See page 152 of the Impact Assessment of the Commission, point 18.5 a. *Pooling mechanism*: <https://ec.europa.eu/info/sites/default/files/revision-eu-ets-with-annex-en-0.pdf>

² See page 142 and 143 of the Impact Assessment of the Commission on the EU ETS: <https://ec.europa.eu/info/sites/default/files/revision-eu-ets-with-annex-en-0.pdf>



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Aiming to address the enforcement concerns, a compliance guarantee deposited either to a sector-specific fund proposed above or the existing innovation fund could be introduced. Under this option, the commercial operator would deposit a guarantee corresponding to the emissions covered by the EU ETS at each port call. The guarantee would be deposited into the sector-specific fund or the innovation fund until the commercial operator surrenders the allowances required by the Directive. The EU ETS price would be taken as a reference price for the guarantee and would be determined at such a level to discourage the operator from failing to surrender the allowances (for instance the highest EU ETS price of the previous year plus premium).

Policy alternative B – introduction of a public law requirement in the contractual agreements

The introduction of a binding/public law requirement building upon the text of Recital 20 for the pass-through of the costs from the shipping companies to the commercial operators comes with certain advantages. It would on one hand ensure a transparent and consistent implementation of the ‘polluter pays’ principle and would avoid enforcement uncertainty. On the other hand, even a public law requirement would possibly entail litigation and filing for damages in case the clauses of the contract implementing this requirement are not met by the commercial operator.

Under this policy alternative, an article should be added requiring that in line with the ‘polluter pays’ principle, by means of a binding clause under a contractual agreement, the entity that is responsible for the decisions affecting the CO2 emissions of a ship shall bear the costs arising from the implementation of this Directive. This entity would be the entity that is ultimately responsible for the purchase of fuel and the choice of route and speed of the ship.

Considering the above mentioned pros and cons of each option, ECSA prefers Policy

alternative B, i.e. the introduction of a binding/public law requirement for passing through the costs of the EU ETS from the shipping companies to the commercial operators in the context of a contractual agreement.

The recommendations for a concrete legal text on the pass-through of the costs to the commercial operator is currently under development and will be provided by ECSA at a later stage.

Annex – Recommendations for the integration of a sector-specific fund into the EU ETS proposal

1) Recommendation for Recital

A Maritime Climate Fund should be established from the revenues generated from the auctioning of maritime allowances under the EU ETS. The Fund should aim to provide carbon price certainty over the period of a year and to support the energy transition of the maritime sector through financing innovation projects. In particular, it should aim to bridge the price differential between low- and zero-carbon fuels and conventional fuels through the carbon contracts for difference among other tools.

2) Recommendation for Article

Maritime Climate Fund

1. A Maritime Climate Fund (‘the Fund’) shall be established to financially support the energy transition of the maritime transport sector. The revenues under the Fund shall be used to finance energy related projects including carbon contracts for difference and bridging the differential in costs between conventional and low carbon alternative technologies. All investments supported by

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the Fund shall be made public and shall be consistent with the aims of this Directive.

2. By way of derogation from Article 12 of this Directive, shipping companies may opt out and pay an annual membership contribution to the Fund corresponding to their total emissions under the scope of this Directive as reported under Regulation (EU) 2015/757.

3. The Fund shall surrender allowances collectively on behalf of shipping companies that are members of the Fund. The membership contribution per tonne of emissions during the following year shall be set by the Fund in advance, and shall be at least equal to the average price for allowances in the preceding year.

4. The Fund shall acquire allowances equal to the collective total quantity of contributions referred to in paragraph 2 of this Article during the preceding calendar year and shall surrender them to the registry established under Article 19 of this Directive by 30 April each year for subsequent cancellation. All information on the contributions shall be made available to the public.

5. The revenues generated from the auctioning of allowances surrendered by shipping companies and by the Fund shall be used through the Fund and finance its objectives.

6. The Fund shall be managed centrally through a Union body whose governance structure shall be similar to the governance of the innovation fund of this Directive. Relevant stakeholders shall have an appropriate consultative role. All information on the investments and all other relevant information on the functioning of the Fund shall be made available to the public.


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