

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2013/38/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 August 2013

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 Committee ⁽¹⁾,

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) On 23 February 2006, the International Labour Organisation (ILO) 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 ⁽³⁾ authorised Member States, in the interests of the European Community, to ratify MLC 2006. Therefore, Member States should ratify it as soon as possible.
- (3) Member States, when performing port State control inspections in accordance with Directive 2009/16/EC of the European Parliament and of the Council of 23 April

2009 on port State control ⁽⁴⁾ in relation to matters covered by Conventions which they have not yet ratified and which stipulate that every ship is subject to control by officers duly authorised when in a port of another contracting State or Party, should make every effort to comply with procedures and practices under those Conventions and should thus refrain from making reports relevant to port State control to the International Maritime Organisation (IMO) and/or the ILO. Member States which have not yet ratified an international convention covered by Directive 2009/16/EC at the time of its entry into force should make every effort to establish similar conditions on board their ships in accordance with the requirements of that Convention.

- (4) In order to ensure a harmonised 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 Union law, Member States should aim at ratifying the Conventions by the date on which they enter into force, at least those parts thereof falling under Union competence.
- (5) 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.
- (6) For the purposes of Directive 2009/16/EC, it is preferable, rather than the terms 'seafarer' and 'crew' being defined, that those terms be understood in each instance in accordance with the way in which they are defined or understood in the relevant international conventions. In particular, for any matters relating to the enforcement of MLC 2006, the term 'crew' should be understood as referring to 'seafarer' as defined in MLC 2006.
- (7) For any matters covered by this Directive relating to the enforcement of MLC 2006, including for ships for

⁽¹⁾ OJ C 299, 4.10.2012, p. 153.

⁽²⁾ Position of the European Parliament of 2 July 2013 (not yet published in the Official Journal) and decision of the Council of 22 July 2013.

⁽³⁾ OJ L 161, 22.6.2007, p. 63.

⁽⁴⁾ OJ L 131, 28.5.2009, p. 57.

which the International Safety Management Code is not applicable, references in Directive 2009/16/EC 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.

- (8) A substantial part of the MLC 2006 standards is implemented within Union law by means of 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 ⁽¹⁾ and Council Directive 1999/63/EC of 21 June 1999 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) ⁽²⁾. Those MLC 2006 standards which fall within the scope of Directive 2009/13/EC or Directive 1999/63/EC are to be implemented by the Member States in line with those Directives.
- (9) As a matter of general principle, the measures adopted to give effect to this Directive should under no circumstances constitute grounds justifying a reduction by Member States in the general level of protection of seafarers on board ships flying the flag of a Member State under the applicable Union social law.
- (10) MLC 2006 contains enforcement provisions defining the responsibilities of States performing 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 and anchorages, irrespective of the State whose flag it flies.
- (11) Port State control is governed by Directive 2009/16/EC, which should include MLC 2006 among the Conventions the implementation of which is verified by Member States' authorities in their ports.
- (12) Member States, when performing port State control inspections in accordance with Directive 2009/16/EC, should take into account the provisions of MLC 2006 which stipulate that the maritime labour certificate and the declaration of maritime labour compliance are to be accepted as prima facie evidence of compliance with the requirements of MLC 2006.
- (13) The law 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.
- (14) In order to ensure uniform conditions for the implementation of Directive 2009/16/EC, implementing powers should be conferred on the Commission. The Commission should be entitled to adopt implementing acts: to implement a methodology for the consideration of generic risk parameters relating in particular to the flag State criteria and company performance criteria; to ensure uniform conditions for the scope of expanded inspections, including the risk areas to be covered; to ensure uniform application of the procedures for the control and security checks of ships; to set up a harmonised electronic format for the reporting of complaints related to MLC 2006; to implement harmonised procedures for the reporting of apparent anomalies by pilots and port authorities or bodies and of follow-up actions taken by Member States; and to establish the detailed arrangements for publication of information on companies with a low and very low performance, the criteria for aggregating the relevant data and the frequency of updates. 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 powers ⁽³⁾.
- (15) Implementing acts relating to the methodology for the consideration of generic risk parameters concerning in particular the flag State criteria and company performance criteria, to the reports from pilots and port authorities or bodies, 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, and to the detailed arrangements for the publication of information on companies with a low or very low performance, should not be adopted by the Commission where the committee referred to in this Directive delivers no opinion on the draft implementing act presented by the Commission.
- (16) When establishing implementing rules, the Commission should specifically take into account the expertise and 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').
- (17) The implementing rules, including references to Paris MOU instructions and guidelines, should not compromise the exercise of the professional judgment of inspectors or of the competent authority and the flexibility provided for in Directive 2009/16/EC.

⁽¹⁾ OJ L 124, 20.5.2009, p. 30.

⁽²⁾ OJ L 167, 2.7.1999, p. 33.

⁽³⁾ OJ L 55, 28.2.2011, p. 13.

- (18) The inspection database referred to in Directive 2009/16/EC should be adapted and developed in line with the amendments introduced by this Directive or changes adopted within the context of the Paris MOU.
- (19) The Paris MOU seeks to eliminate the operation of sub-standard ships through a harmonised system of port State control, comprising coordinated inspection of ships calling at ports, including Member States' ports, in the Paris MOU Region. Those inspections are aimed at verifying that ships meet international safety, security and environmental standards, and that seafarers have adequate living and working conditions, in conformity with the international conventions in force. When inspections are carried out and when reference is made to Paris MOU instructions and guidelines, account should be taken of the fact that those instructions and guidelines are developed and adopted to ensure consistency and to guide inspections with a view to facilitating the greatest possible degree of convergence.
- (20) The inspection of on-board living and working conditions of seafarers and of their training and qualifications, to verify that these comply with the requirements of MLC 2006, requires the necessary level of training for inspectors. The European Maritime Safety Agency and Member States should promote the issue of training for inspectors for the purposes of reviewing compliance with MLC 2006.
- (21) In order to allow the Commission to update the relevant procedures swiftly, thereby contributing to the achievement of a global level playing field for shipping, 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. 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.
- (22) 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 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.
- (23) Directive 2009/16/EC should therefore be amended accordingly.
- (24) According to Article VIII, MLC 2006 is to come into force 12 months after the date on which there have been registered ratifications by at least 30 Members of the ILO with a total share in the world gross tonnage of ships of 33 per cent. This condition was fulfilled on 20 August 2012, and MLC 2006 enters into force on 20 August 2013.
- (25) 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) point 1 is amended as follows:
- (i) point (g) is deleted;
- (ii) 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) 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.';
- (c) the following paragraph is added:
- 'All the references in this Directive to the Conventions, international codes and resolutions, 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) Article 3 is amended as follows:
- (a) paragraph 3 is replaced by the following:
- '3. When inspecting a ship flying the flag of a State which is not a party to a Convention, Member States shall ensure that the treatment of that ship and its crew is not more favourable than that of a ship flying the flag of a State party to that Convention. Such ship shall be subject to a more detailed inspection in accordance with procedures established by the Paris MOU.';

(b) the following paragraph is added:

'5. Measures adopted to give effect to this Directive shall not lead to a reduction in the general level of protection of seafarers under Union social law in the areas to which this Directive applies, as compared to the situation which already prevails in each Member State. In implementing those measures, if the competent authority of the port State becomes aware of a clear violation of Union law on board ships flying the flag of a Member State, it shall, in accordance with national law and practice, forthwith inform any other relevant competent authority in order for further action to be taken as appropriate.'

(3) In Article 8, paragraph 4 is deleted.

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

'3. Implementing powers shall be conferred on the Commission to implement a methodology for the consideration of generic risk parameters relating in particular to the flag State criteria and 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 application of the procedures referred to in paragraph 1 and of the security checks referred to in paragraph 2 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 31(3).'

(7) In Article 17, the following paragraphs are added:

'Where, following a more detailed inspection, the living and working conditions on the ship are found not to conform to the requirements of MLC 2006, the inspector shall forthwith bring the deficiencies to the attention of the master of the ship, with required deadlines for their rectification.

In the event that the inspector considers such deficiencies to be significant, or if they relate to a possible complaint under point 19 of Part A of Annex V, the inspector shall also bring the deficiencies to the attention of the appropriate seafarers' and shipowners' organisations in the Member State in which the inspection is carried out, and may:

(a) notify a representative of the flag State;

(b) provide the competent authorities of the next port of call with the relevant information.

In respect of matters concerning MLC 2006, the Member State in which the inspection is carried out shall have the right to transmit a copy of the inspector's report, to be accompanied by any reply received from the competent authorities of the flag State within the prescribed deadline, to the Director-General of the International Labour Office with a view to such action as may be considered appropriate and expedient in order to ensure that a record is kept of such information and that it is brought to the attention of parties who might be interested in availing themselves of relevant recourse procedures.'

(8) In Article 18, the fourth paragraph is replaced by the following:

'The identity of the complainant shall not be revealed to the master or the shipowner of the ship concerned. The inspector shall take appropriate steps to safeguard the confidentiality of complaints made by seafarers, including ensuring confidentiality during any interviews of seafarers.'

(9) 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 for under Regulation 5.1.5 of MLC 2006 have been pursued. The inspector may also conduct a more detailed inspection in accordance with Article 13 of this Directive.

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, 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 to be submitted by the flag 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 shall be accompanied by any reply received within the prescribed deadline from the competent authority of the flag State. The appropriate seafarers' and shipowners' organisations 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 brought to the attention of parties, including seafarers' and shipowners' organisations, which might be interested in availing themselves of relevant recourse procedures.

7. 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).

8. This Article shall be without prejudice to Article 18. The fourth paragraph of Article 18 shall also apply to complaints relating to matters covered by MLC 2006.'

(10) Article 19 is amended as follows:

(a) The following paragraph is inserted:

'2a. In the case of living and working 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 of the port State 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. Moreover, 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 living and working 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 seafarers' and shipowners' organisations in the port State in which the inspection was carried out.'

(11) 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).'

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

'Implementing powers shall be conferred on the Commission to establish the detailed arrangements for 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).'

(13) 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, 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 20 August 2013. 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.

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.

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

Where the committee delivers no opinion on a draft implementing act to be adopted pursuant to Articles 10(3), 23(5) and the second paragraph of Article 27 respectively, 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.

(*) OJ L 324, 29.11.2002, p. 1.’

(15) Article 32 is deleted.

(16) Article 33 is replaced by the following:

‘Article 33

Implementing rules

When establishing the implementing rules referred to in Articles 10(3), 14(4), 15(4), 18a(7), 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 experience gained with the inspection system in the Union and build upon the expertise of the Paris MOU.’

(17) In Annex I, Part II, point 2B is amended as follows:

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

‘— Ships which have been the subject of a report or complaint, including an onshore complaint, by the master, a crew member, or any person or organisation with a legitimate interest in the safe operation of the ship, on-board living and working 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 in respect of which the implementation of that plan has not been checked by an inspector.’.

(18) Annex IV is amended as follows:

(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.’.

(19) In Annex V, Part A, the following points are added:

- '16. The documents required under MLC 2006 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 living and working 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 living and working conditions on the ship do not conform to the requirements of MLC 2006.'

(20) In Annex X, point 3.10 is amended as follows:

(a) the title is replaced by the following:

'Areas under MLC 2006';

(b) 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) relating to the living and working conditions of seafarers on the ship, as stipulated in the ship's maritime labour certificate and declaration of maritime labour compliance.'

Article 2

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 21 November 2014. 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.

Article 3

Entry into force

This Directive shall enter into force on 20 August 2013, the date of entry into force of MLC 2006.

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 12 August 2013.

For the European Parliament
The President
M. SCHULZ

For the Council
The President
L. LINKEVIČIUS