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EUROPEAN COMMISSION PROPOSAL FOR A DIRECTIVE ON COMPLIANCE WITH FLAG STATE REQUIREMENTS

COMMENTS BY EUROPEAN COMMUNITY SHIPOWNERS' ASSOCIATIONS AND INTERNATIONAL CHAMBER OF SHIPPING

GENERAL

The shipping industry shares the objective of the proposed Directive which is to improve flag state performance, and to help ensure that EU Member States meet their obligations under international safety and pollution prevention regulations, not least those adopted by IMO.

In principle, ECSA and ICS support measures aimed at encouraging Member States to volunteer to participate in the IMO Member State Audit Scheme, and the industry strongly supports the full implementation by EU Member States of the new Code on the Implementation of Mandatory IMO Instruments. However, as stated by industry in its initial comments on the Commission's proposals in 2004, it is an open question whether or not EU legislation will be the most efficient means of providing this encouragement. Moreover, this would seem to be a political issue that will require careful consideration by Member States and the Parliament.

For the most part the detailed proposals contained in the Directive will be matters on which national flag administrations might be best placed to comment on their practicality. However, we have sought to highlight some of those issues that might require careful thought, particularly those proposals which may have implications for the competence of national maritime administrations at IMO. The political dimension of this issue is a matter for EU Member States to address. However, the industry has a distinct interest because the outcome could have a wider practical impact on the quality of future regulatory decision making at IMO, which could be detrimental to the interests of maritime safety and pollution prevention in the EU and worldwide.

The industry questions the Commission's premise on page 3 of the Explanatory Memorandum that the proposals will overcome 'IMO's principal weaknesses' – the supposed 'high degree' of discretion of governments from the basic rules of IMO Conventions, the non-mandatory nature of the IMO audit scheme, and the Commission's contention that 'to a large extent these weaknesses explain the differences in quality among the various flags, while at the same time weakening the legal capacity to [take port state control action]'. We elaborate upon this below.

On page 8 of the Explanatory Memorandum, the Commission appears to justify its proposals using the principles of subsidiarity, suggesting that 'no international control system already exists' for the harmonisation of rules on 'granting and maintaining flagging rights'. However, such a system is provided by the UN Convention on the Law of the Sea (UNCLOS) and, of course, as provided for in UNCLOS, by IMO Conventions themselves. The Commission also implies that without an EU Directive, Member States would somehow be acting in isolation to combat poorly performing flags. However, this is simply not the case, since IMO itself provides the forum for such co-operation, including means to exercise port state control, as enshrined in IMO Conventions, and through the new IMO audit scheme.

Detailed remarks on draft Directive

Preamble paragraph 11

As mentioned above, the industry would question the supposed 'high degree' of discretion of governments from the basic rules of IMO Conventions, which is presumably a justification for the Directive to provide a mechanism, as outlined in Article 1, for 'harmonised interpretation' of rules which IMO has agreed to leave to flag states.

Particular care is needed when considering the treatment of IMO Conventions where IMO has deliberately decided upon a degree of flexibility with regard to how specific requirements might be implemented at the national level. In particular, the concept of accepting equivalent solutions is important in order to accommodate new and innovative solutions not foreseen at the time of adoption of the Conventions. Moreover, where IMO Conventions, as a result of international discussion, may allow some flexibility with regard to how detailed rules might be implemented, this has little directly to do with the question of poorly performing flags (most of which, being non-EU flags, will not in any case be affected by the Directive) whose failure relates to the lack of implementation of basic IMO requirements rather than the minor flexibility accorded by IMO Conventions.

Article 1, paragraph 1 C)

See our remarks on the preamble. We suggest that Member States and the Parliament may wish to consider carefully the desirability of the EU harmonising measures which IMO leaves to the discretion of Member States.

Article 2

We note that the 2001 anti fouling systems Convention is listed as a 'specific convention' but not the 2004 Ballast Water Management Convention which has also not yet entered into force. The shipping industry favours the ratification and entry into force of both of these IMO Conventions as soon as possible.

Article 3, paragraph 6

See our remarks on the preamble. We suggest that Member States and the Parliament may wish to consider carefully the desirability of the EU harmonising measures which IMO leaves to the discretion of Member States.

Article 5, paragraph 2

The requirements concerning movement of ships between flags might be strengthened. The Shipping Industry Guidelines on Flag State Performance (see www.marisec.org/flag-performance) recommend that a flag state accepting a ship from another state should only accept such a ship 'when it is satisfied that it is in compliance with international requirements and has survey reports confirming that the ship is in class'.

Article 7

The industry fully endorses the necessary oversight of classification societies and other Recognised Organizations (ROs). While we note that virtually all EU maritime nations to some extent rely on ROs and would therefore be affected by this requirement, the words 'relying upon', as used in the text, are possibly somewhat vague; the words could be replaced by "delegating the verification and possibly certification of the ships to Recognised Organizations".

Flag states may wish to consider carefully the benefits of the proposed supplementary survey at 12 month intervals. Notwithstanding that most ships would be excluded by paragraph 3, this could add another level of administrative complexity to ship survey requirements in EU Member States.

Article 10

The industry is not sure of the necessity of this Article since the requirement by flag states to observe the IMO principles of safe manning are already mandatory through cross references contained in the IMO SOLAS and STCW Conventions to which EU States are party. If there is ambiguity about the mandatory status of the IMO safe manning requirements, this would be better addressed by IMO itself, e.g. by upgrading the IMO guidelines to become a Code (as the industry has recently suggested to the IMO Maritime Safety Committee).

Article 11

Member States in particular will wish to consider the practicalities and utility of the information which it is suggested might be required on national ship databases, and before adopting this requirement it may be helpful if there is liaison with other major data sources such as the Paris MOU on Port State Control and Equasis to avoid unnecessary duplication and recording.

Article 12

We do not understand why Constructive Total Losses should be excluded from any evaluation of loss statistics that may be required.

Article 13, paragraph 3

The industry notes the proposal that the Commission should observe the IMO audit process of EU Member States.

Article 14

As indicated in the industry comments to the Commission in 2004, Member States may wish to give careful thought to whether ISO standards should be used on a mandatory basis to ensure compliance with IMO regulations.

ISO 9001: 2000 is a generic standard that has to be adapted to fit the needs of the entity being audited in discussion with the relevant auditing body. Arguably, the new IMO audit scheme is an existing attempt to apply ISO principles to the specific needs of flag states, and it might be preferable to focus on encouraging adherence to the IMO Code and participation in the audit scheme, under which the specific standards have already been agreed by governments at IMO.

Article 15

The scope of the future Co-operation agreements is somewhat unclear. However, to reiterate a point made during the 2004 consultation, industry would be very concerned by any notion that the introduction of the EU flag state initiative might somehow automatically entitle EU flag ships to special discriminatory treatment. Quality should bring its own reward: improvements in flag state performance should feed through to improved port state control records for EU flag ships which in turn should lead to less frequent PSC inspections. The treatment of ships from third countries should relate to a ship's individual safety performance and factors (such as the flag state's PSC inspection record) that have been agreed within the Paris MOU on PSC for targeting purposes.

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