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)

[[X1]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)**]**

[[X1]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[(1)], 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,

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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

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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[(2)],

HAS ADOPTED THIS REGULATION:

Editorial Information

X1 Substituted by Corrigendum to 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 (Official Journal of the European Union L 214 of 19 July 2014).

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 Commission.

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 on the Commission's own initiative or at the request of a Member State.

Article 2

Definitions

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

In addition the following definition shall apply:

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'Member State concerned' means any Member State that has entrusted a recognised organisation with the inspection, survey and certification of ships flying its flag for compliance with the international conventions, in accordance with Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations[3], including the Member State that has submitted the request for recognition of that organisation to the Commission, in accordance with Article 3 of Regulation (EC) No 391/2009.

CHAPTER II

FINES AND PERIODIC PENALTY PAYMENTS

Article 3

Identification of infringements

1 The Commission 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[4], 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 Commission 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 Commission.

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

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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 Commission 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 Commission.

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 Commission 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