

COMMISSION IMPLEMENTING DIRECTIVE 2014/111/EU**of 17 December 2014****amending Directive 2009/15/EC with regard to the adoption by the International Maritime Organization (IMO) of certain Codes and related amendments to certain conventions and protocols****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations ⁽¹⁾, and in particular the second sentence of Article 7(2) thereof,

Acting in accordance with the conformity checking procedure set out in Article 5 of Regulation (EC) No 2099/2002 of the European Parliament and of the Council establishing a Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) ⁽²⁾,

Whereas:

- (1) Pursuant to Article 5(1) of Regulation (EC) No 2099/2002, Member States and the Commission shall cooperate in order to define, as appropriate, a common position or approach in the competent international fora with a view to reducing the risks of conflict between the maritime legislation of the Union and international instruments.
- (2) Directive 2009/15/EC forms together with Regulation (EC) No 391/2009 of the European Parliament and the Council ⁽³⁾ one coherent piece of legislation where the activities of recognised organisations are regulated in a consistent manner in accordance with the same principles and definitions. Pursuant to Article 3(2) of Directive 2009/15/EC, if a Member State decides, with respect to ships flying its flag, to authorise an organisation to carry out on its behalf the inspections and surveys related to statutory certificates, it shall entrust these duties only to a recognised organisation, which, pursuant to Article 2(g) of that Directive, means an organisation recognised in accordance with Regulation (EC) No 391/2009. Therefore, the set of rules on the basis of which the organisations concerned are recognised has an impact on both acts.
- (3) The term 'international conventions' as defined in Article 2(d) of Directive 2009/15/EC means the International Convention for the Safety of Life at Sea of 1 November 1974 ('the SOLAS Convention') with the exception of chapter XI-2 of the Annex thereto, the International Convention on Load Lines of 5 April 1966 ('the Load Lines Convention') and the International Convention for the Prevention of Pollution from Ships of 2 November 1973 ('the MARPOL Convention'), together with the protocols and amendments thereto, and the related codes of mandatory status in all Member States, in their up-to-date version.
- (4) The IMO Assembly at its 28th session adopted an IMO Instruments Implementation Code (III Code), as set out in IMO resolution A.1070(28) of 4 December 2013, as well as amendments to the Load Lines Convention, with a view to rendering the III Code mandatory, together with an associated flag State audit scheme, as set out in IMO resolution A.1083(28) of 4 December 2013.
- (5) The IMO Marine Environment Protection Committee (MEPC) at its 66th session adopted amendments to the Protocol of 1978 relating to the MARPOL Convention, as set out in resolution MEPC.246(66) of 4 April 2014, and to the Protocol of 1977 relating to the MARPOL Convention, as modified by the Protocol of 1978 relating thereto, as set out in resolution MEPC.247(66) of 4 April 2014, with a view to rendering the III Code mandatory, together with an associated flag State audit scheme.

⁽¹⁾ OJ L 131, 28.5.2009, p. 47.

⁽²⁾ OJ L 324, 29.11.2002, p. 1.

⁽³⁾ Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations (OJ L 131, 28.5.2009, p. 11).

- (6) The IMO Maritime Safety Committee (MSC) at its 93rd session adopted amendments to the SOLAS Convention, as set out in resolution MSC.366(93) of 22 May 2014, and to the Protocol of 1988 relating to the Load Lines Convention, as set out in resolution MSC.375(93) of 22 May 2014, with a view to rendering the III Code mandatory, together with an associated flag State audit scheme.
- (7) The MEPC at its 65th session and the MSC at its 92nd session adopted an IMO Code for Recognized Organizations (RO Code), as set out in resolution MSC.349(92) of 21 June 2013.
- (8) The MEPC at its 65th session adopted amendments to the Protocol of 1978 relating to the MARPOL Convention with a view to rendering the RO Code mandatory, as set out in resolution MEPC.238(65) of 17 May 2013.
- (9) The MSC at its 92nd session adopted amendments to the SOLAS Convention and to the Protocol of 1988 relating to the Load Lines Convention with a view to rendering the RO Code mandatory, as set in resolutions MSC.350(92) and MSC.356(92) of 21 June 2013.
- (10) The III and RO Codes are therefore expected to enter into force during the period between 1 January 2015 until 1 January 2018 in accordance with the applicable rules for the adoption, ratification and entry into force of amendments under each of the IMO conventions concerned.
- (11) On 13 May 2013, the Council adopted Council Decision 2013/268/EU on the position to be taken on behalf of the European Union within the International Maritime Organization (IMO) with regard to the adoption of certain Codes and related amendments to certain conventions and protocols ⁽¹⁾. Pursuant to Article 5 of that Decision, the Council authorised the Member States to give their consent to be bound, in the interest of the Union and subject to the declaration set in the Annex of that Decision, by the amendments referred to in recitals (4) to (9) of this Directive.
- (12) The declaration annexed to Council Decision 2013/268/EU states that Member States consider that the III Code and the RO Code contain a set of minimum requirements on which States can elaborate and improve as appropriate for the enhancement of maritime safety and the protection of the environment.
- (13) It also states that nothing in the III Code or RO Code shall be construed to restrict or limit in any way the fulfilment of Member States' obligations under the law of the Union in relation to the definition of 'statutory certificates' and 'class certificates', the scope of the obligations and criteria laid down for recognised organisations, and the duties of the European Commission as regards the recognition, assessment and, where appropriate, the imposition of corrective measures or sanctions on recognised organisations. The same declaration states that, in the case of an IMO audit, Member States will state that only compliance with those provisions of the relevant international conventions which Member States have accepted, including in the terms of this declaration, shall be verified.
- (14) In the legal order of the Union, the scope of Directive 2009/15/EC as well as that of Regulation (EC) No 391/2009 includes references to the 'international conventions' as described in recital (3). In this framework, amendments to IMO conventions are automatically brought into Union law at the same time when they enter into force at the international level, including the related codes of mandatory status such as the III and RO codes, which therefore form part of the IMO instruments relevant for the application of Directive 2009/15/EC.
- (15) Amendments to international conventions may however be excluded from the scope of Union maritime legislation in accordance with the conformity checking procedure if they meet at least one of the two criteria set out in Article 5(2) of Regulation (EC) No 2099/2002.
- (16) The Commission evaluated the amendments to the IMO conventions in accordance with Article 5 of Regulation (EC) No 2099/2002 and determined that a number of discrepancies exist between, on the one hand, the III Code and the RO Code, and, on the other hand, Directive 2009/15/EC and Regulation (EC) No 391/2009.

⁽¹⁾ OJ L 155, 7.6.2013, p. 3.

- (17) First, paragraph 16.1 of part 2 of the III Code provides for a minimum list of resources and processes which flag States have to establish, including the provision of administrative instructions pertaining *inter alia* to ship class certificates required by the flag State to demonstrate compliance with structural, mechanical, electrical, and/or other requirements of an international convention to which the flag State is a party or compliance with a requirement of the flag State's national regulation. As detailed in recital (21) below however, Union law draws a distinction between statutory certificates and class certificates. The latter are documents of a private nature and are neither acts of a flag State nor issued on any flag State's behalf. This provision of the III Code in fact refers to SOLAS Chapter II-1, Part A-1, Regulation 3-1, which provides that ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognized by the Administration in accordance with the provisions of regulation XI-1/1. 1. The SOLAS convention clearly identifies the ship or its legal representation vis-à-vis the flag State as the object of this requirement. Furthermore, when acting in its capacity as class society, a recognised organisation issues ship class certificates in accordance with its own rules, procedures, conditions and private contractual arrangements, to which the flag State is not a party. Therefore, this provision of the III Code contradicts the delineation of class and statutory activities as set out in the existing EU legislation.
- (18) Second, paragraph 18.1 of part 2 of the III Code requires the flag State to determine, "*with regard only to ships entitled to fly its flag*", that a recognised organisation has adequate resources in terms of technical, managerial and research capabilities to accomplish the duties entrusted to it. In contrast, this aspect is addressed under Union law as a requirement for the purpose of the recognition as reflected in criterion A.3 in Annex I of Regulation (EC) No 391/2009, and with regard to the entire fleet in the class of the organisation concerned, without distinction based on flag. Should the above provision of the III Code be incorporated into Union law, it would restrict the application of criterion A.3 in Annex I of Regulation (EC) No 391/2009 to the recognised organisation's performance with regard only to ships flying the flag of Member States, in contradiction with the requirements currently in force.
- (19) Third, paragraph 19 of part 2 of the III Code introduces a prohibition for a flag State to mandate its recognised organisations to apply to ships, other than those entitled to fly its flag, any requirements pertaining to *inter alia* their classification rules, requirements or procedures. Pursuant to Directive 2009/15/EC, Member States can only authorise an organisation to act on their behalf for the statutory certification of their respective fleet if that organisation has been recognised and is being monitored for this purpose in accordance with Regulation (EC) No 391/2009. In this framework, the recognised organisations as such have to comply with certain requirements in their relevant activities across their classed fleet, irrespective of the flag. This relates to most of the criteria set out in Annex I of Regulation (EC) No 391/2009, as well as to other obligations, in particular Article 10(4) of that Regulation. Should the above provision of the III Code be incorporated into Union law, it would restrict the application of the existing recognition requirements in Regulation (EC) No 391/2009 *inter alia* if they qualify as rules, requirements and procedures to the recognised organisation's performance with regard only to ships flying the flag of Member States.
- (20) Fourth, section 1.1 of part 2 of the RO Code defines a 'Recognized Organization' as an organisation assessed by a flag State and found to comply with part 2 of the RO Code. In contrast, Article 2(g) of Directive 2009/15/EC provides that a recognised organisation is '*an organisation recognised in accordance with Regulation (EC) No 391/2009*'. Based on the Commission's evaluation set out in recitals (21) to (23), it appears that several provisions in part 2 of the RO Code are incompatible with Regulation (EC) No 391/2009. Consequently, a recognised organisation as defined in the RO Code would not fulfil all the requirements of Regulation (EC) No 391/2009 and could therefore not meet the definition of a recognised organisation as set out in Union law.
- (21) Fifth, section 1.3 of part 2 of the RO Code defines 'statutory certification and services' as a single category of activities that a recognised organisation is entitled to perform on behalf of the flag State, including the issuance of certificates pertaining to both statutory and class requirements. In contrast, the definitions set out in Article 2(i) and (k) of Directive 2009/15/EC draw a clear distinction between 'statutory certificates', which are those certificates issued by or on behalf of a flag State in accordance with the international conventions, and 'class certificates', which are those documents issued by a recognised organisation, in its capacity as class society, certifying the fitness of a ship for a particular use or service in accordance with the rules and procedures laid down and made public by that recognised organisation. It follows that, under Union law, statutory and class certificates are distinct and have different natures. Namely, statutory certificates have a public nature, while class certificates have a private nature, being issued by the class society in accordance with its own rules, procedures and conditions. It follows that classification certificates issued by a recognised organisation for a ship in order to attest compliance with classification rules and procedures, including when verified by a flag State as proof of compliance with SOLAS Chapter II-1, Part A-1, Regulation 3-1, are documents of a strictly private nature which are neither acts of a flag State nor carried out on any flag State's behalf. In the RO Code however, 'statutory certification and services' are systematically referred to as being performed by the RO "*on behalf of the flag State*",

contradicting the legal distinction established in Union law. Notwithstanding this contradiction, this provision of the RO Code, if accepted as a norm in the Union legal order, entails a manifest risk that the recognition requirements contained in Regulation (EC) No 391/2009 which pertain to the entire activity of the organisation, irrespective of flag, could no longer be enforced within the EU. Due to the link between the two instruments as explained in recital (2), this risk is also relevant to Directive 2009/15/EC.

- (22) Sixth, section 3.9.3.1 of part 2 of the RO Code provides for a mechanism of co-operation between recognised organisations under the sole framework established by the flag State with the view to standardising processes concerning statutory certification and services for the flag State, as appropriate; whereas section 3.9.3.2 of part 2 of the same Code establishes a framework "by a flag State or a group of flag States" to regulate co-operation among their recognised organisations on technical and safety-related aspects of "statutory certification and services of ships [...] on behalf of the said flag State(s)". In contrast, co-operation between recognised organisations under Union law is governed by Article 10(1) of Regulation (EC) No 391/2009, which requires recognised organisations to consult with each other with a view to maintaining equivalence and aiming for harmonisation of their rules and procedures and the implementation thereof, and sets out a framework for the mutual recognition, in appropriate cases, of class certificates for materials, equipment and components. Those two co-operation processes under Article 10(1) pertain to the private activities of the recognised organisations, in their capacity as classification societies, and therefore apply without distinction based on flag. The co-operation mechanisms provided for in the RO Code, if incorporated into Union law, would therefore limit the scope of the co-operation framework established by Regulation (EC) No 391/2009 to the recognised organisations' activities with regard only to ships flying the flag of Member States, in contradiction with the requirements currently in force.
- (23) Seventh, section 3.9.3.3 of part 2 of the RO Code is identical to paragraph 19 of part 2 of the III Code; therefore the considerations made in recital (19) are equally relevant to this provision of the RO Code.
- (24) Nothing in either the III Code or the RO Code should place any restrictions on the Union's capacity to lay down, in accordance with the Treaties and international law, appropriate conditions for the granting of recognition to organisations wishing to be authorised by the Member States to carry out ship survey and certification activities on their behalf, with a view to achieving the Union's objectives and in particular to enhance maritime safety and the protection of the environment.
- (25) The scheme for the mutual recognition of class certificates for materials, equipment and components laid down by Article 10(1) of Regulation (EC) No 391/2009 is only enforceable within the Union in respect of ships flying the flag of a Member State. As far as foreign vessels are concerned, the acceptance of relevant certificates remains at the discretion of relevant non-EU flag States in the exercise of their exclusive jurisdiction, notably under the United Nations Convention on the Law of the Sea (UNCLOS).
- (26) Based on its evaluation, the Commission determined that the provisions of the III Code and of the RO Code referred to in the preceding recitals are incompatible with Directive 2009/15/EC, or with Regulation (EC) No 391/2009 and consequently with Directive 2009/15/EC due to the link between the two instruments as explained in recital (2), and should be excluded from the scope of that Directive. Therefore Article 2(d) of Directive 2009/15/EC should be amended accordingly.
- (27) As the RO Code enters into force on 1 January 2015, this Directive should enter into force as soon as possible after its date of publication.
- (28) The Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) did not deliver an opinion on the measures provided for in this Directive. An implementing act was deemed to be necessary and the chair submitted the draft implementing act to the appeal committee for further deliberation. The measures provided for in this Directive are in accordance with the opinion of the appeal committee,

HAS ADOPTED THIS DIRECTIVE:

Article 1

In Article 2 of Directive 2009/15/EC, point (d) is replaced by the following:

- '(d) "international conventions" means the International Convention for the Safety of Life at Sea of 1 November 1974 (SOLAS 74) with the exception of chapter XI-2 of the Annex thereto, the International Convention on Load Lines of 5 April 1966 and the International Convention for the Prevention of Pollution from Ships of

2 November 1973 (MARPOL), together with the protocols and amendments thereto, and the related codes of mandatory status in all Member States, with the exception of paragraphs 16.1, 18.1 and 19 of part 2 of the IMO Instruments Implementation Code, and of sections 1.1, 1.3, 3.9.3.1, 3.9.3.2 and 3.9.3.3 of part 2 of the IMO Code for Recognized Organizations, in their up-to-date version.'

Article 2

1. Member States shall adopt and publish, by 31 December 2015 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions.

They shall apply those provisions from 1 January 2016.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. 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 3

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

Article 4

This Directive is addressed to the Member States.

Done at Brussels, 17 December 2014.

For the Commission
The President
Jean-Claude JUNCKER
