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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	6 November 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Subject:	Proposal for a COUNCIL DECISION on the position to be adopted, on behalf of the European Union, in the International Maritime Organization during the 31st session of the IMO Assembly on the adoption of amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, Procedures for Port State Control, 2017 (resolution A.1119(30)) and the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30))

Delegations will find attached document COM(2019) 575 final.

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EUROPEAN
COMMISSION

Brussels, 6.11.2019
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Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, in the International Maritime Organization during the 31st session of the IMO Assembly on the adoption of amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, Procedures for Port State Control, 2017 (resolution A.1119(30)) and the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30))

EXPLANATORY MEMORANDUM

1. SUBJECT-MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union at the 31st session of the International Maritime Organization's Assembly that will take place in London from 25 November to 4 December 2019 in connection with the envisaged adoption of

- Amendments to the use and fitting of retro-reflective materials on Life-Saving Appliances;
- Procedures for port State control 2019; and
- Amendments to the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC Guidelines).

1. CONTEXT OF THE PROPOSAL

1.1. The Convention on the International Maritime Organization (IMO)

The Convention on the International Maritime Organization (IMO) ('the Agreement') establishes the IMO, the purpose of which is to provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade, and to encourage the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships, promoting a level playing field; and to deal with related administrative and legal matters.

The agreement entered into force on 17 March 1958.

All Member States are parties to the Agreement.

1.2. The International Maritime Organization

The International Maritime Organization (IMO) is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships. It is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.

All Member States are members of the IMO. The European Commission has held an observer status in the International Maritime Organisation (IMO) since 1974 on the basis of "an Arrangement for Co-operation and Collaboration between the Inter-Governmental Maritime Consultative Organisation (IMCO)[1] and the Commission of the European Communities on matters of mutual interest to the parties".

[1] The name was changed in 1982 to International Maritime Organization (IMO).

Membership in the Organization is open to all States. The Assembly consists of all the Members. Regular sessions of the Assembly take place once every two years. The Assembly is the governing body of the IMO. The Assembly determines the work program and votes on the budget to which all Members contribute. Furthermore, the Assembly can recommend to Members for adoption regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment assigned to the Organization by or under international instruments, or amendments to such regulations and guidelines which have been referred to it. A majority of the Members other than Associate Members shall constitute a quorum for the meetings of the Assembly.

1.3. The envisaged acts of the IMO Assembly

On 25 November to 4 December 2019, during its 31st session (A 31), the IMO Assembly is to adopt:

Amendments to the use and fitting of retro-reflective materials on Life-Saving Appliances;

Procedures for port State control 2019; and

Amendments to the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC Guidelines).

The purpose of the envisaged acts respectively are to:

1. update the current means of weather testing the materials by deleting an outmoded and rarely used carbon arc device;

2. update the current 2017 procedures for port State control by including reference to those measures adopted subsequently by IMO bodies (the 30th session of the IMO Assembly, the 72nd, 73rd and 74th sessions of the Marine Environment Protection Committee and the 99th 100th and 101st session of the Maritime Safety Committee) as well as amending specific appendices 8 and 11 and inserting a new appendix 18; and

3. update the Survey guidelines to reflect recent amendments to mandatory instruments, primarily the Ballast Water Management Convention, but also certain elements in SOLAS and MARPOL, such as respectively special category spaces in passenger ships and statements of compliance with fuel oil consumption.

2. POSITIONS TO BE ADOPTED ON BEHALF OF THE UNION

2.1. Amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances.

The 101st session of the Maritime Safety Committee (MSC 101) recalled that at its previous session, having considered document MSC 100/19/4 submitted by EU Member States and the Commission, proposing amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on life-saving appliances, the Committee had agreed to the deletion of the words "carbon arc" in paragraph 4.10 and had requested the IMO Secretariat to prepare a relevant draft Assembly resolution for approval at MSC 101, with a view to submission to A

31 for adoption (MSC 100/20, paragraphs 19.14 and 19.15). Views were expressed that deletion of the term might render the provision too vague.

The Committee, having noted the possibility that relevant proposals may be submitted to A 31 addressing the above-mentioned concern, approved the draft Assembly resolution on Amendments to the use and fitting of retro-reflective materials on life-saving appliances (resolution A.658(16)).

The amendments to resolution A.658(16) on the Use and fitting of retro-reflective materials on life-saving appliances are set out in Annex 27 to IMO Document MSC 101/24. Paragraph 14.41 of the MSC 101 report (MSC 101/24) indicates that the amendments are foreseen to be adopted at the 31st session of the IMO Assembly (A.31).

2.2. Amendments to Procedures for Port State Control, 2017 (resolution A.1119(30))

The IMO Procedures for Port State Control 2017 (resolution A1119(30)) contains guidelines on particular subjects as appendices to the main document. At the 5th session of the Sub Committee on the Implementation of IMO Instruments (III 5), revisions of the Procedures for Port State Control, notably as regards Appendix 2 on Guidelines on the detention of ships, were agreed (see IMO document III 5/15 para 5.34) and were to be further developed intersessionally, with a view to submission of a draft Procedures for Port State Control, 2019, together with a draft resolution, to III 6 for consideration, prior to potential direct submission to A 31 for consideration with a view to adoption, subject to approval by the Committees.

At the 101st session of the Maritime Safety Committee (MSC 101), the Committee noted the referral by III 5 of draft amendments to appendix 8 (Guidelines for PSCOs on the ISM Code) and appendix 11 (Guidelines for PSCOs on certification of seafarers, manning and hours of rest) of the Procedures for Port State Control, 2017 (resolution A.1119(30)) to the 6th session of the Sub Committee on the Human Element, Training and Watch-keeping (HTW 6) for technical review and advice to III 6. MSC 101 agreed that the relevant outcome of HTW 6 be referred to III 6 for consideration when preparing the draft Assembly resolution on Procedures for Port State Control, 2019. The Committee then authorised III 6 to report the outcome of its work directly to the 31st session of the Assembly (A.31) for adoption by that Assembly (see IMO document MSC 101/24, para 10.15.3).

III 6 reviewed and finalised amendments to the above mentioned appendices 7 and 11 and at the request of MEPC 74 included a new appendix 18 "resolution MEPC.321(74) on 2019 Guidelines for port State control under MARPOL Annex VI chapter 3", which is related to the 2020 sulphur cap and the prohibition on the carriage of non-compliant fuel oil for combustion purposes for propulsion or operation on board a ship from 1 March 2020. It updated Appendix 19 on the List of instruments relevant to port State control procedures to reflect developments subsequent to the Procedures for Port State Control 2017.

III 6 endorsed the amendments to the Procedures to Port State Control 2017 and authorised it to be forwarded to A31 for adoption. The revision of resolution A.1119(30) on Procedures for Port State Control are set out in Annex XX to IMO Document III 6/15. Paragraph XX of the III 6 report (III 6/15) indicates that the amendments are foreseen to be adopted at the 31st session of the IMO Assembly (A.31).

2.3. Amendments to the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC) (resolution A.1120(30))

At the 5th session of the Sub Committee on the Implementation of IMO Instrument (III 5), the Sub Committee recalled that at its previous session it had established the Correspondence Group on the Review of the Survey Guidelines under the HSSC and the Non-exhaustive List of Obligations under Instruments Relevant to the IMO Instruments Implementation Code (III Code) to continue updating the Survey Guidelines to include the requirements deriving from amendments to relevant IMO instruments entering into force up to and including 31 December 2019, with a view to submission of draft amended Survey Guidelines under the HSSC to A 31 for adoption. These amendments include for SOLAS, special category spaces in passenger ships and for MARPOL, statements of compliance with fuel oil consumption in relation to GHG data collection. At the following 101st session of the Maritime Safety Committee (MSC 101), the Committee having noted the outcome of III 5, and determined some outstanding issues, then authorised III 6 to report the outcome of its work directly to the 31st session of the Assembly (A.31) for adoption by that Assembly (see IMO document MSC 101/24, para 10.15.1).

III 6 considered the amendments to the HSSC Guidelines and authorised them to be forwarded to A31 for adoption. The amendments to resolution A.1120(30) on the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC) are set out in Annex XX to IMO Document III 6/15. Paragraph XX of the III 6 report (III 6/15) indicates that the amendments are foreseen to be adopted at the 31st session of the IMO Assembly (A.31).

2.4. Relevant EU legislation and EU competence

2.4.1. Amendments to the use and fitting of retro-reflective materials on Life-Saving Appliances

Retro-reflective materials on life-saving appliances concern marine equipment that falls under the scope of Directive 2014/90/EU of the European Parliament and of the Council of 23 July 2014 on marine equipment and repealing Council Directive 96/98/EC[2]. Retro-reflective materials are object of the provisions included in Commission Implementing Regulation (EU) 2018/773 of 15 May 2018 on design, construction and performance requirements and testing standards for marine equipment and repealing Implementing Regulation (EU) 2017/306[3]. In particular, reference is made in that Implementing Regulation to IMO resolution A.658(16) on "Use and fitting of retro-reflective materials on life-saving appliances". Any amendments to the IMO resolution and its successors will therefore have a direct effect on the Regulation's requirements.

2.4.2. Amendments to Procedures for Port State Control, 2017 (resolution A.1119(30))

Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control[4] (PSC Directive) concerns the enforcement, in respect of ships using Union ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions.

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2 OJ L 257, 28 8.2014, p. 146
3 OJ L 133, 30.8.2018, p.1
4 OJ L 131, 28.5.2009, p. 57.

The objective of the PSC Directive is to reduce substandard shipping in the waters under the jurisdiction of the Member States. Certificates and documents, including record books, are checked by PSC officers. To be noted that the PSC Directive requires Member States to apply the Paris MoU Guidelines and does not refer to the IMO Guidelines, which are inspired by, but not necessarily the same as, the Paris MoU Guidelines. There is therefore EU competence in this field, but a legal effect of IMO PSC Guidelines on EU legislation is at best indirect.

2.4.3. Amendments to the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC) (resolution A.1120(30))

Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations[5] establishes measures to be followed by organisations entrusted with the inspection, survey and certification of ships for compliance with the international conventions on safety at sea and prevention of marine pollution, while furthering the objective of freedom to provide services. In the Annex to this Regulation, criterion B 7(k) states,

> *"the recognised organisation must ensure that*
>
> *the statutory surveys and inspections required by the harmonised system of survey and certification for which the recognised organisation is authorised are carried out in accordance with the provision set out in the Annex and Appendix to IMO resolution A.948(23) on survey guidelines under the harmonised system of survey and certification."*

Any amendments to the IMO resolution and its successors will therefore have a direct effect on the requirements of Regulation (EC) No 391/2009.

2.4.4. EU competence

The amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances will affect EU law through the application of Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (Recast)[6].

The application of Directive 2009/16/EC on port State control is based on the Procedures for Port State Control and instructions (guidelines) of the Paris Memorandum of Understanding (PMoU) as set out in Annexes 1 and VI respectively. The IMO procedures for port State control and its amendments may influence developments in PMoU guidelines and hence may have a direct effect on the application of the Directive 2009/16/EC.

The Survey Guidelines under the Harmonised System of Survey and Certification (HSSC) are a requirement under Regulation (EC) No 391/2009. Any amendment to the Survey Guidelines will affect EU law through the application of Regulation (EC) 391/2009.

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5 OJ L 131, 28.5.2009, p. 11.
6 OJ L 163, 25.6.2009, p. 1.

3. LEGAL BASIS

3.1. Procedural legal basis

3.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing 'the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.'

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement at issue.[7]

The notion of '*acts having legal effects*' includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are '*capable of decisively influencing the content of the legislation adopted by the EU legislature*'.[8]

3.1.2. Application to the present case

The IMO Assembly is a body set up by an agreement, namely the Convention on the International Maritime Organization.

The acts which the IMO Assembly is called upon to adopt constitute acts having legal effects. The envisaged acts are capable of decisively influencing the content of EU legislation, namely:

1. Directive 2009/45/EC on safety rules and standards for passenger ships. Article 6(2)(a)(i) of this Directive establishes that new passenger ships of Class A are to comply entirely with the requirements of the 1974 SOLAS Convention, as amended.

2. Directive 2009/16/EC on port State control. Article 15 requires Member States to ensure that their inspectors follow the procedures and guidelines specified in Annex VI. These guidelines are set by the PMoU. Amendments to the IMO Procedures for Port State Control 2017 may have a bearing on developments in the PMoU guidelines and hence have an effect on the application of this Directive. It should be noted that the IMO III Sub Committee discussed the amendments under the agenda item "Measures to harmonize port State control (PSC) activities and procedures world wide".

3. Regulation (EC) No 391/2009 on common rules and standards for ship inspection. The Survey Guidelines under the Harmonised System of Survey and Certification (HSSC) are a requirement under this Regulation. Annex I, criterion B7(k) states:

   "7. The recognised organisation must ensure that:

   (k) the statutory surveys and inspections required by the harmonised system of survey and certification for which the recognised organisation is authorised are carried out in accordance with the provision set out in the Annex and Appendix to IMO resolution

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7 Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraph 64.

8 Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraphs 61-64.

A.948(23) on survey guidelines under the harmonised system of survey and certification."

Therefore, amendments to the Survey Guidelines under the Harmonised System of Survey and Certification would affect EU law through the application of Regulation (EC) No 391/2009.

The envisaged acts do not supplement or amend the institutional framework of the Agreement.

The procedural legal basis for the proposed decision, therefore, is Article 218(9) TFEU.

3.2. Substantive legal basis

3.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is adopted on behalf of the Union. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

3.2.2. Application to the present case

The main objective and content of the envisaged act relate to sea transport. The substantive legal basis of the proposed decision, therefore, is Article 100(2) TFEU.

3.3. Conclusion

The legal basis of the proposed decision should be Article 100(2) in conjunction with Article 218(9) TFEU.

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on the position to be adopted, on behalf of the European Union, in the International Maritime Organization during the 31st session of the IMO Assembly on the adoption of amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, Procedures for Port State Control, 2017 (resolution A.1119(30)) and the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30))

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Convention on the International Maritime Organization (IMO) ('the Agreement') entered into force on 17 March 1958,

(2) Pursuant to Article 15(j) of the Agreement, the Assembly can recommend to Members for adoption regulations and guidelines concerning maritime safety, the prevention and control of marine pollution from ships and other matters concerning the effect of shipping on the marine environment assigned to the Organization by or under international instruments, or amendments to such regulations and guidelines which have been referred to it.

(3) The IMO Assembly, during its 31st session on 25 November – 5 December 2019 is to adopt amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, Procedures for Port State Control, 2017 (resolution A.1119(30)), and the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30)).

(4) It is appropriate to establish the position to be adopted on behalf of the Union in the IMO, as the adopted amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, Procedures for Port State Control, 2017 (resolution A.1119(30)) and the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30)) will be capable of decisively influencing the content of Union law, namely Directive 2009/45/EC of the European Parliament and of the Council on safety rules and

standards for passenger ships[9], Directive 2009/16/EC of the European Parliament and of the Council on port State control[10] and Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations[11].

(5) The 101st session of the Maritime Safety Committee (MSC 101), which took place in London 5-14 June 2019, recalled that at its previous session, having considered document MSC 100/19/4 proposing amendments to resolution A.658(16) on the use and fitting of retro-reflective materials on life-saving appliances, the Committee had agreed to the deletion of the words "carbon arc" in paragraph 4.10 and had requested the IMO Secretariat to prepare a relevant draft Assembly resolution for approval at MSC 101, with a view to submission to the 31st Assembly (A 31) for adoption (MSC 100/20, paragraphs 19.14 and 19.15). The Committee then approved the draft Assembly resolution on Amendments to the use and fitting of retro-reflective materials on life-saving appliances (resolution A.658(16)).

(6) The 5th session of the Sub Committee on the Implementation of IMO Instruments (III 5), which took place in London 24-28 September 2018, agreed to certain revisions of the Procedures for Port State Control 2017, notably as regards Appendix 2 on Guidelines on the detention of ships, were agreed, to be further developed intersessionally, with a view to submission of a draft Procedures for Port State Control, 2019, together with a draft resolution, to III 6, meeting in London 1-5 July 2019, for consideration, prior to potential direct submission to A 31 for consideration with a view to adoption, subject to approval by the Committees.

(7) At MSC 101, the Committee authorised III 6 to report the outcome of its work directly to the 31st session of the Assembly (A.31) for adoption by that Assembly. III 6 reviewed and finalised the amendments to the Procedures for Port State Control 2019 and, following a the request by the Marine Environment Protection Committee at its 74th session in London 13-17 May 2019, included a new appendix 18 "resolution MEPC.321(74) on 2019 Guidelines for port State control under MARPOL Annex VI chapter 3". III 6 endorsed the amendments to the Procedures to Port State Control 2017 and authorised them to be forwarded to A 31 for adoption.

(8) At III 5, the Sub Committee recalled that at its previous session it had established the Correspondence Group on the Review of the Harmonised Ship Survey and Certification (HSSC) Guidelines and the Non-exhaustive List of Obligations under Instruments Relevant to the IMO Instruments Implementation Code (III Code) to continue updating the Survey Guidelines to include the requirements deriving from amendments to relevant IMO instruments entering into force up to and including 31 December 2019, with a view to submission of draft amended Survey Guidelines under the HSSC to A 31 for adoption. At MSC 101, the Committee having noted the outcome of III 5, and determined some outstanding issues, then authorised III 6 to report the outcome of its work directly to the 31st session of the Assembly (A.31) for adoption by that Assembly. III 6 considered the amendments to the HSSC Guidelines and authorised them to be forwarded to A31 for adoption.

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9 OJ L 163, 25.6.2009, p. 1.
10 OJ L 131, 28.5.2009, p. 57.
11 OJ L 131, 28.5.2009, p. 11.

(9) The Union's position is to be expressed by the Member States of the Union that are members of the IMO, acting jointly in the interest of the Union.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted, on behalf of the Union, at the 31st session of the IMO Assembly shall be to agree to the adoption of amendments to:

(a) resolution A.658(16) on the use and fitting of retro-reflective materials on Life-Saving Appliances, as laid down in document MSC 101/24, Annex 27.

(b) Procedures for Port State Control, 2017 (resolution A.1119(30)) as laid down in document III 6/15 Annex XX; and

(c) the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC), (resolution A.1120(30)) Certification (HSSC), 2015 (resolution A.1104(29)), as laid down in document III 6/15 Annex XX.

Article 2

1. The position referred to in Article 1 shall be expressed by the Member States of the Union that are members of the IMO, acting jointly in the interest of the Union.

2. Minor changes to the position referred to in Article 1 may be agreed without further decision of the Council.

Article 3

This Decision shall enter into force on the date of its adoption.

Done at Brussels,

For the Council
The President