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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

concerning flag State responsibilities for the enforcement of Council 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, and amending Directive 1999/63/EC

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The Maritime Labour Convention (MLC), 2006 was adopted by the International Labour Organisation (ILO) with a quasi unanimous vote on 23 February 2006 in Geneva. It applies to international shipping and covers essential matters such as the minimum requirements for seafarers to work on board a ship (title I of the MLC), conditions of employment (title II of the MLC), accommodation, recreational facilities, food and catering (title III of the MLC) health protection, medical care, welfare and social security protection (title IV) and compliance and enforcement (title V) in order to guarantee decent working and living conditions on board ships, as well as procedures to implement these provisions. The Convention can be considered as the first maritime labour code for more than 1.2 million seafarers worldwide, as well as for shipowners and maritime nations around the world.

The EU Member States and the Commission have supported the ILO work on this matter from the outset. The EU sees a valuable input in the MLC which aims at establishing a level playing field in the worldwide maritime industry by setting common minimum standards for all flags and seafarers. In this respect, the EU has already adopted Council Decision 2007/431/EC of 7 June 2007 authorising Member States to ratify, in the interest of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organisation¹. Some Member States have already ratified it (Spain, Bulgaria, Luxembourg, Denmark, Latvia, the Netherlands) and others are about to do so. On the substance, the Member States national legislations are generally more protective and detailed than the ILO standards. To maintain the consistency between the international and national standards and to ratify the Convention, an extensive and time consuming screening of the national legislations is the prerequisite.

At this stage, 22 countries have ratified the MLC representing more than 45% of the world fleet tonnage while 30 ratifications and 33% of the world fleet tonnage are required by the MLC to enter into force.

The EU also adopted Council Directive 2009/13/EC of 16 February 2009, implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC². Directive 2009/13/EC constitutes an outstanding achievement of the sectoral social dialogue and the present proposal aims at ensuring that it is endowed with proper enforcement means in the Union.

To this end it is foreseen, on the one hand, to require Member States to apply Directive 2009/13/EC when they wield their powers as flag States.

As things stand, through Directive 2009/13/EC, European legislation has been put in line with the international standards fixed by the MLC. This Directive took up the relevant provisions of the MLC establishing rights for seafarers contained in its Titles I, II, III and IV above mentioned.

¹ OJ L 161, 22.06.2007, p.63

² OJ L 124, 20.05.2009, p.30

However, the European social partners, wishing to implement their agreement by means of a Council decision on the basis of Article 155 TFEU, do not have the power to include in their Agreement the enforcement provisions contained in Title V of the MLC and asked the Commission to act in this respect. The present initiative aims precisely to do so on the flag State responsibilities.

This initiative is part of the EU policy on the maritime professions. In fact, as stated by the Commission in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strategic goals and recommendations for the EU's maritime transport policy until 2018³, there is a genuine EU interest in enhancing the attractiveness of the maritime professions to Europeans by means of actions that involve, where appropriate, the Commission, the Member States and the industry itself. This fully applies to the implementation of the MLC which considerably improves working and living conditions on board ships. The Communication underlines that the agreement between EU social partners on the implementation of key elements of this Convention demonstrates the wide support within the industry in this field and that, therefore, action of the EU and its Member States should aim to:

- move towards rapid ratification of the MLC by Member States and the early adoption of the Commission's proposals based on the social partners' agreement for implementing its key elements in EU law.

- ensure the effective enforcement of the new rules by means of adequate measures, including flag and port State control requirements.⁴

The White Paper on the Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system⁵ highlights the importance of a social agenda for the maritime transport to both promote jobs and enhance safety and the Staff Working Document accompanying the White Paper foresees a proposal to ensure effective enforcement of the MLC.

This proposal is closely associated with the Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/16/EC on port State control, aimed to ensure a global level-playing field for industry by enforcing the MLC in all European ports.

1.1 The Maritime Labour Convention

As generally acknowledged and explicitly stated by the ILO, the shipping industry is “the world’s first genuinely global industry” which “requires an international regulatory response of an appropriate kind – global standards applicable to the entire industry”.

The MLC, adopted in 2006, provides comprehensive rights and protection at work for all seafarers regardless of their nationality and the flag of the ship.

The MLC aims to both achieve decent working conditions for seafarers and secure fair competition for quality shipowners. It sets out seafarers' rights to decent conditions of work

³ COM(2009) 8

⁴ See paragraph 3 of the Communication.

⁵ COM (2011) 144 final

on a wide range of subjects, and has been designed to be globally applicable, easily understandable, updatable and uniformly enforced. It has also been designed to become a global instrument known as the "fourth pillar" of the international regulatory regime for quality shipping, complementing the three key Conventions of the International Maritime Organization (IMO): the International Convention for the Safety of Life at Sea (SOLAS Convention), the International Convention on Standards of Certification, Training and Watch keeping (STCW Convention) and the International Convention for the Prevention of Pollution from Ships (MARPOL Convention).

It contains four Titles dealing with the seafarers' rights: Title 1 on minimum requirements for seafarers to work on board a ship; Title 2 on conditions of employment; Title 3 on accommodation, recreational facilities, food and catering; Title 4 on health protection, medical care, welfare and social security protection.

Moreover, the MLC, in its Title 5, contains mechanisms to improve supervision at all levels: the ship, the company, the flag State, the port State, the labour supplying State and the ILO system for a global and uniform compliance and verification. Indeed, together with a sound corpus of rules, a more effective enforcement and compliance system was needed in order to eliminate substandard ships for the sake of ship safety and security and environmental protection.

Therefore, the EU has to provide means, through flag State and port State control to ensure that the relevant MLC maritime labour standards are applied on board all ships calling at EU ports, regardless of the nationality of the seafarers.

The enforcement of the MLC standards through flag State and port State control has also to be seen as a way to limit social dumping, which deteriorates working conditions on board, and penalises shipowners offering decent working conditions complying with the ILO rules.

1.2. The MLC flag State responsibilities

By adopting the MLC, the ILO has developed innovative provisions regarding certification of labour conditions on board ships.

The MLC establishes a strong enforcement regime, backed by a certification system where the flag State (or a recognized organisation/entity acting on its behalf) reviews the shipowners' compliance plans and verifies and certifies that they are actually in place and being implemented. Ships will be required to carry a *maritime labour certificate* and a *declaration of maritime labour compliance* on board. These documents will be produced by the flag State exerting jurisdiction over the ships and certifying the outcome of the checks. Under the MLC, this requirement concerns ships above 500 gross tonnage (GT) that are engaged in international voyages or in cabotage abroad. However, EU Flag States will be expected to ensure that national laws and regulations implementing Directive 2009/13/EC are respected on smaller ships (less than 500 GT) for which the certification is not mandatory under the MLC. In order to avoid adding a further regulatory layer on Member States, the whole system of certification has not been integrated into EU law by the present proposal, but left to international law.

1.3. Current EU legislation

The EU has set up a legal framework to increase maritime safety by adopting three maritime safety packages, the latest dating from 2009. Some of the EU rules on maritime safety and health and safety are relevant for the present proposal. They are shortly summarised below.

1.3.1 Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements⁶

At EU level, Directive 2009/21/EC aims to ensure that Member States effectively and consistently discharge their obligations as flag States, to enhance safety and prevent pollution from ships flying their flag. It provides for the conditions for ships to be registered under the flag of a Member State and the obligation for flag States to set up a quality management system and internal evaluation in line with the international standards. To this end, IMO standards - in particular the mandatory audit plan of national maritime administrations and the IMO Flag State Code - apply.

Directive 2009/21/EC, however, does not contain a list of duties that have to be performed by the flag State but refers to IMO procedures. Therefore, the specific duties for the flag State implied by the enforcement of Directive 2009/13/EC, should be introduced into EU law. Since the objectives of the current proposal are separate and different by nature from those of Directive 2009/21, it appears more consistent to opt for a stand alone proposal rather than amending Directive 2009/21/EC.

1.3.2 Directive 2009/13/EC

Following the agreement between the EU social partners, Directive 2009/13/EC implements certain standards of the MLC within Union law. Its annex, in particular, has incorporated the relevant elements of Titles 1, 2, 3 and 4 of the MLC on the minimum requirements to work on board ships (medical certificate, minimum age, training and qualifications), the conditions of employment (seafarer's employment agreements, repatriation, compensation for the ship's loss or foundering, manning level, career and skill development and opportunities for seafarers' employment), provisions on accommodation, recreational facilities, food and catering, the provisions on health protection, medical care and welfare including the shipowners' liability and access to shore based facilities and lastly the provisions on onboard complaint procedures.

Except as expressly provided otherwise, Directive 2009/13/EC applies to all ships whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. The Directive does not apply to warships and naval auxiliaries.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES

The EU Member States actively took part in the MLC negotiations with the Commission which organised the co-ordination of the EU positions. All EU member States adopted the MLC in 2006.

⁶ OJ L131, 28.05.2009, p.132

A fully fledged public consultation offered an opportunity for Member States and stakeholders to express their views in June 2011.

There was a general consensus on the need for updating the legislation related to flag State and port State in order to enforce the MLC requirements.

The specific positive effects which were underlined were reinforcing maritime safety, improving quality shipping, making the conditions of competition fairer between EU and non EU operators and between EU and non EU flags.

Stakeholders also mentioned the better job quality for all seafarers, namely EU seafarers working on board EU flagged vessels, EU seafarers working on board non EU flagged ships, even beyond the EU, for non EU seafarers working on board non EU flagged ships.

The Task Force on Maritime Employment and Competitiveness, an independent body set up by Vice-President Siim Kallas in July 2010, which finalised its work in June 2011 and issued a Report⁷ containing policy recommendations on how to promote the seafaring profession in Europe, has recommended the enforcement of the MLC.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1 The content of the Proposal

3.1.1 Responsibilities of the Flag State

The national flag constitutes the primary source of State responsibility for a ship. Flag States are required to ensure that their ships comply with the standards accepted by flag States under international law and conventions, in particular with international minimum standards. This means that a flag State's ships are to be operated and maintained in a manner that minimizes the risk to seafarers, the marine environment, and the cargo. Article 94 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS 1982), establishes flag States' fundamental duties and Article 94(5) requires flag States to take any steps necessary to secure observance with generally accepted international regulations, procedures and practice.

The flag State exercises effective jurisdiction and control over administrative, technical and social matters on their ships and crew on the high seas. It enforces regulations over vessels registered under its flag, including those relating to inspection, certification, and issuance of safety and pollution prevention documents.

In concrete terms, before allowing a ship to fly their flag, Member States shall check that the ship complies with international rules and regulations in the domains falling within its responsibilities.

The current proposal on flag State is limited to taking up some parts of Title V of the MLC related to the flag State's responsibilities. As mentioned, Directive 2009/21/EC on flag State is complemented but not amended by the present proposal. The proposal provides for the enforcement and compliance of the flag State with Directive 2009/13/EC.

⁷ Published on 20 July 2011: <http://ec.europa.eu/transport/maritime/seafarers/doc/2011-06-09-tfmec.pdf>

However, the MLC provisions setting up the duty for the ships to bear a maritime labour certificate and a declaration of maritime labour compliance and certifying that all the 14 MLC matters (minimum age of seafarers, medical certification of seafarers, qualifications of seafarers, seafarers' employment agreements, use of any licensed or certified or regulated private recruitment and placement service for seafarers, hours of work or rest, manning levels for the ship, accommodation, on-board recreational facilities, food and catering, health and safety and accident prevention, on-board medical care, on-board complaint procedures, payment of wages) could not be all transposed into EU law for reason of EU competence and political opportunity.

Thus, Directive 2009/13 does not encompass the full range of matters covered by the MLC. As a consequence, the obligations of the EU flag States are limited to enforce the provisions of Directive 2009/13/EC.

3.1.2 Detailed content of the proposal

Directive 2009/21/EC seeks to ensure that the flag of all EU Member States have good standing (not being blacklisted...) and to incorporate the International Maritime Organisation (IMO)'s flag State audit scheme into EU law and to introduce the quality certification of the national maritime authorities while the present proposal has different purposes. The present proposal does not refer to any IMO procedures but lays down principles to monitor the application of Directive 2009/13/EC taking up some of the Maritime Labour Convention standards. For the sake of clarity, it is preferable to have a separate text.

Article 1 describes the subject matter of the proposal consisting in ensuring that the EU flag States meet their responsibilities in applying and enforcing Directive 2009/13/EC.

Article 2 refers to the definition of ship and shipowner based on the MLC definition and used in Directive 2009/13 to avoid any discrepancy between the standards and the implementation measures.

Article 3 lays down the obligation for flag State to establish mechanisms for inspection and to ensure the compliance of its ships with Directive 2009/13/EC.

Article 4 refers to professional qualifications and independence of the staffs in charge of verifying that the matters covered by Directive 2009/13/EC are rightly applied on board vessels flying the flags of the Member States concerned.

Article 5 deals with the complaints on board EU flagged ships and lays down the principles and procedure to be followed by the flag States competent staff.

3.1.3 Explanatory documents accompanying the notification of transposition measures

Further to the Joint Political Declarations (OJ 2011/C 369/02; OJ 2011/C 369/03)⁸, the Commission is now considering the need for explanatory documents on a case by case basis. By virtue of proportionality, explanatory documents have not been deemed justified in the present proposal, which does not modify any other existing legislative act, to avoid possible additional administrative burden and since the proposal is well delimited and does not affect

⁸ COM ((2007) 502)

heavily regulated domains at national level. Thus, the present proposal does not include the recital on explanatory documents..

3.2 Legal basis

Article 100(2) of the Treaty on the Functioning of the European Union

3.3 Subsidiarity principle

Harmonised rules on enforcement across the EU should contribute to establishing a level playing field in order to both avoid distortions of competition in the internal market at the expense of maritime safety and to ensure decent working and living conditions for all seafarers regardless of their nationality. In particular the experience of port State control at EU level has proved efficient to ensure better surveillance of ships calling at EU ports by pooling resources and exchanging information.

3.4 Proportionality principle

Measures by flag State is the prime means of enforcement in the shipping industry. The current proposal aims at strengthening the role of the flag State in monitoring the effective application of Directive 2009/13/EC in a consistent way, avoid the Member States to act individually at the expense of consistency and possibly in breach of either international or Union law.

3.5 Choice of instruments

In a context of minimum standards to be implemented by Member States by measures in their own national systems and in the field of shared competences, the appropriate instrument is a directive.

3.6 Entry into force

This Directive shall enter into force on the date of entry into force of the Maritime Labour Convention, 2006, similar to Directive 2009/13.

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(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 Committee⁹,

Having regard to the opinion of the Committee of the Regions¹⁰,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Union action in the field of maritime transport aims, inter alia, at improving shipboard living and working conditions of seafarers, safety at sea and the prevention of pollution caused by maritime accidents.
- (2) The Union is aware of the fact that most accidents at sea are directly caused by human factors, especially fatigue.
- (3) One of the main objectives of the maritime safety policy of the Union is to eradicate substandard shipping.
- (4) On 23 February 2006, the International Labour Organisation adopted the Maritime Labour Convention, 2006 (the Convention), desiring to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing

⁹ OJ C [...], [...], p. [...].

¹⁰ OJ C [...], [...], p. [...].

international maritime labour conventions and recommendations, as well as the fundamental principles to be found in other international labour conventions.

- (5) Council Decision 2007/431/EC of 7 June 2007¹¹ has authorised the Member States to ratify the Convention. Member States are urged to ratify it as soon as possible
- (6) The Convention sets out maritime labour standards for all seafarers regardless of their nationality and of the flag of the ships.
- (7) Council Directive 2009/13/EC of 16 February 2009¹² implements the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006 and amending Directive 1999/63/EC (the Agreement).
- (8) Directive 2009/13/EC was adopted on the basis of Article 155 of the Treaty.
- (9) Since agreements concluded by virtue of Article 155 of the Treaty to be implemented by Council decisions can only cover matters defined by Article 153 of the Treaty, certain provisions of the Convention relating to flag State responsibilities for the enforcement of the Convention could not be part of the social agreement implemented by Directive 2009/13/EC. Those provisions should be integrated into Union law by virtue of this Directive.
- (10) Although Directive 2009/21/EC governs the flag State responsibilities by incorporating the IMO's flag State audit scheme into Union law and by introducing the certification of quality of national maritime authorities; a separate directive covering the maritime labour standards is deemed more appropriate and clearer to reflect the different purposes and procedures,
- (11) Directive 2009/13/EC applies to seafarers on board ships flying the flag of a Member State. Member States should therefore monitor compliance with all the provisions of that Directive by ships flying their flag.
- (12) For the control of the effective enforcement of Directive 2009/13/EC, it is necessary that Member States verify through regular inspections, monitoring and other control measures, that ships that fly their flag comply with the requirements of Directive 2009/13/EC.
- (13) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or 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. 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.
- (14) Since this Directive enforces Directive 2009/13/EC, this Directive should enter into force on the same date as Directive 2009/13/EC,

¹¹ OJ L 161, 22.6.2007, p. 63

¹² OJ L 124, 20.5.2009, p. 30.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

This Directive lays down rules to ensure that Member States effectively discharge their obligations as flag States to monitor compliance of ships flying their flag with Directive 2009/13/EC. This Directive is without prejudice to Directive 2009/21/EC of the European Parliament and of the Council¹³.

Article 2

Definitions

For the purpose of this Directive, the following definitions shall apply:

- a) "ship" means a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply;
- b) "shipowner" means the owner of the ship or another organisation or person, such as the manager, agent or bareboat charterer, who has assumed the responsibility for the operation of the ship from the owner and who, on assuming such responsibility, has agreed to take over the duties and responsibilities imposed on shipowners in accordance with the Annex to Directive 2009/13/EC, regardless of whether any other organisation or persons fulfil certain of the duties or responsibilities on behalf of the shipowner.

Article 3

Compliance monitoring

Member States shall ensure that appropriate checks and monitoring mechanisms are established and that effective and adequate inspections are carried out to ensure that the working and living conditions of seafarers on ships flying their flag meet, and continue to meet, the requirements of Directive 2009/13/EC.

Article 4

Staff in charge of compliance monitoring

Member States shall ensure that staff in charge of verifying the proper implementation of Directive 2009/13/EC has the training, competence, terms of reference, powers, status and

¹³ OJ L131, 28.5.2009, p. 132.

independence necessary or desirable so as to enable them to carry out that verification and ensure compliance with that Directive.

Article 5

Complaints

1. If a Member State receives a complaint which it does not consider manifestly unfounded or obtains evidence that a ship that flies its flag does not conform to the requirements of Directive 2009/13/EC or that there are serious deficiencies in its implementing measures, that Member State shall take the steps necessary to investigate the matter and ensure that action is taken to remedy any deficiencies found.
2. Staff in charge of dealing with complaints shall treat as confidential the source of any grievance or complaint alleging a danger or deficiency in relation to seafarers' working and living conditions or a violation of laws and regulations and give no intimation to the shipowner, the shipowner's representative or the operator of the ship that an inspection was made as a consequence of such a grievance or complaint.

Article 6

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 12 months after its entry into force. They shall forthwith communicate to the Commission the text of those provisions.
2. When Member States adopt those provisions, 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.
3. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 7

Entry into force

This Directive shall enter into force on the date of entry into force of Directive 2009/13/EC.

Article 8

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President