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**COMMISSION STAFF WORKING DOCUMENT**

**Ex-post evaluation of Directive 2009/21/Ec on Compliance with Flag State requirements  
and Directive 2009/18/Ec establishing the fundamental principles governing the  
investigation of accidents in the maritime transport sector**

{SWD(2018) 233 final}

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## Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
AIB	Accident Investigation Body
AIS	Automatic Information System
CISE	Common Information-Sharing Environment
COLREG	Convention on International Regulations for Preventing Collisions at Sea
EMCIP	European Marine Casualty Information Database
EMSA	European Maritime Safety Agency
III Code	IMO Implementation of International Instruments Code
IMO	International Maritime Organisation
HAZMAT	Hazardous materials and dangerous goods
HLSG	High Level Steering Group on the Governance of the Digital Maritime System and Service
LL	International Convention on Load Lines
LRIT	Long Range Identification and Tracking system
MARPOL	International Convention for the Prevention of Pollution from Ships
NIR	New Inspection Regime (port State control)
NSW	National Single Window
PCS	Port community systems
PMoU	Paris Memorandum of Understanding on port State control
QMS	Quality Management System
RFD	Reporting Formalities Directive
RO	Recognised organisation

SOLAS	International Convention for the Safety of Life at Sea
SSN	Union Maritime Information and Exchange System (SafeSeaNet)
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
UNCLOS	United Nations Convention on the Law of the Sea
VIMSAS	Voluntary IMO audit scheme
VTMIS	Vessel Traffic Monitoring and Information Exchange System

## 1 INTRODUCTION

This ex-post evaluation looks into Directive 2009/21/EC<sup>1</sup> on compliance with flag State requirements and Directive 2009/18/EC<sup>2</sup> establishing the fundamental principles governing the investigation of accidents in the maritime transport sector.

Action in the area of maritime transport aims at ensuring the long-term performance of the European maritime transport system as a whole to the benefit of all other economic sectors and to the final consumer. The European Commission's policy is strict implementation of maritime safety, security and pollution prevention rules, aiming to reduce the risk of serious maritime accidents and minimizing the environmental impact of maritime transport, while remaining competitive.

International law (developed by the International Maritime Organization - IMO) requires that Member States as Flag States take all necessary steps to give the applicable international instruments full and complete effect. This is the non-delegable responsibility of any Flag State and the underlying core principle for ensuring that, from the point of view of safety and environmental protection, the training and competence of seafarers as well as living and working conditions on board, a ship is fit for the service for which it is intended. Directive 2009/21/EC lays down the framework for oversight at EU level by making the (at that time voluntary) IMO audits mandatory for EU flag States. Hence, the effective discharge of all relevant obligations are verified through audits by the International Maritime Organisation (IMO) of a flag State in its entirety and including all aspects, ship registers and administrative arrangements.

As part of a State's flag responsibilities is the core obligation to carry out casualty investigations; Directive 2009/18/EC incorporates the principles underlying the relevant international requirements (IMO) into EU law, but also introduce the important stipulation that accident investigation (AI) bodies need to be independent bodies given the nature of their work. Countries affected by an accident at sea have the responsibility to investigate the causes and propose ways of preventing recurrences in the future. Such investigations do not seek to determine or assign any civil or criminal liability but rather, in the EU context, to ensure (1) that AI takes place (2) is reported and (3) is discussed so that the Member States can 'learn' from accidents and prevent them from happening again thereby improving maritime safety.

### 1.1 Purpose of the evaluation

The purpose of the ex-post evaluation is to assess the application of the flag State Directive (FSD) and the Accident Investigation Directive (AID) taking into account their objectives and

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<sup>1</sup> Directive 2009/21/EC of the European Parliament and of the Council of 23 April 2009 on compliance with flag State requirements, [OJ L 131, 28.5.2009, pp. 132–135](#)

<sup>2</sup> Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council, [OJ L 131, 28.5.2009, pp. 114–127](#)

looking, among other points, into their impact on maritime safety and relevant developments both national and international relating to the discharge by Member States of obligations incumbent on States as flag States.

Article 9 of the FSD provides that the Commission shall, every five years, submit a report to the European Parliament and the Council on the application of the Directive, including an assessment of the performance of the Member States as flag States. Such a report was produced by the Commission in 2013 (COM (2013) 916 final).

However, given that the change from a voluntary IMO audit, to a mandatory IMO audit, took place on 1 January 2016, it is necessary to examine and evaluate the FSD, and if the 'frame' it provides is adequate for its purpose and in particular Article 7 wherein the previously voluntary IMO audit is made mandatory.

Article 23 of the AID provides that the Commission shall, every five years, submit a report to the European Parliament and the Council on the implementation of, and compliance with, this Directive, and, if necessary, propose further measures in the light of the recommendations set out therein.

Given that the AID has now been in place for more than 5 years of implementation it is considered appropriate on the basis of the experience gained in its operation to evaluate it to see what if any changes or modifications could be proposed.

## **1.2 Scope of the evaluation**

The evaluation in particular focuses on how the framework has functioned in relation to flag State responsibilities:

- The Flag State audit process ;
- Conditions for allowing a ship to operate upon granting the right to fly the flag of a Member State (including possible links with Regulation 789/2004 on the transfer of cargo and passenger ships between EU FS registers<sup>3</sup>) ;
- State of EU FS registers (size, gained/lost numbers of ships, composition of fleet, size and capacity of administration) and record keeping/availability ;
- Performance in port State control (all regimes) ;
- Quality Management System certifications and internal evaluation ;
- Independence and resources in relation to Accident Investigation.

As regards the Flag State obligation to carry out Accident Investigations, the evaluation looks at the main causes of accidents and incidents and to what extent common criteria and harmonised procedures for safety investigations and collecting accident data have been applied. The evaluation also addresses whether the AI Directive corresponds to the needs of today's society. The evaluation covers all investigations of accidents carried out under the scope of the AI Directive in all EU Member States involving accidents and incidents on ships flying an EU flag and ships flying a third country flag.

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<sup>3</sup> Regulation (EC) No 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) No 613/91, [OJ L 138, 30.4.2004, pp. 19-23](#)



As regards the FS Directive the evaluation examines the application and impacts of the Directive from 17.06.2011, when it took effect, until 31.12.2015 in all EU Member States in which it is implemented.

As part of the above but still distinct, the AI Directive evaluation examines the application and impacts of the Directive (as amended) from 17.06.2011, when it took effect, until 31.12.2015 in all EU Member States<sup>4</sup> in which it is implemented.

The evaluation assesses the effectiveness, efficiency, relevance, coherence and EU added-value of the Directives.

## **2 BACKGROUND TO THE INITIATIVE**

### **2.1 Maritime safety in perspective**

Due to its history and international nature maritime transport has developed a rather unusual regulatory structure. At the global level maritime safety and marine environmental protection are promoted through an international legal framework that consists primarily of the United Nations Convention on the Law of the Sea (UNCLOS), 1982, and a number of safety conventions adopted under the auspices of the IMO. These international instruments provide comprehensive standards that serve as bases for the formulation of domestic laws that regulate the design, manning, equipment, operation, management, maintenance, and disposal of ships.

Member States of the IMO implement the international conventions and in order to be able to operate, trade and benefit from the provisions of the IMO conventions all vessels have to have a "nationality" or flag, whose laws and regulations apply to the vessel. Vessels flying the flag of a state are said to be flagged to that state.

As previously stated the primary responsibility making sure that the vessel complies with the international standards for safety, pollution prevention and on-board living and working conditions lies with the flag State which must ensure that the owner/ operator takes all appropriate action to do so. However as has been noted there are owners and indeed flag States who are unwilling and/or unable to fully and correctly discharge their responsibilities. However, as in line with the principle of customary international law known as "freedom of navigation" all vessels have the right to call at any port, PSC has been developed to provide a defence against this. However as port state control is not intrinsically part of a flag state responsibilities it has been decided for the purposes of clarity and to avoid confusion to assess the port State control directive (Directive 2009/16/EC) separately from the FS and AI directives.

This being said maritime safety in Europe is comparatively one of the safest forms of transport of either goods or persons. During 2016 some 3145 marine casualties and incidents

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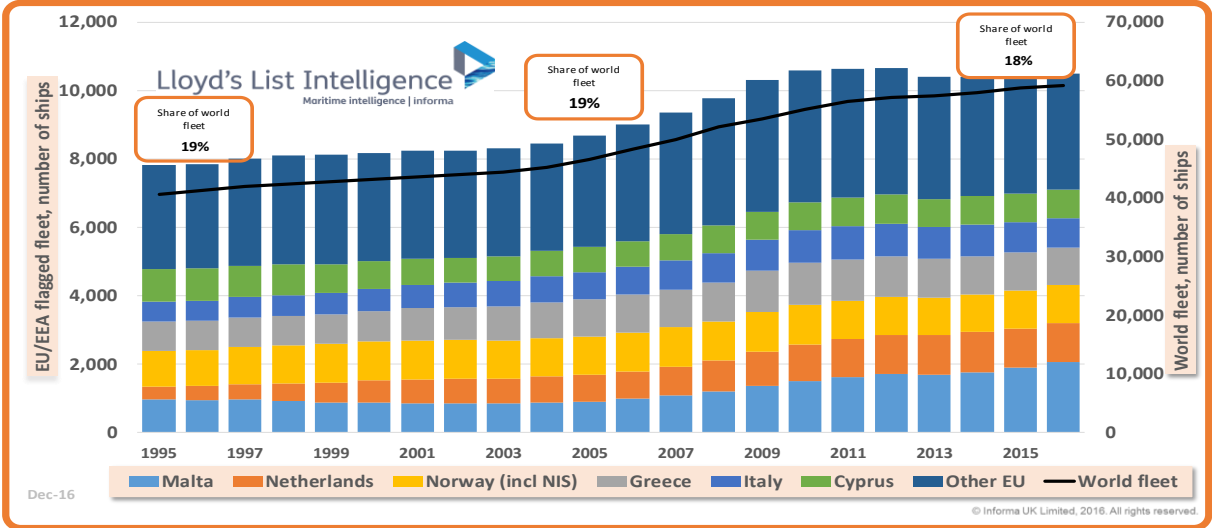
<sup>4</sup> Croatia joined the Union in July 2013; but will be included in this evaluation as prior to its EU accession it had been a member of the Paris MoU on Port State control and had largely followed the same rules and structures as the other EU MEMBER STATES, therefore Croatia is included in this ex-post evaluation.

were reported to the European Maritime Casualty Information Platform (EMCIP) operated by the European Maritime Safety Agency (EMSA) by the maritime accident investigation bodies in the EU/EEA. In total there were 106 reported fatalities, 957 persons injured, 26 ships lost and 123 investigations launched. The reported and recorded figures have remained rather stable over the last seven years. When taken against the number of persons carried by ship and/or the number of tonnes of cargo transport the casualty figures are rather small but this does not mean that the Union of its Member States can become complacent. The numbers of vessels carrying passengers and or dangerous and polluting cargoes means that a single accident could have a disproportionately large impact on society or on the environment.

Given the multi layered aspect of maritime safety regulation with States having responsibilities as Flag States, coastal States and port States it is not always easy to attribute improvements in safety, environmental protection and social conditions solely to one type of legislation taken by states acting in one capacity. The maritime safety regulation picture is a complex and overlapping one. Some of the improvements observed in the picture in Europe since the adoption of the third maritime safety package in 2009 of which the FS and AI Directive were part may have happened anyway (e.g. as a consequence of IMO compliance, Paris MoU provisions<sup>5</sup>, flag State surveys, and shipowner actions).

One element that may have had a positive effect on the safety record in the last ten years is a spike in new vessels being built just before the world economic slump in 2008. While there is no direct link between the age of a vessel and its safety record newer tonnage tends to be better maintained and have fewer deficiencies. The database management services as well as the training and capacity building offered by EMSA to Member State authorities are perceived by stakeholders as one of factors behind the effectiveness of the Directives.

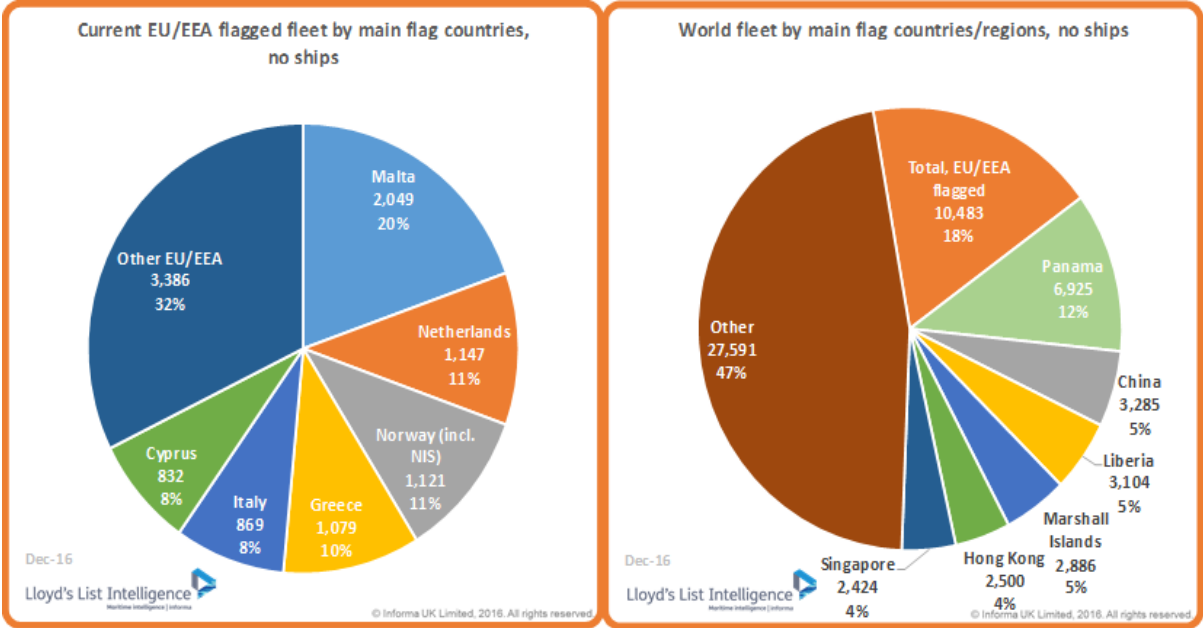
The EU flagged fleet



<sup>5</sup> The Paris Memorandum of Understanding on Port State Control (PMoU) is an intergovernmental structure for PSC enforcement. The EU regime of PSC (Directive 2009/16/EC and its predecessor legislation) was built on and to a large extent incorporates the PMoU. All EU Member States with seaports as well as Canada, Russia, Croatia, Iceland and Norway are members of the PMoU. The Commission and the European Maritime Safety Agency (EMSA) work closely with the PMoU.

In December 2016, according to Lloyd’s List Intelligence, the EU/EEA flagged<sup>6</sup> fleet consists of 10,483 ships. The EU/EEA share of the world merchant fleet has decreased from 19% in 1995 to 18% in December 2016. The average age of the EU/EEA flagged fleet is 19 years. Malta has the largest fleet with 2,049 vessels (20%), followed by Netherlands with 1,147 vessels (11%), Norway (incl. NIS<sup>7</sup>) 1,121 vessels (11%) and Greece 1,079 vessels (10%). Italy has a fleet of 869 ships and Cyprus 832. These six biggest flag states in the EU/EEA represent two thirds of the total EU/EEA flagged fleet. The other countries in the EU/EEA have a total of 3,386 vessels (32%).

While the EU/EEA share of the world fleet is 18%, the six biggest flag states in the world (Panama, China, Liberia, Marshall Islands, Hong Kong and Singapore) account for 35% of the world fleet. All other flag states account for nearly half (47%) of the world fleet.



### 2.2 Description of the initiative and its objectives

As regards the FSD, Member States as flag States are obliged to discharge their obligations ensuring that all applicable rules at International and EU level are adhered to before granting a ship the right to fly its flag; enter into (one of) its register of ships and start operating. This is the fundamental of ensuring a level playing field in maritime safety, including training of seafarers and, pollution prevention internationally. In order to support Member States' flag administrations to effectively exercise their obligations the EU legislation required all

<sup>6</sup> The flag state of a vessel is the state under whose laws the vessel is registered or licensed  
<sup>7</sup> Norwegian International ship register

Member States to develop, implement, certify and maintain a quality management system for the operational parts<sup>8</sup> of the flag related activities.

In order to ensure effective oversight and control over their fleet each Member States must keep, and have readily available (normally in a FS register) detailed information and records concerning ships flying their flag, including information on marine casualties. For verification purposes, each Member State as flag State must mandatorily undergo an IMO Audit (non-mandatory at the time the directive was adopted or entered into force) and publish the outcome of the audit in accordance with relevant national legislation on confidentiality. The overall purpose is to on the one hand to verify the level of implementation of IMO instruments by States in their capacity as flag States and to identify and act upon any areas or issues to further improve the exercise of functions and operational oversight of vessels as part of continuous improvement.

The implementation of flag State (and coastal and port State) obligations under IMO instruments are guided by the IMO instruments and now mandatory IMO Implementation of International Instruments Code<sup>9</sup> (III Code) and cover areas such as implementation, delegation authority, enforcement, flag State surveyor, flag State investigations and review and improvement.

More particularly as regards the AI Directive, Member States are obliged under the EU Directive to establish an independent investigative body to look into very serious marine casualties and decide on the investigation of others, to provide for a system of safety-focused investigations, to draw up commonly structured investigation reports and to populate the European Marine Casualty Information Database (EMCIP) which has been created for this purpose. To further facilitate the work of Member States, a Common Methodology<sup>10</sup> for investigating marine casualties and incidents has been developed. Moreover, a permanent cooperation framework of national investigative bodies has been established to enhance cooperation amongst them.

The expected output of the harmonised system of safety inspections is that investigations are conducted in an unbiased manner and that the root causes of accidents are more easily identified along with the appropriate lessons derived therefrom. The Directive allows for the collection, collation and sharing of safety data. This should have facilitated the industry in responding to accidents and the development of more targeted, evidence based policy responses at international, EU and Member State level to accidents and incidents.

As explained above, safety investigations are conducted separately and are distinct from police, judicial or administrative investigations which may be conducted by either the flag or coastal states. Safety investigations are an ex post examination of how a vessel was equipped and operated before, during and after an accident and as such the information gathered during the safety investigations may complement other safety related inspections of vessels such as

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<sup>8</sup> All aspects and applicable conventions in the III-Code

<sup>9</sup> IMO Resolution A.1070(28)

<sup>10</sup> Commission Regulation (EU) No 1286/2011 of 9 December 2011 adopting a common methodology for investigating marine casualties and incidents developed pursuant to Article 5(4) of Directive 2009/18/EC of the European Parliament and of the Council (OJ L328, 10.12.2011)

those carried out under port State control inspections (under Directive 2009/16/EC) or flag State surveys<sup>11</sup> (under Directive 2009/21/EC) – the latter of which only apply to Member States' nationally flagged vessels.

Taken together these Directives, also with the PSC Directive, form, in accordance with the international set up and rules, a core of administrative action in ensuring maritime safety and environmental protection; Flag State being the first line<sup>12</sup> of defence (for ensuring vessels are fit for purpose in the first place), Port State Control being second line of defence (carrying out verification spot checks) and, should an accident still happen, accident investigation which will look at all the previous aspects and give, as appropriate, safety recommendations in the interest of further improving the regime and the effectiveness of the rules and policy.

### 2.3 Baseline

The benchmark is the situation before the pieces of legislation were implemented measured against the objectives pursued by the legislation. Given the centralised character of the system, the benchmark must also be seen in the context of the EMSA founding Regulation aimed at providing support to the Commission and the EU Member State; especially as training provider and host of the EMCIP system

Departing from the context as provided above and building on the information collected during the evaluation a counterfactual can be developed. The counterfactual draws a picture on the likely situation without the Directives coming into force and thus enables a more accurate evaluation of the impact of the Directives.

At this point it should be emphasised that linking specific impacts in maritime safety to the FSD and AID is complicated. The reason being that maritime safety is influenced not only by the two Directives, but by a comprehensive framework of international, European and national legislation. In addition, the work by recognized organizations (ROs)<sup>13</sup> together with technical improvements and advancements in seafarers training all contribute to safety at sea.

It should also be noted that Directive 2013/54/EU concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006, is a free standing Directive and as such has not been specifically looked at in the context of this study. This directive and Directive 2013/38/EU amending Directive 2009/16/EC on port State control regime together provide a comprehensive enforcement mechanism for the Maritime Labour Convention 2006 for EU flagged vessels worldwide and for non-EU flagged vessels which call to EU ports.

*Table 2.1 Counterfactual Flag State Directive*

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<sup>11</sup> Flag State surveys are used by flag states to ensure satisfactory standards are being maintained on board vessels flying their flag. The surveys are carried out by approved Flag State Inspectors (which in many cases can be recognized organizations) and include verification of statutory documentation and an examination of the vessel's structure, machinery and equipment as well as a more thorough inspection and/or operational testing of firefighting equipment, lifesaving appliances and safety equipment.

<sup>12</sup> The responsibility for the continuous maintenance of a ship and its equipment and for complying with the requirements of rules and regulations applicable to the ship lies with the shipowner and is sometimes also referred to the first line of defence

<sup>13</sup> A classification society is a non-governmental organization that establishes and maintains technical standards for the construction and operation of ships and offshore structures. In many cases flag states delegate many of their inspection and survey activities to classification societies, in this regard the classification societies are called recognised organisations.

Factor	Situation without the FSD
<b>Exchange of ship safety records between EU MEMBER STATES</b>	Safety records are still mostly transferred by ROs and shipowners. Flag State administrations are rarely in contact with each other on this. Without the Directive it is likely that the safety records would be transferred by ROs to an even greater extent.
<b>Detention of a ship flying an EU MEMBER STATES flag</b>	Maritime administrations indicate that the procedures to bring a ship into compliance with the relevant IMO conventions after detention are longstanding and continuously adjusted. Without the FSD the procedures would be broadly similar to what they are today.
<b>Availability of fleet information</b>	Maritime administrations guarantee that the minimum information requirements as posed by Art.6 FSD are available. Most administrations maintain this information themselves, whereas one Member State indicated that it cooperates with ROs on this. Without the FSD the information availability would probably not be very different.
<b>IMO audits</b>	19 EU Member States were voluntarily audited by IMO prior to the FSD coming into force. One Member State (Belgium), underwent the audit twice in line with the audit guidelines. All other EU Member States with an operational flag register completed the FSD by 2016. Without the FSD it is very likely that several EU Member States would not have undergone the IMO Audit. Additionally, without the FSD it is likely that EU Member States would be less willing to make the audit outcomes available, either to the general public or selected stakeholders.
<b>Quality management system (QMS)</b>	Some maritime administration had a QMS in place prior to the FSD coming into force. The FSD in 2009 introduced the mandatory requirement on all EU MS with a register to develop, implement and maintain a certified QMS by 17 June 2012. Several have introduced a QMS and most have certified their system because of the FSD. Without the FSD it would have been unlikely that some Member States would have introduced, certified and maintained a QMS. The now Mandatory III-Code does not have this requirement. However, the most efficient way to meet the requirements in III-Code is to have and maintain a QMS.
<b>Internal evaluation</b>	Between 2011 and 2015 a total number of twelve Member States were grey listed by the PMoU. This resulted in a report to the Commission identifying the causes for the status. Beyond this Member States frequently identified actions to improve their flag performance. Without the FSD it is unlikely that the relevant maritime administrations would have conducted a similar internal evaluation, nor would such be enforced by other institutions.
<b>Resources and staffing</b>	Over the past decades flag State works have been largely delegated to ROs, as evidenced by information gathered from MS. Great variance is observed and depending on organisational structure and size of the fleet, surveyor per ship is ranging from one FS Inspector/Surveyor per 111 ships to one per every 2 ships.. Also, FS officers can be used for multiple tasks also be involved in RO monitoring, PSC and other maritime safety fields. The FSD did not impact the level of staffing of EU Member States' maritime administrations.

Source: Ecorys Final Report, pp.34-35

Table 2.2

## Counterfactual Accident Investigation Directive

Factor	Situation without the AID
<b>Independent Accident Investigation Bodies (AIB)</b>	Since 2011 13 AIBs were founded and several Member States changed the governance structure of the Body to ensure its independence. It is can therefore be reasonably surmised that without the AID there would be far fewer AIBs and their legal position would have been less independent from other public bodies.
<b>Technical investigation and lessons learned from accidents and incidents</b>	Most of the countries with no AIB prior to 2011 used to conducted investigations primarily for criminal prosecution purposes. The creation of AIBs has given a boost to accident investigations for safety reasons with an emphasis on continuous learning. Without the AIB there would be less safety/technical investigations of accidents.
<b>Harmonisation of accident investigation reporting</b>	The Directive has led to a harmonised reporting of accidents and incidents as a standard set of requirements needs to be met. While the IMO had developed a casualty Investigation Code it would appear that without the obligatory nature of the AID this would not have been the case
<b>Report sharing</b>	The creation of EMCIP has facilitated AI report sharing as it has provided a database on which information can be stored and searched and a common window for publication of reports from all AIBs that can now look into the reports of their colleagues and learn from investigations others have performed. In the absence of the AID, AI report sharing would have been limited and depended on the existing (national) publication platforms, were available.
<b>Resources and staffing</b>	Currently, an accident investigator employed by an AIB submits on average around 24 reports in the EMCIP database. The harmonised AI reporting format is more demanding than the reporting formats used before the introduction of the AID. This means that without the Directive, the workload of AIBs (which already existed) would have been significantly lower with a consequent lower demand for staff. Also, without the AID it is plausible that at least 28 accident investigators would not have been employed. This would likely result in underreporting and an incomplete view on maritime safety in European waters and for the EU Member States flagged fleet.

Source: *Ecorys Final Report, p.35*

## 2.4 Counterfactual scenario

### *Flag State Directive*

Since the FS directive mandated the IMO audit and required a certified quality management system, the most significant counterfactual is that, absent the FSD, there would be less harmonisation and control in how FS fulfil their obligations as flag States, and less possibility of enforcement. It is also likely that the use of ROs would have been to an even greater extent. If the FS Directive it is likely that the procedures to bring a ship into compliance with the

relevant IMO conventions following a PSC detention would be similar, due to the development of the PSC procedures in the PMoU; these procedures are something that predates the FS Directive and are continuously adjusted and updated. It is important to note that this provides for coherence with the PSC Directive as a Flag never inspects their own flagged ships under port State control. Such inspections should be done as flag State inspections.

With respect to the minimum information requirements required by Article 6 of the FS Directive it is likely that without the FS Directive the information availability would probably not be very different, as there is a natural need to have a register of ships. The requirement put a frame as to a minimum of information what such registries should include and have readily accessible, and for use of control (fulfilling obligations) of the flagged fleet, including in a transfer of flag/register situation. These information forms the core to carry out an assessment/inspection prior to allowing a ship to operate, ensuring the ship in question complies with the applicable international rules and regulations. That is then part of the first line of defence – ensuring at the time of issuing the certificates that the vessel is fit for purpose, rather than being detained under port State control, carried out by another State.

18 EU Member States had been voluntarily audited by the IMO prior to the FS Directive coming into force. Without the FS Directive it is very likely that several EU Member States would not have undergone the IMO Audit. Furthermore, it seems clear that without the FSD EU Member States would have been less willing to make the audit outcomes available, either to the general public or selected stakeholders.

Prior to the FSD coming into force some EU maritime administration had a quality management system (QMS) in place, but it is not known if certified in accordance with applicable international quality standards. The FSD in 2009 introduced the mandatory requirement on all EU MS with a register to develop, implement and maintain a QMS by 17 June 2012. Hence, several introduced a QMS and certified their system because of the FSD (today all but one Member States). Without the FSD it would have been unlikely that Member States would have introduced, certified and maintained a QMS in accordance with international quality standards. The now Mandatory III-Code does not have this requirement. However, the most efficient way to meet the requirements in III-Code is to have and maintain a QMS.

Between 2011 and 2015 a total number of twelve Member States were on the basis of the PSC performance of ships flying their flag placed on the grey list of the PMoU<sup>14</sup>. This resulted in those Member States having to prepare a report to the Commission identifying the causes for this status and corrective actions envisaged to improve their flag performance. Absent the FS Directive Article 5 it is unlikely that the relevant maritime administrations would have conducted a similar internal root cause analysis. If they did not nothing would have happened as it is only through the FSD this becomes enforceable.

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<sup>14</sup> Flag States are classified into black, grey or white lists, by the PMoU on the basis of the total inspections and detentions over a rolling three year period. The black-grey-white list status of a flag is primarily used by the PMoU as a targeting mechanism but it also can indicate that a flag is poorly performing.



Over the past decades flag State works have been largely delegated to ROs, as evidenced by the information gathered from Member States. Depending on organisational structure and size of the fleet, great variance is observed ranging from one FS Inspector/Surveyor per 111 ships to one per every 2 ships. In many structures, Flag State officers are used for multiple tasks such as RO monitoring, PSC and other maritime safety fields. The FSD did not require any specific level of staffing and therefore did not impact the level of staffing of EU Member States' maritime administrations.

### *Accident investigation Directive*

Since the AI Directive mandated the creation of an independent AI body, the most significant counterfactual is that, absent the AI Directive none of the 13 AI bodies established by Member States since 2011 would exist..

The creation of AIBs has given a boost to accident investigations for safety reasons with an emphasis on independence and the development of safety recommendation for accident prevention purposes. Without the AI Directive there would be fewer AI Bodies and therefore less safety investigations of accidents.

The obligatory nature of the AI Directive has led to a harmonised reporting of accidents and incidents as a standard set of requirements has to be met. The creation of EMCIP has increased AI reporting, facilitated AI reporting and the sharing of reports and this would not have been possible without the AI Directive.

## **3 METHOD**

This evaluation was supported by an evaluation study report<sup>15</sup> conducted by an external contractor, and provided the Commission with an independent evidence-based assessment of the two Directives. The evaluation was conducted simultaneously with the evaluation of the Port State Control Directive (2009/16/EC) to ensure that the frequent interaction within the consultations were all covered and in order to optimize data collection efforts and to minimize stakeholder fatigue. Internal workshops were also organised at the inception and interim stage to share insights that are relevant for the respective evaluations.

Several tasks were performed<sup>16</sup>:

- Study structure, with the development of an evaluation framework, exploratory interviews carried out and the visit of the evaluation team to the European Maritime Safety Agency (EMSA) on the 29<sup>th</sup> and 30<sup>th</sup> November 2016 ;
- Desk research, with the collection of literature and data from databases on shipping and accidents (MarInfo, THETIS, and UNCTADstat) ;

<sup>15</sup> [https://ec.europa.eu/transport/facts-fundings/evaluations/reports-year\\_en](https://ec.europa.eu/transport/facts-fundings/evaluations/reports-year_en)

<sup>16</sup> For a more detailed presentation of the methodology used in this evaluation, please refer to [annex 1](#)

- The Open Public Consultation (OPC), that lasted from 7<sup>th</sup> October 2016 until 20<sup>th</sup> January 2017 and covered different topics as part of the fitness check of maritime transport legislation for better safety and efficiency, and which collected 53 responses in total. Respondents to the OPC included: Shipowners & operators, National Maritime Authorities, Port Authorities, industry associations, private companies and NGOs as well as, citizens replying in their personal capacity such as seafarers and other interested citizens ;
- The targeted survey, opened from the 11<sup>th</sup> January until the 16<sup>th</sup> February 2017, with a total of 79 responses collected ;
- Targeted in-depth interviews of 33 identified stakeholders, in order to collect more detailed inputs ;

The table below provides an overview of the number of stakeholders that were consulted per group and consultation method. A small number of stakeholders used to opportunity to provide input through multiple channels. This resulted in a total number of 171 responses by stakeholders.

**Table Overview of responses per stakeholder group and method**

Stakeholder group	Interviews	Survey (rate)	OPC*	EMSA visit	Total
1.a) Maritime Administrations	7	14	61%	13	34
1.b) AI Bodies	7	15	60%	0	23
1.c) Ministry (Maritime affairs)	4	3	38%	0	7
2) Ship owners	6	5	10%	11	22
3) Ports and ship agents	0	16	17%	5	21
4) Third (non-EU) States	1	2	18%	0	3
5) Recognised organisations	2	3	27%	0	5
6) Seafarers and their organisations	1	9	20%	0	10
7) Other actors	5	12	21%	24	46
<b>Total</b>	<b>33</b>	<b>79</b>		<b>53</b>	<b>171</b>

Source: Ecorys.

- The analysis entails a comparison and triangulation of data as obtained through the various collection methods mentioned above.

### 3.1 Limitations

Table 2.2 below<sup>17</sup> presents an overview of difficulties in data collection and mitigating measures, organised per evaluation question. Although some difficulties were encountered, following repeated efforts to involve stakeholders the evaluation gathered sufficient inputs to answer the evaluation questions. Moreover, sufficient secondary material (i.e. databases, literature) could be accessed to provide additional inputs and quantify several effects.

<sup>17</sup> As extracted from Ecorys *Final Evaluation Report*, p.22

On the whole the conclusions are therefore found to be robust and comprehensive.

Table 3.1 Overview of limitations and mitigation measures Source: Ecorys

<b>Evaluation aspect</b>	<b>Limitation</b>	<b>Mitigation measure/solution</b>
<i>Unbalanced stakeholder representation</i>	Limited interest amongst several stakeholder groups (notably ship owners and non-EU flags) to participate in the evaluation study	Identified underlying reasons, namely: 1) limited perceived relevance of Directives, and 2) limited understanding of the Directives. Through repeated efforts sufficient involvement was guaranteed nevertheless.
<i>Unequal response rates to survey</i>	In line with the previous limitation, some stakeholder groups responded below expectations to the targeted survey	Follow-up mails were sent directly to the relevant contact persons, and several calls were made to request AI bodies and FS administrations to fill in the survey.
<i>Information and data per MS</i>	Limited responsiveness by Member States to submit information on staffing and FS inspections	Several reminders and direct calls with the relevant bodies.
<i>Stakeholder fatigue</i>	Several evaluation studies took place in the recent time, limiting the willingness to participate in the stakeholder consultation	A strong collaboration between the consultants on the PSC and this evaluation was established, to ensure that stakeholders were contacted and insights could be shared efficiently.
<i>Regional differences regarding the implementation of the Directives</i>	The performance of EU Member States flags and AI bodies varies strongly <sup>18</sup> , leading to different perspectives on the Directives	Deliberate efforts were taken to query both high and low performers in terms of flag performance and non-conformities

<sup>18</sup> Depending on the size of the fleet/accidents under that fleet

#### 4 IMPLEMENTATION STATE OF PLAY (RESULTS)

The Member States had until 17<sup>th</sup> June 2011 the obligation to transpose both the FS and AI Directives.

In order for the AI Directive to become operational, two pieces of secondary legislation have been adopted:

- Commission Regulation (EU) No 1286/2011 of 9 December 2011 adopting a common methodology for investigating marine casualties and incidents developed pursuant to Article 5(4) of Directive 2009/18/EC of the European Parliament and of the Council <sup>19</sup>;
- Commission Implementing Regulation (EU) No 651/2011 of 5 July 2011 adopting the rules of procedure of the permanent cooperation framework established by Member States in cooperation with the Commission pursuant to Article 10 of Directive 2009/18/EC of the European Parliament and of the Council<sup>20</sup>.

All Member States were obliged to transpose the AI Directive although Article 8 provides that landlocked Member States which have neither ships nor vessels flying their flag had only to identify an independent focal point to cooperate in the investigation rather than establish an AI body.

The FSD has not been subject to a visits round by EMSA to check and verify implementation, as it is more of a framework Directive. Therefore also no horizontal analysis has been possible.

Implementation has been ensured in follow-up to cases under Article 8, including requests for corrective action in case a Member States figure on the PMoU grey list. There has also been the occasional presence of EMSA as observer invited by the flag State, during IMO Audits.

The Commission has acted in some cases and has opened infringement procedures<sup>21</sup> against Member State failures to fulfil the requirements in the FSD.

Verification of the implementation of the AID on the other hand has benefitted from a scheduled series of EMSA visits since April 2012 to Member States related to the implementation of the AID. The cycle of visits covered 30 EU/ EEA Member States and 31<sup>22</sup> investigative bodies in total. The first visit was conducted in April 2012, nine months after the deadline for Member States to have transposed the Directive into national law and three months after the last of the complementing instruments, the common methodology, had come into force the cycle of visits was completed in mid-2017. As a follow up to these visits the European Commission engaged with the Member States concerned with a view to address issues identified during the EMSA visits and any other issues arising from implementation or

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<sup>19</sup> [OJ L 328, 10.12.2011, pp. 36–40](#)

<sup>20</sup> [OJ L 177, 6.7.2011, pp. 18–23](#)

<sup>21</sup> Case 382/17 and 383/17 Commission v. Portugal (ongoing; not yet published)

<sup>22</sup> One Member State (UK) has two investigative bodies operating for two different maritime administrations (UK and Gibraltar)

in particular relating to the EMCIP database. As a result some 5 infringement cases<sup>23</sup> have been opened against Member States

**5 ANSWERS TO THE EVALUATION QUESTIONS**

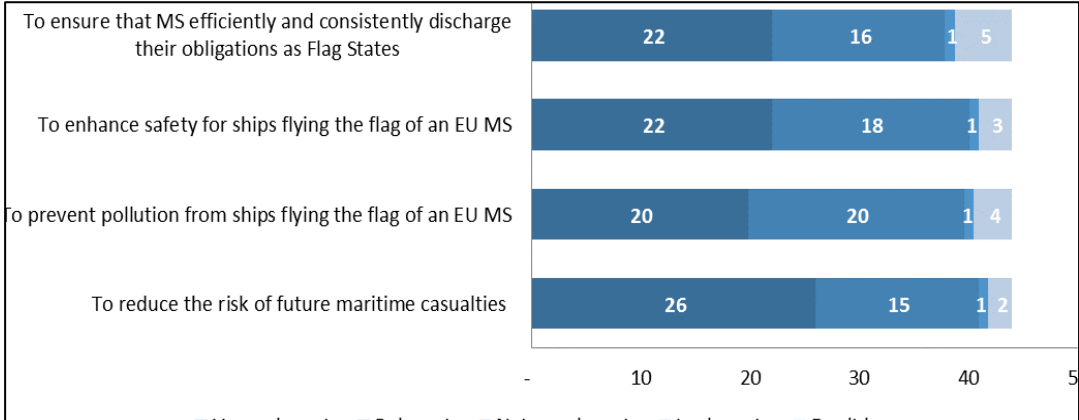
Five evaluation criteria were identified using the Commission's Better Regulation framework, on the basis of which thirteen (13) evaluation questions were defined, listed below under each relevant evaluation criterion.

**5.1 Relevance**

*5.1.1 Evaluation Question 1: To what extent are the framework requirements in the FS Directive, including the safety investigations required by the AI Directive, relevant and appropriate to the current needs?*

As can be seen in the figure below, the majority of stakeholders think the FSD and the AID are still (very) relevant in relation to the original objectives. None of the stakeholders considers the Directives to be irrelevant.

Figure - Relevance of the original objectives of the FSD and AID (n = 44)



Source: Survey.

From analysing the responses from the various stakeholder groups the following comes out:

- On ensuring that Member States efficiently and consistently discharge their obligations as flag states: stakeholder groups where the majority of stakeholders are of the opinion that the Directives are very relevant are: ‘accident investigation bodies’ (9 out of 15) and ‘seafarers’ (4 out of 5). In the other stakeholder groups opinions are more balanced;
- On enhancing safety for ships flying an EU flag: in all stakeholder groups the opinions are mostly divided equally between very relevant and relevant;

<sup>23</sup> Cases 2013/2122 Italy, 2015/2183 Cyprus, 2015/2204 Belgium, 2016/2002 Ireland, 2016/2114 Portugal (not yet published)

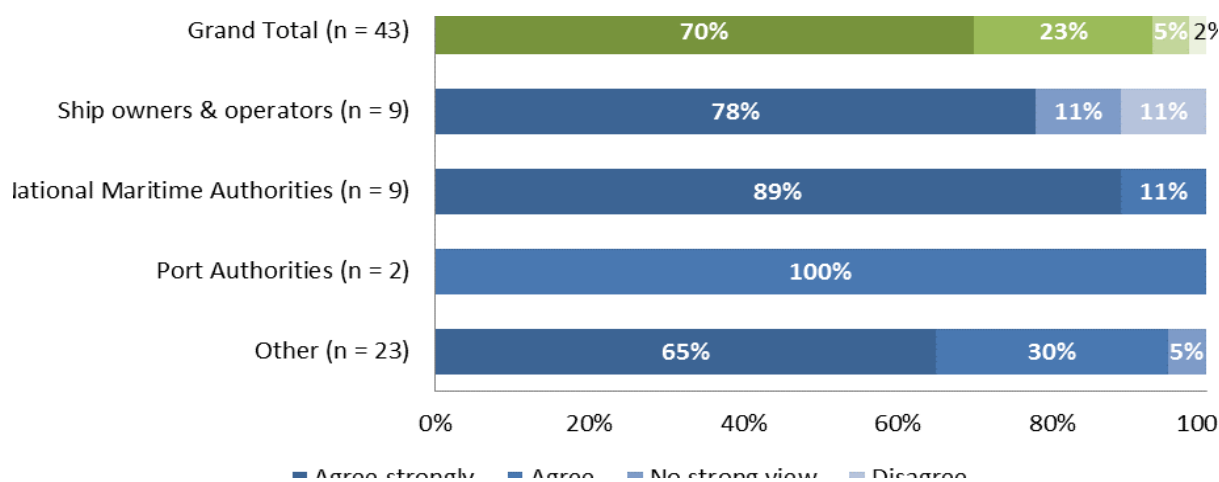
- On preventing pollution from ships flying an EU flag: the majority of stakeholders per individual category indicated that they are of the opinion that the Directives are very relevant;
- On reducing the risk of further maritime casualties: in most stakeholder groups the respondents indicated that the Directives are relevant or very relevant.

Overall, the majority indicated that the objectives of the Directives are relevant Stakeholders deem the Directives most relevant for the objective to reduce the risk on future maritime casualties (26 out of the 44 respondents).

This is matched by the more general perception. As seen in the table below, 70% of respondents to the open public consultation strongly agreed that the flag State Directive is relevant towards achieving cleaner, safer and harmonised shipping in the EU while a further 23% of respondents agreed that it was relevant. The FSD’s main relevance is related to transposition of international regulation into EU legislation. It thereby provides consistency in the regulatory framework across Member States and the effective application of international obligations in a more uniform and harmonised way.

The views on the relevance of the FSD were however divergently expressed during interviews; several Flag State administrations indicated that the FSD is more relevant for smaller administrations that are still in the process of establishing and implementing flag State procedures and the IMO conventions. For those longer established Flag State administrations the FSD is less relevant and seen as a duplication of international efforts.

Table - Relevance of flag State inspections in relation to maritime safety and prevention of accidents



The main development since the FSD came into force is that the IMO audit became mandatory for all IMO Members and that, as a result, Article 7 of the FSD has expired. The FSD in its current form is therefore not fully aligned with changes in IMO legislation.

In the opinion of some stakeholders, (5) with the IMO Audit becoming mandatory, the added value of the FSD reduced. Stakeholders also remarked that with the introduction of the IMO

III Code, which is broader and more detailed than the FSD<sup>24</sup>, the FSD risks duplicating international legal efforts. At the same time it was noted that the key relevance of the FSD is that it transposes international regulation and even though this, to some extent, is considered a duplication of international regulation, it provides for real enforcement possibilities, not available under the international regime.

Nevertheless, most stakeholders agree that the FSD contributes to consistency between maritime authorities in all EU Member States.

With regard to the impact of recent developments most survey respondents stated that no major developments have occurred that influence the relevance of the FSD. However 25% of respondents indicated that the shift from voluntary IMO audits to mandatory audits may have deprived the FSD of some of its importance.

The Accident Investigation Directive was found to correspond to the needs of today's society. All stakeholders that answered the question agreed that the AID is relevant. 71% of them strongly agree with the remaining 29% agreeing that it is relevant. The AID has shown itself to be appropriate for reaching its original objectives, especially with regard to improving maritime safety. In addition, the Directive provides a consistent framework for conducting maritime accident investigations and ensures that accident investigations are conducted in a uniform and harmonised way throughout the EU. No changes, e.g. legal or technological, have been identified that affect the relevance of the Directive.

What is key is how relevant the measures are still today and what added value they have produced. On this key question respondents included in the evaluation, largely indicated that the Directives are relevant towards achieving cleaner, safer and harmonised shipping in the EU. The main relevance is related to transposition of international regulation into EU legislation. It thereby provides consistency in the regulatory framework across Member States and the effective and enforceable application of international obligations in a more uniform and harmonised way.

## **5.2 Effectiveness**

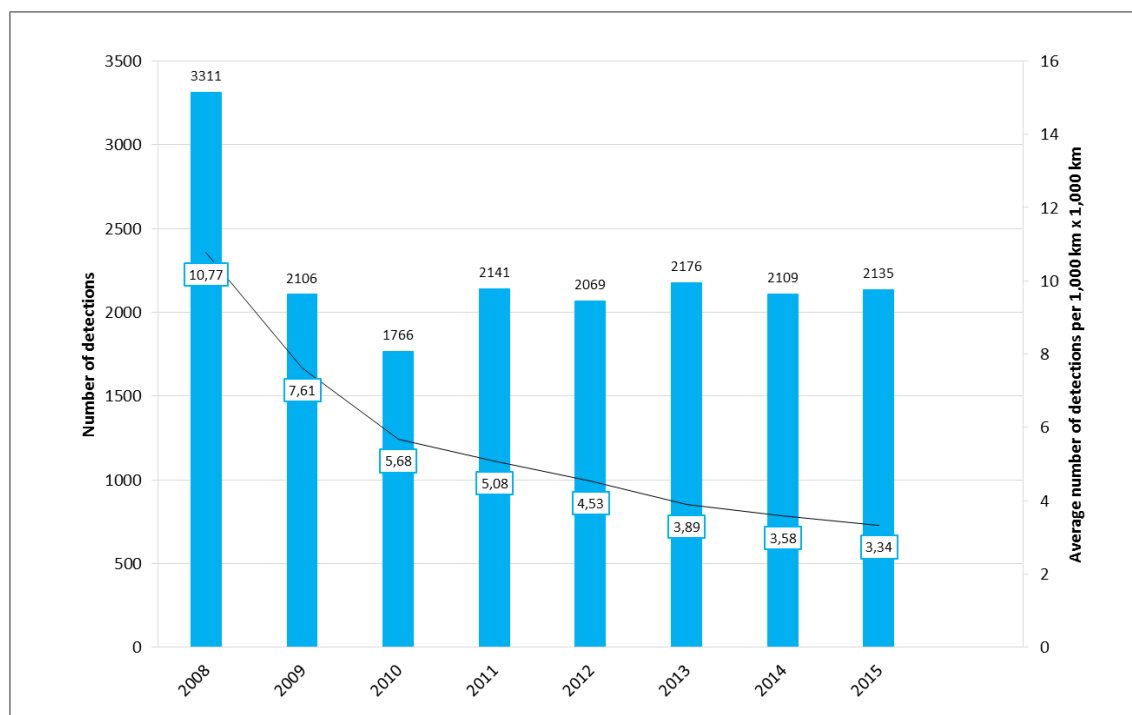
Overall the FSD and AID have been effective in achieving their intended objectives, although their contribution generally needs to be appreciated in light of the broader maritime safety framework that is developed by Member States, the EU and IMO.

The absence of major accidents of a similar scale as those involving the *Erika* and the *Prestige* oil tankers respectively, in 1999 and 2002, gives an indication that there has been considerable progress in eliminating sub-standard/non-compliant vessels from EU waters. In relation to oil spills, the figure below illustrates the decreasing and stabilising trend in EU waters between 2008 and 2015 (average number of detections per 1000 square km).

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<sup>24</sup> Although the Commission original proposal for a FS Directive was much more detailed it changed, in the negotiations of the third maritime safety package, to become a 'frame' awaiting the entry into force of the III –Code, under finalisation in IMO at the time

Figure - Detection of possible spills – Trend over a decade



Source: EMSA

The public consultation on the Implementation of the 2009 EU's Maritime Transport Strategy<sup>25</sup> (for the mid-term review) showed a high level of satisfaction with the EU safety legislation and safety levels achieved in EU waters amongst stakeholders. However the latter continue to be concerned about effective enforcement. The results of the targeted consultations and the open public consultation for the fitness check have also confirmed that a wide range of stakeholders consider the existing legislative set up as effective to ensure a high and uniform level of maritime safety and pollution prevention.

The existence of EU rules covering the responsibilities of Member States as flag (port and coastal) State have provided an effective way to prevent accidents through the various complementary lines of defence. This indication should be treated with caution given that there are several other pieces of EU legislation which also contribute to achieve the objectives of maritime safety and pollution prevention. It is thus difficult to attribute effects to one directive over another. This makes it difficult to isolate the effects of the directives, such as the evolution of the state/age<sup>26</sup> of the fleet and/or the consequences of economic cycles on the transport rates.

Against that background, the following conclusions per evaluation question can be drawn.

<sup>25</sup> SWD(2016) 326

<sup>26</sup> In December 2016 the EU/EEA flagged fleet had an average age of 19 years. The world fleet average age was 22 years. (source: Lloyds List Intelligence)



*5.2.1 EQ2: To what extent have Member States undergone IMO Flag State audits? What was the scope and coverage?*

A total of 18 Member States underwent an IMO audit before the FSD had come into force. Seven more were audited between 2011 and 2015. It is believed that Article 7 FSD incentivised some Member States to volunteer for an audit. Examples are Portugal that requested an audit only after EC action, and that of Belgium receiving two audits following the seven year provision in the FSD.

*5.2.2 EQ3: (a) Have Member States ensured follow-up actions to the IMO audit?*

*(b) Have Member States made the outcome of the audit available and to whom?*

*(c) Did the requirements to publish the outcome of the audit ('peer review') play a role?*

*(d) Transparency and availability of relevant information about ships registered under EU flag registers has been achieved?*

Of 18 Member States follow-up actions stemming from the IMO audit have been drawn for “legislation” (9) and “strategy” (7) issues. Both “implementation” and “enforcement” required follow-up actions (five each). 74% (29 out of 39) of the identified follow-up actions have been marked as complete.

The disclosure of IMO audit outcomes occurs to a limited extent. Member States (7), that at all disclose, often reason that it suffices to grant access to the outcomes only to other IMO Member States. Also, several audits were performed prior to the FSD coming into force, so that Member States did not feel an obligation to publicly disclose information. It needs also to be taken into consideration that a MS shall publish the outcome of the audit in accordance with relevant national legislation on confidentiality. The impact of the FSD is therefore felt to a lesser extent, although the disclosure of audit reports and results are not always giving the full situation, as, more importantly, any corrective or improvement action taken is what needs to be taken showing continuous improvement. The power of transparency should not be underestimated and was the reason for the FSD to include such provision in its article 7.

Regarding the sharing of vessel safety information, more than half of the survey respondents agree that the FSD is a facilitating instrument for the exchange of information regarding vessels safety record. All Member States do have a database that stores the required information as per the FSD. Member States consider this exchange of this information unproblematic. Depending on if it is a change of flag/register and/or change of RO several reliable channels to do so exist. The FSD had little impact on this in the sense that keeping a ship registry is a necessity when having a fleet and therefore in place prior to 2011. However, the more uniform requirements of what those registries in all MS should contain have been established. It is a prerequisite for fulfilling the requirement in article 4 as such information is needed in order to ensure, prior to allowing a ship to operate, that the ship complies with applicable international, EU and national (as the case may be) rules and regulations.

### 5.2.3 EQ4: To what extent the Directive has helped to avoid changes of flag register?

The impact of the FSD on flag transfers has been minimal because it did not directly targeted the drivers that inform ship owners to transfer to a different EU Member States or third country flag. Against the background of recent trends in flagging of shipowners and the growth and size of the flags the drivers are the quality of service and the flag State's fiscal regime. Respondents indicated moreover that transfers between EU Member States flag registers to evade environmental or safety regulation today are rare. While such dynamics are acknowledged, they mostly concern transfers from the EU to non-EU registers. These movements are not affected by the FSD.

There is however a link in how such registers could be kept electronically and linked to a the Union Maritime Information and Exchange System (established by the VTMIS Directive) and a Central Ship Database, to enable monitoring and enforcement in the same way as it is used for port State control, as well as transport facilitation.

#### **Example Box – Monitoring and enforcement of the Double Hull Regulation**

*Regulation (EC) No 530/2012<sup>27</sup> on the accelerated phasing-in of double hull oil tankers brings into EU law the international requirement that single hull tankers (SHT) carrying heavier grades of fuel oil shall have been phased out at latest by the end of 2015.*

*On behalf of the European Commission, EMSA has been monitoring the movement and activity of SHT to ensure compliance with Regulation (EC) No 530/2012. EMSA has extracted from the Union Maritime Information and Exchange System (SafeSeaNet) and correlated this with four external sources in order to obtain more vessel details. Using external sources the objective was twofold: to verify whether the vessel is still active and where it is operating. On the basis of this monitoring EMSA has supported Member States as flag States and has been able to confirm that the Regulation is being correctly implemented in the EU. There are no SHT operating under the flag of an EU country and no SHT has been found operating in EU waters since 2011.*

### 5.2.4 EQ5: To what extent EU Member States have ratified International Conventions

The FSD may have contributed, together with other legislative efforts by the EC, to the speeding up of the number of ratifications in line with the main objectives of the FSD; to enhance safety and prevent pollution from ships flying the flag of a Member State as well as to fulfil one's international obligations as a flag state. The impact of Directive 2009/21/EC and the Declaration made by Member States at Council level made 19 November 2008 (at the time of discussing the FS proposal within the third maritime safety package) on the number of ratifications is therefore more indirect. Still there are a number of (recent) Conventions not ratified or put into effect at Member States level yet, creating an uneven situation not least for industry stakeholders and may result in distortion of competition.

<sup>27</sup> Regulation (EU) 530/2012 of the European Parliament and of the Council of 13 June 2012 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers (OJ L172 of 30.6.2012)

*5.2.5 EQ6: To what extent Member States follow up on detentions under port State control (PSC) regimes of their flagged ships? How has Member States PSC performance evolved since the introduction of the Directive?*

EU Member States have to a large extent standardised their follow-up procedures for when a ship is detained by a port State. The procedures are moreover said to be consistently applied. All consulted maritime administrations (such procedures do not apply to other stakeholders) indicated that these procedures were established prior to the FSD came into force and alterations to the procedures are not specifically linked to the FSD. They are however fundamental for a FS in fulfilling their obligations as a flag for their fleet and as such made enforceable under the FSD.

These efforts did however not always contribute to the quality performance as measured through port State control (PMoU) for flags of EU Member States, as their flag performance has slightly deteriorated in the PMoU PSC regime. This has led to an increase in grey listings between 2011 and 2015. Overall however, the performance of EU flags as measured through port State control (PMoU) is high. It is to be noted that in most cases such performance measurement is normally also part of a quality management system (KPI).

*5.2.6 EQ7: To what extent the requirement that all Member States create an accident investigation body led to the expeditious holding of unbiased safety investigation?*

Apart from two landlocked countries (Czech Republic and Slovakia)<sup>28</sup>, all other EU Member States have established an accident investigation body charged with investigating maritime accidents. Of the Member States that have established such a body, in 15 this body specialises in maritime transport, while for the remaining 12 (as well as for Norway and Iceland) maritime accidents and incidents are investigated by an investigative body tasked with broader investigative functions for more modes of transport.

Five interviewed AIBs consider the creation of a current independent accident investigation body to be solely related to fulfilling the requirements set by the AID. 67% of respondents of the open public consultation either mostly or fully agreed that the AID fostered the creation of AIBs while 84% expressed the view that the AID strengthened the independence of AIBs operation. 85% were of the view that the Directive increased accident investigation quality and 92% stated that the Directive improved cooperation while 69% said it improved resource sharing among Member States. Prior to the adoption of the AID, some Member States only provided for criminal or administrative investigations of maritime accidents. However, even in some cases where an accident investigation body already existed, the body was part of a larger structure (for example within the Ministry of Transport or a Coast Guard) and so its structure had to be altered to fulfil the independence criteria.

This being said a great variation exists in the way that AIBs are created and positioned or linked to the rest of the administration. Three main models have been identified for AIBs:

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<sup>28</sup> In accordance with Article 8 of the AID, landlocked Member States with no ships or vessels flying their flag will identify an independent focal point to cooperate in any investigation pursuant to Article 5(1)(c) (substantially interested state)

- i. Being a part of the relevant Ministry supervising maritime transport acting however in an independent way, in this case the AIB reports directly to the Minister that supervise maritime transport who approves the entities budget
- ii. Functioning under the supervision of other Ministries (e.g. Ministry of Justice), in which case the AIBs report to another cabinet member who consequently approves their budget; and
- iii. Operating as independent entities not coming under the supervision of a specific ministry, but potentially reporting directly to the prime minister or even to non-governmental authorities.

Apart from the structure, another broad indicator of independence is the financial autonomy of these bodies and their capacity to rely on a steady budget to cover their regular and occasional expenses.

After the AID came into force, the majority of Member States had to establish or re-establish their AIBs. Furthermore those AIBs that were operational prior to 2011, have in some cases since seen a change in their operations and reporting obligations to comply with AID requirements. The grand majority of stakeholders responded that the AID has overall led to a strengthening of the AIB's independence.

In this regard it should however be noted that of the 5 infringement cases that the Commission has opened in relation to the AI Directive since its transposition all have related to the issues of independence, resources and impartiality of the AIB.

*5.2.7 EQ8: To what extent are all Member States adequately resourced, including for their independent investigation body? Does this have an impact on effectiveness? Are there any gaps in coverage?*

On the whole stakeholders indicated that FS administrations experience resource constraints in terms of staff, in particular technical and experienced staff/surveyors and financial means. In most EU Member States ROs are acting<sup>29</sup> on a maritime administrations behalf for a large number of functions. The number of ROs active per Member State differs between 1 and 11, depending on organisational structure and size of fleet.. By plotting the number of ROs against the employed FS inspectors two models for FS administrations were identified. The dominant model in the EU entails few FS inspectors and a large role for ROs. The other model - as applied by France, Italy and Spain – suggests a higher number of FS inspectors and a smaller role for ROs. The former in turn underlines the importance of proper monitoring of ROs acting on behalf of the EU Member States in question, especially as it is not possible under international law to delegate away any responsibility as a flag State.

With respect to the AID, the Directive has brought a positive effect to resource sharing between AIBs. Their budget is in most cases defined annually and covers all operational needs. The AIBs reported however constrains mostly in relation to lack of financial means and human resources availability while lack of appropriate skills and infrastructure are also identified.

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<sup>29</sup> In accordance with EU legislation EU MEMBER STATES can only use ROs that meet the quality criteria stipulated in Regulation .... And are published on the list of recognised Organisations (O.J. ....)

Many AIBs face serious staffing and financial constraints. As a response of the stakeholders consulted half of AIBs were found to largely depend on external expertise and support to perform accident investigations (for between 40-80% of their workload), particularly if the incident took place far from their territory. AIBs interviewed generally considered that this does not yet prevent them from fulfilling their obligations according to the AID. It was however reported that resource availability and connected staffing issues limits the investigation of accidents that are not classified as very serious. Consequently gaps in coverage can occur.

*5.2.8 EQ9: What are the effects, if any, on the work of EMSA, both as regards the visits and inspections programme they carry out and as regards the support to Member States in particular in the area of AI?*

AIBs responded positively on the effects that EMSA has on maritime safety and the quality of maritime administrations. Particularly positive responses were received on the trainings on accident investigation and its support of the Permanent Cooperation Framework. The same goes for EMSA providing capacity building support to FS and the particular wish, among other issues, expressed by Member States to work out better guidance on how to monitor ROs. The added value of operational support on marine incidents and data analysis were acknowledged to a lesser extent.

### **5.3 Efficiency:**

*5.3.1 EQ10: Is the system for record keeping and reporting (AI reports) established by the AI directive efficient?*

EMCIP is the European database to store data on marine casualties and incidents. EMSA manages and analyses the data, and provides trainings to AIBs on using the system. To avoid duplicated reporting a number of Member States have divested their national marine incident reporting database and only use EMCIP. Member State authorities appreciate that EMCIP offers a harmonised system for accident investigations, which facilitates cooperation between them in terms of definitions and elements to address. It is also used by AI bodies for accidents they investigate outside the scope of the Directive and offers a useful dissemination tool for their work as well a connection with the corresponding IMO notification system (GISIS).

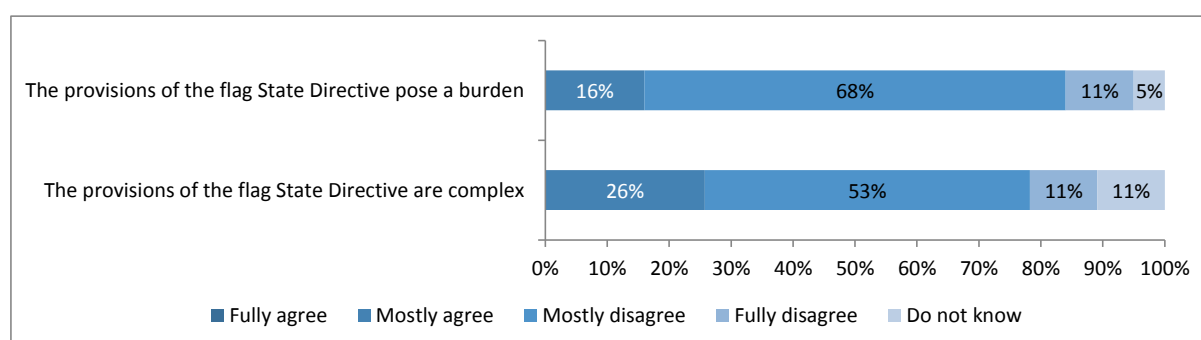
This being said almost 75% of AIBs responding consider EMCIP difficult to use. Moreover, respondents disagree that the requested information is reasonable in terms of workload. During interviews some stakeholders expressed that the added value of using EMCIP was not fully clear, as limited aggregated analyses of accident data had been made. The obligation to report (not investigate) also minor incidents is considered by the AIBs to be a considerable burden. The difficulties of using the database combined with the reporting requirements that are regarded as strict, makes that the usage of EMCIP is considered by many to be disproportionate to the added value. As such, the introduction of the updated and easier to use version of EMCIP in 2018 is welcomed by stakeholders.

### 5.3.2 EQ11: Are there any potential areas of administrative burden reduction (for example regarding the EMCIP database) and simplification?

The FSD, as an EU Directive only providing a frame, is experienced as relatively uncomplex and does not impose a substantial administrative burden on maritime administrations.

As shown in the figure below, based on the survey, 79% of respondents disagree mostly or fully that the FSD poses a burden and 64% considers that the provisions of the FSD are not complex. This follows logically from the few provisions and because some requirements also follow from other (inter)national regulation already decided and where resources should already be foreseen or made available<sup>30</sup>. Burdens are therefore not necessarily associated with the FSD.

Figure - Survey outcomes on the efficiency of the Flag State Directive (n=19)



Source: Survey.

The FSD puts several obligations on MS, notably:

- Art 5: Follow-up procedures when a flagged ship is detained by a port State;
- Art 6: Maintain a database with ship (safety) information;
- Art 7: Undergo an IMO audit;
- Art 8: Implement and maintain a QMS for the flag state administration;
- Art 8: Provide the EC with a report on flag State performance when grey listed.

The main difference is that the FSD makes the obligations enforceable and thereby contributes to a more harmonised implementation among EU MS and therefore more equal intra-EU competition, in terms of level safety field.

The AID increased the administrative burden on AIBs as it increases the reporting requirements both in quantitative (reporting on serious accidents) and qualitative terms (reporting put on a more demanding basis due to EMCIP). At the time of its adoption the co-legislator was of the view that information on maritime accidents should be collected at the EU level as this was not being done in a systematic way. No evidence has been adduced in the present evaluation to demonstrate that the reporting obligation on the Member States is

<sup>30</sup> c.f. III-Code Part-2 Flag States point 16

disproportionate to the objective. However, it is hard to see how the administrative (mainly reporting) burden could be reduced while maintaining the same high standards of reporting.

Apart from the remarks previously made in connection with EMCIP, the AID is also not experienced as administratively burdensome and/or complex, the burden and complexity of the AID are perceived to be relatively limited: 74% mostly or fully disagreed that the provisions of the AID pose a burden, and 68% disagreed that the AID is complex.

An explanation for this finding is that the AIBs are highly professionalised and that the respondents are well informed on the provisions and benefits of the AID. Stakeholders did indicate however that a number of definitions are problematic several AIBs pointed to difficulties with regards to the definitions of injuries. For instance, the definition of serious marine injuries was considered not clear enough, which in turn leads to an over-reporting of incidents.

## **5.4 Coherence**

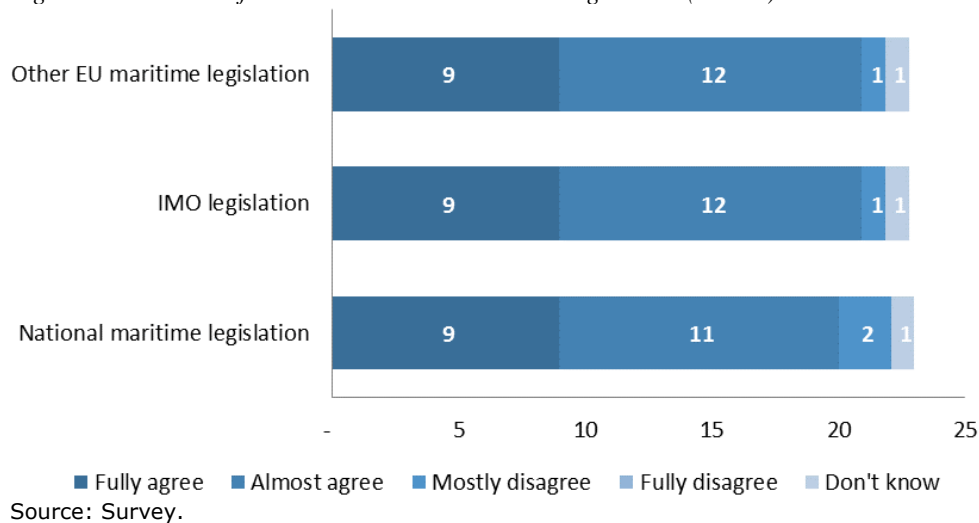
*5.4.1 EQ12: To what extent are the Directives internally coherent and complementary to the other maritime safety legislation such as port state control inspections and flag state surveys (delegated to RO or not) which provide for systems of regularly scheduled and/or targeted ex ante inspections? Are there any gaps or overlaps?*

The evaluation question asks whether the two Directives (FSD and AID) are coherent. As the Port State Control Directive is important, as the so-called second line of defence, the PSC is included in this analysis as well. The analysis showed that on a high level the three directives are coherent. On minor points, the Directives deviate, however this can be explained by their individual rationales and objectives, which ask for different approaches.

Based on detailed comparison of the two directives and other Directives and Regulations included in the Third Maritime Safety Package, in particular the PSC Directive and the legislation applicable to ROs as well as outcomes of the targeted survey, there was no indication that the FSD and AID are not coherent with the other applicable legislation.

The figure below presents the outcomes of the target survey on the statement whether or not the FSD is coherent with (i) other EU maritime legislation, (ii) IMO legislation and (iii) national maritime legislation.

Figure - Coherence of the FSD with other maritime legislation (n = 23)



With regard to other EU (maritime) legislation it should be noted that some stakeholders indicated that they considered there was overlap to some extent between the FSD and Regulation 789/2004, as they both concern change of ships from one register (Flag) to another. However, it became clear that opinions on whether or not those two instruments should be integrated into one instrument differ substantially between stakeholders and there is no conclusive evidence supporting either option. It is recognised that, whereas the FSD (EU Directive) has a safety objective only, i.e. avoid so-called 'flag hopping' (like class hopping) to avoid stricter enforcement of applicable rules, the Transfer of Register (EU Regulation) concerns the objective of vessels as goods on the internal market subject to the four freedoms, whilst respecting safety standards, i.e. national specific technical rules should not work as a barrier to free circulation.

In relation to IMO legislation, several stakeholders consulted in the targeted interviews and in the survey indicated that the FSD is no longer fully in line with the now mandatory IMO III-Code and the IMO RO-Code. Due to a deviation some inconsistencies occur, which should be taken away in order to ensure uniformity. This means that the FSD needs to be slightly adapted and brought into accordance with mainly the IMO III-Code. Although several of the stakeholders interviewed expressed concerns, stakeholders responding to the targeted survey are of the opinion that the FSD and IMO legislation are (mostly) coherent. As can be seen above, nine out of the 23 indicated they full agree with the statement that the FSD is coherent with IMO and 12 respondents indicated they mostly agree.



## 5.5 EU added-value

5.5.1 *EQ13: What has the EU interventions added to the work being done by Member States either individually or within the context of the IMO?*

### 5.5.1.1 Flag State Control Directive

The overarching EU added value of the Flag State Directive is that it brings consistency between the maritime authorities in all EU Member States by providing common base and set common obligations. Importantly, it ensures the effective implementation of IMO instruments and limits in some ways the sometimes high degree of discretion that Member States may apply when implementing or applying IMO conventions. Uniformity in application and adherence to obligations incumbent on a Member States as flag State is important and the Flag State Directive contributes in ensuring such compliance with applicable requirements.

Besides this overarching value added, several specific obligations have been pointed out as areas of value added, notably the mandating of the IMO audit and the implementation of a quality management system.

The FSD contributed to the fact that the all EU Member States underwent an IMO audit. Stakeholders expressed the importance of the FSD in order to ensure that (1) Member States actually will undergo an audit; (2) for the sake of a level playing field and, (3) to enhance the quality of the maritime administration and improve the flag performance.

With regard to the requirement to develop, implement and maintain a quality management system, some stakeholders, mainly flag State administrations (3), indicated that they do not see much added value in the requirement of the Directive regarding its introduction. This because many administrations already had such a system in place. However, they were not necessarily certified in accordance with an international standard (normally the ISO 9001 series). So while some already had some sort of system in place, the Directive has contributed to ensure that it is a system certification in accordance with international quality standards, which ensures uniformity and also ensures that it is continuously maintained (under ISO 9001 certification there is normally validity renewable every three years. However, overall the perception among stakeholders is that having such a certified system in place generates value added as the quality of the flag State control is better ensured and it is a requirement same for all EU Member States and actually forms part of continuous improvement in maritime safety, normally done by any quality minded administration.

As the voluntary IMO audit became mandatory for all IMO members and EU Member States, it did not include the specific requirement to have a certified quality management system. It is however acknowledged such a system supports in order to effectively meet the III-code requirements. Hence, the mandatory requirement already in place in the EU legislation on all EU MS with a register to develop, implement and maintain a QMS requirement, has supported the EU Member States in complying.

### 5.5.1.2 Accident Investigation Directive

The main added value of the AID is that it effectively brings EU legislation and national legislation in line with IMO regulation. Prior to the AID not all Member States effectively implemented the IMO guidelines, which led to a wide variety in accident investigations.

The AID formulated several additions to the international legal system. The main additions made by the AID are:

- Creation of an independent accident investigation body;
- Establishment of the Permanent Cooperation Framework;
- Design of a European database for marine casualties.

In addition to those explicitly formulated, the AID also provides for a standardized approach for accident investigation and reporting. As a result of this standardisation, accident investigations are conducted in a harmonised way and reports are comparable.

Since the adoption of the AID accident investigation has become more streamlined in and between EU Member States, although some countries still have progress to make. In those countries, the AIBs are still under development and/or resources are limited. Overall, stakeholders agree that the AID contributed to the professionalization and harmonisation of accident investigation practices. This is perceived as a considerable added value.

## 6 CONCLUSIONS AND RECOMMENDATION

### 6.1 Conclusions

#### 6.1.1 Flag State Directive

The international basis for flag State responsibility is embedded in the United Nations Convention on the Law of the Sea<sup>31</sup> (UNCLOS), in particular in articles 94 (duties of the flag State) and 217 (enforcement by flag States). Article 94 lays down the obligation for each flag State to *effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*. This includes, among others, regular surveys conducted by a qualified surveyor to assess the seaworthiness of the ship as well as on-board safety (94 (4) (a)). It also includes ensuring compliance of master and crew with applicable international regulations regarding safety of life at sea, prevention of collisions and prevention, reduction and control of marine pollution (94 (4)(c)).

Article 217 lays down the requirements of enforcement for flag States. In sub-article 1 it is stated that flag States need to ensure that ships flying their flag comply with the applicable international rules and standards (e.g. maritime safety and pollution prevention). The rules

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<sup>31</sup> It is in this context important to note that the European Union also is a contracting party to UNCLOS.

and standards referred to are the ones adopted by the *competent international organisation* (i.e. IMO)<sup>32</sup>. In addition, flag States are under the obligation to adopt auxiliary national legislation and other measures which are required for implementation of IMO rules and standards. These are then audited under the mandatory IMO Audit Scheme using the mandatory IMO Instruments Implementation Code (III-Code). This code encompasses the responsibilities stemming from the International Conventions incumbent on a State as a flag, coastal and port State.

It should be noted that stakeholders are not always fully informed on the exact scope of the FSD. Several stakeholders indicated that, according to their opinion, the FSD does not apply to secondary registries and to registries of overseas territories. This confusion may lead to a less efficient and effective implementation of the provisions of the Directive.

The overall conclusion of this evaluation based on the conclusions for relevance, effectiveness, efficiency, coherence and EU added value is that the Directives have by and large met expectations among all authorities involved achieving EU-wide benefits. They are meeting their (same) objectives as part of the overall maritime safety policy and provide support for national capacities in meeting international obligations and performing responsibilities and operational tasks in the maritime domain incumbent on them. Although some difficulties have been experienced in finding technical expertise.

The evaluation shows that the Directives are relevant and continues to play a key role within the EU maritime transport and maritime safety policy.

**The conclusion in one sentence** – the interventions work and contribute towards the overall EU maritime safety policy, especially through providing consistency in the regulatory framework across Member States and the effective and enforceable application of international obligations in a more uniform and harmonised way.

On the key questions - how relevant the measures are still today and what added value they have produced - respondents indicated that the Directives are relevant towards achieving cleaner, safer and harmonised shipping in the EU. The main relevance is related to transposition of international regulation into EU legislation. It thereby provides consistency in the regulatory framework across Member States and the effective and enforceable application of international obligations in a more uniform and harmonised way.

This contributes to a level playing field and more equal competitive situation for the EU-flagged fleet.

While most of the aspects related to coastal and port State obligations in the III-Code are already the subject of EU legislation (VTMIS- and PSC-Directives) the rules related to the first line of defence, States as flag States, are with the exception of the AID not equally well covered. The flag State Directive is more a frame of certain obligations for Member States as

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<sup>32</sup> UNCLOS only mentions the competent international organization. With the adoption of the Convention on the International Maritime Organization (IMO Convention) the IMO became the competent international organization. Since then, flag States party to IMO Conventions need to ensure that ships flying their flags comply with the rules and standards laid down in the conventions to which they are Party.

flag States. It is to be noted that the Commission original proposal for what was adopted as the FSD was more comprehensive, but that in the discussions on that proposal Member States wanted to wait for the (then under negotiation) III-Code, to keep EU legislation aligned with international rules and by so doing avoiding differences and therefore possible disadvantages for EU flags. The III-Code and the IMO Audit Scheme became mandatory for IMO signatory states on 1 January 2016.

The current situation is that almost all EU Member States as flag States on the one hand have delegated away almost all work on their fleet in commercial traffic, to recognised organisations but this leaves them with domestic<sup>33</sup> transport vessels and fishing vessels where they, on the other hand, have to do the work as flag States (and where normally ROs/classification societies are not involved).

Importantly, even if delegated to ROs, doing work on behalf of the flag, the responsibility remains with the flag State and there is therefore a need to maintain clear and strong monitoring, as also required by the III-Code.

The collected figures on staffing, the involvement of inspectors in other maritime functions, and the general profile of maritime administrations provides a first indication on the ability of Member States to successfully implement the IMO conventions and perform effective oversight of the ROs. For both the FSD resources, in particular finding qualified technical expertise, is becoming a problem. For flag States this risks leading to even fewer inspections (and audits) of their own flagged fleet and less control (technical knowledge) in monitoring ROs.

Member States were positive about the trainings provided by EMSA, on the basis that the EMSA training contribute to maritime administrations.

#### *6.1.2 Accident investigation Directive*

For the AID the evaluation concluded that this still corresponds to the needs of today's society. This view is also confirmed by the stakeholder consultation. The AID proved to be successful in reaching its original objectives. In addition, the Directive provides a consistent framework for conducting maritime accident investigations and ensures that accident investigations are conducted in a uniform and harmonised way throughout the EU.

Over three quarters of stakeholders responded that the AID has generally led to the strengthening of the AIBs' independence and their ability to conduct expeditious and unbiased investigations. This being said resources, staffing and expertise issues are widely reported as problematic.

Resource constraints were identified that limit some Member State AIBs in implementing the IMO conventions, limiting their effectiveness as a flag and coastal State. The stakeholder consultation highlighted that constraints are particularly felt in terms of financial means and staffing. With regards to accident investigations, this results in underreporting of incidents. AIBs were found to depend to a large extent on external expertise and support to perform accident investigations and many AIBs face staffing and financial constraints. This is

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<sup>33</sup> National traffic only (e.g. public service obligations)

particularly the case for those Member States with small fleets and limited maritime transport activity where the establishment of a permanent dedicated investigative body is seen as an unnecessary and disproportionate burden.

As regards the AID in all EU/EEA that have fully implemented the Directive investigations are managed and/or conducted by investigative bodies of a permanent character, as required by the AID. Not all individual investigators of such bodies are necessarily permanently employed by the AIB. The fulfilment of this requirement of the AID cannot be seen in isolation. An AIB cannot conduct investigations of the required quality, apply the required principles and use resources effectively unless it also has the required impartiality, independence and technical competence of its staff. The setting up of an institution serves little purpose if any of these fundamental requisites are lacking.

Stakeholders generally supported the use of EMCIP and understood its potential value. At the same time it was emphasized that using the database was cumbersome and the benefits do currently not outweigh the required investment in time

## **6.2 Recommendations**

Based on the ex-post evaluation of the FSD and AID, a number of recommendations were made regarding the future implementation of the Directives and possible revisions thereof.

The expiration of Article 7 of the FSD as of January 2016, mandating the IMO audit for Member States, nullifies what was seen by some as the strongest added value of the FSD. With the mandatory IMO Member State Audit Scheme coming into force it is also noted that the new scheme is more detailed and provides IMO with additional instruments to promote the effective implementation of IMO conventions. Still, the IMO does not have enforcement powers similar to those as laid down in the FSD.

### *6.2.1 Alignment of the FS Directive on the role of flag states with current international obligations*

What is missing within what is a framework Directive are the Flag State obligations. Those relevant parts in the now mandatory III-Code should be introduced in the legislative framework and alignments as necessary be made, to ensure continued uniformity and enforcement, contributing to a higher level of maritime safety and maritime transport efficiency as well as guaranteeing a level playing field between Member States. The EU is often accused of developing regional legislation not aligned with the IMO standards and undermining the effectiveness of international regulation, creating a competitive disadvantage for EU flags. As the relevant IMO instrument, the IMO III Code, has become mandatory in 2016, the directive could now be revised to align it to the III-Code as has been done with other IMO instruments. The requirement for Member States as FS to undergo the now mandatory IMO Audit should be maintained and the provision of publishing outcomes and follow-up action strengthened (see further below).

As the evaluation has shown, most MS as flag State rely on ROs to a great extent. An important aspect will be how RO monitoring should be done by the Member States. This is to some extent already covered in the existing EU RO legislation but it can benefit from clearer rules, procedure and guidance for how Member States should do this, share information with

each other and coordinate and cooperate with EMSA. It is to be recalled that this responsibility cannot be delegated away.

Linked to this is the measurement of performance of flags in article 8.2 of the FS Directive. Today it is measured through PSC only and only in the Paris MoU. It needs to be assessed if not also other criteria and parameters should be used, including any such applicable to ROs given that effectively in most Member States they carry out the actual work.

While safety is crucial, it cannot be looked at in isolation. The regulatory framework must also support conditions under which the maritime industry can thrive and remain competitive on the global market. This includes the integration of new approaches and emerging technologies, including the use of digitalisation – Integrated Maritime Services – for effective monitoring and support in enforcement as well as support to maritime administrations and therefore the efficiency of maritime transport.

#### *6.2.2 IMO Audit disclosure*

The requirements regarding the public disclosure of the (full) audit report is not mandated, nor is the sharing of other audit outcomes. The Commission could consider whether the disclosure mechanisms as advanced by the mandatory IMO Audit Scheme suffice. Novel approaches to improve the collection and dissemination of knowledge, like the involvement of EMSA as an observer to Member State IMO audits, can be considered.

#### *6.2.3 EMSA*

As is the case for port and coastal State obligations, support to Member States in the exercise of their flag obligations making use of EMSA and benefitting from EU-wide systems (for risk assessment, monitoring and enforcement/compliance) would be very useful. The potential for further support using the systems for risk assessment and therefore more pro-active safety, security and pollution prevention rather than only re-active, should be explored. This would help to focus the better use of resources and address shortages in expertise and can ease the burden on quality operators, further improve competitiveness of the sector but without losing focus and enforcement efforts.

An additional and linked element would be to have EMSA training for flag State inspectors. This would enable maritime administrations to more effectively implement IMO conventions and at the same time ensure a higher level of harmonisation of flag State inspections across Europe.

#### *6.2.4 Coherence with Regulation (EC) 789/2004*

The overlap to some extent between Regulation (EC) 789/2004 and the FSD was addressed by several stakeholders, but inconclusive. Both the FSD and the Regulation require more or less the same type of information. This overlap was already addressed in the Staff working document on the implementation of Regulation 789/2004. While the difference in objectives of the two pieces of legislation is highlighted, the Commission may want to consider whether further alignment between the Regulation and Directive is necessary and can be achieved.

### *6.2.5 Resources and staffing maritime administration and AIB*

Monitoring of the evolution of the staffing and resources is advised, to identify and anticipate on resource constraints. While doing so it remains important to consider the various models that Member States apply to organise their maritime administration, specifically with regard to the role of ROs.

One solution to this issue, in the context of AI, has been the creation in a number of Member States of multi-modal AIBs which allow for economies of scale, shared expertise across modes and shared support staff costs. The resource, staffing and expertise issue mean that AIBs do not carry out all the activities they might like to and cannot in some cases respond in adequate time to incident, especially if these occur far from their national territory.

### *6.2.6 EMCIP*

The need for a more user-friendly and optimised EMCIP version, of which the launch is foreseen in 2018, is identified as particularly relevant.

## ***Annex 1:***

### *1. Identification of the lead DG; Agenda planning/Work Programme references*

- DG MOVE is the lead DG
- Agenda Planning Reference 2016/MOVE/059:

### *2. Organisation and timing*

- The Evaluation began in April 2016 with the first meeting of the Inter-Service Steering Group (ISG), which discussed the draft Roadmap and Consultation Strategy for this evaluation. The Roadmap was published for public feedback on 10 May 2016. The Commission subsequently proceeded with the call for expression of interest for the support study, which was assigned to ECORYS Nederland B.V. (consortium leader) through Specific Contract Specific Contract No MOVE/D2/SER/2016-24/SI2.739268 Implementing Framework contract No MOVE/A3/119-2013/Lot 4.
- The contractor started work on the support study in October 2016 and delivered the final report, after all comments by the Commission had been taken on board, in July 2017.
- The ISG held another 4 meetings after the first meeting in April 2016, on the different steps of the evaluation process. The Commission Services participating in the ISG are: Secretariat-General, DG Maritime Affairs and Fisheries, DG Taxation and Customs Union, DG for Communications Networks, Content and Technology, DG European Commission Humanitarian Aid & Civil Protection (ECHO), DG Migration and Home Affairs, DG for Employment, Social Affairs and Inclusion, DG Industry, Entrepreneurship and SMEs, DG Environment, DG Health and Food Safety and the European Maritime Safety Agency (EMSA).

### *3. Evidence used*

The evaluation relies mostly on the "*Ex-post evaluations of Directive 2009/21/EC on compliance with flag State requirements and Directive 2009/18/EC establishing the fundamental principles governing the investigation of accidents in the maritime transport sector*"<sup>34</sup> carried out by an external consultant.

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<sup>34</sup> Link to bookshop



### *Task 1: Study structure*

The task, part of the inception phase, was carried out in order to establish the foundation for implementing the project. An evaluation framework was developed at the beginning of the project to facilitate the evaluation. Exploratory interviews were carried out and the kick-off meeting with the Commission took place.

The evaluation team also visited the European Maritime Safety Agency on 29 and 30 November 2016. The team spoke to several officers who are involved in EMSA activities in the fields of accident investigation, Port State Control, as well as Member State visits and RO inspections. Information was shared on the experiences with the Directives and their implementation across the EU. The use and application of the relevant data platforms, notably THETIS and EMCIP, were moreover discussed. All activities resulted in the submission and approval of the Inception Report.

### *Task 2: Desk research*

Literature was collected in line with the information needs coming from the evaluation framework, mainly concentrating on questions related to effectiveness and coherence. A list of documents reviewed is presented in Annex 2. Results from desk research have been linked to the evaluation questions, and as such incorporated in the Sections 4-9.

In addition to the literature several databases on shipping and accidents were leveraged. These include MarInfo, THETIS, and UNCTADstat, and together with data and information gathered from Member states, provided additional input towards the data analysis and in answering the evaluation questions.

### *Task 3: Open Public Consultation*

The Open Public Consultation (OPC) under consideration concerns the ‘Public consultation on the fitness of EU legislation for maritime transport safety and efficiency’. The consultation period lasted from 7 October 2016 until 20 January 2017 and covered the following topics:

- Fitness check of maritime transport legislation for better safety and efficiency
- Flag State responsibilities
- Accident investigation
- Port State Control
- Reporting formalities
- VTMISS
- Maritime transport legislation for the training and mutual recognition of seafarers.

The aim of the OPC was to collect views on the identified maritime topics from various stakeholders (national authorities, shipowners, ports, seafarers, associations etc.). The consultation was open to all entities and citizens. Respondents were given the opportunity to reply on closed and open questions related to the aforementioned areas. The OPC collected 53 responses in total.

#### Task 4a: Targeted survey

An invitation to participate to the survey was sent to 308 stakeholders from all relevant stakeholder groups. Questions on Port State Control were included so that only one survey had to be sent out on this related field.

The survey was opened from 11 January till 16 February 2017. Reminders were sent to boost participation. Maritime administrations and accident investigation bodies were moreover contacted directly to remind them of the survey. A total of 79 responses were collected. To avoid stakeholder fatigue and boost participation, the questions were tailored per stakeholder group. Consequently not all questions are answered by all 79 respondents.

#### Task 4b: Targeted interviews

In-depth interviews were introduced to collect more detailed inputs. This tool proved especially useful in receiving elaborate views on the functioning of the Directives. Anonymising the responses was offered to ensure openness in responses. Stakeholders that were considered for interviews were identified in consultation with the Commission and through the evaluation team's professional networks. A total of 33 in-depth stakeholder consultations are categorised under exploratory interviews (4), targeted and case study interviews (27), and written input received from stakeholders (2).

#### Overview of stakeholder consultation activities

The table below provides an overview of the number of stakeholders that were consulted per group and consultation method. A small number of stakeholders used to opportunity to provide input through multiple channels. This resulted in a total number of 165 responses by stakeholders.

Table 6.1 Overview of responses per stakeholder group and method

Stakeholder group	Interviews	Survey (rate)		OPC*	EME MBER STAT ESA visit	Total
1.a) Maritime Administrations	7	14	61%	13		34
1.b) AI Bodies	7	15	60%	0	1	22
1.c) Ministry (Maritime affairs)	4	3	38%	0		7
2) Ship owners	6	5	10%	11		22
3) Ports and ship agents	0	16	17%	5		21
4) Third (non-EU) States	1	2	18%	0		3
5) Recognised organisations	2	3	27%	0		5
6) Seafarers and their organisations	1	9	20%	0		10
7) Other actors	5	12	21%	24	5	41
<b>Total</b>	<b>33</b>	<b>79</b>		<b>53</b>	<b>6</b>	<b>165</b>

Source: Ecorys, Final report, p.21

### 6.3 Annex 2: Synopsis report<sup>35</sup>

#### Evaluation of Directive 2009/21/EC on compliance with Flag State requirements and Directive 2009/18/EC establishing the fundamental principles governing the investigation of accidents in the maritime transport sector

##### 6.3.1 Consultation activities

###### 6.3.1.1 Survey

In the course of this study seven main stakeholder groups have been identified and consulted:

1. *EU Member States as port States, coastal States and as flag States:* All 28 EU member states, in their capacity of implementing and enforcing authorities. In most countries this will be the national maritime administration or similar bodies. Accident investigation bodies are consulted in their capacity to conduct accident investigations and implement the Accident Investigation Directive (AID) ;
2. *Ship owners engaged in different types of trade:* Ship owners engaged in various activities. This stakeholder group encompasses various players with strong interests in quality shipping and maritime safety ;
3. *Ports and ship agents operating in ports:* Ports and ship agents can be affected by the Directives following maritime incidents and accidents in port areas but also by port state control inspections and the potential detention of vessels ;
4. *Third (non-EU) States whose ships call in EU ports:* Non-EU flag states with vessels calling in EU ports need to provide relevant certificates according to international standards. Third States are equally consulted on the quality of European flags versus non-EU flags and potentially experiences with accident investigations ;
5. *Recognised organisations developing and applying technical standards for the design, construction and survey of ships and which carry out surveys and inspections on board ships:* ROs are questioned based on their involvement in inspections and experiences with flag State administrations and accident investigations ;
6. *Seafarers and their organisations in particular with regard to the enforcement of applicable standards of living and working conditions:* While the directives are not primarily aimed towards standards of living and working conditions, these stakeholders are questioned on whether these topics are affected by the Directives ;
7. *Other actors involved in maritime transport:* Other actors relevant to the Directives include the European Maritime Safety Agency (EMSA) registering marine casualties, the International Maritime Organisation (IMO), and academia.

An invitation to participate to the survey was sent to 308 stakeholders from all relevant stakeholder groups. The survey included questions of an evaluation study on Port State

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<sup>35</sup> Cf. Ecorys, *Stakeholder Consultation Report*

Control (PSC) that runs in parallel. The survey was opened from 11<sup>th</sup> January till 16<sup>th</sup> February 2017. A total of 79 responses were collected.

#### 6.3.1.2 Interviews

In-depth interviews were introduced to collect more detailed inputs. This tool proved especially useful in receiving elaborate views on the functioning of the Directives. Anonymising the responses was offered to ensure openness in responses. Stakeholders that were considered for interviews were identified in consultation with the Commission and through the evaluation team's professional networks. A total of 33 in-depth stakeholder consultations are categorised under exploratory interviews (4), targeted and case study interviews (27), and written input received from stakeholders (2).

#### 6.3.1.3 Open Public Consultation

The OPC collected 53 responses in total. For the purpose of this report, OPC respondents have been categorized in 5 categories:

- **Ship owners & operators (11 respondents):** containing 5 respondents replying on behalf of private shipping companies and 6 respondents replying on behalf of shipping industry associations (National and European) ;
- **National Maritime Authorities (13 respondents):** containing 11 national maritime authorities and 2 regional public authorities with a role in maritime transport affairs ;
- **Port Authorities (5 respondents):** containing 4 port authorities and 1 European port association ;
- **Other - Individuals (15 respondents):** containing citizens replying in their personal capacity such as seafarers and other interested citizens ;
- **Other - Organisations (9 respondents):** containing all respondents replying on behalf of entities that did not fit in the above categories, such as industry associations, private companies and NGOs.

No responses were received from national accident investigation bodies.

The collected responses originate from 13 EU Member States and 2 non-EU countries (Norway and Montenegro). Most responses are from Belgium (23%, i.e. 12 responses), 5 of which are European and international associations. France and UK are next with 13% (7 responses) and 10% (5 responses) out of the total responses respectively.

#### 6.3.1.4 EMSA visit

The evaluation team visited the European Maritime Safety Agency on 29<sup>th</sup> and 30<sup>th</sup> November 2016. The consultants spoke to several officers who are involved in EMSA activities in the fields of accident investigation, Port State Control, as well as Member State visits and RO inspections. A discussion was held on their experiences with the Directives and their implementation across the EU. Relevant data platforms, notably THETIS and EMCIP, were moreover topic of discussion.

This annex builds on these inputs to define the stakeholders' positions on the various evaluation questions.

## 6.3.2 Results of consultation activities

### 6.3.2.1 Relevance

Overall, stakeholders indicate that both the FSD and the AID are still relevant today and are in line with the objectives as presented in the intervention logic:

1. To ensure that MEMBER STATES efficiently and consistently discharge their obligations as flag states ;
2. To enhance safety for ships flying the flag of an EU MEMBER STATES ;
3. To prevent pollution from ships flying the flag of an EU MEMBER STATES ;
4. To reduce the risk of future maritime casualties.

This view was confirmed by the respondents in the targeted stakeholder survey (44 responses in total). Stakeholders deem the Directives most relevant for the objective to reduce the risk on future maritime casualties (26 out of the 44 respondents believe this to be very relevant).

#### **Flag State Control Directive**

When zooming in on the relevance of the FSD alone, the views on its relevance are somewhat mixed:

- In the OPC, stakeholders were generally positive about the relevance of the FSD. Out of the 43 responses, a total of 70% of the respondents (30 in total) strongly agrees with this view, while an additional 23% (10 respondents in total) agrees with this statement ;
- During the interviews the views held by stakeholders were more diverse. Several Flag State administrations indicated that the FSD is generally more relevant for smaller administrations that are still in the process of establishing and implementing flag State procedures and the IMO conventions. For longer established administrations the relevance of the FSD is limited and mostly a duplication of international efforts.

Nevertheless, most stakeholders agree that the FSD contributes to consistency between the procedures and professionalization of maritime authorities in all EU Member States. A key topic of debate among stakeholders interviewed (mainly flag state administration) is the actual application of the FSD – e.g. whether or not the FSD does apply to secondary and overseas registries.

#### **Accident Investigation Directive**

The evaluation found overall positive survey results, indicating that the AID is still relevant for reaching the objectives. During the interviews, interviewees indicated that the AID so far proved appropriate for reaching its original goals, especially with regard to improving maritime safety. Also, in the OPC, stakeholders stated that the AID is still relevant. All stakeholders that answered the question (45 in total) agree that the AID is relevant. 71% of them strongly agree (equalling 32 respondents), while the remaining 29% (equalling 13 respondents) agrees with the statement.

With regards to *recent developments* influencing the relevance of the Directives, the following was said:

- **FSD:** Most survey respondents are of the opinion that no major developments have occurred that influence the relevance of the Flag State Control Directive or they do not know the answers. Nevertheless, 25% of the respondents indicated that developments have taken place which may influence the relevance of the Flag State Control Directive. A main point influencing the relevance is the shift from voluntary IMO audits to mandatory audits. During the interviews several maritime administrations remarked that the FSD lost its importance as a consequence of the expiration of Article 7 – the voluntary IMO audit ;
- Stakeholders also remarked that with the introduction of the IMO III Code which is broader than the FSD and also more detailed, the FSD therefore is (1) not fully up to date with international regulation since the mandatory IMO Member State Audit Scheme came into force, which is more comprehensive and provides new instruments to ensure the effective implementation of IMO conventions compared to VIMSAS, and (2) is a mere duplication of legal efforts ;
- **AID:** Although 28% of the stakeholders indicate that developments took place that influenced the functioning of this Directive, they mainly refer to changes in national law.

## Conclusion

Stakeholders generally indicate that especially the Accident Investigation Directive is still relevant today and corresponds to the needs of today's society. In addition, the Directive provides a good legal framework for conducting maritime accident investigations and ensures that accident investigations are conducted in a uniform and harmonised way throughout the EU. Whether or not the Flag State Control Directive is still relevant today is a topic of debate among stakeholders. Based on the analysis, it may be concluded that the FSD in its current form lost some relevance following developments at the IMO level.

### 6.3.2.2 Effectiveness

#### *Disclosure of IMO audit outcomes*

A total of 18 Member States underwent an IMO audit before the FSD had come into force. Seven more were audited between 2011 and 2015. Only 9 Member States disclosed the outcomes to the general public, either the full audit report or a summary. Other Member States do typically have access to the audit results. As reasons for non-disclosure, maritime administrations indicated a lack of interest by the public and potentially detrimental reputation effects that a negative audit can cause.

#### *IMO Audit corrective actions*

During interviews maritime administrations generally reported to have followed-up on the recommendations in communication with the audit team. Such is confirmed by IMO auditors.

Survey responses of 17 Member States showed that actions have been identified in all fields examined during the audits. Most often, follow-up actions have been drawn for “legislation” (9) and “strategy” (7) issues. Also, “implementation” and “enforcement” require a moderate number of follow-up actions (five each). In at least five cases, the actions are reported as not completed yet, while for an additional five, respondents were not sure of the action status. Additionally, 74% (29 out of 39) of the identified follow-up actions have been marked as complete.

### *Transparency of ship register information*

Interviews with various maritime administrations highlighted that vessel safety records are rarely requested directly by other Member States. Other channels, like the ship-owner or ROs are more frequently used.

More than half of the survey respondents agree that the FSD is a facilitating instrument for the exchange of information regarding vessels safety record to this conclusion (19% fully agree and 28% mostly agree). On the other hand, just one forth mostly disagrees with this leaving roughly 19% of participants without a view on the issue.

One Member State indicated that after the FSD came into force, they had received a limited number of such request suggesting that at least some Member States now make use of this provision.

### *Flag Transfers*

Flag transfer data was consulted to assess whether changes occurred since the entry into force of the FSD. The figure below provides an overview of the trends.

The impact of the FSD on flag transfers has been minimal because it does not directly target the drivers that inform ship owners to transfer to a different EU Member States or third country flag. These drivers are the quality of service and the flag's fiscal regime.

Respondents indicated moreover that transfers between EU Member States flag registers to evade environmental or safety regulation are unheard of. While the existence of such dynamics is acknowledged, they mostly concern transfers from the EU to non-EU registers. These transfers are not directly affected by the FSD.

### *EU Member States' flag performance and detention follow up actions*

The targeted interviews with Maritime administrations showed that the follow up actions on detained ships are derived from long-standing, formalized guidelines. Some administrations indicated that ROs are involved in the follow up procedure if a ship is detained in a port that is distant from the flag State.

All interviewed administrations shared that after a notification is received that a ship flying its flag was detained by a Port state, the ship owner is contacted to discuss the underlying causes for detention and to agree on actions to prevent future detentions from happening. Most flag States also impose some form of sanctions on the ship owner, like calling the ship back for a flag State inspection. The interview statements are corroborated by the survey responses<sup>36</sup>.

### *Accident Investigation Bodies*

Five interviewed AIBs consider the creation of a current independent accident investigation body to be solely related to fulfilling the requirements set by the AID.

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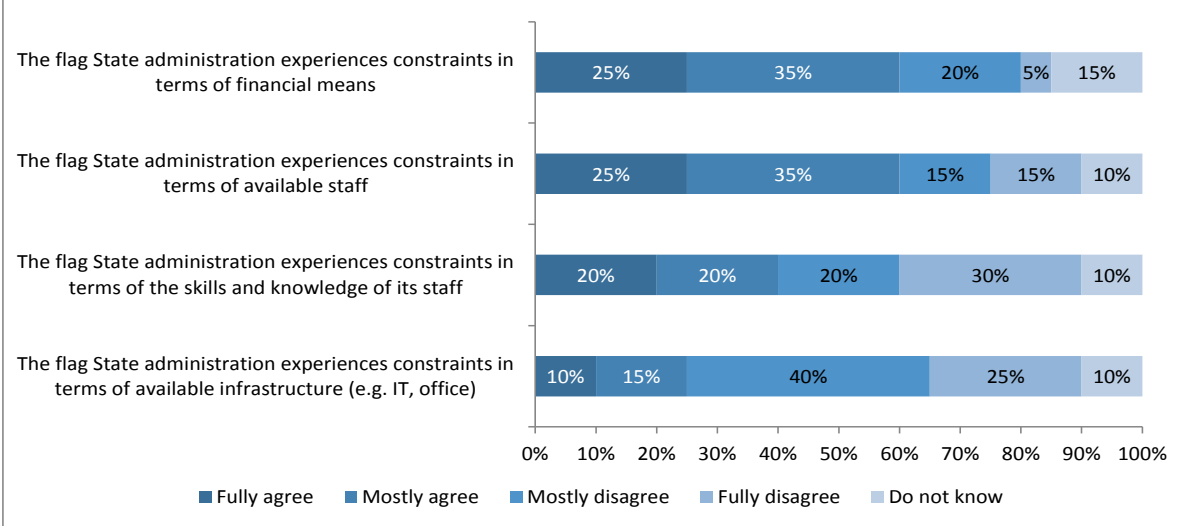
<sup>36</sup> 79% of the respondents fully agreed with the statement "We have a standardized procedure to follow when a ship is detained". 79% fully agreed with the statement "We consistently follow-up when a flagged ship is detained". 37% of the respondents fully agreed and 37% mostly agreed with the statement "The lessons that are learned after a ship is detained are shared with relevant stakeholders". 42% fully agreed, 26% mostly agreed, and *nota bene* 11% fully disagreed with the statement "We impose sanctions when a ship is detained". Source: Ecorys, Survey, *Stakeholder Consultation Report* (2017).

The majority of relevant respondents (n=19) either mostly or fully agree that the AID fostered the creation of AIBs (67%), strengthened the independence of AIBs operation (84%), increased accident investigation quality (85%) and also improved the cooperation (92%) and resource sharing (69%) among Member States.

*Resources*

On the whole interviewees indicated that several FS administrations experience some resource constraints in terms of staff and financial means. Such was confirmed by the survey results.

Survey outcomes on follow-up procedures (n=19)



Source: Ecorys, survey (2017)

AIBs were found to largely depend on external expert support to perform accident investigations. Many AIBs face staffing and financial constraints.

Half of the AIBs surveyed use external private experts to perform their duties (for between 40% and 80% of accidents). Moreover, some of these agencies have established agreements (e.g. Memorandum of Understandings) for receiving external expert support from specialised organisations or from other government departments when specific skills are needed.

Respondents do generally consider that this does not yet prevent them from fulfilling their obligations according to the AID. It was nevertheless reported that resource availability is considered when deciding to investigate accidents that are not classified as very serious. Consequently gaps in coverage do occur.

*EMSA*

Survey inputs were collected on the effects of EMSA’s work in the field of accident investigation, showing that the trainings and support for the Permanent Cooperation Framework are very positively regarded.

EMSA’s operational support with accident investigations and the analysis on marine casualty data are deemed less useful. Such was confirmed during interviews, where AIB’s evidenced little awareness of these activities.



## **Conclusion**

Overall the FSD and AID have been effective in achieving their intended objectives, although their contribution generally needs to be assessed in light of the broader maritime safety framework that is developed by Member States, the EC and IMO.

### **6.3.2.3 Efficiency**

Over 74% of respondents (14) consider EMCIP difficult to use. Moreover, respondents disagree that the requested information is reasonable in terms of workload. During interviews some stakeholders expressed that the added value of using EMCIP was not fully clear, as limited aggregate analyses were drafted or familiar with the AIBs.

The obligation to report (not investigate) also minor incidents is considered by the AIBs to be a considerable burden. It is noted however that EMSA publishes an annual overview of marine casualties and incidents, which become increasingly comprehensive.

Concerning the FSD, most interviewees indicate that the administrative burden that is caused by the FSD is limited, and so is the complexity. The reason is that the FSD puts few requirements on EU Member States that are not already mandated by international law, other EU legislation, or national requirements. The survey outcomes corroborate these results. 79% of respondents disagree mostly or fully that the FSD poses a burden and 64% consider that the provisions of the FSD are not complex.

The burden and complexity of the AID are perceived to be relatively limited: 74% mostly or fully disagreed that the provisions of the AID pose a burden, and 68% disagreed that the AID is complex.

However, several AIBs pointed to difficulties with regards to the definitions of injuries. For instance, the definition of serious marine injuries was considered not clear enough, which in turn leads to an over-reporting of incidents. A clarification and harmonisation of the definition is considered to be potentially beneficial regarding reduction of workload. In the same line of thinking, overall harmonization with safety regulation of other modes (aviation, rail) would simplify the work of multi-modal investigation bodies.

## **Conclusion**

The FSD is experienced as a relatively simple Directive and does not impose a substantial administrative burden on maritime administrations. It is also noted that most of the requirements under the FSD also follow from IMO conventions. Therefore the Directive is not regarded as complex and burdensome.

While the AID is considerably more expansive in terms of provisions, it is generally also not regarded as complex and burdensome. One element of the AID is nevertheless regarded as complex and resource intensive, namely the use of the EMCIP database. As such, the introduction of the updated more user-friendly version of EMCIP is welcomed by stakeholders.

### **6.3.2.4 Coherence**

## Flag State Control Directive

- Other EU legislation: during the stakeholder consultation, especially during the interviews, the potential overlap between the FSD and Regulation 789/2004 was highlighted. In addition, stakeholders indicated that it is not always fully clear what information needs to be collected based on article 6 FSD and what information needs to be collected based on Regulation 789/2004.
  - 21 out of the 23 respondents indicated that they mostly or fully agree with the statement that the FSD is coherent with other EU maritime legislation. One port state inspectorate indicated to mostly disagree with the statement, while one port did not comment to the statement.
- IMO legislation: several stakeholders indicated that the FSD is no longer fully in line with the IMO III-Code and the IMO RO-related legislation. Due to these developments some inconsistencies occur, which should be taken away in order to ensure a well-functioning international legal system. This means that the FSD needs to be slightly adapted and brought into accordance with mainly the IMO III-Code.
  - Although several of the stakeholders interviewed expressed concerns related to the coherence between the FSD and IMO legislation, stakeholders responding to the targeted survey are of the opinion that the FSD and IMO legislation are (mostly) coherent. Nine out of the 23 indicated they fully agree with the statement that the FSD is coherent with IMO and 12 respondents indicated they mostly agree. Also for this statement, one port state inspectorate indicated to mostly disagree with the statement, and one port did not comment to the statement.
- National legislation: In relation to national law, it seems that all national rules in Member States are fully in line with the FSD requirements. Therefore there does not seem to be a need for national legislative efforts to bring national systems in line with the FSD.
  - This view is confirmed by most of the respondents in the targeted survey. 20 out of the 23 respondents indicated that they (mostly) agree with the statement that national legislation is coherent with the FSD. Only two Recognised Organisations indicated to mostly disagree.

## Accident Investigation Directive

- Other EU legislation: The general view held by stakeholders is that the AID is coherent with other EU maritime related initiatives. No clear gaps or overlaps were mentioned during the interviews.
  - In the targeted stakeholder survey 15 respondents out of the 21 reflected that they (mostly) agree with the statement that the AID is coherent with other EU maritime legislation. Five respondents, among them four accident investigation bodies and one port, indicated that they have no opinion regarding this statement. One accident investigation body indicated to mostly disagree.
- IMO legislation: With regards to the coherence between the AID and IMO legislation stakeholders consulted held a more mixed view. Although most stakeholders indicated that

in general the AID and IMO are in line, many also pointed out that with the adoption of the IMO III-Code differences in definitions occur.

- The view above is confirmed by the stakeholders responding to the targeted survey. Although the majority of stakeholders (18 out of the 21) indicated that they agree that the AID is coherent with IMO legislation, 15 of them indicated to be of the opinion that the AID is partially coherent.
- National legislation: None of the interviewees mentioned coherency problems between the AID and their national legal system. Therefore, it seems that all national systems are in line with the requirements laid down in the AID.
  - The majority of stakeholders (18 out of the 21) (mostly) agree with the statement that the AID and national legislation are coherent. Only one stakeholder, an accident investigation body, indicated that he/she mostly disagrees with this statement. Another accident investigation body fully disagrees with the statement.

## **Conclusion**

Stakeholders are of the opinion that the FSD and AID, together with the PSC, form a coherent system.

Also with other EU legislation the two Directives are perceived to form a coherent system. The main exception highlighted by stakeholders is the overlap between Regulation 789/2004 and the FSD. The stakeholders interviewed seemed to be in favour of a merger between the two legal instrument, in order to avoid duplication.

With regards to the coherence of the two Directive and IMO legislation, the majority of stakeholders highlighted that the instruments might be incoherent. The FSD is regulating more or less the same topics as IMO; however, as legislation comes from two sources (EU and IMO) it puts a regulatory burden on Member States. In addition, the FSD is no longer fully aligned with developments with respect to the IMO III-Code and the IMO RO-related legislation. Similar views regarding the coherence between the AID and the IMO III-Code were identified, including differences in definitions.

None of the stakeholders indicated severe inconsistencies between their national legal system and the two Directives. As a result, no legal efforts at a national level are required to bring the national systems in line with the EU system.

### 6.3.2.5 EU added-value

#### **Flag State Control Directive**

Flag State administrations indicated that the provision of the IMO audit was a value added. However, with the audit becoming mandatory under IMO itself, the added value of the FSD in this respect diminished.

Stakeholders, mainly flag State administrations, indicated that they do not see much added value of the introduction of a certified quality management system. Many administrations already had such a system in place.

The requirement to exchange safety records when a ship is changing flags is not perceived by stakeholders as an added value. Stakeholders indicated that this is already regulated by Regulation 789/2004. Laying down a similar provision in the FSD is a duplication of legal efforts.

According to several stakeholders the main added value of the FSD is the fact that the Flag State Directive brings consistency between the maritime authorities in all EU Member States by providing common base and set common obligations.

### **Accident Investigation Directive**

The obligation to create an independent investigation body is seen by many AIBs as an added value of the Directive. Closely linked to the creation of an independent body, stakeholders also indicate that the AID effectively brings EU legislation and national legislation in line with IMO regulation.

With regard to the Permanent Cooperation Framework stakeholders (mainly AIBs) indicate that it is a valuable initiative as it contributes to the sharing of information amongst AIBs and aid with establishing contacts between the bodies, which benefits the functioning of the AIBs.

Overall, the EMCIP database is seen as a useful tool. However, in its current form filling in the database is perceived as a complicated and time consuming task. Also the fact that only the AIB can add information is seen as a barrier. Nevertheless, stakeholders are optimistic about EMCIP II, which should resolve those issues.

Overall, stakeholders agree that the AID contributed to the professionalization and harmonisation of accident investigation practices. Since the adoption of the AID accident investigation has become more streamlined between the EU Member States, although some countries still have a long way to go. This is perceived as an added value.

### **Conclusion**

Stakeholders do perceive a clear added value of the Accident Investigation Directive as this Directive obliged Member States to set-up an independent investigation body and also harmonisation of accident investigation practices throughout the EU.

The added value of the Flag State Control Directive is less straightforward for stakeholders, especially with the expiration of Article 7 (IMO audit). Nevertheless, the Directive brought consistency between the maritime authorities in all EU Member States by setting common obligations, and by supporting the effective implementation of IMO conventions.