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NOTE

From:	General Secretariat of the Council
To:	Delegations
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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2009/21/EC on compliance with flag State requirements

In view of the Shipping Working Party meeting on 27 September 2023, delegations will find attached a revised Presidency compromise proposal.

New text compared to the initial Presidency compromise proposal (12982/23) is marked in **bold underline** (new text) and ~~strikethrough~~ (deleted text).

General scrutiny and language reservation: all delegations.

Parliamentary scrutiny reservation: DK.

2023/0172 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/21/EC on compliance with flag State requirements

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

[for the recitals (1) - (23), please refer to document WK 11940/23]

¹ OJ C , , p. .

² OJ C , , p. .

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2009/21/EC

Directive 2009/21/EC is amended as follows:

(-1) In Article 1, points **(a) and** (b) of paragraph 1 ~~is~~**are** replaced by the following:

‘(a) to ensure that Member States effectively and consistently discharge their responsibilities and obligations as flag States; and

(b) to enhance safety and prevent pollution from seagoing ships flying the flag of a Member State with regards to the applicable IMO Conventions and EU legislation.’

(0) Article 2 is replaced by the following:

‘Article 2

Scope

This Directive shall apply to the administration of the State whose flag the ship is flying, for ships subject to certification and engaged in international voyages.’

(1) Article 3 is amended as follows:

(a) point (a) is replaced by the following:

‘(a) ‘ship’ means a ship or craft flying the flag of a Member State falling within the scope of the relevant IMO Conventions under the scope of the III-Code, and for which a certificate is required;’

(b) point (e) is replaced by the following:

‘(e) ‘IMO audit’ means an audit conducted in accordance with the provisions of Resolution A 1067(28) (“Framework and Procedures for the IMO Member State Audit”), in its up-to-date version, adopted by the International Maritime Organisation (IMO);’

(c) the following points are added:

‘(f) ‘Conventions’ means the Conventions, with the Protocols and amendments thereto **making the use of the III-Code mandatory**, and **the** related codes of mandatory status, in their up-to-date version, ~~as defined in Part 1, paragraph 6 of the Resolution A.1070(28) (“IMO Instrument Implementation Code”)~~ in its up to date version;

- (g) ‘III-Code’ means Resolution A.1070(28) (“IMO Instruments Implementation Code”), adopted by the International Maritime Organisation (IMO), ~~part 1—limited to paragraphs 1, 2 and 6 and part 2 with the exception of paragraphs 16.1, 18, 19, 20, 21, 29, 30, 31, 32, 34, 38, 39, 40 and 41, in its up to date version;~~
- (h) ‘flag State surveyor’ means a public-sector employee, duly authorised by and working exclusively for the competent authority of a Member State ~~without prejudice to the national legislation in matters of employment compatibility,~~ responsible for or performing surveys, verifications and audits on ships and companies covered by the relevant international mandatory instruments and fulfilling the independence requirement specified in Article 8(1). **A surveyor nominated by a recognized organization may perform the same tasks indicated herein when so authorised by the flag state;**
- (i) ‘flag State inspector’ means:
- i. a public-sector employee, working exclusively for and duly authorised by the competent authority of a Member State ~~without prejudice to the national—legislation in matters of employment compatibility or~~
- ii. a person non-exclusively employed, authorised **by the competent authority of a Member State** on an ad hoc basis ~~by the Member State~~ **or in a contractual situation with the competent authority of the Member State, and duly authorised by the competent authority of the Member State**
- who may carry out periodic flag State inspections, and who fulfils the qualification and independence requirements specified in Article 8(1);

- (j) ‘other personnel assisting in the performance of surveys’ means a person not exclusively employed by, but **authorised on an ad hoc basis by the Member State or** in a contractual situation with the competent authority of the Member State, and duly authorised by the competent authority of the Member State who may assist flag state surveyors when carrying out surveys, specified by the competent authority, and who fulfils the criteria of communication, qualification and independence specified in Article 8(1);
- (k) ‘periodic flag State inspection’ means an inspection ~~to verify continuous compliance of the ship with the international rules and regulations of the instruments under the scope of the III Code, not leading to certification~~ **to secure observance of the Conventions by ships entitled to fly its flag and by entities and persons under its jurisdiction so as to ensure compliance. When the inspection is not carried out on board it shall ensure the same safety and environmental protection level;**
- (j) ‘HSSC’ means Resolution A. 1156(32) (“Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), 2021, in its up-to-date version, adopted by the International Maritime Organisation (IMO);’

(2) In article 4, paragraph 1 is replaced by the following:

‘1. Prior to allowing a ship to operate, which has been granted the right to fly its flag, the Member State concerned or the RO acting on its behalf shall take the measures it deems appropriate to ensure that the ship in question complies with the applicable international rules and regulations. In particular, it may verify the safety records of the ship using, where available, the inspection reports and certificates contained in its own database or, as applicable, in the database referred to in article 6a. It shall, if necessary, consult with the losing flag State in order to establish whether any outstanding deficiencies or safety issues identified by the latter remain unresolved.’

(3) The following Articles 4a to 4c are inserted:

Article 4a

Safety of ships flying the flag of a Member State

1. In respect of international shipping Member States shall apply in full the mandatory flag State related provisions laid down in the ~~IMO-Conventions under the scope of the III-Code in accordance with the conditions and in respect of the ships referred to therein and shall apply the III-Code~~ **as defined in article 3**, paragraphs 1, 2 and 6 of part 1 and ~~part 2 with the exception of paragraphs 16.1, 18, 19, 21, 29, 30, 31, 32, 34, 38, 39, 40 and 41.~~

2. Member States shall take all necessary measures to ensure compliance with international rules, regulations and standards related to the Conventions ~~falling under the scope of the III-Code~~ by ships entitled to fly their flag. Those measures shall include, in addition, the following:

- (a) (deleted);
- (b) ensuring that ships entitled to fly their flag have been surveyed in accordance with the survey guidelines under the Harmonized System of Survey and Certification (HSSC); and following its annexes as far as deemed necessary; and,
- (c) ~~on a risk-based approach, taking into account any serious incidents, accidents and generic performance criteria, carry out periodic flag State inspections of ships to verify that the actual condition of the ship is in conformity with the certificates it carries.~~ **These inspections may be carried out using a risk-based approach, using criteria such as:-**
 - i. reports of very serious accidents**
 - ii. inspection following a detention or prohibition of operation issued by the Port State Control**
 - iii. inspection exceeding a Port State Control deficiency ratio established by each Member State**
 - iv. records of inspections carried out according to national legislation as deemed appropriate by each Member State.**

Member States may depart from the risk based approach and carry out periodic flag state inspections using their own procedures and instructions in compliance with the IIICode

3. Member States shall ensure that any deficiencies confirmed or revealed by an inspection carried out in accordance with paragraph 2(c) are rectified **in an appropriate timeframe, as determined by the flag State.**
4. On completion of ~~any~~ **a periodic** inspection carried out, the flag State inspector shall draw up a report providing relevant information and outcome of verification of compliance with the Conventions ~~excluding any reference to port State inspections.~~

Article 4b

Safety and pollution prevention requirements

1. Each Member States shall ensure that its administration relies on appropriate resources, whether its own or ~~outsourced~~ **delegated**, according with the size and type of its fleet and its performance **with respect to the implementation of administrative processes, procedures and resources necessary**, in particular, for meeting the obligations provided for in Article 4a and paragraphs 2 and 3 of this Article.
2. Each Member State shall ensure the oversight of the activities of flag State surveyors, flag state inspectors, other personnel assisting in the performance of surveys and recognised organisations.
3. Each Member State shall develop or maintain a design review and technical decision-making capability whether its own or ~~outsourced~~ **delegated**, according with the size and type of its fleet.
4. In order to ensure harmonisation of the periodic flag State inspections referred to in Article 4a(2) point (c), the Commission, after agreeing with the expert group on flag State matters referred to in Article 9a(1), shall adopt implementing acts may adopt recommendations to define the uniform measures to determine the minimum requirements for the implementation of the obligations provided for by paragraph 1.'

Article 4c

Common capacity building of flag State personnel

1. The personnel responsible for or performing surveys, inspections and audits on ships and companies shall undergo training relevant for the specific activities carried out by the flag State surveyors and inspectors.

2. The Commission, with the agreement of the expert group on flag State matters referred to in Article 9a(1), may develop a non-mandatory capacity building scheme and keep it updated, considering new technologies and in relation to new or additional obligations arising from the ~~relevant international instruments referred to in the III Code~~ **Conventions**, for Member States flag State surveyors and inspectors. **Compliance with this scheme shall be voluntary.** By no means it shall restrict the capacity of Member States to nominate and deem qualified its flag state surveyors and inspectors.

(4) Article 5 is amended as follows:

(a) the sole paragraph is numbered as paragraph 1.

(b) the following paragraph 2 is added:

‘2. Member States shall develop and implement an appropriate control and monitoring programme for providing a timely response to situations in paragraph 1 of this Article ~~as well as safety incidents and alleged pollution.~~’

- (5) Article 6 is replaced by the following:

Article 6

Electronic information and exchange

1. Member States ~~shall cooperate in the development of electronic information and exchange. They~~ shall ensure that at least the following information concerning ships flying their flag is made accessible in an electronic format:
- (a) particulars of the ship (name, IMO number, etc.);
 - (b) date of validity of statutory certificates (full, or interim ~~or temporary~~);
 - (c) identification of the recognised organisations involved in the certification of the ship;
 - (d) (deleted);
 - (e) (deleted);
 - (f) identification of ships which have ceased to fly the flag of the Member State concerned during the previous 12 months
 - (g) (deleted).

~~2. The information shall be communicated to the inspection database provided for in Article 6a for those member states willing to use the database.~~

3. Landlocked Member States which have no ships flying their flag that fall under the scope of certification indicated in this directive are exempted from the implementation of this article.’

(6) The following Article 6a is inserted:

‘Article 6a

Inspection database

1. The Commission **with the agreement of the expert group on flag State matters referred to in Article 9a(1)** shall develop, maintain and update an inspection database containing the information specified in Article 6. Member States may connect to that database. That database shall be based on the inspection database referred to in Article 24 of Directive 2009/16/EC and shall have similar functionalities to that database.

2. **Without prejudice to national data protection requirements,** Member States ~~when using that~~ **expressing their interest to use the inspection** database ~~to exchange and transfer information,~~ shall:

- a) ~~ensure that~~ **communicate** the information contained in Article 6 ~~will be made compatible and interoperable with the Union maritime safety databases;~~ and
- b) ~~ensure that~~ **as an option, transfer to the inspection database** the information related to inspections carried out in accordance with this Directive, ~~[including information concerning deficiencies~~ **and certificates**~~], is transferred to the inspection database compatible and interoperable with Union maritime safety.~~

ensuring that the information is compatible and interoperable.

2.bis. Member States may use their own databases to collect the information referred to in Article 6. The information shall be communicated to the inspection database provided by Commission at least on a yearly basis. Commission shall ensure the transfer the information from Member States database and be responsible to integrate the data in the inspection database.

3. The Commission shall ensure that the inspection database makes it possible to retrieve any relevant data concerning the implementation of this Directive based on inspection data provided by Member States.

4. Member States ~~using~~ **expressing their consent to use** the database shall have access to all the information recorded in the inspection database referred to in paragraph 1 of this Article and the inspection system provided for in Directive 2009/16/EC. Nothing in this Directive shall prevent the sharing of such information between relevant competent authorities within and between Member States, with the Commission or with the European Maritime Safety Agency (EMSA) established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council³.

5. Member States ~~using~~ **expressing their consent to use** the database shall ensure that the date of validity of the Statutory certificates referred to in Article 6(1) paragraph b, is transmitted electronically to the inspection database referred to in paragraph 1 of this Article using the functional and technical specifications for a harmonised electronic reporting interface provided for in Article 24a of Directive 2009/16/EC.

[6. Landlocked Member States which have no ships flying their flag that fall under the scope of certification indicated in this directive are exempted from the implementation of this article.]'

(7) Article 7 is replaced by the following:

³ Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ L 208 5.8.2002, p. 1).

'Article 7

Monitoring of compliance and performance of Member States

1. Member States shall take the necessary measures to undergo the IMO audit of their administration at least once in **according to** the cycle agreed ~~adopted~~ at the IMO ~~subject to a positive reply from the IMO to a timely request of the Member State concerned, and may publish the outcome of the audit as well as any corrective actions in the Global Integrated Shipping Information System (GISIS) database set up by the IMO. Member States may also make the same information available to the public, in accordance with relevant national legislation on confidentiality.~~
2. ~~Upon request of the Commission on a case by case basis Member States may allow that the Commission, assisted by EMSA, participates as an observer in the IMO auditing process and, when agreed by the Member State, that any Audit report and the information on subsequent action taken is immediately made available to the Commission.~~
3. In order to ensure the effective implementation of this Directive and to monitor the overall functioning of flag State compliance **with the Administration legal duties pursuant to this directive** the Commission shall collect the necessary information when carrying out visits to Member States,'

(8) Article 8 is amended as follows:

(a) paragraph 1 is replaced by the following:

‘Each Member State shall implement and maintain a quality management system covering all ~~registers~~ **flags** under its authority for the operational parts of the flag State-related activities of its administration. Such quality management system shall be certified in accordance with the applicable international quality standards such as ISO 9001 standards.

The quality management system shall include defined responsibilities, authority and interrelation of ~~all~~ flag State personnel **in accordance with Article 4c paragraph 1**, ~~including other personnel assisting in the performance of inspections~~ who manage, perform and verify work relating to and affecting **the flag state obligations of the applicable Conventions**. Such responsibilities shall be documented, specifying what type and scope of inspection work that may be performed **also** ~~by other personnel assisting in the performance of inspections~~ **non-exclusively employed flag state inspectors**, and also specify how such personnel shall communicate and report. **The quality management system shall indicate the tasks that can be carried out by other personnel assisting in the performance of surveys.**

Each Member State shall ensure that flag state inspectors non-exclusively employed and other personnel assisting in the performance of inspections have education, training and supervision commensurate with the tasks they are authorized to perform and can apply flag state instructions, procedures and criteria.

Member States shall take appropriate measures ~~and guarantees~~ to prevent conflicts of interests of all personnel performing a survey, **verification** or an inspection and is independent in relation to the work to be performed.

Three years after the date of transposition of this directive the quality management system shall cover the aspects related to this article.’

(b) the following paragraphs are added:

2a. (deleted)

2b. In order to develop a common harmonised performance scheme, the Commission, after consulting the expert group on flag State matters referred to in Article 9a(1), may adopt recommendations to define the details for such scheme, which will not be mandatory.

2c. (deleted)

(9) Article 9 is deleted.

(10) The following new Articles are inserted:

Expert group on flag State matters

1. The Commission shall establish an expert group on flag State matters for discussing flag State issues and facilitate exchanges of experience between the Member States' national **competent** authorities, flag State experts and inspectors, ~~including as appropriate those from the private sector.~~

The ~~high level~~ **expert** group on flag State matters shall be composed of representatives of the Member States and of the Commission, assisted by EMSA.

It shall adopt its rules of procedure.

2. The expert group on flag State matters shall have the following tasks, inter alia:

(a) make recommendations for a common approach to flag State inspections; procedures and guidelines for the control of ships;

(b) **(deleted)**

(b.bis) develop a ~~risk-based approach~~ **harmonized recommendations** for carrying out periodic flag **State** inspections as referred to in Article 4a.2(c);

(c) develop a **voluntary** methodology to help to determine appropriate resources, adequate to the size and type of fleet, referred to in Article 4b;

~~(d) identify measures that may be developed in order to improve the capacity building referred to in Article 4c, in particular as regards keeping up to date knowledge about changes in conventions and emanating due to new technologies;~~

(d.bis) with the agreement of the expert group on flag State matters develop the inspection database referred to in Article 6a including matters related to compatibility and interoperability for those Member States expressing their consent to use the database

- (e) (deleted);
- (f) (deleted);
- (g) develop recommendations for the performance criteria referred to in Article 8(2b);
- (h) (deleted);
- (i) assist in analysing flag State performance, with a view to identifying best practices;
- ~~(j) assist the Commission in identifying measures that may be developed in order to establish harmonised interpretations of issues left to the discretion of the administrations in the Conventions;~~

Article 9b

Information and data

The Commission, ~~shall use~~ **using** existing relevant union maritime databases, **shall stablish** **an electronic reporting tool** for the purposes of gathering information and data from the Member States in relation to this Directive. Member States shall periodically, and at least once a year, ~~inform~~ **provide** the Commission, ~~about~~: **the information necessary for the discussions of the expert group referred to in the relevant paragraphs under article 9a.**

~~(a) — administering safety and pollution prevention requirements~~

~~(i) — size and age of flagged fleet in terms of number and gross tonnes of conventional ships; —~~

~~(ii) — (deleted); —~~

~~(iii) — (deleted);~~

~~(iv) — the number of ships flagging in and flagging out by type of ship and by originating country or destination country;~~

~~(b) — (deleted) —~~

~~(c) — delegation of authority~~

~~(i) — Recognised Organisations authorised, functions delegated and certificates issued on behalf of the Member State~~

Member States may not submit data when national data protection requirements do not allow them to do so.

'Article 9c

Derogations

~~Landlocked~~ Member States which have closed their national register or have no ships flying their flag that fall within the scope of this Directive may derogate from the provisions of this Directive as long as the above mentioned requirements are fulfilled. Any Member State that intends to avail itself of that derogation shall notify the Commission at the latest on [to be defined]. Any subsequent change shall also be communicated to the Commission.'

- (11) Article 10 is replaced by the following:

'Article 10

Committee procedure

1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) established by Regulation (EC) No 2099/2002. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.'

(12) (deleted)

(13) (deleted)

(14) (deleted)

Article 2

Transposition

1. Member States shall adopt and publish, by [*OP: Please insert a date: **four** years from the date of entry into force of this amending Directive*] the laws, regulations and administrative provisions necessary to comply with this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

