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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	29 April 2022
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2022) 202 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union, within the Port State Control Committee of the Paris Memorandum of Understanding on port State control regarding the membership of the Russian Federation of the organisation

Delegations will find attached document COM(2022) 202 final.

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EUROPEAN
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Proposal for a

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EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The EU regime on port State control (PSC) is set out in Directive 2009/16/EC (as amended). PSC in the Union is based on the structure of the Paris Memorandum of Understanding (Paris MOU) on Port State Control which has existed since 1982. Directive 2009/16/EC (as amended) incorporates the procedures and tools of the Paris MOU. All maritime EU Member States as well as Canada, Iceland Norway, the Russian Federation and the United Kingdom participate in the MoU. The European Union is not a member of the Paris MOU.

In order for PSC in the Union to function a certain number of decisions have to be taken each year in the context of the Paris MOU. These decisions are taken by consensus at the annual "Port State Control Committee" (PSCC) which meets in May of each year. By virtue of Directive 2009/16/EC decisions taken by the appropriate competent body of the Paris MOU become binding on EU Member States.

Pursuant to Article 218(9) of the Treaty on the Functioning of the European Union, the position to be adopted on behalf of the Union in international organisations such as the Paris MOU when they are called upon to adopt acts having legal effects, must be adopted by Council Decision, on a proposal from the Commission.

Following the Russian Federation invasion of Ukraine, on 14 March 2022 the Paris MOU Secretariat received a letter from the Ukrainian Minister of Infrastructure Mr. Oleksandr Kubrakov. In the letter, the Paris MOU is requested (i) not to unduly detain Ukraine-flagged ships following port State control inspections, (ii) to exclude the Russian Federation from the Paris MOU and (iii) not to recognize certificates issued on behalf of the Russian Federation Maritime Administration.

In relation to the first request not to unduly detain Ukrainian vessels, on 2 March 2022 the Paris MOU issued PSCircular 101 (Guidance on repatriation of seafarers due to situation in Ukraine) which addresses this matter. PSCircular 101 informs member authorities that there is a need to apply flexibility under the current circumstances, including with respect to seafarer repatriation, the Maritime Labour Convention 2006, certificates issued under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and medical certificates. If developments make it necessary, the Paris MOU can consider further adjustments to PSCircular 101.

In relation to the request regarding the membership of the Russian Federation of the Paris MOU, it should be noted that the Russian Federation has been excluded from access to and use of the THETIS PSC targeting tool and inspection database provided for under Article 24 of Directive 2009/16/EC. This means that Russian Federation participation in the work of the Paris MOU has already been severely limited and without access to that database the Russian Federation cannot effectively discharge its obligations under Paris MOU or contribute to the work of the MOU.

Although there is a consensus among EU Member States that action should be taken against the Russian Federation, neither the Memorandum nor any of the policy instructions contain any procedure or mechanism to remove members from the Paris MOU. Apart from exclusion, those members who have expressed a view have indicated a preference to suspend membership until further notice. While the immediate legal effect would be similar to exclusion, this is less permanent. Suspension would allow for further consideration of the need for complete exclusion from the Paris MOU and it could be reversed if the

circumstances change. However, the Memorandum has no provision for suspension of membership either.

The Paris MOU chair has proposed to carry out a Paris MOU written procedure to decide on the suspension of membership of the Russian Federation before the annual Port State Control Committee meeting (PSCC55) which is scheduled to take place from 16-20 May 2022. This is so that this sensitive issue does not overshadow the PSCC55 meeting.

2. POSITION TO BE TAKEN ON THE UNION'S BEHALF

In view of the gravity of the situation, it is appropriate to: (i) agree with the approach set out in paragraph 5 of document PSCC55/11.1 not to unduly detain Ukraine-flagged ships following port State control inspections, (ii) suspend the membership of the Russian Federation to the Paris MOU in response to Russia's unprovoked and unjustified invasion of Ukraine in accordance with Article 62(3) Vienna Convention on the Law of Treaties (iii) agree with the approach set out in paragraph 7 of document PSCC55/11.1 regarding the derecognition of statutory certificates issued by the Russian Federation.

The attached text is a proposal for a Union position under Article 218(9) of the TFEU which has then to be adopted by the Council. This is to agree to a course of action set out in a Paris MOU document PSCC55/11.1. The specificities of the EU position is attached to the draft council decision as Annex 1.

Directive 2009/16/EC effectively brings the procedures, tools and activities of the Paris MOU within the scope of Union law. Therefore, the Paris MOU falls within Union exclusive external competence by virtue of the last limb of Article 3(2) TFEU.

3. LEGAL BASIS

The following Decision is based on the Treaty on the Functioning of the European Union, and in particular Article 100(2), in conjunction with Article 218(9) which provides that the Council, on a proposal from the Commission shall adopt a decision 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. This shall apply to the position to be adopted by the Member States, acting jointly in the interest of the Union, in the context of the Paris MOU.

Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (as amended) is the legal basis setting up the principles to be adhered to by the Member States within the PSCC of the Paris MOU.

The acts to be adopted in the context of the Paris MOU constitute acts having legal effects. The envisaged acts have legal effects because are capable of decisively influencing the content of EU legislation, namely Directive 2009/16/EC. This is because Directive 2009/16/EC effectively brings the procedures, tools and activities of the Paris MOU within the scope of Union law. Moreover, the suspension of the membership of the Russian Federation to the Paris MOU is an act of organisational nature that influence the way in which decisions are made within the Paris MoU.

The envisaged acts do not supplement or amend the institutional framework of the Agreement. Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), 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 Memorandum of Understanding on Port State control (Paris MOU) was signed in Paris on 26 January 1982 and took effect on 1 July 1982. The Paris MOU has 27 maritime administrations as members (Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovenia, Spain, Sweden and the United Kingdom). The Union is not a member of the Paris MOU.

(2) Directive 2009/16/EC of the European Parliament and of the Council[1], sets out the Union's legal regime on port State control, reformulating and reinforcing the previous Union legislation in this field in place since 1995. The Union's legal regime is based on the Paris MOU.

(3) As regards the Union Member States, Directive 2009/16/EC effectively brings the procedures, tools and activities of the Paris MOU within the scope of Union law. By virtue of that Directive, certain decisions taken by the appropriate competent body of the Paris MOU become binding on the Union Member States.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Paris MOU, as the envisaged acts will be capable of decisively influencing the content of Union law, namely Directive 2009/16/EC. Pursuant to Article 218(9) of the TFEU, the position to be adopted on behalf of the Union in a body set up by an agreement, when that body is called upon to adopt acts having legal effects is to be adopted by a Council Decision, on a proposal from the Commission.

(5) The European Council adopted its conclusions of 24 February 2022, condemning in the strongest possible terms the Russian Federation's unprovoked and unjustified military aggression against Ukraine. At its meeting on 24-25 March 2022, the European Council set out that Russia's war of aggression against Ukraine grossly

[1] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control (OJ L 131, 28.5.2009, p. 57).

violates international law and reiterated the demand that Russia immediately stop its military aggression in the territory of Ukraine.

(6) In the context of the Russian Federation invasion of Ukraine, on 14 March 2022 the Paris MOU Secretariat received a letter from the Ukrainian Minister of Infrastructure. In the letter, the Paris MOU is requested not to unduly detain Ukraine-flagged vessels following port State control inspections, to exclude the Russian Federation from the Paris MOU and not to recognize certificates issued on behalf of the Russian Federation Maritime Administration.

(7) In relation to the first request not to unduly detain Ukrainian vessels, on 2 March 2022 the Paris MOU issued PSCircular 101 (Guidance on repatriation of seafarers due to situation in Ukraine) which addresses this matter. PSCircular 101 informs member authorities that there is a need to apply flexibility under the current circumstances, including with respect to seafarer repatriation, the Maritime Labour Convention 2006, certificates issued under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 and medical certificates. If developments make it necessary, the Paris MOU can consider further adjustments to PSCircular 101. This position should be communicated to the Ukrainian authorities.

(8) In relation to the request regarding the membership of the Russian Federation, it should be noted that the Russian Federation has been excluded from access to and use of the THETIS PSC targeting tool and inspection database provided for under Article 24 of Directive 2009/16/EC. This means that Russian Federation participation in the work of the Paris MOU has already been severely limited and without access to that database the Russian Federation cannot effectively discharge its obligations under the Paris MOU.

(9) Neither the Memorandum nor any of the policy instructions contain any procedure or mechanism to remove members from the Paris MOU. Apart from exclusion from the Paris MOU, an alternative is to suspend membership until further notice. While the immediate effect would be similar to exclusion, this is less permanent. However, no provision has been included in the Memorandum for suspension either. Suspension allows for further consideration of the need for complete exclusion from the Paris MOU and it could be reversed if the circumstances change.

(10) The European Union, as a global actor, is at the centre of efforts at the UN[2] and other multilateral fora and processes to hold the Russian Federation accountable for their unprovoked and unjustified invasion of Ukraine, to reverse the invasion, and to ensure a return to full respect for the sovereignty, independence, and territorial integrity of Ukraine within its internationally recognised borders. The unprovoked and unjustified act of aggression by Russia against Ukraine is a serious violation of Article 2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any State.

(11) In light of the above, in view of the gravity of the situation, and for as long as the Russian Federation does not abide by the principles of the UN Charter and its international obligations, it is appropriate to suspend the Russian Federation's Membership of the Paris MOU in accordance with Article 62(3) of the Vienna

[2] See United Nations General Assembly Resolution ES-11/1 entitled "Aggression against Ukraine" at the 11th Emergency Special Session of United Nations General Assembly of 2 March 2022 and United Nations Human Rights Council Resolution 49/1 of & March 2022.

Convention on the Law of Treaties, in response to Russia's unprovoked and unjustified invasion of Ukraine.

(12) In relation to the third request not to recognise certificates issued by the Russian Federation Maritime Administration, these Certificates are issued in accordance with the international conventions and that the Russian Federation remains a member of the International Maritime Organisation and that the Paris MOU does not have competence to derecognise such certificates. This position should be communicated to the Ukrainian authorities.

(13) The Union is not a contracting party to the Paris MOU. The Union's position is thus to be expressed by the Member States of the Union that are members of the Paris MOU acting jointly.

(14) It is therefore necessary to authorise the Member States to act in accordance with the position to be adopted on behalf of the Union.

(15) Cooperation with other third country members of the Paris MOU (Canada, Iceland, Norway and the United Kingdom) within the PSCC are essential in reaching a decision to suspend Russian Federation membership of the Paris MOU.

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted on the Union's behalf within the context of the Paris Memorandum of Understanding on Port State Control ('Paris MOU'), in relation to Russian Federation membership of the Paris MOU, is set out in Annex I to this Decision

Article 2

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

Article 3

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President