

EUROPEAN COMMISSION GIVES IHM ENFORCEMENT GUIDANCE

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On 30 June 2020, we published an article discussing the additional difficulties the Covid-19 pandemic presented for shipowners in meeting the 31 December 2020 deadline for IHM compliance under the EU Ship Recycling Regulation (“EUSRR”).

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We referred to anecdotal evidence suggesting there are approximately 35,000 vessels that will be required to comply with the EUSRR by 31 December 2020, a third of which had not yet begun the work required to prepare and have certified an IHM. As a result, there has been substantial industry lobbying of the EU Commission for an extension to the deadline for compliance to allow for the unprecedented delays caused by Covid-19.

On 20 October 2020, the EU Commission (the “Commission”) issued a notice¹ setting out guidelines on the enforcement of obligations under the EUSRR relating to the IHM requirement for vessels operating in EU waters (the “Guidelines”). These propose a “harmonised approach temporarily for a limited period of six months after the entry into application of the IHM-related obligations for existing EU-flagged vessels and non-EU-flagged vessels calling at EU ports (i.e. until 30 June 2021)”.

EU COMMISSION RESPONSE

Acknowledging the challenges presented by the Covid-19 pandemic, the Guidelines state that “...it may be necessary to take into account the exceptional circumstances linked to the Covid-19 crisis in the enforcement of those obligations by Member States, where those circumstances create situations where the compliance with these obligations is temporarily not possible, or excessively difficult...” while reinforcing the “basic principle” that primary responsibility in relation to compliance with the IHM requirements of the EUSRR lies with the shipowner and monitoring compliance with these legal obligations is the responsibility of the EU Port State authorities.

Member States are asked to “carefully assess” the specific circumstances of each shipowner, taking account of the length of time between the EUSRR coming into force and the IHM deadline, and the extent to which that seven-year period was utilised by the shipowner to prepare to comply with those obligations. The obligation is thus squarely placed on shipowners to ensure that they have done everything possible to comply with the EUSRR prior to the 31 December 2020 deadline.

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The EU Commission Guidelines set out two distinct scenarios where compliance with the EUSRR may not be possible.

1. Vessels without a valid IHM and/or accompanying certificate

a) The owner/master is required to provide evidence that all possible measures were taken to undertake the work and get the certification required, which will be considered by a Port State Control inspector and determined on a case-by-case basis as to whether that evidence is acceptable;

b) In relation to IHMs, if the evidence is accepted, the inspector will specify that the documents are to be completed and approved within four months after the inspection; and

c) In relation to a Ready for Recycling Certification, as this is only valid for three months it should be completed and approved at the earliest possible opportunity prior to the vessel undertaking its last voyage.

2. Vessels with a semi-completed IHM with an associated approved Inventory Certificate or Ready for Recycling Certificate (for EU-flagged ships) or the Statement of Compliance (for non-EU-Flagged ships), that does not contain on-board (either targeted or random) sampling

a) Where a certificate is based on an IHM without the on-board sampling element, the IHM should in principle not be acceptable as it is not complete, however, a remote survey/sampling could be accepted if there is evidence that the Flag State has agreed to this. The owner/master will need to ensure all plans/arrangements indicating when it will be feasible for qualified samplers to complete the IHM are kept onboard which will be considered by a Port State Control inspector and determined, on a case-by-case basis, as to whether that evidence is acceptable;

b) In relation to IHMs, if the evidence is accepted, the inspector will specify that the IHM should be completed and approved within four months after the inspection; and

c) In relation to a Ready for Recycling Certification, the owner/master of the vessel will be warned that it is required to complete the IHM and obtain an updated Ready for Recycling Certificate before entering the ship recycling facility.

CONCLUSION

The Commission has acknowledged the difficulties arising out of the Covid-19 pandemic in endorsing a six-month harmonised approach for failure to comply with the IHM requirement of the EUSRR but, perhaps in view of the significant time that shipowners had to comply before the pandemic, has stopped short of offering the sorts of formal deferrals and derogations seen in other sectors. It is clear that the Commission does not want this extension to apply automatically, particularly where it is obvious that little, if any, preparation had been done in the period between the EUSRR coming into force and the IHM compliance deadline.

As such, the Guidelines clearly place the onus on shipowners to prove they have done everything reasonably practicable to comply. It should also be noted that the Guidelines are non-binding, and that the extent to which a shipowner has tried to meet its obligations is likely to remain a subjective judgment for the individual Port State Control.

The Guidelines go some way to addressing the difficulties in compliance caused by the Covid-19 pandemic, but there remains a degree of risk for ship owners, and it would be prudent for those that are not going to meet the 31 December deadline to try and mitigate this risk by preparing documents which set out what steps have been taken to comply with the EUSRR and, where they have not, why they have been unable to do so. WFW would be very happy to assist with this. It is equally important that shipowners remember that the Guidelines are not an exemption from compliance, but a pause in enforcement, so they should continue to take all steps to prepare their IHMs as soon as reasonably practicable to avoid enforcement in the future.

Rachael Davidson, a former senior associate in our London office, also contributed to this article.

[1] EU Commission Notice: *“Guidelines on the enforcement of obligations under the EU Ship Recycling Regulation relating to the Inventory of Hazardous Materials of vessels operating in European waters”* (2020/C 349/01)

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