



EUROPEAN FREE TRADE ASSOCIATION
ASSOCIATION EUROPEENNE DE LIBRE-ECHANGE

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1 Annex

**EEA EFTA COMMENTS ON THE PROPOSAL FOR A DIRECTIVE OF THE
EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE
FUNDAMENTAL PRINCIPLES GOVERNING THE INVESTIGATION OF
ACCIDENTS IN THE MARITIME TRANSPORT SECTOR AND AMENDING
DIRECTIVES 1999/35/EC AND 2002/59/EC (COM(2005) 590).**

Dear Mr Brinkmann,

I have the pleasure of submitting the EEA EFTA Comments on the Proposal for a Directive of the European Parliament and of the Council establishing the fundamental principles governing the investigation of accidents in the Maritime Transport Sector and amending Directives 1999/35/EC and 2002/59/EC (COM(2005) 590).

We look forward to continuing our co-operation in this area.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Hans Peter Walch'. To the left of the signature are the initials 'PP'.

Mr Hans Peter Walch
EFTA Chairman of Subcommittee II

Mr Matthias Brinkmann
Head of Unit C3
DG RELEX
European Commission
B-1049 Brussels

CC: Mr Fotis Karamitsos, Director, Unit G, Logistics, Innovation, Co-modality and
Maritime Transport, DG TREN, European Commission

Enclosure

EUROPEAN ECONOMIC AREA
STANDING COMMITTEE
OF THE EFTA STATES

Brussels, 2 October 2006
Ref. no: 1069874

SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA COMMENTS ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING THE FUNDAMENTAL PRINCIPLES GOVERNING THE INVESTIGATION OF ACCIDENTS IN THE MARITIME TRANSPORT SECTOR AND AMENDING DIRECTIVES 1999/35/EC AND 2002/59/EC (COM(2005) 590).

I EXECUTIVE SUMMARY

The EEA EFTA States welcome the Commission's proposal for a directive establishing fundamental principles for the investigation of accidents in the maritime transport sector. In particular the EEA EFTA States support the principles of independence of such investigations from criminal investigations and the requirement for the functional independence of the investigating body.

The EEA EFTA Member States emphasise the importance of harmonisation of the directive's basic principles and the main principles of the International Maritime Organization (IMO) *Code for the Investigation of Marine Casualties and Incidents, A.849 (20)* (IMO Code) and also with the new IMO Code, *International Standards and Recommended Practices in Marine Casualty and Incident Investigation* (under preparation). It is however not necessary that the directive be in parallel with the new IMO Code in all aspects. In particular, where the new IMO Code is only recommendatory in some parts, the EU regime may establish obligations, and stricter rules may apply in some respects for the EU Member States under the directive.

It is also essential that the directive does not include provisions that conflict with international law, hereunder *United Nations Convention on the Law of the Seas of 10 December 1982* (UNCLOS), in particular its principles concerning the jurisdictional rights of flag States and coastal States.

II Introduction

The establishment of an accident investigation regime raises some important issues, especially:

- which casualties shall be investigated

State's specific jurisdictional powers in accordance with UNCLOS Article 56, including the coastal State's jurisdiction with regard to the protection and preservation of the marine environment. Investigations of a marine accident in the EEZ will as a general rule not be within the coastal State's jurisdictional rights. On this background the EEA EFTA States suggest that the introduction to the directive for example adds a new paragraph:

"Article 92 and 58 of the United Nations Convention on the Law of the Sea 1982 (UNCLOS) establish the exclusive jurisdiction of the flag State on the high seas and in the Exclusive Economic Zone, whereas Article 56 establish the rights, jurisdiction and duties of the coastal State in the exclusive economic zone, including jurisdiction with regard to the protection and preservation of the marine environment."

Other substantially interested States, apart from the flag State and the coastal State, do not have any jurisdiction under UNCLOS with regard to investigations of the ship.

IV Article 5, paragraph 1

In Article 5 the flag State, the coastal State and other substantially interested States are all obliged to "ensure that an investigation is carried out by the investigative body referred to in Article 8".

This obligation is further developed in Article 5 paragraph 4 and Article 8. Article 5 paragraph 4 establishes the principle that the investigations shall follow the methodology etc. of Regulation 1406/2002. Article 8 states that Member States *shall require* that the investigators be authorised in specific ways, such as having free access to the ship, to ensure an immediate listing of evidence, to require examination or analysis of such items and to have free access to the VDR etc.

Article 5 paragraph 1 raises certain problems, both in relation to the new IMO Code and the UNCLOS.

Both the present IMO Code and the draft new code are based on the principle that the obligation to investigate applies only to the flag State, and furthermore, that the coastal State has a right to investigate casualties occurring within that State's territorial sea, but not an obligation.

Furthermore, the system outlined in Article 5 paragraph 1 is not compatible with the regulation of jurisdiction in the UNCLOS. For the coastal State, the problem will arise primarily if it is intended that the proposed directive Article 2 paragraph 1 letter b, referring to "areas over which Member States are entitled to exercise jurisdiction", shall include the exclusive economic zone (EEZ). Most of the measures mentioned in Article 8 of the proposed directive fall outside the coastal State's jurisdictional rights in the EEZ under UNCLOS. The coastal State may therefore not be able to carry out such investigations in the EEZ as it may be obliged to do under Article 8.

The way the proposed directive is presently drafted, it does not seem to leave room for States to rely on a third country flag State's investigations, even where these investigations fully comply with the IMO Code. On the contrary, Article 12 paragraph 3 of the proposed directive seems to indicate the opposite. Furthermore, Article 5 paragraph 4 of the proposed directive states that safety investigations must follow the EU methodology pursuant to Regulation 1406/2002. Obviously, third country flag States will apply the IMO rules, and not the EU regulation.

The EEA EFTA States would like to raise the question whether the resources of the investigation board of the coastal State can be put to better use than to carry out additional investigations also when a satisfactory investigation has been carried out by a third party flag State in accordance with the IMO Code. An obligation to carry out double investigations where a new investigation cannot be expected to give much added value with regard to safety issues and experience may not be the best use of resources. It may be useful to refer in article 5 paragraph 4 to third party safety investigations that satisfy certain requirements.

VI Article 7 number 1 second paragraph

Article 7 number 1 second paragraph requires Member States to refrain from conducting parallel marine safety investigations into the same casualty. In the EEA EFTA States' view this requirement is not in accordance with the principles of the new IMO Code, which aims at regulating the coordination and cooperation between the States. Furthermore, the proposed directive is not in accordance with the rights of the coastal State under UNCLOS Article 2 to conduct their own investigation where the casualty occurs in the territorial sea. A prohibition against parallel investigation may create difficulties in this respect.

The EEA EFTA States would suggest that the directive should establish procedures promoting cooperation and coordination in such cases when a casualty involves the interests of more than one State.

The EEA EFTA States suggest that Article 7 no. 1 second paragraph be amended as follows:

"A Member State performing an investigation in accordance with this directive should give other interested Member States right to participate in the investigations.

Where more than one Member State undertakes safety investigations, they should coordinate their investigation operations."

previous version of the text for the new code. It is not yet clear how this will be solved in the new code.)

Therefore, at this point it would be recommendable to await the final text of the new code before finalising the directive.
