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Subject: **Preparation of the Council meeting (Transport, Telecommunications and Energy) on 29 October 2012**

Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/16/EC on port State control

- *General approach*

Introduction

1. On 23 March 2012, the Commission transmitted the above proposal to the European Parliament and to the Council.

Content of the proposal

2. The Maritime Labour Convention (MLC 2006) was adopted by the International Labour Organisation (ILO) on 23 February 2006. On 20 August 2012, 30 Member States of the ILO with a total share of at least 33 per cent of the world gross tonnage of ships had deposited their ratification instruments. Consequently, MLC 2006 will enter into force as binding international law on 20 August 2013. MLC 2006 provides comprehensive rights and protection at work for all seafarers regardless of their nationality and the flag of the ship. It aims to both achieve decent working conditions for seafarers and secure fair competition for quality shipowners. It applies to international shipping and covers essential matters such as the minimum requirements for seafarers to work on board a ship (Title 1 of MLC 2006), conditions of employment (Title 2), accommodation, recreational facilities, food and catering (Title 3), health protection, medical care, welfare and social security protection (Title 4) and compliance and enforcement (Title 5).
3. The purpose of the above proposal is to bring the European Union legislation in line with the enforcement and compliance rules foreseen by Title 5 of the Maritime Labour Convention and thereby to integrate rules regarding the responsibilities of port States into EU law.
4. The proposal amends Directive 2009/16/EC *inter alia* by incorporating the requirements established by MLC 2006, namely by:
 - including the maritime labour certificate and the declaration of maritime labour compliance among the documents to be checked by port State control inspectors;
 - extending the scope of inspections to new items (e.g. the existence of an adequate labour contract signed by both parties for each seafarer with the required clauses in the contract); and
 - extending the scope of investigation in case of complaints and providing for the adequate procedure.

Furthermore, the proposal amends the "comitology" provisions of Directive 2009/16/EC in order to adapt them to the Lisbon Treaty.

Work within Council bodies

5. The examination of the proposal by the Shipping Working Party started in April 2012, under the Danish Presidency. It should be noted that the proposal was not accompanied by an impact assessment.
6. The proposal was the subject of a progress report to the TTE Council on 7 June 2012¹.
7. The Presidency has been able to find solutions for all of the concerns expressed in that progress report, in particular the question of whether port State control can validly be carried out by Member States who have not ratified one or several of the conventions referred to in Directive 2009/16 as amended (see recitals 2a and 2b) and the so-called "non-regression clause", which is a reminder to Member States that the directive should not constitute grounds for lowering the level of protection of workers already provided for in other EU legislation (see recitals 4a and 4b).

Work within the European Parliament

8. The European Parliament has only recently started the examination of the proposal. A rapporteur was nominated in April 2012 (Mr Simpson, S&D-UK) by the parliamentary committee responsible, the Transport and Tourism Committee (TRAN). A first exchange of views in the TRAN committee is scheduled for October 2012.
9. The vote in the TRAN committee is scheduled for November 2012, and vote in plenary could take place in January or February 2013.

¹ Doc. 9863/12.

Remaining reservations

10. Malta and the United Kingdom maintain parliamentary scrutiny reservations.

11. The Commission maintains reservations on the provisions on implementing and delegated acts as well as on the deletion of its proposal for amending point II 2B of Annex I to Directive 2009/16/EC, according to which ships flying the flag of States which have not ratified a whole set of conventions (including MLC 2006) would be subject to more frequent inspections.

Conclusion

12. The Permanent Representatives Committee / Council are invited to examine the text, as set out in the Annex to this report, with a view to reaching a general approach on the text at the Council session on 29 October 2012.
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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Directive 2009/16/EC on port State control

(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 Committee²,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure,

Whereas:

² OJ C [...], [...], p. [...].

- (1) On 23 February 2006, the International Labour Organisation adopted the Maritime Labour Convention, 2006 (MLC 2006), desiring to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour conventions.
- (2) Council Decision 2007/431/EC of 7 June 2007³ has authorised the Member States to ratify MLC 2006. Member States should ratify it as soon as possible.
 - (2a) Member States, when performing port State control inspections in accordance with Directive 2009/16/EC, as amended by this Directive, relating to provisions of Conventions which they have not yet ratified and which stipulate that every ship is subject to control by officers duly authorized when in a port of another contracting Government or Party, should make every effort to comply with procedures and practices under the Conventions and should thus refrain from making reports, relevant to port State control, to the IMO and/or the ILO. Member States, who have not yet ratified an international convention covered by Directive 2009/16/EC at the time of its entrance into force, should make every effort to establish similar conditions on board their ships in accordance with the requirements of the Convention.
 - (2b) In order to ensure a harmonized approach to the effective enforcement of international standards by Member States when performing both flag and port State control inspections and to avoid friction between international and European law, Member States should aim at ratifying the Conventions by the date on which they internationally enter into force, at least those parts thereof falling under Union competence.
- (3) MLC 2006 sets out maritime labour standards for all seafarers regardless of their nationality and of the flag of the ships on which they serve.

³ Decision 2007/431/EC authorising Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation (OJ L 161, 22.6.2007, p. 63).

- (3a) It is appropriate in Directive 2009/16/EC, as amended by this Directive, rather than to define the terms "seafarer" and "crew", to understand them in each instance in the way they are defined or understood in the relevant international conventions. For any matters in Directive 2009/16/EC, as amended by this Directive, relating to the enforcement of MLC 2006, the term "crew" should be understood as referring to "seafarer" as defined in MLC 2006.
- (3b) For any matters in this Directive relating to the enforcement of MLC 2006, including for ships for which the ISM Code is not applicable, references in Directive 2009/16/EC, as amended by this Directive, to "company" should be understood to mean "shipowner" as defined by the relevant provision of MLC 2006, since the latter definition better fits the specific needs of MLC 2006.
- (4) An important part of the standards of MLC 2006 is implemented within Union law by means of Council Directive 2009/13/EC of 16 February 2009⁴ and Council Directive 1999/63/EC of 21 June 1999⁵. Those standards of MLC 2006 which are covered by the scope of Directive 2009/13/EC and/or Directive 1999/63/EC are to be implemented by the Member States in line with those Directives.
- (4a) As a matter of general principle, the application and/or interpretation of this Directive should under no circumstances constitute grounds for Member States justifying a reduction in the general level of protection of persons working on board ships flying the flag of a Member State under the applicable Union social legislation.

⁴ Directive 2009/13/EC implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 (OJ L 124, 20.5.2009, p. 30).

⁵ Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) (OJ L 167, 2.7.1999, p. 33).

- (4b) Should the competent authority of the port State become aware of a breach or non-respect of Union legislation, including provisions of the Union labour legislation, on board ships flying the flag of a Member State, it should, in accordance with national law and practice, forthwith inform the competent authority, including where relevant national labour authorities, which in turn should notify the relevant information to the competent authorities in the flag State.
- (5) MLC 2006 contains enforcement provisions defining the responsibilities of States exercising port State control obligations. In order to protect safety and to avoid distortions of competition, Member States should be allowed to verify compliance with the provisions of MLC 2006 by any ship calling at their ports, irrespective of the State in which it is registered.
- (6) Port State control is governed by Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009⁶, which should include MLC 2006 among the conventions the implementation of which is verified by Member States' authorities in Union ports.
- (6a) Member States, when performing port State control inspections in accordance with the provisions of Directive 2009/16/EC, as amended by this Directive, should take into account the provisions of MLC 2006 which stipulate that Member States should accept the maritime labour certificate and the declaration of maritime labour compliance as a *prima facie* evidence of compliance with the requirements of that Convention.
- (7) The rules of the Union should also reflect the procedures set out in MLC 2006 with regard to the handling of onshore complaints relating to the matters dealt with in MLC 2006.

⁶ OJ L 131, 28.5.2009, p. 57.

- (8) In order to ensure uniform conditions for the implementation of Directive 2009/16/EC, that Directive should be amended so as to confer implementing powers on the Commission. The Commission should be entitled to adopt implementing acts for the use of a harmonised electronic format for the reporting and follow-up by port State authorities of complaints related to MLC 2006, as well as for the establishment of the ship risk profile criteria based on Article 10 of Directive 2009/16/EC. This is a highly technical exercise to be carried out in the framework of the principles and criteria which have been established by that Directive. Those powers should be exercised in accordance with 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 Member States of the Commission's exercise of implementing powers⁷.
- (8a) When establishing implementing rules, the Commission should specifically take into account the expertise and the experience gained with the inspection system in the Union and build upon the expertise of the Memorandum of Understanding on Port State Control, signed in Paris on 26 January 1982, in its up-to-date version ("Paris MOU").
- (8b) The implementing rules, including references to Paris MOU instructions and guidelines, should not compromise the exercise of the professional judgment of the inspectors or of the competent authority and the flexibility provided for in the relevant articles of Directive 2009/16/EC.
- (8ba) When making reference to Paris MOU instructions and guidelines, it is to be taken into account that those are developed and adopted to ensure consistency and to guide inspections in order to facilitate as much convergence as possible.
- (8c) The inspection database referred to in Article 24 should be adapted and developed in function of Directive 2009/16/EC, as amended by this Directive, and/or changes adopted within the context of the Paris MOU.

⁷ OJ L 55, 28.2.2011, p. 13.

- (9) The power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amendments to Annex VI to Directive 2009/16/EC containing the list of the 'Instructions' adopted by the Paris MOU, with a view to keeping the procedures applicable and enforceable in the territory of the Member States, in line with those agreed upon at international level and in compliance with the relevant Conventions. The possibility for the Commission to swiftly update those procedures would contribute to achieving a global level-playing field for shipping. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.
- (10) [...]
- (11) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, 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.
- (12) Directive 2009/16/EC should therefore be amended accordingly.
- (13) This Directive should enter into force on the same date as MLC 2006,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 2009/16/EC

Directive 2009/16/EC is hereby amended as follows:

(1) Article 2 is amended as follows:

(-a) in point 1, point (g) is deleted;

(a) in point 1, the following points are added:

'(i) the Maritime Labour Convention, 2006 (MLC 2006);

(j) the International Convention on the Control of Harmful Anti-fouling Systems on Ships, 2001 (AFS 2001);

(k) the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunkers Convention, 2001).';

(b) [...]

(c) [...]

(d) [...]

(e) the following points are added:

'23. "Maritime labour certificate" means the certificate referred to in Regulation 5.1.3 of MLC 2006.

24. "Declaration of maritime labour compliance" means the declaration referred to in Regulation 5.1.3 of MLC 2006.';

(f) the following paragraph is added:

'All the references to the Conventions, international codes and resolutions referred to in this Directive, including for certificates and other documents, shall be deemed to be references to those Conventions, international codes and resolutions in their up-to-date versions.'

(2) In Article 3, the following paragraph is added:

5. [...]

(3) In Article 8, paragraph 4 is replaced by the following:

'4. The Commission may adopt detailed measures to ensure uniform conditions for the application of the provisions of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(4) In Article 10, paragraph 3 is replaced by the following:

'3. The Commission may adopt detailed measures necessary for the implementation of this Article, in particular

(a) the flag State criteria;

(b) the company performance criteria.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(5) In Article 14, paragraph 4 is replaced by the following:

'4. The scope of an expanded inspection, including the risk areas to be covered, is set out in Annex VII. The Commission may adopt detailed measures to ensure uniform conditions for the application of Annex VII. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(6) In Article 15, paragraph 4 is replaced by the following:

'4. The Commission may adopt detailed measures to ensure uniform conditions for the application of the provisions of paragraphs 1 and 2 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(7) The following Article is inserted:

'Article 18a

Onshore MLC 2006 complaint-handling procedures

1. A complaint by a seafarer alleging a breach of the requirements of MLC 2006 (including seafarers' rights) may be reported to an inspector in the port at which the seafarer's ship has called. In such cases, the inspector shall undertake an initial investigation.
2. Where appropriate, given the nature of the complaint, the initial investigation shall include consideration of whether the on-board complaint procedures provided under Regulation 5.1.5 of MLC 2006 have been explored. The inspector may also conduct a more detailed inspection in accordance with Article 13.
3. The inspector shall, where appropriate, seek to promote a resolution of the complaint at the ship-board level.

4. In the event that the investigation or the inspection reveals a non-conformity that falls within the scope of Article 19, the provisions of that Article shall apply.
5. Where paragraph 4 does not apply and a complaint by a seafarer related to matters covered by MLC 2006 has not been resolved at the ship-board level, the inspector shall forthwith notify the flag State, seeking, within a prescribed deadline, advice and a corrective plan of action submitted by that State. A report of any inspection carried out shall be transmitted by electronic means to the inspection database referred to in Article 24.
6. Where the complaint has not been resolved following action taken in accordance with paragraph 5, the port State shall transmit a copy of the inspector's report to the Director-General of the International Labour Office. The report must be accompanied by any reply received within the prescribed deadline from the competent authority of the flag State. The appropriate shipowners' and seafarers' organizations in the port State shall be similarly informed. In addition, statistics and information regarding complaints that have been resolved shall be regularly submitted by the port State to the Director-General of the International Labour Office.

Such submissions are provided in order that, on the basis of such action as may be considered appropriate and expedient, a record is kept of such information and is brought to the attention of parties, including shipowners' and seafarers' organizations, which might be interested in availing themselves of relevant recourse procedures.

7. Appropriate steps shall be taken to safeguard the confidentiality of complaints made by seafarers.

8. In order to ensure uniform conditions for the implementation of this Article, implementing powers shall be conferred on the Commission regarding the setting up of a harmonised electronic format and procedure for the reporting of follow-up actions taken by Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).

9. This Article shall be without prejudice to Article 18.'

(8) Article 19 is amended as follows:

(a) The following paragraph is added:

'2a. In the case of working and living conditions on board which are clearly hazardous to the safety, health or security of seafarers or deficiencies which constitute a serious or repeated breach of MLC 2006 requirements (including seafarers' rights), the competent authority where the ship is being inspected shall ensure that the ship is detained or that the operation in the course of which the deficiencies are revealed is stopped.

The detention order or stoppage of an operation shall not be lifted until those deficiencies have been rectified or if the competent authority has accepted a plan of action to rectify those deficiencies and it is satisfied that the plan will be implemented in an expeditious manner. Prior to accepting a plan of action, the inspector may consult the flag State.'

(b) paragraph 6 is replaced by the following:

'6. In the event of detention, the competent authority shall immediately inform, in writing and including the report of inspection, the flag State administration or, when this is not possible, the Consul or, in his absence, the nearest diplomatic representative of that State, of all the circumstances in which intervention was deemed necessary. In addition, nominated surveyors or recognised organisations responsible for the issue of classification certificates or statutory certificates in accordance with Conventions shall also be notified where relevant. In addition, if a ship is prevented from sailing due to serious or repeated breach of the requirements of MLC 2006 (including seafarers' rights) or due to the working and living conditions on board being clearly hazardous to the safety, health or security of seafarers, the competent authority shall forthwith notify the flag State accordingly and invite a representative of the flag State to be present, if possible, requesting the flag State to reply within a prescribed deadline. The competent authority shall also inform forthwith the appropriate shipowners and seafarers' organisations in the port State in which the inspection was carried out.'

(9) In Article 23, paragraph 5 is replaced by the following:

'5. Implementing powers shall be conferred on the Commission to adopt measures for the implementation of this Article, including harmonised procedures for the reporting of apparent anomalies by pilots and port authorities or bodies and of follow-up actions taken by Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(10) In Article 27, the second paragraph is replaced by the following:

'Implementing powers shall be conferred on the Commission to establish the modalities of publication of the information referred to in the first paragraph, the criteria for aggregating the relevant data and the frequency of updates. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(11) The following Articles are inserted:

'Article 30a
Delegated acts

The Commission shall be empowered to adopt delegated acts in accordance with Article 30b, concerning amendments to Annex VI to this Directive, in order to add to the list set out in that Annex further instructions relating to port State control adopted by the Paris MOU Organisation.

Article 30b
Exercise of the delegation

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Article 30a shall be conferred on the Commission for a period of five years from ...*. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.
3. The delegation of power referred to in Article 30a may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

* OJ: Please insert date: the date of entry into force of this amending Directive.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.
5. A delegated act adopted pursuant to Article 30a shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council'.

(12) Article 31 is replaced by the following:

'Article 31
Committee

1. The Commission shall be assisted by the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) established by Article 3 of Regulation (EC) No 2099/2002 of the European Parliament and the Council. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. [...]
3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply. Where the committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.
4. [...]'.

(13) Article 32 is repealed.

(13a) Article 33 is replaced by the following:

'Article 33
Implementing rules

When establishing the implementing rules referred to in Articles 8(4), 10(3), 14(4), 15(4), 18a(8), 23(5) and 27 in accordance with the procedures referred to in Article 31(3), the Commission shall take specific care that those rules take into account the expertise and the experience gained with the inspection system in the Union and building upon the expertise of the Paris MOU!.

(14) In point II 2B of Annex I,

(a) the fifth indent is replaced by the following:

'– Ships which have been the subject of a report or complaint, including onshore complaint, by the master, a crew member, or any person or organization with a legitimate interest in the safe operation of the ship, on-board working and living conditions or the prevention of pollution, unless the Member State concerned deems the report or complaint to be manifestly unfounded.'

(b) the following indent is added:

[...]

'– Ships for which a plan of action to rectify deficiencies as referred to in Article 19(2a) has been agreed but its implementation has not been checked by an inspector.'

(15) In Annex IV,

(a) points 14, 15 and 16 are replaced by the following:

'14. Medical certificates (see MLC 2006).

15. Table of shipboard working arrangements (see MLC 2006 and STCW 78/95).

16. Records of hours of work and rest of seafarers (see MLC 2006).'

(b) the following points are added:

'45. Maritime labour certificate.

46. Declaration of maritime labour compliance, parts I and II.

47. International Anti-Fouling System Certificate.

48. Certificate of insurance or other financial security in respect of civil liability for bunker oil pollution damage.'

(16) In Annex V point A, the following points are added:

'16. The MLC 2006 required documents are not produced or maintained or are falsely maintained or the documents produced do not contain the information required by MLC 2006 or are otherwise invalid.

17. The working and living conditions on the ship do not conform to the requirements of MLC 2006.

18. There are reasonable grounds to believe that the ship has changed flag for the purpose of avoiding compliance with MLC 2006.

19. There is a complaint alleging that specific working and living conditions on the ship do not conform to the requirements of MLC 2006.'.

(17) In point 3.10. of Annex X, the following points are added:

'8. The conditions on board are clearly hazardous to the safety, health or security of seafarers.

9. The non-conformity constitutes a serious or repeated breach of the requirements of MLC 2006 (including seafarer's rights).'

Article 2 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...*. They shall forthwith communicate to the Commission the text of those provisions.

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.

2. Member States shall communicate to the Commission the text of the main measures of national law which they adopt in the field covered by this Directive.

* OJ: Please insert date: 18 months after the date of entry into force of this amending Directive.

Article 3
Entry into force

This Directive shall enter into force on the date of entry into force of MLC 2006.

Article 4
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President
