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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Shipping
N° prev. doc.:	1401/22 INIT
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the use of renewable and low-carbon fuels in maritime transport and amending Directive 2009/16/EC - Comments from the Member States - Denmark

Delegations will find, attached, comments from **Denmark** on the above subject.

Rådet for Den Europæiske Union
Generalsekretariatet

Bruxelles, den 3. februar 2022

WK 1401/2022 INIT

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Af:	Generalsekretariatet for Rådets Arbejdsgruppe vedrørende Søtransport
A:	
Præk. nr.:	ST. 12813/2/21 REV. 2
Ingen Komm. dok.:	ST. 10327/21 TILFØJES 1-3
Om:	Forslag til Europa-Parlamentets og Rådets forordning om anvendelse af vedvarende og kulstoffattige brændstoffer inden for søtransport og om ændring af direktiv 2009/16/EF Drøftelse af bestemmelser om sanktioner og håndhævelse (blok D) og fleksibilitetsmekanismer (underblok A2)

Comments by the Danish government

The Danish Government thanks the Presidency for the questions regarding bloc D and article 17 &18.

Before addressing these questions, we kindly recall the main general priorities regarding this bloc by the Danish government.

The Danish Government firmly believes, that if FuelEU Martime is to have a real effect and ensure that the maritime industry moves in a greener direction, the regulation must not only maintain a high level of ambition, with regards to its reduction targets, but also introduce sanctions that have a deterrent effect on those companies that are not willing to comply. Therefore, we must introduce a regulation that rewards those companies who are willing to make the investments in the green transitions and at the same time remove all incentives to circumvent the requirements set forth in this regulation.

Part I — Block D

D1. Consistency of the sanctions system (including the role of States and the right of review)

The proposed Regulation provides for a distinction between, on the one hand, the penalties provided for in Article 20 which must enable a company to ensure compliance with the regulation of its vessel in a situation of lack of conformity and, on the other hand, the system of penalties laid down by the Member States pursuant to Article 23 in the event of non-compliance with the Regulation.

a) In order to clarify the respective roles and procedures of Articles 20 and 23(1), do you consider that the "penalties" provided for in Article 20 should be considered as a means of compliance, and if so do you think that a term "compliance fee" is more appropriate?

- The Danish government does not believe that the penalties paid in article 20 should be considered a "compliance fee" as suggested in this question. It is important that the cost of non-conpliance levels or exceeds the cost of complying with the regulation in order to remove all incentives for non-compliance.
- Therefore the penalties should in fact be considered a "sanction" that penalizes those who do not comply and not as a "*compliance fee*".
- Moreover, the Danish government believes that there should be a maximum number of times, which the penalty can be paid in order to retrieve the certificate of compliance, rather than actually complying with the reduction targets.
- As an example it could be proposed, that the penalty can only be paid two consecutive years. If the ship cannot comply with the regulation the third year, it should not be able to retrieve its certificate of compliance and article 23 should be activated.
- Please find our suggestion on this below.

b) ***Would you like the verifier to be responsible for imposing the Article 20 penalty or would you prefer a public authority to formally impose or notify the Article 20 penalty? In this case, which authority would you like to entrust this responsibility (Member State in which the verifier is accredited? Member State with the status of administering authority within the meaning of the ETS Directive? other?)?***

- The Danish government supports the verifier's role as limited to the one <u>*calculating*</u> the penalty according to the formula in annex V.
- However, the Danish government would like to note, that it would give rise to constitutional concerns if a private entity, such as a private verifier, would be the entity to <u>*issue*</u> and <u>*collect*</u> the financial penalties.

D2. Enforcement by port States (including expulsion decision)

a) ***Are you in favour of the expulsion order mechanism as proposed in Article 23(3) or would you prefer to make changes to it?***
If yes on what aspects?
- *decision-making authority (port State? State having the status of administering authority within the meaning of the ETS Directive? flag State? any Member State?);*

- *its scope (limited to the vessel concerned or extended to all ships of the company?);*
- *its nature (e.g. expulsion only and/or detention?);*
- *the obligations of the flag State when the flag State is a Member State?*

- The Danish government is overall satisfied with the wording in article 23.3.
- We do not see need to change the wording with regards to which authority should be the one to issue the expulsion order. As a principle, and also related to the ongoing deliberations on bloc C, we believe that it should be the MS themselves who define and mandate the authorities used to ensure the compliance, monitoring, expulsion orders, etc in his regulation.
- We do however have two suggestions for improvements in the article:
    - First: In order to ensure alignment in enforcement and sanction procedures, the wording in paragraph 23.3 should be changed to "Shall" rather than "may", with regards to when the competent authority is to issue an expulsion order (please find the text suggestion below).
    - Secondly, it can be considered to include a specific reference to EMSA in article. Such a reference is also evident in the MRV regulation and thus ensure more alignment between the two EU files. Please find a suggestion on this below.
- Moreover, the Danish government does not, at the moment, support an idea to forward an expulsion order on all ships under the same company. Each ship is sanctioned according to its non-compliance, which should be sufficient.
- We are open to hear further suggestions on how the sanctions can be tightened and harmonized across the Union.

b) ***Would a mechanism similar to that currently in place for the banning of airlines in Article 16 (paragraphs 5-11) of the ETS Directive, which gives the Commission a decision-making role, be relevant to you in FuelEU Maritime?***

- On the outset the Danish Government does not support an idea to align these mechanisms. The aviation sector functions in a different way compared to the shipping sector. Therefore, the same system cannot be applied in both sectors.

D3. Calculation and level of penalties provided for in Article 20

a) ***Article 20(1): Do you support the calculation formula and the factors proposed in item 4 of (Appendix V? If not, have you identified an alternative drafting?***

- The Danish government takes a general scrutiny reservation on annex V. We are not convinced, that the formula for the calculation of the penalty is sufficiently high to provide an incentive to invest in greener alternatives.
- We have found, that based on the current penalty formula, there is a positive business case in not complying with the regulation and instead "just" pay the penalty.
- This is in contradiction to the intention behind the penalty, as laid out in article 25 and 36 in the preamble to the FuelEU regulation.
- The Danish government finds it of utmost importance that the penalty for non-compliance as a minimum levels the cost of the green fuels and associated technologies or preferably exceeds these.

- Therefore, we would like to ask the Commission about the basis for the multiplier of 2400 EUR in annex 5, which is related to paragraph 20.1 and would like to hear from the Commission, whether they believe this multiplier is indeed sufficiently high enough to have a dissuasive effect?
- Once we understand better the background for the multiplier, we can forward an example of a possible new multiplier.

b) ***Article 20(2): Do you wish to adapt the elements of the calculation of the penalty under section 20(2):***
   - ***Does the power considered be the total installed power? The power of electric demand at berth? Anything else?***
   - ***Should the multiplication factor in euro (EUR 250) be changed?***

- As voiced at previous SWP meetings, the new definition of electrical power demands will severely reduce the penalty for not complying with the OPS requirements. This was also confirmed by the Commission during the SWP meeting on February 9 2022.
- The Danish government finds, that the simplest solution to this is first and foremost to increase the 250 EUR multiplier as proposed now.
- The Danish government believes that the penalty should at least be as high, as it was with the former calculation using the "power demand" at berth definition.
- We are considering a much higher multiplier, which should as a result ensure, that the penalty matches the real use of used electricity and provide an incentive to use OPS instead.
- We would welcome another suggestion by the Presidency or Commission for a new on the multiplier with the new wording in article 20.2.

c) ***Article 20(4): would you be in favour of the Regulation imposing more criteria or guidance on the Commission for updating the level of penalties by delegated act in order to better regulate the delegated power to the Commission?***

- We maintain a scrutiny reservation on this question, which needs further evaluation nationally.

D4. Allocation of revenue generated by compliance penalties Article 20

a) ***Would you like the funds derived from the Article 20 penalties to be returned to Member States or the Innovation Fund?***

- The Danish government has found, that there are treaty wise obstacles related to the specific part of the regulation.
- As mentioned at the SWP meeting on February 9 2022 it is our understanding, that the Council legal service is undertaking a review on this specific part and the legality of allocating the revenues from the penalty to the innovation fund. We were glad to hear that the Legal Service confirmed this, and look forward to receive the written remarks.
- We will therefore also reserve the right to get back to these questions, once we have heard from the Legal service on this issue.
- However, at the outset the Danish government cannot support the earmarking of the revenues. We do favor that the maritime sector is provided with EU funding opportunities through the ETS Innovation Fund, as the investment needs in this sector are enormous if we are to meet the EU's climate targets. In that context we note that the Commission has proposed to significantly increase the volume of the

Innovation Fund in the proposal for revision of the ETS directive.

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b) If you prefer a return to the Member States, what allocation key do you consider relevant to associate each vessel with a Member State?

- Will revert with further comments once we have heard from the Council Legal Service.

c) Are you in favour of these funds benefiting the maritime sector directly or indirectly? If so, how?

- Will revert with further comments once we have heard from the Council Legal Service.

Part II sub-block A2

Flexibility mechanisms

a) ***Do you think that the definitions and method of calculating "compliance surplus", "compliance deficit", "pool total compliance balance" and "pool average compliance balance" should be specified in the Regulation?***

- Yes, the Danish government are in favor of clear definitions as a principle.

b) ***If further changes to the parameters of the flexibility mechanisms of Articles 17 and 18 seem to you to be made, have you identified any concrete amendments?***

- As mentioned on previous occasions, the Danish Government finds it of upmost importance that the regulation includes components that create an incentive for the private sector to invest in a greener future.
- Therefore, the Danish government finds it very important, that article 18 is not subject to fundamental changes.
- The Danish government believes that this article provides an important and necessary incentive and flexibility for first movers to invest in cleaner fuels at an early stage. We also believe it will be a benefit to smaller companies with a smaller fleet, to comply with the regulation, by allowing them to join forces with those who have been able to invest in cleaner technologies and fuels.
- Therefore we also support the wording in article 17 & 18 as they are now. We also, for the moment, do not have amendments to the compliance balance calculations. We have not yet had time to review the non-paper issued by the Presidency on annex I & II why we might revert with specific comments to the suggestions in this paper.

Original text in proposal	Suggestion by DK	Comment
	Article 20.3	
Notwithstanding Article 19(1), the verifier shall issue a FuelEU certificate of compliance once the penalties referred to in paragraphs 1 and 2 of this Article have been paid. The actions referred to in this Article as well as the proof of the financial payments in accordance with Article 21 shall be recorded in the FuelEU certificate of compliance.	*Notwithstanding Article 19(1), the verifier shall issue a FuelEU certificate of compliance once the penalties referred to in paragraphs 1 and 2 of this Article have been paid. The actions referred to in this Article as well as the proof of the financial payments in accordance with Article 21 shall be recorded in the FuelEU certificate of compliance.* **a) <u>A penalty for complying to this regulation can only be done for two consecutive periods, where after article 23 is activated.</u>**	The penalty should not be considered as an easy solution for not complying with the regulation. Therefore the Danish government suggests to introduce a cap on the number of times, a ship can pay a penalty rather than complying to the regulation. This will create a bigger incentive for complying to the regulation, which is necessary.
	Article 23.3	
Where a ship has failed to present a valid FuelEU certificate of compliance for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of call may, after giving the opportunity to the company concerned to submit its observations, issue an expulsion order. The competent authority of the Member State shall notify the expulsion order to the Commission, the other Member States and the flag State concerned. Every Member State, with the exception of any Member State whose flag the ship is flying, shall refuse entry of the ship which is subject to the expulsion order into any of its ports until the company fulfils its obligations. Where the ship	*Where a ship has failed to present a valid FuelEU certificate of compliance for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of call shall, after giving the opportunity to the company concerned to submit its observations, issue an expulsion order. The competent authority of the Member State shall notify the expulsion order to the Commission, the other Member States and the flag State concerned. Every Member State, with the exception of any Member State whose flag the ship is flying, shall refuse entry of the ship which is subject to the expulsion order into any of its ports until the company fulfils its obligations. Where the ship*	The Danish government finds it important, that the level of sanctions is **<u>high</u>** and **<u>harmonized</u>** across the Union. First off, the sanctions must have a deterrent effect on those not complying with the regulation. This is a main priority of the Danish government. Second, the sanctions should be harmonized, in order to maintain a level playing field across the Union. If this is not the case ships can speculate on which MS and Ports they should sail to, in order to avoid those with stricter sanctions.

flies the flag of a Member State, the Member State concerned shall, after giving the opportunity to the company concerned to submit its observations, order a flag detention until the company fulfils its obligations.	*flies the flag of a Member State, the Member State concerned shall, after giving the opportunity to the company concerned to submit its observations, order a flag detention until the company fulfils its obligations.*	
Where a ship has failed to present a valid FuelEU certificate of compliance for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of call may, after giving the opportunity to the company concerned to submit its observations, issue an expulsion order. The competent authority of the Member State shall notify the expulsion order to the Commission, the other Member States and the flag State concerned. Every Member State, with the exception of any Member State whose flag the ship is flying, shall refuse entry of the ship which is subject to the expulsion order into any of its ports until the company fulfils its obligations. Where the ship flies the flag of a Member State, the Member State concerned shall, after giving the opportunity to the company concerned to submit its observations, order a flag detention until the company fulfils its obligations.	*Where a ship has failed to present a valid FuelEU certificate of compliance for two or more consecutive reporting periods and where other enforcement measures have failed to ensure compliance, the competent authority of the Member State of the port of call may, after giving the opportunity to the company concerned to submit its observations, issue an expulsion order. The competent authority of the Member State shall notify the expulsion order to the Commission, EMSA, the other Member States and the flag State concerned. Every Member State, with the exception of any Member State whose flag the ship is flying, shall refuse entry of the ship which is subject to the expulsion order into any of its ports until the company fulfils its obligations. Where the ship flies the flag of a Member State, the Member State concerned shall, after giving the opportunity to the company concerned to submit its observations, order a flag detention until the company fulfils its obligations.*	