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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the application of Directive 2009/20/EC on the insurance of shipowners for maritime
claims**

1. INTRODUCTION

Directive 2009/20/EC¹ of the European Parliament and of the Council on the insurance of shipowners for maritime claims (hereinafter referred to as 'the Directive') entered into force on 29 May 2009. The Directive aims to encourage responsible behaviour by all economic operators, to improve the quality of merchant shipping and ensure safety at sea.

This report aims to inform the European Parliament and the Council on the application of the Directive, in accordance with Article 8 thereof.

The report relies on the outcome of a survey undertaken by the European Maritime Safety Agency (EMSA) at the request of the European Commission on the application of the Directive², as well as on information and data retrieved from the inspection database³ (commonly known as 'THETIS'⁴) established in accordance with Article 24 of Directive 2009/16/EC⁵ on port State control as amended. The Commission has received no complaints on the Directive since its application date (i.e. 1 January 2012)⁶.

2. BACKGROUND

The Directive makes compulsory in the EU the requirement for shipowners to have adequate insurance covering their ships, as endorsed in Resolution A.898(21) of the International Maritime Organization (IMO)⁷, combined with the principle of limitation of liability in accordance with the 1996 Protocol to the 1976 Convention on Limitation of Liability for Maritime Claims (hereinafter referred to as 'LLMC 1996'). It stipulates that all ships flying a flag of a Member State as well as any ship flying a flag of a third country entering to EU ports (or – in some cases – operating in the territorial waters of a Member State) shall be covered by insurance for the amount equal to the relevant maximum amount for liability laid down in the LLMC 1996 provisions⁸.

LLMC 1996 establishes the right of shipowners (including charterers, managers, and operators) and salvors to limit their liability for a variety of maritime claims related to the operation of a ship. The calculation of limits under the Convention is based on the tonnage of

¹ OJ L 131, 28.5.2009, p. 128.

² The survey examined the application of the Directive between 1 January 2012 and 31 December 2014. It included a Questionnaire sent by EMSA to Member States, to which 25 Member States replied (ES, LU and NL did not reply).

³ Information extracted for the period from 1 January 2012 and 30 September 2015, see Annexes A, B and C to this Report.

⁴ <http://emsa.europa.eu/psc-main/thetis.html>

⁵ OJ L 131, 28.5.2009, p. 57.

⁶ Accurate as of 15 December 2015.

⁷ IMO Assembly Resolution A.898(21) of 4 February 2000, 'Guidelines on Shipowners' Responsibilities in respect of Maritime Claims'.

⁸ Not all Member States are parties to LLMC 1996. 23 Member States have ratified it, while AT, CZ, IT, PT and SK have not yet ratified this Convention. This does not affect the latter States' obligations under the Directive.

the ship in question. LLMC 1996 has increased the liability limits compared to its predecessor (LLMC 1976). These limits were further raised by the IMO in 2012, and have entered into force on 8 June 2015.

For the purposes of the Directive, there is no definition of the term 'ship' as such. The Directive applies to ships of at least 300 gross tons, and it excludes "*warships, auxiliary warships or other State owned or operated ships used for non-commercial public services*". That said, the definition of a 'shipowner' is clearly limited to seagoing ships, and it includes, other than the registered owner, any person responsible for the operation of ship.⁹ Thus, the Directive applies to seagoing ships only. It is worth noting that this is also the case with LLMC1996, which does not include a definition of a 'ship', and it is through the definition of 'shipowner' that its application is equally limited to seagoing ships. The Directive was modelled on LLMC 1996, and the negotiating history of the Directive attests to the wish of the co-legislator not to add to or amend the definitions of the Convention¹⁰.

3. TRANSPOSITION BY MEMBER STATES

The deadline for transposition of the Directive into national law was the 1st of January 2012. All Member States have notified to the Commission their national implementation measures for the Directive. No amendments have been communicated since 2012 to the national transposing legislation in Member States.

4. APPLICATION OF THE DIRECTIVE

This section of the Report examines the application of the Directive following the sequence of its provisions. As Article 1 points out, the Directive governs "*certain aspects of*" the obligation of shipowners to have insurance for maritime claims. The Directive is complementary to the international instruments regulating civil liability of shipowners for

⁹ See infra [Section 4.1](#).

¹⁰ See Document 14287/2/08 REV 2 ADD 1, Common Position adopted by the Council on 9 December 2008 concerning the adoption of a Directive of the European Parliament and of the Council on the insurance of shipowners for maritime claims:
http://register.consilium.europa.eu/content/out?lang=en&typ=SET&i=ADV&RESULTSET=1&DOC_ID=14287/08|14287/*/08&DOC_LANCD=FR&ROWSPP=25&NRROWS=500&ORDERBY=DOC_DATE+DESC

specific types of damages¹¹, as well as to EU and national rules concerning criminal and administrative liability of shipowners¹².

4.1 Scope and Definitions (Articles 2 and 3)

Article 2 defines the scope of the Directive based on the size (i.e. tonnage) and the type of ships (i.e. excluding warships and State-owned vessels used for non-commercial public service). The application of these provisions does not pose any difficulties for Member States.

The relationship of the obligations under the Directive with the obligations under the international conventions on liability and compensation, including mandatory insurance, that are listed in the Annex of the Directive is also laid down in Article 2(3) thereof. The Directive specifically states that it is "without prejudice to" these international conventions. Hence, the obligation of insurance established under the Directive applies in addition – not in contradiction – to the obligation to have adequate insurance or other financial security under these conventions, in the Member States where these conventions apply.

Member States' approaches vary in this regard. This is due to two factors. Firstly, Member States have not yet ratified all international conventions listed in the Annex to the Directive.¹³ Moreover, Member States have chosen different means of transposing Article 2(3) into their national legislation. Namely, only a few Member States have chosen to refer to these international conventions and their relationship with the Directive; while other Member States do not explicitly refer to the Annex of the Directive in their national transposition measures. Be that as it may, the international conventions and the Directive are not contradictory but complementary instruments, and the instruments mentioned in the Annex constitute *lex specialis* on the specific types of damages they encompass arising from different shipping activities, i.e. oil carriage by sea in tankers, carriage of hazardous and noxious substances (HNS) by sea, bunker oil pollution, removal of wrecks. In 2008 Member States had

¹¹ The Annex to the Directive contains a list of these instruments:
- The International Convention on Civil Liability for Oil Pollution Damage, 1992 ('CLC 1992');
- The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 ('HNS Convention');
- The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 ('Bunker Oil Convention');
- The Nairobi International Convention on the Removal of Wrecks, 2007 ('Wreck Removal Convention').

¹² The list contained in the Annex to the Directive includes Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents. The original Commission proposal for a Directive on the civil liability and financial guarantees of shipowners also describes the relationship between the Directive and national and other EU rules on liability for shipping activities, see COM(2005) 593final and SEC/2005/1517.

¹³ According to the latest information published by IMO on 5 November 2015, the status of the 4 international conventions listed in the Annex to the Directive (see footnote 11) in the EU is the following: 26 Member States are parties to the CLC 1992, 0 Member States are parties yet to the HNS Convention, 28 Member States are parties to the Bunker Oil Convention, and 6 Member States are parties to the Wreck Removal Convention. The following link contains up-to-date information on ratification of all IMO Conventions: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202015.pdf>

undertaken a strict commitment to ratify all Conventions listed in the Annex¹⁴, and the Commission will continue to urge Member States to make progress in this regard¹⁵.

As outlined in Section 2 above, the Directive does not contain a definition of the term 'ship' as such. However, in the light of Articles 2(2) and 3(a) its scope is limited to seagoing ships and it specifically excludes warships or other State owned or operated ships used for non-commercial public service. Moreover, its applicability to different types of ships is also linked to the scope of flag State and port State control, which are the two enforcement mechanisms of the Directive. As long as a ship is eligible for a Port State Control Inspection in accordance with Directive 2009/16/EC, it can be expected that an inspection may take place to confirm applicability and conformity with the provisions of the Directive.

Article 3 of the Directive contains a definition of 'shipowner' that is in line with LLMC 1996. The latter instrument is also identified clearly in the definitions section of the Directive as the consolidated text of the 1976 LLMC Convention as amended by the 1996 Protocol. Finally, the notion of 'insurance' is defined in a non-exhaustive manner, copying verbatim the definition of insurance contained in IMO Resolution A.898(21). That is making reference to the "*indemnity insurance of the type currently provided by members of the International Group of P&I Clubs*" as an example of relevant cover.

4.2 The obligation to have insurance (Article 4)

Article 4 of the Directive establishes the obligation to have adequate insurance for shipowners:

- (a) whose ship is flying the flag of a Member State;
- (b) whose ship is entering a port under the jurisdiction of a Member State; and
- (c) whose ship is operating in the territorial waters of a Member State, provided that the relevant Member State has chosen to include this traffic into the scope of the Directive and without prejudice to the rules of international law on innocent passage.

The Directive also stipulates that the insurance shall cover claims falling under the scope of LLMC 1996 as claims subject to limitation. The amount of the insurance per ship and per incident must be equal to the relevant maximum amount for limitation of liability under LLMC 1996.

Member States in their capacity as flag States and as port States must require shipowners to comply with the relevant obligation under the Directive. All Member States have designated national competent authorities for the implementation of the obligations under Article 4 of the Directive.

¹⁴ Council Document No. 15859/08 ADD 1, of 19/11/2008, "Statement by the Member States on Maritime Safety".

¹⁵ In particular, as regards the HNS Convention, the Commission has presented two parallel proposals authorising Member States to become parties to the 2010 Protocol to the HNS Convention, in the interest of the Union, see COM(2015) 304final and COM(2015) 305final, adopted on 22.6.2015.

However, with regard to the flag State implementation, only a few Member States reported that verification of the validity of the relevant insurance certificate would take place, in particular to check and verify compliance regarding the liability cover¹⁶. Similarly, with regard to port State control, not all Member States have given effective indication of how the adequacy of the insurance certificate, held by foreign flag ships when entering their ports, is verified. Only a limited number of Member States have reported to the Commission that verification of the validity of the insurance certificate takes place during port State control inspections, in particular as regards the liability cover.

With regard to the possibility to require insurance for ships operating in Member States' territorial waters, several Member States have reported that they have transposed this requirement in their national legislation. However, the Commission has not obtained sufficient information to ascertain how this requirement is applied by Member States¹⁷.

4.3 Inspections and compliance through port State control (Article 5)

Article 5 of the Directive stipulates that ships entering a Member State's ports and flying the flag of another State are required to have insurance covering maritime claims in accordance with Article 4 of the Directive. Member States fulfil their obligations as port States under the Directive through Port State Control inspections, conducted within the framework of Directive 2009/16/EC¹⁸.

While vessels subject to Port state control are not targeted for inspection on the basis of their insurance status¹⁹, any inspection of a ship by a port State, in accordance with Directive 2009/16/EC, has to include a verification that an insurance certificate, in compliance with Article 6 of the Directive, is carried on board. The verification of the insurance certificate is part of a Port State Control inspection in accordance with Annex IV, point 41 of Directive 2009/16/EC. No Port State Control inspection can be recorded in THETIS, unless verification of the presence of an insurance certificate is reported accordingly. A specialised module has been created in THETIS ("THETIS-I") for recording deficiencies in Member States under the Directive, which has been operational as of 1 July 2013. Although not every vessel is inspected on each visit the systematic coverage of inspections offered by the EU Port State

¹⁶ One Member State has reported that it uses the registration procedure to control the fulfilment of the shipowner's obligation, and another Member State reported that it conducts relevant audits at shipowners' offices.

¹⁷ Only one Member State reported that the verification of insurance for ships of foreign flag, in its territorial waters, was a responsibility of coastal Vessel Traffic Systems (VTS).

¹⁸ Some Member States reported that, in order to confirm compliance with the specific requirements of the Directive, they may carry out Port State Control inspections under a national regime.

¹⁹ Port State Control inspections vary in frequency depending on the risk the ships pose: the most dangerous ships being inspected most often, while those vessels which pass inspection without problems are subject to less frequent inspections. Persistently substandard ships can be banned from European waters (see <https://portal.emsa.europa.eu/web/thetis/refusal-of-access>); while the Commission publishes lists of persistently substandard shipowners (<https://portal.emsa.europa.eu/web/thetis/company-performance>), in accordance with Commission Regulation (EU) No 802/2010 of 13 September 2010 implementing Article 10(3) and Article 27 of Directive 2009/16/EC of the European Parliament and of the Council as regards company performance as amended by Commission Implementing Regulation (EU) No 1205/2012 of 14 December 2012 (OJ L 347 15.12.2012 p.10).

Control regime means that every individual vessel calling in EU ports is inspected, on average, every 11 months.

In addition, several Member States have reported that they require ships entering their ports for pre-entry notification of insurance, using mainly the Union Maritime Information and Exchange System²⁰ (SafeSeaNet, (SSN)). Pre-entry notification requirements are useful for targeting ships for inspection and contribute to the more effective and rational implementation of the Directive. It is worth noting that, pursuant to Article 16(1)(d) of Directive 2002/59/EC, ships which have failed to notify, or do not have, insurance certificates or financial guarantees pursuant to Union legislation and international rules, should be communicated to the coastal stations concerned in other Member States located along the planned route of the ship.

The Commission strongly supports this practice, which also serves the objectives of this Directive, as pointed out in the impact assessment supporting the Commission's proposal for a Directive on the civil liability and financial guarantees of shipowners²¹, which led to the adoption of the Directive.

Moreover, pre-entry notification of insurance, combined with the potential for simplification of reporting that SSN offers, can prove an effective means to address uncertainties concerning liability of the shipowner and availability of compensation when a ship is in need of assistance²² within or in proximity to EU waters. Using SSN to obtain and share information on the insurance cover of ships entering EU ports can be particularly helpful to national competent authorities examining the possibility of the accommodation of a ship in need of assistance in seeking a place of refuge²³.

In case of non-compliance with the Directive by a ship entering a Member State's port and flying a different State's flag, namely the lack of adequate insurance cover, detention of the ship is possible in accordance with Directive 2009/16/EC. Furthermore, Article 5(2) of the Directive provides an additional tool to those foreseen in Directive 2009/16/EC. That tool, whose application is left to the discretion of Member States, foresees the expulsion of non-compliant ships from the port of a Member State with parallel notification to the Commission, other Member States and the flag State concerned, which has as a result the refusal of entry to ports of other Member States for the ship concerned. Notification takes place via SSN, using an 'incident report' template developed for that purpose²⁴. The majority of Member States have transposed this possibility for expulsion; though the expulsion of ships remains a very rare case in the EU.

²⁰ SafeSeaNet (SSN) was established under Directive 2002/59/EC, of the European Parliament and of the Council establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5.8.2002, p. 10, as amended. SSN is managed by EMSA.

²¹ SEC/2005/1517 and COM(2005) 593final, see supra note 11.

²² *"Ship in need of assistance' means, without prejudice to the provisions of the SAR Convention concerning the rescue of persons, a ship in a situation that could give rise to its loss or an environmental or navigational hazard"* in accordance with Article 3(v) of Directive 2002/59/EC.

²³ *"Place of refuge' means a port, the part of a port or another protective berth or anchorage or any other sheltered area identified by a Member State for accommodating ships in distress"* in accordance with Article 3(m) of Directive 2002/59/EC.

²⁴ SSN Incident Reporting Guidelines v.2, Appendix 7

4.4 Certification of insurance (Article 6)

Article 6 of the Directive establishes the minimum requirements that must be fulfilled to attest to the existence of adequate insurance on board the ship, in accordance with Article 4. The examination of the minimum formal contents of a certificate, as prescribed in Article 6 of the Directive, is the main focus during verification of insurance. Control of the authenticity of the certificate and examination of the liability limits pursuant to LLMC 1996 are less common among Member States²⁵. A limited number of Member States²⁶ appear to have national guidelines in place regarding verification of insurance.

A relevant issue, where Member States' approaches differ, is the acceptance in practice – mainly during port State control – of insurance certificates in electronic format. It is important to note that the insurance sector has embraced the use – almost exclusively – of electronic certificates (e.g. P&I Certificate of Entry); and the IMO has approved 'Guidelines for the Use of Electronic Certificates'²⁷ in shipping, which can be pertinent to insurance verification as well. Electronic versions of certificates have specific characteristics, and there are procedures in place to allow their authentication and subsequent verification. In order to ensure that the use of electronic certificates for the purposes of this Directive is accepted and applicable in all Member States, further consideration of this issue should be envisaged.

4.5 Penalties for non-compliance of own ships (Article 7)

For the purposes of flag State implementation of the requirements under Article 4 of the Directive, Article 7 prescribes the establishment of a system of penalties for cases of breaches of national provisions enacted in this field. National penalties established under this provision must be effective, proportionate and dissuasive. Based on the examination of the national transposition measures communicated to the Commission and the replies by Member States to EMSA's survey, the interpretation of this requirement under the Directive varies among Member States, notably with regard to the corresponding amounts of the financial penalties. No cases of imposition of penalties for non-compliance with the Directive by ships flagged in a Member State, under this provision, have been reported²⁸.

5. ENFORCEMENT DATA

The enforcement of the obligations imposed by the Directive to the shipowners is the responsibility of Member States. This section summarises the information collected through Member States' replies to the survey conducted by EMSA, cross-referencing those with the data available through THETIS.

²⁵ Based on the replies to the Questionnaire received by EMSA in the course of its survey.

²⁶ Four Member States according to the results of EMSA's survey.

²⁷ IMO FAL.5/Circ.39/Rev.1, 7 October 2014, can be found at:

<http://www.imo.org/en/OurWork/Facilitation/Electronic%20Business/Pages/default.aspx>

"FAL 39 agreed that electronic certificates should be treated as equivalent to traditional paper certificates, provided that the certificates and the website used to access them conform to the guidelines approved by the Organization and that specific verification instructions are available on board the ship."

²⁸ See infra [Section 5.1](#).

5.1 EU Flag State Implementation

Reports from Member States in THETIS on the outcome of Port State Control inspections on ships flying a flag of another EU Member State indicate that, as regards ships flying EU flags, 13 cases of non-compliance related to insurance certificates have been identified between July 2013 and end September 2015²⁹. When comparing this to the total number of 45 cases of non-compliance related to insurance certificates on ships recorded in THETIS during the same period, it can be concluded that ships flying an EU flag represent nearly one third (29%) of the total of the non-compliance cases.

However, one must also bear in mind that the percentage of non-compliant ships flying an EU flag in relation to the total number of Port State Control inspections of such ships is very low, i.e. 0,1%. Moreover, the non-compliance percentage of EU flagged ships is lower compared to non-EU flagged ships (respectively 0,1% compared to 0,15% for non-EU ships³⁰).

Although, as outlined above, few cases of non-compliance by ships flying EU national flags have been reported through THETIS, no Member State has reported to have imposed any penalty on a ship flying its flag for lack of adequate insurance cover under the Directive.

5.2 Port State Control

As from 1 January 2012, Member States have conducted a significant number of verifications in accordance with Article 5 of the Directive within the framework of Port State Control inspections as depicted in Annex A of this report³¹.

Since the specialised module on THETIS (THETIS-I) has become operational on 1 July 2013 and until September 2015, 34944 inspections in total have been recorded. Port State Control enforcement has identified a total of 45 deficiencies under the Directive as depicted in Annex B of this report³². When compared to the total of 34944 inspections, 45 deficiencies give a 99,87% compliance rate, which is significantly high³³.

In detail, per annum, the respective percentages of non-compliance³⁴ in relation to the total number of ship inspections are: 0,15% for 2013, 0,09% for 2014 and 0,16% for 2015. In most of the cases³⁵, Member States have requested rectification of the relevant deficiency before departure and only in 4 out of the 45 (i.e. 9%) a detention order was issued³⁶.

²⁹ See Annex A.

³⁰ In total: 13331 inspections of EU flagged ships revealed 13 deficiencies and 21613 inspections on non-EU flagged ships revealed 32 deficiencies. See Annex C.

³¹ A total sum of 58768 Port State Control inspections recorded in THETIS by EU Member States between January 2012 and September 2015.

³² Recorded in THETIS from July 2013 to September 2015.

³³ The non-compliance rate of all the ships calling at EU Member States' ports is 0,13%.

³⁴ As per THETIS records from July 2013 to September 2015.

³⁵ N.B.: According to THETIS data, deficiencies 'rectified' and 'to be rectified before departure' were 33 out of 45.

³⁶ See Annex B. N.B.: One Member State has reported a detention in reply to EMSA's survey, which has not been recorded on THETIS; thus, it has not been included in the table in Annex B.

The majority of Member States have transposed the provisions of Article 5(2)³⁷ concerning the possibility to issue an expulsion order for failure to comply with the Directive. Among the Member States who apply this possibility, according to THETIS information, only 1 Member State³⁸ has issued an expulsion order (issued in 2013 and lifted in 2015). Furthermore, another Member State³⁹ has issued two expulsion orders, duly notified through SSN to other Member States and communicated to the Commission, but not recorded in THETIS as these expulsion orders were issued before July 2013, when 'THETIS-I' became operational.

Finally, some Member States⁴⁰ have also applied penalties of a financial nature against non-EU Member State flagged ships entering their ports and found not in compliance with the Directive.

6. CONCLUSIONS

The Directive has been in force for approximately four years and it appears to be working well in pursuing its objectives. In particular, as compliance records show based on the information available, the vast majority of ships flying EU flags or entering EU ports have adequate insurance in line with the Directive. The system established under the Directive, thus, gives reasonable assurance that, should an incident involving such a ship result in a third party loss, and consequently give rise to maritime claims as defined in LLMC 1996, victims will be able to receive compensation from the shipowner and his insurer, up to the amount of the relevant liability limit.

Some issues of implementation and enforcement of the obligations under the Directive, as outlined in the present report, could be further improved through enhanced use of the existing operational information and exchange systems to achieve a more uniform application of the Directive, both from a flag State and port State point of view.

³⁷ Three Member States have not transposed this provision and are applying only the measure of detention in the enforcement of the relevant provisions of the Directive, through Port State Control.

³⁸ See Annex B.

³⁹ See Annex B.

⁴⁰ 6 Member States reported application of financial penalties on foreign flag ships in replying to EMSA's survey.