

Proposal for a Regulation of the European Parliament and of the Council on the Prohibition of Organotin Compounds on Ships

(2002/C 262 E/36)

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(Submitted by the Commission on 12 July 2002)

EXPLANATORY MEMORANDUM

General introduction

In accordance with the policy objectives outlined in the Commission's White Paper on Transport Policy ⁽¹⁾, this proposal for a regulation of the European Parliament and the Council aims to reduce the negative environmental impact of harmful anti-fouling paints used on ships.

Ships travel faster through the water and consume less fuel when their hulls are clean and smooth-free from fouling organisms, such as barnacles, algae and molluscs, therefore they are coated with anti-fouling systems. During the '60s the chemical industry developed efficacious and cost-effective anti-fouling paints using metallic compounds, in particular the organotin compound tributyltin (TBT). By the '70's most seagoing vessels had TBT paints on their hulls.

Awareness of the harmful environmental effects of organotin compounds gradually grew in the late '80s. Scientific studies have shown that organotin compounds, in particular TBT, used as anti-fouling systems on ships, pose a substantial risk of adverse impacts on ecologically and economically important marine organisms ⁽²⁾.

The Community decided, already in December 1989, to ban on its territory the marketing of organotin compounds used as biocides to prevent fouling on hulls of ships of less than 25 metres in length ⁽³⁾. The International Maritime Organization (IMO), in its turn recognized this risk and recommended governments to adopt measures to eliminate anti-fouling paints containing TBT.

Under environmental pressure the idea of a general ban on TBT gained ground in the '90s and the chemical industry started to develop alternative anti-fouling systems.

In November 1999 the IMO Assembly called for a global prohibition of the application of organotin compounds which act as biocides in anti-fouling systems on ships by 1 January 2003 and a complete prohibition of the presence of these organotin compounds on ships by 1 January 2008 ⁽⁴⁾. To achieve this goal the IMO decided to develop a legally binding Convention, with a world-wide application. Under these circumstances the Community decided to await the outcome of the deliberations within the IMO framework before deciding to enlarge the marketing ban on TBT to all ships ⁽⁵⁾.

On 5 October 2001 at the end of a five-day diplomatic conference, the IMO adopted a Convention on the control of harmful anti-fouling systems on ships (AFS-Convention).

⁽¹⁾ In this White Paper (COM(2001) 370 of 12 September 2001) it is, stressed amongst others, that a modern transport system must be sustainable from an economic and social as well as an environmental viewpoint.

⁽²⁾ Organotins have been shown to be toxic and to have hormone-disrupting properties in marine organisms.

⁽³⁾ Council Directive 89/677/EEC of 21 December 1989 amending for the eighth time Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (OJ L 398, 30.12.1989, p. 24).

⁽⁴⁾ IMO Resolution A. 895(21) adopted on 25 November 1999.

⁽⁵⁾ Commission Directive 1999/51/EC of 26 May 1999 adapting to technical progress for the fifth time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (tin, PCP and cadmium) (OJ L 142, 5.6.1999, p. 22).

In view of this conference, Member States and the Commission cooperated closely taking full account of the guidance provided by the Council ⁽¹⁾,

The new IMO Convention will prohibit the use of harmful organotins in anti-fouling paints used on ships and will establish a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems.

The new Convention is open for signature since 1 February 2002. It will enter into force 12 months after 25 States representing 25 % of the world's merchant shipping tonnage have ratified it.

The summary of the main provisions of this Convention is given in Annex A.

When providing its guidance for the negotiation of the AFS-Convention, the Council also urged the Commission to take any additional steps deemed necessary, in order to ensure a general ban of TBT used on ships all over the Community and its surrounding seas on the dates recommended in IMO Resolution A. 895(21).

In view of the diplomatic AFS-Conference the Community identified three main objectives to be reached within the new convention:

- Introduction of fixed dates for the banning of TBT, in order to pass a clear message to both the shipping and the chemical industries,
- Integration of the 'precautionary principle', to be understood as 'the lack of full scientific evidence' in the articles of the Convention,
- Adoption of an appropriate entry into force mechanism ⁽²⁾.

Having analysed the outcome of the diplomatic Conference and in particular in light of the 3 main objectives the Council ⁽³⁾ and the Commission welcomed the results achieved at IMO level.

As a follow-up of this AFS-Conference the main action required and expected from the Member States is of course the signature and ratification of the AFS-Convention at the earliest possible opportunity.

Having regard to the abovementioned Council request, the Commission is of the opinion that additional steps are necessary to:

- put the Member States in the best possible position in order to encourage them to ratify the AFS-Convention and to resolve possible obstacles, which might create an impediment to speedy ratification and thus to contribute to the earliest possible entry into force of the AFS-Convention,
- safeguard at Community level the achievement of the main goal of the AFS-Convention, i.e. the prohibition of the application of organotin compounds on ships by 1 January 2003 and a complete prohibition of their presence by 1 January 2008.

Therefore the Commission:

- recommends Member States to sign and to ratify the AFS-Convention at the earliest possible opportunity,
- will adopt Commission Directive ... adapting to technical progress for the ninth time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (organostannic compounds),

⁽¹⁾ Conclusions of the Council of 12 February 2001 on the final negotiations on the International Convention on the control of harmful anti-fouling systems.

⁽²⁾ The entry into force of conditions laid down in the Marpol Convention (15 States representing at least 50 % of the world tonnage) were not considered appropriate. Practice has demonstrated that under these circumstances it might take more than 6 years before the Convention would enter into force.

⁽³⁾ The Environmental Council of 21 October 2001 took note of the positive outcome of the AFS-Conference, as reported by the Belgian Presidency.

- proposes to the European Parliament and the Council to adopt, before the end of 2002, this regulation prohibiting the application of organotins which act as biocides in anti-fouling systems on ships flying the flag of a Member State as from 1 January 2003 and a general prohibition of active organotin on ships sailing to or from Community ports on 1 January 2008, irrespective of the entry into force of the Convention.

It must be stressed that, with this Regulation, the Commission does not want to duplicate the AFS-Convention, which has a broader scope than the simple banning of organotin compounds.

The AFS-Convention prohibits the use of any harmful organotins in anti-fouling paints used on ships. Today this is restricted to organotin compounds, but the Convention establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems, implementing the precautionary principle. Once the AFS-Convention enters into force, the prohibition in the future of any other harmful anti-fouling system will be properly addressed.

The line of conduct followed by the Commission is dictated by Resolution 1 of the International Conference on the Control of Harmful Anti-Fouling Systems on Ships ⁽¹⁾.

In this resolution, despite a proactive approach of the prohibition of the application of organotin compounds, the Conference recognised that the time remaining until 1 January 2003, may not be sufficient to enable entry into force of the Convention by that date. Desiring that organotin compounds will effectively cease to be applied in shipping as from 1 January 2003, the Conference requested the IMO Members States to accept the provisions of the Convention as a matter of urgency. In parallel the industry has been urged to refrain from the marketing, sale and application of organotin compounds by that date.

Need for a Regulation

- Due to the fact that the Community is not a contracting party to the AFS-Convention, the ratification of this convention is left solely to the discretion of the Member States. Practice has demonstrated that the ratification process is a cumbersome exercise, which cannot always be accomplished within a short time frame.
- The Commission expects that, despite a general willingness to do so, only a few States will be able to ratify the AFS-Convention before 1 January 2003. Realistically it is to be expected that the AFS-Convention will enter into force several years after this date.
- In addition, for those Member States which would not be able to ratify the Convention before 1 January 2003 the retroactive implementation of the '1 January 2003' requirement, laid down in the Convention, might create an impediment for the ratification process through their national legislation. Therefore it is appropriate to help them to overcome the difficulties they might encounter with such retroactive implementation in their national legislation.
- In responding to AFS-Conference Resolution 1, Member States might introduce national measures with a different scope and application date. Such non-harmonised introduction of the prohibition of TBT in the Community would be to the detriment of the shipping industry and easily result in a distortion of competition between Member States. Therefore, a simultaneous prohibition should be achieved.
- Finally, it must be stressed that the objectives and results pursued through the amendment of Council Directive 76/769/EEC concerning the marketing and use of TBT paints would not affect ships painted with TBT outside the Community, nor ships sailing under a flag of a non-EC Member State. Therefore it is necessary to broaden the prohibition of TBT by 1 January 2003.

⁽¹⁾ Doc. IMO AFS/CONF/25 of 8 October 2001.

For these reasons, the Commission proposes to introduce the ban of organotin compounds:

— for all ships flying the flag of a Member State with effect from 1 January 2003, and

— for all ships, irrespective of their flag, entering a European port by 1 January 2008,

through a Regulation of the European Parliament and the Council, which should enter into force before 1 January 2003.

Main principles of the Proposal

— No need to duplicate the AFS-Convention

It is important to underline that all Member States expressed their satisfaction with the outcome of the AFS-Conference. Consequently it might be expected that all of them will ratify and implement the AFS-Convention.

Having regard to the world-wide commitments made in 1999 at IMO Assembly level and the more appropriate 'entry into force mechanism' of the AFS-Convention and taking account of AFS-Conference Resolution No 1, the Commission expects that the AFS-Convention will effectively enter into force before 1 January 2008. Nevertheless any uncertainty on the total ban of TBT on this date cannot be accepted at Community level.

Under these circumstances the Commission refrained from proposing the development of legislation at Community level, which would unnecessarily duplicate the implementation provisions, which the Member States have to adopt under their obligations as a contracting party to the AFS-Convention. Furthermore it cannot be ignored that some Member States and third countries might already have become a party to the Convention. Therefore, it would be counterproductive to create, within this Regulation, a survey and certification regime different from the AFS-Convention. The Commission is further of the opinion that the most appropriate regime for the control of the implementation of the prohibition of TBT on ships is the one laid down in Directive 95/21/EC of the Council of 19 June 1995 on port State control of shipping. However this Directive can only be used once the AFS-Convention has entered into force. This is the main reason why in the interim period the prohibition to use harmful TBT paints cannot be imposed on ships not flying a flag of the EC. This Regulation should therefore be seen as an incentive for a speedy ratification of the AFS-Convention.

— Restrictive scope

The AFS-Convention has been drafted as a framework convention. After its entry into force and having due regard to the precautionary principle, this framework shall facilitate the listing of any harmful anti-fouling systems on ships. At this stage only organotin compounds which act as biocides in anti-fouling systems are incorporated in the Convention. Taking into account the specific procedures that will apply to add any other harmful anti-fouling systems to this list, the Commission is of the opinion that the Regulation could and should be restricted to organotin compounds. The AFS framework also adequately addresses the handling and treatment ashore of the wastes from the removal of harmful anti-fouling substances.

— Placing the shipping industry on an equal footing

When adopting the AFS-Convention, all the governmental parties expressed their willingness to cease applying harmful organotin compounds on ships on 1 January 2003 and therefore appealed on specific measures to be taken both at governmental level and industry level, within their field of competence.

The Commission therefore, in response to this request and consistent with international law, refrained from imposing the prohibition of the application of TBT paints to all ships entering European ports. In addition, it must also be recognised that a large number of third countries, which cannot benefit from the added value of a supranational regulation, might have difficulties in imposing, on 1 January 2003, the prohibition on applying TBT to their ships⁽¹⁾. Therefore, the Commission proposes to suspend the application of the prohibition of the application of TBT paints on ships sailing under a non-EC flag until the entry into force of the AFS-Convention.

Any possible competitive disadvantage for both the EU shipowners⁽²⁾ and the yards⁽³⁾, which would follow the recommended banning on 1 January 2003, could be avoided through voluntary commitments at the level of professional organisations representing these interests (International Chamber of Shipping (ICS) and ship building/repair associations).

The Commission welcomes the prompt reaction of the international shipping industry to ban TBT with effect from 1 January 2003. In particular, the strong recommendations of the International Chamber of Shipping (ICS) have to be put in evidence. Immediately after the AFS-Conference, the ICS stressed that 'whether or not the Convention enters into force by 1 January 2003 is perhaps somewhat academic as the fixed dates of 1 January 2003 and 1 January 2008 should be regarded as firm for any ship operating in international trade'. Consequently the Commission, in addressing the shipping aspects of the TBT ban, is building upon this economic reality.

The ratification process is totally beyond the control of the Community. There is, furthermore, no legal guarantee that the banning on 1 January 2008, which has commonly been accepted, would effectively be applicable on that date. Therefore the world-wide shipping industry, which has to programme the maintenance of its ships, requires clear and timely notification of the new environmental condition for access to EC ports. For this reason the general ban of organotin compounds is introduced in the EC legislation.

— Promoting the earliest possible ratification of the AFS-Convention at flag State level

Voluntary commitments at flag State level, in line with AFS-Conference Resolution No 1, should be further promoted⁽⁴⁾. The positive effect of the way forward followed by the Community with this Regulation should also have a beneficial effect upon other flag States. Special attention should also be given to those which have applied for membership of the European Union. Under the accession conditions they will also be bound by this Regulation at the date they effectively join the Community.

Flag States and open registers in particular, which have banned the use of TBT paints on their ships, will have an economic interest in ensuring that the AFS-Convention enters into force as early as possible, thus creating a world-wide level playing field. This Regulation will consequently result in an additional incentive for flag States to ratify the AFS-Convention.

In this context it must be stressed that Cyprus, Malta and the Baltic countries together represent 10 % of the world gross tonnage. Also, the fleet of the countries of the European Economic Area (the 15 Member States + Norway and Iceland), together with the fleets of the 13 applicant countries, represent 30 countries and not less than 30,91 % of the world tonnage.

Assuming that all Member States fulfil their political commitment to ratify the AFS-Convention in the course of 2002/2003, that the applicant countries do the same and considering that a number of third countries also have this intention (Japan, the US), the Convention might enter into force in 2004/2005. Regarding this aim of a complete prohibition of organotin compounds not later than 2005, the Commission will monitor the progress of the entry into force of the AFS-Convention and its application by third flag ships operating in the European Union waters.

⁽¹⁾ In this context it is useful to note that in 2001, according to LMIS figures, 15 875 individual ships (of 500 GT or more) visited EU ports. 4 503 (28,36 %) sailed under an EU flag.

⁽²⁾ From a practical point of view it might be questioned whether it would be really worthwhile for a shipowner to change flag just for a few years, knowing that the AFS-Convention will enter into force a few years later and that the date of 1 January 2008 for the total removal of TBT remains unchanged. In addition one should not lose sight of the pressure upon the industry, which has also, through AFS-Conference Resolution No 1, been invited to implement the ban on 1 January 2003.

⁽³⁾ It must be stressed that under Directive 76/769/EEC yards in the Community have already today a competitive disadvantage compared with yards outside the Community.

⁽⁴⁾ Already today Japan and New Zealand have banned the use of TBT paints on their ships.

— Legal considerations

In order to avoid any confusion or misinterpretation with regard to the implementation of a Convention ⁽¹⁾, which has not yet entered into force, and in order not to interfere negatively in the ratification process, which is commonly expected to be as short as possible, the Commission is of the opinion that the Regulation should not transpose or refer in its main provisions (Articles 3 to 5) to the AFS-Convention.

A general ban (for all ships irrespective of their flag) of the application of TBT on ships entering a port of the Community on 1 January 2003 would not be compatible with the AFS-Convention.

The Commission proposes to base the Regulation itself upon Article 80(2) of the EC Treaty.

Specific considerations

Article 1

This article defines the purpose of the Regulation.

Article 2

This article contains the definition of the key terms used in the Regulation. Most of them are based upon those used in the IMO AFS-Convention.

Article 3

This article defines the scope of the Regulation. It defines the ships upon which the provisions of the Regulation will be applied. It is the intention to cover all ships, which enter a European port, irrespective of their flag from 1 January 2008 onward. In addition specific provisions, only applicable to all ships flying a flag of Member State, are necessary in order to implement Resolution No 1 of the AFS-Conference. The inclusion of ships 'operating under the authority of a Member State' is necessary to cover also offshore platforms, which are also covered under the AFS-Convention.

The Regulation shall not apply to any warships or other government ships since the treatment of these ships is adequately covered under the AFS-Convention. Consequently these ships should not be addressed in the Regulation, which essentially deals with the interim period.

The AFS-Convention also addresses ships that enter a shipyard. This Regulation is not addressing this case, taking into account that the amended Directive 76/769/EEC will adequately cover those ships.

Article 4

This article introduces the ban to apply organotin compounds on ships as from 1 January 2003. Before the entry into force of the AFS-Convention, the application of this article will be suspended for ships not flying the flag of a Member State.

Article 5

The first paragraph deals with ships which, before 1 January 2003, fly a non-EC flag, and which will be coated with a new anti-fouling system after that date, in the case that such ships would be transferred to an EC register. These ships should also no longer apply anti-fouling paints with active organotin compounds after 1 January 2003. This is, therefore, an incentive for shipowners of third countries, including European owners operating their ships under the flag of an open register, to follow the recommendations of the ICS and thus to regard the date of 1 January 2003 as a fixed date. In doing so these shipowners will safeguard the market value of their ships in case of a possible transfer to an EC register.

The second paragraph is also an incentive for shipowners. Knowing that, in any case organotin compounds will be totally banned in the Community on 1 January 2008, they will be able to adequately schedule the re-painting of their ships in dry-dock.

⁽¹⁾ Fully supported by all the Member States.

As foreseen in the AFS-Convention both the sandblasting of the ships and the bearing of a coating will be accepted to neutralise the harmful effects of organotin compounds.

Article 6

Paragraph 1 addresses the Member States and should allow them to put into place the most appropriate survey and certification regime, similar to the one of the AFS-Convention, without prejudicing the entry into force of the AFS-Convention.

Ships of 400 gross tonnage, irrespective of their voyage will have to be surveyed. This is imposed in the AFS-Convention for ships solely operating on international voyages.

Ships of 24 metres or more in length but less than 400 gross tonnage, will, in conformity with the AFS-Convention, only have to carry a Declaration of compliance. No specific survey or certificate has been foreseen under this Regulation in order not to impose an unreasonable burden upon Member States' administrations. However, if necessary at a later stage, a harmonised regime could be introduced through the comitology procedure.

For ships of less than 24 metres in length, mainly recreational craft and fishing vessels, no specific survey or certification has been foreseen. These ships form a special niche, which essentially operates within the Community. They will entirely be covered under the provisions of Directive 76/769/EEC, as amended.

Paragraph 2 deals with the recognition of certificates and documents. Parties (Member States and third countries) which would already apply the AFS-Convention rules are entitled to use AFS-Certificates and Declarations.

The 3rd paragraph is a safeguard in case the Convention would not have entered into force by 1 January 2007, which would certainly not be the case if all European countries ratify the Convention before 2005.

Article 7

For the control of the certificates an explicit reference is made to the port State control directive and to the relevant provisions of the AFS-Convention and the guidelines which will be developed by the IMO before the end of 2002.

This article covers the control of ships flying an EC flag during the interim period. Since the legal scope of Directive 95/21/EC is linked to international conventions which have entered into force, this Directive cannot be used as a legal basis for PSC controls under this Regulation. Therefore Member States should apply provisions equivalent to those of the PSC Directive. A similar approach has been followed with regard to fishing vessels under Directive 97/70/EC. The Commission nevertheless recommends that Member States develop an ad hoc regime within the Paris MOU and will consequently support any initiative of that kind.

It is the intention of the Commission to amend Directive 95/21/EC on port State control of shipping in order to include the AFS-Convention under the relevant instruments of this Directive.

A safeguard provision, similar to the one introduced under Article 6, covers the case that the Convention would not have entered into force by 1 January 2007.

Article 8

This article organises the possibility for the Commission to amend the annexes under very strict conditions.

Article 9

This article confers the implementing tasks (regulatory procedure) in relation with Articles 6, 7 and 8 to the Committee established by Article 12(1) of Directive 93/75/EEC.

Article 10

This article foresees that the Commission shall report to the European Parliament and the Council, one year after the entry into force of this Regulation, on the state of ratification of the AFS-Convention and propose, if necessary, amendments to ensure an accelerated reduction to the presence of harmful anti-fouling compounds in EU waters.

Article 11

This article foresees an immediate entry into force in order to allow the effective banning of organotin compounds on ships from 1 January 2003.

Annex I

This annex establishes the minimum requirements, which are necessary to ensure a proper implementation of this Regulation before the AFS-Convention has entered into force and has been implemented in the legislation of the Member States.

The first part deals with the survey regime, the second with the certification. Some ships already fulfil the requirement of the AFS-Convention. This is due to the introduction of the fixed date of 1 January 2003 in Annex 1 to the Convention and the positive response given by the shipping industry (ICS) to effectively apply the ban from 1 January 2003 on. Consequently, some States have already issued an administrative circular allowing recognized classification societies to deliver, on their behalf, a Statement of Compliance with the AFS-Convention pending the entry into force of the Convention. The Commission, whilst recommending this practice to all Member States, proposes to take due account of this positive element in the certification process.

Annexes II and III

These annexes introduce the appropriate certificates and documentation, which is fully in accordance with the AFS-Convention.

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The Community is seriously concerned by the harmful environmental effects of organotin compounds used as anti-fouling systems on ships, and in particular of tributyltin (TBT) coatings.
- (2) An International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS-Convention) was adopted on 5 October 2001 at a Diplomatic Conference

held under the aegis of the International Maritime Organization (IMO) with the attendance of the Member States.

- (3) The AFS-Convention is a framework Convention allowing the banning of harmful anti-fouling systems used on ships, according to well-defined procedures and having due regard to the precautionary principle expressed in the Rio Declaration on Environment and Development.
- (4) The AFS-Convention, at this stage, only prohibits the application of organotin compounds (TBT coatings) on ships.
- (5) Fixed application dates have been included in the AFS-Convention: 1 January 2003 for the prohibition of the application of TBT coatings on ships and 1 January 2008 for the elimination of the presence of active TBT coatings on ships.
- (6) The AFS-Convention will only enter into force 12 months after its ratification by at least 25 States representing at least 25 % of the world's tonnage.
- (7) Member States should ratify the AFS-Convention at the earliest opportunity.

- (8) Member States should be put in the best possible position for a speedy ratification of the AFS-Convention and possible obstacles, which might impede such ratification, should be removed.
- (9) The International Conference on the Control of Harmful Anti-Fouling Systems on Ships, being aware that the time remaining until 1 January 2003 may not be sufficient to enable the entry into force of the AFS-Convention by that date, and desiring that organotin compounds will effectively cease to be applied in shipping as from 1 January 2003, requested in AFS-Conference Resolution No 1 Member States of the IMO to do the utmost to prepare for consent to be bound by the Convention as a matter of urgency and urged the relevant industry to refrain from the marketing, sale and application of organotin compounds by that date.
- (10) As an immediate follow-up to the AFS-Conference the Commission [has adopted] Commission Directive .../2002/EC adapting to technical progress for the ninth time Annex I to Council Directive 76/769/EEC in order to ban, with effect from 1 January 2003, the marketing of organostannic compounds in anti-fouling paints for all ships, irrespective of their length.
- (11) In the light of AFS-Conference Resolution No 1, additional steps are necessary for the implementation of measures concerning organotin compounds in order to ensure a general ban of TBT used on ships throughout the Community and its surrounding seas on the dates provided for by the AFS-Convention.
- (12) A Regulation should be the appropriate legal instrument as it imposes directly and in a short time frame, on shipowners and Member States, precise requirements to be implemented at the same time and in the same manner throughout the Community. This Regulation, which should seek solely to ban organotin compounds, should not duplicate the AFS-Convention.
- (13) Uncertainty on the total ban of active TBT coatings cannot be accepted at Community level; the world-wide shipping industry, which has to programme the maintenance of its ships, should be made aware clearly and on time that as from 1 January 2008 ships bearing an active TBT coating on their hulls will no longer be allowed in Community ports.
- (14) Third countries, particularly if they cannot benefit from the added value of a supranational regulation, might have legal technical difficulties in imposing on 1 January 2003, through their national legislation, the prohibition to apply TBT on their ships. The application of the prohibition in this Regulation to apply TBT paints should therefore be suspended as regards ships sailing under a non-Community flag an interim period beginning on 1 January 2003 and ending at the date of entry into force of the AFS-Convention.
- (15) Flag States which have banned the use of TBT paints on their ships, have an economic interest in ensuring that the AFS-Convention enters into force as early as possible, in order to ensure a world-wide level playing field. This Regulation, which prohibits all ships flying the flag of a Member State from applying TBT coatings on their ships as from 1 January 2003, should constitute an incentive for flag States to ratify the AFS-Convention.
- (16) The definitions and prescriptions used in this Regulation should as far as possible be based upon those used in the AFS-Convention.
- (17) This Regulation should also apply to ships operating under the authority of a Member State in order to ensure its application to offshore platforms. It should not apply to any warships or other government ships since the treatment of those ships is adequately covered under the AFS-Convention.
- (18) Imposing the prohibition of active TBT coatings on all ships registered in a Member State after 1 January 2003 and flying the flag of a Member State, and whose anti-fouling system has been applied, changed or replaced after 1 January 2003, should be an incentive for the shipping industry to implement the recommendation of AFS-Conference Resolution No 1.
- (19) It is appropriate to establish the same survey and certification regime as the one provided for by the AFS-Convention. Under this regime all ships of 400 gross tonnage, irrespective of the nature of their voyage should be surveyed, whilst ships of 24 metres or more in length but less than 400 gross tonnage should only have to carry a declaration of compliance with the Regulation or with the AFS-Convention. The Community should have the right to introduce a harmonised survey regime for these ships, if this proved necessary at a later stage.
- (20) It is not necessary to provide for specific survey or declaration for ships less than 24 metres in length since these ships, mainly recreational craft and fishing vessels, will mainly be adequately covered under the provisions of Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations ⁽¹⁾.
- (21) Certificates and documents issued in conformity with this Regulation, as well as AFS-Certificates and AFS-Declarations issued by Parties to the AFS-Convention should be recognised.

⁽¹⁾ OJ L 262, 27.9.1976, p. 201, as last amended by Commission Directive 2002/.../EC (OJ L ...).

- (22) If the AFS-Convention has not entered into force by 1 January 2007, the Commission should be permitted to adopt appropriate measures allowing ships flying the flag of a third country to demonstrate their compliance with this Regulation, as well as adopting measures for the control of the implementation of these provisions.
- (23) The most appropriate regime for the control of the implementation of the prohibition of TBT on ships and the requirements of the AFS-Convention is the one laid down in Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control) ⁽¹⁾ and amendments should be made to that Directive at the appropriate time. Having regard to the specific scope of that Directive, equivalent provisions should be applied to ships flying the flag of a Member State during the interim period.
- (24) In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down procedures for the exercise of implementing powers conferred on the Commission ⁽²⁾, the Commission should be authorised to adapt the annexes to this Regulation by use of the regulatory procedure provided for in Article 5 of that Decision.
- (25) In order to assess the achievement of the objective of the Regulation the Commission shall report to the European Parliament and the Council and propose, if necessary, the appropriate adjustments to the Regulation.
- (26) The entry into force of this Regulation should be such as to allow the effective banning of organotin compounds on ships as from 1 January 2003,

HAVE ADOPTED THIS REGULATION:

Article 1

Objective

The purpose of this Regulation is to reduce or eliminate adverse effects on the marine environment and human health caused by organotin compounds, which act as active biocides in anti-fouling systems used on ships flying the flag of, or operating under the authority of, a Member State and on ships, regardless of the flag they fly, sailing to or from ports of the Member States.

Article 2

Definitions

For the purpose of this Regulation:

1. 'Anti-fouling system' means a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms;
2. 'Gross tonnage' means the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex 1 to the International Convention on Tonnage Measurement of Ships, 1969 or any successor Convention;
3. 'Length' means the length as defined in the International Convention on Load Lines, 1966, as modified by the Protocol of 1988 relating thereto, or any successor Convention;
4. 'Ship' means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft, fixed or floating platforms, floating storage units (FSUs) and floating production storage and off-loading units (FPSOs);
5. 'AFS-Convention' means the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, adopted on 5 October 2001;
6. 'Recognized organisation' means a body recognised in accordance with the provisions of Council Directive 94/57/EC ⁽³⁾;
7. 'AFS-Certificate' means the certificate issued to ships in conformity with the provisions of Annex 4 to the AFS-Convention;
8. 'AFS-Declaration' means a declaration drawn up under the provisions of Annex 4 to the AFS-Convention;
9. 'AFS-Statement of Compliance' means a document stating compliance with Annex 1 to the AFS-Convention, issued by a recognized organization on behalf of the Administration of a Member State;
10. 'Interim period' means the period beginning on 1 January 2003 and ending at the date of entry into force of the AFS-Convention.

Article 3

Scope

1. This Regulation shall apply to:
 - (a) ships flying the flag of a Member State,
 - (b) ships not flying the flag of a Member State but which operate under the authority of a Member State, and

⁽¹⁾ OJ L 157, 7.7.1995, p. 1, as last amended by Directive 2001/106/EC of the European Parliament and of the Council (OJ L 19, 22.1.2002, p. 17).

⁽²⁾ OJ L 184, 17.7.1999, p. 23.

⁽³⁾ OJ L 319, 12.12.1994, p. 20.

- (c) ships, that enter a port or offshore terminal of a Member State, but do not fall within points (a) or (b).

2. This Regulation shall not apply to any warships, naval auxiliary, or other ships owned or operated by a State and used, for the time being, only on government non-commercial service.

Article 4

Prohibition to apply organotin compounds which act as biocides

As from 1 January 2003, organotin compounds which act as biocides in anti-fouling systems shall not be applied or re-applied on ships.

However during the interim period this provision shall only apply to ships, referred to in points (a) or (b) of Article 3(1).

Article 5

Prohibition to bear organotin compounds which act as biocides

1. Ships, registered in a Member State after 1 January 2003 and flying the flag of a Member State, and whose anti-fouling system has been applied, changed or replaced after 1 January 2003, shall not bear organotin compounds which act as biocides in anti-fouling systems on their hulls or external parts and surfaces, unless they bear a coating that forms a barrier to such compounds to prevent them leaching from the underlying non-compliant anti-fouling system.

2. As from 1 January 2008 ships, regardless of their flag, shall either not bear organotin compounds which act as biocides in anti-fouling systems on their hulls or external parts and surfaces, or bear a coating that forms a barrier to such compounds leaching from the underlying non-compliant anti-fouling system.

3. The provisions of paragraphs 1 and 2 shall not apply to fixed and floating platforms, FSUs and FPSOs that have been constructed prior to 1 January 2003 and that have not been in dry-dock on or after 1 January 2003.

Article 6

Survey and certification

1. The following shall apply as regards the survey and certification of ships flying the flag of a Member State:

- (a) Ships of 400 gross tonnage and above, excluding fixed or floating platforms, FSUs and FPSOs, shall be surveyed and certified in accordance with the requirements laid down in Annex I.

- (b) Ships of 24 metres or more in length, but less than 400 gross tonnage, excluding fixed or floating platforms, FSUs and FPSOs, shall carry an AFS-Declaration or a declaration signed by the owner or owner's authorised agent drawn up in accordance with the format laid down in Annex III as demonstration of compliance with Article 4.

If necessary, the Commission, in accordance with the procedure laid down in Article 9(2), may establish a harmonised survey and certification regime for these ships.

- (c) Member States may establish appropriate measures for ships that are not subject to the provisions of points (a) and (b) in order to ensure compliance with this Regulation.

2. The following shall apply as regards the recognition of certificates, declarations and statements of compliance:

- (a) As from 1 January 2003 Member States shall recognise any valid AFS-Certificate issued to a ship flying the flag of a Party to the AFS-Convention or a certificate issued in accordance with the format laid down in Annex II, when it is issued by the administration of any other Member State or by a recognised organisation acting on its behalf.
- (b) Until 1 January 2004 Member States shall recognise any AFS-Statement of Compliance issued on behalf of another Member State.
- (c) As from 1 January 2003 Member States shall recognise any valid AFS-Declaration issued to a ship flying the flag of a Party to the AFS-Convention or a declaration signed by the owner or owner's authorised agent drawn up in accordance with the format laid down in Annex III.

These declarations shall be accompanied by appropriate documentation (such as a paint receipt or a contractor invoice) or contain appropriate endorsement.

3. If the AFS-Convention has not entered into force by 1 January 2007, the Commission, in accordance with the procedure laid down in Article 9(2), shall adopt appropriate measures in order to allow ships flying the flag of a third country to demonstrate their compliance with Article 5.

*Article 7***Port State control**

During the interim period Member States shall apply control provisions equivalent to those laid down in Directive 95/21/EC to ships of 400 gross tonnage and above flying the flag of a Member State. With regard to the inspections and detection of violations Member States shall be guided by the provisions laid down in Article 11 of the AFS-Convention and the relevant Guidelines of the International Maritime Organization (IMO).

If the AFS-Convention has not entered into force on 1 January 2007, the Commission, in accordance with the procedure laid down in Article 9(2), shall establish appropriate procedures for these controls.

*Article 8***Adaptations**

In order to take account of developments at international level and, in particular in the International Maritime Organization (IMO), or to improve the effectiveness of this Regulation in the light of experience, the Annexes to this Regulation may be amended in accordance with the procedure laid down in Article 9(2).

*Article 9***Committee**

1. The Commission shall be assisted by the Committee established by Article 12(1) of Directive 93/75/EEC ⁽¹⁾, hereinafter referred to as 'the Committee'.

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be three months.

3. The Committee shall adopt its rules of procedure.

*Article 10***Evaluation**

One year after the entry into force of this Regulation, the Commission shall report to the European Parliament and the Council on the state of ratification of the AFS-Convention and provide information on the extent to which organotin compounds, which act as biocides in anti-fouling systems on ships are still used on ships not flying the flag of a Member State operating to or from European ports. In the light of this report the Commission shall propose, if necessary, amendments to ensure an accelerated reduction of the contribution by ships not flying the flag of a Member State to the presence of harmful anti-fouling compounds in EU waters.

*Article 11***Entry into force**

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

⁽¹⁾ OJ L 247, 5.10.1993, p. 19.

ANNEX I

SURVEYS AND CERTIFICATION REQUIREMENTS FOR ANTI-FOULING SYSTEMS ON SHIPS FLYING THE FLAG OF A MEMBER STATE**1. Surveys**

- 1.1. Ships of 400 gross tonnage and above, excluding fixed or floating platforms, FSUs and FPSOs, shall as from 1 January 2003, be subject to surveys specified below:
 - (a) an initial survey before the ship is put into service or when the ship is for the first time in a dry-dock for the application of anti-fouling systems; and
 - (b) a survey when the anti-fouling systems are changed or replaced. Such surveys shall be endorsed on the certificate required under paragraph 2.1.
- 1.2. The survey shall be such as to ensure that the ship's anti-fouling system fully complies with Articles 4 and 5.
- 1.3. Surveys shall be carried out by officers duly authorised by the Administration of the Member State, or of another Member State, or of a party to the AFS-Convention, or by a surveyor nominated for the purpose by one of those Administrations, or by a recognised organisation acting on behalf of the Administration.
- 1.4. Unless provided otherwise in this Regulation Member States shall for the surveys referred to in paragraph 1.1 follow the requirements laid down in Annex 4 to the AFS-Convention, as well as the guidelines for surveys developed by the IMO.

2. Certification

- 2.1. After completion of a survey referred to in paragraph 1.1(a) or (b), a Member State, which is not yet a Party to the AFS-Convention shall issue a certificate in accordance with the format laid down in Annex II. A Member State, which is a Party to the AFS-Convention, shall issue an AFS-Certificate.
 - 2.2. A Member State may rely upon an AFS-Statement of Compliance, for the demonstration of compliance with the requirements of Articles 4 and 5. A certificate referred to in paragraph 2.1, shall replace this AFS-Statement at the latest by 1 January 2004.
 - 2.3. Member States shall require that a ship referred to in paragraph 1.1 carries a certificate issued in accordance with paragraph 2.1.
 - 2.4. Member States shall for the purposes of the certification referred to in paragraph 2.1 follow the requirements laid down in Annex 4 to the AFS-Convention.
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ANNEX II

FORMS OF THE CERTIFICATE AND RECORD FOR ANTI-FOULING SYSTEMS

The international certificate and the record of Anti-fouling systems shall be drawn up in the form set out below.

In case these forms are used only within one Member State references to the AFS-Convention may be deleted.

INTERNATIONAL ANTI-FOULING SYSTEM CERTIFICATE

(This certificate shall be supplemented by a Record of Anti-fouling Systems)

(Official seal) (State)

Issued under the provisions of [the International Convention on the Control of Harmful Anti-Fouling Systems on Ships and] ⁽¹⁾ Regulation ... of the European Parliament and the Council on the banning of organotin compounds on ships

under the authority of the Government of

(name of the State)

by

.....
(person or organisation authorised)

When a Certificate has been previously issued, this Certificate replaces the certificate dated

Particulars of ship ⁽²⁾

Name of ship:

Distinctive number or letters:

Port of registry:

Gross tonnage:

IMO number ⁽³⁾:

An anti-fouling system controlled under Annex 1 to the Convention [and Regulation ...] has not been applied during or after construction of this ship ☐

An anti-fouling system controlled under Annex 1 to the Convention [and Regulation ...] has been applied on this ship previously, but has been removed by (insert name of the facility)
on (date) ☐

An anti-fouling system controlled under Annex 1 to the Convention [and Regulation ...] has been applied on this ship previously, but has been covered with a sealer coat applied by (insert name of the facility)
on (date) ☐

An anti-fouling system controlled under Annex 1 was applied on this ship prior to 1 January 2003, but must be removed or covered with a sealer coat prior to 1 January 2008 ☐

⁽¹⁾ May be deleted for ships engaged only on voyages within one Member State.

⁽²⁾ Alternatively, the particulars of the ship may be placed horizontally in boxes.

⁽³⁾ In accordance with the IMO Ship Identification Number Scheme adopted by the International Maritime Organization.

THIS IS TO CERTIFY THAT:

1. the ship has been surveyed in accordance with Regulation 1 of Annex 4 to the [Convention and] Regulation ... of the European Parliament and the Council on the banning of organotin compounds on ships; and
2. the survey shows that the anti-fouling system on the ship complies with the applicable requirements of [Annex 1 to the Convention and] ⁽¹⁾ Regulation ... of the European Parliament and the Council on the banning of organotin compounds on ships.

Issued at:

.....
(Place of issue of Certificate)

.....
(Date of issue)

.....
(Signature of authorised official issuing the Certificate)

Date of completion of the survey on which this certificate is issued:

.....

⁽¹⁾ May be deleted for ships engaged only on voyages within one Member State.

RECORD OF ANTI-FOULING SYSTEMS

This Record shall be permanently attached to the International Anti-Fouling System Certificate

Particulars of ship:

Name of ship:

Distinctive number or letters:

IMO number:

Details of anti-fouling system(s) applied:

Type(s) of anti-fouling system(s) used:

Date(s) of application of anti-fouling system(s):

Name(s) of company(ies) and facility(ies)/location(s) where applied:

Name(s) of anti-fouling system manufacturer(s):

Name(s) and colour(s) of anti-fouling system(s):

Active ingredient(s) and their Chemical Abstract Service Registry Number (CAS number(s)):

Type(s) of sealer coat, if applicable:

Name(s) and colour(s) of sealer coat applied, if applicable:

Date of application of sealer coat:

THIS IS TO CERTIFY that this Record is correct in all respects.

Issued at:

(Place of issue of Record)

(Date of issue)

(Signature of authorised official issuing the record)

Endorsement of the Records ⁽¹⁾

THIS IS TO CERTIFY that a survey required in accordance with [Regulation 1(1)(b) of Annex 4 to the Convention and] paragraph 2.1 of Annex I of Regulation . . . of the European Parliament and the Council on the banning of organotin compounds on ships found that the ship was in compliance with the [Convention and the] Regulation

Details of anti-fouling system(s) applied

Type(s) of anti-fouling system(s) used:

Date(s) of application of anti-fouling system(s):

Name(s) of company(ies) and facility(ies) location(s) where applied:

Name(s) of anti-fouling system manufacturer(s):

Name(s) and colour(s) of anti-fouling system(s):

Active ingredient(s) and their CAS number(s):

Type(s) of sealer coat, if applicable:

Name(s) and colour(s) of sealer coat applied, if applicable:

Date of application of sealer coat:

Signed:

(Signature of authorised official issuing the Record)

Place:

Date ⁽²⁾:

(Seal or stamp of the authority)

⁽¹⁾ This page of the Record shall be reproduced and added to the Record as considered necessary by the Administration.

⁽²⁾ Date of completion of the survey on which this endorsement is made.

ANNEX III

DECLARATION ON ANTI-FOULING SYSTEM FOR SHIPS OF 24 METRES OR MORE IN LENGTH, BUT LESS THAN 400 GROSS TONNAGE

Drawn up under Regulation . . . of the European Parliament and the Council on the banning of organotin compounds
on ships

Name of ship:

Distinctive number or letters:

Port of registry:

Length:

Gross tonnage:

IMO number (if applicable):

I declare that the anti-fouling system used on this ship complies with Article 4 of Regulation ... of the European Parliament and the Council on the banning of organotin compounds on ships.

(Date)

(Signature of owner or owner's authorised agent)

Endorsement of anti-fouling system(s) applied

Type(s) of anti-fouling system(s) used and date(s) of application:

(Date)

(Signature of owner or owner's authorised agent)

Type(s) of anti-fouling system(s) used and date(s) of application:

(Date)

(Signature of owner or owner's authorised agent)

Type(s) of anti-fouling system(s) used and date(s) of application:

(Date)

(Signature of owner or owner's authorised agent)

ANNEX A

Convention on the control of harmful anti-fouling systems on ships

The new IMO convention will prohibit the use of harmful organotins in anti-fouling paints used on ships and will establish a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems

Articles 1 and 2 list the general obligations and relevant definitions.

Under the terms of the new Convention, Parties to the Convention are required to prohibit and/or restrict the use of harmful anti-fouling systems on ships flying their flag, as well as on ships not entitled to fly their flag, but which operate under their authority and on all ships that enter a port, shipyard or offshore terminal of a Party (Articles 3 to 4). Anti-fouling systems to be prohibited or controlled will be listed in an annex (Annex 1) attached to the Convention.

Article 5 recalls appropriate action with regard to the waste removal of an anti-fouling system.

Article 6 on Process for Proposing Amendments to controls on anti-fouling systems sets out how the evaluation of an anti-fouling system should be carried out. This amendment process, together with Annex 2, will allow to update Annex 1, when necessary and according to a specific and detailed procedure involving the Marine Environment Protection Committee of the IMO and a 'technical group', to include people with relevant expertise, to review proposals for other substances used in anti-fouling systems to be prohibited or restricted (Article 7). Scientific and technical research on the effects of anti-fouling systems will be monitored (Article 8).

Article 9 and Annex 3 deal with communication and exchange of relevant information on surveyors and approved anti-fouling systems.

The survey and certification systems are given in Article 10 and Annex 4.

Article 11 describes the port State control system for inspection of ships and detection of violations. The Convention includes a clause in Article 13 which states that a ship shall be entitled to compensation if it is unduly detained or delayed while undergoing inspection for possible violations of the Convention.

Article 12 deals with violations of the Convention and the establishment of a system of sanctions. Settlement of disputes and the relationship with the Law of the Sea are addressed in Articles 14 and 15.

Article 16 covers the procedure to amend the Convention itself. Amendment through a tacit acceptance procedure is foreseen with the involvement of the Marine Environment Protection Committee of the IMO.

Article 17 covers the signature, ratification, acceptance, approval and accession to the Convention, whilst the entry into force conditions are given in Article 18. The convention will enter into force 12 months after 25 States representing 25 % of the world's merchant shipping tonnage have ratified it.

Article 19 covers the denunciation of the Convention and Article 20 designates The Secretary-General of the International Maritime Organization (IMO) as the depository of the Convention.

Annex I attached to the Convention states that by an effective date of 1 January 2003, all ships shall not apply or re-apply organotins compounds which act as biocides in anti-fouling systems. By 1 January 2008 (effective date), ships either: shall not bear such compounds on their hulls or external parts or surfaces; or shall bear a coating that forms a barrier to such compounds leaching from the underlying non-compliant anti-fouling systems.

- Ships of above 400 gross tonnage and above engaged in international voyages (excluding fixed or floating platforms, FSUs and FPSOs) will be required to undergo an initial survey before the ship is put into service or before the International Anti-fouling System Certificate is issued for the first time; and a survey when the anti-fouling systems are changed or replaced.
 - Ships of 24 metres or more in length but less than 400 gross tonnage engaged in international voyages (excluding fixed or floating platforms, FSUs and FPSOs) will have to carry a Declaration on Anti-fouling Systems signed by the owner or authorised agent. The Declaration will have to be accompanied by appropriate documentation such as a paint receipt or contractor invoice.
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