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Fitness Checks in Practice: Safety of Passenger Ships

This briefing attempts to look closer at how the European Commission's fitness checks work in practice based on the case of maritime safety. Fitness checks are relatively new tools, linked to the Commission's Better Regulation agenda. Specifically, the concept of fitness checks is part of the REFIT agenda and was introduced in 2010, and developed further in the 2012 communication on [regulatory fitness](#).¹ All legislation can in theory be subjected to a fitness check and in May 2015 the European Commission set out more detailed [guidelines about how to conduct a fitness check](#) for the first time. A rolling programme of fitness checks is also operated by the European Commission. The latest edition was published in May 2015: [REFIT: State of Play and Outlook](#).

The fitness checks differ from evaluations in that they are 'comprehensive policy evaluations assessing coherence and consistency between and within regulatory areas and whether a larger regulatory framework for an entire policy sector is fit for purpose'.² Their aim is to identify the cumulative impact of legislation over time and identify any overlaps, gaps or obsolete measures. So, while broader than an evaluation, they are based on the same five criteria: efficiency, effectiveness, coherence, relevance, and EU added value.³

EP committee responsible at time of adoption of the EU legislation: Committee on Transport and Tourism (TRAN)

Directives reviewed by the fitness check:

- **Directive [2009/45](#)** (Passenger ships: safety rules and standards) adopted in plenary on [21 October 2008](#). This Directive repealed Directive 1998/18, which was supposed to be transposed by 31 January 2004;
- **Directive [2003/25/EC](#)** (Safe seas: roll-on/roll-off (ro-ro) passenger ships, specific stability) adopted in plenary on [7 November 2002](#) to be transposed by 17 November 2004;
- **Directive [1999/35/EC](#)** (Maritime safety: ro-ro ferries and high speed passenger craft, conditions for the operation) adopted in plenary on [10 March 1999](#) to be transposed by 1 December 2000; and
- **Directive [1998/41/EC](#)** (Maritime safety: registration of persons sailing on board passenger ships) adopted in plenary on [11 March 1998](#), all of the legislation to be transposed by 1 January 2000.

¹ COM(2012) 746

² Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook COM (2014) 368

³ For an overview of the European Commission's evaluation plans see [Evaluation in the European Commission: Rolling Check-List and State of Play](#), European Parliamentary Research Service, December 2015

1. Background

1.1. Maritime safety legislation

Ship safety legislation has implications in a variety of areas, from environment to labour laws. With 23 out of 28 Member States being coastal countries, the consequences of accidents at sea are of great importance. In general, maritime safety standards are developed at an international level via the International Maritime Organisation (IMO). The International Convention for the Safety of Life at Sea (SOLAS) is the most important treaty in the area of maritime safety. However, EU and national law sit alongside international agreements in areas where the international standards are deemed insufficient or do not apply.

Maritime safety law has often been developed in response to accidents at sea and EU law is no exception in that respect. During the 1990s, following several accidents and oil spills, the European Commission started legislating in this area, as well as transposing international standards into EU law. Several Directives followed in the areas of seafarer training,⁴ marine equipment,⁵ port state control,⁶ and passenger ship safety.⁷ In addition to these Directives, three comprehensive European Maritime Safety Packages have also been adopted since the start of this millennium.

The [first package](#) (the Erika I Package) strengthened, among other things, the legal provisions for ship inspection, and introduced a system of denying substandard vessels access to EU ports. The [second package](#) introduced a traffic and monitoring information system for vessels, and established the [European Maritime Safety Agency](#) (EMSA). EMSA provides the EU with technical support and assists in the development and implementation of EU legislation on maritime safety, pollution by ships and maritime security. The [third maritime safety package](#) focused on increased inspections, better monitoring of ships flying EU Member State flags, as well covering the topic of places of refuge for ships in distress.

1.2. EU ship safety legislation

The legislation in the area of ship safety is relatively broad and covers a variety of ships, i.e. passenger ships, fishing vessels and oil tankers, for example. Ship safety legislation is also closely interlinked with other areas such as safety inspections and port control. EU legislation is also used to implement international standards. In terms of passenger ship safety, the main legislation is related to Directive [2009/45](#) which concerns passenger ships on domestic journeys and is therefore not covered by international rules. Other important EU legislation includes Directive [1998/41](#) which is related to the registration of passengers, and regulation [3051/95](#) which is directed at the safe operation of roll-on/roll-off (ro-ro) passenger ferries.⁸ Ro-ro ships are vessels designed to carry vehicles that can be driven on and off ships.

1.3. European Parliament Position

Parliament has actively participated in the area of maritime safety legislation, making several resolutions calling for improved safety following the oil spill disasters in 2000 and 2002. In 2002, the Parliament set up a temporary committee (MARE) to look at ways of improving maritime safety which made several recommendations later reflected in maritime safety legislation such as the [Third Maritime Safety Package](#).⁹ The Parliament subsequently commissioned an [external ex-post impact assessment](#), presented to the

⁴ Directive 94/58/EC

⁵ Directive 96/98/EC

⁶ Directive 95/21/EC

⁷ See page two of this briefing for details of EU maritime safety legislation.

⁸ See [EMSA](#) and [European Parliament- Maritime Transport: Traffic and Safety Rules Fact Sheet](#)

⁹ COM (2005) 585

Committee on Transport and Tourism (TRAN) in January 2015, to assess the implementation and effectiveness of the Third Maritime Safety Package. The report concluded that no unintended effects of the legislation had been identified and that the majority of anticipated immediate operational outcomes had materialised. For example, increased transparency in the performance of vessels, better knowledge of maritime traffic and increased Member State cooperation on accident investigations.

2. Scope and purpose of the Fitness Check

The shipping safety legislation is broad, interlinked and often guided by international standards. The first and most important challenge is therefore to define the scope of the fitness check. Any conclusions made will be entirely dependent on this.

The European Commission's rationale for this review was driven by the fragmented nature of the legislation, often agreed after serious accidents. However, a previously recognised need to modernise the legislation also played an important role. The central questions were therefore whether passenger ship safety legislation had resulted in a set of consistent safety standards for all passengers, enabled fair competition and increased EU-intra-mobility in the maritime sector.

Four Directives were chosen for this review (see below for details). These had previously been reviewed in a 2011 [evaluation](#), although that evaluation looked at four countries only. The fitness check report did not include any discussion about whether any other legislative acts or a different scope were considered or, if so, why they had been excluded. An internal European Commission Steering Group¹⁰ was set up to advise and provide input throughout the review, as stipulated in the Better Regulation guidance. The new guidelines, which came into force after this fitness check had started, stipulated that a roadmap should be published in advance of the fitness check for stakeholders to provide feedback. However, as there was no roadmap preceding this fitness check, no collection of stakeholder feedback on the project scope appears to have taken place.

Directive [2009/45/EC](#) is in many ways the main focus of the fitness check. Most of the data presented in the report as well as in the accompanying supporting study and previous evaluations relate to this Directive. However, in terms of final recommendations, the Directive features less prominently. Directive 2009/45 introduces a uniform level of safety for passengers undertaking domestic voyages. In particular, it applies to ships of 24 meters and above, constructed in steel or equivalent, and high-speed passenger craft (HSC). Directive 2009/45 covers less than a third of domestic passenger ships (28 per cent) but these ships make up 64 per cent of total EU passenger capacity.¹¹ While most passenger ship traffic is concentrated in the Mediterranean, the proportion of ships under Directive 2009/45 are more equally divided, with 46 per cent of domestic journeys taking place in the Mediterranean and 35 per cent in the North Sea and the Channel.¹²

Directive [2003/25/EC](#) focuses on additional stability requirements for ro-ro ships relating to counteracting the effects of water accumulation on the decks. Directive [1999/35](#) outlines the process for a series of mandatory surveys for ro-ro ships and HSCs operating to and from ports in Member States. It requires Member States hosting the vessels to check that the safety certificates issued by the flag state are correct.

¹⁰ Directorates-General of Employment, Social Affairs and Inclusion (EMPL); Internal Market, Industry, Entrepreneurship and SMEs (GROW); Research and Innovation (RTD); Joint Research Centre (JRC); Justice and Consumers (JUST); Environment (ENV); Maritime Affairs and Fisheries (MARE); Legal Service (LS); and the Secretariat General (SG) were invited to the Steering Group meetings.

¹¹ Tractebel Engineering, Support Study for the Fitness Check: Evaluation of Passenger Ship Safety Legislation, by order of the European Commission, August 2015

¹² Tractebel Engineering, Support Study for the Fitness Check: Evaluation of Passenger Ship Safety Legislation, by order of the European Commission, August 2015

Finally, Directive [1998/41/EC](#) aims to ensure that search and rescue operations are done efficiently. It stipulates that passengers' details should be submitted to the ship master and to the company's passenger register or equivalent onshore facility. The legislation applies to passenger ships sailing to or from a Member State, with some exceptions relating to the length of the journey (i.e. 20 miles or more).

While not included in the fitness check, three additional Directives are identified in the report as overlapping with two of the Directives under review. Directive [2009/16](#) overlapped with Directive 1999/35 with regards to survey requirements, while Directive [2002/59](#) and [2010/65](#) provided more up-to-date reporting requirements compared to Directive 1998/41. Given that the overlap between these Directives features prominently in the conclusion on potential simplifications, the report could have been clearer about why these Directives were out of scope of the fitness check.

3. Findings

The May 2015 [Better Regulation Package](#) included a [toolkit](#) to ensure best practice. In the area of evaluations and fitness checks, it introduced the Staff Working Document (SWD) as the key deliverable. The SWD should summarise the final results of the fitness check in a transparent manner. The document may draw on both external contractor work and/or internal European Commission analysis. Ultimately, this means that the choice of how evidence is presented will be up to the European Commission. Although the guidance stresses the importance of evidence being clearly referenced, in practice, it can often be hard to disentangle whether the evidence comes from external or internal research and whether it is quantitative evidence, such as Member State statistics, or qualitative evidence, such as interviews with individual stakeholders. In the case of this fitness review, clearer references to sources could have been provided more consistently across the report.

All in all, the fitness check concluded that the legal framework was adequate but that there was scope for simplification and clarification. In terms of the five evaluation criteria, the legislation was generally deemed efficient and effective, as accidents were relatively rare and the cost of EU regulation did not differ substantially from national legislation. In addition, EU standards provided Member States with a streamlined framework which they would otherwise have had to replace with national or international standards. It also noted that the more stringent safety inspections for ro-ro passenger ships, as outlined in the EU legislation, appeared necessary as data showed that they were much more likely to have an accident than other passenger ships. It therefore concluded that the EU legislation was fit for purpose.

However, looking closer at some of the findings, we can see that the evidence is not always sufficiently clear cut or robust to conclude with such certainty that the legislation is fit for purpose:

In terms of the existence of an internal market for example, the fitness report identified the change of flag as the main indicator for a market without barriers, i.e. a ship certified under Directive 2009/45 could move to another country without any modifications. Data did show that there had been a clear increase in changes of flag since 1998 when the Directive came into force (a 400% increase). However, more could have been done to investigate whether the Directive was the deciding factor. The comparison simply looked at changes of flag before and after 1998 and did not include any analysis of shipping trends during the time period (1979 to 2014) to see whether other events could explain the increase in flag change and in what years the bulk of these took place. In reality, while flag changes had increased, just two per cent of the total domestic passenger ships were operating in a different state than the flag state.¹³

¹³ This percentage, while low, was still deemed to provide a good indication that local markets were not protected. (However, three countries did not reply to this question (UK, Netherlands and Cyprus). Figures obtained from fitness support study by Tractebel

In the area of cost of surveys, the study relied on very diverse data from Member States. This meant that cost estimates were slightly unreliable. Survey and inspection regimes did present some considerable costs to ship owners. However, with only EU rules in existence, it was not possible to compare these costs with any national legislation. In other areas such as the exemption and equivalency arrangements, the process could be compared with SOLAS which was less costly but also less stringent.

Another important issue was to what extent the EU legislation had led to improved safety. The accident data available showed that the number of accidents was lower for ships falling outside the scope of the Directive, but that the number of injuries and fatalities were similar. Therefore, judged on the data available, there were more serious injuries per accident for vessels outside the scope of the Directive. The real issue however, was that figures had only been collected since 2011, which meant that there was insufficient data to make robust conclusions about tendencies for accidents. Some numbers were so small (i.e. fatalities) that any change could have big implications for the conclusions. Additionally, there did not appear to be a like for like comparison, given the differences between the ships and their routes, i.e. closeness to the shore. The contractor for the supporting study also pointed to an overall lack of empirical research on the relationship between legislation and accidents.

4. Methodology

4.1. Data quality

Central to any evaluation or fitness check is the quality of the data and whether reliable conclusions can be drawn from it. As a lack of available data had hampered previous reviews, great emphasis was put on data collection. Member States were asked to provide a range of information related to their domestic fleet and the application of the four Directives. Available data was also sought from EMSA and Eurostat. The additional data coupled with the cost/benefit analysis meant that a much clearer picture of the regulatory burden and of the internal market could be obtained.

Although data availability improved greatly, the lack of data, in particular the lack of baseline data (before and after the Directives came into existence) and like for like comparative data, still created some issues in terms of the robustness of the findings. The fitness check did make this lack of baseline data clear. It also mentioned that attempts had been made to make a comparison with relevant jurisdictions outside the EU, but that insufficient data was available.

4.2. Previous evaluations and studies

The fitness check drew on two previous pieces of research commissioned by the European Commission as well as a specific fitness support study. Most evidence appears to have come from this last study.

The previous two pieces of research had a similar methodology to the fitness check support study but were smaller in scope, partly due to the lack of response to questionnaires from Member States. The [2011 evaluation](#) of passenger ship legislation¹⁴ looked at the same four Directives as the fitness check, although it concentrated on an in-depth study of four countries, while [the impact assessment support study](#) only reviewed Directive 2009/45. Although solutions proposed by the two studies varied compared to the fitness check support study, the issues identified in previous research were revisited in the fitness check.

The bulk of the quantitative data used in the study, along with stakeholder interviews, came from the 2015 [Support Study for the Fitness Check: Evaluation of Passenger Ship Safety Legislation](#). The study appeared

¹⁴ Grimaldi e Associati, PassengerShip Safety Legislative Review, by order of the European Commission, April 2011

both thorough and clear, with any uncertainties being highlighted. In terms of independence, it is worth noting that the European Commission was rather heavily involved in some of the aspects of the research, namely it developed the data collection tool and conducted part of the interviews with stakeholders. It may be that this involvement was due to past experience of external researchers struggling to obtain answers from national administrations, but nevertheless, the reasoning for such an involvement from the European Commission could have been made clearer.

The advantage of using a Staff Working Document (SWD) is that all available evidence is collected and summarised in one document. This is also where the evidence is assessed against the five set evaluation criteria. This means that supporting studies are used to collect evidence towards the evaluation but do not attempt to answer the evaluation per se. This could mean that the studies on which the SWD report is based would not always be designed to answer the specific evaluation questions.

4.3. Stakeholder consultations

In terms of stakeholder views, these were covered by the research and the consultations.¹⁵ From the result of the consultations, it was clear that the issue of administrative burden had been a key concern to some stakeholders, as well as some of the other issues investigated in the study. For example, whether EU legislation influenced the choice of ship material.¹⁶ It is, however, less clear how representative the stakeholder views were and how their feedback was taken into account in the fitness check overall. Often, the same stakeholders contributed to the various pieces of research and consultations, which could lead to some double counting. It would have been helpful if the methodology used to analyse qualitative evidence and the role of qualitative evidence in the report overall had been made clearer.

4.4. Cost/benefit analysis

The cost/benefit analysis was done within the fitness support study and was based on EU guidance on cost/benefit analysis¹⁷ and on the Standard Cost Model.¹⁸ The fitness check focused mainly on a cost comparative analysis rather than on benefits. The analysis included direct costs (charges, substantive compliance costs, and administrative burdens) and enforcement cost, but excluded indirect costs. The cost/benefit analysis was undertaken in certain specific areas identified as key, namely: regulatory costs affecting ship building and operation; certificates and inspections; exemptions and equivalency arrangements; and the process of updating legislation in line with international requirements. The approach, the results and potential weaknesses of the analysis were clearly outlined in the report. In terms of weaknesses, the main issue highlighted was the variation in data obtained from Member States. The reason for this disparity between Member States was not very clear. The report even suggested that it could be due to differences in the interpretation of what costs Member States should provide, which would make the comparative analysis less robust. In any case, as the report points out this meant that the 'uncertainty with regards to the results presented in the cost-benefit assessment is rather high'.

4.5. The role of the European Commission

Apart from developing the quantitative tools for national administrations, the European Commission also undertook the accident data analysis and a review of legislation. The legal analysis assessed gaps and inconsistencies across the Directives, while the contractor carried out some comparative analysis between EU and national legislation. This analysis, coupled with feedback from stakeholders on legal overlaps and

¹⁵ [Mid-term Review of 2011 Transport White Paper](#) (2011)
[Consultation on a review of EU passenger ship safety legislation](#) (2012)

¹⁶ Some argued that aluminium ships had increased due to EU legislation, but the study showed that most countries already treated aluminium as equivalent to steel, therefore this does not present evidence that this had an effect on behaviour.

¹⁷ http://ec.europa.eu/smart-regulation/guidelines/tool_52_en.htm

¹⁸ http://ec.europa.eu/smart-regulation/guidelines/tool_53_en.htm

pragmatic solutions, appears to have informed many of the conclusions in the report. All in all, the European Commission played a relatively active role in producing and presenting the evidence.

5. The European Commission's follow up to the fitness check

As a follow up to the fitness check, the Commission published a [roadmap](#) in December 2015, containing proposals to simplify the legislation related to maritime safety based on the findings in the fitness check. The roadmap included a series of proposals, from relatively straightforward clarifications and updates, to potentially more controversial ones for some Member States. Some of the simplification suggestions relate to overcoming gaps/overlap between the Directives under review and other Directives not included in the fitness check. The proposal to ensure that all aluminium ships were equivalent to steel ships went against the wishes of those Member States currently applying national regulation for aluminium ships. The fitness check showed that there was no economic incentive to build aluminium ships instead of steel ships as claimed by some stakeholders, and that in fact, most countries already treated aluminium as equivalent to steel under Directive 2009/45. Some Member States also wanted to see standardised guidance for all small ships, rather than the roadmap suggestion of excluding smaller steel passenger ships¹⁹ from Directive 2009/45. In fact, the 2011 evaluation had argued for an extension of the Directive to ships of all sizes. Perhaps the conflicting conclusions in the reports on this issue could have been made clearer in the fitness check.

Conclusions

It is clear that the fitness check has put great emphasis on assessing the available evidence as thoroughly as possible. However, the lack of data remains an issue, and although this is made clear, at times some conclusions, related to accidents or change of flag for example, could have been more nuanced, given the relative unreliability of the data. To what extent this affects the overall conclusions of the report is less clear. In particular, could they have been more wide-ranging if the data had been better?

The final conclusions on simplifications are relatively straightforward, identifying overlap and outdated requirements, while some of the more difficult questions remain less answered. This is particularly the case in terms of accidents, where more and stronger evidence on the role of EU legislation in improving passenger safety would be especially helpful. As mentioned in the report, better data collection and monitoring systems are required for robust post-implementation assessments to be carried out.

While the remit of the fitness check has a clear logic, the fact that the same Directives were previously included in an evaluation potentially dilutes the idea of a fitness check being broader than an evaluation. A clearer differentiation between evaluations and fitness checks along with increased transparency around the initial scoping decisions would be helpful. As the fitness checks become more established, the use of an initial roadmap and stakeholder feedback will hopefully go some way in addressing the issue.

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www.europarl.europa.eu/thinktank (Internet) – www.eptthinktank.eu (blog) – www.eprs.sso.ep.parl.union.eu (Intranet)

¹⁹ Below 24 metres of steel or equivalent