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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Shipping
N° Cion doc.:	10103/23
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/21/EC on compliance with flag State requirements - Comments by the Netherlands

Delegations will find, in Annex, comments from the **Netherlands** on the above mentioned subject.



Comments of the Netherlands on the flag State proposal

General position as published on delegates portal by DE, EL, MAL and NL

- We support in principle the specification of an oversight program of the member states flagged fleet and registered organisations (RO). Having said that, we would reiterate the importance of a goal-based approach in drafting this requirement. Prescriptive articles for these programs may limit the MS in the development of such programs catered for their fleet and needs and could have negative consequences for the most effective use of resources, available in any MS. Hence the new directive should, in our view, cater for generic information (risk)based principals, which in the end guide flag state surveyors to the right ship and/or RO at the right time. This risk-based approach has proven its effectiveness in the Paris MoU port state inspections, where substandard shipping is almost banned from our ports.
- At this stage the co-sponsors would not support the introduction of a specific requirement defining appropriate resources, corresponding with type and size of fleet. This may lead to a disproportionate demand of staff for those MS having larger fleets. Moreover, we believe that this requirement may lead to an administrative burden for the industry with a negative effect on the choice of shipowners for an EU flag. This should not be the consequence of an EU directive.
- Regarding common capacity building we agree that a high level of knowledge throughout the Union is a cornerstone for the quality of certification, inspections and surveys. And that the EMSA Academy courses are useful tools for the MS to gain and keep this knowledge. However, we would like to stress that the training of surveyors and inspectors in the first place is (and should remain) a responsibility and prerogative of MS. Different MS have different programs in place for becoming a flag- and/or port state inspector. The minimum criteria for inspectors stipulated in par. 29 – 36 of the III-Code in our view serves this purpose well. A combination of national training programs including on the job training, voluntary virtual- and on-site training courses for Flag State Surveyors through the EMSA Academy would be in our view the best solution. Especially for the possibility for MS to differentiate within the curriculums and learning needs per individual candidate. The flag state related activities comprise a broader (and in some cases more profound) framework of knowledge (e.g. certification services and RO monitoring), that should not be taken lightly and requires specific skills and expertise.
- It should be clear that bringing relevant FS parts I and II of the III-Code under this directive does not mean that all agenda items at IMO will fall under EU exclusive competence as a consequence.

Article 1

Amendments to Directive 2009/21/EC

Directive 2009/21/EC is amended as follows:

(1) Article 3 is amended as follows:

(a) 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);’

(b) the following points are added:

‘(f) ‘Conventions’ means the Conventions, with the Protocols and amendments thereto, and related codes of mandatory status, in their up-to-date version, as defined in par.6 (1-6) of the III-Code;

Clarification

1(b) ‘(f) According to the Netherlands we should adhere to the scope of the III-Code and not the PSC directive as stated in the Commission’s proposal.

(g) ‘III-Code’ means parts 1 and 2 of Resolution A.1070(28) (“IMO Instruments Implementation Code”), adopted by the International Maritime Organisation (IMO), with the exception of paragraphs 16.1, 18.1, 19, 29, 30, 31 and 32 of part 2

Clarification

Earlier comments of the Netherlands to delete a number of exception paragraphs may be disregarded after explanation of the Commission on the SWP of 13-09 and legal service.

(h) ‘flag State surveyor’ means a public-sector employee, duly authorised by and working exclusively for the competent authority of a Member State responsible for, or performing surveys and audits on ships and companies covered by the relevant international mandatory instruments and fulfilling the independence requirement specified in Article 8(1)...;

Clarification

Definition brought in line with the III-Code.

(i) ‘flag State inspector’ means a public-sector employee, working exclusively for and duly authorised by the competent authority of a Member State responsible for, or performing

periodic flag State inspections, and who fulfils the independence requirement specified in the III-Code.

Clarification

Brought in line with the III-Code description.

- (k) ‘Periodic flag State inspection’ means an inspection to verify continuous compliance of the ship with the international rules and regulations, not leading to certification;

Clarification

Important point for the Netherlands: modern inspection techniques do not always require inspectors to physically visit the ship. One could also perform parts of the inspection remote (desk-top research based on intelligence retrieved from various relevant sources) in combination with a visit to the office. Or perform CIC’s via questionnaires. The goal is to verify if the ship is in compliance with the rules and regulations. The III Code uses the term ‘periodic inspection’. According to the Netherlands, the description in the directive should not limit any (future) innovative inspection techniques.

- (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 instructed on its behalf, shall ensure that the ship in question complies with the applicable international rules and regulations. In particular, it shall verify the safety records of the ship using the inspection reports and certificates. 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.

Clarification

Usually and especially when ships are flagged in, the RO on behalf of (and under a specific instruction) of the Member State performs the first statutory surveys in order to verify compliance. Not all information to be verified may be available in this database, especially when it comes to outside EU flagged ships.

Article 4a

Safety of ships flying the flag of a Member State

- 1.

Clarification:

Should be deleted. This is already part of the ratification obligations.

2. Member States shall take all necessary measures to ensure compliance with international rules, regulations and standards by ships entitled to fly their flag. Those measures shall include the following:
 - (c) prohibiting ships from sailing until such ships can proceed to sea in compliance with international rules, regulations and standards;
 - (d) 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,
 - (e) carrying out periodic flag State inspections of ships to verify that the actual condition of the ship is in conformity with the certificates it carries. A risk-based approach taking into account annex xx may be used to optimize the effectiveness of these periodic inspections.
3. Member States shall ensure that any deficiencies confirmed or revealed by an inspection carried out in accordance with paragraph 2(c) are rectified.
4. On completion of any inspection carried out, the flag State inspector shall draw up a report providing relevant information and outcome of verification of compliance with the international rules and regulations.

Clarification

2e): In this article we introduce a risk based approach into the Directive.

4.: This should not be a fixed format (also subject to national provisions as part of national items to be inspected), but reflecting the outcome related to the instruments as part of the scop of the III Code. May be further discussed at SWP.

Article 4b

Safety and pollution prevention requirements

1. Each Member States shall ensure that its administration relies on appropriate resources, commensurate with the size and type of its fleet, 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 and recognised organisations and participate in, and contribute to, the EU Recognised Organisation oversight scheme.
3. Each Member State having ships under its flag shall develop and/or maintain a design review and technical decision-making capability for their fleet.

Clarification

Important point for the Netherlands: the high level steering group should be dealing with information sharing, exchanging best practices, harmonize implementation issues etc. This group should not discuss minimum recourse requirements this article refers to in article 4b par.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, is recommended to undergo the harmonised scheme specified in paragraph 2 relevant for the specific activities carried out by the flag State personnel assigned.

Clarification

This way we still refer to the harmonized scheme but leave it up to the member State to differentiate on learning needs of the different candidates.

2. The Commission, seeking the advice of the high level group on flag State matters referred to in Article 9a(1), shall develop a common non mandatory capacity building scheme (post-qualification at national level) and keep it updated, considering new technologies and in relation to new or additional obligations arising from the relevant international instruments, Member States flag State surveyors and inspectors .

Clarification

In line with our comments in par. 1 (see also position paper NL/GER/MAL/GR)

(2) 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.’

Clarification

To use SafeSeaNet for continuous monitoring seems very difficult to implement. On top of that, Authorities are already actively informed via port- and coast State Authorities when ships of their flag are involved in any accident, detentions, security threat etc, or other various channels.

'Article 6

Electronic information and exchange

1. Member States shall ensure that at least the following information concerning ships flying their flag is kept and is made accessible in an electronic format compatible and interoperable with Union maritime safety databases:

- (a) particulars of the ship (name, IMO number, etc.);

- (b) statutory certificates (full, interim or temporary) including dates of surveys, additional and supplementary surveys, if any, and audits;
 - (c) identification of the recognised organisations involved in the certification and classification of the ship;
 - (d) identification of the competent authority which has inspected the ship under port State control provisions and the dates of the inspections;
 - (e) outcome of the port State control inspections (deficiencies: yes or no; detentions: yes or no);
 - (f) identification of ships which have ceased to fly the flag of the Member State concerned during the previous 12 months;
 - (g) outcome of the periodic flag State inspections (deficiencies: yes or no; detentions: yes or no);
2. The information shall be communicated to the inspection database provided for in Article 6a. The master shall also be provided with a copy of the report.'

Clarification

Detailed inspection reports may include information which could not be made public. For the interest of transparency the outcome of the inspection is relevant. Therefore the text aligned with article 6 (e).

- (3) The following Article 6a is inserted:

Article 6a

Inspection database

1. The Commission shall develop, maintain and update an inspection database containing the information specified in Article 6. All Member States shall be *connected 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. Member States shall ensure that the information related to inspections carried out in accordance with this Directive, including information concerning deficiencies, is transferred without delay to the inspection database as soon as the report(s) according to Article 4a(4) is completed.
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 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. This information may influence the risk profile as described in annex I of 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) 1406/2002 of the European Parliament and of the Council³.

5. Member States shall ensure that Statutory certificates referred to in Article 6(1) paragraph b, *shall be 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.’

Clarification

***Administrative burden and financial implications and time to implement should be clear and agreed upon for the MS.**

****Question to Commission: so the MS may differentiate in what detail to record? Flag State inspections may also include National Legislation (on top of the minimum Convention requirements) may we presume that this would not be part of the data recorded? Otherwise it will be complicated for other MS to differentiate between National and International requirements.**

***** In order to achieve a better balance between Flag and Port State Control inspections, as discussed during SWP 13-09-2023, a hook is created in this Directive to be further arranged in the amendments of 2009/16/EC (a foreseen PSC inspection may than be re-assessed to take place or not).**

(4) Article 7 is replaced by the following:

‘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 every seven years, subject to a positive reply of the IMO to a timely request of the Member State concerned, and shall 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 shall also make the same information available to the public, in accordance with relevant national legislation on confidentiality.
2. Member States shall invite the Commission, assisted by EMSA, to participate as an observer in the IMO auditing process and, 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 the Commission shall collect the necessary information and carry out visits to Member States, in accordance with

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).

Clarification

- 1. Added positive reply in line with the current directive.**
- 2. EMSA and the Commission participating in the IMO audits, according to the Netherlands serves synergy, transparency and harmonization between the MS.**
- 3. RO oversight scheme is subject to the requirements established in Directive 2009/15/EC and should be addressed in respect of this Directive.**

(5) 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 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.

The quality management system shall include defined responsibilities, authority and interrelation of all flag State personnel, including other personnel assisting in the performance of inspections who manage, perform and verify work relating to and affecting safety and pollution prevention. Such responsibilities shall be documented, specifying what type and scope of inspection work that may be performed by other personnel assisting in the performance of inspections, and also specify how such personnel shall communicate and report.

Each Member State shall ensure that other personnel assisting in the performance of inspections have education, training and supervision commensurate with the tasks they are authorized to perform.

The Member States shall ensure that all personnel performing a survey or an inspection has no conflict of interest attesting to their independence in relation to the work to be performed.

(b) the following paragraphs are added:

‘2a. Member States shall evaluate their performance annually and identify areas for possible improvement, based on results of the activities performed in the framework of the quality management system referred to in paragraph 1 of this Article and the flag State performance referred to in paragraph 2b of this Article, as well as Article 7.

2b. In order to ensure a common harmonised performance scheme for the purposes of paragraph 2a, the Commission, based on the proposal of the high level group on flag State matters referred to in Article 9a(1), shall adopt implementing acts to define the details for a revised performance scheme in paragraph 2 of this Article. Those implementing acts shall be adopted in accordance with Article 10.2.*

⁴ Regulation (EU) xx/xx of the European Parliament and of the Council ... [EMSA Regulation]

Measures to evaluate the performance of the flag States, shall take into consideration, inter alia, flag State inspection results, port State control detention rates, casualty statistics, communication and information processes, annual loss statistics (excluding constructive total losses) and other performance indicators as may be appropriate, to determine whether staffing, resources and administrative procedures are adequate to fulfil the flag State obligations.

;

Clarification

8(a): as discussed on SWP 13-09 this should be limited to the operational part of the flag State administration (as in the current directive). Furthermore, asking for a signed declaration according to the Netherlands provides an administrative burden. This should be arranged (and usually is) for under national provisions.

*** What does this mean? What kind of details are evaluated on a yearly basis and what are the consequences of a revised implementing act? Commission please explain.**

2b: the high level group agrees on the final proposal.

2c: In practice this means that EU flags are going to be benchmarked (performance on a public website) based on the information they provide themselves. This is undesirable for attractiveness of EU flag registries. The Netherlands is of the opinion that the performance lists already in place, assessing the world-wide registers serves this purpose best. Better to keep this information internal for the high level expert group for evaluation of performance purposes.

(6) Article 9 is deleted.

(7) The following new Articles are inserted:

'Article 9a

Expert* group on flag State matters

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

The high level 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 high level 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) develop a common recommended reporting format, including timing for flag State inspections;
- (c) ;

- (d) identify measures that may be developed in order to make recommendations 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;
- (e) provide guidance on how to use the information in the relevant Union maritime databases for preparation of flag State inspections, with a view to increase efficiency in the use/pooling of resources for PSC e.g. by focus areas;
- (f) develop performance criteria referred to in Article 8(2b);
- (g) develop guidance, templates and similar for the reporting obligations referred to in Article 9b;
- (h) analyse flag State performance, QMS audits and, IMO Audits comparing findings and follow-up action, with a view to identifying best practices;
- (i) identify measures that may be developed in order to establish:
 - (i) harmonised procedures for the application of exemptions and equivalents applied in accordance with the IMO Conventions;
 - (ii) harmonised interpretations of issues left to the discretion of the administrations in the Conventions;
 - (iii) apply unified interpretations for provisions laid down in the Conventions.

Clarification

***if acceptable this should be amended throughout the complete text.**

Rest of the proposed changes in this article are in line what was discussed during SWP 13-09, remarks in related articles and to eliminate vague tasks of the proposed expert group.

Article 9b

Information and data

The Commission shall establish 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 the Commission, about:

- (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) the number of flag State inspectors/surveyors/auditors and other personnel assisting in the performance of inspections;
 - (iii) the number of flag State surveys, inspections and audits carried out as flag States;
 - (iv) the number of ships flagging-in and flagging-out by type of ship and by originating country or destination country;
- (b) quality management and audits

- (i) planned or confirmed dates for IMO Audit;
 - (ii) copy of valid quality management system certificate
 - (c) delegation of authority
 - (i) Recognised Organisations authorised, functions delegated and certificates issued on behalf of the Member State
- (8) Article 10 is replaced by the following:

Clarification

If we upload the QMS certificate the compliance, scope and dates are clear for renewal, otherwise please explain why this information is deemed necessary.

'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.'
- (9) The following Article 10a is inserted:

'Article 10a

Delegated Acts*

The Commission shall be empowered to adopt delegated acts in accordance with Article 10b, concerning amendments to Annex 1, in order to take account of new flag State related provisions and commitments developed at international level, in particular, in the IMO.

The amendments to the IMO Conventions and to the IMO Instruments Implementation Code (III CODE) may be excluded from the scope of this Directive pursuant to Article 5(2) of Regulation (EC) No 2099/2002.'

- (10) The following Article 10b is inserted:

Clarification

Under scrutiny by Legal services (Council decision)

'Article 10b

Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
 2. The power to adopt delegated acts referred to in Article 10a shall be conferred on the Commission for a period of five years from [xx] 202X. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
 3. The delegation of power referred to in Article 10a may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
 4. Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making.
 5. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
 6. A delegated act adopted pursuant to Article 10a shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.'
- (11) The text set out in the Annex to this Directive is added as Annex to Directive 2009/21/EC.

Article 2

Transposition

1. Member States shall adopt and publish, by [*OP: Please insert a date: one year 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,

Clarification

The Netherlands sees no added value of the incorporation of parts of the III Code into the Directive, while there are already references in place in the Directive and it is legally binding and adopted through national transposition. Furthermore, the Netherlands is not in favour of duplication of legislative instruments and it is unclear to the Netherlands what the implications are to the competency of the Union in the international context.