

# **An Examination of the European Union's Regulatory Framework on Ship and Port Facility Security**

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## **Abstract**

The vitality of the global economy is largely dependent on the movement of ships for the transport of goods and persons by sea. At a European Union level, the single market is heavily dependent on efficient and secure maritime transport. This dissertation examines the effectiveness of the European Union regulatory framework on ship and port facility security. The work addresses why ship and port facility security are crucial for the effective operation of maritime trade within the European Union. The study identifies and examines the main European Union instruments regulating ship and port facility security, in particular, how Regulation 725/2004 and Directive 2005/65/EC has been transposed in EU legal framework. The dissertation also assesses the implementation of said instruments regulating ship and port security by selected Member States of the European Union, namely Spain and Malta. The findings of this research suggest that apart from imposing harsher punitive measures and criminalising the intent to commit a crime against a ship or a port facility, the Member States should continue working together in order to enhance ship and port facility security framework.

**Keywords:** European Union, Maritime Security, Ship and Port Security, ISPS Code, Port Facilities Security.

## Table of Contents

<i>Abstract</i> .....	<i>I</i>
<i>Table of Contents</i> .....	<i>II</i>
<i>Table of Statutes, Judgements and Treaties</i> .....	<i>IV</i>
<i>The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031</i> .....	<i>IV</i>
<i>Acknowledgments</i> .....	<i>VII</i>
<i>Abbreviations</i> .....	<i>VIII</i>
<i>General Introduction</i> .....	<i>2</i>
<i>Chapter 1: Importance of International Trade for the EU's Single Market</i> .....	<i>9</i>
1.1. Introduction.....	9
1.2. Competences within the EU.....	10
1.3. The Importance of International Maritime Trade for the EU's Single Market 12	
1.3.1. The Role of EU's Port States.....	14
1.3.2. The Role of EU's Flag States .....	17
1.4. The EU's Maritime Security Strategy .....	19
1.5. Ship and Port Facility Security within the EU and its Significance for Stakeholders .....	22
1.5.1. Seafarers.....	23
1.5.2. Shipowners.....	24
1.5.3. Port Personnel .....	25
1.6. Conclusion .....	27
<i>Chapter 2: An Analysis of the International Ship and Port Facility Security Code</i> .....	<i>29</i>
2.1 Introduction .....	29
2.2 The Historical Development of the ISPS Code.....	29
2.3 Objectives, Structure and Application of the ISPS Code .....	32
2.4 ISPS Code Responsibilities .....	34
2.4.1 Contracting Governments .....	34
2.4.2 Shipping Companies .....	37
2.4.3 Port Facilities .....	39
2.5 Conclusion .....	40
<i>Chapter 3: European Union Legislation Regulating Ship and Port Facility Security</i> .....	<i>42</i>
3.1 Introduction .....	42

3.2 Early Developments of EU's Framework on Ship and Port facility Security .....	42
3.3 Regulation (EC) No 725/2004 on Enhancing Ship and Port Facility Security .....	45
3.4 Directive 2005/65/EC on Enhancing Port Security .....	48
3.5 Commission Regulation (EC) No 324/2008 Laying Down Revised Procedures for Conducting Commission Inspections in the Field of Maritime Security .....	51
3.6 Conclusion .....	53
<b><i>Chapter 4: Implementation of European Legislation on Ship and Port Facility Security: An Analysis of Selected EU Member States .....</i></b>	<b>56</b>
4.1 Introduction .....	56
4.2 Implementation of the EU Legislation on Ship and Port facility Security in the Spanish Legal System .....	56
4.3 Implementation of the EU Legislation on Ship and Port facility Security in the Maltese Legal System .....	60
4.4 Conclusion .....	64
<b><i>Conclusion .....</i></b>	<b>65</b>
<b><i>Bibliography .....</i></b>	<b>68</b>

## **Table of Statutes, Judgements and Treaties**

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Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1.

#### **Treaties**

Consolidated Version of Treaty Establishing the European Community, Treaty of Rome (1957).

Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) (2016) OJ C202/1.

IMO (Resolution) 'The International Ship and Port Facility Security Code' (Amendment to the Annex of SOLAS, 17 December 2002) Conf Res 2 (ISPS Code).

The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031.

UNGA Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) (1988) No. 29004.

United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397.

## **Legislation**

### **European Union**

#### **Directives**

Council Directive 2005/65/CE of 26 October 2005 on enhancing port security (2005) OJ L 310.

Council Directive 2015/1794/EU amended the scope of five EU labour law Directives by including seafarers in Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Directive 2009/38/EC and Directive 2002/14/EC on information and consultation of employees, Directive 98/59/EC on collective redundancies, and Directive 2001/23/EC on safeguarding employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

Council Directive 2009/16/EC of 23 April 2009 on port state control (2009) OJ L 131/57 and amending Directive 2013/38/EU of 12 August 2013 (2013) OJ L 218/1 and amending Regulation (EU) No 1257/2013 of 20 November 2013 on ship recycling (2013) OJ L 330/1 and amending Regulation of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport (2015) OJ L 123/55.

#### **Regulations**

Commission Regulation (EC) No 324/2008 on procedures for conducting Commission inspections in the field of maritime security.

Council Regulation (EC) 725/2004 of 31 March 2004 on enhancing ship and port facility security (2004) OJ L129.

Commission Regulation (EC) 884/2005 of 10 June 2005 laying down procedures for conducting commission inspections in the field of maritime security (2005) OJ L148.

## **National**

### **Malta**

'Authority for Transport in Malta Act: Arrangement of Act, XV. 2009.49'.

'Port Security Regulations L.N 484 of 2004'.

'Port Security Regulations, S.L. 499.35'.

'Ports Security (Amendment) Regulations, L.N 3 of 2008'.

### **Spain**

Order FOM/1194/2011, On 29 April, Which Regulates The Integrated Procedure Of Scale Of Ships In Ports Of General Interest, Original Language Title: Orden FOM/1194/2011, de 29 de abril, por la que se regula el procedimiento integrado de escala de buques en los puertos de interés general.

Real Decreto 1617/2007, de 7 de Diciembre, Por el Que se Establecen Medidas Para la Mejora de la Protección de los Puertos y del Transporte Marítimo, Official publication: Boletín Oficial del Estado ( B.O.E).



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## Abbreviations

CJEU	Court of Justice of the European Union
CLC	International Convention on Civil Liability for Oil Pollution Damage
CSO	Company Security Officer
DUE	Documento Unico de Escala
EMSA	European Maritime Safety Agency
EP	European Parliament
EU	European Union
EUMSS	European Union Maritime Security Strategy
EUROSTAT	European Statistical office For Ships
GT	Gross Tonnage
ILO	International Labour Organization
IMLI	International Maritime Law Institute
IMO	International Maritime Organization
ISPS Regulation	Regulation (EC) 725/2004
ISPS	International Ship and Port Facility Security Code
LN	Legal Notice
MARPOL	The International Convention for Prevention of Marine Pollution
MARSEC	Maritime Security Regulatory Committee
MS	Member State
PFSA	Port Facility Security Assessment
PFSO	Port Facility Security Officer
PFSP	Port Facility Security Plan
PSC	Port State Control
PSP	Port Security Plan
Royal Decree	Royal Decree number 1617/2007
RSO	Recognized Security Organization
SOLAS	The International Convention for the Safety of Life at Sea
SSA	Ship Security Assessment
SSC	Ship Security Certificate
SSO	Ship Security Officer
STCW	The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
The Directive	Directive 2005/65/CE
UK	United Kingdom
UN	United Nations
UNCLOS	The United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNGA	United Nations General Assembly
USD	United States Dollar

## General Introduction

From the earliest recorded history, the oceans had served for trade and commerce.<sup>1</sup> Today, around 80 percent of international trade is still carried by sea.<sup>2</sup> The vitality of the global economy is largely dependent on the movement of ships for the transport of goods and persons by sea. From a regional perspective, within the European Union (EU) the single market is also heavily dependent on efficient maritime transport. It has been reported that 90% of EU's external trade and more than 40% of its internal trade is carried by sea.<sup>3</sup> In 2019, according to European Statistical office (EUROSTAT), EU ports handled close to 3.6 billion tons of freight.<sup>4</sup>

The international community relies on maritime security in order to protect the safety of life at sea and the efficiency of global maritime trade. Despite the lack of a universal definition of the term maritime security under international law,<sup>5</sup> this concept can generally be described as a regime used to combat willful and unlawful acts against ships.<sup>6</sup> According to Hawkes' established definition, maritime security encompasses:

...those measures employed by owners, operators and administrators of vessels, port facilities, offshore installations, and other marine organizations or establishments to protect against threats, seizure, sabotage, piracy, pilferage, annoyance or surprise.<sup>7</sup>

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<sup>1</sup> Bruce Farthing, *International Shipping: An introduction to the policies, politics and institutions of the maritime world* (Lloyd's of London Press 1987) 1.

<sup>2</sup> Michael Richardson, *A Time Bomb for Global Trade: Maritime-related Terrorism in an Age of Weapons of Mass Destruction* (ISEAS 2004) 36.

<sup>3</sup> Isabel Novo-Corti, Fernando Gonzales-Laxe, 'Maritime Transport and Trade: The Impact of European Transport Policy. An Overview of Maritime Freight Transport Patterns' (2009) XII (1) ERS 132, 135.

<sup>4</sup> EUROSTAT, 'Maritime freight and vessels statistics' (2020) < [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Maritime\\_ports\\_freight\\_and\\_passenger\\_statistics&oldid=218671](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Maritime_ports_freight_and_passenger_statistics&oldid=218671) > accessed on 13 June 2021.

<sup>5</sup> Felicity Attard, 'IMO's Contribution to International Law Regulating Maritime Security' (2014) 45 (4) JMLC 479, 494; UNGA, 'Report on the Oceans and the law of the sea: Report of the Secretary General' UN Doc. A/63/63 (2008) para 39.

<sup>6</sup> Philippe Boisson, *Safety at Sea: Policies, Regulations and International law* (Bureau Veritas 1999) 154.

<sup>7</sup> Kenneth Hawkes, *Maritime Security* (Cornell Maritime Press 1989) 9.

Whilst Klein bases her definition of maritime security on the ‘existing or potential threats’ tied to the *mare liberum* concept,<sup>8</sup> Kraska and Pedrozo refers to it as to ‘a stable order of the oceans subject to the rule of law at sea’ which requires ‘littoral and coastal States, landlocked States, flag States, and port States to work in concert with international organizations and the maritime industry’.<sup>9</sup>

Indeed, maritime security has long been a top priority on the EU’s agenda.<sup>10</sup> For example, in 2008, the EU Commission adopted a Regulation on procedures for performing inspections in the field of maritime security for the purpose of ensuring that the Member States (MS) are implementing effective measures, procedures and structures.<sup>11</sup> Since shipping is crucial for the EU’s economy, the progressive development and improvement of its maritime security policies remains a crucial part of the Union’s objectives. In 2014, the EU Union’s Maritime Security Strategy (EUMSS)<sup>12</sup> was introduced as a response to increasing maritime security challenges facing States in the region. The strategy provides a comprehensive approach to maritime security which balances various interests ranging from the freedom of navigation, economic demands, to border security and the conservation of marine biodiversity.<sup>13</sup> The strategy was developed to ensure effective and cost-efficient responses to the protection of the maritime domain, including borders, ports and offshore installations, in order to secure sea borne trade, address potential threats from unlawful and illicit activities at sea, as well as to make optimal use of the sea’s potential for growth and jobs, whilst safeguarding the marine environment. The EUMSS, being the most comprehensive EU strategy to date, focusses on protecting maritime infrastructure, defending EU maritime

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<sup>8</sup> Natalie Klein, *Maritime Security and the Law of the Sea* (Oxford University Press 2011) 11.

<sup>9</sup> James Kraska and Raul Pedrozo, *International Maritime Security Law* (Martinus Nijhoff Publishers 2013) 16; Martin Robson, ‘Maritime Security and the Law of the Seas’ (2014) 14 (4) *Defence Studies* 414.

<sup>10</sup> European Commission, ‘Second Report on the Implementation of the EU Maritime Security Strategy Action Plan’ (Brussels, 2017) 3 <<https://data.consilium.europa.eu/doc/document/ST-10398-2017-INIT/en/pdf>> accessed on 15 June 2021.

<sup>11</sup> Commission Regulation (EC) 324/2008 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security (2008) OJ L98, Recital 7 and Article 18.

<sup>12</sup> European Union Maritime Security Strategy, 11205/14, adopted by the General Affairs Council on 24 June 2014.

<sup>13</sup> European Commission, ‘Report on the implementation of the revised EU Maritime Security Strategy Action Plan’ (Brussels, 2020) 3 <[https://ec.europa.eu/oceans-and-fisheries/ocean/blue-economy/other-sectors/maritime-security-strategy\\_en](https://ec.europa.eu/oceans-and-fisheries/ocean/blue-economy/other-sectors/maritime-security-strategy_en)> accessed on 17 June 2021.

interests, in adherence with and respect for international rules and principles.<sup>14</sup> Ultimately, it is constructed as an approach that ensures respect for the sovereignty of the MS without creating new costs or policies.<sup>15</sup>

At an international level, the major institutionalized source of maritime security law rules have been developed by States under the auspices of the International Maritime Organization (IMO). The IMO is the United Nations (UN) specialized agency,<sup>16</sup> responsible for the safety and security of international shipping and the protection of the marine environment from pollution from ships.<sup>17</sup> The IMO has developed a multifaceted international regulatory framework addressing various aspects of maritime security, in particular, port security.<sup>18</sup> Maritime ports, besides being an important border control points, are crucial intermodal nodes in the freight and passenger transport infrastructure. Port security is considered to be the cornerstone of various international maritime transport security regimes whereby the protection of port users, public as well as the protection of the maritime vessels are of paramount importance.

Enhancing port security against maritime security threats became increasingly important following the September 11, 2001.<sup>19</sup> In the wake of the 9-11 terrorist attacks, the IMO's Maritime Safety Committee began to develop new ship and port security regulations. This process led to the adoption of the International Ship and Port Facility

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<sup>14</sup> Lennart Landman, *The EU Maritime Security Strategy Promoting or Absorbing European Defence Cooperation?* (Clingendael 2015) 2.

<sup>15</sup> Ferdinand Bous, EDN Analysis: The development of a European naval strategy (European Defence Network 2020) 7 <<https://e-d-n.eu/wp-content/uploads/2021/04/The-development-of-a-European-Naval-Strategy.pdf>> accessed on 20 June 2021.

<sup>16</sup> The Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031.

<sup>17</sup> Kitack Lim, 'The Role of the International Maritime Organization in Preventing the Pollution of the World's Oceans from Ships and Shipping' (2017) UN Chronicle <<https://www.un.org/en/chronicle/article/role-international-maritime-organization-preventing-pollution-worlds-oceans-ships-and-shipping>> accessed on 21 June 2021.

<sup>18</sup> Shakeel B. Burthoo-Barah, Verena Tandrayen-Raghoobur, 'Maritime Security and Piracy in Mauritius' in Khalid Bichou and others (eds), *Maritime Transport Security: Issues, Challenges and National Policies* (Edward Elgar Publishing Limited 2013) 267-270; Chris Trelawny, 'The International Maritime Organization (IMO) and civil maritime security in ports' in Patrick Chaumette (eds), *Economic challenge and new maritime risks management: What blue growth?* (GOMILEX 2017) 49, 51.

<sup>19</sup> John F. Frittelli, 'Port and Maritime Security: Background and Issues for Congress' in Jonathon P. Vesky (eds), *Port and Maritime Security* (Nova Science Publishers 2008) 1.

Security Code (ISPS Code) in 2002, as an amendment to the International Convention on the Safety of Life at Sea (SOLAS).<sup>20</sup> The Code, adopted and implemented within a record 2 year period,<sup>21</sup> provided the first international regime that focuses on preventive security measures to protect ships and port facilities.<sup>22</sup> The ISPS Code has been transposed into the EU framework by the Regulation 725/2004 (ISPS Regulation),<sup>23</sup> successively, extended into the whole port area by the Directive 2005/65/CE (the Directive).<sup>24</sup>

It should be noted that EU ports are increasingly under threat from crimes such as drug smuggling,<sup>25</sup> stowaways,<sup>26</sup> cargo theft,<sup>27</sup> piracy and terrorism.<sup>28</sup> Other threats which have been recognized by the EU Commission, and relevant in the context of port security are: irregular migration by sea,<sup>29</sup> human trafficking and the smuggling of tobacco,<sup>30</sup>

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<sup>20</sup> IMO (Resolution) 'The International Ship and Port Facility Security Code' (Amendment to the Annex of SOLAS, 17 December 2002) Conf Res 2 (ISPS Code). The ISPS Code is contained in 1974 SOLAS, Annex, Chapter XI-2 on special measures to enhance maritime security.

<sup>21</sup> Prakash Metaparti, 'Rhetoric, rationality and reality in post-9/11 maritime security' (2007) 37 (7) *Maritime Policy and Management*, 723.

<sup>22</sup> Alexandros M. Goulielmos and Agisilaos A. Anastasakos, 'Worldwide security measures for shipping, seafarers and ports: An impact assessment of ISPS Code' (2005) 14 (4) *Disaster Prevention and Management* 462, 463.

<sup>23</sup> Council Regulation (EC) 725/2004 of 31 March 2004 on enhancing ship and port facility security (2004) OJ L129.

<sup>24</sup> Council Directive 2005/65/CE of 26 October 2005 on enhancing port security (2005) OJ L 310.

<sup>25</sup> Chih-Hao Wen, Ping-Yu Hsu, Ming-Shien Cheng, 'Applying intelligent methods in detecting maritime smuggling' (2017) 19 *Maritime Economics & Logistics* 573, 578; Basil Germond, 'The EU's security and the sea: defining a maritime security strategy' (2011) *European Security* 20 (4) 563, 576; European Commission, 'Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Agenda and Action Plan on Drugs 2021-2025' (Brussels, 2020) 1.

<<https://data.consilium.europa.eu/doc/document/ST-10398-2017-INIT/en/pdf>> accessed on 25 June 2021.

<sup>26</sup> Rosalie Balkin, 'The International Maritime Organization and Maritime Security' (2006) 30 (1 & 2) *Tulane Maritime Law Journal* 1, 12.

<sup>27</sup> European Commission, 'EU Security Guidance for the European Commercial Road Freight Transport Sector' (2019) <[ps://ec.europa.eu/transport/sites/default/files/roadsec-abridged-version\\_en.pdf](https://ec.europa.eu/transport/sites/default/files/roadsec-abridged-version_en.pdf)> accessed on 26 June 2021.

<sup>28</sup> Martin N. Murphy, 'Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World' (2011) 4 *Journal of Strategic Security* 13, 13; James Kraska, *Contemporary Maritime Piracy, International Law, Strategy and Diplomacy at Sea* (ABC-CLIO 2011) 35.

<sup>29</sup> Enkelejda Koka, Denard Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation' (2019) 21 (1) *EJML* 26, 26-52.

<sup>30</sup> Pooja Theresa Stanslas, 'Transborder Human Trafficking in Malaysian Waters: Addressing the Root Causes' (2010) 41 (4) *JMLC* 595, 598.

alcohol and counterfeited goods.<sup>31</sup> Besides being of direct concern to the EU citizens, these threats interrupt EU's integration process and have significant economic impacts for EU MS. From a purely economic perspective, the threats discussed above are seen by many criminals as a lucrative 'very successful' business where financial gains play a crucial role.<sup>32</sup> The danger associated with these illicit activities are complex and far reaching and impinge upon human security and safety. Moreover, maritime threats increase the risks for operators which result in high costs. High costs not only increase the prices of the commodities, but also reduce the number of participants amongst the traders. The most affected are usually the small and medium enterprises which play a vital role in local, national, and global economies and are very important in job and income generation.<sup>33</sup> With this in mind, maritime security is now accepted as one of the necessary preconditions for an effective logistics system for the maritime supply chain, which can provide MS with high economic growth.<sup>34</sup>

The EU's regulatory framework on ship and port security aims to protect the maritime link in the transport logistics chain against the risk of an attack and threats of this type.<sup>35</sup> It has been designed to ensure the best level of preventive security possible for maritime transport, which does not come at the cost of the world trade, but rather promotes and enhances it. The contribution of the EU in the field of maritime security adds additional value to the international legal framework on ship and port facility. The incorporation of IMO rules into the EU's legal framework ensures their 'harmonized application' across all EU MS. In addition, the EU aids to improve international standards by initiating and contributing directly to their development and adoption at international level.<sup>36</sup>

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<sup>31</sup> Carina Bruwer, 'Smuggling and Trafficking of Illicit Goods by Sea' in L. Otto (Ed), *Global Challenges in Maritime Security* (Springer 2020) 49, 53.

<sup>32</sup> UNSC 'Piracy off Somali Coast Not Only Criminal, but Very Successful, Security Council Hears, Cautioned There Could Be No Peace at Sea without Stability on Land' (18 November 2009) Press Release SC 9793.

<sup>33</sup> Ali Asgary, Ali Ihsan Ozdemir, Hale Özyürek, 'Small and Medium Enterprises and Global Risks: Evidence from Manufacturing SMEs in Turkey' (2020) 11 Int J Disaster Risk Sci 59, 60.

<sup>34</sup> Oktay Çetin, Mesut Can Köseoğlu, 'A Study on the Classification of Maritime Security Threat Topics' (2020) 7 (3) IJEG 365, 366.

<sup>35</sup> Angela Carpenter, 'Security and Europe's Sea Ports: threats and issues facing maritime gateways to Europe' in Maria O'Neill and others (eds), *New Challenges for the EU Internal Security Strategy* (Cambridge Scholars 2013) 58-59.

<sup>36</sup> Safety and Environment | Mobility and Transport (europa.eu) <://ec.europa.eu/transport/modes/maritime/safety\_en> accessed on 27 June 2021.

## **Research Questions and Chapter Outline**

The aim of the dissertation is to analyse the adequacy and effectiveness of the EU regulatory regime on ship and port facility security. The study seeks to examine how the main international instrument on ship and port security, the ISPS Code, has been transposed in EU legal framework. It will also assess how EU instruments regulating ship and port security have been implemented by selected EU MS.

The first chapter will outline the importance of international trade for the EU's single market. It will address why ship and port facility security are crucial for the effective operation of maritime trade within the Union and for the stakeholders such as seafarers, ship owners, and port personnel.

The second chapter will provide an in-depth examination of the ISPS Code. In this respect, it will address the structure, application and main objectives of this international instrument. This Chapter will also identify and analyse the major international obligations and responsibilities imposed on different States under the Code.

The third chapter will identify and examine the main EU instruments regulating ship and port facility security. In this respect, it will determine to what extent, if at all, does this framework go beyond international obligations found in the ISPS Code.

The fourth chapter will address the State practice of selected EU countries concerning the implementation of the relevant EU instruments on ship and port security and determine whether they have necessary legal infrastructure in place.

The dissertation will conclude by presenting the key findings of the study. It will also provide a number of proposals which may contribute to further development and improvement of ship and port security within the EU.



## **Research Methodology**

The proposed study will implement a research methodology which is largely desk-based, focusing on an examination of relevant international and regional instruments and national legislation. Research on these primary sources will be supplemented by information obtained from secondary sources including reports from reputable international and regional organizations, journal articles and books. Research visits will be undertaken at the facilities of the University of Malta Main Library, Faculty of Laws Library and the IMO International Maritime Law Institute (IMLI) Library.

## **Literature Review**

The primary sources relied upon includes EU legislation, international conventions, agreements and domestic laws of MS such as the Maltese and Spanish. Official reports, reasoned opinions and commentaries of the EU institutions were also essential for this project. Books, journal articles (printed and electronic), reports, newsletters, and material from online sources all contributed in conducting an indebt analysis on the research question. The writings of maritime security law experts such as James Kraska and Raul Pedrozo, Natalie Klein, Jan Engel de Boer, Lennart Landman, and Peter Lehr were acknowledged and duly referenced. The facilities of the University of Malta library, the Faculty of Laws Library, the National Library of Malta, and the IMO International Maritime Law Institute library were all used for research for this dissertation.

## Chapter 1: Importance of International Trade for the EU's Single Market

### 1.1. Introduction

The European market, also referred to as 'common market' or 'single market' or 'internal market', lies at the foundation of the European integration process and is the key segment of the EU from its inception.<sup>37</sup> It aims to eliminate any existing barriers to trade and achieve a market without any borders or internal frontiers.<sup>38</sup> Once eliminated, the market constituted of the 27 MS will create a superior body which will then require a great degree of uniformity and legal harmonization.<sup>39</sup> Naturally, the harmonization will prevent the MS from incorporating laws into their national statute other than those set out in the applicable EU act.<sup>40</sup>

In relation to the single market in maritime transport, the harmonization of norms governing ship and port facility is necessary for proper operation of maritime trade within the Union. The said harmony could be easier achieved if the EU enjoyed exclusive competence across the board, which is not the case. In fact, MS frequently do not tolerate giving up their competence because they perceive it as a constraint of their sovereignty, therefore competence is frequently shared.<sup>41</sup>

Maritime navigation and trade by sea predates the formation of the EU single market by centuries.<sup>42</sup> Merchants have historically relied on navigation through the territorial and internal waters into ports, to conduct maritime trade, despite the fact that land

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<sup>37</sup> Laurence W. Gormley, 'Competition and Free Movement: Is the Internal Market the Same as a Common Market?' (2002) 13 (6) EBLR 517, 518.

<sup>38</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) (2016) OJ C202/1, Article 26(2); Kamiel J. Mortelmans, 'The Common Market, the Internal Market, the Single Market, what's in a market?' (1998) 35 (1) CMLR 101, 134.

<sup>39</sup> Andrew McGee, Stephen Weatherill, 'The Evolution of the Single Market – Harmonization and Liberalization' (1990) 53 (5) *The Modern Law Review* 578, 579.

<sup>40</sup> Werner Schroeder, 'Limits to European Harmonisation of Criminal Law' (2020) 20 (2) *EUCRIM* 144, 145.

<sup>41</sup> Niki Aloupi, 'The Conseil Constitutionnel's Jurisprudence on 'Limitations of Sovereignty' in Helmut Philipp Aust and Thomas Kleinlein (eds), *Encounters between Foreign Relations Law and International Law: Bridges and Boundaries* (Cambridge University Press 2021) 167.

<sup>42</sup> Wim Blockmans, Mikhail Krom, Justyna Wubs-Mrozewicz, 'Maritime Trade Around Europe 1300-1600: Commercial Networks and Urban Autonomy' in Wim Blockmans and others (eds.), *The Routledge Handbook of Maritime Trade Around Europe 1300-1600* (Routledge 2017) 1.

routes were easier to control and protect in some regions.<sup>43</sup> With the advent of the EU single market, maritime navigation gained increased importance. Nevertheless, it is argued that it still remains incomplete in some sectors including shipping.<sup>44</sup>

Being regulated at the Union level, the maritime industry is governed by the legal framework designed to ensure a safe and coherent environment for both EU and foreign actors.<sup>45</sup> However, the absence of exclusive competence in particular sectors, such as transportation, fisheries, and industry, presents challenges in the harmonization process, which, at times, hinders maritime trade from maintaining high standards across the EU and weakens the European market's basic principles.<sup>46</sup> This Chapter aims to examine the competences within the EU and highlight the role that the international trade plays in the EU's single market. It outlines the efforts that have been spearheaded by the EU to protect maritime trade. It examines the role of key players such as EU port and flag State in protecting ship and port facility security within the Union, and finally addresses its significance for stakeholders concerned.

## 1.2. Competences within the EU

The European legal order's strength is often attributed to a set of 'revolutionary' principles developed by the Court of Justice of European Union (CJEU) in 1960's.<sup>47</sup> Early developments of such principles are evident in *Van Gend En Loose* case, whereby the Court held that 'the Community constitutes a new legal order of international law'.<sup>48</sup> The statement paved the way for the fundamental principles of supremacy and of direct effect, which were justified on the basis of the Rome Treaty's 'purpose, spirit, and

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<sup>43</sup> Ayse Devrim Atauz, *Eight Thousand Years of Maltese Maritime History: Trade, Piracy, and Naval Warfare in the Central Mediterranean* (University Press Florida 2008) 42.

<sup>44</sup> ECSA, *A Single Market for Shipping – Time to Make it Happen* (2017) <ps://www.ecsa.eu/news/single-market-shipping-time-make-it-happen> accessed on 29 June 2021.

<sup>45</sup> Ljupco Sotiroski, 'The EU and International legal Framework in Maritime Safety' (2016) 25 (1), 297, 299.

<sup>46</sup> Hamed Alavi, 'The European Union external competencies and maritime industry' (2018) 8 (SI) *Judicial Tribune* 128, 129.

<sup>47</sup> William Phelan, 'The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt' (2017) 28 (3) *EJIL* 935, 936.

<sup>48</sup> Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* (1963) ECR 1.

wording'.<sup>49</sup> The Court held that the under this new legal order, there may be some limitations on State sovereignty, albeit in limited areas.<sup>50</sup> The goal was to bring MS closer together and harmonize their national laws so that they could be applied in a uniform manner and to the same extent across the Union.<sup>51</sup> In essence, the EU's doctrines of the supremacy and the direct effect are both founded on the EU's competence in certain areas.<sup>52</sup> In this regard, one of the most unusual features in the debate over institutional changes and treaty revision has been the division of competences between the EU and its MS.<sup>53</sup> From an economic standpoint, the concept of a single market would be jeopardized if it were to be governed by various national laws from each MS at the same time. Thus, the concept of competence is crucial for the proper functioning of the EU.

The competence of the Union can be generally described as the area of activity entrusted to the EU by the MS. The notion of competence, according to Bulygin, is both important and elusive, yet capable of changing legal relationships.<sup>54</sup> Hohfeld describes the competence as affirmative 'control' over a given legal relation.<sup>55</sup> In general terms, the competences may take three different forms.<sup>56</sup> The exclusive competence, such as custom Union, common commercial policy and common fishery policy, being the first form, implies that only the EU has the power to legislate and enact binding acts.<sup>57</sup> As a result, MSs are deprived of their authority in specific policy areas.<sup>58</sup> The second form refers to shared competencies, in which the EU and MS have the authority to enact and

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<sup>49</sup> Consolidated Version of Treaty Establishing the European Community, Treaty of Rome (1957); Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (8<sup>th</sup> Edition, Oxford University Press 2018) 293.

<sup>50</sup> *Van Gend en Loos* (n 49), 48.

<sup>51</sup> Morten Rasmussen, 'Revolutionizing European law: A history of the Van Gend en Loos judgment' (2014) 12 (1) *International Journal of Constitutional Law* 136, 155.

<sup>52</sup> Adrian Berski, 'Which Doctrine has had the Bigger Impact on EU law, Direct Effect or Supremacy?' (2016) Report prepared for School of Languages, Law and Social Sciences, Technological University Dublin, 1.

<sup>53</sup> Julie Smith and Camila Soar, 'Division of Competences in the European Union: Strategy Paper' (European Programme Royal Institute of International Affairs Ghatham House 2002) 2.

<sup>54</sup> Eugenio Bulygin, 'On Norms of Competence' (1992) 11(3) *Law and Philosophy* 201, 201.

<sup>55</sup> Wesley Hohfeld, 'Some Fundamental Legal Conceptions As Applied in Judicial Reasoning', (1913) 23 (16) *Yale Law Journal* 28, 55.

<sup>56</sup> Marise Cremona, 'EU External Relations: Unity and Conferal of Powers' in Loic Azoulai (eds.), *The Question of Competence in the European Union* (Oxford University Press 2014) 74-80.

<sup>57</sup> TFEU (n 38), Article 3.

<sup>58</sup> Markus Klamert, 'Common Provisions: Article 3-5' in Markus Klamert and others (eds.), *Commentary on the EU: Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 71.

implement legally binding acts.<sup>59</sup> Internal market, regional policy, transportation, and the environment are examples of shared competence areas.<sup>60</sup> The third form pertains to the area of supporting competences where the power of State and of the Union co-exist but subject to the principle of subsidiarity.<sup>61</sup> Industry, culture, tourism, and education all fall under this category.<sup>62</sup> Even while the allocation of competencies appears straightforward in principle, it is a contentious and sensitive subject in practice.<sup>63</sup>

The discussion of competencies, in the authors' view, is quite important for this research work. Because the subject matter is ship and port facility security, it's critical to know who has the authority to legislate in such important areas like common commercial policy, common fisheries policy, environment, industry and transport which are intrinsically linked to the maritime security.

### **1.3. The Importance of International Maritime Trade for the EU's Single Market**

The EU is one of the world's most progressive economies, accounting for some 25 per cent of the global economy and 40 per cent of world trade in goods and services.<sup>64</sup> Having the largest single market area, EU ensures free trade amongst all 27 MS and is participating in the world trade on their behalf.<sup>65</sup> Such mandate is ensured by EU's

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<sup>59</sup> Robert Schutze, 'EU Competences: Existence and Exercise' in Anthony Amull and others (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 75.

<sup>60</sup> TFEU (n 38), Article 4.

<sup>61</sup> John Tillotson, Nigel Foster, *Text, Cases and Materials on European Union Law* (4<sup>th</sup> Edition, Cavendish Publishing Limited 2003) 54; Gerard Conway, 'Conflict of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11( 9) *German Law Journal* 967, 988.

<sup>62</sup> TFEU (n 38), Article 6.

<sup>63</sup> Sacha Garben, 'Competence Creep Revisited' (2017) 57 (3-4) *JCMS* 1,1.

<sup>64</sup> Don Kenyon, Pierre van der Eng, 'Australia and the EU: Partners in the New Trade Agenda' in Ann Marie Elijah and others (eds), *Australia, the European Union and the New Trade Agenda* (ANU Press 2017) 258.

<sup>65</sup> Johan Bjerkem, Malcolm Harbour, *Making the Single Market work: Launching a 2022 masterplan for Europe* (EPC 2019) 6, <[https://www.epc.eu/content/PDF/2019/190828\\_MakingSingleMarketwork\\_JB.pdf](https://www.epc.eu/content/PDF/2019/190828_MakingSingleMarketwork_JB.pdf)> accessed on 2 August 2021.

exclusive competence in the trade policy.<sup>66</sup> Acting for 27 MS, the Union has one of the largest world trading power which is vital for international trade participation.<sup>67</sup>

To be able to maintain its position on international plane, the EU must ensure coherent and safe environment throughout the Union. Shipping for example, often referred to as one of the most valuable assets of the EU,<sup>68</sup> is one of the most pivotal elements of the European economy and is fundamental to the prosperity of the region.<sup>69</sup> Since almost 90 per cent of the external freight trade is seaborne,<sup>70</sup> the health and security of maritime industry is of a great concern for the EU.<sup>71</sup>

Maritime transport not only interlinks all EU MS but also, being one of the least expensive modes of transport,<sup>72</sup> is a key medium for EU's international imports and exports.<sup>73</sup> Supply of energy,<sup>74</sup> liquid and dry bulk products,<sup>75</sup> food,<sup>76</sup> and other commodities are mostly carried by ships.<sup>77</sup> Given the crucial role that international shipping plays in the EU and world trade in general,<sup>78</sup> the oceans, the ships, the ports, and the stakeholders need to be kept safe and secure at all times, where both port and flag States should contribute towards this. Given the geographical location of a number of MS, such as Malta, Spain, and the Netherlands, the port State can also be the coastal

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<sup>66</sup> TFEU (n 38), Article 207.

<sup>67</sup> Rafael Leal-Arcas, *EU Trade Law*, (EE Publishing 2019) 25.

<sup>68</sup> ECSA, 'Economic Value of the EU Shipping Industry, 2020' (Maritime Cyprus 1 December 2020) <<https://maritimecyprus.com/2020/12/01/ecsa-economic-value-of-the-eu-shipping-industry/>> accessed on 2 August 2021.

<sup>69</sup> Herkules E Haralambides, *The Shipping Policy of the European Union* (1997) Center for MEL Erasmus University Rotterdam, 1.

<sup>70</sup> *Ibid* 22, 462.

<sup>71</sup> Frederich Houbie, 'MARISA: Enhancing Maritime Security Across Europe' *Maritime Logistic Professional*, (16 April 2021) <<https://www.maritimeprofessional.com/news/marisa-enhancing-maritime-security-across-366864>> accessed on 5 August 2021.

<sup>72</sup> Belay Seyoum, *Export-Import Theory* (3<sup>rd</sup> edn, Routledge 2017) 190.

<sup>73</sup> Felix Thompson, 'Shipping industry slams EU's proposed new emissions charge as 'extraterritorial tax on trade'', *Global Trade Review* (21 July 2021).

<sup>74</sup> Kapil Narula, *The Maritime Dimension of Sustainable Energy Security*, (Springer 2019) 70.

<sup>75</sup> *Ibid*, 100.

<sup>76</sup> *Ibid*, 118.

<sup>77</sup> Ajay Menon, '8 Major Types of Cargo Transported Through the Shipping Industry' (Marine Inside 5 October 2020) <<https://www.marineinsight.com/types-of-ships/8-major-types-of-cargo-transported-through-the-shipping-industry/>> accessed 10 August 2021.

<sup>78</sup> S Sudalaimuthu and Rai S. Anthony, *Logistics Management for International Businesses: Text and Cases* (PHI Learning 2009) 63.

and flag States at the same time.<sup>79</sup> As a result, under international and EU law, each of them has different rights and obligations.

### 1.3.1. The Role of EU's Port States

The EU has a coastline of 70,000 kilometers that stretches over two oceans and four seas.<sup>80</sup> With over 1,200 commercial seaports spread across 23 MS, the EU is one of the world's densest port regions.<sup>81</sup> The ports of Rotterdam, Antwerp, and Hamburg are all major EU ports.<sup>82</sup>

As noted by the European Commission, maritime spaces and its coasts are central to Europe's well-being and prosperity.<sup>83</sup> Sea-ports and shipping allow the EU to benefit from the rapid growth of international trade and to play a leading role in the global economy, while the exploitation of mineral resources, aquaculture, blue biotech and emerging sub-sea technologies represent increasingly important business opportunities.<sup>84</sup> In terms of deadweight tonnage, European maritime businesses have a beneficial ownership of 41 per cent of the global fleet.<sup>85</sup> To safeguard EU's interest, the EU passed the Port State Control Directive,<sup>86</sup> which is a significant piece of legislation. The Directive's goal is to eliminate substandard shipping, which

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<sup>79</sup> Yubing Shi, *Climate Change and International Shipping: The Regulatory Framework for the Reduction of Greenhouse Gas Emissions* (Brill 2016) 288.

<sup>80</sup> Liu Nengye, Frank Maes 'The European Union and the International Maritime Organization: EU's External Influence on the Prevention of Vessel-Source Pollution' (2010) 41 (4) *JMLC* 1, 2.

<sup>81</sup> European Commission, 'Europe's Seaports 2030: Challenges Ahead' (Brussels, 2013) 3 <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_13\\_448](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_13_448)> accessed on 6 August 2021;

<sup>82</sup> Saurabh Sinha, '10 Major Ports in Europe' (Marine Insight, 5 July 2021) <<https://www.marineinsight.com/know-more/major-ports-in-europe/>> last accessed on 3 August 2021.

<sup>83</sup> European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (Brussels, 2007) 1 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF>> accessed on 7 August 2021.

<sup>84</sup> *Ibid* 3.

<sup>85</sup> 'Merchant fleet: Building, ownership, registration and recycling of ships, 2019' (E-Handbook of Statistics 2020) <[https://stats.unctad.org/handbook/MaritimeTransport/MerchantFleet.html#ref\\_Unctad\\_2020a](https://stats.unctad.org/handbook/MaritimeTransport/MerchantFleet.html#ref_Unctad_2020a)> accessed on 11 August 2021.

<sup>86</sup> Council Directive 2009/16/EC of 23 April 2009 on port state control (2009) OJ L 131/57 and amending Directive 2013/38/EU of 12 August 2013 (2013) OJ L 218/1 and amending Regulation (EU) No 1257/2013 of 20 November 2013 on ship recycling (2013) OJ L 330/1 and amending Regulation of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport (2015) OJ L 123/55.

also jeopardizes marine security. It is applicable to any vessel entering any European port with priority being given to inspections.

The author will now briefly examine the international law regime regulating port areas. Internal waters are assimilated to the territory of the port/coastal State over which it exercises full sovereignty.<sup>87</sup> A concomitant of this sovereignty is that power of the coastal/port State to regulate access to its ports.<sup>88</sup> Furthermore, port States have a responsibility to take action against unsafe and unsecure vessels.<sup>89</sup> In fact, Article 25 of United Nations Convention on the Law of the Sea (UNCLOS) gives States the power to take any action necessary in the territorial sea which is necessary to prevent a violation of conditions of port entry.<sup>90</sup>

Due to the growth of the European market and its importance on a global scale, international organizations have established a variety of standards and laws that must be followed by all maritime vessels. Failure to comply, could result in a vessel navigating the waters being deemed dangerous or carrying illicit goods,<sup>91</sup> risking not only people's lives but also the environment. If a foreign vessel enters the internal waters of a port State, then that State it is entitled to exercise prescriptive and enforcement jurisdiction. However, the ship will remain subject to the rules of its flag State, as discussed below, throughout the journey, even when it enters the port of another State. With the establishment of increased port State authorities, instances of States exercising 'dual' or 'concurrent' jurisdiction have become increasingly common.<sup>92</sup> Nevertheless, due to a

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<sup>87</sup> Rene-Jean Dupuy and Daniel Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff Publishers 1991)1036.

<sup>88</sup> Chuyang Liu, *Maritime Transport Services in the Law of the Sea and the World Trade* (Thomas Gottier (ed),14<sup>th</sup> edn, International Academic Publishers) 96; Minh Duc Tran, 'An Introduction of Port State Control in Vietnam' (Master of Science dissertation, World Maritime University Sweden 1999) 7.

<sup>89</sup> James Kraska, 'Ship and Port Security Facility' in David J. Attard and others (eds.), *The IMLI Manual on International Maritime Law Volume III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 455.

<sup>90</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397.

<sup>91</sup> Michael Tousley, 'United States Seizure of Stateless Drug Smuggling Vessels on the High Seas: Is It Legal' (1990) 22 (2) CWRJIL 375, 387.

<sup>92</sup> Arron N. Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?' (2016) 31 (1) IJMCL 499, 500.



lack of flag State enforcement, the formation of a secondary regime such as Port State Control (PSC) was crucial for the stakeholders.<sup>93</sup>

PSC is a process concerned with the control of foreign flagged ships in national ports and has been described as ‘the coastal State’s most significant weapon in the fight against substandard shipping’.<sup>94</sup> The major goal of PSC is to ensure safer ships and cleaner seas by preventing the substandard and unsecured vessels from sailing. According to Hare PSC involves:

... the powers and concomitant obligations vested in, exercised by, and imposed upon a national maritime authority (or its delegee) by international convention or domestic statute or both, to board, inspect and where appropriate detain, a merchant ship flying a flag foreign to that State in order to ensure compliance by that ship with all applicable international safety at sea instruments and with any domestic legislative maritime safety requirements.<sup>95</sup>

Although complimentary, PSC is not and can never be a replacement for the flag State's appropriate implementation of its obligations.<sup>96</sup> Despite its origins as a supplemental activity to flag State control,<sup>97</sup> PSC is today viewed as a highly effective ‘final safety net’ that may be dispensed with but only in an ideal world.<sup>98</sup>

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<sup>93</sup> Alan Knight, ‘Port State Control: An Important Concept in the Safety of Life at Sea, the Protection of the Marine Environment, and of Goods in Transit’ in International law Institute Canada (eds.), *The Future of Ocean Governance and Capacity Development* (Brill Nijhoff 2018) 463.

<sup>94</sup> James Harrison, *Saving the Oceans Through Law: The International legal Framework for the Protection of the Marine Environment* (Oxford University Press 2017) 156.

<sup>95</sup> John Hare, ‘Port State Control: Strong Medicine to Cure a Sick Industry’ (1997) 26 (3) *GJICL Special Admiralty Issue* 571, 572.

<sup>96</sup> Oya Özçayir, ‘The Use Of Port State Control In Maritime Industry And The Application Of The Paris MOU’ (2008) 14 (2) *Ocean and Coastal Law Journal* 201, 201.

<sup>97</sup> Maria Imbrol, ‘The Development of Port State Control – Where are We Today’ (LLD thesis, University of Malta 2015) 10.

<sup>98</sup> IMO, ‘Port State Control’ <<https://www.imo.org/en/OurWork/MSAS/Pages/PortStateControl.aspx>> accessed on 14 August 2021.

### 1.3.2. The Role of EU's Flag States

EU MS are also major flag State registries, for example, Malta and Greece are the biggest in EU and were included in the list of 'top ten flag States' in terms of gross tonnage.<sup>99</sup> The growth of the registries is accompanied by the growth of responsibilities and obligations vis a vis international community. The flag State's obligations were abruptly expanded as maritime risks such as piracy, armed robbery against ships, illegal fishing, and weapon proliferation increased globally.<sup>100</sup> The dramatic increase of such crimes in recent years at sea demonstrated the necessity of effective flag State implementation and enforcement of maritime security laws, at an international and regional level. Under international law, any State, whether coastal or landlocked, can serve as the flag State as long as it possesses the requisite maritime infrastructure and adheres to all generally accepted internationally accepted rules, regulations and practices established by the IMO.<sup>101</sup> Article 87 of the UNCLOS provides that all States enjoy certain freedoms on the high seas, including the freedom of navigation. The freedoms are commonly followed by a set of obligations and responsibilities. Article 94 of the UNCLOS establishes a non-exhaustive list of responsibilities that the flag State must fulfill in connection to vessels flying its flag. On the high seas, ships fall under exclusive jurisdiction of the flag State.<sup>102</sup> That is the State in which the vessel is registered.<sup>103</sup> It should be stressed that under international law, it is States that are given the right to navigate and therefore ships exercise this right once they are registered with State.<sup>104</sup> Once registered, all activities which occur on board the vessel fall under the exclusive jurisdiction of that flag

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<sup>99</sup> 'Top 10 Flag States 2020' (*Lloyd's List* 3 December 2020) <<https://lloydslist.maritimeintelligence.informa.com/LL1134965/top-10-flag-states-2020>> accessed on 15 August 2021.

<sup>100</sup> Matthew Gianni, *Real and Present Danger: Flag State Failure and Maritime Security and Safety* (WWF Oslo/London 2008) 9.

<sup>101</sup> Karan Chopra, 'What are Flag States in the Shipping Industry And What's Their Role?' (*Marine insight*, 13 October 2019) <<https://www.marineinsight.com/maritime-law/what-are-flag-states-in-the-shipping-industry-2/>> accessed on 17 August 2021.

<sup>102</sup> Markiyon Z. Kulyk, 'Piracy, Hijacking, and Armed Robbery Against Ships' in David J. Attard and others (eds.), *The IMLI Manual on International Maritime Law Volume III: Marine Environmental Law and Maritime Security Law* (Oxford University Press 2016) 397; *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea)* (Judgement of 1 July 1999) ITLOS Reports 1999, 60-61.

<sup>103</sup> Alan Branch and Martin Stopford, *Maritime Economics* (Routledge 1999) 431.

<sup>104</sup> Philipp Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer 2007) 88.

State, and the vessel and all persons on board are subject to that State's laws and EU treaty obligations.<sup>105</sup>

Apart from vessels that are registered in terms of law in a particular State and having genuine link to the said State,<sup>106</sup> there are other types of vessels which either choose a flag of convenience, or remain stateless. When it comes to vessels that are stateless, those that are not flying any flag, they are thought to be criminal ships attempting to evade jurisdiction.<sup>107</sup> Such vessels are deprived of any protection on the high seas,<sup>108</sup> will be prevented from entering ports, navigating on the high seas or in a State's exclusive economic zone,<sup>109</sup> and participating in trading activities.

The importance of the flag State authority lies in its maritime security's civilian functions. Controls exercised by flag States and port States, discussed in the previous sub-chapter, are fundamental for proper operation of the maritime authorities.<sup>110</sup> As a matter of fact, In recent years, the relationship between flag State and maritime security is of great importance in the international relations.<sup>111</sup> As a result, a flag State's maritime security responsibilities have been extended to encompass maritime security governance in conjunction with other law enforcement agencies from port States.<sup>112</sup>

Risks and threats associated with non-state actors, including piracy, terrorism, human trafficking, trafficking of illicit substances and proliferation of weapons only increased the list of responsibilities of the flag States. Criminals that engage in maritime illegal operations utilize ships as targets,<sup>113</sup> or as potential weapons.<sup>114</sup> Irrespective of a crime,

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<sup>105</sup>Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2<sup>nd</sup> edn. 2015) 157.

<sup>106</sup> Francesca Hili, 'An Analysis of the Evolution of the Concept of Genuine Link in Shipping Law through International Judgments' (LL.B. (Hons) term paper, University of Malta 2017) 35.

<sup>107</sup> Ann Marie Brodarick, 'High Seas, High Stakes: Jurisdiction Over Stateless Vessels And An Excess Of Congress Of Congressional Professional Power Under The Drug Tower Under The Drug Trafficking Vessel Interdiction Act' (2012) 67(1) University of Miami Law Review 255, 256.

<sup>108</sup> Allyson Bennet, 'That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act' (2012) 37 (1) The Yale Journal of International Law 433, 439.

<sup>109</sup> *M/V 'Virginia G' (Panama/Guinea-Bissau)* (Judgement of 14th April 2014) ITLOS Press 211, 103.

<sup>110</sup> See Section 1.2.1.

<sup>111</sup> Hamad Bakar Hamad, *The Roles of Flag States in Maritime Security Governance: A Case Study of the East African Community* (2016) 6 (14) Research on Humanities and Social Sciences 95, 101.

<sup>112</sup> Nivedita M. Hosanee, 'A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of the 1982 United Nations Convention on the Law of the Sea' (UN-Nippon Foundation Fellowship Thesis 2010) 100.

<sup>113</sup> Henri Fouche, 'Somali Pirates Take to the High Seas: Expediency or Long-Term Pirate Strategy?' 37 (2) *Scientia Militaria: SAJMS* 67, 68.

<sup>114</sup> Richard Farrell, 'Maritime Terrorism: Focusing on the Probable' (2007) 60 (3) *NWCR* 46, 50.

once it is committed or attempted at sea, the vessel is always a key element. For this reason, it is crucial for flag States to ensure that they fulfil its obligations under international law. Thus, awarding a vessel the right to fly its flag, the State assumes responsibility for the application and enforcement of international maritime rules and ensure that not only the vessel is secured but also those onboard of the said vessel.<sup>115</sup>

#### **1.4. The EU's Maritime Security Strategy**

The EU's economic operations are heavily reliant on the maritime navigation due to its geographical location. The logistics frequently include the busiest and most significant marine routes, such as the Suez Canal and the Strait of Gibraltar, which pass across the maritime boundaries of the EU.<sup>116</sup> The EU has established a common security policy over the previous two decades in order to maintain these routes safe and secure.<sup>117</sup>

From a European perspective, maritime security is a fundamental component for the Union's overall security. As a result of this importance, many policies have been adopted to help preserve and achieve maritime objectives. With the adoption of the EUMSS in June 2014 the European Council, following lengthy negotiations, took a step toward a progressive collaborative EU strategy to improve how the EU anticipates and responds to maritime issues.<sup>118</sup> It is a comprehensive maritime security strategy designed to address various security interests and threats from the global marine domain that may have an impact on navigation, economy, persons and territorial security of MS.<sup>119</sup> Moreover, piracy and terrorism, conventional military challenges and indirect threats emanating from illegal fishing and climate change are also catered for within the said

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<sup>115</sup> UNCLOS (n 90), Article 94.

<sup>116</sup> 'Ports' Relationship in the Mediterranean region: future cooperation, competences and competitions' (*Docks the Future*, 11 November 2020) <<https://www.docksthefuture.eu/relationship-with-med-neighbouring-countries/>> accessed on 18 August 2021.

<sup>117</sup> Livia B. Carmo Gault and Laura C. Ferreira-Pereira, 'Maritime Cooperation in the European Union-China Relations and the 21<sup>st</sup> Century Maritime Silk Road: What is at Stake?' in Francisco Jose B. S. Leandro and Paulo Afonso B. Duarte (eds.), *The Belt and Road Initiative: An Old Archetype of a New Development Model* (Palgrave Macmillan 2020) 265.

<sup>118</sup> Council of the European Union, 11025/14 'European Union Maritime Security Strategy' as adopted by the council General Affairs (Brussels, 24 June 2014).

<sup>119</sup> *Ibid*, 14.

strategy.<sup>120</sup> EUMSS strives to protect the EU's maritime interests across the world, particularly its maritime infrastructure, which includes ports.<sup>121</sup>

The EUMSS, being the core strategy till this day, was founded upon European Security Strategy<sup>122</sup> and Internal Security Strategy.<sup>123</sup> This instrument brings together diverse maritime-related sectors and bypasses the civilian-military gap. The strategy involves different EU institutions which include the Commission, the Council, as well as the authorities of MS and international actors. The EUMSS defines the maritime security as:

a State of affairs of the global maritime domain, in which international law and national law are enforced, freedom of navigation is guaranteed and citizens, infrastructure, transport, the environment and marine resources are protected.<sup>124</sup>

The maritime strategy is focused upon a flexible and problem-oriented approach to common issues of maritime security governance, rather than establishing new institutions and hierarchies to centralize response coordination.<sup>125</sup> It is so because at the time of writing the EUMSS, the EU conducted an exercise of mapping important agencies inside the organization and among its members.<sup>126</sup> The EUMSS is cross-sectoral, encompassing programs like fisheries, port State control, maritime training, environmental protection, and a significant international and security component, including defense.<sup>127</sup> Border control, maritime surveillance and naval operations are all examples of foreign and security actions that fall within the ambit of EUMSS.<sup>128</sup> The

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<sup>120</sup> Ibid.

<sup>121</sup> Sanda Cinca, 'EUMSS' in Dan Dungaci (ed.), *The Geopolitical Black Sea Encyclopedia* (Cambridge Scholar Publishing 2020)180.

<sup>122</sup> Cristiano Cabrita, 'Maritime security strategy and the EU global strategy: thinking globally?' (2017) 15 (1) LPIS 9, 14.

<sup>123</sup> Internal Security Strategy for the European Union: Towards a European Security Model, 5842/2/10 REV 2 JAI 90, agreed by the Council on 25 March 2010.

<sup>124</sup> EUMSS (n116).

<sup>125</sup> Ibid.

<sup>126</sup> Christian Bueger and Timothy Edmunds, Beyond Sea Blindness: A New Agenda for Maritime Security Studies (2017) 93 (6) International Affairs 1294, 1302.

<sup>127</sup> Andrea Frontini, 'The European Union Maritime Security Strategy: sailing uncharted waters?' (*European Policy Centre*, 26 June 2014) <[https://aei.pitt.edu/56472/1/pub\\_4569\\_the\\_eu\\_maritime\\_security\\_strategy.pdf](https://aei.pitt.edu/56472/1/pub_4569_the_eu_maritime_security_strategy.pdf)> accessed on 19 August 2021.

<sup>128</sup> Marianne Riddervold, *The Maritime Turn in EU Foreign and Security Policies: Aims, Actors and Mechanisms of Integration* (Palgrave Macmillan 2018) 12.

strategy was implemented through an action plan which was revised by the European Council in June 2018.<sup>129</sup>

The framework is based on four essential principles. First, a cross-sectoral approach, aimed at coordination and cooperation among civilian, military, research and industry actors, as well as EU agencies.<sup>130</sup> Second, maintaining the functional integrity of the 'ecosystem' by making use of existing structures, instruments, policies, mandates and competences at the national and EU levels.<sup>131</sup> Third, respect for human rights, democracy and international law – in particular,<sup>132</sup> full compliance with UNCLOS.<sup>133</sup> Fourth, adherence to maritime multilateralism by cooperating with international partners and organizations – in particular the United Nations (UN) and North Atlantic Treaty Organization (NATO) – and by coordinating with international and regional maritime forums.<sup>134</sup>

The strategy also suggests improving the EU's approach in other areas in order to successfully cope with a wide variety of challenges and threats. EUMSS aims at reduction of costs and increase of efficiency through enhancement of coordination, and coherence across the numerous sectors and players dealing with a wide range of maritime security challenges.<sup>135</sup> Because the approach attempts to do this at no additional costs and without creating additional mandates, rules, or institutions that might normally encourage or compel actors to collaborate, the strategy's success is more reliant on actors' willingness to respond to the call for collaboration. The idea is for the MS to join forces and collaborate as they do in many other areas. Naturally, there is a great difference between the drafting and implementation processes, however it is only logical that protection of EU's most important source of trade and income is

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<sup>129</sup> Council of the EU, 10494/18 'The Revision of the European Union Maritime Security Strategy (EUMSS) Action Plan' as adopted by the council General Affairs (Brussels, 26 June 2018).

<sup>130</sup> Rudolf Roy, 'The European Union's Approach to Maritime Security' in Joachim Krause and Sebastian Bruns (eds.), *Routledge Handbook of Naval Strategy and Security* (Routledge 2016) 383.

<sup>131</sup> Ibid.

<sup>132</sup> Salla Garsky, 'Strong, Independent, and Effective: The European Union's Promotion of the International Criminal Court' in Astrid Boening and others (eds.), *Global Power Europe -Vol. 2: Policies, Actions and Influence of the EU's External Relations* (Springer 2013) 4.

<sup>133</sup> *Council of the EU* (n129), 2.

<sup>134</sup> Ibid, 10.

<sup>135</sup> John Richardson, 'The Complexity of EU Maritime Security Policy' in Pedro Borges Graca (eds.), *The Challenges of the Atlantic* (ISPS University of Lisbon 2015) 84.

paramount for the wellbeing of all MS and their citizens. Once this concept is completely realized, the EUMSS will be able to establish a true identity and ensure that the interests of all stakeholders are protected.

### **1.5. Ship and Port Facility Security within the EU and its Significance for Stakeholders**

The European transportation network transports more than 70% of all goods exchanged with the rest of the globe.<sup>136</sup> In this supply chain the EU ports act as key strategic nodes due to the fact that they connect the sea and land using a vessel as a medium.<sup>137</sup> EU flag States which account for a 40 per cent of the global tonnage.<sup>138</sup> Seaports are the sole point in transit chain where the physical cargo and its whole digital profile meet in one place before being transported by sea or land to their final destination. The operational system that ports involve is very complex and critical for global transportation infrastructure.<sup>139</sup>

Since ports are located on the shores or in tidal estuaries of the MS, they are governed by the State's national laws not by IMO's regime. As a matter of fact, the ISPS Code only covers the port facilities, which are defined in SOLAS chapter XI-2. As a result, the vast majority of the port is beyond the scope of the ISPS Code, potentially resulting in severe standards discontinuity, a concern that organized crime has not overlooked.<sup>140</sup>

The goal of seaport security is to prevent illegal activities that might threaten the lives of seafarers, shipowners, and port staff, as well as have a detrimental effect on the port's infrastructure and facilities. Risk assessment is one of the measures that helps to achieve

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<sup>136</sup> James J. Corbett and James J. Winebrake, 'International Trade and Global Shipping' in Kevin Gallagher (eds.), *Handbook on Trade and Environment* (Edward Elgar 2008) 33.

<sup>137</sup> Dilek Demirbas, Helen Flint and David Bennett, 'Supply chain interfaces between a port utilizing organisation and port operator' (2014) 19 (1) *Supply Chain Management* 79, 80; United Nations Conference on Trade and Development (UNCTAD), 'Port Marketing and the Third Generation Port' (United Nations 1992) 2.

<sup>138</sup> Javier Bilbao-Ubillos, Ana Fernández-Sainz and Rosa Payán-Azkue, 'State aid, EU maritime transport policies and competitiveness of EU country fleets' (2021) 13 (7) *European Transport Research Review* 1, 1.

<sup>139</sup> Kenneth Christopher, *Port Security management* (CRC Press 2015) 21.

<sup>140</sup> Peter Cook, 'Comment: The emerging spectrum of maritime security' (2020) 1 (1) *IJMCS* 50, 53.

the such goals.<sup>141</sup> The effective governance and security of port facilities help to managing such challenges as smuggling, robbery and corruption.<sup>142</sup>

The significance of the EU legislative framework on ship and port facility security should not be underestimated, as the seaport acts as the ultimate guardian, defending the land from sea-borne threats.

### 1.5.1. Seafarers

The seafarer's role in the maritime industry is crucial and should not be underestimated. These individuals function as key workers for the global supply chain. Unfortunately, they are also regularly exposed to threats and challenges at sea. Inclement weather, vulnerability to piracy and armed robbery, growing concerns of criminalization, boredom, monotony, and solitude onboard, suicide, tiredness, and stress are all factors that may adversely affect the seafarer's life.<sup>143</sup>

The importance of maritime security and training for seafarers to deal with maritime security threats cannot be overstated. In the event of piracy for example, proper training of sailors helps them to defend themselves against pirates rather than fighting them.<sup>144</sup> In order to fight the threat, in December 2008 EU launched the Operations 'Atlanta' which, amongst other tasks, deters and disrupts piracy and armed robbery at sea.<sup>145</sup>

When it comes to employment conditions of seafarers, International Labor Organization (ILO) and IMO provide international minimum standards, training, security, and safety. The belief that worldwide minimum requirements in shipping are sufficient, has resulted

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<sup>141</sup> Ayman Nagi, Marius Indorf, Wolfgang Kersten, 'Bibliometric Analysis of Risk Management in Seaports' in Wolfgang Kersten and others (eds.), *Digitalization in Supply Chain Management and Logistics* (Epubli 2017) 495.

<sup>142</sup> Christian Bueger (n 126), 1301.

<sup>143</sup> Carolyn A.E. Graham, 'Maritime Security and Seafarers 'Welfare: Towards Harmonization' (2009) 8 (1) *WMU Journal of Maritime Affairs* 71, 72.

<sup>144</sup> Pankaj Bhargava, 'The Menace of Maritime Piracy and Somali Pirates – Is There a Solution?' (*Marine Insight* 27 February 2021) <<https://www.marineinsight.com/marine-piracy-marine/the-evolution-from-ship-piracy/>> accessed on 21 August 2021.

<sup>145</sup> Suk Kyoon Kim, *Global Maritime Safety & Security Issues and East Asia* (Brill Nijhoff 2019) 178.



in the exclusion of seafarers from a number of EU Directives.<sup>146</sup> This type of discriminatory exclusion was only recently addressed by the Union.<sup>147</sup>

Finally, a shared understanding of the international and EU legislative frameworks on maritime security protects not just the jobs and financial stability of seafarers, but most importantly their lives. Because a ship is constantly in need of personnel to protect it, proper operation of the security machinery guarantees that all seafarers are safely performing their duties.<sup>148</sup>

### 1.5.2. Shipowners

Shipowners are the major participants in the maritime world. The role of the proprietor brings with it duties and obligations towards many different stakeholders. Apart from general duty ‘to bring his venture to a safe termination’ the shipowner’s duties are, as that of other persons, necessarily limited to what is practically and reasonably in their power.<sup>149</sup> Shipowners privately engage armed security personnel due to the vast range of threats that the sector faces, but all legal requirements of the flag, port, and coastal States must be satisfied.<sup>150</sup> Although shipowners' contributions to the maritime security system are unavoidably costly, the advantages outweigh the disadvantages, as for

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<sup>146</sup> ‘Seafarers’ special status continues to be used against them – it’s time to stop’ (*European Transport Workers’ Federation* 26 April 2021) <[https://www.etf-europe.org/seafarers-special-status-continues-to-be-used-against-them-its-time-to-stop/#\\_ftnref1](https://www.etf-europe.org/seafarers-special-status-continues-to-be-used-against-them-its-time-to-stop/#_ftnref1)> accessed on 21 August 2021.

<sup>147</sup> Directive 2015/1794/EU amended the scope of five EU labour law Directives by including seafarers in Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer, Directive 2009/38/EC and Directive 2002/14/EC on information and consultation of employees, Directive 98/59/EC on collective redundancies, and Directive 2001/23/EC on safeguarding employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses

<sup>148</sup> Madhvedra Singh, ‘Maritime Counter-Terrorism: Navies of the World Unite’ in Swati Parashar (eds.), *Maritime Counter Terrorism: A Pan-Asian Perspective* (Dorling Kindersley 2008) 9.

<sup>149</sup> Great Britain. Royal Commission on Loss of Life at Sea, ‘Final Report of the Royal Commission on Loss of Life at Sea: With Minutes of Evidence, Appendix, and Digest of the Evidence’ (H.M. Stationery Office, 1887) 44.

<sup>150</sup> ‘Document No 14: IMO Circular 1334, Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships’ in Kristen E. Boon and others (eds.), *Terrorism Commentary on Security Documents, Vol 113: Piracy and International Maritime Security* (Oxford University Press 2011) 323; Dimitrios Angelopoulos, ‘German legislation regarding PMSCs: The accreditation process is not yet clear’ (*Piracy Daily*, 4 June 2013) <<https://www.maritime-executive.com/article/German-Legislation-Regarding-PMSCs-The-Accreditation-Process-Is-Not-Yet-Clear-2013-06-12>> accessed on 22 August 2021.

example Somali pirates only cost the global economy approximately 18 billion US dollars (USD) each year.<sup>151</sup> Similarly, shipping companies also have an extensive list of various obligations under the ship and port security instruments.

The safety of the crew, vessel, and cargo is a major concern for shipowners involved in international trade.<sup>152</sup> Following the execution of crew members on *MV Beluga* Nomination and payment of USD 13 million ransom,<sup>153</sup> the International Chamber of Shipping jointly with International Association of Dry Cargo Shipowners and other actors in the maritime industry issued a joint public statement, stating that:

The international shipping industry is truly disturbed at reports that pirates have been torturing seafarers physically and mentally, often in the most barbaric ways, including hanging them over the ship's side by ropes around their ankles with their heads under water and even subjecting them to the horrendous practice of keelhauling.<sup>154</sup>

Evidently, when a vessel passes through dangerous routes, the risk associated with the voyage increase, as does the significance of maritime security. Because it has a direct impact on human, political, economic, and environmental well-being, the legal framework governing maritime security is very complex.<sup>155</sup>

### 1.5.3. Port Personnel

A huge amount of ships pass through EU ports every day. Large volumes necessitate labor, which must be conducted in secure facilities. While seafarers play the most

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<sup>151</sup> Teo Kermeliotis, 'Somali Pirates Cost Global Economy '\$18 Billion a Year'' in Debra A. Miller (eds.), *Piracy on the High Seas* (Greenhaven Press 2014) 11.

<sup>152</sup> B.J Parkinson, 'Maritime Security: A Joint Responsibility' in Thomas C. Fitzhugh III (eds.), *International Perspectives on Maritime Security* (Maritime Security Council 1996) 208.

<sup>153</sup> 'Pirates release MV Beluga Nomination', (*Oceanus Live* 13 April 2011) <<http://www.oceanuslive.org/main/viewnews.aspx?uid=00000258>> accessed on 23 August 2021.

<sup>154</sup> Kaija Hurlburt, 'Somali Pirates and Turture' in Maximo Q. Mejia, Jr. and others (eds.), *Piracy at Sea* (Springer 2013) 308.

<sup>155</sup> Peter Chalk, 'The Maritime Dimension of International Security Terrorism, Piracy, and Challenges for the United States', (2008) Project Air Force xii.

important role in ship security,<sup>156</sup> port facility personnel play a crucial part in port facility security. According to IMO, port facility personnel means:

... any person employed or engaged in a port facility having specific security-related duties and all other port facility personnel working in the port facility identified in the approved port facility security plan as requiring training or instruction and familiarization training.<sup>157</sup>

Port personnel, like other stakeholders, are concerned about the port's internal affairs since any threats ensuing due to lax security in port facilities or on board vessels entering those ports, may put the port staff in danger. Given the surplus capacity in the system that might be employed in the case of a real emergency, it has been argued that the main threat to the ports is not physical damage to infrastructure.<sup>158</sup> The underlying constraint is labor's unwillingness to work in potentially dangerous situations.<sup>159</sup> This will create labor deficit which will have a detrimental influence on international trade.

In this regard, no maritime security threats shall be deemed independent or unrelated. Maritime criminal operations are rarely independent and are usually linked to other organized crimes.<sup>160</sup> On the surface, it appears that severe maritime threats such as piracy would have minimal influence on port workers. However, once a ship has been taken by pirates, there is no assurance that it will not be utilized in a terrorist attack on a port, as happened in *Dewi Madrim* on the Sumatra coast.<sup>161</sup> This may be the case, on the other hand, even if the vessel has not been captured by pirates, but hijacked for example. This was a big concern following 9/11, where the international community feared that ships (similar to the aircraft used in 9/11) would be used as vessels of mass

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<sup>156</sup> See Section 1.5.2.

<sup>157</sup> IMO, 'Guidelines on Security-Related Training and Familiarization for Port facility Personnel' Ref. T2-MSS/2.11.1 (MSC.1/Circ. 1341, 27 May 2010) 1.

<sup>158</sup> Edward E. Leamer, Christopher Thornberg, 'Ports, Trade, and Terrorism: Balancing the Catastrophic and the Chronic' in Jon D. Haveman and Howard J. Shatz (eds.), *Protecting the Nation's Seaports: Balancing Security and Cost* (PPIC 2006) 46.

<sup>159</sup> Ibid.

<sup>160</sup> UNCTAD, 'Maritime Piracy: Part I An Overview of Trends, Costs and Trade Related Implications' (United Nations, 2014) 11.

<sup>161</sup> Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (Routledge 2007)8.

destruction to cause loss of life in and damage to port areas.<sup>162</sup> Any ship that is used by the criminals, for example, as weapon of mass destruction may seriously jeopardize the lives of port personnel.

Casaca outlined the significance and deficiencies in the port systems after investigating the port training programs of eight MS, whereby and she placed maritime security among the top challenges.<sup>163</sup> It follows that one of the most significant aspects of the overall security apparatus is the training of port personnel to identify, evaluate and subject to necessary qualifications, to neutralize the threats.<sup>164</sup>

## 1.6. Conclusion

The volume of goods that ships move on an annual basis demonstrates the importance of maritime transportation in the international trade.<sup>165</sup> Clearly, the EU, with its 27 MS, is one of the main actors in this trade activity.<sup>166</sup> The role of a trade leader imposes significant responsibilities that can only be fulfilled within a harmonious EU legal framework. Despite the fact that the EU has a number of exclusive competencies, there are still areas that impede the integration process.<sup>167</sup> One of these sectors is transportation, which should ideally come under exclusive competence for the benefit of international maritime trade but is currently subject to shared competence.<sup>168</sup>

Maritime navigation, or rather its secure operation, is another aspect that influences the integration of the single market. The secure maritime sector and shipping services

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<sup>162</sup> Aaron Lukas, 'Protection Without Protectionism: Reconciling Trade and Homeland Security' (*Cato Institute* 8 April 2004) < <https://www.cato.org/trade-policy-analysis/protection-without-protectionism-reconciling-trade-homeland-security?queryID=b6b0784f6e5914e544174d4fb948c3df>> accessed on 24 August 2021.

<sup>163</sup> Ana C. Paixão Casaca, 'Insights into the port training of the new European Union Member States', (2006) 33 (3) *Maritime Policy & Management* 203, 206.

<sup>164</sup> Marios Meletiou, 'Improved Port Performance Through Training: The Contribution of the International Labour Organization' (ILO, 22<sup>nd</sup> International Port Conference - "Human Resources and Sea Ports Performance" - 12 – 14 March 2006, Alexandria, Egypt).

<sup>165</sup> See Section 1.1.

<sup>166</sup> See Section 1.3.

<sup>167</sup> See Section 1.2.

<sup>168</sup> *Ibid.*

have an impact on trade flows, the products sold by nations, and how price shocks reverberate across trade.<sup>169</sup>

One of the EU's key duties in the marine industry, according to the study performed in this chapter, is to safeguard ships and port infrastructure from threats. The flag and port States, on the other hand, share such obligations.<sup>170</sup> To that end, the EU implemented a comprehensive strategy known as EUMSS, which went above and beyond international obligations.<sup>171</sup>

Finally, because ports and ships are both directly and indirectly job creators at the local and national levels, as well as income generators,<sup>172</sup> they must be kept secure at all times, and all stakeholders must contribute to this effort.<sup>173</sup>

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<sup>169</sup> Myrto Kalouptsidi, 'The Role of Shipping in World Trade' (*Econofact* 9 June 2021) <<https://econofact.org/the-role-of-shipping-in-world-trade>> accessed on 25 August 2021.

<sup>170</sup> See Section 1.2.1 and 1.2.2.

<sup>171</sup> See Section 1.4.

<sup>172</sup> Peter Gripaos and Rose Gripaos, 'The impact of a port on its local economy. The case of Plymouth' (1995) 22(1) *Maritime Policy Management* 13, 14.

<sup>173</sup> See Section 1.5.

## Chapter 2: An Analysis of the International Ship and Port Facility Security Code

### 2.1 Introduction

As noted above, the centerpiece instrument regulating international ship and port facility security is the ISPS Code.<sup>174</sup> This chapter will commence by discussing the historical development of the Code. It will then examine the objectives, structure and application of the instrument. The purpose of the chapter is to introduce and address the main obligations in the ISPS Code, which will be examined in further detail when discussing the EU legislation on ship and port security in subsequent chapters. It will conclude by determining to what extent does the ISPS Code address modern ship and port facility security challenges, eighteen years after its adoption.

### 2.2 The Historical Development of the ISPS Code

The IMO is the UN's specialized organization,<sup>175</sup> responsible agency for maritime safety and security, environmental protection and maritime transportation facilitation. As the global standard setting authority for safe, secure and efficient shipping on clean oceans, the Organization has facilitated the adoption of over fifty agreements and developed numerous codes and guidelines.<sup>176</sup> The IMO's rapid response to challenges posed to the shipping industry,<sup>177</sup> was often necessary in light of the emergence of new and diverse threats. For example, in 1985, the Italian registered cruise liner, the *Achille Lauro* was

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<sup>174</sup> Sam Bateman, 'Building Good Order at Sea in Southeast Asia: The Promise of International Regimes' in Kwa Kwa Chong Guan and John Skogan (eds.), *Maritime Security in Southeast Asia* (Routledge 2007) 106.

<sup>175</sup> Mohammad A. Ali, 'The International Labour Organization for Minimum Labour Standards: The Seafarers' Case' in David Lewin, Bruce E. Kaufman and Paul J. Gollan (eds.), *Advances in Industrial and Labour Relations: Volume 18* (Emerald Publishing 2011) 253.

<sup>176</sup> Mark Gaouette, *Cruising for Trouble: Cruise Ships as Soft Targets for Pirates, Terrorists, and Common Criminals* (Greenwood Publishing 2010) 179.

<sup>177</sup> Barbara Kwiatkowska and Alfred H. A. Soons, 'Transboundary Movements of Hazardous Wastes and Their Disposal: Emerging Global and Regional Regulation' in Lammers A. C. Kiss (eds.), *Hague Yearbook of International Law: Volume 5* (Martinus Nijhoff 1992) 87; Philippe Boisson, 'Law of Maritime Safety' in David J. Attard and others (eds.), *The IMLI Manual on International Maritime Law: Volume II Shipping Law* (Oxford University press 2016) 206.

one of the first major terrorist targets at sea.<sup>178</sup> In the wake of the incident, the IMO adopted Resolution A. 584(14) on ‘measures to prevent unlawful acts threaten the safety of ships and the security of their passengers and crews’.<sup>179</sup> The IMO continued to develop and facilitate the adoption of several important maritime security instruments, such as the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA).<sup>180</sup>

Following the tragic terrorist attacks on US soil on September 11, 2001, the international community was concerned that vessels may be used as weapons of mass destruction to cause loss of life and severe damage to maritime infrastructures.<sup>181</sup> As a result, the IMO’s Assembly Resolution A. 924(22) called for a review of current international legal framework to protect and prevent such crimes against ships at sea and in port, as well as to enhance security onboard and ashore.<sup>182</sup> One hundred and nine contracting parties to the SOLAS Convention, including EU MS such as Malta, Greece, Netherlands, Italy and Germany,<sup>183</sup> gathered at the IMO's headquarters in London in December 2002 for a diplomatic conference on maritime security.<sup>184</sup> The meeting resulted in the adoption of a new chapter XI-2 to the SOLAS Convention on ‘Special measures to improve maritime security’. Chapter XI-2 incorporated the far-reaching ISPS Code, which was made mandatory for all contracting State parties to the SOLAS Convention.<sup>185</sup> The adoption of these maritime security measures were the result of collaboration between contracting States, their national agencies, government entities, and the maritime and

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<sup>178</sup> Peter Lehr, ‘Maritime Terrorism: Locations, Actors, and Capabilities’ in Rupert Herbert-Burns and others (eds.), *Lloyd’s MIU Handbook of Maritime Security* (Auerbach Publications 2009) 67.

<sup>179</sup> IMO (Resolution of the Assembly) ‘Measures to Prevent Unlawful Acts which Threaten the Safety of Ships and the Security of Their Passengers and Crews’ (20 November 1985) Res. A.584 (14).

<sup>180</sup> UNGA Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) (1988) No. 29004.

<sup>181</sup> Azhar Ahmad, ‘Maritime security post-9/11’ (2009) 29 (2/3) 81, 81.

<sup>182</sup> IMO Assembly, ‘Review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships’ (19-29 November 1985) Res A. 924(22).

<sup>183</sup> EcoLex, ‘International Convention for the Safety of Life at Sea’ <<https://www.ecolex.org/details/treaty/international-convention-for-the-safety-of-life-at-sea-solas-tre-000115/>> accessed on 26 August 2021.

<sup>184</sup> Hartmut G. Hesse, ‘Maritime Security in a Multilateral Context: IMO Activities to Enhance Maritime Security’ (2003) 18 (1) IJMCL 327, 328.

<sup>185</sup> Arsham Mazaheri, ‘Impacts of the ISPS code on port activities-A case study on Swedish ports’ (2009) 2 (4) WRITR 326, 327.

port sectors.<sup>186</sup> The main objective of such initiative was the assessment of security threats, implementation of preventative measures, and response to security incidents involving ships or port infrastructure.<sup>187</sup> Security incident is defined by the Regulation 1.13 of the Chapter XI-2 of the SOLAS Convention as:

Security incident means any suspicious act or circumstance threatening the security of a ship, including a mobile offshore drilling unit or a high-speed craft, or of a port facility or of any ship/port interface or any ship-to-ship activity.

Governments, shipping firms, and port authorities are all subject to the ISPS Code's extensive security rules and standards which are found in its two parts: Part A and Part B.<sup>188</sup> The former is mandatory, while the latter is recommendatory in nature and provides guidelines on how to execute the obligations under Part A. Soon after its adoption, Mr. Efthimios E. Mitropoulos, the then Secretary General of the IMO, urged all 'servants of the maritime mode' to step up their efforts to meet the new comprehensive security regime's entry-into-force deadline the 1 July 2004.<sup>189</sup> According to the European Commission, the outcome of the Diplomatic Conference of the IMO of 12 December 2002 introduced substantial improvements in the security of ships and port facilities used for international trade.<sup>190</sup> The Commission continued that more effort is needed on other international planes, particularly inside the EU, to guarantee that the issues are addressed thoroughly and to avoid the use of bilateral initiatives similar to those introduced by some Third Countries.<sup>191</sup>

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<sup>186</sup> Jan Engel de Boer, 'The IMO: Maritime Terrorism/Security and Global Ocean Governance' in David J. Attard and others (eds.), *The IMLI Treatise on Global Ocean Governance, Volume III: IMO and Global Ocean Governance* (Oxford University Press 2018) 161.

<sup>187</sup> Ibid.

<sup>188</sup> Nurul Huda Ahmad Razali and Wan Siti Adibah Wan Dahalan, 'The ISPS Code and Its Implementation in Malaysia' (2012) 5 (2) *Arena Hukum* 42, 42; John C.W. Bennett, 'Maritime Security' in Clifford R. Bragdon (ed.), *Transportation Security* (Elsevier 2008) 164.

<sup>189</sup> Peter Moth, *ISPS Code: 2004 Update* (Foreshore Publications 2004) x.

<sup>190</sup> European Commission, 'Fight against terrorism: Security of European maritime transport to be strengthened' (8 May 2003) <[https://ec.europa.eu/commission/presscorner/detail/lv/IP\\_03\\_651](https://ec.europa.eu/commission/presscorner/detail/lv/IP_03_651)> accessed on 27 August 2021.

<sup>191</sup> Ibid.



### 2.3 Objectives, Structure and Application of the ISPS Code

The ISPS Code was adopted in a highly political climate.<sup>192</sup> The principal objective of the Code is to create a comprehensive and global framework for risk assessments in the maritime transportation industry.<sup>193</sup> The instrument is centered on the notion that securing ships and port infrastructure is essentially a risk management activity that often requires *ad hoc* risk assessments in order to determine the security measures that are required according to the circumstances of each case.<sup>194</sup> The Code seeks to establish a uniform and consistent methodology for assessing security threats, allowing local authorities to find a balance between the level of threat involved and vulnerability of ships and port facilities.<sup>195</sup>

Section A/1.2 of the ISPS Code sets forth the following objectives, which include:

1. to establish an international framework involving co-operation between Contracting Governments, Government agencies, local administrations and the shipping and port industries to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade;
2. to establish the respective roles and responsibilities of the Contracting Governments, Government agencies, local administrations and the shipping and port industries, at the national and international level for ensuring maritime security;
3. to ensure the early and efficient collection and exchange of security-related information;
4. to provide a methodology for security assessments so as to have in place plans and procedures to react to changing security levels; and

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<sup>192</sup> Jibkwon Jeong, 'Progress and challenges : ten years after the ISPS code' (Master of Science dissertation, World Maritime University 2013) 8.

<sup>193</sup> Arsham Mazaheri, 'How the ISPS code affects port and port activities' (Master of Science thesis, University of Boras 2008) 10.

<sup>194</sup> *Ibid* 13.

<sup>195</sup> Engel de Boer (n 186) 162.

5. to ensure confidence that adequate and proportionate maritime security measures are in place.

The wording of the Section A/1.2, in particular, the phrasing: 'The objectives of this Code are:' suggests that the list of purposes is exhaustive. It is critical to notice that the objectives, apart from being listed in the 'Foreword' of the Code, are also included in the Code's mandatory Part A. Section A/1.2 implies that the measures to be employed by the stakeholders must meet the Code's objectives. Part A sets forth thirteen requirements for contracting governments,<sup>196</sup> shipping companies,<sup>197</sup> and port authorities.

The ISPS Code does not provide specific measures that each port or ship must adopt. Instead, due to the different types and sizes of ships and ports facilities, the Code provides a standardized framework for evaluating and responding to the different risks. Kraska opines that 'The risk assessment enables governments to offset changes in the threat condition with adjustments in the security measures'.<sup>198</sup>

The ISPS Code focuses on the port facility's ship as terrorist's target, the possibility of ships entering port areas being used as weapons of mass destruction, as well as the use of ships as a means to transport criminals who intend to jeopardise security regime.<sup>199</sup> The Code's application is however restricted in scope.<sup>200</sup> It only applies to ships and the ports that service them provided the said ships are engaged on international voyages.<sup>201</sup> International voyage was defined by the SOLAS Convention as 'a voyage from a country to which the present Convention applies to a port outside such country, or conversely'.<sup>202</sup> Furthermore, only passenger ships, including high-speed passenger craft, cargo ships, including high-speed craft, of 500 gross tonnage and upwards, and mobile offshore drilling units fall within the scope of the Code.<sup>203</sup>

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<sup>196</sup> ISPS Code, *Part A*, Section A/4.

<sup>197</sup> *Ibid* Section A/6.

<sup>198</sup> James Kraska (n 89), 448.

<sup>199</sup> *Ibid* 446.

<sup>200</sup> ISPS Code, *Part A*, A/3.

<sup>201</sup> *Ibid* Section A/3.1, A.3.2.

<sup>202</sup> SOLAS (n 20) Regulation 2(d).

<sup>203</sup> *Ibid* Section A/3.1.1.

The ISPS Code's full implementation is hampered, according to Kraska, by the failure of certain non-EU states to comply with its provisions.<sup>204</sup> Even though IMO does not provide a list of non-compliant States, ports not covered by the ISPS Code face very serious challenges which include migration, border control, customs and security measures.<sup>205</sup> It may be argued that universal implementation and enforcement of the Code remain a work in progress. Nevertheless, it is this author's view that the instrument has, overall, been effective in providing a consistent and standardised method which allows States to respond to rapidly developing security incidents by offsetting changes in security threat levels on ships and in port facilities with changes in vulnerability for ships and port areas.<sup>206</sup>

The ISPS Code incorporates the risk management concept into a set of basic functional security requirements for ships and port facilities. In relation to port facilities, port facility security plan and port facility security officers are amongst the requirements that shall be met. Such requirements for ships include the following:<sup>207</sup>

1. ship security plans;
2. ship security officers;
3. company security officers; and
4. certain onboard equipment.

## **2.4 ISPS Code Responsibilities**

### **2.4.1 Contracting Governments**

Contracting governments can establish designated authorities to carry out their security obligations in terms of Part A of the ISPS Code.<sup>208</sup> Certain security obligations, subject to

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<sup>204</sup> Kraska (n 198) 449.

<sup>205</sup> Damir Zec and others, 'Port Security Organization and functionality – Implementation of the ISPS Code in Medium and Small Countries' in Elisa Shahbazian and Galina Rogova (eds.), *Human Systems Integration to Enhance Maritime Domain Awareness for Port/Harbour Security* (IOS Press 2008) 46.

<sup>206</sup> Kraska (n 198) 449.

<sup>207</sup> Engel de Boer (n 186) 163.

<sup>208</sup> ISPS Code, Part B, B/1.7.

limitations set out within the Code itself,<sup>209</sup> may also be delegated by governments or specialized entities to Recognized Security Organizations (RSO).<sup>210</sup> The RSO may be defined as an entity which met terms and conditions stipulated in the International code and possesses adequate security experience and understanding of ship and port operations,<sup>211</sup> and that is authorized to conduct an assessment, verification, approval, or certification activity as required by SOLAS chapter XI-2 or part A of the ISPS Code.<sup>212</sup> The RSO may prepare the ship security plan for a specific ship,<sup>213</sup> or review and approve ship security plans, or amendments to a previously approved plan, provided it has not been involved in the preparation of the said plan or its amendments subject to approval.<sup>214</sup>

Contracting governments are, through designated authority for ports and administrations for States, responsible for determining the security levels in effect at any given moment, which will apply to their ships and port infrastructure. The setting of the security levels is the responsibility of the contracting governments (through designated authority for ports and administrations for States) and will apply their ships and port facilities. This is one of the most important obligations. However, the ISPS Code expressly specifies which duties a contracting government cannot delegate to a RSO.<sup>215</sup>

The ISPS Code establishes three levels of security for ships and port facilities:<sup>216</sup>

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<sup>209</sup> Ibid Part A, Section A/4.3. This should be Ibid as we discussed i.e. 'Ibid Part A, Section A/4.3'

<sup>210</sup> Ibid Part B, B/1.7.

<sup>211</sup> US Congress and others, *Interim Final Regulations on Port Security: Hearing Before the Subcommittee on Coast Guard and Mar[i]time Transportation of the Committee on Transportation and Infrastructure, House of Representatives, One Hundred Eighth Congress, First Session, July 22, 2003* (US Government Printing Office 2003) 5.

<sup>212</sup> Adolf K.Y. Ng and Zaili Yang, 'Maritime security regulations and policies in Hong Kong: A Critical Review and the Development of a risk-Based Security Assessment Model' in Khalid Bichou and Joseph S. Szyllowicz (eds.), *Maritime Transport Security: Issues, Challenges and National Policies* (Edward Elgar 2013) 243.

<sup>213</sup> ISPS Code, Part A, Section A/9.1.1.

<sup>214</sup> Iliana Christodoulou-Varotsi and Dmitry A. Pentsov, *Maritime Work Law Fundamentals: Responsible Shipowners, Reliable Seafarers* (Springer 2008) 691.

<sup>215</sup> ISPS Code, Part A, A/4.1; The responsibilities are: setting of the applicable security level and approving Port Facility Security Plan, determining which of the port facilities located within the territory of a Contracting Government are required to designate a Port Facility Security Officer and to prepare a Port Facility Security Plan, approving a Port Facility Security Assessment or any subsequent amendments to a previously approved assessment and approving a Port Facility Security Plan or any subsequent amendments to a previously certified plan.

<sup>216</sup> Ibid Section B/1.8.

Security Level 1 – normal: the level at which ships and port facilities normally operate;

Security Level 2 – heightened: the level applying for as long as there is a heightened risk of a security incident; and

Security Level 3 – exceptional: the level applying for the period of time when there is the probable or imminent risk of a security incident.

The ISPS Code requires particular information to be communicated to the IMO, and made available and accessible to facilitate effective communication between Contracting Governments, Company/Ship Security Officers, and Port Facility Security Officers.<sup>217</sup> Furthermore, the ISPS Code assigns the contracting governments supervisory responsibility. The governments should test any authorized and later updated Ship or Port Facility Security Plans, even if the delegated body approved such plans on their behalf.<sup>218</sup> It is an important responsibility, according to this author, because it ensures that the initial level approved by the contracting government is maintained throughout.

Assessing the risk posed by a ship to a port facility or a ship to another ship helps the State to determine if a Declaration of Security is required.<sup>219</sup> The Declaration establishes not only the security requirements that a port facility and a ship may share, but also their responsibilities for those requirements.<sup>220</sup>

Part B of the ISPS Code encourages contracting governments to first, disclose specific information with their peers,<sup>221</sup> second, to issue appropriate identification documents to government officials authorised to enter port facilities and board a ship,<sup>222</sup> and third, to improve ship security by alternative methods that are not covered by Part A of the

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<sup>217</sup> Ibid Section B/1.22.

<sup>218</sup> Ibid Part A, Section A/4.4.

<sup>219</sup> Ibid Part A, Section A/5.

<sup>220</sup> Navsregs, 'What is a Declaration of Security under the ISPS Code' (19 June 2017) <<https://navsregs.wordpress.com/2017/06/19/declaration-of-security-under-the-isps-code/>> accessed on 2 September 2021.

<sup>221</sup> ISPS Code, Part B, Section B/4.17.

<sup>222</sup> Ibid Section B/4.18

Code.<sup>223</sup> To that purpose, contracting governments must ensure that security measures do not exceed what is required, as this may be perceived as an impediment rather than a positive initiative.<sup>224</sup>

#### **2.4.2 Shipping Companies**

A shipping company that operates any of the ships which fall under the application of the ISPS Code must appoint a Company Security Officer (CSO) and a Ship Security Officers (SSO).<sup>225</sup> While one CSO may operate for one or more ships,<sup>226</sup> one officer must be assigned for each ship in the case of SSO.<sup>227</sup> Part A of this Code defines these officials' duties, responsibilities,<sup>228</sup> and training requirements.<sup>229</sup> Responsibilities of the CSO includes advising on the level of threats likely to be encountered by the ships, overseeing the Ship Security Assessment (SSA) process, arranging for internal audits and reviews of security activities and enhancing security awareness and vigilance.<sup>230</sup>

The responsibilities of shipping companies must be understood in terms of not only Part A, but also Part B of the ISPS Code, which specifies the duties that can be performed by the Company's delegates, such as the CSO and SSO. The company must offer necessary support CSO, ship's master, and SSO for them to fulfill their duties and responsibilities outlined in Part A of the ISPS Code.<sup>231</sup> Section 11.2 of Part A of the ISPS Code contains a comprehensive but not exhaustive list of duties that the CSO must execute.<sup>232</sup> At the same time, the CSO is not required to directly undertake all duties relating to his office; rather, he or she must oversee that they are performed effectively.<sup>233</sup>

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<sup>223</sup> Ibid Section B/4.20.

<sup>224</sup> Francis D'Addario, 'ISO/PAS 28001 enables Starbucks Coffee Company's supply chain strategy', (2006) 3 (7/8) ISO Focus 12, 13.

<sup>225</sup> ISPS Code, Part B, Section B/1.9.

<sup>226</sup> Ibid Part A, Section A/11.1.

<sup>227</sup> Ibid Part A, Section A/12.1.

<sup>228</sup> Ibid Part A, Section A/11.2.

<sup>229</sup> Ibid Part A, Section A/13.

<sup>230</sup> Ibid Part A, Section A/11.2.

<sup>231</sup> Ibid Part A, Section A/6.2.

<sup>232</sup> Ibid Part A, Section A/12.2.

<sup>233</sup> Ibid Part B, Section B/8.1.

The ship SSA is an important and necessary part of the developing and updating process for the Ship Security Plan. The CSO should follow any specific guidance offered by the contracting governments throughout the SSA process.<sup>234</sup> A crucial obligation of the CSO is to ensure that a Ship Security Plan (SSP) is adopted and submitted for approval to either to the Administration or RSO.<sup>235</sup> The SSP is drafted to ensure that the ship's security measures forming part of the plan are implemented on board. The SSP is necessary to safeguard the crew, cargo and ship facilities from any security threats.<sup>236</sup> The company must make sure that the SSP includes details on the ship master's overriding power and responsibility for making decisions about the ship's security and, if required, requesting help from contracting government.<sup>237</sup>

Section 2.2 of Part A contains a non-exhaustive set of SSO's responsibilities. Part B specifies that the SSO's responsibilities for security measures to control access to the ship, which may vary depending on the level of security.<sup>238</sup> Furthermore, the SSO should be responsible for all policies and management over restricted areas.<sup>239</sup> The company is responsible for ship security training, drills, and exercises,<sup>240</sup> as well as ensuring that the ship has a valid International Ship Security Certificate (SSC).<sup>241</sup> While the SSC is subject to Port State Control, it indicates that the ISPS Code has been complied with. If necessary, the company must be prepared to offer information about the ship, its cargo, its crew, and its passengers before port entry.<sup>242</sup> Finally, the company must ensure that accurate information about the ownership and control of the ship is available on board.<sup>243</sup>

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<sup>234</sup> Ibid Part B, Section B/8.2.

<sup>235</sup> Ibid Part B, Section B/9.4.

<sup>236</sup> Shilavadra Bhattacharjee, 'Understanding Ship Security Plan On Board Ships' (*Marine Insight*, 5 February 2021) < <https://www.marineinsight.com/marine-safety/understanding-ship-security-plan-board-ships/>> accessed on 2 September 2021.

<sup>237</sup> ISPS Code, Part A, Section A/6.1.

<sup>238</sup> Ibid Part B, Section B/9.14, B/9.16, B/9.17.

<sup>239</sup> Ibid Part B, Section B/9.19.

<sup>240</sup> Ibid Part A, Section A/13.

<sup>241</sup> Ibid Part A, Section A/19.2.1.

<sup>242</sup> Engel de Boer (n 186) 164.

<sup>243</sup> Ibid.

### 2.4.3 Port Facilities

Under the ISPS Code, contracting government port authorities have a responsibility to inspect ships returning from international voyages and to monitor port areas under their control.<sup>244</sup> The port authority's contracting government is also responsible for developing, vetting and approving a Port Facility Security Plan (PFSP).<sup>245</sup> In order to develop the PFSP and subsequently keep it up to date,<sup>246</sup> the contracting government is required to perform regular port facility security assessments (PFSA).<sup>247</sup> PFSA is a procedure for identifying and evaluating essential assets and infrastructure, allowing for the assessment of the importance of structures and installations that may require protection.<sup>248</sup> The identification and evaluation phase is essential because it lays the groundwork for diverting mitigation measures to the assets and structures that are most significant to safeguard in the event of a security incident.<sup>249</sup> PFSA should take into account the possibility of human loss, economic importance of the port, symbolic value, and the presence of government installations.<sup>250</sup>

Another obligation of contracting governments is to appoint a Port Facility Security Officer (PFSO) who must carry out tasks such as ensuring that a SSA is carried out and that the SSP is developed, approved, implemented and maintained under Part A of the ISPS Code.<sup>251</sup> For example, Sections 18 and 13 of Part A of the ISPS Code detail the training requirements as well as the drills which are part of the PFSO responsibilities. Port State authorities or ships entering port areas must take necessary measures in response to security levels imposed.

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<sup>244</sup> Anish Wankhede, 'The ISPS Code For Ships – An Essential Quick Guide', (*Marine Insight*, 1 January 2021) <<https://www.marineinsight.com/maritime-law/the-isps-code-for-ships-a-quick-guide/>> accessed on 3 September 2021.

<sup>245</sup> ISPS Code, Part A, Section A/16, A/16.2.

<sup>246</sup> Ibid Part A, Section A/15.1.

<sup>247</sup> Ibid Part A, Section A/15.2.

<sup>248</sup> Ibid Part A, Section A/15.5.1.

<sup>249</sup> Ibid Part A, Section A/15.5.2.

<sup>250</sup> Marine Study, 'ISPS Code 15: Port Facility Security Assessment' <<https://thearnestudy.com/topic/15-port-facility-security-assessment-2/?v=08ad08f64910>> accessed on 1 September 2021.

<sup>251</sup> Ibid Part A, Section A/17.1.



It should be noted that security measures and procedures indicated in the Code must be implemented in such a way that they cause the least amount of disruption or delay.<sup>252</sup> As with the SSP, the PFSP must include explicit instructions on operational and physical security measures that are appropriate for the each and every security level specified in the ISPS Code.<sup>253</sup>

Finally, the PFSO is to ensure that the PFSP's requirements are properly executed.<sup>254</sup> The effectiveness of the PFSP and the PFSA can be verified by an independent audit or by the contracting government's competent authorities.<sup>255</sup> Any significant modifications to the plan must be approved by the body that had originally certified the PFSP.<sup>256</sup>

## 2.5 Conclusion

The adoption of the ISPS Code was an extraordinary response by the international community to enhance global maritime security following the devastating effects of 9/11 terrorist attacks.<sup>257</sup> The instrument's speedy adoption addressed a crucial *lacunae* in the existing international maritime security regime by tackling the regulation of ship and port facility security and by providing a comprehensive global risk assessment framework for the maritime transportation sector.<sup>258</sup> Its hybrid structure, which includes mandatory and recommendatory components, was designed to allow contracting governments to quickly react to a wide range of security challenges that may jeopardize their ships and port infrastructure. As a result, the majority of the States' attention has shifted to implementing Part A rules which incorporates a list of objectives and responsibilities.<sup>259</sup> The EU, however, adopted ISPS Regulation in order to avoid the situation where a MS,<sup>260</sup> due to the lack of the legal and policy architecture, would not

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<sup>252</sup> Ibid Part A, Section A/14.1

<sup>253</sup> Ibid Part A, Sections A/14.2 – A/14.5.

<sup>254</sup> Ibid Part A, Section A/17.2.2.

<sup>255</sup> Ibid Part A, Section A/16.3.1.

<sup>256</sup> Ibid Part A, Section A/16.5

<sup>257</sup> See Section 2.2.

<sup>258</sup> See Section 2.3.

<sup>259</sup> See Section 2.4.

<sup>260</sup> ISPS Regulation (n23).

be able to fully implement the measures. The Commission highlighted on the importance of effective implementation of the measures in order to encourage third countries to recognize EU's levels of security and provide reciprocal measures.

In conclusion, this author is of the opinion that the ISPS Code provides an international framework for deterrence of security incidents worldwide and even after eighteen years it is considered to be a major achievement in the development of international maritime security law. In so far as the Union is concerned, the IMO, by adopting the ISPS Code, laid a solid platform for the EU's future efforts.

## Chapter 3: European Union Legislation Regulating Ship and Port Facility Security

### 3.1 Introduction

The EU is surrounded with a coastline of approximately 68 thousand kilometres.<sup>261</sup> The EU, as one of the world's most important participants in maritime trade, the Union has a vested interest in ensuring that the maritime industry is controlled.<sup>262</sup> The objective of this chapter is to address the main EU legislation regulating ship and port security across the Union. The chapter will also discuss the purpose of selected instruments, their application at the EU level, and some of the most important provisions therefrom. It will conclude by determining to what extent, if at all, do the rules found in the EU's legal framework on ship and port facility go beyond international obligations found in the ISPS Code.

### 3.2 Early Developments of EU's Framework on Ship and Port facility Security

The devastating events of 9/11 provided the impetus for the implementation of legal changes in the EU. Shortly after the incident, the EU Parliament released a statement condemning the attacks and expressing its solidarity with the US.<sup>263</sup> The events prompted an unprecedented step of calling an extraordinary session of the European Council which was convened just 10 days after the terrorist attacks with the aim to 'analyze the international situation following the terrorist attacks in the United States and to impart the necessary impetus to the actions of the European Union'.<sup>264</sup> In its

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<sup>261</sup> Gerd Winter, 'Summary and Suggestions for Reform Towards a Legal Clinic for Fisheries Management' in Gerd Winter (ed.), *Toward Sustainable Fisheries Law: A Comparative Analysis* (IUCN 2009) 314.

<sup>262</sup> Desislava Nikolaeva Dimitrova and Roger Blanpai, *Seafarers' Rights in the Globalized Maritime Industry* (Kluwer 2010) 90.

<sup>263</sup> Michaela Grobel, 'Haunted by History: Ghost and 'Ghosting' in Elfriede Jelineck's *Stecken*' in Matthias Piccolruaz Konzett and Margarete Lamb-Faffelberger (eds.), *Elfriede Jelinek: Writing Woman, Nation, and Identity: A Critical Anthology* (Rosemont Publishing 2007) 138.

<sup>264</sup> Christian Kaunert and Marina Della Giovanna, 'Post-9/11 EU counter-terrorist financing cooperation: differentiating supranational policy entrepreneurship by the Commission and the Council Secretariat' (2010) 19 (2) *Developing European Internal Security Policy* 275, 275.

conclusion, the Council approved the five-point plan of action to tackle the terrorism.<sup>265</sup> Enhancing of police and judicial co-operation, development of international legal instruments, putting an end to the funding of terrorism, strengthening air security and coordinating the EU's global action were all areas that according to Council required immediate attention.<sup>266</sup>

From a maritime security perspective, as noted above, the IMO was the first to respond to the 9/11 terrorist act, convening the Diplomatic Conference on maritime security on the 12 December 2002, barely fifteen months after the terrorist attacks. At the time, ten countries were preparing to join the EU, including Estonia, Latvia, Slovakia, and Poland.<sup>267</sup> While maritime security was essential for some of them, it was critical for other, such as Malta and Cyprus,<sup>268</sup> which are the major port States and ship registries. As the EU expanded its borders, the necessity to ensure that its MS had the required framework in place to deal with ship and port facility security issues became even more relevant.

Following the adoption of the ISPS Code, Loyola de Palacio the then Vice-President of the EU Commission stated that:

The current geopolitical climate requires an urgent and effective implementation in Europe of what has been agreed at world level to ensure the highest possible levels of security for seamen, ships, ports and the whole intermodal transport chain.<sup>269</sup>

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<sup>265</sup> Helen Bower, 'Terrorism: The European Union Response, October 2003' (*European Sources Online* 27 October 2003) <<https://www.europeansources.info/record/terrorism-the-european-union-response-october-2003/>> accessed on 3 September 2021.

<sup>266</sup> European Council, 'Conclusions and Plan of Action of the Extraordinary European Council Meeting' (21 September 2001) <[https://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/140.en.pdf](https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf)> accessed on 3 September 2021.

<sup>267</sup> La-Bhus Fah Jirasavetakul and Jesmin Rahman, *Foreign Direct Investment in New Member State of the EU and Western Balkans: Taking Stock and Assessing Prospects* (IMF 2018) 3.

<sup>268</sup> Benjamin Parameswaran, *The Liberalization of Maritime Transport Services: With Special Reference to the WTO/GATS Framework* (Springer 2012) 26.

<sup>269</sup> European Commission (n 190), 1.

After acknowledging the significance of the IMO's Diplomatic Conference, the Commission underlined the need for further improvements in order to create a comprehensive framework on ship and port facility security.<sup>270</sup> Instead of limiting itself to the legal mechanisms developed by IMO, the Commission, not for the first time,<sup>271</sup> goes further in developing ship and port security regime and initiates the debate on entire maritime transport sector. The reason for EU to initiate such discussions and introduce its own regulatory rules is that following a number of maritime disasters, involving passenger ships as *Estonia* in 1994<sup>272</sup> and *Express Samina* in 2000,<sup>273</sup> as well as cargo vessels *Erika* in 1999<sup>274</sup> and *Prestige* in 2002.<sup>275</sup> Following these incidents, the Union expressed concern with the sufficiency or rather insufficiency of the IMO framework on maritime transport.<sup>276</sup> The primary motivation behind such decision was two-fold, first, dissatisfaction with the IMO regulatory procedure which was regarded as slow, and second, presence of a strong EU enforcement mechanism.<sup>277</sup> It follows that while failing to satisfy requirements under IMO Conventions is unlikely to result in legal repercussions, non-compliance with EU obligations may lead to penalties.<sup>278</sup> To this affect, the EU has enacted a number of legal instruments that implements and to a certain extent supplement IMO standards and rules.<sup>279</sup>

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<sup>270</sup> Ibid.

<sup>271</sup> Great Britain: Parliament: House of Commons: European Scrutiny Committee, *Twenty-third Report of Session 2005-06: Documents Considered by the Committee on 29 March 2006, Including; Promotion of Clean Road Vehicles; Report, Together with Formal Minutes* (The Stationary Office 2006) 19.

<sup>272</sup> Hubert Klupfel, 'Ship-Evacuation-Guidelines, Simulation, Validation and Acceptance Criteria' in Wolfram W. F. Klingsch and others (eds.), *Pedestrian and Evacuation Dynamics 2008* (Springer 2010) 256.

<sup>273</sup> Henrik Ringbom, *The EU Maritime Safety Policy and International Law* (Brill 2008) 45.

<sup>274</sup> Anthony Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (Nijhoff 2012) 29.

<sup>275</sup> Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publishers 2007) 235.

<sup>276</sup> Marketa Pape, 'European Parliament Briefing: The IMO – for 'safe, secure and efficient shipping on clean oceans' (February 2016) 6

<[https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577964/EPRS\\_BRI%282016%29577964\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577964/EPRS_BRI%282016%29577964_EN.pdf)> accessed on 4 September 2021.

<sup>277</sup> Ibid.

<sup>278</sup> Claudia Cinelli, 'Law of the Sea Framework' in Ramses A. Wessel and Jed Odermatt (eds.), *Research Handbook on the European Union and International Organizations* (Edward Elgar Publishing 2019) 477.

<sup>279</sup> Robin Churchill, 'The European Union and the Challenges of Marine Governance: From Sectoral Response to Integrated Policy?' in Davor Vidas and Peter Johan Schei (eds.), *The World Ocean in Globalisation: Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Martinus Nijhoff Publishers 2011) 409.

### 3.3 Regulation (EC) No 725/2004 on Enhancing Ship and Port Facility Security

On 31 March 2004, the European Parliament and the Council adopted the ISPS Regulation on enhancing ship and Port Facility Security which applies to all MS and automatically becomes part of their domestic law. The ISPS Regulation defines maritime security as ‘the combination of preventive measures intended to protect shipping and port facilities against threats of intentional unlawful acts’.<sup>280</sup> It also provides a definition of ‘port facility’ that is not included in the ISPS Code. According to the ISPS Regulation, the port facility means ‘a location where the ship/port interface takes place; this includes areas such as anchorages, waiting berths and approaches from seaward, as appropriate’.<sup>281</sup> The ISPS Regulation’s main objective is to implement Union measures intended to improve the security of ships through preventive mechanisms used in international trade and associated port facilities in the light of intentional unlawful acts including piracy and armed robbery at sea.<sup>282</sup> Moreover, it sets a foundation for the harmonised interpretation and implementation of the IMO’s special measures to enhance maritime security, which were enacted in 2002.<sup>283</sup> The ISPS Regulation transposes Chapter XI-2 of the SOLAS Convention and the Ship and the ISPS Code which are essential components of international maritime security framework.<sup>284</sup>

In relation to international shipping, both the ISPS Code and the ISPS Regulation have the same application date that is 1 July 2004.<sup>285</sup> Unlike the ISPS Code, the ISPS Regulation enhances the security not just for the international shipping and port facilities that support it, but also for domestic shipping and port facilities within the Union.<sup>286</sup> With the introduction of the ISPS Regulation, Part B of the ISPS Code acquired mandatory nature.<sup>287</sup> In addition, the ISPS Regulation provides the Union interpretation of some of the IMO's ‘open’ mandatory dispositions such as application to short-sea

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<sup>280</sup> Council Regulation (n 23) Article 2.5.

<sup>281</sup> Ibid Article 2.11.

<sup>282</sup> Ibid Article 1.1.

<sup>283</sup> Ibid Article 1.2.

<sup>284</sup> Ibid Preamble 5; Jörn-Ahrend Witt, *Obligations and Control of Flag States: Developments and Perspectives in International Law and EU Law* (LIT Verlag Munster 2007) 144.

<sup>285</sup> Council Regulation (n 23) Article 3.1.

<sup>286</sup> Ibid Recital 7.

<sup>287</sup> Ibid Recital 8.

shipping,<sup>288</sup> cases of port facilities only occasionally serving international routes,<sup>289</sup> a control regime for ship security prior to any ship entering an EU port,<sup>290</sup> as well as security checks in port.<sup>291</sup>

The ISPS Regulation extends beyond the ISPS Code for a variety of reasons. For the sake of ship and port security and promotion of uniform interpretation amongst MS, the ISPS Regulation turns recommendations from the ISPS Code Part B into requirements.<sup>292</sup> As a result, EU framework facilitates a common implementation, among EU MS, of measures designed to improve ship and port security outlined in the ISPS Code. The Union obliges national authority to be responsible for coordinating, implementing and monitoring the application of the provisions of the ISPS Regulation.<sup>293</sup> The ISPS Regulation provides, under Commission's supervision, for an inspection mechanism designed to evaluate the control techniques and implementation of national plans established under it.<sup>294</sup> The European Maritime Safety Agency (EMSA) shall support the Commission and carry out the inspection responsibilities delegated to it by the ISPS Regulation.<sup>295</sup> Furthermore, the ISPS Regulation established the Maritime Security Committee (MARSEC Committee) intended to design the operation standards required to ensure harmonised application of standards established in the common maritime security legislation.<sup>296</sup> The Committee's mission is to ensure that EU regulations achieve their goals and offer the essential protection for maritime transport in the Union.<sup>297</sup>

The ISPS Regulation uses various terms from the IMO's framework to enhance legal requirements for the maritime transport within MS.<sup>298</sup> To this effect, MS shall

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<sup>288</sup> Ibid Article 5.2.

<sup>289</sup> Ibid Regulation 2, Article 2.

<sup>290</sup> Ibid Article 4.29.

<sup>291</sup> Ibid Article 4.30.

<sup>292</sup> Ibid Recital 16.

<sup>293</sup> Ibid Recital 11.

<sup>294</sup> Ibid Recital 5.

<sup>295</sup> Filippo Lorenzon, 'Safety and Compliance' in Yvonne Baatz (ed.), *Maritime Law* (Informa Law from Routledge, 3 edn, 2014) 361; Jost Delbruck, Thomas Giegerich and Andreas Zimmermann (eds.), *German Year Book of International Law* (48 edn, Duncker and Humblot, 2006) 256.

<sup>296</sup> Davide Casale, 'EU Measures on Transportation Security Against Terrorism' in Mete Tahmisoglu and Cinar Ozen (eds.), *Transportation Security Against Terrorism* (IOS Press 2008) 105.

<sup>297</sup> Ibid 106.

<sup>298</sup> Iliana Christodolou-Varotsi, *Maritime Safety Law and Policies of the European Union and the United States of America: Antagonism or Synergy* (Springer 2009) 41.

implement, through national legislation or regulation,<sup>299</sup> measures supplementary to mandatory provisions of the ISPS Regulation as per Article 3.3 of the ISPS Regulation which holds that:

MS shall, ..., decide the extent to which they will apply, by 1 July 2007, the provisions of this Regulation to different categories of ships operating domestic services other than those referred to in paragraph 2, their companies and the port facilities serving them. The overall level of security should not be compromised by such a decision.

With respect to responsibilities of the stakeholders such as States and shipping companies, the ISPS Regulation imposes the same obligations as those found under the ISPS Code described above.<sup>300</sup> The ISPS Regulation applies the requirements forming part of the Chapter XI-2 of the SOLAS Convention and both Parts of the ISPS Code to passenger vessels sailing up to a maximum of 20 nautical miles beyond the coasts.<sup>301</sup> Furthermore, the ISPS Regulation established responsibilities for ships that are not involved in international voyages, such as the appointment of safety officers for ships and shipping companies, the writing of safety plans, and the performing of safety evaluations.<sup>302</sup>

The ISPS Regulation's security measures are only a component of what is required to achieve a sufficient degree of security throughout the maritime transport industry.<sup>303</sup> To that purpose, the Commission committed itself to propose a directive, which will now be discussed in the subsequent sub-section, establishing the additional measures to be implemented in EU ports.<sup>304</sup>

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<sup>299</sup> UNCTAD, 'Report on Maritime Security: ISPS Code Implementation, Costs and Related Financing' (14 March 2007) UNCTAD/SDTE/TLB/2007/1, 12 <[https://unctad.org/system/files/official-document/sdtetlb20071\\_en.pdf](https://unctad.org/system/files/official-document/sdtetlb20071_en.pdf)> accessed on 5 September 2021.

<sup>300</sup> See Section 2.4.

<sup>301</sup> Council Regulation (n 23) Article 3.2;

<sup>302</sup> Ibid Article 3.5.

<sup>303</sup> Dominique Cant, 'Maritime and Supply Chain Security in Europe' in Eliza Shahbazian and Galina Rogova (eds.), *Human Systems Integration to Enhance Maritime Domain Awareness for Port/Harbour Security* (IOS Press 2008) 3.

<sup>304</sup> European Commission (n190), 3.



### 3.4 Directive 2005/65/EC on Enhancing Port Security

Unlike the Regulations which have direct application in all MS,<sup>305</sup> the Directives need to be transposed in each and every MS. Difference between a Directives and Regulations is that they may be used for different purposes.<sup>306</sup> Regulations provides a 'one size fits all' rules for the whole Union and enters into force on the same day for all MS.<sup>307</sup> The Directives provide a set of norms and leaves application of these norms to the MS.<sup>308</sup> Directives are best suited where convergency that needs to be achieved, may be so achieved by taking into account differences and national circumstances of each MS.<sup>309</sup> Directives, unlike rigid Regulations, provide for a degree of flexibility.<sup>310</sup> The European Parliament and Council adopted the Directive on Enhancing Port Security on the 26 October 2005, requiring the MS to transpose it by the 15 June 2007.<sup>311</sup> MS shall forward to the Commission the national legislation transposing the Directive.<sup>312</sup>

While the ISPS Regulation covers security at port facilities, the Directive regulates the whole port area security.<sup>313</sup> To this effect, the Directive defines the term 'port' as:

... any specified area of land and water, with boundaries defined by the MS in which the port is situated, containing works and equipment designed to facilitate commercial maritime transport operations.

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<sup>305</sup> OECD, *Better Regulation in Europe: France 2010* (2010) 155.

<sup>306</sup> Herman Lelieveldt and Sebastiaan Princen, *The Politics of the European Union* (Cambridge University Press 2015) 80.

<sup>307</sup> Karolina Žurek, *European Food Regulation after Enlargement: Facing the Challenges of Diversity* (Martinus Nijhoff Publishers 2011) 225.

<sup>308</sup> Larry A. DiMatteo and Martin Hogg, *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 431.

<sup>309</sup> Herman Lelieveldt (n 306).

<sup>310</sup> Bruno de Witte, Dominik Hanf and Ellen Vos, *The Many Faces of Differentiation in EU Law* (Hart Publishing 2001) 138.

<sup>311</sup> Council Directive (n24) Article 18.1.

<sup>312</sup> Ibid Article 18.2.

<sup>313</sup> Johny Dalgaard, 'ISPS Code Implementation: Overkill and Off-Target' in Angela Carpenter, Tafsir Johansson and Jon A. Skinner (eds.), *Sustainability in the Maritime Domain: Towards Ocean Governance and Beyond* (Springer Nature 2021) 133.

By subjecting a whole port and port related areas to a security regime, the Directive supplements the security measures imposed by the ISPS Regulation.<sup>314</sup> The main objective of the Directive is to introduce Union measures to enhance port security in the face of threats of security incidents.<sup>315</sup> It shall also ensure that security measures taken pursuant to ISPS Regulation benefit from enhanced port security.<sup>316</sup> The Directive introduces a set of three particular measures, such as a common basic standards for port security, implementation methods for those norms, and appropriate compliance monitoring mechanisms.<sup>317</sup> To achieve maximum protection for maritime and port operations, measures that cover all ports within a territory identified by the MS should be applied in order to ensure that security measures implemented in accordance with the ISPS Regulation, benefit from enhanced security within port activity areas.<sup>318</sup> Since the boundaries are defined by the MS, in instances where the port facility covers the whole port area, the ISPS Regulation takes precedence over the Directive.<sup>319</sup> Since the port may be either multi or single facility, the Directive extends back from the ship/shore interface into the greater port area.<sup>320</sup> While defining port boundaries, MS shall indicate the landside, the waterside and any equipment intended to be used for maritime trade.<sup>321</sup>

To ensure compliance, the MS shall create a port security authority for each port on their territory,<sup>322</sup> which is defined as ‘the authority responsible for security matters in a given port’.<sup>323</sup> Thus, the said authority is duty bound to prepare and subsequently implement port security plans discussed above based on port security assessment.<sup>324</sup> The PSP shall instruct upon the coordination with port facility and ship security officer

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<sup>314</sup> Jörn-Ahrend Witt (n 284) 145.

<sup>315</sup> Council Directive (n24) Article 1.1.

<sup>316</sup> Ibid.

<sup>317</sup> Ibid Article 1.2.

<sup>318</sup> Ibid Annex I: Port Security Assessment.

<sup>319</sup> Ibid Article 2.4.

<sup>320</sup> Department of Transport, Tourism and Sport, ‘Port Security Assessment 2019-2024’ (2019) 4 <<http://assets.gov.ie/80480/0cbfff79-9952-4f24-807a-5cb04f11c4d8.pdf>> accessed on 5 September 2021.

<sup>321</sup> Ibid.

<sup>322</sup> Council Directive (n24) Recital 10.

<sup>323</sup> Ibid Article 3.5.

<sup>324</sup> Ibid Article 5.2; Davide Casale (n294), 105.

and coordinate the duties of the port security committee.<sup>325</sup> An obligation to ensure that port security plans are developed, maintained and updated in terms of the minimum standards prescribed by the Directive is on the MS.<sup>326</sup>

In 2009, the Commission, in terms of Article 19 of the Directive, presented the European Parliament and the Council with the first evaluation report where it analysed the effectiveness of the Directive and the compliance of the MS.<sup>327</sup> After noting the key issues,<sup>328</sup> the Directive focused on main topics such as perimeter of port area,<sup>329</sup> information related to port security assessment,<sup>330</sup> monitoring of port security plans and their implementation and recognised security organisation.<sup>331</sup> The Commission initiated 2 infringement proceedings against United Kingdom (UK) and Estonia after they failed to transpose the Directive. In its conclusion, the Commission noted that, given the importance of marine transportation, keeping the port protected is in the best interest of everyone.<sup>332</sup> To this effect, all MS shall ‘continue to permanently improve prevention, protection and response measures to counteract the new threats arising from terrorism, piracy or any other intentional illegal act’.<sup>333</sup>

The Second report presented in 2013 made reference to five infringement proceedings.<sup>334</sup> Proceedings against Greece, Spain and UK were initiated due to delays

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<sup>325</sup> Ibid Annex II: Port Security Plan; See Section 1.5.3.

<sup>326</sup> Ibid Article 7.

<sup>327</sup> European Commission, ‘Commission report: Report assessing the implementation of the Directive on enhancing port security’ (20 January 2009) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0002:FIN:EN:PDF>> accessed on 6 September 2021.

<sup>328</sup> Ibid 6: ‘In keeping with the principle of subsidiarity, the Directive stipulates that the Member States should themselves establish each port’s boundaries and leaves them free to decide whether to apply them to adjacent areas. Member States should also ensure that port security assessments and port security plans are properly drawn up. The idea of the co-legislators was to make use of the same security structures and bodies as in the Regulation, so as to create a security regime that could be used for the whole maritime transport logistics chain, to include ships, terminals and port areas. This approach was meant to allow a simplification of procedures as well as provide synergy among the security authorities in the Member States.

<sup>329</sup> Ibid 7.

<sup>330</sup> Ibid.

<sup>331</sup> Ibid 8.

<sup>332</sup> Ibid 9.

<sup>333</sup> Ibid.

<sup>334</sup> European Commission, ‘Commission report: Second Report Assessing the Implementation of the Directive on Enhancing Port Security’ (18 November 2013) < <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013DC0792> > accessed on 7 September 2021.

in performing assessments and adopting port security plans.<sup>335</sup> The proceedings against Sweden and Germany were related to incorrect implementation of the Directive.<sup>336</sup> Six years later, the third report referred to only one infringement procedure against Germany for failure to define the boundaries, approve port security assessments and plans, and appoint port security officers.<sup>337</sup> In both reports the Commission acknowledged that a significant progress has been made and level of security has increased in European ports.

### **3.5 Commission Regulation (EC) No 324/2008 Laying Down Revised Procedures for Conducting Commission Inspections in the Field of Maritime Security**

On the 10 June 2005, the Commission introduced Regulation 884/2005 laying down procedures for conducting Commission inspections in the field of maritime security.<sup>338</sup> The Regulation 884/2005 was enacted pursuant to the Article 9.4 of the ISPS Regulation which imposes an obligation on the Commission to commence the inspections of port facilities, shipping companies and to supervise the application of the ISPS Regulation by the MS.<sup>339</sup> Commission inspection was defined as:<sup>340</sup>

An examination by commission inspectors of Member States 'national maritime security quality control system, measures, procedures and structures, to determine compliance with Regulation (EC) No 725/2004.

The Regulation 884/2005 also identified stakeholders such as the Commission Inspector, the National Inspector, and the Committee, as well as their respective responsibilities.<sup>341</sup> By way of example, Commission inspector's responsibilities include examination of MS'

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<sup>335</sup> Ibid Article 5.3.

<sup>336</sup> Ibid.

<sup>337</sup> European Commission, 'Commission report: Third Report Assessing the Implementation of the Directive on Enhancing Port Security' (25 April 2019) Article 4.3 <<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52019DC0191>> accessed on 7 September 2021.

<sup>338</sup> Commission Regulation (EC) 884/2005 of 10 June 2005 laying down procedures for conducting commission inspections in the field of maritime security (2005) OJ L148.

<sup>339</sup> Ibid Preamble.

<sup>340</sup> Commission Regulation (n326) Article 2.1.

<sup>341</sup> Ibid Article 2.

national maritime security quality control systems, measures and procedures to determine compliance with ISPS Regulation or the Directive.<sup>342</sup>

The Commission adopted Regulation 324/2008 on 9 April 2008, repealing Regulation 884/2005 and establishing updated procedures for conducting Commission inspections in the field of maritime security.<sup>343</sup> The amendments to Regulation 884/2005 were motivated by the fact that it was only applicable to the port facilities controlled by the ISPS Regulation and did not extend to the whole port area defined by the Directive.<sup>344</sup>

The Commission's obligations were extended by Regulation 324/2008, which covered supervision of port facilities and other areas of the port defined by the Directive.<sup>345</sup> The definition of the term 'Commission inspection' was also amended to incorporate the Directive.<sup>346</sup> The inspection power enables the Commission to assess the efficiency of national quality control systems, maritime security measures, processes, and structures at the national, regional, and local levels, as well as individual port facilities and relevant shipping companies. According to Regulation 324/2008, the MS is required to cooperate in an effective manner with the Commission throughout the inspection process.<sup>347</sup> MS shall provide access to all necessary documents upon Commission's request.<sup>348</sup> Furthermore, unless an inspector works at the port being inspected, an officer chosen by the MS must assist the Commission in port inspections.<sup>349</sup> Qualifications required for being appointed as a national inspector include: 1) a good understanding of maritime security; 2) past experience; and 3) knowledge of inspection principles and operations being examined.<sup>350</sup>

Following the completion of inspection, the Commission shall draw up a report and communicate it to the MS concerned.<sup>351</sup> If inspection was carried out on a ship while being anchored in port, the report must also be sent to the vessel's flag State.<sup>352</sup> Apart

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<sup>342</sup> Ibid Article 2.1.

<sup>343</sup> Commission Regulation (n 11) (EC) Recital 7 and Article 18.

<sup>344</sup> Ibid Preamble.

<sup>345</sup> Ibid Article 1.

<sup>346</sup> Ibid Article 2.1.

<sup>347</sup> Ibid Article 3.

<sup>348</sup> Ibid Article 4.2.

<sup>349</sup> Ibid Article 5.

<sup>350</sup> Ibid Article 7.

<sup>351</sup> Ibid Article 11.1.

<sup>352</sup> Ibid Article 11.2

from providing a detailed observation, the report shall identify any non-conformity or major non-conformity.<sup>353</sup> Whilst the former implies that objective evidence indicates the non-fulfilment of the requirement of the ISPS Regulation and of the Directive,<sup>354</sup> the latter means that existing deviation from the aforementioned legislation poses a serious threat and requires immediate remedial actions.<sup>355</sup> The Commission may, in such situations, conduct a follow-up inspection or,<sup>356</sup> if necessary, initiate infringement proceedings against the MS concerned.<sup>357</sup> In the hands of the Commission, the ability to launch infringement actions is an extremely strong enforcement mechanism. It may be regarded as a 'whip', but when employed against an MS, it is done so not only for the advantage of international commerce, but also for the interest of the Union as a whole and EU citizens. Noncompliance with ship and port facility rules is vital because it may disrupt international trade and put many people's lives in jeopardy.

### **3.6 Conclusion**

The events of 9/11 have had significant effects on the transportation systems worldwide including within the EU. An extraordinary session of the European Council recognized the need for an immediate plan of action to combat terrorism for the benefit of all MS and key port States such as Germany and Netherlands, and especially since the EU was on the verge of welcoming 10 more MS, including important port and flag States. Despite the fact that all MS were already Parties to the SOLAS Convention and the ISPS Code, the EU decided to establish its own legislative framework owing to its strict enforcement procedures and with the aim of introducing a uniform approach to ship and port facility security throughout the Union. Recognizing the importance of the ISPS Code, the EU took the initiative and incorporated the Chapter XI-2 of the SOLAS Convention, which includes the ISPS Code, in its entirety into the ISPS Regulation, resulting in the conversion of some recommendations from Part B into obligations.<sup>358</sup>

As outlined by the European Commission:

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<sup>353</sup> Ibid Article 11.4.

<sup>354</sup> Ibid Article 2.6

<sup>355</sup> Ibid Article 2.7.

<sup>356</sup> Ibid Article 13.1(b).

<sup>357</sup> Ibid Article 13.1(c).

<sup>358</sup> See Section 3.2.

The EU will work towards more efficient international governance of maritime affairs and effective enforcement of international maritime law, urging MS to ratify the relevant instruments. It will promote coordination of European interests in key international for an Improvement of maritime safety and security and fight against illegal activities in international waters will be (some of) the external priorities for the Union's Integrated Maritime Policy.<sup>359</sup>

It should be noted that neither port facilities nor ports are defined in the ISPS Code but are defined under the ISPS Regulation and the Directive respectively. The ISPS Regulation enables uniform implementation of ship and port facility rules among MS because it is directly applicable at the Union level. Through the adoption of specific legal instruments, MS and their national authorities are made accountable for coordinating, executing, and overseeing the Regulation's implementation. Furthermore, specific EU Committees, such as MARSEC were established under the ISPS Regulation to provide operational standards for ships and port facility security and ensure their consistent execution.<sup>360</sup>

The EU considered that some aspects of the legal framework were missing after the adoption of the ISPS Regulation. In fact, the term 'port facility' did not encompass the entire port region and thus left certain areas remained unregulated until Directive 2005/65/EC was adopted.<sup>361</sup>

Furthermore, the Union legislator approved Regulation 884/2005 on procedures for conducting Commission Inspections in the field of maritime security to strengthen the legislative framework on ship and port facility security. It is a powerful system that has

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<sup>359</sup> Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Integrated Maritime Policy for the European Union of 10 October 2007, COM (2007) 575. < <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0575&from=BG> > accessed on 8 September 2021.

<sup>360</sup> See Section 3.3.

<sup>361</sup> See Section 3.4.

allowed the Commission to supervise the whole process of implementing the relevant Regulations and, if required, apply penalties for noncompliance.<sup>362</sup>

Because it applies not just to ships registered in EU Member States, but also to ships registered in non-EU nations that import and export to and from the EU, EU maritime legislation has shown to be effective.<sup>363</sup> As a result, the EU has emerged as a driving force behind successful implementation and, at times, enhancement of IMO rules on ship and port facility security.<sup>364</sup> Consequently, the EU strives to contribute to more effective implementation of existing international instruments relating to maritime security by using its external policy. In light of the above, the EU legal system's strength is determined not only by the legal framework established by EU institutions, but also by how the 27 MS implement and transpose the ship and port security Regulations and Directive in their domestic laws.

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<sup>362</sup> See Section 3.5.

<sup>363</sup> Judith van Leeuwen and Kristine Kern, 'The External Dimension of European Union Marine Governance: Institutional Interplay between the EU and the International Maritime Organization' (2013) 13 (1) *Global Environmental Politics* 69, 69.

<sup>364</sup> *Ibid.*



## **Chapter 4: Implementation of European Legislation on Ship and Port Facility Security: An Analysis of Selected EU Member States**

### **4.1 Introduction**

EU MS are responsible for the effective implementation and application of relevant EU legislation on ship and port facility security within their borders. In this respect, the chapter focuses on the practice of Spain, having the largest coastline in Europe, and Malta, being the largest ship registry in EU and an important island State. The chapter will provide a brief discussion on implementation of Regulation 725/2004, and will then examine how these two MS have transposed the Directive 2005/65/EC into their national laws.

### **4.2 Implementation of the EU Legislation on Ship and Port facility Security in the Spanish Legal System**

On 1 January 1986, Spain became a MS of the European Community (EC), today the EU.<sup>365</sup> Joining the EU confers not just rights but also obligations on MS, such as applying EU legislation in its territory.<sup>366</sup> Due to the direct applicability of EU Regulations, there appears to be fewer complications than with transposition of EU Directives. In the latter situation, failure to transpose a Directive frequently results in infringement proceedings.<sup>367</sup> The infringement procedure is the result of the Commission's investigation and identification of possible infringement of EU law.<sup>368</sup> If an EU MS fails to communicate measures that transpose an EU Directive and fails to comply with the

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<sup>365</sup> European Union – Commission, 'Instrument of Accession of Spain and Portugal to the European Communities' (Brussels, 11 June 1985) MEMO 75/85, <[http://aei.pitt.edu/94538/1/instruments\\_of\\_accession.pdf](http://aei.pitt.edu/94538/1/instruments_of_accession.pdf)> accessed on 9 September 2021.

<sup>366</sup> Lisa Webley and Harriet Samuels, *Complete Public Law: Text, Cases, and Materials* (Oxford University Press 2021) 236.

<sup>367</sup> See Section 3.4.

<sup>368</sup> Alessandra Fratini and Martin Zauner, 'Failure to Implement the Postal Directive in the EU and EEA: public and Private Enforcement of State Liability' in Michael A. Crew, Paul R. Kleindorfer (eds.), *Multi-Modal Competition and the Future of Mail* (Edward Elgar Publishing 2012) 48.

Commission's reasoned opinion on the subject within the time frame specified in the said opinion, the Commission may bring the case before CJEU.<sup>369</sup>

Spain has an eight thousand kilometer-long coastline, the longest of any MS.<sup>370</sup> A significant percentage of international trade to and from Spain is carried out by sea.<sup>371</sup> Due to the length of the coastline and its geographic location, Spanish land is vulnerable to maritime security threats such as irregular migrants from numerous African and Asian countries, who cross the Straits of Gibraltar and travel from the west coast of Africa to the Canaries.<sup>372</sup> It follows that the larger the coast, the harder it is to keep it secure. In 2019, with more than half a billion tons of cargo traffic and in excess of 37 million passenger flow, Spanish ports have set new milestones.<sup>373</sup> Similar success applies to the Spanish ship ownership and registration. As of January 2020, the fleet under the Spanish shipowners' control and sailing under the Spanish flag reaches 5 million gross tonnage (GT).<sup>374</sup> The statistics suggest that Spain, to be able to retain a leading position in maritime trade on international plane must ensure that its ships and ports are secured. Spain has already been the victim of a large-scale terrorist assault including the use of public transportation, such as trains.<sup>375</sup> A total of 191 people were killed and nearly 1,800 others were injured in ten explosions in Madrid Metropolitan.<sup>376</sup> Such a tragic incident highlights the need for the MS of keeping transportation safe from threats. From maritime perspective, the much-needed legislative framework for the security of ships and port facilities allows for the detection and prevention of similar terrorist operations.

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<sup>369</sup> TFEU (n38) Article 258.

<sup>370</sup> Gerda Priestley and Joan Carles Lluordes, 'Planning for Sustainable Development in Spanish Coastal Resorts' in Sheela Agarwal and Gareth Shaw (eds.), *Managing Coastal Tourism Resorts: A Global Perspective* (Channel View Publications 2007) 90.

<sup>371</sup> Frank Harris Hitchcock, *Spain's Foreign Trade* (Washington Government Printing office 1898) 9.

<sup>372</sup> Francisco Piniella, Jorge Walliser, Jorge Walliser and Aitor Martínez-Lozares, 'Global Maritime Security: The role of Spain as a Port State' (2008) *Journal of Maritime Research* 15, 22.

<sup>373</sup> Anna Mestre and Carlos Górriz, 'The Shipping Law Review: Spain' (*The Law Reviews*, 8 June 2021) <<https://thelawreviews.co.uk/title/the-shipping-law-review/spain#footnote-012-backlink>> accessed on 10 September 2021.

<sup>374</sup> Spanish Shipowners Association, 'Merchant marine and maritime transport 2019/2020' (ANAVE 2020) 5 <[https://www.anave.es/images/informes/marina\\_mercante/2020/MMTM2020\\_eng\\_webOK.pdf](https://www.anave.es/images/informes/marina_mercante/2020/MMTM2020_eng_webOK.pdf)> accessed on 10 September 2021.

<sup>375</sup> Kathleen Sweet, *Aviation and Airport Security: Terrorism and Safety Concerns, Second Edition* (2<sup>nd</sup> edn, CRC Press 2008) xxi.

<sup>376</sup> Max M. Houck and Jay A. Siegel, *Fundamentals of Forensic Science* (Academic Press 2009) 473.

Since the EU has legislated on ship and port facility security through the ISPS Regulation,<sup>377</sup> the rules of the said Regulation become directly applicable in Spain from the 1 July 2004.<sup>378</sup> In addition, Regulation 324/2008 allows the Commission to monitor correct application of the ISPS Regulation by means of surveys that are performed in a transparent, effective, harmonized and consistent manner.<sup>379</sup>

Directives on the other hand need to be transposed into the Spanish' national law by an agreed date.<sup>380</sup> The Directive 2005/65/EC, which had a 15 June 2007 deadline was transposed into the national law of Spain by Royal Decree number 1617/2007 (Royal Decree) of 7 December 2007, after a nearly 6 months long delay.<sup>381</sup> The Royal Decree established measures for the improvement of the security of ports and maritime transport, which aims at adopting measures aimed to improving the protection of ports from the threat of deliberate illegal incidents or acts that affect maritime security.<sup>382</sup> For the purpose of fulfilling the obligation, Spain creates a managing entity for the corresponding port,<sup>383</sup> in Spanish referred to as 'Autoridad de protección portuaria'.<sup>384</sup> Its functions include control in the port area, compliance with the regulations that affect the maritime protection of port and port facilities and that is without prejudice to the competences that fall within the jurisdiction of other organs of the public administrations.<sup>385</sup> Article 14 of the Royal Decree specifies three levels of security, as defined by the ISPS Regulation. All three levels are linked to the ISPS Regulation and the ISPS Code's related provisions.<sup>386</sup> To minimize the level of threat, the ships approaching

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<sup>377</sup> See Section 3.3.

<sup>378</sup> ISPS Regulation (n23) Article 3.1.

<sup>379</sup> Commission Regulation (n 11), Article 1.

<sup>380</sup> Rachel A. Epstein and Ulrich Sedelmeier, *International Influence Beyond Conditionality: Postcommunist Europe after EU enlargement* (Routledge 2013)16; Piet Eeckhout, 'The Eu's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism' in Andrea Biondini, Piet Eeckhout and Stefanie Ripley (eds.), *EU Law After Lisbon* (Oxford University Press 2012) 284.

<sup>381</sup> Real Decreto 1617/2007, de 7 de Diciembre, Por el Que se Establecen Medidas Para la Mejora de la Protección de los Puertos y del Transporte Marítimo, Official publication: Boletín Oficial del Estado ( B.O.E ) ; Number: 304/2007 ; Publication date: 2007-12-20 ; Page: 52395-52405.

<sup>382</sup> Ibid Article 1.

<sup>383</sup> Ibid Article 7.

<sup>384</sup> (Port Security Authority)

<sup>385</sup> Real Decreto 1617/2007 (n381) Article 7.2.

<sup>386</sup> See Section 2.4.1.

Spanish ports are required to furnish the port authority with security-related information before entering the port.<sup>387</sup> The latter provision applies only to ships listed in the article 3.1 of the Royal Decree which include vessels engaged in the International voyage and exceeding 500 GT.<sup>388</sup> The information needs to be sent to the requesting port in a 'Single Document of Call' or so-called 'Documento Unico de Escala' (DUE).<sup>389</sup> The DUE is regulated by Order FOM/3056/2002 of 29 November 2002 as amended by Order FOM/3769/2007 of 14 November 2007 and FOM/1194/2011 of 29 April 2011, which establishes the integrated scale procedure in the ports of general interest.<sup>390</sup> DUE is a document that provides all of the information required by the port authority's administration to enable the ship to enter the port.<sup>391</sup> The contents of the DUE document are listed in the Annex I of the Order FOM/1194/2011 and includes details of the vessels such as name, flag and IMO number,<sup>392</sup> name of the consignee, port of departure and estimated time of arrival to port waters.<sup>393</sup> This information shall be submitted by electronic messages,<sup>394</sup> at least 24 hours before entry into the port.<sup>395</sup>

Furthermore, the employment of pilot control technology to regulate passenger and cargo aboard ro-ro ferries was agreed upon in 2012, following a meeting in Madrid attended by delegates from France, England, Italy, and Portugal.<sup>396</sup> This project is part of the implementation of the ISPS Regulation, Directive, and Royal Decree, which aims to improve port and shipping security in Spain.<sup>397</sup> In addition, pursuant to the order of the Ministry of Presidency PCI/1188/2018 dated 15 November 2018, a system of

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<sup>387</sup> Real Decreto 1617/2007 (n381) Article 19.1.

<sup>388</sup> Ibid Article 3.1, Article 3.2 and Article 3.3.

<sup>389</sup> Ibid Disposición adicional segunda (Second Additional Provision).

<sup>390</sup> Order Fom/1194/2011, On 29 April, Which Regulates The Integrated Procedure Of Scale Of Ships In Ports Of General Interest, Original Language Title: Orden FOM/1194/2011, de 29 de abril, por la que se regula el procedimiento integrado de escala de buques en los puertos de interés general.

<sup>391</sup> Ibid Article 8.1.

<sup>392</sup> IMO number is a unique identifier for ships, registered ship owners and management companies intended to enhance maritime safety and security and to minimise maritime fraud.

<sup>393</sup> Ibid Annex I.

<sup>394</sup> Ibid Article 7.

<sup>395</sup> Ibid Article 9.1.b.

<sup>396</sup> INSEC, 'AQUAPOL: The European Maritime Police Carried Out a Pilot Test in Four Spanish Ports Including Gijon' (6 August 2012) < <http://www.insec-project.eu/en/noticias.2/year2012.aquapol-the-european-maritime-police-carried-out-a-pilot-test-in-4-spanish-ports-including-gijon.a40.html>> accessed on 11 September 2021.

<sup>397</sup> Ibid.

inspections for conformity with maritime security requirements in the port sector was established.<sup>398</sup>

### 4.3 Implementation of the EU Legislation on Ship and Port facility Security in the Maltese Legal System

Malta, being a large ship registry, was an important addition to the Union's maritime sector. Since 2015,<sup>399</sup> the Maltese Flag has become the sixth largest registry in the world and the largest in Europe.<sup>400</sup> In terms of maritime security, Malta may be considered 'vulnerable' as a small island State. Even small scale attacks, have the potential to cause an extensive damage to the Maltese registered ships, port facilities and also loss of life in terms of crew and port workers. In 1985, Malta, similar to Spain, also had firsthand experience with a terrorist attack in which an Egyptian airplane was hijacked by a group of Palestinian nationals.<sup>401</sup> At the time of the crime, the hijackers were armed with explosives capable of converting an aircraft into a weapon of mass destruction comparable to the one used in the 9/11 attack.<sup>402</sup> A similar case might occur with a hijacked ship, making it critical for Malta to have a preventative maritime security regulatory framework in place for its maritime infrastructures.

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<sup>398</sup>Juan L. Pulido Begines and Achim Puetz, 'Maritime Safety and Security in Spain' in Justyna Nawrot and Zuzanna Peplowska-dabrowska (eds.), *Maritime Safety in Europe: A Comparative Approach* (Informa Law 2021) 236.

<sup>399</sup> EXUMA, 'Malta Flag becomes the 6th Largest Merchant Ship Register in the World, Consolidates its position as Largest in Europe' (*Transport Malta* 27 January 2015) < <https://news.transport.gov.mt/malta-flag-becomes-the-6th-largest-merchant-ship-register-in-the-world-consolidates-its-position-as-largest-in-europe/> > accessed on 12 September 2021.

<sup>400</sup> MaritimeMT, 'Malta Flag 6th Largest Ship Registrar' (29 May 2020) < <https://www.maritimemt.edu.mt/insights/malta-flag-6th-largest-ship-registrar#:~:text=The%20Malta%20Flag%20is%20the,2500%20vessels%20were%20merchant%20vessels> > accessed on 12 September 2021.

<sup>401</sup> Christopher Soler, 'The Global Prosecution of Core Crimes under International Law' (Springer 2019) 491.

<sup>402</sup> Albert Galea, '35 years on: The EgyptAir hijacking that descended into a bloodbath in Malta' (*Malta Independent* 22 November 2020) <<https://www.independent.com.mt/articles/2020-11-21/local-news/35-years-on-The-EgyptAir-hijacking-that-descended-into-a-bloodbath-in-Malta-6736228851>> accessed on 12 September 2021.

Implementation of the ISPS Regulation in Malta was made through a Legal Notice (LN) 484 of 2004 'Port Security Regulations 2004'.<sup>403</sup> Its main objective was to enable Malta to enhance ship and port security by performing its obligations arising from the SOLAS Convention and ISPS Code.<sup>404</sup> Furthermore, rules must be interpreted and construed in accordance with the ISPS Regulation, and if there is a conflict between the ISPS Regulation and the ISPS Code, the former takes precedence.<sup>405</sup> The then Malta Maritime Authority (MMA) was appointed as the designated authority,<sup>406</sup> whose responsibilities include overseeing the execution of the requirements of the Subsidiary Legislation: Port Security Regulations 499.35 (Port Regulations).<sup>407</sup> The Authority's functions and duties required it to guarantee that security assessments are carried out, reviewed, and authorized,<sup>408</sup> and that facility security plans are developed, approved, executed and maintained.<sup>409</sup>

On the 30 November 2007, the European Commission sent a reasoned opinion to a number of MS, including Malta and Spain, for failing to transpose the EU rules on enhancing port security into their national law by the 15 of June 2007.<sup>410</sup> The sending of a reasoned opinion is the final step before possible reference to the CJEU. Reasoned opinion prompted the transposition of the Directive 2005/65/EC which was implemented through an amendment of the Port Regulations by the LN 3 of 2008 Ports Security (Amendment) Regulations.<sup>411</sup> These amendments enacted retroactively and were declared to have entered into force on the 15 of June 2007, the day the Directive 2005/65/EC was to be transposed in all MS.<sup>412</sup>

The Port Regulations include a list of ships and facilities that are subject to its provisions, as well as a list of other vessels ships that are specifically exempt from the Port

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<sup>403</sup> 'Port Security Regulations L.N 484 of 2004'.

<sup>404</sup> Ibid Article 2(1).

<sup>405</sup> Ibid.

<sup>406</sup> Ibid Article 5.

<sup>407</sup> 'Port Security Regulations, S.L. 499.35'.

<sup>408</sup> Port Security Regulation (n402) Article 6 (a) (i).

<sup>409</sup> Ibid Article 6 (a) (ii).

<sup>410</sup> European Commission, 'Port security: Commission sends reasoned opinions to Estonia, Malta, Spain and the United Kingdom' (Brussels, 30 November 2007) IP07/1825.

<sup>411</sup> 'Ports Security (Amendment) Regulations, L.N 3 of 2008'.

<sup>412</sup> Ibid Article 1(2).

Regulations' application.<sup>413</sup> Whilst the passenger and cargo ships involved in international voyages, and port facilities within the internal and territorial waters of Malta that serve the said ships are covered by the Port Regulations,<sup>414</sup> warships together with the pleasure crafts and fishing vessels are excluded from Port Regulation's application.<sup>415</sup> The amendments also required a change of the designated authority which has been changed from MMA to the Authority for Transport in Malta (TM) established by Authority for Transport in Malta (Arrangement) Act.<sup>416</sup> As a result, TM, being appointed as a new designated authority, assumed all powers and responsibilities under the Port Regulations.<sup>417</sup> TM's functions and duties include establishing of procedures related to information protection, performing of security inspections and specifying appropriate security levels for port facilities within the territory of Malta.<sup>418</sup> If the TM deems it essential, it may extend the regulations to a ship or port facility to which the Port Regulations do not apply in order to improve ship or port security.<sup>419</sup>

To ensure proper implementation of the ISPS Regulation and of the Directive 2005/65/EC, the Port Regulations establish an inter-ministerial Maritime Security Committee (the Committee).<sup>420</sup> The Committee is appointed by the Minister responsible for ports (the Minister) and composed of Permanent Secretary responsible for Ports, the Commander of the Armed forces of Malta, the Commissioner of Police and other heads of the government departments.<sup>421</sup> The Committee is an advisory body tasked to advise TM on the development, maintenance and promotion of an effective system of maritime security.<sup>422</sup> Furthermore, amongst other duties, the Committee is responsible for developing the necessary strategies and policies to reach all international and national obligations and relevant objectives related to maritime security in general.<sup>423</sup> Also, in cases of potential level three threat, the Committee shall develop the necessary

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<sup>413</sup> Port Regulations (n407) Article 3.

<sup>414</sup> Ibid Article 3(1).

<sup>415</sup> Ibid Article 3(2).

<sup>416</sup> 'Authority for Transport in Malta Act: Arrangement of Act, XV. 2009.49'.

<sup>417</sup> Port Regulations (n406) Article 5.

<sup>418</sup> Ibid Article 6.

<sup>419</sup> Ibid Article 57.

<sup>420</sup> Ibid Article 8.

<sup>421</sup> Ibid Article 10.

<sup>422</sup> Ibid Article 9(a).

<sup>423</sup> Ibid Article 9(b).

directives for the effective response and support.<sup>424</sup> TM shall also ensure that port security plans are developed by the recognized security organizations.<sup>425</sup> Once the port facility security assessment and plans are developed, it may be approved by the TM after the consultation with the Committee took place.<sup>426</sup> When it comes to approving previously authorized assessments and plans, TM is under no duty to engage the Committee.<sup>427</sup>

Port security officer's appointment also falls within the ambit of the TM and acts as a point of contact for port security related issues.<sup>428</sup> Unless the same individual, port security officer shall cooperate with port facility security officer.<sup>429</sup> The latter stakeholder is appointed by the port facility operator.<sup>430</sup> The duties of the port facility security officer include, but are not limited to, facilitating the development, implementation, revision and maintenance of the PFSP for port facility operator and performing duties and responsibilities set out in Part A of the ISPS code and PFSP.<sup>431</sup>

According to the Port Regulations, the Minister may, if necessary to improve or enhance maritime security to enable Malta to be part of a concerted international response to a threat to maritime security, authorize screening of any person or any personal effect or object, authorize any search on board of ship or port facility.<sup>432</sup> In such situations the Minister is under an obligation to consult the TM, the Committee and if necessary, other departments and entities.<sup>433</sup> Powers to permit the aforementioned screening and searches also apply to the TM if there is a reasonable suspicion of a security incident arising.<sup>434</sup>

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<sup>424</sup> Ibid Article 9(c).

<sup>425</sup> Ibid Article 27(4).

<sup>426</sup> Ibid Article 27(5).

<sup>427</sup> Ibid Article (39)

<sup>428</sup> Ibid Article 28(1), Article 28(2).

<sup>429</sup> Ibid Article 28(3).

<sup>430</sup> Ibid Article 31(1).

<sup>431</sup> Ibid Article 31(3)

<sup>432</sup> Ibid Article 42.

<sup>433</sup> Ibid Article 42(3).

<sup>434</sup> Ibid Article 43.



The Port Regulations are also enforced by establishing a number of offenses, in particular of any master or any port facility operator, who fails to comply with the Port Regulations' requirements.<sup>435</sup> Moreover, the offences committed by a body or association of persons are also subject to punitive measures.<sup>436</sup> In terms of offenses, the Port Regulations do not prohibit the imposition of harsher penalties under other laws.<sup>437</sup>

Given the foregoing, port regulations enable the domestic application of the ISPS Regulation and Directive 2005/65/EC. The procedures for enforcement guarantee that international and EU rules are not only adopted but also effectively enforced.

#### **4.4 Conclusion**

Spain and Malta are the two MS that are heavily dependent on the maritime transport. Apart from EU's interest, safeguarding and securing ship and port facilities are also crucial for their national economies. The need to apply the ISPS Regulation and transpose the Directive 2005/65/EC is therefore critical for the security of ships and port facilities in Spain and Malta. Spain, after suffering the devastating incident in Madrid's underground transportation system, still failed to meet its obligations under EU law, that is to transpose the Directive 2005/65/EC by the required deadline.<sup>438</sup> In contrast, Malta managed to avoid infringement proceedings by enacting comprehensive Port Regulations and forming the Committee to guarantee efficient application and enforcement of international norms.<sup>439</sup> Finally, by designating authorities, appointing port security officers, creating Committees, conducting security assessments, and drafting security plans the Spanish and Maltese legislation have met the standards required in the Directive 2005/65/EC.

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<sup>435</sup> Ibid Article 52-53.

<sup>436</sup> Ibid Article 54.

<sup>437</sup> Ibid Article 55.

<sup>438</sup> See Section 4.2.

<sup>439</sup> See Section 4.3.

## Conclusion

Maritime security requires littoral and coastal States, landlocked States, flag States, and port States to collaborate with international organizations and the maritime industry to protect international trade.<sup>440</sup> In view that the internal market of the EU is the cornerstone of European integration, the Union has always worked to ensure that its maritime areas are secure and safe. The EU's ability to maintain the necessary level of security is contingent on its ability to legislate in the field of transportation. Transportation is a shared responsibility and thus, the EU has enacted a number of binding acts and ensures that they are implemented consistently. To this end, both port State's and flag State must ensure appropriate implementation of their obligations. Low cost of maritime transport makes it primary mode of international imports and exports for the EU, on which the single market relies. Sea-ports and shipping allow the EU to benefit from the rapid growth of international trade and to play a leading role in the global economy. In this respect, proper implementation and enforcement of the ship and port facility security is crucial for stakeholders. The objectives of the EU framework on maritime security, in particular, port and ship security are to prevent illegal activities that may jeopardize the lives of seafarers and port employees and also hamper maritime trade. The EU has implemented several measures to assist protect and accomplish these objectives. The EUMSS, for example, is a comprehensive maritime security strategy aimed to meet different security interests and threats from the global maritime domain that may have an impact on navigation, economy, persons, and territorial security of MS..<sup>441</sup>

Following the terrorist attacks of September 11 2001, the ISPS Code, one of the most far-reaching maritime security instruments adopted on an international plane. Its objective is to address security threats to ships and port infrastructure through both mandatory and recommended measures. Immediately following its adoption, the EU recognized the necessity for further regulation in the field of ship and port facility

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<sup>440</sup> See Section 'General Introduction'.

<sup>441</sup> See Section 1.

security on a regional level, particularly as maritime trade has become increasingly important as the EU's single market has developed.<sup>442</sup>

In order to enable the MS to effectively implement the ISPS Code requirements, the EU adopted Regulation 275/2004 where it incorporates the ISPS Code and requires certain provisions of its Part B to be mandatory. After realizing that certain areas of the port are not covered by the ISPS Regulation, the Council adopts the Directive 2005/65/EC in order to regulate the whole port area. In order to ensure that MS comply with the ISPS Regulation and the Directive 2005/65/EC, the Regulation 324/2008 laying down revised procedures for conducting Commission inspections in the field of maritime security is adopted. It is an important mechanism that ensures proper implementation and enforcement of EU norms on ship and port facility security by 27 MS.<sup>443</sup> The contribution of the EU in the field of ship and port facility security adds value to the international legal framework on ship and port facility. The incorporation of IMO rules into the EU legal framework ensures harmonized application across the 27 MS.

The implementation of the ISPS Regulation and the EU Directive 2005/65/EC was rather difficult for certain MS. It was noted that both Spain and Malta had received reasoned opinions from the Commission for failure to transpose the Directive 2005/65/EC. Whilst Malta complied with the instructions set out in the reasoned opinion in a timely manner, Spain failed to do so and was subjected to an infringement procedure. Following a detailed examination of the transposition instruments of both MS, it transpires that Malta went beyond the minimum requirements set out in the Directive 2005/65/EC. To ensure proper implementation and enforcement of the EU legislation, Malta incorporated punitive measures for the stakeholders who fails to comply with the provisions of the Port Regulations.<sup>444</sup>

To enhance the European ship and port facility security system, a number of substantive and procedural reforms are required. In terms of substantive, criminalizing the intent to conduct an illegal act against a ship or port facility will allow MS to prevent the crime

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<sup>442</sup> See Section 2.

<sup>443</sup> See Section 3.

<sup>444</sup> See Section 4.

before it is even attempted. In terms of procedural reforms, MS authorities should make it easier for witnesses to be examined promptly in order to preserve valuable evidence. Preventive measures and substantial sanctions for attempted crime would result in greater enforcement of European rules, benefiting the EU and international community as a whole. MS must join forces and criminalize any form of attempt under their national laws, as well as actively coordinate to enhance ship and port facility security.

While the maritime security threats that EU ships and port facilities face have not been eradicated, the implementation of specific EU legislation to counter these crimes has been a positive development. Nevertheless, this author argues that there is still room for improvement. The 27 MS should continue to collaborate to enhance political and economic conditions in order to deter persons from attempting to conduct crimes against any ship or port facility within the Union in order to protect the lives of maritime operators and ensure effective operation of maritime trade.

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