



Support study to the Evaluation of Regulation (EC) 392/2009

Final Report

Ecorys
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Support study to the Evaluation of Regulation (EC) 392/2009

Final Report

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LIST OF ABBREVIATIONS

- Bln. Billion
- CLIA Cruise Lines International Association
- COM Commission
- DSC Dynamically Supported Craft
- EC European Commission
- ECJ European Court of Justice
- EEC European Economic Community
- EMCIP European Marine Casualty Information Platform
- EMSA European Maritime Safety Agency
- EU European Union
- FGTI Fonds de garantie des actes de terrorisme et d'autres infractions
- FTE Full-time equivalent unit
- GBP British's Pound
- GT Gross Ton
- HSC High Speed Craft
- ICS International Chamber of Shipping
- IG International Group (referring to the international group of P&I clubs)
- IMO International Maritime Organisation
- LLMC Convention on Limitation of Liability for Maritime Claims
- MCA Maritime Coast Agency (UK)
- MC99 Montreal Convention 1999
- Mln. Million
- MS Member State
- NEB National Enforcement Body
- PAL Athens Protocol 2002
- PRM Person/passenger with reduced mobility
- P&I Protection and Indemnity
- Ro-pax Roll-on/roll-off passenger
- SCM Standard Cost Model
- SDG Steer Davis Gleave
- SDR Special Drawing Right
- SEK Swedish Kronor
- TEU Treaty of the European Union

- UK United Kingdom
- US United States
- USD United States' Dollar
- VDR Voyage Data Recorder

1 EXECUTIVE SUMMARY

Background

The European Commission has mandated a study supporting the *Ex-Post Evaluation of Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents* (hereafter referred to as the Liability Regulation). The objective of this report is to provide conclusions and recommendations, based on the analysis of the results of the desk and field research.

Evaluation criteria and questions

The evaluation concentrates on the following six evaluation criteria:

The *relevance* of the Liability Regulation, i.e. the extent to which intervention's objectives are pertinent to the needs, problems and issues to be addressed;

The *effectiveness* of the Liability Regulation, i.e. the extent to which set objectives are achieved;

The *efficiency* of the Liability Regulation, i.e. the extent to which desired effects are achieved at a reasonable cost;

The *coherence* of the Liability Regulation, i.e. the extent to which the intervention logic is non-contradictory and/or the Liability Regulation does not contradict other interventions with similar objectives;

The *European Added Value* of the Liability Regulation, i.e. the value resulting from the Liability Regulation which is additional to the value that would have been otherwise created by Member State action alone;

The *complementarity* of the Liability Regulation, i.e. the extent to which the Regulation has been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States.

Based on these evaluation criteria, ten evaluation questions are defined, as presented below in the conclusions. An evaluation framework has been created to provide well-founded, evidence-based answers for each of the evaluation questions. The evaluation framework defines indicators for the evaluation questions and pinpoints the information, forming the basis for data collection and analysis.

Conclusions

The conclusions are linked to the ten defined evaluation questions, which are elaborated below, grouped per evaluation criterion.

Relevance: Evaluation Question 1: To what extent are objectives of this initiative still relevant today?

No major developments at a political, legal or technical level affecting the implementation of the Regulation have taken place since the introduction of the Liability Regulation. The entry into force of the Athens Protocol has been an important event, however, stakeholders do not see this as a reason for adapting the Liability Regulation. The fact that the Liability Regulation is

relatively “young”, with an implementation timespan of less than four years¹ is obviously a strong contributing factor in this regard. The short timespan since implementation may also explain the fact that the needs on which the Liability Regulation is based correspond to the needs of today’s society. The latter applies especially to the problems of “rights of passengers”; and “no level playing field”; and, to a lesser extent, the “safety level of passengers”.

Relevance: Evaluation Question 2: To what extent is the current scope of application of the Regulation adequate for the attainment of the objectives?

There is broad consensus on the application of the Liability Regulation on international and domestic Class A and B ships. The inclusion of these ships contributes to attaining the Regulation’s objectives, as supported by the stakeholder survey. Extending the scope of the Regulation to domestic Class C and D ships is perceived differently per Member State, resulting in the majority of the Member States not having opted for extension to Class C and D ships so far. Stakeholder views, as presented in the stakeholder survey, are split regarding the importance of the stated problems in relation to Class C and D ships. While the majority of stakeholders have no strong opinion, passenger rights are considered a relatively unimportant problem for Class C and D vessels, whereas safety of passengers and level playing field are considered relatively important problems for Class C and D ships.

In the decision to extend the scope of the Regulation to Class C and D ships, different and sometimes opposing aspects are taken into consideration by Member States. One aspect is the rights of passengers, which need to be protected, irrespective of the size or material of the vessel or the area of operations. An additional aspect is that having two systems for passenger ships can result in complexity, unfair competition and market distortion. At the same time, an important factor is the ability of the sector, notably the smaller operators, to comply with the provisions of the Liability Regulation, specifically related to the insurability of Class C and D ships.

Member States have developed their own systems at national level in which the above-mentioned aspects are balanced. Member States that have made the Regulation applicable to Class C and D ships have often created measures to reduce the burden on the sector, notably by creating exemptions to adopt certain provisions of the Regulation, as in the case of Denmark. This approach works well in these Member States. Member States that have not extended the scope to Class C and D ships have often included means of protecting passengers’ rights for Class C and D ships in their national legislation. For example, in Germany, the German Commercial Code applies to Class C and D ships, which is based on the Athens Convention. Although the passenger may not be protected at the level of the Regulation, the practical situation may be quite similar to the situation in Denmark. For Member States that have not extended the application of the Regulation to Class C and D ships, local solutions are created on a country by country basis, which are reflected in national legislation.

¹ Entry into force of the Regulation is 31 December 2012.

In conclusion, extending the scope to Class C and D ships is a trade-off between sometimes opposing aspects and thus a political decision. The evaluation, including through its stakeholder consultation, does not provide the results to take this political decision. Mitigating measures can be defined to compensate for risks related to the choice for a system. In case of extension, some provisions from the Liability Regulation may be softened, reducing the burden on the sector. In case of non-extension, provisions may be created in national law, contributing to passenger protection. From a passengers' rights perspective, expanding the scope to Class C and D ships provides more safeguards.

Effectiveness: Evaluation Question 3: To what extent have the objectives of the Regulation been achieved?

The extent to which the objectives have been met is presented for the four defined objectives:

Objective of protecting passenger rights: The facts collected present a broad picture of the adequacy of the Regulation to achieve this first objective. Stakeholders tend to agree that the Regulation strengthens the passenger's position. Inputs collected from a number of sources address the specific impact of the Regulation improving the level of the advance payment and reducing the time required to receive it. Evidence on the Regulation's impact on the final compensation suggests that despite difficulties still encountered in grasping the full intended benefits of the Regulation, passengers are better off than before. Additionally, the Regulation can be considered to have had a positive impact on the number of cases reaching settlements, as the clarification provided on the compensation level that can be expected and the strict liability provision strengthen the victim's negotiation power increasing the chances of a settlement.

Objective of creating a level playing field: The facts and opinions collected present different angles on this issue. However, the collected input is sufficient to suggest that the playing field is levelled to a large extent for international carriage and especially for the cruise sector. The same is not exactly the case for domestic carriage where the differences of the national legal frameworks and Regulation application process cause Member States to deviate from a harmonised application. It should be here noted that during this evaluation period, only a fraction of the EU domestic fleet came under the provisions of the Regulation. Thus, the impact of the Regulation on creating a level playing field, in domestic transport will be possible to assess more coherently after the Regulation comes into full effect in 2019.

Objective of incentivising increased safety and security performance of passenger transport operators: Academic literature and stakeholder views collected provide different angles to answering this question. The theoretical mechanism that was expected to increased pressure for vessel safety, as a result of the mandatory insurance requirement, seems not to materialise as stakeholders think that safety standards have improved due to the entry into force of dedicated maritime safety rules for ship construction and design, and ship operation. Insurance premiums do not seem to play a role in that regard.

Objective of setting up and complementing a balanced framework of passenger rights protection: The Regulation is an improvement in creating a balanced framework of passenger rights. However, looking into specific issues, such as the compensation of vehicle or property damage, the input

basis is less than that used for the other objectives, also due to the marginal importance attributed to the issue by the relevant stakeholders. Data collected from the case studies indicate that compensations might have increased as an impact of the Regulation. Combined with the provisions protecting additional passenger rights (information, luggage, advanced payment etc.), the Regulation results in harmonisation towards other modes.

Effectiveness: Evaluation Question 4: To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?

The Regulation has contributed to a large improvement of the harmonisation of sea passenger rights in Europe. This is initially the case for international voyage where since 2013 a reference framework has been created, providing clarity in the expectations for compensations and dis-incentivising “forum shopping”. However, the limited application of the Regulation on domestic carriage (with the states possessing the larger fleets deferring application for Class A and Class B) and especially the vastly different approaches of Member States in regulating (or not) vessel classes beyond Class A and B ships currently lead to a very diverse framework of application across the EU. This situation is expected to improve after the deferment period is concluded. Nonetheless, a large factor preventing a harmonised approach across Europe is the great variation of national legal frameworks which are applied in addition to the Regulation, and defining a number of critical elements.

Effectiveness: Evaluation Question 5: Has the Regulation led to any positive or negative unexpected effects?

The Regulation has presented no unexpected negative impacts. The findings indicate that the insurability of carriers has not been affected by the Regulation. Authorities have managed to contain fees charged for certificates to a small amount and insurance premiums and passenger fares have been largely unaffected. This should be seen in the context of broad exemptions and deferments of the application of the Regulation and against a soft market condition for the vessel insurance industry that has allowed for retaining insurance premiums to remain unchanged. Moreover, the Regulation has caused unexpected positive effects, such as providing clarity for dealing with (especially international) claims on accidents and incidents and the fact that it may have caused a small number of Member States to go beyond the scope of the application and expand the coverage of passenger rights.

Efficiency: Evaluation Question 6: Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

The costs of implementing the Liability Regulation are low. Estimates suggest annual costs to be between zero and approximately € 40 million, which mainly concerns the increase of insurance premiums due to the raised liability ceilings. Other cost elements such as certification costs, administrative burdens and costs of adapting operations are considered to be only a small fraction of this amount. Additionally, costs for MS authorities to issue the relevant certificates are considered to be on average approximately between € 35,000 and € 70,000 per Member State per year. Additionally, no impact on passenger fares has been identified. This amount represents only a marginal

share of the industry's size (in the order of 0.05%). Stakeholders consulted confirm the costs to be minimal.

The benefits are diverse. Besides the achievement of objectives (in particular, improved passenger rights and an improved level playing field, as noted above), also savings in claims handling as a result of the Regulation are reported. However, these benefits could not be quantified due to lack of data on the levels of compensations provided and the duration of legal proceedings. Overall, the Regulation is considered to be efficient, as it is largely achieving its objectives, thereby creating benefits (which could, however, not be quantified), against relatively low costs.

Coherence: Evaluation Question 7: To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability?

The Liability Regulation is coherent in different degrees with the three identified EU policies, as illustrated below. With regard to the *maritime safety policy* it can be said the Regulation is coherent and contributes to reach the overall goals of the Third Maritime Safety Package. With regard to both the *EU policy on passenger rights* and the *EU's approach to transport operator liability*, the coherence is more disputable. Although the maritime regime is becoming increasingly more in line with the regimes in other modes, some differences still exist. However, the differences identified are justified as they are the result of the specific transport mode characteristics, which require their own regime (e.g. lower compensation to maritime passenger as a result of the hotel-like environment² they enjoy on-board the ship, etc.). Stakeholders do not agree whether or not further alignment is needed and desirable. One point of potential concern is the coherence between the Liability Regulation and the Travel Package Directive.

Coherence; Evaluation Question 8: Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014)?

The Liability Regulation is in line with the 2011 White Paper on Transport. Although the Regulation does not always actively contribute in reaching the overall goals laid down in the White Paper, the Regulation does not hamper its realisation. Where possible, the Liability Regulation provides the building blocks to reach one or more of the defined goals. Therefore, it can be concluded that Liability Regulation is coherent. The contribution of the Liability Regulation to achieving the goals laid down in the ten priority policies areas is less apparent. The Liability Regulation mainly contributes to priority number 4 on a deeper and fairer market as the Liability Regulation creates a level

² On-board the ship the passenger enjoys great freedoms. For instance, the passenger can move around freely and even engage in sporting activities. As such there is no great difference between passengers on-board a cruise ship and guests in a land-based hotel. Operators of land based holiday resorts do not face reversed burden of proof in cases where their guests sustain personal injury on their premises. A similar argumentation should apply to cruise operators in case of a non-shipping incident aboard their ships (Soyer2002). It is not fair and appropriate to expose a sea carrier to a similar regime as in air, as the risk on a self-inflicted injury in air is much lower than in sea. By applying the same liability rules, the sea carrier would run a much higher risk to be held liability, although he will not be able to avoid the personal sustained injuries of passengers.

playing field for all ships carrying passengers entering an EU port. The Regulation also indirectly influences priority number 1 on jobs, growth and investments as the Regulation requires investments in on-board safety, additional insurance and more documentation, which could contribute negatively to the goals set in the first priority area. Although the Liability Regulation does not contribute actively to most of the priority areas, the Regulation also does not hamper its full realisation and therefore can be seen as coherent with the overall goals.

EU added value: Evaluation Question 9: What added value has the Regulation brought, compared to the international and national regimes for liability of carriers of passengers at sea?

The Liability Regulation clearly has EU added value. In particular, the fact that the Liability Regulation contributed to the ratification and entry into force of the Athens Protocol 2002 is an important added value. In addition, the obligation for a carrier to provide information to the passenger (before the journey starts) and the obligation to make an advance payment (in case something has happened), is also adding value. It should be noted that although the Liability Regulation has introduced additional passenger rights, the actual implementation of those rights should be further improved to realise its full potential.

Complementarity: Evaluation Question 10: To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

The main value added of Liability Regulation is its contribution to the ratification and entry into force of the Athens Protocol 2002. The Liability Regulation has supplemented a system consisting of the Athens Convention 1974 and individual national regimes, which is seen by stakeholders as an improvement. Mainly academic authors seem to encounter some issues, for example, related to choice of jurisdiction and recognition. An often-mentioned problem in literature is possible concerns with the Brussels I Regulation. The EU wished to continue applying the Brussels Regulation, instead of using the rules on recognition and enforcement in civil and commercial matters as created under the PAL2002. Academics point out that the Brussels rules have been criticised as not being as generous as the PAL rules. To be more precise, under the Brussels Regulation, enforcement may be denied on the grounds of public policy considerations or irreconcilability with an earlier judgment.

Stakeholders, both interviewed and the ones responding to the survey, did not indicate that major problems are encountered. Some issues between domestic laws and the Liability Regulation are reported, however, their number is limited. Such problems could be best addressed on a national level. In principle, the provisions of the Liability Regulation would take precedence over the national laws. All in all, it can be concluded that the complementarity between the Liability Regulation and other international regimes, and the Liability Regulation and national regimes is high.

Recommendations

Based on the ex-post evaluation of the Liability Regulation, a number of recommendations can be made regarding the future implementation of the Regulation and a possible revision thereof.

Extending the scope to Class C and D ships

Member States define their own national systems on liability of Class C and D ships in which they balance passenger rights and (financial) burden to the sector. In a few cases (Denmark, Sweden, The Netherlands), the Regulation is applied to Class C and D ships. Other Member States have opted not to apply the Regulation to these ships and have their national legislation to deal with liability and passenger rights. Although both routings can work in practice, and often result in situations which are rather close in terms of passenger protection and burden on the sector, a possible alignment of national systems may be beneficial. A dialogue on this issue between the Commission and the Member States is recommended, possibly through an expert network, as suggested below.

Clarification: provision of guidelines and definitions

The implementation of the Regulation would benefit from clarification on some of aspects of the Regulation. This can be done in case the Liability Regulation would be revised. Alternatively, this can be done through soft law by preparing guidelines based on best practices. Subjects to consider include:

Uniform rules on calculation of damages;

Clearer distinction between shipping incident and non-shipping incident;

Clearer rules on what constitutes personal injury;

Integration of the consequences of the EU accession to PAL 2002 in the Regulation, i.e. integration of jurisdiction rules in the Regulation insofar as this concerns international jurisdiction of the courts and not internal jurisdiction within a single Member State³;

Clear definition of "ship defect".

Monitoring compliance with the Regulation

If Member States do not monitor compliance with the obligations of providing advance payment and providing information to passengers on their rights, the consequence is that the requirements, as included in the Regulation, are regarded as recommendations, which may not be followed up. Thus, strict monitoring of the implementation of the Regulation is recommended.

Develop an expert network at Member States level

As it is rather complex to have a full overview of the implementation of the Liability Regulation, it could be considered to set up an expert network at Member States level. National contact points could be established that can collaborate as a working group towards effective implementation of the Regulation. This expert network can be used to contribute to the implementation of some of the above-mentioned recommendations, notably on the provision of guidelines and definitions, for example on defining uniform rules on calculation of damages; making clear distinction between shipping incident and non-shipping incident; setting clear rules on what constitutes

³ This recommendation does not concern purely domestic cases.

personal injury; integrating the consequences of the EU accession to PAL 2002 in the Regulation; and clearly defining “ship defect”. The expert network can exchange good practices in the implementation of the Regulation, for example related to expanding the scope of the Regulation to Class C and D ships. As a result, the Regulation may be applied in a more harmonised way. Such an expert network could also be beneficial in the process of a revision of the Regulation, if that would be considered, by providing input in the process and creating support.

EXECUTIVE SUMMARY

Rappel

La Commission européenne a mandaté une étude étayant l'évaluation *ex post* du règlement no 392/2009 relatif à la responsabilité des entreprises de transport maritime de passagers en cas d'accident (dénommé ci-après règlement en responsabilité). L'objectif de ce rapport est de fournir des conclusions et des recommandations, sur la base de l'analyse des résultats obtenus à partir d'une recherche documentaire et d'une prospection sur le terrain.

Critères d'évaluation et questions

L'évaluation se concentre sur les six critères d'évaluation suivants :

1. La *pertinence* du règlement en responsabilité, c'est-à-dire dans quelle mesure les objectifs d'intervention sont pertinents relativement aux besoins, problèmes et questions à considérer ;
2. L'*efficacité* du règlement en responsabilité, c'est-à-dire dans quelle mesure les objectifs fixés sont atteints ;
3. L'*efficacité* du règlement en responsabilité, c'est-à-dire dans quelle mesure les effets attendus sont atteints à un coût raisonnable ;
4. La *cohérence* du règlement en responsabilité, c'est-à-dire dans quelle mesure l'intervention logique, de même que le règlement en responsabilité, ne sont pas contradictoires au regard d'autres interventions ayant des objectifs similaires ;
5. La *valeur ajoutée européenne* du règlement en responsabilité, c'est-à-dire la valeur résultant du règlement en responsabilité qui vient en sus de la valeur qui aurait été autrement produite par l'action de l'État membre lui-même ;
6. La *complémentarité* du règlement en responsabilité, c'est-à-dire jusqu'à quel point le règlement a réussi à compléter la convention d'Athènes et les mesures nationales en responsabilité civile pour les passagers en cas d'accidents maritimes applicables aux États membres.

Sur la base de ces critères d'évaluation, dix questions d'évaluation ont été arrêtées, ainsi que présentées ci-dessous dans les conclusions. Un cadre d'évaluation a été défini afin de procurer des réponses motivées, s'appuyant sur des éléments concrets pour toutes les questions d'évaluation. La stratégie d'évaluation définit des indicateurs concernant les questions d'évaluation et identifie les informations, qui constituent la base aux fins de collecte des données et d'analyse.

Conclusions

Les conclusions sont liées aux dix questions d'évaluation définies, ainsi que développées ci-dessous, groupées par critère d'évaluation.

Pertinence : Question d'évaluation 1 : Dans quelle mesure les objectifs de cette initiative sont-ils encore pertinents aujourd'hui ?

Aucune démarche d'envergure, que ce soit à un niveau politique, juridique ou technique, jouant un rôle dans la mise en œuvre du règlement n'a eu lieu

depuis l'introduction du règlement en responsabilité. L'entrée en vigueur du protocole d'Athènes a été un événement important, néanmoins, les parties intéressées ne considèrent pas cela comme une raison suffisante pour adapter le règlement en responsabilité. Le fait que règlement en responsabilité soit relativement « jeune », considérant un délai de mise en œuvre inférieur à quatre ans⁴, constitue évidemment un facteur déterminant à cet égard. Il est possible que le court délai depuis la mise en œuvre explique également le fait que les besoins, sur la base desquels est fondé le règlement en responsabilité, corresponde aux besoins de la société d'aujourd'hui. Cette dernière remarque s'applique en particulier aux problèmes des « *droits des passagers* » et « *aux règles du jeu qui ne sont pas équitables* », de même, dans une moindre mesure, au « *niveau de sécurité des passagers* ».

Pertinence : Question d'évaluation 2 : Dans quelle mesure le champ d'application actuel du règlement convient pour atteindre les objectifs ?

Il existe un large consensus sur l'application du règlement en responsabilité pour les navires des classes A et B. L'intégration de ces navires contribue à atteindre les objectifs du règlement, comme cela est étayé par l'étude des intervenants. L'élargissement du champ d'application du règlement aux navires en trafic intérieur des classes C et D est perçu différemment par les États membres, ce qui entraîne qu'une majorité d'entre eux n'ont pas opté pour une extension aux navires des classes C et D jusqu'à présent. Les points de vue des intervenants, tels que présentés dans l'enquête auprès de ceux-ci, sont répartis au regard de l'importance des problèmes mentionnés en relation aux navires des classes C et D. Bien que la majorité des intervenants n'aient pas une opinion très arrêtée, les droits des passagers sont considérés comme un problème relativement peu important pour les navires des classes C et D, alors que la sécurité des passagers et que des règles du jeu équitables sont perçues comme des problèmes assez importants pour les navires des classes C et D.

Concernant la décision de l'élargissement du règlement aux navires des classes C et D, des considérations différentes et parfois contradictoires sont prises par les États membres. Un aspect, celui des droits des passagers, nécessite d'être protégé, indépendamment de la taille ou du matériau du navire ou des lieux d'exploitation. Un aspect supplémentaire est que le fait d'avoir deux systèmes pour des navires de passagers peut devenir complexe, entraîner de la concurrence déloyale et de la distorsion de marché. Simultanément, un facteur important relève de la capacité du secteur, en particulier des petits exploitants, à se conformer aux dispositions du règlement en responsabilité, notamment la possibilité d'assurer des navires des classes C et D.

Les États membres ont élaboré leurs propres dispositifs au niveau national, au sein desquels, les aspects évoqués ci-dessus sont compensés. Les États membres qui ont rendu la réglementation applicable aux navires des classes C et D ont souvent créé des mesures en vue de réduire la pression sur le secteur, notamment par l'introduction de dérogations concernant l'adoption de certaines dispositions du règlement, comme c'est le cas au Danemark.

⁴ Le règlement est entré en vigueur le 31 décembre 2012.

Cette approche fonctionne bien dans ces États membres. Des états membres n'ayant pas élargi le champ d'application aux navires des classes C et D, ont fréquemment intégré des dispositifs de protection des droits des passagers pour les navires des classes C et D dans leur droit national. Par exemple, en Allemagne, le Code du commerce allemand est applicable aux navires des classes C et D, lequel est élaboré sur la base de la convention d'Athènes. Bien que les passagers puissent ne pas être protégés au niveau du règlement, dans la pratique la situation est quasi similaire à celle du Danemark. Pour ce qui concerne les États membres n'ayant pas élargi l'application du règlement aux navires des classes C et D, des solutions ont été prises à l'échelon local, pays par pays, et celles-ci transparaissent dans les législations nationales.

En conclusion, l'élargissement de l'application aux navires des classes C et D est un compromis entre des aspects parfois antagonistes et en conséquence une décision politique. L'évaluation, prenant en compte la consultation des intervenants, ne fournit pas de résultats permettant de prendre cette décision politique. Des mesures d'atténuation peuvent être définies afin de compenser les risques liés au choix d'un système. En cas d'élargissement, des dispositions du règlement en responsabilité peuvent être modérées, réduisant d'autant la pression sur le secteur. Dans le cas de non-élargissement, il est possible de prendre des dispositions dans le droit national qui contribuent à la protection des passagers. D'une perspective des droits des passagers, l'élargissement du champ d'application aux navires des classes C et D procure davantage de protections.

Efficacité : Question d'évaluation 3 : Dans quelle mesure les objectifs du règlement ont-ils été atteints ?

Le niveau de réalisation atteint des objectifs est présenté pour les quatre objectifs définis :

1. *Objectif de protection des droits des passagers* : Les faits recueillis présentent une image générale de l'adéquation du règlement pour atteindre ce premier objectif. Les intervenants ont tendance à convenir que le règlement renforce la position des passagers. Les données recueillies auprès d'origines diverses abordent l'impact spécifique du règlement dans l'amélioration du niveau du paiement anticipé et de la réduction du délai pour le percevoir. Le rôle du règlement sur la compensation finale suggère, qu'en dépit des difficultés toujours rencontrées dans l'obtention complète des dédommagements attendus du règlement, les passagers sont mieux lotis qu'auparavant. En outre, il est possible de penser que le règlement a eu un effet positif sur le nombre de cas ayant fait l'objet d'un accord, dans la mesure où les éclaircissements fournis quant au niveau de l'indemnisation pouvant être attendue et des dispositions strictes en matière de responsabilité renforcent le pouvoir de négociation de la victime, augmentant ainsi les chances de règlement.
2. *Objectif de création de règles du jeu équitables* : Les faits et les opinions recueillis présentent des angles de perception différents. Néanmoins, les données recueillies sont suffisantes pour penser que les règles du jeu sont dans une large mesure équitables dans le transport international, en particulier dans le secteur des croisières. Ce qui n'est pas exactement le cas pour le transport intérieur où les différences entre les stratégies juridiques nationales et la procédure d'application du règlement entraînent

les États membres à dévier au détriment d'une application harmonisée. Il convient de noter ici, qu'au cours de cette période d'évaluation, seule une fraction de la flotte intérieure de l'Union européenne s'est conformée aux dispositions du règlement. En conséquence, le rôle joué par le règlement dans la création de règles de jeu équitables pour le transport national, sera plus aisé à évaluer de façon cohérente, une fois le règlement pleinement en vigueur en 2019.

3. *Objectif d'encouragement des exploitants en transport de passagers en faveur de résultats accrus en termes de sûreté et de sécurité* : La documentation universitaire et les points de vue des intervenants qui ont été collectés fournissent des angles de réponse différents à cette question. Le mécanisme théorique dont on attendait qu'il augmentât la pression au profit de la sûreté des navires en tant que conséquence de l'exigence faite d'une assurance obligatoire, ne semble pas produire ses effets dans la mesure où les intervenants estiment que les normes de sûreté ont été améliorées en raison de l'entrée en vigueur des règles de sûreté spécifiques dans la construction et l'architecture navales, de même que dans l'exploitation maritime. Les primes d'assurance ne semblent jouer aucun rôle à cet égard.
4. *Objectif de mise en place et de réalisation d'une stratégie équilibrée de protection des droits des passagers* : Le règlement constitue une amélioration dans la création d'une stratégie équilibrée des droits des passagers. Néanmoins, en observant des problèmes particuliers, tels que l'indemnisation des dommages aux véhicules ou aux biens, l'engagement est moindre comparativement à celui envers d'autres objectifs, ce qui est également dû à l'importance marginale accordée aux problèmes par les intervenants. Les données recueillies à partir d'études de cas, indiquent que les indemnisations auraient augmenté sous l'influence du règlement. Combiné avec les dispositions de protection supplémentaire des droits des passagers (information, bagages, paiement anticipé, etc.), le règlement résulte en une harmonisation envers d'autres modes.

Efficacité : Question d'évaluation 4 : Dans quelle mesure, les dispositions adoptées par le règlement garantissent-elles le même niveau de protection des droits des passagers, indépendamment de la zone d'exploitation du navire ?

Le règlement a contribué à une grande amélioration de l'harmonisation des droits des passagers maritimes en Europe. C'est d'abord le cas pour les voyages internationaux où, depuis 2013, une stratégie de référence a vu le jour, fournissant plus de clarté dans les attentes en matière de compensations et de découragement de la chalandise aux meilleures solutions. Néanmoins, l'application limitée du règlement dans le transport intérieur (les États possédant les flottes les plus importantes reportant l'application pour les classes A et B) et en particulier les approches très différentes des États membres dans la régulation (ou non) des classes de navire au-delà des classes de navire A et B, conduit aujourd'hui à une stratégie d'application très diverse à travers l'Union européenne. On s'attend à ce que la situation s'améliore suite à la fin de la période d'ajournement. Cependant, un facteur important empêchant une approche harmonisée à travers l'Europe est la grande variation des cadres juridiques nationaux qui sont appliqués en plus du règlement et qui définissent un certain nombre d'éléments essentiels.

Efficacité : Question d'évaluation 5 : Est-ce que le règlement a abouti à des résultats positifs ou négatifs inattendus ?

Le règlement n'a présenté aucun effet négatif inattendu. Les constatations indiquent que l'assurabilité des transporteurs n'a pas été touchée par le règlement. Les autorités ont réussi à contenir les frais facturés pour les certificats à un montant réduit, tandis que les primes d'assurance et les tarifs des passagers sont demeurés, en grande partie, inchangés. Il faut prendre cela en considération dans le contexte de larges exemptions et des reports d'application du règlement, de même qu'en regard de la faiblesse du marché du secteur de l'assurance maritime qui a permis de maintenir les primes d'assurance inchangées. En outre, le règlement a entraîné des effets positifs inattendus, comme davantage de clarté pour le traitement (en particulier, à l'international) des litiges relevant des accidents et des incidents, de même le fait que celui-ci pourrait avoir entraîné un petit nombre d'États membres à aller au-delà le champ d'application et à élargir la prise en charge des droits des passagers.

Efficacité : Question d'évaluation 6 : Est-ce que les coûts des mesures adoptées par le règlement en vue de réaliser les objectifs susmentionnés demeurent acceptables et proportionnels relativement aux avantages du règlement ?

Les coûts liés à l'introduction du règlement en responsabilité sont faibles. Des estimations donnent une indication des coûts annuels compris entre zéro environ 40 millions €, qui concernent principalement l'augmentation des primes d'assurance due à l'augmentation des plafonds de responsabilité. Les autres charges, comme les frais de certification, les charges administratives et les coûts d'exploitation, ne constituent qu'une faible partie de ce montant. En outre, les coûts des autorités des États membres pour délivrer les certificats utiles sont considérés comme étant en moyenne de l'ordre de 35 000 à 70 000 € par État membre et par an. Par ailleurs, aucune incidence sur les tarifs des passagers n'a été relevée. Ce montant ne représente qu'une part marginale par rapport aux volumes du secteur (de l'ordre de 0,05 %). Les intervenants consultés confirment que les coûts sont minimes.

Les avantages sont divers. Au-delà de la réalisation des objectifs (en particulier, droits des passagers améliorés et règles du jeu équitables, ainsi que cela a été précisé ci-dessus), des économies dans la gestion des sinistres à la suite du règlement ont été rapportées. Cependant, ces avantages n'ont pas pu être quantifiés en raison du manque de données relatives aux niveaux d'indemnisation octroyée et aux délais des procédures judiciaires. D'une manière générale, le règlement est perçu comme efficace, dans la mesure où il atteint pleinement ses objectifs, créant ainsi des avantages (toutefois, impossibles à quantifier) avec des coûts relativement faibles.

Cohérence : Question d'évaluation 7 : Dans quelle mesure le règlement s'intègre-t-il harmonieusement au sein de la stratégie des politiques de l'Union européenne en matière de sûreté maritime et des droits des passagers et plus particulièrement, au sein de l'approche de l'Union européenne en matière de responsabilité des exploitants en transport de passagers ?

Le règlement en responsabilité est cohérent à divers degrés avec les trois politiques de l'Union européenne recensées, ainsi que cela est illustré ci-dessous. Pour ce qui concerne la *politique de sûreté maritime*, on peut affirmer que le règlement est cohérent et contribue à atteindre les objectifs globaux du troisième paquet maritime. Pour ce qui concerne, à la fois la *politique des droits des passagers de l'Union* et *l'approche de l'Union envers la responsabilité des opérateurs de transport de passagers*, la cohérence est plus discutable. Bien que le régime maritime devienne notablement plus en ligne avec les régimes d'autres modes, il subsiste toujours quelques différences. Cependant, les différences recensées sont justifiées du fait qu'elles sont le résultat des caractéristiques particulières du mode de transport, lesquelles nécessitent un régime qui leur soit propre (par exemple, une indemnisation plus faible des passagers à raison de l'environnement de type hôtelier⁵ dont ceux-ci jouissent à bord du navire, etc.). Les intervenants ne sont pas d'accord sur le fait qu'il soit nécessaire ou non de procéder à un alignement supplémentaire. Un point de préoccupation potentielle est la cohérence entre le règlement en responsabilité et la directive relative aux voyages organisés.

Question d'évaluation 8 : Est-ce les objectifs du règlement sont (encore) cohérents avec la politique européenne des transports, notamment le Livre blanc sur les transports (non publié lors de son adoption) et les dix espaces politiques désignés comme prioritaires par la Commission européenne actuelle (ainsi qu'annoncé en juillet 2014) ?

Le règlement en responsabilité est conforme au Livre blanc de 2011 sur les transports. Bien que le règlement ne contribue pas toujours activement à atteindre les objectifs globaux énoncés dans le Livre blanc, celui-ci ne freine pas leur réalisation. Lorsque cela est possible, le règlement en responsabilité fournit les éléments constitutifs pour atteindre un ou plusieurs des objectifs définis. En conséquence, on peut conclure que le règlement en responsabilité est cohérent. La contribution du règlement dans la réalisation des objectifs fixés dans les dix espaces politiques est moins évidente. Le règlement en responsabilité contribue principalement à la priorité numéro 4 relative à un marché qui soit plus juste et durable dans la mesure où le règlement en responsabilité crée des règles du jeu équitables pour tous les navires de transport de passagers qui entrent dans un port de l'Union européenne. Le règlement influence également indirectement la priorité numéro 1 relative aux emplois, la croissance et aux investissements dans la mesure où le règlement exige des investissements dans la sûreté à bord, des assurances

⁵ À bord du navire, le passager jouit de grandes libertés. Par exemple, le passager peut se déplacer librement et même prendre part à des activités sportives. De fait, il n'existe pas de grande différence entre des passagers à bord d'un navire de croisière et les hôtes d'un hôtel basé à terre. Les exploitants de lieux de villégiature basés à terre ne sont pas confrontés à la difficulté de l'inversion de la charge de la preuve lorsque leurs hôtes sont victimes de dommages corporels dans leurs installations. Il est nécessaire qu'une argumentation similaire soit appliquée aux exploitants de croisière en cas d'incident à bord des navires qui ne relèverait pas du domaine maritime (Soyer 2002). Exposer un transporteur maritime à un régime similaire à celui de l'aérien, n'est ni équitable, ni approprié, dans la mesure où le risque d'une blessure auto-infligée en transport aérien est bien moindre qu'en mer. Lors de l'application de règles similaires, le transporteur maritime courrait de bien plus grands risques d'être tenu pour responsable, bien que celui-ci ne soit pas en mesure d'éviter les dommages corporels subis par les passagers.

supplémentaires et davantage de documents, ce qui pourrait contribuer négativement aux objectifs définis dans le premier domaine prioritaire. Bien que le règlement en responsabilité ne participe pas activement à la plupart des domaines prioritaires, celui-ci ne fait pas obstacle à leur pleine réalisation et peut donc être considéré comme cohérent avec les objectifs globaux.

Valeur ajoutée : Question d'évaluation 9 : Quelle est la valeur ajoutée apportée par le règlement, comparativement aux régimes internationaux et nationaux en matière de responsabilité civile des transporteurs de passagers maritimes ?

Le règlement en responsabilité a clairement de la valeur ajoutée européenne. En particulier, le fait que le règlement en responsabilité ait contribué à la ratification et l'entrée en vigueur du protocole d'Athènes de 2002 constitue une valeur ajoutée importante. En outre, l'obligation faite à un transporteur de fournir des informations au passager (avant que le voyage ne débute) et l'obligation d'un paiement anticipé (dans le cas d'un événement) constitue également de la valeur ajoutée. Il est nécessaire de remarquer, bien que le règlement sur la responsabilité eût octroyé des droits supplémentaires aux passagers, que l'octroi effectif de ces droits doit encore être amélioré pour atteindre sa pleine efficacité.

Complémentarité : Question d'évaluation 10 : Dans quelle mesure le règlement est-il parvenu à compléter la convention d'Athènes et les mesures nationales en responsabilité civile pour les passagers en cas d'accidents maritimes applicables aux États membres ?

La principale valeur ajoutée du règlement en responsabilité est sa contribution à la ratification et l'entrée en vigueur du protocole d'Athènes de 2002. Le règlement en responsabilité a complété le dispositif de la convention d'Athènes de 1974 et des régimes nationaux individuels, ce qui a été perçu par les intervenants comme une amélioration. Pour l'essentiel, ce sont des auteurs universitaires qui semblent rencontrer quelques difficultés, par exemple, en relation avec le choix de la compétence et de la reconnaissance. Une question qui revient fréquemment dans la littérature universitaire concerne les possibles interrogations par rapport au Règlement « Bruxelles I ». L'Union européenne souhaitait poursuivre l'application du Règlement « Bruxelles I » au lieu d'utiliser les règles sur la compétence et la reconnaissance dans les affaires civiles et commerciales telles que créées sous le PAL 2002 (Passive Activity Loss Rules). Les universitaires indiquent que les règles de Bruxelles ont été critiquées dans la mesure où elles n'étaient pas aussi généreuses que les règles PAL. Pour être plus exact, dans le cadre du règlement de Bruxelles, il est possible de refuser une entrée en vigueur à raison de considérations de politique d'intérêt général ou parce qu'inconciliable avec un jugement antérieur.

Les intervenants, ceux ayant été interrogés et ceux ayant répondu à l'enquête, n'ont pas indiqué avoir rencontré de difficultés majeures. Quelques problèmes entre les législations nationales et le règlement en responsabilité ont été signalés, leur nombre néanmoins est limité. De telles difficultés pourraient être mieux traitées à un niveau national. Dans le principe, les dispositions du règlement en responsabilité ont préséance sur les lois nationales. Dans l'ensemble, on peut conclure que la complémentarité entre le

règlement en responsabilité et d'autres régimes internationaux ou nationaux est élevée.

Recommandations

Sur la base de l'évaluation ex-post du règlement en responsabilité, il est possible de faire un certain nombre de recommandations concernant la future introduction du règlement et de sa possible révision.

Étendre le champ d'application aux navires des classes C et D

Les États membres définissent leurs propres dispositifs nationaux sur la responsabilité civile des navires des classes C et D au sein desquels ceux-ci équilibrent les droits des passagers et les charges (financières) du secteur. Dans quelques cas (Danemark, Suède, Pays-Bas), le règlement est appliqué aux navires des classes C et D. D'autres États membres ont choisi de ne pas appliquer le règlement à ces navires et leurs législations nationales traitent de la responsabilité civile et des droits des passagers. Quoique les deux approches puissent fonctionner dans la pratique et souvent résulter en des situations relativement proches en termes de protection des passagers et de charge pour le secteur, un alignement possible des dispositifs nationaux pourrait être bénéfique. Des échanges à ce sujet, entre la Commission et les États membres est recommandé, si possible par le truchement d'un réseau de spécialistes ainsi que suggéré ci-dessous.

Éclaircissement : mise à disposition de lignes directrices et de définitions

L'introduction du règlement tirerait profit d'éclaircissements sur certains de ses aspects. Ceci peut se faire en cas de révision du règlement en responsabilité. Sinon, ceci peut se faire par le biais de dispositions non-contraignantes en préparant des lignes directrices fondées sur des pratiques exemplaires. Les points à prendre en compte comprennent :

- Des règles uniformes pour le calcul des dommages ;
- Une distinction claire entre les incidents maritimes et les incidents ne relevant pas du transport maritime ;
- Des règles plus claires sur ce qui constitue des dommages corporels ;
- Intégration des conséquences de l'adhésion de l'Union européenne aux PAL 2002 dans le règlement, c'est-à-dire l'intégration des règles de compétence juridictionnelle au sein du règlement, dans la mesure où cela concerne la compétence internationale des tribunaux et pas la compétence juridictionnelle intérieure d'un seul État membre⁶ ;
- Une définition claire de « défaut du navire ».

Contrôle de conformité avec le règlement

Lorsque des États membres ne contrôlent pas le respect des obligations de paiement par anticipation et la mise à disposition aux passagers d'informations relatives à leurs droits, il s'en suit que les exigences du règlement, telles qu'elles figurent dans le règlement, ne sont considérées que comme des recommandations que l'on est autorisé à ne pas suivre. Par conséquent, un contrôle rigoureux de l'introduction du règlement est suggéré.

⁶ Cette recommandation ne concerne pas strictement des cas nationaux.

Développer un réseau de spécialistes au niveau des États membres

Comme il est assez complexe d'avoir un aperçu complet de l'introduction du règlement en responsabilité, il convient d'envisager de mettre en place un réseau de spécialistes au niveau des États membres. Des points de contact nationaux pourraient être établis pouvant collaborer en tant que groupe de travail pour favoriser l'introduction effective du règlement. Il peut être possible d'utiliser ce réseau de spécialistes afin de contribuer à l'introduction de certaines des recommandations mentionnées ci-dessus, notamment en ce qui concerne la mise à disposition de lignes directrices et de définitions, par exemple la définition de règles uniformes de calcul des dommages ; en établissant une distinction claire entre des incidents maritime et non-maritime ; en définissant des règles claires sur ce qui constitue des dommages corporels ; l'intégration des conséquences de l'adhésion de l'Union européenne aux PAL 2002 dans le règlement ; et une définition claire de « défaut du navire ». Le réseau de spécialistes échange de bonnes pratiques dans l'introduction du règlement, par exemple liées à l'élargissement du champ d'application du règlement aux navires des classes C et D. De cette façon, le règlement serait appliqué de façon plus harmonieuse. Un tel réseau de spécialistes pourrait également être bénéfique dans le processus de révision du règlement, si on l'envisageait sous la forme de contributions et d'un soutien.

2 INTRODUCTION

2.1 Background

The present report forms part of the study mandated by the European Commission supporting the Ex-post Evaluation of Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents⁷ (MOVE/D2/LT D (2015)). The European Commission has granted a contract to carry out the support study to the evaluation of Regulation 392/2009 to the consortium consisting of Ecorys (leading partner), Grimaldi Studio Legale, and Erasmus School of Law (ESL).

2.2 Objective of this report

The objective of the Final Report (FR) is to provide conclusions and recommendations of the evaluation, based on the analysis of the results of the desk and field research.

2.3 Contents of this report

The Final Report consists of the following chapters:

- Chapter 2: methodology, presenting the design of the ex-post evaluation, as well as the key processes, i.e. data collection and analysis;
- Chapter 3: context, with emphasis on the Athens Convention and the Regulation; the state of play and the national application of the Regulation;
- Chapters 4-9: analysis of the facts collected through desk research, survey questionnaire, interviews and case studies, resulting in responding to the evaluation questions;
- Chapter 10: conclusions and recommendations, based on the analysis carried out in the Chapters 4-9.

The evaluation framework is presented in Annex 1. Annex 2 presents the survey questionnaire with results of the survey presented in Annex 3. Annex 4 presents the references and Annex 5 the results of the literature review. Annex 6 presents the draft questionnaire of the case studies. Annex 7 presents the results of the case studies. Annex 8 includes interviews script and Annex 9 the Background Note for Interviewees, while Annex 10 presents the list of interviewed persons and Annex 11 the approved minutes of the interviews. Annex 12 presents the baseline situation (selected country fiches). Annex 13 presents a comparison of passenger rights between modes of transport.

⁷ Hereafter referred to as the Liability Regulation.

3 METHODOLOGY

This chapter presents the methodological aspects of the evaluation of the Liability Regulation. The intervention logic is presented in Section 2.1, highlighting the objectives, needs, activities and outputs, as well as EU policies and external factors. Section 2.2 presents the scope of the evaluation by listing the six evaluation criteria, which can be linked to the intervention logic, and the 10 evaluation questions formulated for these criteria. These criteria and questions form the basis for the evaluation framework, which is outlined in briefly addressed in Section 2.2. Section 2.3 presents the design of the evaluation, including the evaluation's objective and the tasks to be carried out to deliver the project objectives. Section 2.4 presents the process of data collection and analysis, including its bottlenecks and the limitations of the evaluation.

3.1 Evaluation criteria, questions and evaluation framework

Evaluation criteria

The evaluation concentrates on the following six evaluation criteria:

1. The relevance of the Liability Regulation, i.e. the extent to which intervention's objectives are pertinent to the needs, problems and issues to be addressed;
2. The effectiveness of the Liability Regulation, i.e. the extent to which set objectives are achieved;
3. The efficiency of the Liability Regulation, i.e. the extent to which desired effects are achieved at a reasonable cost;
4. The coherence of the Liability Regulation, i.e. the extent to which the intervention logic is non-contradictory and/or the Liability Regulation does not contradict other interventions with similar objectives;
5. The European Added Value of the Liability Regulation, i.e. the value resulting from the Liability Regulation which is additional to the value that would have been otherwise created by Member State action alone;
6. The Complementarity of the Liability Regulation, i.e. the extent to which the Regulation has been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States.

Evaluation questions

Based on these evaluation criteria ten (10) evaluation questions are defined, as presented below (grouped per evaluation criteria): The evaluation questions are addressed in Chapters 4-9, forming the analytical part of this Draft Final Report.

Relevance

1. To what extent are the objectives of this initiative still relevant today?
2. To what extent is the current scope of application of the Regulation (i.e. international and classes A and B of domestic carriage) adequate for the attainment of the objectives?

Effectiveness

3. To what extent have the objectives of the Regulation been achieved?
4. To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?
5. Has the Regulation lead to any positive or negative unexpected effects?

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

Coherence

7. To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability? Are there any overlaps, gaps or inconsistencies?
8. Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport, and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014⁸)?

EU Added Value

9. What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?

Complementarity

10. To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

Evaluation framework

An evaluation framework was developed as an aid for the assessment of the Liability Regulation. It ensures a pragmatic and structured approach for answering each evaluation question, while detailing data needs and data collection tools. The purpose of the evaluation framework is to assist in reaching well founded, evidence-based answers for each of the evaluation questions. In practical terms, the framework assists in linking the questions to indicators, as well as in defining approaches on data collection, sources, and methodology for analysis of the tasks to follow.

Annex 1 includes the evaluation framework. This framework has been fine-tuned on the basis of literature review and exploratory interviews, as well as comments received from the Commission. It has been used in the analytical work and the formulation of responses to the evaluation questions.

⁸ Summary of President Juncker's Political Guidelines (July 2014). Source: http://ec.europa.eu/priorities/docs/political-guidelines-short_en.pdf.

3.2 Design of the evaluation

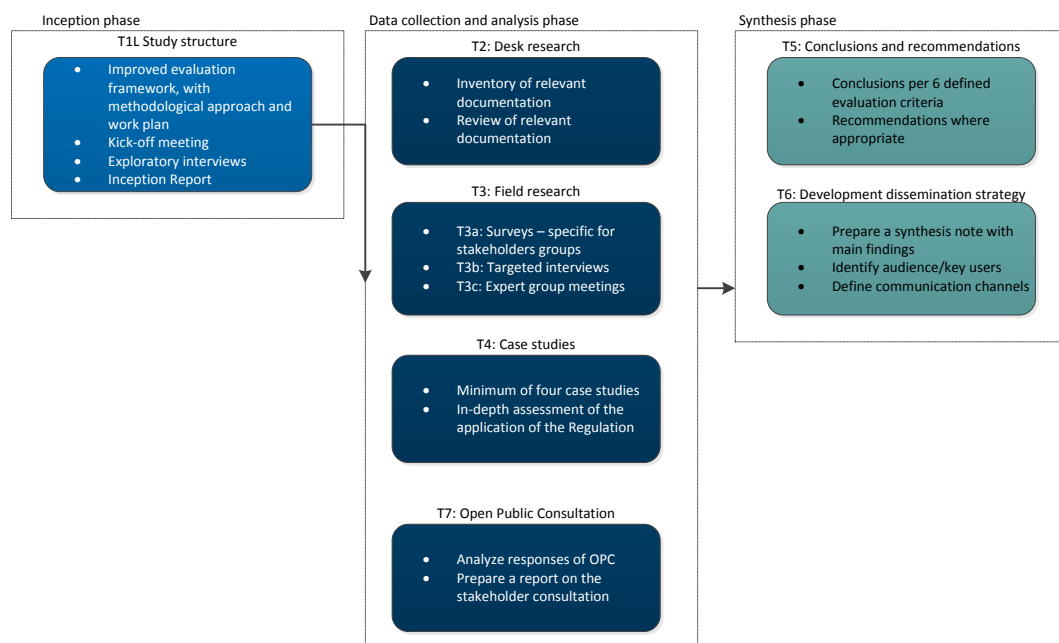
Objective of the evaluation

The general objective is to support the Commission with the evaluation of the Liability Regulation. More specifically, this support study provides the Commission with input for an independent evidence-based assessment of the application of the legislation on liability of carriers of passengers by sea in the event of accidents in the years 2013-2015, according to its effects and the needs it aims to satisfy, examining specific aspects thereof.

Tasks

The project's methodological approach is illustrated in Figure 3.1, presenting the seven tasks that are described in the subsequent section.

Figure 3.1 Methodological approach



Source: Ecorys

Task 1 Study structure

The study structure task, part of the inception phase, was carried out in order to establish the foundation for implementing the project. An evaluation framework was developed at the beginning of the project to facilitate the evaluation (see description above). A total of six exploratory interviews were carried out⁹ and the kick-off meeting with the Commission took place. All activities resulted in the submission and approval of the Inception Report.

Task 2 Desk research

Literature has been reviewed, based on information needs coming from the evaluation framework, mainly concentrating on questions related to effectiveness and coherence. A list of documents reviewed is presented in Annex 4. Results from desk research, as reported in Annex 5, have been linked to the evaluation questions, and as such incorporated in the Sections 4-

⁹ See Annex 10: List of interviews for detailed information on the exploratory interviews (names, organizations, dates). Annex 11 contains the minutes of meetings of these interviews.

9. The use of the initial results of review of academic legal literature was found to be limited. Therefore, we have broadened the scope of the literature review, providing results that could be better used for responding to the evaluation questions.

Task 3a Questionnaires targeted survey

The questionnaire survey was targeted at the main actors concerned with the application of the Liability Regulation, i.e. EU Member States (policy making authorities and inspectorate authorities) ; ship owners; passengers' associations; insurers; academic; law firms and third (non-EU) states. The questionnaire survey was officially opened on 20 May 2016 and, with an initial one-month response period, had a deadline of 20 June 2016. In order to further raise the response rate, the deadline was been extended to 29 July 2016. A total of 72 persons have commenced the survey, with many persons partially completing the survey¹⁰. Some stakeholder groups are relatively well represented, notably the Member States, with a combined 40 responses from policy making authorities and inspectorate authorities. Other stakeholder groups are less well represented, e.g. passenger representatives (five responses) and law firms (three responses). A full overview of respondents is presented in Annex 3. Overall, it is the consultant's opinion that the response rate is satisfactory. Some groups that are less well presented, such as law firms and passenger representatives, were given extra emphasis in interviews. A total of nine law firms and five passenger representatives were interviewed, as presented in Annex 9, adding to the evidence base and robustness of our conclusions.

Task 3b Targeted interviews

In total, 43 interviews have been carried out. An overview of stakeholder groups that have been interviewed is presented in Table 3.1. Annex 9 presents the individual organisations that have been interviewed.

Table 3.1 Overview of interviews conducted per stakeholder group

Stakeholder groups	Implemented
EU Member State	12
Ship owner / operator	5
Passengers / Victims association	5
Insurer	5
Third (non-EU) state	0
Law firm	9
Academic	5
Other	2
Total	43

All interviews have approved minutes of meeting (see Annex 11). An interview script and a background note for the interviewees have been prepared for these interviews, presented in Annex 8 and 9 respectively. The interviews have proven to be a very effective instrument for collecting data. It should be noted that it has not always been possible to cover the full

¹⁰ Out of the 72 respondents that started the survey, 42 respondents completed the survey fully or the majority, allowing for quantitative analysis of the questions of the first and larger part of the survey. Details are presented in Annex 3.

range of evaluation aspects with all stakeholders, as presented in the interview script. Often a stakeholder had a specific field of interest. However, the whole blend of stakeholders provided a comprehensive coverage of the full range of evaluation aspects.

Task 3c Expert group meetings

The conference on Meeting of National Enforcement Bodies for the Rights of passengers when travelling by sea and inland waterway (25 April 2016) has been attended, providing the opportunity to present the evaluation to national enforcement bodies of EU Member States.

Task 4 Case studies

Four case studies are included to understand how the Liability Regulation has impacted the compensation of passengers injured as a result of shipping incidents and other related accidents that have occurred¹¹; and to gather input for replying to evaluation questions¹². Four case studies have been selected that represent the different types of incidents covered under the scope of the Liability Regulation and the Athens Convention, i.e. the cases of the Ogia (2015, a wave crashed into the ship causing passengers to fall from their seats); the Norman Atlantic (2014, fire on-board the ship); the Sorrento (2015, fire on-board the ship); and the City of Poros (1998, terrorist attack). The cases have been selected to reflect accidents of a different nature. Moreover, shipping incidents and non-shipping incidents were included to illustrate whether cases involving a shift in the burden of proof (i.e. passenger to carrier) are being handled in a different matter. Detailed information on the case studies is presented in Annex 7.

Task 5 Conclusions and recommendations

In this task, the data collection has been analysed, resulting in conclusions, mainly in the form of responses to the evaluation questions, and recommendations. The analysis is presented in Sections 4-9 and the conclusions and recommendations are presented in Section 10.

Task 6 Development dissemination strategy

In this task, a dissemination strategy is developed to stimulate the use and uptake of the evaluation results. To this end a synthesis note is made, summarising the conclusions and recommendations of our analysis. This synthesis note is distributed to a large audience, making use of contacts established during the stakeholder consultation process and the wider audience, to be reached in collaboration with the Commission.

Task 7 Open Public Consultation

Input was provided to the questionnaire of the Open Public Consultation (OPC). The OPC was launched at a relatively late point in time in order to provide input for both the ex-post evaluation and possibly also the impact assessment on the points where the Regulation explicitly requires the Commission to examine possible amendments. Results of the OPC have

¹¹ More details on this are presented in the Questionnaire for case studies, as presented in Annex 6.

¹² The case studies have especially provided information for responding the evaluation criteria effectiveness, efficiency, coherence and complementarity.

become available end of October and have been reported in the Stakeholder Consultation Report. It should be noted that the response rate of the OPC was low (16 responses). Where useful, results from the OPC have been integrated in the Final Report.

3.3 Data collection and analysis

The data collection process has been driven to meet the information needs that have been defined in the evaluation framework. This section points out data limitations and draws conclusions on the ability to respond to the evaluation questions.

Limitations

Limitations have been encountered in collecting data. In such cases, mitigating measures have been taken in order to still be able respond to the evaluation questions.

Initially, the short implementation period of the Liability Regulation has resulted in relatively limited experience with the implementation of the Regulation¹³. Many Member States have opted for the transitional provisions, as included in Article 11 (see Table 4.7)¹⁴. As a consequence, the experience with the application of the Regulation to domestic ships is limited to a restricted number of Member States¹⁵.

Table 3.2 presents an overview of difficulties in data collection and mitigating measures, organised per evaluation question.

Table 3.2 Difficulties in data collection and mitigating measures

Evaluation question	Data limitation	Mitigating measure solution
<i>General</i> high representation of Member State authorities in survey	The majority (57%) of the 72 respondents of the survey represent Member State authorities; either policy making or inspectorate bodies. Consequently, the survey results may be biased.	The survey results are reviewed per stakeholder category, where needed. In addition, results are triangulated with other sources, notably interviews.

¹³ The Liability Regulation entered into force on 31 December 2012. According to the ToR our evaluation period considers the period until 31 December 2015, thus the implementation period is restricted to 3 years.

¹⁴ From the total of 28 Member States the transitional provision is relevant for 22 Member States (five member States being landlocked and Malta not having Ships Class A-B). Out of the 22 remaining Member States, 10 have opted to make use of the transitional provision for Class A ships and 12 Member States have opted to make use of the transitional provision for Class B ships.

¹⁵ Experience with Class A ships: 12 Member States; experience with Class B ships: 10 Member States; experience with Class C-D ships: 3 Member States.

Evaluation question	Data limitation	Mitigating measure solution
<i>General</i> some stakeholder groups under-represented in survey (notably law firms and passenger representatives)	Out of the 72 respondents three were law firms and five were passenger representatives.	Specific focus was placed in the interviews in providing coverage of the categories that were under-represented in the survey. A total of nine law firms and five passenger representative organisations were interviewed.
<i>Relevance</i> benchmark analysis of Member States that have already applied the Regulation to domestic ships and Member States that have not done so.	The comparison base of quantified data was small, weak or absent, e.g. on level of compensation paid, level of insurance premiums, passenger complaints, or related to accidents (shipping and non-shipping).	Analysis was more done qualitatively and based on responses from stakeholders, particularly how they perceived relevance issues, e.g. the extent to which needs and objectives are still relevant today.
<i>Effectiveness</i> consulting the EMSA spreadsheet to draw conclusions with respect to the incident analysis section	The mechanism used by the EMCIP database which is also reflected in the EMSA spreadsheet of incidents does not answer the question of whether an incident is considered as a shipping or a non-shipping incident.	No conclusions were drawn with respect to the categorization of the incidents on the basis of the EMSA spreadsheet. Instead, the case studies offered more insight regarding how particular incidents were treated.
<i>Effectiveness</i> Literature review	It was hard to connect the opinions of authors to specific evaluation criteria, provided that in most instances authors offer some general input.	The scope of the literature review was broadened enabling the consultants to distinguish the main points raised by most authors and on that basis determine whether these fall under one of the given evaluation criteria.

Evaluation question	Data limitation	Mitigating measure solution
<p><i>Effectiveness</i> Mapping the scope of application of the Regulation</p>	<p>The information available on the scope of application of the Regulation by individual Member States, in most cases did not clarify how HSC, DSC and non-steel vessels were treated. Further, the list with the information on the scope of application of the Regulation, as held by the EC was not updated with latest policy decisions.</p>	<p>All competent National authorities needed to be approached with a specific inquiry to clarify the exact scope of application and managed to obtain a very high response rate for coastal Member State.</p>
<p><i>Effectiveness</i> Impact on insurance premiums</p>	<p>We faced a lack of disaggregated data on the impact of the Regulation on insurance premiums. Data on the overall (liability) insurance premiums do not reflect in specific the impact on European passenger carriage. Moreover specific P&I clubs¹⁶ and most of the approached ship owners were not willing to take part in the targeted interviews or able to provide specific relevant data, therefore no quantification possible of the exact impact on insurance premiums was possible.</p>	<p>The question was approached qualitatively both in the survey as well as in the interviews to obtain an assessment of the impact of the Regulation. The opinions of different stakeholder groups (national authorities, ship owners and insurers) were triangulated to validate them.</p>

¹⁶ A P&I Club provides protection and indemnity insurance, which is a form of mutual maritime insurance and more commonly known as "P&I" insurance.

Evaluation question	Data limitation	Mitigating measure solution
<i>Effectiveness</i> Impact on level and timing of compensations	The limited amount of important accidents that happened during the application of the Regulation led most stakeholders to be able to only theorize on the impact of the Regulation. Moreover, the many parameters defining the nature of such accidents prevent (in most parts) any direct comparison of cases prior and after the application of the Regulation.	The assessment of such impacts of the Regulation is to a large extent based on the findings of the existing case studies which is supplemented by stakeholder opinions.
<i>Effectiveness</i> Impact on compensations for luggage and mobility equipment	Claims related to loss of luggage or mobility equipment are rare, usually small in size and no monitoring of such claims was identified, while most stakeholders were not able to comment on these impacts due to lack of knowledge.	The assessment of such impacts is based on the limited opinions that were encountered and the overall impact of the Regulation on such cases is presented as a secondary impact of the Regulation taking into account the information limitations.
Effectiveness/coherence	Absence of case law on the interpretation of key provisions of Regulation 392/2009 and PAL 2002.	This lack was addressed by analysing cases on other legal instruments with similar rules.
Effectiveness/coherence	Absence of case law on compensations awarded under Regulation 392/2009 and PAL 2002.	The analysis was performed by looking into the applicable national law rules on these issues.
<i>Effectiveness</i> analysis of how the provisions of the Regulation have affected the handling of passengers' claims and improved their knowledge of their rights.	In the context of the case studies Confidentiality issues and lack of /limited availability of relevant stakeholders. Lack of hard sources.	Various stakeholders have been consulted on the same issues in order to fill information gaps and to assess the accuracy of the gathered information.

Evaluation question	Data limitation	Mitigating measure solution
<i>Efficiency</i> scarce literature sources and information form	Available literature in which elements of costs and efficiency are addressed are dated from times prior to the Regulation entering into force.	The assumptions found in these studies could not be verified with other literature, but have been complemented with interviews.
<i>Added value</i> assessment of how the implementation of the Regulation has impacted passengers' protection.	In the context of the case studies Lack of /limited availability of relevant stakeholders.	The gathered information has been complemented by a legal analysis allowing filling information gaps.

Source: Ecorys, Grimaldi, ESL.

Conclusion on data limitations and robustness of conclusions

The evaluation is confronted with data limitations. An important factor in this is the short implementation period (three years) and the fact that the application of the Liability Regulation to domestic carriage (Class A-D ships) has been postponed in about half the Member States¹⁷. Consequently, the evidence base is restricted. Bearing that in mind, the data collection process, as described in the Tasks 2-4 (see Section 2.2), has delivered a strong base for analysis and responding to the evaluation questions. Where data limitations were faced, sufficient mitigating measures have been taken, as outlined in Table 3.2.

¹⁷ In line with Article 11 of the Regulation.

4 CONTEXT

This section presents information on the context within which the Regulation is applied. Firstly, the evaluation's intervention logic is presented (Section 3.1). Secondly, a comparison is made between the Athens Convention and the Regulation (Section 3.2). Consequently, the Baseline Situation prior to the introduction of the Regulation in a sample of Member States is presented (Section 3.3). This is followed by a presentation of the market developments affecting passenger transport that has taken place since the introduction of the Regulation (Section 3.4), to be followed by an overview of differences in the application of the Regulation by Member States (Section 3.5). Finally, a description of the state of play in terms of data on passenger fleet and their performance and incident analysis is presented in Section 3.6.

4.1 Intervention logic

The intervention logic describes how the intervention is expected to work, i.e. how different inputs/activities/outputs triggered by the EU intervention are expected to interact to deliver the promised changes over time and ultimately achieve the objectives. The intervention logic also considers external factors which may influence both the performance of the EU intervention, or generate the same type of effects. A graphical presentation of the intervention logic, as included in the evaluation roadmap, is presented in Figure 4.1¹⁸. Elements from the intervention logic are addressed below, starting with objectives, based on needs and leading to measures, and then external factors and EU policies are addressed¹⁹.

Objectives

Liability rules for damages caused to passengers are important to safeguard passengers' rights, but also to create a level playing field for carriers across Europe fostering responsible shipping practices and, indirectly, raising safety standards.

Hence, the following general objectives are defined:

1. Ensuring that passenger rights are respected in the event of accidents at sea in the course of carriage, including in particular an adequate level of compensation, irrespective of the area of operation of the vessel;
2. Establishing a level playing field for the operators taking into account insurability of risks and the differences among the different types of carriage;
3. Establishing an additional incentive for better safety performance of operators in EU waters, as carriers will have to demonstrate that their ships are safe in order to obtain the mandatory insurance coverage.

¹⁸ See: http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_move_048_evaluation_liability_of_passenger_carriers_by_sea.pdf.

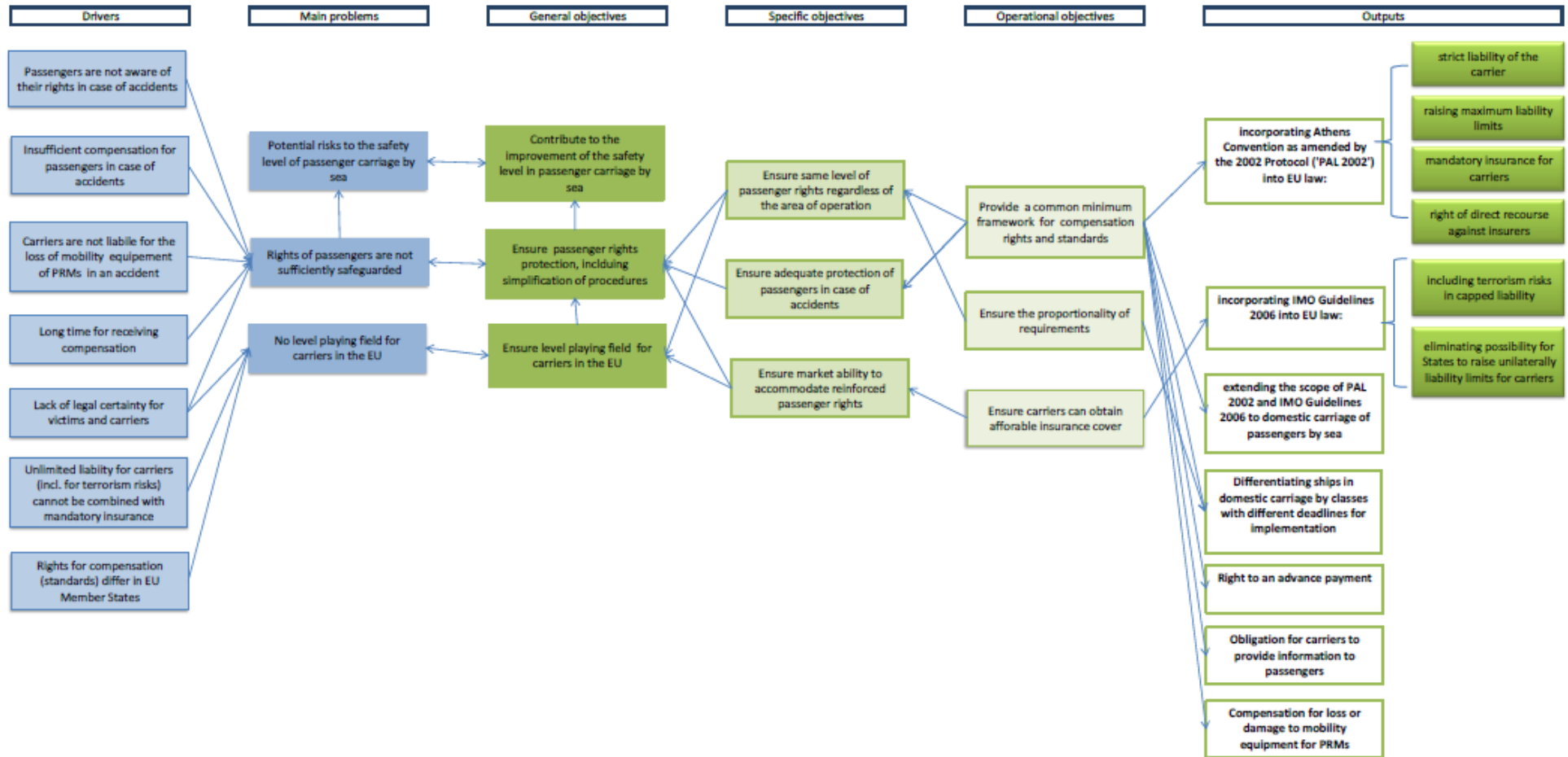
¹⁹ It should be noted that elements have been added in relation to the intervention logic as presented in Figure 4.1, notably on a fourth defined objective.

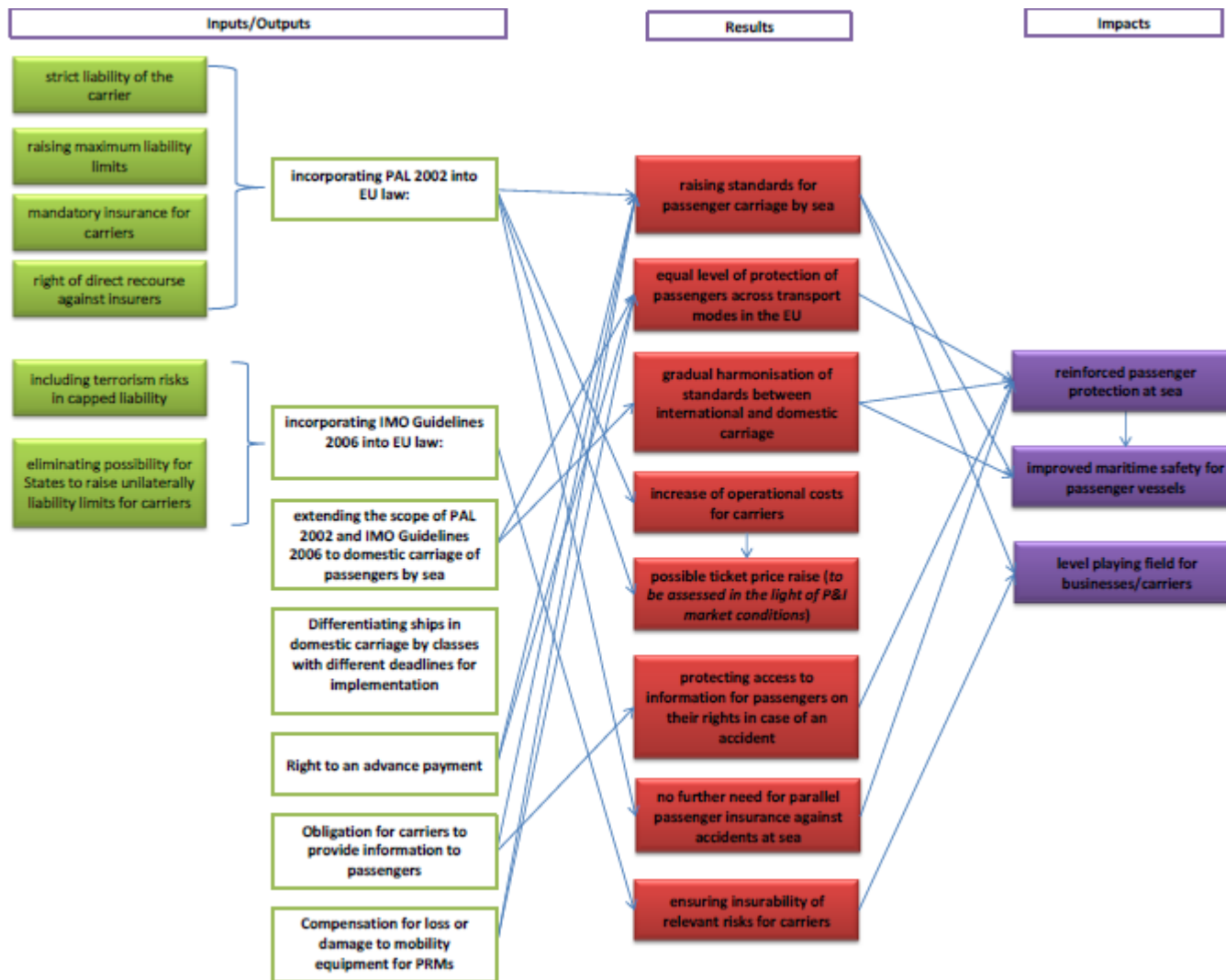
A fourth general objective was added²⁰:

4. Seeking to create a balanced framework of protection for passengers across transport modes, with respect, in particular, to the right to information, the rights to special compensation for persons with reduced mobility and the right to an advance payment.

²⁰ This fourth general objective is not included in the intervention logic that is included in the roadmap.

Figure 4.1 Intervention logic





Source: Evaluation roadmap.

Needs: drivers and problems

The intervention logic links drivers to the defined problems in the following way:

1. Main problem 1- rights of passengers are not sufficiently safeguarded:
 - Passengers are not aware of their rights in case of accidents;
 - Insufficient compensation for passengers in case of accidents;
 - Carriers are not liable for the loss of mobility equipment of PRMs in an accident;
 - Long time for receiving compensation;
 - Lack of legal certainty for victims and carriers.
2. Main problem 2- no level playing field for carriers in the EU:
 - Rights for compensation (standards) differ in EU Member States;
 - Unlimited liability for carriers (including for terrorism risks) cannot be combined with mandatory insurance;
 - Lack of legal certainty for victims and carriers.
3. Main problem 3 - potential risks to the safety of passengers carriage by sea.
 - This problem is directly linked to the first main problem, no specific drivers are defined.
4. Main problem 4 - balanced framework of protection for passengers across transport modes.
 - This problem has been added to provide the base for the fourth general objective, as defined above, dealing with difference in level of protection of passengers carried by sea as compared to passengers travelling by transport modes (air, train, bus);
 - Underlying drivers are: different levels of compensation; difference in timing of receiving compensation; difference in providing information to passengers (between modes) and in general differences in legal certainty from victims across modes.

Measures: activities and outputs

Three types of measures are defined in the Regulation to deliver above-mentioned objectives:

7. Measures establishing *specific rights for passengers* in case of an accident in the course of carriage by sea:
 - Incorporating Athens Convention as amended by the 2002 Protocol (PAL 2002) into EU law (strict liability of the carrier; raising maximum liability limits; mandatory insurance for carriers; right of direct resource against insurers);
 - Rights of an advance payment;
 - Obligation for carriers to provide information to passengers;
 - Compensation for loss or damage to mobility equipment for Passengers with Reduced Mobility (PRMs).
8. Measures establishing a *wider scope of application for these rights*, going beyond the standards of the relevant international convention, covering *both international and domestic carriage*:
 - Extending the scope of PAL 2002 and IMO Guidelines 2006 to domestic carriage of passengers by sea.

9. Measures taking into account the financial capabilities of carriers and protecting the insurability of the relevant obligations established under the two aspects mentioned above:
- Incorporating IMO Guidelines 2006 (including terrorism risks in capped liability; eliminating possibility for states to raise unilaterally liability limits for carriers).

In order to support the proportionality of the requirements, different deadlines for implementation are defined for the various ship classes in domestic carriage.

Results and impacts

The following three impacts are defined, each presented with underlying results:

1. Reinforced passenger protection at sea:
 - Equal level of protection of passengers across transport modes in the EU;
 - Gradual harmonisation of standards between international and domestic carriage;
 - Protecting access to information for passengers on their rights in case of an accident.
 - No further need for parallel passenger insurance against accidents at sea.
2. Improved maritime safety for passenger vessels:
 - Raising standards for passenger carriage by sea.
 - Gradual harmonisation of standards between international and domestic carriage;
3. Level playing field for businesses/carriers:
 - Raising standards for passenger carriage by sea.
 - Ensuring insurability of relevant risks for carriers.

Besides the results that are listed with the three defined impacts, there is also the result of increased costs for carriers, which may result in an increase of ticket prices.

EU policies and External factors

EU policies

The Liability Regulation is part of a larger EU policy framework. The main policies influencing the Liability Regulation are listed below: This part is elaborated in Section 7 on coherence.

- EU approach to transport operators' liability;
- EU passenger rights policy;
- EU maritime safety policy;
- EU transport policy;
- EC ten priority policy areas, as announced in the Summary of President Juncker's Political Guidelines (July 2014)²¹.

²¹ Source: http://ec.europa.eu/priorities/docs/political-guidelines-short_en.pdf

External factors

The external factors relate to developments outside the direct influence of the European Commission, but which do influence impact of the Regulation. Most important legal external factors are the adoption and coming into force of the 2002 Athens Protocol, as well as the adoption of the IMO Guidelines 2006. Both documents aim to improve maritime passenger protection and set clear rules on operator's liability. During the evaluation it is important to assess the complementarity between the Regulation on the one hand and the 2002 Athens Protocol and IMO Guidelines on the other.

Besides legal external factors also economic external factors are important to assess the impacts of the Liability Regulation. Most important economical factor is the recent (and future) increase of passenger transport, especially in the cruise sector. The number of cruise passengers is growing each year²², both at a global level as well as in the EU. This growth implies that the group falling within the scope of the Regulation is also increasing. Irrespective of safety levels, the number of incidents might increase to a higher number of potential 'victims'.

Contrary to the cruise market, the number of EU ferry passengers is declining. A recent study (2015) indicates that the average number of ferry passenger in the EU declines with 2% per year²³. As a result, the number of ferry passengers falling within the scope of the Regulation will decrease.

4.2 The Athens Convention and the Liability Regulation

The Liability Regulation is part of a multi-layered framework of international and EU legislation impacting sea passenger rights. In order to properly assess the Liability Regulation based upon the evaluation criteria and mainly to assess the relevance; effectiveness; efficiency; coherence; EU added value and complementarity, it is important to first assess the differences between the Liability Regulation and Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974²⁴ (Section 3.1.1) and the difference between the Liability Regulation and the original Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974²⁵ (Section 3.1.2).

4.2.1 The Liability Regulation compared to PAL 2002

The Liability Regulation did not incorporate the entire PAL 2002, but only Articles I, Ibis, II para. 2, III to XVI, XVIII, XX and XXI. There are three points where the Regulation has taken a different approach than PAL 2002: the scope, the procedural rules (expressed in jurisdiction and recognition) and the possibility for the carrier to invoke global limitation Conventions. After the

²² Source: <http://www.cruisemarketwatch.com/growth/>.

²³ Source: Cenit et al (2015).

²⁴ Hereinafter referred to as PAL 2002.

²⁵ Hereinafter referred to as Athens Convention 1974.

accession of the EU to PAL 2002 with the Council Decisions of 2012²⁶, the impact hereof was largely eliminated. Table 4.1 highlights the main differences between the Liability Regulation and PAL 2002.

Table 4.1 Liability Regulation compared to PAL 2002

Liability Regulation	PAL 2002
Scope	
Article 2: Connecting factor "Member State"	Article 2: Connecting factor "State Parties"
Article 2: International carriage within the meaning of point 9 of Article 1 of the Athens Convention and carriage by sea within a single Member State on board ships of Classes A and B under Article 4 of Directive 98/18/EC Member States may apply this Regulation to all domestic seagoing voyages.	Art 2: International Carriage Article 1.3: exclusion of air-cushion vehicles
The Regulation has broadened the regime to types of transport excluded under PAL 2002 and thus expanded passenger protection.	
Jurisdiction	
The Liability Regulation excludes jurisdiction rules of PAL 2002. With the accession of the EU to PAL 2002 (Council Decision 2012/23/EU), the PAL 2002 jurisdiction rules however have priority over those of Regulation 1215/2012 in a situation where said Convention is applicable (Recital 4 Council decision 2012/23/EU). In other situations (for example domestic transportation), Regulation 1215/2012 (recast repealing Regulation 44/2001 'Brussels I(bis)') will be applicable within its scope of application : Article 4.1: domicile respondent. In addition: Special jurisdiction Rules for consumer contracts. Article 18: A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the	Article 17: (a) the court of the State of permanent residence or principal place of business of the defendant, or (b) the court of the State of departure or that of the destination according to the contract of carriage, or (c) the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State, or d) the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State." Insofar as these courts are situated in state parties 3. After the occurrence of the incident which has caused the

²⁶ Council Decision 2012/22/EU: Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, with the exception of Articles 10 and 11 thereof. OJ L 8, 12.1.2012, p. 1–12 and Council decision 2012/23/EU of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards Articles 10 and 11 thereof, OJ 12 January 2012, L 8/13).

Liability Regulation	PAL 2002
<p>place where the consumer is domiciled.</p> <p>However, transport contracts are excluded from the scope of the above protective consumer jurisdiction rules, except in case of an all in price for transport and accommodation (art. 17.3 Brussels I(bis)); other transport contracts fall under art. 7 1b) 2 Brussels I(bis).</p> <p>art. 7 1b) 2 Brussels I(bis): Member State where, under the contract, the services were provided or should have been provided.</p> <p>In this situation also exclusive jurisdiction clauses are valid (art. 25 Brussels I(bis)).</p>	<p>damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration</p>
<p>A difference exists in case of domestic transport covered by the Liability Regulation but not by PAL 2002, in such situation, in case of cruise contracts, the jurisdiction rules are as favourable to the passenger as under PAL 2002. In case of ferry-transportation, jurisdiction rules of the Liability Regulation are however less favourable, as 'ferry transportation' does not qualify as a package travel, and thus it falls under general contractual jurisdiction rules and not under protective consumer jurisdiction rules under the Brussels I Regulation. From a legislative point of view it could be argued that reference to the jurisdiction rules of PAL 2002 in the Liability Regulation (including a possible delimitation of the applicability of these rules as to take into account the effects of Council Decision 2012/23/EU) could be advantageous for passengers as this would avoid that passengers would need to analyse three different legal instruments in order to find the applicable jurisdiction rules.</p>	
<p>Recognition</p>	
<p>Even though the EU acceded to PAL 2002, the rules on recognition and enforcement of PAL 2002 do not apply in the following situations(art. 2.2 and 2.3 and Recital 5 Council decision 2012/23/EU):</p> <ul style="list-style-type: none"> -in case of judgements by EU courts when recognition or enforcement is sought in another EU member State. -in case of judgments by States Parties to the Lugano Convention when recognition or enforcement is sought in an EU member State. <p>In the first hypothesis this topic stays subject to Regulation 1215/2012. (in case of a judgment rendered by Danish courts, the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the</p>	<p>Article 17 bis:</p> <p>Any judgment given by a court with jurisdiction in accordance with Article 17 which is enforceable in the State of origin where it is no longer subject to ordinary forms of review, shall be recognised in any State Party, except</p> <ul style="list-style-type: none"> (a) where the judgment was obtained by fraud; or (b) where the defendant was not given reasonable notice and a fair opportunity to present the case. <p>2. A judgment recognised under paragraph 1 shall be enforceable in each State Party as soon as the formalities required in that State have been complied with. The formalities shall not permit the</p>

Liability Regulation	PAL 2002
<p>recognition and enforcement of judgments in civil and commercial matters is applicable, which ensures application of the Brussels I Regulation in Denmark):</p> <p>Article 45 Brussels I(bis): the recognition of a judgment shall be refused:</p> <p>(a) if such recognition is manifestly contrary to public policy (order public) in the Member State addressed;</p> <p>(b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so</p> <p>(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;</p> <p>(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or</p> <p>(e) if the judgment conflicts with:</p> <p>(i) the jurisdiction rules applicable to consumer contracts (see above)</p>	<p>merits of the case to be re-opened.</p> <p>However, according to para 3 A State Party to this Protocol may apply other rules for the recognition and enforcement of judgments, provided that their effect is to ensure that judgments are recognised and enforced at least to the same extent as under paragraphs 1 and 2."</p>
<p>Under Article 17 bis. PAL 2002, the grounds for a refusal of recognition are fewer than under Brussels I(bis). An important difference between the two is that PAL 2002 doesn't provide for a public policy exception.</p>	
<p>Global limitation</p>	
<p>Article 5.1 This Regulation shall not modify the rights or duties of the carrier or performing carrier under national legislation implementing the International Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the Protocol of 1996, including any future amendment thereto. In the absence of any such applicable national legislation, the liability of the</p>	<p>Article 19 This Convention shall not modify the rights or duties of the carrier, the performing carrier, and their servants or agents provided for in international conventions relating to the limitation of liability of owners of seagoing ships.</p>

Liability Regulation	PAL 2002
carrier or performing carrier shall be governed only by Article 3 of this Regulation.	
Global limitation can undermine the effectiveness of the protection of passenger rights. PAL 2002 doesn't specify the limitation Conventions that could be invoked by the carrier. While carriers can thus for example invoke LLMC 1976 under PAL 2002, this is not possible under the Regulation.	
Source: ESL	

In addition, the Liability Regulation provides for additional protection of passengers, as it provides for rules on advance payment and protective measures for disabled passengers, as well as the requirement to provide passengers with appropriate and comprehensible information regarding their rights. Main additions are:

- *Advance payments*: Article 8: Advance payment in case of injury or death within 15 days of at least 21.000 Euro in case of death;
- *Disabled passengers*: In the event of loss of, or damage to, mobility equipment or other specific equipment used by a passenger with reduced mobility, the compensation shall correspond to the replacement value of the equipment concerned or, where applicable, to the costs relating to repairs;
- *Information*: Article 7: the carrier and/or performing carrier shall ensure that passengers are provided with appropriate and comprehensible information regarding their rights under this Regulation.

4.2.2 The Liability Regulation and PAL 2002 compared to Athens 1974

As the Liability Regulation took over the PAL 2002 provisions to a large extent, and those provisions brought a significant change to the liability regime of the Athens Convention 1974, such differences also exist between the Liability Regulation and the Athens Convention 1974. As a result of the EU's accession to PAL 2002 (Council decision 2012/22/EU and 2012/23/EU), PAL 2002 became a part of the EU legal order.

Table 4.2 presents the main differences between the Liability Regulation and PAL 2002 on the one hand, and the Athens 1974 Convention on the other hand. The main differences relate to liability standards and the burden of proof, liability limits and deductibles, time bars and compulsory insurances.

Table 4.2 Regulation 392/2009 & PAL 2002 compared to Athens 1974 Convention

Regulation 392/2009 and PAL 2002	Athens 1974
Liability standard and burden of proof shipping incidents: Article 3.1: Presumed liability (strict liability), Damage up to 250.000 SDR: only a limited number of exceptions available: Damage (a) resulted from an act of	Article 3.1: Fault based liability. Article 3.2: Burden of proof for the claimant But: Article 3.3: presumed liability if the death of or personal injury to the passenger or the loss of or damage to cabin luggage arose from

Regulation 392/2009 and PAL 2002	Athens 1974
<p>war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or (b) was wholly caused by an act or omission done with the intent to cause the incident by a third party.</p> <p>Damage above 250.000 SDR: proof of the absence of fault or negligence.</p> <p>Non-shipping incident: Article 3.2: fault based liability, burden of proof on claimant.</p>	<p>or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.</p>
<p>The main difference between PAL 2002 and Athens 1974 are the defences available to the carrier in case of shipping incidents, insofar it relates to damage under 250.000 SDR. While the reference to force majeure in PAL 2002 does broaden the possibilities to escape liability, still this standard is higher than the absence of fault under Athens 1974.</p>	
<p>Liability limits and deductibles</p>	
<p>Luggage: Compensation (art. 8, 1, 2 and 3): 2250 SDR (cabin luggage), 12700 (Vehicles) and 3375 (other Luggage) Deductibles (art. 8.4): 330 SDR (vehicles) and 149 SDR (other luggage). Dead or personal injury Article 7.1: 400.000 SDR Article 7.2: state parties can increase limits</p>	<p>Luggage: Compensation (art. 8, 1, 2 and 3): 833 SDR (cabin luggage), 3333 (Vehicles) and 1200 (other Luggage) Deductibles (art. 8.4): 117 SDR (vehicles) and 13 SDR (other luggage). Dead or personal injury Article 7.1: 46.667 SDR Article 7.2: state parties can increase limits</p>
<p>The liability limits underwent a significant increase with PAL 2002. Even though regards is to be given to the inflation factor, depending on calculations, over this period inflation of the SDR-limit is only to be estimated at between 100 and 200 %. Thus especially the limits for vehicles and death or personal injury substantially increased, even when taking into account the inflation-correction. Downside for the passenger is the fact that the same is true for the deductibles for other luggage.</p>	
<p>Time bar</p>	
<p>Article 16.1: time bar 2 years Article 16.3: suspension But claim barred 5 years after disembarkation or the time disembarkation should have taken place or 3 years after the actual knowledge about the injury, loss or damage resulting from the incident</p>	<p>Article 16.1: time bar 2 years Article 16.3: suspension subject to national law But claim barred 3 years after disembarkation or the time disembarkation should have taken place</p>
<p>Compulsory insurance</p>	
<p>art. 4(bis): art. 4(bis).1: Compulsory insurance or other financial securities in case of</p>	

Regulation 392/2009 and PAL 2002	Athens 1974
vessels licensed to carry more than 12 passengers. At least 250.000 SDR per passenger per distinct occasion. art. 4(bis).10: Direct action against the insurer, up to this limit of 250.000 SDR.	

Source: ESL.

4.3 Baseline: situation prior to the Liability Regulation

Before the entry into force of the Liability Regulation, some EU Member States were party to the Athens Convention 1974, others had national rules which were strongly in line with the provisions of the Athens Convention, and the remainder had their own specific national regime in place. In this section, a brief overview of the systems in place in several EU Member States is presented. The situation prior to 1 January 2013 was analysed for seven EU Member States, i.e., the Netherlands, Denmark, the United Kingdom, France, Italy, Germany and Greece. These seven Member States have been chosen as they represent large passenger vessel fleets in Europe and together form a well-balanced geographical representation of EU sea basins, i.e. representing the Baltic Sea, North Sea, Atlantic Sea and Mediterranean Sea.

In the analysis three main questions were elaborated:

1. Whether *strict liability of the carrier* applied before the Regulation and if the Member States were party to Athens 1974/2002?
2. Whether specific legislation covered accidents at sea on board passenger vessels?
3. How passengers were compensated for claims falling under the Regulation before the Regulation?

In order to answer these three main questions, 11 sub-questions were formulated. Together the answers provide insights for the three main questions. The sub-questions are listed below:

1. What was the regime in force concerning the liability of carrier before 2013 and whether there was a regime of strict liability or fault liability?
2. Was there a distinction between shipping and non-shipping incidents?
3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incident?
4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?
5. Was the Member State member of the Athens 1974 Convention?
6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?
7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?
8. Was there an obligation of the carrier to be insured?
9. Did the passenger have a direct action against the insurer?

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?
11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

Table 4.3 below presents the brief answers to the 11 questions above. Annex 12 presents more elaborated answers to these questions.

Table 4.3 Overview of responses per baseline question

	NL	DK	UK	FR	IT	DE	EL
1. Regime in place?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Strict or fault-based liability?	Fault-based	Fault-based	Fault-based	Fault-based	Fault-based	Fault-based	Fault-based
2. Distinction shipping non-shipping?	No	No	No	Yes	No	Yes	Yes
3. Presumed liability of the carrier?	Yes, for some damages	Yes, for some damages	Yes, for some damages	Yes, only for persons	Yes	Yes	Yes
4. Specific of general liability rules?	Specific	General	Specific	Specific	Specific	Specific	Depended on damage
5. Party to Athens Convention 1974?	No	No	Yes	No	No	No	Yes
6. Compensation for loss damage mobility equipment?	No	No	No	No	No	No	Yes
7. Advance payment possible?	No	No	No	No	No	No	No
8. Insurance obligation carrier?	No	No	No	No	No	No	No
9. Direct action against insurer?	No	No	No	No	No	No	No
10. Liability limits in place?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
11. Information obligation of the carrier?	No	No	Yes	No	No	No	No

Table 4.3 indicates that the regimes in place in the analysed countries are highly similar. In relation to the three main questions the following answers can be given.

Question 1: strict liability of the carrier

None of the seven countries analysed had a strict liability system in place. Two countries, the UK and Greece, were party to the Athens Convention, while the remaining five closely followed the provisions laid down in the Convention. Therefore, the applicable regimes in these seven countries are very similar and comparable (except for countries specific differences, which are often minor).

Question 2: specific legislation covering accidents at sea on board passenger vessels

In most of the countries analysed, the liability of the carrier was governed by specific rules regarding the contract of carriage. Only in two of the countries were general rules on contractual liability in place. In Denmark all claims were dealt with under the general liability rules, while in Greece it depended on the specific claim. In case of death or injury of a passenger or damages or loss of belongings, a specific regime was in place, while for all other claims general rules applied.

Question 3: compensation for claims falling under the Regulation

In all the countries which were analysed, the liability of the carrier was limited, although the actual limits differ per country²⁷. In all countries damages were paid in case of the passenger's death or injury and damage to or loss of luggage. In some countries rules regarding valuables also existed. None of the countries specifically included mobility equipment under the scope of the liability regime. While no case law addressing issues related to such equipment were identified, the assessment is that such equipment would be treated as cabin luggage²⁸.

Furthermore, within the analysed countries, none of the legal regimes foresaw an obligation to the carrier or insurer to provide the passenger with an advance payment.

4.4 Market developments

The aim of this section is to present the developments in the market of passenger transport since the entry into force of the Regulation. The following sections present developments in passenger fleet size (cruise and ferries), sector size, passenger volumes and developments in the sea passenger vessels insurance market. These developments provide contextual knowledge that assists in the interpretation of the stakeholder consultation findings as performed in the assessment of the evaluation questions.

²⁷ For example, in Italy there are no limits for damage to persons.

²⁸ Under the Regulation the regime of liability for such equipment is the same as the one for cabin luggage.

4.4.1 Passenger fleet size

In the years following the adoption of the Regulation, the passenger vessel fleet registered under EU flags has remained relatively constant with a small increase observed in the number of vessels as seen in Table 4.4. This increase has occurred to its majority in the last year. However, the total fleet volume (in dead weight tonnes) has decreased in the mean time by more than 3.5%.

Table 4.4 Number of passenger ships with EU flags (300 gross tonnes and over)

	2012	2013	2014	2015	2016	Change
# of ships	1.267	1.240	1.276	1.269	1.295	2.2%
1000s dwt	2.858	2.799	2.797	2.786	2.758	-3.5%

Source: Institute of Shipping Economics and Logistics²⁹

This development underlines the fact that the number of vessels required to apply the Regulation has not changed significantly.

4.4.2 Sector size

Looking into the evolution of the number of ferry connections calling at EU ports, two clear patterns can be distinguished. Although domestic ferry connections have increased nearly constantly since 2008 raising from 559 to 609, the 378 ferry lines on cross-border connections have in the same period decreased by approximately 15% with the entirety of this decline coming after 2011.

Table 4.5 Number of ferry connections in the EU

	2008	2009	2010	2011	2012	2013	2014	Change
Domestic	559	571	568	593	597	616	609	8.2%
Cross-border	378	365	372	376	350	337	327	-15.6%
Total	937	936	940	969	947	953	936	-0.1%

Source: TRT Trasporti e Territorio³⁰

This reduction on cross-border traffic is attributed to the competition from fixed links and low-cost airline carriers and the escalation of bunker prices (prior to 2014) having influenced the operations in the industry.

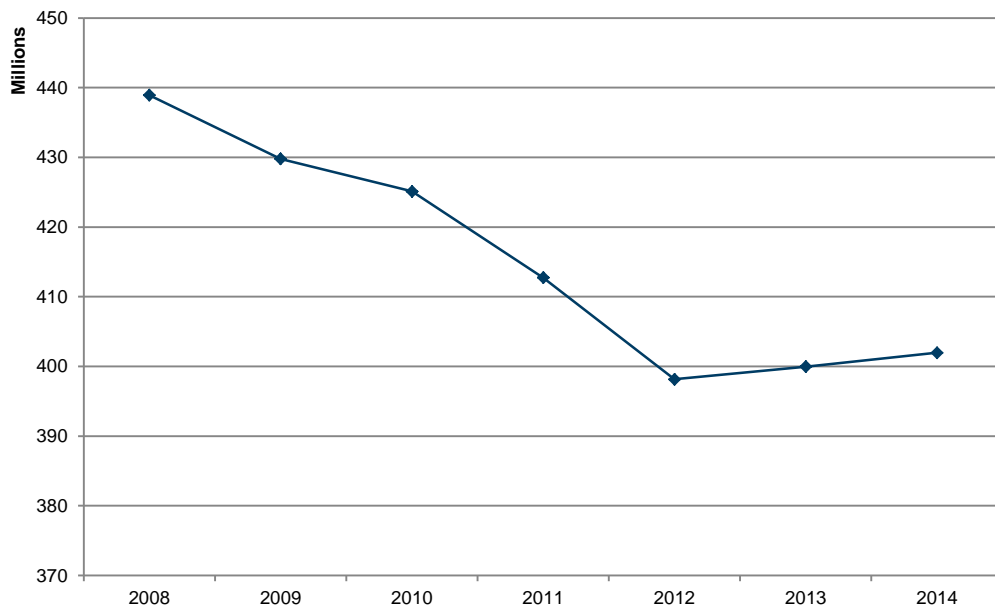
4.4.3 Sea passenger volumes

However, recent developments have been more intense in the volumes of sea passengers. Since the Regulation came into force, the number of sea passengers embarking and disembarking in EU ports has remained relatively stable at approximately 400 million. This came predominantly in the period just prior to the introduction of the Regulation (2008-2012), a nearly 8% decrease in ridership had been observed as in 2012 there were 40 million less passengers arriving at or departing from EU ports compared to 2008 (see Figure 4.2).

²⁹ Shipping Statistics and market review 2016, volume 60 – No. 7, World Merchant Fleet by Ownership Patterns

³⁰ TRT Trasporti e Territorio (2015), Research for TRAN Committee - The EU Maritime Transport System: Focus on Ferries

Figure 4.2 Number of passengers embarking and disembarking at EU ports



Source: Eurostat (mar_mp_aa_cph).

This fact comes to showcase that the application of the Regulation came at a challenging timing for the sea passenger transport sector.

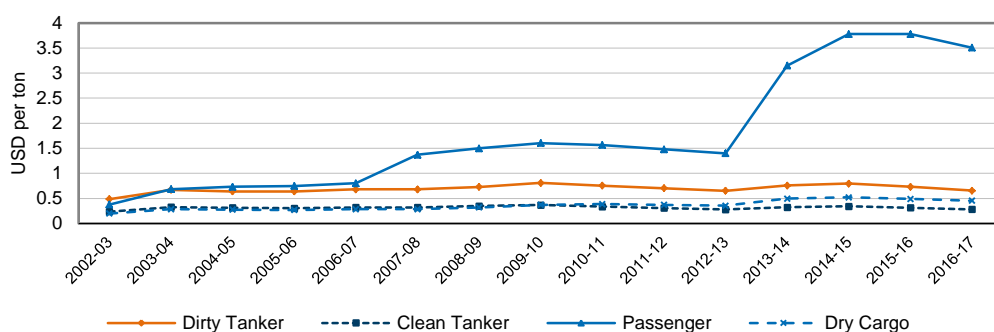
4.4.4 Passenger vessels insurance market

Finally, it is worth mentioning the context in matters of insurance premiums in which the Regulation was introduced. As prof. Erik Roesag demonstrates in his research of published P&I club insurance premiums (presented in Figure 4.3) there is a notable increase in passenger transport premiums. After a period of relative stability in insurance premiums lasting from 2007 to 2012, a large jump in insurance premiums for passenger transport is observed. In just one year, insurance premiums for passenger vessels more than doubled while in the same time the increases in premiums for other shipping segments were very modest. While it is tempting to link this increase to the impact of the Regulation the introduction of which coincides with this increase, it is important to note that these premiums concern global prices and are only slightly influenced by EU-specific liability regulations. On the other hand, as insurance industry interviews indicated, insurance premiums are mostly influenced, at a global level, by accidents that lead the industry to reassess the risk exposure³¹. Industry experts reported that the Regulation impact on premiums was already anticipated and introduced earlier as the industry was expecting the coming into force of the Athens Protocol 2002³².

³¹ The sudden increase in premiums can, in the view of these findings, be linked to the Costa Concordia accident occurring in 2012.

³² Could potentially be linked to the increase in premiums taking place in 2007.

Figure 4.3 P&I club insurance premiums for passenger ships



Source: Erik Roesag (http://folk.uio.no/erikro/Erik_Rsg/Erik_Rsg.html)

The 2013 premium increases have been reported to be linked to the ongoing restructuring of the mutuality scheme as discussed in Section 5.1.2.

4.5 National application of the Regulation

This section aims to present the main difference in implementation of the Regulation in the Member States. Firstly, the application to vessel types is presented for all Member States that responded to the information request. The application of the Regulation on specific issues is then examined in a representative sample of Member States.

4.5.1 Scope of application

The Athens Convention 1974 entered into force on April 28, 1987, and ten EU Member States became a party to this Convention. Even though PAL 2002 imposes on the member states to the protocol the duty to denounce from the Convention (17.5 PAL), the Athens Convention is still relevant today for two reasons. Firstly, at the moment of entry into force of the Regulation, PAL 2002 did not enter into force yet, as the required number of ratifications (10) were not yet made. PAL 2002 only entered into force on 23 April 2014. Denunciations only became effective as of this date and thus after the entry into force of the Regulation. Secondly, even today, PAL 2002 has only 24 Member States and still only 15 EU Member States became a party to it, while three EU Member States are still party to the Athens Convention 1974. For the three Member States that are still party to the Athens Convention 1974, the Accession of EU to PAL 2002 has also brought into effect the relevant provisions of PAL 2002 to these countries³³.

Table 4.6 EU Member States who ratified Athens 1974 and/or PAL 2002*

	Athens 1974	Denunciation Athens 1974	Accession PAL 2002
Belgium	X	23 April 2014	23 April 2014
Bulgaria			23 April 2014
Croatia	X	23 April 2014	23 April 2014
Denmark			23 April 2014

³³ Although should these countries not Denounce Athens 1974 conflicts of interpretation over which convention takes effect may raise in the event of an accident.

	Athens 1974	Denunciation Athens 1974	Accession PAL 2002
Estonia	Still party		
Greece	X	23 April 2014	23 April 2014
Ireland	X	7 November 2014	7 November 2014
Latvia	X	23 April 2014	23 April 2014
Lithuania			10 June 2015
Luxembourg	Still party		
Malta			23 April 2014
Netherlands			23 April 2014
Poland	Still party		
Romania			21 January 2015
Slovakia			13 July 2015
Spain	X	11 September 2015	11 September 2015
Sweden			2 September 2015
United Kingdom	X	23 April 2014	23 April 2014

* Austria, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Italy, Portugal, and Slovenia have neither ratified PAL 2002 nor Athens 1974.

The Liability Regulation applies to all EU-28 Member States. The Regulation does not only apply to international shipping, but also to domestic shipping. However, under the Regulation it is possible to apply the Regulation to all forms of national shipping (Class A, B, C and D), to apply it only to Class A and B ships or to also exempt those classes until a set deadline given in the Regulation. Table 4.7 provides an overview of the application of the Regulation to domestic shipping in each of the Member States.

Table 4.7 Application of Article 11 of the Regulation

Application of Article 11 of the Regulation	EU Member States + EEA
Application of the Regulation to domestic carriage Classes A and B since 31/12/2012 application to Classes C and D (in bracket)	The Netherlands, Norway (31/12/2012), Denmark (15/01/2013), Sweden (2/9/2015)
Application of the Regulation to domestic carriage: Class A and B since 31/12/2012	Belgium, Bulgaria, Finland, France, Lithuania, Romania*, Slovenia* Landlocked Member States: Austria, Czech Republic*, Hungary, Luxembourg, Slovakia*
Application of the Regulation to domestic carriage: Class A since 31/12/2012 Postponement of application to Class B until 31/12/2018	Ireland*, Poland
Application of the Regulation to domestic carriage: Class A: 31/12/2014 Postponement of application to:	Spain

Application of Article 11 of the Regulation	EU Member States + EEA
Class B until 31/12/2018	
Postponement of application of the Regulation to: Class A: 31/12/2016 Class B: 31/12/2018	Croatia*, Cyprus, Estonia*, Germany, Greece, Italy, Latvia*, Portugal*, United Kingdom
Not applying the Regulation in domestic carriage due to absence of Class A and B ships	Malta

(*): Based exclusively from desk research.

Source: Survey, Interviews and European Parliamentary Research Services.

Denmark, the Netherlands and Sweden have chosen to apply the Regulation also to Class C and D ships. However, in order to reduce the burden to the maritime administration and ship-owners, these countries have chosen for a lighter implementation to these vessels. For Denmark, the implementation approximates the provisions of the PAL as these vessel classes are exempt from some of the Regulation provisions, such as the obligation to carry a war-risk insurance. However, they are stripped of the obligation to issue a certificate of insurance (proof of insurance suffices).

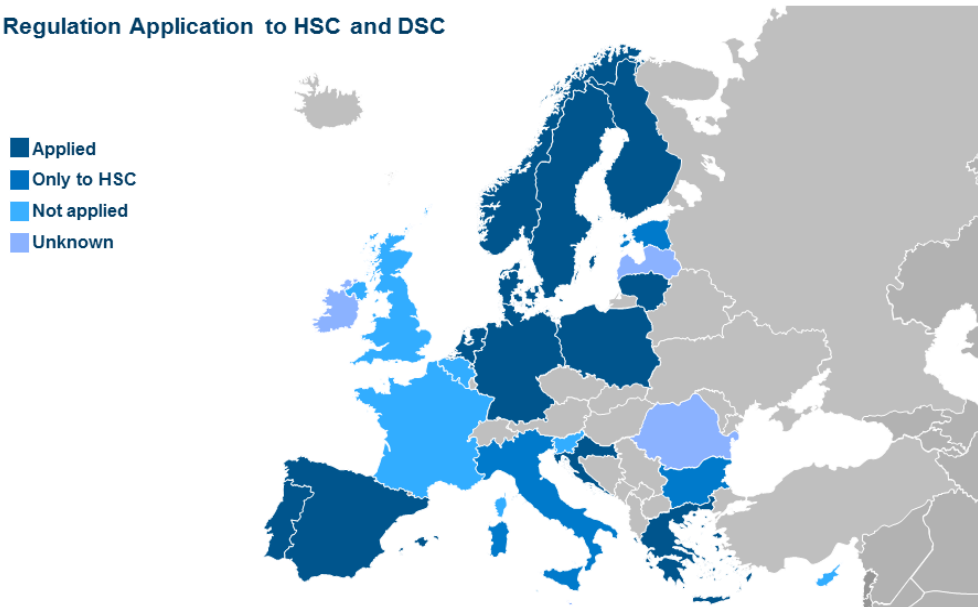
A number of vessel categories are not explicitly included in the provisions of the Regulation. This relates to:

- High Speed Craft (HSC);
- Dynamically Supported Craft (DSC);
- Non-steel vessels, made of:
 - Aluminium;
 - Wood;
 - Composite materials.
- Vessels carrying less than 12 passengers.

Throughout our research, it was noted that Member States adopted different approaches as to the application of the Regulation to these vessel types. Figure 4.4 presents the application of the Regulation to High Speed Craft (HSC) and Dynamically Supported Craft (DSC) domestic carriage. The two categories are approached in the same way by the Member States. A usual exception to the application of the Regulation is the air-cushioned vessels (i.e. France, the Netherlands). Most of the Member States apply (or intend to apply) the Regulation to vessels of equivalent use as to the steel classes to which they already apply (or plan to apply) the Regulation.

Figure 4.4 Application of Regulation to High Speed Craft (HSC) and Dynamically Supported Craft (DSC)

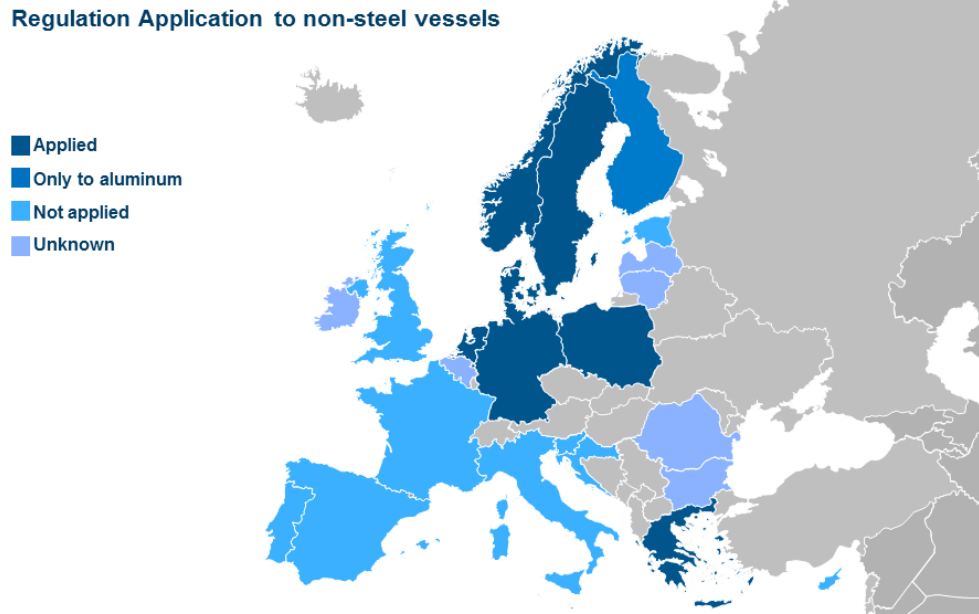
Regulation Application to HSC and DSC



Source: Ecorys.

Figure 4.5 presents the application of the Regulation to non-steel vessels. Similar to the previous figure, Member States chose to apply (or intend to apply) the Regulation to vessels of equivalent use as to the steel classes to which they already apply (or plan to apply) the Regulation. Here it should be noted that a number of Member States could not respond to the enquiry as to their application of the Regulation to non-steel vessels. This is the case especially for Member States that have deferred the application of the Regulation for Classes A and B and are therefore not yet applying the Regulation to any domestic carriage.

Figure 4.5 Application of Regulation to non-steel vessels (aluminium, wood, composite)



Source: Ecorys.

Finally, it should be noted that Denmark is the only member state that applies the Regulation to all vessels, including those that are licenced to carry less than 12 passengers. The approach of the Ministry of Transport of Denmark is that there should be no discrimination as to passenger rights depending on the route and vessel type.

4.5.2 Application in selected Member States

The absence of uniform rules, determining the recoverable damage, result in a threat to uniformity, as national law regimes governing recoverable damage differ to a significant extent. Member States can be categorised in four legal systems regarding their approach on transport liability legislation:

1. The French System (e.g. France, Belgium, Spain and Italy);
2. The German system (e.g. Germany, The Netherlands, Switzerland and Austria);
3. Common law systems (English law, Scottish law and Irish law);
4. Scandinavian systems.

These systems mainly differ on three main aspects:

1. The amount of compensation;
2. The types of damage that are considered recoverable;
3. The compensation for personal injury.

The biggest difference in these systems exists between the Common Law (highest compensation) and Scandinavian Law (lowest compensation). In addition, the circle of persons entitled to compensation is subject to significant differences. While compensation for loss of income is awarded in all countries, compensation for pain and suffering is not awarded in most countries

belonging to the German system, while the French system has an open system and judges award such compensation to a broad category of people, and in English law, there is a closed system. The Fatal Accidents Act provides for such compensation to a limited category of people. Again the amount of compensation differs greatly. For example, in English law, an integral compensation is awarded for loss of income, often amounting to millions in compensation. In the French system, for example, compensation scales are applied, leading to a more limited compensation.

The question whether compensation is available for personal injury in different countries, is very much linked with social security. Traditionally, there is no liability for costs covered by social security. However, there might be a recourse action available in national law for social security institutions. When it comes to mental distress, in Southern countries, compensation is being awarded, while in the Netherlands, Germany and the UK such compensation is only being awarded in case of a recognised psychological disease. Exceptions exist in case of a violation of human rights (e.g. privacy), but in such situations the violation of law is the basis for the claim and not necessarily the damage incurred.

It is considered unlikely that a harmonising effect from the Regulation will occur on these points. According to Professor Lindenbergh³⁴, there are no examples in other domains where the existence of common limits to liability had a harmonising impact on the compensations that are awarded.

In the following tables, the differences in a representative sample of Member States identified largely confirms the above as presented, with Table 4.8 addressing the differences in the limits to liability and Table 4.9 addressing differences in the types of recoverable damages.

A study of the pre-existing national law of a sample of EU member states shows evidence that albeit most countries did not ratify the Athens Convention 1974, all of them still provided for a national law limitation and a reversed burden of proof. However, the limits in national law were significantly lower than those under PAL 2002. With this, PAL 2002 significantly improves passenger rights.

Table 4.8 Limits to liability in a sample of Member States

	Athens Convention 1974/1976/1990	Limitation based on National Law	1996 protocols/ 1976 LLMC	Burden of proof
Netherlands	Not ratified	Loss of life/ injury 137.000 Euro p.p. Luggage 1.000 Euro Vehicles 9.100 Euro	Ratified	National law: Reversal of the burden of proof

³⁴ Professor of Civil Law, Erasmus University Rotterdam.

	Athens Convention 1974/1976/1990	Limitation based on National Law	1996 protocols/ 1976 LLMC	Burden of proof
Germany	Not ratified	Loss of life/ injury DM 320.000 Luggage DM 4.000 Vehicles DM 16.000 Other luggage DM 6.000	Not ratified	National law: Reversal of the burden of proof
France	Not ratified	Loss of life/ injury SDR 175.000 p.p. Cabin luggage 1.140 Euro Vehicle 4.600 Euro Other luggage 1.520 Euro	Ratified	1961 Brussels Convention and national law: Reversal of the burden of proof
United Kingdom	Ratified	Loss of life/ injury SDR 300.000 p.p. Luggage SDR 833 Vehicles SDR 3.333 Other luggage 1.200 SDR	Ratified but excluded sea-going ships from the application of LLMC 1996	Article 3 (3) Athens Convention 1974: Reversal of the burden of proof.

Table 4.9 Recoverable damages in a sample of Member States

		France	Germany	Common Law (UK)	Scandinavia (Norway)
Loss of earning capacity	Recoverable	Only insofar accompanied by financial loss of actual or future income		+	+
	Calculation	Standardised (not binding)	No standardisation	Standardised	Standardising case law
			BGH, 17.01.1995 VI ZR 62/94	(Ogden Tables) ³⁵	Article 3-1 SKL

³⁵ <https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death>.

		France	Germany	Common Law (UK)	Scandinavia (Norway)
Mental distress	General conditions	General principles: 1)witnessing daily horror is not sufficient 2) pure emotional shock is not sufficient, only if accompanied by mental or physical injury.			Not awarded
	Additional conditions		Close relationship (BGH11.5.1971, BGHZ 56, 163)	Close relationship with victim/ Proximity in time and place (Alcock v. Chief Constable of South Yorkshire [1992] 1 A.C. 310)	
	Compensation for pain and suffering	+	Schmerzensgeld	Awarded Pain and suffering: subjective test Amenity: objective test Compensation for injury: standardised (Judicial College guidelines)	Not awarded

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³⁶ <https://www.wildy.com/isbn/9780198757627/judicial-college-guidelines-for-the-assessment-of-general-damages-in-personal-injury-cases-13th-ed-paperback-oxford-university-press>.

		France	Germany	Common Law (UK)	Scandinavia (Norway)
Loss of consortium (dead of a relative)	Pretium doloris	Open category: affection relationship	No	-limited category of persons -only if financially dependent upon deceased (The Fatal Accidents Act 1976+ Damages for bereavement Order 2013/510 (sum is 12.980 GBP))	Not awarded

4.6 State of play

4.6.1 Data on passenger fleet and their performance

Using the data from Directive 2009/45 EC, an overview has been made of the number of domestic carriage vessels falling under the main vessel classes for which the Liability Regulation has been adopted (Class A-D ships and HSC). This has been done by checking for each of the separate Member States and Norway whether the Regulation is into force³⁷ for the various classes. Figure 4.6 summarises the number of ships and their passenger capacity by Member State. There is a total of 922 vessels operating in the domestic shipping according to the Directive 2009/45 vessel database, out of these 882 are classified as either belonging to classes A-D or HSC. This number should be compared to about 4,600 passenger vessels operating in international shipping³⁸ to which the Athens Convention already applied.

Italy, Greece and Norway have the largest passenger ship fleet for which the Regulation applies, both in numbers and passenger capacity. Note that Italy and Greece together account for approximately 37% of the total number of passengers embarked and disembarked in the EU in 2014.³⁹, explaining their larger fleets. In both Greece and Italy, the Regulation will enter into force for Class A on 31 December-2016 and Class B on 31 December 2018. This means that in the near future, a large group of passengers will benefit from the Regulation.

³⁷ European Commission (2012). Application of Regulation (EC) No 392/2009 to domestic carriage on board ships of Classes A, B, C and D as of 31/12/2012.

³⁸ Tractebel (2015), Support Study for the Fitness Check (FC), Evaluation of Passenger Ship Safety Legislation.

³⁹ Eurostat (2016), Maritime Ports Freight and Passenger Statistics. Retrieved on 21-06-2016 from http://ec.europa.eu/eurostat/statistics-explained/index.php/Maritime_ports_freight_and_passenger_statistics.

Although not an EU Member State, Norway has the largest number of vessels and passenger capacity on ships abiding to the Regulation to this date (and will remain so until 31 December, 2016 when a number of countries will be added). Passenger ships from Denmark, the UK and Spain also host significant capacity, explained by the relatively large number of (dis)embarking maritime passengers yearly. Denmark accounts for around 10% of the total of the EU, while the UK and Spain account for slightly less.

Out of the 882 vessels, the Liability Regulation applies to only about a third (282). This number will grow to reach 333 vessels by the end of this year when the Regulation will be applied to the remaining Class A ships, and will be nearing half of the vessels in 2018, with 428. By 2018 all ships of Class A and Class B should fall under the regulation. At that point, only around 20% of the Class C ships and roughly 40% of the Class D ships will fall under the regulation. Additionally, roughly a quarter of HSC vessels (41 out of 152) already apply the Regulation (most of which are Norwegian). For the majority of the rest (107 vessels), their flag states stated that they aim to apply the Regulation to HSC but have deferred the application to A and B class vessels for 2017 and 2019 respectively. Therefore, it is assumed that the application of the Regulation to these vessels will take effect fully only after 31 December, 2018.⁴⁰ This would raise the application of the Regulation to approximately 97% of the EU HSC fleet (see Figure 4.6).

Figure 4.6 Comparison of the ships under the regulation with the total number of ships per class

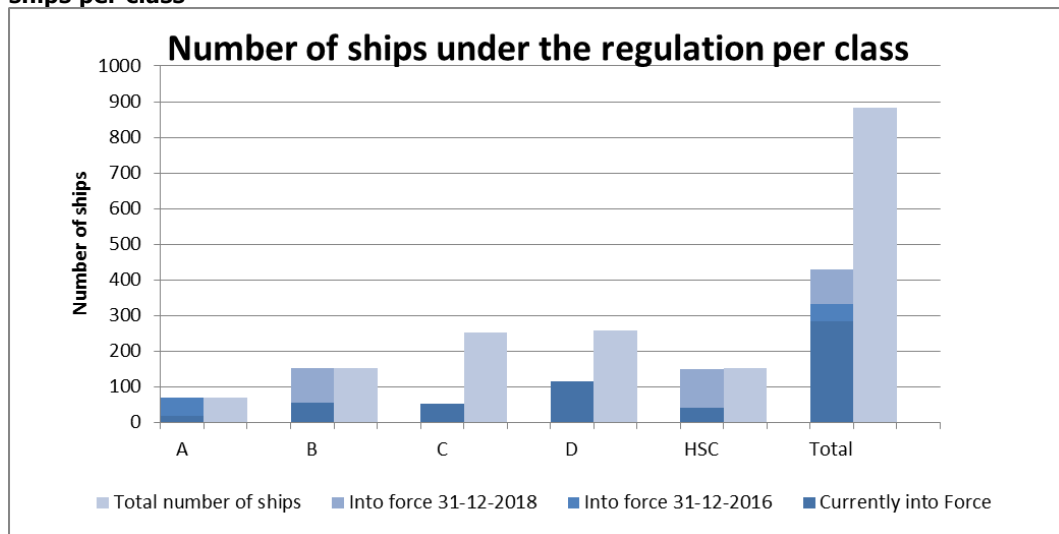
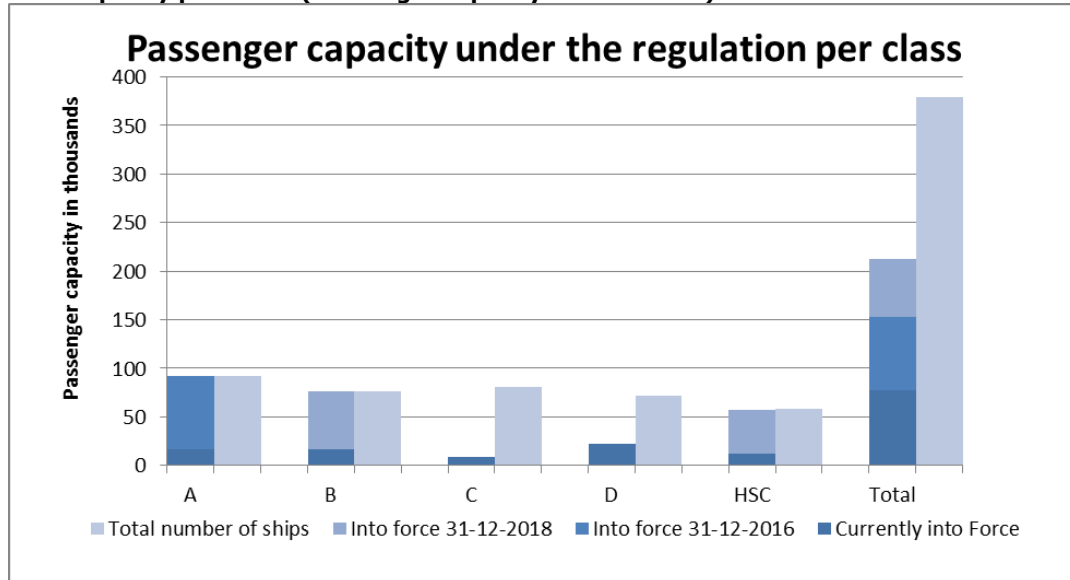


Figure 4.6 illustrates that Class A and B jointly cover about 25% of the total domestic fleet of the database. Figure 4.7 shows that these ships cover just over 44% of the capacity, which is explained by the larger average capacity of Class A and B ships. Note however that even though Class A and B are larger on average, Class C and D ships can also be large: vessels with a capacity of over 1,000 passengers are no exception. Class C and D ships represent about 61% of the ships, while covering 42% of the passenger capacity and the rest

⁴⁰ These MS (Greece, Italy, Spain and Estonia) have not indicated any limitations to the application of the Regulation to HSC vessels therefore we assume application to the entirety of their HSC fleet after the Regulation comes into effect for Class A and B ships in these countries.

belong to the HSC category. While the Regulation currently applies to around 20% of the EU domestic fleet capacity⁴¹, this figure is expected to increase to just over 40% after 31 December, 2016 and reach 56% by the beginning of 2019.

Figure 4.7 Comparison of the passenger capacity under the regulation with the total capacity per class. (Passenger capacity in thousands)



Regarding Class C and D, by the end of 2018 the Regulation will apply⁴² to only 11% of the overall Class C ships capacity and to 31% of the overall Class D capacity. In addition, the HSC class of ships represent roughly 15% of the total capacity, of which 97% will be under the Regulation. Figure 4.8 and Figure 4.9 present the current and prospective application of the Regulation per country, in regard to the number of vessels and total vessel capacity respectively.

⁴¹ Always referring to the fleet identified under the Directive 2009/45 EC database.

⁴² Also assuming steady fleet size and composition for each vessel class.

Figure 4.8 Comparison of the ships under the regulation with the total number of ships per country

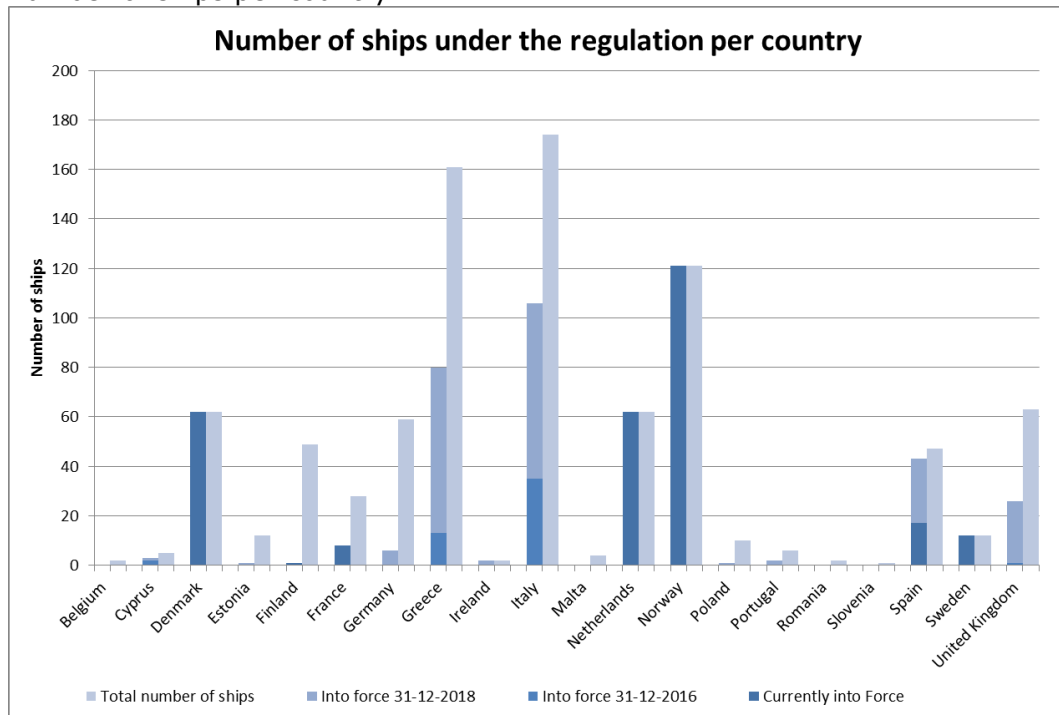
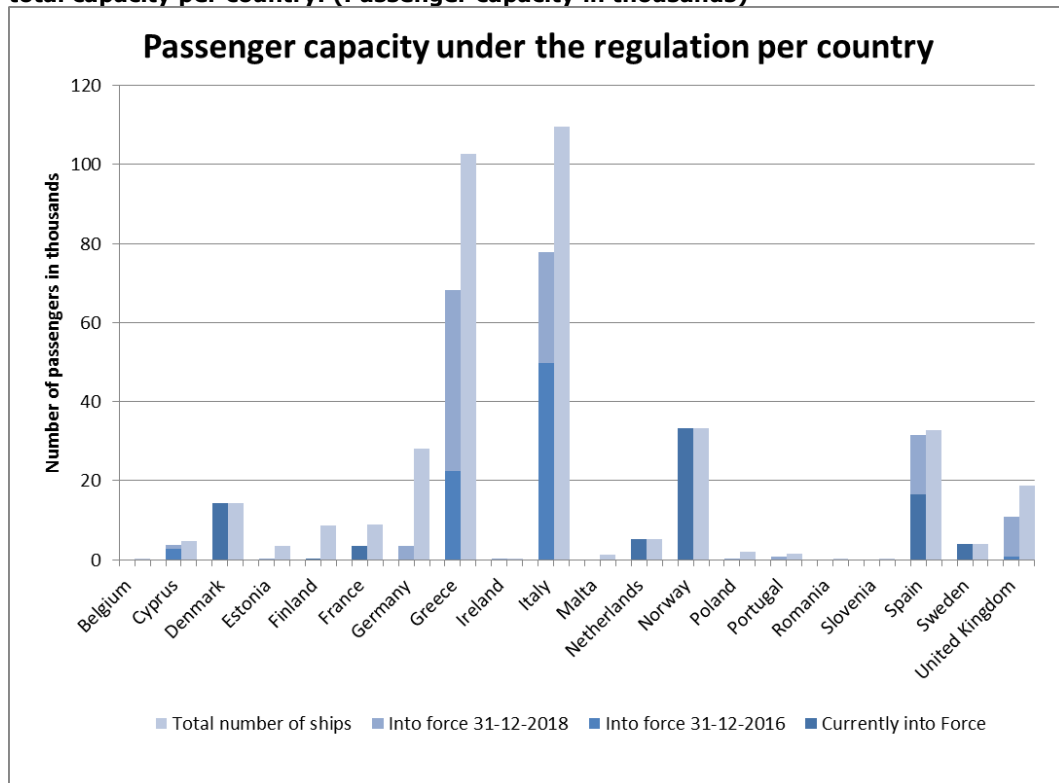


Figure 4.9 Comparison of the passenger capacity under the regulation with the total capacity per country. (Passenger capacity in thousands)



4.6.2 Incident analysis

This section focuses on the analysis of the EMSA EMCIP database incident information. The aim of this database is to record the accidents occurring in the EU, as collected at a national level, which includes the total number of incidents falling under the scope of the Regulation from 2013 to 2015. The EMCIP database does not contain information on claims or compensations that are pertinent for the Regulation since this data is confidential and not collected at an EU or national level. In order to obtain such information, an inquiry to the relevant stakeholders (e.g. insurers, ship owners, passengers) is necessary. Thus the purpose of this exercise was to identify potentially relevant incidents for the case studies for which this more specific analysis can be made.

The findings of the incident analysis are summarised further below. As demonstrated in Table 3.8, during the complete period of the Regulation's application there have been 443 incidents in total, which include 372 occupational accidents and 71 casualties with ships. The vast majority of incidents constitute occupational incidents resulting in injuries of less serious nature which occurred in the accommodation area of the ship. In most cases, such events are falls of passengers from escalators, stairs or other areas of the ship. Due to the fact that these incidents do not amount to "very serious marine casualties", it is highly unlikely that an investigation has been initiated and consequently that a report has been issued. Furthermore, it should be emphasised at this point that the distinction between occupational accidents and casualties with ships does not coincide with the exact categories of "shipping" and "non-shipping" incidents as defined by the Athens Convention. More specifically, a casualty with a ship indicates an event which affected the ship itself, and possibly a passenger as well. On the other hand, an occupational accident reflects an event which did not affect the ship at all. Therefore, although it appears that these categories could encompass the distinction of shipping and non-shipping incidents, the analysis of the cases found below illustrates that this is not the case in many instances.

Table 4.10 Incidents reported in EMSA database

Type of incident	Count of reported incidents
Casualty with a ship	71
Less Serious	44
Marine incident	2
Serious	18
Very serious	7
Occupational accident	372
Less Serious	300
Marine incident	7
Serious	58
Very serious	7
Grand Total	443

Source: EMSA Directive 2009/18/EC.

Table 4.11 Total lives lost and injured passengers

	Sum of Lives lost Passenger Total	Sum of People injured Passenger Total
Casualty with a ship	19	173
Occupational accident	7	371
Grand Total	26	544

Source: EMSA Directive 2009/18/EC.

In the Skagastøl case, the fall of a passenger down the staircase resulted in extensive head injuries and ultimately his death. In view of the severity of his injuries, the Norwegian Authority undertook the responsibility to conduct an investigation. It was thus found that the stairs were so designed that they could entail a risk of falling. Specifically, as set out in the English summary of the official report "the angle of the stairs was steep, the first step down was placed 35 cm in past the edge of the wheelhouse deck, and the railing on the starboard side did not extend all the way to the last step. (...) The drawings, which were approved by the Norwegian Maritime Authority, show that the plan was that the railing would extend down the full length of the stairs on both sides. However, the railing was not built in accordance with the drawings. The Norwegian Maritime Authority did not discover this during inspection. The investigation has shown that the shipping company's safety management system and mapping of risks had not identified falling on the stairs as a risk factor on board 'Skagastøl'. Since the accident, the shipping company has extended the railing beside the stairs on this ferry and another ferry with a corresponding design. The shipping company has further emphasised passenger safety and fall injuries in its safety management system. The Norwegian Maritime Authority has also defined fall injuries as a focus area in its risk-based inspections".

According to the IMO Casualty Investigation Code, an Investigation Authority should be established, which is responsible for the issuance of such reports in the event of an accident involving a ship. The States bear such responsibility in case of very serious marine casualties. Such an instance is further defined as a marine casualty involving the "total loss of a ship, the death of a person or severe damage to the environment". For the rest of the occasions, Chapter 17 specifies that a marine safety investigation should be conducted into casualties or incidents which do not amount to "very serious marine casualties" in case it is considered likely that this would provide information which is useful for the prevention of other incidents. With respect to the scope of these reports, it is worth noting that the goal of the investigation is to identify not only the immediate causal factors but also the failures which were present in the whole chain of responsibility. Having noted this, these reports do not have a legal focus as mentioned. In accordance with the above, Directive 2009/18/EC clearly states in Article 1 that the purpose of these rules is to improve safety and prevent casualties. The same provision further denotes that investigations under said Directive shall not be concerned with determining liability or apportioning blame. Thus, despite the fact that the reports offer valuable insight with respect to the causes of accidents, relying solely on these reports regarding the issues of fault, negligence, the distinction of shipping and non-shipping incidents and in general the liability of the carrier, would not lead to safe conclusions.

In light of the analysis above, it is considered that there is insufficient information in order to conclude whether a particular event is one amounting to a shipping incident or a non-shipping incident. As a result, essential information is lacking in order to assess whether passengers have been compensated sufficiently in the event of an accident. As explained above, the investigation report mechanism followed by the Member States does not touch upon the question whether an event is shipping or a non-shipping one. This may be explained in view of the fact that the focus of the investigations is not set to serve judicial purposes. Other than the investigation reports issued by the competent Authorities, Member States submit the information related to all incidents (including the aforementioned reports) to the European Marine Casualty Information Platform (EMCIP database). The EMSA spreadsheet, which relies on that data, refers to the grouping of incidents into occupational accidents and casualties with ships, which cannot be relied upon for the purpose of identifying the shipping incidents. Thus, based on the data shared by EMSA and the investigation reports, it was not possible to identify the instances involving a reversed burden of proof and consequently investigate whether carriers comply with their obligations under the Regulation outside of courtrooms.

Another consideration is whether a particular effect of the ship amounts to a ship defect, as this was defined above. In terms of evaluating the provisions of the Athens Convention it has been voiced by some experts that the definition of "ship defect" contains uncertainty. According to the 2002 Protocol to the Athens Convention, a ship defect is defined as follows: "defect in the ship means any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances". By way of example, in a specific incident case, a toilet door swung shut due to the movement of the vessel and caught the fingers of a passenger who was assisting a minor in the bathroom amputating them. It may be argued that the door securing mechanism was faulty or that the absence of such mechanism amounts to a defect of the ship. It is not clear however if this event would fall under the scope of the definition of 'defect' set out above. Considering the important consequences of this categorisation, as well, as the fact that passengers who suffered injuries as a result of a shipping incident are subject to higher limits of compensation and a reversed burden of proof, such uncertainty could endanger the level of protection offered by the Regulation.

In the Skagastol case on the other hand, it is likely that the staircase qualifies as a part of the ship used for the embarkation of passengers, and thus to a ship defect. Nevertheless, the distinction between occupational accidents and casualties with ships is based on the question of whether the event under consideration has also affected the ship itself, other than possibly a

passenger⁴³. Therefore, the question that inevitably arises is the following: In a case where the ship or parts of the ship cause the injury or death of a passenger, is it to be considered as an event that affected the ship? Or does such an event still qualify only as an occupational accident? Notably, this incident has been reported to EMSA as an occupational accident, which denotes the fact that the shipping incident category and the casualty with a ship category do not coincide.

⁴³ According to the definition provided by EMSA in the 2015 Annual Overview of Marine Casualties and Incidents (<file:///C:/Users/ioannis.giannelos/Downloads/Annual%20Overview%20of%20Marine%20Casualties%20and%20Incidents%202015.pdf>)

5 Relevance

This section presents the conclusions of the analysis related to the defined relevance evaluation questions, based on the results of desk research, interviews, stakeholder survey and case studies. Each evaluation question is scored on its underlying evaluation criterion.

5.1 Q-1: Needs still relevant today

Q1: To what extent are objectives of this initiative still relevant today?

This question is broken down in two sub-questions:

1. Are objectives and underlying problems and drivers still relevant and appropriate?
2. This sub-question considers (i) whether needs, on which the Regulation and its objectives are based, still correspond to the needs of today's society; and (ii) to what extent objectives have proven to be appropriate for the intervention?
3. To what extent has the environment changed (technological, legal, policy) and if so, is there a need to adapt the Regulation to the changing environment?

5.1.1 *Are objectives and underlying problems and drivers still relevant and appropriate*

The Liability Regulation entered into force on 31 December 2012. The short implementation period⁴⁴ contributes to a general perception amongst stakeholders that the needs, on which the Liability Regulation is based, still correspond to the needs of today's society. This is, for example, reflected by the Maritime Coast Agency (UK), stating that the Liability Regulation brings reassurance as a result of having legislation in place that ensures that if a shipping incident occurs, the matter is properly dealt with. This is further reinforced by a Dutch Transport Law Association representative noting that the Liability Regulation is useful legislation increasing the international uniformity in the sector, as well as a specialist P&I and Marine Liabilities insurance provider stating that all objectives of the Liability Regulation are relevant. Moreover, more than half of the 13 respondents to the relevant OPC question stated they considered the objectives of the Regulation to be fully in line with the needs of the maritime industry and passengers, while the rest stated they are mostly or partially in line.

Regarding the main problems defined, and its underlying problem drivers, the following can be remarked based on feedback from stakeholders:

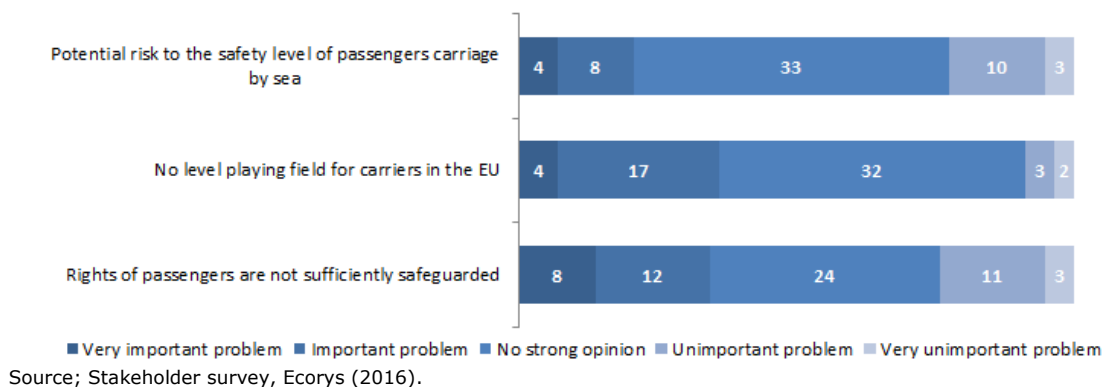
- *Rights of passengers are not sufficiently safeguarded.* This problem is indeed still relevant as even with the Liability Regulation in place, there continue to be issues on the specific implementation of the Regulation.

⁴⁴ According to the ToR, our evaluation period considers the period until 31 December 2015, thus 3 years.

For example, the proper provision of information on passenger rights in the case of the Norman Atlantic is a point of debate. As an illustration, a Norman Atlantic passenger and lawyers assisting passengers stated that no information on passengers' rights was provided. In addition, in the Sorrento case, no advance payments were granted in connection with the shipping incident. The Norman Atlantic case also illustrates that advance payments in Italy are complicated by legal uncertainties concerning the identification of the relatives of the deceased passengers entitled to such payments. This because the provisions on advance payments do not specify who the entitled relatives are. In a recent case, an Italian judge ruled that all relatives are entitled to an advance payment⁴⁵. The relevance of level and timing of compensation in general is broadly recognised;

- *No level playing field for carriers in the EU.* This problem is still relevant as well. As an illustration, a large tour operator mentions that before the Liability Regulation victims from poorer regions and countries were likely to be offered a smaller compensation and would be prompt to settle with that. Through the Liability Regulation a proper and harmonised level of compensation for passengers involved in maritime accidents is guaranteed.;
- *Potential risks to the safety level of passenger carriage by sea.* This problem is mostly not recognised as a direct problem related to the Liability Regulation. Instead, the Liability Regulation is considered to (at best) indirectly affect the safety level of passengers, as described in Section 4 on effectiveness.
- In general, the first two main problems (passenger rights and level playing field) are seen as fully relevant. To a lesser extent this applies to safety level of passengers. This is confirmed by responses from the stakeholder survey, as illustrated in Figure 5.1⁴⁶.

Figure 5.1 Survey outcome for needs still corresponding to today's society



- When zooming in on the responses from the various stakeholder groups the following conclusions can be drawn:
- On passenger rights: the Member States, notably through their policy making authorities found this to be an important or very important problem. Out of the group that considered this problem to be very

⁴⁵ Minutes from confidential interview.

⁴⁶ Respondents combined scores on important problem and very important problem is higher than the combined scores for unimportant problem and very unimportant problem for "passenger rights" and "level playing field", while being about equal for "safety level of passengers".

important, 75% is policy making authorities. Passenger representatives (2 out of 3) and ship owners (5 out of 9) indicated to have no strong opinion on the matter.

- On level playing field: notably the policy making authorities considered level playing field to be a very important problem (from the 4 very important responses, 3 came from policy making authorities). This in contrast to the inspectorate authorities, from which none scored this as very important. Groups that scored level playing field important are policy making authorities (33%), ship owners (30%) and notably insurers (50%).
- On safety level: the “no strong opinion” response is dominant. Responses in the categories “important” and “unimportant” are spread quite evenly over the stakeholders groups.
- The survey also provides insight into how the underlying problem drivers are perceived by stakeholders:
- The problem drivers for the problem of “*passenger rights*” are almost all scored as important or very important contributors, with the following combined scores of important and very important contributors:
 - Passengers not being aware of their rights: 73%;
 - Long time for receiving compensation: 66%;
 - Insufficient compensation: 66%;
 - Lack of legal certainty of victims and carriers: 68%;
 - Carriers are not liable for loss of mobility equipment of PRMs: 37% (which is ranked considerably lower than the other factors).
- The problem drivers for the problem of “*no level playing field*” are also almost all scored as important or very important contributors, with the following combined scores of important and very important contributors:
 - Right for compensation (standards) differ in EU Member States: 61%;
 - Lack of legal certainty for passengers and carriers: 70%;
 - Unlimited liability for carriers *(including terrorism risks) cannot be combined with mandatory insurance: 66%.

5.1.2 To what extent has the environment changed and is there a need to adapt the Regulation accordingly?

Since the implementation period of the Liability Regulation is short, as established above, the time factor again strongly affects this sub-question. No major changes have taken place with the exception of the entry into force of the Athens Protocol⁴⁷. Notwithstanding the Athens Protocol, all stakeholders consulted made it clear that there have been no changes of technical, legal or policy nature that have resulted in the need to adapt the Regulation. Examples of stakeholders that have confirmed this include national administrations, such as the Danish Ministry of Transport and the French Ministry of Environment, and market parties, such as ship operators and

⁴⁷ This convention entered into force on 23 April 2014.

insurance providers. The stakeholder survey confirms this pattern as the vast majority, i.e. 94.3% of the respondents, indicates that there have been no developments at a political, legal or technical level since the introduction of the Liability Regulation which have affected the implementation of the Regulation.

5.1.3 Conclusion response to the evaluation question

No major developments at a political, legal or technical level affecting the implementation of the Regulation have taken place since the introduction of the Liability Regulation. The entry into force of the Athens Protocol has been a milestone, however, stakeholders do not see this as a reason for adapting the Liability Regulation. The fact that the Liability Regulation is relatively “young”, with an implementation timespan of less than four years⁴⁸ is obviously a strong contributing factor in this. The short timespan since implementation may also explain the fact that the needs on which the Liability Regulation is based correspond to the needs of today’s society. The latter applies especially to the problems of “rights of passengers”; and “no level playing field”; and to a lesser extent to “safety level of passengers.

5.2 Q-2: Scope of application of the Regulation

Q2: To what extent is the current scope of application of the Regulation (i.e. international, classes A and B of domestic carriage) adequate for the attainment of the objectives?

This question is broken down into two sub-questions⁴⁹:

1. Is the current scope of international and Class A and B adequate for attaining the objectives of the Regulation?
2. Should the scope of the Regulation be extended to Class C and D in order to better attain the objectives of the Regulation?

Classification of domestic passenger ships

Before addressing these two sub-questions the classification of domestic passenger ships is addressed. This classification of domestic passenger ships, i.e. the Classes A, B, C and D, are defined in the *Directive on safety rules and standards for passenger ships*⁵⁰. The ship classes are based on the place of

⁴⁸ Entry into force: 31 December 2012.

⁴⁹ The two sub-questions are close related. The perceived insufficient adequacy is mainly linked to the extension of the scope to Class C and D ships. The discussion on extending the scope to Class C and D is mainly dealt with in the second sub-question.

⁵⁰ As defined in Article 4 of Directive 98/18/EC:

- Class A' means a passenger ship engaged on domestic voyages other than voyages covered by Classes B, C and D.'Class B' means a passenger ship engaged on domestic voyages in the course of which it is at no time more than 20 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height;
- 'Class C' means a passenger ship engaged on domestic voyages in sea areas where the probability of exceeding 2,5 m significant wave height is smaller than 10 % over a one-year period for all-year-round operation, or over a specific restricted period of the year for operation exclusively in such period (e.g. summer period operation), in the course of which it is at no time more than 15 miles from a place of refuge, nor more than 5 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height;
- 'Class D' means a passenger ship engaged on domestic voyages in sea areas where the probability of exceeding 1,5 m significant wave height is smaller than 10 % over a one-year period for all-year-round operation, or over a specific restricted period of the year for operation exclusively in such period (e.g. summer period operation), in the

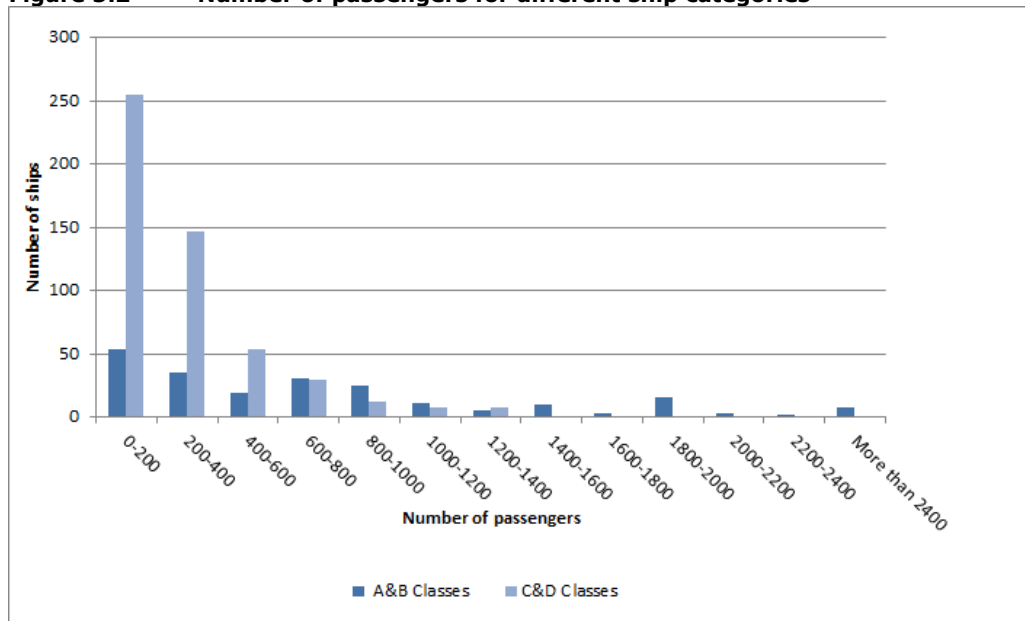
operation of a ship, notably related to distance to shore and wave height. An overview per Member State of the application of the Liability Regulation to these ship classes is included in Table 4.7.

Regarding the ship classification, the following remarks can be made:

- The classification is not always clear to those who need to work with the Regulation. For example, a Dutch ferry operator indicated to find it difficult in what category to place its ships;
- The classification is not linked directly to a liability regime for passenger ships or (level of) mandatory insurance obligation. Nor can the classification be directly linked to the stated objectives of the Regulation (apart from safety level of passengers).

The ship size and the number of passengers carried are related to the above-mentioned classification. Figure 5.2 presents an overview of number of ships per passenger volumes classes (0-200; 200-400, etc.). Although it is evident that Class A and B ships are the larger ships and Class C and D are the smaller ships, it can also be noted that Class A and B ships can also be found in the lower passenger volume classes and that in the volume classes 800-1,400 passengers there is a substantial overlap between the classes of domestic passenger ships.

Figure 5.2 Number of passengers for different ship categories



Source: EC Domestic Vessel database (Directive 2009/45).

Notwithstanding the above-mentioned overlap, a common perception is that the current scope, i.e. international and Class A and B domestic passenger ships are the larger, high volume passenger ships. The Class C and D ships are the smaller, low volume passenger ships. This size-based perception is applied in the response to the two sub-questions below, together with the factual difference in reach of operations, i.e. international and long-distance domestic versus more local operations. These factors result in the description of the two categories, as presented in Table 5.1.

course of which it is at no time more than 6 miles from a place of refuge, nor more than 3 miles from the line of coast, where shipwrecked persons can land, corresponding to the medium tide height.

Table 5.1 Perceived characteristics of ship categories

Ship categories	Size and pax	Operations
Current scope: international and Class A-B	Large, high volume pax	International, domestic long-distance
Possible extended scope: Class C-D	Small, low volume pax	Local, short distance

Source: Ecorys.

As indicated in Section 3.5, a number of ship categories are not explicitly included in the Liability Regulation. This includes High Speed Craft (HSC) and Dynamically Supported Craft (DSC). This also applies to non-steel ships, such as aluminium, wooden and composite materials ships. Member States make their own choices in applying the Liability Regulation to these ship categories, affecting the scope of the Regulation. The majority of respondents of the survey questionnaire (64%) indicates that the Regulation applied to High Speed Crafts (HSCs) calling in ports in their country, whereas 59% of respondents indicate that the Regulation applied to High Speed Crafts (HSCs) flying the flag in their country.

5.2.1 Adequacy of current scope of international and Class A and B for attaining the objectives of the Regulation

Broad consensus exists amongst Member States on the current scope of the Liability Regulation and its ability to obtain the objectives of the Regulation. Member States declare that coverage of international and Class A and B domestic ships is appropriate, at least as a minimal level (a “no regret” level).

All Member States that were directly consulted underline the fact that international and Class A and B ships are to be included. Some Member States, such as the United Kingdom, do not foresee any problems with the (upcoming) application of the Regulation, as most ship-owners are aware of upcoming changes and the Maritime Coast Agency (MCA) provides support through guidance notes. In addition, the step from existing practice for international and Class A and B domestic ships is relatively small. For example, limits to liability in the United Kingdom based on national law are already at a comparable level to the provisions of the Liability Regulation (see Table 4.8). In other Member States, applying the Liability Regulation requires a more substantial change in relation to the existing situation. For example, in Poland the legal system was based on the Athens Convention with much lower limits to liability.

Whereas there is consensus on the current scope, Member States differ in the extent to which they see the current scope as sufficient or whether the scope should be expanded to Class C and D domestic ships. The latter is elaborated in the second sub-question below.

Related to the objectives of the Liability Regulation the following can be remarked:

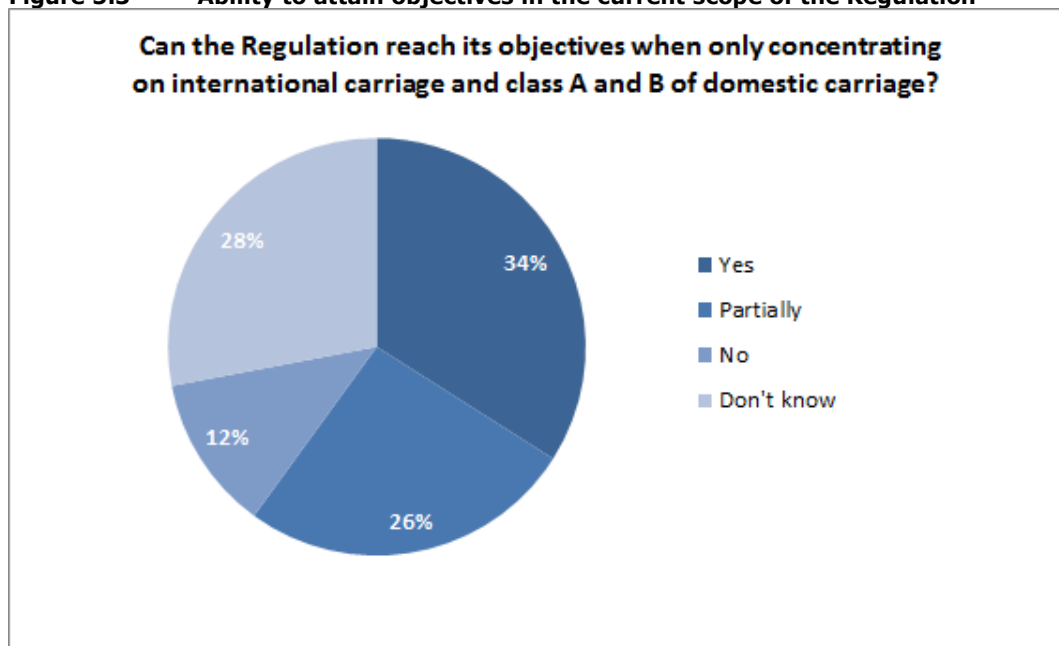
- It is notably the passenger rights objective that is used as an argument for going beyond the current scope and expanding the scope of the Liability Regulation to Class C and D ships. The reasoning is that

passengers on smaller ships should be granted the same level of protection as passenger on larger ships;

- From a level playing field point of view, it is probable that international and Class A and B domestic ships would have passengers from different countries, in which case the risk of discrepancies in dealing with accidents would be greatest. Based on this, the current scope of the Liability Regulation would be sufficient to deal with cases that created inequalities in the past;
- A comparison between Member States that have applied the Regulation on (i) Class A and B ships, as from 31 December 2012, and (ii) Member States that have made use of the transitional provisions, as defined in Article 11 of the Regulation⁵¹, has not been feasible as the time period is too short and the number of accidents is too limited.

The consensus regarding the current scope of the Liability Regulation and its ability to obtain the objectives of the Regulation is partly confirmed by the stakeholder survey. From the 50 respondents, 34% indicates that the Liability Regulation can reach its objectives in its current scope; while 12% states that this is not the case, with the remaining respondents scoring partially true (26%) and don't know (28%). The fact that for each three respondents that think the Regulation with the current scope can obtain its objectives, there is one respondent that thinks this is not the case, fits at least partially in with the described general consensus. The relatively high score on partially true is an indication that a scope extension to Class C and D ships is needed, as elaborated in the next section.

Figure 5.3 Ability to attain objectives in the current scope of the Regulation



Source; Stakeholder survey, Ecorys (2016).

⁵¹ See Table 3.5 on the extent to which the Liability Regulation has been applied to the international and Class A,B,C and D ships in time.

5.2.2 Should the scope of the Regulation be extended to classes C and D in order to better attain the objectives of the Regulation?

On the question of extension of the Regulation to Class C and D ships two principally opposing views can be registered. The main argument in favour of expanding the Liability Regulation's scope is based on the principle that the protection of the passenger should not depend on where the vessel operates, nor the size or the material of the vessel. The argument not to expand the scope of the Regulation is often triggered by not wanting to increase the financial burden on the Class C and D ship operators, by having to meet provisions of the Regulation, such as war risks, potentially resulting in insurance difficulties. This section first concentrates on the argument(s) for expanding the scope, notably by focusing on Member States that have chosen to do so (Denmark, the Netherlands and Sweden). Subsequently, reasons for not expanding are presented, followed by an elaboration of the trade-off between the two opposing arguments.

Factors supporting expanding the scope to Class C and D ships

The principle argument for expanding the scope of the Liability Regulation to Class C and D ships is based on the principle that the protection of the passengers should neither depend on the place of operation of the passenger ship nor on the size of the material of the ship. Additional arguments are found in reducing complexity of the system (by avoiding two parallel systems for Class A and B ships on the one hand and Class C and D ships on the other hand).

The passenger protection argument is clearly reflected in Danish policy. Regarding the implementation of the Liability Regulation, the Danish Ministry of Transport identifies three main ship categories:

- International carriage and domestic Class A and B ships;
- Domestic Class C and D ships;
- Other ships used to carry passengers (also with less than 12 passengers)⁵².

It should be noted that Denmark has a lot of sea transport and a relatively high number of small ferry lines (159 registered Class C and D ships). This amount exceeds by far the international carriage and Class A and B ships (30 registered Class A and B ships). For the first category (Class A and B ships), the Liability Regulation applies fully. The Liability Regulation is also applied to the second and third category; however, not all provisions from the Liability Regulation are maintained (see below in section on trade-off). The prevailing argument for this broad application is the protection of the passenger (irrespective of type of passenger ship). This argument is also stated by other Member States, for example by Sweden and France.

⁵² See Order no. 9 of 10 January 2013 issued by the Danish Maritime Authority. The reason for included this last category within the scope of Danish law is that many boating activities take place which can lead to serious injuries, but where covered by the then applying legislation. A direct cause of introducing for smaller ships was an incident with a dragon boat where several children fell from the boat and were injured. At the time of the incident, only general liability legislation applied (in which the burden of proof was placed on the victims).

The Netherlands follow a pragmatic approach in extending the scope of the Liability Regulation to Class C and D ships. A common approach is applied for all sea-going ships, including Class C and D ships. An underlying argument is that passenger ship operators will be faced with similar requirements, avoiding unfair competition and market distortion. It should be noted that in the Netherlands ships (although sea-going) operating on the Waddensee are qualified as inland ships and therefore fall outside the scope of the Liability Regulation. In France, it is noted that the distinction between Class A and B ships on the one hand and Class C and D ships on the other hand, increases the complexity of the framework governing the liability of carriers.

Factors supporting not expanding the scope to Class C and D ships

The overriding argument for not expanding the scope of the Liability Regulation to Class C and D ships is the burden on the sector, notably related to the insurability of Class C and D ships.

France, for example, indicates that an extension of the Regulation to Class C and D ships would raise administrative and financial burden and possible insurance problems for smaller ships, especially related to insuring war and terrorism risks. The Department of Transport of the United Kingdom indicates that there is no intention to apply the Regulation to Class C and D ships⁵³. For these ships it will be problematic to obtain all the cover needed for war-risk. MCA adds that applying the Regulation to Class C and D ships will create an additional financial burden for these ships. It should be noted that for the Class C and D ships insurance is already in place; namely the 300,000 SDR⁵⁴ or 46,666 SDR, depending on the carrier's principle place of business⁵⁵;

The trade-off: balancing passenger rights and burden on the sector

In practice, Member States often search for a compromise in which above-mentioned drivers are combined and balanced. A compromise can be found by following different routings:

- By extending the scope to Class C and D ships in combination with excluding the application of some provisions of the Liability Regulation to Class C and D ships. The clear example is Denmark, which has chosen this route to protect passengers irrespective of the place of operation of the passenger ship or the size of the material of the ship.

⁵³ As an indication of the fleet composition in the United Kingdom, out of the fleet of 275 passenger vessels (as per 1 September 2011), 46 vessels (17%) were international passenger vessels; 63 vessels (23%) were domestic Class A and B ships; and 166 vessels (60%) were domestic Class C and D ships.

⁵⁴ The SDR (Special Drawing Rights) is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves (<http://www.imf.org/external/np/exr/facts/sdr.htm>). 1 SDR= 1,2477 EUR, per 23 September 2016 (<http://nl.investing.com/currencies/eur-sdr-converter>)

⁵⁵ Before the introduction of Regulation 392/2009, the UK already was party to the Athens Convention 1974. The UK had the intention to ratify the Athens Protocol 2002 (which they have done now); however, before they ratified the Athens Protocol the Regulation came into force which caused some problems. Especially related to different limitations schemes being in place:

- Sea-going ships providing UK international services Limit of 300,000 SDR based on domestic legislation which incorporates Convention on Limitation of Liability for Maritime Claims (LLMC);
- Non-EU ships providing international services Limit of 46,666 SDR based on Athens Convention;
- Sea-going ships providing UK domestic services (for carriers whose principal place of business is in the UK) Limit of 300,000 SDR based on domestic legislation which incorporates LLMC;
- Sea-going ships providing UK domestic services (for carriers whose principle place of business is outside UK) Limit of 46,666 SDR based on Athens Convention;
- Non-sea going ships providing UK domestic services on inland waterways limit of 175,000 SDR based on LLMC.

- By-non-extending the scope to Class C and D ships in combination with applying national legislation to Class C and D ships, resulting in (some level of) protection of passenger. Such is the case for the UK and Germany which have opted not to extend the scope of the Liability Regulation in order to avoid additional burden on the sector, i.e. the Class C and D ships.

As illustrated above, in Denmark this trade-off via the route of extension is well illustrated. The scope has been extended, however, not all provisions of the Liability Regulation apply to Class C and D ships and the other ships used to carry passengers (see categorisation mentioned above). Provisions not applied include handicapped equipment, advanced payment, war-risk coverage. For these two ship categories, legislation is aligned with the IMO Regulation. Furthermore, for the two mentioned ship categories the authorities are not required to issue a certificate, as is required for Class A and B ships. For Class C and D ships and other vessels, Danish law only requires that they have obtained insurance and that proof of insurance is available on board the ship. The above-mentioned adjustments were made in order to lighten the burden for smaller ship operators, while ensuring passenger protection. The special provisions for Class C and ships and other passenger ships aim to tackle the difficulty of smaller operators to get extra P&I coverage for smaller ships. Thus, applying only the Athens Convention and IMO Conventions provisions standardises the insurance requirements, rendering no need for new insurance products. It should be noted that no significant difficulties were encountered in the implementation of the Regulation for Class C and D ships. Only very few reactions were derived from local communities/operators, mainly on their capacity to insure their local operations. To accommodate this process, a minor extension of the implementation period was granted, allowing for a relevant insurance product to become available. Other Member States follow a similar approach in which the burden for smaller ship operators is relieved. For example, in Sweden war-risk is not applied to smaller ships.

A clear example of the routing via non-extension is Germany. Germany does not apply the Liability Regulation to Class C and D ships; however, German national law (German Commercial Code) applies to Class C and D ships, which provides for almost the same rules as the Athens Regulation. Three main areas are identified where differences appear:

- The rights of passengers with reduced mobility are less generous under German law;
- The right to have a direct claim against the insurer does not exist under national law;
- The right to have an advance payment is not a part of the German passenger protection regime.

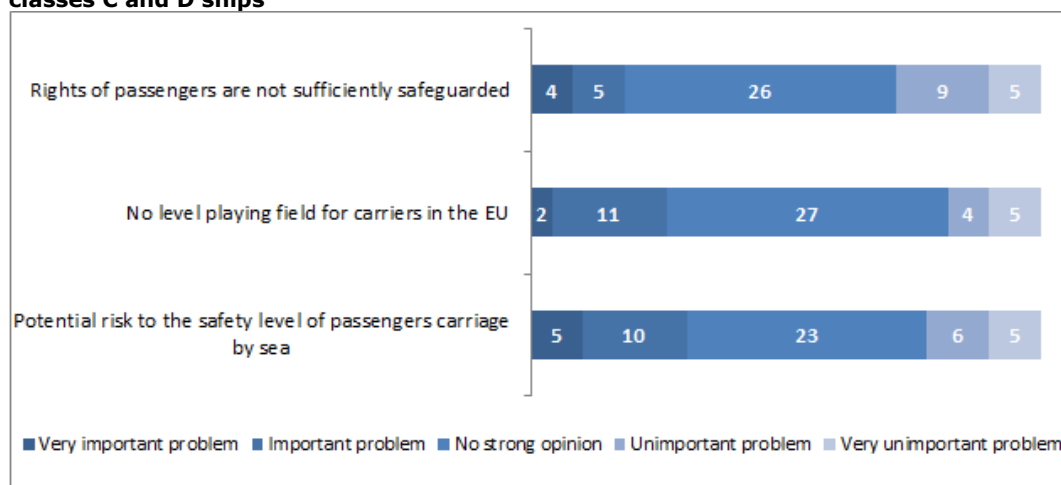
Based on the above, it can be argued that Member States in their effort to design an adequate liability system for the Class C and D ships are driven by the dual ambition of (i) protecting passengers, irrespective of the type of ship used, and (ii) protecting the sector by avoiding (too) high financial and administrative burden. The routing towards a compromise solution may lead via extending the scope, while exempting the sector from some of the

provisions that would result in substantial burden to the sector (as applied in Denmark and Sweden). An alternative routing may be through not expanding the scope to Class C and D ships, but applying national legislation to these ships, often based on the Athens Convention, providing passengers protection (most other Member States, see example Germany). Depending on applicable national legislation, these two routings may result in situations that are rather similar in terms of passenger rights and burden to the sector.

Different approaches towards extending the Liability Regulation towards Class C and D ships are to some extent also reflected by responses from stakeholders to the survey questionnaire. When asked about the relevance of the defined problems (passenger rights, level playing field, safety of passengers) for Class C and D ships, the majority of respondents have no strong opinion (passenger rights: 53%; level playing field: 55%; and safety of passengers: 47%), as presented in Figure 5.4. When combining the score of important and very important vs. unimportant and very unimportant, the following pattern can be seen:

- Safety of passengers: combined important (30%) outscored combined unimportant (22%);
- Level playing field: combined important (26%) outscored combined unimportant (18%);
- Passenger rights: combined unimportant (28%) outscored combined important (18%).

Figure 5.4 Survey outcome for the importance of the stated problems in relation to classes C and D ships



Source, Ecorys, survey (2016).

5.2.3 Conclusion response to the evaluation question

There is broad consensus on the application of the Liability Regulation on international and domestic Class A and B ships. The inclusion of these ships contributes to attaining the Regulation's objectives, as supported by the stakeholder survey. Extending the scope of the Regulation to domestic Class C and D ships is perceived differently per Member State, resulting in the majority of the Member States not having opted for extension to Class C and D ships so far.

Stakeholder views, as presented in the stakeholder survey, are split regarding the importance of the stated problems in relation to Class C and D ships. While the majority of stakeholders have no strong opinion, passenger rights are considered a relatively unimportant problem for Class C and D vessels, whereas safety of passengers and level playing field are considered relatively important problems for Class C and D ships.

In the decision to extend the scope of the Regulation to Class C and D ships, different and sometimes opposing aspects considered by Member States. One aspect is the rights of passengers, which need to be protected, irrespective of the size or material of the vessel or the area of operations. An additional aspect is that having two systems for passenger ships can result in complexity, unfair competition and market distortion. At the same time, an important factor is the ability of the sector, notably the smaller operators, to comply with the provisions of the Liability Regulation, specifically related to the insurability of Class C and D ships.

Member States have developed their own systems at national level in which the above-mentioned aspects are balanced. Member States that have made the Regulation applicable to Class C and D ships have often created measures to reduce the burden on the sector, notably by creating exemptions to adopt certain provisions of the Regulation, as in the case of Denmark. This approach works well in these Member States. Member States that have not extended the scope to Class C and D ships have often included means of protecting passengers' rights for Class C and D ships in their national legislation. For example, in Germany, the German Commercial Code applies to Class C and D ships, which is based on the Athens Convention. Although the passenger may not be protected at the level of the Regulation, the practical situation may be quite similar to the situation in Denmark. For Member States that have not extended the application of the Regulation to Class C and D ships, local solutions are created on a country by country basis, which are reflected in national legislation.

In conclusion, extending the scope to Class C and D ships is a trade-off between sometimes opposing aspects and thus a political decision. The evaluation, including through its stakeholder consultation, does not provide the results to take this political decision. Mitigating measures can be defined to compensate for risks related to the choice for a system. In case of extension, some provisions from the Liability Regulation may be softened, reducing the burden on the sector. In case of non-extension, provisions may be created in national law, contributing to passenger protection. From a passengers' rights perspective, expanding the scope to Class C and D ships provides more safeguards.

5.3 Conclusion on relevance

The two evaluation questions on relevance combined indicate the overall relevance of the Liability Regulation. The Regulation scores especially high on the first evaluation question on the needs being still relevant in today's society. As concluded above, the fact that the Liability Regulation is still relatively young strongly contributes to this.

On the second evaluation question, regarding the scope of the Liability Regulation being adequate for attaining the Regulation's objectives, there is broad consensus on the application of the Regulation to international and domestic Class A and B ships. Regarding expanding the scope to domestic Class C and D ships, stakeholder opinions are split, with a slight advantage for the view that this segment faces the same problems as the larger vessels. On the issue of extending the scope of the Regulation, Member States take different positions, as indicated above. A limited number of Member States (Denmark, Sweden, and the Netherlands) have chosen to extend the scope of the Regulation, mainly based on the argument that a passenger should be protected irrespective of the location of operation, size and material of a ship. Often mitigating measures are taken to reduce the burden on the sector. Other Member States have not extended the scope, often because financial burden on the sector. In these Member States, sometimes specific national legislation is in place to protect the passenger, as reflected in the German case. The level of passenger protection differs per Member State. Although passenger protection can be at reasonable levels, the level of passenger protection is in general less secured than under the Liability Regulation.

6 Effectiveness

This section presents the conclusions of the analysis related to the defined effectiveness evaluation questions. For each question, the main indicators, as identified in the Evaluation Framework (see Annex I) are discussed based on the results of desk research, interviews, stakeholder survey and case studies. Then, for each evaluation question a short conclusion is provided.

6.1 Q-3: Meeting Regulation objectives

Q3: To what extent have the objectives of the Regulation been achieved?

In order to better address this evaluation question, it is relevant to distinguish the four specific Regulation objectives and assess the effectiveness in achieving each one of them separately. Namely, to what extent have the following objectives been fulfilled following the adoption of the Liability Regulation:

1. Are passenger rights better protected in the event of an accident?
2. Has a level playing field for sea passenger carriers been created?
3. Have passenger transport operators been incentivised to improve their safety and security performance?
4. Has a balanced framework of passenger rights protection been established and complemented?

More specifically, the following sections assess how these general level objectives are pursued, including the achievement of the specific objectives, as given in the evaluation roadmap. These, as well as the operational objectives, are implicitly addressed in the following sections under the relevant general objectives:

1. Ensure same level of passenger rights regardless of the area of operation⁵⁶
2. Ensure adequate protection of passengers in case of accidents⁵⁷
3. Ensure market ability to accommodate reinforced passenger rights⁵⁸

And in more detail with the achievement of the operational objectives:

1. Provide a common minimum framework for compensation rights and standards
2. Ensure the proportionality of requirements⁵⁹
3. Ensure carriers can obtain affordable insurance cover⁶⁰

6.1.1 Are passenger rights better protected in the event of an accident?

When asked about the capacity of the Liability Regulation to improve the protection of passenger rights in the event of an accident, nearly two thirds of

⁵⁶ See section 5.2 on the scope of application of the Regulation to international and domestic carriage.

⁵⁷ See section 5.1.1 on the provision and timing of compensations and advanced payments and section 5.1.4 on the protection of luggage, vehicles, mobility equipment and the right to information.

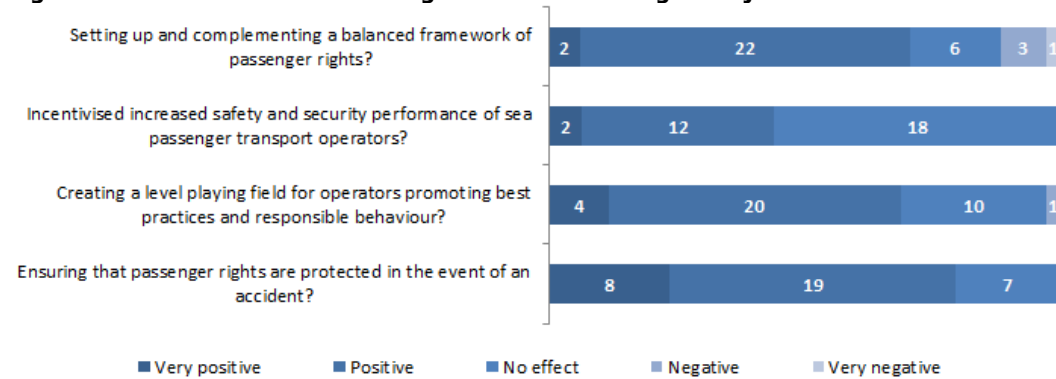
⁵⁸ See section 5.1.2 on the impact on insurance premiums.

⁵⁹ See section 5.1.4 on the comparison with aviation.

⁶⁰ See section 5.1.2 on the impact on insurability of vessels.

the stakeholders that participated in the survey have indicated that the impact of the Regulation has been either positive (44%) or very positive (19%) while the rest indicated either an absence of impact or a knowledge over the issue. (see Figure 6.1). Among the respondents, ministries and ship owners are the most positive groups supporting that the Regulation had a positive or very positive effect in this aspect by 73% and 72%. Additionally 10 out of 13 OPC respondents stated that the Regulation was fairly or absolutely contributing to an improved protection of passenger rights. This is in line with the findings of the Third Maritime Safety Package evaluation where the majority of survey respondents⁶¹ reported that the position of passengers has improved due to the Regulation.

Figure 6.1 Performance of Regulation in achieving its objectives



Source, Ecorys, survey (2016).

Across the board, the Regulation is thought to improve the power of passengers when claiming a compensation in the event of an accident⁶². This can be viewed in comparison to the Athens Convention 1974 or to the national framework previously in application. A number of stakeholders interviewed⁶³ stated that the Regulation *strengthens the passengers' negotiation position* specifically due to the strict carrier liability provisions of the fault-based system previously in place in most Member States. This finding is strengthened by the Norman Atlantic and Ogia case findings where passenger rights protection, in terms of strengthening the negotiating power of victims and improved timing of compensations delivery, have improved as an impact of the Regulation coming into effect. Additionally, the increased minimum and maximum limits to liability provided are, in regard to these two cases, assessed to have equipped accident victims with ammunition when negotiating an agreement with the operator, further strengthening their negotiation power.

The above have been recognised as expected outcomes of the Regulation implementation by academics that studied the Regulation prior and after its implementation.⁶⁴ Further, they consider that the extension of the limitation

⁶¹ Public authorities.

⁶² Victims' negotiation power is considered to be initially weakened due to the legal systems access barriers as a result of the high processes costs and the possible long delays in attribution of liability.

⁶³ The Swedish Ministry of Justice, the Danish Ministry of Transport, Raets Marine, Vista tour operator and Norman Atlantic victim lawyer.

⁶⁴ Testa (2013), Kirchner et al. (2015), Kroger (2009).

period to file a claim to up to three or five years serves the interests of the passengers better in view of the possible injuries involved in sea transportation, which could be diagnosed at a later stage (such as a whiplash).⁶⁵

Strict liability in shipping vs non-shipping accidents

Testa and Peralta (2014) follow Soyer (2012) in, highlighting the importance of the distinction between shipping and a non-shipping incident. Despite the demarcation of the exact boundaries of these two categories being subject to interpretation (e.g. the definition of a ship defect entails the risk of vagueness and therefore is in need of clarifications) as explained earlier, they both, suggest that imposing a strict liability in case of a shipping incident is only fair, however, the same cannot be the case for non-shipping accidents, given the hotel-like environment on-board of ships which is much more prone to accidents compared to air transport. According to Soyer, similar to the liability rules applicable to operators of holiday resorts, it would be unfair for cruise operators to have to prove their innocence with respect to injuries in non-shipping incidents. As stated by Lewins, a similar case is noted for Australia, where a passenger may bring a claim under the Trade Practices Act. More specifically, in that case the amended section 74 of the Act dictates that a carrier may limit his liability for injury or death in case of an event involving recreational activities on board the hotel-like environment of a cruise ship.

A comparison of findings from interviews with lawyers involved in both the Costa Concordia and the Norman Atlantic accident indicates that the Costa Concordia case set the tone for higher compensations offered in the Norman Atlantic case. The Italian Ministry of Transport clarifies that in the case of the Costa Concordia, compensation was provided pursuant to contractual rules and not pursuant to Italian rules on the liability of the ship owner.⁶⁶ According to the analysis of liability limits in national legislation prior to the application of the Regulation it was established that in most countries the limits to liability of the carrier were set considerably lower than those foreseen in the Regulation.⁶⁷ In that sense, the Liability Regulation increases the limit to liability across Member States, on average increasing the potential compensation to be provided in case of an accident. This comes to verify relevant survey findings regarding an expected increase in compensations provided, despite the fact that the limited occasions of application of the Regulation rendered a number of stakeholders unable to respond.⁶⁸ Nevertheless, in the case of Norman Atlantic specifically, the case study analysis found that the level of compensation is actually lowered as a result of the Regulation, as Italy, not having ratified the Limitations of liability for Maritime Claims (LLMC) Convention, was one of the Member States that did not have a maximum limit to liability⁶⁹, while the provisions of the Regulation make it difficult to break the maximum limit to liability. Compensations provided in the case of the Norman Atlantic also included a compensation for psychological trauma despite the lack of a solid framework on how to deal

⁶⁵ Soyer (2012).

⁶⁶ Rules on the contract of carriage and on the liability of the carrier Articles 1681 Civil Code and 409 Transport Code.

⁶⁷ See section 3.2 National application.

⁶⁸ According to the survey results 28% of the respondents considered the Regulation to have had a positive (19%) or very positive (11%) effect on the amount of compensation received by passengers. The rest had a neutral or no view on the impact of the Regulation.

⁶⁹ It should be noted that limits are different. The LLMC sets a global limit. the liability could be limited but only to the extent the global limits would be reached.

with claims of this nature, as it is still unclear as to whether moral and psychological injury is included under the term "personal injury" in the Regulation.

Breaking the liability limits

Some authors have additionally found the requirements necessary for the carrier to lose the right to limit his liability problematic. In the words of sir Haddon-Cave: "The phrase "...recklessly and with knowledge that damage would probably result ..." is now regarded as having the same subjective meaning in many jurisdictions: the wrong-doer must be proved actually to have known or realized that damage would probably (not just possibly) result." Notably, the author comments that in view of the above, an incident may amount to manslaughter but may still not lead to breaking the liability limits under the Athens Convention. (The test of involuntary manslaughter was restated by the English Courts in *R v Adomako* to be: "Gross negligence, which a jury might properly find on proof [A] of indifference to an obvious risk to injury to health, or [B] of actual foresight of the risk coupled with either the determination nevertheless to run it or with an intention to avoid it but involving such a high degree of negligence in the attempted avoidance as the jury considered justified conviction, or [C] of inattention or failure to advert to a serious risk going beyond mere inadvertence in respect of an obvious and important matter which the defendants' duty demanded he should address.")

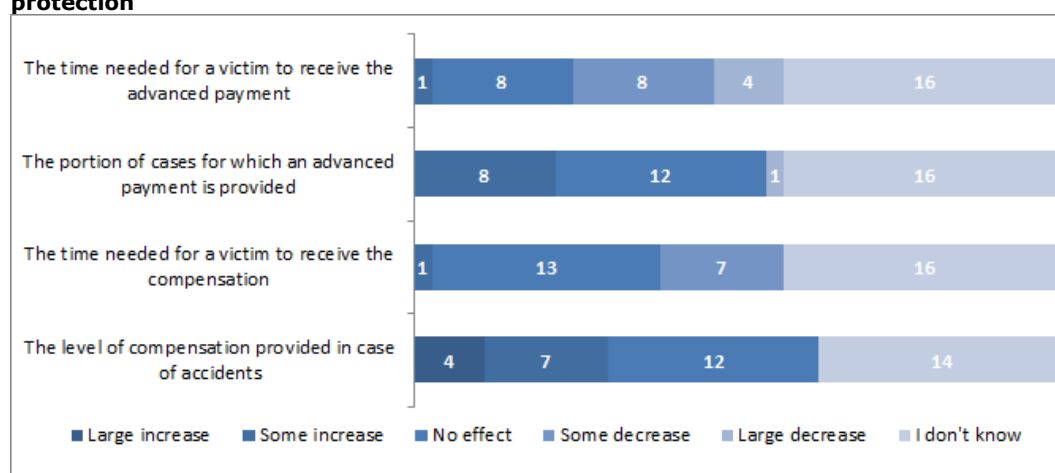
Although insurers and transport authorities already recognised the tendency to settle smaller claims avoiding the costs and image damage of the judicial procedure, they do realise that the strengthened passenger position created *improves the chances of settling individual claims*. In case a settlement is not reached, then the Regulation still acts as a safety net ensuring a proper compensation for passenger victims. The Norman Atlantic case is again indicative of this trend with more than 400 (out of 730) claims settled to date. All in all, information retrieved on compensations provided in the Norman Atlantic case in the event of death are near the maximum liability limit set by the Regulation (approx. 400,000 SDR) indicating that the Regulation provisions set the tone for negotiating a settlement agreement. The Ogia case can also be used to indicate the increased willingness of insurers to compensate for modest expenses without going in depth and questioning the nature of the accident, as proven by the direct compensation of medical costs. In this light, the Regulation acts positively in clarifying what claimants should expect, which in combination with the increased negotiation power of claimants, makes a settlement more probable.⁷⁰

In line with the above, it can be expected that the Regulation's push in the direction of settling cases avoiding lengthy judicial processes will eventually have a positive impact on reducing the overall time needed for claimants to receive their compensations. This is proven by the fact that more than 400 out of the 730 lawsuits in the Norman Atlantic case have been already settled in the two years following the accident. Furthermore, the Ogia case, where the insurer directly compensated medical expense, highlighted that compensation (at least for medical expenses) is accelerated as a result of the provisions of the Regulation. On the contrary, an Italian lawyer identified that the biggest problem with the application of the Regulation in Italy, was the existence of

⁷⁰ According to insurers interviewed.

too general provisions giving rise to legal uncertainty. As a result, he suggested that insurers and carriers have incentives to make low settlement offers and delay payments. These contradictions in views and, the limited amount of cases in which the Regulation has been applied as well as the limited comparability of accident cases, *do not provide clear evidence to derive a general conclusion on the impact on the timing of receiving compensation*, although generally it would be expected that a reduction of time needed would be the case due to the additional clarity. This is illustrated by the survey findings, as stakeholders that responded were largely unaware of such an impact (43%) or believe the Regulation had no effect (35%) as can be seen in Figure 6.2. Nevertheless, it is worth noting that 3 out of the insurers that completed the survey stated they realised some or a decrease or a large decrease in the time for a victim to receive compensation.

Figure 6.2 Stakeholder opinions regarding Regulation impact in passenger rights protection



Source, Ecorys, survey (2016).

Regarding *advanced payments*, the interviewees provided conflicting views as to the availability, and timing of such payments and the difference brought by the Regulation. This is the case as different viewpoints, even when examining the case of the same accident can be due to different levels of information availability or different national legal provisions. For instance, a Greek lawyer stated that the Regulation enabled passengers to claim advanced payments, which was a rare practice before. Nevertheless, the Norman Atlantic, Ogia and Sorrento cases indicated that *there have been limited (if any) initiatives aiming at informing passengers of their rights and passengers were confronted with a lack of information on their rights*. This resulted in some cases where passengers did not request an advance payment or even compensation as entitled. What can be concluded from these cases is that, only a fraction of the potential beneficiaries of the Norman Atlantic accident made actual use of this right and actually received advanced payments, despite the fact that the Regulation indicates that the carrier is obliged to identify and inform the beneficiaries accordingly. The carrier has been reported to have provided the advanced payment within a week from receiving requests without contesting the claims. In the case of Ogia however, the application of the Regulation is considered to have encouraged the

provision of advanced payments that would probably not have been provided under the French legal framework⁷¹.

The same case has been reportedly handled differently in Italy. A lawyer representing claimants of the Norman Atlantic case claims that advanced payments are prone to delays when the relatives of the deceased entitled to such payment need to be identified. Additional interviews indicated that advanced payments were not always provided to relatives of the victims within the timeframe foreseen by the Regulation if received at all. According to lawyers that dealt with the case of Norman Atlantic, this happens because some aspects of the Regulation *do not necessarily fit well in Member States' liability frameworks*. One is that there is legal uncertainty in case of international carriage as to which rules apply to advance payment, whether they are the rules of the Court hearing a case or the rules of the State of nationality of a deceased passenger. This problem is also relevant for the compensation of relatives of a deceased passenger: it is not clear which rules apply for determining who the relatives entitled to compensation are and how to allocate compensation.

Interviewees from the insurance industry of countries where advanced payments were already a common industry practice (despite not being a legal requirement) before the adoption of the Regulation (such as France and Germany), suggest that the Regulation *impact on the advanced payment is also significant as it is now easier provided* with the clarification of liability attribution.

Finally, competent authorities that were interviewed⁷² reported no indication that the current regime is not working well. Specifically, *no complaints have been received* regarding the application (or non-application) of the Regulation since its introduction. However, this is not seen as a large change to the previous situation as it might be the case as claimants turn first to their lawyers for their claims rather than the authorities. This is confirmed by the report on the Ex-Post Impact Assessment of the Third Maritime Package⁷³, where no significant implementation issues regarding the Regulation implementation had been identified. Some of the respondents commented that the number of complaints regarding passenger rights has decreased (although no specification of the nature of these complaints is provided).

Conclusion on achieving the objective

Objective of *protecting passenger rights protection*: The facts collected present a broad picture of the adequacy of the Regulation to achieve this first objective. Stakeholders tend to agree that the Regulation strengthens the passenger's position. Inputs collected from a number of sources address the specific impact of the Regulation improving the level of the advance payment and reducing the time required to receive it. Evidence on the Regulation's impact on the final compensation suggests that despite difficulties still

⁷¹ In Ogia three advance payments were made.

⁷² UK Department for Transport, UK Maritime Coast Agency, Greek National Enforcement Body, Italian Ministry of Transport and the Danish Ministry of Transport.

⁷³ [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536331/EPRS_STU\(2015\)536331_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536331/EPRS_STU(2015)536331_EN.pdf)

encountered in grasping the full intended benefits of the Regulation, passengers are better off than before. Additionally, the Regulation can be considered to have had a positive impact on the number of cases reaching settlements, as the clarification provided on the compensation level that can be expected and the strict liability provision strengthen the victim's negotiation power increasing the chances of a settlement.

6.1.2 *Has a level playing field for sea passenger carriers been created?*

When asking stakeholders about the effectiveness of the Liability Regulation in creating a level playing field for the protection of passenger rights in the event of an accident, more than half (56%) indicated that the Regulation had a positive impact or very positive impact (47% and 9% respectively), 23% declared that it had no effect and 2% responded suggesting it had a negative effect, while the rest (19%) declared having no opinion on the subject. The most positive stakeholder group regarding their belief in this respect has been that of Member States' policy making authorities, with 73% considering the Regulation worked in that direction.

Most of the stakeholders who were interviewed agree with the statement that *the Regulation brings an improvement to the levelling the playing field* for passenger carriers across Europe. The Regulation is thought⁷⁴ to have to a large extent harmonised the way carriers and insurers deal with claims of passengers of different nationalities (within the same accident), providing common liability limits, rights etc. as previously the victims country of origin and/or the location of the accident might have influenced the level and process of providing compensation. Levelling the playing field through the creation of a harmonised regulatory framework was also one of the main advancements referred to by ship owner stakeholders⁷⁵ that participated to the OPC. The Regulation brings an improvement in creating a level-playing field for carriers since the area of operation and the nationality of the passengers becomes of a lesser importance when regarding the level and process of providing compensations. However, the impact of largely different national legal backgrounds should not be underrated as suggested by insurance industry stakeholders. These provisions (still) regulate the majority of domestic going vessels. The diverging national legislations undermine the creation of a level playing field as some Member States apply stricter rules (e.g. broader definition of shipping accident in France) or choose to apply the Regulation in different ways (see Section 3.2 on national application).

However, the capacity of the Regulation to level the playing field should also be viewed in light of the deferred application of the Regulation for Class A and B ships. Since, the Member States that have chosen to defer the application of the Regulation to a later date include some of those with the largest fleet registries, such as Italy, Greece, Spain, Germany and the UK, it is not really possible to assess the creation of a level playing field as far as domestic carriage is concerned until these deferrals expire. The same line of thinking

⁷⁴ Interviews CLIA, Greek lawyer, Greek NEB, HA Group.

⁷⁵ Four ship owner stakeholders participated to the OPC including ECSA, CLIA and two individual operators (as seen in the Stakeholder Consultation Report).

concerns application to Class C and D ships where only the Netherlands and Denmark apply the Regulation to Class C and D ships since its entry into force, while Sweden expanded the scope of application to cover classes C and D in 2015. Overall, in passenger rights protection *for domestic carriage creation of a level playing field is limited* to date to cover about a third of the domestic operating vessels and a fifth of the domestic operating fleet capacity (see Figure 4.6 and Figure 4.7).

Exceptions to the Regulation application to Speed Craft (HSC) vessels, Dynamically Supported Craft (DSC) vessels and non-steel vessels (wood, aluminium and composite) are more prevalent. Whereas some Member States have adopted a functional application of the Regulation depending on the conditions of operation of the vessel, others retain a ship-safety-categorisation approach, extending or not the Regulation to the aforementioned categories in a similar way as other requirements (i.e. apply to aluminium but not wood vessels), while others exclude either all or some of these vessel categories.

As far as insurance premiums are concerned, there are limited data available concerning their development in light of the Regulation's adoption. Shipping and insurance industry stakeholders suggest that in principle, significantly increased insurance premiums were expected, but *in the current market situation no large increases in insurance premiums were observed*. Especially for international carriage involving Member States that had ratified the PAL 2002, the Regulation brought minimal impact. This statement was confirmed in an interview with CLIA as it was suggested that there has been no reference from cruise operators regarding a significant increase in insurance premiums after the Regulation come into force. The most recent IG P&I premium increases as presented in the P&I club circulars represent a global situation and are mostly irrelevant with the Liability Regulation. These increased premiums for passenger ships are introduced by the P&I clubs at a global scale and are relevant to the restructuring of the mutuality scheme that is taking place lately. The considerations leading to this restructuring concern the remaining appropriateness of P&Is bundling the risks of different shipping segments. This is because most of the perceived differences in the (some times diverging) levels of risk to cover the liability of different shipping segments. The industry's reaction in covering this perceived difference in risks comes with the increase in passenger vessel premiums.

From interviews with representatives from the insurance industry, it was derived that currently there is no room in the market to absorb increases in premiums as ship owners would not be able to pay for them. Nevertheless, differences in the capacity of larger and smaller operators to secure insurance and their capacity to pay for the premiums still exist with larger carriers having the advantage of additional negotiating power vis-à-vis insurers.

The Ex-Post Impact Assessment study for the Third Maritime Safety Package, which took place after a year of the application of the Regulation, had derived similar findings as the ones gathered from the stakeholder consultation. That is to say that the Regulation did not have a significant effect on insurance premiums. Nevertheless, it was stated that *"if a serious incident involving the*

*death of passengers on a large passenger ship were to occur, the market would possibly need to reassess its exposure and reinsurance capacity, and both capacity and cost of insurance reinsurance may become an issue.”, which is not linked to the Regulation alone. A statement confirmed by insurance industry stakeholders currently. Also, less than a quarter of survey respondents (23%) suggested that there has been some increase in insurance premiums with none of the ship owners that respondent to this question being amongst them, On the contrary, insurers and academics were positive that the Regulation brought some increase to the insurance premiums, without presenting any concrete evidence thereof. These facts point to the conclusions that despite the minimum impact on insurance premiums in the current context. The Regulation might lead to a latent increase in the years to come should the market conditions and occurrence of incidents change regardless of the fact that up to date *no impact has been observed on the insurability of vessels.**

Conclusion on achieving the objective

Objective of *creating a level playing field*: The facts and opinions collected present different angles on this issue. However, the collected input is sufficient to suggest that the playing field is levelled to a large extent for international carriage and especially for the cruise sector. The same is not exactly the case for domestic carriage where the differences of the national legal frameworks and Regulation application process cause Member States to deviate from a harmonised application. It should be here noted that during this evaluation period, only a fraction of the EU domestic fleet came under the provisions of the Regulation. Thus, the impact of the Regulation on creating a level playing field, in domestic transport will be possible to assess more coherently after the Regulation comes into full effect in 2019.

6.1.3 Have passenger transport operators been incentivised to improve their safety and security performance?

Roughly a third of the stakeholders consulted in the survey (33%) indicated that the Regulation had a positive (28%) or very positive (5%) impact on increased safety and security performance of passenger transport operators. This positive view was shared by just 2 out of 7 (29%) ship owners that responded to this question. Alternatively, 42% of the respondents stated that the Regulation had no effect towards this objective and the rest (26%), claimed unaware of any relevant Regulation impact.

The functioning of the Liability Regulation in respect to the objective of incentivising increased safety and security performance is based on a simple market principle. This has been described⁷⁶ by theorising that a compulsory insurance scheme would create the need for carriers to operate aiming for higher safety and security standards in pursuit of achieving lower insurance premiums. This would happen in case insurance companies would be more willing (and thus requesting lower premiums) to insure vessels they perceive as well maintained rather than poorly maintained or overcrowded vessels. The Regulation was expected to *create a mechanism that would eventually*

⁷⁶ Kircher et al. (2015), Soyer (2012).

internalise the cost of running an unsafe operation provoking higher insurance premiums and eventually ensuring higher safety standards would occur in response to the added layer of safety checks conducted by the P&I clubs.

- Nevertheless, stakeholders from the insurance industry and beyond have revealed that although *insurers can inspect a vessel* and decide not to insure it if this found to be substandard, ultimately insurer inspections take place only when there are already reasonable doubts concerning the safety standards of the vessel. Factors affecting the decision to make an inspection are not based on stringent rules *per se* but respond to the knowledge of the carrier's general management practices, safety record, claims history, age and class of vessel and most importantly on flag reputation. That is to say, that in order to trigger an inspection of a vessel, usually other layers of control will have raised attention to the safety performance of the vessel and/or operator. This means that the market mechanism does not eventually create a complementary safety check mechanism, but rather creates one that is triggered only when a vessel is already considered of potential safety hazard.

The explanation of the market mechanism provided above can be confirmed when considering the research of Professor Erik Rosaeg identifying a correlation between ships (not) having P&I cover and their detention record under Port State Control. Professor Roesag claims that of the ships detained by Port State Control, a higher than average proportion did not have P&I cover.⁷⁷

When asked, national authorities⁷⁸ stated exactly that they considered the impact of the Regulation on ship safety to be less obvious and to their understanding safety standards to be more efficiently implemented and enforced by the provisions of the Port State Control (2009/16/EC) and Flag State Control (2009/21/EC) Directives. This view of the Regulation having *no claim for an impact on safety* performance of operators, or at least only a marginal indirect impact was shared by the majority of the consulted stakeholders⁷⁹. Ship owners and cruise operators interviewed specifically stated that they already had a high incentive to take good care of passenger safety due to their pursue of client satisfaction and aim to avoid bad publicity. As far as security is concerned, the responses received addressed the lack of ability of operators to foresee terrorism acts and perform a meaningful risk analysis thereof. According to interviewees, cruise operators already avoid destinations with low public perception of security for commercial reasons and to comfort passenger-clients rather than a choice motivated by insurance premiums. This leads us to conclude that it may *only have minor indirect impact to the safety performance* of a carrier.

The limited accident cases that occur annually do not allow for a robust statistical analysis attributing an impact to the Regulation. This is especially the case as the EMSA incident dataset reliably presents only the amount of incidents occurring during the application of the Regulation (2013 2015) with

⁷⁷ Interview prof. Erik Rosaeg.

⁷⁸ UK Department for Transport, Swedish Ministry of Transport, Danish Ministry of Transport.

⁷⁹ Interviews with P&I service provider, ship-owner association, claims lawyer and a national Maritime Law association.

earlier data being of poor quality and therefore a *comparison of accident occurrences with the years prior to the application of the Regulation is not possible*.

Some incremental behavioural changes have been recorded in the aftermath of incidents, such as the one occurred with the 'Skagastøl' vessel. In this case, the shipping company has since extended the railing beside the stairs on this and another ferry with a corresponding design, after a passenger had fallen from the stairs. The shipping company has further emphasised passenger safety and fall injuries in its safety management system. At a higher level, the Norwegian Maritime Authority has also defined fall injuries as a focus area in its risk-based inspections. However, *it is not clear to what extent such behavioural changes can be attributed to the Regulation or other instruments of the Third Maritime Safety Package*. This would have been the case should the increasing liability requirements lead insurers to perform more rigorous inspections before underwriting a vessel. Nonetheless, no change in the inspection mechanism has been identified in the last years as a result of the Regulation coming into force and non-IGPANDI insurers reported that the only impact of the increase in liability was the reduction in vessel size they are willing to underwrite, especially regarding the cruise sector to which a "claims culture" is attributed.

The conclusions above are confirmed when inquiring for operational implications of the Regulation. Only 4 out of 38 (13%) survey respondents indicated that their organisation implemented actions to increase safety and security while 3 out of 38 (11%) reported an impact on the approach to assessing safety and security standards (see Figure 6.3). This argument is strengthened by the fact that non of the positive respondents to these questions, were amongst the 6 ship owners participating in the survey. On the contrary the ship owner stakeholders that participated to the OPC mentioned that the main impact on their organisation's operation was an increase in administrative burden.

Figure 6.3 Impact of Regulation on safety and security assessment



Source, Ecorys, survey (2016).

Conclusion on achieving the objective

Objective of *incentivising increased safety and security performance of passenger transport operators*: Academic literature and stakeholder views collected provide different angles to answering this question. The theoretical mechanism that was expected to increased pressure for vessel safety as a

result of the mandatory insurance requirement seems not to materialise as stakeholders think that safety standards have improved due to the entry into force of dedicated maritime safety rules for ship construction and design, and ship operation. Insurance premiums do not seem to play a role in that regard.

6.1.4 Has a balanced framework of passenger rights protection been established and complemented?

- Under this objective, the provisions of Regulation are compared with the provisions protecting passenger rights for air transport. This mode was selected for the comparison as the type of carriage (mass transportation provided by larger operators) is more comparable. This comparison is done for both the levels of compensation but also for the types of passenger rights that are protected. The aim is to assess whether passenger rights are protected in a similar way rather than protected to the same level. Afterwards, it was assessed whether the protection of the full set of passenger rights as described in the Liability Regulation has been achieved.
- First, comparing maritime with air transport liability regulation, a number of passenger rights seem to be protected in a different way (let alone at a different level) between the two modes; mainly:
- The liability position of the sea passenger is disadvantageous compared to that of the air passenger. This is first and foremost true for non-shipping incidents, but also in case of shipping incidents the carrier has a much broader possibility to escape liability;
- The limits for compensation for death or bodily injury are different in case of air transportation (minimum limit is 100.000 SDR and unlimited maximum compensation) than in case of transport by sea (minimum limit 250.000 SDR and maximum is 400.000 SDR).;
- In case of damage to luggage, the Liability Regulation is more favourable for passengers as it includes a presumption of fault in case of a shipping incident, whereas the passenger under the MC99 has to prove that the carrier is at fault. The limits to liability amount to 3.375 SDR for sea transport, compared to 1,131 SDR for air transport;
- Both regimes provide for mandatory insurance. In case of air transportation, however, insurance must ensure the full amount of compensation, while in the case of maritime transportation, only insurance up to the lower limit to liability is compulsory. Moreover, the maritime carrier only needs to take up insurance in case of vessels licenced to carry more than 12 passengers⁸⁰, while there is no such rule relating to air transport. A number of other vessels operating domestically are also exempt from this obligation (Class C and D, HSC, DSC, air-cushioned, non-steel vessels), depending on the preferred approach of the respective Member State (either flag or host state to the carrier). Member States have also had the opportunity to defer the application of the Regulation for Class A and B of domestic carriage vessels;
- The fact that the 392/2009 Regulation and the PAL 2002 provide for a direct action against the insurer is beneficial for maritime passengers as it is widely considered that this enhances passengers negotiating position.

⁸⁰ since according to Council Directive 98/18/EC, on which the Regulation basis the classification of vessels of domestic traffic, to which the Regulation applies, passenger ships are considered all ships that carry more than 12 passengers.

Despite the remaining differences between modes, the information obligation and the advance payment can be considered significant improvements to the protection of passenger rights and the enhancement of the framework of passenger rights. Additionally, the provisions on compulsory insurance and the right for direct action against the insurer improve the position of claimants.

When examining the success of the Regulation in protecting passenger rights including the provision of information and compensations for damages to vehicles, luggage and mobility equipment the majority of the stakeholders that filled in the survey (56%) considered that the Regulation had a positive impact or very positive impact (51% and 5% respectively). Slightly more positive were the views of Member States' policy-making authorities (53% and 13% respectively). A smaller amount 14% stated that the Regulation had no effect, while another 9% of the respondents thought the Regulation had a negative (7%) or very negative effect (2%) on achieving this objective. The rest of the respondents (21%), indicated they didn't know the effects of the Regulation on this objective (see Figure 6.1). These findings are in line with the responses of public authorities recorded in the Impact Assessment survey for the Third Maritime Safety Packages where a small number of respondents noticed that the situation now allows for greater comparability between different modes of transport.

Lawyers specialised in maritime liability stressed the fact that improving the information position of passengers (i.e. information obligation of the ship-owner) before the start of a journey is fairly ambitious. As mentioned in Section 5.1.1, *there have been limited (if any) initiatives aiming at informing passengers of their rights and passengers were confronted with a lack of information on their rights*. Nonetheless, the quality and quantity of available information to passengers has increased strongly or just increased as a consequence of the Regulation, according to 39% of the 41 survey respondents. Only 5% suggested a decrease in the level of available information and 27% indicated no effect, while a 29% declared no knowledge over the topic, however, no strong evidence was identified in that direction.

In the Norman Atlantic case, *compensations were also provided for the loss of vehicles* according to the provisions of the Regulation. The situation is more complicated in the event of a leased vehicle as both lessee and lessor need to be compensated. Lawyers representing passengers claim that under the current framework it is very difficult for passengers to provide evidence for the quantification of the damage to property, such as damage to vehicles, however this might relate to deficiencies of the national legal framework in Italy.⁸¹ The Norman Atlantic case shows in this respect that offers are made by the insurer concerning vehicles located in specific parts of the ship⁸² invoking the limits to liability set by the Regulation. However, these limits prevent the settlement of claims for more expensive vehicles.

⁸¹ One of the main problems is related to the fact that there are no clear rules in Italy to identify the entity that has the responsibility to unload the ship and this implies that this uncertainty delays all the activities aimed at the gathering of the evidence necessary to quantify damages to the property of passengers (e.g. vehicles).

⁸² Referring to the vehicles located on the parking decks for which the identification and examination of vehicles has finished.

When examining the application of the provisions of the Regulation in relation to luggage loss claims and loss of mobility equipment, it gets even harder to provide with quantitative evidence of its impact. *In the cruise industry carriers are reported to have been eager to provide compensations in case of loss of luggage or minor injuries* to avoid any court case, even before the Regulation coming into force. As a result there is limited documentation of the smaller cases and hardly a lawyer is necessary making thus difficult to distinguish the impact of the Regulation.

- Evidence of the limited awareness of the impact of the Regulation can be seen in the survey findings where a total of 33 survey respondents provided answers on the development of passenger complaints over time:
- Slightly more than half (between 52 and 58%) chose the “don’t know” option for all of the complaint categories;
- The rest largely supported that there was no effect relevant to the Regulation on the number of complaints received by national authorities with only a few respondents recognising the Regulation’s impact on specific complaint types;
- 6% indicated some decrease in complaints over “loss or damage of mobility equipment for handicapped passengers”;
- 3% indicated some increase in complaints relevant to “lack of an advanced payment in the event of injuries or deaths” and another 3% indicated some decrease;
- 3% suggested a large increase in complaints relevant to “loss or damage of luggage or vehicles” and 3% suggesting a large decrease;
- 6% suggested a large (3%) or some increase (3%) in complaints regarding “compensations in the event of injuries or deaths”.

In specific, Ministries reported no effect (46%) or unawareness over any effect of the Regulation (54%) on the number of comments received. Similarly, none of the ship owners participating to the survey realised any impact on the number of complaints.

In any case, the Regulation has been considered by the stakeholders interviewed, a good step towards completing a solid framework of passenger rights further harmonising the types of rights protected across modes.

Conclusion on achieving the objective

- Objective of *setting up and complementing a balanced framework of passenger rights protection*: The Regulation is an improvement in creating a balanced framework of passenger rights. However, looking into specific issues, such as the compensation of vehicle or property damage, the input basis is thinner than that used for the other objectives, also due to the lesser importance attributed to the issue by the stakeholders involved. Data collected from the case studies indicate that compensations might have increased as an impact of the Regulation. Combined with the provisions protecting additional passenger rights (information, luggage, advanced payment etc.) the Regulation results in harmonisation towards other modes.

6.2 Q-4: Ensuring the same level of passenger rights protection

Q4: To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?

In order to better address this evaluation question, the geographical parameter of passenger rights protection are considered, both addressing differences between Member States, as well as within specific Member States.

Currently the Regulation can be considered as having a potentially coherent impact on passenger rights only when international carriage is concerned. As identified earlier the deferred application of the Regulation for Class A and B ships of domestic carriage as well as the application on Class C and D ships leads to an uneven application of the Regulation across the Union since a considerable number of domestic vessels will not be applying the Regulation even after 31/12/2018⁸³.

- Additionally, the approach of Member states concerning the vessel categories not defined in the Regulation can differ significantly. *A near unique approach is adopted by each Member State as to the application of the Regulation on non-defined vessel types* such as High Speed Craft (HSC), Dynamically Supported Craft (DSC), non-steel vessels and vessels with less than 12 passengers as can be seen in Section 3.3. These findings have been supported by the survey and interview data retrieved during the stakeholder consultation.⁸⁴ These differences are based on Member States' interpretation of the Regulation requirements. The analysis of the domestic passenger fleet data falling under the Regulation indicates that to this day, the Regulation provisions are only applicable to a small portion of the EU domestic fleet. *Exemptions to vessel types, become especially relevant in light of specific the domestic market share of some of these vessel types in specific Member States.* Such is the case for HSC vessels holding a significant market share in the UK domestic market⁸⁵ or wooden vessels in Greece and Italy⁸⁶ and other examples.
- A number of authorities have identified issues with achieving the insurability of especially the smallest vessels under the high limits provided by the Regulation.⁸⁷ These concerns may relate to the availability of war or terrorist risk insurance, as there is the need to ensure that insurers are ready to cover such risks. *Securing the insurability of smaller carriers is a main concern related to the functioning of the insurance market nationally.* While for Denmark, a country with a very good safety record, there have been very few complaints regarding the insurability of vessels, despite the extension of the Regulation to all vessel classes. However, the same is not the case in other countries. In Poland for instance, the application of the Regulation to Class B ships has had to be deferred to 2018 from an

⁸³ As identified earlier in Chapter 3

⁸⁴ Survey results: Out of the 22 respondents, the majority (64%) indicate that the Regulation applied to High Speed Crafts (HSCs) calling in ports in their country while a clear majority of Members States (59%) apply the Regulation also to vessels lying their flag. This indicates that the Regulation is not applied equally to HSC vessels across the Union but rather, some countries apply it to HSC while others do not.

⁸⁵ According to the UK Maritime Coast Agency.

⁸⁶ Directive 2009/45/EC domestic vessel database.

⁸⁷ Similar preoccupations were identified in the interviews with at least the French, UK, Danish and Polish authorities.

initial planning to apply the Regulation in 2013, due to claims of ship owners that they were unable to obtain affordable insurance for their vessels. It is indeed in accordance with earlier findings that insurance premiums would be more challenging to cover for smaller operators in countries with poorer safety records than for larger ones with better performances. Eventually the differences in insurability of vessels contribute to different Member States' approaches applying the Regulation. Although this is definitely not the sole criterion for making such decisions, measures to alleviate the burden from ship owners (such as those applied in Denmark) can assist in expanding the application of the Regulation to cover a larger share of the domestic vessel fleet. To confirm this line of thinking, insurance industry stakeholders have mentioned that for countries with lower safety standards, insurance premiums can be higher compared to countries holding good safety records, however the most important factor in defining insurance premiums is the safety reputation of the operator.

- Further, *national definitions of shipping incident, ship and contract of carriage may endanger the Regulation's uniformity*, since the applicability of the Regulation may depend on the requirements set by different states.⁸⁸ Similar concerns are raised in connection to the definition of injury and the inclusion of emotional injury under the head of damages.⁸⁹ Further comments that the provision allowing individual nations to adopt higher limits of liability or unlimited liability for claims regarding death of or personal injury to a passenger can threaten the Regulation's uniformity. This could threaten one of the main advantages that the shipping and insurance industry see into the Regulation; the harmonisation of the approach to liability across the Union.
- National definitions may also affect the calculation of damage and the exemplary damages estimation which can differ significantly between different countries. These damages are calculated based on a fixed table in the Netherlands and the UK,⁹⁰ but even if other countries develop a similar approach it is far from certain that the calculation of damages will be performed in a harmonised manner. Currently *the uniform level of compensation theoretically does not incentivise "forum shopping"* as claims brought in different Member States will probably result in similar compensations⁹¹. Nonetheless, according to lawyers, if large differences in the valuation of damages appear, this may prompt the reappearance of "forum shopping" behaviours as has been reportedly the case for Costa Concordia victims trying to unsuccessfully bring their claims before US courts.⁹² However the phenomenon cannot be totally eclipsed with the type of provisions envisaged in the Regulation as the experience of the Norman Atlantic victims shows that differences in the time needed for the judicial procedure between Member States led Greek victims to seek Italy as a jurisdiction forum, expecting a faster process there. All in all non-uniform national legislations applying to the points not covered or clarified by the Regulation may boost such behaviours. Such points are namely related to heads of damages, quantification of damages, the persons who are entitled to compensation, are all issue that are left to be determined by the *lex fori*.

⁸⁸ B. Soyer, "Boundaries of the Athens Convention: What you see is not always what you get!", in Dr Thomas (ed) *Liability Regimes in Contemporary Maritime Law*, Informa 2007.

⁸⁹ Shaw supra note 9; Testa supra note 1; Kroger supra note 1.

⁹⁰ Interview with P&I representative.

⁹¹ Interview prof Erik Roesag.

⁹² Interview lawyer Costa Concordia Network of Passengers and Lawyers.

For example, some national laws provide for non-pecuniary damages and others do not; adult siblings are entitled to quite significant non-pecuniary compensation in case of death under Greek law, but that is not the case in other jurisdictions.

6.2.1 Conclusion response to the evaluation question

The Regulation has contributed to a large improvement of the harmonisation of sea passenger rights in Europe. This is initially the case for international voyage where since 2013 a reference framework has been created, providing clarity in the expectations for compensations and dis-incentivising “forum shopping”. However, the limited application of the Regulation on domestic carriage (with the states possessing the larger fleets deferring application for Class A and Class B) and especially the vastly different approaches of Member States in regulating (or not) vessel classes beyond Class A and B ships currently lead to a very diverse framework of application across the EU. This situation is expected to improve after the deferment period finishes. Nonetheless, a large factor preventing a harmonised approach across Europe is the great variation of national legal frameworks applying aside the Regulation and defining a number of critical elements.

6.3 Q-5: Unexpected Regulation effects

Q5: Has the Regulation lead to any positive or negative unexpected effects?

There has been a limited identification of unexpected Regulation effects with most of them being less significant than the impacts addressed earlier. It should be noted, that the identified effects come in relation to the current scope of application of the Regulation. This means that as the Regulation comes into full effect with the expiration of the deferral periods for A and B vessel classes, more effects might be observed in the field of domestic transport. The additional effects identified are addressed in the following Sections.

Out of the 42 survey respondents that answered this question, a clear majority (83%) indicated that they saw no unexpected effects of the Regulation. From the remaining seven respondents the following aspects were derived:

- the additional administrative burden for authorities;
- the creation of a clear framework of rules;
- the initiative of some Member States to expand the Regulation provisions also to smaller vessels; and
- the strengthening of a claims culture due to the existence of the insurance regime.

In the following sections these aspects are addressed, plus the issue of impact on insurance premiums and passenger fares that have been identified in the Evaluation Framework.

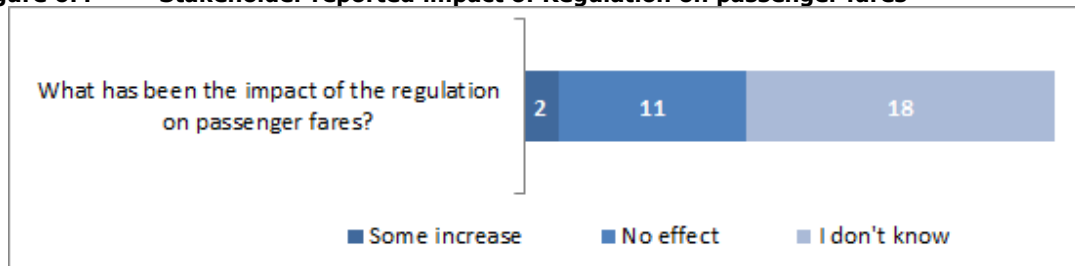
The respondents of the survey for the Impact Assessment of the Third Maritime Safety Package stated that the issuing Blue Card certificates to third

country vessels (alongside issuing certificates for EU Member States' vessels), calling at ports in the EU induced extra costs. At that time some Member States' administrations were planning to introduce fees to cover these extra costs. Further, all Member States agreed that the Regulation puts pressure on their staff. In the interviews conducted with state authorities, *we identified that indeed a number of authorities introduced certificate fees* (the level of which is elaborated in Section 6) to compensate for the small amount of FTE consumed by this process. Denmark went one step forward making the whole certificate procedure digital lowering costs and fees in the process.

When asked in the survey about the impact of the Regulation on the insurability of passenger carrying vessels, only a few participants were positioned to respond (7). However there was no response indicating the impact to be challenging or very challenging to the insurability of carriers. This might have also been the case as the application of the Regulation has been deferred for the vast majority of the domestic vessels. This finding comes in line with the statements of interviewees indicating that there has been to date only a very minor (if any) impact of the Regulation on insurance premiums also as a result of the current market conditions.⁹³ Thus, it is considered that *the insurability of the vessels currently under the scope of application is not threatened*. In any case, P&I representatives indicated that they expect *differences between larger and smaller operators regarding their capacity to pay for the premiums*.

No stakeholder interviewed identified an impact on passenger fares while *only 6% of the survey respondents suggested that the Regulation resulted in some increase of passenger fares*. On the same question, 35% indicated there was no effect and another 58% were not aware of any relevant effect.

Figure 6.4 Stakeholder reported impact of Regulation on passenger fares



Source, Ecorys, survey (2016).

A large number of stakeholders interviewed identified as a major impact of the Regulation the fact that it *offers clarity* especially in European cases where the passengers have the choice to go to different jurisdictions. Further, it was stated that the Regulation contributes by offering legal certainty. This feeling is supported by stakeholders on both the claimant and insurer/ship owner side. A German P&I correspondent goes one step further indicating that:

- "... passenger claims under German law have not changed. They cover (as was the case also before) all types of claims including injuries, material, moral and psychological claims. What has changed since the

⁹³ As mentioned in section 5.1, should the market conditions change, or a large accident occur, experts of the market expect a rise in insurance premiums as a reaction.

effect of the Regulation has been the fact that looking into a claim in principle has become much more straightforward nowadays. It is clearer as to what is covered.”

- Finally, the Regulation triggered the ratification of the PAL 2002 by a number of Member States and led some Member States to reassess, adjust and update their national legal framework⁹⁴. Moreover some states were triggered to expand the application of the Regulation beyond the provisions of the Regulation to also cover Class C and D ships (and other). This has been the case in the Netherlands, Denmark and Sweden. Stakeholders in these Member States such as the Dutch Maritime Law Association, Dutch ship owners, the Danish Ministry of Transport and the Swedish Ministry of Justice report that the implementation of the Regulation to classes C and D brought no unexpected negative effects.⁹⁵

6.3.1 Conclusion response to the evaluation question

The Regulation, within the scope of application during the evaluation period⁹⁶, has presented no unexpected negative impacts. The findings indicate that the insurability of carriers has not been affected by the Regulation. Authorities have managed to contain fees charged for certificates to a small amount and insurance premiums and passenger fares have been largely unaffected. This should be seen in the context of broad exemptions and deferments of the application of the Regulation and against a soft market condition for the vessel insurance industry that has allowed for retaining insurance premiums to remain unchanged. Moreover, the Regulation has caused unexpected positive effects, such as providing clarity for dealing with (especially international) claims on accidents and incidents and the fact that it may have caused a small number of Member States to go beyond the scope of the application and expand the coverage of passenger rights.

6.4 Conclusion on effectiveness

Based on the evaluation of the three questions related to the effectiveness of the Regulation, it is concluded that the Liability Regulation has been largely successful in achieving its objectives. The Regulation has been most effective in improving passenger rights protection, and in creating a balanced framework of passenger rights. The main contributors to these achievements have been the clarifications provided on how to deal with maritime accidents and incidents and the introduction of new types of passenger rights protection in an attempt to harmonise with the existing framework. However, the Liability Regulation has been less successful in levelling the maritime transport playing field for all carriers. In the case of international carriage, the Regulation has contributed in developing a set of common practices. However, the differences in application scope, as well as the interpretation and

⁹⁴ Example of Poland from interview with Dr. Peplowska.

⁹⁵ All 3 MS that have expanded the application of the Regulation to vessel classes C and D have taken measures to lighten the burden for smaller carriers according to the findings of the interviews conducted.

⁹⁶ Referring to the deferred application to class A and B vessels.

interaction with national legal frameworks do not allow for an equal implementation in all Member States. The full effects of the Regulation in matters of levelling the playing field will be possible to observe only after the Regulation comes into full effect after the expiration of the deferment period. Further, the Regulation has not been successful to date in incentivising (at least directly) a better safety performance. This is because the Regulation has landed on a timing where the shipping market is facing difficulties to live up to increased premiums. and thus, insurers absorbed the increased risk for the time being.

Considering the potential for equal protection of passenger rights, the Regulation has been fairly successful in guaranteeing this for international carriage, however the differences in implementation scope and national frameworks between Member States allow for the continuation of potential deviations in practices⁹⁷ not only between Member States but also within the same Member State.

Nonetheless, the Regulation has been successful in not producing considerable unexpected effects, but rather a small set of unexpected benefits have emerged, relevant to the increasing clarity in liability regimes and the increasing passenger rights protection in some Member States beyond the obligatory provisions of the Regulation.

To conclude the above, it can be stated that the Regulation has been an effective instrument to achieve its objectives within its current scope of application.

⁹⁷ In case accidents do occur.

7 Efficiency

This chapter presents the conclusions of the analysis related to the defined efficiency evaluation question, based on the results of desk research, interviews, stakeholder survey and case studies. Each evaluation question is scored on its underlying evaluation criterion.

7.1 Q-6: *Costs reasonable and proportionate in relation to benefits*

Q- 6: Do the costs of the measures adopted in the Regulation to achieve the objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

For the evaluation, this question is divided into three sub-questions (which are presented in detail below)::

1. What are the costs of implementing the Regulation?
2. What are the benefits of implementing the Regulation?
3. Are costs reasonable and proportionate in relation to the benefits?

7.1.1 *Costs of implementing the regulation*

The inventory of data, interviews and literature has revealed cost impacts in the following categories:

- For the ship owners to comply;
- For the authorities to implement, monitor and enforce;
- For the passengers.

Costs for ship owners

The Liability Regulation has had cost implications for ship owners in three fields:

1. Insurance premiums to be paid by ship owners;
2. Certificate costs to be paid to authorities;
3. Administrative burden related to these;
4. Costs of adapting operations.

Each of these categories is discussed further below.

1. Insurance premiums to be paid by ship owners

Typically liability insurance makes up some 10% of total insurance costs (the remainder for hull * machinery, cargo etc.).⁹⁸ It is noted that this figure includes more than only passenger liability insurance costs. Typically, insurance costs can make up in the order of 10% of total shipping costs⁹⁹, although this ballpark figure should be interpreted with care as a range of

⁹⁸ Based on IUMI statistics on insurance premiums, <http://www.iumi.com/index.php/committees/facts-a-figures-committee/statistics>.

⁹⁹ For example, Panteia, Significance and PwC (2015), Study on the Analysis and Evolution of International and EU Shipping. Final report, September 2015.

variables will be of influence (factors like size and age of the ship, area of operation and the variation of other cost components like fuel costs). The overall levels of insurance premiums are typically not published by shipping lines. Stakeholders consulted indicated that financial information was confidential and insurance industry stakeholders were found unwilling to disclose it. In general terms, interviewees indicated that the levels of insurance premiums paid relate to fleet composition, track record of the company, as well as external factors such as competition in the insurance industry.

Theoretically, a rise in liability insurance cover would lead to an increase in insurance premiums to be paid. Now, since the Athens Convention has already been ratified in several Member States, the changes in liability cover due to the Liability Regulation are fairly small, so that in those countries no, or hardly any, change would be needed, whereas in countries that had applied much lower liability cover ceilings, they would change.

Secondly, insurance premiums are also affected by the actual pay-out from funds needed as a consequence of accidents and incidents. Major events with high financial impact on insurance firms usually have repercussions on premiums in following years.

From the interviews and literature review, however, it was found that liability insurance premiums have changed very little or not at all. Moreover, it was stated that, in view of the expected ratification of the Athens Convention and/or the announcement of the Liability Regulation, insurance premiums were already gradually adapted, so that a firm one-time increase at the moment of the Regulation entering into force was not seen.

Along with studies conducted at European level, also several Member States investigated the efficiency of the Regulation. Several of these concern *ex ante* analyses, such as presented in a Lloyds List 2008 Article, in which insurer Marsh indicated that war risk cover would cost less than USD 0.10 per passenger per day¹⁰⁰, or the UK government's *ex ante* impact assessment of 2012¹⁰¹, in which they made use of an estimate provided by insurer Marsh of USD 0.03 per passenger per carriage. Adding costs of certificates, the UK government's IA concluded that an overall annual costs of GBP 42,000 for all ship-owners, as of 2018, excluding administrative costs for ship-owners and monitoring & enforcement costs. However, this source dates from before the entry into force of the Regulation, and the estimate could not be verified against actual market rates. According to the Ex-Post Impact Assessment of the Third Maritime Safety Package¹⁰², the implementation of the Liability Regulation did not have a significant impact on insurance premiums. They suggest, however, that if 'a major incident was to occur, the market would possibly need to reassess its exposure and reinsurance capacity, and both capacity and cost of insurance reinsurance may become an issue.' To this

¹⁰⁰ Lloyds List (2008), CLIA joins with Marsh in online insurance launch. Monday 28 January 2008.

¹⁰¹ UK DfT (2012), Impact Assessment for: Domestic legislation implementing EU Regulation 392/2009 on the liability of carriers of passengers by sea in the event of accidents. 09/07/2012.

¹⁰² European Parliamentary Research Service (2015), Ex post Impact Assessment on the Implementation and Effects of the Third Maritime Safety Package. Study for the European Parliamentary Research Services, October 2015.

date, such an accident has not happened, so that the validity of this assumption cannot be verified.

The UK government's consultation, which it held alongside its 2012 *ex ante* study, indicates that out of 34 stakeholders invited, only five responded¹⁰³ who reported that no monetised estimate of the potential costs and benefits could be made.

On the whole, while literature does not provide for detailed reviews of insurance costs before and after the regulation, recent stakeholder papers suggest little impact.¹⁰⁴ For domestic shipping, literature suggests data availability is too limited for any quantitative estimate (See for example the UK impact assessment for raising LLMC limits for domestic shipping).¹⁰⁵

In relation to premium levels, interview findings deliver the following understanding:

- At the side of shipping companies, an impact on insurance premiums was expected. As far as interviewees are concerned, however, this cannot be substantiated, and most interviewees state that no, or hardly any change of premiums was observed. A main reason for this given is that premiums were already being adjusted in response to the pending entry into force of the Athens Protocol 2002 (and the IMO Resolution and Guidelines agreed by the IMO Legal Committee in 2006). Passenger cover limits were increased thus affecting the premium levels as well. The entry into force of the Regulation on 31 December 2012 did not have any additional impacts. It can be argued whether this statement holds for all countries, since the Athens Protocol was not ratified in all Member States at the same time (see Section 3.3);
- An additional reason for premiums not to have changed that was raised by interviewees, was the fact that the insurance market is considered highly competitive, and insurers indicate that raising their premiums would have negatively affected their market positions;
- Financial information is confidential and insurance industry stakeholders were found not willing to disclose it;
- Interviewees note that the level of insurance premiums not only relates to passenger numbers but also to a variety of risk factors and formulae, including specific characteristics (e.g. ship type, age, trading route, ship management, safety record, historical claims record). It may well be that ship-owners have taken operational measures to improve their safety profile as a means to absorb part of the insurance premium increase. This is not confirmed by the interviewees, but signals of such actions are noted in the survey (see below);
- The impact on premiums may have been smaller for larger sized ship owners, as those will have more negotiation powers than smaller firms;
- Another factor raised is the 'claim culture' in Europe compared to that in the USA, where claimants are incentivised to 'play hard' in trying to

¹⁰³ UK government response to the consultation on the implementation of regulation (EC)392/2009 on the liability of carriers of passengers by sea in the event of accidents and the UK's ratification of the Protocol of 2002 to the Athens Convention relating to the carriage of passengers and their luggage by sea, 1974.

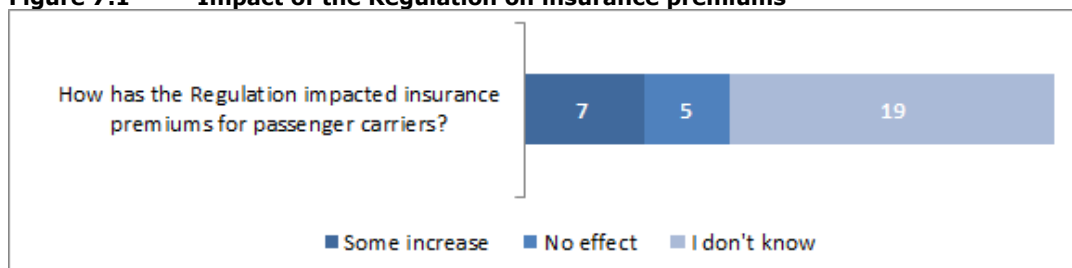
¹⁰⁴ CLIA Europe written response to survey, 24-06-2016.

¹⁰⁵ UK DfT (2015), Consultation on changes to domestic legislation implementing certain international maritime liability conventions. Including Annexed Impact Assessment. 22 December 2015.

get as much compensation as possible. This would raise the costs of legal procedures and ultimately would translate into higher premiums, according to one interviewee, who also explained that this aspect would be more significant for international multi-day cruise holidays than for smaller vessels operating on day excursions. Typically, as one interviewee stated, “when a number of claims of the same nature come in and are won by the claimant, the premium will increase in that respective area”. The safety record as well as the amounts paid in previous claims are thus important factors in defining premium levels;

- Finally, interviewees point to the fact that the insurance market is volatile and that insurers are not always willing or able to provide insurance. For instance, smaller insurance companies that have a limit to the amounts they are able to insure, may not be able to offer insurance for larger vessels (the coverage including the number of passengers * the liability amounts). This especially holds for independent insurers that are not attached to P&I clubs. The vessel and operator claim history is usually also taken into account in such decisions;
- It is unclear how the insurance market will react to future war risk cover in the event of a major incident, as there is currently no experience with such risks. Generally it is stated that war risk cover is receiving increased interest from ship owners, which may be a reflection of current circumstances of increased terrorism and cybercrime attention;
- Overall, out of 31 respondents answering this question, 16% (5 respondents) state that insurance premiums have seen some increase, while 23% (7 respondents) report a significant increase, and other respondents don't know. Respondents do not see any difficulties (29%), or only slight challenges (43%) among operators to accommodate the required premiums. On the impact on passenger fares, respondents report no effect (35% of 31 respondents) or some effect (6%), with the majority of respondents stating not to know (58%).

Figure 7.1 Impact of the Regulation on insurance premiums



Source, Ecorys, survey (2016).

- How the fee is calculated: 60% of the respondents refers to a flat fee as the basis of calculation, whereas 13% mention that other factors like company performance and safety record, or a combination of these, are of influence to the insurance cost.

As the regulation has only effectively been in force for a short period of time, with claims from major accidents not being fully handled yet, evaluation literature is scarce if not altogether absent. However, lessons from evaluations in other sectors (aviation, rail) may be of relevance as these may have parallels to the maritime sector:

- Regulation 784/2004 on insurance requirements for air carriers and aircraft operators was the subject of a midterm review by Steer Davies Gleave in 2012¹⁰⁶. On premium levels, it reports a strong volatility, quoting Aon insurers that “hull and liability premium has swung from 84% increases and 24% declines between 2000 and 2010”. Also they mention a succession of cycles where premiums exceeded claims and vice versa. Typically this was caused by a factor of ‘low chance high impact’. Still price levels are stated to be low and an indicative figure of 0.80 USD (approximately € 0.70) for all basic airline insurance premiums is reported, with examples of lower premiums for short-haul intra-European flights. This figure covers all insurance aspects and the share of liability insurance is not separately given. In terms of impact on the sector, the report concludes that as carriers already had significant insurance cover, the EU Regulation has not had any significant impact on their costs, but that for small and niche operators its impacts may have been significant;
- Regulation 1371/2007 arranges, amongst others, liability requirements for railway undertakings in view of the rights to compensation in the event of death or injury, or damage to luggage. It must be noted that the scope of this regulation is wider than that of Regulation 392/2009. The evaluation conducted by Steer Davies Gleave in 2012¹⁰⁷ reports that there is only limited information on the efficiency of the Regulation and no data on implementation cost is given, or addressing aspects of the regulation that do not deal with liability itself. The report is stating, however, that the implementation costs appear to have been limited, as in most countries railway undertakings were already applying similar policies.

All in all, estimates on the impact of the Regulation on insurance costs range from zero to about 10 cents per passenger per carriage. If this range is applied to the volume of passenger shipping in the EU in 2012 (371 mln embarkations according to Eurostat¹⁰⁸), insurance costs would have been impacted by at most € 37 mln per year (assuming average trips to take one day). For the cruise sector, the number of passengers was 6.1 mln in 2012¹⁰⁹, and if an average cruise duration of one week is assumed, this would imply a maximum increase of insurance costs of about € 4.3 mln for this sector. As the Eurostat embarkation data include cruise as well as ferry passengers, adding up these figures would result in double-counting, and a reasonable estimate of the total insurance impact would be between zero and € 41 mln per year. Based on the literature and interviews, it is concluded that the actual cost increase will probably be at the lower end of this range, also as insurers have indicated strong competition in their market, limiting their abilities of raising premiums.

When comparing this increase to overall shipping costs, the impact is considered as very small. For example, a large ferry operator such as Stena line has 34 vessels in operation, carrying some 7 mln passengers per year

¹⁰⁶ Steer Davis Gleave, 2012, Mid-term evaluation of Regulation 785/2004 on insurance requirements of air carriers and aircraft operators. Final Report for DG MOVE, July 2012.

¹⁰⁷ Steer Davis Gleave, 2012, Evaluation of Regulation 1371/2007. Final Report for DG MOVE, July 2012.

¹⁰⁸ Eurostat Database (accessed 28-09-2016), Passengers embarked and disembarked in all ports by direction annual data. Figure for 2012 amounts to 371.441.000, which is a decline from over 400 mln before 2009, and which is increasing again to 378 mln by 2014.

¹⁰⁹ CLIA Europe, http://www.cruising.org/docs/default-source/research/clia_europe_statistics_and_markets_2014.pdf?sfvrsn=2.

and has a turnover of 12,400 mln SEK (€ 1.3 bln). If insurance premiums for their operations would increase by € 0.10 per passenger (the high end of the estimate range), this would affect its overall turnover by some 0.05%, or a little higher if premiums are based on ship capacity.¹¹⁰ Applying this calculation to other large ferry operators such as DFDS or Grimaldi results in similar low percentages.

2. Certification costs to be paid to authorities

Ship owners need to acquire certification providing evidence that they comply with the regulation (i.e. have the required liability insurance in place). typically, Member State authorities charge fees for the issuing and renewal of such certificates.

Administrative costs to be made (the costs of acquiring certificates from authorities) are generally considered low although a wide range of fees is quoted, ranging from € 26 to about € 166.¹¹¹

If one would assume an average of € 100 per certificate, then the overall yearly costs for 922 domestic vessels (See Section 3.4)) would be around € 0.1 million, an insignificant amount compared to the increase of insurance premium costs of (between zero and) € 41 mln as presented above. From the survey and interviews, it is concluded that these fees are to cover the costs of the authorities issuing the certificates.

3. Administrative burden for ship owners

Having to comply with the Regulation places some effort on the side of the ship owners, in terms of ensuring that insurance is in place, application of certificates, and handling claims in accordance with the regulation.

On the side of ship owners, interviewees point to the fact that, in most countries, prior to the Liability Regulation entering into force they also had to spend staff time for insurance and claims arrangements, and the changes due to the Liability Regulation itself have not really affected this. Even more so, as the regime has created a harmonisation within Europe, for companies operating internationally, findings from interviews suggest that it may have reduced their administration costs. The same is said for handling claims, which may have rather become more efficient than prior to the Regulation (see under benefits section 6.1.2 hereafter).

It is therefore concluded that the Regulation has had no, or only negligible, impact on the administrative burden for ship owners.

4. Costs of adapting operations

In advance of the Regulation entering into force, it has been argued that the Regulation could stimulate ship owners to adapt their operations procedures in view of increasing safety, thus lowering liability risk. This assumption is, however, not confirmed. Rather, respondents to the survey as well as

¹¹⁰ Figures taken from Stena Line website, <http://www.stenaline.com/en-GB-corp/corporate>.

¹¹¹ Figures taken from the Survey, figures available for 5 countries. In the Netherlands, the tariff is € 133 per certificate (per year), https://www.ilent.nl/onderwerpen/transport/visserij/sportvisserij/sportvisserijvaartuigen/passengers_liability_certificate/.

interviewees indicate that the safety culture within the maritime passenger sector, and even more so in the cruise segment, already was of a very high standard. Most, if not all respondents, report that the Regulation has not affected the operational procedures of the sector. Only 5 out of 38 (13%) report that it has led to organisations implementing actions to improve safety and security. There are no indications of extra costs which have been incurred.

Figure 7.2 Operational implications of the Regulation



Source, Ecorys, survey (2016).

Domestic shipping and the costs associated to ships of category C and D

- As a consequence of the above, according to interviewees, the impact on costs would be larger for smaller operators. Typically small ferry/cruise operators active regionally rather than EU wide or global have a smaller fleet and smaller ships, and less staff. For them the Regulation may have had a relatively larger cost impact. This would be an argument for some interviewees not to include classes C and D, as these are usually operated by smaller companies. On the other hand, smaller ship operators will typically not arrange their insurance directly, but have their agent or broker deal with insurers along with other insurance requirements to ship owners. Administrative costs for small ship owners would thus be absorbed in the efficiency of (larger sized) insurance brokerage firms. Further to this it was found that in some countries that have not included Class C and D ships under the scope, national legislation is in place that addresses passenger liability aspects for these segments (see Section.3 and Annex 12);
- It is also noted that a distinction between domestic and international routes would be likely, as the latter were already required to follow the 1974 Convention. In regard to domestic routes, interviewees point to the distinction between commercially operated routes and public service obligations, where the latter are regulated through concessions in which there may or may not be a clause for responding to legislative changes (which would be relevant in general, not just in view of the Liability Regulation). In any case, no data on fares before and after the Regulation entered into force are known, and interviewees report no impacts in this regard;
- The fact that the regulation extends to domestic shipping, as opposed to the Athens Convention, may thus mean an increase of costs, which however depends on whether there were liability regimes in place for domestic shipping at national level. As shown in Section 3, a number of Member States has national regimes in place addressing passenger liability of domestic shipping, and only the levels of coverage may have

changed (which in the case off the UK has meant an increase, thus likely implying an increase of premiums as well). Particular concern is raised for niche categories like heritage shipping, a category also identified has affected stronger in the aviation liability regime.

As illustrated in Chapter 3, the Regulation extends to domestic shipping of Class C and D ships in only a few Member States (Denmark, the Netherlands and Sweden). The cost impacts analysed above apply to these categories as well, but available data does not provide sufficient basis to calculate the costs of implementing the Regulation for these categories.

Interviewees have argued that for ferry operators active in segments of Class C and D ships, the Regulation would have larger impacts than for large international operators, because small operators have much smaller fleets and typically insurance costs make up a larger share of their operations. Also, some interviewees argued, the negotiating power of large international operators is larger than for small operators, thus resulting in higher insurance premiums for the smaller operators. On the other hand, while large companies with large fleets are limited in their choice of insurers to the P&I clubs able to carry the high liability amounts which for large cruise ships can be more than € 1 bln), small operators can choose also other, smaller insurers, and typically will work through insurance brokers as to minimise their administrative burden. Further to this, liability insurance is usually arranged in packages addressing other maritime insurance requirements as well, thus benefiting from efficiency gains.

Although figures on passengers carried by Class C and D ships are lacking, one can assume that, as these ships operate on shorter distances, they will serve at higher frequencies, and will carry higher numbers of passengers per unit of operation. Risks may be rated lower as they operate in more quiet waters, while more frequent in-port operations may pose an increased risk compared to longer voyages. All in all, such factor might balance out resulting in similar average insurance premiums per passenger/day on board Class C and D ships.

As operators of Class C and D ships are generally smaller firms, annual reports are not widely published so that cost structures cannot be assessed.

It is noted in literature and also by interviewees, that in various countries that have not included Class C and D ships yet, alternative national legislation on liability is in place. Therefore, the extra cost of the Regulation would be minimal and only depend on the coverage limits and any exemptions in place.

Costs for authorities

Authorities responsible for implementing the Regulation are also faced with costs, in particular costs of issuing certificates, of monitoring, and of enforcement. Administrative costs on the side of authorities for the issuing of certificates are typically rated around 0.5 hours per certificate, an amount that interviewees consider as very reasonable. The fees charged to ship owners are typically intended to cover these costs, so that no net costs for authorities remain. Additional costs for authorities concern inspections which

are usually part of the normal Port State Control inspections. From the interviewees who touched upon this point, it appears that the addition of one extra certificate under these inspections adds only insignificant to the costs of inspections.

The main costs for authorities relate to monitoring and enforcement.

- A Swedish government report providing an *ex ante* assessment of the impacts of the Regulation, indicates a cost increase to Swedish courts which the courts estimate at 500,000 SEK (€ 52,000) annually, but which the government considers much lower. No cost increase for the Coast Guard who is to implement and enforce the Regulation was expected. The report states not to expect any significant increase of premiums, as the majority of ships already needed to have coverage in place before the Regulation entered into force,¹¹²
- The costs to comply with the Regulation are estimated as very small, with some respondents reporting 0.5-1 FTE and others stating that this has had no impact on their staffing. Noting that 54% of the respondents are representing government authorities, this could be an indication of the implementation cost at the side of the Member States. They can however not distinguish between activities relating to certification and enforcement, and activities relating to the handling of accidents. The time effort of issuing certificates are typically given as 1 day, with answers ranging from 0.1 day to 4 days for first time certification, and 0.1 to 2 days for renewals.

From the survey responses by Member States, an average of 0.5 to 1 FTE per year per Member State is found. It is noted that, on the one hand, several interviewees consider this estimate too low as it does not take account the additional efforts of ship's inspections in port. On the other hand, as in many Member States already insurance certificates were issued prior to the regulation entering into force, the required extra staff time would be lower. Therefore, the indicated extra effort is considered a reasonable estimate. One would expect the effort to vary with the annual number of ships to be certified as well, but the responses from Member States do not show such correlation.

Applying the Standard Cost Model (SCM) to these numbers of FTE per Member State gives a cost of approximately € 35,000 to € 70,000 per Member State per year¹¹³, or about € 1 mln to € 2 mln for all Member States together. Obviously the cost impact will be lower than average in countries with lower salary costs of civil servants and higher in countries with higher average salaries.

Costs for passengers

In *ex ante* studies, as well as in evaluations of liability regulations in other transport sectors, it has been argued that cost increases for operators would be passed on to passengers through fare increases. However, insurance premiums were hardly raised, and no impact on fares has been observed.

¹¹² Swedish government, 2015, Regeringens proposition 2014/15:95 Förstärkt skydd för fartygspassagerare, 12 March 2015.

¹¹³ Derived from Regulation (EU) no 423/2014, assuming a mix of staff grades.

While the impacts on premiums is thus considered small or invisible, its subsequent impact on passenger fares would even be smaller. Interviewees also report that, compared to other factors, the costs of overall insurance is only a small share of shipping costs, up to a few percent (all insurance, not just for passenger liability). For instance fuel costs, a significant part of shipping costs, have reduced sharply with oil price decline over the past years. Meanwhile, as regards the cruise sector, over the past 5 years the size of cruise ships has increased thus reducing the cost per passenger.

As a result, it is concluded that, so far, costs for passengers in terms of fare levels, have not been affected by the Regulation.

7.1.2 Benefits of implementing the Regulation

A regulation can be considered efficient if its objectives are achieved (effectiveness) against reasonable cost. Therefore, to assess the benefits, a review of its effectiveness is an important starting point (see Section 5). In addition, the Liability Regulation may have had other benefits, in particular through impacts on operating costs (savings). The latter is the case in particular as regards the costs of handling liability claims.

Benefits resulting from effectiveness

The Liability Regulation has four objectives, as indicated in Section 2.1. Achieving those objectives was expected to create benefits in the areas of:

- Passenger rights in the event of accidents: largely successful;
- A level playing field among ship operators: less successful;
- Incentives for better safety performance: not successful;
- A more balanced framework of passenger rights across transport modes: largely successful.

As concluded in the previous chapter, the regulation has been largely successful in improving passenger rights protection and in creating a balanced framework of passenger right, but less successful in further levelling the playing field among operators. It is evaluated as not effective in incentivising a better safety performance. The previous chapter also indicates that no quantification of the effectiveness could be made due to lack of data.

Benefits from improved passenger rights

Achieving improved passenger rights is a benefit in itself, and the effectiveness evaluation has shown that the regulation has been successful in contributing to this, in terms of

- Significantly raising the liability limits (a factor 2 or more, see Sections 3.2 and 3.4)
- Reducing uncertainties due to the variations in liability levels and regimes in place in EU Member States before the Regulation (again see Section 3.4).

The result is highly appreciated by the stakeholders. Such a benefit is very important, and the survey, as well as the case studies, show that passengers have benefited from higher compensation limits, advance payment and faster

settling of claims. Indicators identified in our evaluation framework to quantify this measure included number of complaints received by authorities and/or consumer representing agencies (a reduction of complaints, or a high satisfaction level of addressing complaints), and the effort (hours of time, number of forms to fill) of passengers to claim their compensation

However no data on the number of claims or the duration of their handling, on the pay-out of compensation or advance payment could be provided by authorities nor by passenger representing agencies. Also other stakeholders consulted did not have such data available.

As a side effect to this, findings from the interviews point to the additional benefit for passengers of experiencing less 'hassle'. The regulation has improved the clarity for liability grounds and has helped to harmonise/standardise the settling of claims, as well as the more automatic provision of information, advance payments, etc. It has also helped to ease the process that passengers/victims need to go through when confronted with an accident.

The appreciation of this benefit can be confronted with the amount of liability complaints received by ship operators or authorities. Specifically, no complaints have been received since the introduction of the Regulation. A comparison with complaints prior to the entry into force of the Regulation could not be made, as no consistent time series is available.

Overall, and in line with the assessment of the effectiveness of the Regulation in respect of passenger rights, the benefits in this category are considered to be significant.

Benefits from improved level playing field

The instrument of an EU Regulation provides a powerful mechanism for achieving harmonised legislation across the EU Member States. In view of liability, the Regulation is said to have contributed to ratifying the Athens Convention, thus achieving a level playing field for liability in international shipping. From the side of the passenger shipping industry (ship operators), this is considered a significant benefit, as it:

- Provides a level playing field among operators thus reducing inequalities in competition within the sector. As one interviewee mentioned, the differences in operations between geographic areas are reduced, making it easier to compete, access new markets, etc. An example from the cruise market was that competition for tourists is made more level as all operators need to include in their offers the same liability coverage, irrespective of where they operate. While this was appreciated by the stakeholders consulted, it was also noted that, according to ship operators, passengers usually do not consult the liability coverage, and do not use this parameter for choosing an operator;¹¹⁴
- Enhances administration within a company. For operators active in multiple markets, the harmonisation across Europe may have eased their internal operations, for instance by aligning the insurance

¹¹⁴ Eurobarometer 432, January 2016, <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/search/tourism/surveyKy/2065>

requirements across the countries of activity, thus allowing lower operating costs (administration costs staff time) for this ship operator. The extent to which such a benefit accrues depends on the size of the company and its areas of activity. As compliance to the Liability Regulation is only a small part of the administrative activities of a company, the benefit cannot be isolated or quantified;

- Improved transparency - this can be seen as a benefit both for operators and for passengers. For passengers, as mentioned above, more clarity over rights and procedures reduces their 'burden' in case of accidents. For operators, it reduces their uncertainty over liability claims that they may be confronted with.

For domestic shipping, it has contributed similarly as regards classes A and B, but so far only partially as 12 Member States have postponed application of the Regulation for categories A and/or B till end of 2016 or end of 2018 (see section 3.3). The regulation has only marginally contributed to a level playing field for classes C and D as these are either deferred in most countries, or a range of exceptions is applied, as explained in the previous chapter. Therefore, the benefits of an improved level playing field remain at the side of international shipping and domestic shipping of classes A and B. On the other hand, it is also observed that operators active in the markets of categories C and D typically are smaller operators only active within their own country. Therefore, assuming a national legislation on liability is in place, within their market a level playing field already exists. Only for those operators active in multiple countries and/or active also on A and B category markets, extending the scope would provide additional benefits.

Benefits from improved passenger safety performance

Although survey respondents indicate a positive impact of the Regulation on safety and security performance, most interviewees state that there is no impact at all. Their main argument is that first of all the safety standards in passenger shipping are believed to be already very high, since a good safety image is considered crucial for an industry with such high visibility in the consumer market, and second that other legal requirements (SOLAS and ISPS Code Port State Control in particular) are providing more of an incentive than the Liability Regulation. Further to this, attention to on-shore activities safety of cruise passengers is receiving increased attention from operators.

On the other hand, interviewees consulted had not been faced with accidents that called upon the Liability Regulation, suggesting that at least the accidents have not increased. As stated earlier, the data on accidents reported by EMSA, while showing 26 lives lost and 544 people injured over the period 2013-2015, do not allow a proper analysis of the numbers before and after the entry into force.

Hence the benefit of improved passenger safety performance is considered to be limited.

Benefits from a more balanced framework of passenger rights across transport modes

While the objective of the Regulation also was to further harmonise passenger rights across modes of transport, conclusion from the previous is that although it has certainly raised the level of passenger rights, the benefit of these rights being more balanced with those applicable in other modes of transport is less clear. This may be due to the fact that passengers choosing for a ship journey do so without necessarily considering the passenger rights they would have when choosing another transport mode.

The focus of the objective on balanced passenger rights lies with the right to information, the rights to special compensation for persons with reduced mobility and the right to an advance payment. The main benefit achieved in this regard is that rights have been harmonised across EU Member States, including domestic shipping categories A and B. Besides the general improvement of passenger rights (addressed above) the fact that they have been harmonised across countries can be considered an additional benefit, as travellers are now treated equally irrespective of where they travel (in the EU). Such benefit can be expressed by the level of compensation offered (harmonised through the Regulation) but also the equal treatment in terms of handling claims and paying advances, which could be measured through time required for receiving payment, and complaints received on these. The main benefit here is the improved clarity transparency, and due to the harmonisation the increased certainty among passengers that their rights are ensured irrespective of where they make their boat trip. Unfortunately, however, none of the stakeholders consulted were able to provide quantitative data on these indicators.

Finally, in the context of harmonisation, a benefit identified in relation to passenger rights is that the Regulation is believed to have contributed to easier enforcement. For authorities, inspecting foreign vessels, the regulation has changed the requirements, and harmonised them across Europe. However as inspections are a Member State's responsibility, this has not provided efficiency benefits to individual inspectorates.

Savings in claims handling

The Regulation is reported to have had an impact on the costs of handling claims following accidents or incidents, in particular due to its provision of a uniform approach across Europe, and including domestic shipping in this approach as well. Lawyers interviewed suggest that the Liability Regulation has helped smoothing the claim procedure, thus lowering its cost. Two reasons are given, firstly, being that the Regulation has provided more clarity regarding under which conditions the ship owner is liable and which jurisdiction applies, reducing disputes between claimants' lawyers and ship owners, and secondly, that the Regulation is said to have contributed to an increased willingness to settle claims outside of court, thus avoiding lengthy court cases and associated high costs. In addition, Member State authorities and ship owners confirm this assumption, while the settling of claims outside of court is also observed in the case studies, which have shown that accidents involving multiple countries (international shipping) and/or passengers from multiple nationality created complexities in handling claims. This statement is

confirmed from the effectiveness analysis in the previous chapter, concluding that the strengthened passenger position improves the chances of settling claims.

This reasoning should, however, be taken with care, as respondents from the survey do not have personal experience in applying the Regulation in regard of dealing with liability claims, and a comparison with claims related to the regime prior to the Regulation is not possible as data on claim costs prior to the Regulation are not available, and claims under the Regulation have not been completed yet. The case studies conducted indicate, however, that the time required for handling claims has been shortened compared to what it would have been without the Regulation in place. For example, case study interviewees state that individual claimants (passengers) have their claims settled several years faster than before.

It is noted here that a distinction between international and domestic accident claims must be made. For international claims, in most countries the Athens Convention/PAL would be followed had the Regulation not been there, and the impact of the Regulation on claims handling is limited. For domestic cases, the Regulation is considered a major improvement as the case studies show, but this benefit cannot be monetized. As an example, if a lawyer would charge € 20,000 for handling a claim (which would in practice depend on duration and complexity) and the duration of the claims procedures is shortened by half (from the case studies it can be seen that cases can take several years to be settled), a significant amount of costs is saved for each individual case (in the order of € 10,000 in this example).

Opposite to what was stated by interviewees, part of the respondents to the survey report an increase of the duration of legal procedures after accidents (12%) as well as an increase of the number of cases ending up in court procedures (17%). This might be due to the fact that most respondents have not been involved in claims handling and can only indicate their expectation. No particular country differences could be derived from the responses.

Overall, it seems fair to conclude that the Regulation has helped to lower the costs of handling claims, both at the side of the ship owners, insurers and their lawyers, and at the side of the authorities (courts). A quantification of these benefits can however not be made as quantitative data on actual changes (e.g. numbers of claims handled, duration, pay-out of compensation or advance payments, as well as changes in accident levels since the Regulation entered into force, could not be obtained from any of the sources consulted (literature, interviews, surveys, case studies). This relates partly to the fact that the Regulation has only been in use for a short period of time and experience with it is limited. For instance, the stakeholders interviewed have not been engaged in liability claims in the context of the Regulation since its entry into force, and the accident case studies, which are very specific and cannot be generalised in this regard, largely are still in the handling process¹¹⁵.

¹¹⁵ This is partly due to the fact that each accident is different.

7.1.3 Are costs reasonable and proportionate in relation to the benefits

The total costs of implementing the Regulation are estimated at between zero and € 43 million per year, the majority of which concern costs for ship owners in the form of an increase of liability insurance premiums to be paid, the remainder relating to cost increases for authorities implementing and enforcing the regulation. Overall, this amount is considered low, both in terms of how it is perceived among stakeholders, and objectively in terms of the relative impact on the passenger shipping sector as a whole, where this amount is negligible compared to overall operating costs and revenues (in the order of 0.05%).

It has not been possible to quantify the benefits due to lack of data on the levels of compensations provided and the duration of legal proceedings, however, it is still reasonable to assume that they outweigh the costs especially as the costs are fairly low overall and make up a minimal contribution to overall shipping costs. This conclusion is supported by the survey respondents.

7.2 Conclusion on efficiency

The costs of implementing the Liability Regulation are low. Estimates suggest annual costs to be between zero and approximately € 40 million, which mainly concerns the increase of insurance premiums due to the raised liability ceilings. Other cost elements such as certification costs, administrative burdens and costs of adapting operations are considered to be only a small fraction of this amount. Additionally, costs for MS authorities to issue the relevant certificates are considered to be on average approximately between € 35,000 and € 70,000 per Member State per year. Additionally, no impact on passenger fares has been identified. This amount represents only a marginal share of the industry's size (in the order of 0.05%). Stakeholders consulted confirm the costs to be minimal.

The benefits are diverse. Besides the achievement of objectives (in particular improved passenger rights and an improved level playing field, as illustrated above), also savings in claims handling as a result of the Regulation are reported. However, these benefits could not be quantified. Overall, the Regulation is considered to be efficient, as it is largely achieving its objectives, thereby creating benefits (which could, however, not be quantified due to lack of data on the levels of compensations provided and the duration of legal proceedings), against relatively low costs.

8 Coherence

This chapter presents the conclusions of the analysis related to the defined coherence evaluation questions, based on the results of desk research, interviews, stakeholder survey and case studies. Each evaluation question is scored on its underlying evaluation criterion.

8.1 Q7: Coherence with EU maritime safety and passenger right policies

Q7: To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability? Are there any overlaps, gaps or inconsistencies?

8.1.1 To what extent does the Regulation fit in the EU maritime safety policy?

The Liability Regulation has been adopted as part of the Third Maritime Safety Package. Together with six other Regulations and Directives¹¹⁶, this Regulation aims to improve maritime safety throughout the EU and reduce substandard shipping. In order to achieve these overarching goals, the Third Maritime Package puts emphasis on four topics:

1. The eradication of substandard vessels;
2. The emphasis on accountability, responsibility and liability;
3. The combination and integration of data;
4. Monitoring and reporting requirements.

The Liability Regulation relates especially to the second topic, as the Regulation focuses on introducing a liability regime for carriers in case a passenger dies or is injured during the journey. Besides the Liability Regulation other regulations and directives focus on liability aspects (especially Directive 2009/20/EC, Directive 2009/17/EC and Regulation 391/2009). Although all regulations and directives lay down rules on liability, they all focus on different actions causing liability of ship owners. The differences, however, do not lead to coherency problems between the different instruments of the EU maritime safety policy.

During the *ex-post* evaluation of the Third Maritime Package¹¹⁷, the Liability Regulation was only in force a couple of years. The evaluation concluded that, at that time, it was not possible to indicate whether or not the Regulation had effectively contributed to reaching the set goals. The evaluation, however, did conclude that the Regulation, together with several other Regulations and Directives, did contribute to a more equal share of the burden of measures

¹¹⁶ Directive 2009/21/EC (on Flag State Control), Directive 2009/16/EC (on Port State Control), Directive 2009/15/EC and Regulation 391/2009 (on ship inspection and survey organization), Directive 2009/17/EC (on vessel traffic monitoring), Directive 2009/18/EC (on investigation of maritime accidents) and Directive 2009/20/EC (on insurance for ship-owners for maritime claims).

¹¹⁷ European Parliamentary Research Service (2015).

among maritime players. The set of rules also makes it increasingly difficult for ship-operators to avoid the applicable rules.

The findings of the previous evaluation are supported by stakeholders' views obtained during this evaluation. One stakeholder explicitly referred to the coherence between the Liability Regulation and the EU maritime safety policy, while others referred to the coherence in broader terms. In the stakeholder survey held, 43% (15 respondents) indicated that they consider that the Liability Regulation is entirely in line with the EU policies on maritime safety. One respondent indicated that the Liability Regulation is partially conflicting with other EU policies in maritime safety¹¹⁸, while the remaining 19 respondents indicated that they do not know whether or not the regulation is in line with the broader maritime policies.

None of the stakeholders, both the ones interviewed and the ones responding to the survey, mentioned problems between the Liability Regulation on the one hand and other EU maritime safety related regulation or policies on the other. It therefore seems plausible to conclude that the Liability Regulation is coherent with other EU maritime safety related policies.

8.1.2 To what extent does the Regulation fit in the EU passenger right policy?

This evaluation aspect can be divided into three aspects. One the hand, it is important to assess whether or not the Liability Regulation is coherent with the overall passenger rights policy of the European Commission. On the other hand, it is important to assess if the Liability Regulation (together with Regulation 1177/2010) is in line with the protection offered in other modes of transport. As a final step, the coherence between the Liability Regulation and the Travel Package Directive is discussed.

Coherence with general passenger right policies

The EU has formulated a comprehensive set of basic passenger rights¹¹⁹, which should apply to all transport modes (i.e. air, rail, waterborne, bus and coaches). This set of basic passenger rights is based on three cornerstones; (i) non-discrimination, (ii) accurate, timely and accessible information, and (iii) immediate and proportionate assistance. Based on these cornerstones ten principles have been formulated which form the core of the EU passenger rights framework. The principles are:

1. Right to non-discrimination in access to transport;
2. Right to mobility: accessibility and assistance at no additional cost for disabled passengers and passengers with reduced mobility (PRM);
3. Right to information before purchase and at the various stages of travel, notably in case of disruption;
4. Right to renounce traveling (reimbursement of the full cost of the ticket) when the trip is not carried out as planned;
5. Right to the fulfilment of the transport contract in case of disruption (rerouting and rebooking);

¹¹⁸ The stakeholder did not specifically indicate where Regulation 392/2009 partially conflicts with the other maritime policies.

¹¹⁹ COM(2011) 898 final.

6. Right to get assistance in case of long delay at the departure or at connecting points;
7. Right to compensation under certain circumstance;
8. Right to carrier liability towards passengers and their baggage;
9. Right to a quick and accessible system of complaint handling;
10. Right to full application and effective enforcement of EU law.

For maritime transport the ten principles mentioned above are codified in two Regulations; Regulation 1177/2010 and the Liability Regulation. These two Regulations need to be seen as complementary instruments, where most of the passenger rights are protected by Regulation 1177/2010.¹²⁰ The Liability Regulation focuses on a limited number of the above mentioned passenger rights. This is not problematic however, as the main aim of the latter Regulation is to lay down a Community regime relating to liability and insurance for the carriage of passengers by sea in the event of accidents only (see Article 1 the Liability Regulation). The focus of the Regulation therefore lies more on introducing a liability scheme for the carriers and thereby strengthening passenger protection further. The focus of Regulation 1177/2010 is on fulfilling the three cornerstones mentioned above.

The main rights protected by the Liability Regulation are:

- Principle 3 (right to information):
 - This principle is laid in Article 7 which states that 'the carrier shall ensure that passengers are provided with appropriate and comprehensible information regarding their rights.' In essence, this means that the carrier, amongst others, has to provide the passenger with information on the possibilities for compensation, the maximum limits, the right to an advance payment and the time frame applicable.
- Principle 8 (right to compensation):
 - This principle is laid down in Annex I; Articles 7 (loss of life or personal injury) and 8 (loss of or damage to luggage) of the Annex give the maximum compensation limits. Articles 3 and 5 provide guidance on how and when liability can be established;
 - Article 4 of the Regulation itself explicitly includes the right for compensation in the event of loss or damage to mobility equipment. In addition, Article 6 provides the right of an advance payment.
- The remaining principles are covered by Regulation 1177/2010. Solely looking at these two regulations in relation to the Commission's policy to passenger rights, these two Regulations together form a coherent set of rules, aiming to protect the basic passenger rights.

¹²⁰ It should be noted that the scope of the two Regulations is different. Regulation 392/2009 applies to all ships flying the flag of a EU Member State, all contracts of carriage made in EU Member States or when the place of departure or destination is located in a EU Member State (article 2). Regulation 1177/2010 applies to passenger services where the port of embarkation is located in a Member State, to passenger services of which the port of embarkation is outside EU the territory of a Member State, but the port of disembarkation is within the territory and the service is carried out by a Union carrier or on a cruise where the port of embarkation is within the territory of a Member State (however articles 16(2), 18, 19, 20(1) and 20(4) will not apply).

This view is partially confirmed by the stakeholders consulted during the evaluation. Several interviewees are of the opinion that the Liability Regulation fits well with the overall EU passenger rights policy¹²¹. Others did not explicitly comment on this topic.

In the survey, 49% of the respondents (17 in total) indicated that they are of the opinion that the Regulation is entirely in line with the EU passenger rights policy. However, another 9% (3 respondents) indicated the Regulation is partially conflicting. Main points of concern voiced by stakeholders relate to the fact that:

- provisions regarding mobility equipment are laid down in both the Liability Regulation and Regulation 1077/2010. As the rules are laid down in two pieces of legislation, this might lead to deviations in the application of such rules. To increase further coherence between the two Regulations, both regimes should be consolidated, which would reduce the possibility of different interpretations;
- certain regulations are read and explained differently in different countries, leading to different application of passenger regulation throughout the EU.

Although some stakeholders voiced their concern that the Liability Regulation and Regulation 1177/2010 might not be fully coherent, it seems that on most points both regulations are in line with the overall passenger right policies of the European Commission. Therefore, it is possible to say that the Liability Regulation is coherent with the overall policies.

Coherence with passenger rights in other modes

A second relevant point to address is whether or not the rules laid down in the Liability Regulation (together with Regulation 1177/2010) are coherent with the rules laid down in other modes of transport.

As a first general observation to the question posted above, Kirchner and his co-authors¹²² note that “due to the similar nature of many passenger transports, it has been important for the EU to strengthen passenger rights across the board. However, whether or not the rights granted to passengers in maritime transport are coherent with the rights granted in other transport modes remains a question mark.”

In 2012 the ex-post evaluation of the Rail Regulation¹²³, an overview of the different regulations was made and they were compared on several topics, such as rules regarding information, security & liability and PRMs. In the comparison Regulation 1371/2007 (rail), Regulations 889/2002, 261/2004 and 1107/2006 (air) and Regulation 181/2011 (bus and coach) were included. For maritime transport only Regulation 1177/2010 was included in the analysis. As presented in Annex 13, Regulation 1177/2010 covers many of the different passenger rights aspects as laid down in COM (2011) 898, however the liability & security aspects are not covered by this Regulation.

¹²¹ Stakeholders indicating that the Regulation 392/2009 fits well with the overall passenger rights framework are e.g. the Maritime and Coastguard Agency (UK), the Danish Ministry of Transport and the Dutch maritime network association.

¹²² Kirchner, Tüngler & Martin Hoffmann (2015).

¹²³ Steer Davis Gleave (2012).

If the Liability Regulation is added to this overview (as is done in Annex 13) it becomes clear that the points on liability and security are covered in maritime transport as well. On a high aggregation level it can be concluded that the Liability Regulation together with Regulation 1177/2010 are coherent with the passengers rights laid down in other transport modes (as all relevant topics are addressed).

The comparison also shows the extent of the protection offered between the different modes. It becomes clear that the actual protection offered varies between the modes. For example, the advance payment granted in the event of death or injury is at least € 21,000 in rail and maritime transport, in air transport it is at least € 19,000, while an advance payment in bus and coach transport is absent. The Commission stated in the 2011 Communication on passenger rights¹²⁴ that: *'in order to guarantee a fair and respectful treatment of passengers, the legislator has had two aims. First, to introduce a common set of passenger rights guaranteed by law for the four transport modes. Secondly, to allow the necessary distinctions due to the specific characteristics of each mode and their markets, related to the industries (company size, revenues or number and frequency of routes) and passengers (length, price and conditions of the trip) to ensure proportionality.'* Therefore the offered passenger protection between modes can differ depending on specific characteristics of the transport modes. Although the Commission has a clear view on passenger right protection, it remains a topic of debate between different stakeholders whether or not passenger rights granted in different modes should be equal.

In the *ex-post* evaluation of the Third Maritime Safety Package¹²⁵ around 40% of the stakeholders indicated that the effect of the Regulation on the comparability with other modes is as anticipated. In their opinion, the rights granted within maritime transport are sufficiently coherent with the rights granted in other modes. The remaining 60% indicated that no effect was seen with the entry into force of the Liability Regulation.

Attorney General Jääskinen at the European Court of Justice¹²⁶ is not yet satisfied that passenger rights are equally protected in all modes. He expressed that while there are similarities between different liability regimes for different modes of transportation, the comparability is limited. In the opinion of the Attorney General, the EU still has to develop a coherent ocean-related vision. The Liability Regulation is a noteworthy example of how Europe can lead in the search for new legislative developments.

Several academic authors, however, disagree with the view that maritime passenger rights should fully equal to passenger rights in other modes, notably air transport. For example, Kroger¹²⁷ touches upon the fact that the sea carrier simply cannot be subject to the same rules as the air carrier mainly on the basis of the differing estimates of potential risks of the individual transport mode, the economic background of the markets and the

¹²⁴ COM(2011) 898 final.

¹²⁵ European Parliamentary Research Service (2015).

¹²⁶ C-509/11 ÖBB-Personenverkehr, AG 2013.

¹²⁷ Kroger (2001).

political influence on liability clauses. This view is supported by Soyer¹²⁸ who indicates that circumstances surrounding the transportation of passengers by sea and the potential risks involved are different from transportation by air. In air transport, the passenger is seated for most of the voyage with a fastened seat belt, while ship passengers find themselves free to move and enjoy a hotel-like environment.¹²⁹ These views are in support of lower compensation limits for maritime passengers and a more limited liability of the carriers, in case of non-shipping incidents. For a more elaborate overview of the differences between passenger rights protection in air and maritime transport, please refer to Section 5.1.4.

On the other hand, Kroger also argues that the definition of damages under the Athens Convention is notably wider than the one included in the Montreal Convention (the international Convention forming the basis for air passenger rights)¹³⁰, encompassing mental or psychological losses¹³¹. The same view is expressed by Saggerson¹³² who denotes the fact that the use of the words "personal injury" compared to "bodily injury" indicates that psychiatric injury or other impairment of mental faculties are included under the Athens Convention.

Where academics seem to have a rather clear view of which types of damages are covered under the Montreal Convention and the Athens Protocol, stakeholders consulted seem to have a less clear understanding. Several lawyers argue that a legal gap regarding the possible compensation of certain damages exists. For example in case of an air incident, the ECJ ruled¹³³ that the limit provided under the Montreal Convention includes all kinds of damages (so also emotional and psychological trauma is covered). In case of a maritime incident, it is unclear if all kinds of damage will be covered under the set limit. This poses legal uncertainty amongst stakeholders.

Furthermore, quite some stakeholders consulted during the evaluation support the view that differences between the transport modes are not an obstacle for sufficient passenger right protection. Many indicate that the fact that passengers' rights are protected in maritime transport and are, in general, protected in a similar way as in other modes, is more important than the minor differences that still exist. These differences are inherent to maritime transport according to the stakeholders.

¹²⁸ Soyer (2002).

¹²⁹ On-board the ship the passenger enjoys great freedoms. For instance, the passenger can move around freely and even engage in sporting activities. As such there is no great difference between passengers on-board a cruise ship and guests in a land-based hotel. Operators of land based holiday resorts do not face reversed burden of proof in cases where their guests sustain personal injury on their premises. A similar argumentation should apply to cruise operators in case of a non-shipping incident aboard their ships (Soyer2002). It is not fair and appropriate to expose a sea carrier to a similar regime as in air, as the risk on a self sustained injury in air is much lower than in sea. By applying the same liability rules, the sea carrier would run a much higher risk to be held liability, although he will not be able to avoid the personal sustained injuries of passengers.

¹³⁰ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999).

¹³¹ And thus offer a higher level of protection of the maritime passenger compared to the air passengers and more types of damage can be claimed in maritime transport.

¹³² Saggerson (2008).

¹³³ C-63/09 Axel Walz versus Clickair SA.

All in all, it can be concluded that the Liability Regulation (together with 1177/2010) is rather coherent with the passenger right protection offered in other modes. On minor points differences still exist, however such differences are not seen as major obstacles. As indicated in paragraph 5.1.4, only 9% of the respondents indicated that Regulation 392/2009 has a negative or very negative effect on reaching the objective of creating a balanced framework of passenger right protection.

Coherence between the Liability Regulation and the Package Travel Directive

One potential problem referred to in some academic literature is a possible tension between the Liability Regulation and the Travel Package Directive¹³⁴. The problem especially arises in the cruise shipping market, as cruise passengers can both have a contract of carriage (and then would fall under the scope of the Liability Regulation) and a contract for a travel package¹³⁵ (and then would fall under the Travel Package Directive¹³⁶).

The judgment of the European Court (Grand Chamber) of 7 December 2010, in the joined cases C-585/08 and C-144/09 has confirmed the view that cruise ship services could fall under the scope of the aforementioned Directive and thus be regarded as package travel. The court had to decide – among other questions- whether a “voyage by freighter” constituted package travel for the purposes of Article 15.3 of Regulation n^o 44/2001. The ECJ ruled that a contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Accordingly, such a service fulfilled the necessary conditions for a package within the meaning of Article 2.1 of Directive 90/314.

In view of the above, authors refer to some cases where the Courts dealt with the potential conflict between the Package Travel laws and the Athens Convention.¹³⁷ In *Lee vs Airtours Holidays Ltd*¹³⁸, the contract for a cruise holiday on *Sun Vista*, which caught fire and sank with passengers’ valuables on board, had been made through a travel agent. The claim was brought under Regulation 15 of the PTR, against the travel agent for inter alia loss of valuables.¹³⁹ Judge Hallgarten held that the Regulations represented an alternative regime to the Convention. Insofar as the Regulations conflicted with UK domestic law (the law implementing an international convention), the regime of the Regulations must prevail pursuant to the European Communities Act. In case there was no express incorporation of the Athens

¹³⁴ Council Directive 90/314/EEC.

¹³⁵ Peralta (2014).

¹³⁶ According to Article 2.1 of Council Directive 90/314/EEC the term “package” means “the pre-arranged combination of at least two of the following: “transportation, accommodation, other tourist services not ancillary to transport or accommodation and accounting for a significant part of the package. The separate billing of various components of the same package shall not absolve the organizer or retailer from the obligations under this Directive.”

¹³⁷ Peralta (2014), Mandaraka-Sheppard (2009); Tsimplis (2009).

¹³⁸ *Lee and Lee v Airtours Holidays Ltd and Airtours Plc*, 26 April 2002, Central London County Court (HH) Hallgarten QC, (2004) 1 Lloyd’s Rep 683.

¹³⁹ The UK Package Travel, Package Holidays and Package Tours Regulations 1992.

Convention in the contract, the package travel rules prevailed over the Athens Convention to the extent that the two conflicted. However, in the Norfolk case¹⁴⁰, the plaintiff tried to file a suit under the package travel rules since the two-year limitation period had elapsed. The court rejected this claim by explaining that a claim for any personal injury suffered aboard a cruise ship when the Athens Convention applies will fall within the scope of the Convention and as a consequence the claim was found time barred. The fact that the package travel rules flowed from the Package Travel Directive did not affect the standing of the Convention. The Court also noted that Athens Convention was given the force of law in the UK and therefore applied even where there was no express reference to it in the contract.

As noted by both Tsimplis and Mandaraka Sheppard, the risk of conflict is in any case waived in view of the Liability Regulation which takes precedence over national laws implementing the Package Travel Directive. On the other hand, Peralta in his Article discusses both legal instruments and considers when it should be appropriate for the Package Travel Directive to take precedence over the Convention's regime. Accordingly, Peralta suggests that the key to that question is to consider the role of transport in the services. In the carriage of passengers, the transport is essential and the "obligation of result", which involves the carriage of passengers to their destination, cannot be changed in that case. In contrast, in cruise shipping, transport is ancillary to other services. The vessel is the destination itself and in view of that, the itinerary could change without significant consequences. That type of transport, according to the author, qualifies as a package component and the package travel rules should apply.

Until now, no case relating to this question is pending before the European Court of Justice. Therefore no ruling on EU level is available and national courts remain the main source of information.

It should be noted that Peralta also refers to possible repercussions on the notion of "package" deriving out of the application of Regulation 1177/2010 of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) n° 2006/2004 that will be applicable from 18 December 2012. Peralta refers to the answer provided by the Commission following a question posed by the European Parliament¹⁴¹, regarding in particular the marketing of cruises. According to the Commission, *"The Commission finds it likely that a cruise that fulfils the requirements of Article 2(1) of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours ('the directive') would qualify as a 'package'. In relation to this, the Commission points to the fact that most cruises are sold at an inclusive price and involve a combination of at least transport and accommodation."*¹⁴²

¹⁴⁰ Norfolk v My Travel Group plc (2004) 1 Lloyd's Rep 106.

¹⁴¹ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2011-007683&language=EL>.

¹⁴² "[...] As highlighted by the Honourable Member, the Court of Justice of the European Union has repeatedly pointed out the criteria that are sufficient for a service to qualify as a package within the meaning of Article 2. The Commission cannot find strong arguments to argue that a cruise should only be considered 'as a stand-alone service within the category of transport services' in relation to the definition of a 'package'. Against this background, the Commission is of the opinion that Regulation (EC) No 1177/2010(3) and its definition of a 'cruise' do not have repercussions on the notion of a 'package' as defined in Article 2(1) of the directive. However, as the Honourable Member is aware, the competence to interpret EU

Also several stakeholders discussed the potential conflict between the Package Travel Directive and the Liability Regulation. According to them it can lead to legal uncertainty for, especially, the cruise passenger. In their opinion, the potential conflict reduces the protection of the passenger.

Based on the discussion above, it can be concluded that it is unclear whether or not the Liability Regulation is coherent with the Travel Package Directive. This issue can only be clarified through further experience gained with the application of both instruments, in particular in view of the recent revision of the Package Travel Directive.

Directive (EU) 2015/2302¹⁴³ on package travel and linked travel arrangements, which repeals the 1990 Package Travel Directive with effect from 1 July 2018, when the national provisions transposing Directive (EU) 2015/2302 will become applicable, suggests in its recital 17 that cruises will normally have to be considered as packages. Article 14 (5) of Directive (EU) 2015/2302 specifies that rights to compensation or price reduction under the Directive shall not prevent travellers from presenting claims under certain EU regulations and under international conventions. Compensation and price reduction granted under those regulations and international conventions have to be deducted from each other in order to avoid overcompensation. Article 14 (4) of Directive (EU) 2015/2302 provides that insofar as international conventions binding the Union limit the extent of or the conditions under which compensation is to be paid by a provider carrying out a travel service which is part of a package, the same limitations shall apply to the organiser.

8.1.3 To what extent does the Regulation fit in the EU approach to transport operator's liability?

As acknowledged by the Commission in its European vision for passengers¹⁴⁴ the EU legislation transposes international conventions into EU law. The Liability Regulation transposes the Athens Protocol 2002 in EU law. Regulation 889/2002 does something similar for the Montreal Convention (carriage by air)¹⁴⁵.

The international conventions all establish liability of the carrier and impose liability limits. However, each regime has its own merits and substantial differences can exist between passenger protection in one mode compared to the other. Most mentioned differences exist between air and sea. Therefore, it is interesting to take a closer look at the differences existing between Athens Protocol and the Montreal Convention, especially regarding; (i) the different liability regimes, (ii) the limitation period and (iii) incident vs accident.

legislation rests with the Court of Justice of the European Union. The Commission can therefore not give a legally binding answer regarding the interpretation of Article 2(1) of the directive."

¹⁴³ Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326 of 11.12.2015, p. 1

¹⁴⁴ COM(2011) 898 final.

¹⁴⁵ For all transport modes, except bus transport, EU regulations are in place transposing international conventions into EU law.

Differences in liability regimes

The 2002 Protocol amended the previous provisions of the Athens Convention and introduced strict liability for shipping incidents while at the same time raising the limits. These changes brought the liability regime of the sea carrier one step closer to the respective regime imposed by Montreal for the air carrier. Nevertheless, these two regimes are not identical. More specifically, non-shipping incidents are still subject to a fault-based regime under the 2002 Protocol. As explained by Soyer and Kroger, this differentiation is justified in view of the different circumstances surrounding the transportation of passengers by sea and the potential risks involved. The air passenger is seated for most of the voyage with a seat belt fastened, while the ship passengers find themselves free to move and in some cases may engage in sport activities. On-board cruise ships in particular, many authors recognize that passengers enjoy a hotel-like environment¹⁴⁶, which means that passengers can walk around freely and in some instances even can enjoy sport activities. In an airplane, the passenger is seated with his/her seatbelt fastened. The risk on a self sustained injury is in air transport much lower than in sea transport (as a result of the freedom to move around). Thus, it does not seem fair and appropriate for a sea carrier to be exposed to the same liability rules as an air carrier and be held strictly liable for all accidents, which occur in the course of the voyage.¹⁴⁷

In addition, the liability of the sea and air carrier is also different as far as the limits are concerned. Although the Montreal Convention provides for unlimited liability in case of injury or death, the Athens Convention retained the limits and raised them through the 2002 Protocol. Sir Haddon-Cave¹⁴⁸ strongly supports the view that shipping law should follow the example of aviation and eliminate the limits of liability, since the grounds justifying their existence have ceased to exist for both modes of transport.

Other authors argue that the differences between the two modes are inevitable. The Athens Convention includes a maximum liability limit which is considered desirable on the grounds of public policy and the structure of the insurance markets.

Limitation period

Referring to the two-year limitation period applicable under the Regulation, Soyer comments that the possibility granted to courts to extend the period to three or five years will allow a passenger diagnosed with a whiplash injury four years after disembarkation to bring a claim and be compensated. For P&I Clubs however, such extension amounts to an extended period of exposure to risks. Comparing this provision to the respective one under Montreal, it is evident that the latter does not offer the possibility to extend the limitation period. Nevertheless, according to Soyer, it should be kept in mind that the types of injuries which may take longer to be diagnosed are not as common in

¹⁴⁶ In the words of Soyer, "In this respect, there is not great difference between the positions of passengers on a cruise and guests at a land-based resort. The operators of holiday resorts do not face reversed burden of proof in cases where their guests sustain personal injury on their premises; neither therefore should cruise operators have to prove their innocence with respect to guest injuries in non-shipping incidents aboard their vessels".

¹⁴⁷ Soyer (2002); Kroger (2001).

¹⁴⁸ Haddon-Cave (2001).

air transportation. It should also be noted however, that the author does not provide any concrete data in support of his argument above. He concludes that, "the Montreal Convention seems inapt as a basis for opposing change in the Athens Convention in this area."

Incident versus accident

Saggerson also points out that the use of the word "incident" as opposed to "accident" may be intended to extend the scope of liability beyond the one contemplated by Montreal Convention, despite the fact that no concrete examples in support of this view are shared by the author. At the same time, the author adds that it avoids the difficulties arising when interpreting the term "accident" under the Montreal regime. In the author's opinion, however, it is likely that injury resulting from some internal factor specific to the passenger (for example pre-existing physical weakness) are not likely to be covered by the Athens compensation regime any more that they give rise to compensation under the Montreal Convention.

Stakeholders views

Although differences certainly exist between the applicable regimes in air and sea, many stakeholders are of the opinion that with the entry into force of the Liability Regulation the differences between the regimes have decreased, that operator's liability is more equal and that passenger rights (especially those of maritime passengers) have increased.

Although most stakeholders indicate that differences have decreased, they also indicate that the coherence with other modes is not yet fully achieved. For instance, prior to the adaptation of the Liability Regulation, the gap between passenger right protection in the maritime field on the one hand and air and rail on the other hand was considerable. With the adoption of the Liability Regulation the gap is closed and passenger rights regimes became more in line. However, the protection in maritime transport is still less favourable compared to the other modes, especially air and rail.

Another example referred to is the difference between the liability of a ship operator and of an airline operator. An airline operator under the Montreal Convention is unlimitedly liable unless he is able to prove that the accident was not due to fault or negligence (from him or his servants/agents). In maritime law, the operator is only limited liable unless his recklessness is proved by the claimant. In the opinion of the lawyer, the Montreal regime is more preferable from a passenger right point of view.

Some stakeholders still remark that it is questionable if the Liability Regulation is coherent with other modes, from a liability requirement perspective. The limit to liability is not equal between modes, as well as the requirements for establishing liability. Main differences exist between maritime and rail.

These mixed views on whether or not the Liability Regulation is coherent with the EU approach to transport operator's liability are also apparent from the survey responses. 17% of the respondents (6 in total) specified that they think the Regulation is entirely in line with the EU regime on transport

operator's liability. Another 11% (4 respondents) indicated they think the Regulation is partially conflicting and one other respondent answered that the Regulation is entirely conflicting¹⁴⁹. The remaining 69% (24 respondents) indicated that they do not know whether or not the Regulation is coherent with the over EU regime.

All in all, it can be concluded that there is no shared view whether or not the Liability Regulation is coherent with the EU's approach to transport operator's liability.

8.1.4 Conclusion response to the evaluation question

The Liability Regulation is coherent in different degrees with the three identified EU policies, as illustrated below. With regard to the *maritime safety policy* it can be said the Regulation is coherent and contributes to reach the overall goals of the Third Maritime Safety Package. With regard to both the *EU policy on passenger rights* and the *EU's approach to transport operator liability* the coherence is more disputable. Although the maritime regime is becoming more and more in line with the regimes in other modes, some differences still exists. However the differences identified are justified as they are the result of the specific transport mode characteristics, which require their own regime (e.g. lower compensation to maritime passenger as a result of the hotel-like environment they enjoy on-board the ship¹⁵⁰) Stakeholders do not agree whether or not further alignment is needed and desirable. One point of potential concern is the coherence between the Liability Regulation and the Travel Package Directive.

8.2 Q8: Coherence with broader EU policy

Q8: Are the objectives of the Regulation (still) coherent with the EU transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the Current European Commission (as announced in July 2014)?

8.2.1 Are the objectives (still) coherent with the 2011 White paper on Transport?

In 2011, the European Commission adopted the White paper on Transport¹⁵¹, in which the Commission sets out the roadmap to reach a Single European Transport Area. The White Paper highlights the actions needed to establish a competitive and resource efficient transport system. Part of reaching this goal, is to increase passenger right protection ensuring that the rights granted to passengers are equal throughout the EU. In Annex I of 2011 White paper, an overview of passengers' right related initiatives is presented. The following initiatives are included:

¹⁴⁹ None of the respondents indicate why they think Regulation 392/2009 is not entirely or not at all in line with the EU approach to transport operator's.

¹⁵⁰ Which means that passengers can walk around freely and in some instances even can enjoy sport activities. In an airplane, the passenger is seated with his/her seatbelt fastened. The risk on a self sustained injury is in air transport much lower than in sea transport (as a result of the freedom to move around).

¹⁵¹ COM(2011) 144 final.

1. Develop a uniform interpretation of EU Law on passenger rights and a harmonised and effective enforcement, to ensure both a level playing field for the industry and a European standard of protection for the citizens;
2. Assemble common principles applicable to passengers' rights in all transport modes (Charter of basic rights), notably the 'right to be informed', and further clarify existing rights. At a later stage, consider the adoption of a single EU framework Regulation covering passenger rights for all modes of transports (EU Codex);
3. Improve the quality of transport for elderly people, Passengers with Reduced Mobility and for disabled passengers, including better accessibility of infrastructure;
4. Complete the established legislative framework on passenger rights with measures covering passengers on multimodal journeys with integrated tickets under a single purchase contract as well as in the event of transport operator's bankruptcy;
5. Improve the level playing field at international level through the inclusion of care quality standards in bilateral and multilateral agreements for all modes of transport, with a view to further passengers' rights also in the international context.

With regard to the *first initiative*, developing a uniform interpretation of EU Law and passengers rights, it seems that the Liability Regulation, together with Regulation 1177/2010, is in line with the overall objective. As indicated by the table in Annex 13, the current passenger right regime is highly similar between the different modes, except for some minor changes. However not all stakeholders consulted share this view. Several indicated that EU passenger rights are not yet harmonised, as especially limits to liability differ per mode. Other stakeholders address the issue that certain regulations are read and explained differently in different countries, leading to different application of passenger regulation. It can be concluded that on this point the Liability Regulation is rather coherent with the initiative laid down in the White paper on Transport.

Also with regard to the *second initiative* the Liability Regulation seems to be in line. The Regulation explicitly introduces a right for the passenger to be informed (Article 7). Where needed, existing rights are further clarified. One example is the explicit inclusion of mobility equipment in the definition of luggage (Article 4). Some of the stakeholders indicated that the obligation to inform passenger of his/her rights is an important improvement. However, raising awareness of these rights remains important. CLIA, for instance, has introduced a campaign to also make non-EU passengers aware of their rights, and the UK Maritime and Coast Guard Agency is involved in a wide range of promotional activities to raise awareness (e.g. via websites, seminar and a dedicated app). With regard to this initiative, it can be concluded that the Liability Regulation is coherent, however on the practical effect, work still needs to be done.

The Liability Regulation is contributing in reaching the *third initiative*. In particular, special attention is to passengers with reduced mobility (see Article 4 where mobility equipment is included in the definition of luggage). Other

aspects of this initiative are covered by Regulation 1177/2010, which has as its main purpose guaranteeing such rights. As the Liability Regulation does contain provision contrary to this view, it can be concluded that the Liability Regulation is coherent with the third initiative as well.

The Liability Regulation does not seem to explicitly contribute to the *fourth and fifth initiatives*. However, the current rules laid down in the Liability Regulation still allow reaching the initiatives and it seems no contradictory rules have been adopted. It can be concluded that, although Regulation 392/2009 does not actively contribute to reaching those goals, the Regulation also does not prohibit its realisation. It could be concluded that the Liability Regulation is also coherent on these points.

Most stakeholders involved in the evaluation (74% or 26 respondents) were not able to say whether or not the Liability Regulation is coherent with the 2011 White paper on Transport. The remaining 26% (or nine respondents) indicated they think the Regulation is fully or partially in line with the White paper on Transport¹⁵².

All in all, it can be concluded that, although the Liability Regulation does not actively contribute to all goals laid down in the White Paper on Transport, the Regulation does not prohibit its full realisation. Where possible, the Liability Regulation provides the building blocks to reach one or more of the defined goals. Therefore, it can be concluded that the Liability Regulation is coherent.

8.2.2 *Are the objectives (still) coherent with the 10 priority policy areas?*

In July 2015, the new European Commission presented their political guidelines and they formulated ten priority policy areas. Transport policy is part of the first priority 'a new boost for jobs, growth and investment'. None of the subtopics formulated directly relates to passenger right protection in maritime transport specifically nor to passengers' right protection in general. Although none of the actions formulated directly link to the Liability Regulation, the Regulation indirectly impacts the priority. As highlighted by some stakeholders they worry whether or not the Liability Regulation is coherent with the goals set out in this priority area.

The stakeholders indicated that a slight conflict between the Liability Regulation and the priority policy on growth and jobs exists as for companies with older and/or smaller vessels, it is very difficult to live up to the higher safety standards. Also the Regulation increases bureaucracy and requests more documents. All these factors hamper growth possibilities of smaller ship operators, likely result in a loss of jobs. Although the Liability Regulation itself does not aim to impact jobs, growth and investments, indirectly the Regulation does as the Regulation requires investments in on-board safety, additional insurance and more documentation, which could contribute negatively to the goals set in the first priority area.

¹⁵² The stakeholders indicating that the Regulation is only partially in line with the 2011 White Paper on Transport did not provide further details supporting their opinion.

Another relevant priority is priority number four which relates to a deeper and fairer internal market. Especially the aim of establishing level playing contributes to this priority area. Several stakeholders indicated that one of the main advantages of the Liability Regulation is the creation of a level playing field for all ships carrying passengers. The same set of rules applies to all ships calling at an EU port. As argued in Section 5.1.2, the level playing field is not fully realised throughout the entire maritime sector. In international shipping, the Liability Regulation has increased the level playing field, as confirmed by several stakeholders. On the domestic shipping markets, differences still exist and the level playing field has not been established everywhere.

Under the remaining eight priorities protection of passenger rights appears to not be explicitly included. One stakeholder remarked that although improved compensation is not conflicting with any of these policy areas, it is hard to see how the Athens regulation contributes to reaching these objectives set out in the priority policy areas.

This view and the lack of understanding of how the Liability Regulation and the ten priority areas are interlinked, also becomes apparent from the stakeholder survey. Seven respondents (20%) answered that in their opinion the Liability Regulation is entirely in line with the ten priority policy areas set by the European Commission. Two respondents (3%) indicated that they believed the regulation is partially conflicting, while the remaining 26 respondents (74%) indicated they do not know whether or not the regulation is in line with the priority areas. The results show that for many stakeholders, the link between the Liability Regulation and the ten priority areas is not clear.

As hardly any concrete problems have been identified by stakeholders or during the literature review, it seems that the Liability Regulation does not hamper a sufficient execution of the ten priority areas. It can therefore be said that although the Regulation does not actively contribute to the goals laid down, the Regulation does not prohibit its full realisation.

8.2.3 Conclusion response to the evaluation question

The Liability Regulation is in line with the 2011 White Paper on Transport. Although the Regulation does not always actively contribute in reaching the overall goals laid down in the White Paper, the Regulation does not hamper its realisation. Where possible, the Liability Regulation provides the building blocks to reach one or more of the defined goals. Therefore, it can be concluded that the Liability Regulation is coherent. The contribution of the Liability Regulation to achieving the goals laid down in the ten priority policies areas is less apparent. The Liability Regulation mainly contributes to priority number 4 on a deeper and fairer market and indirectly the Regulation contributes to priority number 1 on jobs, growth and investments. The Regulation does not contribute to the remaining eight priorities the Regulation. Although the Liability Regulation does not contribute actively to most of the priority areas, the Regulation also does not hamper its full realisation and therefore can be seen as coherent with the overall goals.

8.3 Conclusion on Coherence

The Liability Regulation is mostly coherent in relation to the topics discussed, however, this depends on several factors. The Liability Regulation is coherent with the overall EU maritime safety policies and the White Paper on transport. There is to be no conflict between the Liability Regulation and the ten priority policy areas, however, the Liability Regulation does not actively contribute to reaching most of the goals laid down in the priority policy areas. Having said so, the Regulation clearly contributes to the fourth priority related to the internal market, while indirectly contributing to first priority on jobs, growth and investments.

The Liability Regulation seems not to be fully coherent with the EU policy on passenger rights and the transport operator's liability. Whether or not the Liability Regulation needs to be fully coherent with these policies, is a topic of debate amongst stakeholders. The point of potential concern is the relation between the Liability Regulation and the Package Travel Directive, which may both be applicable to a cruise contract.

9 EU added value

This chapter presents the conclusions of the analysis related to the defined EU added value evaluation question, based on the results of desk research, interviews, stakeholder survey and case studies. The evaluation question is scored on its underlying evaluation criterion.

9.1 Q9: EU added value compared to national and international regimes

Q9: What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?

9.1.1 Added value of the Liability Regulation compared to previous system

The Liability Regulation did not incorporate the entire Athens Protocol 2002 (PAL 2002), but most of its provisions, namely Articles I, Ibis, II para. 2, III to XVI, XVIII, XX and XXI. These Articles include, amongst others, the new provisions regarding a strict liability, the introduction of the distinction between shipping and non-shipping incidents, the mandatory insurance obligation for the ship operator, the direct action to the insurer and the new and higher liability limits. PAL 2002 aims to provide a better passenger protection compared to the regime laid down in the Athens Convention 1974.

In addition to these new rules, the Liability Regulation also made some additions to the PAL 2002. Based on its Recital, the Liability Regulation envisions five main additions:

1. Extending the scope to domestic shipping (recital 3);
2. Including mobility equipment explicitly in the luggage definition (recital 4);
3. Ensuring an advance payment for the passenger (recital 5);
4. Introducing an information obligation for the carrier (recital 6);
5. Speeding up entry in to force of the Athens Protocol 2002 (recital 2);

Each of the five main additions are presented below.

Extending the scope to cover certain types of domestic carriage

One of the objectives of the Liability Regulation is to extend the scope of the liability regime established under the Athens Protocol 2002. The Athens regime only applies to international shipping, excluding all domestic shipping activities from its scope. In recital 3 of the Liability Regulation it is stated that, because the distinction between national and international transport has been eliminated within the internal market it is appropriate to have the same level and nature of liability in both international and national transport within the Community. Article 1 (2) of the Regulation therefore states that besides international carriage of passengers, also carriage of passenger on board ships of Classes A and B fall within the scope of the Regulation.

As illustrated in Section 3.5.1 (see Table 4.7), the Liability Regulation provides temporary exemptions for ships falling within the Classes A and B. For Class A ships the Regulation will apply no later than 31 December 2016 (Article 11 (1)) and for Class B ships the Regulation will apply not later than 31 December 2018 (Article 11 (2)). It is open to Member States to decide whether or not they apply the Regulation to their Class C and D ships as well.

In the *ex-post* evaluation of the Third Maritime Safety Package¹⁵³ an overview of the *status quo* per 31 December 2012 was presented. For each of the Member States, it was indicated if per 31 December 2012 they had already applied the Regulation to their Class A and B ships or whether they had exempted them. An overview of Member States applying the Regulation to their Class C and D ships was also provided. The study reported that at that time, it was not yet possible to conclude what the impact of the Regulation on domestic shipping was, as many Member States had opted for delaying the application of the Regulation's provisions to domestic carriers. In many Member States, the rules will apply onwards from 2017 and 2019. During this evaluation, the exercise was carried out again. For each of the 28 Member States (plus Norway), an assessment was made as to which ship classes they applied the Regulation. The results of this exercise, which are presented in Section 3.5.1, are summarised in Table 9.1.

Table 9.1 Application to domestic shipping comparison between 2012 and 2016

Application to domestic shipping	Status per 31/12/2012	#	Status per 31/09/2016	#
Application of the Regulation to domestic shipping, classes A, B, C and D	The Netherlands and Denmark	2	The Netherlands, Denmark, Sweden and Norway	4
Application of the Regulation to domestic shipping: Classes A and B	Belgium, Bulgaria, Finland, France, Lithuania, Poland, Romania, Slovenia and Sweden	9	Belgium, Bulgaria, Finland, France, Lithuania, Romania and Slovenia	7
	Landlocked countries: Austria, Czech Republic, Hungary, Luxembourg, Slovakia	5	Landlocked countries: Austria, Czech Republic, Hungary, Luxembourg, Slovakia	5
Application to Class A, postponed application to Class B	-	0	Ireland, Poland ¹⁵⁴ and Spain	3
Postponement of application for classes A and B	Croatia, Cyprus, Estonia, Germany, Greece, Italy, Ireland, Latvia, Portugal,	11	Croatia, Cyprus, Estonia, Germany, Greece, Italy, Latvia, Portugal, United	9

¹⁵³ European Parliamentary Research Service (2015).

¹⁵⁴ Based on interview with Ministry of Maritime Economy and Inland Navigation (Poland). The Ministry indicated that the information presented in the previous study was not correct.

Application to domestic shipping	Status 31/12/2012	per	#	Status 31/09/2016	per	#
	Spain, Kingdom	United		Kingdom		
Not applying Regulation to classes A and B due to absence of these classes	Malta		1	Malta		1

Source: European Parliamentary Research Service (2015) and stakeholder interviews.

As shows, the number of countries applying the Regulation to all domestic ship classes has increased from two to four¹⁵⁵. In addition, three countries (Ireland, Poland and Spain) now apply the Regulation to their Class A ships, while their Class B ships are still exempted. Although, the application of the Regulation to domestic shipping is only slowly expanding, it has become broader since 31 December 2012.

Sub-conclusion

Although the Regulation does not yet apply to all Class A and B ships, stakeholders consulted indicated that the extension of the scope is a value added, as also passengers travelling with a Class A or B vessel will be better protected than before the adoption of the Liability Regulation.

Mobility equipment

A second point where the Regulation aims to add value compared to the Athens Protocol is the compensation of mobility equipment or other specific equipment (in short mobility equipment). Although it could be argued that mobility equipment is already covered by the liability rules regarding luggage, Article 4 of the Regulation explicitly includes it within the definition. As stated in Article 4 *'in the event of loss, or damage, to mobility equipment or other specific equipment used by a passenger with reduced mobility, the liability of the carrier shall be governed by Article 3(3) of the Athens Convention'*.

Most EU Member States did not have specific national maritime liability legislation in place regarding loss of or damage to mobility equipment in maritime transport. Based on the analysis, presented in Chapter 3, it can be concluded that out of the seven considered countries, only Greece had dedicated regulations in place to cover loss of or damage to mobility equipment. The remaining six countries did not have any specific rules in place. Therefore, it seemed there was a need to harmonise this aspect at EU level. Since the entry into force of the Liability Regulation, the same system is now in place in all seven countries.¹⁵⁶

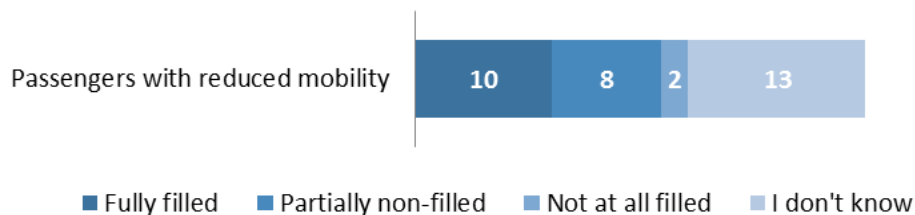
¹⁵⁵ Including Norway as non EU Member State.

¹⁵⁶ By explicitly including this provision in the Regulation it applies to all passengers falling within the scope of the Regulation. It is no longer possible that at national level different rules will be applied and mobility equipment is not compensated when damaged or lost. National courts cannot deviate from this right and need to ensure, when asked, to compensate for this.

In the reviewed literature, no comments were made whether or not the explicit inclusion of mobility equipment in the definition of luggage will add to increased passenger protection and therefore if it could be seen as an EU added value. Also during the interviews, most stakeholders did not provide any insights in this topic. IGPANDI commented on compensation to disabled passenger and indicated that disabled passengers were, before the entry into force of the Regulation, already sufficiently compensated. Consequently, the Regulation does not bring added value in this respect. Some ship operators stated that they have not received claims regarding damage to or loss of mobility equipment. They reflect that most passengers, in such cases, will instead turn to their health insurers for compensation.

The results of the stakeholder survey provide a diverse picture whether the explicit inclusion of mobility equipment in the definition of the luggage brings EU added value. As the figure below shows, 10 respondents (equalling 30% of the sample) indicated that this objective is fulfilled. Another 10 respondents indicated that the objective is partially fulfilled or not at all. The remaining 13 (39%) of the respondents indicated that they are not able to answer the question.

Figure 9.1 Stakeholder opinion whether objective is fulfilled (mobility equipment) in #



Source, Ecorys, survey (2016).

Sub-conclusion

The overall conclusion is that this objective only contributes slightly to EU added value. Many stakeholders (especially interviewees and (academic) authors) are not aware of the extended definition and those that are, do not particularly see the added value.

Advance payments

A third addition made by the Liability Regulation to the Athens Protocol regime is the obligation for the carrier to pay the passenger or its relative(s) an advance payment. According to recital 5 of the Regulation it is appropriate that the passenger is entitled to an advance payment in case of death or personal injury. This implicates that in case of loss of or damage to luggage the passenger is not entitled to such a payment. The recital explicitly states that the advance payment does not constitute recognition of liability. The specifics are laid down in Article 6, which states that the passenger should receive the payment within 15 days after identification of the passenger. In case of death, the payment should not be less than € 21,000 and in case of personal injury, a case by case assessment will be made.

Before the entry into force of the Liability Regulation, none of the seven countries reviewed in Chapter 3 had specific national legislation in place that granted the passenger an advance payment. The obligation to provide an advance payment is now part of their national legal systems. It needs to ensure a basic level of passenger protection (i.e. in all EU-28 countries the passenger is entitled to an advance payment in line with the rules presented above).

Several academic scholars welcome the obligation of the advance payment. Kirchner *et al*¹⁵⁷ indicate that the right to an advance payment constitutes an important benefit for the protection of the passenger carrier by sea. Ringbom¹⁵⁸ indicates that the introduction of an advance payment contributes to a better passenger protection. Testa¹⁵⁹ also considers that the advance payment has significantly improved the position of a passenger. He denotes the importance of a balance among the interests of carriers, passengers and insurers and goes on to emphasise that such balance will ensure the proper level of compensation for passengers in the event of an accident.

During the interviews, most stakeholders commented on the introduction of advance payments. Views as to whether or not the advance payments bring added value are mixed. Most insurers indicated that the obligation of paying advance payments is more a codification of standing practice than the introduction of a new obligation. According to insurers, prior to the adoption of Regulation 392/2009, it was already common in maritime shipping that passengers involved in an accident would receive an advance payment. In this regard, they were already compensated for direct costs, e.g. medical treatment.

Some lawyers indicated that the introduction of the advance payment is the main value added of the Liability Regulation. Other lawyers indicated that although ship operators or insurers need to pay an advanced payment, they do not always seem willing to do so. One of the problems identified was determining who is entitled to the advance payment in case of a deceased passenger. The answer to this question differs per Member State. According to these lawyers, passengers mainly obtained a 'paper right'. They are entitled to an advance payment according to the law, but in practice they do not receive it and therefore are left empty-handed.

It was also commented by smaller ship operators that the advance payment can pose financial difficulties on them. In case of a larger shipping incident, with many passengers injured or killed, the total amount of advance payments to be paid can be substantial. As the companies are rather small, they think they will not have the necessary money available to fulfil their obligations. In case insurers can pay the advance payment, this problem might be solved. However, for the ship operators interviewed, it was not clear if the insurers would also cover the advance payment.

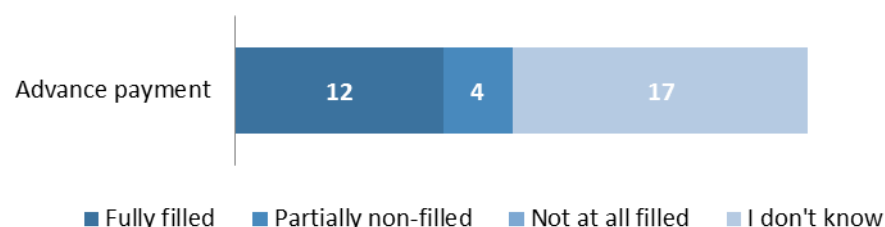
¹⁵⁷ Kirchner, Tüngler & Martin Hoffmann (2015).

¹⁵⁸ Ringbom (2012).

¹⁵⁹ Testa (2013).

The stakeholder survey provided a mixed picture as well. Up to 16 respondents (equalling 48% of the sample) indicated that this objective is either fully or partially fulfilled. The remaining 17 respondents (52%) indicated they are not able to answer the questions. None of the respondents indicate that the objective is not at all filled.

Figure 9.2 Stakeholder opinion whether objective is fulfilled (advance payment) in #



Source, Ecorys, survey (2016).

- One of the survey respondents indicated that the introduction of the advance payment leads to a new problem. According to Article 6 (2), an advancement payment has to be made within 15 days after establishing the identity of the passenger. However, investigations into size of the damage (especially concerning personal injuries which need a case by case assessment), which could be required to assess the size of the advance payment, are often not completed within 15 days. This may lead to difficulties into determining the height of the advance payment required. According to the stakeholder, this problem is only partially addressed by the Regulation.

Sub-conclusion

Although academic scholars see a clear added value of the right to an advance payment, many other stakeholders hold mixed views. Lawyers especially do not agree whether or not the advance payment has led to an actual benefit for the passenger, as in many cases the advance payment is not paid and the passenger has only obtained a 'paper right'. Insurers have an opposing view and indicate that providing an advance payment was already standing practice in maritime shipping. Therefore they see the right to an advance payment as a mere codification of current practices which has not changed the position of the passenger.

As the views between different stakeholder groups differ widely, it is not possible to provide one overarching answer. It should be concluded that the right to an advance payment is in principle welcomed by all stakeholders, but that the practical implementation still requires improvement. Therefore it is concluded that this objective is only partially met.

Information obligation

A fourth difference between the Liability Regulation and the Athens Protocol is the introduction of an information obligation by the carrier in the Regulation. In recital 6 of the Liability Regulation, it is stated that it is deemed appropriate that passengers are informed about their rights prior to their journey or, at the latest, on their departure. Article 7 elaborates on this right. Important to note is that the information needs to be, according to Article 7, provided at all points of sale, including sale by phone and via internet.

The country analysis as outlined in Chapter 3 shows that before the entry into force of the Liability Regulation, only the UK had a legal information obligation. The remaining six countries did not require the ship operator to provide the necessary information.

The *ex-post* evaluation of the Third Maritime Safety Package¹⁶⁰ assessed what the impact of the Regulation is regarding the provisions of equal passenger rights and provision of better information regarding these rights. The study concluded that due to insufficient availability of information it was, at the time, not possible to draw any conclusion.

Academic scholars, especially Testa¹⁶¹, indicate that the information obligation for the carrier can be seen as a significant improvement on the position of the passenger. Ringbom¹⁶² is in support of this view.

Several stakeholders¹⁶³ which were interviewed commented on the obligation to provide information to passengers. In particular, lawyers interviewed for the case studies commented on the topic. During the case studies, it turned out to be difficult to establish whether or not the information had been provided to the passenger. Therefore, it is difficult to conclude if these legal obligations, in practice, has led to a concrete added value (i.e. better informed passengers).

Several other stakeholders questioned whether passengers actually read the information provided to them. Some indicated that they have a strong feeling that even when information is provided, most passengers do not consider their rights until an incident has happened. Some of these stakeholders, e.g. the Maritime and Coastguard Agency and CLIA, indicated they have taken actions to raise awareness amongst passengers to inform them about their rights (e.g. via websites, seminars and a dedicated app).

Fear exists for those stakeholders¹⁶⁴, as although passengers now have a right to be informed, their actual situation has not improved, because many passengers do not consider their rights before the start of the trip. Effectively, their position has not improved.

Also with regard to this objective, the survey responses are mixed. Up to 13 respondents (equalling 39%) indicate that this objective is fully filled. Another 8 respondents (24%) indicated that the objective is only partially or not at all fulfilled. The remaining 12 respondents (36%) did not know whether or not the objective is fulfilled.

¹⁶⁰ European Parliamentary Research Service (2015).

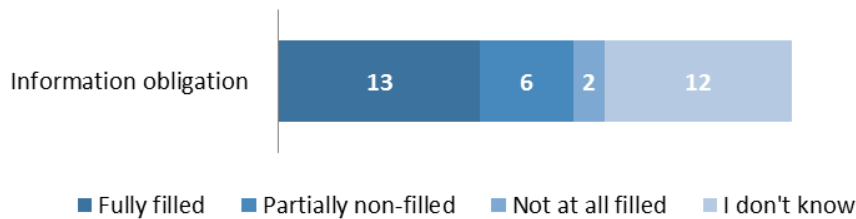
¹⁶¹ Testa (2013).

¹⁶² Ringbom (2012).

¹⁶³ Mainly Member State authorities, ship operators, lawyers and academics.

¹⁶⁴ Mainly Member State authorities, ship operators, lawyers and academics.

Figure 9.3 Stakeholder opinion whether objective is fulfilled (information obligation) in #



Source, Ecorys, survey (2016).

Sub-conclusion

Mixed views for this topic also exist amongst stakeholders. Stakeholders generally seem to agree that the information obligation is a good stimulus to improve the passenger position. However, many indicate that granting a right to the passenger and informing them about it is not enough to also ensure that the passenger is better protected. The way in which passengers are informed is important in order to ensure that they are actually aware of their rights. Therefore, awareness campaigns are essential. Overall, it can be concluded that the inclusion of this right in the Liability Regulation is an important step in the right direction to improve the position of the passenger.

Speeding up entry into force Athens Protocol 2002

The last and perhaps most important objective of the Liability Regulation is to ensure entry into force of the Athens Protocol 2002. In recital 2 of the Regulation, it is stated that both the Community and its Member States are in process of deciding whether to accede to or ratify the Protocol. As part of the entry into force of the Liability Regulation, Member States also promised to ratify the Athens Protocol (see Chapter 3). Via Council Decisions 2012/22/EU and 2012/23/EU, the EU acceded to the PAL2002.¹⁶⁵ The PAL2002 would only enter into force once accepted by 10 States.¹⁶⁶ Prior to any EU action, ratification was advancing slowly and with the accession of several EU Member States to the Protocol, the ratification requirements were fulfilled (Belgium being the 10th State to ratify).

The *ex-post* evaluation of the Third Maritime Safety Package¹⁶⁷ concluded that because the majority of the passenger ships already carried insurance, the impact of the Regulation is rather limited in Europe. However, the impact of the Regulation at the international level is large. The *ex-post* evaluation concluded the Athens Protocol significantly improved the rules compared to the rules laid down in the Athens Convention 1974 and that the Protocol came into force thanks to the Regulation¹⁶⁸¹⁶⁹.

¹⁶⁵ 2012/23/EU: Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards Articles 10 and 11 thereof

¹⁶⁶ <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/13-athens-2002-.aspx#.WByAyi0rKUK>

¹⁶⁷ European Parliamentary Research Service (2015).

¹⁶⁸ Please refer to page 125 of the *ex-post* evaluation.

¹⁶⁹ Per 31 October 2016 PAL2002 had a total of 27 ratifications, including the accession of the EU. None EU countries that ratified PAL2002 are Albania, Belize, Marshall Island, Montenegro, Norway, Palau, Panama, Serbia and Syrian Arab Republic.

The Protocol, as a result of the Regulation, is now in force and, as a result, novelties introduced by the Protocol are applicable in maritime shipping; e.g. the compulsory insurance obligation and the direct action against the insurer. Several academic scholars, Kirchner *et al*¹⁷⁰, and Testa¹⁷¹ amongst others, indicate that both novelties have improved the position of the passenger. Kirchner *et al* state that the economic pressure on carriers, as a result of the insurance obligation, may serve as an incentive for improving the safety standards on-board.

Testa also discusses, besides the insurance obligation, the right of direct action against an insurer. This right is subject to certain limitations, for example, the right of the insurer to be relieved of liability if the damage is a result of the carrier's wilful misconduct. Such a right undermines the Regulation's aim to ensure proper compensation to passengers, although public considerations may justify such provision. Finally, with respect to the right of Governments to limit liability to SDR 250.000 or 340 million in the event of the risks mentioned in Section 2.2. of the IMO Guidelines, Testa assesses these limits are reasonable, despite the fact that the impact of such limits could be substantial in certain cases. Two positive characteristics of the said right is the *pro rata* distribution and the fact that the 340 million SDR are designated for passenger claims under the Convention only.

Soyer¹⁷² notes that the social function of insurance has changed over the years, leading to the approach which suggests that "insurance proceeds are viewed as for the benefit of the injured party". The right of direct action is in line with this new approach according to the author.

During the interviews IGPANDI, ICS, FENVAC, the Danish Ministry of Transport and the Swedish Ministry of Justice mentioned that the main advantage for them is that the Liability Regulation achieved that the Athens Protocol 2002 applies in the EU. The rules laid down in the Protocol do directly apply in all EU-28 Member States.

Improved passenger protection is also mentioned several times. CLIA, for instance, indicated that the regulation leaves less room for lawyers to manoeuvre regarding liability and jurisdiction. As a result, passenger protection has increased. Several lawyers indicated that the regulation provides clear guidance, for example, by clarifying that a carrier can only be exempted from liability if he proves that the accident was caused by *force majeure* or action of a third party. Individual insurers indicate that the process of assessing claims is now simpler, due to clear guidance. As a result, the individual passenger has enhanced protection.

The Maritime and Coastguard Agency indicated that the largest added value of the Regulation is the guarantee that ship-owners do have a proven means of financial protection which they have to provide. The fact that during the Paris MoU inspections, a ship is checked whether it has the actual proof available on board, contributes to effective oversight and good compliance.

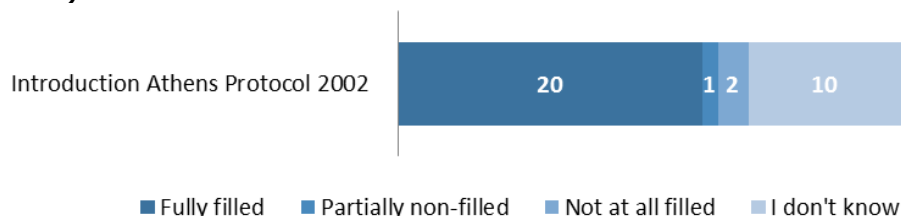
¹⁷⁰ Kirchner, Tüngler & Martin Hoffmann (2015).

¹⁷¹ Testa (2013).

¹⁷² Soyer (2002).

The picture presented above is confirmed by the stakeholder responses to the survey. In total, 33 respondents of the survey¹⁷³ responded to this question. 61% (equalling 20 respondents) answered that this objective is fully fulfilled. 3% (equalling 1 respondent) indicated that this objective was only partially fulfilled, while 6% (equalling 2 respondents) indicated this objective is not fulfilled at all. The remaining 30% (equalling 10 respondents) indicated that they do not know whether or not this objective has created EU added value.

Figure 9.4 Stakeholder opinion whether objective is fulfilled (Athens Protocol 2002) in #



Source, Ecorys, survey (2016).

Sub-conclusion

Based on the information presented above, it can be concluded that the objective of speeding up the entry into force of the Athens Protocol has been successful. Not only did the Protocol enter into force, most stakeholders also see this as the main advantage of the Liability Regulation.

Other observations resulting from stakeholder consultation

Besides information regarding the five objectives described above, some additional information was also collected from stakeholders. During the interviews, other topics were often mentioned by stakeholders: uniformity equal application and compensation.

Uniformity and equal application

Several stakeholders referred to uniformity and equal application of liability law in the maritime field. One stakeholder indicated that equal application, especially on international carriage, is nowadays ensured. Another stakeholder indicated that the regulation has harmonised passenger rights. Without the regulation, rights would have been different between Member States. A third stakeholder highlighted in this respect that a level playing field has been created, which provides the same conditions for every one.

Compensation

Several of the law firms indicate that settlements have been reached, especially in cases which involved injuries of deaths. Two law firms involved in the Norman Atlantic case indicate that although they were able to settle in case of injury and death, it is difficult to settle in case damage to vehicles or luggage is concerned. In case vehicles are concerned, the car insurance companies also need to be involved, which increases the complexity of the settlement.

¹⁷³ The question was asked to both Member State policy makers and inspectorates.

One of the stakeholders in the survey indicate one area of concern. He addressed the lack of explicit provisions which regulate the recognition of judgements of States not party to the Athens Protocol. In the opinion of the stakeholder this gap is also not addressed in the Liability Regulation and therefore still exists.

9.1.2 The Liability Regulation and the basic EU principles

As part of the EU value added analysis, it is important to assess whether or not the Commission's adaptation of the Liability Regulation is in line with the main principles of EU policy making, more specifically the principles of subsidiarity and proportionality. Both principles are elaborated below.

The principle of subsidiarity

The principle of subsidiarity is laid down in Article 5.3 TEU (Treaty of the European Union). This Article states that the European Union can only act when objective of the proposed action, when it does not fall under the exclusive competence of the EC, cannot be sufficiently received by the individual Member States.

Article 5.3 TEU Principle of subsidiarity

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The main aim for adopting the Liability Regulation, as stated in Article 1 of the Regulation, is to lay down a Community regime relating to liability and insurance for the carriage of passengers. In order to do so, the Regulation aims, at least partially, to incorporate the provision of the Athens Protocol 2002. It could be argued that it is the obligation of Member States themselves to ratify the Athens Protocol, but as indicated in Table 4.6 none of the Member States had yet done so (at the time of the drafting of the Liability Regulation). In addition, only a limited number of Member States (10 out of the 28) were Party to the Athens Convention 1974. Although some Member States not being Party to the Athens Convention 1974 (i.e. Denmark and the Netherlands) had rather similar legal systems in place, differences existed and passenger protection could widely differ between the different Member States.

These differences are confirmed by the analysis done in Chapter 3 for seven EU Member States (i.e. the Netherlands, Denmark, the United Kingdom, France, Italy, Germany and Greece) for which the situation prior to the entry into force of the Liability Regulation has been analysed. The table, repeated here, clearly shows that differences in passenger rights protection existed between the seven Member States. In order to ensure an equal basic level of passenger protection, intervention at EU level seemed justified. Member States would not have been able to achieve similar results when all acting individually. For example, it would have been very difficult to provide for additional rights (such as the advance payment and the information obligation) as maritime transport is often international, i.e. involving more

than one Member States. In order to achieve similar results each Member State should have tried to reach bilateral agreements, which is a difficult and time consuming process. Also there would not be a guarantee that rights between different agreements would be similar. Hence, passenger protection could be different depending on the applicable agreement. Therefore, the adoption of the Liability Regulation provides EU added value as currently the same set of basic rules applies to all EU 28 Member States.

Table 9.2 Overview of the answer per country (situation prior to 1 January 2013)

	NL	DK	UK	FR	IT	GE	EL
1. Regime in place? Strict or fault-based liability?	Yes Fault-based	Yes Fault-based	Yes Fault-based	Yes Fault-based	Yes Fault-based	Yes Fault-based	Yes Fault-based
2. Distinction shipping non-shipping?	No	No	No	Yes	No	Yes	Yes
3. Presumed liability of the carrier?	Yes, for some damages	Yes, for some damages	Yes, for some damages	Yes, only for persons	Yes	Yes	Yes
4. Specific of general liability rules?	Specific	General	Specific	Specific	Specific	Specific	Depended on damage
5. Party to Athens Convention 1974?	No	No	Yes	No	No	No	Yes
6. Compensation for loss damage mobility equipment?	No	No	No	No	No	No	Yes
7. Advance payment possible?	No	No	No	No	No	No	No
8. Insurance obligation carrier?	No	No	No	No	No	No	No
9. Direct action against insurer?	No	No	No	No	No	No	No
10. Liability limits in place?	Yes	Yes	Yes	Yes	Yes	Yes	Yes
11. Information obligation of the carrier?	No	No	Yes	No	No	No	No

The second important principle is the principle of proportionality, indicating that the content and action chosen by the EU shall not exceed what is necessary to achieve the objectives of the Treaty, in this case improving the position of the passenger by creating a liability regime for the carrier.

Article 5.4 TEU Principle of proportionality

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

As indicated in the previous Section, some stakeholders explicitly indicated that due to the Regulation, the level of minimum protection is now equal throughout Europe, especially for international voyages (and for domestic shipping, Classes A and B, from 2017 respectively 2019 onwards). A similar conclusion was reached in the *ex-post* evaluation which concluded that, although the impact for the majority of the passenger ships maybe rather limit, the impact of the Regulation at the international level is large. The *ex-post* evaluation concluded the Athens Protocol improved the rules significantly compared to the rules laid down in the Athens Convention 1974 and that the Protocol came into force due to the Regulation.

As indicated above, substantive differences between Member States used to exist. By applying a Regulation as instrument, rules throughout Europe are identical and the same level of protection needs to be offered. In addition to this, the Regulation has been effective in at least partially achieving its objectives, with more success in increasing passenger rights protection, creating a level-playing field and working towards a balanced framework of passenger rights protection. All the previous have been achieved with only a minor impact on costs for the industry, the authorities and the passengers (as seen in Chapter 6). That said, we can conclude that within the EU-28, the Regulation seems to be proportionate.

9.2 Conclusion on EU added value

The Liability Regulation clearly has EU added value. In particular, the fact that the Liability Regulation contributed to the ratification and entry into force of the Athens Protocol 2002 is an important added value. In addition, the obligation for a carrier to provide information to the passenger (before the journey starts) and the obligation to make an advance payment (in case something has happened), is also adding value. It should be noted that although the Liability Regulation has introduced additional passenger rights, the actual implementation of those rights should be further improved to realise its full potential.

10 Complementarity

This chapter presents the conclusions of the analysis related to the defined complementarity evaluation question, based on the results of desk research, interviews, stakeholder survey and case studies. Each evaluation question is scored on its underlying evaluation criterion.

10.1 Q-10 Complementarity in supplementing the Athens Convention and other regimes

Q10: To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

10.1.1 The differences between Regulation 392/2009 and the Athens Protocol 2002

According to Ringbom, IMO Conventions normally do not allow the European Union to become a party.¹⁷⁴ If this is the case, each individual Member State can decide to ratify a convention or not. However, if an IMO Convention contains provisions falling under the exclusive EU competence (e.g. provisions on jurisdiction, recognition and enforcement), Member States cannot ratify the convention individually, unless authorised by the EU. As far as conventions concerning issues of maritime liability, the EU has taken action in different ways in order to promote ratification. The author refers to the example of oil - pollution liability regime and decision 2004/246 which authorised Member States to ratify the 2003 Supplementary Protocol to the IOPC Funds Convention.

A different approach was adopted regarding the sea carrier's liability in case of accidents. More specifically, the 2002 PAL is linked to European law through the inclusion of a clause allowing the EU or any other regional economic integration organisation to become a contracting party. As explained by Ringbom, when ratifying or acceding, the organisation (i.e. the EU) is required to submit a list of subject matters over which it exercises competence. With respect to those issues, the EU takes over the responsibilities of the Member States and has a number of votes equalling the number of its Member States parties to the protocol. The subject matters that are not listed are thus presumed to remain in the competence of Member States.

Despite the fact that the original proposal for the EU to become party to the 2002 PAL was made in 2003, it was only in 2011 and after the adoption of the 392/2009 that the EU took the decision to accede to the Protocol.¹⁷⁵ It is important to note that under EU law, conventions to which the Union is a

¹⁷⁴ Ringbom (2012).

¹⁷⁵ Council Decision 2012/23/EU.

party rank higher than EU directives or regulations which means that the IMO provisions thereby take precedence over conflicting EU rules.

New provisions

Even if, as was noted above, the Liability Regulation specifically aims at incorporating the provisions of the Athens Convention 2002 into European law, it contains a number of additional features that go beyond the scope of the convention as explained by Ringbom. Apart from extending the scope of application of the Athens Convention (which only applies to ships in international trade) to sea carriage within a single member State, it introduced certain new substantive elements inspired by the EU's work on passenger rights in other fields. Most important additions are:

- the obligation for the performing carrier to make an advance payment sufficient to cover immediate economic needs within 15 days from the identification of the person entitled to damages;
- the specific provisions on the full compensation of damage to equipment belonging to persons with reduced mobility, and on information to passengers;
- The implementation of the 2006 IMO Guidelines.

Jurisdiction and Recognition of foreign judgments

There are certain differences in substance between the EU rules on jurisdiction and recognition as laid down in that Regulation and their international counterparts. The Athens Convention provides a broader range of options for claimants by listing four jurisdictions, i.e.:¹⁷⁶

1. the court of the State of permanent residence or principle place of business of the defendant;
2. the court of the State of departure or that of the destination according to the contract of carriage;
3. the court of the State of the domicile or permanent residence of the claimant, if the defendant has a place of business and is subject to jurisdiction in that State;
4. the court of the State where the contract of carriage was made, if the defendant has a place of business and is subject to jurisdiction in that State.
6. As to recognition and enforcement, Ringbom indicates that the IMO conventions seek to avoid complex procedures relating to the recognition of cross-border judgments by requiring the recognition of a judgment which is no longer subject to ordinary forms of review, except where the judgment was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present his case.
7. Judgments are required to be enforceable in each state party as soon as the formalities required in the state where the judgment was issued have been complied with. Under the Brussels Regulation (Recast) recognition of a judgment given in one court of an EU member state is automatic in another member state unless contested.
8. Ringbom states that while it may be discussed how significant this difference actually is, it was perceived by the EU in the negotiations as representing a potential weakening of its own recognition scheme. The

¹⁷⁶ Please refer to article 17 of the PAL Athens Convention.

matter was resolved in the Athens Protocol by the introduction of the opt-out clause. Ringbom finally notes that there has been some uncertainty as to the legal effects of the EU decision to ratify the IMO Liability Convention in the interest of the EU and whether it could oblige Member States to apply the provisions of the Brussels Regulation instead. A practical approach would be to give precedence to the IMO conventions' rules on jurisdiction, while the EU regime for recognition and enforcement could be applied as between Member States instead of the (quite similar) rules of the conventions. Such a solution has recently been favoured in decision 2012/23 relating to the accession of the EU to the 2002 Protocol to the Athens Convention.

Other authors have expressed their concern, particularly in connection to the opt-out clause.¹⁷⁷ More specifically, Gahlen explains that EU Member States were prevented from ratifying the PAL 2002 since it contained rules on jurisdiction, recognition and enforcement in civil and commercial matters, although these issues were already regulated under the Brussels Regulation. For the purpose of eliminating these hesitations, the EU ratified the 2002 PAL by virtue of Article XIX of the PAL.

Gahlen points out that, since the EU wished to continue applying the Brussels Regulation, it negotiated a disconnection clause, which is found under Article XVI bis para 3 of PAL 2002. According to that Article, contracting States may apply other rules for the recognition and enforcement of judgments, provided their effect is to ensure that judgments are recognised and enforced at least to the same extent as under paragraphs 1 and 2. As a result, Contracting States are allowed to deviate under the aforementioned condition. The author nevertheless highlights the fact that the Brussels rules have been criticised as not being as generous as the PAL rules. To be more precise, under the Brussels Regulation, enforcement may be denied on the grounds of public policy considerations or irreconcilability with an earlier judgment, as also highlighted by Tebbens.

In contrast to the exceptions possible under the Brussels Regulation, these exception grounds are not found under the PAL 2002 rules. An important example mentioned by Gahlen regarding PAL2002 is that a judgment from an EU Member State which declares a passenger claim to be limited in amount, in accordance with Article 5 of the Liability Regulation allowing the global limitation of claims as long as this is based on the 1996 LLMC, could be considered as contravening public policy in a State where recognition is sought and where such a claim could not be limited.

In addition, different limits of liability could lead to contradictory judgments, especially in view of the multitude of possible forums under the PAL. The arguments above lead to the violation of the PAL or the alteration of the Brussels Regulation's scope.

¹⁷⁷ Gahlen (2015) and Tebbens (2008).

Main advantages of the Regulation compared to the Athens Protocol 2002

Stakeholders¹⁷⁸ were also asked what the main advantages of the Regulation are compared to a system with national and international law. In total, 17 stakeholders did provide written comments in the survey.

The provided answers can be divided into two main categories. On the one hand, many stakeholders mentioned the introduction of uniform regulation throughout the EU, harmonisation of legal system and the creation of a EU-wide level playing field. On the other hand, the availability of financial guarantees, better consumer/passenger protection and the introduction of common interpretation and guidance (on how to deal with claims) are highly valued. In addition to these to main answers, the entry into force of the Athens Convention was also mentioned. These views were confirmed throughout the interviews.

10.1.2 Co-existence of PAL and Liability Regulation

Kirchner and his co-authors state that "the EC's choice to replicate large parts of the PAL 2002 in the Liability Regulation Annex I indicates that there was not only a rush in the proliferation of passenger-related legislation, but also a lack of understanding as to the relationship between EU (formerly the EC) law and international law". According to their view, there is a double regime, which may threaten the coherence and uniformity of the Regulation.

Kirchner et al. explain the above as follows: *"Those EU Member States that have ratified the PAL 2002 are now bound by both the Liability Regulation and the PAL 2002. While the EU's aim may be the creation of a coherent legal system, the question needs to be asked whether the changes introduced by the EC may have made it more difficult to reach this goal. The only way to prevent the emergence of two different legal systems, which was not intended by either the EU or the drafters of the PAL 2002, would be to adopt a monist understanding which would see international and domestic law as one coherent legal order and international law as self-executing. While a monist understanding of international law can be found, it seems highly unlikely that the EC intended to adopt such an understanding of international law. It appears more likely that the potential problems are the result of an oversight on the part of the EC, rather than the consequence of a monist view."*

Furthermore, the authors point out that transport law in the European Union faces the challenge of having become three-layered, irrespective of the specific mode of transportation. Thus, domestic, European and international law apply, which may lead to conflicts.

Finally, Ringbom explains that since the rules of the Regulation became binding before the Athens Convention Protocol was in force, the duplication of its provisions could give rise to interesting questions, such as whether a separate EU certificate is required to replace the IMO certificate which is referred to in the Regulation. However, this has not been the case as the EU

¹⁷⁸ Complementarity questions in the survey were mainly asked to and answered by Member States, both authorities and inspectorates.

Member States and the Commission explained also at IMO at LEG 101 (2014) noting that certificates issued under the Convention will be recognised for the purposes of the Regulation, provided that the relevant war risk insurance blue card is also present – in line with the IMO 2006 Guidelines¹⁷⁹.

The different versions of the Athens Convention could also raise the prospect that Member States may be under an EU law obligation to apply the more stringent liability rules of the 2002 PAL, but may still be bound under international law to implement the 1974 Convention in relation to other State Parties to that convention. This has not been supported by any evidence in practice so far.

Stakeholder opinions on having two regimes in place

In academic literature, several concerns regarding the applicability of two international regimes have been addressed. During the survey, respondents were also asked if they currently experience any problems now that two systems are in place (i.e. the Regulation and the Athens Convention). Up to 20 respondents¹⁸⁰ answered this question, with 16 indicating that they have not experienced any problems. Four respondents answered that having two systems in place may lead to questions or difficulties. For example, Finland indicated that it is not clear if and how fast the Regulation can be updated if the Athens Convention is modified.

The German respondent indicated that problems might occur when the international law is interpreted by different national courts. However, the stakeholder also points out that this is a problem which can hardly be avoided.

Two respondents from Norway indicated that having two systems in place makes this specific legal system very complicated. The first Norwegian stakeholder signalled that the system becomes complicated once parts of a Convention are included in national law, while the country itself does not ratify the Convention. The other stakeholder suggested combining the Regulation, the Athens Convention and the IMO guidelines all together in order to have only one piece of relevant regulation.

10.1.3 Additions to Regulation 392/2009 laid down in national law

As indicated above, a three layered legal system currently exists. Besides the international and European law, domestic law also applies. During the stakeholder consultation (interviews, targeted survey and OPC) stakeholders were asked what kind of national provisions exist in addition to the Liability Regulation and the Athens Convention 2002.

¹⁷⁹ See para. 8.23 of the LEG 101 Report: "8.23 One delegation stated that the 1974 Athens Convention and its 2002 Protocol was incorporated into EU law and all EU Member States fully supported and effectively implemented the 2002 Protocol, and issued certificates in accordance with the requirements of article 4bis. Certificates issued by an EU Member State attesting that insurance or other financial security was in place were in full compliance with article 4bis and all States parties to the Protocol were strongly encouraged to accept them. With regard to the 2006 reservation and guidelines endorsed by resolution A.988(24), the delegation noted that the reservation was binding in the EU."

¹⁸⁰ Mainly Member State authorities and inspectorates.

Two main categories of national additions can be identified. On the one hand, several Member States (e.g. Sweden, Finland, Germany, the Netherlands and Portugal) have adopted auxiliary legislation, which aims to optimise the proceedings of the Liability Regulation. The additional provisions can be qualified as procedural requirements indicating when claims expire and what kind of penalties or sanctions are available when no common understanding is reached.

On the other hand, several Member States have, without applying the Regulation to their Class C and D ships, laid down provisions which require guarantees from the ship operator which are highly similar to the provisions of the Regulation, with some minor deviations. One example is Germany where Class C and D ships are not covered, but where, nevertheless, German national law applies to those ships in a more or less similar way¹⁸¹.

Although most stakeholders did not indicate specific problems with having a three layered legal system in place, two stakeholders explicitly mentioned problems. The French Ministry of Environment, responsible for the implementation of the Liability Regulation, addressed the issue that the definition of shipping incident under French law is wider than the one used in the Regulation. Under French law it also includes 'every major incident involving the ship'. As a result, most incidents will be qualified as a shipping incident under French law and strict liability will be in place. Consequently, there is a risk that the liability of the ship operator will increase.

The Italian stakeholders indicated that in Italy no auxiliary legislation has been adopted. Therefore, many provisions of the Regulation are not further clarified. An example which was often mentioned, are the problems with the advance payment. Insurers cannot make advance payments to heirs, when there is no written agreement between the intended heirs. Therefore, the payment is made with delay. It is also not clear which authority needs to handle passenger claims.

¹⁸¹ Some provisions of German law deviate from the Regulation for these smaller ships:

- The rights of passengers with reduced mobility are less generous under German law;
- The rights to have a direct claim against the insurer does not exist under law;
- The right to have an advance payment is also not a part of the German passenger protection regime.

10.2 Conclusion on complementarity

The above analysis shows no major problems between the Liability Regulation on the one hand, and international regimes, in particular the Athens Protocol, on the other. Mainly academic authors seem to encounter some issues, for example related to choice of jurisdiction and recognition. An often mentioned problem in literature is possible concerns with the Brussel I Regulation.

Stakeholders, both interviewed and the ones responding to the survey, did not indicate that major problems are encountered. Some issues between domestic laws and the Liability Regulation are reported, however, their number is limited. Such problems could be best addressed on a national level. In principle, the provisions of the Liability Regulation would take precedence over the national laws. Overall, it can be concluded that the complementarity between the Liability Regulation and other international regimes, and the Liability Regulation and national regimes is high.

11 Conclusions and recommendations

This section presents the conclusions (Section 10.1) and recommendations (Section 10.2) of the *ex-post* evaluation. The conclusions are based on the conclusions formulated in the analytical Sections 4-9, dealing with the evaluation criteria and questions.

11.1 Conclusions

Relevance

Evaluation question 1: Needs still relevant today

No major developments at a political, legal or technical level affecting the implementation of the Regulation have taken place since the introduction of the Liability Regulation. The entry into force of the Athens Protocol has been an important event, however, stakeholders do not see this as a reason for adapting the Liability Regulation. The fact that the Liability Regulation is relatively “young”, with an implementation timespan of less than four years¹⁸² is obviously a strong contributing factor. The short timespan since implementation may also explain the fact that the needs on which the Liability Regulation is based correspond to the needs of today’s society. The latter applies especially to the problems of “*rights of passengers*”; and “*no level playing field*”; and to a lesser extent to “*safety level of passengers*”.

Evaluation question 2: Scope of application of the Regulation

There is broad consensus on the application of the Liability Regulation on international and domestic Class A and B ships. The inclusion of these ships contributes to attaining the Regulation’s objectives, as supported by the stakeholder survey. Extending the scope of the Regulation to domestic Class C and D ships is perceived differently per Member State, resulting in the majority of the Member States not having opted for extension to Class C and D ships so far. Stakeholder views, as presented in the stakeholder survey, are split regarding the importance of the stated problems in relation to Class C and D ships. While the majority of stakeholders have no strong opinion, passenger rights are considered a relatively unimportant problem for Class C and D vessels, whereas safety of passengers and level playing field are considered relatively important problems for Class C and D ships.

In the decision to extend the scope of the Regulation to Class C and D ships, different and sometimes opposing aspects considered by Member States. One aspect is the rights of passengers, which need to be protected, irrespective of the size or material of the vessel or the area of operations. An additional aspect is that having two systems for passenger ships can result in complexity, unfair competition and market distortion. At the same time, an important factor is the ability of the sector, notably the smaller operators, to comply with the provisions of the Liability Regulation, specifically related to the insurability of Class C and D ships.

¹⁸² Entry into force: 31 December 2012.

Member States have developed their own systems at national level in which the above-mentioned aspects are balanced. Member States that have made the Regulation applicable to Class C and D ships have often created measures to reduce the burden on the sector, notably by creating exemptions to adopt certain provisions of the Regulation, as in the case of Denmark. This approach works well in these Member States. Member States that have not extended the scope to Class C and D ships have often included means of protecting passengers' rights for Class C and D ships in their national legislation. For example, in Germany, the German Commercial Code applies to Class C and D ships, which is based on the Athens Convention. Although the passenger may not be protected at the level of the Regulation, the practical situation may be quite similar to the situation in Denmark. For Member States that have not extended the application of the Regulation to Class C and D ships, local solutions are created on a country by country basis, which are reflected in national legislation.

In conclusion, extending the scope to Class C and D ships is a trade-off between sometimes opposing aspects and thus a political decision. The evaluation, including through its stakeholder consultation, does not provide the results to take this political decision. Mitigating measures can be defined to compensate for risks related to the choice for a system. In case of extension, some provisions from the Liability Regulation may be softened, reducing the burden on the sector. In case of non-extension, provisions may be created in national law, contributing to passenger protection. From a passengers' rights perspective, expanding the scope to Class C and D ships provides more safeguards.

Effectiveness

Evaluation question 3: Meeting the objectives of the Regulation

The extent to which the objectives have been met is presented for the four defined objectives:

1. Objective of *protecting passenger rights protection*: The facts collected present a broad picture of the adequacy of the Regulation to achieve this first objective. Stakeholders tend to agree that the Regulation strengthens the passenger's position. Inputs collected from a number of sources address the specific impact of the Regulation improving the level of the advance payment and reducing the time required to receive it. Evidence on the Regulation's impact on the final compensation suggests that despite difficulties still encountered in grasping the full intended benefits of the Regulation, passengers are better off than before. Additionally, the Regulation can be considered to have had a positive impact on the number of cases reaching settlements, as the clarification provided on the compensation level that can be expected and the strict liability provision strengthen the victim's negotiation power increasing the chances of a settlement.
2. Objective of *creating a level playing field*: The facts and opinions collected present different angles on this issue. However, the collected input is sufficient to suggest that the playing field is levelled to a large extent for international carriage and especially for the cruise sector. The same is not exactly the case for domestic carriage

where the differences of the national legal frameworks and Regulation application process cause Member States to deviate from a harmonised application. It should be here noted that during this evaluation period, only a fraction of the EU domestic fleet came under the provisions of the Regulation. Thus, the impact of the Regulation on creating a level playing field, in domestic transport will be possible to assess more coherently after the Regulation comes into full effect in 2019.

3. *Objective of incentivising increased safety and security performance of passenger transport operators:* Academic literature and stakeholder views collected provide different angles to answering this question. The theoretical mechanism that was expected to increased pressure for vessel safety as a result of the mandatory insurance requirement seems not to materialise, as stakeholders think that safety standards have improved due to the entry into force of dedicated maritime safety rules for ship construction and design, and ship operation. Insurance premiums do not seem to play a role in that regard.
4. *Objective of setting up and complementing a balanced framework of passenger rights protection:* The Regulation is an improvement in creating a balanced framework of passenger rights. However, looking into specific issues, such as the compensation of vehicle or property damage, the input basis is thinner than that used for the other objectives, also due to the lesser importance attributed to the issue by the stakeholders involved. Data collected from the case studies indicate that compensations might have increased as an impact of the Regulation. Combined with the provisions protecting additional passenger rights (information, luggage, advanced payment etc.) the Regulation results in harmonisation towards other modes.

Evaluation question 4: Ensuring same level of passenger rights

The Regulation has contributed to a large improvement of the harmonisation of sea passenger rights in Europe. This is initially the case for international voyage where since 2013 a reference framework has been created, providing clarity in the expectations for compensations and dis-incentivising “forum shopping”. However, the limited application of the Regulation on domestic carriage (with the states possessing the larger fleets deferring application for Class A and Class B) and especially the vastly different approaches of Member States in regulating (or not) vessel classes beyond Class A and B ships currently lead to a very diverse framework of application across the EU. This situation is expected to improve after the deferment period finishes. Nonetheless, a large factor preventing a harmonised approach across Europe is the great variation of national legal frameworks applying aside the Regulation and defining a number of critical elements.

Evaluation question 5: Unexpected effects of the Regulation

The Regulation has presented no unexpected negative impacts. The findings indicate that the insurability of carriers has not been affected by the Regulation. Authorities have managed to contain fees charged for certificates to a small amount and insurance premiums and passenger fares have been largely unaffected. This should be seen in the context of broad exemptions

and deferments of the application of the Regulation and against a soft market condition for the vessel insurance industry that has allowed for retaining insurance premiums to remain unchanged. Moreover, the Regulation has caused unexpected positive effects, such as providing clarity for dealing with (especially international) claims on accidents and incidents and the fact that it may have caused a small number of Member States to go beyond the scope of the application and expand the coverage of passenger rights.

Efficiency

Evaluation question 6: Costs are reasonable and proportionate

The costs of implementing the Liability Regulation are low. Estimates suggest annual costs to be between zero and approximately € 40 million, which mainly concerns the increase of insurance premiums due to the raised liability ceilings. This amount represents only a marginal share of the industry's size (in the order of 0.05%). The consulted stakeholders confirm the costs to be minimal.

The benefits are diverse. Besides the achievement of objectives (in particular improved passenger rights and an improved level playing field, as illustrated above), also savings in claims handling as a result of the Regulation are reported. However, these benefits could not be quantified. Overall, the Regulation is considered to be efficient, as it is largely achieving its objectives, thereby creating benefits (which could, however, not be quantified), against relatively low costs.

Coherence

Evaluation question 7: Coherence with maritime and passenger rights policy

The Liability Regulation is coherent in different degrees with the three identified EU policies, as illustrated below. With regard to the *maritime safety policy*, it can be said the Regulation is coherent and contributes to reach the overall goals of the Third Maritime Safety Package. With regard to both the *EU policy on passenger rights* and the *EU's approach to transport operator liability*, the coherence is more disputable. Although the maritime regime is becoming more and more in line with the regimes in other modes, some differences still exist. However, the differences identified are justified as they are the result of the specific transport mode characteristics, which require their own regime (e.g. lower compensation to maritime passenger as a result of the greater freedom of sea passenger to move on board freedom, which increases the chance on self sustained injuries, It is not seen as fair that a sea carrier should be held liable for injuries that result from the passenger him/herself and which cannot be prevented by the ship operator.). Stakeholders do not agree whether or not further alignment is needed and desirable. One point of potential concern is the coherence between the Liability Regulation and the Travel Package Directive, which has to be further examined in the light of the recent revision of the latter entering into force in 2018.

Evaluation question 8: Coherence with broader EU policy

The Liability Regulation is in line with the 2011 White Paper on Transport. Although the Regulation does not always actively contribute in reaching the overall goals laid down in the White Paper, the Regulation does not hamper its realisation. Where possible, the Liability Regulation provides the building blocks to reach one or more of the defined goals. Therefore, it can be concluded that Liability Regulation is coherent. The contribution of the Liability Regulation to achieving the goals laid down in the ten priority policies areas is less apparent. The Liability Regulation mainly contributes to priority number 4 on a deeper and fairer market and indirectly the Regulation contributes to priority number 1 on jobs, growth and investments. The Regulation does not contribute to the remaining eight priorities the Regulation. Although the Liability Regulation does not contribute actively to most of the priority areas, the Regulation also does not hamper its full realisation and therefore can be seen as coherent with the overall goals.

EU added value

Evaluation question 9: EU added value compared to national and international regimes

The Liability Regulation clearly has EU added value. Especially, the fact that the Liability Regulation contributed to the ratification and entry into force of the Athens Protocol 2002 is an important added value. In addition, also the obligation for a carrier to provide information to the passenger (before the journey starts) and the obligation to make an advance payment (in case something has happened), is adding value. It should be noted that although the Liability Regulation has introduced additional passenger rights, the actual implementation of those rights should be further improved to realise its full potential.

Complementarity

Evaluation question 10: Complementarity in supplementing the Athens Convention and other regimes

The above analysis shows no major problems between the Liability Regulation on the one hand and international regimes, in particular the Athens Protocol, on the other. Mainly academic authors seem to encounter some issues, for example, related to choice of jurisdiction and recognition. An often mentioned problem noted in the reviewed literature are possible concerns with the Brussel I Regulation.

Stakeholders, both interviewed and the ones responding to the survey did not indicate that major problems are encountered. Some issues between domestic laws and the Liability Regulation are reported, however, their number is limited. Such problems could be best addressed on a national level. In principle, the provisions of the Liability Regulation would take precedence over the national laws. All in all, it can be concluded that the complementarity between the Liability Regulation and other international regimes, and the Liability Regulation and national regimes is high.

11.2 Recommendations

Based on the *ex-post* evaluation of the Liability Regulation, a number of recommendations can be made regarding the future implementation of the Regulation and a possible revision thereof.

Extending the scope to Class C and D ships

Member States define their own national systems on liability of Class C and D ships in which they balance passenger rights and (financial) burden to the sector. In a few cases (Denmark, the Netherlands and Sweden) the Regulation is applied to Class C and D ships. Other Member States have opted not to apply the Regulation to these ships and have their national legislation to deal with liability and passenger rights. Although both routings can work in practice, and often result in situations which are rather close in terms of passenger protection and burden on the sector, a possible alignment of national systems may be beneficial. A dialogue on this issue between the Commission and the Member States is recommended, possibly through an expert network, as suggested below.

Clarification: provision of guidelines and definitions

The implementation of the Regulation would benefit from clarification on some of aspects of the Regulation. This can be done in case the Liability Regulation would be revised. Alternatively, this can be done through soft law by preparing guidelines based on best practices. Subjects to consider include:

- Uniform rules on calculation of damages;
- Clearer distinction between shipping incident and non-shipping incident;
- Clearer rules on what constitutes personal injury;
- Integration of the consequences of the EU accession to PAL 2002 in the Regulation, i.e. integration of jurisdiction rules in the Regulation insofar as this concerns international jurisdiction of the courts and not internal jurisdiction within a single Member State¹⁸³;
- Advance payment procedure;
- Clear definition of "ship defect".

Monitoring compliance with the Regulation

If Member states do not monitor compliance with the obligations of providing advance payment and providing information to passengers on their rights, the consequence is that the requirements, as included in the Regulation, are regarded as recommendations, which may not be followed up. Thus, strict monitoring of the implementation of the Regulation is recommended.

Develop an expert network at Member States level

As it is rather complex to have a full overview of the implementation of the Liability Regulation, it could be considered to set up an expert network at Member States level. National contact points could be established that can collaborate as a working group towards effective implementation of the Regulation. This expert network can be used to contribute to the

¹⁸³ This recommendation does not concern purely domestic cases.

implementation of some of the above-mentioned recommendations, notably on the provision of guidelines and definitions, for example on defining uniform rules on calculation of damages; making clear distinction between shipping incident and non-shipping incident; setting clear rules on what constitutes personal injury; integrating the consequences of the EU accession to PAL 2002 in the Regulation; and clearly defining "ship defect". The expert network can exchange good practices in the implementation of the Regulation, for example related to expanding the scope of the Regulation to Class C and D ships. As a result, the Regulation may be applied in a more harmonised way. Such an expert network could also be beneficial in the process of a revision of the Regulation, if that would be considered, by providing input in the process and creating support.

ANNEX 1 EVALUATION FRAMEWORK

Relevance

1. To what extent are objectives of this initiative still relevant today?

What do we want to measure?

- 1) Regulation still relevant?

The Regulation was adopted in 2009 and entered into force on 31 December 2012. Consequently, the Regulation is still in the early stages of its lifecycle.

Sub-question: To what extent has the environment changed (technological, policy, legal) and based on this, is the Regulation still relevant or needs to be adapted to a changed environment?

- We need to assess whether any significant changes have taken place. An area for consideration is increased terrorist threat. Also from the perspective of including terrorism risk into EU law through incorporating IMO guidelines 2006 (also scope see relevance question 2);
- If so, whether the Regulation would need to adapt to these changes.

Remark on data/input: here we need to rely on stakeholder consultation. It is a question that we can include in interview scripts and surveys. Expected answer: little/no changes due to short timespan. Terrorist risks may need special attention.

- 2) Objectives and underlying problem and drivers still relevant and appropriate?

When the Regulation entered into force, it aimed to establish (i) an adequate level of passenger rights across the Union is respected, (ii) create a level playing field for operators, (iii) incentivise improved safety performance and (iv) complement the framework of passenger protection across transport modes. This against the drivers and problems as described in the intervention logic¹⁸⁴.

Sub-question: How well do the defined needs still correspond to the needs within the EU today?

- We need to assess whether the needs, on which the Regulation were based, are still corresponding to today's needs. We can use the intervention logic as included in the roadmap (focus on the drivers and problems mentioned) as a basis and check whether these drivers are still relevant for the Regulation today (considering the situation that the Regulation would not exist).

Remark on data/input: on needs: here we need to rely on stakeholder consultation. It is a question that we can include in interview scripts and surveys.

Sub-question: To what extent have these above-mentioned objectives proven to have been appropriate for the intervention, i.e. the Regulation?

- We need to assess whether the right objectives are set? For this, we should look at the intervention logic and see if the link between

¹⁸⁴ See roadmap.

Relevance

1. To what extent are objectives of this initiative still relevant today?

defined drivers and problems and defined objectives still “works”;

- We need to approach this per objective (all four). We need to consistently approach this taking into consideration responses to the first effectiveness question.

Remark on data/input: here we need to rely on stakeholder consultation. It is a question that we can include in interview scripts and surveys.

Indicators

- None

Sources

Additional information for Sources evaluation

Stakeholder input relating to:

- Perceived changes in the environment (technological, policy, legal);
- Perceived importance of needs and objectives.

- Questionnaire;
- Stakeholder targeted interviews;
- Expert Group meeting on national enforcement of passenger rights.

Methodological approach

On Regulation still relevant:

Changes in the “environment” will be assessed qualitatively through consulting the stakeholders. Due to the short timespan since implementation of the Regulation, we expect the Regulation still to be relevant (on this aspect).

On needs and objectives still relevant and appropriate:

This will be assessed qualitatively through consulting the stakeholders. We can include selected elements of the intervention logic (drivers, problems, objectives) and check whether these are still in tune with the situation as of today.

Relevance

2. To what extent is the current scope of application of the Regulation (i.e. international classes A and B of domestic carriage) adequate for the attainment of the objectives

What do we want to measure?

1) Expanding scope to C and D classes

Currently, domestic carriage classes C and D ships are not covered by the Regulation. We need to assess whether the needs (drivers and problems) and objectives are also relevant for C and D classes and whether consequently the scope of the Regulation would need to be expanded to covering also C and D classes. In other words, can the Regulation reach its objective if it only concentrates on classes A and B or does the scope of the Regulation need to be expanded?

Special focus will be on the performance of the Netherlands and Denmark, as C and D classes are covered in these countries. The performance of these countries will be benchmarked against the overall performance.

Sub-question: Are the defined drivers (see intervention logic) and problems (rights of passengers not sufficiently safeguarded, no level playing field for carriers, potential risks for safety levels) also relevant for Class C and D ships?

- We need to assess the way the rights of passengers in C and D classes are dealt with. This can be broken down in a number of aspects, such as:
 - Are passengers of C and D classes sufficiently compensated in case of accidents (in relation to provisions included in the Regulation for A and B classes)? This includes receiving an advance payment;
 - Are passengers of C and D classes compensated in a timely manner in case of accidents (in relation to provisions included in the Regulation for A and B classes);
 - Are passengers of C and D sufficiently informed about their rights in case of accidents (in relation to provisions included in the Regulation for A and B classes)?
- We also need to assess the level playing field for carriers in relation to C and D classes vessels:
 - To what extent do rights for compensation (standards) differ in EU Member States for C and D classes?
 - Can limited liability (including terrorism risks) for C and D classes be combined with mandatory insurance?

Remark on data/input: here we can use KPIs, as defined for the first effectiveness question (see box KPIs below).

Sub-question: Has the Regulation been effective in reaching its objectives regarding C and D classes in the Netherlands and Denmark? Note: this question is clearly linked to effectiveness but included here as it presents insight in how the Regulation affects C and D classes.

- We need to assess the extent to which objectives are met for C and D classes in the Netherlands and Denmark and establish an overview of the situation before and after the implementation of the Regulation;

Relevance

2. To what extent is the current scope of application of the Regulation (i.e. international classes A and B of domestic carriage) adequate for the attainment of the objectives

- This overview will include also unexpected effects as addressed in evaluation question 5 on effectiveness aiming to assess if the Regulation has managed to meet sector needs.

2) Application of classes A and B to domestic carriage

The Regulation defines transitional provisions in Article 11 related to carriage by sea within a single Member State on board for classes A and B ships. 17 EU Member States have chosen to apply the Regulation to domestic carriage for classes A and B as pre 31/12/2012. 10 EU Member States have chosen to defer the application of the Regulation to a later stage, i.e. Class A to 31/12/2016 and Class B to 31/12/2018^{25F}¹⁸⁵. In other words, part of the EU Member States has applied the Regulation to domestic carriage of passengers and part of the EU Member States has not. We need to assess whether the Regulation has reached its objectives for A and B classes in those EU Member States where the Regulation has already been applied to A and B classes for domestic carriage. Note: see overview of entry into force of Class A and B for domestic carriage per EU Member State, indicating at what date the application entered into force for A and B classes.

Sub-question: Are the defined drivers (see intervention logic) and problems (rights of passengers not sufficiently safeguarded, no level playing field for carriers, potential risks for safety levels) relevant for Class A and B ships related to domestic carriage?

- To assess whether the defined drivers and problems and stated objectives are relevant for A and B classes for domestic carriage;
- Make a benchmark comparison between those EU Member States that have already applied the Regulation to A and B classes for domestic carriage and those EU Member States that have not yet applied the Regulation to those classes;
- Assess whether the application of the Regulation to A and B class vessels in some Member States managed to meet sector needs.

Quantitative indicators

Related to C and D classes:

- Development in the level of compensations paid and comparison with the amounts claimed;
- Development in the number of passenger complaints relevant to each of the passenger rights elements of the Regulation;
- Development in the

Sources

Related to C and classes:

- Interview transcripts with carriers, P&I clubs, passenger organisations, national authorities;
- Survey on carriers, national authorities, P&I clubs, passenger organisations and victim associations;
- Passenger complaints gathered by National authorities;
- THETIS information system data on Port State reported Regulation

¹⁸⁵ For Malta this is not applicable as there are no classes A and B ships operating within its jurisdiction.

Relevance

2. To what extent is the current scope of application of the Regulation (i.e. international classes A and B of domestic carriage) adequate for the attainment of the objectives

- number of regulation reported deficiencies;
 - Development in insurance premiums paid by carrier operators (also per country).
 - Related to A and B classes for domestic carriage:
 - Development in the level of compensations paid and comparison with the amounts claimed;
 - Development in the number of passenger complaints relevant to each of the passenger rights elements of the Regulation;
 - Development in the number of regulation reported deficiencies;
 - Development in insurance premiums paid by carrier operators (also per country).
- deficiencies;
 - Flag State control data on Regulation deficiencies as gathered by national competent authorities;
 - P&I club data on insurance premiums.
 -

Additional information for Sources evaluation

- Impact of the Regulation scope expansion to domestic carriage classes C and D in Denmark and the Netherlands;
 - Stakeholder opinions on impact of Regulation scope expansion on fares and insurability of vessel operators.
- Survey questionnaire for passenger carrier operators, passenger and victim associations, ship-owners and P&I Clubs;
 - Targeted interviews with passenger carrier operators, passenger and victim associations and ship-owners and P&I Clubs;
 - Targeted interview of Dutch and/or Danish stakeholders.

Methodology

In order to answer this evaluation question, it is necessary to understand the relevance of the passenger vessels that are not (yet) covered by the Regulation and to assess how this affects achieving the objectives of the Regulation. This applies to C and D classes, as well as A and B classes for domestic carriage (in a number of EU Member States see overview table presented by DG MOVE). The quantitative data collection needs to be closely coordinated with data collected for responding to the first effectiveness question related to achieving stated objectives. Targeted interviews with Danish and Dutch stakeholders can assist in understanding the costs and

Relevance

2. To what extent is the current scope of application of the Regulation (i.e. international classes A and B of domestic carriage) adequate for the attainment of the objectives

benefits induced by the expansion of the regulation scope in this countries to domestic carriage classes C and D. Additional input in that direction can be collected from the rest of the targeted interviews as well as from the stakeholder survey.

3. To what extent have the objectives of the Regulation been achieved?

What do we want to measure?

To what extent have the 4 objectives of the Regulation been attained:

1. To ensure that passenger rights are protected in the event of accidents;
2. To create a level playing field for operators promoting best practices and responsible behaviour;
3. To incentivise increased safety and security performance of passenger transport operators;
4. To assist in setting up and complementing a balanced framework of passenger rights protection also regarding the right to information, special compensation for reduced mobility passengers and the right to an advance payment.

Effectiveness in achieving Objective 1

Sub-question: To what extent has the Regulation achieved the objective of protecting passenger rights in the event of accidents?

- For this sub-question, it would be relevant to estimate the development of the time needed for compensations to be paid since the entry into effect of the Regulation;
- Additionally, the portion of accident cases settled instead of ending in court cases. Should a settlement be reached, it could be assumed that victims consider the offered compensation to be in accordance with the provisions of the Regulation;
- Moreover, an estimation of the portion of cases for which an advanced payment has been given, and the time necessary to provide this payment can be further indications of the effectiveness of the Regulation to protect passenger rights;
- Also relevant, is to compare the level of compensations paid before and after the entry into effect of the Regulation and to assess the development in the relation between claimed and settled amounts;
- Finally, the development in the number of passenger complaints received by national competent authorities, relevant to each of the Regulation's provisions, can be a further indicator to assessing the level of passenger right protection.

Remark on data/input: Data on the impact of the Regulation on the level of compensations and the portion of accident cases being settled would be asked to the relevant stakeholders in the targeted interviews task (EPF, ECTAA, victims' associations, IG P&I etc.).

Effectiveness in achieving Objective 2

Sub-question: Has the Regulation succeeded in creating a level playing field for operators promoting best practices and responsible behaviour?

- Answering this question requires examining the level of harmonisation in passenger carriers' insurance requirements in the EU accounting for the existing exceptions to the Regulation;
- Moreover, it is relevant to estimate the portion of sea passenger traffic that falls under these exceptions. In specific i) the portion of sea passenger traffic with C and D class vessels; ii) the portion of sea passenger traffic with A and B class vessels for countries in which the application of the Regulation has been postponed;
- Further, an estimation would be relevant regarding passenger traffic reaching EU ports conducted with third country flag vessels that have not

3. To what extent have the objectives of the Regulation been achieved?

made the reservation under the 2006 IMO Guidelines regarding liability for 'war-risks';

- Finally the impact to insurance premiums (per country) can be considered a correction to the uneven playing field that might have existed prior to the Regulation application.

Remark on data/inputs: For answering this sub-question, the data collection approach regarding passenger traffic data is similar to the one used for evaluation question 1 on relevance but needs to go in further detail to provide estimations on the portion of EU sea passenger traffic not abiding with the requirements of the regulation.

Effectiveness in achieving Objective 3

Sub-question: Has the Regulation been successful in incentivising increased safety and security performance of passenger transport operators?

- Initially, the evolution of the number of maritime transport accident involving passengers' needs to be estimated;
- Further an understanding of the contribution of this Regulation to the safety and security performance of the sector needs to be examined;
- This can build on assessing the stakeholder behavioural changes that have been brought by the entry of the Regulation into effect, i.e. whether the Regulation has led operators in applying stricter safety and security procedures. This assessment should account for the differences between Member States that have deferred the application of the Regulation and those that have not done so;
- On the other hand, the performance of the Regulation can be measured by observing the evolution in the number of Regulation recorded deficiencies.

Remark on data/inputs: For the identification of impacts of the Regulation on the behaviour of stakeholders such as operators and P&I clubs the primary source of information would be the information coming out of the interviews and survey with the relevant stakeholders. The EMSA and national data should be reviewed in relation to the development in maritime accidents while the THETIS system can be consulted regarding recordings of Regulation deficiencies by port state control. Since the Regulation under evaluation is just one of the developments that are considered to potentially have influence maritime safety, it is relevant to always try to distinguish the part of the effects on the indicators addressed that can be attributed to this Regulation compared to other developments,

Effectiveness in achieving Objective 4

Sub-question: Has the Regulation assisted in setting up and complementing a balanced framework of passenger rights protection also regarding the right to information, special compensation for reduced mobility passengers and the right to an advance payment?

- The Regulation aims in assuring that passenger rights are sufficiently safeguarded, this can be assessed by investigating the behavioural change of carriers in providing information, special compensation for reduced mobility passengers and advanced payments in the case of accidents;
- Further the effectiveness in attaining this objective is related to assessing the development in the number of passenger complaints received by national

3. To what extent have the objectives of the Regulation been achieved?

competent authorities, relevant to each of the Regulation's provisions, can be a further indicator to assessing the level of passenger right protection;

- Also relevant for answering this question could be an assessment of the number of court cases related to these elements of passenger rights, where relevant data are available.

Remark on data/inputs: The survey amongst relevant stakeholders is key in identifying a stakeholder behavioural change that that may have been inflicted by the Regulation.

Indicators

- Past development and future trends of sea passenger transport volumes;
- Portion of sea passenger transport except by the Regulation's provisions;
- Fleet volume temporarily exempt from implementation of the Regulation (per country or region);
- Development of maritime accidents;
- Portion of accident cases compensated or ending in settlements;
- Development in the level of compensations paid and comparison with the amounts claimed;
- Development in the portion of cases receiving an advanced payment and the level of such a payment;
- Development in the time needed to victims receiving an advanced payment and the final payment of the compensation;
- Development in the number of passenger complaints relevant to each of the passenger rights elements of the Regulation;
- Percentage of carriers operators and other stakeholders that have undertaken actions to improve passenger safety and passenger rights protection;
- Development in the number of regulation reported

Sources

- Transport Statistical Pocketbook 2015;
- 2013 Reference scenario;
- COM(2015) 508 final;
- EMSA annual overview of marine casualties and accidents;
- EMSA monitoring data EMCIP accident investigation results;
- Passenger complaints gathered by National authorities;
- THETIS information system data on Port State reported Regulation deficiencies;
- Flag State control data on Regulation deficiencies as gathered by national competent authorities;
- P&I club data on impact of the regulation on insurance premiums;
- Interview transcripts with carriers, P&I clubs, passenger organisations, national authorities;
- Survey on carriers, national authorities, P&I clubs, passenger organisations and victim associations;
- Case studies.

3. To what extent have the objectives of the Regulation been achieved?

deficiencies;

- Development in insurance premiums paid by carrier operators (also per country).

Additional information for Sources evaluation

- National legislation in place concerning liability of passenger carriers in the event of accidents;
 - Stakeholder actions undertaken to improve passenger safety and passenger rights protection;
 - Stakeholder opinion on the elements consisting a balanced framework of passenger rights protection;
 - Stakeholder opinions on creating a level playing field.
- Stakeholder targeted interview transcripts;
 - Survey of stakeholders;
 - Open public consultation results (if available and relevant).

Methodology

The assessment of the Regulation success in meeting its four objectives will be initially based as much as possible on quantitative data and will be further supplemented by qualitative inputs. Per objective, the methodology applied:

- Strengthening of protection of passenger rights: data are collected on the number and content of complaints received from the national enforcement bodies. Additionally, the targeted interviews will be utilised to draw a comparison between the level of compensation claimed and that paid and the portion of cases ending in court cases versus those settled. Further input will be requested regarding the provision of an advanced payment as well as the time lapsing between the accident and the deposit of the advanced payment and the final compensation. The views of passenger and victim associations and the input received from the open consultation and other data sources on the effect of the Regulation on safeguarding passenger rights will further complement the assessment of this objective;
- Creating a level playing field: The Regulation describes some exceptions its scope of application. These regard domestic sea passenger transport for vessels of Class C and D (the Member States can decide on themselves whether to expand the Regulation scope to these vessel classes) and 3rd country flag vessels from states that have ratified the Protocol to Athens 2002 but not the 2006 IMO Guideline regarding reservations for 'war-risks'. Additionally, for domestic transport in some Member States its application to vessels of Class A and B is temporally deferred. Referring to statistical data on passenger transport within these exemption classes will highlight the level of exemption from the level playing field. Also, the effect on insurance premiums paid by operators will be estimated per country based on input from the survey questionnaires, the targeted interviews and other data collection means. Assuming that the Regulation creates an equal need for insurance, uneven changes in premiums per country can be considered to be the case when insurance requirements significantly varied in the pre-Regulation situation. This analysis will be complemented by an assessment of the national legal frameworks in place before the Regulation adoption and the qualitative input received from the stakeholder survey and interviews;
- Increasing safety and security performance: Data regarding Regulation deficiencies recorded by port state control and their development as registered by European and national monitoring mechanisms will be used to assess the compliance with the regulation requirements. Data retrieved from EMCIP on maritime passenger accidents development after the implementation of the regulation cannot be straightforward linked to the increased safety performance of the regulation since the safety performance of the EU sector is affected by a number safety regulations (Third Maritime Safety Package) and developments. Thus, the interpretation of the impact of the Regulation on safety performance will have to be assessed in close examination of stakeholder inputs regarding actions triggered by the Regulation entering into force. This assessment needs to account for the differences in behavioural change between states that have chosen to defer the application of the Regulation for domestic carriage and those that have not. The latter will assist in also assessing the stakeholder behavioural change that can be attributed to this Regulation compared to that attributed to other developments;
- Contribution to a balanced passenger rights protection framework: Data on development and content of passenger complaints will be gathered from the national enforcement bodies (where such data are kept) and if possible related to the specific elements of passenger rights protection provided in the Regulation. Additionally the impact of the Regulation on behavioural

Effectiveness

3. To what extent have the objectives of the Regulation been achieved?

change of stakeholders regarding passenger rights protection will be recorded via the stakeholder survey with questions targeting the protection of passengers with reduced mobility, the protection of passengers' right to information and the provision of an advanced compensation in the event of accident. The survey findings will be cross-validated with the analysis conducted in the case studies.

Effectiveness

4. *To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?*

What do we want to measure?

This question relates to the level of harmonisation of Regulation implementation among EU Member States. Meaning, that the aim is to assess whether the Regulation has managed to produce the same level of passenger rights protection across the whole of the EU internal market.

Is passenger rights protection harmonised regardless of the area of operation of a ship?

Sub-question: Are passenger rights protected to the same level regardless of the area of operation of a ship?

- Answering this question relates to determining the exceptions to the regulation as identified in the previous evaluation questions and the geographical distribution of these exceptions;
- Moreover, it is interesting to attempt an analysis of the significance of these exemptions for each country and/or region of the EU.

Remark on data/inputs: Similar to Evaluation question 3 on effectiveness, answering this will require data from EU and national-level statistics regarding passenger traffic levels with vessels and operators exempt by the Regulation, or for which the Regulation application is deferred to a future date.

Sub-question: Is passenger rights protection applied to the same level regardless of the area of operation of a ship?

- This refers to the developments in the number of maritime accidents, passenger complaints, portion of cases settled and recorded deficiencies to the Regulation as measured in for evaluation question 3 on effectiveness. This need to be analysed against their geographical element (either at a regional or country scope);
- Further, the behavioural impact of the Regulation on stakeholder practices in protecting passenger rights as identified in evaluation question 3 on effectiveness can be also analysed in relation to the geographical scope of the Regulation.

Remark on data/inputs: In answering this sub-question we draw data from the same sources as in Evaluation question 3 on effectiveness, adding however a geographic element to their analysis either accounting for regional or for a country distribution.

Indicators

- Past development and future trends of sea passenger transport volumes (per country or region);
- Portion of sea passenger transport except by the Regulation's provisions (per country or region);
- Development of maritime accidents (per country or

Sources

- Transport Statistical Pocketbook 2015;
- COM(2015) 508 final;
- EMSA annual overview of marine casualties and accidents;
- EMSA monitoring data EMCIP accident investigation results;
- Passenger complaints gathered by national authorities;

Effectiveness

4. To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?

- region);
- Portion of accident cases compensated or ending in settlements (per country or region);
- Development in the level of compensations paid and comparison with the amounts claimed (per country or region);
- Development in the number of passenger complaints relevant to each of the passenger rights elements of the Regulation (per country or region);
- Percentage of carriers operators and other stakeholders that have undertaken actions to improve passenger safety and passenger rights protection (per country or region);
- Development in the number of regulation reported deficiencies (per country or region);
- Development in insurance premiums paid by carrier operators (per country or region);
- Fleet volume temporarily exempt from implementation of the Regulation (per country or region).
- THETIS information system data on Port State Regulation deficiencies;
- Flag State control data on Regulation deficiencies as gathered by national competent authorities;
- European Parliament IA of the Third Maritime Safety Package (2015);
- Regulation State of implementation;
- National statistics of countries deferring regulation application regarding domestic fleet classification;
- P&I club data on impact of the regulation on insurance premiums;
- Interview transcripts with carriers, P&I clubs, passenger organisations, national authorities;
- Survey on carriers, national authorities, P&I clubs, passenger organisations and victim associations;
- Case studies.

Additional information for evaluation Sources

- National differences in Regulation implementation;
- National differences in enforcement procedures;
- Stakeholder views regarding Regulation implementation harmonisation.
- Desk research on Regulation implementation differences;
- Websites of National Enforcement Bodies on complaint processing procedures and complaint reporting;
- Information available by carriers to passengers regarding the complaint procedures;
- Information from National

Effectiveness

4. To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship?

Enforcement Bodies relevant to legislation enforcement, sanctions imposed and cost of compliance;

- Expert Group meeting on national enforcement of passenger rights;
- Case studies.

Methodology

In assessing the effectiveness of the Regulation implementation along the EU Transport Area we build on the results of evaluation question 3 on efficiency and add a geographical element to where possible in order to create insight on the level of harmonisation to passenger right protection brought by the regulation, as well as on the harmonisation on passenger rights protection practices applied by the relevant stakeholders.

Initially, the level of harmonisation of passenger rights protection is assessed by addressing the significance of the regulation exemptions. The first step to this consists of an analysis of significance of the exemptions and instances of Regulation deference at an EU level, as performed in evaluation question 3. The second step considers an analysis of the significance of these exemptions at a more detailed geographical scope (national or regional).

The volume of the EU and national fleets currently exempt from the application of the Regulation can be addressed through EU and national statistics. The Report from the Commission to the European Parliament and Council "*REFIT Adjusting course: EU Passenger Ship Safety Legislation Fitness Check*" provides additional statistics on the classification of the EU passenger vessel fleet under each vessel category. Additionally, the Transport statistical Pocketbook 2015 can be used to further deepen our understanding.

Nevertheless, except from the harmonisation of Regulation protection of passenger rights, also the level of harmonisation in applying passenger rights protection needs to be analysed across the European Transport Area. This means that the following indicators need also to be assessed regarding their geographical distribution: development of passenger complains per passenger rights element, development of maritime accidents occurrence, recorded regulation deficiencies and portion of cases settled instead of resulting in court cases.

Eventually, the desk phase of the study can focus in understanding differences in the Regulation enforcement procedures and reporting processes amongst Member States to identify potential reporting bias when national sources data are collected. The views of stakeholders (especially of those active in multiple Member States) on the differences in Regulation implementation will add valuable insight in framing an answer to this evaluation question. Also the analysis of case study findings and further desk research on academic publications can contribute to qualitatively answering this question.

5. Has the Regulation lead to any positive or negative unexpected effects?**What do we want to measure?**

This question relates to the impacts caused by the implementation of the Regulations that were not foreseen. This can be especially related to effects of the Regulation that have not been identified as significant in the impact assessment conducted prior to the Regulation implementation or to effects beyond the Regulation objectives, the significance of which had been underestimated.

Sub-question: Has the Regulation resulted in unexpected effects?

- This question goes beyond the identified and expected Regulation impacts that have been addressed in evaluation question 3 and 4 on effectiveness;
- In answering this exploratory interviews held are critical as they will provide the necessary insight on what the full scale of effect of the Regulation.

Sub-question: What is the scale of the Regulation unexpected effects?

- Once additional Regulation impacts are identified, relevant additional indicators need to be developed to measure them;
- Next step is to identify additional data sources that can yield relevant information regarding these new indicators;
- Finally adjusting the survey questionnaire as well as the interview guides for the interview as much as possible to capturing the necessary input for measuring these indicators.

The identified unexpected effects might relate to the unforeseen potential impacts of the Regulation on transport fares or to the ability of the market to obtain affordable insurance coverage to operators all over the European Transport Area and regardless of the maritime passenger transport type of service. Other unforeseen effects could concern the potential financial and administrative cost of the regulation as well as any potential administrative burden caused.

Additionally, other existing or potential effects of the regulation beyond what is described in the Commission's impact assessment accompanying the proposal for the Regulation {SEC(2005) 1516}. The views of the relevant stakeholders need to be investigated for relevant input. Should these unexpected effects identified not be quantifiable, they need to be at least qualitatively described.

Remark on data/inputs: In answering this sub-question we initially rely heavily on the stakeholder input on the experienced unexpected effects. This approach runs the risk of overreliance on a biased viewpoint. Therefore, the effect should be quantifiable as much as possible, reliant on data and will need to be carefully assessed and triangulated with other stakeholder views and against existing academic literature.

Indicators

- Impact in insurance premiums paid by carrier operators;
- Impact on the market

Sources

- EUR-Lex, {SEC (2005) 1516});
- European Parliament IA of the Third Maritime Safety Package (2015);

Effectiveness

5. Has the Regulation lead to any positive or negative unexpected effects?

- capacity to obtain affordable insurance coverage to operators;
- Effect on passenger fares;
- Financial and administrative cost of the regulation to authorities.
- UK Department of Transport consultation document on the Regulation implementation;
- Exploratory interview scripts;
- Academic literature and reports on the effects of the Regulation implementation;
- Survey to national authorities, carrier operators, P&I clubs and passenger organisations.

Additional information for Sources evaluation

- Other unexpected effects of the regulation;
- Other types of administration costs and burdens.
- Interviews scripts with stakeholders;
- Expert Group meeting on national enforcement of passenger rights;
- Case studies;
- International Standard Cost Model Manual;
- Better Regulation Toolbox on identification of impacts.

Methodology

The Impact Assessment of the Regulation as presented in SEC (2005) 1516, identifies the expected impacts of the Regulation implementation, this IA will form the starting point to an analysis of the unexpected benefits and costs of the regulation. The European Parliament IA of the Third Maritime Safety Package (2015), and the UK Department of Transport consultation document on the Regulation implementation identify impacts of the regulation implementation such as an increased pressure on national authorities' administration to issue certificates which is dealt in some cases by the application of administration fees.

Additionally, the exploratory interviews conducted during the project inception phase will provide further guidance on the identification of unforeseen costs and benefits of the Regulation implementation. These effects and their scale will be supported by facts and data retrieved from other stakeholders. All unexpected identified effects will need to be triangulated with other stakeholder views and independent data sources. E.G: When carrier operators identify a negative effect on their operations, this will need to be proven with reliable data and confirmed in consultation with other relevant stakeholders such as the National Enforcement Bodies, or by reviewing the extensive existing literature of academic publications. Further the possibility to use the remaining targeted interviews and/or the survey to retrieve further information from stakeholders regarding the quantification of such additional costs and benefits will be assessed and potentially a tailored questionnaire approach will be adopted to retrieve information from the most relevant stakeholders.

Effectiveness

5. Has the Regulation lead to any positive or negative unexpected effects?

Further quantification of the regulatory and administrative costs and burden of the Regulation can be assisted (if deemed significant) by the application of the International Standard Cost Model methodology.

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

To answer this question, we need to compare the benefits with the costs of the regulation, and assess if the ratio is reasonable and proportionate. For assessing the efficiency of the Liability Regulation, a comparison with the situation before the introduction of the Liability Regulation is considered. In the analysis we will, to the extent relevant, distinguish:

- Between countries that had already signed up to the Athens Convention and countries that had not;
- International from domestic shipping;
- Between countries that have included ship categories C&D versus countries that have not.

What are the costs of adopting the regulation?

1. What are the costs involved for ship-owners?

Sub-question: What are the charges related to the measure (i.e. fees paid to authorities for issuing insurance certificates)?

- These concern the fees to be paid to authorities for certification.

Remark on data/inputs: These can be obtained from Member States national inspectorate's tariff books, if published, or else requested from the Member States authorities concerned.

Sub-question: What are the costs of organising compliance with the measure (i.e. payment of the required insurance premiums)? These concern other costs for the ship-owners, notably:

- How much do liability insurance premiums cost for a ship on an annual basis?
- What are the main decisive factors that define the premium level?
- How much do the liability insurance premiums under the Liability Regulation differ from those before the regulation was introduced (e.g. under the Athens Convention).

Remark on data/inputs: These costs are not found in publications online, but will need to be gathered directly from P&I clubs (IGPANDI) and from ship-owners (ECSA, CLIA, national ship-owner associations). If these sources provide insufficient information, additionally through the survey indications may be gathered. The results from the survey held under the EP's 3rd MP IA survey suggest that respondents considered no significant impacts on premiums.

Sub-question: What is the administrative burden for ship-owners of ensuring continued compliance? This includes:

- Time effort for acquiring a first time certificate;
- Time effort for certificate renewal;
- Other administrative burdens on the side of the ship-owners.

Remark on data/inputs: Ship-owners will be consulted (ECSA, CLIA, selected individual ship-owners) to gather indications of the level of these costs.

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

Sub-question: What are the costs for ship-owners associated to accidents/incidents?

These may include:

- Costs of advance payments to be made to passengers;
- Costs of adjudication;
- Differences in annual settling costs (ship-owners vis-à-vis P&I clubs).

Remark on data/inputs: As regards the first two items, only in the case of accidents, such costs are considered. As the number of cases over the past few years is limited, and as indicated in our proposal most cases may not yet have seen a final verdict, only indications are possible. Ship-owners, P&I clubs as well as passenger associations (EPF, ECTAA) will be consulted for this. From the case studies also information on these costs may be derived.

Were there any other possible costs changes since the introduction of the Liability Regulation? These might be:

- Specific cost changes due to adding domestic shipping;
- Does the distinction between war and non-war matter?
- Distinguish the situation in EU countries that already signed up to the Athens Conventions versus those that had not.

2. What are the costs involved for authorities?

This addresses both flag state and port state authorities. For authorities we identified the following cost categories:

- Costs for issuing certificates (flag state);
- Costs for monitoring (flag state);
- Costs for enforcement in case of non-compliance (port state);
- Costs associated to accidents/incidents (both port state and flag state);
- Other costs.

Remark on data/inputs: As these cost items will mainly involve staff time costs, data on staff numbers and time inputs per type of activity and per ship is needed:

- Staff numbers involved before/after: have these increased as the regulation was added or rather reduced as the harmonization lowered the effort needed?
- Time effort involved among authorities;
- Time involved in handling accidents/incidents and court procedure costs savings compared to the pre-Liability Regulation situation;
- Level of cost coverage from fees paid by ship-owners (which is a transfer).

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

Data on staff numbers and time for handling certification, monitoring and accidents will be requested from Member States competent authorities (survey among all Member States; interview with EMSA + with selected Member States). This information will feed the calculation of administrative costs using the Standard Cost Model.

What are the benefits of adopting the Regulation?

The benefits of the regulation can be organised in line with the Regulation's objectives (see also evaluation question 3 effectiveness).

Sub-question: what are the benefits in terms of improved protection of passenger rights in the event of accidents?

- How much have liability complaints reduced?
 - Numbers of complaints over time;
 - Impact of the harmonization generated by the regulation: lower number of complaints and/or % addressed satisfactorily;
- Effort of passenger to obtain liability payments?

Remark on data/inputs: Information on these aspects will be based on complaints records from Member States authorities, national or EU Ombudsman, and complemented with data from ECTAA and EPF. Interviews with the latter, as well as case studies, will be used to validate these data.

Sub-question: What are the benefits in terms of an improved level playing field among operators?

- Has the duration of the legal procedure after an accident been reduced in comparison with that before the Liability Regulation was introduced?

Remark on data/inputs: Ideally for this factor, data is kept by authorities, ship-owners or passenger representative organisations. These will be consulted for such information. Alternatively, the survey will be used to gain further insight.

Sub-question: What are the benefits in terms of increased maritime safety?

- Numbers of accidents (before/after the regulation), number of casualties injured;
- Other safety improvements, for instance improved safety equipment on board ships.

Remark on data/inputs: Data on numbers of accidents and severity will be taken from EMSA's EMCIP database, noting the limitations of interpreting these data (trends related to better reporting). It will be important to distinguish the contribution of the Regulation from other safety regulations and policies that may have impacted the number of shipping accidents over the past years.

Sub-question: What are the benefits in terms of a better balanced framework vis-à-vis other modes of transport? (we understand that this is

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

referred to)

- How is better information to passengers perceived?

Remark on data/inputs: Passenger representative organisations will be consulted on their views of the balance achieved and the benefit this has generated.

Sub-question: Are there any other benefits?

- Any unintended side effects affecting the regulation's efficiency.

Remark on data/inputs: This question will be answered in close relation to evaluation question 5 on effectiveness, for this interviewees will be asked for their views on other benefits that the Regulation has delivered.

What do we consider reasonable and proportionate?

The ratio of benefits and costs can be drafted on the basis of the first two sub-questions. However because of the nature of the measure (a regulation posing continuous costs), an assessment of the annual cost/benefit ratio is considered more appropriate than a Cost Benefit Analysis. If the ratio is positive, one may consider the costs reasonable and proportionate in relation to the benefits. Other than that, we propose to:

- Compare with other liability regimes introduced earlier in other transport sectors evaluations of those regulations, if these are available:
 - Regulation 23027/97 on air transport liability;
 - Regulation 1371/2007 on rail transport liability;
 - Regulation 2009/20/EC on insurance of ship-owners for maritime claims ex post evaluation 2015 (as part of the Third Maritime Package) by the European Parliamentary Research Service.
- Assess the efficiency vis-à-vis the Athens Convention (by adding national shipping to the scope + putting more stringent requirements?)
 - To get the Athens convention effective (3rd MP IA states that main benefit of Liability Regulation is that it resulted in 28 countries ratifying the Athens Conventions, which would alternatively have been much higher costs or delay);
 - Would international liability standards (Athens convention) have been more efficient than the EU regulation?
 - Understanding that international might be better/more efficient, but an EU harmonized approach perhaps more stringent/more effective at low extra costs, thus still being considered efficient.

What role do exemptions/variations in application play in the Regulation's efficiency?

In some Member States, additional categories of ships (C+D) are included in the scope, while in other countries these are not. Also for categories A and B there may be deviations in place.

Sub-question: have exemptions or variations been applied with regard to ship categories A, B, C, and D in your country? To clarify what these

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

exemptions were.

Sub-question: To what extent does this affect the efficiency? Does it increase or rather reduce efficiency?

To assess this, we will collect information on:

- Data on safety & complaints related to these types of ships;
- Indication of compliance costs for these ships;
- Comparison between countries (NL/DK vs other EU Member States);
- Comparison with exemptions/variations included in other liability regulations (ex post evaluations for air transport; maritime liability).

Quantitative indicators

In terms of "direct compliance costs";

- Average increase in vessel insurance premiums;
- Value of fees paid per vessel to obtain an insurance certificate;
- Increase in workload to comply with requirements;
- Costs of advance payments;
- Legal costs.
- In terms of "enforcement costs":
- Costs incurred by authorities for monitor and enforce the regulation;
- Adjudication costs incurred.
- Benefits can be quantified as:
- Reduction in passenger complaints received by authorities;
- Reduction in accidents;
- Reduction of deviations in passenger rights protection provisions for different modes.

Additional information for evaluation

Stakeholder opinions on benefits regarding:

- Contribution to creating a level playing field;

Sources

- European Parliament IA of the Third Maritime Safety Package (2015);
- Academic studies and reports on the effect of liability regulations on insurance premiums, fares and the capacity of the market to offer insurance coverage;
- UK consultation on the implementation of the Regulation;
- Questionnaire to P&I clubs;
- Questionnaire to carrier operators;
- Questionnaire to port authorities;
- Questionnaire to National Enforcement Bodies;
- Passenger complaints gathered by national authorities or by ECTAA or EPF;
- EUR-LEX (on passenger rights Regulations for different modes);
- Expert Group meeting on national enforcement of passenger rights.

Sources

- Targeted interviews with IGPANDI, EPF, ECTAA, Member States inspection authorities;

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6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

- Incentivising improvement of safety performance.
- Stakeholder survey;
- Case studies (case law, case study interviews, case study data).

Stakeholder opinions and perceptions on costs and benefits.

Methodology

The assessment of benefits will align as much as possible with the aspects addressed under evaluation questions 3-4-5 effectiveness.

In order to include them in the CBA, however, they will need to be monetised. The study on the costs and benefits of regulation^{26F¹⁸⁶} refers to several methods to do this, namely Willingness to Pay (WTP), Willingness to Accept (WTA), Stated Preference (SP) and Revealed Preference (RP). For several of the above benefits, such values can be obtained from valuation studies at European level (e.g. value of statistical life for accidents), but for other benefits, stakeholders need to be consulted.

Gathering data on costs is expected to be more difficult, in particular as it includes an element of commercial sensitivity. The evaluation will target this data need by:

- Collecting publicly available tariff data on certification fees and insurance premiums;
- Contact IGPANDI and its member P&I clubs as well as Member State inspectorates to obtain further detailed information;
- Contact ECSA and individual ship-owners to obtain cost information;
- Conduct interviews with selected stakeholders (see stakeholder overview matrix) to verify information collected and where possible to acquire further understanding or details;
- Use the survey to collect opinions on levels and directions of costs observed.

The analysis of efficiency will in particular take account of potential differences between EU Member States, by analysing the costs and benefits observed at a country level, to the extent possible. This should provide an understanding on:

- The efficiency in countries that had already signed the Athens Convention before the Liability Regulation was introduced versus countries that had not;
- The efficiency in countries that have included ship categories C and D versus in countries that have not.

Efficiency of the regulation then implies a ratio of costs to benefits (or in other words: inputs to intended effects)^{27F¹⁸⁷}, as well as an assessment of the possibilities to improve this ratio.

¹⁸⁶ http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf.

¹⁸⁷ http://ec.europa.eu/smart-regulation/guidelines/tool_43_en.htm.

Coherence

7. To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability? Whether there are any overlaps, gaps or inconsistencies?

What do we want to measure?

This Regulation is part of the Third Maritime Safety Package. This consists of a series of 7 proposals intending to supplement European maritime safety rules and improve the efficiency of the measures already in place. The liability provisions of the Third Maritime Safety Package are complemented by the Directive on extra-contractual liability of ship-owners. In order to assess the coherence of the Liability Regulation with the overall EU maritime safety policy the following sub-question needs to be addressed:

Sub-question: To what extent does the Regulation fit in the EU maritime safety policy?

- What are the main objectives of the EU maritime safety policy?
- Do the Regulation and overall maritime safety policy have similar objectives?
- Are there any parts of the Regulation conflicting with the main objectives of the EU maritime safety policies?

Remark on data/input: To assess the coherence between the Regulation and the EU maritime safety policy it is vital to analyse the relevant legal and accompanying documents, e.g. negotiation history, policy papers and other background information. The findings of this desk research needs to be validated with the authors of both the regulation and the maritime safety policy, as well as with the relevant stakeholders.

Additionally, the Union has actively pursued harmonisation of passenger rights protection for all modes of transport. This is described in the Communication from the Commission on "A European vision for Passengers". In that, this Regulation does not stand alone, but should be seen as part of the overall effort to safeguard passenger rights and incentivise an ameliorated safety performance. Relevant regulations have been adopted to protect also air, rail and road passenger rights. Additionally, regarding aviation, a separate regulation have been adopted to foster the protection of Reduced Mobility Passengers and that of disabled passengers. In order to assess the coherence of Regulation 392/2009 with the overall EU passenger rights policy the following sub-question needs to be addressed:

Sub-question: To what extent does the Regulation fit in the EU passenger rights policy?

- What are the main objectives of the EU passenger rights policy?
- Are the objectives set in the Regulation in line with the objectives of the EU passenger rights policy?
- Are there any parts of the Regulation conflicting with the EU passenger rights policy?
- Which passenger rights are protected in other modes (i.e. air, rail and road)?
- Are the protected passenger rights in the Regulation similar to the protected rights in the other modes?

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

- Are there deviations between the levels of protection in maritime transport compared to the other modes?

Remarks on data/input: Again, starting point of the assessment will be an extensive desk research. The relevant policy documents, legislation and background documents will be analysed. The findings of this part will be validated with the authors of the policy and other Regulations. For triangulation of the facts, relevant stakeholders like passenger organisations, consumer organisations and legal stakeholders will be interviewed. Also a survey will be conducted aiming to collect experiences from national stakeholders.

In addition to the assessment whether or not the Regulation is coherent with the EU passenger rights' policy, a detailed assessment will be made on the coherence between the Regulation and the EU approach to transport operators' liability. Is the liability system in line with the liability systems adopted for other modes (i.e. rail, road and air)?

Sub-question: To what extent does the Regulation fit in the EU approach to transport operators' liability?

- What are the main objectives of the EU approach to transport operators' liability?
- Are the objectives set in the Regulation in line with the objectives of the EU approach to transport operators' liability?
- Are there any parts of the Regulation conflicting with the EU approach to transport operators' liability?
- How is transport operators' liability regulated in other modes (i.e. air, rail and road)? What is the scope, exemptions etc.?
- Is the transport operator's liability similar to the liability in the other modes?
- Are there deviations between the levels of protection in maritime transport compared to the other modes?

Remarks on data/input: Also for this part of the evaluation, desk research will be the starting point of the analysis. Based on the relevant policy documents, legislative acts and their accompanying documents a good understanding of the EU approach to operators' liability can be obtained. This desk research will be further supplemented with relevant academic literature on transport operators' liability and factual documentation. The findings will be validated with the main authors of the EU approach. For triangulation purposes several targeted interviews with the main stakeholders will be conducted and a survey will be used to collect views from national stakeholders.

The Regulation on liability and compensation for damage of passengers in the event of maritime accidents needs to be examined in close connection with the provisions of the above mentioned legislative acts. The coherence of the Regulation with the rest of the legislation of these two policy areas (maritime safety and passenger rights protection (including

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

the transport operators' liability)) needs to be examined for overlaps, potential gaps and inconsistencies.

Indicators

- Qualitative indicators:
- The level of harmonisation between the Regulation No 392/2009 provisions on passenger rights protection and that of the passenger rights regulations for other modes; as well as the transport operators' liability;
- The level of coherence of the Regulations with the rest of the Third Maritime Safety Package legislative acts.

Sources

- EUR-Lex;
- Third Maritime Safety Package;
- A European vision for Passengers: Communication on Passenger Rights in all transport modes {COM(2011) 898 final};
- European Parliament IA of the Third Maritime Safety Package (2015);
- Ex-post evaluation of Regulation 261/2004 on air passenger rights (2010);
- Ex-post evaluation of Regulation 1371/2007 on rail passenger rights (2012);
- Ex-post evaluation of Regulation 1107/2006 on protection of people with reduced mobility when travelling by air;
- Targeted stakeholder interviews.

Additional information for evaluation

- Stakeholder input on the coherence of the Regulation with the Third Maritime Safety Package and the rest of the maritime safety regulations;
- Expert input on the adequacy of the Regulation to incentivise better safety performance and increased passenger rights protection.

Sources

- Questionnaire for carrier operators;
- Questionnaire for passenger organisations consumer organisations;
- Questionnaire for national competent authorities;
- Expert Group meeting on national enforcement of passenger rights;
- Targeted stakeholder interviews;
- Open public consultation results.

Methodology

The answer to this question will be given through an analysis of the objectives/requirements of the Regulation and those of the other legislative acts in the areas of maritime safety and passenger rights protection in search for overlaps in their provisions, gaps in the protection of passenger rights and inconsistencies of the regulations for

Efficiency

6. Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

the different modes. Central in the analysis are the policy documents relating to the EU maritime safety policy, the EU passenger rights policy and the EU approach to transport operators' liability. As indicated before besides extensive desk research, findings will be validated with the respective authors of the policy to get a full understanding of the intentions of the different policies.

The evaluations of the relevant passenger rights protection regulations for other modes will be reviewed in order to identify possible differences between the level of protection as well as the transport operators' liability. Besides an extensive desk research the differences/gaps can be identified through stakeholder consultation. The main stakeholders will be interviewed, while others will be approached via a survey. Especially the input from national stakeholders will be obtained through the survey. Although we aim to approach all relevant national stakeholders and do our utmost best to achieve the highest possible response rate, it deserves mentioning that it is possible that not all national stakeholders are able/willing to answer. Therefore, it might be difficult to obtain the full picture.

Coherence

8. Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014)?

What do we want to measure?

This question seeks to investigate the coherence of the Regulation with the higher level EU Transport policy objectives. These are set out in the 2011 White paper on Transport in relation to passenger rights protection, maritime and transport safety, creation of a level playing field and improvement of the level of transport services. The objectives of the Regulation as well as the results obtained from its implementation need to be compared with the ambitions set in the White Paper. In order to do so, the following are relevant:

Sub-questions:

- What are the main objectives of the 2011 White Paper on Transport?
- Are the objectives set in the Regulation in line with the objectives of the 2011 White Paper on Transport?
- Are there any parts of the Regulation conflicting with or deviating from the 2011 White Paper on Transport?

Remarks on data/input: Large part of the assessment will be based on desk research. The relevant policy documents and related background information will be analysed. The findings of the desk research will be validated with the main authors of the Regulation and the EU Transport policy.

The Juncker Commission announced in July 2014 the ten policy priority areas for the current European Commission. The coherence of the orientation of the Regulation with the policy priorities as formed the Political Guidelines for the European Commission announced by Jean-Claude Juncker needs to be assessed as well. In order to do so, the following need to be addressed:

Sub-questions:

- What are the main objectives of these 10 priority policy areas?
- What are the most relevant policy areas in relation to the Regulation?
- Are the objectives of the Regulation in line with the objectives set in the relevant priority policy areas?
- Are there any parts of the Regulation conflicting with or deviating from the relevant priority policy areas?

Remarks on data/input: Again, main sources of input will be the relevant policy documents. Information on the ten priority areas will be collected and analysed. Information ranges from relevant policy documents to additional background information and other publically available information. Information with the main stakeholders will be conducted. This will be mainly other DGs.

Indicators

- Qualitative indicators:
- Level of alignment of the Regulation objectives and impacts with the EU Transport Policy objectives;
- Level of alignment of the Regulation objectives and impacts with the policy

Sources

- 2011 White Paper on Transport;
- Political Guidelines for the Next Commission;
- Targeted stakeholder interviews.

Coherence

8. *Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014)?*

objectives set in the Juncker Political Guidelines.

Additional information for Sources evaluation

Stakeholder opinions on perceived alignment with EU transport policy objectives. • Qualitative comments for stakeholder surveys (EU level stakeholder).

Methodology

Assessing the coherence of the Regulation with the higher level EU policy directions requires examination of the objectives as well as the assessed impacts of the Regulation in contrast with the objectives for transport as set in the 2011 White Paper for Transport. Additionally, coherence of the Regulations impacts with the ten policy priority areas identified in the Political Guidelines delivered by President-elect Juncker will be assessed. To formulate an informed opinion, not only the relevant document will be analysed, but also the relevant EC DGs will be interviewed to obtain a clear understanding of the embedment of the Regulation in higher EU policy.

EU Added Value

9. *What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?*

What do we want to measure?

This section will look at whether, and if so, to what extent, the Regulation's additional requirements did bring benefits on an EU level compared to the previously existing combination of international legislation and national regimes governing liability of carriers of passengers by sea. To answer this question, two sub-questions need to be addressed:

Sub-questions:

- What are the main additions of the Regulation to the previous system of international and national legislation?
- Which (i.e. relating to protection/liability/information) gaps have been filled by the Regulation compared to the previous system of international and national legislation? And can therefore be considered as advantages?
- Which Member States have deferred the Regulation application for A & B classes? And what have been the reasons for doing so?

Remarks on data/input: To answer these questions the team will mainly depend on input provided by different stakeholders. It is expected that only limited information can be obtained through desk research as most documents will relate to facts instead of identifying the main perceived advantages/gaps. As the main input will be stakeholder opinions, the analysis needs to be conducted carefully in order to avoid a biased outcome.

Additionally, this section will address also questions regarding the fulfilment of the principles of conferral, subsidiarity and proportionality by this Regulation. Specifically:

Sub-questions:

9. What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?

- Does producing the Regulation fall within the competences of the EU, in the light of the founding treaties, more specifically Article 5.2 TEU? (principle of conferral);
- Does action at an EU level deliver clear advantages that cannot be delivered by actions of the EU countries, more specifically Article 5.3 TEU? (principle of subsidiarity);
- Do the content and the form of the action not go beyond what is necessary to achieve the objectives set by the Treaties, more specifically Article 5.4 TEU? (Principle of proportionality).

Remarks on data/input: It is important to analyse whether or not the Regulation falls in the scope of the different principles. In order to assess the exact scope of the principles information on the principles needs to be collected. This will be done through policy documents and court rules where possible.

Indicators

Qualitative indicators:

- Has the Regulation delivered sufficient benefits to justify EU action that could not be produced by national legislation regarding:
 - Strengthen the protection of passenger rights;
 - producing a level playing field;
 - increase safety performance;
 - contribute to creating a balanced framework of passenger rights protection across transport modes.

Sources

- Desk research on previously existing national regimes and regulations regarding passenger vessel liability;
- Desk research on previously existing national procedures for processing passenger complaints and enforcing national legislation;
- Desk research on relevant international legislation;
- European Parliament IA of the Third Maritime Safety Package (2015);
- UK consultation on the implementation of the Regulation;
- Questionnaire to P&I clubs, carrier operators, passenger organisations, consumer organisations, port authorities National Enforcement Bodies;
- Court cases.

Additional information for evaluation

- Stakeholder input on the contribution of the additional requirements to delivering benefits.

Sources

- Stakeholder survey;
- Targeted interviews;
- Case studies.

9. What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?

Methodology

The main part of the value added question (i.e. the part of the value added brought by the Regulation compared to the previous situation) will be largely based on stakeholder input. Although we aim to approach all relevant national stakeholders and do our utmost best to achieve the highest possible response rate, it deserves mentioning that it is possible that not all national stakeholders are able/willing to answer. Therefore, it might be difficult to obtain the full picture. In addition, it is crucial to ensure that the picture is well balanced and does not give a biased overview.

For second part of this evaluation the answer will be mainly based on desk research and analysis of relevant court cases. Crucial is to collect the most relevant court cases, especially the ones relating to one of the three founding principles and maritime passengers. If such cases do not exist, cases that are somewhat similar will be selected.

Complementarity

10. To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

What do we want to measure?

This section will look at whether, and if so, to what extent, the Regulation's additional obligations compared to the Athens Convention did bring benefits on an EU level. In order to answer this question, the following sub-questions are relevant:

Sub-questions:

- What is covered by the Athens Convention?
- What are the main additions the Regulation brings compared to the Athens Convention (in terms of scope, grounds for compensation/liability, and other passenger rights)?
- Where do the Regulation and the Athens Convention overlap?
- Where does the Regulation deviate from the Athens Convention?
- In case additional passenger rights are given by the Regulation, is this considered to be a success?

Remarks on data/input: to answer most of the sub-questions desk research will be conducted. The Athens Convention and the related protocol will be studied as well as the relevant background documentation. The findings will be validated with relevant stakeholders. To answer the last sub-question, stakeholder input is required. In order to obtain this target interviews as well as a survey will be held.

As a second step, the team will assess whether the Regulation (EU law) impose conflicting or overlapping obligations on Member States, or other burdens that result in inefficiencies in delivering higher sea passenger transport services safety performance. To answer this question, the following sub-questions are of relevance:

Sub-questions:

- What was regulated by the national liability of passenger carriers,

Complementarity

10. To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

before introduction of the Regulation?

- Which bottlenecks have been overcome with the introduction of the Regulation?
- Are there still any difficulties with regard to passenger right protection?
- Are difficulties experienced now that two systems, i.e. the Regulation and the Athens Convention, are in place?

Remarks on data/input: the sub-questions mainly relate to national liability systems. To obtain information, national authorities need to be contacted. In order to do so a survey will be sent. Although the team will do its utmost best to contact all relevant national authorities, it is unsure whether or not answers from all national stakeholders will be received. Missing information leads to an information gap, which will make it difficult to answer this part of the evaluation question.

Indicators

Qualitative indicators:

- Benefits derived from the additional requirements of the Regulation;
- Is there an overlap between the Regulation and the Athens Convention?
- Are there conflicting requirements deriving from the simultaneous implementation of the Regulation and the Athens Convention?

Sources

- Athens Convention;
- European Parliament IA of the Third Maritime Safety Package (2015);
- UK consultation on the implementation of the Regulation;
- Survey to relevant authorities in Member States.

Additional information for evaluation

- Stakeholder input on the simultaneous application of the regulation and the Athens Convention.

Sources

- Targeted interviews;
- Questionnaire for National Enforcement Bodies;
- Questionnaire for P&I clubs;
- Questionnaire for passenger and victims associations;
- Case studies.

Complementarity

10. To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

Methodology

This section will rely on the liability system that would have existed if the Regulation was not in place. It will look at how passenger rights would be protected should they have been affected only by the provisions of Athens Convention and/or national legislation. Therefore, the analysis will look at the situation that would have existed without the additional requirements of the Regulation and will compare that situation to the existing one where the Regulation requirements are in force. This will allow the measuring of the benefits (i.e. added values) of the additional requirements of the Regulation. Consideration will also be given to the possible (in) efficiencies caused by the coexistence of Regulation and the Athens Convention.

ANNEX 2 SURVEY QUESTIONNAIRE

Background

Regulation 392/2009 has been adopted as part of the third maritime safety legislative package. Liability rules for damages caused to passengers are important to safeguard passengers' rights, but also to create a level playing field for carriers across Europe fostering responsible shipping practices and, indirectly, raising safety standards.

Regulation 392/2009 lays down rules for the establishment and organisation of a strict liability regime for carriers of passengers by sea, coupled with a mandatory insurance obligation for the carrier, and a right of direct recourse of the passenger against the carrier's insurer. This regime is in fact established in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, and is reproduced in Annex 1 of the Regulation. Objectives of the regulation are:

To ensure that passenger rights are protected in the event of accidents;
To create a level playing field for operators promoting best practices and responsible behaviour;
To incentivise increased safety and security performance of passenger transport operators;
To assist in setting up and complementing a balanced framework of passenger rights protection also regarding the right to information, special compensation for reduced mobility passengers and the right to an advance payment.

The European Commission has initiated the ex-post evaluation of Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents and has granted a contract to carry out the evaluation to the consortium consisting of Ecorys (leading partner), Grimaldi and Erasmus School of Law (ESL). The evaluation will provide the Commission with an independent evidence-based assessment of the application of Regulation 392/2009 in the first three years since it became applicable, 2013-2015. This evaluation shall also provide input to the Commission to, as per Article 1 (3), if appropriate, present a legislative proposal in order, inter alia, to extend the scope of this Regulation to ships of Classes C and D under Article 4 of Directive 98/18/EC.

Explanatory note

The application of the Regulation is foreseen to gradually expand to all domestic carriage vessels belonging to classes A and B. Article 4 of Directive 98/18/EC classifies domestic carriage vessels into 4 classes.

Structure of the questionnaire

The questionnaire consists of the following sections:

Part I: Respondent information;
Part II: Problems that the Regulation aims to address;
Part III: Functioning of the Regulation;
Part IV: Practical experiences and suggestions.

Support

For any questions relevant to the survey, please contact passenger.carrier.liability@ecorys.com. If you cannot continue the survey while waiting for support, you can stop the survey and continue later.

Confidentiality clause

ECORYS adheres to the EU's legislation on the protection of personal data (Regulation (EC) 45/2001). Any data collected through this survey will be managed in line with these requirements and will not be shared with third parties. The survey results will thereto be stored in a confidential manner.

The data collected will be aggregated and presented anonymously in the main report. It will be guaranteed that individual answers will not be traceable to the companies approached.

Please inform us should your company policy require additional safeguards with regard to compliance. We would be pleased to cooperate on this matter.

Important caveat

Please note that this document has been drafted for information and consultation purposes only. It has not been adopted or in any way approved by the European Commission and should not be regarded as representing the view of the Commission. It does not prejudge, or constitute the announcement of any position on the part of the Commission on the issues covered. The European Commission does not guarantee the accuracy of the information provided, nor does it accept responsibility for any use made thereof.

This questionnaire will take about 30 minutes to complete.

Part I Respondent information

1. In what capacity are you completing this questionnaire?*

Capacity	Select one
My personal capacity	<input type="radio"/>
Private sector company	<input type="radio"/>
Industry association or NGO	<input type="radio"/>
National public authority	<input type="radio"/>
Lawyer acting for claimants under the Regulation	<input type="radio"/>
Other, please specify	<input type="radio"/>

2. What country or region are you based? * Select one answer.

• Austria	• Netherlands
• Belgium	• Poland
• Bulgaria	• Portugal
• Croatia	• Romania
• Cyprus	• Slovakia
• Czech Republic	• Slovenia
• Denmark	• Spain
• Estonia	• Sweden
• Finland	• United Kingdom
• France	• Iceland
• Germany	• Norway
• Greece	• Europe non-EU
• Hungary	• USA
• Ireland	• Canada
• Italy	• Rest of America
• Latvia	• Asia
• Lithuania	• Africa
• Luxembourg	• Australia
• Malta	• Other, please specify:

3. Indicate the sectors in which you are engaged *

Sector	Select at least one
EU Member State Policy making authority	0
EU Member State Inspectorate authority	0
Ship owner operator	0
Passengers victims association	0
Insurer	0
Third (non-EU) state	0
Law firm	0
Academic	0
Other, please specify:	0

Part II Underlying problems, environment and scope of the Regulation

4. Which of the following problems that were identified at the development stage of the Regulation are in your opinion still important problems that the Regulation should address in today's society?

Main problems	Very important problem	Important problem	No strong opinion	Unimportant problem	Very unimportant problem
A) Rights of passengers are not sufficiently protected	0	0	0	0	0
B) No level playing field for passenger carriers in the EU	0	0	0	0	0
C) Potential risk to the safety level of passengers carriage by sea	0	0	0	0	0
Other problems, please specify: (1)	0	0	0	0	0
Other problems, please specify: (2)	0	0	0	0	0
Other problems, please specify: (3)	0	0	0	0	0

What causes the stated problems?

IF RESPONDENT SCORES Q4 (A) AS VERY IMPORTANT PROBLEM OR IMPORTANT PROBLEM:

--> GO TO Q5. OTHERWISE: GO TO Q6.

5. In today's society, are the following factors important contributors to the stated problem "**Rights of passengers are not sufficiently protected**"?

	Very important Contributor	Important contributor	No strong opinion	Unimportant contributor	Very unimportant contributor
Passengers are not aware of their rights in case of accidents	0	0	0	0	0
Insufficient compensation for passengers in case of accidents	0	0	0	0	0
Carriers are not liable for the loss of mobility equipment of person with reduced mobility in an accident	0	0	0	0	0
Long time for receiving compensation	0	0	0	0	0
Lack of legal certainty for victims and carriers	0	0	0	0	0
Other cause(s), please specify: (1)	0	0	0	0	0
Other cause(s), please specify: (2)	0	0	0	0	0
Other cause(s), please specify: (3)	0	0	0	0	0

IF RESPONDENT SCORES Q4 **(B)** AS VERY IMPORTANT PROBLEM OR IMPORTANT PROBLEM:

-> GO TO Q6. OTHERWISE: GO TO Q7.

6. In today's society, are the following factors still important contributors to the stated problem "**No level playing field for carriers in the EU**"?

	Very important Contributor	Important contributor	No strong opinion	Unimportant contributor	Very unimportant contributor
Rights for compensation (standards) differ in EU Member States	0	0	0	0	0
Unlimited liability for carriers (including terrorism risks) cannot be combined with mandatory insurance	0	0	0	0	0
Lack of legal certainty for victims and carriers	0	0	0	0	0
Other cause(s), please specify: (1)	0	0	0	0	0
Other cause(s), please specify: (2)	0	0	0	0	0
Other cause(s), please specify: (3)	0	0	0	0	0

Changes in the operational environment of the Regulation

7. Have there been developments (e.g. policy, legal, technological) since the introduction of the Regulation that affect the way it is implemented?

- Yes (please specify in box below)
- No

If Yes, please specify

Scope of the Regulation

8. Can the Regulation fully reach its objectives covering international carriage and only some types of domestic carriage (classes A and B as defined in Article 4 of Directive 2009/45/EC¹⁸⁸)?

- Yes
- No
- Partially
- Don't know

Please elaborate your answer in box below

Q9 ONLY TO BE RESPONDENT BY MEMBER STATES (SO Q3: EU MEMBER STATE POLICY MAKING AUTHORITY OR EU MEMBER STATE INSPECTORATE AUTHORITY)

9. Has your country made use of the possibility to apply the Regulation to all domestic seagoing voyages (in accordance with Article 2 of the Regulation)?

- Yes
- No
- Partially
- Don't know

Please elaborate your answer in box below:

¹⁸⁸ OJ L 163, 25.6.2009, p. 1: <http://eur-lex.europa.eu/eli/dir/2009/45/oj>.

10. How important are the stated problems in relation to domestic carriage in classes C and D?

Main problems	Very important problem	Important problem	No strong opinion	Unimportant problem	Very unimportant problem
Rights of passengers are not sufficiently safeguarded	0	0	0	0	0
No level playing field for carriers in the EU	0	0	0	0	0
Potential risk to the safety level of passengers carriage by sea	0	0	0	0	0

Q11 ONLY TO BE RESPONDENT BY MEMBER STATES (SO Q3: EU MEMBER STATE POLICY MAKING AUTHORITY OR EU MEMBER STATE INSPECTORATE AUTHORITY)

11. Does your country apply the Regulation on High Speed Craft (HSC):

	Yes	No	Please specify
Calling in ports of your country	0	0	
Flying the flag of your country	0	0	

Part III Functioning of the regulation
Objectives

12. How has the implementation of the Regulation affected its originally stated objectives?

	Very negative	Negative	No effect	Positive	Very positive
Ensuring that passenger rights are protected in the event of an accident?	0	0	0	0	0
Creating a level playing field for operators promoting best practices and responsible behaviour?	0	0	0	0	0
Incentivised increased safety and security performance of sea passenger transport operators?	0	0	0	0	0
Setting up and complementing a balanced framework of passenger rights?	0	0	0	0	0

13. In what way has the implementation of the Regulation impacted the following aspects?

	Large increase	Some increase	No effect	Some decrease	Large decrease
The number of accident cases ending in court procedures?	0	0	0	0	0
The duration of legal procedures after accidents?	0	0	0	0	0
The quantity and quality of information provided to sea vessel passengers?	0	0	0	0	0

14. Has the Regulation resulted in any other type of effect?

- Yes
- No

Please specify your answer in box below

Data needs (to be addressed only by Member State authorities)

15. Can you please specify which of the following factors impact the calculation of the fees charged to provide a certificate of insurance under the Regulation in line with the 2002 Athens Protocol requirements, and with the IMO Guidelines of 2006? Please specify how these fees are calculated (e.g. per vessel class, tonnage, passenger etc.)

	Yes	No	If Yes, Please explain how
It is a flat rate	<input type="radio"/>	<input type="radio"/>	
Vessel size	<input type="radio"/>	<input type="radio"/>	
Vessel passenger capacity	<input type="radio"/>	<input type="radio"/>	
Vessel class (A, B, C, D or HSC)	<input type="radio"/>	<input type="radio"/>	
Vessel age	<input type="radio"/>	<input type="radio"/>	
Vessel safety standards	<input type="radio"/>	<input type="radio"/>	
Vessel safety record	<input type="radio"/>	<input type="radio"/>	
Operating company safety standards	<input type="radio"/>	<input type="radio"/>	
Operating company safety record	<input type="radio"/>	<input type="radio"/>	
Country of operation	<input type="radio"/>	<input type="radio"/>	
Portion of time operating in EU water annually	<input type="radio"/>	<input type="radio"/>	
Other factor (1), please specify:	<input type="radio"/>	<input type="radio"/>	
Other factor (2), please specify:	<input type="radio"/>	<input type="radio"/>	
Other factor (3), please specify:	<input type="radio"/>	<input type="radio"/>	

Operational implications

16. To your experience, has the Regulation resulted in any of the operational implications mentioned below?

	Yes	No	If Yes, Please explain how
Affected the operations of your organisation?	<input type="radio"/>	<input type="radio"/>	
Led your organisation to a different way of assessing vessel safety and security standards?	<input type="radio"/>	<input type="radio"/>	
Led your organisation to implementing actions to improve vessel safety and	<input type="radio"/>	<input type="radio"/>	

	Yes	No	If Yes, Please explain how
security?			

Impacts

17. How has the implementation of the Regulation impacted the following aspects?

	Large increase	Some increase	No effect	Some decrease	Large decrease
The level of compensation provided in case of accidents	0	0	0	0	0
The time needed for a victim to receive the compensation	0	0	0	0	0
The portion of cases for which an advanced payment is provided	0	0	0	0	0
The time needed for a victim to receive the advanced payment	0	0	0	0	0

18. How has the implementation of the Regulation affected the number of complaints received relevant to the following aspects?

	Large increase	Some increase	No effect	Some decrease	Large decrease
Compensations in the event of injuries or deaths	0	0	0	0	0
Lack of an advanced payment in the event of injuries or deaths	0	0	0	0	0
Loss or damage of luggage or vehicles	0	0	0	0	0
loss or damage of mobility equipment for handicapped passengers	0	0	0	0	0

Q19 and Q20 ONLY TO BE RESPONDENT BY INSURERS (SO Q3: INSURERS)

Costs

19. Can you please indicate if the following factors affect the calculation of the vessel insurance premiums paid for obtaining non-war Blue Card, and in what way?

	Yes	No	If Yes, Please explain how
Vessel size	0	0	
Vessel passenger capacity	0	0	
Vessel class (A, B, C, D or HSC)	0	0	

	Yes	No	If Yes, Please explain how
Vessel age	0	0	
Vessel safety standards	0	0	
Vessel safety record	0	0	
Operating company safety standards	0	0	
Operating company safety record	0	0	
Country of operation	0	0	
Portion of time operating in EU water annually	0	0	
Other factor (1), please specify:	0	0	
Other factor (2), please specify:	0	0	
Other factor (3), please specify:	0	0	

20. Can you please indicate if the following factors affect the calculation of the vessel insurance premiums paid for obtaining war risk Blue Card, and in what way?

	Yes	No	If Yes, Please explain how
Vessel size	0	0	
Vessel passenger capacity	0	0	
Vessel class (A, B, C, D or HSC)	0	0	
Vessel age	0	0	
Vessel safety standards	0	0	
Vessel safety record	0	0	
Operating company safety standards	0	0	
Operating company safety record	0	0	
Country of operation	0	0	
Portion of time operating in EU water annually	0	0	
Other factor (1), please specify:	0	0	
Other factor (2), please specify:	0	0	
Other factor (3), please specify:	0	0	

21. How has the Regulation impacted insurance premiums for passenger carriers?

Large increase	Some increase	No effect	Some decrease	Large decrease	I don't know
0	0	0	0	0	0

Please explain

IF YOU SCORED Q20 AS LARGE INCREASE OR SOME INCREASE:
--> GO TO Q22. OTHERWISE: GO TO Q23

22. How challenging has it been for carriers to accommodate the required insurance premiums after the application of the Regulation?

Not challenging	Slightly challenging	Challenging	Very challenging
0	0	0	0

23. In relation to obtaining the certification as required by the legislation, what is the average effort required for each vessel related to these activities?

person-days
Obtain first time certification
Annually renew the certification
Other necessary activities (please describe):

24. What has been the impact of the Regulation on passenger fares?

Large increase	Some increase	No effect	Some decrease	Large decrease	Don't know
0	0	0	0	0	0

25. How many staff (FTE full time equivalents) are in your organisation dealing with the requirements of the Regulation, on an annual basis.

.....FTE/year

26. Please specify if possible in what activities your staff is involved, e.g. issuing certificates, monitoring, enforcement in case of non-compliance, handling accidents/incidents, other costs

27. To what extent do the fees paid by applicants (vessel owners) cover the administrative costs of your authority)?

.....%

Part IV Links with other Policies & Legislations

28. Is the Regulation in line with the following policies?

	Entirely in line	Partially conflicting	Entirely conflicting	Don't know
EU policies on maritime safety	0	0	0	0
EU passenger rights policies	0	0	0	0
Transport operator's liability in other modes	0	0	0	0
EU White Paper on Transport 2011	0	0	0	0
Ten priority policy areas	0	0	0	0
Please elaborate				

29. Which gaps have been filled by the entry into force of the Regulation?

	Fully filled	Partially non-filled	Not at all filled	Don't know
Introduction of the Athens Protocol 2002 standards in EU legislation	0	0	0	0
Applicability of international liability rules to domestic shipping	0	0	0	0
Provision of advance payment	0	0	0	0
Protection of people with reduced mobility	0	0	0	0
Information obligation on the side of the operator	0	0	0	0
Other (1):	0	0	0	0
Other (2):	0	0	0	0
Other (3):	0	0	0	0

30. Which additional topics regarding maritime passenger rights are regulated in national legislation? Please only refer to topics not including in the Regulation.

Please elaborate

31. Do you experience any problems now that two systems are in place, i.e. the Regulation and the Athens Convention?

Please elaborate

32. What are the main advantages of the Regulation compared to the previous system of international and national legislation?

Please elaborate

Part V Other comments or input

33. Do you have any other comments on the application of the Regulation?

Please elaborate

34. Do you have any documents or data that you would like to share related to the application of the Regulation? You can send them to passenger.carrier.liability@ecorys.com.

35. For the evaluation of the Regulation, we would like to ask for your contact details in case a clarification for certain question is necessary. In addition, we could possibly approach you for an interview.

THANK YOU FOR YOUR PARTICIPATION!

ANNEX 3 RESULTS OF THE QUESTIONNAIRE

This section provides a brief summary of the steps taken to implement the survey, as well as an overview of the online survey responses.

Process

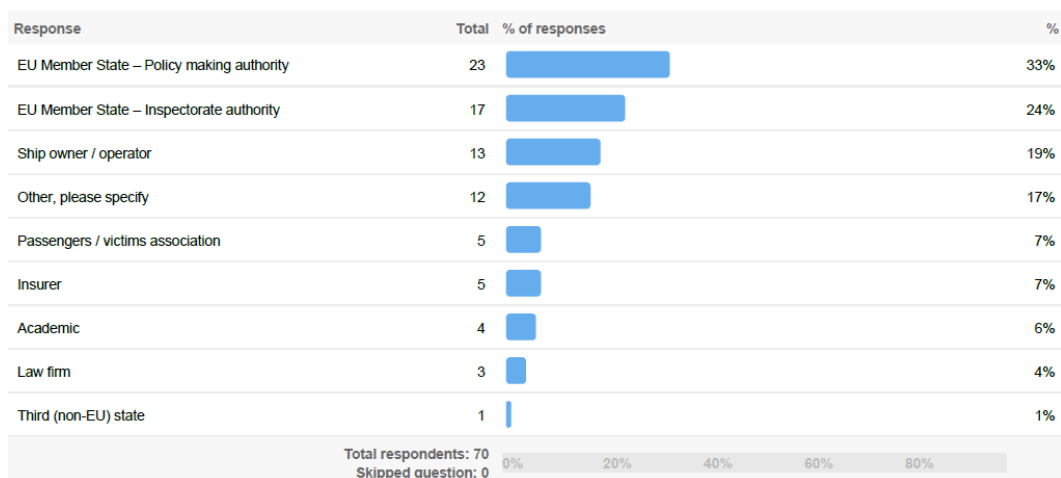
The following initial steps have been taken to implement the survey:

- For each of the eight identified stakeholder groups, between 10 and 30 stakeholders have been identified. Contact details have been gathered for these stakeholders, in addition to contact details supplied by the Commission.
- Around 160 initial emails have been sent with the request to complete the questionnaire. Out of the 160 emails, 15 email deliveries failed and another 15 emails were returned with an 'out of office' message.
- A reminder has been sent to all earlier recipients 2.5 weeks after the initial invitation. With this reminder, almost all contact persons that initially returned an 'out of office' message have been reached. The reminder had a great impact on the response numbers, from around 15 that had started the survey to 51 that had started the survey, with a greater overall level of completion among respondents.
- In addition, we have asked relevant associations, such as CLIA, Interferry, ECSA and IGPANDI, to approach their members to fill in the questionnaire survey. This process has not proven to be effective yet, as only a few members have responded.

Respondent details

Figure A3.1 shows the spread of respondents by sector. A total of 72 have started the survey, though not all of them have entirely finished the survey. There are 42 respondents over halfway, making their the most important questions in the survey having enough responses to be able to do quantitative analysis.

Figure A3.1 Spread of respondents by sector: Fully and Partially completed survey
Indicate the sectors in which you are engaged?



It can be seen that the sector EU member state policy making authority and inspectorates have been contributing the most, however it should be noted

that some of the respondents filled in the survey on account of both bodies resulting into slightly imploding these figures. The ship owners follow. The "other please specify" category consists of the sectors mentioned in Table A3.1. In addition, four respondents haven't specified their sector.

Table A3.1 Sectors stated in question 2: Indicate the sectors in which you are engaged?

Other, please specify:

I was active in drafting the convention
 Class
 EEA Member State inspectorate authority
 ECC Denmark
 Individual
 Trade association
 Consumer rights protection agency
 European Group of Travel Agents and Tour Operators Association

In

Figure A3.2 an overview is given of the geographical spread. With more than 20 EU28 countries having completed one or more questionnaires, the survey represents the EU nicely. The "other, please specify" responses are shown in table A3.1.

Figure A3.2 Results of question 3: What country or region are you based?

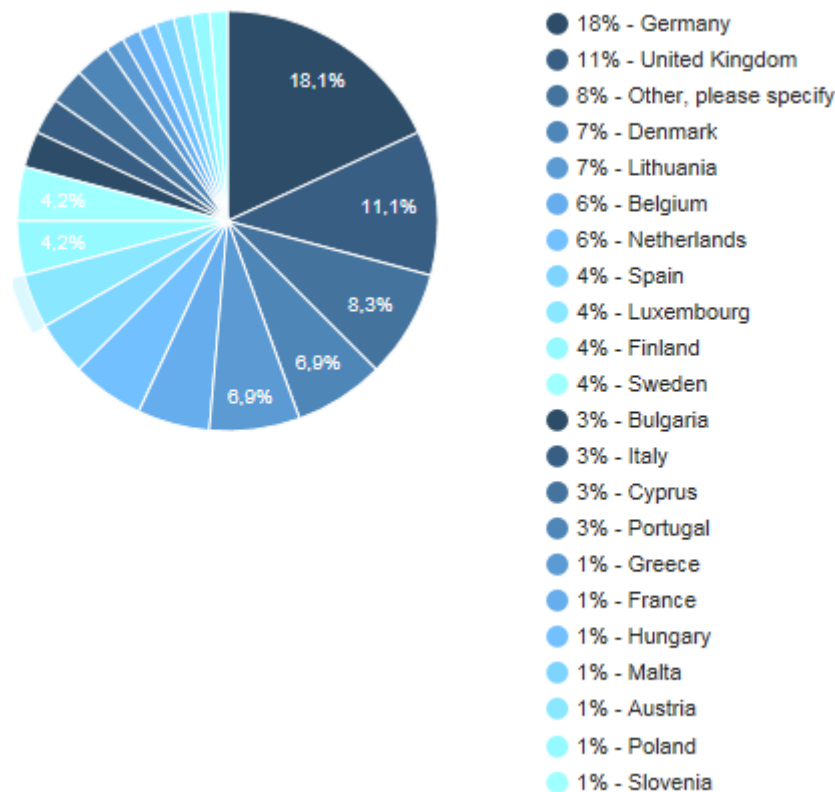


Table A3.2 Region or countries specified in question 3: What country or region are you based?

Other, please specify

Iceland

Norway
Norway

ICS represents national ship-owners from 35 countries

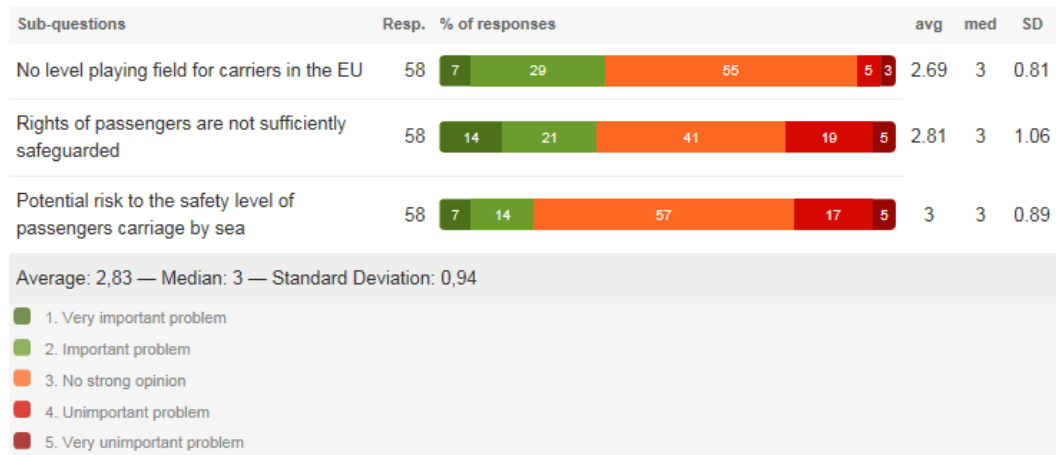
Europe, ECSA represents all Ship-owners' National Associations of the European Union and Norway

Context

Figure A3.3 shows the results of the question “Which of the following problems that were identified at the development stage of the Regulation are in your opinion still important problems that the Regulation should address?”.

Figure A3.3 Results of question 4

Which of the following problems that were identified at the development stage of the Regulation are in your opinion still important problems that the Regulation should address?



In addition, respondents have given other problems the regulating should adress. The respondents that gave these additional problems then have been asked to rate the importance of these problems. Both can be found in Table A3.3.

Table A3.3 Additional problems and their perceived importance

Other, please specify:	Rated as
Vessels operating predominantly from the EU but flagged to non EU countries	Very important problem
ECSA is not aware of any problems on the matters referred to above. In detail, ECSA is unable to answer to this question with the proposed options.	No strong opinion
How the regulation framework is monitored by individual country authorities	Important problem
Limits of liability	Very important problem
The Regulation could address as a matter of clarification that compensation for pain and suffering does not come on top of the limitation amount but that these damages are	Important problem

part of the damage to which the 'normal' limitation amounts apply.	
Equal rights instead of preferring customers over the company	Important problem
Anti strict liability rules	Very important problem

Question 5 and 6 serve as a follow-up questions to gain insight in the reason for viewing “Right of passengers are not sufficiently safeguarded” and “No level playing field for carriers in the EU” as a (very) important problem. Various contributors have been identified, and the respondents that have rated “Right of passengers are not sufficiently safeguarded” as a (very) important problem have been asked to rate these contributors. In addition, respondents have been asked whether there are additional contributors to these problems. The results are given in Figure A3.4. One additional contributor has been mentioned by a respondent. This additional contributor and the respondent’s preceived importance are given in Table A3.4.

Figure A3.4 Results of question 5

In today's society, are the following factors important contributors to the stated problem “Rights of passengers are not sufficiently safeguarded”?

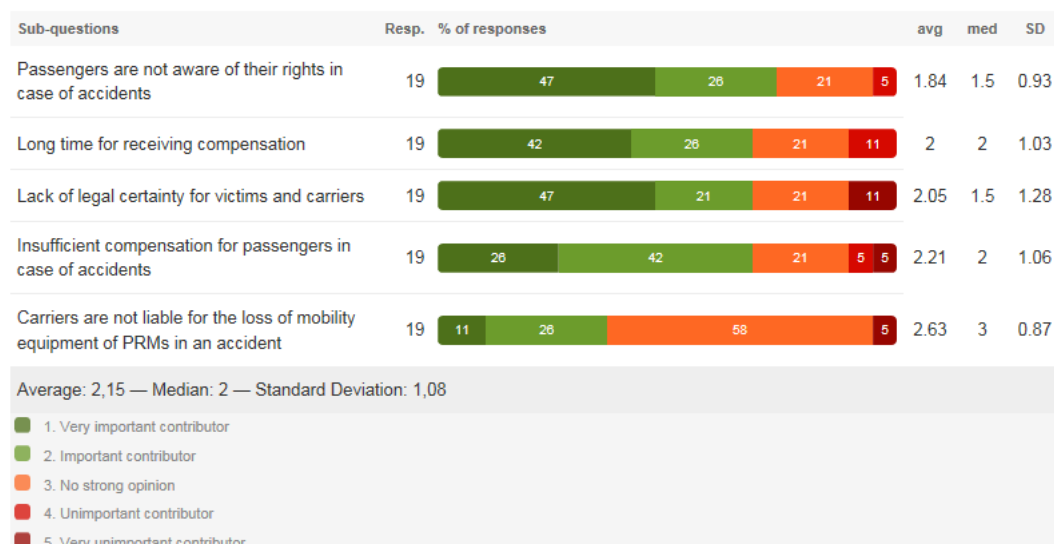


Table A3.4 Additional contributors and their rating

Additional contributor	Rated as
E-mail contracts are not read properly	Important problem

Question 6 was only asked to respondents rating “No level playing field for carriers in the EU” as a important problem or a very important problem. The results are shown in Figure A3.5. There are no additional contributors to the problem mentioned by the respondents.

Figure A3.5 Results of question 6

In today's society, are the following factors still important contributors to the stated problem "No level playing field for carriers in the EU"?

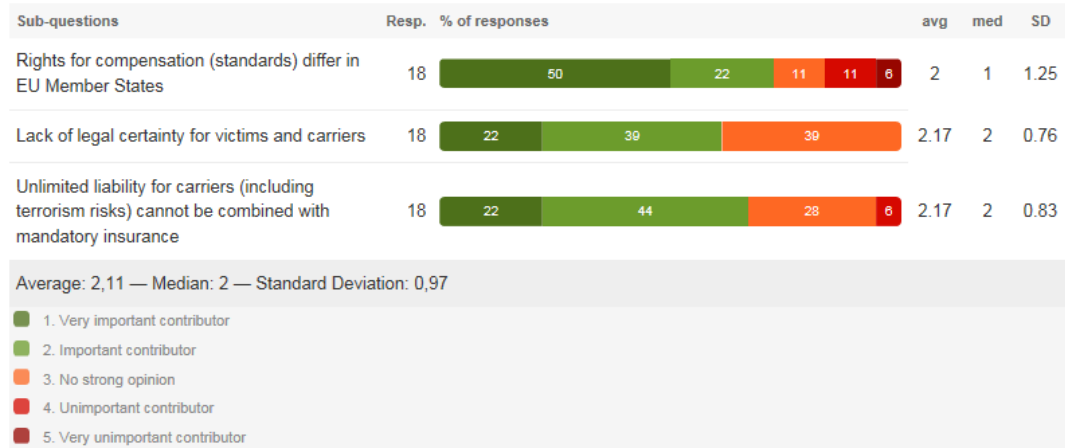
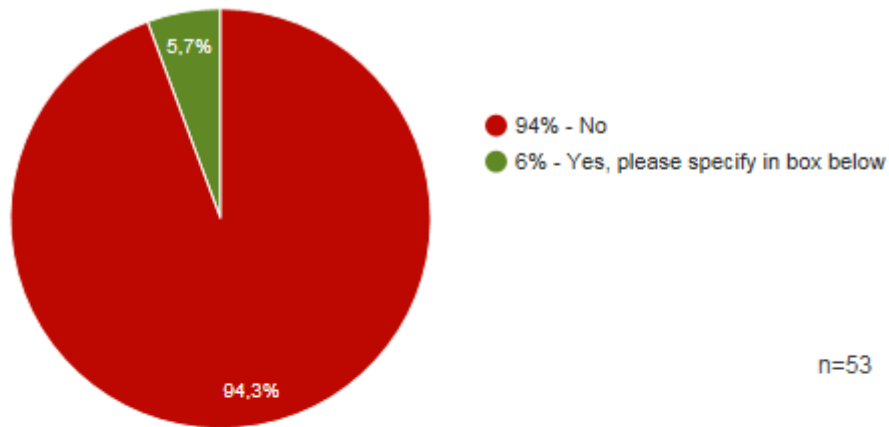
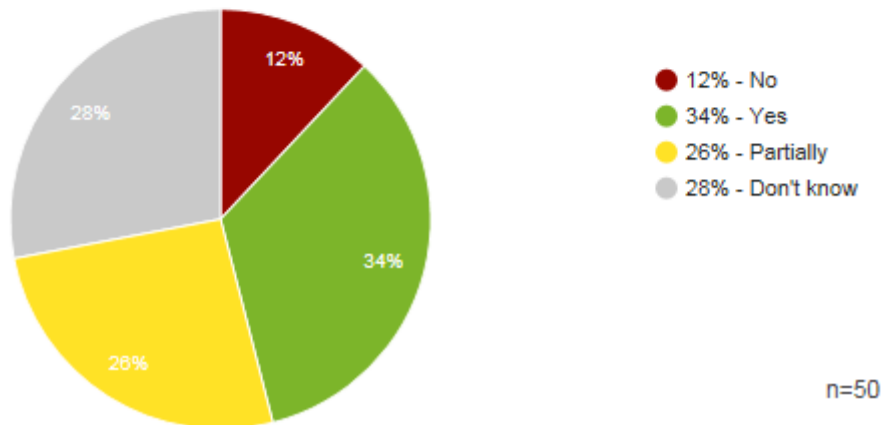


Figure A3.6 Results of question 7 and 8

Have there been developments (e.g. policy, legal, technological) since the introduction of the Regulation that affect the way it is implemented?



Can the Regulation reach its objectives when only concentrating on international carriage and class A and B of domestic carriage?



The results of questions 7 and 8 can be seen in Figure A3.6. The respondents that have given Yes as an answer in question 7: "have there been developments (e.g. policy, legal, technological) since the introduction of the regulation that affect the way it is implemented?", were asked to specify their choice. However, given there are more specifications than individuals opting for yes, also some of the respondents opting no have been giving an explanation. These specifications can be found in Table A3.5.

Table A3.5 Specification of question 7

Yes, please specify:

L'inclusion des trafics domestiques pour les seuls navires de classe A et B crée une dualité de régimes de responsabilité sur la base de critères techniques qui ne sont pas pertinents pour les questions de responsabilité. The inclusion of domestic traffics only for Class A and B ships creates a duality of liability regimes on the basis of technicals criteria that are not relevant to the matter of liability.

It is probable that the cases concerning international carriage and Class A and B of domestic carriage would also be the cases in which there would be the

Yes, please specify:

greatest likelihood to have groups of passengers from different countries, and in which the risk of discrepancies in treating their cases would be greatest. Therefore, the current scope of application of the Regulation appears to be sufficient to cover most of the cases that created perceivable inequalities in the past.

German Commercial Code provides for almost the same rules as the Athens Regulation. So, there would be no affect. However, German law does not have rules as to advance payment (Article 6 of the Regulation) and a direct claim against the insurer (Annex I to the Athens Regulation Article 4bis para 10). To my opinion these two rules are not used very often, so that the Regulation definitely will reach its objectives without widening the scope. Even though Article 4 of the Athens Regulation does not apply to domestic carriage (classes C and D), these rules would apply thorough Regulation 1177/2010 (also for domestic carriage).

It could be considered disproportionate to require small domestic carriers to retain insurance cover amounting to several thousands of Euros for a relatively small danger.

Passengers on smaller carriers should be granted the same level of protection as passenger on larger carriers.

The Regulation should cover all to reach an overall consensus.

Also smaller ships has a significant risk potential.

as per my understanding some countries have also included all category types of vessels to be included also in domestic travels when some haven't or some just have included category A and B.

ICS does not deal with issues concerning domestic carriage.

ECSA would like to underline that the compensation for domestic carriage may vary depending on the class of the ship depending on national legislation. Classes A and B are regulated in the Regulation to come into force soon. Besides, we would like to mention that national regulations in Germany have fully implemented the regulations on international carriage in accordance with the Regulation, which came into force on 31 December 2012, both with regard to liability of carriers, as well as with regard to the carriage of passenger liability certificates on board. With regard to domestic carriage, national German law makes use of the possibility provided for in Article 4 of Directive 2009/45/EC to apply the Regulation with regard to passenger liability certificates: Class A ships four years after the date of application of the Regulation i.e. 31 December 2016; and Class B ships six years after the date of application of the Regulation i.e. 31 December 2018. Liability regulations with regard to Class A and B ships, as well as Class C and D ships, in accordance with the Regulation are additionally already implemented in national German Commercial law. In addition, we were informed that transitional arrangements in the Regulation permitted Member States to defer the application of the rules to Class A ships until the end of 2016 and to Class B ships until the end of 2018. The UK took up this option, which means that they are unable to provide the information sought by the researchers.

The results of question 9 are given in

Figure **A3.7** . In addition, a box has been provided to explain the answer. These explanations are shown in Table A3.6.

Figure A3.7 Results of question 9

Has your country made use of the possibility to apply the Regulation to all domestic seagoing voyages (in accordance with Article 2 of the Regulation)?

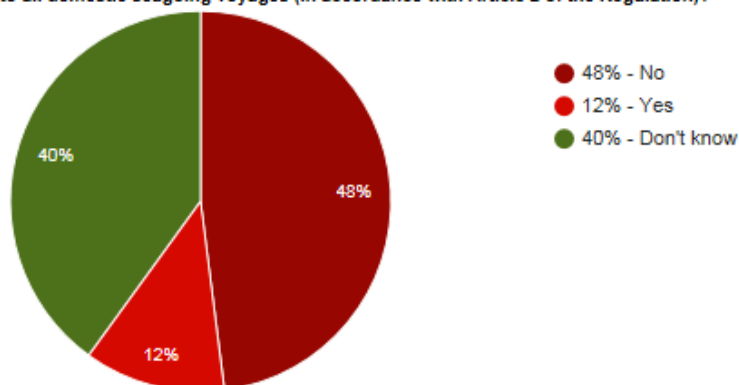
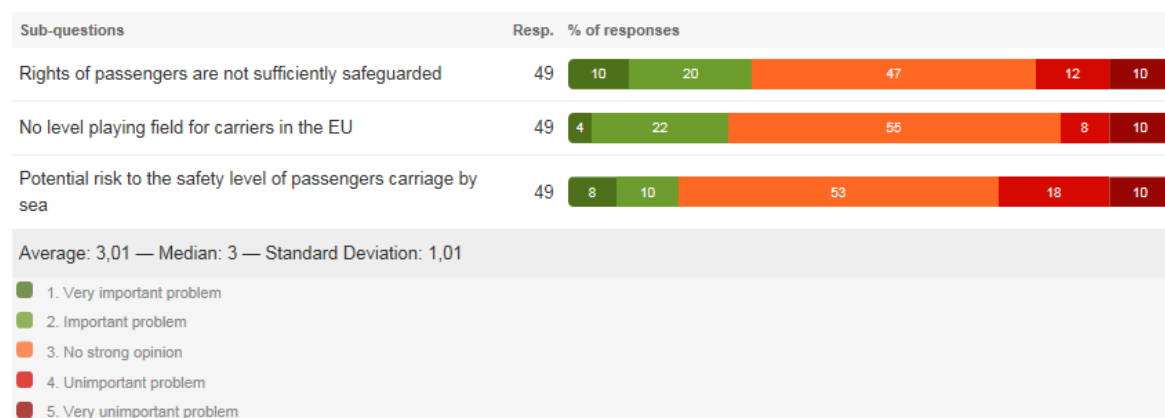


Table A3.6 Explanations of question 9

Please elaborate	
Regulation is applied to transport of passengers and their luggage on international and national voyages by Class A and B ships as defined by Directive 2009/45/EC.	
Greece has made use of the possibility to defer the application of the Regulation to Class A and Class B ships until 31.12.2016 and 31.12.2018 respectively.	
We do require insurance to the limits of Athens Convention 74/76 (which was the requirement of the national law for all passenger carriers before the regulation).	

Figure A3.8 Results of question 10

How important are the stated problems in relation to domestic carriage in classes C and D?



Question 10 is shown in Figure A3.8 and question 11 in Figure A3.9. The latter is Member state only, meaning only Member State’s authorities and inspectorates were shown this question. In addition, stakeholders have been asked to explain their answers on question 11. These are shown in Table A3.7.

Figure A3.9 Results of question 11

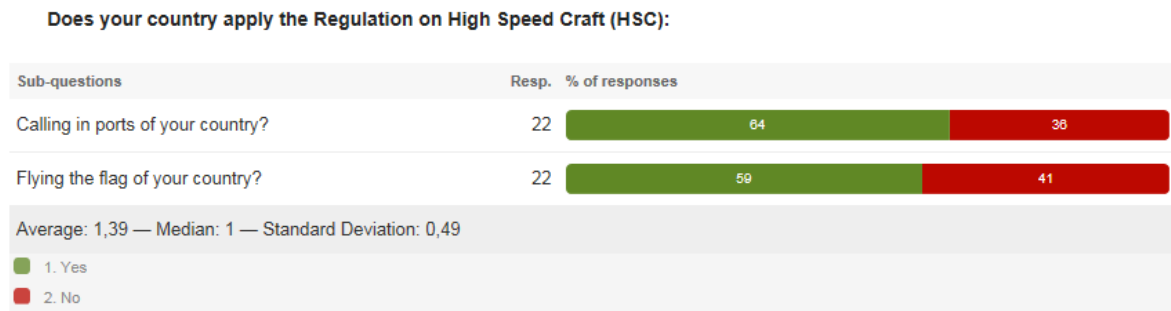


Table A3.7 explanation of question 11

Question	Explanation
Calling in ports of your country?	Virtu Ferries. No high speed craft calling LT ports. In accordance with the definition of ship as given in Athens Convention, only air cushion vehicles are excluded.
Flying the flag of your country?	Virtu Ferries. No high speed craft under LT flag. no HSC under Belgian flag.

Functioning of the Regulation

Objectives

The results of question 12 and 13 are shown in respectively Figure A3.10 and Figure A3.11.

In addition, the responses on the “please explain” question given with question 13 are given in Table A3.8.

Figure A3.10 Results of question 12

How has the implementation of the Regulation affected its originally stated objectives?

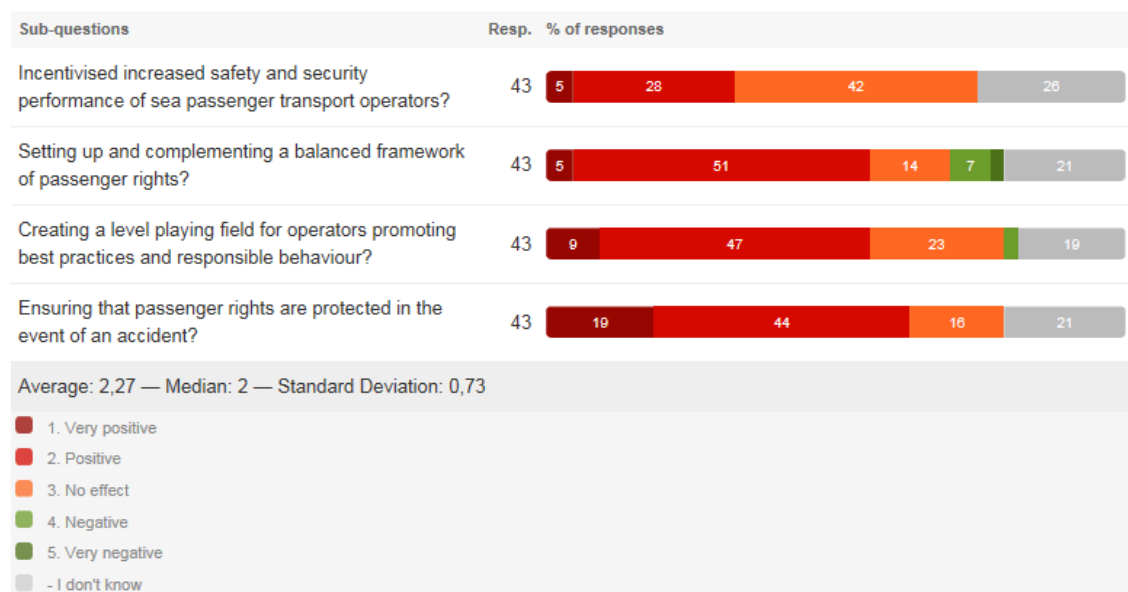


Figure A3.11 Results question 13

In what way has the implementation of the Regulation impacted the following aspects?

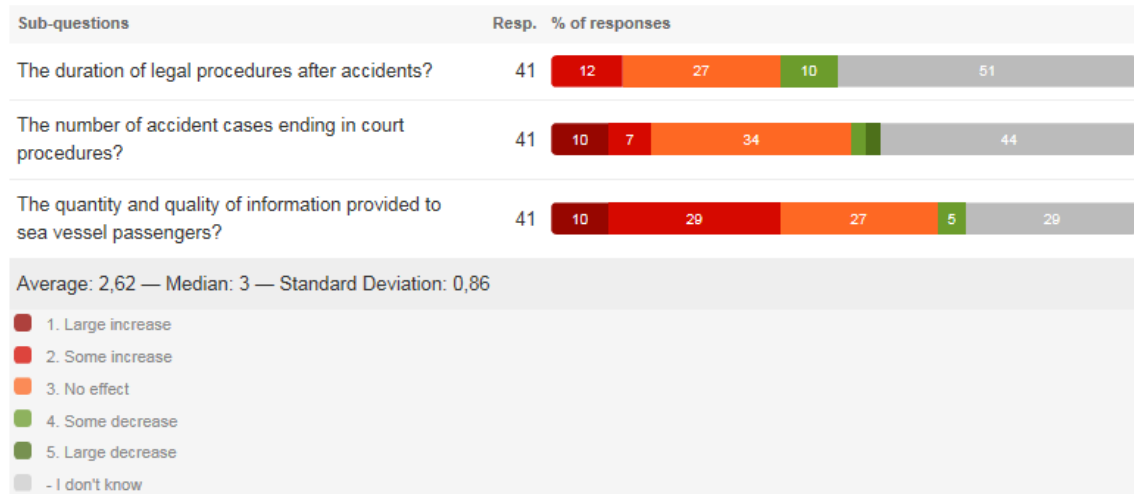


Table A3.8 Explanations of question 13

Question	Response	Explanation
The duration of legal procedures after accidents?	No effect	Already party to earlier IMO Convention.
	No effect	The duration of court proceedings first of all depends on the complexity of the individual Claim and less on the legal regime to be applied.
The quantity and quality of information provided to sea vessel passengers?	Some decrease	Notices are handed over to the passenger and displayed on many places. the passenger is also made Aware of his rights during the booking process.
	No effect	I doubt that passengers actually read the information as to their rights. If there has been an incident which could give rise to liability, the passenger will inform afterwards.
The number of accident cases ending in court procedures?	No effect	There have been no accidents where the regulation would apply.
	No effect	From experience, it appears that most passenger cases were, and still are, settled beforehand.
	Some decrease	Before and after the Regulation carriers want to avoid court proceedings. The Regulation provides for clear rules and thereby helps to find an amicable settlement.
	No effect	Accidents resulting in the application of the rules are rare; so an increase in the number of cases if any is probably more attributable to the rising passenger numbers.

Figure A3.12 Results of question 14

Has the Regulation resulted in any other type of effect?

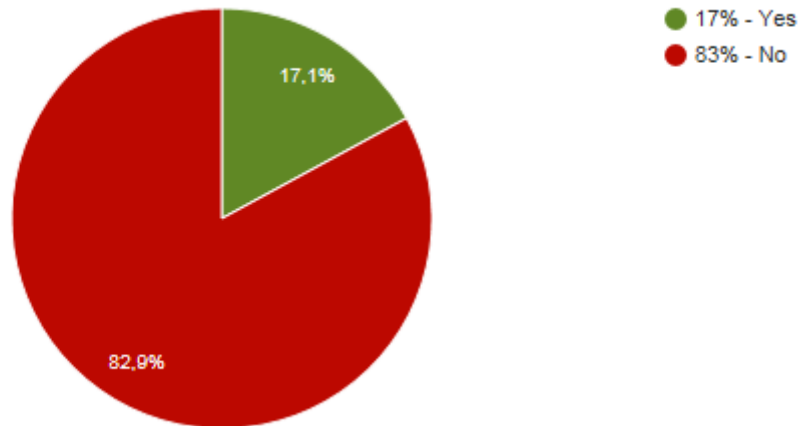


Figure A3.12 shows the results of question 14. Respondents then have been asked to specify their answers. All the specifications given are shown in Table A3.9.

Table A3.9 specifications of question 14

Please specify

We do not know.

Do not know, therefore the answer is 'No'.

Clear rules (for instance as to Article 5 (Valuables)) help to find quicker solutions. Extensive discussions are being avoided.

Administrative burden and costs for the administrations.

The Danish Merchant Shipping Act now includes rules related to the liability and insurance for the carriage of passengers by sea for ships of classes C and D as well as for ships with up to 12 passengers. To a large extent, these rules are based on regulation 392/2009.

Ambulance chasers seeking to pursue claims against carriers because Insurance is in place.

ICS and its members are not aware of any other type of effect that may have resulted from the Regulation.

ECSA and its members are not aware of any other type of effect that may have resulted from the Regulation.

Data needed from Member States

Figure A3.13 Results of question 15

Can you please specify which of the following factors impact the calculation of the fees charged to provide a certificate of insurance under the Regulation in line with the 2002 Athens Protocol requirements, and with the IMO Guidelines of 2006? Please specify how these fees are calculated

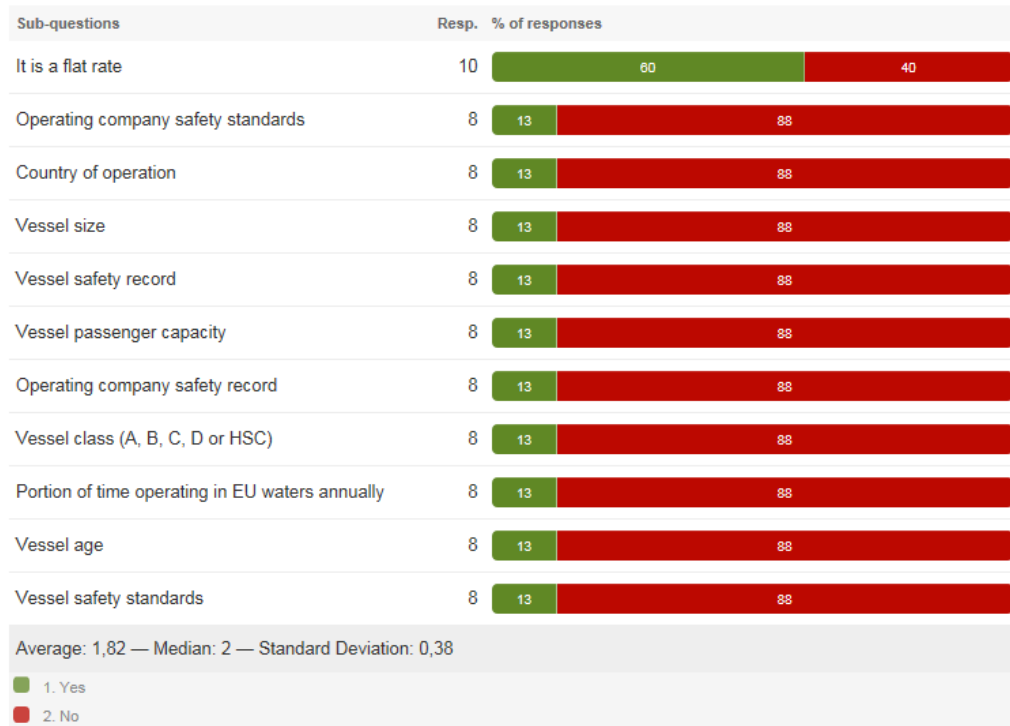


Figure A3.13 shows the results of question 15. Respondents then have been asked to specify their answers. All the specifications given are shown in Table A3.10. One explanation has been given for answering no to every single one of the factors, and that is a lack of data. This was not included in the table. Respondents also have been asked to state additional factors influencing the charged premium, however none are given.

Table A3.10 specifications of question 15

Please specify

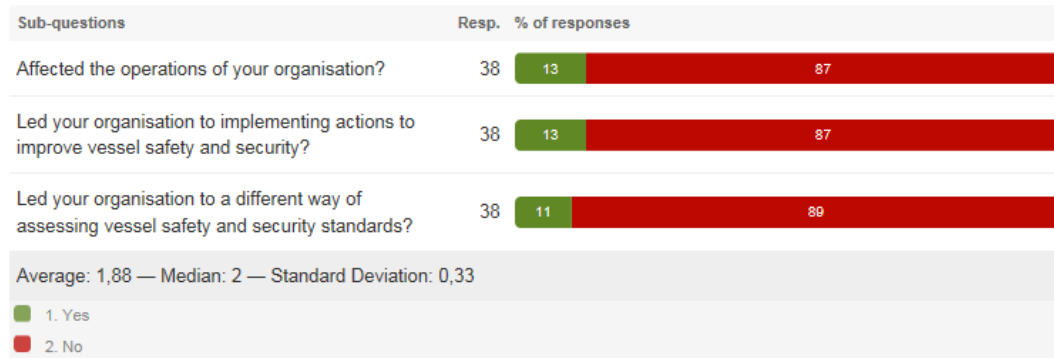
30 Euro which was set by the parliament and it's also the same for the CLC 92 and Bunkers 2001 certificates

The deliverance of the certificate is delegated

Operational implications

Figure A3.14 Results of question 16

To your experience, has the Regulation resulted in any of the operational implications mentioned below?



Respondents have been asked if they perceived operational implications of the regulations. It's results are in Figure A3.14. In addition, an explanation has been asked for each of the sub-questions. These are stated in Table A3.11.

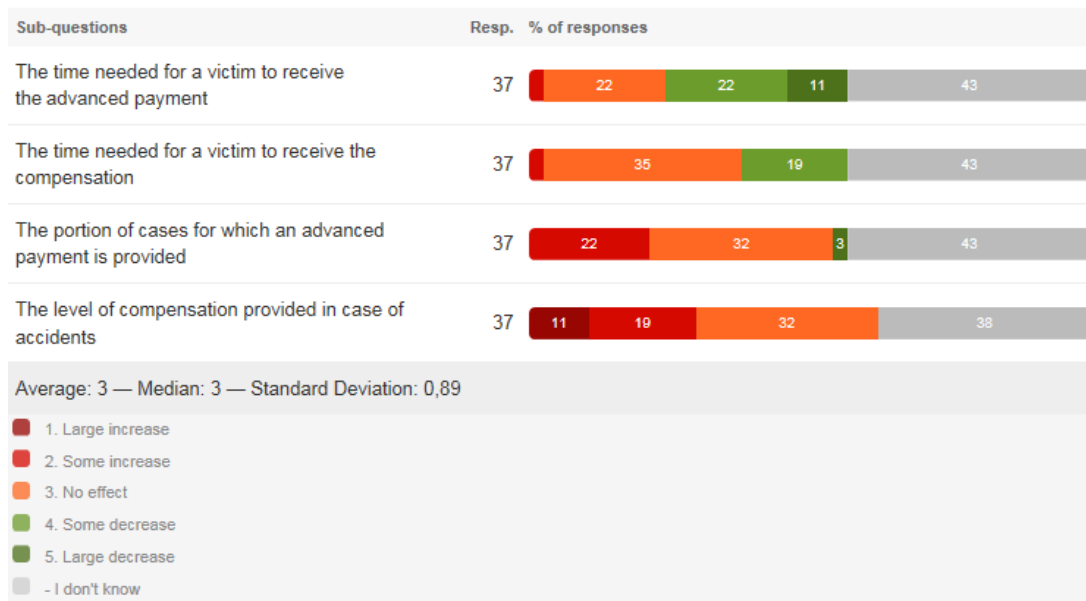
Table A3.11 Explanation for question 16

Sub-question	If yes, please specify
Affected the operations of your organization?	Need for certification.
	Response times were reduced.
	Administrative burden.
Led your organization to a different way of assessing vessel safety and security standards?	Vessels safety is driven by customer demand and/or IMO rules and regulations and not by legal requirements.
	Reserving of claims and costs.
	Before the Athens Regulations there were strict rules as to safety.
Led your organization to implementing actions to improve vessel safety and security?	our circulars and seminars for members regarding safety matters have increased.
	Loss Prevention.
	Before the Athens Regulations there were strict rules as to safety.
	Royal decree 270/2013 to elaborate the certificate.
	Vessels safety is driven by customer demand and/or IMO rules and regulations and not by legal requirements (same as earlier).

Impacts

Figure A3.15 Results of question 17

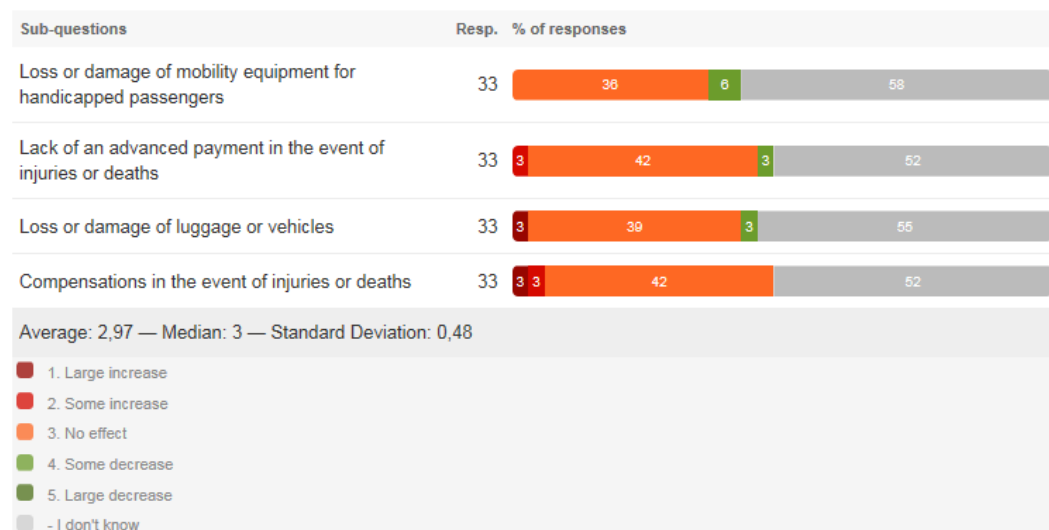
How has the implementation of the Regulation impacted the following aspects?



The results of question 17 and 18 are shown in respectively Figure A3.15 and Figure A3.16. Note question 18 was not shown to stakeholders that are not part of the complaint process on either side.

Figure A3.16 Results of question 18

How has the implementation of the Regulation affected the number of complaints received relevant to the following aspects?



Questions 19 and 20 were only for insurers. The results are given in Figure A3.17 and Figure A3.18. One should note that this response does contain the views of IGPANDI, which represents multiple P&I clubs. One of the respondents stated that the non-war Blue Card is made available at no extra cost. A second insurer has specified their costs some more, including additional contributors as given in Table A3.12.

Figure A3.17 Results of question 19

Can you please indicate if the following factors affect the calculation of the vessel insurance premiums paid for obtaining non-war Blue Card, and in what way?



Table A3.12 Detailed explanation and additional factors mentioned by one of the respondents

Factor	Contributor?	
Vessel Size	Yes	Premium is per GT
Vessel Passenger capacity	Yes	More passengers is more risk
Vessel class	Yes	Seize
Vessel age	Yes	Older ships pay higher premium
Vessel safety standards	Yes	IACS class
Vessel safety record	Yes	History of incidents is part of risk assessment
Operating company safety standards	No	
Operating company safety records	No	
Country of operation	Yes	
Portion of time in EU waters annually	No	
Other contributing factors		
Loss record of a ship owner but closely related to safety record		
PSC detentions		
Nationality of the crew		

Figure A3.18 Results of question 20

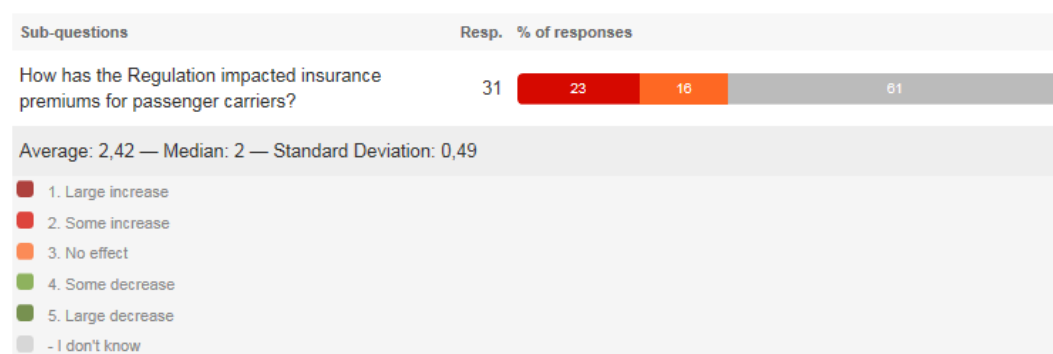
Can you please indicate if the following factors affect the calculation of the vessel insurance premiums paid for obtaining war risk Blue Card, and in what way?



One of the explanatory answers given at these questions, is that the ship owners are rated individually. This implicates there is no standardized way, and is handled on a case-by-case base. No other contributors to the insurance premium have been given, other than already stated.

Costs

Figure A3.19 Results of question 21
Insurance premiums



The explanation for question 21 are given in Table A3.13.

Table A3.13 Explanations of respondents of the choices in question 21

Please explain
Hungary is a landlocked country without seagoing vessels in the ship registry.
Les primes d'assurance ont varié pour des raisons qui ne sont pas liées au règlement, telles que l'accident du Costa Concordia ou des hausses de coût de réassurance engendrés par des événements en dehors de son champ d'application. Il ne semble pas possible d'isoler un effet spécifique du règlement. L'impact financier réel en cas de sinistre resterait sujet à

Please explain

spéculation. Insurance premiums have varied for reasons not related to the regulation, such as the Costa Concordia accident or higher reinsurance cost due to major disasters outside of its scope. It does not seem possible to isolate an effect specific to the regulation. The real financial impact in case of an accident would remain a matter of speculation.

Premiums are decided directly with customers of insurance undertakings.

As far as we have heard from our carriers, some increase.

The liability exposure has increased significantly and consequently requires more premium.

Insurance Premiums have increased plus the additional war insurance.

Overall passenger carriers have high premiums to begin with and extra liability costs more .

ICS does not have information on this aspect.

We are not aware of any impact, but should any changes on the insurance market occur, then this would cause an impact and this would have to be assessed. The Regulation has not been reported as being burdensome.

Question 22 was only shown to stakeholders that have answered question 21 as large increase or some increase. The results can be seen in Figure A3.20.

Figure A3.20 Results of question 22
Accommodating the required premiums



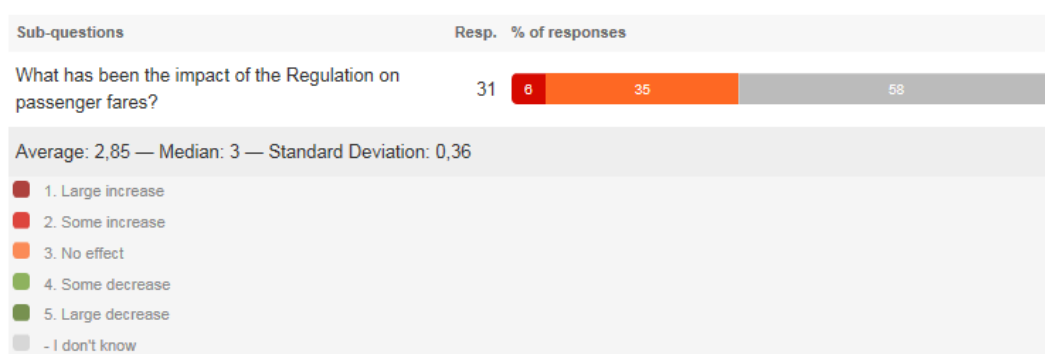
Question 23 consists out of 3 open sub questions. Submitted results that give the anticipated response to the question are given in Table A3.14. In addition, multiple respondents answered that they either didn't know, the values weren't calculated and/or no certificates have been issued. There are 12 of these replies, and are not given in the table as they do not give any extra information other than that they do not know what the exact administrative burden is.

Table A3.14 Results of question 23

	person-days
Obtain first time certification	1 person = 1 day
	0.1 person day
	4 days more or less
	3
Annually renew the certification	1 person = 1 day
	0.1 person day

	1 day more or less
	2
Other necessary activities (please describe):	
1) formal request of the Blue Cards by P&I Club	1 person = 1/2 day
2) formal request of the certificate by the Italian authority (CONSAP) = 1 person = 1/2 day	1 person = 1/2 day
3) delivery of the original certificate to the vessel	(not specified)

Figure A3.21 Results of question 24
Passenger fares



The results of question 24 on impact of the regulation on passenger fares are shown in Figure A3.21. After that the number of staff and the specification of the activities involved have been asked in question 25 and 26. The results are given in Table A3.15.

Table A3.15 Results of question 25 and 26

How many staff (FTE full time equivalents) are in your organisation dealing with the requirements of the Regulation, on an annual basis? (FTE/year)	Specify if possible in what activities your staff is involved, e.g. issuing certificates, monitoring, enforcement in case of non-compliance, handling accidents/incidents, other costs
1	monitoring implementation.
None full time	Issuing.
1 unit	The Ministry of transport is involved for regulatory matters.
1	Monitoring, enforcement in case of non-compliance and spreading information about the regulation to businesses and consumers.
None	Issuing certificates.
No staff	no case was registered.
0,5 FTE	Flag authority: issuing certificates, monitoring, handling accidents and incidents reports.

1	La délivrance des certificats est délégué. L'activité de notre administration concerne le suivi de la délégation et les vérifications portant les assureurs, ainsi que le contrôle de l'Etat du port. L'estimation est aléatoire, concernant une faible partie de l'activité d'un grand nombre de personnes, en ce qui regarde le contrôle de l'Etat du port. The issuance of certificates is delegated. The activity of our administration includes the monitoring of this delegation, the verification carried out on the insurers and port state control. The estimate is a guess as, regarding port state control, many persons are involved, but only for a quite minor part of their total activity.
Implementation part is delegated to port authorities under the supervision from the Ministry of Maritime Affairs and Insular policy	Issuing certificates to ships under the Greek flag or ships calling at Greek ports and general enforcement including imposition of sanctions in case of non-compliance.
Less than one FTE a year	Issuing certificates, monitoring, enforcement in case of non-compliance Regarding the question before: It is really hard to say, as we don't have any staff dedicated exclusively to this regulation. It is a part of many responsibilities of the FSC/PSC. Taking into account total hours worked, I would say less than one FTE/year (but keep in mind that we don't have many ships covered by the regulation in our register as for the FSC)

Question 26 was "To what extent do the fees paid by applicants (vessel owners) cover the administrative costs of your authority? Give your answer as approximate percentage." The results are given in Table A3.16. Other responses mainly say that either this is not known, not calculated, or because the stakeholder isn't the authority issuing certificates. Another reason given is that there were no cases registered in the respective country.

Table A3.16 results of question 27

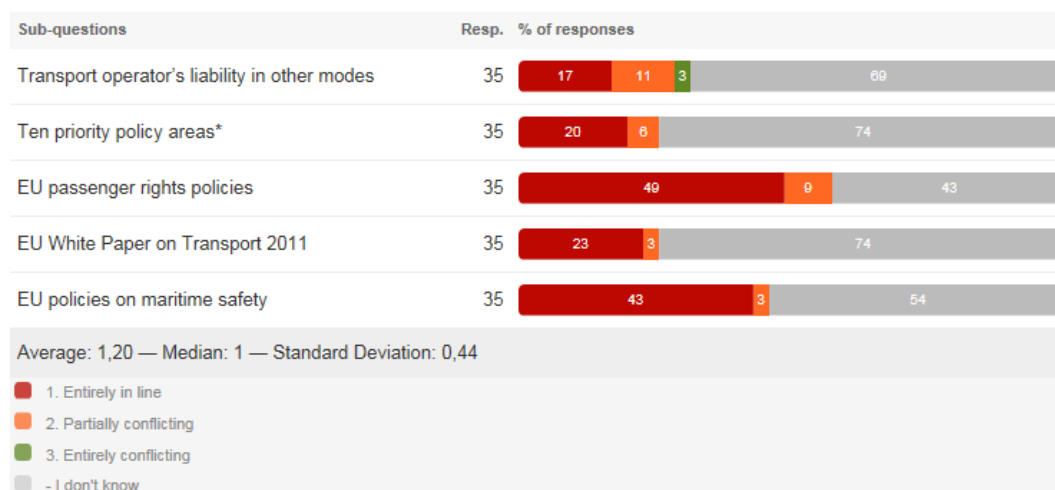
To what extent do the fees paid by applicants (vessel owners) cover the administrative costs of your authority?

None
0%
100%
75%
0%
0%

Link with other Policies and Legislations

Figure A3.22 Results of question 28

Is the Regulation in line with the following policies?



The results of question 28 are given in Figure A3.22. In addition, an explanation has been asked for each of the sub-questions. These are stated in Table A3.17.

Table A3.17 explanations of question 28

Please elaborate

Les dispositions relatives aux indemnisations des équipements de mobilité des règlements 392/2009 et 1077/2010 mériteraient d'être consolidées. The clauses relating to compensation for mobility equipment in the regulation 392/2009 and 1077/2010 should be consolidated.

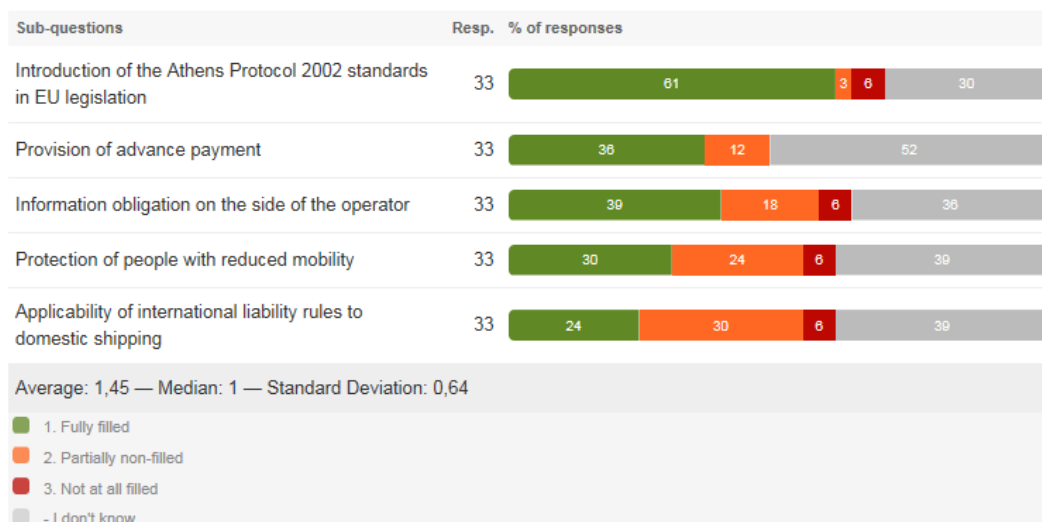
I am not sure but the feeling I get is that a regulation is normally checked with other regulations as well so partly in line with obviously exceptions as always.

It is slightly conflicting regarding the priority policy area that has to do with growth and jobs. Even if the carriers invest on to the safety, it is a huge investment to transfer older and smaller vessels to according to standards which lead that the smaller companies are facing the fact that it is not worth, which thus leads to loss of jobs and loss of investments. Regulation has also lead to an increased bureaucracy and documentation, and some nations authorities have not been up to date in order to provide blue cards or advice to carriers.

ECSA is unable to answer to this question with the proposed options. ECSA notes that the Regulation does not address issues of safety of passengers as such and that passenger rights are (additionally) protected by Regulation 1177/2010. Regarding EU passenger rights policies, it could be stated that these policies complement the passenger rights regulation. Regarding 'Transport operator's liability in other modes' there are similar initiatives/framework for other transport modes, but ECSA is not an expert on regulations that are referring to these other modes. We are therefore not able to present a more detailed analysis on this. Concerning the 'Ten priority policy areas', while improved compensation isn't conflicting with any of these policy areas, it's hard to see how the Athens regulation contributes to reaching these objectives.

Figure A3.23 Results of question 29

Which gaps have been filled by the entry into force of the Regulation?



The results of question 29 are given in Figure A3.23. In addition respondents have been asked to mention other gaps that have been filled by the regulation. These additional gaps than have been rated by the respective respondent. The results are stated in Table A3.18.

Table A3.18 Other gaps mentioned by respondents in question 29

Other gaps specified	Rated as
No provisions for recognition of judgments from non-member Athens states.	Not at all filled.
Advance payment brings the problem that investigation into the accident has not fully concluded yet within 15days.	Partially non-filled.

The last couple of questions are open questions. Firstly, Table A3.19 shows the response on question 30 on national legislation on maritime passenger rights.

Table A3.19 Results of question 30

Which additional topics regarding maritime passenger rights are regulated in national legislation? Please only refer to topics not including in the Regulation.

More control over the quality of insurance and length of legal proceedings.
reduction claim by time delay.
National Maritime Law (1994/674) includes provisions for competent authorities and the sanctions which can be used to enforce the Maritime Passenger Rights regulation (1177/2010). The law also includes general provisions for the duties and liabilities of the Ship Management Company, which might be applied in this case.
Regulation no. 463/1998 provides for rules for the issuance of passenger carrying license for all ships engaged in domestic voyages. The requirements of the regulation include confirmation of insurance of passengers.
There are no additional topics. German Commercial Code introduces almost all rules taken from the Athens Regulation (exception: advance payment, direct claim against insurer).

Which additional topics regarding maritime passenger rights are regulated in national legislation? Please only refer to topics not including in the Regulation.

Passenger rights in case of delays, cancellation of the carriage etc.

As mentioned above, in respect of ships not covered, we do require insurance to the limits of Athens Convention 74/76 (which was the requirement of the national law for all passenger carriers before the regulation).

In general, the rules of regulation 392/2009 have been extended in Danish law to include the carriage of passengers by ships of classes C and D as well as ships with up to 12 passengers. A few exceptions relate to liability for terrorism-related damage, compensation for damage to mobility equipment and the duty to inform passengers and provide advance payment.

Strict liability based on case law.

ICS deals with international regulations and is unable to answer questions on national legislation.

Regulation 1177/2010, which has entered into force in 2012, mainly introduces in EU law the following rights Right to travel for persons with reduced mobility (PRMs), without discrimination. Should safe boarding disboarding not be possible, the operator must try to offer an alternative. Upon request of the passenger, the refusal shall be motivated. The operator, as well as the terminal operator, must provide assistance if the need has been notified in advance. The personnel providing assistance, but also any staff member in relation with the clients, must be training as relevant Assistance and compensation in case of travel disruptions (delays and cancellations). For any delays at departure above 90 minutes, the carriers shall offer drinks, food and, if necessary, accommodation, and the passenger may ask either for re-routing or reimbursement. When the ships' arrival is delayed, the passenger is compensated (25 or 50% of the ticket price, depending both on the duration of the journey and on the delay). In addition, it includes a general obligation to provide information to the passengers, and the possibility for them to lodge a complaint, the regulation Please see: http://ec.europa.eu/transport/themes/passengers/maritime/doc/summary_en.pdf. Lastly, it was reported that in the UK the Consumer Rights Act 2015 provides protection from terms in consumer contracts that purport to: Levy additional charges and fees in small print. Limit the legal rights of consumers. Levy disproportionate charges on consumers in the event of any default on their part ("penalty" clauses). Levy excessive charges for early termination of a consumer contract.

Secondly, the results of question 31 on the experiences of respondents with having both the Regulation and the Athens Convention in place are given in Table A3.20.

Table A3.20 Results of question 31

Do you experience any problems now that two systems are in place, i.e. the Regulation and the Athens Convention?

No.

No.

No problems experienced till now.

No.

No.

Do you experience any problems now that two systems are in place, i.e. the Regulation and the Athens Convention?

No experience.

How fast will and can the Regulation be updated if the Athens Convention is modified? It would be very confusing if the Regulation would include a different and out-of-date version of the Convention.

No.

Non. Les deux systèmes sont essentiellement alignés. Quelques questions concernant la certification ont été résolues. No. The two systems are basically aligned. Some questions about certification have been resolved.

The phenomenon that the European courts may, through an interpretation of the Regulation, interpret the terms of an international convention (that may then be considered binding to domestic courts in the EU, but not outside of the EU) has, to my knowledge, not yet occurred. In any case, domestic interpretation of international treaties is a problem that can hardly be avoided.

No, not at all because the scope of the Regulation is very wide there is in Europe almost no room for direct applicability the Convention.

No.

No.

No, not any longer. At an earlier stage some EU Member States had acceded to the Athens Convention, whereas others had not. This state of affairs led to some uncertainty as to the legal situation. Now all Member States have acceded to the convention, and the uncertainty is gone.

No.

No.

The structure of the legislation has been overly complicated. The Regulation, the Convention and the Guidelines should be written together to one instrument.

It can be confusing to have two similar systems, especially when some countries ratify convention in really late and some parts of it is included to the national law but not ratified the actual convention.

As the Regulation has been largely aligned with the 2002 Athens Protocol, the potential for conflict between the two instruments is reduced and our members have not reported any difficulties.

No, Our members stated that there are no problems to report and in some cases the Regulation has been fully implemented at national level. The issue in this situation is that not all Member States have ratified the 2002 Protocol and that prompt ratification should be encouraged. Furthermore, as it was reported by the UK Chamber of shipping the P&I clubs issue certificates that meet the requirements of the Regulation and the Athens Convention simultaneously, overcoming what might otherwise have been a problem.

Thirdly, in question 32 the advantages of the Regulation over the legislation that was in place before has been asked. The responses of stakeholders have been given in Table A3.21.

Table A3.21 Results of question 32

What are the main advantages of the Regulation compared to the previous system of international and national legislation?

Harmonization.
Better consumers protection.
Uniform regulation.
Don't know.
In Finland there has been no change what so ever since there have been no accidents since the Regulation came into force.
Contribue à l'harmonisation Européenne et internationale des régimes de responsabilité des transporteurs maritimes. Etablit des garanties financières et une responsabilité sans faute. Contribute to the harmonization of maritime carriers liability regimes both within EU and internationally, Establishes financial guaranties and no fault liability.
The liability limits set out in the Regulation provide an important guideline for passengers as to the compensation that they may expect in a given case, especially for settlement agreements.
Clear liability rules which help avoiding extensive discussions as to the liability of the carrier.
Uniform EU regime.
level playing field, insurance availability
1) The system mirrors other international liability systems, e.g. the oil bunker and wreck removal convention systems. That goes, for instance, for the rules on insurance and on certificates as proof of insurance. 2) The system operates with strict liability of the defendant and is easier to handle than the former system making the defendant liable unless he could prove his innocence. 3) Higher liability limits. 4) Improved passenger rights.
more uniform interpretation of the Rules.
It attempts to create a level playing field between maritime and other modes. The attitude of many in the maritime industry, however, is that their is very largely a leisure market and therefore it is not fair to compare it with the markets for air, rail and road. We can appreciate this viewpoint but it should not be overplayed.
The liability exposures can be determined more easily, which is important, since passengers on board are regularly of different nationalities; at the same time the handling is more harmonized and consequently more efficient despite some national peculiarities which still may need to be taken into consideration.
Better compensation and insurance.
Ideally it should bring all the European Union countries under same regulation and level.
The main benefit conferred by the Regulation is that it brought forward the entry into force of the international Athens Convention/Protocol. The Regulation contained additional provisions concerning mobility equipment and advance payments and which would in any event have been covered in appropriate cases by the P&I insurance effected by the IG of P&I Clubs.

Finally, respondents have been asked to give additional comments. Two of them have used this to give a final comment as shown in Table A3.22.

Table A3.22 Additional comments

Do you have any other comments on the application of the Regulation?

Si le champ d'application du règlement devait être étendu, utiliser le critère des classes C et D ne serait pas adéquat, car cela certains navires à passagers resteraient encore en dehors du champ d'application. If the scope of the regulation were to be extended, using the criteria of the C and D class would not be adequate, as some passengers ships would still be outside the scope.

This is a good piece of legislation and there is no need to change this, unless Member States complain, or come up with specific issues.

As a very last point, respondents have been asked their contact details and to upload any documents or data that might have been relevant for the study. These were optional questions, and only the contact details have been given by a few respondents. No documents or datasets were uploaded.

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75. Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships
76. Danish Merchant Shipping Act (Consolidation), per 1 July 2010
77. Danish Merchant Shipping Act (Consolidation), per 17 January 2014
78. Dutch Burgelijk Wetboek, Boek 8, titel 3, per August 2016
79. International Maritime Organisation Athens Convention relating to the carriage of passengers and their luggage by Sea 1974

80. International Maritime Organisation Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974
81. Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents
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ANNEX 5 RESULTS OF REVIEW OF ACADEMIC LITERATURE

Summaries of Literature reviewed

This section includes an overview of the relevant information shared by academics through their publications, organized per author for the reader's convenience.

S. Kirchner, G. Tüngler & J. Martin Hoffmann, "Carrier Liability for Damages Incurred by Ship Passengers: The European Union as a Trailblazer Towards a Global Liability Regime?", 23 U. Miami Int'l & Comp. L. Rev. 193, 2015.

Overall, the authors of this Article suggest that, although not perfect, the Regulation points to the right direction and strengthens the position of passengers under European law. More specifically, they consider the level of passenger compensation to be adequate, especially compared to the respective applicable rules in the US. Additionally, the right to an advance payment constitutes an important benefit for the protection of passenger carried by sea. An interesting point raised by the authors is that the economic pressure on carriers, as a result of the insurance obligation, may serve as an incentive for improving the safety standards on-board.

Furthermore, the authors express their concerns as far as the co-existence of the Regulation and the 2002 PAL is concerned. There are significant differences between the 2002 PAL and the Regulation, since specific rules have been omitted while others have been added to the Regulation. In the author's opinion, "the EC's choice to replicate large parts of the PAL 2002 in the Liability Regulation Annex I indicates that there was not only a rush in the proliferation of passenger-related legislation, but also a lack of understanding as to the relationship between EU (formerly the EC) law and international law". According to their view, there is a double regime, which may threaten the coherence and uniformity of the Regulation. The authors explain the above as follows: "Those EU member states that have ratified the PAL 2002 are now bound by both the Liability Regulation and the PAL 2002. While the EU's aim may be the creation of a coherent legal system, the question needs to be asked whether the changes introduced by the EC may have made it more difficult to reach this goal. The only way to prevent the emergence of two different legal systems, which was not intended by either the EU or the drafters of the PAL 2002, would be to adopt a monist understanding which would see international and domestic law as one coherent legal order¹ and international law as self-executing. While a monist understanding of international law can be found, for example, in Dutch constitutional law, it seems highly unlikely that the EC intended to adopt such an understanding of international law. It appears more likely that the potential problems are the result of an oversight on the part of the EC, rather than the consequence of a monist view." Additionally, the authors point out that transport law in the European Union faces the challenge of having become three-layered irrespective of the specific mode of transportation. Thus, domestic, European and International law apply, which may lead to conflicts.

Finally, Krichner and his co-authors refers to the opinion expressed by the Attorney General at the European Court of Justice, who denoted that there is only limited comparability among the legal regimes for all transport modes.

D. Burke, "Cruise Lines and Consumers, Troubled Waters", 690 Vol. 37 I American Business Law Journal, 2000.

Burke examines the legal obstacles faced by plaintiffs who try to litigate consumer complaints against cruise lines under US law. Some interesting aspects of the author's analysis relate to the applicability of forum selection clauses and time limitation clauses in maritime contracts.

Regarding the issue of jurisdiction clauses, the author refers to the case of *Carnival Cruise Lines v. Shute* involving personal injury where the Court upheld a non-negotiated forum selection clause contained in a cruise contract. The judge justified this decision on three grounds: First, Carriers could face claims in various forums, thus a clause could serve the purpose of eliminating confusion about where suits must be brought. Secondly, the clause may be useful for avoiding the time-consuming and expensive procedure of figuring out the right forum. Third, the Court shared the view that "passengers who purchase tickets containing a forum clause benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the forums in which it may be sued". Notably, the Court highlighted that these clauses are subject to judicial scrutiny for fundamental fairness. On that basis, Courts often look at factors such as reasonable communicativeness, the inconvenience of litigation in a distant forum and bad faith.

Additionally, the author provides insight regarding the limitation period under US law. More specifically, according to this paper, most cruise passenger contracts provide that notice of intent to file suit must be given and claims must be filed within a specified period. In the absence of contractual provisions to the contrary, admiralty law has a three-year statute of limitation period for personal injury claim. A one-year limitation period with a six-month notice requirement to the carrier is permissible under admiralty law if such a limitation is contained in the contract of passage. Such limitation provisions for personal injury claims are routinely included in passenger contracts and upheld by courts, provided they are reasonably communicated.

B. Soyer, "Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974", Journal of Maritime Law & Commerce, Vol. 33, 2002.

Soyer's Article offers valuable insight regarding specific provisions of the 2002 PAL and consequently the Regulation. The author shares his view regarding the basis of liability by stating that the distinction between shipping and non-shipping incidents is appropriate in view of the special circumstances involved in the transport of passengers by sea. Especially when compared to the transportation of passengers by air it is evident that it would not be fair for a sea carrier to be exposed to the same liability rules, provided that the risks are different. The different approach between the applicable rules for the air and sea carrier is justified as far as the time bar is concerned. In other words, since sea transportation entails the risk of injuries which are diagnosed at a later stage, it is considered appropriate to grant the courts the option of

extending the limitation period beyond two years, although such an extension is not an option under the Montreal Convention. The limits of liability for the first layer of liability in shipping incidents should be kept at 225.000 SDR which in his view appears to be a compromise among all parties' interests. The author also criticized the definition of a ship defect under the 2002 PAL which may create confusion and uncertainty. Additionally, Soyer comments that the exceptions of liability for shipping incidents need better drafting. Furthermore, in his view the right of direct action against insurers ensures a better level of protection to sea passengers. Despite the fact that the use of the wilful misconduct defence by the insurer may possibly create some unjust results, it is considered appropriate for public policy reasons. Finally, the author criticizes Article 7 of the 2002 PAL on the basis that it defeats the goal of establishing a uniform liability scheme.

R. Peltz, "The Athens Convention Revisited", 43 J. Mar. L. & Com. 491 2012.

The author suggests in his Article that the incorporation of the Athens Convention's limits in a passenger ticket under US law circumvents public policy. As stated by the author, under 46 U.S.C. §30509 the carrier may not limit his liability for negligence or fault in case of accidents. However, a limited number of cases have upheld the incorporation of the Athens limits in a cruise line ticket. Notably, the author highlights that all of these cases involved a purely foreign voyage. In most of these judgments, the Courts ruled that the passenger should be bound by the ticket's terms, including the term limiting the carrier's liability under the Athens Convention, on the basis that a cruise line ticket does not constitute a contract of adhesion. Nevertheless, this conclusion has been clearly rejected by a number of binding appellate decisions. The Supreme Court has additionally described Carnival Cruise Lines tickets as contracts which amount to contracts of adhesion.

Furthermore, when examining the incorporation of the limits, the courts have generally agreed that these clauses must pass the reasonable communicativeness test, which looks to both the ticket's physical characteristics as well as to whether the clause reasonably communicates the existence and substance of the limitation to the passenger. The tickets which have been found not to meet this standard have either failed to describe the limitation amount in U.S. dollars and/or incorporated numerous additional statutory limitations, thereby making it extremely difficult for a passenger to determine which limitation would apply to any particular situation. Once past this threshold, the focus of the inquiry turns to whether these clauses violate maritime public policy.

In the author's view, maritime public policy in reference to such clauses as defined by the courts is clear cut and unambiguous. Long before the adoption of 46 U.S.C. § 183c, the present statute's predecessor, the courts routinely rejected carrier's attempts at insulating themselves from liability in this manner. Nevertheless, even the newer damage cap violates the public policy underlying both U.S. maritime and land based tort law, which is designed to fully compensate victims of negligence and to deter future wrongdoing by holding tortfeasors responsible for their actions. Therefore, in the final analysis, to allow a carrier to escape responsibility for the consequences of its

own actions by hiding behind a damage cap plucked in isolation out of a 36 year-old treaty, which the United States never signed, is not only contrary to the well-established public policy of both American maritime and land based tort law, but simply unsupportable under the existing law.

K. Lewins, "The Cruise Ship Industry Liabilities to Passengers for Breach of s52 and s74 Trade Practices Act 974 (Cth)", 18 MLAANZ Journal, 2004.

The author explains the position of a passenger who wishes to bring a claim under the Trade Practices Act. According to Lewins, the amended Section 74 is applicable which enables the carrier to limit his liability for injury or death in case of an event involving recreational activities on board the hotel-like environment of a cruise ship. Other than that, the carrier may not limit his liability. Thus, a claim for injury associated with a lack of due care and skill in the navigation of the ship, the traditional 'slip and trip' claims, food poisoning, negligence during beauty services, legionnaires disease etc. will not be subject to limits.

H. D. Tebbens, "The European Union and the Athens Convention on Maritime Carrier's Liability for Passengers in case of Accidents: An Incorporation adventure", 61 RHDJ 653 2008.

The author suggests that the jurisdiction rules under the Athens Convention have an impact on the Brussels I Regulation. More specifically, the author explains: "option a) corresponds to Article 2 of the Regulation, or if the claimant is a consumer to one of the options open to him or her under Article 16. Option c) recalls the special jurisdiction rule for consumers in the Brussels I Regulation in so far as defendants with a place of business in the claimant's state ordinarily will have a 'branch, agency or other establishment' as required by Article 15(2) of the Regulation. However, claims by ship passengers are excluded from this special rule unless the transport contract includes the journey and accommodation for a single price (package tours). It appears therefore that, curiously enough, cruise passengers can but ferry passengers cannot invoke the consumer jurisdiction rules of the Brussels I Regulation. For the latter category of claimants, the Protocol offers a wider choice of courts than the Regulation. Hence it can be said that adopting the 2002 Protocol will in this particular situation supplement the Regulation. The same is true for option d), referring to the place of conclusion of the carriage contract, which has no counterpart in the Brussels Regulation".

Furthermore, the author discusses the disconnection clause allowing the EU Member States to apply the Brussels I Regulation, on the condition that those rules ensure recognition and enforcement at least to the same extent as the Convention permits. However, according to the author's view, the alternative regime might on some occasions be less favourable than the Protocol: for example, the Protocol does not recognize violation of public policy or a conflicting judgment in the second state as a bar to enforcement of the foreign judgment, unlike Article 34 of the Regulation. In other cases, the opposite will be true, e.g., the Protocol is limited to final judgments but the Regulation is not. As explained by Tebbens, although the operation of this particular disconnection clause may give rise to some uncertainties it does imply that in some circumstances the Brussels I Regulation may not be

applied even if by its own terms it is applicable. Therefore, the Protocol is, to that extent, capable of affecting the Regulation.

T. A. Dickerson, "The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights", 28 Tul. Mar. L.J. 447, 2003-2004.

The author gives an overview of the cruise passenger's right under US law, which can be useful for the purpose of evaluating the Regulation's effectiveness in comparison with other regimes.

Maritime law allows cruise lines to impose very short time limitations for the filing of claims and the commencement of lawsuits. For physical injuries occurring on cruise vessels that touch U.S. ports, passengers may be required to file a claim within six months and commence a lawsuit within one year. Additionally, passengers may expect that they are entitled to bring a claim before their local court. However, jurisdiction issues may be more complex than that. For example, the author refers to the possibility jurisdictional issues which may arise when an accident occurs in territorial waters and may involve in rem claims against the ship. Finally, Dickerson also refers to the possibility of a carrier to incorporate the Athens Convention's limitation in the contract, which may apply despite the fact that the US is not a signatory to the Convention, in case the cruise does not touch a US port. As noted by the author, the Athens Convention is important since it may apply to as many as twenty percent of U.S. cruise passengers who annually "sail from, and back to, foreign ports, like a Mediterranean or Caribbean cruise.

M. Tsimplis, "Liability in respect of passenger claims and its limitation", 15 JIML 2009.

The author mentions two cases where the plaintiffs used a package directive instead of the Athens Convention on the basis that the defendant tour operators and their agents fell within the definition of the carrier under the Athens Convention. The author noted that if there were conflicting provisions the Directive would prevail as EU law. However, in view of the 392 Regulation, this conflict would be resolved with the Regulation prevailing over the Directive. Additionally, the author considers that the problem of the conflicting provisions of the Athens Convention and the LLMC is resolved through the Protocol by giving options to the State parties to both Conventions. These options are the following:

- 1) Limit liability for passengers both under the 1996 LLMC and the 2002 Protocol. This would imply a limit of liability of 400.000 SDR per passenger under Article 7.1 of the 2002 Athens Convention capped by an overall limit of 175.000 SDR multiplied by the number of passengers the ship is authorized to carry (according to the ship's certificate) under Article 7.1 of the 1996 LLMC. However, this solution may restrict the strict liability of up to 250.000 SDR under Article 3.1 of the 2002 Athens Convention to 175.000 SDR per passenger (in accordance with the limit of Article 7.1 of the 1996 LLMC) if many passengers were injured;
- 2) A state could provide for unlimited liability for loss of life or personal injury under the 1996 LLMC under Article 15(3bis). In such a case, the limits of the 2002 Athens Convention will apply alone;
- 3) A state could provide unlimited liability under the 2002 Athens Convention and permit limitation of liability under 7.1 of the LLMC;

5) A state can remove the limits of liability from both conventions and permit unlimited liability for passenger claims in respect of death or personal injury.

H. Ringbom, "Maritime Liability and Compensation in EU Law" in B. Soyer and A. Tetterborn, Pollution at Sea Law and Liability, Informa Law 2012.

According to Ringbom, the 2002 PAL is linked to European law through the inclusion of a clause allowing the EU or any other regional economic integration organization to become a contracting party. As explained by Ringbom, when ratifying or acceding the organization is required to submit a list of subject matters over which it exercises competence. With respect to those issues, the EU takes over the responsibilities of the member states and has a number of votes equalling the number of its member states parties to the protocol. In 2011 the EU took the decision to accede to the 2002 PAL. It is very important to note that under EU law conventions to which the Union is a party rank higher than EU directives or regulations which means that the IMO provisions thereby take precedence over conflicting EU rules.

Ringbom highlights the fact that the Regulation contains a number of additional features that go beyond the scope of the convention, including the extension of the scope of application of the Athens Convention, the advance payment and the information provision. Simultaneously, there are certain differences in substance between the EU rules on jurisdiction and recognition as laid down in that Regulation and their international counterparts. The Athens Convention provides a broader range of options for claimants by listing four jurisdictions, i.e. the domicile of the defendant, the state of destination/departure of the carriage and where the defendant has a place of business in those jurisdictions, the domicile of the claimant and the state where the contract of carriage was made. A fifth ground of jurisdiction, granting competence to the courts of the state of the claimant's domicile was deleted from the draft, mainly on the grounds that it would have been against the philosophy of the (then newly adopted) Brussels Regulation. As to recognition and enforcement, the IMO conventions seek to avoid complex procedures relating to the recognition of cross-border judgments by requiring the recognition of a judgment which is no longer subject to ordinary forms of review, except where the judgment was obtained by fraud, or where the defendant was not given reasonable notice and a fair opportunity to present his case. Judgments are required to be enforceable in each state party as soon as the formalities required in the state where the judgment given in one court of an EU member state is automatic in another member state unless contested. Similarly, a declaration that a judgment is enforceable is virtually automatic after purely formal checks of the documents. Enforcement can be refused only on one of the grounds exhaustively listed, mainly cases where recognition would violate the order public of the receiving state. While it may be discussed how significant this difference actually is, it was perceived by the EU in the negotiations as representing a potential weakening of its own recognition scheme. The matter was resolved in the Athens Protocol by the introduction of the opt-out clause. Ringbom finally notes that there has been some uncertainty as to the legal effects of the EU decision to ratify the IMO liability convention in the interest of the EU and whether it could oblige member states to apply the provisions of the Brussels Regulation instead. A practical approach would be to give precedence to the IMO conventions' rules

on jurisdiction, while the EU regime for recognition and enforcement could be applied as between member states instead of the (quite similar) rules of the conventions. Such a solution has recently been favoured in decision 2012/23 relating to the accession of the EU to the 2002 Protocol to the Athens Convention.

C. Haddon-Cave QC, "Limitation against passenger claims: medieval, unbreakable and unconscionable", CMI Yearbook 2001, 234.

Sir Haddon-Cave strongly supports the view that shipping law should follow the example of aviation and eliminate the limits of liability, since the grounds justifying their existence have ceased to exist for both modes of transport. More specifically the author refers to eight reasons listed by Professor Drion used in justification of the right of an air carrier or operator to limit and proceeds to examine whether these reasons still have a stand in either aviation or shipping as follows:

a) Analogy between the aviation and maritime law

The author explains that maritime law influenced strongly the drafters of aviation law in its early stages. Aircraft and ships (unlike railway trains) were thought to share many of the same problems and proclivities and to require similar treatment. The question of the appropriateness of liability limits in the maritime sector in particular has been the subject of heated debates among legal scholars for many years. However, as sir Haddon-Cave notes, since these debates, "public attitudes and government attitudes have hardened and more and more questions are being asked about the justification for limitation of any sort (see e.g. The "Erika")";

b) Necessary protection for a financially weak industry.

The second 'rationale' mentioned by Drion was the perceived necessity to protect a financially weak industry. The aviation industry was fledgling in 1920s but not now; and, moreover, the playing field has been entirely changed by the advent of the modern insurance and reinsurance industry. The same is equally true of the shipping industry if not more so;

c) Catastrophic risks should not be borne by aviation alone.

Professor Drion next refers to the notion that 'catastrophic risks' should not be borne by the industry alone. They are not any longer: the insurers bear the burden;

d) The necessity of the carrier or operator being able to insure against these risks.

Drion next lists the necessity of the carrier or operator being able to insure against these risks. The carrier can, at reasonable cost;

e) The possibility for the potential claimants to take insurance themselves.

Next, Drion mentions the possibility for the potential claimants to take insurance themselves. Travel insurance is widely available, but is relatively expensive compared with cover obtainable by the industry;

f) Limitation of liability was the 'quid pro quo' for the aggravated regime of presumed liability.

Drion next refers to the point that limitation of liability was the 'quid pro quo' for the aggravated regime of presumed liability of the carrier;

g) The avoidance of litigation by facilitating quick settlements.

Finally, Drion refers to the argument that the Warsaw regime has facilitated quick settlements and avoidance of litigation. In recent years this has not been the case: limitation regimes have been an increasing source of litigation.

On the basis of the above, sir Haddon-Cave concludes that raising the limits through the Protocol is not enough to ensure sufficient protection of passenger rights. What should also be taken into account is that the limits are essentially unbreakable according to the author. As explained, "It is a curious fact that in English law at least, and (I suspect) the law of many other countries, a cruise liner captain or aircraft pilot's conduct could give rise to a charge of manslaughter but still be insufficient to break the limit under the Athens". Thus, in light of these problematic provisions and since the grounds justifying the existence of limits has ceased to exist for both air and sea transportation, shipping law should follow the example of air law and eliminate the liability limits.

A. Mandaraka-Sheppard, Modern Maritime Law and Risk Management, Informa 2009.

Under the chapter discussing passenger transportation, the author investigates whether claims by passengers carried in a cruise ship can lead to possible conflicts between the Athens Convention and the PTR 92.189 In *Lee vs Airtours Holidays Ltd.* the contract for a cruise holiday on *Sun Vista* which caught fire and sank with passengers valuables on board, had been made through a travel agent. The claim was brought under Regulation 15 of the PTR, against the travel agent for inter alia loss of valuables. Judge Hallgarten held that the Regulations represented an alternative regime to the Convention. Insofar as the Regulations conflicted with UK domestic law (the law implementing an international convention), the regime of the Regulations must prevail pursuant to the European Communities Act. Nevertheless, the court made clear that if there was no express incorporation of the Athens Convention in the contract, the PTR prevailed over the Athens Convention to the extent that the two conflicted. In stark contrast, in the *Norfolk* case, the plaintiff tried to file a suit under the PTR since the two year limitation period had elapsed. The court rejected this claim by explaining that a claim for any personal injury suffered aboard a cruise ship when the Athens Convention applies will fall within the scope of the Convention. As a result, the claim was time barred. The fact that the PTR flowed from the Package Directive did not affect the standing of the Convention.

The author also refers to the right of the insurer to invoke the defence of the carrier's wilful misconduct. She explains that despite lengthy discussions and recommendations to the IMO's Legal Committee about dropping the "wilful misconduct" defence, since the purpose of compulsory insurance is to protect the victims of disasters, it is unfortunate that it has been maintained. It is also unfortunate that the alternative proposal for protection of victims by the provision of accident insurance, which is not subject to the defence of wilful misconduct, was not accepted. One argument in support of retaining the defence of wilful misconduct is that it will discourage owners who may be minded to scuttle their ship for gain, or deliberately do not maintain the ship

¹⁸⁹ UK Package Travel Regulations 1992.

in a seaworthy condition. However, such an argument is flawed: in the first place, insurers should not insure such owners, and second, such owners will not be deterred by maintaining the defence against the victims, who will have no asset of the bankrupt owner against which to proceed. The other argument in favour of maintaining this defence is that it will be unfair to the other owners who are insured mutually in the P&I Clubs to have to finance the insurance for such conduct by substandard owners. However, the P&I managers and directors of the mutual insurance are in a better position to evaluate the credentials of owners who enter with the particular club (and refuse the insurance of substandard owners), that ferry passengers who may board a substandard ferry.

A. Saggerson, Travel Law and Litigation, 4th rev. ed. St Albans Tarquin Publications, 2008.

In the chapter dealing with passenger transportation and liabilities, Saggerson comments on the relationship between the Convention's regime and the Package Travel Directive. According to his view, the Convention applies by operation of law to any carrier even if the carrier is also a tour operator within the meaning of the PTR 1992. The Convention is not qualified by or limited in its effect by virtue of anything in the PTR 1992 and prevails over the PTR 1992 where the carrier happens also to be a tour operator. He also refers to the Norfolk case, which involved a plaintiff who tried to file a suit under the PTR since the two-year limitation period had elapsed. The judge noted that there was no inconsistency between the Convention and the PTR because the latter did not specify any limitation period at all and therefore there was no reason why for accidents on board vessels to which the Convention applied the limitation period should not be that specified in the Athens Convention. In any event the Convention having the force of law applied as against or as in this case in favour of performing and contracting carriers irrespective of the PTR.

Regarding the comparison between Montreal and the Convention's regime, the author notes the following differences:

- Liability is for personal injury as opposed to bodily injury. This clearly indicated that psychiatric injury or other impairment of mental faculties are included;
- The use of the word incident as opposed to accident may well be intended to extend the scope of liability modestly beyond that contemplated by the Montreal Convention and probably avoids some of the more arcane difficulties that give arises in construing the meaning of the word "accident" under the Montreal and formerly Warsaw-Hague regimes. However, it is likely that injury resulting from some internal factor specific to the passenger (for example pre-existing physical weakness) are not likely to be covered by the Athens compensation regime any more that they give rise to compensation under the Montreal Convention.

Furthermore, the author discusses Article 13, which according to his opinion appears to require proof that there has been a systematic or managerial failure of an intentional or reckless character as opposed to intentional or reckless conduct by an employee in the course of his employment. The Athens Convention seems to assume that where an employee has caused injury or

damage, action will be taken against that employee directly. If it is, the employee is subject to the same regime and also loses the right to limit his liability for intentional or reckless conduct. As with the Warsaw Convention it is for the passenger to prove intention or recklessness in order to overcome the Athens Convention limits. It is thought likely that any court concerned with allegations of recklessness would apply the same test as that which is applied under the Warsaw Convention. Ticketing errors by the carrier do not result in the loss of the carrier's right to rely on the limits of liability activated by the Athens Convention. Finally, Saggerson also touches upon the subject of the measurement of the limitation period, which is subject to the national rules on suspension or interruption of limitation. If the domestic rules of the court seized of the action permit the suspension or interruption of limitation periods, those domestic rules can be applied subject to an absolute bar after three years.

R. Shaw, Carriage of Passengers in Southampton on Shipping Law, Informa 2008.

Regarding the interaction between the Package Travel Directive and the Athens Convention the author refers to the cases of Lee and another v Airtours Holidays Ltd and another (2002), as well Norfolk v. My Travel Group plc. In the former case, the Court held that the provisions of the directive were part of UK domestic law and should be applied unless the provisions of the Athens Convention were specifically referred to in the contract. However, in the Norfolk v. My Travel Group plc Court ruled that that the Athens Convention was given the force of law in the UK and therefore applied even where there was no express reference to it in the contract. The two- year time bar did not conflict with the terms of the Directive. Shaw comments that on a broader basis there is an apparent conflict between the terms of the directive and the express terms of Articles 11 and 14 of the Convention, which demonstrate that it is intended that the code contained in the Convention applicable to claims against a carrier should also apply to claims against the servants or agents of the carrier and more important that no claims by passengers should be brought otherwise than in accordance with the Convention. It is strongly arguable that the provisions of the EU directive to the extent that they conflict with it, amount to a breach by the member states of their treaty obligations to the other state parties to the Athens Convention. However, the introduction of the Athens Regulation partly resolves this conflict.

Finally, Shaw sets out the reasons why plaintiffs might choose the US Courts to bring their claims against carriers. More specifically, the advantages of bringing a claims in the US from the plaintiff's point of view are:

- Higher level of damages;
- Lawyers will accept instructions on a contingency fee basis;
- Penetrating discovery procedures;
- No liability to pay the defendant's costs;
- Class actions.

Shaw also notes that the possibility of obtaining an award of punitive damages in a shipping case in the USA is a myth. There is no recorded

maritime case in the US where such damages have been awarded, but it is fair to say that no defendant or their insurance company wants to be the first. The threat of such proceedings in a case involving a maritime casualty in Europe has in many cases led to a Mid-Atlantic Settlement at a figure substantially higher than that obtainable in the English courts.

M. Tsimplis & R. Shaw, "Carriage of Passengers", in Yvone Baatz Maritime Law, CRC Press 2014.

The authors clarify the interaction between the LLMC and the Athens Convention. As noted by another author above, the States parties to the 2002 Protocol and the LLMC will have the following options:

- 1) Limit liability for passengers both under the 1996 LLMC and the 2002 Protocol. This would imply a limit of liability of 400.000 SDR per passenger under Article 7.1 of the 2002 Athens Convention capped by an overall limit of 175.000 SDR multiplied by the number of passengers the ship is authorized to carry (according to the ship's certificate) under Article 7.1 of the 1996 LLMC. However, this solution may restrict the strict liability of up to 250.000 SDR under Article 3.1 of the 2002 Athens Convention to 175.000 SDR per passenger (in accordance with the limit of Article 7.1 of the 1996 LLMC) if many passengers were injured;
- 2) A state could provide for unlimited liability for loss of life or personal injury under the 1996 LLMC under Article 15(3bis). In such a case, the limits of the 2002 Athens Convention will apply alone;
- 3) A state could provide unlimited liability under the 2002 Athens Convention and permit limitation of liability under 7.1 of the LLMC;
- 5) A state can remove the limits of liability from both conventions and permit unlimited liability for passenger claims in respect of death or personal injury.

Kroger Passengers carried by sea, should they be granted the same rights as airline passengers?

This Article was written in 2001 and discusses the different liability regimes which regulate air and sea transport, in particular the carrier's liability vis-à-vis passengers. In view of the date this Article was drafted, it does not touch upon the provisions of the Regulation and consequently does not evaluate these. However, the author does indeed analyse the underlying reasons justifying the liability regime applicable to the air and sea carrier. Additionally, Kroger touches upon the markets of passenger transportation by sea and finally suggests specific amendments to take place regarding the Athens Convention, which have already been made by the Regulation. To be more precise, the author explains that the sea carrier simply cannot be subject to the same rules as the air carrier mainly on the basis of the differing estimates of potential risks of the individual transport mode, the economic background of the markets and the political influence on liability clauses. The author identifies four categories of markets in sea transport: National ferry transport, International ferry transport linking two nearby countries, cargo ships carrying passengers and the cruise shipping market, which is characterized by the extensive freedom of movement on-board. The liability rules adopted by the Athens Convention must be considered in view of the social-economic conditions present in these markets. Thus, the author considers the liability rules adopted by the Convention appropriate. He justifies his view using the following arguments: The carrier should be primarily responsible for taking

measures to prevent risks, including the responsibility to care for the technical conditions of facilities on-board which are used by passengers. Accordingly, the passenger should be responsible for the proper use of such well-maintained facilities. Furthermore, the definition of damages under the Athens Convention is notably wider than the one included in the Montreal Convention, encompassing mental or psychological losses. Moreover, the Athens Convention includes a maximum liability limit which is considered desirable on the grounds of public policy and the structure of the insurance markets. Kroger also mentions the fact that the ship-owners should be obliged to take out liability insurance with sufficient cover. Most importantly, Kroger comments on the possibility of a direct action against the insurer, which he considers a prudent step. Additionally, the passengers could take out an additional accident insurance. Finally, the author considers whether the high liability limits could act as an incentive for the carrier to take all possible safety measures, concluding that there is little room for a carrier to improve these measures in view of the international legal instruments and guidelines imposing specific safety standards. In his conclusions, the author denotes the importance of balance among the interests of the passengers, the carrier and the insurance markets.

Testa Liability and Insurance for the carriage of passengers by sea under Regulation 392/2009: Providing a lifeline to the cruise industry and ensuring proper compensation for passengers in the event of accidents.

David Testa's Article evaluates the Regulation's provision by categorizing the respective rules and assessing their effectiveness. To be more precise, Testa first discusses the rules on liability adopted by the Athens Convention and embodied in the Regulation. He denotes the importance of the balance among the interests of carriers, passengers and insurers and goes on to emphasize that such balance will ensure the proper level of compensation for passengers in the event of an accident. The author also highlights the importance of the distinction between shipping and a non-shipping incident and the respective consequences of such characterization. Testa's opinion is that imposing a strict liability in case of a shipping incident only is fair. In his opinion a sea carrier could under no circumstances be regarded in the same context as an air carrier, given the hotel-like environment on-board of ships which is much more prone to accidents. However, the author identifies in the next section two particular provisions of the Regulation which he considers were drafted in an imprecise manner. Namely, Testa mentions the two exceptions to strict liability in Article 3(1). In the event when an accident is caused both by one of the exceptions mentioned therein and the contributory fault of the carrier, they would be relieved from liability, which appears to be problematic. Further, the definition of a ship defect entails the risk of vagueness and therefore is in need of clarifications. Finally, the question of whether mental injury is included under the term "personal injury" is one that should have been addressed in the Regulation. In the following parts Testa discusses the possibility for a Member State to adopt higher or unlimited liability in the case of claims relating to the death or injury of passengers. According to the author's position, this provision endangers uniformity and further, it is potentially flawed, in view of the detrimental consequences that it could entail for carriers. Most importantly, carriers are likely to be unable to respond to such claims, which are not subject to limits. As far as the loss of the right to

limit liability, Testa expresses the view that the threshold is set too high, considering that a captain's conduct under the current framework could amount to manslaughter but still not qualify as grounds to lose the right to liability limits. Another important argument voiced by the author is that, although the compensation available to passengers appears to be adequate, it is not reasonable. That argument is justified on the basis that in case of per capita limits, the unused portions of funds could be pooled and made available to satisfy larger claims that exceed the per capita limit. Naturally, the interests of the cruise and insurer industries should be safeguarded. As far as the new provisions introduced by the Regulation are concerned, namely the information obligation and the advance payment, Testa considers that these have significantly improved the position of a claimant. Another positive aspect of the Regulation according to the Article is the compulsory insurance provision, which is desirable both by passengers and carriers. Testa also discusses the right of direct action against an insurer. This right is subject to certain limitations, for example the right of the insurer to be relieved of liability if the damage is a result of the carrier's wilful misconduct. Such right undermines the Regulation's aim to ensure proper compensation to passengers, although public considerations may justify such provision. Finally, with respect to the right of Governments to limit liability to SDR 250.000 or 340 million in the event of the risks mentioned in Section 2.2. of the IMO Guidelines, Testa assesses these limits are reasonable, despite the fact that the impact of such limits could be substantial in certain cases. Two positive characteristics of the said right is the pro rata distribution and the fact that the 340 million are designated for passenger claims under the Convention only.

Justice Thomas A. Dickerson The Cruise passenger's rights and remedies 2014: The Costa Concordia disaster: One year later, many more incidents both on board megaships and during risky shore excursions.

This Article touches upon the issue of the passenger's rights on-board cruise ships, but solely focuses on U.S. legislation and case law. Additionally, the Athens Convention and the EC Regulation are only mentioned in the final chapter, where the author describes the rules contained therein and the applicability of these provisions to U.S. citizens or the application of these rules by U.S. courts. It does not offer insight for the purpose of the evaluation.

Jens Karsten Passengers, consumers and travellers: The rise of passenger rights in EC transport law and its repercussions for Community consumer law and policy.

The paper by Karsten suggests that passenger law may constitute a branch of the wider consumer policy which expands the area of Community law of contracts. The author sets out the developments at the time the Article was drafted in terms of passenger rights' regulation for all transport modes. Following this part, Karsten discusses the policy framework which constitutes the background for the promotion of passenger rights' protection. Among others, it is stated that a minimum degree of protection would bring the individuals closer to the European values. The White Paper "European Transport Policy for 2010: Time to decide" clearly involves the intention to strive for transport with a human face through strengthening of the user's

rights. The author further denotes that despite similar objectives, legislating for an integrated internal market does not engender uniform rules for passengers and consumers. Consumer policy is distinguished into three branches, depending on the group of persons benefiting from the rules established: Consumers, Travelers and Passengers. In the first branch, there is a distinction between private entities or professional ones (B2C or B2B). This is not the case with travellers however, nor passengers. The author concludes with some points for further reflection.

Eugenio Olmedo Peralta New requirements and risk distribution for the liability of carriers of passengers by sea in the event of accidents under Regulation (EC) 392/2009.

Peralta's Article introduces the provisions of the Regulation regarding the liability of the carrier in the event of an accident and connects that liability to a breach of contract. More specifically, Peralta considers that the carrier undertakes the responsibility to carry the passenger to his destination unharmed. Thus, in case a passenger has suffered any kind of damage this obligation is not complied with, resulting consequently in a breach of contract. Nevertheless, the author refers to both the Regulation and the PAL in order to establish that the liability of the carrier depends greatly on the risk distribution. In other words, despite the fact that the carrier has breached an obligation at first sight, he may not be held liable on the grounds that the damage is not attributable to the carrier. The author first touches upon the issues of scope, definitions of terms under the Regulation and the specific liability provisions in a descriptive way. In some instances, Peralta offers some insight as to the evaluation of the Regulation. By way of example, he mentions that *"Anyway, it is easy to comprehend that the regulation is set seeking the protection of the passenger's interests, provided that this shall not imply a burden too heavy to carry by the carriers. Besides, this fault-based liability system and the way it is articulated by the Regulation and the PAL is consistent with the consumers and users' regulations."* Next, Peralta analyses the liability provisions in more detail and discusses the attributability of the harmful event to the carrier. The author distinguishes between shipping and non-shipping incidents and further explains the two-tier liability system under the latter. According to the author, the fact that the passenger bears the burden of proof in case of non-shipping incidents is justified on the grounds of freedom of movement. On the other hand, the author also agrees with the allocation of risks in case of a shipping incidents, provided that the chances that the passenger has contributed to damage produced as a result of these incidents are limited. Additionally, it should be very hard for a passenger to establish the carrier's fault or neglect in case of such an incident. Finally, Peralta sets out the grounds for exemption and notes that the list appears to be incomplete, since the Regulation should also consider the consequences of nuclear incidents.

Sarah Fiona Gahlen Civil Responsibility Regimes for Passenger Claims.

In her dissertation, Gahlen analyses in depth the liability regime governing passenger claims against the sea carrier. The author discusses the provisions of the Athens Convention and the 2002 Protocol and for -inter alia- refers to the EC Regulation 392/2009. In that subsection, Gahlen comments that the EU aimed for a uniform standard of passenger protection to the level granted

to other consumers and a level playing field for carriers. She then proceeds to discuss the rules on jurisdiction, recognition and enforcement. More specifically, Gahlen explains that EU Member States were prevented from ratifying the PAL 2002 since it contained rules on jurisdiction, recognition and enforcement in civil and commercial matters, although these issues were already regulated under the Brussels Regulation. For the purpose of eliminating these hesitations, the EU ratified the 2002 PAL by virtue of Article XIX of the PAL. Nevertheless, since the EU wished to continue applying the Brussels Regulation it negotiated a disconnection clause, which is found under Article XVIbis para 3 of PAL 2002. According to that Article, contracting States may apply other rules for the recognition and enforcement of judgments, provided their effect is to ensure that judgments are recognized and enforced at least to the same extent as under paragraphs 1 and 2. As a result, Contracting States are allowed to deviate under the aforementioned condition. The author nevertheless highlights the fact that the Brussels rules have been criticized as not being as generous as the PAL rules. To be more precise, under the Brussels Regulation enforcement may be denied on the grounds of public policy considerations or irreconcilability with an earlier judgment. In contrast these exception grounds are not found under the PAL 2002 rules. Most importantly, the author suggests that a judgment from an EU Member State which declares a passenger claim to be limited in amount, in accordance with Article 5 of Regulation 392/2009 allowing the global limitation of claims as long as this is based on the 1996 LLMC, could be considered as contravening public policy in a State where recognition is sought and where such a claim could not be limited. Additionally, different limits of liability could lead to contradictory judgments, especially in view of the multitude of possible forums under the PAL. The arguments above lead to the violation of the PAL or the alteration of the Brussels Regulation's scope. In the next sub-chapter Gahlen discusses the geographical scope of application under the Regulation 392/2009. According to the author, these rules differ slightly under the Regulation and the PAL 2002 respectively. The former mirrors the latter's provisions but replaced the reference to the Contracting State with a reference to a Member State. Additionally, the author notices that the application of the PAL to domestic voyages through the Regulation could be considered inappropriate, provided that the PAL specifically limits its scope to "international carriages".

M. Piras, International Recent developments: European Union- maritime passenger transportation.

In his Article, Piras discusses the general developments in the field of maritime passenger transport. Regarding the Regulation, his Article is rather descriptive, setting out the provisions on liability and commenting that for non-shipping incidents the liability regime is similar to a tort liability system. Additionally, the author provides input regarding Italian law. More specifically, he compares the rules under the Regulation to the relevant Italian rules and highlighting the similarities and differences. The Codice della navigazione establishes that the carrier is liable for damages suffered by its passengers unless it proves that the accident arose from a cause not imputable to the carrier. To do so the passenger has to prove the existence of the contract of transport, the fact that the accident occurred during transport and the extent of damages. Accordingly, the carrier is discharged if he can prove that the

damage was caused by an event outside of his sphere of control which was unforeseeable and unpreventable. Further, the Italian Navigation Code has been criticized as burdensome. It has been therefore suggested that a distinction could be made on the basis of whether the incident was due to transport or in occasion of the transport. That distinction has been adopted by courts, despite the fact that it is not incorporated in the text of the law. Additionally, under Italian law the carriage of vehicles is not regulated and courts usually apply the provisions of carriage of goods by sea, resulting in some unsatisfactory results for passengers. In the next sub-chapters, the author touches upon the developments in the other fields of transport as well by setting out the European regulations applicable and explains the rights of passengers in case of interrupted travel. Finally, Piras touches upon the issue of protection of disabled persons and persons with reduced mobility under Regulation 1177/2010 and the obligation to provide information.

Juan Pulido Begines, Cruise Ship Law, in The Hamburg Lectures on Maritime Affairs 2011-2013.

The author of the chapter under consideration offers valuable insight regarding the cruise sector and the applicable rules regarding the protection of passengers' rights on-board cruise vessels. Pulido focuses on the particular nature of a cruise, which includes accommodation and transportation. Due to this special nature leads to a plurality of sources that could be applicable. To be more precise, on the one hand, cruise travel falls under the scope of the relevant rules on package tour travel. On the other hand, it also falls under the scope of rules created for the protection of passengers carried by sea, such as the Athens Convention of 1974. In view of the significant consequences connected to the application of each of the above set of laws, the author further discusses the relationship of cruise shipping with consumer protection law and transport law respectively. As far as the first is concerned the author refers to Council Directive 90/314/EEC of 1990 regulating the relationship between travel agencies and tourists. Based on Article 2.1 cruise ship services can be considered as a package tour. The Courts have ruled that cruise services fulfilled the necessary conditions for a package under the aforementioned Article and further fell under the definition of Article 15.3 of Regulation 44/2001, in other words "a contract of transport which for an inclusive price provides for a combination of travel and accommodation". Setting cruise shipping in the field of EU consumer protection law offers a wide range of protection according to Pulido, especially in comparison to other legal systems. With respect to transport law considerations, the author raises the question of the extent to which the regime of liability for damage suffered by passengers carried by seagoing vessels is applicable to cruise ships. The answer, notably, depends on the contractual regulation taken by the parties and the interpretation given to general rules of package and consumer protection. The application of the Athens Convention is possible, despite significant obstacles. The author specifically refers to the scope of the Convention, which is not intended to establish a comprehensive legal regime for travel contracts, in contrast to uniform law for passengers carried by other means. Additionally, the standards under the Convention are mandatory, with exemption or limitation contract clauses being null. Furthermore, the security obligation assumed by the carrier is ancillary to the principal one of transportation. Finally, its irregular scope of application is the main limitation.

Accordingly, the author comments on the multiple amendments and the creation of Regulation 392/2009 which adopted the PAL 2002 provisions, introducing on the one hand a regime of two-tier responsibility, involving strict liability as well, regarding shipping incidents and on the other hand a fault based regime as far as non-shipping incidents are concerned. After examining some considerations connected to both consumer and transport law and concluding that cruise shipping is a compromise of both, Pulido raises the following question: "When should transport laws be applied with priority over package tour laws?". The key to that question is to consider the role of transport in the services. In the carriage of passengers, the transport is essential and the "obligation of result", which involves the carriage of passengers to their destination, cannot be changed in that case. In contrast, in cruise shipping transport is ancillary to other services. The vessel is the destination itself and in view of that the itinerary could change without significant consequences. That transport, according to the author, qualifies as a package component. Pulido further touches upon some problematic issues under transport law, such as the commercial practice in cruise lines and the forum selection. Notably, if we apply consumer law the forum selection clauses may be overridden according to the terms of Rome I Regulation, which does not apply to contracts of carriage. However, it does apply if the contract under consideration provides for an inclusive price a combination of travel and accommodation. Pulido also touches upon Regulation 1177/2010 which assimilates cruise to transport and sets the same discipline for both. Under these rules both the travel agency and the ship owner should be liable to passengers. Additionally, cruise ship services shall be subject to both Regulations 1177/2010 and 392/2009 as well as the PAL 2002. In the following chapters, Pulido discusses the standard general conditions involved in cruise shipping, comprising standard industry and the contractual relations involved in a cruise ship.

Case law: EFTA Court E-20/14.

In this judgment, the Court finds that Iceland has failed to fulfil its obligations under Article 7 EEA by failing to adopt the measures necessary to make, as such and within the time prescribed, part of its internal legal order the Act referred to at point 56x of Chapter V of Annex XIII to the EEA Agreement (Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents), as adapted to the EEA Agreement by way of Protocol 1 thereto and by Joint Committee Decision No 17/2011 of 1 April 2011. The facts are set out, describing the communications between the EFTA Surveillance Authority and the State of Iceland. The question of whether an EEA/EFTA State has failed to fulfil its obligations must be determined by reference to the situation in that State as it stood at the end of the period laid down in the reasoned opinion. It is undisputed that by the expiry of the time limit given in the reasoned opinion concerning the Regulation, Iceland had not adopted measures so as to implement the Regulation. No information useful for the evaluation framework.

Aviation and maritime law compared.

Comparison 392/2009 & PAL 2002 with 261/2004, Montreal Convention and Regulation 2027/97 as amended by Regulation (EC) No 889/2002.

The comparison of Regulation 392/2009 & PAL 2002 with 261/2004, Montreal Convention and Regulation 2027/97 as amended by Regulation (EC) No 889/2002 serves a double purpose:

1. The fact that the air passengers regimes are already much longer in force allow to predict the implementation of certain provisions of Regulation 392/2009 and PAL 2002 by future case law and to identify potential obstacles, endangering the effectiveness and coherence of Regulation 392/2009;
2. A comparison with the Montreal Regime allows to analyse in how far uniformity in passenger law exists and thus whether the different regimes are coherent.

This comparison deals with the scope, the liability grounds and compensation, advanced payments and mandatory insurance.

Subjects covered

Regulation No. 261/2004	Montreal Convention	Regulation 2027/97 as amended by 889/2002
<ul style="list-style-type: none"> Denied boarding; the flight is cancelled; the flight is delayed. <p><i>Delay is governed by Regulation No. 1177/2010 for maritime passengers. Still, on some points the rules included in Regulation 261/2004 could be relevant to assess the coherence of EU passenger law as well as to test the effectiveness of Regulation 392/2009.</i></p>	<p>Article 1 persons, baggage & cargo Art 19 delay Article 21 death & injury Article 22 damage to baggage</p>	<p>Article 3 Insurance (Jo. Regulation 2407/92) Article 5 Advanced Payment Article 6 Information</p>

Scope

Regulation No. 261/2004	Montreal Convention	Regulation 2027/97 as amended by 889/2002
<p>The scope of the regulation is determined based on geographical considerations regarding the place of departure and arrival as, pursuant to Article 3 it applies to flights departing from a Member State. The place of registration (the nationality of the carrier) is an additional ground upon which the regulation can be invoked.¹⁹⁰ The place where the contract was concluded is not taken into account. Pursuant to Article 3 para 4, passengers that are traveling for free or at a reduced fare not available directly or indirectly to the public fall outside of the scope. The regulations</p>	<p>The convention applies to 'international' carriage. Article 1 para. 2 MC99 reads that or the purposes of this Convention, the expression <i>international carriage</i> means any carriage in which, according to the agreement between the parties:</p> <p>(i) the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties;</p> <p>(ii) or within the territory of a single State Party if there is</p>	<p>International carriage as meant in Article 1 (9) PAL2002, which reads '<i>any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State</i>', it can also apply to domestic voyages within a single Member State on board ships of Classes A and B under Article</p>

¹⁹⁰ In the ECJ case *Schenkel* the Court clarified above that a journey out and back cannot be regarded as a single flight. Consequently, Article 3(1)(a) of Regulation No 261/2004 cannot apply to the case of an outward and return journey such as that at issue in the main proceedings, in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight departing from an airport located in a non-member country when the carrier is not a community carrier.

Regulation No. 261/2004	Montreal Convention	Regulation 2027/97 as amended by 889/2002
pertain only to a motorised fixed wing aircraft. The regulation applies also to <i>operating</i> air carriers. They are considered to act on behalf of the person having a contract with that passenger.	an agreed stopping place within the territory of another State, even if that State is not a State Party. This criterion is stricter than the ones put forth in the regulation, as normally two Member States should be involved. The place of registration (the nationality of the carrier) is not taken into account, neither is the place where the contract was concluded. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.	4 of Directive 98/18/EC', where ¹⁹¹ : the ship is flying the flag of or is registered in a Member State; the contract of carriage has been made in a Member State; or the place of departure or destination, according to the contract of carriage, is in a Member State.

Under the MC99 two points of contact a with contracting states are required to trigger application of the convention, or in the alternative, at least a stopover in a foreign state. The definition of international carriage in Regulation 392/2009 is similar to the MC99. The second requirement is not.

The EC in (23) of the preamble of 261/2004 debates that it should analyse the opportunity of extending its scope to all passengers having a contract with a tour operator or with a Community carrier. This would make Regulation 261/2004 more similar to the maritime equivalent.

Types of damage covered

Montreal Convention	Regulation 392/2009
<p>a. Loss of/damage to/delay of luggage</p> <p>a. exclusion</p> <p>none</p> <p>b. damage and loss to checked in luggage</p> <p><i>Period of responsibility?</i></p> <p>The period of liability for damage to luggage is primarily confined to luggage that is checked in and under the control of the carrier.</p> <p><i>Liability standard?</i></p> <p>Presumed liability</p> <p>EXONERATION: However, the carrier is not liable in case of an inherent <i>defect</i>,</p>	<p>a. Loss of/damage to/delay of luggage</p> <p>a. Exclusion</p> <p>valuables (if negotiated) (Article 5)</p> <p>b. damage and loss to checked in luggage</p> <p><i>checked in luggage?</i></p> <p>Under the regulation there is no concept of checked in luggage. The distinction that is made is cabin luggage versus other luggage. As cabin luggage is within the control of the passenger, the other luggage corresponds with checked luggage in air transportation.</p>

¹⁹¹ Article 1 3. No later than 30 June 2013, the Commission shall, if appropriate, present a legislative proposal in order, inter alia, to extend the scope of this Regulation to ships of Classes C and D under Article 4 of Directive 98/18/EC.

quality or vice of the baggage.

c. unchecked baggage

The liability of the carrier is fault based.

d. delay

Delay s covered pursuant to Article 22(2).¹⁹²

Period of responsibility?

Includes the period in which the luggage is at the marine terminal, station or quay, under the condition that the carrier has taken over the luggage

Liability standard?

The liability of the maritime carrier is fault based but with a reversed burden of proof. Hence, the Montreal Convention is more favourable than PAL 2002 and Regulation 392/2009.

c. unchecked luggage

Unchecked luggage?

This corresponds with cabin luggage (see above)

Liability standard?

Fault based

But: in case of shipping incident, reversed burden of proof.

d. delay

not governed

The MC99 is more favourable to the passengers in case of checked in baggage. The liability regime for luggage that is not checked in the Regulation 392/2009 is more favourable for passengers as it includes a presumption of fault in case of a shipping incident, whereas the passenger under the MC99 has to prove that the carrier is at fault.

¹⁹² *Nastych v. British Airways PLC*, 33 Avi.18,603 (S.D.N.Y. 2010).

B Death or Injury of a Passenger

Article 17

The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Period of responsibility

The carrier is under the MC99 only liable for damage sustained on board the aircraft or during (dis)embarking. In order to establish whether a person is embarking, The court developed a "four-prong test: **(1)** the activity of the passengers, **(2)** restrictions on the passengers' movement, **(3)** imminence of actual boarding, **(4)** proximity of passengers to the gate."¹⁹³

Public spaces such as entrance halls do not fit the requirements.¹⁹⁴

Liability standard:

Presumed liability

EXONERATION Article 20 MC99

The carrier shall be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the passenger.

This exoneration is to be interpreted narrowly and very few examples of actual application of the Article are found in case law. An example however is the case, under the Warsaw regime, *Chutter v. KLM Royal Dutch Airlines & Allied Aviation Services International Corporation*, where a passenger ignored a fasten seatbelt sign to say goodbye to her family. As she hadn't noticed the stairway landing had been removed she injured herself. In this case the carrier was not held liable.¹⁹⁵

To avoid compensation of over 113.130 SDR, the carrier may also avail himself from liability by proving that the damage was not caused by his fault (see Article 21, limitation of liability)

Requirements:

B Death or Injury of a Passenger

Two situations should be distinguished:

1. liability in case of a shipping incident (Article 3.1)

2. Liability in case of a non-shipping incident (Article 3.2)

Period of responsibility

Article 1.8 PAL 2002: the period during which the passenger and/or his cabin luggage are on board the ship or in the course of embarkation or disembarkation, and the period during which the passenger and his cabin luggage are transported by water from land to the ship or vice-versa, if the cost of such transport is included in the fare or if the vessel used for this purpose of auxiliary transport has been put at the disposal of the passenger by the carrier. However, with regard to the passenger, carriage does not include the period during which he is in a marine terminal or station or on a quay or in or on any other port installation

Shipping incident:

Two tier liability:

Tier 1: presumed liability

Exonerations:

Injury or death resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or

Injury or death was wholly caused by an act or omission done with the intent to cause the incident by a third party.

Or damage was caused partly or wholly by the passenger.

Tier 2: fault based liability with reversed burden of proof: absence of actual fault or neglect or proof that damage was caused partly or wholly by the passenger.

Non-shipping incident

Fault based liability

¹⁹³ *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990).

¹⁹⁴ *Air-Inter v. Sage Et A.I.*, Cour d'Appel de Lyon (France), Feb. 10, 1976; (1976) RFDA.

¹⁹⁵ *Chutter v. KLM Royal Dutch Airlines & Allied Aviation Services International Corporation*, US District Court, Southern District of New York, June 27, 1955, (1955) USAvR 250, (1956) JALC 232, *Avi*, Vol. 4, p. 177,733.

A. Accident

- Should be defined flexibly after assessing all the circumstances surrounding the injury of the passengers;
- Should be an event that is abnormal, unexpected or unusual; and
- Should be an event that is external to the passenger and not be an internal reaction of the passenger to the normal operations of the flight¹⁹⁶.

B. Causation

C. Injury

It has been disputed whether Article 17, providing liability for bodily injury, allows recovery for emotional distress. The following options are now available:

1. Disallow recovery for emotional distress¹⁹⁷
2. Disallow recovery of emotional distress if it is not accompanied by physical injury¹⁹⁸
3. Allow emotional distress as damages for bodily injury, including distress about the accident¹⁹⁹
4. Allow recovery only for emotional distress flowing from a bodily injury²⁰⁰

Despite numerous judgments on this point, the issue regarding recovery for emotional damages accompanied by bodily injury remains unsettled.

D. Recoverable damage?

The term 'person' under Article 1 MC99 should be read in the light of Article 1 *para* 2 MC99 which clarifies that there is need for a contract of carriage. In the *Air Baltic* case, the Court used the usage of the term 'person' rather than passenger to argue that also an employer can recover damages in case on of its

Requirements:

See difference between shipping and non-shipping incident.

Shipping incident has a meaning that is at first sight much more restricted (Article 3.5 PAL2002): "*shipping incident*" means shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship;

Dr. Gahlen identifies that the broad definition of 'defects of a ship' (*means any malfunction, failure or non-compliance with applicable safety regulations in respect of any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers; or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage, or damage control after flooding; or when used for the launching of life saving appliances*) may motivate passengers to (successfully) litigate claims not related to a maritime peril, such as slipping on board.

B. Causation

C. Injury

The concept of personal injury could give raise to similar questions concerning mental distress.

D. Recoverable damage?

Just like the Montreal Convention, PAL 2002 doesn't provide any restrictions to the recoverable

¹⁹⁶ *Air France v. Saks* (470 U.S. 392, 105 S.Ct.1338 (1985).) Aggravation of a pre-existing injury during the course of a routine and normal flight should not be considered an „accident“, see: 739 F.2d at 133. The flight attendant's failure to lend assistance van constitute such an event, see: *Olympic Airways v. Husain*, 541 U.S. 1007, 157 L. Ed. 2d 1146, 124 S. Ct. 1221 (2003).

¹⁹⁷ *Rosman v. Trans World Airlines* (1974) N.Y.A.Ct., 34 N.Y.2d 385, 314 N.E.2d 848, 358 N.Y.S.2d 97.

¹⁹⁸ *Eastern Airlines, Inc. v. Floyd* 499 U.S. 530 (1991).

¹⁹⁹ *Jack v. Trans World Airlines, Inc.*, 854 F. Supp. 654 (N.D.Cal. 1994).

²⁰⁰ M. Clarke, *Contracts of carriage by air*, London: Lloyd list 2nd ed. P. 85-90; In re *Air Crash at Little Rock, Arkansas*, on June 1, 1999 (*Lloyd v. American Airlines*).

B Death or Injury of a Passenger

employees is entitled to it.²⁰¹ Both the regulation and the convention apply only to passengers. The ECJ ruled that the MC99 also applies in case of carriage by air thus that a passenger can also be someone who is in a helicopter to perform labour for a third party.²⁰² Article 3 of the Athens Convention likewise doesn't restrict the states that the carrier shall be liable *"For the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident"*. If an identical interpretation is followed, also here employers could claim compensation for damage resulting from death or personal injury of a passenger. This could of course strongly impact the amount of compensation claimed for as *The Convention and Regulation 392/2009 don't restrict the recoverable damage.*

B Death or Injury of a Passenger

damage. Therefore similar questions could arise here.

The liability position of the sea passenger is disadvantageous compared to that of the air passenger. This is first and foremost true for non-shipping incidents, but also in case of shipping incidents the carrier has a much broader possibility to escape liability. Considering the ongoing debate on 'extraordinary circumstances' under regulation 261/2004 in case of delay, the phrase: 'natural phenomenon of an exceptional, inevitable and irresistible character' may need clarification at the same point to avoid similar discussions.²⁰³ Other terms that should be clarified are personal injury and the types of damage that are recoverable or fall under the regime.

²⁰¹ ECJ 17-02-2016, C-429/14 (Air Baltic Corporation v Lietuvos Respublikos specialiujų tyrimų tarnyba).

²⁰² ECJ C-6/14, 25 February 2015, Wucher Helicopter GmbH, Euro-Aviation Versicherungs AG v Fridolin Santer.

²⁰³ See on the issues associated with this exception for example the steer-davis-gleaves study of 2012.

Rights of passengers

a. Compensation	a. Compensation
<p><i>Calculation of damages</i> Pursuant to Article 29 MC99, it is prohibited to award 'punitive, exemplary and other non-compensatory' damage claims. This is for the benefit of the carrier that can bar any claim or a part of a claim that extends beyond this scope.</p> <p><i>Amount of compensation</i> A) dead or bodily injury Article 21 provides a 'two-tier system': Tier 1: 113.130 SDR Tier 2: above 113.150</p> <p>B) Luggage: Limit: 1.131 SDR</p> <p><i>Breaking through the limits:</i> If the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with (subjective) knowledge²⁰⁴ that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.</p>	<p><i>Calculation of damages</i> Article 3 (d) provides that 'loss' shall not include punitive or exemplary damages.</p> <p><i>Amount of compensation</i> A) dead or personal injury Shipping-incident: two-tier system Tier 1: 250.000 SDR Tier 2: 400.000 SDR Non-shipping incident: 400.000 SDR</p> <p>B) Luggage Pursuant to Article 8 the carrier may limit his liability for:</p> <ul style="list-style-type: none"> • the loss of or damage to cabin luggage to 2 250 SDR; • the loss of or damage to vehicles including all luggage carried in or on the vehicle to 12 700 SDR per vehicle, per carriage; • the loss of or damage to luggage other than that mentioned to 3 375 SDR per passenger, per carriage. <p><i>Breaking through the limits:</i> If the damage is caused by an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result, the carrier loses the right to invoke the limits (Article 13 PAL2002).</p> <p><i>Global limitation:</i> possibility to limit under the 1996 Protocol (Article 5.1 Regulation 392/2009).</p>

The limits for dead or bodily injury are much higher in case of air transportation than in case of transport by sea. The limits for luggage are higher in case of sea transportation. However regards is to be given to the fact that the size of luggage is not necessarily comparable in both types of transport.

²⁰⁴ *Bassam v. American Airlines* (5th Cir. (La.) July 14, 2008).

b. Advanced Payments	b. Advanced Payments
<p>Article 28 Montreal Convention- Advance payments</p> <p>In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons. Such advance payments shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier</p> <p>Regulation 2027/97 as amended by Regulation (EC) No 889/2002</p> <p>Article 5: The Community air carrier shall without delay, and in any event not later than fifteen days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered;</p> <p>2. Without prejudice to paragraph 1, an advance payment shall not be less than the equivalent in Euro of 16 000 SDRs per passenger in the event of death;</p> <p>3. An advance payment shall not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of Community air carrier liability, but is not returnable, except in the cases prescribed in Article 20 of the Montreal Convention or where the person who received the advance payment was not the person entitled to compensation.</p>	<p><i>Pursuant to Article 6 of Regulation 392/2009, a passenger may claim an advanced payment in case a shipping incident caused:</i></p> <ol style="list-style-type: none"> 1. Where the death of, or personal injury to, a passenger is caused by a shipping incident, the carrier who actually performed the whole or a part of the carriage when the shipping incident occurred shall make an advance payment sufficient to cover immediate economic needs on a basis proportionate to the damage suffered within 15 days of the identification of the person entitled to damages. In the event of the death, the payment shall not be less than EUR 21 000; 2. Recital (5) of the preamble reads 'It is appropriate to oblige the carrier to make an advance payment in the event of the death of or personal injury to a passenger, whereby advance payment does not constitute recognition of liability'.

The deadline for advanced payments is identical under both regimes. Under Regulation 392/2009 the sum in case of death is slightly higher (16000 SDR equals € 19860.97).

Mandatory insurance

Article 50 Montreal Convention—Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State Party into which it operates to furnish evidence that it maintains or adequate insurance covering its liability under this Convention.

Article 3 Regulation 2027/97 as amended by Regulation (EC) No 889/2002

The obligation of insurance set out in Article 7 of Regulation (EEC) No 2407/92 as far as it relates to liability for passengers shall be understood as requiring that a Community air carrier shall be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the **full amount** to which they are entitled in accordance with this Regulation.

Article 4(bus):

Article 4(bus).1: Compulsory insurance or other financial securities in case of vessels licensed to carry more than 12 passengers.

At least 250.000 SDR per passenger per distinct occasion.

Article 4(bus).10: Direct action against the insurer, up to this limit of 250.000 SDR.

Both regimes provide for mandatory insurance. In case of air transportation insurance must however ensure the full amount of compensation, while in case of maritime transportation only Tier 1 insurance is compulsory. Moreover the maritime carrier only needs to take up insurance in case of vessels licenced to carry more than 12 passengers, while there is no such rule in case of air transport. Beneficial for the sea passenger is however the fact that PAL 2002 provides for a direct action against the carrier.

ANNEX 6 QUESTIONNAIRE CASE STUDIES

1. What is your involvement in the marine accident [.....]?
2. How many passengers/victims' relatives did you assist (for passengers' lawyer)?
3. With how many passengers did you settle? (for carriers'/P&I lawyers)
4. Which were the reasons that led some claimants to not settle?
5. What was the amount of the compensation proposed offered?
6. Was it a lump sum?
7. Did it vary according to the losses suffered?
8. Which losses were compensated?
9. Did settlement offers cover damage to luggage and vehicles?
10. Did you invoke limitation of liability for claims arising out of the accident according to LLMC 1996 limits? (for carriers/P&I/insurers)
11. Which documents were you/passengers requested to submit in order to obtain compensation?
12. Did you assist any passenger with reduced mobility? How was loss of, or damage to, mobility equipment or other specific equipment compensated?
13. Did any of the passengers you assisted received/asked for an advance payment?
14. If applicable what was the reason for the refusal to grant an advance payment?
15. How long did it take to make an advance payment for death or personal injury to the relevant persons?
16. How did you identify the relevant persons entitled to an advance payment?
17. How much was the advance payment made?
18. How were the passengers informed about their rights prior to departure?
19. Was any other form of assistance available after the accident occurred?
20. How long did it take on average to settle a claim?
21. How are claims for injury resulting from an accident linked to war or terrorism acts dealt with in your jurisdiction?
22. Is there a fund that specifically compensates the victims of terrorist attacks in your Member State?
23. If yes, how does it work?

ANNEX 7 CASE STUDIES

This Annex presents the results of the case studies performed. Section 1 introduces the four case studies, after which the case studies are presented in more detail, i.e. the Norman Atlantic case study in Section 2; the City of Poros case study in Section 3; the Ogia case study in Section 4; and the Sorrento case study in Section 5.

Introduction

The aim of the case studies was two-fold:

1. To understand how the Regulation has impacted the compensation of passengers injured as a result of shipping incidents and other related accidents that have occurred; and
2. To gather input for replying to evaluation questions.

Four case studies were selected that represent the most common types of incidents covered under the scope of the Liability Regulation and the Athens Convention. The cases selected were each of a different nature, i.e. cases of accidents on board ships caused by different events. Moreover, shipping incidents and non-shipping incidents were included to illustrate whether cases involving a shift in the burden of proof (i.e. passenger to carrier) were being handled in a different manner.

Since no terrorist attack had been carried out against an EU flagged ship or ship travelling to/from EU ports in the period covered by this evaluation, our approach was to select a benchmark case as a case study, i.e. a terrorist attack involving a carrier that occurred prior to the Regulation entering into force. The analysis of this case study assessed whether and to what extent the victims of the terrorist attack were compensated, and how the victims and their relatives would have been compensated had the Regulation been applicable.

It is worth noting that:

- Three of the selected case studies occurred recently: two in 2015 and one in 2014;
- The accident investigations concerning two case studies are still pending;
- None of the claims related to the case studies have been the subject of a judicial decision;
- We could not identify a suitable marine accident that occurred in 2013 in terms of availability of information and the number of potential claimants;
- We are aware of one non-shipping incident that occurred in 2013²⁰⁵ that involved the Italian flagged ship Sorrento where a passenger died. However, since the case involved only one claim, we decided that this

²⁰⁵ See MARINE CASUALTY SAFETY INVESTIGATION REPORT 10/2013
<http://www.hbmci.gov.gr/js/investigation%20report/final/10-2013%20SORRENTO.pdf>.

case may not be suitable to provide a comprehensive picture of the application of the Regulation.

The selected four case studies are presented in the table below.

Table A7.1 Selected case studies

Case	Year	Ship Name	Incident	Location	Flag	Pax Injuries/Deaths
004/2015	2014	Norman Atlantic	Fire on board	Italy	Italy	> 11 deceased ²⁰⁶ 31 injured ≥ 700 lawsuits
675/2016	2015	Sorrento	Fire on board	Spain	Italy	Some claims of personal injury and some claims of damage to property
1119/2016	2015	Ogia	A wave crashed into the ship causing passengers to fall from their seats	France	France	16 injured
Benchmark case	1988	The City of Poros	Terrorist attack on board	Greece	Greece	11 deceased 100 injured

Source: Grimaldi Studio Legale.

Our case selection includes: two case studies on major fire incidents on board passenger vessels; a case study involving minor personal injuries that frequently occur on board passenger vessels; and a case study on a terrorist attack on a passenger ship.

The Norman Atlantic case involves the well-known incident of a fire on board the ship which resulted in numerous deaths, multiple injuries and more than 700 lawsuits. It is worth noting that the accident investigation report has not yet been published. Therefore, the official number of deaths and injured passengers has not been established. Moreover, the case has not yet been heard before a court and an investigation is ongoing before the Criminal Court of Bari (Proceeding number 20598/14 RG) and in Greece.

The Sorrento case concerns a shipping incident that occurred on 28 April 2015 on board the Ro-Ro/passenger ship Sorrento owned by the Grimaldi Group,

²⁰⁶ 11 is a figure provided by the European Commission. Based on our findings this number should be 24. This includes missing passengers. Our source are *the Ordinanza ammissiva di incidente probatorio* issued by the Court of Bari on 22 April 2015. We counted the relatives of passengers parties to the criminal proceeding concerning Norman Atlantic. In addition, we took into consideration information provided by the insurer of the charterer. It is also worth pointing out that pursuant to data included in an Italian report the accident caused at least 27 deaths. The report was updated as to February 2015: *RAPPORTO SUI SINISTRI MARITTIMI 2014*, available at http://www.mit.gov.it/mit/mop_all.php?p_id=23901. However, the report does not differentiate between passengers and members of the crew.

an Italian shipping company, and operated by Transmediterranea Acciona. The ship caught fire while sailing from Palma to Valencia, Spain with 152 passengers. Based on the information gathered, some claims for injuries and for damages to property have been filed.

In the accident concerning Ogia, many passengers fell from their seats due to heavy rolling caused by a big wave crashing into the ship. Based on the accident investigation report, 16 passengers were injured. This accident is interesting because the insurer handled the claims as shipping incident²⁰⁷ claims, despite the fact that the accident does not qualify as shipping incident under the Regulation.

In the City of Poros incident, three Palestinian gunmen stormed the vessel killing nine passengers. The passenger ship was returning from a daily island cruise in the Saronic Gulf²⁰⁸. The gunmen boarded the vessel at Aegina, Greece, its normal boarding point. After the ship had left port, the gunmen attacked using automatic weapons and hand grenades. In 2012, the case was heard before a French court.

Norman Atlantic Case study

Introduction: the facts

On Sunday, 28 December 2014²⁰⁹, a fire broke out in the garage of the ro-ro ship Norman Atlantic of Italian flag and registry. The ship was built in 2009, had a capacity of 850 passengers, and was performing the Patras-Igoumenitsa-Ancona trip. The ship was owned by the Italian shipping company Visemar Transporti SRL and was chartered by the Italian company Visemar di Navigazione SRL.

ANEK Lines ("ANEK") had sub-chartered the vessel from the Italian company Visemar di Navigazione SRL (the vessel's bareboat charterer), from December 2014. While information on the contract between ANEK and Visemar di Navigazione was not available, the information provided confirmed that ANEK issued the travel tickets. Thus it entered into the contract of carriage with the passengers in its own name²¹⁰.

The ship owner was insured with Gard while the sub-charterer was insured with West of England. It commenced the service between Greece and Italy on 14 December 2014. The charterer contract had a 12 month duration and the daily rate was 16,500 Euros²¹¹. The ship was chartered for the Ancona-Igoumenitsa-Patras route. It was in international waters 35 miles north of Corfu when the incident occurred.

²⁰⁷ See Ogia case study.

²⁰⁸ See City of Poros case study for an assessment of the classification of the ship under current EU law.

²⁰⁹ IMO: 9435466.

²¹⁰ Information provided by the International Group of P&I Clubs. Based on non-confirmed information the agreement between ANEK and Visemar was a time charter. Time charter is the hiring of a manned vessel for a specific period of time; the owner still manages the vessel but the charterer selects the ports and directs the vessel where to go. The charterer pays for all fuel the vessel consumes, port charges, commissions, and a daily hire to the owner of the vessel.

²¹¹ Source: <http://www.trasportoeuropa.it/index.php/home/archivio/14-marittimo/11925-norman-atlantic-era-un-pezzo-pregiato-della-flotta-ro-ro>.

After very lengthy coordinated operations of the Italian and Greek authorities, rescue efforts were made by means of air and sea. The majority of the ship's passengers and crew were saved.

Based on the information available in the press (but not confirmed by official passenger registration records), the ship was travelling with 422 passengers and 55 crew members²¹². 234 passengers were Greek and many of the remaining passengers were Turkish and Italian. In addition, the ferry was carrying 222 vehicles. In the accident, around 24 passengers died and at least 31 were injured.

Investigations

The safety and criminal investigations concerning the causes of the accident on board the Norman Atlantic are still open. However, since the accident was caused by a fire, the accident can qualify as a shipping incident under the Regulation.

A combined port state control and ro-pax inspection (in accordance with Directive 2009/16/EC²¹³ and the procedures of the Paris MoU²¹⁴ (an international organisation) and Directive 1999/35/EC²¹⁵) was carried out on the vessel on 19 December 2014 by the Greek authorities (as "port state" and "host state") in Patras harbour in Greece and identified six different deficiencies affecting the ship, including malfunctioning fire doors, missing emergency lights and equipment, faulty lifesaving devices and inadequate documentation²¹⁶. All of these deficiencies were considered by the inspector to be of a minor nature and were left for correction by the crew within 14 days in accordance with the port state control Directive.

The Italian *Ministero delle Infrastrutture e dei Trasporti, Direzione Generale per le Investigazioni Ferroviarie e Marittime* is still carrying out safety investigations in view of the submission of the safety report that will be included in the EMCIP database²¹⁷.

Based on information provided on 15 September 2016 by the investigation Unit of the Ministry of Transport (the *Direzione Generale per le Investigazioni Ferroviarie e Marittime*), the investigations are close to their conclusion and the marine casualty investigation report will be prepared shortly thereafter.

In addition, two criminal investigations are pending in connection with the accident.

²¹² <http://www.keptalkinggreece.com/2014/12/28/norman-atlantic-ablaze-dramatic-rescue-efforts-to-evacuate-478-passengers-crew/>.

²¹³ Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control.

²¹⁴ www.parismou.org.

²¹⁵ Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high speed passenger craft services.

²¹⁶ http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015_000687+0+DOC+XML+V0//EN&language=pl.

²¹⁷ The European Marine Casualty Information Platform (EMCIP) is a database and a data distribution system operated by EMSA. Member States notification of marine casualties and incidents, and reporting of data resulting from safety investigations in EMCIP, has been mandatory since 17 June 2011.

One is pending before the Criminal Court of Bari (Italy)²¹⁸. It is still in the evidentiary phase and the data of the VDR (Voyage Data Recorder or black box) has not yet been fully decrypted, according to information provided by one of the technical advisers in the criminal proceeding²¹⁹.

The Court of Bari opened criminal investigations against various individuals including: the representatives of the charterer and the sub-charterer (both natural persons), the charterer (Visemar di Navigazione) and the sub-charterer (ANEK Lines) (both legal persons).

The charges brought against the natural persons are for various criminal offences. Among them are manslaughter, abandonment of a ship in distress and shipwreck. The charterer and the sub-charterer are charged with administrative offences.

In April 2015, the Prosecutor ordered an inspection of the ferry to assess the functioning of the ship's systems and security measures, the causes of the fire and of its spread, and the management of the rescue operations. The first official site inspection on the Norman Atlantic was carried out on 12 June 2015 by the experts appointed by the Criminal Court of Bari and consultants of the parties in the dispute. The ship is currently moored in the Bari port.

The unloading of the vehicles on board was completed in April 2016²²⁰. The vehicles have been moved and stored in a warehouse to allow the owners and ANEK to assess the recoverability of the cars.

Another criminal investigation is pending in Greece²²¹. The crimes that the Greek prosecutor is investigating are the following: impairing the safety of maritime transport, and provocation of fire (arson) resulting in death and injuries.

From a criminal law standpoint, it is interesting to note that an accident such as the Norman Atlantic gives rise to interesting legal issues since at least two countries have jurisdiction over the crime allegedly committed by individuals involved in the accident and in both States, public prosecutors have an obligation to bring up charges against authors of criminal actions assuming that some conditions are met.

Italy has jurisdiction over the alleged crimes based on the flag of the ship²²² and on the nationality of the offender²²³ and of the nationality of the victims²²⁴.

Greece has jurisdiction based on the territoriality principle²²⁵, the nationality of the offender and the nationality of the victims.

²¹⁸ Proceeding No. 20598/14.

²¹⁹ Minutes from confidential interview .

²²⁰ <https://giustiziapernormanatlantic.wordpress.com/category/news/>.

²²¹ Information provided by lawyer Tsiridis at the 9th International Conference on Maritime Law: <http://www.imlc2016piraeus.gr/index.php/en/theconference/the-9th-international-conference.html>. No public information on this proceeding was found.

²²² Under this principle the flag State of the vessel can prosecute criminal offences that are committed on board, regardless of the nationality of the perpetrator.

²²³ Also called active personality principle: according to this principle a State has the power to prosecute its nationals for offenses committed abroad.

²²⁴ Also called passive personality principle. Under this principle a State can prosecute acts committed by a foreigner abroad against its nationals.

Against this background and in the absence of EU rules determining the prevailing criminal jurisdiction, the Italian and Greek proceedings are taking place in the two countries contemporaneously and concern the same individuals and the same facts²²⁶.

The above situation implies that from a legal standpoint it cannot be excluded that the two parallel criminal proceedings may have partially conflicting outcomes for the following reasons.

On the one hand, Article 50 of the Charter of Fundamental Rights in European Union foresees the *ne bis in idem* principle, i.e. the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Thus, the application of such principle should imply that once an irrevocable decision is issued from one State (Italy or Greece), the latter shall be considered as a supranational *res judicata* and therefore prosecution for the same acts (*idem factum*) will be inadmissible in all other courts.

On the other hand, the principle of *ne bis in idem* applies assuming that the same persons are convicted for the same facts. Thus, the extent to which this principle will prevent Greek and Italian courts from adopting conflicting decisions will depend on whether they will conclude that they are prosecuting the same facts²²⁷.

Furthermore, we believe that it is not to be excluded that the matter will be heard by the European Court of Justice, upon the request of one of the national Courts.

Handling of claims

Based on our analysis²²⁸, 66 alleged injured passengers and the relatives of 14 deceased or missing passengers have filed their claims in the criminal proceeding that is pending in Italy²²⁹. The claimants²³⁰ filed their claims in the criminal proceeding because, pursuant to Italian law, parties to a criminal proceeding may rely on the findings of the criminal proceeding in their

²²⁵ Under this principle a sovereign state can prosecute criminal offences that are committed within its borders. The principle also bars states from exercising jurisdiction beyond their borders, unless they have jurisdiction under other principles such as the principle of nationality, the passive personality principle, the protective principle, and possibly universal jurisdiction. According to the Greek Penal Code (Article 16) the place of commission of a crime is the place where the action took place, or where an omission that caused the event qualified as a crime took place, and the place where the results of an action materialize.

²²⁶ EU rules foresee a mechanism to avoid parallel criminal proceedings (COUNCIL FRAMEWORK DECISION 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings). However, the mechanism is aimed at improving the exchange of information between the competent authorities of different Member States and at facilitating the possibility to reach consensus about any effective solution aimed at avoiding the adverse consequences arising from such parallel proceedings. Thus the current framework does not prevent parallel criminal proceedings.

²²⁷ As regards the interpretation of "idem factum" (same facts) the case law of the European Court of Human Rights ("ECHR") in the case of *Sergey Zolotukhin v. Russia*, Judgment of 10 February 2009 ("ECHR Decision") indicates that in order to assess whether criminal proceedings are concerning the same facts one has to look at the concrete factual circumstances involving the same defendant and inextricably linked together in time and space, and not at the legal qualification of facts under prosecution. This is in line with the case law of the EU Court of Justice (Decisions *Van Esbroek*, Case C-436/04 of 09.03.2006; and *Kretzinger*, Case C-288/05, of 18.07.2007).

²²⁸ We had access to the so called "Ordinanza ammissiva di incidente probatorio", an order of the Bari criminal Court. A reading of such order allowed identifying the passengers and relatives of passengers who have not settled their claims with the insurer and have filed their claims in the criminal proceeding concerning the accident Norman Atlantic.

²²⁹ However, these figures are not official and are based on an analysis of documents of the criminal proceeding which is still pending and where many natural and legal persons filed their claims and not only passengers and their relatives. In addition, since other persons might still file their claims in the criminal proceeding the list is not final.

²³⁰ As explained by the lawyers of some claimants.

subsequent civil proceedings where the amount of losses suffered will be assessed²³¹.

This implies that many claimants may have to wait many years before being able to claim compensation before a civil law court, since a criminal proceeding may last years in Italy.

A second reason why the lawyers recommended for the passengers to not settle their claims (out of court) and to not start a civil proceeding pending the criminal proceeding relates to the amount of compensation they may seek under the Regulation. Under the Regulation, the liability of the carrier is capped at 250,000 units of account for the loss suffered as a result of death or personal injury to a passenger. However, such limit can be exceeded where the fault or negligence of the carrier is proven, i.e. where the carrier cannot prove that the incident was not due to its fault or neglect. In other words, if the carrier is found liable in the criminal proceeding, then the carrier will not be able to invoke the above limit. In addition, the findings of the criminal proceeding could also ease the burden of proof for claimants having suffered damage to property. The liability of the carrier for damage to property is essentially based on fault²³². Fault is presumed for non-cabin luggage and for cabin luggage in shipping incidents.

More importantly, the findings of a criminal proceeding could be used in a claim seeking compensation for the loss of life which is above the limits set in the Regulation pursuant to Article 13 of Annex I to the Regulation²³³²³⁴, i.e. above the 400,000 unit of account limit.

The discussions below detail the information gathered concerning out of court settlements. Such information concerning the handling of Norman Atlantic claims is not public information.

Advance payment

Pursuant to Article 6 of the Regulation, in the case of death of or personal injury to a passenger caused by a shipping incident, the carrier should grant an advance payment to the injured passenger or to the relatives of the deceased passengers to cover immediate economic needs. This payment should be done within 15 days of the identification of the person entitled to damages. Concerning advance payments, the analysis found that the practical application of such provision is problematic.

²³¹ First, being a party in the criminal proceeding will allow the claimant to rely on the findings of the criminal proceeding concerning the cause of damage, i.e. that the death or the injury was caused by the accident. Second, being a party to the proceeding allows the claimant to rely on the findings of the proceeding concerning the liability of the carrier and the crew and thus, that the accident was caused by the fault of the latter. Thus, being able to rely on the findings of the criminal proceeding will ease the burden of proof of the claimant in a civil law proceeding that the latter could start further to the conclusion of the criminal proceeding.

²³² Pursuant to the Regulation for the loss suffered as a result of the loss of or damage to cabin luggage, the carrier shall be liable if the incident which caused the loss was due to the fault or neglect of the carrier. The fault or neglect of the carrier shall be presumed for loss caused by a shipping incident. For the loss suffered as a result of the loss of or damage to luggage other than cabin luggage, the carrier shall be liable unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

²³³ The reference is to the provision "Loss of right to limit liability": "The carrier shall not be entitled to the benefit of the limits of liability prescribed in Articles 7 and 8 and Article 10(1), if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result".

²³⁴ Minutes from confidential interviews .

Based on information provided by the passengers, the passengers' lawyers and the carrier's lawyer, no advance payment was offered to passengers²³⁵. Most of the information available involved advance payments to relatives of deceased passengers.

The data gathered shows that most of the relatives of deceased/missing passengers received an advance payment, but that such payment was not made before April 2015 i.e. four months after the accident took place. The analysis identified that the main reason for the delay in payment was the uncertainty identifying the relatives entitled to the advance payment. The uncertainty was a result of disputes among relatives²³⁶ which made it difficult for the insurer to grant such payment pending any agreements among the relatives. However, this was a problem mostly relevant only to Italian passengers to the best of our knowledge.

The information also shows that the amount granted was far above the minimum 21,000 Euros per deceased passenger required by the Regulation. In some cases, the advanced payment reached 150,000 Euros. Conversely, the lawyer of Greek claimants did not identify any major obstacles to receive the advance payment. Rather, the advance payment was paid immediately after the request was submitted²³⁷.

Regarding injured passengers, our analysis was based on the information provided by some lawyers involved in the case.

Based on the information provided, we were able to gather that the advance payment was granted to a few injured passengers within 1 week of the request being made²³⁸. Notably, seven passengers sought advanced payments and all seven received the payment over a period of February-April 2015. One injured passenger was paid in January 2015. The average request for payment was approximately €7,000. However, we confirmed that the lawyers of other passengers who received minor injuries and settled did not request an advance payment²³⁹.

Based on our analysis, one reason why lawyers did not ask for advance payment is that there were few seriously injured passengers in the Norman Atlantic accident²⁴⁰. Another reason was due to the lack of awareness concerning the provision of Article 6 of the Regulation, as confirmed by the fact that this provision is not correctly interpreted by practitioners²⁴¹ and that most of the consulted stakeholders interpret the provision as requiring a request from the passenger, while the Regulation requires the carrier to provide such payment independently from a request.

²³⁵ Minutes from confidential interviews.

²³⁶ Minutes from confidential interviews

²³⁷ Minutes from confidential interview.

²³⁸ Minutes from confidential interview.

²³⁹ Minutes from confidential interview.

²⁴⁰ Minutes from confidential interview].

²⁴¹ Minutes from confidential interviews.

Out of court settlements

While no Norman Atlantic claim has been settled in court yet, based on information provided by the lawyers whom we interviewed, a substantial number of claims have been settled out of court.²⁴²

Our analysis found that the number of claims filed in relation to the accident was 730. Out of those, one law firm settled 303 claims and another law firm settled around 100 claims. Thus, around 400 claims have been settled²⁴³.

Personal injuries including psychological injury

Concerning settlement offers, we were informed that Norman Atlantic's insurer combined a general approach and case-by-case approach to determine the amount of compensation for personal injuries²⁴⁴.

The insurer and its lawyers fixed a standard amount for each passenger but were ready to modify the offer in light of the details of each case. All passengers who were on board and claimed compensation for psychological damages were offered €30,000 on the basis that these persons had a similar or identical experience, namely that they were found in the water and rescued by boats. That offer could be raised by approximately 5,000 Euros if the passenger could prove additional damages.

Our research could not gather extensive information concerning the approach followed in connection with the compensation of physical injuries such as burns, since few passengers were seriously injured in the accident.

Based on the information provided by an Italian passengers' lawyer, none of the injured passengers whom the lawyer assisted settled their claims because an agreement on the amount of compensation could not be reached²⁴⁵.

In conclusion, the approach to determine the amount of damages for personal injuries was on a case by case basis which was based on the evidence submitted by the claimant concerning the gravity of his or her injury, i.e. a medical report²⁴⁶.

Loss of life

Information concerning compensation for loss of life shows that out of the 23 claims²⁴⁷ filed, only 5 were formally settled. However, formal settlements for 2 more claims are pending as an agreement has been reached.

The agreed amount of compensation for each loss of life averaged above 500,000 Euros²⁴⁸. The lower amount was granted to the elder relatives of a deceased passenger who did not have any children or a spouse. The amount awarded was partially based on the deceased's obligation to provide support for the claimants and on the number of the relatives who were financially dependent on the deceased passenger.

²⁴² Information provided in confidential interview.

²⁴³ Minutes from confidential interview.

²⁴⁴ Minutes from confidential interview.

²⁴⁵ Minutes from confidential interviews.

²⁴⁶ Minutes from confidential interview.

²⁴⁷ A further claim has been submitted in relation to the death of an unticketed passenger.

²⁴⁸ Confidential source of information.

No settlements were reached before October 2015. Most of them occurred in 2016, which is over one year after the accident took place. For the remaining claims, the reasons for not settling are in general due to the fact that the insurer and relatives could not reach an agreement on the amount of the compensation, as relatives were asking for an amount higher than the Regulation limit, i.e. higher than 400,000 units of accounts.

Another obstacle in reaching a settlement is the fact that claims are often filed by separate groups of relatives, typically the spouse and the children, and also the brothers and sisters of the deceased passenger²⁴⁹.

Disputes among such relatives concerning the distribution among claimants have led to delays and continue to hinder the conclusion of settlement agreements between the insurer and the claimants. This problem concerns mostly Italian passengers and has been identified by the interviewed Italian lawyers as a major difficulty in the handling of claims for loss of life.

Another obstacle to the settlement of claims for loss of life is that there are minors/persons among the claimants who are legally unable to conclude an agreement. This implies that the person (typically a parent) who has custody of a legally incapable individual needs to obtain the authorization from the competent judicial authority to reach an agreement with the insurer²⁵⁰.

Damage to property

Concerning compensation for damages to vehicles or to luggage, there is conflicting information regarding the approach followed by the insurer to compute the compensation of vehicles.

Some lawyers noted that the insurers suspended the quantification of such damages pending the unloading of the Norman Atlantic that occurred in April 2016²⁵¹ I²⁵².

However, other sources stated that the unloading of the ship did not affect the timing of the settlement negotiations since passenger cars were stowed on either deck 5 (upper weather deck) of the ship or deck 2 (closed lower deck)²⁵³. They also stated that compensation was offered based on the market value of the vehicles at the end of December 2014. The amount of compensation was up to the limit provided in the Regulation for vehicles. It was also noted that compensation offers were made to owners of "undamaged cars" on the ground that the smoke affected the cars.

We were not provided with data on the number of concluded settlement agreements concerning claims for loss of vehicles. It is noted that the main reason why settlement agreements concerning damage/loss of vehicles were

²⁴⁹ The legal reason for this uncertainty is that in case of death claimants are compensated not only *jure hereditario* but *jure proprio*. Thus the amount of the compensation to which every claimant is entitled is not determined by succession law but by a case by case analysis.

²⁵⁰ Minutes from confidential interview.

²⁵¹ Minutes from confidential interview.

²⁵² Minutes from confidential interviews

²⁵³ Such sources refer that it was known from soon after the incident that nearly all the cars on deck 5 were completely destroyed, and that in early March 2015 the Italian Authorities produced a list of "undamaged" cars in deck No.2.

not concluded was because the insurer made a comprehensive settlement offer combining claims for personal injuries and claims for damage to property.

Since the accuracy of such information could not be verified, we conclude that claims for damage to vehicles were not settled because an agreement could not be made on the amount of damage²⁵⁴.

Concerning damages to mobility equipment, it is noted that no claims for loss of such equipment were filed.

Damage to luggage

Based on the information provided by stakeholders, settlement agreements have included damage to luggage. Claims concerning luggage ranged from hundreds of Euros to up to several thousands of Euros. Most were around the limitation figure of SDR 2,250.

The average settlement was around 2,500 Euros based on supporting documents.

Damage to trucks and cargo

In addition to passengers' vehicles, the vessel was carrying trucks that contained cargo and their drivers. It is referred that in the Norman Atlantic case, the carrier did not issue a bill of lading for the cargo, but cargo was carried under a simple "receipt of carriage" provided by Anek specifying the main particulars of the trucks.

Publicly available information demonstrate that ANEK initially offered compensation for the trucks, but the offered amount was not sufficient to replace the damaged vehicles according to some truck owners.

Thus, for example, several truck owner members of OFAE (Federation of Greek truckers) have not settled with the company and are seeking compensation in court²⁵⁵. Instead, some truck owners assisted by a Greek lawyer who provided information on a confidential basis settled their claims with the insurer for an amount that was around 70% of what they had originally sought. This amount included compensation for the lost truck as well as for the cargo that it was carrying. Settlements were reached within ten months from the occurrence of the accident.

It is worth pointing out that the physical and material damages suffered by truck owners in the Norman Atlantic accident gives rise to interesting legal issues which have not been addressed in court, since there is no case law concerning Norman Atlantic.

However, some practitioners involved in the case have analysed the relevant legal framework in order to substantiate the claims of their clients with the insurer and have come to the conclusion that it is not controversial that the physical damage suffered by the truck owners/drivers who were on board Norman Atlantic falls under the scope of the Regulation/Athens Convention.

²⁵⁴ Minutes from confidential interview.

²⁵⁵ <http://www.ekathimerini.com/204631/article/ekathimerini/news/questions-still-hang-over-norman-atlantic-disaster>

It is also not controversial that the damage to/loss of the trucks falls into the scope of the above legal instruments.

Instead, the damage to/loss of the cargo contained in trucks carried on the Norman Atlantic should be compensated under Greek law on the contract of carriage of goods (Greek Code of Private Maritime Law – L.3816/1958) to the extent that the cargo were not carried based on the issuance of a bill of lading by the carrier²⁵⁶.

Finally, it is worth pointing out that the situation of truck drivers in the aftermath of the accident was made more complex by the fact that they were still obliged to pay their social security fees despite not being able to work²⁵⁷.

Evidence

Based on the gathered information, the victims/relatives were required to produce different kinds of evidence for settlement negotiations depending on the damage claimed.

Passengers claiming the standard psychological damage needed to prove that they were on board the Norman Atlantic to receive a settlement offer. For example, passengers were required to submit their passenger ticket as evidence that they were on board. However, our analysis found that the claimant's name on a list detailing the rescued passengers, the deceased passengers and the missing passengers drafted by the competent authorities was sufficient²⁵⁸.

Passengers claiming bodily injury or additional emotional damage had to submit a medical report which would substantiate their claim.

Passengers claiming compensation for the lost vehicles had to submit the vehicle's insurance contract along with a certification that the insurers had not paid or did not intend to pay any compensation for the loss of the vehicle to the passenger due to the loss.

For leased cars, the lessor was required to be involved in settlement negotiations²⁵⁹.

Passengers who claimed damage to luggage had to submit a list of items in the luggage²⁶⁰.

Relatives of deceased passengers had to submit a Family Status Certificate or any other certificate proving their status as relatives of the deceased passengers.

²⁵⁶ Damage to cargo can be compensated under The Hague-Visby Rules. However, the application of the Hague-Visby Rules is conditioned on the fact that the carrier issues a bill of lading. As anticipated, this was not the case for the cargo carried by the Norman Atlantic. Against this background, one lawyer of truck owners has concluded that the liability of the carrier for damage to cargo carried by Norman Atlantic cannot be compensated under international rules and notably The Hague-Visby Rules, but under Greek rules. The courts which will deal with Norman Atlantic claims will have a final say on the liability rules applicable to the carriage of cargo. Under Greek Law, the liability of the carrier is a fault presumed liability and the Greek laws provide limitation of liability and time bar provisions which in certain cases are different than the ones provided in the Hague-Visby Rules.

²⁵⁷ Information provided to the press by Apostolos Kenanidis, head of the OFAE (Federation of Greek truckers).

²⁵⁸ Minutes from confidential interview.

²⁵⁹ Minutes from confidential interview.

²⁶⁰ Minutes from confidential interview.

Information to passengers

We did not gather evidence supporting that Norman Atlantic passengers were informed of their rights under the Regulation before or after the accident²⁶¹.

A Norman Atlantic passenger and the lawyers assisting passengers stated that no information on passengers' rights²⁶² was provided on board the ship. The lawyers stated that their clients were not aware of what their rights were.

We have tried to discuss this issue with the further involved stakeholders but the latter were not available for an interview. Furthermore no stakeholder could provide the ticket bought by passengers.

In addition, our discussions with Italian authorities show that there are no specific regulatory tools in place enabling the monitoring of compliance with the obligation to provide information to passengers of their rights under the Regulation.

Our conclusion in this regard is that there is no evidence that Norman Atlantic passengers received information on their rights pursuant to the Regulation prior to its departure..

However, since none of the stakeholders consulted could/was in a position to provide the ticket of the trip or other supporting evidence, there is no conclusive evidence that such information was not provided, at least on the ticket.

Counterfactual

In order to assess the added value of the Regulation, we compared the legislative framework in Italy concerning the liability of carriers before the Regulation's entry into force. Italy was the country of the flag of the ship, of destination of the voyage²⁶³, of the domicile and residence of many passengers²⁶⁴ and where the carrier has a place of business.

According to Italian law, applicable to domestic and international voyages before 2013, the liability of the carrier concerning personal injuries and death was based on fault but there was a rebuttable presumption of fault. Italian law did not require a limit for the liability of the carrier for personal injuries or death.

It did, however, require a limit on damage to property (Article 423 Transport Code). The liability limit for vehicles was 103,29 Euros or a greater amount if the value was declared by the passenger when the vehicle was boarded onto

²⁶¹ Minutes from confidential interviews].

²⁶² Minutes from confidential interview.

²⁶³ Indeed the Norman Atlantic was carrying passengers from Igoumenitsa and Ancona.

²⁶⁴ See rules on jurisdiction pursuant to the Athens Convention as amended by Pal 2002 and as applicable to the NA accident further to the accession of the EU to the Pal 2002 (2012/23/EU: Council Decision of 12 December 2011 concerning the accession of the European Union to the Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974, as regards Articles 10 and 11 thereof OJ L 8, 12.1.2012, pages 13–16).

the ship. This limit would not apply where the claimant could prove the intent or gross negligence of the carrier in causing the accident. The law did not require any limit to liability for damage to cabin luggage. However, a claimant seeking compensation for the damage to cabin luggage was required to prove the fault of the carrier.

As to non-cabin luggage, the carrier was liable for fault and fault was presumed. The limit to liability was calculated based on the number of kilograms of the luggage multiplied per 300 Italian liras (i.e. around 1 Euro and fifty cents) or based on the value declared by the passenger when he provided the luggage to the carrier. Finally, under Italian law, carriers were not required to be insured but compulsory insurance was required for ships which provided a direct action against the insurer of the ship.

Italian law did not require the obligation of the carrier to grant an advance payment in the case of a shipping incident, or specific provisions on compensation of mobility equipment.

There were no provisions in Italy and in Greece requiring the carrier to provide information to passengers concerning their right to compensation for the losses arising from incidents that occurred in the course of the carriage.

Against this background, a comparison of the legal framework in Italy before 2013 and after the Regulation's entry into force shows that the passengers' rights have increased and that Norman Atlantic passengers have more protection under the Regulation than under Italian law.

One of the main improvements is that the carrier will not be able to exclude its liability by proving that the shipping incident was not caused by its own fault. Should the carrier be still able to escape liability, this would have weakened the passengers' positions in settlement negotiations with the insurer.

As explained above, the criminal proceeding concerning Norman Atlantic will likely last years. After the end of the criminal proceeding, the claimants will still have to bring the case before civil courts. Thus, passengers would have to wait years before obtaining the sought compensation.

A second improvement is the fact that the Regulation requires the carrier to provide an advance payment in the case of shipping incidents. The granting of such payment has been delayed in some cases due to disputes among the relatives of deceased passengers. Nonetheless, the Regulation has provided a needed form of assistance to passengers and relatives of deceased passengers. As seen, in some cases the amount of such payment was far above the minimum sum required by the Regulation.

The protection of passengers with reduced mobility has also been improved by the Regulation. However, the implementation of such provision in the case Norman Atlantic could not be assessed due to the lack of claims from passengers with reduced mobility. However, it should be pointed out that pursuant to Italian law there were no provisions on such compensation for

such equipment. In addition, the liability of the carrier for objects not delivered to the carrier was based on fault and such fault was not presumed²⁶⁵. On the other hand the fault is presumed in case of shipping incidents under the Regulation.

Finally, the Regulation improves the rights of passengers to the extent that it provides an obligation on the carrier to provide information on their right to passengers, at the latest before departure. Indeed such obligation was not required under Italian law²⁶⁶ before 2013. However, at this stage, the improvement is purely legal since our case study shows that there is no evidence that this provision has been implemented based on the Norman Atlantic case.

The Regulation's entry into force affects the position of passengers in Italy to the extent that it requires a limitation of liability in the case of personal injury and death which applies even in the case of the fault of the carrier and thus was a factor in settlement negotiations among passengers and the insurer of the carrier. Indeed settlement offers for claims concerning loss of life have been made within the liability limit required in the Regulation, and this limit does not provide for full compensation of the relatives of passengers based on the actual damage suffered. This limit was not required under Italian law.

In addition, to compare the added value of the Regulation, we have compared the outcome of the Norman Atlantic case with its likely outcome under Pal 2002.

With the accession of the EU to Pal 2002 and its entry into force in April 2014, the provisions of the Athens Convention as amended by Pal 2002 apply to international voyages²⁶⁷ in the EU. Thus, from a theoretical standpoint, the Norman Atlantic accident would have fallen under the scope of Pal 2002 had the Regulation not been in place. Taking into consideration the legal implications of the accession of the EU to Pal 2002, we assessed whether the application of the Regulation in the Norman Atlantic case strengthened the protections granted to passengers compared to under Pal 2002. In this respect, we note that the regime of liability provided in the Regulation is similar to the one established under Pal 2002. Thus the liability would not have changed in Norman Atlantic had Pal 2002 applied.

The main differences between the Regulation and Pal 2002 concern the right to an advance payment, the right to compensation for loss/damage to mobility equipment and the carrier's obligation to provide passengers with information on their rights.

Against this background, our conclusion regarding the added value of the Regulation is that passengers are better protected under the Regulation than

²⁶⁵ Thus, the passenger would have to prove the fault of the carrier to seek compensation for mobility equipment or other specific equipment.

²⁶⁶ Greek law did not foresee such obligation as well (see above).

²⁶⁷ Assuming that the ship is flying the flag or is registered in a State party to the Convention, or the contract of carriage has been made in a State party to the Convention, or the place or of destination is in a State party to the Convention.

would be the case if Pal 2002 applied, primarily because passengers and relatives of deceased passengers are able to obtain an advance payment by the insurer under the Regulation but not under Pal 2002.

Conclusive remarks

The provisions of the Regulation enhance the protection of passengers compared to the Pal 2002 and the national legislation of Italy.

The effectiveness of the Regulation in ensuring an adequate protection of passengers has been affected to some extent by a lack of understanding of some of its provisions among the involved stakeholders and by a lack of implementing measures at the national level that ensure a proper enforcement of some of the rules of the Regulation that impose concrete obligations on the involved operators.

City of Poros Case study

Introduction: the facts

The City of Poros was a Greek cruise ship that made day-cruises for Cycladic Cruises to Hydra, Aegina and Poros from Flisvos Marina, a port in the Athens suburbs. The ship was roughly 200 feet (60 m) long, and ran the regular 16 mile (26 km) trip between the two harbours every day, with a carrying capacity of 500 passengers.

On this voyage, the City of Poros ship would keep a distance of 5 miles from the coast and of less than 15 miles from a place of refuge. In addition, the strength of the wind and wave height during such voyage make unlikely the probability of exceeding 2,5 metres significant wave height.

On 11 July 1988 at 18:45 the ship was attacked by three armed gunmen. On that day, it was carrying 471 passengers. 220 of them were French. The three gunmen boarded the ship at Aegina, and then waited until the ship was three miles into its journey before they began their attack. Using concealed automatic weapons and hand grenades, they opened fire on their fellow passengers. Some of the latter passengers jumped overboard, and some died because they became caught in the ship's propellers.

Shortly after the attack began, the three gunmen were picked up by their accomplices on a speedboat that pulled up alongside the City of Poros before disappearing.

The rescue operation was carried out by those that were not hurt on board the ship and by other ships that arrived shortly after the distress signal. Many of the passengers in the water were rescued by these other ships and taken to shore, where emergency services were waiting to transport them to hospitals. The final toll was nine killed and around 50 injured, many of which were seriously injured. Mostly tourists were killed, including three ²⁶⁸ from France, one from Denmark, one from Sweden, one from Hungary, and two

²⁶⁸ The French deceased passengers were: Laurent VIGNERON, Isabelle BISMUTH and Annie AUDEJEAN.

from Greece. The French victims were 2 students and a 21-year-old secretary. 28 of the injured passengers were French.

The attack on the City of Poros was preceded by a large car bomb explosion in Piraeus earlier in the day at the pier that the ship usually berths at. Due to the isolated location of the pier and the lack of tourists waiting on it (as the ship was at sea), the only fatalities were the two occupants of the vehicle, both of whom were killed instantly.

There were suggestions that the bomb's intended target was the ship, but there was no evidence to prove this. It was also suggested that the attack on the ship was the "Plan B" after the failed car bomb. On 13 July 1988 the Fatah terrorist organization claimed responsibility for the act.

Investigations

The investigations that followed the accident were led by the French and Greek authorities. Greek investigators originally suspected that a French passenger was involved in the accident. Since the beginning of the investigations four men were the suspected terrorists. On 7 September, a French judge sent a letter rogatory to Greece, and on 30 October French investigators went to Greece.

Both the Athens Police and the Piraeus Police involved in the investigations cooperated with the French authorities. However, the cooperation was difficult²⁶⁹. The French authorities took the lead in the investigations. Sweden and Bulgaria were also involved in the investigations.

The weapons used in the attack were of Libyan origin, and at least one of the assailants entered Greece on a Libyan passport. It was suggested that one of the reasons of the attack was to pressure the Greek government into releasing some terrorists from jail²⁷⁰.

We did not have access to the Greek police files concerning this case²⁷¹, but based on the gathered information, no list of passengers was available on the ship and no sufficient controls had been carried out by the ship's staff²⁷². To the best of our knowledge, no criminal or civil proceedings concerning the case were opened in Greece²⁷³ further to the attack.

In February 2012, France brought three of the terrorists to trial in absentia. The three men were: Adnan Sojod who was charged with voluntary homicide, Samir Khaidir and Abdul Hamid Amoud who were both charged with

²⁶⁹ Pleading of the French Avocat Général Olivier Bray, hearing of 1 March 2012, criminal proceeding concerning the case City of Poros.

²⁷⁰ <http://www.higginsctc.org/patternsofglobalterrorism/1988pogt.pdf>. A case had been running in the Greek courts concerning the known ANO member Muhammed Rashid, who was fighting extradition to the United States for terrorist activities. The Greek justice Minister later arranged for his release and transport to Libya, which was at this time engaged in a terrorist campaign against Western Europe and the USA as part of their revenge for Operation El Dorado Canyon.

²⁷¹ Based on the information provided informally by the French Judge who heard the criminal case in France in 2012 the Greek file included at least pictures of the accident.

²⁷² The information is provided on the webpage <http://cityofporos.fenvac.org/>. The page reports the pleading of the French Avocat général Olivier Bray.

²⁷³ It is worth pointing out that pursuant to French criminal law a criminal proceeding cannot be opened in France if for the same fact a criminal proceeding has been opened in another State (*ne bis in idem principle*).

attempted voluntary homicide linked to a terrorist enterprise. In addition, the latter two men were convicted of "aiding and abetting". Around sixty French victims filed their claims in the proceeding. Many French passengers did not file their claims.

Handling of claims

At the outset, we note that based on our research, we were unable to conclude that City of Poros passengers were compensated pursuant to the civil liability rules that governed the liability of the carriers for passengers in Greece at the time of the attack. The legal grounds for such conclusion are explained below. The factual grounds for such conclusions are based on the information provided by the consulted stakeholders. Also, our desk research did not identify any reference to any judicial proceedings opened in Greece further to the attack.

In addition, our analysis found that no action has been brought against the carrier in France, a country from which many passengers were citizens of.

Instead, our information concerning the outcome of compensation claims were based on information provided by French stakeholders and on the documents of the criminal proceeding that took place in France in 2012 concerning the City of Poros case.

Based on information provided by stakeholders and confirmed by desk research, many French passengers did not claim compensation immediately after the attack but claimed compensation only in 2012, after the criminal proceeding concerning the terrorist attack was opened in France.

In addition, none of the French passengers sought or obtained compensation from the carrier²⁷⁴.

On 1 March 2012, a French Court, the COUR D'ASSISES DE PARIS, issued a decision concerning the right to compensation for the French victims of the attack who had filed their claims in the criminal proceeding concerning the case.

The claimants were French passengers who under criminal law are qualified as victims of the attempted murder.

This decision condemns the authors of the crime, the above listed Adnan Sojod, Samir Khaidir and Abdul Hamid Amoud to compensate the claimants.

The amount of the compensation varied depending on the damage claimed. The compensations awarded to passengers and relatives of deceased passengers are described below.

²⁷⁴ Minutes case study interview Françoise Rudetzki. Ms Rudetzki handled the claims of French passengers on behalf of the FGTI. She refers that the French victims referred that they did not obtain any compensation before addressing the FGTI. In addition, a reading of the French decision of 1 March 2012 shows that reference is only made to the compensation received by French victims from the FGTI. No reference is made in such decision to the fact that claimants had received compensation from other stakeholders than the FGTI.

The Criminal court awarded to each claimant:

- an amount varying from 10,000 to 30,000 Euros for serious moral damage;
- an amount of 5,000 Euros for the so called "exceptional permanent loss". The exceptional permanent loss is a non-economic loss that is not defined in the French "nomenclature Dintilhac", a list elaborated by the French judiciary that identifies and defines the categories of losses that victims of personal injuries may suffer;
- an amount of 10,320 Euros for permanent disability and of 3,420 for temporary disability;
- an amount of 1,500 Euros for the so called esthetic loss;
- an amount of 2,000 Euros for the so called "loss of wellbeing", i.e. loss related to the fact that the claimant has lost the ability to practice the activities that he usually carried out before the event causing the personal injury occurred.

In addition, the court awarded a payment varying from 600 to 3,000 Euros under Article 375 of the French Criminal procedure code. This Article enables a criminal court to condemn the author of a crime to reimburse the party who filed a civil claim in a criminal proceeding for the costs incurred to the extent that such costs have not been paid by the State.

That said, since the authors of the crime were tried in absentia, the compensation awarded in the above decision was not paid to claimants.

However, French passengers have been compensated under French law protecting victims of terrorism and notably by Le Fonds de garantie des victimes des actes de terrorisme et d'autres infractions (FGTI)²⁷⁵ in the 1990s²⁷⁶ and after the end of the above criminal proceeding in 2012.

²⁷⁵ The FGTI was set up by a law of September 9th 1986 and applies to all acts of terrorism committed after December 31st 1984. The Fund, financed by national solidarity contributions, compensates the victims of terrorist acts and the families of the people killed in these attacks. It does not cover the material damage caused.

It provides compensation to victims of acts of terrorism perpetrated in France (all victims or their beneficiaries, regardless of their nationality and their administrative status in France) and to all French victims or their beneficiaries for acts of terrorism perpetrated abroad. In addition, the Fund provides full compensation for harm caused to the victims in the event of injury or for the families in the event of death. Compensation is offered to victims independently of judicial proceedings. The victims keep their rights according to criminal proceedings and can bring an action against terrorists. The Guaranty Fund manages the files directly and the compensation is not subject to tax. The victims have 10 years to apply for compensation from the Fund. However, in 2012 the law governing the fund was amended and pursuant to Article 9 of the law of September 9th 1986, as amended, the victims of acts of terrorism can seek compensation within one year after a criminal decision concerning the relevant case has been issued.

We have been informed by a representative of the Association S.O.S. Attentats that this amendment of French law was made in order to allow the victims of the attack City of Poros to ask compensation as many of them had not sought compensation before 2012. From a procedural standpoint, whenever an act of terrorism is committed in France, the FGTI is informed of the identity of the victims by the District Prosecutor. If the terrorist attack occurred abroad, the Guaranty Fund is informed of the identity of the victims by the Ministry of Foreign Affairs. People who consider themselves as victims of terrorism can apply directly to the FGTI.

Victims or their beneficiaries must send their claims for compensation to the Guaranty Fund by certified mail.

The claim must include a letter stating: the person's first and last name, nationality, marital status, address and occupation, the date and place of the attack; or the date of the hostage-taking and liberation; all the information about the state health insurance records (number, center, address, applicable plan); whether the incident is an occupational accident and, if so, the employer's name and address; the amount of any benefits received from state health insurance (daily benefits or a disability pension) and insurance companies; a photocopy of the passport, resident's permit, French ID card, or family record book; a police report or witness' account; the initial medical certificates, hospital reports and sick leave certificates; proof of loss of wages and earnings; photocopies of all bills (personal attendant, childcare, transportation, etc.); documentary proof of all losses suffered and the person's bank account details (IBAN code).

Publicly available information show that a French passenger was granted the amount of 10,000 French francs by the FGTI on 9 August 1988, and the amount of 50,000 French francs on 18 October ²⁷⁷. In addition, our research found that around 20 additional passengers were granted compensation by the FGTI shortly after the accident²⁷⁸.

The relatives of all the deceased French victims were compensated by the FGTI shortly after the accident. Such compensation was granted to the parents and siblings of the victims²⁷⁹. The compensation received by relatives from the FGTI included non-economic losses, i.e. the so called moral damage but not the economic loss since all the deceased passengers were young and did not have an obligation to provide for any of their relatives²⁸⁰. However, we did not get information concerning the exact amount of the payment they received.

As anticipated, many passengers sought compensation from the FGTI after the conclusion of the above French criminal proceeding concerning the City of Poros. From a legal standpoint, the decision of 1 March 2012 is not binding on the FGTI. Thus the handling of the subsequent claims submitted by passengers was not affected by the above decision. This implies that the FGTI was not bound to grant each claimant the respective amount of the compensation awarded by the French court in such decision²⁸¹.

Advance payment

Further to Article 9 of French law of 9 September 1986, the FGTI must grant an advance payment to victims of acts of terrorism within one month of receiving the claim. Additional advance payments may be made according to the person's medical situation. As mentioned above, our research showed that at least one passenger received an advance payment in August 1988, i.e. one month after the attack was carried out.

Out of court settlements

To the best of our knowledge neither the carrier nor its insurer compensated passengers and their relatives for loss of life or personal injuries. Settlements were concluded between the FGTI and the French claimants (see section above).

Evidence

Based on the gathered information and on a reading of the French decision of 1 March 2012, the victims were required to produce a medical report, in order

The Fund is directly in charge of the files. It makes an offer within three months after the victims or their beneficiaries submit proof of loss. If the victims do not agree with the Fund's offer they can file a civil claim, and can then appeal the court's decision. Payments can be made as a lump-sum; an annuity or a combination of both.

²⁷⁶ Information provided informally by the FÉDÉRATION NATIONALE DES VICTIMES D'ATTENTATS ET D'ACCIDENTS COLLECTIFS.

²⁷⁷ This information is available in the French decision of 1 March 2012.

²⁷⁸ Reference to such payment is made in the French decision of 1 March 2012.

²⁷⁹ None on the French City of Poros victims had children.

²⁸⁰ Minutes case study interview Françoise Rudetzki.

²⁸¹ Information provided by the legal expert of the FÉDÉRATION NATIONALE DES VICTIMES D'ATTENTATS ET D'ACCIDENTS COLLECTIFS. The latter was not available for an interview but kindly accepted to provide information.

to substantiate their claim for physical loss in the criminal proceeding concerning the City of Poros.

On the other hand, pursuant to French law, in order for victims to obtain compensation from the FGTI, they must provide: evidence that they were in the place where the terrorist took place, all the information about the state health insurance records (number, centre, address, applicable plan); the amount of any benefits received from state health insurance (daily benefits or a disability pension) and insurance companies; a photocopy of the passport, resident's permit, French ID card, or family record book; a police report or witness' account; the initial medical certificates, hospital reports and sick leave certificates; proof of loss of wages and earnings; photocopies of all bills (personal attendant, childcare, transportation, etc.); and documentation to prove all losses suffered.

Information to passengers

Not applicable.

Counterfactual

To assess the Regulation's added value, we compared the actual outcome of the City of Poros case with the virtual outcome of such case had the Regulation been applicable. We carried out such comparison in three scenarios.

In the first scenario, we compared the actual outcome to the virtual outcome of the case, taking into consideration the City of Poros' classification today. In the second scenario, we assessed the Regulation's impact assuming that the City of Poros was a Class A ship and the accident occurred after 31 December 2012 and before 31 December 2016. In the third scenario, we assumed that the attack took place after 31 December 2016, i.e. the date as from which the Regulation applied in Greece to Class A ships involved in domestic voyages.

In assessing the actual outcome of the case, we took into account the relevant legislation applicable at the time of the accident, in order to fill in any information gaps concerning the handling of passengers' claims versus the carrier and its insurer²⁸².

An analysis of Greek legislation in force at the time and applicable to ships involved in domestic voyages, provides the conclusion that based on Greek law, passengers were not entitled to compensation from a maritime carrier in the case of a terrorist attack, unless the claimant could prove that the carrier had committed a very serious security breach and the breach had allowed the terrorist attack.

Pursuant to Greek law at the time of the attack, maritime carriers were neither required to keep a list of passengers nor required to check the luggage of passengers.

²⁸² Indeed due to the time elapsed it was impossible to identify the insurer of the ship and to interview the carrier. In addition, there is no legal literature on this case shedding light on the outcome of possible passengers' claims to which the accident gave rise nor hard sources such as Greek judicial decisions on the case.

Thus, we believe that passengers had no grounds to seek compensation from the carrier under Greek law in connection with the City of Poros case. In addition, pursuant to Greek law applicable to ships engaged in domestic voyages, passengers were not entitled to an advance payment and the carrier was not required to be insured. As a consequence, passengers did not have a direct claim against the insurer of the carrier and/or the ship.

Greek law did not require carriers to inform the passengers of their rights nor any specific rules concerning the compensation for loss/damage to mobility equipment. Moreover, it did not foresee a general mechanism to compensate victims of terrorism before 2009.

Scenario No. 1

The City of Poros would likely be classified as a Class C ship under Directive 2009/45/EC²⁸³. Thus, the City of Poros would likely fall out of the scope of the Regulation since Greece did not decide to apply the Regulation to Class C and D ships. Therefore, the Regulation would not impact the outcome of the case since Greek law would still apply.

Scenario No. 2

In scenario 2, to assess the possible added value of the Regulation, we assumed that the City of Poros was not a Class C ship but a Class A ship that was carrying a voyage of more than 20 nautical miles.

Since the Regulation applies in Greece to Class A ships as of December 2016 and Class B ships as of December 2018, the Regulation's application would not affect the outcome in the City of Poros case if the attack occurred after 2013.

Scenario No. 3

The Regulation would however impact the outcome of the City of Poros case if the attack had occurred after 31 December 2016 and the City of Poros was a Class A ship. Under the Regulation, for non-shipping incidents, the carrier is liable if he is at fault. The claimant has the burden of proof to establish the carrier's fault. It follows that the Regulation does not affect the basis for the carrier's liability. Concerning the possibility to prove the fault of the carrier, we note that a list of passengers was missing in the City of Poros case.

For instance, as of 1999, further to Directive 98/41²⁸⁴, the ship operator has an obligation to keep a registry of passengers on passenger ships departing from an EU port on a voyage of more than 20 nautical miles. It follows that from a theoretical standpoint, a claimant could successfully argue that the carrier committed a serious breach of security and thus allowed a terrorist attack. Consequently he could seek compensation from the carrier.

²⁸³ It is worth pointing out that in 1988 there were not EU harmonized standards and classification for passenger ships and craft operating domestic services and that the first Directive harmonizing such standards was Council Directive 98/18/EC of 17 March 1998 on safety rules and standards for passenger ships.

²⁸⁴ Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community.

The Regulation's application to the City of Poros case would imply that the ship would be insured for terrorist attack risks and that the passengers would have a direct claim against the insurer. They would not be entitled to advance payment. Thus, the application of the Regulation to the City of Poros case could have facilitated the negotiations of all the passengers with the insurer of the carrier and likely allowed them to get compensation without delay. The amount of the compensation for personal injuries and loss of life would be capped under the Regulation. The Regulation would also have facilitated the specific position of French passengers in the City of Poros case to the extent that they had suffered damage to property. However, the Regulation would not have improved the situation of French passengers in connection with their personal injuries and loss of life as French law requires full compensation of losses for personal injuries or death.

Conclusive remarks

The City of Poros case study shows that the protection of passengers in terroristic attacks on board domestic Class C and D ships remains uneven across the EU. The Regulation has not substantially improved the position of passengers of ships engaged in international voyages and will not substantially improve the position of passengers of Class A and B ships in the future, to the extent that the fault of the carrier would still need to be proven by the claimant.

On the other hand, the fact that the passengers (in international and in some domestic voyages) will have the possibility to directly address the insurer might facilitate the handling of their claims and speed up the compensation process.

Ogia Case study

Introduction: the facts

The Ogia accident occurred on 1 May 2015 on board the French passenger ship Ogia. The accident occurred close to the Île d'Yeu.

16 passengers were injured in the accident²⁸⁵. The ship has the capacity to carry 309 passengers and it does not carry vehicles. The ship is classified as a category 3 ship under the French law of 23 November 1987, i.e. it is authorized to travel up to 60 miles from the coast. This law was in force when the ship Ogia was built in 2003.

Based on the information provided by the French Bureau d'enquêtes sur les événements de mer²⁸⁶ the ship is a Class B ship under Directive 2009/45/EC²⁸⁷.

In France, the Regulation applied since 2013 to domestic voyages for Class A and B ships. Thus the accident that occurred on board the Ogia falls within the scope of the Regulation.

²⁸⁵ Based on the findings of the "*Rapport d'enquête simplifié*" drafted by the French Bureau d'enquêtes sur les événements de mer" and published in September 2015.

²⁸⁶ Which is part of the French Ministère de l'Écologie, du Développement durable et de l'Énergie.

²⁸⁷ Email of 6 July 2016.

Ogia is a ship which belongs to the Compagnie Vendéenne, a company belonging to the company Croisières. It is operated primarily for connections between Saint-Gilles-Croix-de-Vie and Île d'Yeu (60 minute crossing). On 1 May 2015 at 08:30, 220 passengers boarded in Saint-Gilles-Croix-de-Vie. The number of passengers boarded was deliberately limited by the captain by taking into account the number of available seats.

There was a group of 50 people belonging to an association of retired persons who reached the pier by coach. Based on the captain of the ship, the group was informed about the conditions at sea. The carrier noted that the driver of the coach was offered to change the trip but he did not accept. The group embarked while other passengers were already on board.

At 9:00, the Ogia was ready to set sail with 220 passengers to Port-Joinville (Ile Yeu). The safety instructions were broadcast on TV screens placed in the living room and in the upper deck of the ship. The captain made an announcement to passengers to inform them of the precautions to take during the trip in the light of the conditions at sea. Based on what referred by the passengers to the BEAmer, they did not understand the content of the announcement.

At around 9:40, 4.2 miles from the Pointe Crows (Ile d'Yeu), two waves (higher than 3 meters) raised the vessel which then fell heavily. Due to the shock, several passengers were ejected from their seats and 16 of them were injured. The chief engineer informed the captain of the accident and asked him to reduce the speed. The speed was then reduced to 13 knots.

At 9:53, the captain made a request for assistance to SDIS 85 (which alerted the CROSS Etel).

The crew took care of the injured. At 10:05, the Ogia was sheltered by the island and the speed was increased up to 20 knots in order to arrive to Port-Joinville faster.

At 10:08, the 85 CODIS alerted by the CROSS organized the arrival of the wounded.

At 10:15 the Ogia docked in Port-Joinville. The crew grouped the injured passengers in the same area. At 10:19, firefighters were on board. At 12:00, firefighters disembark the last of the injured. At 24:17, five of them were transported via helicopter to the mainland; others injured were brought to the hospital of Ile d'Yeu. Most of the injured passengers were brought back to the continent by the evening boat. As anticipated 16 injured passengers were injured. The injuries included bruises, mouth injuries, and sprains.

Two passengers, a 35 year old father and his son, were sitting in the front of the upper deck. The father suffered injuries that produced a temporary total disability for one week.

Nine passengers were sitting in the front of the main deck. One of them was still hospitalized four weeks after the incident. Four passengers sitting in the middle of the main deck were injured.

The accident did not cause any damage to luggage or other passengers' belongings.

Investigations

The main conclusions of the safety report drafted by the *Bureau d'enquêtes sur les évènements de mer* is that had the speed of the ship been limited to 12 knots, the trip would have been more comfortable and this would have reduced the risk for passengers to be ejected from their seats. It was noted that at 12 knots, the arrival time would have been delayed about 20 minutes.

The report also concluded:

1. The use of benches in the front of the main dock increases the risk of injury when a ship rolls or pitches;
2. It would be beneficial to have seats with a system that would allow passengers to maintain their position while a ship rolls or pitches;
3. Chairs located where the platform movements are not as strong could be offered to the most vulnerable passengers.

Handling of claims

Based on the information gathered²⁸⁸, one year after the Ogia accident occurred, the insurer received claims by six injured passengers. Ten passengers who were slightly injured did not file any claim.

The accident did not cause any damage to the property of the passengers such as luggage.

The company also received claims by the social security organisations and the insurers of some passengers that were hospitalized to the extent that such organisations had anticipated the medical costs borne by some of the passengers. However, no further details were provided in this respect.

Our analysis also found that passengers' claims were treated by the insurer as claims related to a shipping incident, despite the fact that the accident that occurred on board the Ogia does not qualify as shipping incident under the Regulation.

The Ogia accident consisted of the raising of the vessel and its fall which caused passengers to fall from their seats. This cannot be qualified as a shipping incident since this notion includes shipwrecks, capsizing, collisions or stranding of the ship, explosions or fires in the ship, or a defect in the ship.

This opinion is shared by the French Ministry of Transport.

²⁸⁸ Minutes from confidential interview

The reason why the Ogia has been treated as a shipping incident is that the definition of shipping incident under French law is broader than the one of the Regulation, as it includes "every major incident involving the ship".

Under French law, the qualification of an accident as a shipping incident presumes the carrier is at fault. However, there have not been measures that have clarified that the definition of a shipping incident in the Regulation is different from the one of the French Transport Code, and that operators should not use the definition of the French Transport Code to assess whether and to what extent the Regulation applies.

Thus, it occurs that practitioners qualify a shipping incident under the Regulation as an accident that would qualify as a shipping incident under French law but that would not qualify as shipping incident under the Regulation. In this respect, we note that the European Court of Justice and/or French judges could interpret the notion of shipping incident under the Regulation as encompassing any accident involving the whole ship and not only individual passengers. However, pending a judicial decision we conclude that the accident occurred on the ship Ogia is not a shipping incident.

Advance payment

Based on the consulted stakeholders, three passengers were awarded an advance payment.

It was also noted that the reason why the insurer granted the advance payment was a commercial one, i.e. the company did not want to initiate a dispute on the advance payment with the passengers. Thus, the insurer did not assess whether the passengers were entitled to an advance payment under EU law. In our opinion, the insurer granted such a payment partially because it qualified the accident as a shipping incident.

Out of court settlements

To the best of our knowledge, no Ogia claim has been settled in court.

Based on information provided by the insurer of the ship, six passengers filed compensation claims.

Personal injuries

No Ogia passenger has been compensated yet for personal injuries other than the medical costs incurred. Three passengers were compensated for the cost of medical fees and their case was closed.

The claims submitted by the other three passengers have not been settled yet. Such passengers were hospitalized and have undergone thorough medical inspections aimed at assessing the physical damage suffered.

The medical report of one passenger was finalized in 2015. The medical assessments concerning the other two passengers will take place in October 2016. The latter three passengers have not yet quantified their claims.

Loss of life

The accident did not cause any loss of life. Therefore no claim for such damage was filed.

Damage to property

The accident did not cause any damage to property. Therefore no claim for such damage was filed.

Evidence

Based on the gathered information, the victims were required to produce a medical report in order to substantiate their claim.

Information to passengers

The stakeholders' consultation did not provide evidence that passengers were informed of their rights under the Regulation before their departure.

On the contrary, based on the information gathered, passengers submitting claims in their personal capacity are in general not aware of their rights under the Regulation. Rather, professionals (i.e. the so called providers of legal protection insurance) who submitted claims on behalf of passengers tended to file claims in order to enforce the passengers' rights.

While this information does not prove that information was not provided by the carrier, such information indicates that there is a knowledge gap among passengers such that the implementation of the Regulation has likely not yet filled in. This is also confirmed by the fact that only six injured passengers out of 16 filed compensation claims. In addition, the analysis found that France has not adopted specific rules aimed at verifying how carriers inform passengers on their rights under the Regulation.

Against this background, the analysis concluded that while there is no conclusive evidence that the carrier provided information to the passengers concerning their rights under the Regulation.

Counterfactual

From a legal standpoint, the Ogia accident is a non-shipping incident under the Liability Regulation. Since the accident occurred in a domestic voyage on a Class B ship, the liability of the carrier would fall under the scope of French legislation had the Regulation not been applicable. Indeed Pal 2002 does not apply to domestic voyages.

Under French law, the accident would qualify as a shipping incident to the extent that it involved more passengers and the event causing the accident involved the whole ship²⁸⁹. Had French law been applied to the Ogia accident, the carrier would have been liable only to the extent that it could not prove that there was no negligence or fault of its own.

²⁸⁹ Article L5420-1 to L5421-12 of the Transport Code.

Pursuant to French law, damages to persons were limited pursuant to Article 7 of the Convention on Limitation of Liability for Maritime Claims, 1976 to the amount of 175,000 Units of Account (around 210,000 Euros). No limits could be invoked in case the damage was the consequence of intentional, reckless conduct.

The law limited the liability to 1,140 Euros per passenger for cabin luggage, 460 Euros per passenger for personal effects and non-registered cabin luggage, and 4,600 Euros for both the passengers' vehicles and the luggage it may contain. There were no limits for valuable objects given to the personnel of the ship to hold for the passenger.

Concerning insurance matters, French law did not foresee an insurance obligation specific to the carrier, but Directive 2009/20 applies to ships of more than 300 GT and pursuant to such Directive, ships have to be insured. This insurance obligation covers standard civil liability insurance for the operator of the ship.

In addition, the law did not require that the passengers have a direct action against the insurer of the ship. To the contrary, the insurance policies of ships required that the insured operator had to compensate the claimant and that afterward he could be reimbursed by the insurer.

French law did not require an obligation to grant an advance payment, specific rules on the compensation of the mobility equipment and on the provision of information to passengers.

Since the Ogia case has not been settled in Court, it is not possible to assess whether the carrier will be held liable for fault. Based on the findings of our analysis, the carrier had informed passengers of the strong weather conditions advising them to stay inside the ship and reduced the number of passengers before departure, in order to ensure that all passengers would fit into the ship. However, a French judge could find that the carrier's staff could have handled the situation in a way that would prevent the occurrence of the accident, i.e. could have reduced the speed of the ship.

In this context, the fact that French law requires a presumption of fault of the carrier for damages to persons implies that the insurer/the carrier would have been likely to try to settle the case out of court had French law been applicable. Thus under French law, a passenger would have likely been compensated by the carrier or his insurer, at least in out of court settlements.

Under the Regulation in a case such as Ogia, the carrier would be liable only to the extent that the claimant could prove the fault of the carrier. Thus a correct application of the Regulation would have made it more difficult for the passenger to obtain compensation than under the previously applicable French rules.

However, since the insurer treated the accident as a shipping incident, the application of the Regulation has strongly impacted and could further impact

the handling of the compensation claims in the OGIA case. Indeed, treating Ogia as a shipping incident implies that the carrier's liability is classified by the insurer as strict, and that the carrier can only be exempted from liability if he proves that the accident was caused by force majeure or an action of a third party.

Thus, to the extent that the insurer has treated the Ogia case as a shipping incident, the legal position of passengers is better protected under the Regulation than under French law.

In addition, the insurer has granted passengers an advance payment. Such payment was not required under French law neither in the case of shipping incidents nor in the case of non-shipping incidents.

Thus to the extent that passengers were compensated before a settlement agreement was reached and for the medical costs incurred, it can be concluded that they were better protected under the Regulation than under French law.

Concerning damage to property, since property was not damaged in the Ogia case, the analysis could not identify any impact of the application of the Regulation on compensation of damage to property including mobility equipment or to other property.

The entry into force of the Regulation has improved the protection of passengers in France to the extent that the liability limits for both damages to person and property have been increased.

However, based on the information received, no impact can be observed in the Ogia case because the accident did not cause any damage to property and secondly because so far passengers have not filed claims above the liability limit foreseen by French law.

Finally, as observed, French law did not require the carrier to inform the passenger of their right to compensation. From a purely legal standpoint, the Regulation has improved the protection of passengers by providing for such obligation.

However, the case study could not gather evidence that passengers had been informed before departure of their rights under the Regulation. Thus, such improvement appears to still be theoretical.

Conclusive remarks

The Ogia case demonstrates that the application of the Regulation has substantially strengthened the position of passengers to the extent that the more favourable provisions of the Regulation concerning shipping incidents have been applied.

The case also shows that had the Regulation been strictly applied, the position of injured passengers would have been to some extent less favourable under the Regulation than under French law.

The case also shows that that insurers are willing to settle claims and do not question the nature of the accident to the extent that the claims are modest.

Finally, the case also showed that passengers might not be well informed of their rights since six out of sixteen injured passengers filed compensation claims with the insurer.

Sorrento Case study

Introduction: the facts

Sorrento²⁹⁰ was a ro-pax ferry which was built in 2003 as Eurostar Valencia. The ferry was renamed Sorrento in 2006. It was owned by the Grimaldi Group. On March 2014 it was chartered to Atlantica di Navigazione and operated by Acciona Trasmediterránea on the Palma de Mallorca Valencia route (289,3 km). Acciona Trasmediterránea was carrying passengers in its own name, i.e. it issued the carriage tickets²⁹¹.

It had the capacity to carry 1,000 passengers and 160 vehicles.

On 28 April 2015, Sorrento caught fire during a voyage from Palma de Mallorca to Valencia. It caught fire off Mallorca, Spain. It was carrying around 156 passengers in addition to 7 cars, 100 lorries, 4 small lorries and a motorbike.

The ship was 15 nautical miles (27 km) off Mallorca when the fire was discovered on one of the car decks. An emergency was declared and a number of vessels went to its assistance including the ferries Publia and Visemar One. Publia rescued most of the 156 passengers and crew. However, four crew members were injured and were taken by helicopter to a hospital in Palma de Mallorca. Some passengers suffered minor injuries but the exact number is unknown. The passengers were from Spain, Romania, China, Colombia, Ecuador, Senegal, Argentina, Albania, Australia, Bulgaria and Algeria²⁹²,

Based on provisional information available on the Spanish *Ministerio de Fomento* website, the accident did not cause any deaths or injuries. No passengers are missing.

In the aftermath of the accident, the carrier provided assistance²⁹³ to the passengers by providing accommodation in a hotel and for transport services carrying passengers home.

Investigations

The case is being investigated by Italian and Spanish authorities, notably by the Direzione Generale per le Investigazioni Ferroviarie e Marittime within the

²⁹⁰ IMO number: 9264312.

²⁹¹ Minutes from confidential interview.

²⁹² <http://www.menorcadiario.es/el-sorrento-llevaba-a-bordo-pasajeros-de-12-nacionalidades-diferentes>.

²⁹³ <http://www.elmundo.es/baleares/2015/04/29/5540eb7e22601d353e8b4574.ht>.

Italian Ministry for Transport and the Spanish Comisión Permanente de Investigación de Accidentes e Incidentes Marítimos (CIAIM).

Italian authorities are heading the investigation. Both authorities refused to provide any details on the case, including the number of passengers injured. Based on information found in the press in May 2015, investigations were delayed due to difficulties related to the ability to gain access to the ship's hold. The causes of the fire are still under investigation. However, it appears that the fire started in a lorry that was on board the vessel.

It seems that a criminal investigation has been opened concerning the accident²⁹⁴.

Handling of claims

Based on the information gathered²⁹⁵, some claims for personal injuries and many claims for damage to property were submitted in connection to the incident.

. No complaints have been submitted by passengers in Spain concerning alleged infringements of their rights under the Regulation. However the Spanish Ministerio De Fomento received one complaint by a German passenger concerning the reimbursement of the price of his ticket²⁹⁶. No judicial decision concerning the case was issued. Nevertheless, some passengers have filed their claims in judicial proceedings²⁹⁷.

The ship owner that the latter did not receive any claims from passengers.

Advance payment

No advance payment has been granted in connection with the shipping incident.

It is referred as well that none of the passengers sought an advance payment²⁹⁸.

Out of court settlements

Personal injuries

Two claims for personal injuries have been settled with the carrier's insurer. No further information was provided.

Based on available information, the personal injuries were not serious.

Loss of life

The incident did not cause any deaths. Therefore no claims for loss of life have been filed.

Damage to property

Some claims for damage to property have been filed but none of them have been settled. There is no detailed information concerning the objects of the claims or the reasons why they have not yet been settled. However, we were informed that the claims concern both damage to luggage and vehicles.

No claims concerning mobility equipment were filed²⁹⁹.

²⁹⁴ Minutes from confidential interview.

²⁹⁵ Minutes from confidential interview.

²⁹⁶ Minutes interview- Gerardo Aynos Maza, *Jefe de Área de Tráfico y Seguridad de la Navegación*.

²⁹⁷ Minutes from confidential interview.

²⁹⁸ Confidential source of information.

Evidence

The stakeholders' consultation did not allow gathering information concerning the evidence that passengers had to provide in filing their claims with the insurer.

As explained, only two claims were settled.

Information to passengers

No information was provided by the consulted stakeholders. Thus the stakeholder consultation did not allow gathering evidence supporting that passengers were informed of their rights under the Regulation before departure..

Counterfactual

In order to assess the added value of the Regulation, we compared the legislative framework concerning the liability of carriers applicable to Class A ships on domestic voyages before and after the Regulation's entry into force in Spain.

According to Spanish law applicable to domestic and international voyages³⁰⁰, the carrier's liability was based on fault. For domestic voyages, the carrier's liability was covered by the rules on the contract of carriage. Such rules foresaw liability based on fault, but fault was not presumed. Rather, the passenger had the burden of proof to establish fault.

It has been noted that maritime accidents have often led to criminal proceedings. Thus, passengers have been involved in the criminal proceedings and have sought compensation under tort law. They have brought carriers to court based on the infringement of their obligation to protect them. It was also noted that it was easier for passengers to seek compensation under tort law than under contractual liability rules³⁰¹.

Regarding insurance, prior to 2013, carriers were required to provide insurance covering damages in the case of an accident. Thus, passengers would have a direct action against an insurer because they would have insurance coverage included as part of their travel ticket.

This insurance would oblige the insurer to pay compensation to the injured passenger. The carrier was the policy holder and paid a premium to the insurer which was included in the price of the ticket. This insurance did not cover the liability of the carrier but the mere fact that an accident occurred on board that caused injury or damages. Passengers were the beneficiaries of the insurance contract. In the case of death, the spouse and children and other

²⁹⁹ Confidential source of information.

³⁰⁰ Spain had ratified the Athens Convention 1974.

³⁰¹ See Minutes interview Hernández Gutiérrez José Francisco (Spanish *Ministerio de Fomento*).

family members were the beneficiaries according to the order of precedence provided for in Article 22 of royal decree 1575/1989.

For domestic voyages the applicable limits to liability were the ones of the LLMC 1996. The losses for personal injuries compensated under Spanish law are economic damages (medical expenses plus days of work lost) and moral damage. Spanish law did not foresee any obligation to grant an advance payment for shipping incidents. It did not provide an obligation for the carrier to provide information to passengers.

Against this background, the application of the Regulation to the Sorrento accident substantially improved the protection of passengers. Under Sorrento the carrier's liability is strict while under Spanish law it is based on fault. Thus, the claimant would need to prove the fault of the carrier. Compensation was eventually obtained by the passengers or their relatives, but this was based on an insurance contract for which the passenger had to pay an additional fee.

In addition, from a theoretical standpoint, the passenger has more protections under the Regulation because they are entitled to an advance payment and because they are better informed.

However, as seen, no advance payment has been granted in the case at hand and not enough information was provided to conclude that passengers were informed of their rights before departure. Thus these improvements remain theoretical.

Conclusive remarks

The provisions of the Regulation enhance the protection of passengers compared to the Spanish legislation which would have been otherwise applicable to the Sorrento case.

The possibility to assess the effectiveness of the Regulation in ensuring adequate protection of passengers is affected to some extent by the fact that only few settlement agreements have been reached between the insurer of the carrier and the passengers and no advance payments were granted.

ANNEX 8 INTERVIEW SCRIPT

This document serves as a checklist for the interviewer both in preparation of and during the interview.

Background of the evaluation

Regulation 392/2009 has been adopted as part of the third maritime safety legislative package. This Regulation lays down rules for the establishment and organisation of a strict liability regime for carriers of passengers by sea, coupled with a mandatory insurance obligation for the carrier, and a right of direct recourse of the passenger against the carrier's insurer. This regime is in fact established in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, and is reproduced in Annex 1 of the Regulation. **Objectives of the regulation** are:

- To ensure that passenger rights are protected in the event of accidents;
- To create a level playing field for operators promoting best practices and responsible behaviour;
- To incentivise increased safety and security performance of passenger transport operators;
- To assist in setting up and complementing a balanced framework of passenger rights protection also regarding the right to information, special compensation for reduced mobility passengers and the right to an advance payment.

Interview preparation

- When approaching stakeholders for an interview, the team will first communicate the context of the evaluation by sending the interviewee guidance note and the EC Letter of Support in advance of the interview. In this document, the interviewee is also made aware of the confidentiality clause our consortium applies with information being treated anonymously and in an aggregated manner.

The targeted interviews consist one of the major information collection blocks for this evaluation. They provide the opportunity to discuss in depth with the stakeholders on the impacts Regulation 392/2009 has had to their organisation and the maritime passenger transport sector overall and compared to the exploratory interviews they are meant to be oriented towards covering the data needs to address the evaluation questions.

The interviews are meant to be conducted in a semi-structured approach, following below headings (order not mandatory, but all items would need to be addressed) to ensure that it provides inputs for answering the entire ex post evaluation questions. During the interview we should make sure that the relevant topics are addressed, and elaborated in depth, depending on the stakeholder's capacity and knowledge of the topic.

Topics of discussion

The interview should provide input to all the key evaluation questions, including their underlying questions as also formulated in the evaluation framework:

Context

Identity of the stakeholder (name, position, organisation, role in relation to the Regulation).

Start with open question (ice-breaker).

What is your general experience with the application of the Regulation:

- In terms of meeting the Regulation's requirements;
- In terms of applying the Regulation in relation to specific accidents incidents.

(let the interviewee elaborate and make useful statements those can be taken as a basis for further in-depth questions related to the evaluation questions hereafter)

Relevance:

- (1) To what extent are the problems that were defined at the time of developing this Regulation (passenger rights; level playing field and passenger safety) and the objectives that were formulated accordingly still relevant today?

Please explore this for the objectives: enhanced passenger rights; improved level playing field for operators and increased passenger safety. The question can also be approached as: if the Regulation would be developed today would it then still try to tackle the same problems and define similar objectives?

- (2) Have there been developments (for example in policy, legal or technological fields) since the introduction of the Regulation that affect the way the Regulation is implemented?

- (3) To what extent is the current scope of application of the Regulation (i.e. international and classes A and B of domestic carriage) adequate for the attainment of the objectives?

Please check if the Regulation can reach its objectives (enhanced passenger rights; improved level playing field for operators and increased passenger safety) by covering ONLY international carriage and domestic Class A and B carriage.

If feasible, bring into the discussion the pros and cons of bringing in C and D classes of domestic carriage into the scope of the Regulation.

Effectiveness:

- (3+4) To what extent have the objectives of the Regulation been achieved?

Please check with the interviewees where relevant, their opinion on the impact of the Regulation on (accounting where possible for the specifics in brackets):

- **Passenger right been better protected** (developments in: level of advanced payments, level of compensations, time to payment, protection of luggage and vehicles, provision of information);
- **Levelling the playing field** (impact on insurance premiums for vessels of different classes, significance of no-war risk liability for 3rd country vessels, exception in the domestic market: i) deferred application to classes A and B, ii) exception of classes C and D, iii) application on HSC, iv) application on non-steel vessels);
- **Increasing safety and security performance** (actions undertaken to improve safety and security performance, contribution of Regulation to increasing safety standards, impact of vessel safety standards to insurance premiums);
- **Setting up and complementing a balanced framework of passenger rights protection** (impact on number and type of complaints received, settlement of cases outside courts).

Especially for countries applying the Regulation beyond classes A and B (i.e. classes C and D, HSC, non-steel vessels), has the application scope contributed to increased objectives achievement.

Especially for stakeholders that operate/are relevant for more than one Member State it is important to enquire their view on uneven application of the Regulation in different Member States.

(5) Has the Regulation led to any positive or negative unexpected effects?
Asking initially in an open way, then try to obtain the interviewees opinion on Regulation impact on:

- attainability of insurance premiums;
- passenger fares;
- administrative burden to comply with the Regulation;
- other...

Additionally please enquire for any issues arising from the application of the Regulation (i.e. delays in advanced payment attribution due to delays in identification of entitled relatives).

Efficiency:

(6) Do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?

- Impact in insurance premiums:
 - for non-war Blue Card and war risk insurance;
 - passenger fares (ask for figures or other indications if possible);
 - and impact on the market (passengers/carriers).

Depending on the stakeholder perspective (ship owner, insurer or government), the stakeholder may have different views. Please explore in the discussion what s/he thinks and why ideally get quantitative figures but if not,

then a qualitative judgment. Important is to get an impression of the changes compared to the situation before the Regulation entered into force. So how much have costs changed?

- Administrative and enforcement burden for authorities (FTE);
- Mainly for governments (how much staff time/other costs for a) issuing certificates/registration and b) monitoring/enforcement and c) related to specific accidents (if applicable).
- Compliance cost, administrative fees and workload hassle (costs and FTE at a company or vessel level);
- Mainly for ship owners (how much staff time/other costs related to complying with the Regulation).

Coherence:

(7) To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability? Whether there are any overlaps, gaps or inconsistencies?

Please try to separate between the different themes in this question; i.e. explore the coherence

- between the Regulation and the EU maritime safety policy;
- between the passenger right protection scheme in Regulation and other modes of transport (besides air, also rail and buses/coaches), e.g. in terms level of compensation, burden of proof;
- between the operators' liability regimes in the Regulation compared to the regimes in other modes.

(8) Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014)?

Please explore the coherence between the Regulation and the White paper of transport, e.g. contribution to transport of persons with reduced mobility/elderly people, develop uniform interpretation of EU passenger law, assemble common principles of transport law (e.g. right to be informed).

Please explore the coherence between the Regulation and the ten EU priority policy goals. (Please note, if interviewees indicates they do not know the answer, this is also a finding).

EU added value:

- (9) What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?

Please elaborate on applicability of Regulation to domestic shipping, advance payments, right to be informed on rights, passengers reduced mobility and the introduction of Athens 2002 and see what in the opinion of the interview is a value added and why.

Complementarity:

(10) To what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

- National and other legislation relevant to liability the stakeholder has to comply and how this works in combination with the Regulation;
- Application of the Regulation in the broader policy context (passenger rights protection, EU transport policy, international and national liability regimes, Protocol to the Athens Convention).

Do you see any other effects/developments as a result of the Regulation?

Final notes, comments, suggestions.

Who else should we consult?

(organisation, name, and main reason why that person would be valuable to speak to).

After the interview

Make detailed minutes of the interview in writing, send these in draft to the interviewee for comments/approval, and then revise as appropriate. Then share with the other consortium partners.

ANNEX 9 BACKGROUND NOTE FOR INTERVIEWEES

Background of the study

Regulation 392/2009 has been adopted as part of the third maritime safety legislative package. This Regulation lays down rules for the establishment and organisation of a strict liability regime for carriers of passengers by sea, coupled with a mandatory insurance obligation for the carrier, and a right of direct recourse of the passenger against the carrier's insurer. This regime is in fact established in the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, and is reproduced in Annex 1 of the Regulation. Objectives of the regulation are:

- To ensure that passenger rights are protected in the event of accidents;
- To create a level playing field for operators promoting best practices and responsible behaviour;
- To incentivise increased safety and security performance of passenger transport operators;
- To assist in setting up and complementing a balanced framework of passenger rights protection also regarding the right to information, special compensation for reduced mobility passengers and the right to an advance payment.

The European Commission has initiated the ex-post evaluation of Regulation 392/2009 on the Liability of Carriers of Passengers by Sea in the Event of Accidents and has contracted the consortium of Ecorys (leading partner), Grimaldi and Erasmus School of Law (ESL) for this task. The evaluation will provide the Commission with an independent evidence-based assessment of the application of Regulation 392/2009 in the first three years since it became applicable, 2013-2015. This evaluation shall also provide input to the Commission to, as per Article 1 (3), if appropriate, present a legislative proposal in order, *inter alia*, to extend the scope of this Regulation to ships of Classes C and D under Article 4 of Directive 98/18/EC.

Objective and approach of the interview

Through the interviews we aim to engage with practitioners and stakeholders regarding the liability of passenger carriers by sea. The key objective is to identify what has been the outcome of 3 years of implementation, in retrospect. To this purpose, we would like to go through your experience dealing with the provisions of the Regulation to discuss the effects it has had on your organisation and maritime passenger transport. Items for the interview include:

- The development of the sector relevant to the objectives of the Regulation;
- Impacts of the Regulation to the maritime transport sector and your organisation (passenger rights, vessel safety, vessel insurance premiums, passenger fares, claim procedures, etc.);
- Practical experience with the Regulation (administration costs, workload induced, complexity of compliance, etc.);

- Issues with Regulation scope (domestic carriage, non-steel vessels, high-speed craft etc.);
- Application of the Regulation in the broader policy context (passenger rights protection, EU transport policy, international and national liability regimes, Protocol to the Athens Convention).

In particular, the ex post evaluation addresses six main evaluation criteria:

1. **Relevance:** to what extent are the objectives of this initiative still relevant today? And to what extent is its scope (i.e. application to international shipping and classes A and B of domestic shipping) adequate?
2. **Effectiveness:** to what extent have the objectives of the Regulation been achieved? To what extent have the measures adopted in the Regulation ensured the same level of passenger rights protection regardless of the area of operation of the ship? Has it led to any unexpected positive or negative effects?
3. **Efficiency:** do the costs of the measures adopted in the Regulation to achieve the aforementioned objectives remain reasonable and proportionate in relation to the benefits of the Regulation?
4. **Coherence:** To what extent does the Regulation fit in well within the framework of the EU maritime safety policy and passenger rights policy and, more specifically, within the Union's approach to transport operators' liability? Whether there are any overlaps, gaps or inconsistencies? Are the objectives of the Regulation (still) coherent with the EU Transport policy, notably the White Paper on Transport (not published when it was adopted), and ten policy areas that are set as priorities by the current European Commission (as announced in July 2014)?
5. **EU added value:** What added value compared to the international and national regimes for liability of carriers of passengers at sea has the Regulation brought?
6. **Complementarity:** to what extent has the Regulation been successful in supplementing the Athens Convention and any national regimes on liability of passenger carriers in case of accidents at sea applicable in the Member States?

Confidentiality

ECORYS adheres to the EU's legislation on the protection of personal data (Regulation (EC) 45/2001). Any data collected through this survey will be managed in line with these requirements and will not be shared with third parties. The survey results will thereto be stored in a confidential manner.

The data collected will be aggregated and presented anonymously in the main report. It will be guaranteed that individual answers will not be traceable to the companies approached.

Please inform us should your company policy require additional safeguards with regard to compliance. We would be pleased to cooperate on this matter.

Planning and contact details

This study is estimated to be completed by the end of October 2016. The interviews are planned to take place in June, July and August 2016.

For more information, please contact the project team:

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ANNEX 10 LIST OF INTERVIEWS

This section presents the status of interviews implemented. The table below provides an overview of people and organisations interviewed (per 7 October 2016):

1. Exploratory interviews, with approved minutes of the meeting;
2. Target and case study interviews, with approved minutes of the meeting;
3. Written input received from stakeholders.

Name	Organisation	Stakeholder category	Date
Approved exploratory interviews			
1. Erik Rosaeg		Academic	15 March 2016
2. David Bolomini	IGPANDI ICS	Insurers Ship-owners	22 March 2016
3. Kiran Khosla			
4. Confidential Interview	Confidential	Lawyer	29 March 2016
5. Confidential Interview	Confidential	Lawyer	30 March 2016
6. Kriton Metaxopoulos	A&K Metaxopoulos & Partners law firm	Lawyer	31 March 2016
Approved target/case study interviews			
7. Confidential Interview	Confidential	Lawyer	1 April 2016
8. Maria Catalano	Italian Ministry of Transport	Member State	6 April 2016
9. Andrew Angel Andrew Kelly	UK Department of Transport	Member State	12 April 2016
10. Michael Hjört	Swedish Ministry of Justice	Member State	20 April 2016
11. Mr. Kontorouhas	Greek NEB	Member State	22 April 2016
12. Confidential Interview	Confidential	Lawyer	4 May 2016
13. Confidential Interview	Confidential	Academic	5 May 2016
14. Confidential Interview	Confidential	Lawyer	6 May 2016
15. Dario Bazargan Maria Pittordis	CLIA	Ship owner	1 June 2016
16. Confidential Interview	Confidential	Ship owner	20 June 2016
17. Marie-Alice Bels Fabien Joret	French Ministry of Environment (first interview)	Member State	24 June 2016

Name	Organisation	Stakeholder category	Date
18. Sarah Gahlen	Lebuhn & Puchta	Lawyer / Academic	5 July 2016
19. Mark Flavell Tim Garnish	Maritime Coast Agency	Member State	7 July 2016
20. Confidential Interview	Confidential	Insurer	7 July 2016
21. Professor Lindenberg		Academic	11 July 2016
22. Taco van der Valk	Netherlands Maritime Law Association	Law association	12 July 2016
23. Fabien Joret	French Ministry of Environment (second interview)	Member State	12 July 2016
24. Confidential Interview *		Family of victim	12 July 2016
25. Confidential Interview	Confidential	Lawyer	15 July 2016
26. Confidential Interview *		Family of victim	26 July 2016
27. Matias Moldenhauer	Vista Tours	Tour operator	2 August 2016
28. Nils Heijboer	Dutch P&I	Insurer	4 August 2016
29. Brigit Sølling Olsen	Danish Ministry of Transport	Member State	4 August 2016
30. Rolf-Jürgen Hermes	PANDI Services	Insurer	8 August 2016
31. Françoise Rudetzki*	SOS Attendants	Passenger representative	8 August 2016
32. Peter Haagen	Raets Marine Insurers	Insurer	10 August 2016
33. Sibrand Hassing	HAL Groups	Ship operator	24 August 2016
34. Confidential Interview	Confidential	Lawyer	7 September 2016
35. Confidential Interview*	-	Passenger / Victim	12 September 2016
36. Gerardo Aynos Maza	Spanish Ministry of Public Works	Member State	14 September 2016
37. Christos Kontorouchas	Greek Ministry of Maritime Affairs	Member State	20 September 2016
38. Hernández Gutiérrez José Francisco	Spanish Ministry of Public Works	Member State	22 September 2016
39. Wouter van Hal	Wagenborg	Ship operator	26 September 2016

Name	Organisation	Stakeholder category	Date
40. Zuzanne Peplowska-Dabrowska	Law Faculty of the Nicolaus Copernicus University	Academic	26 September 2016
41. Annet Bronnewasser Aad Kramers	IL&T (Dutch Inspectorate)	Member State	29 September 2016
Written input received from stakeholders			
42. Stéphane Gicquel	FENVAC	Passenger representative	-
43. Dorota Lost-Sieminska Jan de Boer	IMO	International organisation	-

* These interviews are case study interviews only.

NB: As part of the stakeholder consultation several classification societies have been approached. Both Lloyd's Register and Bureau Veritas indicated that they do not have any experiences with Regulation 392/2009 and/or PAL2002 as this legislation does not affect to their main activities.

Table A9.1 Overview of interviews conducted per stakeholder group

Stakeholder category	Implemented
EU Member State	12
Ship owner / operator	5
Passengers / Victims association	5
Insurer	5
Third (non-EU) state	0
Law firm	9
Academic	5
Other	2
Total	43

ANNEX 11 MINUTES OF INTERVIEWS

Minutes exploratory interview Erik Rosaeg

Interviewee: Erik Rosaeg

Interviewers: Frank Smeele, Fiona Unz (EUR)

Date and time: 15 March 2016, 14.00 15.00

Introduction

Erik Rosaeg has been involved, on behalf of Norway, in the negotiation on the Athens Convention. Passenger rights became an important topic in Norway after the accident with the Scandinavian Star (a ferry between operating between Norway and Denmark which caught fire in 1990, killing 159 people). Following the accident several victim associations were established in Norway. These organisations are more efficient than the passenger organisations, which are loosely organised and are often not able to sufficiently protect passenger rights.

The case of the Scandinavian Star is still ongoing today. The passenger claims have been settled, however the Norwegian Parliament is investigating whether or not the fire was caused deliberately in order to claim insurance benefits (i.e. insurance fraud).

Erik Rosaeg has his own website on which he publishes much information. On his website information can be found on the meetings of the correspondence group; a group of experts that contributed to the negotiations of the Athens Convention.

A vessels category that is often 'forgotten' is the group of high-speed vessels (e.g. catamarans). This vessel category should also be included in the study as they generate a specific sort of claims, i.e. whiplash claims.

Notes on P&I coverage

P&I clubs pool passenger vessels with general cargo vessels. This makes general cargo vessels also stakeholders when it comes to the liability regime of passenger vessels. The pooling arrangements of P&I Clubs are not publicly available, however according to Erik Rosaeg, who has seen examples of them, the description of the features of such pooling arrangement at the website of IGPANDI, including information on the premiums, payment conditions and the limits on the coverage, is accurate.

The P&I Clubs pool both EU and US passenger vessels and are therefore exposed to the unlimited US liability regime and the limited EU regime (based upon the Athens convention). It should be checked with P&I clubs whether or not the cover for claims from US passenger ships is limited.

Information on insurance premium levels can be found in 'P&I Confidential', a non-confidential newsletter.

Erik Rosaeg has found a correlation between ships (not) having P&I cover and their detention record under Port State Control. Of the ships detained by Port State Control a higher than average proportion did not have P&I cover. This provides a supporting argument in favour of mandatory liability insurance for ships calling at EU ports. Since P&I Clubs seem unwilling to provide cover to ships that do not comply with their safety standards, the effect of making liability insurance mandatory is that ship-owners will have no choice but to improve the safety standards of their ships if they wish to keep calling at EU ports. It may also be worthwhile to cross-reference the incident reports in the EMCIP database with the port state inspection and detention records of the ships mentioned therein.

Erik Rosaeg assumes P&I clubs have internal guidelines for claims settling, but these are not in the public domain. It is known however that after an incident, passengers affected receive a standardized offer depending on the nature of their claim. There are offers for different types of injuries, lost luggage etc. It seems many passengers do accept such an offer. It is worth checking this option.

Other coverage than P&I

IUMI does not offer insurance for liability. They mainly focus on insuring the hull and machinery (H&M). They have never shown much interest in passenger ships. For the evaluation, they probably cannot provide much input.

During the discussions at IMO, which led to the amended Athens Convention, at one stage it was considered whether a kind of accident insurance to be taken out by the carrier for the benefit of the passenger could offer an alternative form of compensation for passengers. This idea was however not included in the Athens Convention.

The war risk cover is an important addition to the P&I liability cover. Gard in Norway has experience with this topic. Erik Rosaeg will provide contact details so that this organisation can be contacted. US Shoreline (??) has similar arrangements to the war risk cover. This should be checked.

It is important to keep in mind the relation between Regulation 392/2009, the Athens Convention and the IMO guidelines.

Class C and D ships

It is unsure if the inclusion of Class C and D ships will lead to major insurance issues. Often the government is the owner of the ferry connection, so therefore the government is also responsible for insuring the vessel. In cases where the government is not the owner, the government could consider subsidizing these shipping lines to ensure they are insured. It is important to check if this is in line with state aid rules.

Forum shopping

It is questionable if forum shopping is really an issue under the Regulation. According to Erik Rosaeg, passengers that do not fall within the scope of the Regulation will be covered by the Brussel I Regulation, which regulates

that they are consumers. As a consumer they will benefit from a certain level of protection which is similar in all countries. Therefore, there is no incentive for a passenger to go forum shopping as all courts have to apply the same set of rules.

It should be noted that a ship-owner can still face court cases in more than one country as it is likely that passengers will start a procedure in their country of domicile. For ship-owners this may provide a strong incentive to settle claims amicably so that they avoid court cases in multiple countries, which otherwise could lead to high legal expenses.

Follow-up

- Team members will check website of Erik for useful information. Erik will send the team contact details for other stakeholders to be consulted, especially on war risk cover;
- The team can contact Erik whenever needed for further information or contact details.

Minutes exploratory interview David Bolomini, IGPANDI and Kiran Khosla, ICS

Interviewees: David Bolomini, Kiran Khosla

Date and time: 22 March 2016, 11.30-13.00

Interviewers: Frank Smeele (EUR), Linette de Swart (Ecorys), Fiona Unz (EUR).

Effects upon insurance

The entry into force of the Regulation on 31 December 2012 has had no direct effect upon the premium levels paid by ship-owners and operators of passenger vessels. The Group's passenger cover limits were already raised in response to the pending entry into force of the Athens Protocol 2002 (and the IMO Resolution and Guidelines agreed by the IMO Legal Committee in 2006). The passenger cover limits were subsequently increased for the 2007/8 policy year and currently up to \$ 2 billion is available through the cover provided by the International Group's pooling and reinsurance arrangements. This cover limit is based on a 3,600 PAX ship³⁰². The International Group's cover limit of US\$ 2 billion applies to all passenger ships entered on a mutual basis in any one of the Group's 13 P&I clubs.

Operators of passenger vessels licensed to carry more than 3,600 PAX can obtain excess cover outside the IG reinsurance programme through the regular commercial marine insurance market.

While the US is not party to the Athens Protocol 2002, the Protocol can still apply to passengers engaged in voyages to/from or in the US. For example, if the ticket is bought the UK, but the cruise takes place in US waters, the passenger falls within the scope of the Athens Protocol 2002 by virtue of the provisions in Article 2 'Application'. While relatively few States (25/26) have ratified the Athens Protocol 2002, its incorporation in contracts of carriage (tickets) and the scope of application has had the effect of giving the Protocol much wider geographical cover.

It should be noted that the US has no specific liability regime in place for the carriage of passengers by sea. US passengers' claims not subject to the Athens Protocol or the EU Regulation are likely to be subject to US law (absent other agreed provisions) if the voyage is within the US. If the voyage is outside the US jurisdiction, the governing law and jurisdiction specified in the respective contract of carriage/ticket is likely to apply. As the US has no specific liability regime for passenger claims, the ship-owner will not be subject to a strict liability. A US claimant therefore, if he is to recover his claim for damage or loss, may need to pursue an action in court in accordance with US law, both as to the liability of the ship-owner and the quantum. The burden of proof under general US law lies with the claimant passenger (and not with the ship-owner). The US does permit class actions if needed.

Non war Liability cover versus war risk cover

Since the entry into force of Regulation 392/2009 and followed in April 2014 by the entry into force of the 2002 Athens Protocol, certain categories of passenger vessels registered in or operating in the Member States of the

³⁰² Calculation: 3,600 PAX * the maximum limits of SDR 400,000 = SDR 1,440 billion which equals approximately \$ 2 billion dollar. Calculation is in line with Article 4bis Annex 1 Regulation 392/2009.

European Union are required to carry on board an Athens Protocol 2002 certificate (the certificate is contained in an annex to the Protocol and its format was agreed by the Diplomatic Conference in 2002). The certificate must be issued by a ship's State of registration, providing that State is party to the Protocol. If a ship is not registered in a State Party it must obtain a certificate from a State that has ratified the Protocol. When a State issues the 'Athens' certificate it confirms that it is satisfied that a ship is duly insured in accordance with Article 4bis of the Protocol. States issuing this certificate require ship-owners to provide evidence of liability insurance cover and this is provided by the International Group clubs in the form of so called blue cards. Without such blue cards a ship cannot obtain an Athens certificate. Without such certificate a passenger vessel registered in a State party will be in breach of the applicable rules on registration and may be prohibited from entering the port of a State party or it may be detained by Port State Control Inspectors if it attempts to leave.

The liability provisions in the Protocol do not exempt certain types of risk arising from acts of terrorism and thus include both "war" risks and "non-war" risks see the 2006 IMO Guidelines and Reservation annexed to Regulation 392/2009. The State certificate must verify that insurance for all risks is in place. In marine insurance practice, the provision of non-war liability cover is separate from the provision of war risk cover (which includes cover for terrorism related losses). The IMO 2006 Reservation and Guidelines recognises this and that the International Group insurance arrangements cover non-war risks only and also that war risk cover is obtained by the ship-owner from the commercial war risks insurance market. However, some International Group clubs issue blue cards for owners' liability arising under the IMO 2006 Reservation and Guidelines. Other blue card providers also issue blue cards for war risks, thereby ensuring that owners obtain the requisite certificate from a State Party to the 2002 Protocol for all Protocol risks. It should be noted that war risk cover and liability for such risks is capped by virtue of the Reservation to USD 500 million.

The introduction of insurance certification is a result of the Athens Protocol 2002, which includes an insurance obligation. Here, regulation 392/2009 had no effect other than to enter into force some 13 months before the 2002 Protocol. The International Group clubs had already agreed to issue non-war risk blue cards before the Regulation was adopted in order to ensure that their entered ships would be compliant once the Protocol entered into force.

If a ship-owner's insurance cover with a P&I Club is terminated or some other reason necessitates the termination of blue cards, the P&I club will notify the State that issued the certificate and cancel the blue card/s. It is then incumbent upon that State to recover the Athens certificate from the ship-owner or if cover is terminated for example because of a change of insurance provider a new blue card and certificate must be issued. This is an administrative matter for States.

All International Group clubs provide publicly accessible information regarding vessels and their insurance arrangements, including details of blue cards issued to entered vessels (not only for the Athens Protocol, but also for the

Civil Liability Convention (tankers) Bunker Convention and the Wreck Removal Convention). Typically a passenger ship will carry on board 3 State certificates: one for the Athens Protocol, one for the Bunker oil convention and one for the Wreck Removal Convention. Blue cards issued for all these conventions can be verified on the insuring club's website.

Claim levels

It is premature to say whether there has been an increase in claims or whether claims have been affected as a result of the Regulation. In general, passenger claims seem to have decreased, both in number and quantum. While individual P&I clubs maintain information on claims this is confidential and is not publicly available. Maybe the individual annual reports of the clubs might provide some general information.

The Regulation differs from the 2002 Athens Protocol by introducing an obligation to make advance payments in certain described circumstances. Despite the introduction of this requirement, it is not new for the sector, as most P&I Clubs already made such payments for instance in the incidents involving the Herald of Free Enterprise (1987) and the Estonia (1994). P&I clubs respond quickly once an incident has happened as it is in the club's and the assured's best interests to do so.

It was noted that insurance premiums are calculated according to many risk factors and formulae, including specific characteristics (e.g. ship type, age, trading route, ship management, safety record, historical claims record).

Relationship ship-owner charter

In passenger shipping a variety of charter contracts is used depending on the type of passenger trade. In the case of cruise ships, it is understood that the most often used contract is the bareboat charter. Other charter parties might also be used, such as long term time charter parties or shorter-term time charters. In view of the complexities of the trade and the specialised industry, it is expected that these contracts may contain bespoke provisions regarding indemnity provisions although ICS does not have precise information on the exact terms that might be agreed. However, none of these chartering arrangements detract from the fact that a claimant maintains a right of recourse to the performing carrier and insurer named on the State certificate. If the Consortium would like to have information on this topic, they can best contact individual ship-owners and ask them which types of contracts they use and how these aspects are regulated in those contracts. Equally ICS is happy to co-ordinate by obtaining this information from relevant associations such as CLIA and ferry operator associations.

Passenger tariffs (fares)

It is difficult to say whether fares have changed due to the entry into force of the Regulation. On international shipping routes the effects on fares are probably limited. The effects for domestic passenger routes might be greater as some categories of ships on such routes may need to have insurance cover for the 2002 Athens Protocol. We cannot say, however, whether fares have increased as a result of the entry into force of the Regulation or the 2002

Athens Protocol. Member States may be best placed to provide this information.

Fleet of passenger vessels

As far as ICS and IGPANDI are aware the passenger shipping market has not changed as a result of the Regulation. Only normal market trends have influenced the passenger shipping market. It should be noted that it is very difficult to assess such influences. The UK Department of Transport asked similar questions during their impact assessment of the LLMC 1996 Protocol³⁰³ and hardly received information. The Consortium is advised to check what the UK Department did (contact: Andrew Angel).

Guidelines for claim handling

There are no 'IG' guidelines for clubs on how to deal with claims. Each P&I Club has its own operating methods and instructions or procedures which are in line with industry standard procedures. In addition, some clubs may have manuals or check lists. Clubs, when presented with a claim, will assess each case on its own merits. In the assessment much depends on the governing law/jurisdiction, how the claimant substantiates their claims and the evidence they present in support of their claim. Claim handlers may seek advice from external legal advisors in the law/jurisdiction governing the claim. By doing so, application of the relevant legal system is ensured.

Disabled passengers

Claims from disabled passengers are dealt with in the same way as all other claims. Before the Regulation entered into force priority may have been given to the payment of claims from disabled people who also included their mobility equipment. The Regulation does not provide added value in this respect.

Overall, it is difficult to indicate where the added value of the Regulation can be found. Perhaps the most important effect of the Regulation is that it indirectly helped to bring the Athens Protocol 2002 into force by virtue of European Union Member States ratifying the Protocol. It is possible that in the absence of the Regulation the Protocol would have entered into force later than it did and with fewer States Parties. It is still incumbent on all EM Member States to ratify the Protocol and they should be encouraged to do so.

Final remarks

Passenger ships are only a small part of the business of the International Group clubs. Passenger tonnage accounts for approximately 5% of the total tonnage entered in the IG. The number of passenger claims is limited and therefore examples of such claims is also limited. The largest risk in terms of claims quantum is for wreck removal and related costs not personal injury.

It should be kept in mind that the IG clubs first and foremost represent the interests of their members, i.e. the ship-owners. This relationship is

³⁰³ Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims.

confidential and clubs cannot provide specific information without prior consent of the individual ship-owner.

Both IG and ICS suggest contacting personal injury lawyers to cover the passenger perspective. For example in the UK the Association of personal Injury Lawyers (APIL) could be contacted.

Follow-up

- Minutes of the meeting will be send to IGPANDI and ICS.
- ICS will provide the Consortium with additional names of stakeholders, who can be interviewed or approached for the questionnaire.
- IGPANDI will check if it is possible to provide the Consortium with information on the premiums paid by ship-owners in the category 'loss of life and personal injuries'.
- IGPANDI will look if information on charter agreements in passenger shipping is available.
- IGPANDI and ICS are willing to distribute the Consortium questionnaire amongst their members. They advice the consortium to keep the questions broad in order to ensure a higher response.

Minutes exploratory interview Kriton Metaxopoulos (partner at A&K Metaxopoulos & Partners law firm)

Interviewee: Kriton Metaxopoulos

Interviewers: Wouter Verheyen, Fiona Unz

Date and time: March 31st 2016, 18:30 19:00

Number and types of incidents handled by the firm

Mr. Metaxopoulos denoted the fact that maritime law is not his area of expertise. Therefore, he was involved in the case of Norman Atlantic only. More specifically, Mr. Metaxopoulos assisted an Italian firm with the submission of penal complaints for 25 passengers of the ship. Out of these passengers, 4 have reached an agreement with the carrier and thus settled their claim already. The interviewee also represents the family of a missing person.

Jurisdiction

Mr. Metaxopoulos also noted that he advised all of his clients to choose Italy as jurisdiction forum, due to three reasons: Firstly, timing. In Greece a penal decision could take 15 years to be issued. Civil proceedings can commence at the same time as penal proceedings, however judges usually wait for the penal decision to be published until they decide upon the merits of the civil procedure. Secondly, the penal code in Greece does indeed provide for a possibility to award damages in penal proceedings. However, that happens very rarely in reality. Usually lawyers will merely claim a token amount of €50 for example and then claim the actual amount for damages in the civil proceedings. Thirdly and most importantly, the investigation and all procedural measures are taking place in Italy.

P&I Club approach

Mr. Metaxopoulos shared the view that P&I Clubs do not offer fixed compensation. As an example, he suggested that each passenger has suffered different kinds and extent of bodily injury, which would mean that fixed or standard amounts could not be offered for all. In the case of the Norman Atlantic in particular, the injuries under consideration are of moral nature, therefore there is a lot of room for a court to apply the law at its discretion and determine the damages.

Settlement amounts

Regarding the settlements agreed upon, the interviewee explained that three offers were of the same amount and one is slightly higher. They were all offered as compensation for moral damages. In the single case involving a slightly higher amount, the passenger rejected the amount first offered and the carrier reverted with a higher offer, provided that the passenger would agree to be examined by an Italian doctor. This claim was also based on emotional trauma, the passenger had experienced post-traumatic stress and got the relevant diagnosis.

Evidence

Carriers do not request a lot of evidence. Mr. Metaxopoulos mentioned that practically carriers only request his clients to establish that they were actually passengers of that particular ship. No medical investigations were requested, except for one case.

Distinction between emotional trauma and post-traumatic distress.

All of the cases involve emotional trauma and the passengers get compensation for this particular kind of damage. But in case the passenger can prove that they actually suffered post-traumatic stress, through medical examination and diagnosis then the compensation will be higher, as in the case of the passenger mentioned. In Italy in particular, courts use a complex point system for emotional trauma, which is taken into account by carriers as well.

Advance payments

According to Mr. Metaxopoulos, he generally has not handled cases where advance payments would apply. The family of the missing person are in the process of discussions regarding settlement but to the best of my knowledge there were no advance payments made up to this point.

Evaluation of the Regulation

Mr. Metaxopoulos stated that he would not be in a position to evaluate the Regulation, due to his limited experience with cases falling under its scope. However, he did mention that in his view, the Regulation serves mainly as a shield for carriers. More specifically, carriers can use it in order to limit their offers for settlement to the maximum limit under the Regulation and avoid court proceedings which could disregard the limits and award higher compensation. The penal courts in his opinion, would not apply these limits and would award much higher amounts. So in cases like the Norman Atlantic where penal proceedings are present, these limits would not be applied by courts according to Mr. Metaxopoulos.

Minutes interview – Maria Catalano, Italian Ministry of Transport

Interviewee: Maria Catalano

Interviewer: Dalila Frisani (Grimaldi)

Date and time: 6 April 2016, 12.30-13:30

Introduction

Miss Maria Catalano works as official at the Italian Ministry of Transport, Maritime Transport Department, General Directorate Port authorities, Infrastructures and maritime and inland transport.

She has negotiated for Italy and on behalf of the Italian Ministry of Transport the text of the Regulation. She holds a law degree and is specialized in maritime transport law.

Notes on the application of the Regulation.

Ms Catalano states that while Italian Ministry of Transport negotiated the text of the regulation when it had to be adopted, the Ministry is not responsible for monitoring its implementation.

She also states that Italian law does not clarify which authority is responsible for the implementation of the Regulation, i.e. which authorities is in charge of handling complaints. It could be argued that the competent authority is the Italian Transport Authority, since this Authority is competent to receive complaints under EU Regulation no 1177/2010. However, as specific provisions are missing, there is no legal certainty as to which Italian authority is competent for monitoring the implementation of the Regulation and for receiving complaints concerning the application of the Regulation.

That said, she states that the Ministry of Transport has not received any complaint further to the implementation of the Regulation, and not D'Alessi, ably she has not received any complaints by passengers.

She recommends consulting the Italian Transport Authority in order to obtain information from such authority concerning the possible complaints received in connection to the implementation of the Regulation.

She also states that the Italian authority which has an overview of the implementation of the Regulation and notably on shipping accidents and on accidents on board of ships is the Corpo delle Capitanerie di porto Guardia Costiera (Coast guard). Indeed the Coast Guard received accidents' reports. The Cost Guard should also have statistics on accidents.

Ms Catalano states that the Italian Ministry of Economic Development (MISE) should have relevant information on the impact of the Regulation on the insurance sector.

She also invites the Consultant to interview Confirtarma, Federlinea and the company Tirrenia, currently Compagnia Italiana di Navigazione and other companies providing local transport such as Siremar and Saremar.

Ms Frisani asks Miss Catalano if Italy has adopted any measure implementing the Regulation.

Ms Catalano confirms that there are no measures implementing or facilitating the application of the Regulation. The only implementing measure is the Agreement between the MISE and the company Consap, a Public Service Insurance Company, for the issuance of certificates attesting that the ship is insured.

Compensation of passengers before the implementation of the Regulation

Ms Frisani asks MS Catalano to identify rules that were applicable before the implementation of the Regulation and that ensured the compensation of maritime passengers in case of accidents.

Ms Catalano states that passengers were compensated further to long judicial proceedings and that the legal basis for compensation was the contractual liability pursuant to the contract of carriage under the Civil Code. This implied that liability of the carrier was based on fault.

She also points out that Italy had not ratified the Athens Convention as modified in 2002 and that before the implementation of the Regulation there were no specific rules on the liability of the ship-owner.

She also clarifies that in the case Costa Concordia compensation was provided pursuant to contractual rules and not pursuant to Italian rules on the liability of the ship-owner.

She refers that before 2013 she received complaints by passengers. For example in one case the passenger had hurt himself on board of a ship because a step was not signalized and he fell. The company was not willing to compensate the passenger. At the end an agreement was reached between the company and the passenger due to the intervention of the Ministry of Transport.

Had the case not been settled the judicial proceeding would have been long.

Identification of knowledgeable stakeholders

Mr Catalano identifies the following stakeholders as stakeholders to be contacted:

Ms Luca Ferri, Transport Authority, l.ferri@autorita-trasporti.it, passenger rights;

Ms Silvia Simone, Transport Authority, s.simone@autorita-trasporti.it, passenger rights;

Mr Massimo Greco, Ministry of Economic Development, massimo.greco@mise.gov.it, insurance issues.

Minutes interview Mr. Angel, Mr. Kelly and Mr. Wilson (UK Department of Transport)

Interviewees: Mr. Angel, Mr. Kelly and Mr. Wilson

Interviewers: Johan Gille and Linette de Swart (Ecorys); Frank Smeele and Fiona Unz (EUR)

Date and time: 12 April 2016, 10.30-12.00

The UK system: Regulation 392/2009 and Athens Protocol 2002

For each piece of EU legislation the UK government needs to conduct an impact assessment. Therefore an IA was conducted for Regulation 392/2009 as well. In this IA some problems were experienced, which were mainly caused by the existing domestic regime and also a lack of information on the likely impacts on insurance premiums. It took some time to streamline the domestic legislation with the EU legislation. Further to this it is noted that European Commission IA studies often do not provide much information at the level required of individual Member States.

- One of the main issues was to identify an insurer willing to provide the war risk cover. Some P&I clubs offer a limited war risk cover, but not to the extent necessary to meet the requirements of the Regulation. Eventually Marsh was willing to provide the necessary war risk cover. However, the number of insurers (and underwriters) willing to provide war risk cover was and still is limited in the EU. It seems this has now improved and as a result UK insurers (and underwriters) also insure a relatively high number of non-UK ship-owners.

Before the introduction of Regulation 392/2009, the UK already was party to the Athens Convention 1974. The UK had the intention to ratify the Athens Protocol 2002 (which they have done now); however before they ratified the Athens Protocol the Regulation came into force which caused some problems (if the UK had ratified, the implementation of the Regulation would have been easier). Especially, different limitations schemes were in place:

- Sea-going ships providing UK international services Limit of 300,000 SDR based on domestic legislation which incorporates LLMC31F³⁰⁴;
- Non-EU ships providing international services Limit of 46,666 SDR based on AC32F³⁰⁵;
- Sea-going ships providing UK domestic services (for carriers whose principal place of business is in the UK) Limit of 300,000 SDR based on domestic legislation which incorporates LLMC;
- Sea-going ships providing UK domestic services (for carriers whose principal place of business is outside UK) Limit of 46,666 SDR based on AC;
- Non-sea going ships providing UK domestic services on inland waterways limit of 175,000 SDR based on LLMC.
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- Regulation 392/2009 offers the exemption for Class A and B ships. In the UK those ship types are currently exempted. The limit applying to those ship types is 300,000 SDR. The Regulation will apply to Class A

³⁰⁴ LLMC: Convention on Limitation of Liability for Maritime Claims.

³⁰⁵ Athens Convention (1974).

from 1st January 2017 onwards and to Class B from 1st January 2019 onwards.

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- In the UK, the Regulation will not apply to Class C and D ships. The UK government has no intention to apply the Regulation to these types of vessels. For these vessels it will be problematic to obtain all the cover needed for war risk and it is questionable how large their risk actually is. It should be noted that for the Class C and D ships insurance is already in place; namely the 300,000 SDR or 46,666 SDR depending on where the carrier's principle place of business is. It is also questionable whether State Certificates would be necessary for such vessels either.
- On 1 September 2011 the UK passenger fleet consisted of 257 ships:
- 46 ships providing international passenger services;
- 63 ships providing domestic passenger services (Class A + B);
- 166 ships providing domestic passenger services (Class C + D).
- The data presented in the impact assessment do not distinguish between different passenger ship types. The Maritime Coastguard Agency (MCA) should be able to provide such information.

Potential impacts of Regulation 392/2009

- Financial information is confidential and insurance industry stakeholders were found not willing to disclose it. It will be difficult to obtain information on a potential increase in premiums. It should also be noted that the insurance market is volatile and that insurers are not always willing to provide insurance. It is unclear how the insurance market will react to future war risk cover in the event of a major incident as currently there is no experience with such risks.
-
- The impact on the fares tariffs was not included in the UK consultation. In the UK the government does not interfere in the tariff regimes as the ferry lines are a purely commercial operation and factors like fuel costs are much more important. This situation might be different in Scotland where, for example Caledonian MacBrayne ferries operates under a PSO-contract. The Consortium is advised to contact the Scottish administration to discuss this point.
-
- The UK Department of Transport has no indication that the current regime is not working well, as no complaints have been received. Fortunately, no major accidents happened in the UK. Only some smaller accidents took place in which passengers could claim compensation. The UK Department of Transport does not deal with these claims, so they are unaware if problems occur. This point could be checked with the investigative body that is the main point of contact.

It is unclear if the Regulation will establish a level playing field. The UK was already party to the Athens Convention 1974 and the EU Directive 2009/20 on insurance for ship-owners for maritime claims, therefore all vessels entering the UK were required to have insurance. The adoption of the Regulation, and

higher liability limits, does not essentially change this. In addition, domestic ships already have insurance for a long time.

It is also unclear if the safety on board ships will increase. The impact of the Regulation on ship safety is debatable. However, the most important point is that all vessels need to have insurance and to obtain cover need to full fill certain safety requirements.

Passenger representation

In the UK no single passenger representative organisation exists, which represents passengers on a policy level³⁰⁶. At a non-policy level a 'Voluntary Complaint Handling Body (CHB) Scheme' has been introduced, but this is only for passenger rights purposes. This scheme was initiated by the UK Department for Transport but does not receive governmental funding. The CHBs help passengers to get in contact with the ship-owner and, if needed, can help settle the claim. This system works really well and several other EU Member States have shown an interest in the system. The current CHBs are ABTA (the Association of British Travel Agents); CCNI (Consumer Council for Northern Ireland); the Scottish Government; CLIA UK (the Cruise Liner International Association) and London Travel Watch.

Other remarks

The MCA is the enforcement body and is therefore responsible for executing all parts of the Regulation related to port state control and the issuing of State Certificates (attesting that insurance is in place). They deal with both the domestic and international aspects.

Including Class A and B ships in the scope of the Regulation will not lead to many problems as most ship-owners are aware of the upcoming changes. In addition, the MCA will issue guidance notes indicating which changes are to be expected and how ship-owners can deal with them.

Follow-up:

The UK Department of Transport agreed to send Ecorys contact details of:

- The Maritime Coastguard Agency;
- Representatives of the Scottish Government;
- Complaint handling bodies & investigative body(ies);
- ABTA and other relevant trade associations.

Furthermore they offer their support for the survey process (channelling to relevant organisations in the UK).

³⁰⁶ If passengers want to be represented on a policy level they will contact their local government representatives and try to make them take the case. Failing that they resort to taking Court action.

Minutes interview Mikael Hjort, Swedish Ministry of Justice

Interviewee: Mikael Hjort

Interviewers: Geert Smit and Linette de Swart (Ecorys)

Date and time: 20 April 2016, 10.30 12.00

The Ministry of Justice was involved in developing Regulation 392/2009 and is responsible for its implementation in Sweden. The actual enforcement of the Regulation is done by the Swedish Transport Agency. For questions relating to the Regulation's effectiveness etc. the Consortium is referred to the Agency (see contact details below).

Situation prior to the Regulation

Sweden was not party to the Athens Protocol 2002 and nor to the Athens Convention 1974. Therefore only the Swedish Maritime Code applied to potential passenger claims. The system adopted in the Swedish Maritime Code was in general based on the provisions of the Athens Convention 1974. Only small deviations occurred. 34F³⁰⁷

The previous system is replaced since the introduction of Regulation 392/2009, with regards to incidents falling within the scope of the Regulation. As the Athens Protocol 2002 is annex to the Regulation and EU has acceded to the Protocol, the Protocol now also directly applies in Sweden. 35F³⁰⁸

In addition to the Regulation, Sweden has adopted some national auxiliary legislation as well. The main aim of this national legislation is to ensure that the Athens Protocol and Regulation can function optimally. This auxiliary legislation focuses on penalty clauses, for example on sanctions against ship operators not complying with the insurance obligations, e.g. their vessel can be held in port.

Objectives of Regulation 392/2009

Objective 1: improving passenger rights

Passenger rights have improved since the Regulation and the Athens Protocol 2002. Compared to the previous system operators are now strictly liable. The strict liability gives the passenger a stronger right than under a system of negligence. In addition, ship operators are now obliged to inform passengers on certain rights according to the provisions in the regulation 36F³⁰⁹

Objective 2: creating an level playing field

It is difficult to indicate if this objective is reached. In Sweden there was no resistance from the maritime sector to the new Regulation and the Athens Protocol 2002. Also on a political level no objections to the regulations were made. The introduction went without much resistance.

Objective 3: improving safety on board

It is difficult to indicate if safety on board has increased. It is expected that since ship operators are strictly liable they will have an incentive to improve

³⁰⁷ The main criteria for passenger claims under the Athens Convention 1974 is negligence (see art. 3).

³⁰⁸ As we see it, because of EU:s accession to the Protocol, at least some of it's provisions are directly applicable in Sweden regardless of the Regulation.

³⁰⁹ I cannot really say how this has affected the information to passengers in practice.

safety standards on board. It is not known by Mr. Hjort if safety standards have indeed increased on board Swedish ships. This question could be directed to the Transport Agency.

Objective 4: Comparability with other modes

Mr. Hjort has no knowledge if the Regulation is comparable to regulation of other modes. The comparability was not really considered during the adoption of the Regulation in Sweden.

Obstacles

A few minor obstacles can be mentioned:

- Terminology could lead to interpretation problems.
 - The Athens Protocol uses a specific terminology. As the Protocol became part of EU law, interpretation difficulties can occur. For example, the Protocol refers to Convention State. What does this mean when applying the provision as a part of the Regulation?
- Actions required from the Athens protocol.
 - The Athens Protocol requires actions to be taken by the Convention States (e.g. Article 4a.13). In order to make the Athens Protocol effective some actions need to be taken under national law. How should Member States deal with these obligations now that the provisions in the Protocol directly applies in the Member States?

Advantages of Regulation 392/2009

Main advantage of the Regulation is that the provisions of the Athens Protocol are directly applicable in Sweden. The Regulation has made some modifications to the Swedish system, with the result that stricter rules for carrier liability apply.

Scope of Regulation 392/2009

The scope of the Regulation has been extended to smaller ships operating at domestic level as well. Besides the applicability to Class A and B ships, the Regulation applies to all vessels that are certified to carry more than 12 passengers. For the smaller vessels some exemptions have been made:

- They do not need to have an insurance certificate issued by the Transport Agency. As is the case with the insurance directive (2009/20/EG) it is sufficient with a certificate issued by the insurance provider;
- Some exceptions to liability are made. For example, these smaller ships do not fall under the war risk cover.

Contact details

Transport Agency
Thomas Lantz
+46 70 83 79 215

Minutes interview Mr. Kontorouhas, Greek NEB representative

Interviewee: Mr. Kontorou

Interviewer: Fiona Unz

Date: 22 April 2016

Statistics for Greece

Mr. Kontorouhas explained that Greece has made use of the exception offered under the Regulation's provisions, thus all domestic traffic is currently exempted from the application of 392/2009. Additionally, he stated that there are approximately 13 Class A ships which are temporarily exempted from the Regulation's application and 40 Class B ships to which the Regulation will apply at a later stage, as provided by the Regulation. Furthermore, since the Regulation's entry into force, there have been no reported shipping incidents under the jurisdiction of the Greek Maritime Administration, in contrast to about 10 non-shipping incidents that have been recorded. Mr. Kontorouhas denoted that in the case of the latter, namely the non-shipping incidents, the Greek NEB is in no position to assess whether these incidents involved the fault or negligence of the carrier, and thus the carrier's liability. What is of particular interest is that the NEB has received zero complaints regarding specific provisions under the Regulation such as lost or damaged luggage and mobility equipment, advance payments etc. According to the interviewee, this may be the case due to the fact that the passengers turn to legal representation instead of the Greek NEB. Therefore, the State is not aware of the outcome of any such complaints which may have been dealt by attorneys at law. As a consequence, Mr. Kontorouhas was not able to provide answers to our questions regarding the compensation procedure followed in case of an accident.

Evaluation of the Regulation

As far as the evaluation of the Regulation's provisions is concerned, Mr. Kontorouhas highlighted the fact that the Greek law offers an identical legal framework for the protection of passengers' rights, through law 4195/2013 and two additional circulars. In total, Mr. Kontorouhas considers the Regulation effective and does believe that specific elements are missing. Furthermore, he noted that the Regulation in his view will in the future ensure a level playing field for carriers, keeping in mind that it is still an early stage in the application of the Regulation.

Minutes interview Dario Bazargan and Maria Pittordis (CLIA)

Interviewees: Dario Bazargan, Maria Pittordis

Interviewers: Johan Gille (Ecorys), Ioannis Giannelos (Ecorys)

Date and time: 1 June 2016, 11.00-12.15

Introduction

Maria Pittordis chair of CLIA Europe's Tourism and Consumer affairs working group (lawyer-partner at Hill Dickinson law firm). CLIA Europe has distributed survey to members and asks for extension of the deadline. Also a response paper to be expected from CLIA Europe.

Context

The Costa Concordia incident showed a lot of complexity in claim handling due to different jurisdiction issues.

Relevance

The Regulation could be more impactful for smaller domestic travel. BUT the limits to liability are currently different based on the area of operation. E.g. in the UK, international carriage follows the Liability Regulation (400k SDR), domestic carriage (300k SDR) and river carriage (175k SDR).

It should be understood that cat C and D ships are mainly operated by smaller companies, that are less flexible than big fleet operators.

Effectiveness

The Regulations is doing the job in matters of level playing field. There is now a common way of dealing with passengers of different nationalities (within the same accident). The Costa Concordia indicated the complexity of the pre-Regulation set-up.

A lot of information to show that the Regulation supports the level-playing field.

Regarding advanced payments, the Norman Atlantic incident shows that the Regulation boosted a shift in application.

In 2012, CLIA launched an operational safety review examining procedures to evaluate existing safety procedures, identify industry best practices, and develop new policies for rapid implementation to strengthen the sector's already strong safety record. The review resulted in the voluntary adoption of 10 wide-ranging policies which have all been included in formal IMO regulations and standards specific to passenger ship safety and have been implemented across CLIA members' fleets.

Liability Regulation leaves less room for manoeuvre to lawyers regarding the liability and jurisdiction. Under the 74'Convention and the 2002 Protocol jurisdiction was more complicated, the Liability Regulation has adapted it for the European market.

Efficiency

Liability Regulation has helped to streamline the processes and make it more straight forward compared to the 1974 convention. Handling claims became more straight-forward and efficient and there were much less issues of legal arguments than before, simply because the Liability Regulation created less room for manoeuvre than the old regime did (case example Norovirus in 2015 where court immediately ruled that it did not relate to operations of the ship). Also as the jurisdiction to apply is clearer the claims process is smoothed. There is no reported deficiency. Impact on the cost of insurance and passenger fares needs to be seen (we should ask the individual operators), but there is no evidence or complaint known. It is a short while since the application of the Regulation started as of 2012 and there are still claims in procedure under the 74 convention.

Coherence

The Regulation as such did not lead to increased safety and security levels. Although it was adopted in the context of the so-called third EU Maritime Safety package the Regulation does not address safety or security issues which are instead regulated under different international legal instruments. However strict liability and increased limits could encourage further risk assessment to minimise the risk of accidents No specific impact of the Liability Regulation to safety, but only indirectly (e.g. due to the terrorism clause influencing decision makers). Operational risk assessment of carriers also examines the liability involved in decisions. This impact is indirect and multi-level (insurance department, claims department etc.) and all together contribute to the increased safety culture of organisations. '74 Convention claims are significantly more than the Liability Regulation claims.

CLIA informs passengers that the Regulation applies also to non-EU passengers that join the trip in the EU.

EU added value

Clear added value over 1974 convention/2002 PAL as outlined above.

It is important to assure that the Regulation is understood and applied equally across Europe.

Survey

It is more feasible to receive concrete feedback by the second week of July, due to the timing of the CLIA meeting in end of June and the need to discuss internally and consolidate the views of the sector.

Ecorys will confirm the extension of the deadline by the week of June 5th.

Ecorys is kindly invited to attend the CLIA working group meeting in London (27th of June). Costa, MSC and other operators will be there.

Minutes interview Marie-Alice Bels and Fabien Joret, Ministère de l'Environnement, de l'Energie et de la Mer Direction des affaires maritimes (France)

Interviewees: Marie-Alice Bels, Fabien Joret

Interviewer: Dalila Frisani (Grimaldi)

Date and time: 24 June 2016, 15.00-16:30

Introduction

Ms Marie-Alice Bels is in charge of European Relations within the French Ministry for the Environment, Energy and the Sea. Mr Fabien Joret is in charge of Regulatory affairs within the above Ministry.

The role of the French Ministry for the Environment, Energy and the Sea in the implementation of the Regulation is twofold. On the one hand it has adapted the legal framework with the provisions of the Regulation.

On the other hand it has adopted the necessary measures to delegate to the company Veritas the task of issuing insurance certificates under the Regulation. Veritas is a private company.

The bodies in charge of checking that passenger ships carry the insurance certificates required by the Regulation are the "Centres de sécurité des navires".

The French Ministry for the Environment, Energy and the Sea is then informed about the outcome of controls concerning the obligation to carry insurance certificate.

The Ministry is involved in activities following a shipping incident to the extent that its Bureau d'enquêtes sur les événements de mer (BEAmer) carries out the technical investigations that follow a shipping incident or in any case an incident occurred on board a ship.

The legal investigations that follow an accident on board a ship are carried out by the competent courts.

Impact of the Regulation

The entry into force of the Regulation has substantially impacted the French liability system concerning incidents occurred on board ships.

Notably, it has affected the rules applicable in case of shipping incidents.

Before the implementation of the Regulation French rules foresaw a presumption of fault for carriers.

This implied that in case of shipping incidents carriers could be held non liable if they could prove that there was no fault or negligence on their behalf.

The implementation of the Regulation has, however, not impacted the liability rules applicable in France in case of non-shipping incidents instead.

Concerning insurance issues, further to the implementation of the Regulation carriers have to buy insurance policies covering non-fault liability.

Before the implementation of the Regulation carriers were insured against third party liability, but the insurance did not provide a right of direct recourse to the victims against the insurer.

A major issue with the implementation of the Regulation concerned relates to war or terrorists risks.

French officials refer that the main problem with the implementation of the Regulation concerning insurance against such risks was to ensure that insurers were ready to cover such risks.

Finally, French officials confirm that in France the Regulation applies since 2013 to domestic voyages for ships of Class A and B and does not apply to ship of Class C and D.

French officials refer that, as there have not been shipping incidents concerning French ships or involving French carriers under the regime of the 392/2009 regulation, there is not much experience on the implementation of the Regulation in France and on the problems that its application may trigger in practice.

They also refer that there are no figures attesting an alleged improvement of the safety of the ships since 2013.

However, to their knowledge no ship was found non-compliant with the obligation to hold an insurance certificate covering the non-fault third party liability.

French official refer that there is not a specific authority in charge of receiving complaints by passengers/relatives involved in a shipping incident having suffered loss as a result of injuries or death on board ships or as a result of loss/destruction/damage of property.

However they confirm the Ministry did not receive any complaints on this respect by passengers/relatives.

Some complaints have been filed before the courts by passengers who suffered a loss as a result of injuries in non-shipping related incidents.

French officials refer that France has not adopted specific rules aimed at verifying how carriers inform passengers on their rights under the Regulation.

Costs related aspects.

French officials refer that there are no statistics with regard to the variations of the costs of fares before and after 2013.

Therefore it is impossible to state whether there has been an increase of fares due to the implementation of the Regulation.

In addition, there is also a lack of statistics concerning the cost of insurance premiums further to the implementation of the Regulation.

The officials suggest that some insurers had increased insurance premiums before 2013, profering as a justification the coming implementation of the Regulation.

They also argue that the accident on board Costa Concordia might have impacted prices of insurance premiums more substantially than the implementation of the Regulation.

They also state that French Government did not receive complaints by carriers concerning an alleged increase of costs related to the implementation of the Regulation.

Concerning administrative costs: French officials refer that it was not necessary to allocate new resources fully dedicated to carry out the tasks required by the implementation of the Regulation.

Controls concerning compliance with the Regulation on board ships are carried out by port State controls officers that are in charge to carry out all the relevant inspections that a ship has to undergo under other EU and national regulations.

In conclusion, the costs of the implementation of the Regulation are not perceived excessive.

Advance payment

French officials refer that there in France, until now, the provision related to advance payment has not yet been practically implemented.

The features of this provision and notably the fact it does not identify who the entitled relatives of the victims are or what immediate economic needs are, may create uncertainties concerning the concrete allocation of the advance payment.

Possible amendment of the Regulation

It is necessary to assess very carefully whether to extend the scope of the Regulation and to assess whether insurers are ready to offer insurance coverage for war risks under this extended scope and also for non-fault liability incidents.

If the regulation were to be extended, it would be necessary to delete reference to ship of classes A, B, C and D and to simply refer to passenger ships, because reference to such ships excludes from the scope of the Regulation ships which are not under the scope of directive 98/41.

Minutes interview Sarah Gahlen, Lebuhn & Puchta

Interviewee: Sarah Gahlen

Interviewers: Linette de Swart, Fiona Unz

Date and time: 5 July 2016, 09.00

Context

Dr. Gahlen has not been personally involved in cases falling under the scope of the Regulation. She noted however that some of her colleagues have worked on such cases, mostly involving accidents on-board due to external causes. In general, the interviewee highlighted these cases do not go to court or arbitration, but rather they are settled. From a lawyers' point of view therefore the Regulation serves as guidance, especially regarding the head of damage and the liability limits. Settlements are made on that basis, despite the fact that the decision on the settlement offer is usually made by the insurers instead of the ship-owners, in particular since the introduction of the right of direct action against insurers. Negotiations usually take place, keeping in mind that the liability limits for injury claims are high, especially compared to the limits applicable besides a maritime claim in Germany.

Effectiveness

Dr. Gahlen denoted the fact that the limits under the Regulation are very generous. Additionally, the Regulation offers clarity especially in European cases where the passengers have the choice to go to different jurisdictions. Further, it was stated that the Regulation contributes by offering legal certainty with respect to the head of damages for examples.

On the other hand, the interviewee stated that it is hard to judge whether the provisions of the Regulation have acted as an incentive for ship-owners to enhance safety measures. Rather, Dr. Gahlen is of the opinion that German ship-owners already demonstrate sufficient safety measures on-board their ships.

Furthermore, she stressed upon the fact that improving the information position of passengers (i.e. information obligation of the ship-owner) before start of a journey, is fairly ambitious. A general problem in consumer law is the provision of information to consumers, as they often tend not to read the small letters on their tickets and therefore are not aware of their rights (and are insufficiently informed).

Complementarity

As far as the comparison between the Athens Convention and the Regulation is concerned, Dr. Gahlen noted that there are considerable differences between the original version of the Convention (Athens 1974) and the Regulation. However, she has not seen the aforementioned version of the Convention operating in practice as only a limited number of countries has implemented the Convention.

In contrast, the Protocol of 2002 and the Regulation are similar in many ways, due to the fact that the material law under both is the same. It was also stated that there are some difficulties under the Regulation regarding

jurisdiction and enforcement but that did not create significant issues in practice.

Furthermore, the interviewee explained that most of the problems related to the co-existence of the Convention and the Regulation, which are identified through academic research, are in practice very rare. In general, the Regulation implements the material law under the Protocol in an efficient way. During her academic research, Dr. Gahlen in particular identified a potential issue arising due to the overlap of the Athens Convention and the Brussels Convention. To be more precise, the Athens Convention offers its own system of jurisdiction and enforcement while in Europe Brussels I is applicable. On that basis, Dr. Gahlen noted that since the European system is less generous, this could create problems, however she has not experienced any in practice.

Relevance and Added Value

Most of the ships in Germany, especially connecting small islands on the west coast, belong to the Classes of C and D, namely ships operating domestically close to the shore. Up to this point, such ships are not covered by the Regulation's provisions, considering that Germany has not opted in for these classes. The interviewee could not offer insight with certainty as to the question of whether there is an intention to expand the scope of the Regulation, so that it covers such vessels in Germany. Nevertheless, German national law is very close to the provisions of the regulation. Dr Gahlen could identify three main areas where differences appear:

1. the rights of passengers with reduced mobility are less generous under German law;
2. the right to have a direct claim against the insurer does not exist under national law; and
3. the right to have an advance payment is also not a part of the German passenger protection regime.

Other than the above, the rules under German law are very similar to the provisions of the Regulation.

Finally, regarding the limits in particular, Dr. Gahlen informed us that under German law, in a maritime context the LLMC global limits apply through Directive 20/2009, by which ship-owners are obliged to carry such insurance. According to the interviewee's opinion, that most ship-owners operating passenger vessels carry insurance exceeding the limits of the Regulation.

The interviewee is not aware of any specific developments, e.g. political, legal technological, that have affect the way the Regulation is implemented. Additionally, due to the fact that the cases falling under the scope of the Regulation are usually settled, the interviewee shared the view that the Regulation probably cannot influence policy and law makers, since there not enough court cases heard.

Efficiency

Dr. Gahlen noted that one possible negative effect of the Regulation could be the increased insurance premiums, in view of the high liability limits. As explained however, this opinion is based on an assumption and not any

specific information, especially since insurers are very reluctant in sharing such details.

The Regulation seems to result in more settled claims as the willingness to settle a claim seems to be high (both on the side of ship-owners and insurers). There is no rise in the number of cases going to court and this could be seen as a positive effect of the Regulation.

Coherence

The interviewee was not able to provide an opinion on the coherence of the Regulation concerning passenger right protection in other modes, e.g. air or rail, with certainty, due to the fact that she is not sufficiently familiar with other modes of transport. She is mainly working in the maritime field.

Minutes interview Mark Flavell and Tim Garnish, Maritime Coast Agency (MCA)

Interviewees: Mark Flavell and Tim Garnish

Interviewers: Johan Gille and Linette de Swart (Ecorys)

Date and time: 7 July 2016, 15.00-16.00

Relevance

From a relevance point of view the Regulation is a success. So far not much intervention from the MCA was needed. It is important to have legislation in place that ensures that, once a shipping incident occurs, the matter is properly dealt with. It is good to know that insurance is in place. It is appropriate.

As far as the MCA is aware no changes in the context took place that influence the working of the Regulation. The reassurance the Regulation brings is of importance.

Class C and D ships currently do not fall under the scope of the Regulation. It is questionable whether or not they should be included as it will create an additional financial burden for these ships. The risk factor for those ships is smaller and there is no clear case that such vessels actually need insurance cover. A comparison could be made with Regulation 1177/2010 which applies to Class C and D ships. The vessels do have difficulties in fulfilling their obligations under Regulation 1177/2010. As these ships are already struggling not more pressure should be put on them.

Shipping activities between the UK's mainland and several of their Islands, e.g. Channel Islands and Isle of Man are seen as domestic shipping, to which the Regulation does apply even though these islands are not part of the EU. Shipping from France to the Channel Islands is seen as international shipping and therefore falls within the scope of the Regulation.

HSC should be included in the scope of the Regulation. It would be appropriate to include them as well. For the UK this would be important as a significant share of the UK shipping market consists of HSCs.

Effectiveness

The MCA did not experience any difficulties with Regulation 392/2009. The Regulation is working well and all operators seem to comply with the new obligations. No problems were reported to the MCA and also no complaints related to a cost increase were heard.

The MCA does not have experience with claims as so far no claims have been reported to the organisation. The MCA is responsible for maintaining a register of claims. However, as the organisation did not receive any claims yet, there is no register.

The MCA also does not have experience with accident dealing under the Regulation as luckily accidents, especially those resulting in death casualties, are rare. In recent years some accidents resulted in injury or death; however these accidents were not related to shipping and therefore did not fall within the scope of the Regulation.

The Regulation contributes to the creation of a level playing field, which is important in international shipping. For all ships operating in EU waters the same rules apply which results in a more level playing field.

The MCA does not know if passenger rights' protection has improved. They do not have experience with this. Whether or not payments are made timely, the MCA has no experience with that.

The MCA cannot say if security performance increased as a result of the Regulation. Improvements in safety is an ongoing process and it is difficult to link safety with the Regulation. However, over the years the number of shipping incidents has decreased.

Efficiency

A recent trend seen by the MCA, although unclear if this is related to Regulation 392/2009, is the spike in certification and renewal requests around February 20th. Each year around this date ship-owners seem to renew their insurance certificates and the staff of the MCA needs to issue many more certificates than in other months. Mr. Flavell does not know why February 20th is so important for ship-owners. It might be that ship-owners often re-charter their ships around that date.

It seems that the Regulation did not lead to a significant financial burden for UK ship-owners. The obligations would have been in place already for UK ship-owners, so the Regulation did not change much. However, this might be different for ship-owners from other EU countries. For them the Regulation might have a financial impact. All in all, the obligations are nowadays the days throughout Europe.

Until now the Regulation does not consist of a big administrative task. It would become even easier when one would switch to electronic documentation, however this might lead to some security issues.

Also the administrative costs are low. No changes in staff were made as a result of the Regulation. The fees for an insurance certificate will go up in the near future. The new fee rates are implemented once the Parliament has agreed on them (this is a regular UK procedure). The fees are based on the cost recovery principle. Currently, a ship needs to pay 31 GB pounds per year for the issuing of the insurance certificate. On average it will take a MCA staff member about 0.5 hour per ship to issue the certificate.

On-board checks are conducted together with the Port State Controls checks. Costs for these checks are not included in the 31 pound fee. Most vessels checked do have the insurance certificate on-board. In case the certificate is not on-board often the ship-owner forgot to send it to the ship. All in all the compliance is very good and ships can prove they have the insurance needed.

As for relevance, inclusion of classes C and D would not be desired as the smaller operators active in these classes would be faced with relatively high additional costs while they have less financial power to comply.

Coherence

The coherence between Regulation 392/2009 and other EU maritime policy initiatives seems good. An environment should be created where passengers know of the support.

Overall the protection of maritime passengers is similar to the protection of passengers in other modes. Maritime passengers do not have greater advantages than passengers in the other modes. However, maritime passengers are often not fully aware of their rights (common to passengers in other modes). The MCA deployed several initiatives to increase passenger awareness, e.g. via websites, seminars, broadcasts from the MCA to the industry and joint initiatives with ECTAA and the UK Chamber of Shipping. Also an app has been launched which provides information.

To further strengthen the awareness the industry has a role to play too. The prints on the tickets are too small and therefore not read. The operators should better point out the rights to the passengers.

Added value

The largest added value of the Regulation is the guarantee that ship-owners do have proven means of the financial protection they have to provide, and that it has been taken up to Paris MoU inspection procedures, leading to good oversight and good compliance.

Although MCA does not have experience with Regulation 392/2009, they do have some experience with 1177/2010. There was an UK case where a passenger fell between the loading pontoon and the ship. The accident happened in Cambodia. The accident happened during the embarkation process, which does not fall within the scope of Regulation 392/2009. Problems occurred, especially with the repatriation of the victim. Suggestion might be that the scope of Regulation 392/2009 would be extended, so that further case will fall within the scope.

Complementarity

One of the main differences between Regulation 392/2009 and the Athens Convention 1974 is the compulsory insurance obligation for ship-owners. Result is that each vessel is properly insured nowadays and is also able to proof it, as the Regulation requires that each vessel has an insurance certificate on-board (confirmation that insurance is in place).

Follow-up and suggestions:

- The consortium is advised to talk to IGPANDI;
- The consortium could contact organisations involved in port state control. They might be able to provide more detail on the non-compliance rate;
- Mr. Garnish will send some figures on rates of compliance and inspection statistics.

Minutes interview professor Lindenbergh

Interviewee: professor Lindenbergh

Interviewer: Wouter Verheyen (EUR)

Date and time: 11 July 2016, 13.20-13.35

We contact you for the Review of Regulation 392/2009.

This Regulation incorporates the liability rules of PAL 2002. This convention provides for liability in case of death, personal injury and loss/damage to luggage. The Convention does provide limits to compensation, but doesn't provide rules on recoverable damage and thus this issue remains subject to national law. It is on this point that I want you to evaluate the impact on the effectiveness, uniformity and EU added value of the Regulation.

Are national law regimes governing recoverable damage different to such an extent that this threatens uniformity?

This is indeed the case, all countries have their own regime. The different countries can be categorized in four systems:

- The French System (e.g. Belgium, Spain and Italy);
- The German system (e.g. The Netherlands, Switzerland and Austria);
- Common law systems (English law, Scottish law and Irish law);
- Scandinavian systems.

These systems mainly differ on three points:

- The amount of compensation;
- The types of damage that are considered recoverable;
- The compensation for personal injury.

The biggest difference exists between Common Law (highest compensation) and Scandinavian Law (lowest compensation).

Are there also countries where only symbolic compensation is awarded for emotional damage in case of death or bodily injury?

Traditionally Eastern European regimes knew such regimes, but compensation is going up here as well.

What about the circle of people who are entitled to compensation?

Also on this point there is a big difference between individual countries. While compensation for loss of income is awarded in all countries, compensation for pain and suffering is not awarded in most countries belonging to the German system, while the French system has an open system and judges award such compensation to a very broad category of people, in English law, there is a closed system. The Fatal Accidents Act provides for such compensation to a limited category of people. Again the amount of compensation differs greatly.

Could you illustrate this for the loss of income?

In English law, an integral compensation is awarded, amounting often to millions of compensation. In for example the French system, Bireme's are being used, leading to a more limited compensation.

To what extent is the compensation for personal injury different in different countries?

This is very much linked with social security. Traditionally, there is no liability for costs covered by social security. However, there might be a recourse action available in national law for social security institutions.

And what about the compensation for mental distress?

In Southern countries, compensation is being awarded for mental distress, while in the Netherlands, Germany and the UK such compensation is being awarded only in case of a recognized psychological disease. Exceptions exist in case of a violation of human rights (e.g. privacy), but in such situation the violation of law is the bases for the claim and not necessarily the damage incurred.

Concerning the EU added value: did you already observe in other domains that the existence of limits has a harmonizing impact on the compensations that are awarded?

No.

Are you aware of the distribution of compensations for the different categories of damage in case limits are exceeded?

I expect that there will be a priority, but I`m not aware of this.

One concluding question: what countries do you suggest us to investigate further in order to get a representative overview of the different systems?

German Law, French law and English law. For the Scandinavian regimes, Norwegian law is a good example.

Minutes interview Taco van der Valk, Dutch Maritime Law Association

Interviewee: Taco van der Valk

Interviewer: Linette de Swart (Ecorys)

Date: 12 July 2016

General

Mr. van der Valk does not have specific experience with Regulation 392/2009. He was involved in the Costa Concordia case, however this accident was not covered by the Regulation, as the Regulation had not yet entered in force. Although the Regulation was not yet in force, the lawyers involved tried to take actions in line with the principles of the Regulation, e.g. by approaching passengers earlier on in the process. The Dutch passengers were offered a compensation. The level of compensation was based on older legislation. Some additional compensation was offered, which led to acceptance of the offer by most of the passengers. Only the difficult cases remained and had to be dealt with separately. These cases did not involve Dutch passengers and were dealt with by lawyers from other countries.

Mr. van der Valk was not aware of any cases in the Netherlands since the Regulation was in force, neither in his own practice, nor on the basis of hearsay or published case law. If there actually was a Dutch case where the Regulation applied, maybe the ship-owner dealt with the matter himself and no lawyers were involved.

Most books and Articles published are rather general, only describing what the Regulation contains, without commenting on how it works in practice.

Relevance

The Dutch government has chosen to apply the Regulation to all domestic vessels, including Class C and D ships. Main reason is that in general the Dutch legal system does not apply different rules to international and national transport. Also in other modes and in general freight transport, international rules do apply to both international and national carriers and no distinction is made between the two.

As a result of Regulation 392/2009 the entire EU is member to the Athens Protocol and the rules laid down in that treaty do apply to all, which is important. The Regulation is a useful piece of legislation as it increases international uniformity in the sector.

There have not been any large developments in the legal, technological or political field that have affected the way the Regulation is implemented. It is difficult to indicate what the real impact of the Regulation is until now, as the time between the entry into force of the Regulation and the evaluation is very short. Also no major incident has happened that could showcase the working of the Regulation in full. Such an incident would be needed to see how the Regulation works (but this is of course undesirable).

Effectiveness

One of the objectives of Regulation 392/2009 is to create a level playing field between EU ship-owners. Mr. van der Valka is not aware if this objective has been achieved.

Safety on-board ships is continuously improving. However, it is difficult to indicate whether or not this is a result of Regulation 392/2009. Ship-owners are focused on safety and their performance, so also without the Regulation they would still take measures to improve on-board safety standards.

For cruise liners it is important that passengers are happy. In case a passenger loses his luggage or sustains an injury, the operator is often willing to compensate. The ship-owner would like to ensure that his good name is kept and will avoid negative feedback on Twitter or Facebook. As a result of this, most smaller cases do not involve lawyers and will never end up in court. Therefore, it is difficult to indicate if the Regulation leads to any negative impacts.

Further no negative effects can be seen at this stage.

Efficiency

It is difficult to say whether or not the Regulation has impacted ship operations. Probably P&I clubs already included the higher liability limits in their packages offered to ship-owners. There is no clear evidence that prices have increased substantially.

War risk cover is important for ship-owners, however it is not possible to say if this is a result of the Regulation. The cover may simply be needed in view of current circumstances, just as the increased risk of cybercrime.

Coherence

Overall, the regime of Regulation 392/2009 seems in line with the regimes in other modes of transport. The regimes may differ on smaller points, e.g. the actual height of the limits, but in general the regimes are more or less similar. There is a clear trend in passenger right protection to strengthen the position of the passenger and increase the liability of the operators.

It is difficult to compare the EU passenger right protection for maritime passengers with that of airline passengers as in the airline market it is more common to take a claim to court. In the maritime sector this seems less likely to happen. Both EU regulations (261/2004 and 1177/2010) are rather different, while Montreal and Athens are more similar.

In the opinion of Mr. van der Valka it is important to ensure that international uniformity is created within a sector, e.g. maritime transport, instead of striving for uniformity across all modes. For ship-owners international uniformity is important. The same rules should apply if they plan a cruise trip in Europe or a cruise trip from Europe to the Caribbean.

Complementarity EU value added

The Netherlands had not ratified the Athens Convention 1974. However, they had incorporated most of the provisions in their national law. The structure of the Dutch national system was similar to the structure of the convention. Main difference was the height of the limitations, with the Dutch regime offering higher limits. The Dutch government was at the time, in 1991, of the opinion that the limits under the Athens Convention were not sufficient.

The Athens Protocol 2002 introduced higher limits than the limits under the Athens Convention 1974. The limits of the Protocol were higher than the limits of the Dutch national regime. However, the Dutch government did not change the national limits, which was probably an omission. This omission has been solved by the entry into force of Regulation 392/2009, which introduced the higher limits in the Netherlands.

Follow-up

Mr. van der Valka will indicate which other persons organisations are interesting to interview.

Minutes interview Fabien Joret, Ministère de l'Environnement, de l'Energie et de la Mer Direction des affaires maritimes (France)

Interviewee: Fabien Joret

Interviewer: Dalila Fricano (Grimaldi)

Date and time: 12 July 2016, 17.00-18.00

Introduction

Mr Fabien Joret is in charge of Regulatory affairs within the within the French Ministry for the Environment, Energy and the Sea [See minutes of interview of 24 June 2016 for further details].

As a cautionary word: this interview does not reflect an official position duly adopted by the French authorities.

Case study Ogia

Upon request by the interviewer Mr Joret clarifies that his Ministry has not received any complaint by Ogia's passengers in relation to the accident occurred on board Ogia on 1 May 2015 and that his department has not dealt with such case.

Notwithstanding, upon request of the interviewer, Mr Joret clarifies some issues concerning the French legal framework relevant for the case.

Concerning the qualification of the accident as a shipping incident, Mr Joret considers that the Ogia accident cannot be qualified as a shipping incident under the Regulation.

He acknowledges that the definition of shipping incident under French law is wider than the one of the Regulation, as it includes "every major incident involving the ship".

He explains that since the Regulation is directly applicable in France, there have not been measures that have clarified that the definition of shipping incident in the Regulation is different from the one of the French Transport Code and that operators should not use the definition of the French Transport Code in order you assess whether and to what extent the Regulation applies. But the French transport Code states explicitly that its liability provisions do not cover the case covered by regulation 392/2009.

He expects that at a certain point the French courts or most likely the EU Court of Justice will clarify the definition of shipping incident under the Regulation.

He also provides clarifications on issues raised by other stakeholders interviewed by the interviewer and concerning the identification of the class of the ships involved in domestic voyages pursuant to Directive 2009/45/EC.

He acknowledges that there is not a clear correlation between the French way of classifying ships and the classes as defined in the above EU Directive.

He confirms that the security certificate of ships engaged in domestic voyages specifies whether the ship is Class A, B, C, or D ship under the above Directive.

Case study City of Poros

Mr Joret states that he is not familiar with such accident.

Relevance

Mr Joret cannot identify developments in the last years that would affect the way the Regulation is implemented.

He points out that the fact that different liability regimes apply to ships of Class A and B and to the other passenger ships engaged in national cabotage is not justified from the perspective of passengers' interest and increases the complexity of the framework governing the liability of carriers. On the other hand, an extension of the Regulation would raise question of administrative burden and of the availability and cost of compliant insurance solutions for smaller ships (especially for the war/terrorism risk).

As to the application of the Regulation to high speed crafts in France, he refers that this issue has not been discussed in France.

Apart from the above inconsistency, Mr Joret has no opinion as to whether the Regulation fits or does not fit well with the objectives of EU Transport policy and does not believe that the fact that different liability regimes applicable to other modes of transport affect the consistency of EU framework on passengers' protection.

Coherence

According to Mr Joret one debatable feature of the current legal framework is that passengers are provided less protection under the provisions applicable to contracts of carriage, than under the provisions applicable to the cruise contracts since EU provisions on consumer protection apply to the latter contracts under the regulations pertaining to conflict of law and jurisdiction in commercial matters. There is also an additional layer of protection for contracts relating to package travel.

EU added value

Mr Joret confirms that before the implementation of the Regulation the carrier would have been held liable only in case of fault with a presumption of fault in case of a maritime incident.

Thus in a case of terrorist attack, the carrier could have been held liable if its fault could be proven, i.e. if it would be found that a serious breach of security rules could have facilitated the perpetration of the terrorist attack. However, there is no French case law concerning the liability of a maritime carrier in a case of terrorist attack. Thus we do not know which infringements of security rules would be qualified by a judge as a fault of the carrier in a case of a terroristic attack.

Under French law, passengers have a direct action against the insurer if no fund has been constituted for the purpose of limitation of liability. Nevertheless, unlike under the Regulation, the insurer can then invoke all the defences stipulated in its insurance policy. There was no obligation for the carrier to be insured against third party liability, other than the obligation deriving from directive 2009/20 for ship of more than 300 GT. The fund for the victims of terrorism provides cover in case of terrorism.

In addition, passengers were not entitled to ask for an advance payment.

Minutes interview Matias Moldenhauer (Vista Travel)

Interviewee: Matias Moldenhauer

Interviewers: Ioannis Giannelos, Menzo Rood (Ecorys)

Date and time: 02 August 2016, 10:00-11:00

Context

MR. Matias Moldenhauer owns a small Tour operating company named Vista Travel Reiseveranstaltung. They offer international luxury cruises, with destinations all over the world. They are not a cruise liner themselves, but operate between the passengers and the ship-owners. As a tour operator he offers cruises with international or Class A ships (destined for open seas).

Vista Travel Reiseveranstaltung had a particular case regarding an incident. This was before the application of the Regulation in 2013. The case lasted over seven years. The incident regarded a client who claimed he slipped and hit his head during a cruise. This was on-board an American cruise operator. The passenger can't remember the incident himself because of the resulting head injury, and there were no witnesses. He didn't have an insurance and since he had to be helicoptered and treated in the United States, the compensation amount was eventually very large (approx. 500k). This made the case very complex.

Mr. Moldenhauer says the regulation feels more like it addresses main incidents, like with Costa Concordia. Subjects as advance payments, loss of luggage and provision of information mainly target larger cases. In their case even though the victim could file a law suit against the insurer, since it was expected to be a long lasting case, the victim decided to sue the tour operator instead (i.e. Vista Travel). They assume this is because the lawsuit was easier and cheaper in Germany, instead of in the USA. Also it is an economic choice to sue smaller entities as the possibility to reach a settlement instead of having a long-lasting case is higher. Eventually the case was settled, as winning the lawsuit would be more expensive. The costs of a lawsuit are a large factor in this. The tours Vista Tours books, are mostly US-operated, so ships are safer and their risk is lower.

Mr. Moldenhauer had no specific knowledge of the provisions of the Regulation, as his small Tour Operator business does not require cover equivalent to that required by the Regulation. Legally, tour operators are only obliged to insure for €1,000,000 per incident. The limit to liability of a tour operator is around €10,000,000.

Relevance

Mr. Moldenhauer states that in the United States of America, although the safety of ships is strictly regulated, it is more expensive to bring claims as a passenger to courts than it is in the EU. Thus protection of the rights of passengers is still a relevant topic today, at least in other places in the world. He also mentions that German regulations on passenger rights are already very strict. For example, when you're on a 10-day trip, and you can't call in a port for whatever reason even safety reasons you can be claimed a 10% return of payment. This can vary for other countries. In the USA you have significantly less rights as a passenger.

Mr. Moldenhauer noted that the levelling the playing field is also a relevant objective. As an example he mentioned that previously victims from more poor regions and countries were more probably offered a smaller compensation and would be prompt to settle with that.

No recent development leads to changes in the sector affecting the application of the Regulation.

Effectiveness

The Regulation at stake provides a much fairer and equal scheme for compensations compared to what existed before, where compensation dependent significantly on the origin of the victim and/or the location of the accident. He notes that in for example the United States, it is much harder to claim your rights. Reasons are expensive processes and long delays between trials. Thus there is difference between theoretical rights and what you get in practice. He expects this Regulation to narrow this gap in the EU.

Mr. Moldenhauer does state that the regulation can make it harder for smaller companies to survive. This could be the case when the regulation would also contain Class C and D, which concern average and smaller ships, possibly owned or operated by smaller companies. This would not necessarily help build a level playing field from a tour operator's perspective.

However, Mr. Moldenhauer still sees voluntary offers of small compensations happening a lot in the market when minor losses are concerned, as they are easier and prevent court cases, while leaving both passengers and operators content for avoiding a potentially lengthy and costly procedure.

Regarding the requirement for war and terrorism cover Mr Moldenhauer acknowledges that some regions are riskier, but that's not really a problem dealt by the Regulation as the industry responds to that anyway. In Turkey for example, due to recent political instability and terrorism all cruises were rerouted to other destinations, for example Greece. In practice one can never exclude terrorism acts anywhere, therefore it is difficult to plan trips based on such assessments. It is more probable that cruise operators choose destinations based on public perception of safety for commercial reasons, rather than based on risk analysis.

For tour operators, there is initially not so much added value seen in the Regulation as it takes away freedom however some level of clarity in rights can help. [Paraphrasing] "Nobody likes regulation when it enters into force, but when things get serious, everyone is happy that their rights are clear and protected."

Efficiency

Mr. Moldenhauer says that it is easier for large cruise liners to insure correctly. However for smaller businesses like Vista Travel, it is harder. The profits in the sector are anyway small, and when a serious incident might occur and exceeds the insurance cover, then it is easy to be driven out of business.

The interviewee states that insurance premiums increase every year, but not necessarily due to the Regulation. Inflation and other corrections are the main cause of this. Eventually the Regulation should impact passenger fares, but this is by no means the main cost driver. Costs are mainly driven by fuel (and hotel operating costs for tour operators) so the impact of the Regulation on passenger fares is potentially small. He takes cruises in the Mediterranean sea over the last year as an example for passenger fares. The fares in that region have even increased less than inflation. Some of the reasons given are the introduction of larger ships, making it possible to efficiently serve more customers (i.e. economies of scale) and the evolution of oil prices. The largest ships can carry over 6000 guests, in addition to 3500 crew members. Vista mostly focusses on the cruisers of approx. 300 to 600 guests.

The impact of the Regulation the insurance premiums may not be very large, especially for bigger companies because of the options they can find in the market. For smaller companies, there is a higher impact as they have less choices available.

Mr. Moldenhauer also responds that administrative burden is large to comply to all EU regulations especially for SMEs that cannot afford hiring specialists to assist. This is due to the time needed to check the requirements and prepare compliance, but even more so because of the knowledge required. Large companies have legal departments, but smaller companies cannot always follow all developments. Smaller companies consult their insurer: "What do we need to do to comply with EU legislation?", but sometimes it could also be a risk that a company takes.

EU Added Value

The German passenger protection Regulations were already pretty strict before the entry into force of the Regulation. These national regulations made tours subject to German laws already comply with most of the EU regulations' provisions, such as 392/2009. The regulation provides however added value, mostly due to harmonization of passenger rights, as without the regulation the rights of passengers would be different in the Member States. Now passengers can know what can be expected in matters of compensation, although prior information is not always the case.

Minutes interview Nils Heijboer (Dutch P&I)

Interviewee: Nils Heijboer

Interviewers: Ioannis Giannelos, Menzo Rood (Ecorys)

Date and time: 04 August 2016, 14:00-15:00

Context

Mr. Nils Heijboer is director claim of Dutch P&I (DUPI). Being the P&I club for multiple ship-owners and operators, DUPI acts under Regulation 392/2009. Mr. Heijboer mostly encountered the Athens Convention in practice. However, the consequences of the Regulation have been seen in practice. This is especially true for the rights of advance payment and protection of luggage and cars of passengers. Mr Heijboer states that advance payments are given directly when rightfully asked. DUPI trusts lawyers in this, as they are the experts on the application of the Regulations.

Under Dutch law, a party losing a trial, must pay for the lawyer of the claimant. So when the companies' fault is obvious, costs can also be driven up. He also states that because of trials, which can take a lot of time and money, thus settlements occur often for minor incidents.

Relevance

In the past a lot of claims used to be stalled in court and hoped to be forgotten, or otherwise deplete the claimants sources due to lengthy processes. Since the regulation, Mr. Heijboer sees that the underwriter are more engaged and active. Claims are handled a lot faster since the Regulation

Effectiveness

For countries with a lower safety standards, insurance premiums can be higher than countries with good safety records, however the most important factor is the safety reputation of the operator.

For example, Denmark has quite strict rules. This also results in safer conditions. Mr. Heijboer has had one case there three years ago, where a girl's hand got stuck between the boat and the dock during mooring. In this specific case, the fault is harder to establish. It is explicitly a safety measure that passengers should have their hands inboard. However the reaction of the medical service (ambulance) might also have been critical making the allocation of the claim debatable. The case is still pending, as the lawyer prefers not to settle before the criminal investigation is completed, because claims are higher in case the shipper is proven responsible. After the incident, the shipper explicitly announces a hands on board message during mooring.

Mr. Heijboer notes that there is still a grey area regarding the attribution of liability, with sometimes a lot of discussion as a result. In most cases a deal is worked out, so that court is avoided, if it regards a smaller incident. The regulation makes the rights more clear, but Mr. Heijboer doubts it's more fair than before. He does mentions when the fault lies with the ship-owner, it is easier nowadays to reach a settlement.

In terms of injury, he mentions two types of claimed costs, which are the calculation of damage (including loss of productivity etc., a fixed price) and

exemplary damages/indemnity. This last one can be ridiculously high in some cases, but most of the times are reasonable. This differs per country. In the Netherlands, there is a fixed table with the sums, but in the United States of America, the sum is decided by jury, allowing much larger differences in sums.

Mr Heijboer has also encountered some cases of loss of luggage and damage on cars during shipping. Most of the time the latter involves a gate barrier that drops on the back of a car. This sorts of property damage will be settled. Sometimes there happens a collision. The most common are disappeared or broken belongings of passengers, but the most difficult to handle are the sinking incidents, involving casualties.

Efficiency

Private individuals have more rights, and underwriters cannot walk away from it. In addition, he mentions that with social media, a lot more claim and complaints reach either the company or the rest of the world. In order to stay in business, companies need to have a good reputation. Mr Heijboer sees that this leads to higher safety standards: If a certain company has more claims, the premium will go up, and this absolutely has an effect on the safety standard. When a number of claims of the same nature come in and are won by the claimant, the premium will increase in that respective area. Mr Heijboer says also that if a ship-owner tries to switch insurers, the new underwriter will be able to see the recent losses too, contributing to a higher risk profile for the ship-owner. As insurance is obligatory, and a ship-owner not abiding with safety standards will not be able to find affordable insurance.

The insurance premium is based on multiple criteria in addition to the safety record. Size and number of passenger are other contributors. However, the safety history has a great influence. Mr Heijboer says that sometimes the management of a ship is checked. So the safety record, and the amounts paid in recent claims affect the price. The safety record is operator-based, meaning that the ship's safety record itself isn't as important. In addition, maritime classification societies of the ship are an important contributor. Ships have to be assessed by larger classification societies as Lloyds register, American Bureau of shipping etcetera, if they want to be insured with an International Group P&I.

Mr. Heijboer says that smaller carriers have a more difficult time to obtain the same premiums for a certain coverage compared to larger carriers. Companies like Carnival Cruise Lines, Disney Cruises and Costa Cruises have large fleets, meaning they have more power in negotiating premiums.

In Europe, we have the Athens Convention and the Regulation to protect passenger rights. However in countries like Indonesia, some ships with a capacity of 300 passengers carry 3000 passengers. In European ship owners that break the conditions of the cover, are in trouble. The risk of going bust then in case of an accident is very large. In addition, passengers will shift to companies that abide the safety standard better.

The price of a premium of a fleet is first of all based on standard/basic vessel information, such as number of ships in the fleet, size of the ships and the number of passengers that the ships can carry. A quote for insurance then will be ready in 2 days, so a cover can be in place in 2 days. A few e-mails will do, given the right documents are supplied. Sometimes with a larger ship, it has to be subjected to a condition survey, which will take a little longer, and could take a day.

Coherence

Even though Mr. Heijboer does not necessarily mentioned problems due to having multiple regulations in place, he does mention that certain regulations are read and explained differently in certain countries. In addition, national laws can make even more differences between EU Member States.

EU Added Value

Mr Heijboer finds that the major EU added value is the increased protection of the individual. The regulation has helped counter the process of running individuals out of cost with long trials and delays. This is mostly now the case when the company has a strong defence.

Regarding war-risk, Mr. Heijboer notes that every ship that will go to regions marked as war zone will have to announce it and pay extra premium. The new regulations on this do not necessarily impact premiums, as there is no war within the EU itself.

Minutes interview Brigit Soling Olsen, Danish Ministry of Transport

Interviewee: Brigit Soling Olsen

Interviewers: Ioannis Giannelos, Linette de Swart and Geert Smit (Ecorys)

Date and time: 04 August 2016, 11:00-12:00

Background

Mrs. Olsen was leading the Danish delegation negotiating the 392/2009 Regulation and responsible for drafting the Regulation and implementation in Denmark, including drafting secondary legislation. Mrs Olsen was involved in the subject area prior to the implementation of the Regulation, specifically dealing with the Athens Convention.

National application

Although the Regulation applies directly to Denmark, the government decided to have national regulation as well (including secondary legislation, as mentioned above). This also serves in extending its scope and defining the exact provisions for vessels not covered in the Regulation.

The Danish implementing regulation identifies 3 main vessel categories for the purpose of the Regulation:

1. International carriage and domestic A & B class vessels (already covered by Regulation);
2. Domestic C & D class vessels;
3. Other vessels used to carry passengers (also with less than 12 passengers)³¹⁰.

For the first category, the Regulation applies fully. For the second and third category not all Regulation provisions are maintained. The application for these categories exempts specific Regulation provisions (e.g. handicapped equipment, advanced payment, war-risk coverage, etc.) and is aligned with the IMO regulation. Further, for categories 2 and 3 the authorities are not required to issue a certificate as is required for ships falling in category 1. For ships falling in categories 2 and 3, Danish law only requires that they have obtained insurance and that proof of insurance is available on board the ship. The adjustments were made in order to lighten the burden for smaller vessel operators while ensuring passenger protection.

Category 3 was necessary to ensure that also passengers in smaller vessels are properly protected. This includes vessels operating in ports, event ships, fast ships used for "joyrides" etc. It is important that insurance limitations amounts and strict liability for these ships is in accordance with the Athens Convention. [quote] The commentary to the draft legislation which is an integrated part of the governments proposal stated: the protection of passengers should not depend on where the passenger vessel operates.

³¹⁰ The reason for included this last category within the scope of Danish law is that many boating activities take place which can lead to serious injuries, but where covered by the then applying legislation. A direct cause of introducing for smaller ships was an incident with a dragon boat where several children fell from the boat and were injured. At the time of the incident, only general liability legislation applied (in which the burden of proof was placed on the victims).

The material of which the ship is made nor the size of the ship is relevant for the application of Danish legislation. In Danish law the activity is the subject, not the ship itself. If a ship is carrying passengers (on a contractual basis), the ship fall under the applicably liability regime.

The special provisions for categories 2 and 3 aim to tackle the difficulty of smaller operators to get extra P&I coverage for smaller vessels. Thus applying only the Athens Convention and IMO Conventions provisions standardises the insurance requirements, rendering no need for new insurance product creation.

Denmark has a lot of sea transport and a relatively high number of small ferry lines (159 registered Class C and D ships). This amount exceeds by far the international carriage and Class A and B ships (app. 30 registered Class A and B ships) No significant difficulties were encountered in the implementation of the Regulation for Class C and D ships Only very few reactions were derived from local communities/operators mainly on their capacity to insure their local operations. A minor extension of the period to implement was granted allowing for a relevant insurance product to become available.

Despite the significant sea transport activity, there are very few serious accidents in Denmark, with the last one taking place 3 years ago, proving that shipping in Denmark is very safe. This was an accident on a port tour were a little girl got her arm caught between the ship and the quay and her arm had to be amputated. As the accident took place on a smaller vessel (tourist attraction), this proves the necessity to properly cover also smaller operations.

Before the adoption of Regulation 392/2009 and the Athens Protocol, the Danish liability regime for shipping accidents was based on the general liability regime. In this regime the burden of proof rests with the victim. As a result of the specific rules laid down in the Regulation and the Athens Protocol, Denmark now has a liability regime (for shipping incidents) in which the burden of proof rests with the ship operator. This means a reversal of the burden proof and larger protection of the passenger.

Relevance

The Regulation objectives are seen as relevant. Especially the level of protection of passenger rights is appropriate. Ensuring a level playing field is an issue in international carriage. In domestic operations, equal protection can be enforced by national authorities and rules can apply to all vessels irrespective their flag.

In the time since the application of the Regulation, there are no significant changes observed that would impact the application of the Regulation (for example in the technical or legal environment).

Effectiveness

Safety standards are very efficiently implemented and enforced by PSC and FSC, not this legislation. The legal framework on sanctions in case of violation of these standards is very important.

Denmark has had very few incidents, but the level of compensation and the timing of payment and advanced payment should be affected by clear Regulations. The limits to liability and other provisions provide to the victims options and strengthen their negotiation power in case there is no agreement with the operator. Often an agreement will be reached between the ship operator and the victim and only in a minority of cases a victim needs to rely on the provision of the Regulation. In this respect the Regulation acts as a safety net. However, quality operators do not like to have bad publicity so they operate responsibly and opt for settlements satisfying to the victims.

An evidence of the Danish operators' emphasis on quality is that although the Passenger Rights Regulation 1177/2010 is in force for 3 years, only 2 complaints have been received by the Maritime Authority.

There is a question regarding the harmonisation of liability requirements with other modes, especially rail. Limits to liability are not equal for all modes. Overall, the application of the Regulation has been with no problems and no unexpected effects. although there is only limited experience in place.

Efficiency

The Maritime Authority issues a Liability Insurance Certificate. In order to get this certificate a fee is required, which is based on the amount of time spent and can only be set on a cost-recovery basis. The certificate is issued electronically, which further decreases the cost. The administrative burden (nor the fee itself) is significant. As stated above, no certificate is needed for Class C and D ships and other vessels.

Effort to obtain certificate for operators seems to be a standard operation and no complaints have been observed. Insurance outside the IGPANDI and EU P&I companies might be an issue, since the Danish Maritime Authority needs to check the coverage of the insurer. Before issuing a certificate the Danish Maritime Authority needs to verify whether there is actual coverage behind the insurance paper, so that in case something happens the club will indeed pay. If it would turn out that a club is not able to pay in case of damage, but the ship owner would be able to show a certificate issued by the Danish Maritime Authority, the Danish state could be held liable based on state liability. Such a situation needs to be avoided.

There has been no complaints or proof regarding too high an impact on insurance premiums and passenger fares. Also, there is no hint that the insurability of safe operators is jeopardised. [quote] "If no one is willing to insure an operation, maybe it is not as safe as it should be".

Coherence

The Regulation fits well with EU policy on passenger rights framework. EU should require quality operators and the Regulation is part of this strategy as well as it protects passenger rights.

Added value

There is EU action added value in securing an equal application, especially on international carriage, aimed at protection of passenger rights.

Also of added value is the bringing into effect of the Athens Protocol at EU Member State level through the ratification by the EU.

Complementarity

The Regulation supplements the Athens Convention provisions and the national legislation of Denmark. No problem is reported on the interaction between EU and Danish legislation.

Minutes interview Rolf-Jürgen Hermes, PANDI Services

Interviewee: Rolf-Jürgen Hermes

Interviewer: Ioannis Giannelos (Ecorys)

Date and time: 8 August 2016, 15:00-16:00

General

Mr Hermes is a correspondent for P&I Clubs in Germany and part of a network representing P&I clubs locally covering multiple German ports and having representation in Russia and the Baltic Sea. They protect the interests of ship-owners as well as those of insurers in case of accidents or other difficulties. Amongst others they represent many cruise operators for passenger claims. PANDI has been monitoring the legal situation starting from the Athens Convention. In practice passengers direct their claims initially to the cruise operator, i.e. the contractual partner of the passenger or (less often) ship owners since they are the obvious point of entry into the procedure as in case of incidents. Then the claim is handed to the insurer if necessary.

Relevance

The general approach of the Regulation is right as it aims to clarify passenger rights.

The scope seems partly relevant since it covers the vast majority of passengers (at least for cruise resp. ferry operators). There will be limited use of expanding the scope to smaller vessels at least for Germany, as smaller operators are properly covered by German Law provisions.

However, this Regulation does not seem to be a relevant tool to increasing ship safety or establish a full level playing field as national regulations are impacting this as well.

Effectiveness

Passenger protection was pretty effective already according to German law with the exception that passengers did not have the right of direct action against the insurers.

Mr. Hermes, does not see the Regulation as being able to create a level playing field on itself for multiple reasons: i) there are also national laws applicable that still differ the level of protection in Member States; and ii) more than 90% of the world tonnage is covered by P&I clubs that cover legal liability of ships.

Nevertheless, the Regulation has probably brought on slightly larger premiums due to the potentially increased risk introduced of paying a large claim. Differences between larger and smaller operators and their capacity to pay for the premiums however still exist. There is a difference between carrying EU and US passengers as claims can be higher in the US affecting also the premiums. Operators carrying mixed passengers may be required to pay higher premiums to account for these higher risks.

However, passenger claims under German law have not changed. They cover (as was the case also before) all types of claims including injuries, material,

moral and psychological claims. What has changed since the effect of the Regulation has been the fact that looking into a claim in principle has become much more straightforward nowadays. It is more clear as to what is covered. Once the responsibility is established, there is still however the need to agree on the level of the compensation, this is something still open to interpretation by national courts. Nevertheless, it is now more clear under what circumstances operators can be held liable.

The impact on the advanced payment is also significant as this is easier provided since the liability is now more straightforward to attribute. Advanced payments were anyway in accordance with industry practice, but now they are more easily attributed.

There can be no claim for an impact on safety performance of operators. This is the primary concern of (and dealt with by) other Regulations. Regulation 392/2009 does not have a particular impact in this respect.

Also, no specific negative or unexpected effect has been identified, only possibly a consequence on insurance premiums. But it is difficult not to say impossible to quantify this effect: too many different factors influence the level of the individual level of insurance premium.

Efficiency

Beyond the expected impact on insurance premiums there is no other expected Regulation impact. Mr. Hermes cannot comment on the level of impact as there are no specific information available from different clients. Thus also no insight exists on the impact on the insurability and passenger premiums for operators

Regarding the level of administrative burden brought in by the Regulation, there is no more work required compared to before to acquire a cover, since this was anyway required in Germany, just the provisions of the cover change in in that the level has to reflect the increased legal liability following Regulation 392/2009.

Coherence

EU Law has with the Regulation been unified. Liability is about the same everywhere which makes life easier especially for mixed nationality voyages. The existence of one Regulation for all, reduces a bit of administration work for operators as there is no need for special contract conditions for ship owners in voyages with passengers of different nationalities.

As far as Mr. Hermes is relevant to answer, there are no specific concerns encountered related to the interaction between Regulation 392/2009 and the relevant international framework.

EU value added

There is a higher level of protection than before but liability in principle did not necessarily effectively change, since the way the legal system operates and assesses the value of compensation is still the same, namely relevant to the interpretation of the value of the loss by local judges. The level of

limitation of liability has been set quite high and it is difficult to see individual claims reaching these levels from a German perspective. In normal (95%) cases, these limits are unlikely to become relevant.

Minutes interview Françoise Radetzky, EESC

Interviewee: Françoise Radetzky

Interviewer: Dalila Frisani (Grimaldi)

Date and time: 8 August 2016, 9:00-10:30

Françoise Radetzky is since November 2015 member of the Economic, social and environmental Council (EESC). She was founding president (1986-1998) and General Delegate (1998-2008) of SOS Attendants and is responsible for victims of terrorism.

She was working (as a lawyer) at the French Ministry of Industry between 1971 and 1974 and as CEO of the corporation Havre-Provence in 1982. On December 23, 1983, she was hurt during a terror attack.

Further to this episode she realized that the victims of the terrorist attacks received no support. Thus, she created in 1986 the SOS Attendants-SOS Terrorism for assistance to victims.

She funded the Guarantee Fund for victims of acts of terrorism and other offences in 1986 of which she is still a member of the board. She received in 1990 the status of civilian war victim granted to all victims of terrorism and hostages. Received repeatedly at the UN, she supports the establishment of a European criminal code for particularly serious and transnational crimes.

On 22 September 2008, the association SOS Attendants she headed was dissolved due to lack of funding.

Ms Radetzky manages the above Fund for victims of acts of terrorism but does not handle specific files.

City of Poros attack

Ms Radetzky confirms that to the best of her knowledge no French passenger injured on board the ship City of Poros received any compensation further to the above attack.

She confirms that the French passengers whom her association assisted in the criminal proceeding concerning the case City of Poros stated that they had not been compensated by the insurer of the ship/the carrier or the ship-owners. Similarly, the relatives of the three French deceased passengers did not receive any compensation by the insurer of the ship or by the carrier/ship-owners.

Victims and their relatives stated that they had not received any form of assistance further to the above City of Poros terrorist attack.

She is not aware of whether Greek passengers received any form of compensation by the insurer of the ship.

She is also not aware of any judicial proceeding concerning the attack to the ship City of Poros other than the one opened in France and concluded in 2012.

Concerning the functioning of the Fund she manages, i.e. the *Fonds de garantie des victimes d'actes de terrorisme et autres infractions (FGTI)*, she explains that there are no limits to the compensation that the fund offers to injured victims and to relatives of deceased victims.

Concerning the case City of Poros she refers that the relatives of deceased victims were compensated for moral damage. Entitled relatives were: parents of the victims, sisters and brothers and grandparents. The victims had no children, so the fund did not compensate any children of deceased passengers in the case City of Poros.

She refers that the fund covers the economic losses in case of death of a relative and in case of injuries. However in the case of the three French passengers deceased during the attack, no claim for economic loss could be compensated because the three deceased French passengers were not working due to their young age.

As to the injured passengers, their compensation was calculated based on the findings of the medical report that each claimant submitted to the fund along with his application.

She refers that many passengers jumped into the water so they were not registered by the Greek authorities further to the terrorist act.

Such passengers did not claim compensation immediately after the accident but claimed for compensation when the criminal proceeding started in France in 2012.

However in 2012 their right had expired pursuant to French rules on limitation periods.

In consideration of the situation of the above victims Ms Radetzky lobbied for an amendment of the law concerning limitation periods. Thus in 2012 the law was amended in order to allow victims of terrorist attacks to seek compensation to the fund she manages 1 year after a criminal proceeding concerning a terrorist attack is closed. The new rules on time limits applied retroactively to the claimants in the case City of Poros.

Ms Radetzky clarifies that the fund she manages compensates victims of terrorism for moral and physical losses and for economic losses.

Physical losses are compensated based on specific evidence concerning the disability of the claimant.

Ms Radetzky says that the fund compensates victims even in case they have been compensated pursuant to liability rules.

However the fund does not compensate a loss if the same has already been compensated.

As to the evidence that the claimant has to submit in order to obtain compensation by the fund, he/she has to provide copies of travel tickets or pictures proving that he/she was on board a ship or in the place of the attack at the time of the attack.

Minutes interview Peter Haagen (Raets Marine)

Interviewee: Peter Haagen

Interviewers: Ioannis Giannelos, Johan Gille (Ecorys)

Date and time: 10 August 2016, 15.00-16.00

Context

Raets Marine is a fixed P&I insurer. Besides the mutual P&I club system, since 25 years there are also fixed P&I underwriters. Mutuals don't have profit incentive, but fixed underwriters do. In practice same business, insure ship owners, yacht, fisheries, passenger vessels. The appetite for passenger vessels is more with P&I clubs than fixed underwriters, due to the risk profile. This is especially valid for cruise vessels due to the claim culture in cruise that creates a higher risk profile, making it not very appealing for most insurers.

Example Costa Concordia, claim culture causing insurers (American claim culture also). Plus risk of these types of ships is less predictable. Not too many clubs are willing to underwrite cruise ships, also the members of these clubs do not always like cruise vessels involved. Therefore, there are talks whether or not big cruise lines (and also the large crude tankers) should have their own mutuality. This would result in raising premiums for this sector segment. For ferries there is not such a problem at large.

In any case, Raets Marine, as a fixed P&I have a limited appetite for cruise. These require very high limits of insurance. They underwrite up to limits of 10-25-50 mln, but for the big ones you need 500 mln. (400,000 SDR per pax * capacity can be much higher for big cruise ships). Above 500 passengers a special approval is needed. Passenger ships in their books smaller sized, ideally ferries or day trip vessels. Vast majority of their portfolio in Turkey, some in Indonesia, and here & there across Europe. Example ferries to Wadden Sea islands, Bosphorus ferries etc.

No real changes in behaviour observed since the entry into force of Liability Regulation. No claims since. Continued to insure, take note of the regulation. Only effect has been the increase of liability limits, the size of ships to be insured was reduced in order to fit their capacities. Technically this reduces their market, but as they already targeted smaller vessels only, it did not directly affect them.

The insurance market comprises of the IG (with 13 P&I clubs) and a number of fixed underwriters, globally overall maybe some 25-30. None in some parts of the world (e.g. Latin America). So traditionally the market already works internationally. A ship owner simply needs to have insurance, irrespective of where he sails. He might rely on his local insurance broker (Aon, Marsh, etc.) to find him an appropriate insurance product. He would in most cases not be in direct contact with the insurers anyway. Same goes for other types of shipping insurance.

Relevance

Creating a level playing field is a positive objective. Harmonising is very good, although Europe is still not very good at it. If everybody would finally follow suit that would be ideal. As all insurers are affected similarly, it has not

affected Raets Marine especially. The pay-to-be-paid principle was already eroding as a result of the blue card introduction, but not an issue for them either.

All 4 of the objectives of the regulation are relevant. These help improve the image of shipping at large, especially after some of the most recent events that have affected public opinion (oil spills, Costa Concordia etc.).

Scope (international + domestic A&B): good to have level playing field, good to have protection of passenger rights and awareness among them. But not aware of complaints in this field. This might be different for the cruise segment (with an American claim culture).

Regarding domestic vessels, passengers are really not aware of what they are entitled to, in Costa Concordia and other vessels, there is a lack of information. Complaints on levels of compensations and claims come predominantly from the cruise business also due to the American claim culture. This is not the case for ferries. However, the increased levels of liability, the creation of the level playing field and the increased protection of passenger rights are good objectives that shouldn't be opposed.

For loss of life, etc., fair to have good coverage level. For things like car damage, loss of luggage, is more a matter of travel insurance business, not really critical.

If insurance premiums would increase, it may become more difficult for smaller vessels (regulation already applies to ships carrying 12 pax). On the other hand economic reality will dictate premium levels.

Effectiveness

The set of objectives create a stick & carrot situation. If a ship owner gets a stick (far higher liability thresholds) it should be more effective than anything else. For shipping at large however, during a difficult economic situation (such as that faced now) owners have difficulty to stay afloat. Money shortage first affects maintenance, thus ships are deteriorating, indirectly raising risks. A stick method cannot avoid this. Would this lead to higher premiums? Potentially yes, but in this current situation this is not the case. There is no room to increase premiums as ship owners would not be able to pay for them. Usually insurers can inspect a ship and reject to insure it if this found to be substandard. Ultimately those vessels that are not up to standard on safety will not be able to insure. However insurer inspections take place when there are reasonable doubts concerning the safety standards of the vessel. Factors affecting the decision to make an inspection are not based on stringent rules per se but general management practices, safety record, claims history, age of ship, class, but most importantly on flag reputation....and data crunching.

It is clear that the Regulation does not incentivise safety performance. Ship owners are not incentivised by liability limits, moreover they do not have to demonstrate safety levels of vessels to insurers to get insured (this is not the industry practice). There is in principle no ship owner that cuts corners on safety (risking his ship) due to low liability levels.

The Regulation provides larger clarity regarding the rules of compensation creating a level playing field across Europe and better protection of passenger rights. There is no specific knowledge of impact on claims. However, there are rumours that the more recent cases in IT and EL indicate a move of towards toward the higher limits to liability of the Reg. 400k SDR instead of 250k SDR. This affects the ability of insurers to underwrite larger vessels since the underwriting happens on a higher basis. Normally this would lead to higher premiums but the situation in the insurance market does largely not allow for this increase premiums at this point, this is an insurance competition issue. Should the industry be confronted with an increase in claims, or should the market situation allow, premiums are expected to rise to compensate for the higher risk profile. However, under the new Liability Regulation, Raets Marine has not received any claims.

There has been an increase in IG P&Is premiums for passenger transport recently, however, and since this represents a global situation, this increase is mostly irrelevant with the Liability Regulation. The raise is mostly attributed to the discussion within P&Is regarding the mutuality of risks, very large vessels, such as the larger cruise vessels or container ships (e.g. Emma Maersk) call for a restructuring of the mutuality scheme. This is part of a much more complicated discussion. Ferries are less adversely affected than cruise ships.

Efficiency

Costa Concordia a number of passengers accepted compensation on the basis of Athens convention, but some did not hoping that suing the mother company will result in higher compensation, anticipating the Liability Regulation. However insurance sector is 'soft' at the moment, e.g. can decide to dissolve costs within existing cost structures. This might change in future, but if and when is unknown. If a change in the claims culture starts to arise, it certainly will result in increasing premium levels. Such increases would be much more difficult for smaller ferries to facilitate.

However so far not a lot of material claims are received. If there would, the industry might be forced to increase premiums and if the market does not allow then they would need to step out of this market. This is a general issue across the entire shipping insurance market, not just passenger ships.

Insurance is part of the running costs of a ship, say 5-10%, but don't know how this reflects in passenger fares, probably not having an enormous impact. Things like bunkering costs have much bigger impacts and are much more volatile also. No real difference between larger and smaller ships is expected. The vessel and operator claim history is important. Day ferries are not a high risk category

Costa Concordia costs, although to be covered by re-insurance between P&Is (International Group) but no systematic change. Underlying issue is the sheer value of such big ships that may call for restructuring mutuality. Smaller ship owners, and smaller insurers are increasingly unwilling to be in the same mutuality scheme with these.

Coherence

Link to maritime safety policy: ship owner is not incentive by a stick to become more safely operating. Higher liability limits are OK for passengers, but do not contribute to more safety as such. No ship owner will cut corners just because the risk of liability is lower. Issues like advance payments, good that they are there, but not having an influence on shipping operations.

Regulation contributes to level playing field, which is clearly supported by Raets Marine. It is not that passengers have been brutalised by ship owners in the past, though. Big incidents like Costa Concordia and also crude carriers have been providing arguments for restructuring of the mechanisms, but still shipping should be seen as an important and reliable industry. Sometimes regulations seem to suggest that the sector is not trustworthy, which is not the case at all.

EU Added Value

Level playing field, same conditions for everyone is very much supported. And an insurer does not have to assess each jurisdiction saves them costs. Idem from a claims perspective.

The common Regulation brings a harmonised set of rules that simplifies the process of assessing claims for insurers. Now they do not need to look up all national legislations in such cases (this is more relevant for international carriage).

EU vs national provisions? No experience with this so far.

Interview minutes – HA Group

Interviewee: Sibrand Hassing
Interviewers: Johan Gille and Linette de Swart (Ecorys)
Date and time: 24 August 2016, 10.00- 11.30

Background

Mr. Hassing is the Director Fleet Operations of the HA Group. In this position he is, amongst others, responsible for monitoring all EU regulations and assessing the implications for the HA Group. In the past he worked at the Dutch Ministry of Infrastructure & the Environment.

The HA Group consists of the cruise liners: Holland Amerika Line (HAL), Seabourn, P&O Australia and Princess. Jointly these cruise liners operate 39 ships. HAL owns 14 ships, all sailing under Dutch flag. The ships of Seabourn are sailing under the flag of the Bahamas, the ships of P&O Australia are sailing under UK flag, most of the Princess ships are sailing under the flag of Bermuda, three of their ships fly the UK flag.

The HA Group is part of the Carnival Group and the entire group operates 101 ships. The headquarters of the HA Group is located in the US, similar to the headquarters of many other cruise liners. The cruise market in general is very US oriented and also the majority of HAL passengers (around 80%) are American. Therefore, US legislation is very important for HAL as well as having sufficient insurance in place, as a result of the general US claim culture.

From a cruise line perspective HAL operates in the middle ship size segment, which means that they do have ships with a maximum capacity of 2,700 pax.

Relevance

Before the entry into force of Regulation 392/2009 the ships of the HAL were already insured for liability claims. For each risk the HA Group decides whether or not they will have insurance or whether the risk can be borne from the company's own capital resources. Several risks need to be insured based on legislation, e.g. wreck removal and since its entry into force also the insurance coverage falling under Regulation 392/2009. For other risks an assessment of the risk and the insurance premiums will be made.

Also before the entry into force of Regulation 392/2009, HAL did not receive a major claim, so they do not have experience with this. In general, most of their passengers have their own travel insurance, which will cover the costs in case of lost luggage or minor injuries. In case a passenger files a complaint to HAL, they will try to solve the problem in consultation with the passenger(s). It is important that passengers remain satisfied. In most cases, passengers try to claim a free cruise trip or a reduction on their next cruise, instead of claiming money. More in general, passengers have become more aware and pro-active in claiming their rights. The role of social media is a factor in this.

Until now HAL does not have experience with claims falling under the scope of Regulation 392/2009 as, luckily, no major incident has happened to one of the HAL ships.

HAL only offers international services and therefore has no experience with the domestic Class A, B, C and D provisions of the Regulation. From a cruise perspective this is also hardly relevant as in Europe there are hardly any domestic cruises. Perhaps in the UK and Norway such cruises may be organised, but even Norwegian cruises often start outside Norway (e.g. in Denmark, Germany or the Netherlands). In the cruise industry it is important to start a cruise near a large international airport. Norway does not have such an airport available.

Effectiveness

Level playing field

As the provisions are laid down in a Regulation instead of a Directive, the contribution to the creation of a level playing field will be higher. In practise, P&I clubs offer more or less similar products, which make it easier to take out insurance. Less negotiation time is required, which smoothens the process.

In the cruise market, only the largest P&I clubs are active as the risks that need to be insured are very high. Smaller clubs are not able to offer the required cover for such risks. HA Group has its liability insured with three P&I clubs. For some of them, their relation goes back to the times of establishment of the company (1873). The large clubs are able to provide the advance payments quickly. Being able to quickly fulfil such obligations is vital, especially in the cruise market. In case such an obligation is not fulfilled, the ship is not allowed to leave port which is crucial for a cruise ship (one needs to keep the passengers satisfied and being detained in port is not part of that).

Passenger protection

With the entry into force of the Regulation passengers are better protected than before, according to Mr. Hassing. On the one hand the insurance offered is equal, so the room for ship owners to deviate in this has diminished. They all need to have a similar insurance. On the other hand, ship owners no longer have the freedom to make different offers to passengers, so the level playing field is improved. Before the entry into force one ship owner could, for instance, offer full compensation to the passenger in case of proven damage, while another could offer only to cover 50%. Nowadays, they have to offer full compensation in case of proven damage.

Although it is good that passengers are compensated similar by cruise liners, this will not influence their choice for a specific company. When choosing a cruise, they look at the destination and price. They do not consider any compensation policies. They also typically do not read the general conditions, although HAL always provides them, once the ticket is booked. This was already done before the Regulation entered into force.

Passenger safety

The Regulation did not impact safety standards on board HAL ships. The safety standards were already very high and for cruise liners on-board safety is vital. Much attention is paid to this topic; however the regulation did not additionally raise the awareness. Even before the Regulation, general policy of

the HA Group was not to go to dangerous/high risk areas. Recently, their cruises no longer go to the East Med and Turkey, but this was triggered by internal motivation instead of the regulation. It is common practice in the cruise market to avoid dangerous/high risk areas.

In case cruise ships decide to sail to more dangerous/high risk areas, their insurance premiums will go up as well, as P&I clubs are only willing to insure such vessels when the risks are sufficiently covered.

The cruise market is more influenced by the IMO ISPS Code. As a result of the 9-11 attacks on board security is more intensely monitored in order to increase on board security. In addition, cruise liners are nowadays also more focused on onshore security performance. For example, bus companies offering transport to touristic locations are asked for their safety records, in order to ensure that passengers are safely transported to and from the ship. The responsibility of a cruise operator for the passenger has thus extended. This result more from a business perspective than a legal perspective, as from a legal perspective the operator is often not responsible for passengers going ashore.

Efficiency

The HA Group did not experience problems with obtaining the required insurance. All P&I clubs ensured that they offered the insurance needed, so both the war risk and non-war risk cover were easily obtained. In practise, the HA Group obtains cover from several clubs in order to spread the risk. In case HA Group faces a claim, it can potentially be very high; therefore more than one club is used to ensure that a claim can be dealt with. Each club insures a part of the risk.

Main advantage from an efficiency perspective is the more simplified process for claim handling. The Regulation provides guidance on how to deal with claims and therefore claims could be dealt with in a more standardized way, as there is no room for interpretation. However, no impact on the number of FTE was seen, and HAL has not had any events effecting the application of the Regulation

EU added value

Main advantage of the Regulation is that it creates uniformity. Because the provisions are laid down in a regulation there is hardly any room for interpretation. In each Member State the same rules apply and no deviations are allowed. Also all cruise liners are facing the same regime. In case the provisions were laid down in a directive, the room for interpretation would have been larger. Member States would also have more room to deviate from the rules, which reduces the uniformity of the rules. In such case, still 28 different regimes would apply, which would make it more difficult to comply.

The Regulation has probably impacted the ferry shipping more than the international cruise market, as in the cruise market most operators were already insured against passenger liability (in one form or another). This is due to the fact that the cruise market is very US-oriented. Ferry shipping is

EU organised and the claim culture is less anchored in the EU society than it is in the US one.

Complementarity

A general problem with both IMO and EU regulation that HA Group faces is that the provisions are mainly written for cargo ships and not for passenger ships. From a regulatory view it is understandable that uniform rules apply to the maritime shipping sector as a whole, however for passenger operators in general, and cruise liners in particular, it is difficult to comply with the rules, as passenger shipping is very different from freight shipping.

An example is the Polar regulation, which sets very high quality and safety standards. From a cargo shipping perspective these provisions make much sense as such vessels will really enter the ice and tricky waters. The same rules also apply to the cruise ships. In practise they operate differently in those areas, but still need to comply with the strict rules.

Interview minutes – Spanish Ministry of Public Work

Interviewee: Gerardo Aynos Maza Jefe de Área de Tráfico y Seguridad de la Navegación

Interviewers: 4 September 2016, 10:00-11:30

Date and time: Dalila Frisani (Grimaldi)

Introduction

Mr Gerardo Aynos Maza works at the Subdirección General de Seguridad, Contaminación e Inspección of the Spanish Ministerio de Fomento.

His department deals with maritime claims under the Athens Convention and under Spanish rules on passengers with reduced mobility.

His department issues also insurance certificates under the Regulation 392/2009 and is responsible for checking that ships carry such certificates.

He refers that complaints for claims under the Regulation are to be addressed to the Agency AECOSAN (Spanish Agency for Consumer Affairs, Food Safety and Nutrition).

Information concerning the accident Sorrento

Mr Gerardo Aynos Maza refers that his organization was not involved in the Sorrento accident.

However, his department received a complaint by a German passenger.

The complaint concerned the reimbursement of the price of the ticket and not claims under the Regulation.

Implementation of the Regulation

Mr Gerardo Aynos Maza refers that to the best of his knowledge the implementation of the Regulation is not problematic in Spain.

He also refers that inspections of ships show that ships are compliant with the obligation to be insured under the Regulation and that carrying out the relevant inspections has not increased the administrative burden for Spanish authorities.

Passengers with reduced mobility

He refers that the Regulation has not impacted the Spanish framework on protection of people with disabilities in force since 2007. He refers that no complaints have been submitted to his department by passengers with disabilities concerning their rights under Spanish law and under the Regulation.

Interview minutes – Greek Ministry of Maritime Affairs

Interviewee: Mr CHRISTOS KONTOROUCHAS

Interviewers: Dalila Frisani

Date and time: September 20 2016, 09:00 – 10:00

Introduction

Mr Christos Kontorouchas is the head of the unit dealing with EU and international organizations of the Greek Ministry for Maritime Affairs & Insular Policy.

The Greek Ministry for Maritime Affairs & Insular Policy is competent for all matters concerning the operation of ships and the monitoring of compliance with EU, international and Greek legislation concerning maritime transport.

Among its competence there are issuing certificates of seaworthiness, issuing certificates attesting that insurance or other financial security is in force under the Regulation and Pal 2002.

Case study City of Poros

Mr Kontorouchas states that he is not aware of any file opened in Greece concerning the City of Poros terrorist attack.

However, he does not exclude that there is a security file.

The interview focuses on the assessment of EU legislation in force at the time of the accident and today.

Mr Kontorouchas refers that before 2009 there was an obligation to have insurance for ships carrying regular services in Greece. It was in force since 2001.

In 1988 Greek legislation did not foresee an obligation for the ships to be insured.

The interview focuses on trying to assess the class of the ship City of Poros under current EU legislation.

Mr Kontorouchas refers that taking into consideration the voyage that the ship City of Poros was carrying at the time of the accident and the distance from the coast that the ship would have reached at any time during such voyage, the ship would probably qualify today as Class C ship.

He also took into account the strength of the wind and wave height during such voyage.

The ship would not be covered under the Regulation as under Greek law ships of Class C are not covered by the Regulation.

The ship, if above 300gt, would in any case be insured under national law and Directive 2009/20/EC. The liability covered would be based on fault and would cover the ship.

Concerning the security rules in force at the time of the accident Mr Kontorouchas refers that an obligation to keep a registry of passengers is in place since 1999 further to Directive 98/41³¹¹ passenger ships departing from an EU port on a voyage of more than 20 nautical miles.

However pursuant to Greek law it seems there was not an obligation to keep a registry of passengers in 1988.

Concerning controls to be carried out before the departure of a ship Mr Kontorouchas states that there are currently no rules requiring the carriers to check the luggage of passengers before departure. No such rules were in place in 1988 under Greek law.

There was an obligation of the master of a ship to take care that no gun was carried out on board his ship without his permission but it was a general obligation whose content was no further specified and did not imply an obligation to check the luggage of passengers.

Mr Kontorouchas states that there is no much experience with compensation of passengers in case of terrorist attacks, since no other attacks were carried out in Greece after city of Poros.

Effectiveness

Mr Kontorouchas confirms that all ships inspected comply with the obligation to carry an insurance certificate.

He also states that his department has not received any complaint by Greek passengers concerning alleged infringement of their rights.

Implementation of the Regulation in Greece

Mr Kontorouchas confirms that pursuant to Greek law adopted in 2013 (n. 4195, article seventh) port authorities check whether the carrier complies with the obligation to provide information under the Regulation. Non-compliance with such Regulation can be fined up to 500000 euros. The minimum amount of the fine is 300 euros.

³¹¹ Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community.

Interview minutes – Spanish Ministry of Public Works

Interviewee: Mr Hernández Gutiérrez José Francisco

Interviewers: Dalila Frisani

Date and time: September 22 2016, 10:00 – 11:00

Introduction

Mr Hernández Gutiérrez José Francisco works in the legal department of the **General Directorate** of the Merchant Marine within the Spanish Ministerio de Fomento.

The Ministry is competent for maritime issues in Spain including the implementation of the Regulation and all tasks related to the issuance of insurance certificates and the handling of some passengers claims, such as the ones concerning passengers with reduced mobility.

Case study Sorrento

Mr Hernández states that he has no information concerning the case at hand.

The discussion focuses on the legislative framework applicable in Spain before the entry into force of the Regulation.

Mr Hernández explains that international voyages fell under the scope of the regime of the Athens Convention since Spain had ratified it.

For domestic voyages instead there was not a specific regime.

The applicable rules were the ones of the Commercial Code, Consumer law and the Civil Code.

Notably, the liability of the carrier was governed by the rules governing the contractual liability for the contract of carriage. Such rules foresaw a liability based on fault, but the fault was not presumed.

The passenger had to prove it. There was no presumption of fault in case of accident occurred during the contract of carriage.

Often maritime accidents led to criminal proceeding. Thus passengers acted in criminal proceedings and sought compensation under tort law, meaning that they brought carriers to court for the infringement of the obligation to protect them.

In other words in Spain it was easier for passengers to seek compensation under tort law than under contractual liability rules.

Concerning insurance, before 2013 there was an obligation of selling travel contract which included insurance in case of accident. Thus in case of accidents occurred before 2013 Spanish passengers would have a direct action against an insurer because they would buy insurance in addition to the ticket.

This insurance would cover the accident, and would oblige the insurer to pay compensation to the injured. The carrier was the policy holder and paid a premium to the insurer which was included in the price of the ticket. This insurance did not cover the liability of the carrier but the mere fact that an accident occurred on board. The passenger was the beneficiary of the insurance contract. In case of death the beneficiaries were the spouse and children and other family members according to the order of precedence provided for in article 22 of royal decree 1575/1989.

Concerning limits to liability Mr Hernández refers that for domestic voyages the applicable limits to liability were the ones of the Convention on Limitation of Liability for Maritime Claims (LLMC).

For international voyages the Athens Convention's limits would apply.

The interview focuses on the issue of compensation of damages in case of death of a passenger pursuant to Spanish law.

In case of death of a passenger damages are compensated *jure hereditario*. In this case succession law applies. The carrier has an obligation (a safe transport) arising out of the contract of transport. The heirs are entitled to claim for breach. They must prove the breach.

As to personal injuries the compensated damages are the economic damages (medical expenses plus days of work lost) and a moral damage.

Implementation of the Regulation

Mr Hernández is not aware of any provisions implementing the rules of the Regulation concerning the carrier's obligation to provide information to passengers, or the ones on advance payment, or the ones on passengers with reduced mobility.

In this regard one should consider that Spanish law already had provisions protecting passengers with reduced mobility.

EU added value and coherence

Mr Hernández points out that to the extent that the Regulation has extended Pal 2002 to domestic voyages it has improved the legal framework applicable to maritime passengers transport, making it more coherent.

According to Mr Hernández the previous regime differentiated international and domestic voyages. Thus it was not coherent and it was difficult to justify the existence of different rules.

The interview focuses on the liability of carriers in case of terrorist attacks.

Mr Hernández explains that the liability of the carrier was based on fault. The carrier could in theory be liable in case of a breach of security that had allowed the attack.

He refers that Spanish law foresees a fund for the compensation of victims of terrorism.

The fund is financed by insurers.

Minutes - Interview Wagenborg

Date and time: 26 September 2016, 9.00-9.30

Interviewee: Wouter van Hal

Interviewer: Linette de Swart (Ecorys)

Wagenborg Passagiers Diensten BV (Wagenborg) is a Dutch ship operator, operating ferry services between Schiermonnikoog – Lauwersoog and Ameland – Holwerd. Ships used on those routes qualify as Class D ships.

As Wagenborg provides transport services according to a publically available timetable, the services are qualified as public transport according to Dutch law. Therefore, the services are excluded from the scope of Regulation 392/2009 as well as the Dutch legislation implementing the Regulation.

Wagenborg is not familiar with Regulation 392/2009 and the resulting Dutch new rules. Normally all Dutch ship operators do receive a letter from the Inspectorate (IL&T) when the Dutch government introduces new legislation. In such a letter the new obligations are explained and IL&T also indicates whether or not new certificates are required. Until now Wagenborg did not such a letter.

All vessels of Wagenborg are insured for passenger claims. The ships are insured by a P&I club. Therefore, the company is able to pay the passenger compensation in case of a claim. However, the insurance is not a result of the entry into force of Regulation 392/2009. Even before the entry into force of the Regulation, Wagenborg was insured for such claims.

Wagenborg does not have the certificate as referred to in the Regulation. They also did not apply for such a certificate, as they were not aware of the new obligation. As indicated above, IL&T did not inform Dutch ship owners of the new legislation³¹².

The safety on-board the Wagenborg ships is high. All ships of Wagenborg sail under the Dutch flag and are Dutch owned. As the ships fly the Dutch flag, the standards to use the flag are high. Without sufficient safety standards the ships would not be able to fly the Dutch flag.

On average, Wagenborg transports around 800,000 passengers per year. The number of accidents is limited. Serious accidents hardly occur, max 1 per year. Smaller accidents occur a bit more often, but still their number is low. In general, when a passenger follows the safety instructions, nothing will happen. Most accidents happen on the car deck. Passengers are not allowed between the cars on the car deck during (dis) embarking, however once in a while a passenger does not oblige to this instruction. Being between moving cars on deck, could lead to a minor personal injury.

³¹² However, it should be noted that after the interview held with IL&T it became clear that Wagenborg operates in inland waters and according to Dutch law provides inland waterway services instead of maritime services, therefore Wagenborg falls outside the scope of Regulation 392/2009 and is not required to have an insurance based on Regulation 392/2009.

One of the more challenging provisions in Regulation 392/2009 is the provision regarding the advance payment. In case the company needs to pay an advance payments to a large share of the passengers, for example in case of grounding, the amount will become so high that the company is likely not able to pay all the passengers their advance payment. A solution could be that the insurer pays the advance payment.

As the services offered by Wagenborg can be qualified as public transport under Dutch law, the company has to comply with the Dutch rules regarding public transport. These rules guarantee access to public transport by disabled passengers or passengers with a reduced mobility. Therefore the accessibility of Wagenborg ships is high for these groups of passengers.

Mr. van Hal is not aware of any claims regarding mobility equipment. In case of damage to the equipment, passengers do not turn to the ship operator, but often contact their health insurance, as these insurances have rules in place for covering the costs of repair and/or replacement. In addition, the risk that something happens on-board the ship is very low.

The new Regulation increases the administrative burden for the shipping company. For all of the vessels, certificates should be obtained, which is a time and cost intensive process. The benefits of having the certificate are low as the safety standards are already high (as a result of flag state requirements). There is not much added value in the new requirements.

Main issue for Wagenborg in passenger claims is the involvement of lawyers. These lawyers seem to work more for themselves than for the passengers. The lawyer always wishes to establish liability first before giving insight in the actual damage suffered. Main reason is that lawyers will only get paid once liability is established. According to Dutch, Wagenborg needs to pay in those circumstances. Such practices make it difficult for Wagenborg to settle a passenger claim amiably.

Overall, EU legislation is very complicated. It took Wagenborg quite some time to find out in which vessel class their ships fall. In order to make EU law more effective, it would be much welcomed that the EU rules become easier to find and that the relevant rules are all clustered in one and the same Regulation/Directive, so that one does not have to consult many different pieces of legislation.

In addition, the Dutch codification is also complicated and difficult to follow. It takes quite some effort to identify where and how the EU rules have been implemented in the Dutch Civil Code.

Interview Dr. Zuzanne Peplowska-Dąbrowska

Interviewees: Dr. Zuzanna Peplowska-Dąbrowska
Interviewers: Ioannis Giannelos, Linette de Swart (Ecorys)
Date and time: 26 September 2016, 10.00-11.00 CET

Background

Dr. Zuzanna Peplowska-Dąbrowska is an assistant professor in the Law Faculty of the Nicolaus Copernicus University. She is a member of the Polish Codification Commission for Maritime Law and has been involved in the Polish Maritime Code amendment that took place to incorporate Regulation 392/2009. Before the coming into force of Regulation 392/2009, Poland had not ratified the 2002 PAL. Poland was (and still is) Party to the Athens Convention 1974. The entry into force of Regulation 392/2009 which caused a dichotomy in Polish Maritime Law, as currently international shipping and domestic shipping, involving Class A and B ships, is covered by Regulation 392/2009, while all other domestic shipping is covered by the Athens Convention 1974, as Poland applied the provisions of the Athens Convention 1974 also to domestic shipping (irrespective type and material of the ship). For this reason, Poland is currently considering to ratify the 2002 PAL. This dichotomy was caused when the Polish Maritime Code was amended to reflect the provisions of the 392/2009 Regulation. Classes C and D are regulated under the national law that incorporated and expanded the Athens Convention 1974 to cover all contracts of carriage governed by the Polish Maritime Code, including domestic carriage, however they are left out of the scope of application of Regulation 392/2009. The Codification Commission supports ratification of the 2002 PAL with the intention to apply this to all carriages international and domestic (covering also classes C and D also). However, Classes C and D would be exempted from the mandatory insurance obligation.

National application

The national application of the 392/2009 Regulation in Poland covers both classes A and B, but Class B application is deferred until 2018 regarding the carriers obligation to carrying insurance required under the Regulation, while the other provisions of the Regulation (such as the strict liability) already apply. This approach was chosen because Class B ships were considered not being able to obtaining affordable insurance at low rates. For the same reason the Regulation application was not extended to Class C and D ships. In Poland, the Regulation does not apply to HSC and DSC nor to non-steel vessels.

Relevance

In Poland the main problem faced concerns the application of the old regime (Athens 1974) as under this regime the basis for liability was fault on the side of the carrier. Moreover, low limits of liability are seen as a major disadvantage of the convention. In that sense the Regulation is an improvement as under the new regime there is a presumed liability up to the high liability limits. In cases of shipping incident, the passenger only needs to prove the damage occurring during carriage, while lack of fault on the side of the carrier will not relief him from liability. Also in Poland there was no national legislation regulating the topic except of the law transposing the application of the Athens Convention to domestic carriage. In that sense

Regulation 392/2009 was a relevant tool to use and no framework conditions have changed since to indicate that this is no longer the case.

In the **personal opinion** of Dr. Peplowska-Dąbrowska, the Regulation should be expanded to all vessel classes as passengers should not enjoy different rights when boarding. A reason for it being that passengers are not aware that different regimes might exist and therefore one overall regime would be preferable.

Effectiveness

Dr. Peplowska-Dąbrowska considers that Regulation 392/2009 definitely brings in a better protection of passenger rights. Regarding the levelling of the playing field: the introduction of the Regulation has caused a dichotomy as, according to the national law incorporating the Athens Convention 1974, there is an obligation for carriers to insure all domestic passengers carriage, not only classes A and B, however that obligation requires insurance up to low limits of liability as set in the Athens Convention 1974 and no direct action to insurer is provided. With Regulation 392/2009 a different regime is created where passengers in vessel classes A and B (the latter from 1.1.2019) enjoy a higher level of passenger rights protection compared to passenger on non-Class A and B ships. Also different liability limits between ships operators would exist, which is not preferable. All in all, the level playing field in Poland has diminished in this respect. However, it is envisaged that after the future ratification of PAL 2002 the requirement of financial security from PAL 2002 will be applicable in domestic carriage solely to ships of Class A and B. In that respect ships of C and D class will be exempted from PAL 2002, while other provisions of the Protocol will be applicable. It is believed that otherwise ships of classes C and D would face problems with in obtaining affordable insurance.

No proof is available concerning the impact to insurance premiums. Dr. Peplowska-Dąbrowska can check with the Polish relevant Ministry for such proof collected during the implementation of consultation phase of the Regulation in Poland.

As far as incentivising safety performance, it is expected that the Regulation should cause insurers to place higher pressure on the safety requirements of vessels. Thus the Regulation is thought of having a preventive effect and indirectly increasing vessel safety.

Finally, regarding the effectiveness of the Regulation in securing a balanced framework of passenger rights, this goal is much better achieved under the new regime. With the change of the legal regime being quite substantial and direct action and limits to liability being now established, a more balanced passenger rights protection framework is now the case.

There is no sign or expectation of other impacts of the Regulation's application. Dr. Peplowska-Dąbrowska can check with the Polish relevant Ministry regarding any evidence of direct or indirect impact of the Regulation on maritime passenger fares.

Efficiency

Dr. Peplowska has no knowledge of the impact of the Regulation to the Maritime or other public authorities in Poland. In her upcoming communication with the ministry she can also check if this is the case.

Coherence

In comparison with the Montreal convention, it is difficult to apply the same level of protection for both modes of transport. Comparison of maritime and aviation law shows visible differences when discussing issues such as the limits to liability. Passenger protection comparison depends on the types of claim. There is similar level of protection for delays etc. however different levels of protection regarding personal losses.

The differences in air and maritime carriage markets should be considered when discussing the unification of the regimes for the 2 modes. The major goal should be that passengers are well informed on their rights.

There appear to be no striking problems or issues when examining the Regulation in comparison to the rest of the body of EU policy. A clash might be observed when discussing the comparison between the Regulation and the Travel Package Directive. The 2 legal instruments conflict as the Regulation gives a broad description of what is considered a carrier (might include e.g. a tourist office). The Directive sets a different limit to liability (2-3 times the package price). There is currently no Polish case law clarifying this aspect. Also on an EU level no rulings have been given related to this issue. Therefore, to solve any issues one needs to seek refuge in other Member States. Only under English case law two cases have ruled on these issues. (Lee vs Airtours Holidays Ltd and the Norfolk case). However, both rulings lead to contradictory outcomes and therefore do not provide guidance on the potential outcome. The Regulation is applicable in the time of the adoption, Directives need to be adapted in national law but this does not resolve the issue of which one takes precedence.

Added value

From a Polish perspective, the Regulation has induced the prospective ratification of the Athens PAL 2002. The main reason for not ratifying this until now is political as there seems to be a lack of priority currently in increasing passenger rights protection levels.

Minutes – Interview Dutch Inspectorate (IL&T)

Date and time: 29 September 2016, 15.00 - 16.00
Interviewees: Annet Bronnewasser and Aad Kramers
Interviewers: Geert Smit and Linette de Swart (Ecorys)

Flag state vs port state control

The Dutch Inspectorate (in Dutch: Inspectie voor de Leefomgeving en Transport, IL&T in short) both performs flag state control and port state control inspections. As part of the flag state inspections IL&T issues the necessary certificates for Dutch flagged ships and enforces international, EU and national legislation. It is up to the flag state how to arrange its inspections (see UNCLOS). In the Netherlands, flag state inspections are thematically based. IL&T chooses a topic that is relevant, e.g. life boats, and will inspect ships on this particular topic.

As some flag states do not perform their flag state duties, port state control inspections have been introduced. Within port state control, which focuses on vessels not flying the Dutch flag, IL&T only enforces (no certificates are issued). Port state control inspections are highly regulated (based on the Paris MoU) and only minor room for deviation is possible. Within port state control 'naming & shaming' is used. On the website of the Paris MoU ships with defects are mentioned. This is very effective. Under flag state control it is not possible to do this (no legal possibility for it).

Both inspections (flag state, port state) do influence each other. For example, a common defect established under port state control can be used to increase the number of flag state inspections on this topic.

National application

At the moment, IL&T issues certificates for all international conventions, with the exception of the HNS Convention. However, IL&T expects that this Convention will be added to the list in the near future.

IL&T has a legal obligation to certify all Dutch passenger vessels. For IL&T it is not important whether a passenger ships is qualified as Class A or Class D ship under Regulation 392/2009, as in the Netherlands the Regulation does apply to all passenger vessel operating at sea. Where at sea the ship is operating is for the Dutch certification not relevant.

IL&T issues, based on both war- and non war risk related blue cards, statutory certificates. The certificates issued are in line with the international format required for such certificates. Therefore the certificates issued follow the format laid down in Annex 1 of the Athens Protocol 2002. The blue cards are received from the P&I clubs. For each P&I club, IL&T will check whether or not the club is solvent (and can provide the coverage if needed). Each year the ship operator needs to obtain a new certificate for this insurance.

Only for Regulation 392/2009 IL&T is required to issue a statutory certificate. All IMO liability Conventions and EU liability Regulations require statutory certification based on blue cards. Only insurance Directive 2009/20 EG does not require statutory certification. In principle, IL&T only issues certificates,

based on article 4bis PAL2002, to Dutch flagged ships. Under certain circumstances, the Inspectorate can issue certificates for non-Dutch flagged vessels as well. This can happen in a situation where the ship is operating in Dutch water (and therefore needs to have a certificate), while in its own flag state no law is in place requiring such a certificate.

Not all salt water areas in the Netherlands are qualified as sea. For example, the Waddenzee (although the water is salt) is qualified as internal water. Vessels (although seaworthy) operating on the Waddenzee are qualified as inland ships and therefore fall outside the scope of Regulation 392/2009.

Effectiveness

For the large cruise vessels the impact of the Regulation will be low. These vessels already had an insurance in place and were already able to cover passenger claims if needed. The main difference for them is to have a certificate on-board, which may lead to some additional administration. However, the consequences are limited.

The Regulation will mainly impact small passenger vessels, for example sport fishing vessels. These vessels are qualified as passenger vessels and therefore should now have insurance when operating at sea. The smaller vessels are confronted with new rules and requirements, which will ultimately lead to a cost increase.

For IL&T the new certification obligation led to an increase in administrative burden and work. The Inspectorate had expected that insurers would inform ship-operators about the consequences of Regulation 392/2009, as the ship-operators are their clients. However, most Dutch ship-operators turned to IL&T for information. It took a sufficient amount of time to inform all operators. This was not foreseen by IL&T.

Another additional administrative burden is that under Dutch law IL&T does not only have to send the certificate to the ship-operator (who is required to have the certificate on-board), but also to the cadastre as in the cadastre the owners of the ships are mentioned. Also all certificates obtained for a specific ship need to be laid down there as well.

A peak in certificate application is seen in February, as many ships follow the traditional insurance year (from 20 February to 20 February). Ship operators are rather slow in applying for a certificate as the negotiation with the P&I club takes long. The peak in applications leads to an increase in workload at the side of IL&T.

The best way to improve maritime safety is accidents. For instance, after the accident with the Costa Concordia, many initiatives have been taken to improve safety standards. Accidents have such an impact that they are a much stronger trigger to improve safety than the rules laid down in the Athens Protocol and the Regulation.

Other remarks

The actual implementation of Regulation 392/2009 was done by the Ministries of Transport and Justice.

The EU regulation is rather complicated, as rules regarding maritime passenger protection are spread across different Regulation. It would be welcomed if EU legislation would become easier accessible, e.g. all relevant rules in one document only.

Ex-post evaluation of Reg. 392/2009 on the liability of carriers of passenger by sea in the event of Accidents

First of all the IMO Secretariat emphasizes that interpretation and implementation of IMO instruments is a prerogative of the States Parties, therefore, in principle, the IMO Secretariat does not comment on the way that IMO Member States give effect to the IMO conventions.

Questions:

1. What were the main reasons for adopting PAL 2002? Are those reasons still valid? Are there new needs that would require additional measures?

Answer: The main reasons for adopting PAL Protocol 2002 were updating the text of the 1974 Athens Convention and bringing it into line with other IMO liability conventions. In particular, PAL Protocol 2002 introduces the principles of strict liability and compulsory insurance. Also, the limits of liability have been raised significantly, to reflect present day conditions and the mechanism for raising limits in the future has been made easier. There are no indications known of that these reasons would not be valid at present.

The IMO Legal Committee, at its 92nd session in October 2006, adopted the text of a reservation intended for use as a standard reservation to PAL Protocol 2002 and adopted Guidelines for the implementation of the Athens Convention, to allow limitation of liability in respect of claims relating to war or terrorism. The aim is to put States in a position to ratify PAL Protocol 2002 and thereby afford passengers better cover. However, there was no need for additional measures.

2. Also what are the main differences compared to Athens 1974? Can you provide some examples of deviations?

Answer: PAL Protocol 2002 introduces compulsory insurance to cover passengers on ships and raises the limits of liability. It also introduces other mechanisms to assist passengers in obtaining compensation, based on well-accepted principles applied in existing liability and compensation regimes dealing with environmental pollution. These include replacing the fault-based liability system partly with a strict liability system for shipping related incidents.

Examples: A new Article 4bis of the Convention requires carriers to maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution, to cover the limits for liability under the Convention in respect of the death of and personal injury to passengers.

The limit of the compulsory insurance or other financial security shall not be less than 250,000 Special Drawing Rights (SDR) per passenger on each distinct occasion. Ships are to be issued with a certificate attesting that insurance or other financial security is in force and a model certificate is attached to PAL Protocol 2002 in an Annex.

If the loss exceeds the limit, the carrier is further liable up to a limit of 400,000 SDR per passenger on each distinct occasion unless the carrier proves that the incident which caused the loss occurred without the fault or neglect of the carrier.

3. Is there a possibility for State Parties to deviate from certain PAL 2002 provisions? If yes, where is deviation possible?

Answer: PAL Protocol 2002 allows a State Party to regulate by specific provisions of national law the limit of liability for personal injury and death, provided that the national limit of liability, if any, is not lower than that prescribed in the Protocol. A State Party, which makes use of this option is obliged to inform the IMO Secretary-General of the limit of liability adopted or of the fact that there is none.

Follow-up: On Question 3, you mention that State Parties are obliged to notify IMO of making use of their option to regulate higher limits to liability for personal injury and death, that those foreseen by the PAL Protocol 2002. Can you please share the countries that have made use of this option and accordingly notified IMO? Are you able to also share the higher limits set by those countries?

Ad 1: Regarding Question 3 no State Party has so far notified IMO of making use of the option to regulate higher limits to liability for personal injury and death, than those foreseen by the PAL Protocol 2002.

4. Are State Parties able to adopt national legislation? Is the IMO aware of additional national legislation? And what can the IMO do when this additional legislation is conflicting with the provisions laid down in PAL 2002?

Answer: In general, a treaty must be implemented properly into the domestic law of the States parties so that it can be applied by courts or other national authorities. As regards PAL Protocol 2002 Article 4*bis* contains many provisions that need to be implemented but so do many other provisions of PAL Protocol 2002 and PAL 1974.

IMO is an intergovernmental regulatory body that deals with matters referred to it by its Member Governments and is mainly involved in the development of international regulations on the basis of proposals by its Member Governments, the practical application of which is the responsibility of the maritime administrations concerned. IMO has emphasised the importance of its Member States actually implementing maritime treaties into their domestic law, and the theme for the World Maritime Day 2014 organised by IMO was 'IMO conventions: effective implementation'. Moreover, the second main priority of the 2016-2017 IMO's Integrated Technical Cooperation Programme (ITCP) in the legal field is the promotion of a wider acceptance of the limitation of liability and compensation conventions.

5. The EU is party to PAL 2002. Several of the EU Member States have ratified PAL 2002 as well, while others haven't. Is there, from an IMO perspective, still the need that the remaining EU Member States do ratify PAL 2002 or is it sufficient that the EU is a party?

Answer: From IMO's perspective all IMO Member States are encouraged to ratify and implement the IMO liability and compensation conventions, including PAL Protocol 2002.

Follow-up: On Question 5; to our understanding the implementation of Regulation 392/2009 by the European Commission as well as the ratification of the PAL Protocol 2002 by the EU, effectively implements the Protocol provisions to all EU Member States. That said, what is the reasoning for encouraging EU Member States to also separately ratify and implement the IMO liability and compensation conventions and the PAL Protocol 2002? What would be the practical impact of such actions?

Ad 2: Regarding Question 5 the IMO Legal Committee, at its 101st session, suggested that delegations should take action under the 2014 World Maritime Day theme by encouraging their respective Governments to work towards ratification of all relevant conventions. Although the IMO Secretariat is not in a position to comment on EU legislation we have been informed that the requirements of two EU Council Decisions (2012/22/EU and 2012/23/EU) necessitate further EU Member State intervention to ratify PAL Protocol 2002. For this there are practical reasons to ensure that ships registered in EU Member States can be issued with the correct international certification attesting that they have the necessary insurance in place, but it will also enable the PAL Protocol 2002 to be extended to Oversea Territories that fall outside the EU

6. The EU is currently under pressure. What would happen to the ratification of PAL 2002 when the EU would no longer be Member to the Protocol, so would denounced?

Answer: According to Article 19(1) PAL Protocol 2002 the EU has become Party to the protocol as a regional economic integration organization (REIO) and has the rights and obligations of a State Party, to the extent that the REIO has competence over matters governed by this Protocol and subject to other provisions of Article 19. Article 19(4) provides that the REIO shall promptly notify the IMO S-G of any changes to the distribution of competence, including new transfers of competence. As stated the interpretation and implementation of IMO instruments is not the prerogative of the IMO Secretariat.

7. Has the application of PAL 2002 reached its objectives? Does IMO assess this? If yes, how?

Answer: PAL Protocol 2002 entered into force on 23 April 2014 and at present there are 25 States Parties which represent 43.48% of world tonnage. As stated from IMO's perspective all IMO Member States are encouraged to ratify and implement the IMO liability and compensation conventions, including PAL Protocol 2002.

8. Have you realized any impact to the safety and security of shipping due to the ratification of the PAL 2002?

Answer: IMO has not yet taken out a study on the relation between the safety and security of shipping due to the ratification of the PAL Protocol 2002 but the (insurance) industry may have.

9. Have you realized any impact on transport fares and insurance premiums for ship-owners due to the ratification of the PAL 2002?

Answer: IMO has not yet taken out a study on the impact on transport fares and insurance premiums for ship-owners due to the ratification of the PAL Protocol 2002 but the (insurance) industry may have.

Have you got experience with issues arising from State Parties giving effect to the PAL 2002 in different ways? If yes, could you mention some examples?

Answer: The IMO Legal Committee, at its 101st session, considered insurance ramifications for vessels registered in States that had ratified or would ratify the 2002 Athens Protocol but had not deposited the 2006 reservation and guidelines endorsed by resolution A.988(24) which are referred to in the answer to question 1. The Committee noted that the reservation and guidelines had been developed and agreed with the express intention of facilitating entry into force of the 2002 Athens Protocol. The Committee urged States to include the 2006 reservation when depositing their instruments of ratification to ensure its uniform application and allow operators of passenger ships to obtain the necessary insurance cover and certification to trade.

Memo on the Regulation n° 392/2009

The FENVAC is a French federation of victims intended to help the victims of collective accidents or terrorism, in their compensation proceedings and penal proceedings. For instance, at the time of the stranding followed by the capsizing of “Costa Concordia”, on January 13th, 2012, the FENVAC took up the matter with the French victims to ensure that they were advised of their rights, including the right to be compensated for the suffered damages. Through our intervention, the company *Costa Crociere* reconsidered his original proposal consisting in compensating the victims – except for the injured and the deceased ones – up to 11,000 euros. Finally, an agreement was obtained so that each French victim receives an advance of 8,000 euros, waiting for the individual evaluation of their damages.

As an association working in the interest of the victims of collective accidents, the FENVAC can only be satisfied with the regulation (EC) n° 392/2009 of April 23rd, 2009 on the liability of carriers of passengers by sea in the event of accident. Indeed, before the coming into force of the aforesaid regulation, only one internationally-based instrument governed the carriage of passengers by sea: The Athens convention of 1974. This convention was ratified only by a small number of States of the European Union, of which France is not part. It was amended by various protocols, the main one, the protocol of 2002 was ratified by only four States whereas ten ratifications are necessary so that it comes into force. One of the explanations to the absence of ratification of this convention by many States, including France, which however have been involved in the negotiation, is the severity of the compensation scheme for the victims. In fact, the legal regime of the international maritime transport of passengers is one of the least protective regime in comparison with those adopted at international and European level in air transport and railway. That is why the FENVAC look favourably the coming into force of the regulation n°392/2009 which, as to its contents, attempt to close this gap.

In order to ensure a proper level of compensation for passengers involved in maritime accidents, the regulation adopts the relevant provisions of the Convention of Athens of 1974, while supplementing them by other provisions as to increase the level of protection of the passengers. Three principal aspects constitute to us a significant progress as regards compensation of victims and their dependants: introduction of rules of liability for the carrier, obligation of insurance, obligation for carriers to provide advance compensatory payments. However, the limitation of liability for the death of or personal injury to a passenger is a point which seems to us contradictory with the principle of integral compensation of damages.

I- Contributions of the regulation n°392/2009

Since the entry into force of the regulation, for the loss suffered as a result of the death of or personal injury to a passenger caused by a shipping incident, the carrier has a strict liability amounting to 250 000 units of account. The carrier cannot exonerate himself unless he proves that the incident resulted from an act of war, or a natural phenomenon of an exceptional, inevitable and irresistible character, or was wholly caused by an act or omission done with the intent to cause the incident by a third party. If and to the extent that the loss exceeds the above limit, the carrier shall be further liable unless he proves that the incident which caused the loss occurred without the fault or neglect on his part. The inclusion at European level of a no-fault liability of the carrier amounting to 250 000 units of account, represents a major improvement for the regime relating to the liability of carriers and the compensation of passengers carried by sea. Indeed, the absence of effective rules on liability at international or European scale, undermined the ability of the victims concerned to enjoy their rights to be compensated. The regulation fills this gap and makes it possible for victims to be compensated without having to prove a fault of the carrier. We are therefore satisfied with the inclusion of strict liability of the carrier.

The regulation innovates truly compared to Athens's convention by including compulsory insurance with a right for the victims of direct action against insurers. Here again, we welcome the implementation of this obligation which will ensure the awarding of compensation for the victims or heir dependants, and thus ensure the effectiveness of the regulation.

Lastly, the FENVAC is particularly satisfied with the obligation imposed on the carrier who actually performed the whole or a part of the carriage when the shipping incident occurred, to make an advance payment in the event of the death of or personal injury to a passenger. This advance payment must be sufficient to cover immediate economic needs on a basis proportionate to the damage suffered within 15 days of the identification of the person entitled to damages. It may be observed in this regard that in the *Costa Concordia* case, the advance payment of 8.000 euros proposed to the victims corresponds to the regulation's spirit.

The FENVAC is overall satisfied with the regulation n°392/2009 which constitutes a major advance in terms of compensation for the victims and their dependants in the event of maritime accident. However, the limitation of liability for maritime claims is a point which we consider regrettable.

II- A limitation of responsibility incompatible with the principle of full compensation of damages

In case of death or bodily injury of a passenger, the convention of Athens modified by the protocol of 2002 limit the liability for the carrier amounting to 400,000 units of account. However, according to article 19 of the convention of Athens, in the absence of inexcusable fault, the carrier retains the right to avail himself of the limits of liability prescribed in the international convention on limitation of liability for maritime claims (LLMC). By virtue of its article 7, this convention, as consolidated by the protocol of 1996, allows the carrier to put a cap on his liability for 175,000 units of account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

The limit of 400,000 units of account required under the convention of Athens is thus relatively favourable in the event of individual accident. But when the disaster implies a significant number of victims (deceased or injured), the amounts allotted to each one will be lower than this sum, the carrier profiting from the overall limitation of the LLMC. As comparison, the homologous regulation in aviation (reg. (EC) n° 889/2002 of the European Parliament and the Council of May 13th, 2002 modifying reg. (EC) n°2027/97 relating to the air carrier liability in the event of accidents), does not set an upper limit in case of injury or death.

In compensation of bodily injury, the principle in France is the integral compensation of damages. Therefore, it seems regrettable to us that the regulation n°392/2009 sets a limitation of the carrier's liability in case of death or injury of a passenger.

In conclusion, the regulation n°392/2009 clearly constitutes a notable progress in terms of compensation for the victims and their dependants in the event of maritime accident. It is however regrettable that the levels of compensation remain lower than those of the other modes of transport, which is classical in maritime transport but undoubtedly more contestable in transport of people.

ANNEX 12 BASELINE SITUATION COUNTRY FICHES

The Netherlands

1. What was the regime in force concerning the liability of carrier before 2013? Was there was a regime of strict liability or fault liability?

The Netherlands was not a party to the Athens Convention 1974. However, most of the provisions of the Athens Convention 1974 were transposed into Dutch national law. Some deviations existed between the Dutch regime and the Athens Convention. The main deviation concerned the liability limits, which were higher under Dutch law.

The Netherlands has ratified the 1996 Protocols to amend the 1976 London Limitation of Maritime Claims (LLMC) Convention with entry into force as per 23 March 2011. This implies that the overall limit of liability stated in Article 7 LLMC 1996 is applicable³¹³, i.e. SDR 175,000 per passenger multiplied by the number of passengers the ship is authorised to carry.

As the Dutch regime was more or less similar to the Athens Convention the regime was a fault based regime as well.

2. Was there a distinction between shipping and non-shipping incidents?

Under Dutch law no distinction between shipping and non-shipping incidents was made.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

A carrier was liable for damage caused by the death or injury of a passenger, in case the damage was sustained during the carriage and in case a 'careful carrier' could have avoided the incident or could have avoided the consequences of such incident (Article 8:504.1 Dutch Civil Code 'old').

A carrier was liable for damage caused by entire or partial loss or damage to cabin luggage or living animal, in case the damage was sustained during the carriage and in case a 'careful carrier' could have avoided the incident or could have avoided the consequences of such incident (Article 8:505.1 Dutch Civil Code 'old'):

- Fault and neglect were presumed in case the death or injury of the passenger or the loss of cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship, unless the contrary was proved (i.e. by the carrier) (Article 8:504.2 jo 8:505.2 Dutch Civil Code 'old');
- This presumed fault or neglect did not apply to living animals (Article 8:505.2 Dutch Civil Code 'old').
- In addition to the examples mentioned in Article 8:504.2 (and the Athens Convention) the carrier's fault and neglect was also presumed

³¹³ Article 8:756 BW.

in case the damage caused resulted from decrepitude or malfunctioning of the ship that was used during the carriage (Article 8:504.3 Dutch Civil Code 'old'). This is one of the deviations from the Athens Convention;

- For other luggage such fault and neglect was presumed irrespective of the nature of the incident which caused the loss or damage, unless the contrary was proved (i.e. by the carrier);
- The carrier could not be held liable for the loss of or damage to valuable goods³¹⁴, unless these goods were entrusted to the care of the carrier and the carrier had agreed to provide secured storage (Article 8:507 Dutch Civil Code 'old');

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

A specific liability regime for the carrier was in place. As indicated above, the system in place was highly comparable with the Athens regime, except some deviations. The specific regime was laid down in Article 8:500 8:532 of the Dutch Civil Code 'old'.

In case, the regime did not provide an outcome for a specific case, the general rules on contractual liability (both Article 6:74 and 6:162 Dutch Civil Code) were available as a fall back-option.

5. Was the Member State member of the Athens 1974 Convention?

The Netherlands was not party to the Athens Convention 1974, however the legal regime in place was more in less in line with the provisions of the Athens Convention 1974, except some deviations.

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

The compensated damages were death of or personal injury, and damage to cabin luggage as well as to boarded belongings. There were no specific provisions for damages to disability equipment.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

Under the previous Dutch regime it was not possible to obtain an advance payment.

8. Was there an obligation of the carrier to be insured?

Under the previous Dutch regime carriers were not obliged to have compulsory insurance or any other financial insurance available.

9. Did the passenger have a direct action against the insurer?

No, passengers did only have an action against the carrier, not the insurer.

³¹⁴ E.g. money, gold, jewellery, works of art etc.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

As indicated above the Dutch liability regime was more or less equal to the Athens Convention 1974. Therefore, the limits applied to fault based liability. Main difference between the two systems were the level of compensations. According to Article 8:518.1 Dutch Civil Code 'old' the actual limits were laid down in an administrative order³¹⁵. This administrative order introduced the following limits:

- For injury to or death of the passenger a maximum of € 137,000.- applied;
- For the loss of or damage to luggage a maximum of € 1,000.- applied;
- For loss of or damage to vehicles or ships a maximum of € 9,100.- applied.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No, there was no information obligation for the carrier.

³¹⁵ Please refer to: <http://wetten.overheid.nl/BWBR0005012/2002-01-01>.

Denmark

1. What was the regime in force concerning the liability of carrier before 2013? Was there was a regime of strict liability or fault liability?

The Danish Merchant Shipping Act contained a dedicated section on carrier liability (Part 15, Articles 401-440). Although Denmark was no party to the Athens Convention, the Danish liability regime showed many similarities with the Convention.

The Danish system was based on a fault based liability regime.

2. Was there a distinction between shipping and non-shipping incidents?

In the Danish Merchant Shipping Act no distinction between shipping and non-shipping incidents was made.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

In the Danish Merchant Shipping the following was stated on the liability of the carrier:

- Article 418. The carrier shall be liable for losses suffered as a result of the death of or personal injury to a passenger, caused by an incident in the course of the carriage if the loss was due to fault or neglect by the carrier himself or any person for whom he is responsible acting within the scope of their employment. The same shall apply for losses or damage caused by delay in connection with the carriage of the passenger;
- Article 419.-
 - 1) The carrier shall be liable for losses suffered as a result of loss of or damage to luggage if caused by an incident in the course of the carriage if the loss was due to fault or neglect by the carrier himself or any person for whom he is responsible. The same shall apply for losses or damage caused by delay in the carriage or delivery of the luggage;
 - 2) The carrier shall not be liable for loss of or damage to monies, securities or other valuables such as silver, gold, watches, jewels, jewellery and works of art, except where such valuables have been deposited with the carrier for safe-keeping.
- Article 420. The liability of the carrier may be reduced or eliminated entirely, if the carrier proves that the loss or damage mentioned in sections 418 and 419 was contributed to by the fault or neglect of the passenger;
- Based on the above it can be concluded that carriers, under Danish law, did not face presumed liability. Only in case their fault or neglect has been proved, can they be held liable.

The burden of proof mainly laid with the claimant (i.e. the passenger). In the Merchant Shipping Act the following was said:

- Article 421.-

- 1) The claimant shall have the burden of proving the extent of the loss or damage and that the loss or damage was caused by an incident in the course of the carriage;
- 2) In the event of death or personal injury, the claimant shall also have the burden of proving the damage was caused by the fault or negligence of the carrier or of any person for whom he is responsible. If the damage arose in connection with shipwreck, collision, stranding, explosion, fire or as a result of defects in the ship, however, the carrier shall have the burden of proving that there has been no fault or neglect;
- 3) The provision of subsection 2 shall apply correspondingly for loss of or damage to cabin luggage. The carrier shall have the burden of proving that there has been no fault or neglect for loss of or damage to other luggage;
- 4) The carrier shall have the burden of proving that loss caused by delay was not due to the fault or neglect of the carrier or any person for whom he is responsible.

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

Danish law did not have a specific set of rules in place governing the liability of carriers and the contract of carriage. Liability was based on the general liability regime (also applicable to other contracts). As part of the general liability regime the burden of proof lay with the claimant (i.e. the passenger).

5. Was the Member State member of the Athens 1974 Convention?

Denmark was not a party to the Athens Convention 1974, nor to the Athens Protocol 2002 (before the entry into force of Regulation 392/2009).

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

The compensated damages were death of or personal injury, and damage to cabin luggage as well as to boarded belongings. There were no specific provisions for damages to disability equipment. The carrier also had, under all circumstances, the right to be exempt from liability for the carriage of live animals which are carried as luggage. (Article 431 (4)).

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No, there were no rules granting an advance payment to passengers.

8. Was there an obligation of the carrier to be insured?

Under the previous Danish regime carriers were not obliged to have compulsory insurance or any other financial insurance available.

9. Did the passenger have a direct action against the insurer?

No, passengers did only have an action against the carrier, not the insurer.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

Yes, the Danish regime introduced limits to the liability of the carrier. The following limits did apply according to Article 422:

- 422.-(1) The liability of the carrier for the death of or personal injury to each passenger shall not exceed 175,000 SDR. The liability for delay in connection with the carriage of the passenger may not exceed 4,150 SDR;
- (2) The liability of the carrier for the loss of or damage to or delay of luggage shall not exceed“:
 - 1) 1,800 SDR per passenger for cabin luggage;
 - 2) 6,750 SDR for valuables as mentioned in section 419(2);
 - 3) 10,000 SDR per vehicle; and
 - 4) 2,700 SDR per passenger for other luggage.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No, there was no information obligation for the carrier.

United Kingdom

1. What was the regime in force concerning the liability of carrier before 2013? Was there a regime of strict liability or fault liability?

The UK had ratified the 1974 PAL Convention and the 1976 SDR protocol with entry into force for the UK as per 30 April 1989. The ratification of the Athens Convention was incorporated in UK law through the Merchant Shipping Act 1995, provisions 183 and 184³¹⁶. The provisions itself were enacted as schedule 6 of the Merchant Shipping Act. The Athens Convention did not only apply to international shipping, but also to internal shipping in the UK through the Carriage of Passengers and their Luggage by Sea (Domestic Carriage) Order 1987³¹⁷. The Convention has been denounced again as per 21 January 2014.

The United Kingdom has further ratified the 1996 Protocols to amend the 1976 London Limitation of Maritime Claims (LLMC) Convention with entry into force per 13 May 2004. However, pursuant to the power given in Article 15 3bis LLMC 1996 to contracting states to set a higher limit than the one prescribed in Article 7 (1) LLMC 1996 for loss of life and personal injury claims, the UK has excluded sea-going ships from the application of LLMC 1996.³¹⁸

The Athens Convention 1974 introduced a fault based liability (Article 3 (1)) and therefore in the UK carrier liability was based on a fault based liability regime.

2. Was there a distinction between shipping and non-shipping incidents?

No, the Athens Convention did not make a difference between shipping and non-shipping incidents. So also under UK law (which was de facto the same as the Athens Convention) no difference between the two incident types was made.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

As the UK was party to the Athens Convention 1974 the burden of proof lay with the claimant (i.e. the passenger) for non-ship related incidents. See Article 3 (2) of the Convention.

Article 3 (2) of the Athens Convention 1974

The burden of proving that the incident which caused the loss or damage occurred in the course of the carriage, and the extent of the loss or damage, shall lie with the claimant.

In several cases, especially ship-related incidents, fault and neglect on the side of the carrier were presumed (Article 3(3)) under the following circumstances:

³¹⁶ <http://www.legislation.gov.uk/ukpga/1995/21/contents>.

³¹⁷ S.I.1987/670, please refer to <http://www.legislation.gov.uk/uksi/1987/670/schedule/made>.

³¹⁸ Source: Article 7 (b) Merchant Shipping (Convention on Limitation of Liability for Maritime Claims) (Amendment Order) 1998, SI 1998, 1258.

- Fault and neglect were presumed in case the death or injury of the passenger or the loss of cabin luggage arose from or in connection with the shipwreck, collision, stranding, explosion or fire, or defect in the ship, unless the contrary was proved (i.e. by the carrier);
- For other luggage such fault and neglect was presumed irrespective of the nature of the incident which caused the loss or damage, unless the contrary was proved (i.e. by the carrier);
- In all other circumstances the burden of proving fault and neglect lay with the claimant (i.e. the passenger).

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

As the UK was party to the Athens Convention 1974, the rules laid in this Convention applied in the UK. Therefore specific rules regarding liability governed the contract of carriage.

5. Was the Member State member of the Athens 1974 Convention?

Yes, the UK was party to the Athens Convention 1974. Before the entry into force of Regulation 392/2009, the UK was in the process of ratifying the Athens Protocol 2002.

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

The compensated damages were death of or personal injury, and damage to cabin luggage as well as to boarded belongings. There were no specific provisions for damages to disability equipment.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No, there were no rules granting an advance payment to passengers.

8. Was there an obligation of the carrier to be insured?

Under the Athens Convention carriers were not obliged to have compulsory insurance or any other financial insurance available.

9. Did the passenger have a direct action against the insurer?

No, passengers did only have an action against the carrier, not the insurer.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

The following limitation schemes were in place, before the entry into force of Regulation 392/2009:

- Sea-going ships providing UK international services Limit of 300,000 SDR based on domestic legislation which incorporates LLMC;
- Non-EU ships providing international services Limit of 46,666 SDR based on AC;
- Sea-going ships providing UK domestic services (for carriers whose principal place of business is in the UK) Limit of 300,000 SDR based on domestic legislation which incorporates LLMC;

- Sea-going ships providing UK domestic services (for carriers whose principle place of business is outside UK) Limit of 46,666 SDR based on AC;
- Non-sea going ships providing UK domestic services on inland waterways limit of 175,000 SDR based on LLMC.

Per category the following limits applied, before the entry into force of Regulation 392/2009:

The applicable limits were 46,666 Special Drawing Rights (SDR) per carriage^{6F319}, with limits for cabin luggage of 833 SDR^{7F320}, for vehicles of 3,333 SDR^{8F321} and for other luggage of 1,200 SDR.^{9F322} After the Herald of Free Enterprise disaster (1987) the UK has used the power of Article 7 (2) Athens Convention 1974 to unilaterally raise the limit (in 1989) to SDR 100,000 and as from 1998 to SDR 300,000.^{10F323}

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

Yes, based on SI 1987 No. 703 (The Carriage of Passengers and their Luggage by Sea (Notice) Order 1987) passengers had to be notified about certain provisions of the Athens Convention 1974. Especially, information regarding Article 5 (valuables), Article 7 (limit of liability for personal injury), Article 8 (limit of liability for loss of, or damage to, luggage) and Article 15 (Notice of loss or damage to luggage) had to be given^{11F324}.

France

1. What was the regime in force concerning the liability of carrier before 2013 Was there was a regime of strict liability or fault liability?

The liability of the carrier was based on fault.

Before the implementation of the Regulation French rules foresaw a presumption of liability for carriers for damages to persons.

This implied that in case of shipping incidents carriers could be held non liable only if they could prove that there was no fault or negligence on their behalf.

In case of non-shipping incidents the law did not foresee any presumption of fault. Thus passengers claiming compensation had to provide evidence of the fault of the carrier.

The liability for the loss of cabin luggage and passengers' belongings was a liability for fault.

³¹⁹ Article 7 Athens 1974.

³²⁰ Article 8 (1) Athens 1974.

³²¹ Article 8 (2) Athens 1974.

³²² Article 8 (3) Athens 1974.

³²³ Source: The Carriage of Passengers and their luggage by Sea (United Kingdom Carriers) Order 1998, SI 1998/2917, Article 3.

³²⁴ <http://www.legislation.gov.uk/uk/si/1987/703/schedule/made>.

2. Was there a distinction between shipping and non-shipping incidents?

Yes, there was a distinction between shipping and non-shipping incidents to the extent that the carrier was not presumed liable in case of damages occurred in during the carriage but not related to a shipping incident. The notion of shipping incident in France included an "accident collective" or a tout sinistre majeure".

Such notion was broader than the notion of shipping incident of the Regulation.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

Yes in case of shipping incident the carrier was presumed liable for damages to persons.

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

Yes the liability of the carrier was governed by Titre III of the loi n° 66-420 of 18 juin 1966 sur les contrats d'affrètement et de transport maritimes. Those provisions were codified in Article L5420-1 to L5421-12 of the Transport Code they are still applying to ships not covered by the regulation.

This law provides for the rules applicable to the contract of carriage, the obligations of the carrier and the liability of the latter in case he does not comply with his obligations.

5. Was the Member State member of the Athens 1974 Convention?

No, France was neither party to the Athens Convention nor to the 2002 Protocol.

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

The law foresees that the carrier is liable for injuries and death.

In addition the law foresaw that the carrier is liable for damage to luggage and for registered touristic vehicles belonging to passengers.

There were no specific rules on damages to disability equipment.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No, there were no specific rules.

8. Was there an obligation of the carrier to be insured?

There was not an insurance obligation specific to the carrier, but the obligation under Directive 2009/20 applied to ships of more than 300 GT. This covers standard civil liability insurance for the operator of the ship.

9. Did the passenger have a direct action against the insurer?

No, if a limitation fund had been constituted.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

Yes, there were different limits for different types of damages.

Damages to persons were limited pursuant to Article 7 of the Convention on Limitation of Liability for Maritime Claims, 1976 (i.e.175,000 Units of Account).

No limits could be invoked in case the damage was the consequence of an intentional, reckless action.

The law referred to specific implementing measures setting limits to liability for cabin luggage and personal belongings of passengers. Such measures limited the liability to 1.140 Euros per passenger for cabin luggage, 460 Euros par passenger for personal effect and non-registered cabin luggage and 4600 Euros for both the passengers' vehicle and the luggage it may contain.

There were no limits for value objects that the passenger gave in custody to the personnel of the ship.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No.

Italy

1. What was the regime in force concerning the liability of carrier before 2013 Was there was a regime of strict liability or fault liability?

In Italy before the entry into force of the Regulation passengers were compensated further to long judicial proceedings. The legal basis for compensation were the rules governing the contractual liability pursuant to the contract of carriage foreseen in the Maritime Code.

This implied that liability of the carrier, as interpreted by Italian Court, was based on fault.

2. Was there a distinction between shipping and non-shipping incidents?

No, there was not a distinction between shipping and non-shipping incidents.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

Yes, pursuant to Maritime Code the carrier was presumed liable. The presumption was a rebuttable presumption, meaning that he could escape liability if he could prove he had done everything possible to prevent the event causing the loss.

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

Yes, the liability of the carrier was governed by specific rules foreseen in the Maritime Code. The Maritime code specifies that the carrier is liable for damages to the persons, to luggage and to other objects that the passenger delivered to the carrier in view of the carriage.

5. Was the Member State member of the Athens 1974 Convention?

No, Italy was neither party to the Athens Convention nor to the 2002 Protocol.

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

Pursuant to the rules on the contract of carriage the carrier was liable for damages to person or to property that the passenger was carrying. The Maritime Code specifies that the carrier is liable for damages to luggage and to other objects that the passenger delivered to the carrier in view of the carriage.

The types of damage to persons that are compensated in Italy are not identified in specific rules but have been identified by the case law. In case of personal injury a claimant can seek compensation for the physical loss and for the economic loss directly linked to the injury. The physical losses are compensated pursuant to tables that link the amount of the compensation to the disability caused by the event that caused the damage. The economic loss is compensated based on a calculation of the medical loss and the loss of income due to the impossibility to work.

This applies also in case of death. Relatives can claim compensation for the economic loss linked to the death of the relative assuming that they can provide evidence of such loss, i.e. actual cost borne and loss of the right to claim for maintenance from the deceased passenger.

They can claim also compensation for the physical loss they suffered as a consequence of the loss of a relative (i.e. emotional trauma suffered).

They can also claim compensation for the physical damage suffered by the deceased person, assuming that a certain laps of time elapsed between the accident and the death.

There were no specific rules on damages to disability equipment.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No, there were no specific rules.

8. Was there an obligation of the carrier to be insured?

No.

9. Did the passenger have a direct action against the insurer?

No.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

Yes, there were limits in case of damage to property, but no limits concerning damages to persons.

For luggage the limits to liability were calculated based on the weight of the luggage and amounted to 6 Euros per kilogram.

For vehicles the limits to liability were set at 100 Euros or to the higher value declared by the passenger when the vehicle was boarded.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No.

Germany

1. What was the regime in force concerning the liability of carrier before 2013 Was there a regime of strict liability or fault liability?

The regime in force before 2013 was based on fault as Germany incorporated the Athens Convention by way of reference in an attachment to the Commercial Code.

The liability regime of the Athens Convention applied to all ship and all types of voyages.

2. Was there a distinction between shipping and non-shipping incidents?

Yes.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

Yes.

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

The liability of the carrier was governed by the Athens 1974 Convention. Germany did not ratify the Convention but it incorporated it in its regulations by way of reference.

5. Was the Member State member of the Athens 1974 Convention?

No, Germany was not a member of the Athens 1974 Convention.

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

The compensated damages were death of or personal injury, and damage to cabin luggage as well as to boarded belongings.

The damages compensated under national rules are further specified by the BGB (German Civil Code), which contains general provisions. Damages to person include the costs of medical treatment and any additional measures to restore the health. Also the costs for professional rehabilitation could be compensated. If medical treatment was not adequate to restore the health of the victim, the victim could claim compensation for individual pain and suffering in accordance with section 847 of the German Civil Code. Section 842 of the Civil Code provides a claim for loss of earnings and lost career. In case of the death compensation for loss of earnings can be claimed to the extent that the victim was obliged to pay maintenance to the claimant. German law does not foresee a right of compensation for immaterial damages.

There were no specific provisions for damages to disability equipment.

German courts interpreted the Athens Convention, as allowing the recovery of nonpecuniary damages for pain and suffering under section 847 of the Civil Code.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No there were not rules granting any advanced payment or any other form of assistance.

8. Was there an obligation of the carrier to be insured?

No, the carrier didn't have an obligation to be insured.

9. Did the passenger have a direct action against the insurer?

No, the passenger did not have a direct action against the insurer.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

Yes, for loss of life and personal injury a limit of liability of DM 320,000 (\approx € 164,000) per carriage applied. For cabin luggage a limit of DM 4,000 (\approx € 2,045), for vehicles a limit of DM 16,000 (\approx € 8,180) and for other luggage a limit of DM 6,000 (\approx € 3,068) applied.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No, there was not any obligation to inform passengers about their rights to compensation.

Greece

1. What was the regime in force concerning the liability of carrier before 2013 Was there a regime of strict liability or fault liability?

Before 2013 the legal regime which covered the liability of carriers of passengers caused by shipping accidents was governed by the Greek law no. 1922/1991 which had ratified the Athens International Convention relating to the Carriage of Passengers and their Luggage by Sea dated 13 December of 1974, which introduced a liability based on fault. The Greek Code of private maritime law, dated since 1958, applies to the carriage of passengers in the following cases: a) from the mainland to the Greek islands, b) from the Greek islands to the mainland and c) for the journeys in between Greek islands. The said the Code has also a liability provision based on fault for such accidents.

2. Was there a distinction between shipping and non-shipping incidents?

Yes, this distinction was restricted in the burden of proof. While for shipping accidents (i.e. shipwreck, collision, stranding, explosion, fire and damage of the ship) the carriers' fault or negligence was presumed, unless he proved the opposite, in non-shipping accidents the victim has to give evidence of the fault of the carrier.

3. Which were the rules on the burden of proof? Was the carrier presumed guilty in case of shipping incidents?

Yes, the applicant had to give evidence that the event which caused the loss or damage had happened during the carrying. The carrier presumed guilty in case of shipping incidents unless he could prove the opposite (see answer to question 2).

4. Was the liability of the carrier governed by specific rules governing the contract of carriage or by general rules on contractual liability?

Only the liability of the carrier for passenger's death, injuries and damages or losses of their belongings was governed by the above mentioned law 1922/1991. Other liability issues were governed by general rules on contract liability (civil code, code of private maritime law).

5. Was the Member State member of the Athens 1974 Convention?

Yes

6. Which damages were compensated under national rules: physical loss, economic loss? Were there specific rules on losses concerning luggage, disability equipment?

Pursuant to the rules on the contract of carriage the carrier was liable for damages to persons or to luggage that the passenger was carrying.

Other valuable were compensated to the extent that they had been delivered to the carrier.

The passenger or the relatives of the passenger were entitled to obtain pursuant to Greek law: compensation for material damage (Article 928 GCC), i.e. medical and funeral expenses as well as loss of the right to claim maintenance from the deceased passenger, loss of capacity for work.

7. Where there rules granting an advance payment to passengers in case of shipping incident or any other form of assistance?

No.

8. Was there an obligation of the carrier to be insured?

No.

9. Did the passenger have a direct action against the insurer?

No.

10. Were there limits to the liability of the carrier? If yes, when did they apply? In case of strict liability? What about fault liability?

The carrier could limit his liability except where he acted with intent to cause damage or recklessly.

Greek was party to the Convention on Limitation of Liability for Maritime Claims, 1976 and the limits to liability were governed by such Convention.

11. Did national law foresee an obligation to inform passengers concerning their rights to compensation?

No.

ANNEX 13 COMPARISON PASSENGER RIGHTS BETWEEN DIFFERENT MODES

Area	Right granted	Rail	Air	Bus and coach	Maritime
		Regulation 1371/2007	Regulations 889/2002, 261/2004 and 1107/2006	Regulation 181/2011.	Regulations 1177/2010 and 392/2009 .
Information	Obligation of operator to provide information on rights under Regulation	Must be provided when selling ticket	Notice must be published at check-in desk, and provided in event of incident. NEBs have obligation to inform PRMs of their rights.	Must be provided at latest on departure, and at terminals and on internet.	Must be published on board and in ports. When contract is made in Member State information shall be provided at all points of sale, including sale by phone and via Internet.
Liability and security	Right to immediate assistance in case of death or injury.	At least € 21,000 in event of death.	At least 16,000 SDRs (€19,000) in the event of death or injury.	No.	At least € 21,000 in event of death.
	Right to compensation in case of death or injury.	Necessary costs following death, support for any dependents of passenger, up to national limit of at least 175,000 units of account (€161,000).	Carriers are prohibited from contesting claims of up to 113,100 SDRs (€134,000).	Necessary costs following death, support for any dependents of passenger, up to national limit of at least €220,000.	The liability of the carrier shall not exceed 400,000 units of account per passenger (€ 500,000).
	Right to compensation when baggage is	Up to 1,400 units of account (€1,285) per piece.	Up to 1,131 SDRs (€1,344).	Up to €1,200 per piece.	* Up 2,250 unit of account for cabin luggage, per passenger

Area	Right granted	Rail	Air	Bus and coach	Maritime
	lost or damaged.				(€ 2,807) * Up to 12,700 units of account per vehicle (€ 15,845) * Up to 3,375 units of accounts for other luggage per passenger (4,210) ³²⁵
	Obligation of operator to ensure passengers' personal security.	Must take adequate measures.	No.	N/A.	No.
	Liability of operator for passenger safety, and obligation to have insurance to cover this.	Yes.	Obligation for insurance (defined in detail in Regulation 785/2004).	N/A.	Yes, see annex I, Article 4bis.
Delays cancellations missed	Right to assistance/care (food and drink).	For delays of over 60 minutes, and where available or can reasonably be supplied.	N/A.	For journey of over 3 hours, where delay is over 90 minutes, and where available or can reasonably be supplied.	For delays of over 90 minutes, and where available or can reasonably be supplied.
	Right to accommodation	Yes, with no limitations.	Yes, with no limitations.	Limited to two nights, maximum of	Limited to three nights, maximum of €80 per

³²⁵ Conversion is based on a conversion rate of 1 SDR= 1,2477 EUR, per 23 September 2016 (<http://nl.investing.com/currencies/eur-sdr-converter>).

Area	Right granted	Rail	Air	Bus and coach	Maritime
	where delay is overnight.			€80 per night. No right where cancellation or delay due to severe weather conditions or natural disasters. For journeys of over 3 hours only.	night. No right where cancellation or delay due to severe weather conditions.
	Right to alternative.	Choice between reimbursement, rebooking and re-routing under comparable transport conditions.	Choice between reimbursement, rebooking and re-routing under comparable transport conditions.	Choice between reimbursement and rerouting under comparable conditions.	Choice between reimbursement and rerouting under comparable conditions.
	Right to compensation.	Where reimbursement not accepted, right to compensation varying between 25% of ticket price for short delays (1-2 hours) and 50% if longer.	For cancellation causing delay over 2 hours, and delays over 3 hours, between €250 and €600 (depending on length of journey), but not paid if extraordinary circumstances can be proved	Compensation of 50% of ticket price if choice between continuation re-routing and reimbursement not offered.	In event of delayed arrival at destination. Varies between 25% of ticket price for short delays (delay is approximately 25% of planned journey time) and 50% (for delay of 50%). Does not apply in the case of extraordinary circumstances or severe weather conditions.
PRMs	Access to services and assistance for disabled persons	Yes.	Yes.	Yes.	Yes.

Area	Right granted	Rail	Air	Bus and coach	Maritime
	and persons with reduced mobility.				
	Circumstances under which carriage can be refused.	If it would contravene access rules.	To meet safety requirements set by law or authority, or where physically impossible.	To meet safety requirements set by law or authority, or where physically impossible.	To meet safety requirements set by law or authority, or where physically impossible.
	Requirement for operator to provide training to staff.	No.	Disability awareness or assistance training, depending on role of staff All new staff must have 'disability-related' training.	Disability awareness or assistance training, depending on role of staff.	Disability awareness or assistance training, depending on role of staff.
	Operator obliged to provide accessibility information.	Upon request.	Safety rules must be publically available.	Access conditions must be made publically available, physically or on the internet, and on request of passenger.	Access conditions must be publically available.
	Right to compensation for damage to mobility equipment.	Unlimited.	In accordance with law.	Up to replacement or repair cost of damaged equipment.	Up to replacement or repair cost of damaged equipment (laid down in both Regulations).
Service quality	Obligation for operators to establish complaint handling mechanisms	Yes, initial reply required within one month and final reply within three months.	No requirement.	Yes, initial reply required within one month and final reply within three months.	Yes, initial reply required within one month and final reply within two months.

Area	Right granted	Rail	Air	Bus and coach	Maritime
	regarding violations of these rights.				
	Obligation for operators to establish service quality standards, and to publish their performance against them.	Yes. Publication includes data on complaints received.	Only for PRM services: Airports required to publish quality standards (but not explicitly required to publish performance against them) No requirement for airlines.	No.	Operators required to publish quality standards with respect to passengers with reduced mobility, but not explicitly required to publish performance against them. No requirement for other service quality issues.
Enforcement bodies	Independence.	Independent from operators in organisation, funding decisions, legal structure, decision-making.	Not required.	Independent from operators in organisation, funding decisions, legal structure, decision-making.	Independent of commercial interests in terms of organisation, funding decisions, legal structure and decision-making.
	Where complaints should be made.	To any NEB, no obligation to transfer complaint but general obligation for NEBs to co-operate.	For liability: no right to complain. For delays, cancellations: To any NEB, no obligation to transfer complaint PRM issues: To any NEB, but complaints must be transferred to NEB with responsibility for incident.	To any NEB, no obligation to transfer complaint, but general obligation for NEBs to co-operate.	To any NEB, no obligation to transfer complaint but general obligation for NEBs to co-operate.

Source: Steer Davies Gleave (2012), orange additions Ecorys.



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