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Commission Regulation (EU) No 788/2014

of 18 July 2014

laying down detailed rules for the imposition of fines and periodic penalty payments and the withdrawal of recognition of ship inspection and survey organisations pursuant to Articles 6 and 7 of Regulation (EC) No 391/2009 of the European Parliament and of the Council

(Text with EEA relevance)

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations, and in particular Article 14(2) thereof,

Whereas:

(1) Articles 6 and 7 of Regulation (EC) No 391/2009 empower the Commission to impose fines and periodic penalty payments on recognised organisations, as defined in Article 2 of that Regulation, or to withdraw their recognition, in order to ensure the enforcement of the criteria and obligations established under that Regulation with a clear view to removing any potential threat to safety or the environment.

(2) It is in the interest of transparency to lay down, in accordance with Article 14(2) of Regulation (EC) No 391/2009, detailed rules of procedure for decision-making, as well as the methodology for the calculation of fines and periodic penalty payments by the Commission so that it is known in advance by the organisations concerned, including specific criteria for the Commission to appraise the gravity of the case and the extent to which safety or the protection of the environment has been compromised.

(3) Through the introduction of fines and periodic penalty payments the Commission should have a supplementary tool, allowing it to give a more nuanced, flexible and graduated response to a breach of the rules contained in Regulation (EC) No 391/2009 by a recognised organisation, compared to the withdrawal of its recognition.

(4) Periodic penalty payments should be effective in ensuring that any breach of the obligations and requirements laid down in Regulation (EC) No 391/2009 is promptly and appropriately remedied. Therefore Regulation (EC) No 391/2009 empowers the Commission to apply periodic penalty payments where a recognised organisation has failed to undertake the preventive and remedial actions required by

the Commission, after a reasonable period and until such time as the required actions have been taken by the recognised organisation concerned. If necessary, in light of the circumstances of the case, the daily amount of the periodic penalty payments may gradually be increased to reflect the urgency of the requested actions.

(5) The calculation of fines and periodic penalty payments as a fraction of the turnover of the organisation, bearing in mind the maximum ceiling established in accordance with Regulation (EC) No 391/2009, is a simple method to make the fines and periodic penalty payments dissuasive while remaining proportionate to both the gravity of the case and the economic capacity of the organisation concerned, in light of the diverse sizes of recognised organisations.

(6) The application of the maximum aggregate amount ceiling to the fines and periodic penalty payments should be clearly set out taking into account the different circumstances where this would apply, in the interests of transparency and legal certainty. For the same reasons, the way in which the total average turnover in the preceding three business years for the activities falling under the scope of Regulation (EC) No 391/2009 is calculated for each recognised organisation should also be laid down.

(7) It is appropriate that a decision to withdraw the recognition of an organisation on the basis of the conditions laid down in Article 7(1) of Regulation (EC) No 391/2009 should consider all factors linked to the overarching objective of monitoring the recognised organisations' operations and overall performance, including the effectiveness of any fines and periodic penalty payments already imposed for repeated and serious breaches of that Regulation.

(8) A specific procedure should be laid down in order to enable the Commission, be it at its own initiative or at the request of Member State(s), to withdraw the recognition of an organisation pursuant to Regulation (EC) No 391/2009, further to the Commission's powers to assess recognised organisations and to impose fines and periodic penalty payments with the associated procedures set out in this Regulation.

(9) It is important that a decision to impose fines, periodic penalty payments or the withdrawal of recognition in accordance with this Regulation is based exclusively on grounds on which the recognised organisation concerned has been able to comment.

(10) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the right of defence and the principles of confidentiality and ne bis in idem, in accordance with the general principles of law and the case law of the Court of Justice of the European Union.

(11) Decisions imposing fines and periodic penalty payments in accordance with this Regulation should be enforceable in accordance with Article 299 of the Treaty on the Functioning of the European Union and can be subject to review by the Court of Justice of the European Union.

(12) For the purpose of ensuring fairness and legal certainty in the conduct of the procedure, it is necessary to lay down detailed rules for the calculation of time limits set by the Commission in the course of the procedure and of the limitation periods that apply to the Commission for the imposition and enforcement of fines and periodic penalty payments, taking into account also the date of entry into force of Regulation (EC) No 391/2009.

(13) The enforcement of this Regulation requires an effective cooperation between the Member States concerned, the Commission and the European Maritime Safety Agency. For that purpose, it is necessary to clarify the rights and obligations of each of these parties in the procedures laid down in this Regulation, in order to ensure the effective conduct of the inquiry, decision-making and follow-up process pursuant to Articles 6 and 7 of Regulation (EC) No 391/2009.

(14) The measures provided for in this Regulation are in accordance with the opinion of the Committee on Safe Seas and the Prevention of Pollution from Ships (COSS) established by Regulation (EC) No 2099/2002 of the European Parliament and of the Council,

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation lays down rules for the implementation of Articles 6 and 7 of Regulation (EC) No 391/2009 by the Administration.

It sets out the criteria for establishing the amount of fines and periodic penalty payments, the decision-making procedure to impose a fine and a periodic penalty payment or to withdraw the recognition of a recognised organisation.

Article 2

Definitions

For the purposes of this Regulation, the definitions set out in Article 2 of Regulation (EC) No 391/2009 shall apply.

CHAPTER II

FINES AND PERIODIC PENALTY PAYMENTS

Article 3

Identification of infringements

1. The Administration shall identify an infringement under Article 6(1) of Regulation (EC) No 391/2009 where:

(a) the serious or repeated failure by a recognised organisation to fulfil one of the minimum criteria set out in Annex I of Regulation (EC) No 391/2009 or its obligations under Articles 8(4), 9, 10 and 11 of Regulation (EC) No 391/2009 reveals serious shortcomings in a recognised organisation's structure, systems, procedures or internal controls;

(b) a recognised organisation's worsening performance, taking into account Commission Decision No 2009/491/EC, reveals serious shortcomings in that organisation's structure, systems, procedures or internal controls;

(c) a recognised organisation has deliberately provided incorrect, incomplete or misleading information to the Administration in the course of its assessment or otherwise obstructed that assessment.

2. In any infringement procedure under this Regulation, the burden of proving an infringement shall rest on the Administration.

Article 4

Calculation of fines

1. A basic fine of 0,6 % of the total average turnover of the recognised organisation, as determined in accordance with Article 9, shall be initially assigned to each infringement established on the basis of Article 6(1) of Regulation (EC) No 391/2009.

2. For the calculation of the individual fine for each infringement the basic fine referred to in paragraph 1 shall be increased or reduced, on the basis of the seriousness and of the effects of the infringement, in particular the extent to which safety or the protection of the environment have been compromised, in accordance with Articles 5 and 6 respectively.

3. The maximum amount of each individual fine shall not exceed 1,8 % of the total average turnover of the recognised organisation.

4. Where one action or omission of the recognised organisation forms the sole basis of two or more infringements under Article 6(1)(a) of Regulation (EC) No 391/2009 identified in accordance with Article 3(1)(a) of this Regulation, the concurrent individual fine shall be the highest of the individual fines calculated for the underlying infringements.

5. The total fine imposed on a recognised organisation in one decision shall be the sum of all individual fines resulting from the application of paragraphs 1 to 4 of this Article, without prejudice to the maximum ceiling established under Article 6(3) of Regulation (EC) No 391/2009, as detailed Article 8 of this Regulation.

Article 5

Assessment of the seriousness of an infringement

When assessing the seriousness of each infringement the Administration shall take into account all relevant aggravating and mitigating circumstances, in particular the following:

(a) whether the organisation has acted with negligence or intent;

(b) the number of actions or omissions of the recognised organisation which give rise to the infringement;

(c) whether the infringement affects isolated offices, geographical areas or the entire organisation;

(d) the recurrence of the actions or omissions of the recognised organisation giving rise to the infringement;

(e) the duration of the infringement;

(f) a misrepresentation of the actual condition of ships in the certificates and documents of compliance delivered by the recognised organisation, or the inclusion of incorrect or misleading information therein;

(g) prior sanctions, including fines, imposed on the same recognised organisation;

(h) whether the infringement results from an agreement between recognised organisations or a concerted practice, which have as their object or effect the breach of the criteria and obligations provided in Regulation (EC) No 391/2009;

(i) the degree of diligence and cooperation of the recognised organisation in the discovery of the relevant actions or omissions, as well as in the determination of the infringements by the Administration.

Article 6

Assessment of the effects of an infringement

When assessing the effects of each infringement, in particular the extent to which safety and the protection of the environment have been compromised, the Administration shall take into account all relevant aggravating and mitigating circumstances, in particular the following:

(a) the nature and extent of the deficiencies actually or potentially affecting the fleet certified by the organisation, which the said organisation, as a result of the infringement, has failed to detect or may not be able to detect, or has failed to or may not be able to request the timely correction of, taking into account in particularthe criteria for the detention of a ship laid down in Annex X of Directive 2009/16/EC of the European Parliament and of the Council on port State control;

(b) the proportion of the fleet certified by the organisation actually or potentially affected;

(c) any other circumstances posing specific identifiable risks, such as the type of the ships actually or potentially affected.

Article 7

Periodic penalty payments

1. Periodic penalty payments as referred to in Article 6(2) of Regulation (EC) No 391/2009 may be imposed by the Administration on the organisation concerned, without prejudice to the fines imposed pursuant to Article 3, in order to ensure that preventive and remedial action is taken as required by the Administration in the course of its assessment of the recognised organisation.

2. In the decision imposing fines pursuant to Article 3 the Administration may also establish periodic penalty payments to be imposed on the recognised organisation if, and for as long as, it fails to undertake remedial action or incurs unjustified delays in bringing the infringement to an end.

3. The decision imposing the periodic penalty payments shall determine the time limit within which the recognised organisation has to comply with the required action.

4. Periodic penalty payments shall apply as from the day following the expiry of the time limit established in accordance with paragraph 3 until the day on which appropriate remedial action has been undertaken by the organisation, provided that the remedial action is considered satisfactory by the Administration.

5. The basic amount per day of the periodic penalty payments for each infringement shall be 0,0033 % of the total average turnover of the recognised organisation calculated in accordance with Article 9. For the calculation of the individual amount of periodic penalty payments for each infringement, the basic amount shall be adjusted based on the seriousness of the infringement and taking into account the extent to which safety or the protection of the environment has been compromised, in the light of Articles 5 and 6 of this Regulation.

6. The Administration may decide, in light of the circumstances of the case, and in particular in view of the urgency of the remedial action to be undertaken by the organisation concerned, to increase the daily amount for periodic penalty payments up to the following limits:

(a) when the recognised organisation exceeds the time limit established pursuant to paragraph 3 by more than 120 days, from the 121st to the 300th day from the expiry of the time limit, 0,005 % per day of the organisation's total average turnover, calculated in accordance with Article 9;

(b) when the recognised organisation exceeds the time limit established pursuant to paragraph 3 by more than 300 days, from the 301st day from the expiry of the time limit, 0,01 % per day of the organisation's total average turnover, calculated in accordance with Article 9.

7. The total amount of periodic penalty payments imposed under this Article, individually or in addition to fines, shall not exceed the maximum ceiling established under Article 6(3) of Regulation (EC) No 391/2009, as detailed in Article 8 of this Regulation.

Article 8

Determination of maximum aggregate amount of fines and periodic penalty payments

The maximum aggregate amount of fines and periodic penalty payments imposed to the recognised organisation, as established in Article 6(3) of Regulation (EC) No 391/2009, shall be determined as follows:

(a) the aggregate amount of the fines imposed on a recognised organisation in accordance with Article 4 within one business year for that organisation, taking into account the date of the decision to impose the fines and, in case of more than one decision imposing fines to that organisation, the date of the first decision imposing a fine on that organisation, shall not exceed 5 % of the total average turnover of that organisation calculated in accordance with Article 9;

(b) the aggregate amount of the fines imposed on a recognised organisation in accordance with Article 4 within one business year for that organisation, determined in accordance with paragraph 1, and the periodic penalty payments imposed in the same decisions in accordance with Article 7(2) and accrued for as long as appropriate remedial action is not undertaken by the organisation shall not exceed 5 % of the total average turnover of that organisation calculated in accordance with Article 9. Without prejudice to Article 21, recovery by the Administration of the periodic penalty payments shall not exceed the 5 % ceiling;

(c) the aggregate amount of the periodic penalty payments imposed on a recognised organisation in accordance with Article 7(1) and accrued for as long as appropriate preventive or remedial action is not undertaken by the organisation shall not exceed 5 % of the total average turnover of that organisation calculated in accordance with Article 9. Without prejudice to Article 21, recovery by the Administration of the periodic penalty payments shall not exceed the 5 % ceiling.

Article 9

Calculation of turnover

1. For the purposes of this Regulation the total average turnover of the recognised organisation concerned shall be one third of the amount obtained by adding, over the three business years preceding the Administration's decision, the aggregate turnover of the parent entity holding the recognition and all legal entities which are encompassed in that recognition at the end of each year.

2. In the case of a group with certified consolidated accounts, the turnover referred to in paragraph 1 shall be, as regards the parent entity and all legal entities included in that group which are encompassed in the recognition at the end of each business year, the consolidated revenue of those entities.

3. In the application of paragraphs 1 and 2 only the activities falling under the scope of Regulation (EC) No 391/2009 shall be taken into account.

CHAPTER III

WITHDRAWAL OF RECOGNITION

Article 10

Withdrawal of recognition

1. The Administration may make a decision to withdraw the recognition of an organisation, in the cases referred to in Article 7(1) points (a) to (e) of Regulation (EC) No 391/2009.

2. In order to determine whether a repeated and serious failure constitutes an unacceptable threat to safety or the environment in accordance with Article 7(1)(a) and (b) of Regulation (EC) No 391/2009, the following elements shall be taken into account:

(a) the information and circumstances referred to in Article 7(2) of Regulation (EC) No 391/2009, particularly in light of the circumstances referred to in Articles 5 and 6 of this Regulation;

(b) the criteria and, as the case may be, thresholds defined in Commission Decision 2009/491/EC.

3. When fines and periodic penalty payments imposed on a recognised organisation reach the maximum ceiling established in accordance with Article 6(3) of Regulation (EC) No 391/2009 and appropriate corrective action has not been taken by the recognised organisation, the Administration may consider that these measures have not attained their objective of removing any potential threat to safety or the environment.

Article 11

Deleted

CHAPTER IV

COMMON PROVISIONS

Article 12

Statement of objections

1. Where the Administration considers that there are grounds to impose a fine and periodic penalty payments on a recognised organisation in accordance with Article 6 of Regulation (EC) No 391/2009, or to withdraw an organisation's recognition in accordance with Article 7 of that Regulation, it shall address a statement of objections to the organisation.

2. The statement of objections shall include:

(a) a detailed account of the recognised organisation's actions and omissions, including the description of the relevant facts and the identification of the provisions of Regulation (EC) No 391/2009, which the Administration considers to have been breached by the recognised organisation;

(b) an identification of the evidence on which the relevant findings are based, including by reference to inspection reports, assessment reports, or any other relevant documents which have been previously communicated to the organisation concerned by the Administration;

(c) a notice that fines and periodic penalty payments or the withdrawal of recognition may be imposed by the Administration in accordance with Articles 6 or 7 of Regulation (EC) No 391/2009.

3. When notifying the statement of objections, the Administration shall invite the recognised organisation to submit written observations within a designated time limit, which shall not, in any event, be less than six weeks of the date of receipt of the statement of objections. The Administration shall not be obliged to take

into account submissions received after the expiry of that time limit, without prejudice to the provisions of Article 24 paragraph 4 of this Regulation.

4. The notification of a statement of objections shall not suspend the assessment of the organisation concerned. At any moment prior to the adoption of a decision to impose a fine and periodic penalty payments, or the withdrawal of recognition in accordance with this Regulation, the Administration may decide to carry out additional inspections of an organisation's offices and facilities, to visit ships certified by the organisation or to request the recognised organisation in writing to provide additional information relating to its compliance with the criteria and obligations under Regulation (EC) No 391/2009.

5. At any moment prior to the adoption of a decision to impose a fine and periodic penalty payments, or the withdrawal of recognition in accordance with this Regulation, the Administration may amend its assessment of the recognised organisation concerned. If the new assessment is different to the assessment which gave rise to the statement of objections, because new facts have been discovered, or because new infringements or new circumstances concerning the seriousness of an infringement or its effects on safety and the environment have been identified, the Administration shall issue a new statement of objections.

Article 13

Requests for information

In order to clarify the facts for the purposes of Article 12, the Administration may request in writing the recognised organisation to provide written or oral explanations, or particulars or documents, within a designated time limit, which shall not, in any event, be less than 4 weeks. In such a case the Administration shall inform the recognised organisation of the periodic penalty payments and fines that may be imposed for failing to comply with the request or when incurring unjustified delays in the provision of information or providing deliberately incorrect, incomplete or misleading information to the Administration.

Article 14

Oral hearing

1. At the request of the recognised organisation to which a statement of objections has been addressed, the Administration shall offer that organisation the opportunity to present its arguments at an oral hearing.

2. The Administration may invite any other persons with a legitimate interest in the infringement to take part in the oral hearing.

3. Natural or private legal persons invited to attend shall either appear in person or be represented by legal or authorised representatives.

4. The oral hearing shall not be public. Each person invited to attend may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the recognised organisation and other parties in the protection of their business secrets and other confidential information.

5. The statements made by each person heard shall be recorded. Upon request, the recording of the hearing shall be made available to the persons who attended the hearing.

Article 15

Periodic penalty payments for non-cooperation

1. Where the Administration intends to make a decision imposing periodic penalty payments as referred to in Article 7(1) to a recognised organisation that has failed to undertake or incurs unjustified delays in undertaking preventive and remedial action requested by the Administration, the Administration shall first notify the recognised organisation in writing.

2. The notification by the Administration in accordance with paragraph 1 shall make reference to the specific preventive and remedial action that has not been undertaken by the recognised organisation and the supporting evidence, as well as inform the recognised organisation of the periodic penalty payments that are being considered by the Administration thereon.

3. The Administration shall set a time limit in which the recognised organisation may submit written observations to the Administration. The Administration shall not be obliged to take into account written observations received after the expiry of the time limit.

Article 16

Access to the file

1. At the request of the recognised organisation to which a statement of objections has been addressed, the Administration shall grant access to the file containing documents and other evidence compiled by the Administration on the alleged infringement.

2. The Administration shall set the date and make the relevant practical arrangements for the recognised organisation's access to the file, which may be granted in electronic form only.

3. The Administration shall make available to the recognised organisation concerned, upon request, a list of all the documents contained in the file.

4. The recognised organisation concerned shall have the right to access the documents and information contained in the file. When granting such access, the Administration shall have due regard to business secrets, confidential information or the internal character of documents issued by the Administration.

5. For the purposes of paragraph 4, internal documents of the Administration may include documents or parts of documents pertaining to the internal deliberations of the Administration.

Article 17

Legal representation

The recognised organisation shall have the right to legal representation at all stages of the proceedings under this Regulation.

Article 18

Confidentiality, professional secrecy and the right to remain silent

1. Proceedings under this Regulation shall be carried out subject to the principles of confidentiality and of professional secrecy.

2. The Administration shall not disclose information acquired or exchanged pursuant to this Regulation and of the kind covered by the obligation of professional secrecy and confidentiality.

3. Any recognised organisation or other person who submits information or observations pursuant to this Regulation shall clearly identify any material considered to be confidential, giving the reasons for it, and provide a separate non-confidential version by the date set by the Administration.

4. The Administration may also require recognised organisations and other interested parties to identify any part of a report, of the statement of objections or of a decision by the Administration, which in their view contains business secrets.

5. In the absence of the identification referred to in paragraphs 3 and 4, the Administration may assume that the documents or observations concerned do not contain confidential information.

6. Without prejudice to Article 9 of Regulation (EC) No 391/2009, recognised organisations shall have the right to remain silent in situations where it would otherwise be compelled to provide answers which might involve an admission on their part of the existence of a breach.

Article 19

Decision

1. A decision to impose fines, periodic penalty payments, or the withdrawal of recognition in accordance with this Regulation shall be based exclusively on the grounds on which the recognised organisation concerned has been able to submit its observations.

2. The decision to impose a fine or a periodic penalty payment and the determination of the appropriate amount shall take into account the principles of effectiveness, proportionality and dissuasiveness.

3. When taking measures in accordance with this Regulation and deciding on the seriousness and effect of the relevant actions or omissions on safety and the environment the Administration shall take into account national measures already taken on the basis of the same facts against the recognised organisation concerned, in particular where that organisation has already been subject to judicial or enforcement proceedings.

4. Actions or omissions of a recognised organisation on the basis of which measures have been taken in accordance with this Regulation shall not be subject to further measures. However, these actions or omissions may be taken into account in subsequent decisions made in accordance with this Regulation in order to assess recurrence.

Article 20

Judicial remedies, notification and publication

1. The Administration shall inform the recognised organisation concerned of the judicial remedies available to it.

2. *Deleted*

3. When justified, in particular on grounds of safety or protection of the environment, the Administration may make its decision public. When publishing details of its decision, the Administration shall have regard to the legitimate interests of the recognised organisation concerned and other interested persons.

Article 21

Recovery of fines and penalty payments

The Administration shall proceed with the recovery of the fines and the penalty payments by service of a notice demanding payment of the debt addressed to the recognised organisation concerned.

Article 22

Limitation periods for the imposition of fines and periodic penalty payments

1. The right of the Administration to impose fines and/or periodic penalty payments to a recognised organisation in accordance with this Regulation shall expire after five years from the date when the action or omission of the recognised organisation giving rise to an infringement identified in accordance with Article 3 of this Regulation was committed. However, in case of continuing or repeated actions or omissions giving rise to an infringement, time shall begin to run on the day on which the action or omission ceases.

The right of the Administration to impose periodic penalty payments to a recognised organisation in accordance with Article 15 of this Regulation shall expire after three years from the date when the action or omission of the recognised organisation, for which the Administration requested appropriate preventive and remedial action, was committed.

2. Any action taken by the Administration for the purpose of the assessment or the infringement procedure in relation to an action or omission of the recognised organisation shall interrupt the relevant limitation period established under paragraph 1. The limitation period shall be interrupted with effect from the date on which the action of the Administration is notified to the recognised organisation.

3. Each interruption shall start time running afresh. The limitation period shall, however, not exceed a period equal to twice the initial limitation period, except where limitation is suspended pursuant to paragraph 4.

4. The limitation period for the imposition of periodic penalty payments shall be suspended for as long as the decision of the Administration is the subject of judicial proceedings.

Article 23

Limitation periods for the collection of fines and periodic penalty payments

1. The right to commence judicial proceedings or arbitration for fines and/or periodic penalty payments shall expire one year after the Decision pursuant to Article 19 has become final.

2. The limitation period referred to in paragraph 1 shall be interrupted by any action of the Administration, aimed at enforcing payment of the fines and/or periodic penalty payments.

3. Each interruption shall start time running afresh.

4. The limitation periods referred to in paragraphs1 and 2 shall be suspended for as long as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of the Court seized of the action or an arbitration tribunal.

Article 24

Application of time limits

1. The time limits laid down in this Regulation shall run from the day following receipt of the Administration 's communication or delivery thereof by hand.

2. In the case of a communication addressed to the Administration, the relevant time limits shall be deemed to have been met when that communication has been dispatched by registered post before the relevant time limit expires.

3. In setting the time limits, the Administration shall have regard both to due process rights and the specific circumstances of each decision-making procedure under this Regulation.

4. Where appropriate and upon reasoned request made before the expiry of the original time limit, time limits may be extended.

Article 25

Deleted

CHAPTER V

FINAL PROVISIONS

Article 26

Application

Events which occurred before the date of entry into force of Regulation (EC) No 391/2009 shall not give rise to any measures in accordance with this Regulation.

Article 27

Deleted