



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 11.10.2006  
COM(2006) 588 final

**COMMISSION WORKING DOCUMENT**

**on the control of recognised organisations by the Commission and on the impact of the  
civil liability regime in accordance with Directive 94/57/EC**

## COMMISSION WORKING DOCUMENT

### on the control of recognised organisations by the Commission and on the impact of the civil liability regime in accordance with Directive 94/57/EC

(Text with EEA relevance)

#### 1. INTRODUCTION

The reform, within the « Erika I »<sup>1</sup> package, of the Community legal framework governing the activity of recognised organisations brought about substantial changes to address the concern, shared by the European Parliament, the Council and the Commission, that the performance of recognised organisations does not always meet the necessary standards.

Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations<sup>2</sup> (hereinafter “the Directive”) was thus beefed up to make for greater control of the activities of these private organisations which play a crucial role in maritime safety and pollution prevention. The new rules introduced in particular:

- Stringent sanctions: suspension of Community approval for a year, which can lead to complete withdrawal of approval if the deficiencies resulting in suspension persist;
- The requirement of good safety and pollution prevention control performance before Community approval is granted;
- Stricter independence and quality criteria, as well as greater transparency in the communication of information on vessels in that class.
- Specific minimum levels of civil liability for recognised organisations.

The present report is intended to:

- (1) Give an account of the control of recognized organizations by the Commission, including the encouraging results achieved in addressing situations of potential risk to maritime safety and the marine environment.
- (2) Examine the economic impact of the new liability regime in accordance with article 6(5).

The Commission continues to verify the application of the Directive within the Member States beyond the issues examined in this document and will submit a separate report in accordance with article 16(4) at a later stage.

---

<sup>1</sup> COM(2000) 142 final

<sup>2</sup> OJ L 319, 12.12.1994, p. 20. Directive as last amended by Directive 2002/84/CE of the European Parliament and of the Council (OJ L 324, 29/11/2002 p. 53).

## 2. RECOGNIZED ORGANIZATIONS

Among the approximately sixty classification societies recognized by the Members of the International Maritime Organization (IMO), only twelve have received Community recognition in accordance with the Directive. They are the following:

- American Bureau of Shipping
- Bureau Veritas
- China Recognised organisation
- Det Norske Veritas
- Germanischer Lloyd
- Korean Register
- Lloyd's Register of Shipping
- Nippon Kaiji Kyokai
- Registrecognised organisation Italiano Navale (RINA)
- Russia Maritime Register of Shipping
- Hellenic Register of Shipping
- Registro Internacional Naval (RINAVE)

The recognition of RINAVE, originally granted by the Commission in 2000<sup>3</sup> in accordance with article 4(3) [now 4(2)], was extended on 18 April 2005 for a period of three years and with effects limited to Portugal<sup>4</sup> once the Commission verified that the organization continues to meet the directive criteria as well as RINAVE's satisfactory performance records.

The recognition of the Hellenic Register of Shipping, originally granted by the Commission in 2001<sup>5</sup> in accordance with article 4(3) [now 4(2)], was extended on 2 August 2005 for a period of three years with effects limited to Greece and Cyprus<sup>6</sup> once a) the Commission verified that the organization continues to meet the directive criteria and b) the Hellenic Register of Shipping committed itself to the objective of bringing its performance records into line with the average of the recognised organisations. The effects of this recognition were subsequently extended to Malta<sup>7</sup> on 22 May 2006.

The Polish authorities lodged in March 2004 a formal request for the limited recognition of the Polish Register of Shipping in accordance with article 4(2). Malta, Cyprus, Lithuania, the Czech Republic and the Slovak Republic later joined the Polish request. After nearly two years of intensive corrective work following the Commission's assessment, this organisation now meets all directive criteria and requirements. At the time of drafting this report, the relevant draft decision granting limited Community recognition to the Polish Register of Shipping is in preparation.

---

<sup>3</sup> Commission Decision 2000/481/EC, OJ L 193, 29.7.2000, p.91

<sup>4</sup> Commission Decision 2005/311/EC, OJ L 99, 19.4.2005, p. 15

<sup>5</sup> Commission Decision 2001/890/EC, OJ L 329, 14.12.2001, p.72

<sup>6</sup> Commission Decision 2005/623/EC, OJ L 219, 24.8.2005, p. 43

<sup>7</sup> Commission Decision 2006/382/EC, OJ L 151, 6.6.2006, p. 31

### 3. ASSESSMENT OF RECOGNIZED ORGANIZATIONS

#### 3.1. General overview

According to article 4(5), *“the organisations which on 22 January 2002 are already recognised on the basis of this Directive shall continue to be recognised. Nevertheless, those organisations shall be required to comply with the new provisions laid down in this Directive and their compliance shall be assessed during the first assessments referred to in Article 11”*

According to article 11(3), *“all the recognised organisations shall be assessed by the Commission, together with the Member State which submitted the relevant request for recognition, on a regular basis and at least every two years to verify that they fulfil the criteria of the Annex”*.

Since the entry into force of the amended directive<sup>8</sup>, the Commission has assessed all recognized organizations at least once and the objective of two-yearly assessments has been achieved in 2005.

Priority has been given to verifying compliance with the amending directive. The Commission has carried out extensive assessments based on the analysis of both systems and specific casework. The assessments have included visits to both head office and one or several regional offices for each organization assessed. In a number of cases, the assessment has also included visits to shipyards and ships under construction. In this respect, the Commission conducted in February 2005 a special round of assessments specifically focused on new buildings, in order to examine the recognized organizations' response to the exceptional strain that this market is currently undergoing.

The Member States concerned have regularly taken part in these assessments, which has greatly added to the usefulness of the exercise. Most assessments have been jointly planned in preparatory meetings with the experts appointed by the participating Member State; during the assessments, Member States have been able to follow-up on specific flag state issues and have contributed the flag state views to the exercise; finally, the assessors have discussed their findings with the attending Member State expert before reporting them to the Commission – who has kept the participating administration informed of its conclusions and follow-up.

In the assessment of recognized organizations, the Commission has been assisted by the European Maritime Safety Agency (EMSA) since February 2004.

- The expertise provided by the Agency has allowed the Commission to increase the frequency of the assessments and enlarge their scope, which has proven key in meeting the above mentioned objectives.
- EMSA has formed a team of inspectors with the appropriate combination of skills in the different aspects covered by the directive, and developed a specific fieldwork methodology. This has resulted in a more thorough preparation of the assessments and has greatly increased the Commission's ability to spot areas of weakness in the recognized organizations' systems and procedures where action is needed.

---

<sup>8</sup> 22 January 2002

## 3.2. Main findings of the assessments

### 3.2.1. In general

The assessments carried out so far show a broad degree of compliance among recognized organizations, with the exception of the findings highlighted in the following subsections. The Commission nevertheless considers that the predominant trend is one of formal compliance, with well developed systems and procedures, but all too often to the detriment of pro-active control and effective management of risks.

### 3.2.2. Respect of class rules and statutory requirements

The Commission has examined a considerable number of ship files, either by random sampling and visits to shipyards or following casualties and port state control detentions.

This examination has yielded a sometimes rather bleak picture, with instances where important errors had been made by the surveyors or certain inspections or tests had simply been omitted, while the subsequent internal controls sometimes failed to detect obvious occurrences or provide appropriate follow-up:

- There seems to be a recurrent pattern whereby the most significant occurrences seem to affect the organizations with the worst relative ratios of available resources<sup>9</sup>.
- Thus, the breach of class and statutory requirements by one organization could be traced to the latitude left to the surveyors by the organization's rules and procedures<sup>10</sup> in a context of heavy strain on its resources<sup>11</sup>. A further investigation carried out by the organization at the behest of the Commission identified several other locations where class and statutory requirements were not correctly applied.
- In another case, upon examination of the file of a ship involved in a casualty it was found that serious mistakes made by the surveyor in applying the organization's rules, albeit clearly noticeable from the said file, passed undetected when his work was subsequently reviewed before submission to head office.
- This organization monitored its surveyors correctly and adopted measures in case of low performance, including de-certification. However, it did not go on to examine the ships these surveyors had been inspecting in order to identify and address the potential risks. Unfortunately, a ship that had been inspected by one de-certified surveyor sustained heavy damage shortly afterwards, and examination of the ship file raises serious doubts as to the sufficiency of the survey work on the damaged areas.
- Instances have been found where specific inspections required by the international conventions (e.g. steering gear test with a fully laden ship) seem to be ignored by several recognized organizations.

---

<sup>9</sup> Cf. section 3.2.4

<sup>10</sup> Cf. section 3.2.3

<sup>11</sup> Cf. section 3.2.4

### 3.2.3. “Flexibility clauses”

Assessment of the shipyards’ quality systems by the recognized organizations seems to play an increasingly important role in the certification process.

The Commission fully supports such assessment as a fundamental tool to appropriately supplement the inspection work. However, this is not without pitfalls:

- As mentioned above, it was found that one recognized organization’s rules allowed surveyors to omit inspections based on their assessment of the shipyard quality system (the “flexibility clause”), without control by the management.
- Beyond the need for appropriate management control, statutory inspections should all be carried out without exception. In the referred case, the organization’s procedures and checklists did not distinguish clearly between statutory and class inspections, with the result that both were omitted.
- Even as regards class inspections, one should seriously question the limits of flexibility clauses: recognized organizations are expected to certify ships, not shipyards, and must always retain sufficient direct knowledge to do so.
- Furthermore the Commission is wary of the possibility, voiced by the press, that recognized organizations might be “assisting” shipyards in setting up their quality systems – either directly or by means of subsidiaries and joint ventures. This, whether or not in conjunction with flexibility clauses, might lead to conflicts of interests.

Beyond the measures taken in the individual cases, the Commission intends to make an in-depth assessment of the overall situation and proceed accordingly.

### 3.2.4. Resources

In a number of cases, the Commission has identified a lack of sufficient resources to cope with the actual organization’s workload, in particular as regards the current intensive peak of new building.

- The Commission has basically used two indicators to measure the overall appropriateness of resources, namely: the ratio of ships to surveyor<sup>12</sup>, which provides an overall measurement of the organization’s resources; and the ratio of new constructions to surveyor<sup>13</sup>, aimed at measuring the additional strain on the organization’s resources due to the more demanding inspection and certification activity in connection with ship construction. These ratios provide very meaningful indications, which nevertheless need to be considered in light of other factors such as the composition and age of the fleets. The Commission has also examined whether the resources are sufficient at specific places of work. The

---

<sup>12</sup> Number of directive-relevant ships classed by a recognized organization divided by the number of exclusive surveyors.

<sup>13</sup> Number of directive-relevant ships under construction to the class of a recognized organization divided by the number of exclusive surveyors.

results obtained have then been used as a tool to gauge the material findings of the assessments.

- In assessing the work carried out by one recognized organization at a major shipyard, the Commission could directly identify a clear, sustained imbalance between the available work force (one exclusive surveyor, occasionally aided by a second surveyor) and the number of new constructions to be supervised (four at any given time over several months). This resulted in several breaches to both class and statutory requirements.
- In another case, the Commission detected an abusive recourse to external personnel to assist a recognized organization's surveyors at major new building spots. Such external personnel was found to carry out inspections that can be considered a core activity during new building and should normally be carried out by the organisation's exclusive surveyors.
- As was pointed out in section 3.2.2, a correlation seems to emerge between the most significant material findings and the highest measurements of the above mentioned indicators.

The causes of this problem are not entirely clear, though it might stem from either sheer competition, lack of qualified personnel and/or weakness of the recognized organizations versus the shipyards - against the background of soaring demand and consequently strained production conditions. In any event, the Commission is particularly concerned about the potential impact of this problem on ship safety in the medium and long term, and has taken the necessary measures with the active cooperation of the organizations concerned.

#### 3.2.5. *Quality policy and system*

Recognized organizations have in general put in place quite sophisticated quality systems, with detailed and exhaustively documented procedures. However, the Commission assessments have shown a nearly systematic failure to either define significant key performance indicators, or, more commonly, pull them together in a meaningful system – capable of helping the management assess the organisation's performance and take a pro-active, prevention-oriented stance.

- In general, the Commission's impression is that this is a matter where some time of reflection and trial-and-error by the recognized organizations will inevitably be needed, but should normally be dealt with correctly by all of them in the medium term.

#### 3.2.6. *Independence*

This is doubtless the criterion of most difficult assessment. This is largely due to the very diverse status of recognized organisations: some of them are foundations or similar entities and one is fully owned by a foundation, while others are not-for profit corporations or similar entities, and the rest are joint stock companies.

The Commission has sought to identify the organs and staff actually controlling the business and affairs of the organisation, and to achieve a clear situation where the

categories of interests listed in the Annex (the “restricted categories”)<sup>14</sup> would not be in a position to exercise a determining influence on them. For joint stock companies, the ownership of the shares has equally been taken into account regardless of their corporate structure.

- The analysis has thus sometimes required examination of bodies which, albeit not concerned with the company administration, had a say on decisions concerning rules, acceptance/suspension/withdrawal of class and delivery of statutory certificates – such as classification and technical committees.
- In general, recognized organizations have made significant efforts to come into line with the directive requirements.
- However, in one case, a recognized organization has been required to change the composition of its board of directors in order to ensure full compliance with the Directive requirements.

Concerning surveyor’s independence, the situation is in general satisfactory and all assessed organisations have introduced appropriate protective clauses in their code of ethics, terms of employment, etc.

- Nevertheless, most of these clauses required adjustment to reflect the exact terms of the directive relative to identity with, and personal, business or family links with, restricted categories.
- In general, the Commission has recommended recognized organizations to implement a system whereby the situation of their surveyors could be verified before assigning jobs.

### 3.2.7. *Other directive requirements*

- (1) In general, the exclusion of non-exclusive surveyors from statutory work seems well established save for some isolated instances. While some recognized organizations have ceased to employ non-exclusive surveyors, others still keep them in rather high numbers. The Commission pays particular attention to verifying that non-exclusive surveyors receive appropriate training and monitoring; but in any case, one should seriously question whether this anomalous situation, whereby surveyors excluded from statutory tasks can however perform class inspections, should be allowed to continue.
- (2) There is a prevailing trend for recognized organizations to move towards a more de-centralised structure. However, certain shortcomings suggest that the recognized organizations taking this approach need to put in place additional checks and balances to cope with the new risks generated by de-centralisation (in particular, greater exposure to pressure from operational needs and clients’ requirements).

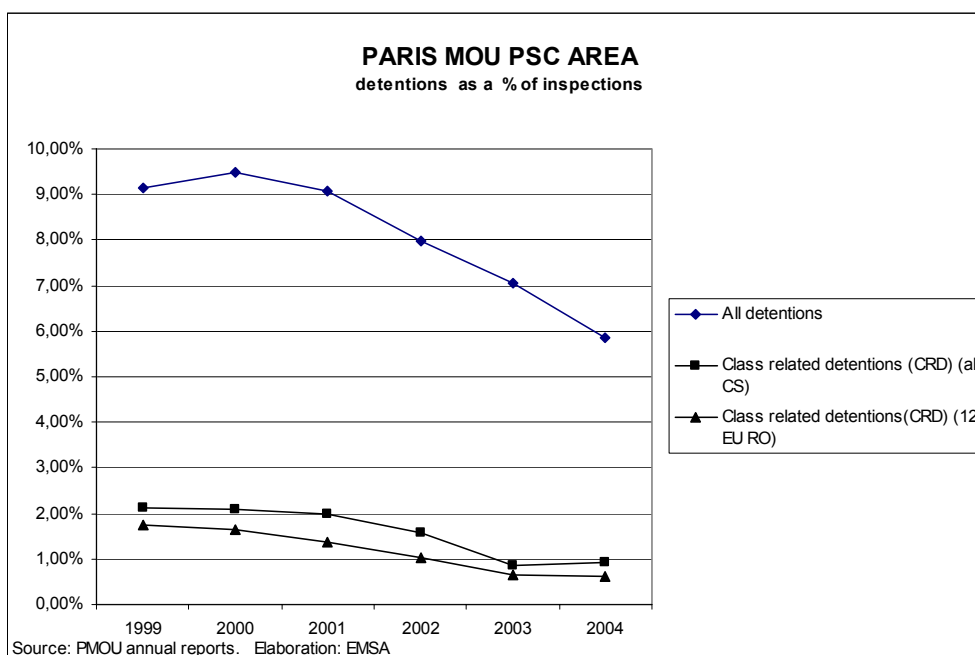
---

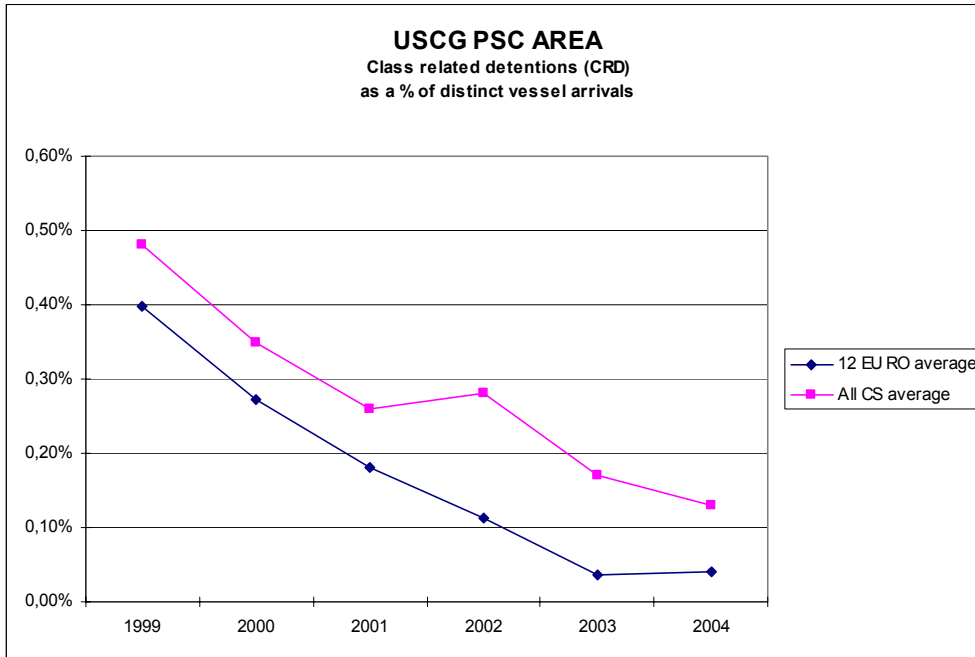
<sup>14</sup> Shipowners or shipbuilders, or others engaged commercially in the manufacture, equipping, repair or operation of ships

- (3) Thus, in the most representative case, de-centralisation of one organization had resulted in regional managers acquiring de facto extensive control as to the assignment of jobs, training and monitoring of surveyors. This was supported by a comprehensive database providing the regional managers with all the relevant information as to surveyor's status, qualifications, etc., while the head office exercised its control basically by means of two-yearly audits. Nevertheless, there followed numerous occurrences of assignment of work to surveyors without the necessary status or qualifications. The case is currently under consideration.
- (4) On the whole, qualifications and training seem to be at present well dealt with by all recognized organizations. The Commission however remains attentive to the still rather frequent instances of overdue refresher training.

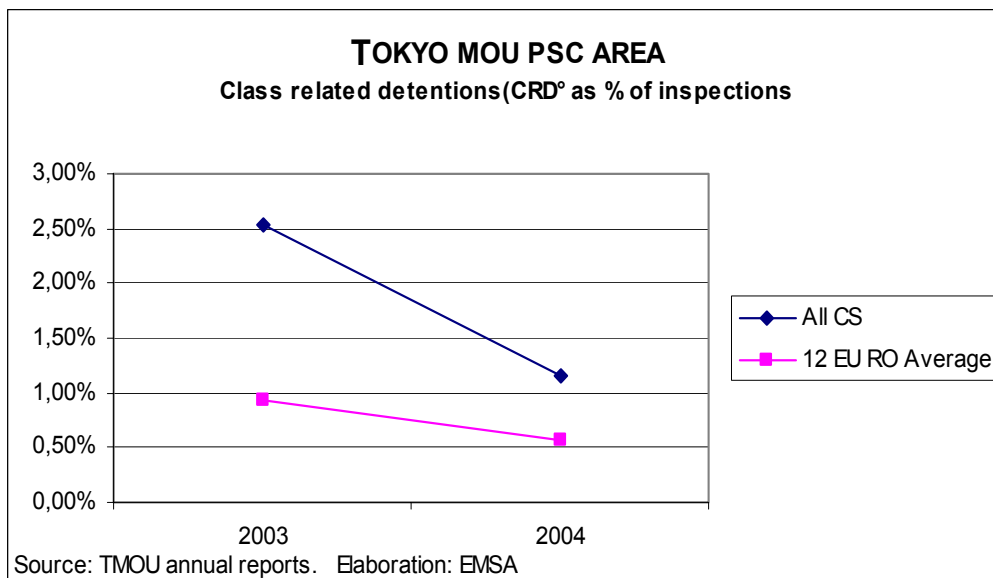
### 3.3. Recognized organizations' performance

Measured in terms of yearly rate of class-related detentions in the Paris MoU, in the Tokyo MoU and by the US Coast Guard, the performance of the twelve Community recognized organizations has improved spectacularly over the past years - as can be seen from the following tables:





Source: USCG annual reports. Elaboration: EMSA



Source: TMOU annual reports. Elaboration: EMSA

The Commission warmly welcomes this improvement, which greatly mitigates the somewhat unsettling feeling given by the assessments carried out so far.

A more sophisticated system to measure the performance of recognized organizations is currently in preparation. The new system will include both yearly and multi-annual detention rates (measured in terms of statistical significance) and take into account other factors such as casualties and the flag composition of the respective fleets.

### 3.4. Measures taken by the Commission

In addressing the shortcomings identified, the Commission has given absolute priority to identifying and removing any potential threats to safety.

In general recognized organizations have cooperated readily and have taken action to amend their rules and procedures, as well as their quality systems, whenever they have been found not to conform to the directive requirements and/or not to have been applied correctly.

Nevertheless, in a number of grave cases, the Commission required the organizations concerned to go one step further and ensure that:

- (1) The potential consequences of any shortcomings are known as precisely as necessary:
  - Comprehensive risk assessments in connection with the systemic failures detected have thus been required. In one case, this risk assessment encompassed the entire organization and up to 1500 ships whose construction had been supervised over the recent years.
- (2) Ships identified as presenting a potential risk are adequately dealt with:
  - Thus several ship re-inspection plans have been required to verify whether the shortcomings identified in the assessments resulted in actual survey errors. At the time of drafting this report, seven ships have been re-inspected and two other are due for immediate re-inspection while more should follow as a result of the risk assessments in progress.
- (3) Rules and statutory requirements, whether existing or newly adopted, are correctly applied in future:
  - Comprehensive training plans have been required, some encompassing the entire organization.
- (4) The organization has sufficient resources to carry out its tasks:
  - Both one-off and multi-annual recruitment plans have thus been required. In one case this represents an increase of more than 10% in the organization's surveyor workforce.
- (5) The independence of the organization is fully guaranteed:
  - As mentioned above, one organization has been required to change the composition of its board of directors in order to achieve a safe majority of non-restricted categories.

Some of these actions are still in progress, but the Commission is convinced that they have brought about an entirely new, pro-active way of dealing with the weaknesses of recognized organizations. Some of them come at a very high cost for the organizations concerned, which proves both their commitment to safety and the added value of the Community action in the field – whose beneficial effects extend well beyond the European fleet.

### **3.5. Conclusion**

The European Commission considers it as a priority for the Community-recognised organizations to ensure at any time the highest quality of their work. One must always bear in mind that every error counts and might one day have disastrous consequences.

From this point of view, the Commission's findings show that much still needs to be done to achieve an acceptable level of risk. The Commission believes that the problem does not lie in either the systems themselves or in the current professional standards of recognized organizations: the main improvement should be in the control environment of these organizations as a whole – which is not yet matching the actual risks involved in their activities.

Over the recent years, unprecedented levels of new building activity have placed enormous strain on the industry, which is taken to the very limits of its capacity. It is important to ensure that recognized organizations can respond adequately so that no mortgage is placed on safety in the long term.

The Commission will not hesitate to withdraw the recognition of one or several recognized organizations if necessary, but not without first attempting every means to ensure that the ships they certify are and continue to be safe. This is what the Commission has done, with encouraging results – also thanks to the willing cooperation of the Member States and the organizations concerned. The Commission will continue along this firm and pro-active line, with the continued technical assistance of EMSA, in the conviction that the measures taken will effectively contribute to making our seas safer.

The above findings have been fully taken into account in the Commission's proposal for the recast of Directive 94/57/EC within the framework of the 3<sup>rd</sup> "Maritime Safety" package. Thus:

- A strengthened, more transparent and independent quality system certification system is fundamental for a preventive policy placing more emphasis on adequate risk management by recognised organisations.
- The introduction of financial sanctions for failure to comply with the Directive criteria (including both lump sum fines and periodic penalty payments) not only adds to the proportionality of the system, but will greatly enhance the effectiveness of the Community action in the field and contribute to the objective of correcting shortcomings at the source.
- The lessons learnt from the assessments carried out so far have allowed the Commission to propose a number of adjustments to the Directive criteria in order to improve both their usefulness and legibility – e.g. as regards the sufficiency of resources.

#### **4. CIVIL LIABILITY**

The Commission, assisted by EMSA, has examined the economic impact of the implementation of the civil liability regime contained in article 6.2(b) of the Directive. The results of the corresponding study are summarised in the annex.

In examining this topic it is important to bear in mind that the Directive governs only the redress a Member State administration may claim from a recognised organisation in the event that the former is held liable as a result of the fault of the latter, judicially or in arbitration.

##### **4.1. Implementation by the Member States**

The above mentioned study has demonstrated that:

- (1) The case of unlimited liability for gross negligence as regulated in Article 6.2(b)(i) is accepted and not disputed.
- (2) With respect to negligence cases in Article 6.2(b)(ii) and (iii), what was intended to be minimum liability levels (floors) have generally become maximum liability levels (ceilings) as a majority of Member States have set limits at, or slightly higher than, the amounts mentioned in article 6.2(b)(ii) and (iii). This is however subject to the important exception that five Member States have used the possibility to negotiate unlimited liability also for these cases.
- (3) No known case has so far triggered the application of the mechanism in article 6.2(b), and there is therefore no case law which could have provided guidance.

#### **4.2. Recognised organisations**

Nothing indicates that the financial stability of recognised organisations has been affected by the introduction of Art.6.2(b).

When consulted, the recognised organisations have in general:

- (1) Insisted on the impossibility to “insure unlimited liability”. This is obvious- insurance cover will always have a limit; but one should expect this coverage to be commensurate with the actual risks incurred. It is important to note that the study has shown that recognised organisations have not increased their insurance coverage as a result of the entry into force of the current civil liability regime under the directive – although this insurance is in general considered sufficient for the Directive thresholds. In their agreements with authorising Member States, some recognised organisations have accepted unlimited liability also in case of negligence. It has been contended that this would work as a barrier to the market as those organisations who are not ready to accept such terms would not be able to operate in the market of the Member States who so require. However,
  - It is up to each party in a negotiation to accept the conditions of the agreement, including unlimited liability, which they are willing to work under. It would also appear that each party in such a negotiation would be of equal strength.
  - The argument that this might be used in a discriminatory manner is not supported by the research as all Member States have agreements with several recognised organisations depending on the size and nature of their flagged fleet.
- (2) Expressed their fear that the Directive may create new rights of recovery. The wording of Article 6 and in particular the words: “...*if liability arising out of any incident is finally and definitely imposed on the administration by a court of law...the administration shall be entitled to financial compensation from the recognised organisation...*” is feared to raise an expectation that third parties now possess a new statutory right to recover financial compensation for their losses from the relevant national maritime administration, and, indirectly, from the relevant recognised organisation via the indemnity provisions in Article 6.2 (b).
  - However, this is clearly not the case: nothing in the directive modifies the liability regime of national administrations.

- Recognised organisations have nevertheless reported significant growth of insurance and litigation costs after the introduction of these provisions. This does not seem to have had a noticeable impact on the fees charged.
  - In order to clarify the situation the recognised organisations suggest that a provision in the sense that Art.6.2(b) does not create new rights of recovery is inserted to alleviate any increasing litigation. It would appear that some Member States in their agreements with recognised organisations have accepted such clauses (e.g. Denmark, Latvia, the Netherlands). These clauses will be verified in order to ensure that they do not have the opposite effect, i.e. to hinder the administrations' capacity to obtain redress in accordance with the Directive.
- (3) Suggested that the limits of Art.6.2(b)(ii) and (iii) should be modified to be maximum limits of liability. Under this scenario the recognised organisations have indicated that they would be willing to accept higher limits of liability.

### 4.3. Conclusion

The Commission notes that, while all Member States have communicated the relevant implementing measures, the research carried out by the University of Southampton<sup>15</sup> suggests that some elements in the Directive may not have been correctly transposed into all national legal systems. The necessary verifications will be made as part of the Commission's conformity assessment programme in this field<sup>16</sup>.

The Commission sees no reason to modify the *status quo* given the absence of any evidence of disruption or impact on the financial stability (equilibrium) of the recognised organisations. In particular, the Commission does not consider it necessary to insert in the Directive a new provision to the effect that Art.6.2(b) does not create new rights of recovery, as recognised organisations demand<sup>17</sup>.

Moreover, the current liability provisions have only been applicable since 22 July 2003, and it is perhaps too early to draw any firm conclusions on the need for their revision – notably in the absence of any relevant court rulings. The Commission will continue to monitor the application of article 6.2.b and, if necessary, report back to the legislator.

---

<sup>15</sup> Cf. table 1 in the Annex

<sup>16</sup> At the time of drafting this report, an infringement procedure is in progress against the Slovak Republic albeit not concerning the liability provisions in the Directive (breach of obligations under article 3)

<sup>17</sup> As a matter of course, the Commission does nevertheless verify in its assessment of each recognised organisations that their insurance coverage is sufficient

**ANNEX : PREPARATORY STUDY REGARDING THE LIABILITY REGIME  
PROVIDED FOR IN ARTICLE 6.2(b) OF DIRECTIVE 94/57/EC, AS AMENDED**

**1. BACKGROUND**

Directive 94/57/EC as amended states in article 6.5 that ‘The Commission shall, not later than 22 July 2006, submit a report to the European Parliament and to the Council evaluating the economic impact of the Liability regime provided for in this Article [article 6.2(b)] on the parties concerned and, more particularly, its consequences for the financial equilibrium of recognized organizations.

The report shall be drawn up in cooperation with the competent authorities of the member States and the parties concerned, in particular recognized organizations/classification societies. The Commission shall, if necessary in the light of this evaluation, submit a proposal amending this Directive with more specific reference to the principles of liability and the maximum liabilities.”

The Commission requested EMSA in September 2005 to carry out a preparatory study in this respect as input for the Commission report. Following a tendering procedure, EMSA awarded the Institute of Maritime Law, University of Southampton a contract to carry out research. This resulted in a report drafted by an independent group of researchers of the Institute of Maritime Law of the University of Southampton in respect of a “Study on evaluating the economic impact of the liability regime on parties concerned and consequences for the financial equilibrium of Recognised organisations – Directive 94/57 article 6.5” dated 15 February 2006.

The overall objective of the study is to illustrate the effects of the implementation of the liability provisions contained in article 6(2)(b) of Directive 94/57/EC (as amended by Directive 2001/105/EC).

The research is specifically focused on recognised organisations authorised in the 25 Member States of the European Union, Norway and Iceland, but some research on other extra-European shipping countries was required in order to provide a background against which commercial advantages or disadvantages of the implementation of the Directive may be evaluated.

The study provides an overview of the monetary limits of liability that have been agreed between on the one hand the 25 EU Member States, Norway and Iceland and on the other hand recognised organisations, in accordance with art. 6(2)(b)(i), (ii) and (iii). Where the national law of a Country provides for unlimited liability, the possibility that the national law of the country concerned offers alternative forms of protection has been explored.

The research and data in the Southampton study has been used as background and input to the present report.

**2. BACKGROUND TO THE LIABILITY PROVISIONS IN ARTICLE 6.2(B)**

The proposal for changes of Directive 94/57/EC, resulting in amendments to the same by Directive 2001/105/EC<sup>18</sup>, where one of the central proposals following the ERIKA accident in

---

<sup>18</sup> OJ L 324, 29.11.2002, p. 53

December 1999, and formed part of the so called ERIKA I package. One of the central issues for discussion in the Commissions proposal was the introduction of the liability provisions in Article 6. The Commission proposal were based on the work of the so called Gothenburg group which comprised some of the EU flag administrations and some of the international recognised organisations discussing and drafting standard clauses in relation to liability and trying to agree on limitation of liability for negligence cases.

The Commission's proposal (COM2000)142 final) contained a text which included unlimited liability for gross negligence or wilful acts and limitations of liability for negligent or reckless acts. The limits suggested were 5 million € for personal injury or death and 2.5 million € for loss or damage to property.

In the co-decision procedure, leading to conciliation between the Council and the European Parliament, the proposal was changed and the maximum limits (or ceilings) were tuned into minimums (or floors). The amounts were changed to 4 and 2 million € respectively.

Article 6.2(b) in Directive 94/57/EC requires the inclusion of the following provisions in the instrument governing the working relationship between national administrations and recognised organisations:

- *If liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property or personal injury or death, which is proved in that court of law to have been caused by a wilful act or omission or gross negligence of the recognised organisation, its bodies, employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said loss, damage, injury or death is, as decided by that court, caused by the recognised organisation;*
- *If liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for personal injury or death, which is proved in that court of law to have been caused by any negligent or reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation to the extent that the said personal injury or death is, as decided by that court, caused by the recognised organisation; the Member States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 4 million;*
- *If liability arising out of any incident is finally and definitely imposed on the administration by a court of law or as part of the settlement of a dispute through arbitration procedures, together with a requirement to compensate the injured parties for loss or damage to property, which is proved in that court of law to have been caused by any negligent or*

*reckless act or omission of the recognised organisation, its employees, agents or others who act on behalf of the recognised organisation, the administration shall be entitled to financial compensation from the recognised organisation, to the extent that the said loss or damage is, as decided by that court, caused by the recognised organisation; the Member States may limit the maximum amount payable by the recognised organisation, which must, however, be at least equal to EUR 2 million.*

The following is important to distinguish:

- (1) Statutory work (surveys) is performed by recognised organisations on the flag fleet in order to determine the compliance of registered vessels with the applicable requirements of the international (IMO) conventions, codes, EU Directives and national legislation. The situation between the flag administration and the recognised organisation should be set out in an agreement between the two parties.
- (2) There is nothing obliging any Flag State to authorize statutory work to any recognized organisation. It is perfectly legitimate to carry out that work themselves, in the same way as it is perfectly legitimate to authorize statutory work to an RO. In practice most Member States tend to authorise, to a smaller or larger degree, statutory work to recognised organisations.
- (3) The situation regulated in the liability provisions is the one between the Flag administration and the Recognised organisation where the Flag has authorized the recognised organisation to carry out statutory tasks on their behalf. If, in that situation, liability arising out of any incident is finally and definitely imposed on the administration by a court of law, that administration can recover what they have been fined to pay, from the recognised organisation performing the work on their behalf.
- (4) In the *gross negligence* case (art 6.2(b) (i)) there is then unlimited liability e.g. whatever the court decides the administration has to pay, they are entitled to recover in full from the RO.
- (5) In the *negligence* cases (art 6.2(b) (ii)(iii)) they can recover up to a maximum as agreed between the Flag administration and the recognised organisation but which can not be lower than 4 and 2 million € respectively. Hence, in the case there is a limitation agreed between the parties to those amounts but a court would award a higher amount, the Flag administration in question would have to cover anything over and above the 2 and 4 million € themselves (or through insurance as the case may be).
- (6) The Directive however leaves it for the two parties, the Flag administration and the recognised organisation which they wish to authorize to do statutory work on their behalf, to negotiate and agree any amount higher than the 2 and 4 million, including unlimited liability. The Directive does however not impose unlimited liability for the negligence cases (art 6.2(b) (ii)(iii)).
- (7) If the parties cannot reach agreement then the administration cannot use or delegate any statutory work to that RO, and will have to perform those tasks as a Flag State, which it is in its full right to do.

The liability provisions in article 6.2(b) entered into force 22 July 2003 and the report in accordance with article 6.5 aims to evaluate the effects of the implementation of the liability provisions. It is interesting to evaluate the level of liability Member States have agreed with recognised organisations, particularly if there are cases where Member States have negotiated and agreed unlimited liability also for the negligence cases. If so, the question if there is any other protection for the recognised organisation in question has been explored.

### **3. LIABILITY LEVELS – SUMMARY OVERVIEW**

#### **3.1. State of Play Liability Levels EU/EEA Flag States**

The Directive stipulates that for gross negligence cases (Art 6.2(b)(i)) there should be unlimited liability and this is not contested, and appears to be that case for all EU MS having implemented the Directive.

The adopted limits of liability in the EU/EEA States vary in respect of negligence cases (Art.6.2(b)(ii)/(iii)).

- Eight Member States (Cyprus, Hungary, Latvia, Lithuania, Poland, Slovenia, Sweden, UK) have limits of liability 4/2 million Euros for Art. 6.2(b)(ii)/(iii) respectively;
- Five Member States and Norway have limits slightly higher than the Directive amounts at 5/2.5 million Euros (Belgium, Denmark, Greece, Malta, Portugal, Norway) applicable to the situations envisaged in Art. 6.2(b)(ii)/(iii) respectively;
- Three Member States (Finland, Ireland and the Netherlands) have limits of liability of 5/2.5 million US dollars<sup>19</sup>.
- Five EU States, namely, France, Germany, Italy, Luxembourg and Spain have adopted unlimited liability under Art. 6.2(b)(ii) and (iii). (There is a possibility that the Polish model agreement may also establish unlimited liability).
- For the remaining four Member States<sup>20</sup>, there were no or little information available.

*In conclusion*, 17 Member States and Norway have introduced limited liability for negligence cases. The amounts by and large correspond to the amounts in the Directive, turning the “floor” into a “ceiling”. 5 Member States have used the possibility provided in Article 6 and agreed unlimited liability also for the negligence cases with the recognised organisations they are authorizing. For 3 Member States and Iceland the situation is unclear due to lack of information.

Table 1 provides a summary overview of the situation as of February 2006, on the basis of a state by state analysis done by the University of Southampton using replies to questionnaires<sup>21</sup>.

---

<sup>19</sup> Using conversion rate in February those amounts translates to 4.2/2.1 million EURO, respectively

<sup>20</sup> Austria, Czech Republic, Estonia and Slovenia

<sup>21</sup> Despite the best endeavours to collect all available data from governmental and other official sources, the accuracy and completeness of the information as provided cannot be guaranteed.

**Table 1** The status of implementation of Art.6(2)(b)

<b>EU Member State</b>	<b>Implementation method</b>	<b>New Agreements</b>	<b>Implementation Problems</b>	<b>(i) Liability for Gross Negligence</b>	<b>(ii) Negligence Recklessness  Loss of Life personal injury  (million €)</b>	<b>(iii) Negligence Recklessness  Property Damage  (million €)</b>	<b>Monetary Unit</b>	<b>recognised organisations authorized by the Member State irrespective of the degree of authorisation</b>
Austria	Not known	Not known	Not known	Not Known	Not Known	Not Known	Not Known	Not known
Belgium	LI + Agreement	Under negotiation	No	Unlimited	5	2.5	Euro	ABS, BV, GL, LR, NKK, DNV
Cyprus	LI + Agreement	Yes	Numbering	Unlimited	4	2	Euro	ABS, BV, DNV, HRS, GL, KR, LR, NKK, RINA, RS
Czech Republic	Not known	No	Not implemented	STC	STC	STC	Not Known	
Denmark	LI + Agreement	Yes	No	Unlimited	5	2.5	Euro	ABS, BV, DNV, GL, LR, NKK, RINA
Estonia	LI + Agreement	Not known	Not implemented	Standard Terms	Standard Terms	Standard Terms		
Finland	LI + Agreement	Under negotiation	No	Unlimited	5	2.5	US\$	ABS, BV, GL, LR, RINA, DNV, RS

<b>EU Member State</b>	<b>Implementation method</b>	<b>New Agreements</b>	<b>Implementation Problems</b>	<b>(i) Liability for Gross Negligence</b>	<b>(ii) Negligence Recklessness Loss of Life personal injury (million €)</b>	<b>(iii) Negligence Recklessness Property Damage (million €)</b>	<b>Monetary Unit</b>	<b>recognised organisations authorized by the Member State irrespective of the degree of authorisation</b>
France	LI + Agreement	Yes	No	Unlimited	Unlimited	Unlimited		ABS, BV, GL
Germany	LI + Agreement	Yes	No	Unlimited	Unlimited	Unlimited		ABS, BV, GL, LR, DNV
Greece	LI + Agreement	Yes	No	Unlimited	5	2.5	Euro	ABS, BV, DNV, GL, KR, LR, NKk, RINA, RS
Hungary	LI + Agreement	Not known	Wording	Unlimited	4	2	Euro	RINA
Ireland	LI + Agreement	Yes	No	Unlimited	5	2.5	US\$	BV, GL, LR, DNV
Italy	LI + Agreement	Yes	No	Unlimited	Unlimited	Unlimited		RINA, ABS, BV, GL
Latvia	LI + Agreement	Yes	Wording	Unlimited	4	2	Euro	ABS, BV, GL, LR, DNV, RS
Lithuania	LI + Agreement	Under negotiation	No	Unlimited	4	2	Euro	BV, LR, DNV, RS
Luxemburg	LI	Yes	No	Unlimited	Unlimited	Unlimited		ABS, BV, DNV, GL, LR, NKK, RINA

<b>EU Member State</b>	<b>Implementation method</b>	<b>New Agreements</b>	<b>Implementation Problems</b>	<b>(i) Liability for Gross Negligence</b>	<b>(ii) Negligence Recklessness Loss of Life personal injury (million €)</b>	<b>(iii) Negligence Recklessness Property Damage (million €)</b>	<b>Monetary Unit</b>	<b>recognised organisations authorized by the Member State irrespective of the degree of authorisation</b>
Malta	LI + Agreement	Under negotiation	Numbering	Unlimited	5	2.5	Euro/Local Currency	ABS, BV, DNV, GL, RINA and RS
Netherlands	LI + Agreement	Under negotiation	No	Unlimited	5	2.5	US\$	ABS, BV, DNV, GL, LR, NKK, RINA
Poland	LI + Agreement	Under negotiation	Wording	Unlimited	4	2	Euro	No Info
Portugal	LI + Agreement	Yes	No	Unlimited	5	2.5	Euro	LR, BV, DNV, RINA, ABS, GL, RINAVE, NKK
Slovakia	LI + Agreement	Not known	Not known	Not known	Not known	Not known		ABS, GL??
Slovenia	LI + Agreement	Yes	No	Unlimited	4	2	Euro	BV, GL, RINA
Spain	LI	Yes	No	Unlimited	Unlimited	Unlimited		BV, GL, RINA
Sweden	Agreement	Yes	No	Unlimited	4	2	Euro	ABS, BV, GL, LR, DNV
U.K.	LI + Agreement	Yes	No	Unlimited	4	2	Euro	ABS, BV, DNV, GL, LR,

<b>EU Member State</b>	<b>Implementation method</b>	<b>New Agreements</b>	<b>Implementation Problems</b>	<b>(i) Liability for Gross Negligence</b>	<b>(ii) Negligence Recklessness Loss of Life personal injury (million €)</b>	<b>(iii) Negligence Recklessness Property Damage (million €)</b>	<b>Monetary Unit</b>	<b>recognised organisations authorized by the Member State irrespective of the degree of authorisation</b>
								RINA, NKK
<b>EEA STATES</b>								
Iceland	LI + Agreement	Not known	Not known	Not known	Not known	Not known	STC/SDR 200,000	No Info
Norway	Agreement	Yes	No	Unlimited	5	2.5	Euro	DNV, LR, BV, GL, ABS

### 3.2. The case of unlimited liability for negligence

Directive 94/57/EC permits European states and recognised organisations to agree higher limitations liability for negligence, without establishing a ceiling to such greater amount. The result of this option has been twofold: on one hand certain countries have opted for negotiating higher maxima (mostly € 2.5 and € 5 million respectively), on the other hand some other countries have insisted on and negotiated an unlimited right of recourse against the recognised organisations authorised in their territory. These states are France, Germany, Italy, Luxembourg and Spain. As can be seen from Table 2 these Member States have signed agreements with EU recognised organisations.

**Table 2**

EU Member State	Art. 6.2(b)(i)	Art. 6.2(b)(ii)	Art. 6.2(b)(iii)	RO
France	Unlimited	Unlimited	Unlimited	ABS, BV, GL
Germany	Unlimited	Unlimited	Unlimited	ABS, BV, GL, LR, DNV
Italy	Unlimited	Unlimited	Unlimited	ABS, BV, GL, RINA
Luxembourg	Unlimited	Unlimited	Unlimited	ABS, BV, GL, DNV, LR, NKK, RINA
Spain	Unlimited	Unlimited	Unlimited	BV, GL, RINA

Independent legal experts in these countries have been contacted by the contractor and the matter of unlimited liability – and potential defences against it – has been explored. The overall results of such investigations may be summarised as follows.

It is a general principle of most legal systems that the sovereign state has to perform its statutory duty with the diligence required for the task involved and that, in case of negligence on its part, it may be found liable to pay damages to all injured parties. The legal systems of France, Germany, Italy, Luxembourg and Spain are all strongly influenced by each other and do not in general provide the administration with protection against actions by their citizens. On the contrary, constitutional provisions guarantee citizens the possibility of a fair trial in order to recover such damages<sup>22</sup>. In some countries there is a special court expressly created to deal with such claims<sup>23</sup>, while in others jurisdiction is left with the civil court.<sup>24</sup>

This being the position, if the responsibility for issuing statutory certificates lies with the administration<sup>25</sup> and the administration cannot part with such liability by mere delegation<sup>26</sup>,

<sup>22</sup> For instance, in Germany § 34 GG, in Italy Art. 28 Cost

<sup>23</sup> As the French *Tribunal Administratif*

<sup>24</sup> As it is the case in Italy

<sup>25</sup> The obligation of issuing statutory certificates is generally imposed on the flag States by international conventions. This seems to be the case even as far as European legislation is concerned, at least from what appears in two of the recitals of the Directive where reference to both the responsibility of Member States for the issuing of international certificates for safety and pollution and the need for closer involvement of the national administrations in the issue of such certificates are referred to

the question arises whether any statutory limitations or requirements prevent the administration from recovering in full from a recognised organisation at fault.

Based on the information gathered, the answer to this question appears to be in the negative<sup>27</sup>. The only European country for which conclusive analysis cannot be provided is Germany, where it has been argued that a constitutional provision allowing recourse action by the Administration against its employees only in case of gross negligence would prevent recovery in all cases of simple negligence. It appears however that the German administration has been careful not to qualify recognised organisations as public employees and that this may invalidate this argument altogether.

*In conclusion*, the study has not identified any relevant national legislation allowing the recognised organisations that are authorised in countries where unlimited liability for negligence is required to avoid or limit such unlimited exposure. The only state in which this may be possible is Germany, but no case appears to have been decided on this issue.

The fact that some EU Flag States demand unlimited liability also for negligence cases may have resulted in several recognised organisations choosing not to seek authorization from those states (See further below chapter 3.3). This may lead to the question if the possibility to negotiate unlimited liability also for negligence cases could work as a means to reduce access to that market?

### **3.3. Directive 94/57/EC and competition**

Some recognised organisations expressed the view that the demand of unlimited liability in cases of negligence by some EU Member States and the associated uninsurable risks has acted as a protectionist measure to distort the market and prevent them from working in such countries. In their view, the real result was to restrict the options of available providers to those who are willing to risk unlimited liability for ordinary negligence. Some recognised organisations suggest that the final text of the Directive supports an indirect continuation of the protectionism of national entities.

This view appears however not to fully consider the situation that some recognised organisations, as can be seen from Table 2, have signed agreements for unlimited liability also for negligence cases. The suggestion that this can be used by a Member State to “protect” the “own” recognised organisation is not supported by the research, as all Member States have agreements with several recognised organisations (depending on the size, demand from shipowners and nature of their flagged fleet).

The Directive provides for the possibility to negotiate such unlimited liability but it is subject to negotiation and agreement from both parties, the EU Member State and the Recognised organisation. It is not imposed by the Directive nor is it at the discretion of only one party.

As has been mentioned earlier, it should be noted that if a EU Member State demands unlimited liability for all negligence cases but there is no recognised organisation willing to

---

<sup>26</sup> Either because of a legal proviso in this sense or because the recognised organisations are qualified as agents of the administration itself

<sup>27</sup> In Spain, Decree 90/2003 clearly imposes such liability and contains no exclusions, exceptions nor limitations

sign an agreement on those terms, that Member State will have to carry out the statutory work on their flagged fleet themselves.

### **3.4. Liability Levels for some (non-EU) Flag States**

Outside the EU, the limits of liability vary significantly within the range currently found within the EU. The research investigated some of the major Flag States in the world, Bahamas, Panama, Canada, China, Japan, New Zealand and, USA, in order to provide a background against which commercial advantages or disadvantages of the implementation of the Directive may be evaluated.

There are States in which the applicable limits of liability are based on the standard terms and conditions of each recognised organisation. Other States are compliant with the IMO model agreement, that is to say have unlimited liability for gross negligence and limits of liability for conduct as that described under Art.6.2(b)(ii) and Art.6.2(b)(iii). In USA, the liability of recognised organisations appears not limited contractually at all.

However, in the USA (and in Germany), legal advice available to recognised organisations suggests that claims based on negligence against the relevant maritime authority are restricted. The existence of unlimited liability between the maritime Authority and the recognised organisation is therefore not operational in practice.

*In conclusion*, on the basis of the Southampton study there appears to be no suggestion that the liability provisions in the Directive have influenced non EU Flag States to introduce unlimited liability for negligence situations.

### **3.5. Relevant Court Cases**

The research carried out by Southampton revealed that to date<sup>28</sup> there is no case either decided or underway under which the recovery of the Flag State against a recognised organisation under Art.6.2(b) has been or may be activated.

### **3.6. Insurance implications**

Recognised organisations have professional indemnity cover spanning between 10 and 100 million dollars for both statutory and general services. However, they state that the insurance arrangements are concluded on an aggregate basis with a total liability cap rather than a “per incident” cap.

Based on information provided by recognised organisations, the insurance implication of the implementation of Directive 94/57/EC may be summarised as follows:

- The implementation of Art. 6.2(b) did not prompt recognised organisations to arrange increased or additional insurance cover;
- However, insurance premiums increased up to threefold as insurers and re-insurers re-evaluated the risks involved;

---

<sup>28</sup> February 2006

- Unlimited liability is uninsurable. Thus recognised organisations operating in countries where there is unlimited liability are running the risk of not being able to meet the liabilities in question in cases of catastrophic incidents, no matter how large the insurance cover they have purchased;
- Reinsurers have expressed their concern in respect of the unlimited liability potential under the Directive;
- Unfavourable contractual terms have been introduced in the insurance contracts;
- In contrast, the surveying fees do not appear to have risen significantly.

*In conclusion*, it appears that the implementation of Art. 6.2(b) did not prompt recognised organisations to arrange increased or additional insurance cover however the insurance premiums may have increased. There is no significant difference in the fees charged by recognised organisations that operate both under systems providing for unlimited and limited liability for negligent acts or omissions.

### **3.7. Financial Stability (equilibrium) of recognised organisations**

On the basis of the information made available<sup>29</sup> there appear to be no hard evidence that the financial stability of the recognised organisations has yet been affected by the introduction of Art.6.2 (b).

A question of interest is whether the EU/EEA provide a competitive working environment, in comparison with the other major shipping countries worldwide.

Based on the research carried out, it appears that the major distinction is not between EU and non-EU Countries but rather between countries with limited and unlimited liability in respect of claims for reckless or negligent acts.

Limitation of liability provides a more secure and stable financial environment for the operation of recognised organisations. Unlimited liability in respect of gross negligence recognised organisations accept as commonplace and to an extent reasonable compromise. However, accepting unlimited liability for simple negligence is generally considered as risking commercial and financial suicide, for which reason some recognised organisations are not prepared to provide their services on such terms.

*In conclusion*, the research has shown that, as far as commercial advantages/disadvantages of the unlimited liability option are concerned, there is no hard evidence that any significant market alteration has followed the implementation of the Directive. According to responses received from recognised organisations, survey fees have risen consistently according to the local markets concerned and do not appear to have been influenced by varying risk exposures.

---

<sup>29</sup> The recognised organisations that responded to the questionnaire had not incurred any liability to a national administration as a result of statutory marine work performed by them for that national administration

## 4. CONSULTATIONS

The research by the University of Southampton was conducted by use of questionnaires covering the issues identified. Given that the information required stemmed from a range of different sources with different interests and backgrounds, five different questionnaires were used and addressed to governments of European Union Member States, governments of non-Member States, recognised organisations, legal experts from within the European Union and legal experts from outside the European Union respectively. In almost all cases the questionnaires were followed up by telephone interviews.

With some important exceptions, written responses received from governments were short and succinct and required follow-up of further investigation. A far greater amount of detail was collected through follow-up calls, even if often accompanied by explicit requests for confidentiality. Responses received from legal experts were very valuable even where not comprehensive. As far as recognised organisations are concerned, all members of the International Association of Classification Societies (IACS) were requested to take part in the study and seven responded. Two other Recognised organisations with limited EU recognition (the Hellenic Register of Shipping and RINA VE) were also contacted.

The approach of the University of Southampton has been supported with a letter from EMSA explaining the work carried out as commissioned by EMSA.

The requirement of Article 6.5 is that “*The report shall be drawn up in cooperation with the competent authorities of the member States and the parties concerned, in particular recognised organisations/ classification societies*”. The approach followed largely meets this requirement.

The majority of IACS members have been providing valuable input to the contractors and their views have been included in the report (see chapter 4.1 below). Not all Member States have been active or responding to the study.

### 4.1. Position of the recognized organisations

The position of a group of recognised organisations in respect of the Directive is made public through the activities of the International Association of Classification Societies (IACS)<sup>30</sup> In its paper *Towards a Future Maritime Policy for the Union: A European vision for the ocean and the seas Contribution by International Association of Classification Societies (IACS)*<sup>31</sup>, IACS expressed its support to the EU initiatives on issues of marine safety. However, with regard to the matter of liability of recognised organisations, IACS raised a number of issues which, in their view, represent weaknesses and deficiencies of the system created by Directive 94/57/CE. Their position may be summarised as follows:

*“... The classification and related statutory services provided by the members of IACS in their capacity as either a classification society or recognised organisation are an essential component of the overall maritime safety and pollution prevention regimes. These services*

---

<sup>30</sup> American Bureau of Shipping, Bureau Veritas, China Classification Society, Det Norske Veritas, Germanischer Lloyd, Korean Register of Shipping, Lloyd's Register, Nippon Kaiji Kyokai, Registro Italiano Navale, Russian Maritime Register of Shipping, Indian Register of Shipping (Associate)

<sup>31</sup> IACS, *Towards a Future Maritime Policy for the Union: A European vision for the ocean and the seas Contribution by International Association of Classification Societies (IACS)*, 13<sup>th</sup> October 2005

*make a significant contribution to the safety of life and property and to the protection of the marine environment.*

*The continued provision of these essential services is threatened by the existing exposure of classification societies to potentially unlimited liability for errors or omissions on their part that do not amount to gross negligence.*

*The members of IACS respectfully request that the Maritime Policy Task Force give due consideration to extending appropriate legal protection to classification societies that operate within EU Member states and are recognised under the EU Council Directive 94/57/EC, as amended, on Common Rules and Standards for Ship Inspection and Survey Organisations and for the Relevant Activities of Maritime Administrations. Such protection would not extend to instances of gross negligence. Such protection would be in recognition of the essential contribution that classification societies make to overall economic growth, local employment opportunities, maritime safety and environmental protection. Such protection should be objective, transparent and allow for an appeal.*

[...]

*As international organisations addressing the most international of industries, marine classification societies rely on the principles of freedom of competition and trade to efficiently provide service to the shipping and offshore industries. Such principles are based on the concept of reciprocity between sovereign nations. IACS respectfully requests that the Maritime Policy Task Force enshrine these principles and concepts within EU maritime policy to encourage competitiveness within a free and fair market”<sup>32</sup>.*

From the above position, the following points emerge:

- IACS does not call for an amendment of Art. 6.2(b)(i) which applies in cases of gross negligence.
- IACS members are concerned that the provision of their services is endangered by the possibility given to the EU Member States under Directive 94/57/EC to establish unlimited liability for damage arising in cases of negligence.
- They call for protection through an amendment of the liability provisions contained in Art. 6.2(b)(ii) and 6.2(b)(iii) of the Directive. These recognised organisations suggest that the limits of Art.6.2(b)(ii) and (iii) are modified to be maxima limits of liability and that a provision in the sense that Art.6.2(b) does not create new rights of recovery is inserted to alleviate the increasing litigation. Under the above scenario the recognised organisations have indicated that they would be willing to accept higher limits of liability, provided they are capped.

They also raise concerns<sup>33</sup> in respect of the effect of the increased threat of criminal liability on their personnel and seafarers on recruiting suitable surveyors.

---

<sup>32</sup> *Ibidem*, para 6.1-6.7

<sup>33</sup> “...IACS asks that the Maritime Policy Task Force consider the strongly negative implications on attracting and retaining the necessary qualified classification personnel that would be occasioned by further broadening laws that criminalise actions that may contribute to accidental pollution but which do not amount to gross negligence or a dereliction of duty on the part of an individual”. This point is not

From the responses received, it appears that the implementation of Art. 6.2(b) of Directive 94/57/EC has influenced the issue of liability in particular:

- (1) It appears to have affected the negotiation process with the various States; and
- (2) It provided the clients of recognised organisations with an impetus to discuss higher liability amounts.

Recognised organisations expect important changes in litigation following the implementation of the liability provisions of Article 6(2) of Directive 94/57/EC. In particular:

- The wording of Article 6 in: “...if liability arising out of any incident is finally and definitely imposed on the administration by a court of law...the administration shall be entitled to financial compensation from the recognised organisation...” appears capable of raising an expectation that third parties now possess a statutory right to recover financial compensation for their losses from the relevant national maritime administration, and, indirectly, from the relevant recognised organisation via the indemnity provisions in Article 6.2 (b)(i), (ii) and (iii).
- Recognised organisations suggest that there is a possibility that claimants in litigation against a recognised organisation may now add claims against the national Administration hoping to trigger claims by that Administration against the recognised organisation in order to support their private interests.
- Recognised organisations reported an increased number of financial claims in respect of their surveys. In addition, they reported a considerable increase of the amounts claimed.<sup>34</sup> They attribute this to the encouragement received by claimants under the wording of Art.6(2)(b).
- Recognised organisations fear that the distinction between negligence and gross negligence may be blurred where there is significant loss of life or damage resulting from a shipping accident, thus “gross” damages and publicity could lead to gross negligence being easily proven.
- Some recognised organisations reported that the increase in litigation is likely to affect the way the duties of marine surveyors are discharged because of the impact that the possibility of high profile litigation may have on the morale and the attitude of both the surveyors of recognised organisations and the civil servants of the National Administrations concerned. There was also the suggestion that work efficiency may be affected by the threat of claims by shipowners whose vessels have or are to be detained following a survey. An increasing number of such threats and claims in very recent years have been suggested.

In addition the recognised organisations have suggested that due to the potential increase in litigation it has become much more difficult to obtain adequate cover from the insurance market, and that where available it is associated with higher premium rates and higher deductibles.

---

<sup>34</sup> directly relevant to the establishment and limitation of civil liability but is linked with the expectation of civil compensation in appropriate cases where criminal liability is established  
No statistics or details were provided