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REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT

Report assessing the implementation of the Directive on enhancing port security

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Report assessing the implementation of the Directive on enhancing port security

(Text with EEA relevance)

1. INTRODUCTION

The main objective of Directive 2005/65/EC[1] of the European Parliament and of the Council of 26 October 2005 on enhancing port security ('the Directive' or 'the Directive on port security') is to complement the measures adopted in 2004 by means of Regulation (EC) No 725/2004[2] of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security ('the Regulation').

The main objective of the Regulation was to implement Community measures aimed at enhancing ship and port facility security in the face of the threats posed by intentional unlawful acts. The Regulation is intended to provide a basis for harmonised interpretation and implementation and Community monitoring of special measures to enhance maritime security adopted by the Diplomatic Conference of the International Maritime Organization (IMO) in 2002. The Regulation takes into account amendments to the 1974 International Convention for the Safety of Life at Sea (the SOLAS Convention) and the establishment of an International Ship and Port Facility Security Code (ISPS Code). The maritime security measures imposed by the Regulation are only some of the measures necessary in order to achieve an adequate level of security across all of the various transport chains linked to maritime transport. The Regulation is limited in scope to security measures onboard vessels and the immediate ship/port interface. These obligations under the ISPS Code are those which Member States have signed up to as a priority, before accepting the implementation of additional obligations as part of the adoption of the Directive.

The Directive completes the mechanism provided for under the Regulation by establishing a security system for all port areas, in order to ensure a high and comparable level of security for all European ports. The aim of the Directive is to improve security in port areas not covered under the Regulation and to ensure that the enhancement of port security will support the security measures taken under the Regulation, without creating additional obligations in areas already governed by the Regulation. In order to obtain the maximum protection for maritime and port activities, port security measures are to be taken covering all ports within a perimeter specifically defined on a case-by-case basis by the Member State concerned, thereby ensuring that security measures taken in accordance with the Regulation benefit from enhanced security in areas of port activity. These measures should apply to all ports in which one or more port facilities governed by the Regulation are situated.

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[1] Directive 2005/65/EC of the European Parliament and of the Council of 26 October 2005 on enhancing port security, OJ L 310, 25.11.2005, p. 28.

[2] Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security, OJ L 129, 29.4.2004, p. 6.

Therefore, the combination of the Regulation on enhancing ship and port facility security, on the one hand, and the Directive on port security on the other, provides a regulatory framework for the protection of the maritime link in the transport logistics chain against the risk of an attack and threats of this type. This framework, which goes beyond international obligations, is designed to ensure the best level of preventive security possible for maritime transport, whilst ensuring that the ability to promote and pursue world trade can continue.

In order to monitor the application by Member States of the Regulation and to verify the effectiveness of national maritime security measures, procedures and structures, in 2005 the Commission adopted Regulation (EC) No 884/2005[3], laying down procedures for conducting Commission inspections in the field of maritime security. On 9 April 2008, the Commission adopted Regulation (EC) No 324/2008[4] laying down revised procedures for conducting Commission inspections in the field of maritime security, which also laid down '*procedures for the monitoring by the Commission of the implementation of Directive 2005/65/EC jointly with the inspections at the level of Member States and port facilities in respect of ports…*'. This Regulation, repealing Regulation (EC) No 884/2005, came into force on 1 May 2008.

Article 19 of the Directive provides that

'*By 15 December 2008 and every five years thereafter, the Commission shall submit an evaluation report to the European Parliament and the Council based, among other things, on the information obtained pursuant to Article 13* [Implementation and conformity checking]. *In the report, the Commission shall analyse compliance with this Directive by Member States and the effectiveness of the measures taken. If necessary, it shall present additional measures.'*

This report assesses the implementation status of the Directive and the effectiveness of the measures taken.

2. RELEVANCE OF THE DIRECTIVE

It should be noted that the Directive applies to all ports located in the territory of a Member State in which one or more port facilities, covered by a port facility security plan approved in accordance with Regulation (EC) No 725/2004, is or are located.

Approximately 750 ports in the European Union fall within the scope of the Directive (see Annex II). However, the geographical distribution of these ports is very unequal, with 590, or 80%, of them situated in only seven Member States (the United Kingdom, Italy, Greece, Denmark, Spain, Germany and France[5]). Together with those in Belgium and the Netherlands, the ports in these seven countries provide points of entry for goods imported into the European Union for the benefit of all Member States[6].

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3 Commission Regulation (EC) No 884/2005 of 10 June 2005 laying down procedures for conducting Commission inspections in the field of maritime security, OJ L 148, 11.6.2005, p. 25.

4 Commission Regulation (EC) No 324/2008 of 9 April 2008 laying down revised procedures for conducting Commission inspections in the field of maritime security, OJ L 98, 10.4.2008, p. 5.

5 See Annex II. The Member States are listed in declining order of the number of ports falling within the scope of the Directive.

6 Import activities in the ports of the seven Member States account for 66% of all imports entering the EU-27 area by sea in 2006 (source: Eurostat).

A seminar was organised at the European Commission's initiative in September 2006 to enable Member States and the Commission to exchange information on the methods envisaged for transposing and implementing the Directive. These informal exchanges also allowed those responsible for maritime security from the Member States to enhance relations of mutual trust, to participate in wider reflection on difficult questions concerning the implementation of the Directive[7], and to begin exchanging information on the mechanisms and practices used, thus helping to increase security standards in areas within the responsibility of the port authorities, especially areas adjacent to port facilities or giving access to them.

3. METHOD AND SCOPE OF THE EVALUATION

In order to prepare this report, in the early summer of 2008 the Commission asked Member States to complete a questionnaire[8] on the transposition and application of the Directive. Twenty of the 22 Member States who were meant to transpose the Directive have completed this questionnaire.

The Commission also began procedures for monitoring the application of Directive 2005/65/EC during the inspections carried out in the field of port security. Since summer 2008, with regard to ports, the procedures for monitoring the application of the Directive have been carried out jointly, in accordance with Regulation (EC) No 324/2008, by the Commission at the same time as national-level and port inspections. In mid-October 2008, four inspections were carried out, i.e. the application of the Directive was monitored in four different Member States.

Given, on the one hand, the short life so far of Regulation (EC) No 324/2008 laying down revised procedures for conducting Commission inspections in the field of maritime security and, on the other, the delay with which several Member States both transposed the Directive and implemented its provisions in practical terms, it would be premature to draw any final conclusions as regards its impact. This report therefore focuses on implementation-related questions and short-term results.

4. IMPLEMENTATION OF THE DIRECTIVE

4.1. Transposition into national law

Adopted on 26 October 2005, the Directive was transposed only slowly into national law in the Member States during 2007 and 2008. The majority of the 22 Member States[9] required to transpose the provisions of the Directive into national law only did so after the deadline for implementation (15 June 2007) had passed. Only six of them provided notification of national measures before this transposition deadline, quickly followed by six other Member States. The average delay in transposition was six months[10]. Ten infringement procedures were

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7 Such as, for example, delimiting a port's outer limits for security purposes, security of the waters within the port, monitoring port approaches or inter-service coordination within Member States.

8 Document MARSEC 2316 (distributed at the 'Maritime Safety' committee meeting on 27 June 2008). As of 20 October 2008, Latvia and Malta had not yet returned their completed questionnaire.

9 Since the Directive concerns seaports, the obligations do not apply to Austria, the Czech Republic, Hungary, Luxembourg and Slovakia (recital no 18).

10 The dates on which transposition measures were notified are listed in the table in Annex I.

started by the Commission in the absence of notification of national transposition measures, which resulted in 10 letters of formal notice being sent on 1 August 2007, followed by six reasoned opinions between November 2007 and February 2008. On 1 January 2008, seven Member States had still not adopted or transmitted to the Commission their national measures transposing the Directive. Finally, on 18 September 2008, the Commission decided to take action before the European Court of Justice, in the absence of notification of national transposition measures within the required deadline, against the last two Member States who had not yet met the deadline[11].

It should be noted that these delays in preparing and adopting national transposition measures in a variety of Member States have had a knock-on effect, in that the relevant authorities were not able to implement the Directive until the national measures had been finally approved and adopted.

4.2. Compliance of national measures adopted in order to transpose the Directive

The delayed adoption of national legislative texts implementing the Directive in Member States has meant that the Commission departments have not yet been able to complete a detailed examination of the compliance of the notified measures with the relevant Directive provisions. Although an initial analysis shows that, on the whole, the Member States have adequately transposed the Directive into national legislation, the local application of the relevant Directive provisions has all too often not yet occurred, as revealed by the first inspection visits[12] performed by the Commission in order to monitor the application of the Directive in ports.

Once all national texts have been sent to the Commission (i.e. by the end of 2008 or early 2009), the Commission will conduct a more detailed examination of national transposition measures and subsequent provisions made by Member States in order to make a global assessment (i.e. covering all relevant Member States) of whether the national measures comply with the relevant provisions of the Directive.

In 2009, the working programme for the performance of maritime security inspections carried out by the Commission will systematically include a section for verifying that the procedures for monitoring the application of the Directive have been correctly applied.

5. KEY ISSUES

Following the tragic events of 11 September 2001 in New York and Washington, 11 March 2004 in Madrid and 7 July 2005 in London, the Directive on port security provides a response to the concerns raised on the need to enhance security for all modes of transport, particularly by enhancing the legal framework and improving mechanisms for prevention.

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

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[11] Estonia and the United Kingdom.

[12] The four ports inspected in four different Member States (in September and October 2008) had not yet commenced preliminary work to assess the drafting and adoption of security plans.

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.

This section discusses the main issues identified in the evaluation exercise.

5.1. Perimeter of each port

Ports vary enormously in terms of their status, ownership, size, function and geographical characteristics. It is difficult to establish a typology, particularly since most ports can be used for all kinds of activities (commercial, industrial, etc) within the port area. Port structures vary from 'historical' ports that towns have developed around and 'modern' ports, created from scratch, directly linked to the hinterland and other forms of communication and transport. The geographical diversity of certain port areas, its integration into the urban fabric or with industrial and commercial estates often makes it difficult to define the perimeter of a port from a security point of view.

This difficulty in determining the boundaries of a port area, which falls within the scope of the Directive, is reflected in the variety of approaches adopted in the Member States. Port authorities have been consulted and involved in the establishment of port area boundaries. In some Member States, such boundaries have been defined on the basis of existing remits of certain authorities or port facilities, whereas in others, the perimeter has been limited to those activities with a direct maritime link. This means that the scope of the Directive does not include, in particular, leisure craft and facilities, residential areas or commercial and industrial plant.

Generally speaking, given the principle that ports under the Directive are those in which one or more port facilities are situated and which form the subject of a security plan for the port installation approved under Regulation (EC) No 725/2004, the perimeter of a port area has often been established by the Member States on a case-by-case basis, according to local conditions. The setting up of a security system throughout a port area has to take into account the unavoidable structural and historical co-existence of commercial activities, fishing and leisure craft. Although terrorist attacks in ports can cause major disruption to transport systems, cause bodily injury in ports or to residents of such areas, the measures taken under port security plans, notably for the first of the three security levels, would make it possible for the necessary trade operations and movement of persons in the ports to occur in a flexible manner.

5.2. Information resulting from the port security assessment

The security assessment has not yet been finalised for all ports, primarily due to the lack of a national regulatory basis. The assessment should enable the assets and infrastructure to be identified that need protection against the threats and risks of intentional illegal action facing port activities. Once the infrastructure's potential exposure has been established, the following phase consists of designing and putting in place appropriate measures that will enable risks to be countered, for each of the three identified risk levels (normal, increasing, high), notably by using technical equipment appropriate to the specific nature of the ports in question. The assessment should be completed by defining the perimeter of each port and proposing effective measures set out in a port security plan, which should be implemented in order to combat the threats and risks identified.

In several Member States, this assessment is subject to the opinion of a local port security committee, chaired by the port security authority. This local port committee is generally formed of local representatives from the administrations working at the port and involved in security (the civil police, coastguard, maritime affairs, customs, armed police, etc.). It is often after receiving this local committee's opinion that the relevant authority approves the assessment and port security plan. The importance of all parties responsible for security working together has once again been shown to be an essential condition to carrying out these assessments and to implementing plans.

The Directive also provides that Member States should designate a port security officer in each port. These officers, appointed by the relevant authority, act as correspondents on port security issues. Member States felt that training in security matters was necessary before such officers were appointed. Although the Directive does not make any provision in this regard, it would generally appear that the knowledge of port security officers is monitored and that they are issued with a certificate of competence.

5.3. Monitoring of port security plans and their implementation

In accordance with Article 13 of the Directive, the Member States are required to monitor and, on that basis, regularly and as appropriate supervise port security plans and the implementation thereof.

Generally speaking, Member States have delegated this task to central administrations, which implement or request the implementation of audits and inspections (scheduled or random) in ports, in order to ensure that plans comply with regulations, that security measures implemented meet the requirements of the plan and that all necessary measures have been taken and implemented.

The national authorities also generally provide significant support to ports and the relevant authorities in the form of advice and assistance, particularly as regards drawing up plans and at local security committee meetings.

5.4. Recognised security organisation

Recognised security organisations (RSOs) meeting the conditions provided for in Annex IV to the Directive may be consulted and used for the purposes of carrying out assessments and preparing plans. However, a recognised security organisation which has conducted a port security assessment or review of such an assessment for a port may not draw up or review the port security plan for the same port.

The possibility of using RSOs varies between Member States. Although some take the view that RSOs meeting the conditions under the Directive can carry out port assessments and prepare port security plans, a larger number of them consider ports and port facilities to be critical national infrastructures and that the delegation of regulatory responsibility is therefore impossible. This is particularly true for those Member States with sufficient administrative capacity to meet these obligations competently, efficiently and entirely independently. The issue of using RSOs is a very complex one and we do not currently have the necessary experience, as regards ports, to draw proper conclusions as regards the cost and reliability of the quality of the service provided.

6. SUMMARY

Although the Directive was adopted upon first reading with a large majority at the European Parliament and unanimously at the Council, and despite the period for transposition into national law being extended from the initial 12 month period in the Commission's initial proposal to 18 months, most of the Member States involved only transposed the Directive after this period had passed, some with a significant delay that could only be reduced by the opening of infringement proceedings.

However, the overall impression is that the main provisions of the Directive, which go beyond international obligations, have been incorporated into the national legislation and regulations of the Member States. Nevertheless, there are still some organisational and functional difficulties in terms of practical implementation at port level. Local administrations are still not fully equipped to ensure the practical implementation of the Directive.

The main difficulties encountered centre on the definition of a port perimeter. This is done on a case-by-case basis, using the results and information obtained during the port security assessment. The wide variety of parties involved in ports, the range in legal status of port facilities and infrastructures, the overlapping in the geographical space of the port of areas which are not directly involved in its commercial activity and the need for synergy in terms of an objective of security that is understood and accepted by all, are a wide range of factors that make the performance of port security assessments a long and difficult process.

7. CONCLUSION

Given that the Commission's experience of the application of the Directive has been relatively recent, it is still too early to perform a final assessment of its impact.

However, following the difficult task of implementing the provisions designed to improve ship security and that of associated port facilities, which Member States have been doing since 2004, the challenge is now to complete security provisions for port areas in order to ensure high and comparable security in all European ports. The work carried out by the Member States in order to complete transposition of the Directive down to local level must continue, not only in order to complete the regulatory framework for maritime security but above all to enhance security in maritime and port activity areas and to ensure maximum protection for these activities within the perimeter of all ports. It should always be borne in mind that the security of the whole logistics chain will always be the same as that of its weakest link.

On the basis of these conclusions, the Commission recalls that the security of ports and their approach areas is essential to security within maritime transport as a whole. It is in no-one's interests to entrust or offload passengers or cargo in a port which is not 'secure'. Conditions of port security require a high level of vigilance on the part of Member States and the preparation of all those involved in order to ensure high and comparable security for all European ports. For this reason, as regards security in maritime areas and ports, work should continue to permanently improve prevention, protection and response measures to counteract the new threats arising from terrorism, piracy or any other intentional illegal act. To this end, from 2009, the working programme for the performance of maritime security inspections carried out by the Commission will include a systematic component allowing verification that procedures for monitoring the application of the Directive have been correctly applied.

The Commission is also proposing examining the constraints facing the authorities responsible for the implementation of security measures. This study should enable an objective typology of ports to be drawn up and to examine how best to include the interests of all parties involved in ports, with suggestions for putting in place the necessary security measures to protect against illegal acts and the devastating consequences of such acts. The research should necessarily focus on interaction between the various areas of port activity, whether commercial, industrial or residential activity or other water-based activity such as fishing or leisure craft with a direct or indirect impact on the general security of the port. Depending on the characteristics identified for each type of port, research should be done into the most suitable method of ensuring the necessary balance between the fundamental principles of freedom and the implementation of measures essential for taking vulnerabilities into account and for responding to threats, in order to ensure – depending on the assessment of risk level – the best level of protection for all users of ports and maritime transport, for Europe's economy and society in general.

ANNEXES:

Annex I: Table indicating the Directive's transposition status in the Member States.

Annex II: Table indicating the number of ports falling within the scope of the Directive, broken down by Member State.

ANNEX I: TABLE INDICATING THE DIRECTIVE'S TRANSPOSITION STATUS IN THE MEMBER STATES (AS OF 15/10/2008)

Notification of all national measures transposing the Directive

Deadline for transposition: 15 June 2007 (Art. 18)

Member States *(1)*	**Transposition of the Directive into national law** *(4)*	**Infringement procedures opened**		
		Date letter of formal notice was sent	**Date reasoned opinion was sent**	**Date of decision to refer to the Court of Justice**
Belgium	27/04/2007			
Bulgaria	**28/08/2007**	**01/08/2007**		
Cyprus *(5)*	**27/07/2007**	**01/08/2007**		
Germany	***Incomplete 7/8*** *(2)*	**01/08/2007**	**29/02/2008**	
Denmark	10/07/2007			
Estonia	**-**	**01/08/2007**	**28/11/2007**	**18/09/2008**
Greece	**15/01/2008**	**01/08/2007**		
Spain	**9/01/2008**	**01/08/2007**	**28/11/2007**	
Finland	12/06/2007			
France	16/07/2007			
Ireland	18/07/2007			
Italy	**10/11/2007**	**01/08/2007**		
Lithuania	31/01/2007			
Latvia	31/08/2006			
Malta	**10/01/2008**	**01/08/2007**	**28/11/2007**	
Netherlands	13/06/2007			
Poland	**30/09/2008**	**01/08/2007**	**29/02/2008**	
Portugal	21/11/2006			
Romania	14/06/2007			
Sweden	30/05/2007			
Slovenia	26/05/2007			
United Kingdom	***Partial*** *(3)*	**01/08/2007**	**28/11/2007**	**18/09/2008**

(1) Since the Directive relates to seaports, the obligations do not apply to Austria, the Czech Republic, Hungary, Luxembourg and Slovakia (recital no 18).

(2) Given the federal nature of this Member State, the Directive falls within the remit of the Länder, which are responsible for transposing the Directive. Currently, seven of the eight Länder meant to transpose the Directive have adopted transposition measures which have been notified to the Commission. On 14 October 2008, the German authorities indicated that the outstanding measures would be adopted by December 2008 (i.e. in Lower Saxony).

(3) On 3 September 2008, the United Kingdom authorities notified transposition measures solely in respect of Gibraltar; however, transposition measures in respect of Great Britain and Northern Ireland are being prepared but have not yet been adopted definitively.

(4) The notifications provided by the Member States are stored in the Commission database managed by the Secretariat-General.

(5) As regards Cyprus, the national measures were notified at the same time as the letter of formal notice was sent and the infringement proceedings were immediately withdrawn.

ANNEX II: TABLE INDICATING THE NUMBER OF PORTS FALLING WITHIN THE SCOPE OF THE DIRECTIVE, BROKEN DOWN BY MEMBER STATE

Member State	Number of ports under the Directive *(1)*	No of ports > 1 million tonnes or > 1 million passengers/year	Member State	Number of ports under the Directive (1)	No of ports > 1 million tonnes or > 1 million passengers/year
Austria	**N/A** *(2)*	**-**	**Italy**	**90**	**28**
Belgium	**4**	**4**	**Lithuania**	**2**	**1**
Bulgaria	**17**	**2**	**Luxembourg**	**N/A** *(2)*	**-**
Cyprus	**3**	**1**	**Latvia**	**6**	**2**
Czech Republic	**N/A** *(2)*	**-**	**Malta**	**5**	**2**
Germany	**62**	**17**	**Netherlands**	**20**	**12**
Denmark	**79**	**16**	**Poland**	**9**	**4**
Estonia	**14**	**4**	**Portugal**	**17**	**6**
Greece	**81**	**9**	**Romania**	**11**	**8**
Spain	**78**	**31**	**Sweden**	**27**	**26**
Finland	**14**	**14**	**Slovenia**	**1**	**1**
France	**47**	**18**	**Slovak Republic**	**N/A** *(2)*	**-**
Hungary	**N/A** *(2)*	**-**	**United Kingdom**	**153**	**51**
Ireland	**18**	**6**	**TOTAL**	**754**	**263**

(1) Figures taken from Member States' notifications of the list of affected ports in accordance with the relevant provisions contained in Article 12 of the Directive.

(2) Since the Directive relates to seaports, the obligations do not apply to Austria, the Czech Republic, Hungary, Luxembourg and Slovakia (recital no 18).