



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR ENERGY AND TRANSPORT

DIRECTORATE G - Maritime transport, Galileo & Intelligent transport
The Director

01 DEC. 2008

Brussels,
TREN/G/FK D(2008) 442447

To Transport Attachés

Dear Sir/ Madam,

Subject: 4th amendment of Directive 96/98/EC on Marine Equipment.

On 30 June 2008, the Commission adopted Directive 2008/67/EC¹ amending for the fourth time the technical annexes of Directive 96/98/EC on Marine Equipment. As in previous amendments, the objective is to update the references to the IMO instruments and the international and European standards – which determine, for each item of equipment falling under the scope of the Directive, the applicable technical requirements and testing standards.

The Commission services have been requested to clarify how, in their view, the 4th amendment will enter into force and how it should be applied by the Member States.

The Commission services wish to stress the fact that this note constitutes the interpretation that these services make of the provisions of the aforementioned directive. Under no circumstances, such an interpretation could be regarded as producing legally binding effects for the Member States or for the Commission, since only the Court of Justice is qualified to interpret community law.

1. AUTOMATIC UPDATE

When amendments to the IMO instruments and international or European standards listed in Annex A.1 enter into force, these amendments apply automatically within the system of the Directive whether or not a reference to them has been explicitly incorporated into the text in accordance with the relevant committee procedure. This includes instruments meant to modify, supplement or replace existing ones: their inclusion in the 4th amendment has the sole objective to keep the published text up-to-date, but does not bring about a new harmonisation as this happened automatically when the said instruments entered into force.

¹ OJ L 171 of 1.7.2008, p. 16

Conversely, new IMO instruments whose objective is not to modify, supplement or replace those listed in Annex A.1 do not apply for the purposes of the Directive until an explicit reference has been incorporated in Annex A.1.

The above is based on the following reasoning:

- According to Article 2 of Directive 96/98/EC, both “international conventions” and “testing standards” are defined by reference to their up-to-date version.
- This reference was introduced by Directive 2002/84/EC which implemented the COSS Regulation (Regulation (EC) 2099/2002). This Regulation contains a particularly broad definition of “international instruments” which includes resolutions, circulars and standards; in particular recitals 8 to 10 leave no doubt that the legislator pursued the objective to render the most recent provisions of international instruments automatically applicable, with the exception of those (whose text is) explicitly incorporated into a Community act.
- Furthermore, a specific conformity checking procedure was established by the said regulation so that specific amendments to the international instruments can be excluded from the scope of the Community maritime legislation if deemed to lower the standard of protection.

Logically, a very significant part of the changes introduced with the 4th amendment are merely reflecting new requirements and standards that had already become applicable by virtue of the automatic update mechanism.

2. ENTRY INTO FORCE AND APPLICATION BY THE MEMBER STATES

Article 3(1) of the amending Directive contains the following standard clause:

" Member States shall adopt and publish, by 21 July 2009 at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from 21 July 2009.

(...)"

Therefore, the date of 21 July is a common date on which application of the amended provisions will happen at the same time for all Member States, i.e. a common date for the entry into force of the respective implementing instruments regardless of when these instruments have been adopted.

3. NEW ITEMS: TRANSITIONAL ARRANGEMENTS

Items newly added to Annex A.1 were previously not subject to any specific requirements under the Directive. In principle, the requirements specified in the 4th amendment for these items should apply as from 21 July 2009. However, Article 2 of the amending Directive contains the following clause:

Where equipment listed as 'new item' under the heading 'item designation' of Annex A.1 or as having been transferred from Annex A.2 to Annex A.1 was manufactured before the date referred to in Article 3(1) in accordance with procedures for type-approval already in force before that date within the territory of a Member State, such equipment may be placed on the market and on board a Community ship during the two years following the said date.

Therefore, until 21 July 2011, both wheelmarked and non-wheelmarked items may be placed on board Community ships, provided that the latter are items newly added to annex A.1 and that they have been appropriately certified under national law. Moreover, as a consequence, the automatic update will not apply to these non-wheelmarked items even if there are changes to the applicable requirements and standards during this transitional period.

4. ITEMS MOVED FROM ANNEX A.1 TO ANNEX A.2

In some cases, items have been moved from Annex A.1 to Annex A.2.

Article 5(2) of Directive 96/98/EC establishes that compliance with the applicable requirements of the international conventions and of the relevant regulations and circulars of the IMO that shall be demonstrated solely in accordance with the relevant testing standards and the conformity-assessment procedures referred to in Annex A1. Therefore, items moved to Annex A.2 cease to be subject to harmonised requirements.

In the absence of harmonised requirements, the general principles of the Treaty apply and the goods concerned may move freely within the Internal Market as long as they have been lawfully placed in the market of at least one Member State, although they do not bear the mark. Thus, no Member State can prohibit or restrict the placing of such goods in its market (or refuse to issue the relevant safety certificates to a ship) based only on the fact that the said goods have been manufactured in accordance with IMO instruments which are no longer, or have not yet been listed in the Directive.

5. GUIDANCE FOR MANUFACTURERS AND NOTIFIED BODIES

The fact that conformity-checking procedures may span a long period must also be taken into account.

Conformity checking, including the resulting certificate, is only a means to an end – which is to attest to the goods' compliance with the applicable requirements. Thus both production and conformity-checking must be planned ahead so as to ensure that the goods are certified to comply with the directive requirements as applicable at the time they are placed on board.

This means that goods manufactured and certified against the old requirements cannot be placed on board after the entry into force of the new requirements even if the certificate has been issued before that date. Conversely, if the goods were manufactured and certified against the old requirements and placed on board before the entry into force of the new requirements, their certificate continues to be valid after that date.

In the case of new constructions, where a considerable time may elapse between the moment the goods are supplied and the moment the ship is delivered, consultation with

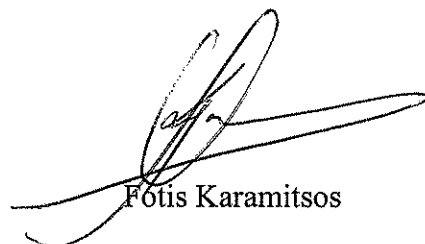
the Administration will be necessary. Although there is no specific rule for this case, Directive 96/98/CE provides an element of guidance in article 3 in conjunction with article 2(1), whereby the directive applies to "new ships" which are defined as those *the keel of which is laid or which is at a similar stage of construction on or after the date of the entry into force of this Directive*. The Commission would thus strongly recommend Member States to use the date when the keel was laid or the date when the ship arrived at a similar stage of construction as the reference date for determining the applicable requirements.

6. SUMMARY

Based on the above considerations, Commission services conclude that:

- (1) For a vast majority of items in Annex A.1, new essential and testing requirements enter(ed) into force automatically even before the application date of the 4th amendment.
- (2) For new items, or items moved from Annex A.2 to Annex A.1, the new requirements apply in all Member States as from 21 July 2009. However, according to article 2 of the amending directive, items manufactured in accordance with national law before that date may be placed on board any new Community ship until 21 July 2011.
- (3) Any other changes made to Annex A.1 in the 4th amendment (e.g. introduction of IMO requirements which are voluntary or have no specific date of entry into force, or which would enter into force after 21 July 2009, or changes to the applicable conformity-checking procedures, etc.) apply in all Member States as from 21 July 2009.
- (4) Items moved from Annex A.1 to Annex A.2 are, as from 21 July 2009, subject to the requirements of national law but should circulate freely in the internal market – thus any restrictions imposed by a Member State for the placing of any of these items on board a ship flying its flag must be justified on reasonable and proportionate safety grounds.

Therefore, Commission services invite the Member States to note these conclusions and to inform both manufacturers and notified bodies accordingly. The Member States are also invited to note the recommendation made under section 5.



Fotis Karamitsos

cc.: Mr W. de Ruiter, EMSA