

Transnational Private Regulation: the a-typical case of the maritime industry*

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Abstract

The recent growth of transnational private regulation (TPR) reflects a redistribution of regulatory power from the domestic to the global level and from public to private regulators. However, the regulatory framework of the maritime industry demarcates an a-typical case in the context of TPR. Exactly the opposite pattern is to be observed, since regulation in this industry has been initiated by private actors and has seen an increasing role for international and regional public regulators over time. As a consequence, in the area of supervision of classification societies, competences now overlap at the level of the national authorities of the flag states, the International Association of Classification Societies (IACS) and the European Maritime Safety Agency (EMSA). While looking at the historical development of the maritime industry into a hybrid regulatory regime, the positive and negative consequences of this hybridization for the legal certainty within this regime will be researched on the basis of a legal and institutional analysis.

1. Introduction

The recent growth of transnational private regulation (TPR) reflects a redistribution of regulatory power from the domestic to the global level and from public to private regulators. However, the regulatory framework of the maritime industry demarcates an a-typical case in the context of TPR. Exactly the opposite pattern is to be observed, since regulation in this industry has been initiated by private actors and has seen an increasing role for international and regional public regulators over time.

Today, the maritime industry is famous for its complex and hybrid framework of private and public actors operating at the international, European and national level. To a certain extent, all private and public organizations have competences in the field of legislation, enforcement and supervision. Unsurprisingly, cooperation happens at different levels and between different actors. In the area of supervision of classification societies, competences seem to overlap at the level of the national authorities of the flag states, the

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International Association of Classification Societies (IACS) and the European Maritime Safety Agency (EMSA). The desirability of such a situation is obviously questionable, since ‘classification societies have often been heavily criticized on their performance and credibility by states, international organizations and marine professionals’ meaning that supervision of their work is of utmost importance. Besides, this hybrid regime may lead to a low level of legal certainty for the legal subjects in the sense that it becomes difficult to understand which rules to follow and which rules to comply with.

Since ‘classification societies have been heavily criticized on their performance and credibility’ two main historical events are important in order to demonstrate the poor performance of these societies.² The first momentum was the ‘crisis of class’ during the late eighties and early nineties, a period in which the classification societies have received a great deal of criticism and complaints.³ Within the sphere of the ‘crisis of class’ a wide range of problems emerged and at various levels, regulatory responses thereto were initiated.⁴ Due to their importance both these problems and regulatory initiatives will be dealt with later in this research. Many attempts have been made to restore confidence in the performance of classification societies. However, these rules could not prevent what happened in 1999 and 2002.⁵ On 12 December 1999 the Malta registered vessel *Erika* broke into two pieces and sank off the west coast of France. In November 2002, the Bahamas registered tanker *Prestige* began to break up off the coasts of Spain and France. As will be explained later, these two accidents together may be seen as the second important historical event that clearly demonstrated the consequences of poor performing classification societies. Both disasters triggered a second call for re-evaluation of the existing international legal framework and worked as a catalyst for new developments both at the European and international level.⁶ The European Union and its Member States, driven by the European Commission and the European Parliament (EP), have taken a leading and proactive role in this process, because the EC ‘considered that the normal framework for international action on maritime safety under the auspices of the IMO fell short of what was needed to tackle the causes of such disasters

² J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 488

³ *ibid* p. 491. See also: P. Boisson, ‘Classification societies and safety at sea. Back to basics to prepare for the future’ (1994) 18 *Marine Policy* 363, p. 363

⁴ J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 493-495

⁵ M. Michinel, ‘The *Prestige* in the Courts’ (2007) 21 *Australian and New Zealand Maritime Law Journal* 171.

⁶ V. Frank, ‘Consequences of the *Prestige* Sinking for European and International Law’ (2005) 20 *International Journal of Marine and Coastal Law* 1, p. 1

effectively'.⁷ The Commission's reaction was embodied in sets of measures called 'Erika Packages'.⁸ In addition, the EMSA has been established in 2002 as a response to both disasters.⁹ These developments of European maritime law in the area of maritime safety are sometimes interpreted as policies of 'unilateralism' or 'regionalism'.¹⁰ It is however believed that, because of the transboundary nature of maritime transport, actions to improve safety are more effective if devised internationally and applied universally.¹¹ As mentioned above, this is not the case in practice. Instead, the historical development of the maritime industry reveals that this industry has changed from a private regulatory regime into a hybrid regulatory regime. We can observe that classification societies and ship owners are currently bound by rules from different levels and organizations at the same time. This hybridization has obviously far-reaching consequences for legal certainty. In fact, as confirmed by the former IMO Secretary-General, Mr. E.E. Mitropoulos, the strife for coherence and legal certainty is of main importance in the maritime industry.

“Because ships move continually between countries and between different jurisdictions, there is an overarching logic in favor of a framework of international standards to regulate the industry. Without internationally recognized and accepted standards, you might have the ludicrous situation that a ship leaves country A bound with cargo for country B, fully compliant with country A's requirements for ship design, construction, equipment, manning and operation, only to find that country B has its own, different requirements. Clearly there has to be a common approach, so that ships can ply their trade smoothly and unimpeded around the globe and countries receiving foreign ships can be confident that, in accepting them in their ports or offshore terminals, they do not place

⁷ V. Frank, 'Consequences of the *Prestige* Sinking for European and International Law' (2005) 20 *International Journal of Marine and Coastal Law* 1, p. 4. See also: N. Liu and F. Maes, 'The European Union's role in the prevention of vessel-source pollution and its internal influence' (2009) 15 *Journal of International Maritime Law* 411, p. 413 and 417. See also: M.A. Nesterowicz, 'European Union legal measures in response to the oil pollution of the Sea' (2004) 29 *Tulane Maritime Law Journal* 29, p. 33

⁸ R. van Gestel and Ph. Eijlander, 'Oprichting van de European Maritime Safety Agency: een nieuwe Octopus in de zee van toezichthouders?' in R. van Gestel, Ph. Eijlander and others (eds), *Domeinconflicten tussen Europees en nationaal toezicht* (Boom Juridische Uitgevers 2006) p. 151-152. See also: G. Gonsaeles and E. Somers, 'The Consequences of the sinking of the M/S *Erika* in European Waters: towards a total loss for international shipping law?' (2010) 41 *Journal of Maritime Law and Commerce* 57, p. 61. See also: J.L.P. Begines, 'The EU law on classification societies: scope and liability issues' (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 504-505

⁹ EMSA, 'Origins and Tasks' [2012] <www.emsa.europa.eu/about/101-mission-statement/135-origins-a-tasks.html> [Last accessed 27 May 2012]

¹⁰ N. Liu and F. Maes, 'The European Union's role in the prevention of vessel-source pollution and its internal influence' (2009) 15 *Journal of International Maritime Law* 411, p. 420

¹¹ M.A. Nesterowicz, 'European Union legal measures in response to the oil pollution of the Sea' (2004) 29 *Tulane Maritime Law Journal* 29, p. 30

their own safety, security and environmental integrity at an unreasonable risk.”¹²

Therefore, the positive and negative consequences of the current hybridization for the legal certainty within this regime will be researched on the basis of a legal and institutional analysis while taking into account the historical development of the regulatory regime.

This research aims to answer the following main question: to what extent does the hybrid regulatory regime of different public and private actors at the international, European and national level in the maritime industry provide for legal certainty for classification societies? As said before, ‘the growth of transnational private regulation reflects a redistribution of regulatory power from domestic to transnational levels and from public to private entities. This redistribution is, however, neither uniform nor unidirectional. In some circumstances, even the opposite pattern is observed shifting from private to public, with an increasing role for international public regulation, especially in terms of oversight of private regimes and a stronger role for regional institutions ranging from new political entities to trade agreements’.¹³ This opposite pattern is exactly what marks the transnational private regulatory regime of the maritime industry which has been initiated by private actors in the second half of the 18th century, and has developed itself into a hybrid regulatory regime where a multiplicity of lawmakers is involved.

The diversity of lawmakers results in a complex system of rulemaking. One may wonder how this affects the effectiveness of the legal framework as is often done in research projects in the field of political science, but legal certainty is one of the major legal elements a regulatory system of high quality should possess. In this context, legal certainty could even be seen as a preliminary condition to be fulfilled before effectiveness will arise.

This research will examine whether the shift from a private to a hybrid regulatory regime typical for this industry influences legal certainty for classification societies. This will be demonstrated on the basis of three factors that may either contribute negatively or positively to legal certainty. The underlying hypothesis this research aims to test is consequently that the development of a private regulatory regime into a hybrid regulatory regime decreases legal certainty for those subject to it.

¹² E.E. Mitropoulos ‘European Maritime Safety Agency: “Looking forward: the evolution of EMSA’s tasks”. Safe and clean shipping – a regional contribution to a global issue’ (11 November 2011) <www.imo.org/mediacentre/secretarygeneral/speechesbythesecretarygeneral/pages/emsas.aspx> [Last accessed 27 May 2012]

¹³ F. Cafaggi, ‘New Foundations of Transnational Private Regulation’, (2011) 38 *Journal of Law and Society* 20, p. 47

1.1. Methodology

In this research project, the case-study method is being used. ‘The case study is best defined as an intensive study of a single case (or a small set of cases) with an aim to generalize across a larger set of cases of the same general type.’¹⁴ ‘Case studies can be conducted and written with many different motives. They vary from the simple presentation of individual cases to the desire to arrive at broad generalizations based on case study evidence but without presenting any of the individual case studies separately.’¹⁵ Within the context of this research, the case-study method is used in order to test the hypothesis that the development of a private regulatory regime into a hybrid regulatory regime increases legal uncertainty for those subject to it. This shift is clearly visible in the present case of the maritime industry. Within this industry, regulation has been initiated by private actors and has seen an increasing role for international and regional public regulators over time. This development demarcates an a-typical case in the context of the theory of transnational private regulation (TPR) which principally reflects a redistribution of regulatory power from the domestic to the global level and from public to private regulators. The maritime situation is unusual in this sense, since generally private actors get involved in a reasonably later stage of the advancement of the legal framework.

The case-study is focused on the organizational phenomena within the maritime area. As a result the IMO, the IACS and the EMSA are included within the case-study. The international IMO Resolutions, the self-supervisory scheme of the IACS and the European legislative documents of the EMSA are namely most important in the field of standard-setting and supervision of classification societies. Therefore, these organizations can be identified as the main actors within the maritime legal framework and will thus be the units of analysis.

It is important to note that this case-study is designed as a single-case design as opposed to a multiple-case design. The rationale for this choice is that this case represents a unique case.¹⁶ Technically speaking, this design is an ‘embedded case-study design’, since more than one unit of analysis is involved: the IMO, the IACS and the EMSA.¹⁷ For this matter, a longitudinal approach is taken. The time period under investigation starts from the second half of the 18th century when ‘the concept of classification caught on around the world

¹⁴ J. Gerring, *Case Study Research: Principles and Practices* (Cambridge University Press 2007), p. 65

¹⁵ R.K. Yin, *Case Study Research. Design and Methods* (Sage Publications Washington DC 2009), p. 20

¹⁶ R.K. Yin, *Case Study Research. Design and Methods* (Sage Publications Washington DC 2009), p. 47

¹⁷ *ibid* p. 50

for the first time'.¹⁸ In relation to this concept, all relevant developments until now are being scrutinized.

An important limitation to be added is the exclusion of interviews as a source of data, since the concept of legal certainty will be examined on the basis of pre-established legal indicators only. Consequently, there will be no sociological element added to this research in the sense that no sociological dimension of legal certainty will be tested. The research will however draw upon history and adds an interdisciplinary element in this way.

1.2. Outline

The following line will be followed in this research. Section 2 starts with setting out the theoretical framework on general matters of regulation theory in order to position the research within the more specific discussion on transnational private regulation. In particular, attention is paid to the concept of legal certainty as an element of the quality of transnational private regulatory regimes. Since there is no agreement on the definition of legal certainty, the principle deserves an explicit analysis which will be presented in this section as well. Section 3 describes the legal framework of the case-study on the maritime industry with all its national, regional and international actors and their competences in the fields of regulation, supervision and enforcement. Due consideration is given to the historical shift from a private regulatory regime into the present hybrid regulatory regime. Moreover, this section will touch upon the core of the research, which is the analysis of the extent of legal certainty within the present hybrid regulatory regime of the maritime industry. In this regard three selected elements will be tested within this particular case-study in order to point out the responsible actor for a possible low level of legal certainty. These elements relate to the clarity of legislation, the form of legislation and the multiplicity of organizations involved as well as regulatory responses to unforeseeable events. In conclusion, section 4 will critically set out the main findings of this research by analyzing the extent to which hybridization affects legal certainty and identifying with as much precision as possible which actors in the legal system bear responsibility for the perceived uncertainty. In addition, this section shall finalize this research in the form of a conclusion and some final recommendations.

2. Theoretical framework

Regulation is a very broad topic, receiving plenty of attention from political scientists and

¹⁸ IACS, 'Classification Societies – What, Why and How?' [2011] p. 4
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

legal scholars. This section starts with describing the emergence and development of transnational regulation in the sense of networks of both state and non-state actors, also being referred to as hybrid regulatory regimes. More specifically, the theory of transnational private regulation as it is presented today will be elaborated upon in subsection 2. At last, since little is known about the consequences of hybrids for legal certainty for the legal subjects in transnational private regulatory regimes, the relevance of this theme for this particular research is being dealt with in this section as well.

2.1. Regulation in the transnational context

Transnational regulatory regimes have already been recognized for a long time. The first usage of the term ‘transnational’ in legal scholarship dates back to 1956. Philip Jessup wrote that he would “use the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories”.¹⁹

Later it was said that a transnational interaction is used to describe ‘the movement of tangible or intangible items across state boundaries when at least one actor is not an agent of a government or an intergovernmental organization’. Thus, a transnational interaction may involve governments, but it may not involve only governments: nongovernmental actors must also play a significant role.²⁰ Transnational relations therefore include the activities of transnational organizations, even when some of their activities may not directly involve movements across states. By this definition, multinational business enterprises, international trade union secretariats and global religious organizations are all transnational.²¹

Another explanation of transnational legal process in the nineties describes it as ‘the theory and practice of how public and private actors – nation-states, international organizations and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law’.²² According to this definition, ‘transnational legal process has four distinctive features’. First of all, it is non-traditional. It breaks down two traditional dichotomies that have historically dominated the study of international law, namely the

¹⁹ P. Zumbansen, ‘Transnational Law’ in J. Smits (ed), *Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 738, p. 738

²⁰ J.S. Nye and R. Keohane, ‘Transnational Relations and World Politics: An Introduction’ (1972) 25 *International Organization* 329, p. 332

²¹ *ibid* p. 335-336

²² H.H. Koh, ‘The 1994 Roscoe Pound Lecture: Transnational Legal Process’ (1996) 75 *Nebraska Law Review*, 181, p. 183-184

division between domestic and international as well as the separation between public and private. Second, it is non-statist. ‘The actors in this process are not just, or even primarily, nation-states, but include non-state actors as well.’ Third, transnational legal process is dynamic, not static. ‘Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again.’ Fourth and finally, it has a normative character. ‘From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again.’²³

More recently, it was again reiterated that ‘transnational law emphasizes the importance of non-state actors in cross-border relationships’. It is not limited to merely private law-based, cross-border transactions involving non-state actors and regulatory networks. ‘Rather, transnational law also encompasses those relationships between state and non-state actors across state boundaries that fall short of leading to official international legal acts such as treaties or conventions.’²⁴

There is thus nothing new about the term ‘transnational’. As a consequence, the national state cannot ignore the international community any longer. It has to take account of other jurisdictions and the supranational context in order to enjoy the benefits from a supranational network. In this regard, the establishment and development of networks of actors has to be recognized. Networks are ‘complex and non-hierarchical, comprised of mechanisms that, taken together, utilize a hybrid range of techniques that seek to regulate conduct’. They may be divided into two broad categories: ‘those which are entirely voluntary in nature, such as codes of conduct voluntarily adopted by individual firms, and those which are ultimately buttressed by a coercive, albeit largely hidden, legal framework’.²⁵ In the context of networks, the state is increasingly dependent on non-state actors to deliver its policies.²⁶ Of course, this ‘does not entail the wholesale relinquishing of control by the state over service provision’, but it has ‘necessitated a change in the kinds of policy instruments

²³ H.H. Koh, ‘The 1994 Roscoe Pound Lecture: Transnational Legal Process’ (1996) 75 *Nebraska Law Review*, 181, p. 184

²⁴ P. Zumbansen, ‘Transnational Law’ in J. Smits (ed), *Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 738, p. 743

²⁵ B. Morgan and K. Yeung, *An Introduction to Law and Regulation. Text and Materials* (Cambridge University Press 2007), p. 320-321. See also: C. Scott, ‘Regulatory Governance and the Challenge of Constitutionalism’ in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010), p. 6. See also: C. Harlow & R. Rawlings, ‘Promoting Accountability in Multi-Level Governance: A Network Approach’ (2006) *European Governance Papers (EUROGOV)*, No. C-06-02, p. 6. <www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf> [Last accessed 27 May 2012]

²⁶ K. Yeung, ‘The regulatory state’ in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) p. 80

available to the state in seeking to fulfill its regulatory functions, for the state could no longer rely on hierarchical authority arising from direct ownership of the resources from which many services had previously been provided'.²⁷ Transnational and non-state powers have thus assumed greater significance in practice over time.²⁸ As a result, 'scholarship has also moved beyond the state as the only, and in some cases the primary, focus of regulatory governance'.²⁹ In recent scholarship 'regulatory governance is conceived of in a manner that is highly fragmented, both within the state and beyond the state, with substantial involvement of supranational and non-state or private organizations at every stage, including the making, monitoring and enforcement of norms'.³⁰ In this sense, one could speak of the emergence of hybrid regulatory regimes. Not only the ways of governing in contemporary regulatory governance are diverse, the same holds thus true for the actors.³¹ The familiar national and international, general and sector specific self-regulatory bodies and standards bodies increased in importance. Businesses are also important in regulatory regimes because they do not only have, albeit sometimes limited, capacities to control behavior within their own organizations, they are also able to regulate the behavior of others. Besides, non-governmental organizations increasingly use their capacity to regulate for setting standards and/or enforcing them.³² It is clear that in the current 'transnational governance regimes, the exercise of power transcends the boundaries of the nation state and crosses the public/private border'.³³

In Europe, more particularly, the regulatory state is neither the nation-state nor the supranational level alone.³⁴ The European level still lacks the formal powers and the institutional capacities needed to establish the appropriate rules and to monitor and enforce

²⁷ K. Yeung, 'The regulatory state' in R. Baldwin, M. Cave and M. Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) p. 67

²⁸ C. Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010), p. 15.

²⁹ C. Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010), p. 18

³⁰ *ibid* p. 21. See also: C. Brown and C. Scott, 'Regulation, Public Law and Better Regulation' (2011) 17 *European Public Law* 467, p. 474. See also: P. Popelier, 'Governance and Better Regulation: Dealing with the Legitimacy Paradox', (2011) 17 *European Public Law* 555, p. 557. See also: F. Cafaggi, 'Private Law-making and European Integration: Where Do They Meet, When Do They Conflict?' in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010), p. 202.

³¹ *ibid* p. 202

³² C. Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010), p. 21-22

³³ C. Harlow & R. Rawlings, 'Promoting Accountability in Multi-Level Governance: A Network Approach' (2006) *European Governance Papers (EUROGOV)*, No. C-06-02, p. 4. <www.connex-network.org/eurogov/pdf/egp-connex-C-06-02.pdf> [Last accessed 27 May 2012]

³⁴ B. Eberlein and E. Grande, 'Beyond delegation: transnational regulatory regimes and the EU regulatory state', (2005) 12 *Journal of European Public Policy* 89, p. 94

their compliance and transposition in the Member States.³⁵ Regulation in Europe therefore includes both levels: it is national and European. In this context, the national regulatory regimes are embedded in a transnational regulatory structure.³⁶ ‘The European level connects with national, regional, and local authorities on the one hand and with private actors and the people at large on the other.’³⁷ This governance ‘network approach’ is officially accepted in the White Paper on European Governance.³⁸

2.2. Transnational private regulation

In their latest articles, Scott and Cafaggi specifically focus on networks and regimes in which public and private actors work together in a complementary way instead of in an alternative sense. From this starting point they developed, together with Senden, a very recent branch of regulation theory which specifically addresses non-state actors and their role in the existing regulatory regimes. A main focus is placed on the transnational level, since they also acknowledge that ‘the private role in regulation is no longer a matter internal to nation states but increasingly, both in scope and intensity, a matter for the transnational (and supranational) levels of governance’.³⁹ This theory is therefore known as ‘transnational private regulation’ (TPR). According to Scott, Cafaggi and Senden, ‘the concept of transnational private regulation emerged to capture the idea of governance regimes which take the form of coalitions of non-state actors which codify, monitor, and in some cases certify firms’ compliance with labor, environmental, human rights, or other standards of accountability’. The regimes are transnational, rather than international, in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties which is a process that is very specific for international law. The actors are non-state or private in the sense that key actors in transnational private regulatory regimes include both civil society or non-governmental organizations and firms, individually as well as in associations. Cafaggi reconfirms that TPR thus entails a broad definition of the private sphere. New players continuously enter the regulatory space. TPR can therefore be identified in very different

³⁵ B. Eberlein and E. Grande, ‘Beyond delegation: transnational regulatory regimes and the EU regulatory state’, (2005) 12 *Journal of European Public Policy* 89, p. 94

³⁶ *ibid* p. 98

³⁷ P. Popelier, ‘Governance and Better Regulation: Dealing with the Legitimacy Paradox’, (2011) 17 *European Public Law* 555, p. 558

³⁸ P. Popelier, ‘Governance and Better Regulation: Dealing with the Legitimacy Paradox’, (2011) 17 *European Public Law* 555, p. 559. See also: Commission, ‘European Governance. A White Paper’ (2001) 428 final

³⁹ D. Curtin and L. Senden, ‘Public Accountability of Transnational Private Regulation: Chimera or Reality?’ (2011) 38 *Journal of Law and Society* 163, p. 186

forms.⁴⁰

In March 2011, the *Journal of Law and Society* has devoted a special issue to the theory of transnational private regulation called ‘*The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates*’. In the main articles on this topic a good deal of information on the foundations of this theory as well as on its conceptual and constitutional challenges is to be found. The definitions as developed by Cafaggi, Scott and Senden will be guiding in this research in order to explain the regulatory regime in the maritime industry. Therefore, considerable attention is devoted to their research findings below.

2.2.1. Foundations of transnational private regulation

Summarized, transnational private regulation constitutes ‘a new body of rules, practices and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation. Its recent growth reflects, first, a reallocation of regulatory power from the domestic to the global sphere and second, a redistribution between public and private regulators’. As already mentioned above, TPR is different from international regulation mainly because standard-setting is not based on states’ legislation. It is rather centered on private actors that interact with international and intergovernmental organizations. This is not to say that states do not take part in and are not affected by TPR, but it emphasizes to a greater extent ‘the role of the state as a rule taker as opposed to a rule maker’.⁴¹

The set of possible regulatory instruments differs significantly from those developed in the domain of public international and national law. ‘Private regulatory regimes are sector specific, driven by different constituencies often conflicting because they protect divergent interests. Standards are generally stricter than those defined by international public organizations, when they exist. The complementarity between public and private often encompasses multiple standards, where the public provides minimum mandatory common standards and the private voluntary stricter ones.’ TPR has not yet developed common principles with general binding effects. Rather, each sector has devised its own tools. ‘This is unlike public international law where *jus cogens* and custom operate as spreading

⁴⁰ C. Scott, F. Cafaggi and L. Senden, ‘The Conceptual and Constitutional Challenge of Transnational Private Regulation’, (2011) 38 *Journal of Law and Society* 1, p. 3

⁴¹ F. Cafaggi, ‘New Foundations of Transnational Private Regulation’, (2011) 38 *Journal of Law and Society* 20, p. 20-21

mechanisms to produce legal effects on all states beyond the signatories.’⁴²

The participation in TPR is generally voluntary, mirroring domestic private regulation. Parties who wish to join the regulatory bodies participating in the regime have a free choice to do so. However once they are in, they are legally bound by the regulatory regime and violation of the rules is subsequently subject to legal sanctions. Voluntariness can also be undermined by public intervention changing the regime from voluntary to compulsory. Besides, ‘subscription to a regime or compliance with a set of standards often conditions the access to the market or the ability to compete, thereby reducing for parties the freedom to choose’.⁴³

2.2.2. Rationales for the emergence of transnational private regulation

As mentioned before, the national regulatory state as the only regulator has been heavily criticized by various scholars. In fact, ‘the growth of TPR is often associated with, if not made dependent upon, the shortcomings of the regulatory state as a global regulator. These weaknesses fostered the emergence of international institutions in the first half of the last century, followed by the development of transnational private regulators in the second half and, particularly, in the last quarter of the twentieth century’.⁴⁴ According to Cafaggi, a trend that frequently occurs with regard to the consolidation of effective TPR is when ‘strong public institutions are in place to complement rather than supplement public regulation at the domestic level’. For that reason, effective private regulation often consolidates in combination with strong public institutions. Cafaggi also reflects on the possibility that TPR actually ‘precedes the creation of public regimes when, in order to fill regulatory gaps, private organizations design new markets and new institutions to be later supplanted by hybrids’.⁴⁵

Cafaggi has drawn up a list of some common factors contributing to the emergence and consolidation of a new generation of transnational private regulation. According to him, the most frequently identified rationale for the emergence of TPR is ‘the need to overcome fragmentation of market regulation, often associated with divergent state legislation’. On the other hand, in other cases ‘TPR reacts to divergent private regulatory regimes in place at the local level by generating new uniform private rules at the transnational level. The creation of a harmonized transnational private regulatory regime may thus be a response to either the

⁴² F. Cafaggi, ‘New Foundations of Transnational Private Regulation’, (2011) 38 *Journal of Law and Society* 20, p. 21

⁴³ *ibid* p. 22

⁴⁴ *ibid* p. 23

⁴⁵ *ibid* p. 24

multiplication of private regimes or diverging domestic public legislation'. In such situations, more recently the proliferation of TPR at the global level is also being observed. As a second reason, Cafaggi states that 'public regulation by states through international treaties has proven difficult to achieve and even when international standards exist, they are rarely uniformly implemented'. Intergovernmental failures such as the failure to reach political consensus over treaty-based solutions have triggered TPR.⁴⁶ Thirdly, the weaknesses of state regulation in monitoring compliance with international standards also trigger the emergence of TPR. The effectiveness of states' implementation is often questioned for the reason that state actors are 'not only often ineffective rule makers but they are also poor at monitoring and enforcing violations of transnational regimes'. For instance, one problem relates to the issue that monitoring at the national level follows the incentives of individual states or litigants in courts which may not always be aligned with those of transnational regimes. This is not to say that domestic monitoring and enforcement does not or should not play a role. On the contrary, the role of national courts is quite significant. However, it is important to recognize its limitations. 'The emergence of TPR with innovative implementation techniques attempts to respond to these shortcomings.'⁴⁷ Fourth, the weaknesses of public international law play a role in the emergence of transnational private regulatory regimes. At the beginning of the 20th century the creation of networks and other forms of international players outside the conventional forms recognized by public international law have been acknowledged. However, 'the international system is still based on the assumption that state responsibility is the primary factor in ensuring effective incentives to implement transnational regulation'. This strongly limits the effectiveness of the regulatory regime which has generated a number of effects. 'On the one hand, a transformation of the public sphere can be observed with the emergence of new bodies, applying new principles of global administrative law. On the other hand, these limitations have favored the development and consolidation of TPR.' Yet another factor that contributes to the growth of TPR is 'the development of new technologies that redistribute rule-making power in favor of private actors and transform the role of the nation state'. It is clear that states maintain a significant role, but the regulatory patterns also show an increasingly transnational private dimension.⁴⁸ 'Technical standards have long been produced by private actors at the international level. They do not constitute a factor in the emergence of private regulation as such but influence the emergence of private regulatory regimes. In

⁴⁶ F. Cafaggi, 'New Foundations of Transnational Private Regulation', (2011) 38 *Journal of Law and Society* 20, p. 25-26

⁴⁷ *ibid* p. 26-27

⁴⁸ *ibid* p. 28

particular, they play a role in the development of new forms of private regulation.’ Technical standards also contribute to a reduction of differences across sectors and they reduce the distance between public and private transnational regulation. Often both public and private bodies refer to the same technical standards. In this sense, they affect several dimensions of TPR. The last rationale for the emergence of TPR is related to the governance of distributional effects connected with the costs of regulation and its impact. ‘These effects cannot be governed only by the fiscal policies of nation states.’ As a response sometimes other private regimes have been created to manage distributional effects. In other instances, internal governance structures have tried to govern the redistribution of resources and capabilities. ‘These factors are at the same time both causes and effects; they constitute, and may trigger in the future, the emergence of new regimes and institutions to address uneven distribution.’⁴⁹

2.2.3. Legal certainty

By now it is clear that transnational private regulation is a new field which is not at all homogeneous. In order to evaluate a particular transnational private regulatory regime, recent research projects have primarily chosen the approach to focus on four elements: legitimacy, enforcement, effectiveness and quality.⁵⁰ The latter element is of major concern for this particular research, because legal certainty is one of the main specific aspects of quality. Quality can also be measured on the basis of several other characteristics being *inter alia* predictability, unambiguity, coherence, accessibility, transparency, adaptability, flexibility and efficacy. Even though the strife for coherence and legal certainty is considered to be of main importance in the maritime industry by the IMO itself, the legal subjects are still facing a multiplicity of lawmakers which results in a complex system of rulemaking.⁵¹ However, in transnational situations involving rules from different levels and different actors the principle of legal certainty may be affected.⁵² This research project therefore aims at exploring the consequences of the current hybridization for the legal certainty within the transnational

⁴⁹ F. Cafaggi, ‘New Foundations of Transnational Private Regulation’, (2011) 38 *Journal of Law and Society* 20, p. 29-30

⁵⁰ Special Issue: The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates (2011) 38 *Journal of Law and Society* p. 1-188

⁵¹ E.E. Mitropoulos ‘European Maritime Safety Agency: “Looking forward: the evolution of EMSA’s tasks”. Safe and clean shipping – a regional contribution to a global issue’ (11 November 2011) <www.imo.org/mediacentre/secretarygeneral/speechesbythesecretarygeneral/pages/emsa.aspx> [Last accessed 27 May 2012]

⁵² A. Meuwese and P. Popelier, ‘Legal implications of Better Regulation: A special issue’, (2011) 17 *European Public Law* 455, p. 465

situation of the maritime industry.

It is important to note here that there is ‘in no way anything like a widely shared notion of certainty in law.’⁵³ Nevertheless, ‘concern for certainty is everywhere in the law’⁵⁴ and is ‘a fundamental value of the legal domain. No well-developed system of laws can ignore altogether the principle of certainty because no legal order can fulfill its essential tasks and be regarded as legitimate unless its requirements (or a core set of them) are certain’.⁵⁵ According to Kelsen ‘certainty should be seen as a legal ideal, not a trait that systems of law necessarily possess’.⁵⁶ And ‘while it is important, the principle of legal certainty cannot be a singular goal in resolving cases and articulating legal doctrine’.⁵⁷ It is not a legal principle to be ‘safeguarded at all costs. It can be outweighed by other legal principles or more momentous legal rules’.⁵⁸ Other values can even be at odds with certainty. For example, accuracy and certainty may conflict. Similarly, fairness must be balanced against certainty. Other values or characteristics of rules include individualization and flexibility. A final, pragmatic consideration that can weigh against certainty is cost.⁵⁹ It is also important to understand that ‘all law and legislation is in some way uncertain’.⁶⁰ The environment in which legislation comes into force is uncertain and variable from the start. Legislation is formulated in abstract terms and only achieves meaning when it is applied to concrete situations which are yet unknown to the lawmaker. For these reasons, it cannot be expected that legislation offers complete security. It should be noted nonetheless that the principle of the certainty of the law takes all this into consideration. It does not require absolute certainty.⁶¹

But what does the principle of legal certainty require? Traditionally, certainty in law is generally associated with ‘uniform treatment, regularity, and predictability’.⁶² Legal scholars have often reiterated that the principle ‘focuses on the predictability of the application of the formal law by the judge, the government and the administration, who are in turn bound by the

⁵³ S. Berteau, ‘Towards a New Paradigm of Legal Certainty’, (2008) 2 *Legisprudence* 25, p. 26

⁵⁴ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1112

⁵⁵ S. Berteau, ‘Towards a New Paradigm of Legal Certainty’, (2008) 2 *Legisprudence* 25, p. 26

⁵⁶ *ibid* p. 31

⁵⁷ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1159

⁵⁸ J. Raitio, ‘Legal Certainty, non-retroactivity and periods of limitation in EU’, (2008) 2 *Legisprudence* 1, p. 8

⁵⁹ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1158

⁶⁰ P. Popelier, ‘Legal Certainty and Principles of Proper Law Making’, (2000) 2 *European Journal of Law Reform* 321, p. 338

⁶¹ P. Popelier, ‘Legal Certainty and Principles of Proper Law Making’, (2000) 2 *European Journal of Law Reform* 321, p. 339

⁶² S. Berteau, ‘Towards a New Paradigm of Legal Certainty’, (2008) 2 *Legisprudence* 25, p. 29-30

law'.⁶³ In order to achieve predictability of the legal order the legal framework must be 'sufficiently accessible to enable a subject of law to discover what options are available to him' and to foresee the legal consequences which a possible action may entail. In that regard, legislation must be sufficiently reliable to enable the legal subject to base longer-term projects within the legal framework. Regulation must also be executable to make it possible for the subject to effectively realize his options and that the legal consequences he wishes to attain can indeed occur.⁶⁴ Moreover, legal certainty requires that legal rules are 'clear and uniformly applicable'⁶⁵ and that its contents are sufficiently precise and knowable in advance.⁶⁶ Other requirements deriving from the principle of legal certainty are to be summarized as follows: laws and decisions must be definite; decisions of courts must be binding; limitations on retroactivity of laws and decisions must be imposed; and legitimate expectations must be protected.⁶⁷

Legal certainty accordingly encompasses a variety of elements, but this traditional model needs some revision in order to 'cope with the focus on private support structures and the fragmentation, diversification and hybridization of governance'.⁶⁸ According to a more modern view, 'it is more important to focus at the everyday situation, and not [only at] the everyday in the courthouse'. It is therefore relevant to assess how well law guides those subject to it.⁶⁹ In this regard, scholars have identified numerous indicators that affect or create uncertainty in the law generally.⁷⁰ These factors may arise before the rule came into existence,

⁶³ B. Hawk, 'The development of articles 81 and 82: Legal Certainty' (2000) EUI RSCAS Competition 2000 1, p. 4. <www.eui.eu/RSCAS/Research/Competition/2000/Hawk_1.pdf> [Last accessed 28 May 2012]. See also: T. Puurunen, 'The Judicial Jurisdiction of States over International Business-to-Consumer electronic commerce from the perspective of legal certainty', (2002) 8 *U.C. Davis Journal of International Law and Policy* 133, p. 140. See also: J. Raitio, 'Legal Certainty, non-retroactivity and periods of limitation in EU', (2008) 2 *Legisprudence* 1, p. 2. See also: P. Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker', (2008) 2 *Legisprudence* 47, p. 60. See also: P. Popelier, 'Legal Certainty and Principles of Proper Law Making', (2000) 2 *European Journal of Law Reform* 321, p. 326.

⁶⁴ *ibid* p. 327-328. See also: P. Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker', (2008) 2 *Legisprudence* 47, p. 55

⁶⁵ T. Puurunen, 'The Judicial Jurisdiction of States over International Business-to-Consumer electronic commerce from the perspective of legal certainty', (2002) 8 *U.C. Davis Journal of International Law and Policy* 133, p. 140-141

⁶⁶ S. Berteau, 'Towards a New Paradigm of Legal Certainty', (2008) 2 *Legisprudence* 25, p. 29-30. See also: J. R. Maxeiner, 'Legal certainty and legal methods: a European alternative to American legal indeterminacy?' (2007) 15 *Tulane Journal of International & Comparative Law* 541, p. 543

⁶⁷ *ibid* p. 549

⁶⁸ B.R. Dorbeck-Jung, 'Global Trade: Changes in the Conceptualization of Legal Certainty?' in V. Gessner (ed) *Contractual Certainty in International Trade. Empirical studies and theoretical debates on institutional support for global economic exchanges* (Hart Publishing 2009), p. 304

⁶⁹ J. R. Maxeiner, 'Legal certainty and legal methods: a European alternative to American legal indeterminacy?' (2007) 15 *Tulane Journal of International & Comparative Law* 541, p. 552

⁷⁰ K.C. Mullally, 'Legal (Un)Certainty, Legal Process, and Patent Law', (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1119

during the rule-making stage or after the creation of the rule.⁷¹ It is suggested that certainty should be investigated from a systemic and chronological perspective which means that the main factors impacting on the certainty of law are ‘system-related and time-dependent’. These factors may be summarized as ‘the quality, method, and style of legislating, the frequency with which legal provisions are modified, the plurality and interactions of legal orders, and the internal consistency, coherence and autonomy of a legal system’.⁷² Other examples are the complexity of rules, exceptions to rules, poor drafting of rules, equitable tests, balancing tests, methodologies for interpreting legal norms, lack of clear policy objectives and unforeseeable events.⁷³ Doubt may also arise ‘in an imperfect or doubtful relationship of legislation to other rules within the same system’.⁷⁴ Moreover, a lack of legal certainty is often ‘felt when there is limited guidance to be found in the case law’ because of a small number of precedents⁷⁵ or when ‘there is uncertainty as to the relevant forum or jurisdiction to hear a case’.⁷⁶ Yet other elements that add to the complexity of a regulatory regime are the incorporation of international and especially European law, the multiplicity of rule-makers within one and the same legal area as well as the total amount of legislation resulting from that large number of lawmakers.⁷⁷

The lack of legal certainty thus encompasses many aspects and causes.⁷⁸ Since the maritime industry is characterized by a hybrid regulatory regime of different public and private actors at the international, European and national level, the legal certainty for those subject to it might be at stake. It is therefore important to conceptualize the principle of legal certainty and as a result to identify the indicators for legal certainty or uncertainty which are

⁷¹ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1121. See also: J. Barnes, ‘Sources of doubt and the quest for legal certainty’ (2008) 2 *Legisprudence* 119, p. 127

⁷² S. Berteau, ‘Towards a New Paradigm of Legal Certainty’, (2008) 2 *Legisprudence* 25, p. 30.

⁷³ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1119. See also: J. Barnes, ‘Sources of doubt and the quest for legal certainty’ (2008) 2 *Legisprudence* 119, p. 120

⁷⁴ *ibid* p. 140

⁷⁵ A. de Hauteclocque, ‘Legal Uncertainty and Competition Policy in European Deregulated Electricity Markets: the Case of Long-term Exclusive Supply Contracts’, (2009) 32 *World Competition* 91, p. 92-94. See also: C.W. Gray and others, ‘The Legal Framework for Private Sector Development in a Transitional Economy, The Case of Poland’ (1991) *Policy Research Working Papers*, WPS 800, p. 2. <www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1991/11/01/000009265_3961002024502/Rendered/PDF/multi0page.pdf> [Last accessed 27 May 2012]

⁷⁶ B. Hawk, ‘The development of articles 81 and 82: Legal Certainty’ (2000) EUI RSCAS Competition 2000 1, p. 3 <www.eui.eu/RSCAS/Research/Competition/2000/Hawk_1.pdf> [Last accessed 28 May 2012]

⁷⁷ P. Popelier, ‘Five Paradoxes on Legal Certainty and the Lawmaker’, (2008) 2 *Legisprudence* 47, p. 56

⁷⁸ K.C. Mullally, ‘Legal (Un)Certainty, Legal Process, and Patent Law’, (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1121

relevant within the context of this particular research project in order to assess the extent of legal certainty within the maritime industry.

First of all, due consideration should be given to the form of the law in order to find out which types of rules or combinations thereof contribute to legal certainty or uncertainty.⁷⁹ Private, public, international, European or national regulation will be taken into consideration. Significant attention will also be devoted to the multiplicity of organizations involved and some observations will be made on the role of private parties in particular. Although the aspiration for certainty from public institutions and the laws that they make is legitimate, uncertainty may also derive from pressures placed on the system by private parties.⁸⁰

Secondly, the clarity of the legislation needs to be examined as an indicator for legal certainty.⁸¹ The focus will be on the relevant provisions with regard to classification societies which will be analyzed on the basis of comprehensible language, consistent definitions and requirements in all legislative documents as well as stability of the norms.⁸² The latter means that modifications of the relevant provisions will be assessed to see how often the rules have been changed, how competences have changed and whether these changes resulted in an increase or rather a decrease of clarity when more and more organizations got involved. Some attention will also be devoted to the availability of time limits for inspections which may help to maintain predictability in legal or administrative decision-making.⁸³

A third indicator may be the emergence of unforeseeable events such as the *Erika* and *Prestige* disasters in 1999 and 2002 respectively as well as the regulatory responses thereto. Swift actions mainly derived from the European Union and it is interesting to see what this meant for the legal certainty within the maritime industry. As has already been mentioned in the section on methodology, no sociological element is added to this research. Consequently, the unforeseeable events will not be dealt with from a sociological perspective, but only from a legal one. The sociological approach would be an interesting area for future research though.

A last indicator to examine the extent of legal certainty within a regulatory regime is the liability insurance system of a particular industry, because 'insurance of various kinds is a

⁷⁹ K.C. Mullally, 'Legal (Un)Certainty, Legal Process, and Patent Law', (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1121

⁸⁰ *ibid* p. 1135

⁸¹ This appears to be an indicator in newly proposed Directives on concession contracts. See: Commission, 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM (2011) 896 final. See also: Commission, 'Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts' COM (2011) 897 final

⁸² J. Raitio, 'Legal Certainty, non-retroactivity and periods of limitation in EU', (2008) 2 *Legisprudence* 1, p. 6

⁸³ *ibid* p. 5

common mechanism in every legal system for protecting against uncertainty'.⁸⁴ However, the issue of liability does not fit within the limited scope of this research and has been researched in many other projects before.⁸⁵ Therefore, this indicator will not be dealt with in this particular research.

The other three indicators will be helpful in order to test the hypothesis that the development of a private regulatory regime into a hybrid regulatory regime decreases legal certainty for those subject to it. For this purpose, it is important to analyze the extent of legal certainty and to identify with as much precision as possible which actors in the legal system bear responsibility for the perceived uncertainty and which actor is the primary institution or actor responsible for the uncertainty.⁸⁶ This research starts with describing the development of the early private regulatory regime of the maritime industry into the hybrid regulatory regime it is today. During this process of development, several unforeseeable events have occurred and triggered regulatory initiatives by various actors in the field. In the analysis of legal certainty, particular attention will be devoted to these events. However, they will not be dealt with as being indicators for a lack of legal certainty, since not the events themselves, but the responses from the industry and actors involved generated effects for legal certainty. As a result, within the context of this research only the first two indicators will be dealt with in the analysis of the existence of legal certainty in order to test the hypothesis of this research. The main focus will first be on the clarity of legislation as an indicator to assess the extent of legal certainty within the maritime industry. Thereafter the multiplicity of organizations and the form of law will be considered as a second indicator for legal certainty or a lack thereof.

3. The regulatory regime of the maritime industry

At present, a multiplicity of organizations is involved in the regulatory process of the maritime industry and the performance of classification societies in particular. This results in a hybrid regulatory regime characterized by an enormous amount of legislation from a wide diversity of actors. The IACS, classification societies themselves, the IMO, national administrations as well as the EMSA play an important role with regard to the legislative

⁸⁴ K.C. Mullally, 'Legal (Un)Certainty, Legal Process, and Patent Law', (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1141

⁸⁵ A.M. Antapassis, 'Liability of Classification Societies', (2007) 11 *Electronic Journal of Comparative Law* 1, <www.ejcl.org> [Last accessed 28 May 2012]. See also: M.G. van den Dool and J.F. van der Vlies, 'Liability of classification societies before and after the *Erika*-verdict' (2008) 3 *Tijdschrift Vervoer & Recht* 91. See also: H. Honka, 'The Classification System and its problems with special reference to the liability of classification societies', (1994) 19 *Tulane Maritime Law Journal* 1

⁸⁶ K.C. Mullally, 'Legal (Un)Certainty, Legal Process, and Patent Law', (2010) 43 *Loyola of Los Angeles Law Review* 1109, p. 1146-1147

process of the safety at sea in the field of standard-setting, enforcement and/or supervision. For this reason, the establishment and development of all these organizations will receive considerable attention within this section.

Interestingly, the maritime industry is characterized by the fact that private actors, in the form of classification societies, were responsible for the emergence of the present transnational regulatory regime. Therefore, this section will provide a chronological overview of the development of the private institutional and legal framework that emerged from the second half of the 18th century into the hybrid institutional and legal framework it is today. Throughout this overview, due consideration is given both to the context and conditions that led to the emergence of transnational (private) regulation and to the two main incentives for important regulatory initiatives throughout history: the ‘crisis of class’ as well as the *Erika* and *Prestige* marine pollution accidents. Thereafter, this section will comprehensively describe the present transnational private regulatory regime of the industry. Considerable attention is paid to the competences, tasks and main activities of the relevant organizations, the stage of the regulatory process where the organizations are present, the type of relationship among the different organizations, the level of regulation, the regulatory instruments used in order to regulate the sector, the relationship of private regulation with national or international regulation and the (shared) responsibilities of private and public organizations in particular. Even though legal certainty is a main theme throughout the whole section, at the very end of it the extent of legal certainty is being analyzed on the basis of two indicators dealing with the form of the law and multiplicity of organizations as well as the clarity of the legislation. A final analysis of which actor or combination of actors increases or decreases legal certainty will be made in the final section of this research project.

3.1. The ‘crisis of class’

The origins of classification societies can be traced back to the second half of the 18th century, when ‘marine insurers based at Lloyd’s coffee house in London, developed a system for the independent inspection of the hull and equipment of ships presented to them for insurance cover’. In 1760 a Committee was formed for this express purpose. ‘At that time, an attempt was made to ‘classify’ the condition of each ship on an annual basis.’ The condition of the hull was classified A, E, I, O or U and equipment was classified G, M or B simply meaning ‘Good, Middling or Bad’. ‘The concept of classification slowly spread to other countries’ and the first classification society was already founded in 1828 in Antwerp, now known as Bureau

Veritas (BV). “As the classification profession evolved, the practice of assigning different classifications has been superseded. Today, a vessel either meets the relevant classification society’s rules or it does not. As a consequence it is either ‘in’ or ‘out’ of ‘class’.”⁸⁷

During the materialization of the concept of classification societies worldwide, it has been recognized in the meantime ‘that the best way of improving safety at sea is by developing international regulations that are followed by all shipping nations’. From the mid-19th century onwards a number of such treaties were adopted and thereafter ‘several countries proposed that a permanent international body should be established to promote maritime safety more effectively’.⁸⁸ In response, the International Maritime Organization has been formally ‘established by means of a Convention adopted under the auspices of the United Nations in Geneva in March 1948’.⁸⁹ ‘The IMO Convention entered into force in 1958 and the new Organization met for the first time the following year.’ The IMO is marked as a specialized agency of the United Nations and its mission is ‘to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation’.⁹⁰ ‘It is also involved in legal matters, including liability and compensation issues and the facilitation of international maritime traffic.’ The IMO currently consists of 170 Member States.⁹¹

Interestingly, until the mid-nineties classification societies have been frequently under the scrutiny of states, international organizations and marine professionals. There was agreement that many classification societies did not perform their work properly and had lost some of their credibility, leading to what has been known as the ‘crisis of class’.⁹² Within the sphere of this ‘crisis of class’ a wide range of problems has emerged.⁹³ The problems firstly related to independence. Parties in the shipping industry have questioned whether

⁸⁷ IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 4

<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]. See also: IACS, ‘Classification Societies – Their key role’ [2011], p. 4

<www.iacs.org.uk/document/public/explained/CLASS_KEY_ROLE.pdf> [Last accessed 27 May 2012]

⁸⁸ IMO, ‘Brief history of IMO’ [2012] <www.imo.org/About/HistoryOfIMO/Pages/Default.aspx> [Last accessed 28 May 2012]

⁸⁹ IMO, ‘Frequently Asked Questions’ [2012] <www.imo.org/About/Pages/FAQs.aspx> [Last accessed 27 May 2012]

⁹⁰ IMO, ‘Brief history of IMO’ [2012] <www.imo.org/About/HistoryOfIMO/Pages/Default.aspx> [Last accessed 28 May 2012]

⁹¹ IMO, ‘Frequently Asked Questions’ [2012] <www.imo.org/About/Pages/FAQs.aspx> [Last accessed 27 May 2012]

⁹² P. Boisson, ‘Classification societies and safety at sea. Back to basics to prepare for the future’ (1994) 18 *Marine Policy* 363, p. 363. See also: J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 490-491

⁹³ *ibid* p. 493-394

classification is any longer objective and impartial.⁹⁴ ‘Classification societies are hired and paid by the owners of the vessels that are classified. They therefore risk alienating their clientele if they apply their standards too strictly in comparison with their competitors.’ Additionally, when classification societies act on behalf of States, they must comply with the guidelines and instructions issued by the authorities of the national administration, and are therefore not independent. As acknowledged by ‘many scholars and maritime operators, the conflict is apparent’ as classification societies in a competitive environment ‘develop the same rules that they thereafter apply’.⁹⁵ Another problem was related to the number and nature of classification societies. The number of organizations engaged in classification grew from ten to more than fifty organizations in the business. The number itself was not a problem, but ‘the increasing number of classification societies has contributed to excessive competition, which has produced erosion in the quality of their services, to the emergence of abuses, and to inspiring (...) a mentality of convenience’ in certain of them. Some have even begun developing their own rules and standards and changing them according to the type of client or the country in which they were going to be applied. Class hopping was another major problem that resulted from the increased number of classification societies and the decrease of their independence. Ship owners tended to take their ships to a competitor when they disagreed with the requirements and recommendations of a particular classification society ‘and some societies proved all too ready to accept vessels previously denied class by another society’.⁹⁶ At last, the lack of national or international laws regulating the activities of classification societies has led to much uncertainty regarding both the duties assumed by classifications societies ‘vis-à-vis their clients and third parties, and the related level of liability’.⁹⁷ This lack of uniform law has fostered some legal uncertainty and made clear that core values, such as safety at sea, could be adequately served only by more stringent regulation of the relevant procedures, harmonized if possible at a supranational level. Two challenges in particular called urgently for attention. ‘Firstly, the articulation of minimum standards of quality for the societies acting on behalf of States, and the establishment of

⁹⁴ P. Boisson, ‘Classification societies and safety at sea. Back to basics to prepare for the future’ (1994) 18 *Marine Policy* 363, p. 363. See also: J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 491

⁹⁵ *ibid* p. 492. See also: P. Boisson, ‘Classification societies and safety at sea. Back to basics to prepare for the future’ (1994) 18 *Marine Policy* 363, p. 363

⁹⁶ *ibid*. See also: J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 492-493

⁹⁷ J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 493. See also: P. Boisson, ‘Classification societies and safety at sea. Back to basics to prepare for the future’ (1994) 18 *Marine Policy* 363, p. 363.

procedures for adequately monitoring the performance of societies acting in such roles' was deemed necessary. Another requirement was 'a general regulation of the liability of classification societies, which presupposed a general consensus on the issue of whether and to what extent the classification society is liable, and might be embodied in either an international convention or a self-regulation instrument from the market'. Proposals relating to both challenges have come from different directions and at various levels regulatory responses were initiated.⁹⁸

To cope with the 'crisis of class', the main and largest classification societies of the world organized themselves as the International Association of Classification Societies in September 1969.⁹⁹ This organization found its legal basis in the International Load Line Convention of 1930 and its recommendations. The Convention recommended collaboration between classification societies to secure 'as much uniformity as possible in the application of the standards of strength'. As a response, classification society 'RINA hosted the first conference of major societies in 1939' where it was agreed upon 'further cooperation between the societies'. A second conference, held in 1955, 'led to the creation of Working Parties on specific topics and, in 1968, to the formation of IACS by seven leading classification societies'. The creation of the IACS was welcomed by the IMO and 'in 1969, IACS was given consultative status with the IMO. It remains the only non-governmental organization with Observer status which is able to develop and apply rules'. After that, the role of classification and classification societies was officially recognized in the '1974 International Convention for the Safety of Life at Sea (SOLAS) and in the 1988 Protocol to the International Convention on Load Lines'.¹⁰⁰ The SOLAS Convention allows for national Administrations to delegate tasks to classification societies. Nowadays, the IACS has thirteen member classification societies and 'it is estimated that they collectively class over 90 percent of all commercial tonnage involved in international trade worldwide'.¹⁰¹ The primary aim of the IACS is to promote and control the services provided by classification societies, through the regulation of their work of classification and thus to enhance public confidence in

⁹⁸ P. Boisson, 'Classification societies and safety at sea. Back to basics to prepare for the future' (1994) 18 *Marine Policy* 363, p. 363. See also: J.L.P. Begines, 'The EU law on classification societies: scope and liability issues' (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 494-495

⁹⁹ *ibid* p. 499-500

¹⁰⁰ IACS, 'Classification Societies – What, Why and How?' [2011] p. 6
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹⁰¹ IACS, 'Classification Societies – What, Why and How?' [2011] p. 4
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

classification societies.¹⁰² According to the classification societies, only self-regulation would be acceptable. However, one was clearly aware that if ‘the industry would not fully support self-regulation, a response would come from legislative and regulatory bodies eager to address any shortcoming’.¹⁰³ And indeed, government intrusion occurred, both at the international and the European level.

The IMO tried to address the problem of unqualified classification societies acting on behalf of maritime administrations by proposing minimum standards. In Resolution A.739(18), dated 4 November 1993, the IMO adopted Guidelines for the Authorization of Organizations Acting on Behalf of the Administration. The aim of this Resolution is ‘to develop uniform procedures and a mechanism for the delegation of authority to, and the minimum Standard for, recognized organizations acting on behalf of the Administration, which would assist flag States in the uniform and effective implementation of the relevant IMO Conventions’. The Resolution lays down that ‘there should be a formal written agreement between the State administration and the non-State organization being authorized to carry out inspections and issue certificates on its behalf’. The Resolution also emphasizes verification and monitoring of the activity of the classification societies, requiring the establishment of a system to ensure the adequacy of work performed by the bodies authorized. Besides, Appendix 1 to the Resolution lists the minimum quality standards for an organization in order to be recognized by the State administration to perform statutory work on its behalf. ‘Those minimum conditions are also part of Directive 94/57/EC where they are developed, made more specific, and clarified’ for application at the European level. More recently, on 23 November 1995, the IMO approved ‘Specifications on the Survey and Certifications Functions of Recognized Organizations Acting on Behalf of the Administration’ by Resolution A.789(19) in order to refine and develop the provisions of Resolution A.739(18).¹⁰⁴

At the European level, 1993 marks the starting point for the development of a ‘comprehensive maritime safety policy’. Since then, the European Union institutions have become more and more involved in matters relating to the safety at sea and maritime pollution. There has been a continuous expansion of the scope of European legal instruments. The European response to the ‘crisis of class’ resulted in the adoption of Council Directive

¹⁰² J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 499

¹⁰³ *ibid* p. 500

¹⁰⁴ *ibid* p. 495-496

94/57/EC on common rules and standards for ship inspection and survey organizations.¹⁰⁵ The minimum conditions listed in Appendix 1 to IMO Resolution A.739(18) are also incorporated into this Directive.¹⁰⁶ The essential aim of this Directive 'is to establish measures to be followed by the Member States and organizations concerned with the inspection, survey and certification of ships for compliance with the international conventions on safe shipping and prevention of marine pollution, in order to ensure that only organizations that meet minimum criteria are allowed to function within the European Union'. First of all, the Directive established criteria for recognition. Inspired by the IACS standards, these criteria are intended to ensure that only highly reliable organizations will be authorized to work on behalf of Member States. Secondly, the Directive limits the Member States of the European Union, in their capacity as flag States, to selecting only recognized organizations when authorizing classification societies to perform tasks on their behalf. 'Finally, the Directive also introduces for Member States the obligation of monitoring classification societies working on their behalf. Consequently, a recognized organization is under constant scrutiny; each Member State is obliged to assess periodically the performance of the bodies working on its behalf and to provide the Commission and all other Member States with precise reports about that performance.'¹⁰⁷

The regulatory responses from the IMO, the IACS and the European Union to the 'crisis of class' may be seen as a first substantial contribution to legal certainty, since they led to the adoption of the desired international laws with regard to the articulation of minimum standards of quality for the societies acting on behalf of States and procedures for adequately monitoring the performance of societies acting in such roles, whereas such legislation was completely absent before this period. Next to the responses from these organizations, also P&I clubs, insurers and charterers organized their own methods of finding out about the real conditions of ships.¹⁰⁸ It may thus be concluded that many attempts from different levels have been made in order to restore confidence in the performance of classification societies.

¹⁰⁵ R. van Gestel and Ph. Eijlander, 'Oprichting van de European Maritime Safety Agency: een nieuwe Octopus in de zee van toezichhouders?' in R. van Gestel, Ph. Eijlander and others (eds), *Domeinconflicten tussen Europees en nationaal toezicht* (Boom Juridische Uitgevers 2006) p. 151-152. See also: J.L.P. Begines, 'The EU law on classification societies: scope and liability issues' (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 502

¹⁰⁶ *ibid* p. 495-496

¹⁰⁷ *ibid* p. 502-503

¹⁰⁸ P. Boisson, 'Classification societies and safety at sea. Back to basics to prepare for the future' (1994) 18 *Marine Policy* 363, p. 375

However, all these rules unfortunately could not prevent the oil pollution disasters in European waters in 1999 and 2002.¹⁰⁹

3.2. The Erika and Prestige maritime disasters

On 12 December 1999 the Malta registered vessel *Erika*, carrying about 30000 tons of oil, broke in two and sank during a storm in the Bay of Biscay off the west coast of France. Part of the oil escaped and contaminated the French Coast. Proceedings were instituted by the French Court against RINA, the classification society which had classified the vessel. Besides, a number of other civil claims and criminal charges have been instituted against this classification society. According to the investigation report by the Maltese Maritime Authority, the incident was a consequence of the serious corrosion of the internal structures of the vessel's ballast tanks, which resulted in their collapse. The experts stated that the level of corrosion was well beyond acceptable standards for a classification society. 'In the legal aftermath of the incident, police and legal authorities charged the master and the ship owner.' Besides, the management company, classification society, charterer and four officers of the French navy were tried in France in 2005.¹¹⁰

In November 2002, the Bahamas registered tanker *Prestige* carrying some 76000 tons of heavy fuel oil began to break up in bad weather in international waters off the coasts of Spain and France. Upon seeking refuge in a Spanish port, the tanker was instead ordered by the Spanish authorities to be towed out to sea, where it sank in waters approximately 3.5 kilometers deep. Large amounts of oil from the sunken tanker began polluting the coast of Spain and France. 'The Spanish authorities arrested the master of the *Prestige* for disobeying authorities and harming the environment.' In May 2003, Spain has also started proceedings against the classification society of the vessel, being American Bureau of Standards (ABS), alleging that its negligence played a considerable part in the sinking of the *Prestige*.¹¹¹ The *Prestige* was listed as meeting all the requirements of ABS, 'but according to the claim, it is clear that the *Prestige* did not satisfy the fatigue requirements. Spain argues that the deficiencies would have been noticed upon inspection'.¹¹²

The *Erika* and *Prestige* accidents clearly demonstrate the consequences of poor performing classification societies. Therefore, both disasters triggered a call for re-evaluation

¹⁰⁹ M. Michinel, 'The *Prestige* in the Courts' (2007) 21 *Australian and New Zealand Maritime Law Journal* 171.

¹¹⁰ J. Wene, 'European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents' (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 57-58

¹¹¹ *ibid*, p. 58

¹¹² *ibid* p. 59

of the existing international legal framework and worked as a catalyst for new developments both at the European and international level.¹¹³ The European Union has taken a leading and proactive role in this process.¹¹⁴ It may even be said that ‘the *Erika* and *Prestige* incidents together mark a turning point in the evolution of European maritime safety law’.¹¹⁵ Especially with regard to the devastating consequences of the *Erika* disaster, the Commission’s reaction was swift and ambitious. The reaction was embodied in sets of measures called ‘*Erika* Packages’.

Only three months after the sinking of the *Erika* vessel, the Commission adopted a Communication on the Safety of the Seaborne Oil Trade in March 2000. This so-called ‘First *Erika* Package’ consisted of a number of amendments to the Directive strengthening Port State inspections in the European Union as well as the Directive strengthening the monitoring of the activities of classification societies. The modifications to the latter Directive simplified the procedure according to which the EC can suspend or withdraw recognition from the societies. Besides, more stringent criteria were set for the societies, amongst others that they will be audited every two years.¹¹⁶ The new legislation additionally called for accelerated phasing out of single-hulled oil tankers in European waters. Internationally, several measures have been adopted by the IMO, such as technical inspections during surveys of bulk carriers and oil tankers.¹¹⁷ In addition, the IACS adopted resolutions to produce uniform interpretations of IMO Conventions, Regulations and Resolutions, and there always is ‘continuous communication between the IACS and the IMO with regard to improvements that can be made’.¹¹⁸ Moreover, the International Convention for the Prevention of Pollution from Ships (MARPOL) was amended in 1992 ‘making it mandatory for new tankers to be fitted with double hulls’ before 2015. Due to the *Prestige* incident further revisions to this Convention were made in 2005 in the sense of adopting the timetable so that the phasing out of single hull tankers as well as smaller tankers was already to be completed by 2010.¹¹⁹

¹¹³ V. Frank, ‘Consequences of the *Prestige* Sinking for European and International Law’ (2005) 20 *International Journal of Marine and Coastal Law* 1, p. 1

¹¹⁴ *ibid* p. 4. See also: N. Liu and F. Maes, ‘The European Union’s role in the prevention of vessel-source pollution and its internal influence’ (2009) 15 *Journal of International Maritime Law* 411, p. 413

¹¹⁵ *ibid* p. 503

¹¹⁶ M.A. Nesterowicz, ‘European Union legal measures in response to the oil pollution of the Sea’ (2004) 29 *Tulane Maritime Law Journal* 29, p. 34

¹¹⁷ J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 61

¹¹⁸ *ibid* p. 62

¹¹⁹ J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 63

Still in the same year as the adoption of the First *Erika* Package, the European Commission introduced a second set of safety measures in December 2010 which is now known as the Second *Erika* Package. Herein the Commission announced the proposals for a Directive establishing a Community information system of monitoring and controlling maritime traffic in European waters as well as a Regulation aimed at the improvement of the international scheme of liability and compensation for oil pollution damage. Most importantly, the Second *Erika* Package contained a proposal for a Regulation creating the European Maritime Safety Agency. According to the Commission, it was especially the ‘*Prestige*’ disaster in December 1999 that underscored the importance of the establishment of a specialized expert body to ensure the application of Community legislation, to monitor its implementation and to evaluate the effectiveness of the measures in place’. The EU therefore deemed it necessary to establish yet another organization in the field of maritime safety. As a result, the EMSA was formally established in Lisbon, Portugal in 2002. The main objective of the EMSA is to ensure a ‘high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community’. It also aims to reduce the loss of human lives at sea.¹²⁰ The EMSA’s activities include ‘inspecting the inspectors in technical areas, enabling the EU to ensure compliance with the rules and fair and equal conditions for shipping across the EU and beyond’. Examples of its inspection activities are ‘checking that foreign ships calling at EU ports are adequately inspected, inspecting vessel traffic monitoring systems, and port waste reception facilities, in the EU’ as well as assisting in the evaluation of the classification societies recognized by the EU.¹²¹ At the international level, IMO regulations in the field of vessel traffic monitoring and liability have also been thoroughly amended after the *Erika* and *Prestige* incidents. For example, there now exists a mandatory requirement for automatic identification systems ‘in all vessels of 3000 gross tonnage (GT) on international voyages, as well as cargo ships of 500 GT and upwards that are not engaged in international voyages’. Furthermore, vessels are now required to have permanent identification numbers in a visible place.¹²² Both disasters also led to amendments of the 1969 Civil Liability

¹²⁰ M. Groenleer, M. Kaeding and E. Versluis, ‘Regulatory Governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation’ (2010) 17 *Journal of European Public Policy* 1212, p. 1218-1219. The objectives and tasks of EMSA are also specifically defined in Council Regulation (EC) 1406/2002 establishing a European Maritime Safety Agency [2002] OJ L208/1, art. 1-2

¹²¹ European Union, ‘Agencies and Decentralized Bodies. European Maritime Safety Agency’ [2012] <http://europa.eu/agencies/regulatory_agencies_bodies/policy_agencies/emsa/index_en.htm> [Last accessed 28 May 2012]

¹²² J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 65

Convention (CLC) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund) as adopted by the IMO. The CLC deals with compensation for damage done to property by an oil pollution incident as well as limitation of ship owners' liability. The Fund Convention is a second tier of compensation in situations where, if the money received from ship owners under the CLC Convention proves inadequate, the rest of the compensation is borne by the oil industry.¹²³ Prior to the *Erika* incident, 'the total sum provided by the Fund for any one incident was not to exceed 135 million Special Drawing Rights (SDR) after adding the amount to the compensation received from CLC'. However, in October 2000 the Fund Convention was *inter alia* amended with regard to the maximum amount of compensation available. The limit was being raised to 203 million SDR.¹²⁴

All the proposals of the first two European *Erika* packages were finalized through the approval of the Third Maritime Safety Package by the European Parliament in 2009. This Third *Erika* Package consisted of proposals for two Regulations and six Directives that had to be transposed between November 2010 and January 2012.¹²⁵ Most importantly, the European Commission proposed to amend Council Directive 94/57/EC on classification societies in order to improve the quality of their work. This Directive was split into a new Directive and a Regulation, meaning that nowadays Regulation (EC) No 391/2009 on common rules and standards for ship inspection and survey organizations, as well as Directive 2009/15/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, are most significant for classification societies operating at the European level. The proposal related to the strengthening of the process of inspection and certification of the safety of ships approved by the European Union. In this respect the Commission's inspection powers were increased by allowing access on board of ships and access to files.¹²⁶ The EC has also been empowered to impose penalties on classification societies. Besides, both legal instruments simultaneously provide for the possibility for Member States to delegate to classification societies the competences to carry out inspections and/or to issue or renew certificates. Currently the European Commission is

¹²³ J. Wene, 'European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents' (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 66

¹²⁴ *ibid* p. 67

¹²⁵ European Commission, 'Maritime Transport. Adoption of the Third Maritime Safety Package' [2011] <http://ec.europa.eu/transport/maritime/safety/third_maritime_safety_package_en.htm> [Last accessed 28 May 2012]

¹²⁶ Press release, 'Third Maritime Safety Package' [2005] <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/438&format=HTML&aged=0&language=en&guiLanguage=en>> [Last accessed 28 May 2012]

entitled to recognize classification societies whereas before 2001 this was a competence entitled to the Member States themselves.¹²⁷ As a consequence, Member States can only authorize a classification society recognized by the European Union. At present, thirteen classification societies are recognized by the EC.¹²⁸

It may be concluded from this overview that the competent organizations always aimed at the coherence of the legislative framework. Already in 1930 did the International Load Line Convention recommend collaboration between classification societies to secure ‘as much uniformity as possible in the application of the standards of strength’. As a result, the IACS was founded in 1969. This is an obvious example of the emergence of transnational private regulation for reasons to overcome fragmentation of market regulation, because all classification societies were developing their own classification rules independently. Later on, both the IMO and the European Union were involved in developing uniform procedures and common rules and standards both in IMO Resolution A. 739(18) dated 4 November 1993 and Council Directive 94/57/EC from 1994 respectively. The essential aim of this Directive was basically to establish measures for compliance with the international conventions on safe shipping and prevention of marine pollution. Therefore, in the strife for a more coherent and more certain legal framework, the minimum conditions of the IMO Resolution were incorporated into the European Directive. In this regard, the drafters of the Directive have also been inspired by the IACS standards. At the same time, the IACS also adopted resolutions to produce uniform interpretations of IMO Conventions, Regulations and Resolutions especially after the *Erika* and *Prestige* disasters. Besides, there always is ‘continuous communication between the IACS and the IMO with regard to improvements that can be made’.¹²⁹ Considering the responses to these disasters, it is possible to say that transnational private regulation by the IACS also emerged for reasons of playing a role in overcoming the weaknesses of state regulation in monitoring compliance with international standards. In this way, the IACS wanted to keep control on its member Societies by offering uniform interpretations of these international standards. All in all, one may conclude that legal certainty is in place with regard to the legislation from the various actors. Continuous attempts are being made by all the organizations to keep the legislation up-to-date and in accordance with each other and, as will be demonstrated later, the provisions are clear and mainly

¹²⁷ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 223-224

¹²⁸ EMSA, ‘Assessment of Classification Societies’ [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]

¹²⁹ J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 62

overlap.

However, the European Union also took unilateral swift actions and adopted some legal instruments, especially in 2002 and 2009, which were aspired at playing a role in monitoring compliance with European standards instead of international standards. According to the Commission it was required to establish a European specialized expert body to ensure the application of Community legislation and to monitor its implementation. For this reason, the EMSA has been created and has as its main objective to ensure a high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community. Especially after the *Erika* and *Prestige* disasters there is thus a clear tendency where the European Union focuses mainly on its own legal system. This is also apparent when looking at the competences of the EMSA, because even though the legislation at the various levels is more or less coherent and certain, the distribution of competences does not provide for legal certainty at all. As will be explained below, the EMSA primarily has inspection tasks according to which it may assess classification societies once every two years. It is however questionable what this actually adds to the self-supervision by the IACS and the controls by the flag states on the basis of IMO Resolutions.

3.3. The situation today: a transnational private regulatory regime

From the above overview, it is apparent that the maritime industry is characterized by a hybrid regime of public and private actors. The private role of classification societies and the IACS has clearly become a matter for the transnational levels of governance. The IACS and classification societies are however not constituted through the cooperation of states as reflected in treaties, a characteristic so particular for international law. Instead, they are non-state or private in the form of international firms. This is logical, since shipping may be perceived as one of the most international industries in the world in which the goods and services provided by the sector easily move across the borders of national jurisdictions.

In the sections below, the roles and competences of the relevant organizations responsible for the safety at sea will be set out in the field of standard-setting, enforcement and supervision. As will be clear, the actors work together in a complementary way, not in an alternative sense. This is slightly different for the EMSA as will be demonstrated below. In the first section some observations will be made on the role of private parties in particular. The section deals with classification societies and the IACS as the private actors in the industry. The second section focuses on the competences of the IMO as the relevant

international public organization. Thereafter, the roles of the national public administrations of the flag states will be explained. In the Netherlands, this is the *Inspectie Leefomgeving en Transport/Divisie Scheepvaart* (ILT). In the end, the EMSA as a regional public organization deserves considerable attention as regards its competences. In order to establish how the maritime sector is governed, the level of regulation as well as the main regulatory instruments being used by these organizations will be discussed here.

3.3.1. Classification societies and the International Association of Classification Societies

As private actors, the IACS and classification societies as such are involved at three levels of the regulatory process, namely standard-setting in the form of classification rules, enforcement of these rules by providing certificates if ships comply with these rules and supervision by the IACS with regard to the performance of their member classification societies. As regards standard-setting, ‘the mission of classification societies is to contribute to the development and implementation of technical standards for the protection of life, property and the environment’ in relation to the ‘design, construction and survey of marine-related facilities, principally ships and offshore structures’.¹³⁰ These rules are published as so-called ‘classification rules’. Over many years, each classification society has developed its own classification rules ‘through extensive research and development and service experience’. In addition, at the level of the IACS ‘Unified Requirements (UR)’ have been agreed upon by the member societies and are to be incorporated into the rules and practices of the individual members. URs set forth minimum technical requirements; hence ‘each IACS Member remains free to adopt more stringent requirements’.¹³¹ Classification societies are also bound by the international Conventions that have been adopted under the auspices of the IMO. They set out ‘uniform standards to facilitate acceptance of a ship registered in one country in the waters and ports of another and in the general furtherance of safety at sea and protection of the environment. These standards are commonly referred to as statutory requirements’ and some or all of them ‘may be covered in a particular class society’s rules’.¹³² Where necessary, the IACS adopts Unified Interpretations (UI) ‘on matters arising from implementing the requirements of IMO Conventions or Resolutions’ and on matters which in the Conventions are left to the satisfaction of the Administration or where more accurate wording has been

¹³⁰ J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 57

¹³¹ IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 10-11
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹³² IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 7-8
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

found essential.¹³³ UIs shall be applied by the IACS Members ‘to ships whose flag Administration has not issued definite instructions on the interpretation of the Regulations concerned’.¹³⁴ Through this system of Unified Requirements and Unified Interpretations, the IACS encourages the harmonization of the rules of classification societies.¹³⁵

Classification societies also play a role in the enforcement stage of the regulatory process in the sense of providing certificates if ships comply with their classification rules. In general, a ship owner applies for a certificate of classification from the society in accordance with which rules the ship has been designed, built and tested. The society issues this certificate provided that the ship has been presented for surveys and that the surveys confirm that the condition of the hull, machinery, equipment and certain appliances remain in compliance with the applicable rules at the time of the survey.¹³⁶ Such a certificate is only a confirmation that the vessel is in compliance with the classification rules that have been developed and published by the society issuing the classification certificate and does not imply ‘a warranty of safety, fitness for purpose or seaworthiness of the ship’. ‘Should any defects that may affect class become apparent (...) the ship owner and operator are required to inform the society concerned without delay.’¹³⁷ Classification societies maintain the right to suspend or withdraw the class of a ship on the basis of pre-established grounds. In that case, the IACS member notifies the ship owner and flag Administration concerned and publishes the information on its website.¹³⁸

With regard to competences in the field of supervision, the tasks of the classification societies have to be distinguished from the competences of the IACS. On the one hand, classification societies supervise the submitted vessels by ship owners that have to go through ‘a clearly specified program of periodical class surveys carried out onboard the vessel, to verify that the ship continues to meet the relevant requirements for continuation of class’.¹³⁹ For this purpose, a class surveyor may only go on board a vessel once a year.¹⁴⁰ It is the owner's responsibility to ensure proper maintenance of the ship until the next survey required

¹³³ IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 9-11
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹³⁴ *ibid* p. 12

¹³⁵ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 221-223

¹³⁶ IACS, ‘Classification Societies – What they do and do not do’ [2004], p. 3 and 5

<www.iacs.org.uk/document/public/explained/Class%20in%20one%20page.pdf> [Last accessed 27 May 2012]

¹³⁷ IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 3

<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹³⁸ *ibid* p. 18

¹³⁹ IACS, ‘Classification Societies – What, Why and How?’ [2011] p.7

<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹⁴⁰ *ibid* p. 8

by the rules.¹⁴¹ On the other hand, the IACS obliges for periodical assessments in accordance with the verification process set out in the Annex ‘Procedures for Membership Applications and Periodical Verification of Existing Members’ in order to provide the assurance that Member classification societies comply with the Charter and the Membership Criteria.¹⁴² Besides, the IACS has developed its own Quality System Certification Scheme (QSCS) ‘in order to ensure that all of its members meet minimum standards and to provide proof of efforts to improve quality control systems’.¹⁴³ This system could be defined as a way of self-supervision¹⁴⁴ in the sense that the IACS supervises the activities of its own members.¹⁴⁵

3.3.2. The International Maritime Organization

As a public international organization, the IMO is involved in the standard-setting level of the regulatory process. It has no competences in the field of enforcement or supervision whatsoever. When the IMO first began operations its main concern was in fact ‘to develop international treaties and other legislation concerning safety and marine pollution prevention’. ‘By the late 1970s, however, this work had been largely completed, though a number of important instruments were adopted in more recent years.’ Therefore, the IMO is now ‘concentrating on keeping legislation up-to-date and ensuring that it is ratified by as many countries as possible’ as well as putting the emphasis ‘on trying to ensure that these conventions and other treaties are properly implemented by the countries that have accepted them’. For good measure, the IMO itself does not implement legislation; the organization was only established to adopt legislation. Governments are responsible for the implementation into their national laws as well as the enforcement.¹⁴⁶

3.3.3. National administrations of the flag states

‘Ship safety standards are thus developed and set at the international level by the IMO’ and implemented by national governments ever since. The standards are subsequently applied by

¹⁴¹ IACS, ‘Classification Societies – What, Why and How?’ [2011] p.6
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹⁴² IACS Charter, Article 2.2(b)
<www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

¹⁴³ J.L.P. Begines, ‘The EU law on classification societies: scope and liability issues’ (2005) 36 *Journal of Maritime Law and Commerce* 487, p. 500

¹⁴⁴ R. van Gestel and Ph. Eijlander, ‘Oprichting van de European Maritime Safety Agency: een nieuwe Octopus in de zee van toezichhouders?’ in R. van Gestel, Ph. Eijlander and others (eds), *Domeinconflicten tussen Europees en nationaal toezicht* (Boom Juridische Uitgevers 2006) p. 158

¹⁴⁵ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 221-223

¹⁴⁶ IMO, ‘Frequently Asked Questions’ [2012] <www.imo.org/About/Pages/FAQs.aspx> [Last accessed 27 May 2012]

both classification societies and national maritime authorities.¹⁴⁷ In this sense, national regulations are harmonized as they are all based on international public legislation from the IMO. The Netherlands is taken as an example in order to demonstrate the duties and competences of national authorities within the regulatory process. In the Netherlands, the competent national authority is the *Inspectie Leefomgeving en Transport/Divisie Scheepvaart* (ILT). The international IMO standards have been implemented into national legislation and now form part of the national legal framework which is mainly laid down in the *Schepenwet* and *Schepenbesluit 2004*. These legislative documents regulate the competences for the ILT in the area of enforcement and supervision. This authority as such is not in the position to develop legislation and therefore has no competences in the standard-setting stage of legislation.¹⁴⁸

As regards enforcement, the ILT plays a role in the sense of providing certificates if ships comply with the national requirements. The *Schepenwet* namely provides that vessels are obliged to possess certain required certificates at the time of departure. The *Schepenbesluit 2004* determines which certificates are required for which type of vessel and the validity periods of each of the certificates. Moreover, the requirements for the obtainment of a certificate are laid down in this legal document.¹⁴⁹ The national administration always has the possibility to delegate certification tasks to classification societies on the basis of the SOLAS Convention and the European instruments. In the *Schepenwet* of the Netherlands, this has also been provided for in article 6.¹⁵⁰

The *Schepenwet* also entrusts the competences in the field of supervision to the officials of the ILT. With regard to the supervision of vessels, one should distinguish flag state controls from port state controls (PSC). The latter entails checks upon foreign ships visiting national ports all over the world. In Europe, this system is based on the Paris Memorandum of Understanding (Paris MOU) and within the Netherlands the ILT performs the port state controls on the basis of the *Wet Havenstaatcontrole*. More important for this research, flag state controls concern the periodical supervision of ships flying the Dutch flag in order to assess whether they comply with international and national legislation. Whenever a vessel applies for a certificate it will be subjected to the necessary investigations in order to ascertain that it complies with the requirements as laid down in the *Schepenbesluit 2004*.

¹⁴⁷ M. Groenleer, M. Kaeding and E. Versluis, 'Regulatory Governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation' (2010) 17 *Journal of European Public Policy* 1212, p. 1219

¹⁴⁸ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 224-225

¹⁴⁹ *ibid* p. 216-219

¹⁵⁰ *ibid* p. 224-225

After expiry of the validity period of the vessel's certificate, it has to go through investigations again for the purpose of renewal of the certificate.¹⁵¹ These monitoring tasks are assigned to the ILT, but may also be delegated to classification societies on the basis of article 6 of the *Schepenwet*.¹⁵² Additionally, the ILT has a supervisory task with regard to classification societies, since the societies are responsible and accountable to the flag Administration for the work that they carry out on its behalf.¹⁵³ However, since recognition of classification societies is now a task of the European Commission, this institution is primarily responsible for the supervision of classification societies. This task has been delegated to the EMSA, although this agency still needs cooperation with the Member States. In that sense is the supervision of classification societies performed by the IVW supplementary to the supervision by the EMSA.¹⁵⁴

3.3.4. The European Maritime Safety Agency

The EMSA as an agency governed by European public law is allowed to perform an indirect role in the field of regulation and enforcement whereas it has full supervisory powers. With regard to regulatory competences, the EMSA only has this indirect role in the sense that the agency provides the European Commission with information. The agency 'will provide technical and scientific advice to the Commission in the field of maritime safety and prevention of pollution by ships in the continuous process of updating and developing new legislation, monitoring its implementation and evaluating the effectiveness of the measures in place'.¹⁵⁵ Importantly, the agency does not have standard-setting competences or decision-making tasks.¹⁵⁶ The EMSA as such cannot interfere in any national, regional or global decision-making.¹⁵⁷

With regard to enforcement, the EMSA again has merely an indirect role in the sense that the agency's audits and information form a basis for actions taken by the European Commission. 'On the basis of EMSA's audits, the Commission can decide to take corrective

¹⁵¹ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 216-219

¹⁵² *ibid* p. 228-230

¹⁵³ IACS, 'Classification Societies – What, Why and How?' [2011] p. 8

<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

¹⁵⁴ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 232

¹⁵⁵ EMSA, 'Origins and Tasks' [2012] <www.emsa.europa.eu/about/101-mission-statement/135-origins-a-tasks.html> [Last accessed 27 May 2012]

¹⁵⁶ M. Groenleer, M. Kaeding and E. Versluis, 'Regulatory Governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation' (2010) 17 *Journal of European Public Policy* 1212, p. 1219

¹⁵⁷ J. Wene, 'European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents' (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 64

action and propose sanctions.’ The EC may also ‘initiate an infringement procedure on the basis of the agency’s information’ and it may act or omit at its own discretion.¹⁵⁸ As a consequence, the effectiveness of the EMSA is highly dependent on the Commission in this regard.¹⁵⁹

The EMSA primarily has inspection tasks which may be summarized as ‘monitoring the port state control regime, assessing classification societies and checking on the work of notified bodies’.¹⁶⁰ The agency’s supervisory role concerning the PSC regime has to be distinguished from its supervisory role concerning classification societies. On the one hand, the EMSA has the task of monitoring the overall functioning of the Community PSC regime. As already explained above, EU port states have national systems and procedures in place to inspect foreign ships in their ports in order to ensure that ships in EU waters are in compliance with safety standards. In addition, the EU has enacted legislation in the context of the Paris MOU.¹⁶¹ However, ‘as the percentage of national inspections is believed to be lower than required, the EMSA has been entrusted with the task of assessing the functioning of the national port state inspection systems and procedures’.¹⁶² This task includes research and visits to the Member States in order to examine to what extent they implement the PSC regime.¹⁶³ On the other hand, Regulation (EC) No 391/2009 and Directive 2009/15/EC require that each of the thirteen EU recognized classification societies is assessed once every 2 years ‘and the EMSA has been entrusted with carrying out this task on behalf of the European Commission’.¹⁶⁴ ‘This task includes visits to regional and local offices and ships detained owing to deficiencies found by the classification organizations, in order to gather

¹⁵⁸ M. Groenleer, M. Kaeding and E. Versluis, ‘Regulatory Governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation’ (2010) 17 *Journal of European Public Policy* 1212, p. 1220

¹⁵⁹ *ibid* p. 1227

¹⁶⁰ *ibid* p. 1216: “With regard to *training*, some agencies provide courses and seminars to national inspectors and other personnel involved in monitoring and inspection activities and they establish common training standards or core curricula for the training of the inspectors of the member states. With regard to *research*, some agencies collect and analyze data to assist the Commission in updating and developing Community legislation and help the member states to improve the transposition and enforcement of rules. They do so, for instance, through the development and dissemination of best practices, thereby encouraging the harmonization of rules and their application across the EU.”

¹⁶¹ *ibid* p. 1219

¹⁶² *ibid* p. 1225

¹⁶³ *ibid* p. 1219

¹⁶⁴ EMSA, ‘Assessment of Classification Societies’ [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]

information on the societies' performance.'¹⁶⁵ 'EMSA also carries out special assessments of classification societies for which EU recognition is being requested by one or more (new) Member States.'¹⁶⁶ It must be repeated that the EMSA still needs cooperation with the Member States in the field of supervision of classification societies.

3.4. Clarity of legislation

After the overview of the competences of the organizations above, it is important to look into the legislation by which these actors are governed. The clarity of the applicable legislation namely could be an indicator for legal certainty within the hybrid regulatory regime of the maritime industry. As already mentioned before, the relevant provisions of the legislative documents need to be analyzed on the basis of comprehensible language, consistent legal definitions and requirements as well as stability of the norms.¹⁶⁷ In this respect the modifications of the relevant provisions will be assessed in order to examine how often the rules have been changed, how competences have changed and whether these changes resulted in an increase or rather a decrease of clarity when more and more organizations got involved. Some attention will also be devoted to the availability of time limits.

The first international public legislative acts that deal with classification societies have been adopted by the IMO and resulted in Resolution A.739(18) of 4 November 1993 – Guidelines for the authorization of organizations acting on behalf of the administration, as well as Resolution A.789(19) of 23 November 1995 – Specifications on the survey and certification functions of recognized organizations acting on behalf of the administration. For members of the IACS, the Charter of this international private organization also plays an important role.¹⁶⁸ All the membership criteria are to be found in its third section. Besides, the requirements and procedures of Annex 1, dealing with membership applications and periodical verification of existing members, are very central for the day-to-day business of classification societies. At the European level, Regulation (EC) No 391/2009 on common rules and standards for ship inspection and survey organizations, as well as Directive

¹⁶⁵ M. Groenleer, M. Kaeding and E. Versluis, 'Regulatory Governance through agencies of the European Union? The role of the European agencies for maritime and aviation safety in the implementation of European transport legislation' (2010) 17 *Journal of European Public Policy* 1212, p. 1219

¹⁶⁶ EMSA, 'Assessment of Classification Societies' [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]

¹⁶⁷ J. Raitio, 'Legal Certainty, non-retroactivity and periods of limitation in EU', (2008) 2 *Legisprudence* 1, p. 6.

¹⁶⁸ IACS Charter adopted at a meeting of Council on 27 October 2009.

<www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

2009/15/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations, are most significant for classification societies operating at the European level.

On the whole, the minimum standards for organizations to be recognized as classification societies are clear and appear to be mostly converged in all these legislative documents. Comprehensible language is present in all of them. There are some minor differences though, but these could be declared by the fact that all legal acts deal with ‘minimum requirements’ which means that it is possible that some acts have more stringent requirements than others. One example to demonstrate the extent of the differences between the legal texts is to be found in article 3.3.1. of Appendix 1 to IMO Resolution A.739(18) which requires that a recognized ‘organization should be established with a significant technical, managerial and support staff’. In article 3 of the General Minimum Criteria in Annex 1 to Regulation (EC) No 391/2009 it is obliged that the recognized organization is ‘equipped at all times with significant managerial, technical, support and research staff’. The only difference thus is the additional requirement of ‘research staff’ at the European level. However, article 3.1(v) of the membership criteria in Chapter 1 of the IACS Charter requires ‘significant in-house managerial, technical, support and research staff’ and is as a result consistent with the criteria in the EU legislation. To be brief, the requirements from all organizations are by and large the same. An additional difficulty in terms of identifying the requirements from the different actors is the fact that all documents are composed in a different manner. Both IMO Resolution A.739(18) and Regulation (EC) No 391/2009 start with general requirements where after the specific provisions are set out, but still these criteria are put in a different order which requires a careful search for the matching criteria in both texts. The IACS on the contrary uses yet another order within its Charter, where no distinction is being made between general and specific requirements. However, this should not be too problematic for frequent users of the legislation, such as classification societies themselves. It should also be noted that the members of the IACS have additional obligations, such as having the ‘technical ability to contribute with their own staff to the work of IACS in developing minimum rules and requirements for the enhancement of maritime safety’ as well as ‘compliance with the IACS Quality System Certification Scheme’.¹⁶⁹ However, they receive the benefits from their membership to the IACS in return. Comprehensible language

¹⁶⁹ IACS Charter, Article 3.1. (vi) and Article 3.1. (x) respectively.
<www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

and consistent definitions and requirements are thus present within all legislative documents and may be seen as contributing to the legal certainty for classification societies. The fact that the sequence of criteria is different in all texts does not detract from this.

The continuation of the norms is rather stable and modifications to the legislation do not form an obstacle in the sense of legal certainty either. Amendments have not taken place very regularly and are rather the exception than the rule. The relevant IMO Resolutions have been adopted in 1993 and have never been substantially updated. The only change that has been made is an additional paragraph 2-1 added after the existing paragraph 2 in Resolution A.739(18), but this should be regarded as a minor amendment only.¹⁷⁰ The IACS Charter is adopted in 2009 and has been revised twice, most recently in January 2012, and again contains only minor amendments that serve just as clarifications of the existing texts. Regulation (EC) 391/2009 and Directive 2009/15/EC have never been amended since their adoption, but it should be noted that they are based on Directive 94/57/EC which has been substantially amended several times as follows from the first whereas clauses in both preambles. However, this is exactly the reason why this Directive has been recast in two new Community legal instruments. Accordingly, the amendments of the relevant legislative acts cannot be seen as depriving the classification societies from any legal certainty, but are rather made with the aim of clarifying the legal texts.

However, an extra burden for classification societies following from the legal texts is the fact that they have to apply for membership of the IACS as well as recognition by the European Commission whenever they want to perform their role within this area. This means that they have to go through a time-consuming procedure twice. First of all, on the basis of article 3.3 of the IACS Charter, ‘any [classification society] which wishes to become a member of IACS shall apply for membership in accordance with the IACS document *Membership Applications and Periodical Verification of Existing Members*’. This document is annexed to the Charter and describes the full application process. Even though it is rather burdensome, the procedure is comprehensible and provides clear time limits for the various phases that any applicant has to complete. Altogether, the applicant classification society will receive the decision of acceptance or rejection within one year. Secondly, at the European

¹⁷⁰ IMO Resolution A.789(19) of 23 November 1995 – specifications on the survey and certification functions of recognized organizations acting on behalf of the administration, para 2-1: “The organization should perform survey and certification functions of a statutory nature by the use of only exclusive surveyors and auditors, being persons solely employed by the organization, duly qualified, trained and authorized to execute all duties and activities incumbent upon their employer, within their level of work responsibility. While still remaining responsible for the certification on behalf of the flag State, the organization may subcontract radio surveys to non-exclusive surveyors in accordance with the relevant provisions of resolution A.789(19).”

level the Member States can only authorize a classification society already recognized by the European Union. Therefore, only Member States can request EU recognition of a classification society as provided for in articles 3 and 4 of Regulation (EC) No 391/2009.¹⁷¹ In this context ‘Member States which wish to grant an authorization to any organization which is not yet recognized shall submit a request for recognition to the [European] Commission together with complete information on, and evidence of, the organization’s compliance with the minimum criteria set out in Annex I’ and some other provisions of this Regulation.¹⁷² The Commission and the respective Member State submitting the request shall then carry out careful assessments in order to verify that the organization meets and undertakes to comply with these requirements.¹⁷³ However, the Regulation lacks any clear procedure and refers for the relevant regulatory procedure to Decision 1999/468/EC.¹⁷⁴ This still leaves open questions such as what these assessments will look like and how much time they will take. On the whole, especially the procedure at the European level contributes to a lack of legal certainty, but should not be seen as too problematic from this perspective, since the largest classification societies are already a member of the IACS or recognized by the EC.¹⁷⁵ For new applicants, especially the procedure of the EC may lead to extra uncertainty.

Besides, changes in the competences of the relevant organizations may be highly relevant to assess the extent of legal certainty within a certain industry. For the maritime industry it is mostly relevant to look into the establishment regulation of the EMSA, because the tasks of the other actors have not been significantly altered yet. Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency has been amended in 2003, 2004 and 2006 ‘mainly due to the evolution of the EU’s maritime legislation’. The first modification concerned financial and budgetary procedures as well as transparency. The second modification ‘brought considerable new tasks to the Agency in particular regarding pollution preparedness and response’. This second revision took also into account the development of EU competences in the area of maritime security and tasked the EMSA with

¹⁷¹ EMSA, ‘Assessment of Classification Societies’ [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]

¹⁷² Council Regulation (EC) 391/2009 on common rules and standards for ship inspection and survey organizations [2009] OJ L31/11 art. 3(1)

¹⁷³ *ibid* art. 3(2)

¹⁷⁴ *ibid* art. 4(1)

¹⁷⁵ For full lists of the recognized organizations and members of the IACS, see: EMSA, ‘Assessment of Classification Societies’ [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]. See also: IACS, ‘IACS explained: Members’ [2012] <www.iacs.org.uk/explained/members.aspx> [Last accessed 27 May 2012]. Please note that the member organizations of IACS do not completely overlap with those recognized by the European Commission.

greater responsibility in the field of training of seafarers as well as ‘providing technical assistance to the Commission inspections in the framework of Regulation 725/2004 on enhancing ship and port facility security’. The third modification provided the EMSA with a ‘multi-annual financial framework of €154 million for the pollution response activities for the period 2007-2013’.¹⁷⁶ However, these previous modifications have not been sufficient to address the new, mostly external, challenges ahead for the EMSA. In 2010 the European Commission therefore presented a draft proposal to amend Regulation (EC) No 1406/2002. The objective of the proposed measure is to clarify the existing tasks and roles of the EMSA as well as ‘extending those tasks to new areas under development at the international and/or EU level’. It is proposed to add fourteen new, largely technical, tasks which ‘arise from the implementation of the Third Maritime Safety Package’. The amended Regulation would extend the EMSA's competences to interfere ‘in the event of pollution from oil and gas installations, and not only from ships, as under the current Regulation’. In addition, the new text provides for ‘enhanced cooperation with neighboring countries and closer involvement of the EMSA in EU maritime research’. Moreover, the EMSA would be asked to contribute to other EU policies related to its field of expertise. ‘The amendments seek also to clarify EMSA’s assistance to the Commission and to the Member States in various international and regional organizations (such as the IMO, ILO and Paris MOU) in order to ensure that the Commission and the Member States receive the best possible technical advice.’ This should be welcomed as an attempt to make the legal frameworks fit together and to improve cooperation between the multiple actors involved in the maritime industry. Nevertheless, it should be noted that currently a majority of Member States is concerned about the extensions proposed, in particular as regards research and EU policies outside the EMSA's core business.¹⁷⁷ Following this proposal, the European Commission clearly feels the need to clarify the existing tasks and roles of the EMSA. This means that the current legislation of this

¹⁷⁶ Commission, ‘Proposal for a Regulation (EU) [...] of the European Parliament and the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency’ COM (2010) 611 final, p. 2. See also: UK European Scrutiny Committee, ‘Documents considered by the Committee on 15 December 2010. The European Maritime Safety Agency’ (2010) <www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428/42812.htm> [Last accessed 28 May 2012]

¹⁷⁷ EU Press Office, ‘Background. Transport, Telecommunications and Energy Council’ (2011) p. 4. <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/trans/120353.pdf> [Last accessed 28 May 2012] See also: European Scrutiny Committee, ‘Documents considered by the Committee on 15 December 2010. The European Maritime Safety Agency’ (2010) <www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428/42812.htm> [Last accessed 28 May 2012] See also: Commission, ‘Proposal for a Regulation (EU) [...] of the European Parliament and the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency’ COM (2010) 611 final, p. 2-7

actor is not transparent concerning the EMSA's competences, which obviously leads to a decrease of certainty for the other actors and classification societies in particular. It is very questionable whether the proposal by the EC will substantially improve these uncertainties, since the new tasks which would be added are of a mainly technical nature.

All in all, the legislative instruments at the international public and private level as well as the EU level are clear and contain consistent definitions and requirements. Modifications to the legal provisions do not affect legal certainty in a negative manner either because they have not taken place very regularly and when they occurred it was with the aim of clarifying the legal texts. However, the fact that classification societies have to apply for both membership of the IACS and recognition by the EC, undermines legal certainty for classification societies. The application procedure for the IACS is comprehensible and has clear time limits, but the European procedure lacks any clarity with regard to these matters. In this sense is the EU responsible for the uncertainty for the classification societies. The EU also contributes very negatively to legal certainty through its EMSA. Next to the fact that its tasks and roles are currently unclear, this Agency is expanding its competences very regularly since its coming into existence, often at the expense of the Member States. As will be demonstrated in the next section, the EMSA even extends its tasks in such a way that it results in overlaps with the other competent maritime actors as well.

3.5. Multiplicity of organizations and form of legislation

It should be clear by now that the competent organizations do not operate totally separate from each other. In fact, the multiplicity of organizations and form of the law may be indicative for the extent of legal certainty or the possible lack thereof. It is important to find out which rules or combination of rules contribute to legal certainty: private, public, international, regional or national. Consequently, the relationship of private regulation with international, regional and/or national regulation will be examined. Besides, the types of relationships among the different organizations as well as the existence of (shared) responsibilities of private and public organizations in particular are important here.

In the standard-setting stage of the regulatory process the main actors involved and responsible are the classification societies, the IACS as well as the IMO. They adopt their own private classification rules; the private international QSCS, Unified Requirements and Unified Interpretations; as well as public international Conventions and Resolutions respectively. There is a clear relationship between these three actors. On the one hand, the

member classification societies of the IACS have to incorporate the Unified Requirements into their own rules and practices. Obviously the QSCS as adopted by the IACS has binding force upon these members as well. The relationship between the IACS and the classification societies is thus based on formal cooperation. The classification societies are also bound by the international legislation that has been adopted under the auspices of the IMO. In this respect the IACS even adopts Unified Interpretations ‘on matters arising from implementing the requirements of IMO Conventions or Resolutions’ and on matters which in the Conventions are left to the satisfaction of the Administration or where more accurate wording has been found essential.¹⁷⁸ Here private regulation fills the gaps left by public regulation. The cooperation between the IMO and the IACS is in this sense more informal. This also derives from the fact that the IACS has merely a consultative status within the IMO. On the other hand, the national authorities and the EMSA are not in the position to develop legislation and thus have no competences in this field. However, the national authorities do have a relationship with the IMO. National governments are namely responsible for the implementation of the IMO legislation into their national laws. The standards are subsequently applied by national maritime authorities. The EMSA does not have a clear relationship with the other organizations involved at the standard-setting stage and cannot interfere in any national, regional or global decision-making either.¹⁷⁹ In this sense, the EMSA is only bound by the legislation that has been developed by the European Commission at the regional level.

With regard to the enforcement stage of the regulatory process, the main actors directly involved in this process are the classification societies and the national administrations of the flag states. On the one hand, the national authorities play a role in the enforcement in the sense of providing certificates if ships comply with the national requirements. They may always delegate certification tasks to recognized classification societies on the basis of the SOLAS Convention, the European instruments and national law. In this sense, public regulation provides for the possibility to delegate competences to private actors. As a result, the classification societies also play a role in the sense of providing certificates if ships comply with their classification rules. Moreover, if a classification society suspends or withdraws the class of a ship, it notifies the ship owner and national administration of the flag state concerned. Besides, IMO Resolution A.739(18) lays down that

¹⁷⁸ Commission, ‘Proposal for a Regulation (EU) [...] of the European Parliament and the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency’ COM (2010) 611 final, p. 2-7

¹⁷⁹ J. Wene, ‘European and International Regulatory Initiatives Due to the *Erika* and *Prestige* Incidents’ (2005) 19 *Australian and New Zealand Maritime Law Journal* 56, p. 64

there should be a formal written agreement between the state administration and the authorized classification society. This all means that there is a clear formal relationship between the classification societies and national administrations in the enforcement process. As a result, the responsibility of providing certificates and therefore enforcement is shared between the national administrations and the classification societies. On the other hand, the IMO does not have any competences in the field of enforcement whatsoever. In this sense, it has no relationship with other organizations. The EMSA only has an indirect role by providing information and performing audits which form a basis for enforcement actions taken by the European Commission. Again, the EMSA does not have any relationships with any of the other organizations involved at the enforcement stage.

The supervisory stage of the regulatory process is the stage where overlapping competences between the various organizations are mostly visible. The IMO is the only organization without any competences in this respect. Supervision of vessels should be distinguished from supervision of classification societies as such. With regard to the inspection of vessels, classification societies supervise the ships on the basis of periodical class surveys ‘to verify that the ship continues to meet the relevant requirements for continuation of class’.¹⁸⁰ At the national level, the competences in the field of supervision of ships are entrusted to the national maritime authorities. These controls concern the periodical supervision of ships flying the particular national flag in order to assess whether they comply with international and national legislation, thereby putting a lot of pressure on the shipping industry in terms of time and money. There are in fact shared responsibilities between the classification societies and the national administrations, because the latter are allowed to delegate monitoring tasks to classification societies on the basis of their own national laws. At this stage again, public regulation thus delegates competences to private actors. In this sense, one could speak of formal cooperation between both actors. Concerning the supervision of classification societies, responsibilities are shared between the national administrations, the IACS and the EMSA. First of all, the IMO provides in its Resolutions A.739(18) and A.789(19) that the national Administrations of the flag states are responsible for the establishment of a system to ensure the adequacy of work performed by the classification societies authorized to act on its behalf. This means that national authorities are allowed to supervise these societies they have recognized and delegated tasks to. The national level is therefore the first level where supervision of classification societies is taking place. National

¹⁸⁰ IACS, ‘Classification Societies – What, Why and How?’ [2011] p. 7
<www.iacs.org.uk/document/public/explained/Class_WhatWhy&How.PDF> [Last accessed 27 May 2012]

procedures obviously differ from country to country and the IMO does not provide for any time limits or frequency of the inspections. This information is to be found in the national laws of the flag states. Secondly, the aforementioned IMO Resolutions require the member states to enable an independent third organization that checks the quality levels of the classification societies. This task is passed on to the IACS. The IACS obliges for periodical assessments in accordance with the verification process set out in the Annex ‘Procedures for Membership Applications and Periodical Verification of Existing Members’ in order to provide the assurance that Member classification societies comply with the Charter and the Membership Criteria.¹⁸¹ In article 1.2. of this Annex it is provided that compliance of all the IACS members is verified once every three years which means that the frequency of inspections is clear for classification societies. This should be seen as a way of self-supervision in the sense that the IACS supervises the activities of its own members.¹⁸² ‘On the occasion of the first periodic verification, the IACS Member is to submit to the Council a compliance statement containing all relevant information, evidence and explanation, with a view to demonstrating that it fulfills the Membership Criteria.’¹⁸³ For subsequent periodic reviews, a statement of any changes that have occurred since the last review will be sufficient.¹⁸⁴ The whole procedure will be handled within six months and this clearly contributes to maintaining the predictability of the legal situation for classification societies.¹⁸⁵ The IACS supervisory procedure is not too burdensome, since classification societies themselves are responsible for providing the correct information on the compliance statement and there is no trouble for ship owners in this regard. It is not entirely clear whether private regulation fills the gaps left by public regulation or the other way around, but it is clear that the IACS and national administrations mutually reinforce each other in the area of supervising classification societies. Interestingly however, the classification societies recognized by the European Union are also assessed by the European Commission ‘on a regular basis and at least every two years to verify that they meet the obligations under this Regulation and fulfill the minimum criteria set out in Annex 1’ as follows from article 8(1) of

¹⁸¹ IACS Charter, Article 2.2(b)
 <www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

¹⁸² S.K. Gabriël-Breurs, ‘*Hulp bij de handhaving*’, Wolf Legal Publishers, 2008, p. 221-223

¹⁸³ IACS Charter, Article 1.2(b)
 <www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

¹⁸⁴ *ibid* art. 1.2(c)

¹⁸⁵ IACS Charter, Article 1.2(a)
 <www.iacs.org.uk/document/public/explained/IACS%20Charter%20and%20Annexes.pdf> [Last accessed 28 May 2012]

Regulation (EC) 391/2009. It is important to note here that the EMSA has been entrusted with carrying out this task on behalf of the European Commission.¹⁸⁶ The frequency of inspections by the EMSA is clear and therewith higher than the regularity of assessments by the IACS. However, the procedure for assessments itself is not laid down and therefore more uncertain. In this context the EMSA namely has various competences. According to article 8(3) the ‘assessment may include a visit to regional branches or the recognized organization as well as random inspection of ships, both in service and under construction’. These assessments happen for the purpose of auditing the recognized organization’s performances. Even though the EMSA is competent to recognize classification societies on behalf of the Member States since 2001, it still needs their cooperation. In that sense is the supervision of classification societies performed by the national authorities supplementary to the supervision by the EMSA and do these actors share the responsibility at the stage of supervision.¹⁸⁷ However, no formal or informal relationships have been established between the EMSA and the IMO or the IACS at this stage. Consequently in the area of supervision of classification societies, competences overlap at the level of the national administrations of the flag states, the IACS and the EMSA. It is unclear why the EMSA has also been entrusted with supervisory tasks and questionable what it adds to the monitoring tasks of the other actors. Even worse, there is no clear alignment of the competences between these organizations. The fact that assessments take place independently at the international, European and national level does not contribute to legal certainty at all. Ships and classification societies are subject to multiple checks and duplications which cost a lot of time and therefore money. This in itself, together with the rather unclear procedures and supervisory policy, makes for an uncertain situation for classification societies in the context of supervision. In this regard the EMSA clearly is responsible for the perceived uncertainty since it lacks any formal or informal relationships with the other organizations besides the national authorities of the European Member States. Neither is there a clear relationship between the European legislation with any private, national or international regulations.

4. Conclusions and recommendations

The hypothesis this research project aimed to test is that the development of a private regulatory regime into a hybrid regulatory regime decreases legal certainty for those subject to

¹⁸⁶ EMSA, ‘Assessment of Classification Societies’ [2012] <www.emsa.europa.eu/implementation-tasks/visits-and-inspections/assessment-of-classification-societies/90-classification-societies/68-classifications-societies.html> [Last accessed 28 May 2012]

¹⁸⁷ S.K. Gabriël-Breurs, *Hulp bij de handhaving* (Wolf Legal Publishers 2008) p. 232

it. In this regard the maritime industry has been used as a case study in order to draw more general conclusions on this matter. It appeared that a multiplicity of organizations is currently involved in the regulatory process of this industry and the performance of classification societies in particular. This results in a hybrid regulatory regime characterized by an enormous amount of legislation from a wide diversity of actors. The IACS, classification societies themselves, the IMO, national administrations as well as the EMSA play an important role with regard to the legislative process of the safety at sea in the field of standard-setting, enforcement and/or supervision. In order to test the hypothesis, this research examined whether the historical development from a private regulatory regime into a hybrid regulatory regime which is typical for this industry decreases legal certainty for classification societies. In fact, legal certainty is often particularly at stake in the transnational regulatory context where legal frameworks are often characterized by hybridization and rules from different actors and from different levels.

As the undertaken analysis has shown, within the maritime industry regulation has been initiated by private actors in the second half of the 18th century and has seen an increasing role for international and regional public regulators over time. As became clear this development demarcates an a-typical case in the context of the theory of transnational private regulation which principally reflects a redistribution of regulatory power from the domestic to the global level and from public to private regulators. The maritime situation is unusual and unique in this sense, since generally private actors get involved in a reasonably later stage of the advancement of the legal framework. As has been described, the theory of transnational private regulation specifically focuses on networks and regimes in which public and private actors work together in a complementary way instead of in an alternative sense. The regimes are transnational, rather than international. TPR specifically addresses non-state or private actors and their role in the existing regulatory regimes. The need to overcome fragmentation of market regulation, often associated with divergent state legislation, is recognized as the most frequently identified rationale for the emergence of TPR. In the most recent research projects on the evaluation of transnational private regulatory regimes legal scholars have focused on four elements, being legitimacy, enforcement, effectiveness and quality.¹⁸⁸ For this particular research the latter element has been most important, because legal certainty is one of the main specific aspects of quality. After a thorough study of this principle it appeared that there is no widely shared notion of certainty in law though. Therefore it has been important to

¹⁸⁸ Special Issue: The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates (2011) 38 *Journal of Law and Society* p. 1-188

conceptualize the principle of legal certainty in order to test the extent of certainty within the maritime industry. As a result, four indicators have been identified of which two have been explicitly tested within this particular research project. Particular attention has also been devoted to the ‘crisis of class’ and both the *Erika* and *Prestige* disasters, since these historical events triggered important regulatory responses also affecting the legal certainty for classification societies. As a first indicator due consideration has been given to the clarity of the relevant provisions of the legislation applicable to classification societies. Next, the multiplicity of organizations and the form of the law have been considered as a second indicator to assess the extent of legal certainty within the maritime industry.

The analysis in this research project showed that during the ‘crisis of class’ in the late eighties and early nineties it became apparent that the lack of uniform national or international laws regulating the activities of classification societies has led to much uncertainty. The crisis also made clear that core values, such as safety at sea, could be adequately served only by more stringent regulation of the relevant procedures, harmonized if possible at a supranational level. It appeared that regulatory responses came from the IMO, the IACS and the European Union which may be seen as a first substantial contribution to legal certainty, since they led to the adoption of the desired international laws whereas such legislation was completely absent before this period. Later on the *Erika* and *Prestige* accidents in 1999 and 2002 respectively triggered a call for re-evaluation of the existing legal framework and worked as a catalyst for new developments both at the European and international level.¹⁸⁹ It became clear from looking into the historical development of the maritime industry that in the past the competent organizations always aimed at the coherence of the legislative framework. Continuous attempts have been made by all the organizations to keep the legislation up-to-date and in accordance with each other. All the legislative documents are now clear and contain comprehensible language as well as consistent definitions and requirements. Besides, the continuation of the norms proved to be rather stable and modifications to the legislation did not form an obstacle in the sense of legal certainty either, because they have not taken place very regularly and when they occurred it was with the aim of clarifying the legal texts. From the analysis of the legal framework it may be concluded that legal certainty is in place for classification societies with regard to the legislation from the various actors.

However, this analysis also demonstrated that in the past especially the European Union took unilateral actions and adopted some legal instruments which were aspired at

¹⁸⁹ V. Frank, ‘Consequences of the *Prestige* Sinking for European and International Law’ (2005) 20 *International Journal of Marine and Coastal Law* 1, p. 1

playing a role in monitoring compliance with European standards instead of international standards. It became clear that especially after the *Erika* and *Prestige* disasters there was an unambiguous tendency where the European Union focused mainly on its own legal system thereby heavily undermining the legal certainty for classification societies. This became very apparent after looking at the competences of the EMSA, since the distribution of competences between the various actors does not provide for legal certainty at all. It has been proven that the current legislation governing the EMSA is not transparent concerning its tasks and roles which obviously leads to an increase of uncertainty for the other actors and classification societies in particular. The European Commission clearly felt the need to clarify this matter and proposed several amendments in 2010 to add fourteen new, largely technical, tasks. It has also been found that next to the fact that its tasks and roles are currently unclear, the EMSA has been expanding its competences very regularly in such a way that it resulted in overlaps with the other competent maritime actors as well. It may be concluded that the supervisory stage of the regulatory process is the stage where overlapping competences between the various organizations are mostly visible. It appeared that concerning the supervision of classification societies, responsibilities are shared between the national administrations, the IACS and the EMSA. The IACS and national administrations formally cooperate and mutually reinforce each other in the area of supervising classification societies. Even though the EMSA is dependent on cooperation from the European Member States, it has no formal or informal relationships with the IMO or the IACS whatsoever. This research showed that it is therefore unclear why the EMSA has also been entrusted with supervisory tasks and that it is questionable what the EMSA adds to the monitoring tasks of the other actors. Even worse, there appeared to be no clear alignment of the competences between these organizations. Thus, the fact that assessments take place independently at the international, European and national level does not contribute to legal certainty at all. Ships and classification societies are subject to multiple checks and duplications which cost a lot of time and therefore money. The study revealed that this in itself, together with rather unclear procedures and supervisory policies, makes for an uncertain situation for classification societies in the context of supervision. All in all, the analysis of this case-study allows for the conclusion that the EMSA clearly is the main responsible actor for the perceived uncertainty for classification societies. Whereas the EC aims to solve this issue by proposing to add fourteen new, largely technical, tasks to the competences of the EMSA it is rather highly recommended to effectively align the competences of the EMSA with the competences of the other actors involved in the maritime

industry. Considering the above, in the maritime industry it is certainly true that the development of a private regulatory regime into a hybrid regulatory regime decreases legal certainty for those subject to it. In this case the hypothesis therefore cannot be falsified.

Both the analysis of the theory and the case-study provided an answer to the research question of this project. The hybrid regulatory regime of different public and private actors at the international, European and national level in the maritime industry does indeed significantly decrease the legal certainty for classification societies. For now it appears that a development where more and more organizations are getting involved within a certain policy area cannot necessarily be considered as a good development, certainly not with regard to legal certainty. This is even worse when organizations are getting more and more competences which are not aligned with one another. It is thus possible to conclude that next to the strife for coherence in terms of legislation, it is also highly recommended to align the competences of all actors involved within a given industry in order to achieve the highest possible extent of legal certainty for the legal subjects.

Obviously, more research is required in order to make more general conclusions on the hypothesis that the development of a private regulatory regime into a hybrid regulatory regime decreases legal certainty for those subject to it. More policy areas should be studied in this regard, and it would be interesting to also add a sociological dimension to the analysis of legal certainty in terms of how the legal subjects perceive the extent of legal certainty within a given policy area.