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#### COVER NOTE

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

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Delegations will find attached document SWD(2018) 233 final.

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## COMMISSION STAFF WORKING DOCUMENT

### EXECUTIVE SUMMARY

**Ex-post Evaluation of Directive 2009/21/EC on compliance with Flag State requirements and Directive 2009/18/EC establishing the fundamental principles governing the investigation of accidents in the maritime transport sector**

{SWD(2018) 232 final}

## EXECUTIVE SUMMARY

This ex-post evaluation looks into Directive 2009/21/EC on compliance with flag State requirements and Directive 2009/18/EC establishing the fundamental principles governing the investigation of accidents in the maritime transport sector.

Action in the area of maritime transport aims at ensuring the long-term performance of the European maritime transport system as a whole to the benefit of all other economic sectors and to the final consumer. EU policy promotes strict implementation of maritime safety, security and pollution prevention rules, aiming to reduce the risk of serious maritime accidents and minimizing the environmental impact of maritime transport, while maintaining competitiveness.

International law (developed by the International Maritime Organization - IMO) requires that Member States as Flag States take all necessary steps to give the applicable international instruments full and complete effect. This is the non-delegable responsibility of any Flag State and the underlying core principle for ensuring that, from the point of view of safety and environmental protection, the training and competence of seafarers as well as living and working conditions on board a ship is fit for the service for which it is intended. Directive 2009/21/EC lays down the framework for oversight at EU level by making the (at that time voluntary) IMO audits mandatory for EU flag States. Hence, the effective discharge of all relevant obligations are verified through audits by the IMO of a flag State in its entirety and including all aspects, ship registers and administrative arrangements.

As part of a State's flag responsibilities is the core obligation to carry out casualty investigations. Directive 2009/18/EC incorporates the principles underlying the relevant international requirements (IMO) into EU law, but also introduce the important stipulation that accident investigation bodies need to be independent bodies given the nature of their work. Countries affected by an accident at sea have the responsibility to investigate the causes and propose ways of preventing recurrences in the future. Such investigations do not seek to determine or assign any civil or criminal liability but rather, in the EU context, to ensure (1) that accident investigation takes place (2) is reported and (3) is discussed so that the Member States can 'learn' from accidents and prevent them from happening again thereby improving maritime safety.

The purpose of the ex-post evaluation is to assess the application of the Flag State Directive and the Accident Investigation Directive taking into account their objectives and looking, among other points, into their impact on maritime safety and relevant developments both national and international relating to the discharge by Member States of obligations incumbent on States as flag States.

This combined ex-post evaluation exercise has been supported by a study carried out by an external contractor.

The evaluation examines the application and impacts of the two Directives from June 2011, when they took effect, until December 2015, in all EU Member States in which they have been implemented. The evaluation assesses the effectiveness, efficiency, relevance, coherence and EU added-value of the Directives.

As regards the Flag State Directive, Member States are obliged to discharge their obligations ensuring that all applicable rules at international and EU level are adhered to before granting a

ship the right to fly their flag; enter into (one of) its register of ships and start operating. This is the fundamental of ensuring a level playing field in maritime safety, including training of seafarers and, pollution prevention internationally. To support Member States' flag administrations to effectively exercise their obligations, EU legislation required all Member States to develop, implement, certify and maintain a quality management system for the operational parts of the flag related activities.

In order to ensure effective oversight and control over their fleet each Member State must keep, and have readily available (normally in a Flag State register) detailed information and records concerning ships flying their flag, including information on marine casualties. For verification purposes, each Member State as flag State must mandatorily undergo an IMO Audit (non-mandatory at the time the Flag State Directive entered into force) and publish the outcome of the audit in accordance with relevant national legislation on confidentiality. The overall purpose is, on the one hand, to verify the level of implementation of IMO instruments by States in their capacity as flag States and, on the other hand, to identify and act upon any areas or issues to further improve the exercise of functions and operational oversight of vessels as part of continuous improvement.

The implementation of flag State (and coastal and port State) obligations under IMO instruments are guided by the IMO instruments and the now mandatory IMO Implementation of International Instruments Code (III Code) and cover areas such as implementation, delegation authority, enforcement, flag State surveyor, flag State investigations and review and improvement.

Accident investigation forms part of a flag States responsibilities, and in the EU context the Accident Investigation Directive, obliged Member States are to establish an independent investigative body to look into very serious marine casualties and decide on the investigation of others, to provide for a system of safety-focused investigations, to draw up commonly structured investigation reports and to populate the European Marine Casualty Information Database (EMCIP) created for this purpose. Safety investigations are conducted separately and are distinct from police, judicial or administrative investigations that may be conducted by either the flag or coastal states. To facilitate the work of Member States, a common methodology for investigating marine casualties and incidents has been developed. Moreover, a permanent cooperation framework of national investigative bodies has been established to enhance cooperation amongst them.

Without the Flag State Directive, it is likely that several EU Member States would not have undergone the IMO Audit, it is also unlikely that Member States would have, certified and maintained a quality management system (QMS) in accordance with international quality standards. The now Mandatory III-Code does not have this requirement. However, the most efficient way to meet the requirements in III-Code is to have and maintain a QMS.

Between 2011 and 2015, a total number of 12 Member States were grey listed by the PMoU. This resulted in those Member States having to prepare a report to the Commission identifying the causes for this status and corrective actions envisaged to improve their flag performance. Absent the Flag State Directive, it is unlikely that the relevant maritime administrations would have conducted a similar root cause analysis.

In the absence of the Accident Investigation Directive, it is likely that the 13 Accident Investigation bodies (AIBs) established since 2011 would not have been put in place. It is reasonable to state that, without the Directive, there would be far fewer AIBs and their legal

position would have been less independent from other public bodies. Most of the countries with no AIB prior to 2011 used to conduct investigations primarily for criminal prosecution purposes. The creation of AIBs has given a boost to accident investigations for safety reasons, with an emphasis on independence and the development of safety recommendation for accident prevention purposes. Without the Directive, there would be fewer AIBs and therefore a lower volume of safety investigations of accidents.

While the IMO had developed a casualty Investigation Code, the obligatory nature of the Accident Investigation Directive has led to a harmonised reporting of accidents and incidents, as a standard set of requirements has to be met. The creation of EMCIP has increased and facilitated reporting and the sharing of reports and this would not have been possible without the Directive.

The overall conclusion of this evaluation based on the conclusions for relevance, effectiveness, efficiency, coherence and EU added-value is that the two Directives have largely met expectations among all authorities involved achieving EU-wide benefits. They are meeting the (same) objectives as part of the overall maritime safety policy and provide support for national capacities in meeting international obligations and performing responsibilities and operational tasks in the maritime domain incumbent on them.

While most of the aspects related to coastal and port State obligations in the III-Code (which became mandatory for IMO Signatory States on 1 January 2016) are already the subject of EU legislation, the rules related to Member States as flag States, with the exception of the Accident Investigation Directive, are not equally well covered. The Flag State Directive has introduced more a frame of certain obligations for Member States as flags to ensure compliance with obligations incumbent upon them, awaiting the III-code to become mandatory.

Almost all EU Member States as flag States have delegated away almost all work on their fleet in commercial traffic, to recognised organisations (ROs) leaving them with domestic transport vessels and fishing vessels. It is important however to note that even if delegated to ROs, doing work on behalf of the flag, the responsibility remains with the flag State and there is therefore a need to maintain clear and strong monitoring, as also required by the III-Code. Issues regarding Flag State administrations and the resourcing thereof have been identified.

What has been identified as missing from the Flag State Directive are the Flag State obligations. As the relevant IMO instrument, the IMO III Code, has become mandatory in 2016, the directive could now be revised to align it to the III-Code as has been done with other IMO instruments, to ensure continued uniformity and enforcement, contributing to a higher level of maritime safety and maritime transport efficiency as well as guaranteeing a level playing field between Member States. The requirement for Member States as Flag State to undergo the now mandatory IMO Audit should be maintained and the provision of publishing outcomes and follow-up action strengthened.

As is the case for port and coastal State obligations, support to Member States in the exercise of their flag obligations making use of EMSA and benefitting from EU-wide systems (for risk assessment, monitoring and enforcement/compliance) would be very useful. An additional and linked element would be to have, as a start, non-mandatory EMSA training for flag State inspectors. This would enable maritime administrations to more effectively implement IMO

conventions and at the same time contribute to a higher level of harmonisation of flag State inspections across Europe.

As resource issues have been identified in relation to Flag State administrations, the monitoring of the evolution of the staffing and resources is advised, to identify and anticipate on resource constraints. In doing so, it remains important to consider the various models that Member States apply to organise their maritime administration. In particular, the issue of how RO monitoring is carried out by Member States could benefit from clearer rules, procedure and guidance; how to share information with each other and coordinate and cooperate with EMSA.

As regards the Accident Investigation Directive, the evaluation has concluded that this still corresponds to the needs of today's society. The Directive proved to be successful in reaching its original objectives, especially with regard to improving maritime safety. It provides a consistent framework for conducting maritime accident investigations and ensures that accident investigations are conducted in a uniform and harmonised way throughout the EU. The Directive has generally led to the strengthening of the AIBs' independence and their ability to conduct expeditious and unbiased investigations. This being said and similarly to the Flag State Directive, resources, staffing and expertise issues have been identified as problematic.