

# Danish shipping register to become more competitive for non-EU and non-EEA merchant shipowners

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### **Introduction**

On October 4 2017 the government proposed a bill to amend the Danish regulations on the registration of ships under Section 2 of the Merchant Shipping Act in order to attract non-EU and non-EEA merchant shipowners and shipping and management companies to the Danish flag. The bill passed Parliament on November 30 2017 and came into force on January 1 2018.

The initiative was prompted by concerns within the industry that the previous regulatory structure had caused uncertainties. As well as offering an appealing economic framework, the legislature recognised accessibility and transparency when registering under the Danish flag as key factors.

The bill's main innovations include:

- an increasingly transparent activity requirement;
- multiple ways of satisfying this requirement; and
- an equal establishment requirement that applies to EU and non-EU shipowners.

The amendment does not apply to fishing or recreational vessels.

### **Previous legislation**

Traditionally, non-Danish shipowners could not register vessels with the Danish Ship Register under Section 1 of the Merchant Shipping Act, which states that a ship's owner must be Danish for the ship to be considered a Danish ship and fly the Danish flag (ie, the owner must be a Danish citizen, a Danish state entity or municipality or a Danish legal person incorporated under Danish law or registered as a Danish company in Denmark).

This position was partially altered pursuant to Section 2 of the Merchant Ship Act, which empowers the minister of industry, business and financial affairs to issue an executive order that sets out in detail the conditions under which non-Danish ships may be included in the Danish Ship Register, including requirements that the administration, control and direction of the ship take place in Denmark. The Merchant Shipping Act was supplemented in this regard by Executive Order 1132/2013, which has been repealed and replaced in accordance with the bill.

Under the previous regulatory framework, shipowners that failed to satisfy the nationality requirements set out in Section 1 of the Merchant Shipping Act had to satisfy the establishment and activity criteria.

Under the executive order's more detailed rules, the establishment criterion required non-Danish

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companies to be established in Denmark in accordance with Section 2, whereas the activity criterion dictated that ships registered in Denmark be used for commercial purposes and be effectively administrated, controlled and directed from Denmark (Section 3 of the executive order).

Pursuant to the previous guidelines, the activity criterion covered:

- technical and safety management;
- manning activities (including contracts and education);
- commercial management; and
- financial operations.

Under the previous legislation, a general distinction regarding non-Danish shipowners was made between merchant ships owned by non-EU or non-EEA shipowners and merchant ships owned by EU or EEA natural or legal persons within the scope of EU regulations on the freedom of movement.

Non-EU or non-EEA legal persons had to satisfy the establishment criterion under Sections 8(1) and 2(2)(a) or (b) of the executive order by establishing:

- primary establishment (ie, a domicile or principal place of business in Denmark); or
- secondary establishment (ie, a subsidiary, branch office or agency in Denmark (Sections 2(2)(b) and 8(1) of the executive order).

The activity criterion had to be satisfied by the same legal person which satisfied the establishment criterion (Section 8(2) of the executive order).

Non-EU natural persons could not register ships in the Danish Ship Register and this remains the case. EU or EEA natural persons had to satisfy the establishment criterion by way of the primary establishment of a permanent place of business from which the person exercised its economic activities in Denmark or another EU member state.

EU or EEA natural persons also had to satisfy the activity criterion under Section 3 of the executive order, which had to be fulfilled by the shipowner or a natural or legal person (Section 4(2) or (3)). EU or EEA legal persons had to satisfy the establishment requirements by:

- primary establishment (ie, having their principal place of business in Denmark);
- secondary establishment (ie, establishing a subsidiary, branch office or agency in Denmark staffed with personnel authorised to act on behalf of the shipowner on a permanent basis); or
- appointing a natural or legal person in Denmark to whom the authorities could confer with in order to exercise control and, if necessary, serve a writ of summons.

The activity criterion could be satisfied by, among other things, appointing a physical or legal person in Denmark (Sections 7(2), 4(2) and 4(3) of the executive order).

## **Amendments**

In the explanatory note to the Merchant Shipping Act amendments, the Danish government recognised that in order to maintain its competitive edge, it had to set out clear and transparent criteria for foreign shipowners entering a ship into the Danish Ship Register.

Following the amendments' entry into force on January 1 2018, shipowners from third countries are no longer required to satisfy the establishment criterion by primary or secondary establishment. Instead, it is sufficient for a shipowner from a third country to appoint a natural or legal person in Denmark to whom the authorities can confer with in order to exercise control and, if necessary, serve a writ of summons (ie, shipowners outside the European Union or European Economic Area are subject to the same establishment requirements as EU and EEA shipowners).

The explanatory note further emphasises that the Danish flag shall not evolve into an open registry.

The activity requirement – which includes economic activities – is therefore maintained as a precondition for entering a foreign ship into the Danish Ship Registry. Accordingly, it is insufficient

to have only a Danish-based mailbox or agents appointed without actual duties relating to the ship's operation.

However, in order to cater for a clearer and more transparent system, the activity criterion may be satisfied in a variety of ways. To satisfy the activity criterion, the shipowner will be required to document that some degree of economic activity takes place in Denmark, including for example:

- a declaration that the technical or commercial management of the ship is exercised out of Denmark;
- proof that the operator of the ship falls within the scope of the Tonnage Tax Act; or
- that a shipowner established in Denmark holds a compliance document pursuant to the International Safety Management Code or proof of an application therefor.

It is further suggested in the explanatory note that the activity criterion can be satisfied through a combination of several individual factors, provided that the shipowner documents actual activities in Denmark that are carried out by employees. This now follows from Section 3(2) of Executive Order 1654/2017.

The minister has been empowered to define such individual factors in more detail under an executive order which sets out detailed and, ideally, clear and transparent requirements for a non-Danish ship to register with the Danish Ship Register (Executive Order 1654/2017).

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