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The Directive 2009/16/EC on Port State Control: Establishing Common Criteria against Substandard Shipping

Abstract: As provided by the Resolution IMO A.787 and A.882 Port State Control (PSC) represents the complex of control and inspection powers exercised by the state on foreign ships in the port to ensure the compliance with the safety standards and regulations by the relevant provisions of the international conventions. Recently the Directive 2009/16/EC of the European Parliament has established new rules to prevent maritime accidents, with reference to environmental damage, to the protection of staff, passengers and others as well as to the identification of procedures to reduce the accidents' consequences. In particular, the Directive has introduced a second line of defense against substandard shipping imposing that the monitoring of compliance with the international standards for safety, pollution prevention and on-board living and working conditions should also be ensured by the port state and not only by the ship's flag state.

Key words: Port State Control, flag state, pollution prevention, compliance of ships, inspections, substandard shipping

Direktiva 2009/16/EC o državnem nadzoru pristanišč: vzpostavitev splošnih meril proti neustreznemu vzdrževanju ladij

Izvleček: Izhajajoč iz resolucij IMO A.787 in A.882 predstavlja državni nadzor pristanišč (PSC) skupek nadzornih in inšpekcijskih pristojnosti, ki jih država izvaja v odnosu do tujih ladij v njenih pristaniščih, da bi zagotovila skladnost z varnostnimi standardi in uredbami, ki jih narekujejo mednarodne konvencije. Direktiva Evropskega parlamenta 2009/16/EC je nedavno vzpostavila nova pravila za preprečevanje nesreč na morju z ozirom na škodo, povzročeno okolju, zaščito osebja, potnikov in drugih oseb ter identifikacijo postopkov za blaženje posledic, ki jih povzročajo nesreče. Direktiva je uvedla predvsem dodatno zaščito proti neustreznemu vzdrževanju ladij: določa, da je za spremljanje skladnosti z mednarodnimi standardi glede varnosti, preprečevanja onesnaževanja in življenja na krovu ladij ter delovnih pogojev odgovorna tudi država, v kateri se nahaja posamezno pristanišče, in ne le matična država, pri kateri je ladja registrirana.

Ključne besede: državni nadzor pristanišč, matična država, preprečevanje onesnaževanja, ustreznost ladij, inšpekcije, neustrezno vzdrževanje ladij

As provided by the Resolution IMO A.787 and A.882 Port State Control (PSC) represents the complex of control and inspection powers exercised by the state on foreign ships in the port to ensure the compliance with the safety standards and regulations by the relevant provisions of the international conventions. (Celle 2007, 712) Historically, the Port State Control was born in the United Kingdom at the end of the nineteenth century in order to guarantee a minimum

safety standard for foreign ships plying the British ports. (Churchill 1999, 96; Douglas 1993, 60) But it is only at the end of the 1970s that in Europe, also on the basis of serious maritime accidents, such as the disastrous environmental damage caused by the ship *Amoco Cadiz*, the common will of the states to equip themselves with the tool of Port State Control is born to improve the safety of the navigation. (O'Connell 1984, 338) After a first international conference in 1980, it will be necessary to wait until 1 July 1982 for the Memorandum of Understanding (MOU) on Port State Control to take effect. MOU was initially applied only in the following countries: Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, and United Kingdom. Actually, there are 9 regional agreements on Port State Control and it has 195 member countries.

The Directive 2009/16/EC of the European Parliament, on the basis of the previous EU legislation, including the Directive 95/21/CE of 19 June 1995, amended several times (Montebello 2006, 95), has clearly established that the responsibility for monitoring pollution prevention and on-board living and working conditions primarily lies on the ship's flag State. The Directive 2009/16/EC has the merit to try, on the one hand, to prevent maritime accidents, both with reference to environmental damage, to the protection of personnel, and, on the other hand, to identify procedures to reduce the consequences once the accidents have occurred. (Mancuso 2006, 148; Ehlers 2008, 120; Kasoulides 1993, 86) However, due to a serious failure of a number of flag states to implement and enforce international standards, the Directive 2009/16/EC has provided a second line of defense against substandard shipping. It imposes that the monitoring of compliance with

the international standards for safety, pollution prevention and on-board living and working conditions should also be ensured by the port state and not only by the flag state of the ship. (Carbone 2010, 170; Maresca 2001, 146)

We need to consider also that Directive 2009/16/EC is a part of the Third Maritime Safety Package adopted by the European Parliament in 2009, which included also the following directives: Directive 2009/15/EC on common rules and standards for ship inspection and survey organizations and for the relevant activities of maritime administrations; Directive 2009/17/EC establishing a community vessel traffic monitoring and information system; Directive 2009/18/EC establishing the fundamental principles governing the investigation of accidents in the maritime transport sector; Directive 2009/20/EC on the insurance of shipowners for maritime claims; Directive 2009/21/EC on compliance with flag state requirements. The European Port State Control regime is based on the idea of targeted inspections, which ensures that ships have to be inspected at the ports of the European Union's states as provided by the Directive 2009/16/EC. The key elements of the European Port State Control regime are: the harmonized approach to inspections and detentions, the annual inspection commitment of the European states, the targeting of ships for inspection based on a ship risk profile, the company performance, and the record keeping and information sharing on substandard shipping and maritime incidents. Each member state shall inspect all priority ships periodically as provided by the article 5 of the Directive 2009/16/EC.

It is important to consider that the number of inspections changes every year and is calculated on the basis of the aver-

age number of inspections carried out in the previous three years. In particular, the targeting of the ships for inspection depends on generic factors and on historical factors. The generic factors include: the type and age of the ship, the performance of the flag state, the performance of the recognized organizations and the performance of the company responsible for the International Safety Management Certification (ISM) . While the historical factors include the number of deficiencies found in the past and the number of detentions imposed. It is also necessary to consider that the ships' control depends on their risk level: the high-risk ships (HRS) must be checked every five months at least, the standard risk ships (SRS) need a check at least every 10 or 12 months, while the low risk ships (LRS) must be checked every 24 or 36 months. As far as the company performance is concerned, it depends on three factors: the number of ships in the fleet, the number of detentions, and the number of ISM or non-ISM deficiencies recorded at each inspection. It is important to consider that ISM deficiencies are considered five times more serious than non-ISM deficiencies. Further, as provided by art. 27 of the Directive 2009/16/EC, the Commission shall establish and regularly publish on a public website the information relating to companies whose performance has been considered as low and very low for a period of three months or more.

A foreign ship can be inspected limitless times during a year in case it occurs in collisions, illegal discharge, unsafe maneuvering, class suspended or withdrawn and when it is not found in the database. The initial inspection consists of a visit on board in order to: check the relevant certificates and documents, verify the general conditions and the hygiene of the ship, check whether any deficiencies detected by an

authority in a previous inspection are been corrected within the time specified in the former inspection report. When the ships are older than 12 years and their condition or crew members are substandard there is the necessity of a more detailed inspection. As provided by art. 16 of the Directive, a member state shall ensure that it will be refused access to its ports to all those ships included in the black list or having been detained more than twice in the last 36 months, and to all those ships flying the flag of a state falling into the grey list because of the numbers of detentions of its ships.

Moreover, the Directive provides (art. 18) about the possibilities for a subject to present a complaint which generally produces an inspection. More exactly, all complaints shall be subject to a rapid initial assessment by the competent authority. This assessment shall make it possible to determine whether a complaint is justified. Should that be the case, the competent authority shall take the necessary action on the complaint, in particular, ensuring that anyone directly concerned by that complaint can make their views known. Where the competent authority deems the complaint to be manifestly unfounded, it shall inform the complainant of its decision and of the reasons therefore. The identity of the complainant shall not be revealed to the master or the shipowner. The inspector shall ensure confidentiality during any interviews of crew members. As provided by article 19, after the inspection the competent authority shall be satisfied that any deficiencies revealed by the inspection must be rectified in accordance with the conventions. In case of deficiencies which are clearly hazardous to safety, health or the environment, the competent authority of the port state has the power to stop the activity of the ship till the deficiencies will be rectified. The detention order or

stoppage of an operation shall not be lifted until the hazard is removed.

If the inspection reveals that the ship is not equipped with a functioning voyage data recorder, when use of such recorder is compulsory in accordance with Directive 2002/59/EC, the competent authority shall ensure that the ship is detained. If such deficiency cannot be readily rectified in the port of detention, the competent authority may either allow the ship to proceed to the appropriate repair yard nearest to the port of detention where it may be readily rectified or require the deficiency to be rectified within a maximum period of 30 days, as provided for in the guidelines developed by the Paris MOU. For these purposes, the procedures laid down in Article 21 shall apply. In exceptional circumstances, where the overall condition of a ship is obviously substandard, the competent authority may suspend the inspection of that ship until the responsible parties take the necessary steps to ensure that it complies with the relevant requirements of the conventions. It is important to notice that various authors consider the possibility of a state to stop the activity of a ship presenting any noncompliance also in the hypothetical case that the state has not joined the Paris MOU or the aforementioned Directive. (Scovazzi 2000, 228; La Fayette 1996, 22)

In the event of detention, the competent authority shall immediately inform the flag state administration or, when this is not possible, the consul or, in his absence, the nearest diplomatic representative of that state. If a ship is unduly detained or delayed, the owner or operator shall be entitled to compensation for any loss or damage suffered. In order to alleviate port congestion (Schiano di Pepe 2007, 136), a competent authority may allow a detained ship to be moved

to another area of the port if it is safe to do so. However, the risk of port congestion shall not be considered when deciding on a detention or on a release from detention. Port authorities shall cooperate with the competent authority with a view to facilitating the accommodation of detained ships. The port authorities shall be informed at the earliest convenience when a detention order is issued.

Finally, it is important to consider that the owner or operator of a ship or his representative in the member state shall have a right to appeal against detention or refusal of access by the competent authority. An appeal shall not cause the detention or refusal of access to be suspended. Member states shall establish and maintain appropriate procedures for this purpose in accordance with their national legislation.

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