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signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
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Subject: COMMISSION STAFF WORKING DOCUMENT EX-POST EVALUATION
OF REGULATION (EC) No 392/2009 ON THE LIABILITY OF CARRIERS
OF PASSENGERS BY SEA IN THE EVENT OF ACCIDENTS EXECUTIVE
SUMMARY

Delegations will find attached document SWD(2017) 328 final.

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COMMISSION STAFF WORKING DOCUMENT

**EX-POST EVALUATION OF REGULATION (EC) No 392/2009 ON THE LIABILITY
OF CARRIERS OF PASSENGERS BY SEA IN THE EVENT OF ACCIDENTS**

EXECUTIVE SUMMARY

{SWD(2017) 329 final}

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EXECUTIVE SUMMARY

Regulation (EC) No 392/2009 establishes liability rules for damages caused to passengers in case of accidents during travel by sea. It covers both international and some types of domestic carriage.

The Regulation in particular establishes strict liability, meaning liability without needing to establish fault, for carriers in case of an accident resulting from a 'shipping incident' as defined in the Regulation. For all other cases, when the accident is not due to a shipping incident (e.g. bad weather) the passenger must prove fault or neglect on the part of the carrier. At the same time, the Regulation obliges the carrier to have insurance, and gives passengers the right to claim compensation directly from the carrier's insurer.

The system of operator liability introduced by the Regulation is based on the Protocol of 2002 to the Athens Convention on the Carriage of Passengers and their Luggage by Sea, 1974 (hereinafter referred to as the 'Athens Convention'), adopted by the International Maritime Organization ('IMO'). However, it differs from the Protocol in terms of its scope of application, and it adds specific provisions to the requirements of the Protocol concerning the rights of passengers with reduced mobility, the right of an advance payment in case of personal injury or death, and the obligation to provide information to all passengers on their respective rights at the point of purchase of their tickets, or – at least – at the point of departure of their journey.

The Regulation also makes it mandatory in the EU for operators to take out war and terrorism risk insurance. However, such insurance cover is 'capped' at a maximum amount set in accordance with the IMO Reservation and Guidelines to the 2002 Protocol adopted in 2006, in order to ensure the ability of the insurance market to cover the relevant risks.

This ex-post evaluation has been carried out as Article 8 of the Regulation provides that the Commission must report on its application, taking into account also pertinent economic developments and developments in international fora. Within the Regulation itself specific points have been raised for further consideration by the Commission and which may be subject to a possible impact assessment and which the current ex-post evaluation was also tasked with gathering evidence for. These points are: (a) the scope of the Regulation and the possibility of extending it to all types of domestic passenger carriage as a mandatory requirement (Article 1(3) of the Regulation); and (b) the financial impact of the Regulation in terms of the cost of premiums on carriers operating domestically, in particular on class B which are already included in its scope of application. The evaluation has been carried out in order to examine the application the Regulation during the first three years since its date of application on 31 December 2012. It is supported by an external study carried out for the Commission in 2016-2017.¹

Among the elements also taken into consideration is the Protocol of 2002 to the Athens Convention, which is annexed to the Regulation, and the provisions thereof that become applicable through the Regulation. Furthermore, the accession of the European Union to the Protocol of 2002, through Council Decisions 2012/22/EU and 2012/23/EU, which took effect with the entry into force of the Protocol in April 2014, has been considered in the ex-post evaluation of the Regulation.

Prior to the adoption of the Regulation, the rights of passengers travelling by sea in the event of accidents were subject to national law, which varied significantly as regards the relevant

¹ <https://bookshop.europa.eu/en/support-study-to-the-evaluation-of-regulation-ec-392-2009-pbMI0417106/>

thresholds of compensation, the grounds of and exceptions to the carrier's liability. While the Athens Convention 1974 had been ratified by a number of EU Member States meaning that the rights of passengers established therein were applicable in many Member States, since this depended on ratification by individual Member States no uniformity across the EU as regards rights of passengers had been established and nor was there a sufficient level of protection of these rights.

In the first three years of its application the Regulation has not been applicable in its full scope in all Member States, due to the possibility established in Article 11 for States to exempt domestic carriage of passengers by sea in classes A and B, the two types of domestic carriage covered by the mandatory scope of the Regulation. At the same time and as Article 2 allows for this possibility, three Member States have chosen to apply the Regulation in an extended manner covering all types of domestic carriage, with some adjustments. As a result a full assessment of all aspects of the Regulation has proved difficult at this time.

This notwithstanding the most important finding of the evaluation is positive as regards the effectiveness of the Regulation and on this basis it is not proposed to modify the Regulation at this stage. The results of the implementation are that it has brought about the introduction of the Athens Protocol standards into EU legislation in terms which are expected to have a knock-on effect on harmonisation and the level playing field across the EU market in the mid to long term. The evaluation has not identified any impediments to the expected benefits. Other significant impacts of the Regulation that the evaluation was able to find evidence for are the provision for advance payment and the obligation on the carrier to provide information to passengers on their respective rights at the point of purchase of their tickets, or – at least – at the point of departure of their journey.

The Regulation does not appear to have produced any unexpected negative impacts to date. The analysis underlying this finding however does cover a period when exemptions were in place. The conclusions may therefore not be transferable to a later period when the Regulation is fully implemented.

The findings indicate that the insurability of carriers has not been affected by the Regulation. Insurance premiums and passenger fares have been largely unaffected. There have been slight unexpected positive effects, such as providing clarity for dealing with (especially international) claims on accidents and incidents and the fact that the regulation may have caused a small number of Member States to go beyond the scope of the application and expand the coverage of passenger rights.

With regard to efficiency the evaluation looked into the different costs and benefits of the Regulation, using proportionality and reasonableness as the main lenses for this analysis. In general, the Regulation was found to have created significant benefits with low costs. The costs and benefits that can be attributed to the Regulation are likely to change substantially once the exemptions expire. A future evaluation will have to assess whether the current conclusion on efficiency will still hold.

The evaluation also concluded that the Regulation is in line with the objectives of the EU maritime safety policy. As part of the Third Maritime Safety Legislative Package the Regulation ensures greater accountability and responsible behaviour on the part of maritime operators. As far as other existing legislation is concerned, the Regulation is coherent and adds useful elements to the existing instruments, while further experience with its application

can clarify its interaction with the Package Travel Directive² and the 2002 Protocol, as that forms part of EU law.

The main EU-added value of the Regulation compared to the Protocol of 2002 and the existing national rules on passenger rights protection is harmonisation across the EU and across transport modes (i.e. advance payment, right to information, mobility equipment), and increased levels of compensation in case of accidents at sea. These objectives, in particular harmonisation, could not have been achieved at a national alone, which indicates that the Regulation is in line with the principle of subsidiarity.

The most important findings of this evaluation relate to the effectiveness of the Regulation, even though the Regulation has been assessed during a time when its mandatory scope has been incompletely applied. This results from the transitional provisions applicable in several Member States, including States representing the largest share of passenger volumes and relevant fleet. The evaluation has relied on an extensive consultation of stakeholders and the general public on the different elements of the Regulation. The evidence gathered through this consultation has been sufficient to draw a conclusion. It is not certain whether the same conclusion will apply to a later period, when the Regulation is fully implemented, however, the current evaluation was able to establish that the Regulation has been effective within the limits of its application. but the consultation has also identified the need for further consideration of the following elements.

The appropriateness of the scope of the Regulation, which is key to its effectiveness, needs to be reassessed, in the context of a possible future impact assessment, in accordance with Articles 1(3) and 9(1) thereof, at a later stage. That cannot take place until sufficient time has elapsed after the full mandatory scope of the Regulation has become applicable to all EU Member States. The exemptions that apply to some types of domestic carriage (namely for class B until 31/12/2018) have to end, and sufficient time allowed thereafter for relevant evidence of implementation to be produced. The nature of cases involving liability of carriers arising from accidents at sea, followed in many cases by lengthy legal proceedings, also needs to be taken into consideration when deciding on how, whether and when to carry out any future evaluation or impact assessment on the subject of this Regulation.

² Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC (OJ L326, 11.12.2015, p.1)