



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 18 April 2013**

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**TRANS 152  
MAR 38**

**PROPOSAL**

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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 16 April 2013

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

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Subject: Proposal for a Council Decision on the position to be adopted, on behalf of the  
European Union, at the International Maritime Organization (IMO) with regard  
to the adoption of certain Codes and related amendments to Conventions

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Delegations will find attached Commission document COM(2013) 208 final.

Encl.: COM(2013) 208 final



EUROPEAN  
COMMISSION

Brussels, 16.4.2013  
COM(2013) 208 final

2013/0111 (NLE)

Proposal for a

**COUNCIL DECISION**

**On the position to be adopted, on behalf of the European Union, at the International Maritime Organization (IMO) with regard to the adoption of certain Codes and related amendments to Conventions**

## EXPLANATORY MEMORANDUM

### **1. CONTEXT OF THE PROPOSAL**

The present Commission proposal concerns the establishment of the Union position in different IMO bodies in relation to the following:

- (a) The adoption of an IMO Instruments Implementation Code (hereinafter referred to as the "III Code") ;
- (b) The adoption of an IMO Code for Recognised Organisations (hereinafter referred to as the "RO Code");
- (c) The adoption of amendments to certain international conventions ; and
- (d) The acceptance of those amendments in accordance with the respective provisions in the conventions concerned.

#### **1.1. The III Code**

The draft III Code has the objective to enhance global maritime safety and protection of the marine environment and assist States in the implementation of the following instruments:

- The International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974) and its 1988 Protocol;
- The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocols of 1978 and 1997 relating thereto, as amended (MARPOL 73/78);
- The Convention on the International Regulations for Preventing Collisions at Sea, 1972, as amended (COLREG 1972);
- The International Convention on Load Lines, 1966 (LL 1966) and its 1988 Protocol;
- The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, as amended (STCW); and
- The International Convention on Tonnage Measurement of Ships, 1969 (TONNAGE 1969).

The Code contains both mandatory provisions and recommendations addressing those aspects which are considered necessary for a Contracting Party to give full and complete effect to the provisions of the applicable international instruments to which it is a Contracting Party. The areas covered are the following:

- As regards flag States, coastal States and port States: general provisions on implementation strategy, scope, initial actions, communication of information, record keeping and improvement;

- As regards flag States: implementation, delegation of authority, enforcement, flag State surveyors, flag State investigations, evaluation and review;
- As regards coastal States: implementation, enforcement, evaluation and review;
- As regards port States: implementation, enforcement, evaluation and review.

## **1.2. The RO Code**

The draft RO Code has the objective to provide flag States with a standard for the assessment and authorisation of recognised organisations as well as mechanisms for the consistent, efficient and effective oversight of recognised organisations, and to clarify the responsibilities of organisations authorised as recognised organisations and the scope of that authorisation.

This concerns the following instruments:

- The International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974);
- The Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973;
- The 1988 Protocol to the International Convention on Load Lines, 1966.

The Code applies to all organisations being considered for recognition or that are recognised by a flag State to perform, on its behalf, statutory certification and services under mandatory IMO instruments and national legislation, and to all flag States that intend to grant that recognition.

The Code contains mandatory provisions as regards delegation of authority and communication of information, and establishes:

- The mandatory requirements that an organisation shall fulfil to be recognised by a flag State;
- The mandatory requirements that a recognised organisation shall fulfil when performing statutory certification and services on behalf of its authorising flag States;
- The mandatory requirements that flag States should adhere to when authorising a recognised organisation;
- Guidelines for flag State oversight of recognised organisations.

## **1.3. Adoption of the Codes**

### *1.3.1. Adoption of the III Code*

Now approved by the IMO Marine Environment Protection Committee in its 64<sup>th</sup> session (MEPC 64, October 2012) and by the IMO Maritime Safety Committee in its 91<sup>st</sup> session (MSC 91, November 2012), the 28<sup>th</sup> IMO Assembly is expected to adopt the III Code in December 2013.

### *1.3.2. Adoption of the RO Code*

Now approved by the IMO Marine Environment Protection Committee in its 64<sup>th</sup> session (October 2012) and by the IMO Maritime Safety Committee in its 91<sup>st</sup> session (November 2012), the RO Code is expected to be adopted by these committees in May and June 2013, in their 65<sup>th</sup> and 92<sup>nd</sup> sessions, respectively.

## **1.4. Amendment of the relevant international conventions**

### *1.4.1. Adoption of amendments concerning the III Code*

The IMO Marine Environment Protection Committee, at its 64<sup>th</sup> session, approved amendments to the protocols of 1978 and 1997 relating to the MARPOL convention with a view to rendering the III Code mandatory, together with an associated flag State audit scheme. The Committee is expected to adopt these amendments at its 66<sup>th</sup> session, in 2014.

The IMO Maritime Safety Committee, at its 91<sup>st</sup> session, approved amendments to the SOLAS convention as well as to the protocol of 1988 relating to the Load Lines convention, with a view to rendering the III Code mandatory, together with an associated flag State audit scheme. At its 92<sup>nd</sup> Session, due to take place in June 2013, the Committee is expected to approve amendments to the STCW Convention with the same purpose. The Committee is expected to adopt the amendments referred to in this paragraph at its 93<sup>rd</sup> session, in 2014.

The IMO Maritime Safety Committee, at its 91<sup>st</sup> session, approved amendments to the Load Lines, COLREG and Tonnage conventions with a view to rendering the said Code mandatory, together with an associated flag State audit scheme, for consideration and adoption by the 28<sup>th</sup> Assembly.

### *1.4.2. Adoption of amendments concerning the RO Code*

The IMO Marine Environment Protection Committee, at its 64<sup>th</sup> session, approved amendments to the Protocol of 1978 relating to the MARPOL convention with a view to rendering the RO Code mandatory. The committee is expected to adopt these amendments at its 65<sup>th</sup> session, due to take place in May 2013.

The IMO Maritime Safety Committee, at its 91<sup>st</sup> session, approved amendments to the SOLAS convention and to the protocol of 1988 relating to the Load Lines convention, with a view to rendering the RO Code mandatory. The committee is expected to adopt these amendments at its 92<sup>nd</sup> session.

### *1.4.3. Acceptance and entry into force. Reservations.*

Once approved and adopted by the competent IMO Committee or by the Assembly, as appropriate, the amendments to the above mentioned conventions will be submitted to the respective contracting parties in order for these to express their consent to be bound by the said amendments either tacitly or expressly, according to the relevant provisions of each convention.

None of the above mentioned conventions contains clauses excluding the formulation of reservations as regards amendments.

#### 1.4.4. *Summary table*

A summary table of the events described in the preceding subsection is presented below for ease of reference:

Code or Convention	Approval	Expected Adoption	Type of acceptance	Circulation period	Expected acceptance	Expected entry into force of the amendments
<b>III Code</b>	MEPC <sup>1</sup> 64, October 2012 MSC <sup>2</sup> 91, November 2012	28 <sup>th</sup> IMO Assembly, December 2013	-/-	-/-	-/-	-/-
<b>Load Lines convention 1966 (III Code)</b>	MSC91, November 2012	28 <sup>th</sup> IMO Assembly, December 2013	Unanimous and tacit, or 2/3 majority and explicit	3 years Based on attainment of sufficient explicit acceptances	1/1/2017	1/1/2018 <sup>3</sup> On a date 12 months after the number of explicit acceptances have been received
<b>Tonnage convention 1969, (III Code)</b>	MSC91, November 2012	28 <sup>th</sup> IMO Assembly, December 2013	Unanimous and tacit, or 2/3 majority and explicit	2 years Based on attainment of sufficient explicit acceptances	1/1/2016	1/1/2017 <sup>4</sup> On a date 12 months after the number of explicit acceptances have been received

<sup>1</sup> IMO Marine Environment Protection Committee

<sup>2</sup> IMO Maritime Safety Committee

<sup>3</sup> Or 12 months after attainment of sufficient explicit acceptances

<sup>4</sup> Or 12 months after attainment of sufficient explicit acceptances

<b>Code or Convention</b>	<b>Approval</b>	<b>Expected Adoption</b>	<b>Type of acceptance</b>	<b>Circulation period</b>	<b>Expected acceptance</b>	<b>Expected entry into force of the amendments</b>
<b>Collision Regulations (III Code)</b>	MSC91, November 2012	28 <sup>th</sup> IMO Assembly, December 2013	2/3 majority Tacit	18 months	1/7/2015	1/1/2016
<b>RO Code</b>	MEPC64, October 2012  MSC91, November 2012	MEPC65, May 2013  MSC92, June 2013	-/-	-/-	-/-	-/-
<b>MARPOL protocol '78 (RO Code)</b>	MEPC64, October 2012	MEPC65, May 2013	2/3 majority Tacit	≥10 months	1/4/2014	1/10/2014



<b>Code or Convention</b>	<b>Approval</b>	<b>Expected Adoption</b>	<b>Type of acceptance</b>	<b>Circulation period</b>	<b>Expected acceptance</b>	<b>Expected entry into force of the amendments</b>
<b>SOLAS convention and Load Lines protocol '88; (RO Code)</b>	MSC91, November 2012	MSC92, June 2013	2/3 majority Tacit	≥1 year	1/7/2014	1/1/2015
<b>MARPOL protocols '78/'97 (III Code)</b>	MEPC64, October 2012	MEPC66, March 2014	2/3 majority Tacit	≥10 months	1/2/2015 <sup>5</sup>	1/8/2015 <sup>6</sup>
<b>SOLAS convention and Load Lines protocol '88; (III Code)</b>	MSC91, November 2012	MSC93, May 2014	2/3 majority Tacit	≥1 year	1/7/2015	1/1/2016

<sup>5</sup> Acceptance deadline might be delayed until 1/7/2015 in order to harmonize with the concomitant amendment of the SOLAS, Load Lines and STCW conventions

<sup>6</sup> Entry into force might be delayed until 1/1/2016 in order to harmonize with the concomitant amendment of the SOLAS, Load Lines and STCW conventions

<b>Code or Convention</b>	<b>Approval</b>	<b>Expected Adoption</b>	<b>Type of acceptance</b>	<b>Circulation period</b>	<b>Expected acceptance</b>	<b>Expected entry into force of the amendments</b>
STCW convention and part A of STCW code (III Code)	MSC92, June 2013	MSC93, May 2014	2/3 majority Tacit	≥1 year	1/7/2015	1/1/2016

## 1.5. Relevant EU legislation

### 1.5.1. Directive 2009/15/EC

Directive 2009/15/EC of the European Parliament and the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations<sup>7</sup> (hereinafter referred to as "the Directive") repealed and partly replaced Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations<sup>8</sup>.

The Directive governs the relationship between the Member States and the recognised organisations which they authorise to carry out statutory tasks on their behalf.

### 1.5.2. Regulation 391/2009

Regulation (EC) N° 391/2009 of the European Parliament and the Council on common rules and standards for ship inspection and survey organisations<sup>9</sup> (hereinafter "the Regulation") modified and replaced the system formerly laid down in Council Directive 94/57/EC for the recognition and assessment of classification societies.

The Regulation lays down a number of criteria and obligations which an organisation must meet in order to obtain and thereafter maintain its EU recognition. These requirements concern both statutory and classification activities and are laid down<sup>10</sup> in Articles 8(4), 9, 10 and 11 as well as in Annex I of the Regulation.

The requirements provided in the Regulation have the specific objective to enhance the safety of, and prevent pollution from, all ships in the class of recognised organisations<sup>11</sup>. They are formulated in general terms and make no distinction based on flag.

The Regulation also governs the granting and withdrawal of EU recognition, provides for the periodic assessment of RO's by the Commission and lays down a system of sanctions in case of non-compliance.

### 1.5.3. Directive 2009/21/EC

Directive 2009/21/EC on flag State requirements<sup>12</sup>, which also formed part of the 3<sup>rd</sup> Maritime Safety Package, lays down a number of obligations for the Member States as flag States. These include in particular an obligation for Member States to take the necessary measures for an IMO audit of their administration to be carried out at least once every seven years. However, this provision shall expire *"at the latest on 17 June 2017 or at an earlier date, as established by the Commission in accordance with the regulatory procedure referred to in Article 10(2), if a mandatory IMO Member State Audit Scheme has entered into force"*.

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<sup>7</sup> OJ L 131, 28.5.2009, p. 47

<sup>8</sup> OJ L 319, 12.12.1994, p. 20

<sup>9</sup> OJ L 131, 28.5.2009, p. 11

<sup>10</sup> Article 3(1)

<sup>11</sup> Recital 13

<sup>12</sup> OJ L 131, 28.5.2009, p. 132

#### 1.5.4. Directive 2008/106/EC

Directive 2008/106/EC on the minimum level of training of seafarers<sup>13</sup> lays down *inter alia* a minimum level of training for seafarers in the Union based on the standards of training contained in the STCW Convention and the associated STCW guidelines, as well as provisions on minimum rest periods for watchkeeping personnel in accordance with the same Convention.

Directive 2008/106/EC also lays down a series of specific obligations for the Member States as flag and port States, such as: a) procedures and common criteria for the recognition by the Member States of certificates issued by third countries, based on the training and certification requirements contained in the STCW Convention; b) criteria concerning the inspection of maritime institutes, training programmes and courses; c) provisions for the inspection of vessels by port authorities and Port State control; d) provisions for the enforcement by the Member States including the prevention of fraudulent practices and a system of sanctions.

### 1.6. EU Competence

In view of the relevant EU legislation above, the Commission considers that the adoption of the draft III Code and the RO Code as well as the amendments to the conventions referred to in section 1.1 and 1.2 above come under exclusive EU competence which the Union has acquired pursuant to Article 3 (2) TFEU, in so far as the adoption of the international instruments at stake may affect common rules or alter their scope. In this respect:

1. The draft III Code is meant to replace Resolution A.973(24) which contains the existing Code for the implementation of mandatory IMO instruments, which in turn replaced Assembly Resolution A.847(20), which the Member States are obliged to apply by virtue of Article 3 (1) of Directive 2009/15/EC.
2. The matter of the RO Code is exhaustively regulated by the above mentioned Directive and by Regulation (EC) n°391/2009, either directly or by reference to a number of IMO resolutions.
3. According to the first subparagraph Article 7(2) of Directive 2009/15/EC: "Following the adoption of new instruments or protocols to the international conventions referred to in Article 2(d), the Council, acting on a proposal from the Commission, shall decide, taking into account the Member States' parliamentary procedures as well as the relevant procedures within the IMO, on the detailed arrangements for ratifying those new instruments or protocols, while ensuring that they are applied uniformly and simultaneously in the Member States."
4. The term "international conventions" is defined both in Directive 2009/15/EC (Article 2(d)) and in Regulation (EC) n°391/2009 (Article 2(b)) to include the SOLAS, MARPOL and Load Lines conventions, together with the protocols and amendments thereto, and the related codes of mandatory application, in their up-to-date version.
5. The obligations incumbent on the Member States as flag and port States under the STCW convention are exhaustively covered by Directive 2008/106/EC.

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<sup>13</sup> OJ L 323, 3.12.2008, p. 33; Directive as last amended by Directive 2012/35/EU

Consistent with a well consolidated body of case law, even if the Union is not a member of the IMO, the Member States are not authorised to assume obligations likely to affect EU rules promulgated for the attainment of the objectives of the Treaties, unless they are authorised to do so by means of a Council decision, on a proposal by the Commission. The need for authorisation therefore extends to any such obligations, regardless of the subject-matter of the international instruments concerned.

## **1.7. Areas of conflict between the draft IMO Codes and EU law**

The Commission considers that the Codes are compatible with EU law with the exception of the following areas:

### *1.7.1. Draft III Code*

#### 1.7.1.1. Class and statutory certificates

Section 16, Part 2 of the Code provides for a minimum list of resources and processes which flag States have to establish in order to administer a safety and environmental protection programme. According to point 1 of this section, this list has to include *"administrative instructions to implement applicable international rules and regulations as well as develop and disseminate any interpretative national regulations that may be needed including certificates issued by a classification society, which is recognized by the flag State in accordance with the provisions of SOLAS regulation XI-1/1, and which certificate is required by the flag State to demonstrate compliance with structural, mechanical, electrical and/or other requirements of an international convention to which the flag State is a party or a requirement of the flag State's national regulations"*.

Regulation (EC) No 391/2009 and Directive 2009/15/EC are defining two types of certificates that can be issued by classification societies - 'statutory certificates' – which are those certificates issued by or on behalf of a flag State in accordance with the international conventions and 'class certificates' which are those documents issued by a recognised organisation certifying the fitness of a ship for a particular use or service in accordance with the rules and procedures laid down and made public by that recognised organisation.

In contrast to these provisions, Section 16 of the Draft III Code seems to refer to all certificates issued by classification societies as being required by the flag State and, consequently, having to comply with the administrative instructions provided by that State. This has to be understood also as referring to what in the EU is considered as class tasks and certificates, and in particular those required as proof of compliance with SOLAS Ch. II-I, Part A-1, Reg. 3-1<sup>14</sup>, which remain acts of the recognised organisations and therefore cannot benefit from the protection due to acts of a State. There is therefore a risk that the requirements contained in the above mentioned Regulation concerning classification tasks and certificates, or action taken in order to ensure the implementation of those requirements, be unduly contested by third States or by recognised organisations themselves based on different administrative instructions emanating from those States.

#### 1.7.1.2. Authorisation of Recognised Organisations

According to the introductory part of Section 18, Part 2 of the draft III Code, *"With regard only to ships entitled to fly its flag, a flag State authorising a recognised organisation to act*

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<sup>14</sup> See below, section 1.7.1.4

*on its behalf, in conducting the surveys, inspections and audits, issuing of certificates and documents, marking of ships and other statutory work required under the conventions of the Organization or under their national legislation, must regulate such authorisation(s) in accordance with the applicable requirements of the international mandatory instruments [...]".*

According to Regulation (EC) No 391/2009, recognition is provided at EU level and the recognised classification society, following such recognition, can fulfil both statutory and classification tasks in the EU. Moreover, the recognition is provided for the worldwide activity of the classification society. The list of minimum criteria and obligations as provided in the Regulation (many of which are of a structural nature) concern the entire activity of the organisation, regardless of flag.

The above mentioned limitation in the draft III Code of the flag State's capacity to regulate the activity of the organisation only as regards ships flying its own flag, may be seen to be in conflict with the set of criteria applied at EU level as a *sine qua non* condition for the granting and maintenance of recognition. It must however be noted that recognition is provided by the Commission, while Member States can only authorise organisations recognised at EU level.

#### 1.7.1.3. Specific requirements

Section 18 in the draft III Code seems to provide an exhaustive list of areas in which the States can intervene in the activity of a recognised organisation in order to ensure compliance with certain standards. Even if these requirements are formulated in a broad manner, they do not cover all the minimum criteria and obligations which are provided in the Regulation - like criterion B.5 (intellectual property) or obligations concerning harmonisation of classification rules and mutual recognition under Article 10 (1) of the Regulation; or deriving from the obligations of the Member States laid down in Directive 2009/15/EC - such as financial liability as provided for in Article 5(2)(b).

However, it appears from the nature of the Code itself and its scope as stated in section 6 (*"The Code seeks to address those aspects necessary for a Contracting Government or Party to give a full and complete effect to the provisions of the applicable international instruments to which it is a Contracting Government or Party ..."*), that, save where an explicit prohibition is formulated, its provisions must be understood as setting minimum standards on which the individual States can elaborate and improve, which is the intent stated in recital 4 of Regulation 391/2009.

#### 1.7.1.4. Application of classification rules

According to section 19, Part 2 of the draft III Code, *"No flag State shall mandate its recognised organisations to apply to ships, other than those entitled to fly its flag, any requirements pertaining to their classification rules, requirements, procedures or performance of other statutory certification processes beyond convention requirements and the mandatory instruments of the organization."*

Hence, the flag State will not be able to impose on classification societies which they authorize requirements which go beyond convention requirements and the mandatory IMO instruments, other than in the case of the ships flying their flag. Per *a contrario*, any flag State may impose such requirements which are in accordance with the IMO Convention or other mandatory IMO instruments, including the III and RO Codes themselves.

As can be seen from the preceding subsection, a number of requirements contained in the above mentioned Regulation and Directive are not covered by this provision.

Furthermore, the precedents in the elaboration of the Codes have shown that some of those requirements tend to be perceived by a number of States as impinging on their sovereignty. That perception is however unfounded, for the following reasons:

- Classification societies remain free to establish their own rules and procedures as they deem fit, provided they comply with the goal-based standards laid down by the IMO. They adopt the said rules and procedures under their own and sole authority.
- It follows that classification surveys carried out and classification certificates delivered in order to establish and subsequently attest to compliance with the said rules and procedures are activities of a strictly private nature and therefore neither acts of any State nor carried out on any State's behalf;
- The private nature of classification tasks and certification is a matter of fact that is not altered by their inclusion in the definition of "statutory certification and services". Nor is such private nature altered by the fact that SOLAS Ch. II-I, Part A-1, Reg. 3-1 requires the Contracting Parties to ensure that ships flying their flag comply with the structural, mechanical and electrical requirements of a classification society which is recognized by the Administration: as is evident from the very wording of this provision, those remain requirements of the classification society and not of the recognizing State;
- Every classification society is free to choose whether or not to enter into authorisation agreements with flag States, and hence to accept or refuse the conditions established by those States, as a condition for recognition, with regard to the said classification rules and procedures;
- It is therefore incumbent on each recognised organisation to ensure that the obligations entered into with different flag States are compatible with one another. While it is perfectly conceivable that conditions for recognition as regards classification tasks and certification, as laid down by different States, may be incompatible with one another, this in no case implies a conflict of sovereign rights and has no other consequence than the impossibility for an organisation to hold recognition from all or part of those States simultaneously.

The experience of past maritime catastrophes such as the accidents of the "Erika" and the "Prestige", both ships flying the flag of (then) third countries but classified by organisations holding EU recognition, has highlighted to what extent maritime safety and the protection of the environment in Europe depend on the good performance of EU-recognised classification societies in both the statutory and classification domains and regardless of flag. The Union cannot ignore this need, as it would otherwise fall in the contradiction that organisations entitled to certify the safety of EU ships, and thus benefitting from free access to a market of considerable quality and size, would however be allowed to perform to lower standards when certifying ships flying the flag of third States and which might pose a threat to legitimate, vital Union's interests such as safety and the protection of the environment. That is the reason why Regulation 391/2009, as is clear from its Articles 1 and 4 read in conjunction with recital 13, requires compliance with appropriate criteria and obligations of a systemic nature, concerning both classification and statutory tasks and making no distinction based on ship flag, as a *sine*

*qua non* condition for an organisation to be recognised at EU level and thereafter maintain that recognition.

### 1.7.2. Draft RO Code

#### 1.7.2.1. Class and statutory certificates

According to section 1.3 of Part II of the RO Code, 'statutory certification and services' means *"certificates issued, and services provided, on the authority of laws, rules and regulations set down by the Government of a sovereign State. This includes plan review, survey, and / or audit leading to the issuance of or in support of the issuance of a certificate by or on behalf of a flag State as evidence of compliance with requirements contained in an international convention or national legislation. This includes certificates issued by an organization recognized by the flag State in accordance with the provisions of SOLAS regulation XI-1/1, and which may incorporate demonstrated compliance with the structural, mechanical and electrical requirements of the RO under the terms of its agreement of recognition with the flag State"*.

Taking into account the definitions of the 'statutory certificate' and 'class certificate' as provided in EU law, the considerations made further up under subsections 1.7.1.1 to 1.7.1.4 for the draft III Code are equally applicable to the draft RO Code.

#### 1.7.2.2. Cooperation between recognised organisations

Points 3.9.3.1 and 3.9.3.2 of Part II of the draft RO Code provide for a mechanism of cooperation between recognised organisations, but under the framework established by the flag State.

Cooperation between recognised organisations is governed by Article 10 (1) of Regulation (EC) No 391/2009, and concerns classification tasks and certificates without distinction based on flag. In contrast to these provisions included in EU law, points 3.9.3.1 and 3.9.3.2 of Part II of the draft RO Code seem to create some limitations in the cooperation between recognised organisations, in the sense that the implementation of the Code by the Member States would imply that (a) mutual recognition would be possible only if a framework for that purpose exists within each Member State for the ships flying its flag and (b) the effects of that framework cannot extend beyond the boundaries of the fleet flying the flag of each Member State.

Regulation 391/2009 is directly applicable in all Member States and therefore fulfils condition (a). However, for the reasons described in sections 1.7.1.3 and 1.7.1.4, the framework of cooperation created by Regulation 391/2009 goes further than the boundaries of the fleet flying the flag of each member states and therefore does not comply with condition (b) and is therefore in conflict with Points 3.9.3.1 and 3.9.3.2 of Part II of the draft RO Code.

#### 1.7.2.3. Application of classification rules

As the provisions of point 3.9.3.3 of Part II of the draft RO Code are identical to those included in section 19, Part 2 of the draft III Code, the considerations made in subsection 1.7.1.4 are also applicable to these provisions.



#### 1.7.2.4. Authorisation of recognised organisations

According to point 8.1.1 of Part II of the draft RO Code, "[...] a flag State may authorise an RO to act on its behalf in statutory certification and services and determination of tonnages only to ships entitled to fly its flag as required by these conventions. Such authorisations shall not require ROs to perform actions that impinge on the rights of another flag State."

This provision should be analysed in correlation with the definition of the 'statutory certification and services' in order to see if the extension of the flag State requirements over class certificates and the minimum list of criteria which have to be met by an organisation in order to be recognised at EU level might call into question powers of other flag States. In this respect, the considerations made in sections 1.7.1.3 and 1.7.1.4 also apply here.

### 1.8. IMO audit

The foreseen amendments to the international conventions discussed are also establishing a mandatory IMO audit scheme defined as *"the IMO Member State Audit Scheme established by the Organization and taking into account the guidelines developed by the Organization, which is intended to ensure consistent and effective implementation of instruments of the Organization and to assist States to improve their capabilities and overall performance in this respect."*

According to the amendments brought, Member States will be subject to these audits at periodic intervals. As defined, the audit shall take into account the compliance with the instruments of the IMO and shall be based on an overall schedule developed by the Secretary-General of the Organization taking into account the guidelines developed.

Hence, in principle, a mandatory IMO audit will assess also compliance with the international conventions as defined in Regulation (EC) No 391/2009 and Directive 2009/15/EC, including the III Code and the RO Code.

In this respect it is necessary to examine if a situation of incompatibility may arise between the international obligations of the Member States and those incumbent on them under EU law.

The analysis made in sections 1.7.1 and 1.7.2 shows that there are a number of areas where the draft III and RO Codes are in contradiction with the applicable EU law and therefore it is necessary to ensure that the obligations incumbent on them under the international maritime safety conventions concerned, and against which they will be audited by the IMO, are compatible with their obligations at EU level.

### 1.9. Directive 2008/106/EC

Without prejudice to the considerations made in sections 1.6 to 1.8, no areas of conflict have been identified between the draft Codes and Directive 2008/106/EC.

### 1.10. Conclusion

In view of the above it is only possible for the Member States to give their consent to be bound by the III and RO Codes if the necessary safeguards are taken in order to ensure that:

- (a) The full effectiveness of Regulation 391/2009 and Directive 2009/15/EC, as well as the Union's capacity to continue to develop such *acquis*; and
- (b) The Commission's capacity to grant recognition only to those organisations which fulfil the criteria and obligations laid down in Regulation 391/2009, and to withdraw the recognition of those which do not,

are fully preserved.

The Commission considers that, in order to protect the achievement of the objectives of the said Directive and Regulation, the Member States should make an express reservation in relation to their obligations under EU law when giving their consent to be bound by the Codes and to submit their maritime administrations to a mandatory IMO Member State Audit Scheme.

As regards the issues discussed under section 1.7.1.3 it should suffice for the Member States to make it clear, when giving their consent to be bound by the Codes, that they interpret the provisions concerned in a certain way – e.g. as providing only a minimum list of requirements which does not prevent the flag States from imposing other requirements on recognised organisations.

Finally, the obligation of the Member States to undergo an IMO audit as provided in Article 7 of Directive 2009/21/EC should be seen also in the light of the obligations incumbent on them at international and EU level. Therefore, any IMO audit should verify compliance only with those provisions of the international conventions which Member States have accepted.

Proposal for a

## COUNCIL DECISION

### **On the position to be adopted, on behalf of the European Union, at the International Maritime Organization (IMO) with regard to the adoption of certain Codes and related amendments to Conventions**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100 (2), in conjunction with Article 218 (9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) Now approved by the IMO Marine Environment Protection Committee in its 64<sup>th</sup> session (MEPC 64, October 2012) and by the IMO Maritime Safety Committee in its 91<sup>st</sup> session (MSC 91, November 2012), the 28<sup>th</sup> IMO Assembly is expected to adopt an IMO Instruments Implementation Code (III Code) in December 2013.
- (2) Now approved by the IMO MEPC 64 and by the IMO MSC 91, an IMO Code on Recognised Organisations (RO Code) is expected to be adopted by these Committees in May and June 2013, in their 65<sup>th</sup> and 92<sup>nd</sup> sessions, respectively.
- (3) The IMO MSC 91 approved amendments to the International Load Lines Convention, 1966 (hereinafter referred to as the "Load Lines convention"); to the International Regulations for Preventing Collisions at Sea, 1972; and to the International Convention on Tonnage Measurement, 1969 with a view to rendering the III Code mandatory, together with an associated flag State audit scheme, for consideration and adoption by the 28<sup>th</sup> IMO Assembly.
- (4) The IMO MEPC 64 approved amendments to the protocols of 1978 and 1997 relating to the International Convention for the Prevention of Pollution from Ships, 1973 (hereinafter referred to as "the MARPOL convention"), with a view to rendering the III Code mandatory, together with an associated flag State audit scheme. The Committee is expected to adopt these amendments at its 66<sup>th</sup> session, in 2014.
- (5) The IMO MSC 91 approved amendments to the International Convention for the Safety of Life at Sea, 1974 (hereinafter referred to as "the SOLAS convention") and its 1988 Protocol, as well as to the protocol of 1988 relating to the International Convention on Load Lines, 1966, with a view to rendering the III Code mandatory, together with an associated flag State audit scheme. At its 92<sup>nd</sup> Session, due to take place in June 2013, the Committee is expected to approve amendments to the International Convention on Standards of Training, Certification and Watchkeeping

for Seafarers, 1978 (hereinafter referred to as "the STCW Convention"), with the same purpose. The Committee is expected to adopt the amendments referred to in this paragraph at its 93<sup>rd</sup> session, in 2014.

- (6) The IMO MEPC 64 approved amendments to the Protocol of 1978 relating to the MARPOL convention with a view to rendering the RO Code mandatory. The Committee is expected to adopt these amendments at its 65<sup>th</sup> session.
- (7) The IMO MSC 91 approved amendments to the SOLAS convention and to the protocol of 1988 relating to the Load Lines convention, with a view to rendering the RO Code mandatory. The Committee is expected to adopt these amendments at its 92<sup>nd</sup> session.
- (8) Once adopted, the amendments to the above mentioned conventions will be submitted by the IMO Secretary-General to the respective contracting parties in order for these to express their consent to be bound by the said amendments either tacitly or expressly, according to the relevant provisions of each convention.
- (9) None of the above mentioned conventions contains clauses excluding the formulation of reservations as regards amendments.
- (10) The draft III Code is meant to replace Resolution A.973(24) which contains the existing Code for the implementation of mandatory IMO instruments, which in turn replaced Assembly Resolution A.847(20), which the Member States are obliged to apply by virtue of Article 3 (1) of Directive 2009/15/EC of the European Parliament and the Council on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations<sup>15</sup>.
- (11) The matter of the RO Code is exhaustively regulated by the above mentioned Directive and by Regulation (EC) N° 391/2009 of the European Parliament and the Council on common rules and standards for ship inspection and survey organisations<sup>16</sup>, either directly or by reference to a number of IMO resolutions.
- (12) Furthermore, according to the first subparagraph of Article 7(2) of Directive 2009/15/EC, following the adoption of new instruments or protocols to the international conventions referred to in Article 2(d), the Council, acting on a proposal from the Commission, shall decide, taking into account the Member States' parliamentary procedures as well as the relevant procedures within the IMO, on the detailed arrangements for ratifying those new instruments or protocols, while ensuring that they are applied uniformly and simultaneously in the Member States. The term "international conventions" is defined both in Directive 2009/15/EC and in Regulation (EC) n°391/2009 to include the SOLAS, MARPOL and Load Lines conventions, together with the protocols and amendments thereto, and the related codes of mandatory application, in their up-to-date version.
- (13) The obligations incumbent on the flag States under the STCW convention are covered by Directive 2008/106/EC on the minimum level of training of seafarers<sup>17</sup>, as amended by Directive 2012/35/EU<sup>18</sup>.

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<sup>15</sup> OJ L 131, 28.5.2009, p. 47

<sup>16</sup> OJ L 131, 28.5.2009, p. 11

<sup>17</sup> OJ L 323, 3.12.2008, p. 33

- (14) It is necessary to ensure the consistency with Union law of the Member States' obligations arising from the application of the III Code and the RO Code under the conventions referred to in the preceding paragraphs and under other conventions which render the said codes mandatory for the Contracting Parties.
- (15) Directive 2009/21/EC on flag State requirements<sup>19</sup> lays down a number of obligations for the Member States as flag States. These include in particular an obligation for Member States to take the necessary measures for an IMO audit of their administration to be carried out at least once every seven years. However, this provision shall expire at the latest on 17 June 2017 or at an earlier date, as established by the Commission, if a mandatory IMO Member State Audit Scheme has entered into force.
- (16) For the above mentioned reasons, the III Code and the RO Code as well as the corresponding amendments to the conventions referred to above come under exclusive EU competence which the Union has acquired pursuant to Article 3 (2) TFEU, in so far as the adoption of the international instruments at stake may affect common rules or alter their scope.
- (17) A number of provisions in the draft III Code are in conflict with the above mentioned instruments of EU law especially as regards: a) the extension of the Code to cover the administrative instructions of the flag State as regards classification tasks and certificates, which entails a risk that the requirements contained in Regulation (EC) 391/2009 concerning those tasks and certificates, or action taken in order to ensure the implementation of those requirements, be unduly contested; b) the limitation of the flag State's capacity to regulate the activity of recognised organisations only to ships flying its flag, in contrast with criteria and obligations laid down in the said Regulation which concern all the activities of recognised organisations, regardless of flag; c) the prohibition for the flag State to mandate its recognised organisations to apply classification or statutory requirements to ships other than those entitled to fly its flag, beyond convention requirements and the mandatory instruments of the IMO, in contrast with the specific criteria and obligations referred to above.
- (18) A number of provisions in the draft RO Code are in conflict with the above mentioned instruments of EU law, especially as regards: a) the definition of "statutory certification and services" which includes services and certification tasks which in Regulation (EC) 391/2009 and in Directive 2009/15/EC are considered part of the recognised organisations' classification activities and hence of a private nature; b) the limitation of requirements for cooperation between recognised organisations only in the framework established by the flag State, in contrast with the obligations laid down in Article 10 of Regulation (EC) 391/2009; c) the application of classification rules, as described above. Moreover, the prohibition in the draft RO Code of any requirements on recognised organisations which may impinge on the rights of another flag State may, when read in conjunction with the Code's definition of statutory certification and services, lead to abusive interpretation of the Code and hence give rise to unjustified restrictions to the implementation of the requirements provided in Regulation (EC) 391/2009 on the classification activities of recognised organisations.
- (19) Neither the areas listed in the draft III Code where the Contracting Parties can intervene in the activity of recognised organisations nor the requirements placed in the

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<sup>18</sup> OJ L 343, 14.12.2012, p. 78

<sup>19</sup> OJ L 131, 28.5.2009, p. 132

draft RO Code on recognised organisations cover all the minimum criteria and obligations laid down in Regulation 391/2009 or deriving from obligations incumbent on the Member States in accordance with Directive 2009/15/EC; however, these provisions must be understood, save where an explicit prohibition is formulated, as setting minimum standards on which the Contracting Parties can elaborate and improve.

- (20) Nothing in either the draft III Code or the RO Code should place any restrictions on the Union's capacity to lay down, in accordance with the Treaties and international law, appropriate conditions for the granting of recognition to organisations wishing to be authorised by the Member States to carry out ship survey and certification activities on their behalf, with a view to achieving the Union's objectives and in particular to enhance maritime safety and the protection of the environment.
- (21) With the exception of the above described areas of potential conflict with Union law, the two draft Codes must on the whole be considered a positive development insofar as they will establish high global standards for the activities of flag States and recognised organisations alike; for these reasons, the development of an IMO RO Code was explicitly envisaged in recital (4) of the Regulation 391/2009. The Union should therefore support the adoption of both Codes as mandatory instruments of the IMO.
- (22) The Union is neither a member of the IMO nor a Contracting Party to the above mentioned conventions. It is therefore necessary for the Council to authorise the Member States to give their consent to be bound, in the interests of the Union, by the amendments to those conventions which will make the III Code and the RO Code mandatory, together with an associated flag State audit scheme,

HAS ADOPTED THIS DECISION:

*Article 1*

1. The position of the Union at the 28<sup>th</sup> IMO Assembly shall be to agree to the draft IMO Instruments Implementation Code, as approved by the IMO Maritime Safety Committee in its 91<sup>st</sup> session and laid down in IMO document MSC 91/22 Annex 16.
2. The position of the Union at the 28<sup>th</sup> IMO Assembly shall be to agree to the following:
  - (a) amendments to the International Load Lines Convention, 1966 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 10;
  - (b) amendments to the International Convention on Tonnage Measurement, 1969 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 12;

- (c) amendments to the International Regulations for Preventing Collisions at Sea, 1972 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 11.

#### *Article 2*

1. The position of the Union at the 65<sup>th</sup> session of the IMO Marine Environment Protection Committee shall be to agree to the draft IMO Code on Recognised Organisations, as approved by the said committee at its 64<sup>th</sup> session and by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 19.
2. The position of the Union at the 65<sup>th</sup> session of the IMO Marine Environment Protection Committee shall be to agree to the adoption of the amendments to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973 with a view to rendering the IMO Code on Recognised Organisations mandatory, as approved by the IMO Marine Environment Protection Committee at its 64<sup>th</sup> session, as laid down in IMO document MEPC 64/23 Annex 23.
3. The position of the Union at the 66<sup>th</sup> session of the IMO Marine Environment Protection Committee shall be to agree to the adoption of the amendments to the protocols of 1978 and 1997 relating to the International Convention for the Prevention of Pollution from Ships, 1973 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Marine Environment Protection Committee at its 64<sup>th</sup> session, as laid down in IMO document MEPC 64/23 Annex 20.

#### *Article 3*

1. The position of the Union at the 92<sup>nd</sup> session of the IMO Maritime Safety Committee shall be to agree to the draft IMO Code on Recognised Organisations, as approved by the said committee at its 91<sup>st</sup> session and by the IMO Marine Environment Protection Committee at its 64<sup>th</sup> session, as laid down in IMO document MSC 91/22 Annex 19.
2. The position of the Union at the 92<sup>nd</sup> session of the IMO Maritime Safety Committee shall be to agree to the following:
  - (a) amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974) with a view to rendering the IMO Code on Recognised Organisations mandatory, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 20;
  - (b) amendments to the 1988 Protocol to the International Convention on Load Lines, 1966 with a view to rendering the IMO Code on Recognised Organisations mandatory, as approved by the IMO Maritime Safety Committee in its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 21.

3. The position of the Union at the 93<sup>rd</sup> session of the IMO Maritime Safety Committee shall be to agree to the following:
  - (a) amendments to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS 1974) with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 17;
  - (b) amendments to the 1988 Protocol to the International Convention on Load Lines, 1966 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme, as approved by the IMO Maritime Safety Committee at its 91<sup>st</sup> session, as laid down in IMO document MSC 91/22 Annex 18.
4. The position of the Union at the 92<sup>nd</sup> and 93<sup>rd</sup> sessions of the IMO Maritime Safety Committee shall be to agree to the approval and subsequent adoption of appropriate amendments to the Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 with a view to rendering the IMO Instruments Implementation Code mandatory, together with an associated flag State audit scheme.

#### *Article 4*

1. The position of the Union as set out in Articles 1 to 3 shall be expressed by the Member States, which are members of the IMO, acting jointly in the interest of the Union, and subject to the reservation contained in the Annex to the present Decision.
2. Formal and minor changes to the Union's position as set out in Articles 1 to 3 may be agreed without requiring that position to be amended.

#### *Article 5*

Member States are hereby authorized to give their consent to be bound, in the interest of the Union and subject to the reservation set out in Annex to this Decision, by the amendments referred to in Articles 1 (2), 2(2), 2(3) and 3(2) to 3(4).

#### *Article 6*

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council  
The President*



## ANNEX

### **Reservation by *[insert name of the contracting Member State]***

As regards the *[Insert name of the relevant Code]*, *[Insert name of the contracting Member State]* wishes to make clear that nothing in the said Code shall be construed to restrict or limit in any way the fulfilment of its obligations under EU law. In particular, *[Insert name of the contracting Member State]* intends to continue to comply with the relevant Union legislation on common rules and standards for ship inspection and survey organisations especially as regards:

- The definition of "statutory certificates" and "class certificates";
- The scope of the obligations and criteria laid down for recognised organisations;
- The duties incumbent on the European Commission in the recognition, assessment and, as the case may be, imposition of corrective measures or sanctions on recognised organisations.

Moreover, *[Insert name of the contracting Member State]* considers that the *[Insert name of the relevant Code]* contains a set of minimum requirements on which States can elaborate and improve as appropriate for the enhancement of maritime safety and the protection of the environment.

Any IMO audit should verify compliance only with those provisions of the international conventions which *[Insert name of the contracting Member State]* has accepted, including in the terms of this reservation.