

## THE CII CONUNDRUM – WILL IT SINK OR SWIM?

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"The new International Maritime Organisation's ("IMO's") Carbon Intensity Indicator ("CII") certification regime will apply from 1 January 2023 and will capture a wide range of ship types above 5,000 GT."

In the race to charter ships with the highest carbon performance rating, the new CII requirements will impact not only ship owners and charterers, forcing them to rethink their contracts, business priorities and chartering practices, but also, albeit indirectly, their customers and financiers. The new International Maritime Organisation's ("IMO's") Carbon Intensity Indicator ("CII") certification regime will apply from 1 January 2023 and will capture a wide range of ship types above 5,000 GT. In this article we summarise the CII framework, explain where this fits in the wider IMO decarbonisation agenda and ask whether CII can really work and survive in its current form.

### BACKGROUND

The CII certification regime is one of the two new decarbonisation measures agreed at the IMO's 76th Marine Environment Protection Committee ("MEPC76") in July 2021. The second key measure is the Energy Efficiency Existing Ship Index ("EEXI") which will also apply from 1 January 2023 and which is focussed on the design parameters and one-time certification requirements for new and existing ships above 400GT. Compliance with EEXI is to be achieved via the International Energy Efficiency Certificate and can be met through the fitting of EPLs (engine power limiters) or SHAPOLI (shaft power limitation) in time for January 2023. Both new regimes require the parties to work together to achieve compliance mainly through increased collaboration and sharing of quality data.

### WHAT IS CII?

The CII certification regime forms part of the amendments made under the International Convention for the Prevention of Pollution from Ships ("MARPOL") Annex VI which came into force on 1 November 2022 (the "Regulations")<sup>1</sup>. From 2024, ships will receive their first CII Rating ranging from A to E (with A being the highest and E being the lowest) based on their emissions from 2023. The IMO intention is for the rating thresholds for emissions to become increasingly more stringent towards 2030 in order for the 40%/2030 IMO emission reduction target to be reached. Furthermore, the A to E ratings under CII will be recorded in the ship's Ship Energy Efficiency Management Plan (the "SEEMP"). It is noteworthy that the Regulations<sup>2</sup> contain specific wording which encourages (but does not oblige) administrators, port authorities and other stakeholders to provide incentives to ships with a CII rating of A or B. It remains to be seen however what incentives will start to emerge and at what scale.

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## WHAT IS THE CII RATING?

The Regulations determine the annual reduction factor needed to ensure continuous improvement of the ship's operational carbon intensity within a specific rating level (i.e. the carbon emissions per unit of 'transport work' or the operating mileage in a given year).<sup>3</sup> Ships covered by CII will be given an annual carbon intensity rating indicating their performance over the previous year. The ship's carbon intensity is measured against annual mileage (the "Attained Annual Operational CII") and then compared to the required operational carbon intensity that the ship must achieve under the Regulations (the "Required Annual Operational CII"). It is intended that

incremental improvements will be made annually.

## HOW IS CII CALCULATED?

The CII is an operational efficiency indicator of a vessel that will have to be assessed and calculated on an annual rather than per voyage basis. It is based on a ship's reported Annual Emissions Ratio ("AER") which is the annual fuel consumption multiplied by the IMO-set CO<sub>2</sub> emissions factor, divided by the distance sailed by the vessel (in ballast and laden condition) and multiplied by the deadweight tonnage ("DWT") capacity (as opposed to actual cargo carried). The CII calculation has received considerable criticism from the maritime industry due to its failure to address some of the practical commercial realities that vessels encounter during operational stage such as the inability to always go slower; contractual limitations connected with rerouting; logistical and geopolitical limitations of sourcing compliant and/or low carbon fuel; the poor performance consequences of unforeseen bad weather, off-hire periods and port delays; as well as the limitations and artificiality of not including actual cargo carried data in the calculation. (For the time being, using actual cargo carried instead of capacity can only be reported on a voluntary basis and not for the purposes of the CII rating.) The existing formula appears to perversely reward ships that ballast around releasing emissions, by giving them a higher rating and penalises ships that face long stays/delays in port, by giving them a lower rating. For these and other reasons the CII calculation will likely go through numerous iterations before a workable, balanced, and fair formula can be agreed.

## WHO IS THE POLLUTER AND WHO WILL PAY?

There are numerous measures that ships can take to improve their CII rating<sup>4</sup>.

However, the Regulations are silent on who would take responsibility for the implementation of such measures and, more importantly, who would pay for them.

The language of the Regulations focusses on the 'ship' having to meet the CII rating requirements as well as those for SEEMP. What this implies is that the polluter, in the eyes of the IMO (similar to the proposed EU Emissions Trading Scheme for Maritime – see our article here) is intended to capture a wide group of actors, and deliberately

so, with a view to creating a shared responsibility between the ship owners, ship managers, the charterer and/or commercial operators. In practice however the

responsibility for compliance with CII will fall primarily on the ship owners unless that responsibility can to a certain degree be assumed contractually by the charterers. To address this, Bimco recently published their CII Operations Clause for Time Charter Parties (the "Clause")<sup>5</sup>, which assigns some of the responsibility for CII on the charterers. However, this will be explored further in our second article here.

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## COMPLIANCE AND ENFORCEMENT

Since compliance with CII requirements will have to be demonstrated via a Statement of Compliance ("SoC") as part of the SEEMP and as part of the CII rating having to be reported to the Flag state within the first three months of the calendar year, it is conceivable that from 2026 an SoC will not be issued to a vessel which fails to comply with minimum CII requirements. This will render the vessel non-sailable and uncharterable thus triggering a domino effect of other legal, economic and commercial repercussions. However, the full extent of enforcement is yet to be determined by the IMO who has promised to review the Regulations in 2026 not only from the point of view of enforcement but also from the point of view of the CII rating calculation. What is clear for now is that a D or E rating for three consecutive periods will trigger the requirement for a Corrective Action Plan ("CAP") to be

implemented by the non-compliant vessel. Whether there is to be a time-limited period for implementing the CAP is not yet known. Further detail on timeframes and enforcement for CAPs is awaited from the IMO and the Department for Transport ("DfT") in the case of the UK.<sup>6</sup>

## WHO IS RESPONSIBLE FOR COMPLIANCE?

As previously stated, in view of the fact that the Regulations are silent on who should bear the responsibility for compliance with CII, in practice, the burden of making technical modifications and meeting the costs of the same will likely fall largely on the owners, unless responsibility can be shared contractually with the charterers. Much will depend on the length of the charters; we would expect responsibility being shared more equally over longer charters while the burden could fall entirely on the owners for short term charters. It is helpful to an extent that the Regulations do not preclude alternative commercial arrangements from being agreed. However, the ship owners and, in many cases, the ship managers, will need to be proactive when entering into charterparties to secure robust contractual provisions which ensure that EEXI and CII standards are achievable, achieved and not hampered at any point by the operations, acts or omissions of the charterers and/or commercial operators such as unplanned change of fuel, speed, route and/or engine power.

## CONCLUSIONS AND RECOMMENDATIONS

It remains to be seen how and if the CII conundrum can be resolved. Given that there is unlikely to be an abundance of highly performing, C or above rated vessels, most owners will be chartering borderline or poorly performing vessels and looking for solutions and contractual mechanisms that control and improve the operational efficiency of the same. With this in mind, we would strongly advise both parties to work together to agree commercially workable ways forward and preferably bespoke CII clauses that meet their specific needs and requirements. There is perhaps one consoling fact in all this, namely, that everyone will be 'in the same boat', rowing through the same fog that is CII, until such time that it is reviewed and hopefully reformed come 2026.

**"Regulations are silent on who would take responsibility for the implementation of such measures and, more importantly, who would pay for them."**

[1] MARPOL Annex VI "Regulations on the Carbon Intensity of International Shipping" and Resolution MEPC.328(76) implementing the CII and subsequent amendments to the Ship Energy Efficiency Management Plan (SEEMP)

[https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Air%20pollution/MEPC.328\(76\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/Air%20pollution/MEPC.328(76).pdf)

[2] Regulation 28.10 of the Resolution MEPC.328(76)

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[3] Regulations 26 and 28 of MEPC.328(76) set out the CII framework.

[4] These include: hull cleaning to reduce drag; speed and routing optimisation; installation of low energy light bulbs; installation of solar/wind auxiliary power for accommodation services; improving voyage planning, for example, proceeding less directly but more efficiently, reducing speed or slow steaming; using alternative fuels, for example, ammonia, methanol and synthetic fuels; installation of energy-saving devices; improving the condition of the ship, for example, cleaning fouling and marine growth; fitting a more efficient propeller; reducing cargo volume intake; and using an overridable power limitation to reduce CII.

[5] <https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/cii-operations-clause-2022>

[6] The draft Merchant Shipping (Prevention of Air Pollution from Ships) Regulations have been laid down and will enter into force on 1 January 2023. Further detail on the UK Regulations which implement the CII and EEXI regime can be provided on request.

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