COMMISSION NOTICE

Guidelines for the interpretation of Directive 2000/59/EC on port reception facilities for ship generated waste and cargo residues

(2016/C 115/05)

Summary

Drawing on the experience gained from monitoring and assessing the implementation of Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues ([1]) during the past 15 years, the Commission has decided in the interests of transparency and legal certainty to issue interpretation on some of the key provisions of the Directive.

This Commission Notice is presented to explain the Commission's views on how certain provisions should be implemented. It does not set out either to revise the Directive or to encroach on the jurisdiction of the Court of Justice in matters of interpretation.

The Notice starts by setting out the main obligations on providing sufficient and adequate port reception facilities and how this should be reflected in the comprehensive waste reception and handling plans for each port in line with the requirements provided in Annex I of the Directive.

It then covers the main obligations on the actual use of those facilities: the delivery requirement for ship-generated waste to port reception facilities before a ship can depart from a port and the exception to that requirement when there is sufficient dedicated storage capacity for all ship-generated waste.

Finally, the Commission Notice provides guidance on the application of exemptions from the main obligations provided in the Directive.

1. INTRODUCTION

Directive 2000/59/EC on port reception facilities for ship generated waste and cargo residues (hereinafter 'the Directive' or the 'PRF Directive') aligns EU law with the international obligations provided in the MARPOL Convention. Since its adoption, the MARPOL Convention has been amended several times, gradually moving towards a total ban on discharges, and new insights have been gained on how discharges of waste into the sea affect marine ecosystems.

The Directive's main aim is to reduce the discharges of ship-generated waste and cargo residues into the sea, thereby enhancing the protection of the marine environment. As such, the Directive is a key instrument for achieving a Greener Maritime Transport, as set out in the Commission's Communication 'Strategic goals and recommendations for the EU's maritime transport policy until 2018', which includes among its recommendations a long term objective of 'zero-waste, zero-emissions' ([2]). The Directive is also the main EU legal instrument for reducing marine litter from sea-based sources in line with the 7th Environmental Action Programme ([3]) and international commitments made by the EU and its Member States.

The Commission has assessed the implementation and effectiveness of the Directive over time. A REFIT evaluation of Directive 2000/59/EC has also been successfully completed in 2015 ([4]). The Evaluation addressed the relevance, effectiveness, efficiency, EU added value and coherence of the Directive and has shown that Member States over the years have developed different interpretations and practices when implementing certain key aspects and requirements of the Directive, in particular as regards the mandatory delivery of ship-generated waste (Article 7), the application of exemptions (Article 9) and the development of the waste reception and handling (WRH) plans (Article 5). The Evaluation concluded that these differences in interpretation and implementation hamper the effectiveness of the Directive.

([1]) OJ L 332, 28.12.2000, p. 81.

([2]) COM(2009) 8 'Strategic goals and recommendations for the EU's maritime transport policy until 2018'.

([3]) Decision No 1386/2013/EU on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.

([4]) Ex-post evaluation of Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues, final report (Panteia/PwC, May 2015), available at: http://ec.europa.eu/transport/modes/maritime/studies/doc/2015-ex-post-evaluation-of-dir-2000-59-ec.pdf

The present Commission Notice reflects the Commission's understanding of certain provisions of the Directive in line with current international and EU law ([5]). As such it aims to provide guidance to Member States on how to interpret and implement those provisions. It does not set out to revise the Directive or to encroach on the Court of Justices jurisdiction in matters of interpretation.

2. **PORT RECEPTION FACILITIES**

2.1. **Adequacy**

Article 4 of the Directive requires Member States to ensure the availability of port reception facilities 'adequate to meet the needs of the ships normally using the port without causing undue delay to ships'. To determine such adequacy the Directive refers to the capability of receiving the types and quantities of ship-generated waste and cargo residues from 'ships normally using that port', taking into account:

— operational needs of the users of the port,

— size and geographical location of the port,

— type of ships calling at that port,

— exemptions provided for under Article 9.

The concept of 'adequacy' has been further elaborated both at international level ([6]), as well as at regional level ([7]). When providing clarifications on the various aspects of the adequacy of the facilities, the Commission took into consideration the guidance provided by these organisations.

The adequacy relates to operational conditions on the one side, i.e. to meet the needs of ships normally visiting the ports and not to create obstacles to ships using the facilities, as well as the environmental management of the facilities on the other side.

As regards the necessary operational conditions, the Commission underlines that the mere provision of facilities does not necessarily mean the facilities are adequate. Poor location, complicated procedures, restricted availability and unreasonably high costs for the service provided are all factors which may deter the use of reception facilities. For a port reception facility to be considered adequate, the facility should be available during a ship's visit to the port, be conveniently located and easy to use, cater for all types of waste streams usually entering the port and not cost so much as to present a disincentive to users ([8]). At the same time, the Commission emphasizes that both the size and geographical location of the port may limit what can technically and reasonably be provided in terms of reception and handling of the waste.

In addition, to meet the environmental performance criteria and contribute to the improvement of the marine environment, the facility must allow for the ultimate disposal of ships' waste to take place in an environmentally appropriate way. According to the PRF Directive, ship-generated waste and cargo residues shall be considered to be waste within the meaning of Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain directives ([9]) ([10]) (the Waste Framework Directive). Consequently, Article 12(g) requires that the treatment, recovery or disposal of ship-generated waste and cargo residues to be carried out in accordance with the Waste Framework Directive and other relevant EU waste legislation.

([5]) EMSA makes available additional technical guidance and best practices developed in Member States on the application of this Directive as part of 'Technical Recommendations on Directive 2000/59/EC on port reception for ship generated waste and cargo residues'.

([6]) Mainly in the context of the International Maritime Organisation (IMO), in particular: Resolution MEPC.83(44) (Guidelines for ensuring the adequacy of port waste reception facilities, 2000), Resolution MEPC.1/Circ.834 (Consolidated Guidance for port reception facility providers and users), Comprehensive Manual on port reception facilities (IMO Publication 597E), section 2.3.1; Guidance developed by the International Standards Organisation (ISO): ISO standard 16304 (2013), Arrangement and management of Port Reception Facilities.

([7]) Mainly in the context of the Baltic Sea Convention, HELCOM: Interim guidance on technical and operational aspects of sewage delivery to port reception facilities (2013), Chapter 6.

([8]) Section 3 of Resolution MEPC.83(44), Guidelines for ensuring the adequacy of port waste reception facilities, 2000.

([9]) Article 2 of the PRF Directive 2000/59/EC.

([10]) Which replaces Directive 2006/12/EC, which at its turn replaces Council Directive 75/442/EEC.

Principles of environmentally sound management of waste are also provided in the International Convention on the control of the transboundary movement of hazardous waste and their disposal (Basel Convention), that the Parties to that Convention must apply. The Basel Convention stipulates in its Article 4(2)(b) that 'each party shall take the appropriate measures to ensure the availability of adequate disposal facilities, for the environmentally sound management of hazardous wastes and other wastes, that shall be located, to the extent possible, within it, whatever the place of their disposal.' The Commission considers that, even though the Convention does not apply to waste generated during the service of a ship ([11]), once the waste is delivered to a port reception facility, the Convention becomes applicable, and the facility must be managed in a way that upholds the principles enshrined in that Convention ([12]) and in EU waste legislation ([13]).

Article 4(3) of the Directive requires Member States to establish procedures in accordance with those agreed by the IMO, for reporting to the port State alleged inadequacies of port reception facilities. Furthermore, Article 12(f) obliges Member States to ensure that the Commission is provided with a copy of these allegations.

2.2. **Waste Reception and Handling Plans**

A fundamental element of the Directive in the context of providing adequate port reception facilities is the obligation to develop and monitor Waste Reception and Handling Plans ('WRH Plans') in all ports for the reception and treatment of ship-generated waste and cargo residues. The WRH Plan forms one of the main mechanisms for implementing the Directive's requirements at the port level. In order to draw up a plan, the competent authorities must firstly estimate the needs of the ships (normally) visiting the port in their competence and secondly take appropriate measures to meet those needs. Article 5 of the Directive requires that such a plan is developed and implemented for each port following consultations with the relevant parties having regard to the requirements in Articles 4, 6, 7, 10 and 12.

2.2.1. *Mandatory elements*

Detailed requirements for the WRH Plans have been set out in Annex I of the Directive. In a WRH Plan a wide range of issues have to be addressed, including those that contribute to the development of the port reception facilities system and the implementation of the Plan.

Annex I distinguishes between a set of key mandatory elements that have to be included in each WRH Plan and a set of recommended elements. Among the mandatory elements are included the descriptions of the facilities, the procedures for reception and collection of waste, the charging system and procedures for reporting alleged inadequacies and for consultation. These elements are part of the information that should be also made available to all port users.

In addition, the list of requirements includes an 'assessment of the need for port reception facilities'. In the opinion of the Commission, this assessment should be based on the statistics available on the type and size of the ships normally visiting the port and the amount and types of waste received in previous years ([14]). The Commission notes that the 'description of the types and quantities of ship generated waste and cargo residues received and handled by the port' is also mentioned as a mandatory item to be included in the WRH Plan. This description has been found to be absent in most of the plans assessed by the Commission over the past years. The Commission considers this information to be essential for a proper assessment of the necessity and adequacy of the port reception facilities in the port, as reflected in the WRH Plan.

Finally, the WRH Plan is also an important tool for the application of the cost recovery system, which is required to be set up under Article 8 of the Directive. According to Annex I, the WRH Plan has to cover a description of the charging system. This information should be made publicly available and subject to ongoing consultation.

2.2.2. *Scope: ports that must have a WRH Plan*

The Directive requires that an appropriate WRH Plan is developed for each port, defined as 'a place or geographical area made up of such improvement works and equipment as to permit, principally, the reception of ships, including of fishing vessels and recreational craft' ([15]).

([11]) Article 1(4) of the Basel Convention — the 'exclusion clause'.
([12]) Legal analysis Basel Convention, NEP/CHW.11/INF/22, http://www.basel.int/implementation/LegalMatters/Ships/tabid/2405/Default.aspx
([13]) In particular Regulation (EC) No 1013/2006 on shipments of waste, implementing the Basel Convention in EU law and referring to the different Guidelines for the environmentally sound management of waste in Annex VIII to the Regulation.
([14]) Section 2.3.1 of the IMO Comprehensive Manual on port reception facilities.
([15]) Article 2(h).

Ports falling within the scope of the Directive are those normally visited by ships that are covered by the Directive ([16]), namely all ships calling at, or operating within a port of a Member State, with the exception of any warship, naval auxiliary or other ships owned or operated by a State, used on government non-commercial service ([17]). Fishing vessels and recreational craft also fall within the scope of the Directive, and consequently also the ports visited by these vessels.

Thus, taking into account the scope of the Directive, the WRH plans may vary significantly in detail and coverage, from a large commercial port to a small fishing port or marina. Some of the items enumerated in Annex I may be only partially applicable to smaller ports with reduced waste streams or with very specialised shipping services. The Commission is of the opinion that what may be considered 'appropriate' for a port would depend on its size, geographic location and the type of activities conducted in the port, which would also determine the level of detail required for each plan.

In line with Article 5(2) of the Directive, the WRH Plan can be **regional** in nature. This is the case where the WRH Plan is set up for numerous ports, combining the essential elements into one regional plan. Port waste management planning on the basis of a regional arrangement can provide a solution when it is undertaken in such a manner as to ensure that vessels do not have an incentive to discharge waste into the sea. In the development of such regional plans it is imperative that the dedicated storage capacity of vessels involved is sufficient to retain their waste between ports of call in accordance with Article 7(2) of the Directive. Such planning requires close collaboration between Member States in the same region ([18]).

Where a regional plan is developed covering more than one port, and implemented in a regional context, the involvement of each port should be proportional to its trade. In all cases, the need for, and availability of, adequate port reception facilities have to be specified for each individual port.

2.2.3. *Consultation with relevant parties*

The Directive contains a specific requirement in Article 5(1) to consult with the relevant parties, in particular with port-users (or their representatives), in the process of developing and implementing the WRH Plan. The consultation procedure, which is also included as a basic requirement in Annex I, offers the port authorities a method to understand and meet their user needs. The Commission considers a constructive dialogue between the port authority, waste contractors, port users and other interested parties, such as environmental organisations, to be crucial for a proper functioning of the system, in particular for establishing adequate facilities that meet the need of ships normally using the port. By assessing the ship-generated waste streams likely to be encountered by the port through stakeholder consultation, the plan developer can develop a suitable WRH Plan through an appropriate analysis of this data.

The consultations referred to in Article 5(1) are further defined in Annex I. Although Article 5 only refers to consultations on the development of a new WRH Plan, Annex I of the Directive refers to 'ongoing' consultations. Taking into account the detailed requirements for WRH Plans, the Commission is of the opinion that the reference to consultations in Article 5(1) should be understood as meaning consultations between Member States and the relevant parties both *during* the initial drafting and *after* the plans have been adopted, which also provides the basis of the evaluation and (re)approval of the plans.

2.2.4. *Evaluation, approval and monitoring*

Article 5(3) of the Directive requires that Member States evaluate and approve the WRH Plans, monitor their implementation and ensure reapproval at least every three years and after significant changes in the operation of the port.

— Evaluation and approval:

When undertaking the evaluation, the competent authorities should consider the submitted WRH Plan against the requirements provided in Annex I of the PRF Directive. If any of the mandatory points of Annex I have not been adequately addressed, the WRH Plan should not be approved and the port authorities should receive a justification in order for them to rectify the outstanding issues immediately.

([16]) Article 3(b).
([17]) Article 3(a).
([18]) IMO Guidelines for ensuring the adequacy of port waste reception facilities, paragraph 5.15.

Ports should undertake a major review of their WRH Plans every three years and after 'significant changes' in the operation of the port. In this context, the question has arisen as to what type of changes in the port should be considered 'significant'. The Commission considers that significant changes may include an important structural increase or decrease in the number or type of ships, the development of new infrastructure in the port, a change in the provision of port reception facilities, or new on-board treatment techniques.

— Monitoring:

Although the Directive does not describe in detail how the monitoring of the implementation of the plans should take place, the Commission considers effective monitoring to be essential to ensure that the plan is properly implemented and that the port reception facilities are operating as required. The purpose of monitoring will be to verify and ensure the functioning of the system in practice in accordance with the approved WRH Plan. The monitoring of implementation of the plans should include an ad-hoc inspection for each port, at least once in three years to align with the need for periodical reapproval. Inspections should be more frequent if regular complaints have been received about the inadequacy of port reception facilities in any particular port. The Commission acknowledges that the inspection of port facilities is often in the competence of different enforcement bodies and exercised within a different legal framework than that applicable to the inspections on board of ships. In this respect, the Commission underlines the importance of an integrated framework for monitoring port reception facilities, as foreseen in Article 12, and of a good collaboration between the enforcement authorities involved in the monitoring of the application of the Directive.

2.2.5. *Reporting of inadequacies*

In addition to transparent consultation procedures, effective procedures for reporting alleged inadequacies are essential for improving the operation of port reception facilities. Under Article 4(3) of the Directive, Member States have to establish procedures, in accordance with those agreed by the IMO, for reporting to the port State alleged inadequacies of port reception facilities. Annex I requires these procedures to be included in the WRH Plan and to be made available to all port users.

Since the procedures for reporting should be aligned with those in IMO, the Commission deems it appropriate that the IMO reporting format ([19]) is used for that purpose. Notification should be made as soon as possible following completion of the reporting format and should include a copy of the master's report, together with any supporting documentation. It is also essential to have national procedures in place to ensure that the Commission is provided with a copy of the allegations of inadequate port reception facilities, in accordance with Article 12(1)(f) of the Directive.

3. **DELIVERY OF SHIP GENERATED WASTE**

3.1. **Main principles of mandatory delivery**

Article 7 is one of the key articles of the Directive, contributing to its overall objective of reducing the discharges of ship generated waste at sea and enhancing the protection of the marine environment. It imposes as a general rule that the master of ship calling at an EU port 'delivers all ship-generated waste to a port reception facility' before leaving that port.

There is only one exception to this mandatory delivery rule, namely where it can be established from the mandatory notification form that there is sufficient dedicated storage capacity for all ship-generated waste. In this sense, the Directive goes beyond the obligations under MARPOL Convention, which only requires the provision of adequate port reception facilities, but does not impose a mandatory use of these facilities, beyond what is implicitly provided in the discharge norms ([20]). For cargo residues the Directive aligns closely to the requirements of the MARPOL Convention, as it provides in Article 10 that the delivery of cargo residues to port reception facilities shall take place in accordance with the provisions of MARPOL.

3.2. **Mandatory delivery of all waste**

Article 7(1) requires the master of a ship calling at an EU port, before leaving the port, to deliver all ship-generated waste to a port reception facility.

Ship-generated waste has been defined as 'all waste, including sewage, and residues other than cargo residues, which are generated during the service of a ship and fall under the scope of Annexes I, IV and V to MARPOL and cargo associated waste as defined in the Guidelines for the implementation of Annex V to MARPOL' ([21]). As regards cargo residues, the Commission notes that these do not fall under the general delivery requirement provided in Article 7, but have to be delivered in accordance with the provisions of the MARPOL Convention, as prescribed in Article 10.

([19]) MEPC.1/Circ.834, Annex, Appendix 1.
([20]) Norms for discharges of ship generated waste into the sea are contained in the respective Annexes to MARPOL, specifying the amounts and conditions under which such discharges are allowed.
([21]) Article 2(c).

Questions have been raised on whether waste that can be legally discharged at sea in accordance with the MARPOL discharge norms and conditions can be excluded from the delivery obligation. This is particularly pertinent in relation to sewage, for which MARPOL allows the discharge at sea under certain conditions ([22]).

In this context, the Commission notes that one of the objectives taken into consideration at the time of the adoption of this Directive was the implementation of the MARPOL Convention ([23]). Furthermore, the Commission acknowledges that Annex II of the Directive ([24]) provides for derogation from the notification requirement for sewage that can be legally discharged at sea under MARPOL Annex IV ([25]). At the same time, the Commission underlines that the overall delivery requirement should be interpreted in the light of the Directive's objectives of reducing ship generated waste into the sea and enhancing the protection of the marine environment. Therefore, the Commission takes the view that what is allowed to be discharged under MARPOL cannot be automatically excluded from the delivery requirement in the Directive. In this respect, it is also important to notice that sewage is not excluded from the application of Article 8 on the fees for ship-generated waste.

With regard to the mandatory delivery in Article 7, questions have furthermore been raised on whether waste from ship repair activities falls within the scope of ship generated waste and should as such be delivered to a port reception facility. In particular, it has been argued that such waste would qualify as 'operational waste', covered by Annex V to MARPOL, which is defined as 'all solid wastes (including) slurries not covered by other Annexes that are collected on board during normal maintenance or operation of a ship, or used for cargo stowage and handling' ([26]).

The Commission is of the opinion that waste from repair activities at ship repair docks should not be considered as 'ship-generated waste' in the meaning of the Directive, as it is does not fall within the scope of Annex V to MARPOL. The definition of 'operational wastes' in Annex V to MARPOL, in particular the reference to 'normal maintenance and operation of a ship', excludes waste stemming from ship repair activities conducted in repair yards. As a consequence, the waste from such activities will be the joint responsibility of the ship and the ship repair yard, which should make the necessary arrangements for delivery and further handling, in full compliance with the requirements provided in EU law on waste ([27]).

3.3. **Sufficient storage capacity**

To ease the burden on ships of having to deliver in each port when the amounts of waste on board do not give raise to potential discharges at sea, Article 7(2) provides an exception from the mandatory delivery requirement by providing that the ship:

'……may proceed to the next port of call without delivering the ship-generated waste, if it follows from the information given in accordance with Article 6 and Annex II, that there is sufficient dedicated storage capacity for all ship-generated waste that has been accumulated and will be accumulated during the intended voyage of the ship until the port of delivery'.

The Commission emphasizes that Article 7(2) of the Directive constitutes an exception from the requirement of mandatory delivery and needs to be interpreted narrowly.

In order to determine accurately what the available dedicated storage capacity on board of a ship is, the information provided in the waste notification required under Article 6 and Annex II will need to be verified. In accordance with Article 6 of the Directive the master of a ship (except of a fishing or recreational vessel) bound for an EU port has the obligation to complete the notification form provided in Annex II of the Directive and notify this information to the competent authority in the Member State where the next port of call is located. Annex II contains a detailed list of the information to be notified, including a table with the different categories of waste and cargo residues delivered in the previous port ([28]), as well as the waste to be delivered and/or remaining on board, and indicating the percentage of the maximum dedicated storage capacity.

([22]) MARPOL also allows the discharge of other types of ship generated waste. However, discharge norms for Annex I and Annex V waste have become increasingly restrictive, allowing only very small quantities of Annex I waste and few categories of Annex V waste to be discharged into the sea, under specific conditions.

([23]) Ref. recital 3 of Directive 2000/59/EC.

([24]) Commission Directive 2007/71/EC amending Annex II of Directive 2000/59/EC of the European Parliament and the Council on port reception facilities for ship generated waste and cargo residues.

([25]) Regulation 11 in Annex IV to the MARPOL Convention.

([26]) Regulation 1.12 of MARPOL Annex V.

([27]) In particular the Waste Framework Directive.

([28]) Annex II to Directive 2000/59/EC was amended by Commission Directive (EU) 2015/2087 of 18 November 2015, in order to include the types and quantities of waste delivered in the previous port of call in the table of information to be notified.

To determine whether there is sufficient dedicated storage capacity in view of the journey ahead, it is also important to take into account the amount of waste that is likely to be generated on board of the vessel between the port of departure and the next port of call. The factors affecting a ship's waste generation are both static (the type of vessel, year of construction, main engine power etc.) and more volatile (the amount of cargo on board, voyage conditions, route planning the number of passengers on board, etc.). There are also a number of factors that significantly contribute to waste reduction on board, including recycling of waste, incineration on board, use of Marine Diesel Oil (MDO), which should also be taken into account when determining if there is sufficient storage capacity.

As regards the different treatment of each waste stream, taking into account that the notification in Annex II of the Directive requires the provision of information on each type of waste, together with the maximum storage capacity and amount of waste that is retained on board for each type of waste, the Commission takes the view that storage capacity must be assessed for each type of waste. The effect of this is that if overall there is storage capacity on the ship, but for one or some types of waste there is no such capacity, the ship would not be allowed to proceed to the next port of call.

3.4. **Intended port of delivery**

Article 7(2) refers to the intended 'port of delivery'. It should be determined whether the 'intended port of delivery' should be understood as the 'next port of call'.

The Commission recalls that the system set out in Article 7(2) is a port-to-port system. The first subparagraph of Article 7(2) refers to the permission of the ship to proceed to the 'next port of call'. It is on the basis of this information that the competent authorities evaluate whether there is sufficient storage capacity on board for all ship-generated waste, in order to avoid risks of discharges at sea on the way to the next port of call. This information is also provided in the notification to be sent to the port of call before arrival, in order for that port to make available port reception facilities adequate to the needs of the ship. The authorization of the port of call referred to in Article 7(2) can only cover a ship's proceeding to the next port of call, but not beyond that port. Within this logic, the 'port of delivery' referred to in Article 7(2) should be understood as the 'next port of call', as it is for the authorities of the next port of call to evaluate if the ship in question may proceed further to another port taking into account the available storage capacity.

Article 7(2) provides that 'if there are good reasons to believe that adequate facilities are not available at the intended port of delivery, or if this port is unknown, and there is a risk that the waste will be discharged at sea, all necessary measure must be taken to prevent marine pollution, if necessary by requiring the ship to deliver its waste'.

The competent authorities will thus need to assess the situation in the intended port of delivery, in particular whether adequate port reception facilities are available in that port. The Commission notes that this may prove to be difficult in the case that the intended port of delivery is located outside the EU or is unknown.

Whereas the application of Article 7(2) can be monitored in EU ports within the framework of the 'port-to port system', supported by the information and monitoring system developed in accordance with Article 12(3) of the Directive (see section 3.5.2 below), this would not be the case when the next port of call is located outside the EU. With respect to vessels departing to non-EU ports, the Commission therefore considers of the utmost importance that competent authorities verify the sufficient storage capacity on board before allowing these ships to depart with waste still on board, and — where the information is available — verify the availability of port reception facilities in the IMO GISIS database ([29]).

3.5. **Monitoring and enforcement**

3.5.1. *Monitoring*

Member States are required to appropriately examine the information notified by the ship in the waste notification form ([30]). This examination should allow the authorities to arrange for adequate port reception facilities to be provided to the ship, as well as to allow for the monitoring of waste deliveries, including assessment of storage capacity.

([29]) Use of the IMO's Global Integrated Shipping Information System (GISIS) may provide information on port reception facilities available in the different ports: https://gisis.imo.org/Public/Default.aspx

([30]) Article 12(d).

As the Commission assessments have shown, currently both active and passive approval procedures are applied in Member States for allowing a ship to depart with ship-generated waste on board:

— Active Approval — after appropriate examination of the waste notification form and an assessment of the sufficient dedicated storage capacity on board, ships are provided with express written approval to leave the port. This is done either with a certificate or a simple message to the ship to be kept on board the vessel; or

— Passive Approval — intervention is only foreseen if, after appropriate examination of the waste notification, or in the absence of the notification, there are reasons to believe that the ship does not comply with the mandatory delivery requirement in the Directive. A PRF Inspection is initiated and, if the ship is found to have insufficient storage capacity on board, it will be asked to deliver its waste before departure. In all other cases, the ship will be allowed to sail to the next port of call, without express approval from the authorities in written or electronic format.

Neither Article 7(2), nor Article 11 and Article 12(1)(d) require the issuance of an explicit approval for the ship to proceed to the next port of call. Therefore, the Commission considers that both the active and passive approval procedures are allowed by the Directive.

3.5.2. *Information and monitoring system*

To help Member States identify the ships which have not delivered their waste in accordance with the Directive, the Directive has foreseen the development of an appropriate information and monitoring system.

The Commission has undertaken the development of this system within the existing SafeSeaNet, established under Directive 2002/59/EC establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC ([31]) and intends to link the system with a dedicated reporting and monitoring module within the Port State Control Inspection Database (THETIS) operated by EMSA.

As of the 1 June 2015, electronic reporting through the National Single Window ([32]) has become mandatory for advance waste notification and is being exchanged between national authorities via the Union Maritime Information and Exchange System (SafeSeaNet) ([33]). To this end, an electronic waste message as part of the Business Rules for the implementation of the message was developed under Directive 2010/65/EU. Member States and the Commission have also agreed that information on ships which have not delivered their ship-generated waste and cargo residues should be transmitted via SafeSeaNet ([34]). The Commission expects that this system will both support Member States in the proper implementation of the Directive, as well as industry by providing for efficient reporting and reducing turn-around time in ports.

In this context, the Commission notes that although the waste notification in Annex II requires a formal signature from the master of the ship, when the waste notification is reported electronically, no written signature on the form will be required in parallel and the user's credentials of the data provider will be sufficient to identify the person submitting the waste notification ([35]).

3.5.3. *Enforcement (inspections)*

Article 11 sets out the inspection regime under the Directive. In principle, Member States have to ensure that *all* ships may be subject to an inspection and that a sufficient number of inspections are carried out. The Commission underlines that this general inspection requirement also includes fishing vessels and recreational craft. However, as it might not be possible in practice to control all ships which do not deliver their waste in ports, the Directive provides certain selection criteria in order to decide what ships should be inspected.

([31]) OJ L 208, 5.8.2002, p. 10.
([32]) Article 5 of Directive 2010/65/EU of the European Parliament and of the Council on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC (OJ L 283, 29.10.2010, p. 1).
([33]) As established by Directive 2002/59/EC.
([34]) See 'SAFESEANET: Incident Report Guidelines'.
([35]) As agreed by the eMS group set up under Directive 2010/65/EU, Waste message — Business Rules, version 0.9, 19 March 2012.

According to Article 11(2)(a) of the Directive, ships (other than fishing vessels and recreational craft authorised to carry no more than 12 passengers), which have not complied with the notification requirements in Article 6, or for which the examination of the information provided by the master of the ship has revealed other grounds to believe that the ship does not comply with the Directive, should be paid *particular attention* in the process of selecting ships for inspection.

As it results from Article 11(2)(a), the notification form is the primary tool for selecting/targeting vessels for inspection. In this context, the Commission underlines the need for an effective exchange of information between the competent authorities and enforcement bodies. In particular, the following information flows are essential:

— The relevant enforcement authority and its inspectors must have access to the notifications without delay.

— The port should report any inconsistencies with the Directive, including absence of notification or non-delivery immediately to the authority undertaking the PRF Inspection;

— The competent authority in each Member State should:

  — receive reports of inconsistencies from the port or third parties, especially regarding those ships which do not comply with the requirements of the Directive;

  — inform the competent authority of the next port of call of non-delivery in breach of Articles 7 and 10 of the PRF Directive, so that the ship will not be permitted to leave that port until a more detailed assessment has taken place, as provided in Article 11(2)(d).

3.5.3.1. Scope of PRF inspections:

The Directive expressly allows for the enforcement to be conducted under the Port State Control Directive ([36]). At the same time, the Directive makes it clear that whatever the framework under which the inspections take place, a 25 % inspection requirement applies. The Commission notes that the 25 % inspection requirement stems from the requirements of the previous Port State Control Directive (Directive 95/21/EC) in force at the time when the Directive was adopted. The current port State control regime, introduced by Directive 2009/16/EC, has replaced the 25 % requirement with a shared inspection burden which is allocated proportionately to each Member State and a risk based targeting mechanism.

The recitals of the Directive emphasize the need to undertake targeted inspections to verify compliance, the number of which should be sufficient to deter non-compliance with the Directive ([37]). This principle of targeted inspections is also reflected in the overall system established by Article 11, with selection criteria based on the information from the notification or the absence of notification. Therefore, the Commission considers that the inspection regime provided in the PRF Directive should also follow a risk based approach, similar to the approach taken in the framework of the current Port State Control Directive, instead of aiming to achieve the 25 % fixed target.

However, the Commission emphasizes that at all times the correct application and enforcement of the PRF Directive should be ensured, in particular the compliance with the selection criteria for inspections which are different from those used in the framework of Port State Control Directive. Furthermore, it is important that those vessels that are not required to send a waste notification to a port, including exempted vessels in regular traffic, fishing vessels and recreational craft (authorised to carry no more than 12 passengers), are also monitored and inspected. Article 11(3) requires Member States to establish control procedure for both fishing vessels and recreational craft to ensure compliance with the Directive.

On the other hand, ships which comply with the Directive, but are unduly delayed because of inadequacy of reception facilities also have the right to be compensated (Article 12(1)(h)).

3.5.3.2. 'Holding the vessel' and the information exchange system

In cases where the relevant authority is not satisfied with the results of the inspection it has to ensure that the vessel does not leave the port until it has delivered its waste. As such the Directive provides the legal basis and conditions for 'holding' the vessel, although — as explained above — the framework, procedures and overall system for holding the vessel may be derived from the Port State Control Framework, as specifically foreseen in Article 11(2)(b). Therefore, even though the framework may be the same, the act of holding a vessel under the PRF Directive has to be distinguished from a 'detention' under the Port State Control Directive.

([36]) Directive 2009/16/EC of the European Parliament and of the Council on port State control (OJ L 131, 28.5.2009, p. 57).
([37]) Recital 18 of the Directive.

The decision to hold a vessel for non-compliance with the delivery requirements in Article 7 or 10 may also be triggered by information received from the previous port, constituting 'clear evidence' of non-delivery. In such cases, the inspector shall not allow a ship to leave the port until a more detailed assessment of the factors relating to the ship's compliance with the waste delivery requirements has taken place.

The cooperation between Member States in enforcing the Directive has as its core the effective reporting system between ports for the exchange of relevant information. Such a system is foreseen in Article 12(3) of the Directive and the Commission undertakes its further development and integration within the existing data reporting systems.

4. **EXEMPTIONS**

4.1. **Conditions**

In order to avoid undue administrative and financial burden for ships visiting the same ports frequently and regularly, Article 9 empowers Member States to exempt ships from the following obligations:

— the advance waste notification (Article 6);

— the mandatory delivery of ship-generated waste (Article 7(1));

— the payment of the waste fee (Article 8).

By following the principle of legal interpretation 'a maiore ad minus', it results that a Member State, which can exempt a ship from all requirements, can exempt it also from only one of those. In the same vein, if it can exempt a ship from delivering all types of ship-generated waste, it can also exempt it from delivering only one or some types of waste.

Article 9 establishes two cumulative conditions for allowing exemptions:

a) the ship is engaged in scheduled traffic with frequent and regular port calls; and

b) there is sufficient evidence of an arrangement to ensure the delivery of the ship generated waste and the payment of fees in a port along the ship's route.

However, these conditions have not been clearly defined at the EU level so far, leaving a wide margin of discretion to Member State authorities to outline the key concepts. Consequently, exemption regimes widely differ between Member States which raises the need to clarify certain key concepts.

4.1.1. *Ships involved in scheduled traffic with frequent and regular port calls*

The notion of 'scheduled traffic with frequent and regular port calls' has not been further defined in the Directive. Drawing from identified best practices in Member States ([38]), the Commission considers that these terms should be interpreted as follows:

— Scheduled: The vessel in question must have a published or planned list of times of departures and arrivals, between identified ports or terminals, or have recurrent ([39]) crossings that constitute a recognizable schedule. This schedule or equivalent can also take the form of declarations of sailing times. It should be noted that the ship's schedule should be set in advance and remain stable over at least 4 months to include seasonal sailings.

— Regular: The vessels must operate on repeated journeys with a constant pattern between the identified ports or terminals and no others, or undertake a series of voyages from and to the same port without intermediate calls.

— Frequent: The vessel must visit the port for which the exemption applies and the port at which it discharges the ship generated waste at least once a fortnight.

([38]) The interpretation takes account of the definitions presently used by the HELCOM Countries in Recommendation 28E/10, 'Guidelines for the establishment of a harmonized "no-special-fee" system for the delivery of ship-generated oily wastes originating from machinery spaces and for the delivery of sewage and garbage, including marine litter caught in fishing nets, to port reception facilities', adopted on 15 November 2007, http://helcom.fi/Recommendations/Rec%2028E-10.pdf, and the United Kingdom, ref. UK Marine Guidance Note MGN 387, 'Guidance on the Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003 and amendments'.

([39]) Recurrent refers to shuttle or 'turn up and go' service type of journeys on very short routes.

An additional issue concerns the types of ships that may benefit from the exemption — in particular if dredgers, pilot boats or short crossing ferries would fall in the scope of Article 9. First of all it should be noted that Article 9 does not differentiate between categories of ships. Furthermore, the Commission considers that ships for which the port of departure and port of arrival are one and the same should for that reason alone not be excluded from the scope of Article 9. It appears perfectly conceivable that a ship calls at the (single) port from which it operates frequently and regularly in the context of scheduled traffic, so that it is justified to allow for an exemption under Article 9, the only purpose of which is that of simplification. Moreover, taking into account the definition of the port, ships providing services within this area or between terminals of the same port, should be able to avail of the provisions of Article 9, provided they also comply with the conditions of sufficient arrangements for payment and delivery at appropriate intervals.

4.1.2. *Sufficient evidence of an arrangement*

Article 9(1) of the PRF Directive provides as a pre-condition for granting an exemption the existence of 'sufficient evidence of an arrangement to ensure the delivery of ship-generated waste and payment of fees in a port along the ship's route'.

The quality of the evidence in support of the exemption request is of key importance to the proper functioning of the exemption regime.

Drawing from the guidance provided by national or regional organisations, the Commission considers that the following evidence, taken together, should be considered as 'sufficient' when presented by the operator of the ship:

— evidence of a signed contract, or contracts, covering each type of ship generated waste with a port or with a registered waste contractor in the port where the waste is to be delivered, along with the frequency of which the waste will be delivered to these facilities;

— receipts and other proof that the contract or arrangement is active;

— evidence that these arrangements are acceptable to the port receiving the ship generated waste, the port(s) for which the exemption is being applied for and other ports on the route.

The requirement of a contract rules out the practice of accepting an exemption on the basis of frequent visits alone. The evidence should be supplemented by proof that the contract is in active use and implemented in practice, in order to avoid abuse of the exemption regime. The last point contains a reference to the acceptability of the arrangement by the port in which the contract is made. This requirement would help to avoid situations, in which the port authority is not even aware that the vessel has been exempted by another Member State on the basis of frequent visits to a specific port. The burden of submitting the required information lies with the ship operator.

Ships travelling between three or more ports can be given an exemption under the Directive for more than one port so long as they notify, deliver and pay the mandatory fee in at least one port along their route. This excludes practices of a ship being exempted for *all* ports along its route, even on the basis of only a private arrangement with a waste contractor for delivery and payment of the waste outside the port (third party arrangement), as such arrangements should be made under the responsibility/authority of a port along the ship's route.

Although Article 9 does not explicitly require that the arrangement for delivery and payment of the fee is made in a port located in a Member State, there may be concerns over the arrangements made in non-EU ports, as these would not necessarily comply with the conditions provided in the Directive and be properly verified and enforced. For that reason, ports granting an exemption based on arrangements made outside the EU, should assess these arrangements against the requirements of the Directive in terms of sufficient and adequate reception facilities, monitoring of delivery and payment of the fees, and in case of doubt not accept those arrangements as 'sufficient evidence' in the meaning of Article 9(1).

4.2. **Exemption procedure**

The application for an exemption will normally be made by the ship's agent or the shipping company/operator to the competent authority of the Member State within which the port is located. The designated authority will require evidence of the ship's scheduled traffic, as well as evidence of the waste management arrangement in place.

Member States' authorities can only exempt ships in ports under their own jurisdiction, but the waste management arrangement on which the exemption is based can be made in any other port along the ship's regular route ([40]).

([40]) For example, a passenger ro-ro ferry trading between Member States A and B may have a garbage contract with a waste management company in State A, an oily waste contract with a waste management company in State B, and a sewage contract with a port authority/municipality in State A.

The exemption granted by one Member State for a port is not valid in another Member State's port (i.e. a separate exemption), as Article 9(1) foresees a 'port-by-port' exemption procedure by referring to 'Member States of the ports involved'. Therefore the ship needs to apply separately for exemptions in each Member State port along its regular route, even if the waste management agreement(s) that form the basis for the exemption may be the same.

The duration of the validity of exemptions varies widely among Member States. In order to avoid abuse, the Commission is of the opinion that the maximum duration of validity of the exemptions should be five years, depending on changes to the traffic pattern of the ship. In any case, the exemption should not extend beyond the duration of the waste management arrangement. Once the exemption has been granted, it is considered good practice to issue an exemption certificate, which may contain all the relevant information pertaining to the exemption, such as a reference to the obligations from which the ship has been exempted, validity conditions and date and place of issuance. The exemption certificate should best be kept on board the ship at all times in order to demonstrate compliance.

Article 9(2) requires that the Commission is informed by the Member States on a regular basis (at least once a year), of the exemptions granted. This can be done either in written format or — preferably — through reporting in SafeSeaNet, used as a basis for the Common Information and Monitoring System.

4.3. **Monitoring and enforcement**

Member States should ensure that proper control procedures are in place for exempted ships and that they are subject to inspection on a regular basis (at least once per year), to verify that they follow the waste delivery arrangements, as required in Article 11(1) of the Directive.

For this purpose, all the relevant enforcement authorities along a ship's regular route should be fully informed on which vessels are exempted, in which ports, and on what grounds. Most importantly, the enforcement authorities in a given port need to be aware of any potential exemption covering that particular port. This is normally achieved through the exemption certificate which the operator/agent of the ship can submit to the relevant authorities as proof of the exemption(s) ([41]) granted. In this context, the Commission emphasizes the importance of an effective exchange of information on exemptions between Member States' authorities through the Common Information and Monitoring System. The information on exemptions will be necessary to verify the arrangements made for delivery and payment of fees, which are preconditions for obtaining the exemption.

([41]) The relevance is also recognised in the HELCOM Guidelines referred in footnote 38, which provide that the State granting the exemption 'should also inform about the issued exemptions the other port States along the scheduled route.'