

**EXPLANATORY MEMORANDUM TO**  
**THE MERCHANT SHIPPING (FLAG STATE DIRECTIVE) REGULATIONS 2011**

**2011 No. 2667**

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 This instrument partially transposes Directive 2009/21/EC which seeks to ensure that Member States effectively and consistently discharge their international law obligations as regards ships flying their flag and to enhance safety and prevent pollution from those ships. The Directive only places obligations on Member States and their competent authorities for maritime purposes. The UK's competent authority is the Maritime and Coastguard Agency (MCA), an executive agency of the Department for Transport.

**3. Matters of special interest to the Joint Committee on Statutory Instruments or the Select Committee on Statutory Instruments**

3.1 None

**4. Legislative Context**

4.1 This instrument transposes Articles 4(2) and 6 of Directive 2009/21/EC which require legislative transposition. Other parts of the Directive have been transposed using administrative measures or do not require transposition. The MCA has published a Merchant Shipping Notice (MSN 1830) which explains its approach to the Directive.

4.2 The approach taken to transposition has been to use legislation to transpose only where this is essential, and where legislation is required, to use the same language and terminology in the Statutory Instrument as that used in the Directive wherever possible.

4.3 The proposal that resulted in Directive 2009/21/EC was the subject of Explanatory Memorandum (EM) 6843/06 submitted to Parliament by the Department for Transport on 29th June 2006. The House of Commons European Scrutiny Committee considered the EM on 5 July 2006. The Committee recommended that the document was politically important, and did not clear it from scrutiny pending further information and developments (34th Report, Session 2005-2006, reference 27324). The House of Lords Select Committee on the European Union referred the EM to their Sub-Committee B for further consideration at the 1259th sif on 12 July 2006. On 19 July 2006 the Chairman of

the House of Lords Select Committee on the European Union wrote to tell the Minister that the Committee would hold the proposal under scrutiny pending further developments.

4.4 Further information was provided to both Committees in Ministerial letters were sent on 10 May 2007, 10 July 2008, 1 October 2008, and 28 October 2008. The House of Commons European Scrutiny Committee cleared the proposal from scrutiny on 5 November 2008 (38th Report, Session 2007-2008). The House of Lords Select Committee on the European Union cleared the proposal on 6 October 2008.

4.5 A transposition note is attached as an annex.

## **5. Territorial Extent and Application**

5.1 This instrument applies to all of the United Kingdom.

## **6. European Convention on Human Rights**

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 Directive 2009/21/EC is one of several EU Directives collectively known as the “ERIKA III package”, which follows the “ERIKA I” and “II” packages. These have been created to address the problems highlighted by the incidents involving the single hull tankers ERIKA and PRESTIGE, which spilled oil at sea in 1999 and 2002 respectively. ERIKA III puts emphasis on the prevention of future such incidents in the interests of maritime safety and the environment.

7.2 The main policy objective of these Regulations is to transpose Article 4.2 and Article 6 of the Directive. Regulation 4 provides an enforceable duty on the Secretary of State (acting through the MCA) to provide safety related information in relation to a ship which has ceased to be a United Kingdom ship and which is to fly the flag of another country in future, where that country requests it. The policy behind the Directive requirement which this regulation implements is that the system of regulating international merchant shipping will be improved if there is better communication between the relevant competent authorities as to safety issues which require attention when a ship leaves one country’s register for another.

7.3 Regulation 4 sets out certain exceptions from the duty which, while not explicitly provided for by the Directive, reflect the spirit and purpose of it. These include exceptions for material held by the UK’s Maritime Accident Investigation Branch (MAIB), and for material which the UK is already under a duty to disclose under domestic law by virtue of EU Regulation 789/2004. The exception in regulation 4(3)(d) regarding material injurious to the public interest is primarily intended to ensure consistency with regulation 12(6) of

the Merchant Shipping (Accident Reporting and Investigation) Regulations 2005 as regards material held by the MAIB.

7.4 Regulation 3 provides an enforceable duty on the Secretary of State/MCA to ensure that information within Article 6 of the Directive is kept and remains readily accessible. This formulation, which reflects the Directive's wording, deliberately does not require the MCA to keep all of the Article 6 information itself, merely to ensure that it has access to it. This is because much of the material is held on international databases to which maritime competent authorities have access, and it would serve no purpose to duplicate the records.

7.5 Again, regulation 3 contains limits on the duty which are not explicitly provided for by the Directive but which are consistent with its purpose. As the purpose of retaining the information is to facilitate the sensible sharing of information between competent authorities when a ship leaves the UK register, the duty to hold the information ends when the information has been shared with the relevant country whose flag the ship now flies, or after 12 months, whichever is the sooner. It is considered that 12 months is a reasonable date to choose, as it is likely that the information held in relation to a former UK ship will be stale more than a year after it left the UK register.

## **8. Consultation outcome**

8.1 A limited and targeted consultation was carried out on the provisions of the Directive as they do not impose any additional burdens, obligations or costs on legal entities outside Government. Consultees included the Chamber of Shipping, and Nautilus and RMT Unions. No significant comments from industry or Union bodies were received.

8.2 The consultation was shorter than 12 weeks because:

- the Directive does not place obligations on any person or organisation other than the Member State/competent authority;
- the United Kingdom is already in practice observing the obligations under these Regulations;
- it is not considered that there are any interested parties other than those which are represented by the parties consulted; and
- it is desirable to complete full transposition of the Directive as soon as possible, given the transposition deadline of June 2011.

## **9. Guidance**

9.1 As mentioned above, MSN 1830 provides a guide to the UK's approach to the Directive. Merchant Shipping Notices are targeted at shipowners, operators, managers, shipbuilders, classification societies, certifying authorities, masters and seafarers. Further guidance and publicity is not considered necessary, as these parties keep abreast of MSNs as a matter of routine, and no obligations are placed on anyone outside government.

## **10. Impact**

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact of this instrument on the public sector is nil.

10.3 An Impact Assessment has not been prepared for this instrument, as it does not impose any new obligations on industry.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The intended outcome of these Regulations is that (a) the UK complies with the Directive and (b) the UK continues to have ready access to the specified information on UK ships, and that the UK continues to provide specified information on request to the relevant country when a ship leaves the UK register for that country's register. These will be measured by the International Maritime Organization (IMO) Flag State Audit process. The final point will also be measured by noting if any complaints are received from foreign competent authorities about the information provided or the speed at which it was provided.

12.2 This Statutory Instrument contains a review clause which obliges the Secretary of State to review the instrument no more than 5 years from the date it comes into force, and at no greater than 5 years intervals thereafter.

## **13. Contact**

13.1 Matt Giacomini at the Maritime and Coastguard Agency, an executive Agency of the Department for Transport (Policy Adviser) Tel: 023 8032 9538 or email: [matt.giacomini@mcga.gov.uk](mailto:matt.giacomini@mcga.gov.uk) can answer any queries regarding the instrument.

Transposition of Directive 2009/21/EC on compliance with flag state requirements

Art.	Content	Current UK legislation or guidance	Planned implementation
1.1(a) Subject Matter	Purpose to ensure Member State flag state obligations and the safety of their ships.	Not applicable.	This is an expression on the purpose of the Directive and does not therefore require implementation.
1.1(b)	Purpose to enhance safety and prevent pollution.	Not applicable.	This is an expression on the purpose of the Directive and does not therefore require implementation.
1.2	Directive is without prejudice to Community maritime legislation.	Not applicable.	This is an expression on the purpose of the Directive and does not therefore require implementation.
2 Scope	Applies to MS administrations	Not applicable.	This is an expression on the application of the Directive and does not therefore require implementation.
3(a-e) Definitions	Defines some of the terms used in the Directive.	Not applicable.	This defines some of the terms used in the Directive and does not therefore require implementation.
4.1 Conditions for allowing ship to operate	Requires member state to ensure ships joining the register meet the applicable international standards	<p>Survey and Certification Instructions to Surveyors MSIS 23 Chapter 6.5, and MCA flag-in matrix, Form MSF 5548.</p> <p>Compliance with survey requirements:</p> <p>Merchant Shipping (Survey &amp; Certification) Regulations 1995 (SI 1995/1210)</p> <p>Merchant Shipping (Passenger Ship Construction) Regulations 1998 (SI 1998/2514)</p> <p>Merchant Shipping (Load Line) Regulations 1998 (SI 1998/2241)</p> <p>Merchant Shipping (Prevention of Oil Pollution) Regulations 1996 (SI 1996/2154)</p> <p>Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008 (SI 2008/2924)</p>	No further implementation required.

		Merchant Shipping (ISM Code) Regulations 1997 (SI 1997/3022) Merchant Shipping (ISM Code) Regulations 1998 (SI 1998/1561)	
4.2	Requires member state to release data to receiving flag States	Regulation (EC) 789/2004 Art 4.3 <a href="http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138:0019:0023:EN:PDF">http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:138:0019:0023:EN:PDF</a> (requires a losing EU register to provide the gaining EU register with details of the ship's condition.)  The UK complies with the requirement in IMO's MSC/Circ.1140 (MEPC/Circ.424) <a href="http://www5.imo.org/SharePoint/blastDataOnly.asp/data_id=11042/1140.pdf">http://www5.imo.org/SharePoint/blastDataOnly.asp/data_id=11042/1140.pdf</a> regarding the release of data to non-EU flag states.	EC Regulations are directly applicable in the UK by virtue of the European Communities Act 1972, therefore no further implementation is required for requests from EU member states. A duty of disclosure for information not covered by the Regulation will be implemented via Statutory Instrument (SI).
5 Detention of ship flying MS flag		Inspection Instructions to Surveyors MSIS 8 Inspection and Enforcement Policy, Chapter 35 paras 2.1- 2.3 ensures effective oversight of follow up UK ships detained abroad. <i>(This document bears a national security marking and has therefore not been supplied.)</i>	This will be further implemented via a Merchant Shipping Notice (MSN).
6 (a-g) Accompanying measures	Storing of data about ships	(a) to (g) are all current UK practice.	This will be reinforced via Merchant Shipping Notice (MSN) and SI.
7 Flag State auditing process	Periodicity requirement for IMO audits (7 years)	MCA were audited Voluntarily under IMO Member State Audit Scheme (VIMSAS) in November 2006 (final report published on the DfT website June 2007).	This will be implemented via a Merchant Shipping Notice (MSN).
8.1 Quality management system and internal evaluation	Requirement for member states to develop and maintain a quality management system	The MCA is certified to Quality Management System ISO 9001:2008 standard	This will be implemented via a Merchant Shipping Notice (MSN). As regards Article 8(1), the deadline is 17 June 2012.

8.2	Requirement for member states which appear on Paris MOU Grey and Black lists to report to the Commission as described	None	This will be implemented via a Merchant Shipping Notice (MSN).
9 Reports	EU Commission to present reports to EU parliament	Not applicable	This is an obligation for the Commission to report, and does not therefore require implementation.
10 Committee Procedure	Procedures of EU bodies	Not applicable	There is no obligation placed on the UK by this Article, and it does not therefore require implementation.
11.1 Transposition	Deadline for transposition	Not applicable	Compliance with Directive required by 17 June 2011.
11.2	Member State reporting national law applicable to this Directive to EU Commission	Not applicable	This describes the Member State's obligation to report to the commission, and therefore does not require implementation.
12 Entry into force	Cites entry into force date of Directive	Not applicable	This Article simply states the entry into force date of the Directive, and therefore does not require implementation.
13 Addressees	Provides addresses	Not applicable	This Article simply states that the Directive is addressed to member states.