



Council of the
European Union

165283/EU XXVII. GP
Eingelangt am 05/12/23

Brussels, 5 December 2023
(OR. en)

16375/23

Interinstitutional File:
2023/0172(COD)

TRANS 576
MAR 160
OMI 87
IA 347
CODEC 2397

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	15953/23
No. Cion doc.:	10103/23
Subject:	Proposal for a Directive of the European parliament and of the Council amending Directive 2009/21/EC on compliance with flag State requirements – <i>General approach</i>

Delegations will find, in Annex, the *general approach* on the above-mentioned proposal, as adopted by the Council at its 3991st meeting on 4 December 2023.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2009/21/EC on compliance with flag State requirements

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The safety of Union shipping and of citizens using it and the protection of the environment should be ensured at all times.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) Under the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and of the Conventions for which the International Maritime Organization (IMO) is the depository, the States which are party to those instruments are responsible for adopting laws and regulations and for taking all other measures which may be necessary to give those instruments full effect so as to ensure that, in terms of safety of life at sea and the protection of the marine environment, a ship is fit for the service for which it is intended.
- (3) To ensure the effectiveness of the IMO Conventions in the Union, all Member States should take the necessary measures to discharge the obligations laid down in those conventions with respect to ships flying their flag. To that end, Member States should discharge their obligations as flag States effectively and consistently in accordance with IMO Resolution A.1070(28) on the IMO Instruments Implementation Code (III Code), adopted on 4 December 2013, which contains the mandatory provisions to be implemented by flag States.
- (3a) Without prejudice to provisions concerning force majeure laid down in the IMO Conventions, Member States should be able to, in crisis situations that may endanger the physical integrity of personnel responsible for or performing surveys, inspections, audits and verifications, introduce restrictions on such activities, while allowing ships to continue to operate.
- (3b) The following international instruments in their latest versions refer to the application of the III Code: the International Convention for the Safety of Life at Sea, 1974; the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto; the International Convention on Standards of Training, Certification and Watchkeeping, 1978; the International Convention on Load Lines, 1966, and the Protocol of 1988 relating thereto; the International Convention on Tonnage Measurement of Ships, 1969; and the Convention on the International Regulations for Preventing Collisions at Sea, 1972.

- (3c) Flag State surveyors are those authorised by the competent authorities of the Member States to survey and certify ships. Such personnel may be assisted by other personnel, for instance those inspecting radio installations. However, such personnel should not include technicians involved in the servicing of life-saving appliances or surveyors that are not directly involved in the survey of the merchant shipping fleet.
- (3d) Section 22 of the III Code states that a flag State should take all necessary measures to ensure compliance with international rules and standards by ships entitled to fly its flag and by entities and persons under its jurisdiction, so as to ensure compliance with its international obligations. In particular, section 22.2 refers to inspections to verify that the actual condition of the ship and its crew is in conformity with the certificates it carries. The periodicity of such inspections should be established by the Member States either by using a risk-based approach or by using their own procedures and instructions, including quantitative or qualitative criteria. The aim of flag States' inspections referred to in this Directive should be to ensure compliance with the III Code and not with Union legislation stemming from IMO Conventions.
- (4) As IMO Resolution A. 948 (23) has been revoked by IMO Resolution A. 1156(32), Member States should apply, to the ships flying their flag, harmonised requirements for certification and survey by the flag State as laid down in the relevant procedures and guidelines annexed to IMO Resolution A. 1156(32) on survey guidelines under the harmonised system of survey and certification. The annexes to the survey guidelines should be followed as far as is deemed necessary by flag State surveyors.
- (5) At international level, the responsibility to investigate maritime accidents falls on the flag State, while at Union level the fundamental principles governing the investigation of maritime accidents, such as the independence of the investigative bodies in the Member States, are regulated by Directive 2009/18/EC of the European Parliament and of the Council³. This Directive should not affect Directive 2009/18/EC.
- (6) (deleted)

³ Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council (OJ L 131, 28.5.2009, p. 114).

- (7) The administrations of the Member States should be able to rely on adequate resources for the implementation of their flag State obligations, according to the size and type of their fleet and based upon the relevant IMO requirements. Minimum criteria and inspection targets related to those resources should be established on the basis of the practical experience of the Member States, including the use of non-exclusive inspectors, in accordance with the IMO Instruments Implementation Code (A.1070(28)) (IMO III Code).
- (7a) Without prejudice to the relevant national legislation, Member States may allow that flag State surveyors and inspectors who work exclusively for the competent authority of a Member State may carry out other work, such as scientific or academic activities, provided that it does not give rise to conflict of interest or impede their independence.
- (8) (deleted)
- (9) (deleted)
- (10) (deleted)
- (11) The establishment and development of a database providing essential information in electronic format on ships flying the flag of a Member State and ensuring the possibility of issuance of electronic certificates should contribute to an enhanced exchange of information among Member States. The development of a common and uniform database for issuance of electronic certificates, including the tools for checking the validity of those certificates, would facilitate and contribute to a tangible breakthrough towards maritime digitalization within the Union. It would support operational needs of its actors, in particular those Member States that have not been in a position to develop their own systems for electronic certificates, and also attend to a more efficient use of available limited resources.
- (12) For monitoring purposes, it is to be encouraged that essential information, such as the ship's particulars, registered owner and data relating to the ship's certificates be available to all authorities concerned and to the Commission.

- (13) Member States should continue to demonstrate their compliance with the mandatory IMO instruments, as required by Resolution A 1067(28) in its up-to-date version on the framework and procedures for the IMO Member State Audit Scheme, adopted by the IMO Assembly on 4 December 2013.
- (14) (deleted)
- (15) In order to further enhance the quality of the flagged ships and to ensure a level playing field between maritime administrations of the Member States, a quality certification of administrative procedures, included in the quality management system in accordance with ISO or equivalent standards, should cover the operational parts of the maritime administration related to survey, inspection, audit, verification and certification under the responsibility of the Member State as flag State. Furthermore, all relevant activities, including the responsibilities, authority, interrelation, and means of reporting and communication of all flag State personnel performing or involved in surveys or inspections, as well as other personnel assisting in the performance of inspections, not exclusively employed by the competent authority of the Member State, and who may assist in carrying out inspections other than statutory surveys or flag State inspections, should be clarified. The quality management system should ensure that the tasks assigned to recognised organisations under the scope of this Directive should comply with the flag State's instructions, and should include the necessary control measures in that respect. In order to ensure their independence, Member States should take appropriate measures to prevent conflicts of interest of involved personnel in relation to the work they are to perform.
- (16) (deleted)
- (17) (deleted)
- (18) (deleted)
- (19) (deleted)

- (20) The measures necessary for the implementation of this Directive with regard to the ships information database should be adopted. In order to ensure uniform conditions for the implementation of Directive 2009/21/EC, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council⁴.
- (20a) The Commission should explore the possibility of setting up a forum for Member State experts dealing with flag State matters, as well as other stakeholders, when necessary, to regularly exchange information and best practices and to develop guidance on issues such as procedures for ship inspections, training resources for inspectors, risk-based criteria that can be used to improve the effectiveness of inspections, the possible development of a common harmonised performance scheme, criteria for analysing flag State performance with a view to identifying best practices and any other issue relevant to the implementation of this Directive.
- (20b) In order to avoid imposing a disproportionate administrative burden on Member States which do not have ships flying their flag that fall within the scope of this Directive, such Member States should not, as long as this condition is fulfilled, be obliged to transpose and implement this Directive.
- (21) (deleted)
- (22) Since the objectives of this Directive, namely to enhance maritime safety and prevent pollution from ships, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale or effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

⁴ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p.13).

(23) Directive 2009/21/EC should therefore be amended,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2009/21/EC

Directive 2009/21/EC is amended as follows:

(-1) in Article 1(1), points (a) and (b) are replaced by the following:

- ‘(a) to ensure that Member States effectively and consistently discharge their responsibilities and obligations as flag States; and
- (b) to enhance safety and prevent pollution from ships flying the flag of a Member State.’;

(0) Article 2 is replaced by the following:

‘Article 2

Scope

This Directive shall apply to the administration of the State whose flag the ship is flying, for ships subject to certification and engaged in international voyages.’;

(1) Article 3 is amended as follows:

(-a) point (a) is replaced by the following:

- ‘(a) ‘ship’ means a ship or craft flying the flag of a Member State falling within the scope of the relevant IMO Conventions under the scope of the III Code, and for which a certificate is required;’

(a) point (e) is replaced by the following:

‘(e) ‘IMO audit’ means an audit conducted in accordance with the provisions of Resolution A 1067(28) (“Framework and Procedures for the IMO Member State Audit”), in its up-to-date version, adopted by the International Maritime Organisation (IMO);’

(b) the following points are added:

‘(f) ‘Conventions’ means the Conventions, with the Protocols and amendments thereto making the use of the III Code mandatory, and the related codes of mandatory status, in their up-to-date version;

(g) ‘III Code’ means Resolution A.1070(28) (IMO Instruments Implementation Code), adopted by the International Maritime Organization (IMO), Part 2, with the exception of paragraphs 16, 18, 19, 20, 21, 29, 30, 31, 32, 34, 38, 39, 40 and 41, in its up to date version;

(h) ‘flag State surveyor’ means a public sector employee, duly authorised by and working exclusively for the competent authority of a Member State, responsible for or performing surveys, verifications and audits of ships and companies covered by the relevant international mandatory instruments and fulfilling the independence requirement laid down in Article 8(1);

(i) ‘flag State inspector’ means:

(i) a public sector employee, working exclusively for and duly authorised by the competent authority of a Member State; or

(ii) a person non-exclusively employed and duly authorised by the competent authority of a Member State, on an *ad hoc* basis or in a contractual situation with the competent authority of the Member State,

who may carry out flag State inspections, and fulfils the qualification and independence requirements laid down in Article 8(1);

- (j) ‘other personnel assisting in the performance of surveys’ means persons duly authorised by the competent authority of the Member State or by a recognised organisation acting on its behalf, who may assist flag State surveyors when carrying out surveys, as specified by the competent authority, and who fulfil the criteria of communication, qualification and independence laid down in Article 8(1);
- (k) ‘flag State inspection’ means an inspection, not leading to certification, conducted to verify that the actual condition of the ship and its crew is in conformity with the certificates it carries; when the inspection is not carried out on board it shall ensure the same level of safety and assurance as that of on-site inspections;
- (j) ‘HSSC’ means Resolution A. 1156(32) (Survey Guidelines under the Harmonized System of Survey and Certification), 2021, in its up-to-date version, adopted by the International Maritime Organisation (IMO);’;

(2) in Article 4, paragraph 1 is replaced by the following:

‘1. Prior to allowing a ship which has been granted the right to fly its flag to operate, the Member State concerned shall take the measures it deems appropriate to ensure that the ship in question complies with the applicable international rules and regulations. Those measures may be taken by a recognised organisation, acting on behalf of the Member State, when duly authorised by the competent authority. In particular, it shall verify the safety records of the ship using, where available, the inspection reports and certificates contained in its own database or, as applicable, in the ship information database referred to in Article 6a for Member States that have opted for it. It shall, if necessary, consult with the losing flag State in order to establish whether any outstanding deficiencies or safety issues identified by the latter remain unresolved.’;

(3) the following Articles are inserted:

‘Article 4a

Safety of ships flying the flag of a Member State

1. In respect of international shipping, Member States shall apply in full the mandatory flag State-related provisions laid down in the Conventions in accordance with the conditions laid down, and in respect of the ships referred to, therein.
2. Member States shall take all necessary measures to ensure compliance with international rules, regulations and standards related to the Conventions by ships entitled to fly their flag. In addition, Member States shall take the following measures:
 - (a) (deleted);
 - (b) ensuring that ships entitled to fly their flag have been surveyed in accordance with the survey guidelines under the Harmonized System of Survey and Certification (HSSC) and following its annexes as far as is deemed necessary;
 - (ba) ensuring that a surveyor employed by a recognised organisation may perform the same tasks as flag State surveyors when so authorised by the competent authority of the Member State; and
 - (c) carrying out flag State inspections to verify that the actual condition of the ship is in conformity with the certificates it carries; such inspections may be carried out using a risk-based approach, which may include the following criteria:
 - (i) records of deficiencies and non-conformities from statutory surveys, audits and verifications performed by the flag State;
 - (ii) reports of very serious accidents;
 - (iii) ships that have been detained or issued with a prohibition of operation notice by a port State control authority;

- (iv) ships that exceed a port State control deficiency ratio established by each Member State;
- (v) records of deficiencies from -inspections carried out according to national legislation as deemed appropriate by each Member State-.

Member States may depart from the risk-based approach and carry out flag State inspections using their own procedures, instructions and relevant information in compliance with the III Code.

- 3. Member States shall ensure that any deficiencies confirmed or revealed by an inspection carried out in accordance with point (c) of paragraph 2 are rectified within an appropriate timeframe, as determined by the flag State.
- 4. On completion of a flag State inspection, the flag State inspector shall draw up a report on the outcome of this task.

Article 4b

Safety and pollution prevention requirements

- 1. Each Member States shall ensure that its administration relies on appropriate resources, whether its own or delegated, according to the size and type of its fleet and with respect to the implementation of the administrative processes, procedures and resources necessary, in particular, for meeting the obligations provided for in Article 4a and paragraphs 2 and 3 of this Article.
- 2. Each Member State shall ensure the oversight of the activities of flag State surveyors, flag State inspectors and other personnel assisting in the performance of surveys, and recognised organisations.
- 3. Each Member State shall develop or maintain a design review and technical decision-making capability, whether its own or delegated, according to the size and type of its fleet.
- 4. (deleted)'

Article 4c

Training and capacity building

1. The personnel responsible for or performing surveys, inspections, audits and verifications of ships and companies shall undergo training relevant to the specific activities carried out.

2. Member States may develop a capacity-building scheme for their flag State inspectors and surveyors and keep it up to date, taking into account new or additional obligations arising from the Conventions and instruments referred to in the III Code.’;

(4) Article 5 is amended as follows:

(a) the sole paragraph is numbered as paragraph 1.

(b) the following paragraph 2 is added:

2. Member States shall develop and implement an appropriate control and monitoring programme in order to provide a timely response to the situations referred to in paragraph 1.’;

- (5) Article 6 is replaced by the following:

‘Article 6

Electronic information and exchange

1. Member States shall ensure that at least the following information concerning ships flying their flag is made available in electronic format:
 - (a) particulars of the ship (name, IMO number, etc.);
 - (b) date of validity of statutory certificates (full or interim);
 - (c) identification of the recognised organisations involved in the certification of the ship;
 - (d) (deleted);
 - (e) (deleted);
 - (f) identification of ships which have ceased to fly the flag of the Member State concerned during the previous 12 months;
 - (g) (deleted).
2. (deleted);

(6) the following Article is inserted:

‘Article 6a

Ships information database

1. The Commission shall develop, maintain and update a ships information database containing the information referred to in Article 6 and providing services for Member States on issuing and controlling of electronic certificates. Member States may connect to that database. That database may be based on the database referred to in Article 24 of Directive 2009/16/EC and may have similar functionalities to that database.
2. Without prejudice to national data protection requirements, Member States opting to use the ships information database:
 - a) shall communicate the information contained in Article 6; and
 - b) may transfer to the ships information database information related to inspections carried out in accordance with this Directive, including information concerning deficiencies and certificates; and
 - c) may use this database to issue, sign, endorse, extend and withdraw electronic certificates for their ships,ensuring that the information is compatible and interoperable.
- 2a. Member States may use their own databases to collect the information referred to in Article 6. That information shall be communicated to the Commission at least on a yearly basis. The Commission shall integrate the data into the ships information database.
3. The Commission shall ensure that the ships information database makes it possible to retrieve relevant data concerning the implementation of this Directive based on inspection data provided by Member States.

4. Member States that have opted to use the database shall have access to all the information recorded in the ships information database referred to in paragraph 1 of this Article and the inspection system provided for in Directive 2009/16/EC. Nothing in this Directive shall prevent the sharing of such information between relevant competent authorities, within and between Member States, with the Commission, or with the European Maritime Safety Agency (EMSA) established by Regulation (EC) No 1406/2002 of the European Parliament and of the Council⁵.

5. Member States that have opted to use the database shall ensure that the date of validity of the statutory certificates referred to in point (b) of Article 6(1) is transmitted electronically to the ships information database referred to in paragraph 1 of this Article, using the functional and technical specifications for the harmonised electronic reporting interface provided for in Article 24a of Directive 2009/16/EC.

5a. The Commission shall adopt implementing acts to define the functioning and the capacities of the database referred to in Article 6a(2)(a). Member States communicating data in accordance with paragraph 2a of this Article shall have access to the database information submitted in accordance with Article 6a(2)(a), under the conditions defined in those implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 10(2).’;

⁵ Regulation (EC) 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency (OJ L 208 5.8.2002, p. 1).

- (7) Article 7 is replaced by the following:

‘Article 7

Monitoring of compliance and performance of Member States

1. Member States shall take the necessary measures to undergo the IMO audit of their administration according to the cycle adopted at the IMO.

2. (deleted)

3. In order to ensure the effective implementation of this Directive and to monitor the overall functioning of flag State compliance with the Administration legal duties pursuant to this Directive, the Commission shall collect the necessary information when carrying out visits to Member States.’;

- (8) Article 8 is amended as follows:

- (a) paragraph 1 is replaced by the following:

‘Each Member State shall implement and maintain a quality management system covering the operational parts of the flag State-related activities of its administration. Such quality management system shall be certified in accordance with applicable international quality standards such as ISO 9001 standards.

The quality management system shall include defined responsibilities, authority and interrelation of personnel performing surveys, inspections, audits and verifications and the flag State personnel who manage, perform and verify work relating to and affecting the flag State obligations under the Conventions. Such responsibilities shall be documented, specifying the type and scope of inspection work that may also be performed by non-exclusively employed flag State inspectors, and how such personnel shall communicate and report. The quality management system shall indicate the tasks that can be carried out by other personnel assisting in the performance of surveys.

Each Member State shall ensure that flag State inspectors non-exclusively employed and other personnel assisting in the performance of surveys have education, training and supervision commensurate with the tasks they are authorised to perform, and that they are able to apply flag State instructions, procedures and criteria.

Member States shall take appropriate measures to prevent conflicts of interests of all personnel performing a survey, verification or inspection and regarding independence in relation to the work to be performed.

Three years after the date of transposition of this Directive, the quality management system shall cover the aspects related to this Article.

(a2) paragraph 2 is replaced by the following:

Member States which appear on the low performance list as published in the most recent annual report of the Paris Memorandum of Understanding on Port State Control (hereinafter the ‘Paris MOU’) shall provide the Commission with a report on their flag State performance no later than four months after the publication of the Paris MOU report.

The report shall identify and analyse the main reasons that led to the detentions and the deficiencies resulting in a low performance status.’;

(b) (deleted)

(9) Article 9 is deleted.

(10) (deleted)

(11) Article 10 is replaced by the following:

‘Article 10

Committee procedure

1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) established by Regulation (EC) No 2099/2002. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.’.

(12) (deleted)

(13) (deleted)

(13a) in Article 11 the following paragraph is added:

‘3. By derogation from the first subparagraph of paragraph 1, the Member States which do not have ships flying their flag that fall within the scope of this Directive may derogate from the obligation to transpose and implement this Directive as long as the above-mentioned condition is fulfilled. Any Member State that intends to avail itself of that derogation shall notify the Commission by *[date of transposition]*. Any subsequent change shall also be communicated to the Commission.

Those Member States may not allow ships falling within the scope of this Directive to fly their flag nor register such ships in their national registry until they have transposed and implemented this Directive.’

(14) (deleted)

Article 2

Transposition

Member States shall adopt and publish, by ... [*OP: Please insert a date: four years from the date of entry into force of this amending Directive*] the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately inform the Commission thereof.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 3

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

Addressees

This Directive is addressed to the Member States.

Done at ...,

For the European Parliament

The President

For the Council

The President
