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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Shipping
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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 - Comments by the Netherlands

Delegations will find, in Annex, comments from **the Netherlands** on the second compromise proposal of the Presidency.



Comments of the Netherlands on the flag State proposal after SWP 27th of September 2023

General position on the process and contents

- In general we refer to our Position Paper as published on the delegates portal;
- We appreciate the continuous efforts made by other Member States, Presidency and the European Commission to bring the proposal to an agreed amendment of the current flag State Directive 2009/21/EC, that has proven its value in the quality of shipping and the continuous good performance of the Netherlands flagged fleet on the ParisMoU white list;
- We understand the pressure that all parties are under to conclude on this proposal, but we do need to stress that not in any way this may result in an amendment that takes on an extra burden for the Member States without the conclusion of its added value for the Union and Member States in their capacity as a flag State;
- Although our thoughts are very much in line with the proposals of the Presidency, we do have some concerns regarding the possibilities to take shipping into next century, where we strongly believe that the added value of tomorrow lies in the sharing of information, working closely together and move forward with digitalisation, risk based approach and innovative (inspection) techniques. But at the same time, we understand the worries of our colleague Member States that fear an extra burden on the already overloaded Administrations. For that reason, we have limited our suggestions to those areas we foresee an added value and burden-relief in the current proposal. Making use as much as possible of the already existing databases and information;
- The proposal should ensure a level playing field between Member States, but even more important not create a disadvantage for the European flagged fleet in relation to non-EU flag States. At the same time it should strive to the highest level of performance on safety and environmental protection whilst not creating a European legislative head on top of the III Code;
- 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;
- Having said the above, we are looking forward to the final proposed text of the Presidency, taking our comments into account, with a view to finalise it in October.

Article 3

Definitions

- (k) 'flag State inspection' means an **on-board** 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 should ensure the same safety and environmental protection level.~~

Justification

Proposal by the Presidency accepted, but to align with the rest of the directive, periodic deleted.

Article 4

Conditions for allowing a ship to operate upon granting the right to fly the flag of a Member State

Art 4.a.2(b)

- (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), following its annexes as far as deemed necessary;

Justification

The Netherlands are reluctant to accept this additional text about the use of the HSSC guidelines for flag States doing their own statutory work. We prefer the original text of the Commission. Well explained by Sweden this may cause problems for the level playing field. This is a mandatory guideline for EU RO's. It is the guideline that shall be followed, hence the word 'guideline'. And it is up to the user (RO and/or flag) to determine which parts are relevant (deemed necessary). It would lower the safety standard if an EU flag State just has to use parts of the guideline.

Art 4.a.2.(c)

~~on a risk-based approach taking into account any serious incidents, accidents and generic performance criteria carrying out periodic supplementary surveys flag State inspections to verify that the actual condition of the ship is in conformity with the certificates it carries, including the following non-exhaustive criteria: of:~~

- i. records from statutory surveys, audits and verifications performed by the flag state
- ii. reports of “very serious accidents”
- iii. inspection following a detention or prohibition of operation issued by the Port State Control
- iv. inspection exceeding a Port State Control deficiency ratio established by each Member State
- v. records of inspections carried out according to national legislation and other relevant information 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, criteria and instructions in compliance with the III Code.

Justification

Although the Netherlands believes that it should be the requirement to perform flag State inspections first, and as an equivalent way may use a risk based approach, we can support the proposal by the Presidency.

Article 7

Monitoring of compliance and performance of Member States

2. Member States may invite the Commission, assisted by EMSA, to be allowed to participate as an observer in the IMO auditing process. The Commission and the Member State should agree on the terms of involvement and level of information sharing at forehand.

Justification

Proposal by the Netherlands to keep at least the possibility for EC/EMSA as an observer, while the Netherlands does see the added value of EMSA participating in the IMSAS scheme. At least for those Member States that are making use of the support for the preparation for an IMSAS audit, but also for the EMSA to monitor the overall performance of the Member States, reoccurring findings, possible improvement or further need for assistance that may benefit all Member States.

Article 9a

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 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;~~

(bbis) develop harmonized recommendations for carrying out periodic flag state inspections as referred to in Article 4a.2(c)

~~(c) assist the Commission in the development of the technical method a recommendatory methodology to help to determine for what constitutes appropriate resources, commensurate with adequate to the size and type of fleet, referred to in Article 4b;~~

~~(d) assist the Commission in identifying 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 identify the data needed to be included the inspection database referred to in Article 6 for the purpose of determining the performance as required by article 7.3 and assess matters related to compatibility and interoperability for those Member States expressing their consent to use the database.

~~(e) develop and implement the EU RO oversight and monitoring scheme referred to in Article 7;~~

~~(f) provide guidance on how to use the information in the relevant Union maritime databases for preparation of flag State inspections/RO monitoring, with a view to increase efficiency in the use/pooling of resources for ROs monitoring e.g. by focus areas;~~

(g) develop recommendations assist the Commission in the technical development of the for the performance criteria referred to in Article 8(2b);

~~(h) assist the Commission in developing guidance, templates and similar for the reporting obligations referred to in Article 9b;~~

(i) assist in analysing flag State performance, QMS audits and, IMO Audits comparing findings and follow-up action, with a view to identifying best practices;

~~(j) assist the Commission in identifying 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;~~

i. ~~apply unified interpretations for provisions laid down in the Conventions.~~

Justification

The Netherlands is in favour of the establishment of an expert group, also to stimulate the progress and information sharing between Member States. For that reason we have limited their tasks with the focus on working together towards continuous improvement.

Article 9b

Information and data

The Commission ~~shall~~, **using existing relevant union maritime databases**, ~~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 with the information necessary for the discussions of the expert group referred to in the relevant paragraphs under article 9a.**

Justification

The Netherlands is in favour of an electronic reporting tool with added value for the Member States. The Union and individual Member States would benefit from an overall database that provides insight in the performance, trends, risks on all different level to ensure continuous improvement. Reference is made to our intervention on the 27th of September during the Shipping Working Party:

- As the databases are already in place, it would be strange not to include them in this Directive. The existing databases like DONA and ROPAX, could function as a starting point to be able to assess the performance to be used by the individual Member States which is a III-Code requirement, and the EU as a whole, combining information from other existing data databases like EMCIP, Thetis, Equasis, etc.

- But to do so, the added value should be determined for which information in the end contributes to enhance EU maritime safety and pollution prevention and provides a profound image of trends, risks and possible improvements.

- Therefore, we would suggest that the requested information should be identified and concluded by the expert group in order to analyse performance of EU flag fleet, also as comparison to, for example, the non-EU flag fleet, based on the information already available in the community databases.

- If deemed necessary by the expert group this could be expanded with relevant information available with the Member States.

For this reason, we think the expert group should play a role in this and the data (if deemed necessary and determined with added value by this group) should be provided for by the Member States.