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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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2018/0159 (NLE)

Proposal for a

COUNCIL RECOMMENDATION

on safety goals and functional requirements for passenger ships below 24 meters in length

{SWD(2018) 238 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

On 20 December 2017, the amendments to Directive 2009/45/EC of the European Parliament and of the Council¹ entered into force, excluding small passenger ships (i.e. ships below 24 m in length) from its scope, with effect from 21 December 2019. This resulted from the recommendations of the Regulatory Fitness and Performance Programme (REFIT) Fitness Check on EU passenger ship safety legislation².

Directive 2009/45/EC has brought about a common high safety level across the EU and important internal market benefits. However, it failed to do so regarding small ships (below 24 meters in length) for which several key safety aspects have not been harmonised (reflecting the difficulty to apply the current prescriptive standards in a common manner to the large variety of small ships and conditions they operate in throughout the EU). It became also clear that the wide range of services that these vessels are built for produces a very broad range of designs and technical solutions. This made identifying a common set of detailed rules extremely challenging and necessitated a different regulatory approach.

Furthermore, only ca. 60 small steel ships out of ca 1950 small ships in total have been certified under Directive 2009/45/EC. This is due to the fact that a large majority of small ships is currently built in other materials than steel (wood, ca. 1000 ships, composite material, ca. 590 ships, and aluminium, ca. 170 ships). For such ships, no common standards or safety benchmark currently exist, either at EU or international level. Every Member State has a different approach to regulating their safety leading to differences in measures, approaches and interpretations, which makes the construction of ships for a wider internal market a challenge.

The absence of harmonised safety standards presents an important challenge especially for smaller European shipowners, relying on the second hand market with small passenger ships (72% out of ca. 360 shipowners with passenger ships under Directive 2009/45/EC have only one domestic passenger ship). In case the ship is not certified according to the Directive, mutual recognition should, in principle, apply. In practice, however, every ship is close to being a prototype, i.e. built for a specific purpose according to technical specifications determined by its future owner. In case of the flag change, the ship needs to be therefore modified and re-certified – with the associated additional costs that this implies.

Concerning the accident statistics, as reported in the accompanying Staff Working Document, the data since 2011 has not shown any imminent safety concern. For small domestic passenger ships outside the scope of the Directive, 555 accidents were recorded between 2011 and 2017 in the European Marine Casualty Information Platform (EMCIP), with 165 injured people and 11 fatalities. This means approximately 2 fatalities every 100 accidents and 1 person injured every 3 accidents.

Nonetheless, the absence of certain requirements in some Member States (e.g. on subdivision of small ships) or the variety of requirements concerning e.g. fire insulation, creates the need for further consideration of the achieved safety level (determined by additional measures tailored to local and geophysical conditions, such as navigation restrictions).

¹ Directive (EU) 2017/2108 of the European Parliament and of the Council of 15 November 2017 amending Directive 2009/45/EC on safety rules and standards for passenger ships (OJ L 315, 30.11.2017, p. 40–51).

² COM(2015)508.

The proposed safety goals and functional requirements for small passenger ships below 24 m in length provide for recommended principles for the safety of these vessels that would, if embraced by Member States and further developed, pave the way for a more common approach as regards safety for small passenger ships operating on domestic voyages within EU waters.

This new approach, based on performance rather than prescriptive requirements, would leave a degree of freedom to adjust for local circumstances where necessary and promote innovative designs. It also better reflects the wide variety of designs, materials and operation of small passenger ships, which are more sensitive to local operational conditions.

The proposal therefore seeks to invite Member States to embrace the recommended performance based safety approach for small passenger ships.

- **Consistency with existing policy provisions in the policy area**

The proposal is fully consistent with Directive (EU) 2017/2108, particularly its recital 8 where the co-legislators invited the Commission to adopt guidelines for small passenger ships as soon as possible, so Member States can take them into account when determining their own national safety standards. Such guidelines should take into consideration any international agreements and conventions by the International Maritime Organization (IMO), as appropriate, and should avoid introducing additional requirements that go beyond existing international rules. The objective is to pave the way for a more common approach as regards safety for small passenger ships operating on domestic voyages within EU waters.

The proposal is fully in line with the REFIT fitness check recommendations on developing guidelines or standards for small vessels, based on functional requirements as part of a goal based standard framework. The recommendation builds primarily on experiences gained and lessons learned at international level in the framework of IMO.

- **Consistency with other Union policies**

The proposal delivers on the Commission's Better Regulation agenda by ensuring that the EU action is necessary, adds value and keeps pace with evolving political, societal and technological developments. It also delivers on the goals of the 2018 Maritime Transport Strategy³ by ensuring, among others, quality ferry services in regular intra-EU passenger transport.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Article 292 of the Treaty on the Functioning of the European Union (TFEU), according to which the Council adopts recommendations acting on a proposal from the Commission, in conjunction with Article 100 (2) TFEU which foresees measures related to sea transport.

- **Subsidiarity (for non-exclusive competence)**

This initiative aims at facilitating the transfer of ships between national registers and allowing for the competition to take place on equal footing, without compromising the safety level. It also provides for a recommended common safety level at the EU for small passenger ships

³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategic goals and recommendations for the EU's maritime transport policy until 2018 (COM/2009/0008).

operating on domestic voyages within EU waters. Neither of these objectives could be achieved by unilateral action at the level of Member States.

- **Proportionality**

The recommendation provides Member States with a non-binding benchmark on safety level of small passenger ships, which, should Member States decide to guide themselves by the common safety goals and functional requirements, would send a clear signal on the internal market potential and could be further built upon. The REFIT fitness check recommended the performance based standards framework for small passenger ships as the only regulatory approach that would be proportionate and generate EU added value. This approach leaves a degree of freedom to adjust for local circumstances where necessary and promotes innovative designs.

- **Choice of the instrument**

In view of the novelty of the proposed approach, its uptake by EU Member States is key to its success. Therefore, the proposed safety goals and functional requirements are put forward to Member States as an inspiration and guidance. This initiative takes the form of a Commission Proposal for a Council Recommendation, to seek the endorsement of the proposed approach by the Council in a non-binding instrument.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

This initiative follows on the recommendations of the fitness check driven by the Commission's Regulatory Fitness and Performance (REFIT) Programme. The fitness check showed that the key objectives of the EU passenger ship safety legislation related to passenger safety and internal market remain highly relevant. However, among others it also identified a number of substantial issues, including the possibility to develop harmonised standards for ships built from non-steel or equivalent materials, currently not covered by the EU regulatory framework. Results of the fitness check and the corresponding follow-up actions were described in the Commission's report.

- **Stakeholder consultations**

The proposed safety goals and functional requirements for small passenger ships (the Small Passenger Ship Guide)⁴ have been developed with national experts and stakeholder organisations in the framework of the Passenger Ship Safety (PSS) Expert Group, which has been enlarged for this purpose to include stakeholder observers. The technical work has been coordinated by the European Maritime Safety Agency, which organised a specific workshop on 13 November 2017 in addition to the regular meetings of the PSS Expert Group and coordinated a correspondence group set up for this purpose.

While the large majority of experts from national competent authorities and stakeholder organisations have been supportive to this initiative, there were some questions on the need for and value added of this initiative. The overview of and feedback provided to these questions is reported in the accompanying Staff Working Document.

⁴ Initially developed under the working title "Small Craft Code".

Furthermore, an online consultation was organised between July and November 2017⁵. This consultation was targeted at economic operators involved in building of and trading with passenger ships below 24 meters in length, such as shipyards, designers, owners and operators thereof. All other stakeholders could contribute to this consultation as they felt fit. This consultation was launched to collect views of economic operators, especially the small and very small ones, on the extent to which common EU rules for small passenger ships could facilitate the internal market with small passenger ships. The consultation also aimed at gathering anecdotal evidence in support thereof. It complemented the above mentioned consultation with national authorities and stakeholders that focused on the technical development of the safety goals and functional requirements themselves.

Overall, the results have shown that this initiative is strongly supported by economic operators (as well as a few national administrations who also submitted their replies or positions) and that common EU safety rules for small passenger ships are seen to have very positive or positive impact on establishing and facilitating internal market with these vessels, increasing competition and possibly also innovation on the market. In their general comments the respondents stressed that any common EU rules should be based on existing practices and should be sufficiently flexible to allow for local operating conditions and expertise to be well reflected.

In view of the novelty of the recommended approach, the adoption of common EU rules has been considered premature. Further development of common performance based safety framework for small passenger ships would necessitate to identify and assess, jointly with the Member States and stakeholders, how this could be done at the EU level and impacts thereof.

- **Collection and use of expertise**

Concerning the data on the fleet and accidents, this initiative builds on the data collected during the REFIT fitness check process and reported in the Commission Staff Working Document 'Adjusting course: EU Passenger Ship Safety Legislation Fitness Check', adopted in 16 October 2015⁶. Findings of external study carried out in support of the fitness check have also been used⁷, as well as the results of the previous work on this issue. The European Maritime Safety Agency (EMSA) provided the key technical assistance in this process, including an overview of the most relevant existing practices for these ships.

- **Impact assessment**

The proposal does not define any specific safety standards or procedures and is therefore not expected to have any direct significant impacts or policy alternatives that could be assessed ex-ante. The recommended safety goals and functional requirements have been developed on the basis of existing practices and jointly with Member States' experts and stakeholder organisations. At this stage, they are put forward to Member States as an inspiration and guidance, to demonstrate that a more common approach to the safety of passenger ships is feasible. In no case they are intended to be applied in a mandatory manner.

The proposal is accompanied by a Commission Staff Working Document that describes the relevant existing practices and reports on the stakeholder input. Should the Commission

⁵ Consultation website: <https://ec.europa.eu/info/consultations/targeted-consultation-safety-goals-and-functional-requirements-small-passenger-ships>.

⁶ SWD(2015)197.

⁷ Tractebel, 2015. Support Study for the Fitness Check (FC) – Evaluation of Passenger Ship Safety Legislation (published at the EU bookshop: <https://publications.europa.eu/en/web/general-publications/publications>)

decide in the future to follow-up on this initiative with the development of specific safety standards or procedures, an impact assessment will be carried out.

- **Regulatory fitness and simplification**

This initiative is based on the so-called performance based standards framework that has been identified in the REFIT fitness check as the only regulatory approach that would be proportionate and generate EU added value. Should Member States decide to guide themselves by the common safety goals and functional requirements for this type of ships at EU level, this would send a clear signal on the internal market potential that could be further built upon.

Given that this initiative does not, at this stage, aim at defining any specific safety standards or procedures and given that its uptake will be left entirely to the decision of Member States, it is not expected to have any immediate quantifiable savings and benefits. Such impacts would be quantified in case this initiative is successfully taken up and further developed.

- **Fundamental rights**

The proposal has no consequences for the protection of fundamental rights

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

No reporting arrangements are foreseen.

- **Explanatory documents (for directives)**

Explanatory documents are not required for this type of initiative.

- **Detailed explanation of the specific provisions of the proposal**

As regards the scope of the proposed safety goals and functional requirements (the Small Passenger Ship Guide), the aim is to cover all small passenger ships below 24 m in length, irrespectively of the material they are built from. The Small Passenger Ship Guide has been inspired by the existing performance based regulatory approaches and corresponds to the first two tiers of the goal based standard model of the International Maritime Organization and the experience with its application.

The structure of the proposed Small Passenger Ship Guide follows the safety categories and sub-categories in existing maritime conventions and codes, i.e. safety category (Chapter) and safety sub-category (Regulation), including (a) functional requirement; (b) hazard addressed; and (c) performance requirement.

The experience has shown that defining a separate layer of goals for each specific functional requirement proved to have relatively little added value. Accordingly, in the Small Passenger Ship Guide, the goals and functional requirements have been merged. Nonetheless, and on the basis of the feedback from experts, a number of general goals have been designed for the Guide in its entirety (rather than for each requirement).

The functional requirements have been extracted from or inspired by existing sources and experiences at international as well as national level, including the 1974 SOLAS Convention, the ongoing work at the International Maritime Organization, national legislation of Sweden

as well as rules of ANEP 77. Where available, the same sources were used to establish the hazards addressed and the corresponding performance requirements. The wording of the functional requirements has been fine-tuned together with the experts, as described in detail in the accompanying Staff Working Document. In case of diverging views, the solution supported by the majority of experts has been retained.

Finally, the Small Passenger Ship Guide has been carefully worded to avoid, as much as possible, qualitative wording and specific technical solutions to avoid ambiguity and not to hinder innovation.

Proposal for a

COUNCIL RECOMMENDATION

on safety goals and functional requirements for passenger ships below 24 meters in length

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 and Article 100(2) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Directive (EU) 2017/2108 of the European Parliament and of the Council⁸ which was adopted on 15 November 2017 excluded passenger ships below 24 meters in length ('small passenger ships') made of steel or an equivalent material from the scope of Directive 2009/45/EC of the European Parliament and of the Council⁹ following the recommendations of the Regulatory Fitness and Performance Programme (REFIT) fitness check on EU passenger ship safety legislation¹⁰. This amendment will be applicable from 21 December 2019.
- (2) The fitness check has shown that the prescriptive requirements of Directive 2009/45/EC which derived from the 1974 International Convention for the Safety of Life at Sea (the '1974 SOLAS Convention') have proven difficult to adapt to small passenger ships. In the absence of specific safety concerns and adequate standards provided by Directive 2009/45/EC, ships below 24 m in length have been therefore excluded from the scope of that Directive.
- (3) Small passenger ships are built mainly from materials other than steel and the vast majority of this fleet was therefore already certified under national legislation. Member States have different approaches to regulating the safety of small passenger ships, which leads to differences in safety rules and standards. Such divergence constitutes an important challenge especially for smaller ship-owners in the Union, who rely on the second hand market of small passenger ships. This has been confirmed by the results of the open consultation, with the majority of respondents being micro or small enterprises. The consultation has shown that a more common approach to safety rules for small passenger ships could have a positive impact on the functioning of the internal market in this field.

⁸ Directive (EU) 2017/2108 of the European Parliament and of the Council of 15 November 2017 amending Directive 2009/45/EC on safety rules and standards for passenger ships (OJ L 315, 30.11.2017, p. 40).

⁹ Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (OJ L 163, 25.6.2009, p. 1).

¹⁰ COM(2015) 508.

- (4) An internal market for recreational craft has been established by Directive 94/25/EC of the European Parliament and of the Council¹¹, harmonising safety characteristics of recreational craft in all Member States and removing thereby obstacles to trade therein between Member States. This is not the case for small passenger ships.
- (5) The fitness check recommended a performance standards framework as the only approach that could be proportionate and could generate added value at Union level. Such approach would leave a degree of freedom to adjust to local circumstances, where necessary, and promote innovative designs, subject to verification that the required safety level is met. In comparison to a prescriptive regulatory framework, it would better reflect the wide variety of designs, materials and operation of small passenger ships, as well as the fact that Member States are better placed to assess the local limitations on navigation for small passenger ships in terms of distance to coast or port and weather conditions.
- (6) The safety goals and functional requirements annexed to this Recommendation are based on such performance standards framework, as well as the existing international, Union and national experience. They have been developed jointly with Member States' experts and stakeholders and could, if embraced by Member States and further developed, provide a reference for passengers sailing domestically on those ships in Union waters. They could facilitate access for Union manufacturers and operators to the wider Union market as well.
- (7) The present Recommendation includes safety goals and functional requirements which are better adapted to small passenger ships. Member States should therefore be invited to guide themselves by the safety goals and functional requirements annexed in this recommendation, in view of achieving a more common approach towards safety rules applicable to small passenger ships.

HAS ADOPTED THIS RECOMMENDATION:1. Member States are invited to pave the way towards a more common approach to safety rules for passenger ships below 24 meters in length ('small passenger ships') that operate on domestic voyages within the Union waters and are neither recreational craft as defined in Article 3(2) of Directive 2013/53/EU nor passenger ships falling within the scope of Article 3(1) of Directive 2009/45/EC, as amended by Directive (EU) 2017/2108 and applicable from 21 December 2019.

2. To that effect it is recommended that, from 21 December 2019, Member States:
 - (a) guide themselves, where relevant, by the safety goals and functional requirements for small passenger ships expressed in the Annex;
 - (b) support further development of the goals and requirements referred to in point (a) within the performance based framework, including the identification and assessment of alternative forms of their verification and implementation;
 - (c) encourage the involvement of stakeholders in such process.
3. This Recommendation does not interfere with the right of Member States to define safety rules applicable to small passenger ships referred to in point 1.

¹¹ Repealed and replaced by Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft (OJ L 354, 28.12.2013, p. 90).

Done at Brussels,

*For the Council
The President*