The EC and enhancing ship and port facility security

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Introduction

"A series of new security measures, a new era in the history of maritime shipping… "

With regard to these new measures, the European Union (EU) issued its own maritime security legislation under the official slogan of better implementation of standards of the International Maritime Organization (IMO). A single and harmonized application of security regulations was announced. These European initiatives suggested a European opposition against the international regulations, in particular within the sphere of maritime affairs.

The implementation of the maritime security regulations by the EC bears a strong resemblance to the EU's aspiration to become "une grande puissance maritime".

The purpose of this paper is to review the incorporation of the existing IMO maritime security measures into the law of the EU and examine the compliance of the new security regime with Community interests, needs and existing legislation. The paper will also attempt to identify possible collisions between new EU maritime security regulations and international law and analyze this development in the legislation of the EU in general.

1. Legal framework of the multilateral measures on enhancing ship and port security

1.1 New international standards for maritime security

After the series of terrorist attacks on the 11th September 2001 ,the challenge of global challenge of terrorism increased. Those acts, "supported" by the attacks on USS Cole in 2000 and on the French oil tanker Limburg in 2002, generated a need for widespread and far reaching reviews of the transport security legislation.

Diplomatic Conferences, held from 9 to 13 December 2002 under the auspices of the IMO in London, adopted a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS).

A general outline of the new measures introduced for port authorities, shipping companies and Contracting Governments is to work in close cooperation with one another to create a security system which will prevent possible terrorist attacks and provide models of behaviour in case of an attack.

1.2 EU legislation

After September 11, the EU also turned to the problems of terrorism. All civil security aviation and general security issues were covered (Regulation EC 2320/2002; Regulation EC 648/2005, Regulation 849/2004). Then maritime security issues were given attention.

International shipping was, one might say, secured" by international legal innovations". It was agreed (owing to the "tacit amendment procedure") that member states belonging to the SOLAS Convention should implement the new rulings. By the 1st of July 2004 ,all EC member states had to comply with the new security standards. Different opinions in matters of security could be a threat to the protection of the Community. In addition, domestic transport remained uncovered by international legislation. Thus, it was decided that legislation on a Community level would be a good means of preventing differences in

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implementation. Besides it would give the Community one more possibility of presenting itself on the international scene (particularly in the field of maritime shipping) as a whole.

EC Regulation 725/2004 adopted on 31st March 2004 transposed into the EC law a mandatory part A of the International Ship and Port Facility Security Code (ISPS Code) and made some aspects of the Part B of the ISPS Code compulsory for inner EU traffic. Besides this is a legal basis for EC inspections controlling the proper implementation of the new measures was established.

The port security (areas beyond the ship/port interface) however, remained uncovered by both international rules and European legislation. In February 2004, the first text of the proposal for a Directive on enhancing port security was published. The new directive also established monitoring systems. Otherwise, and it was stressed during the deliberations on the Directive, new rules don't create new obligations in areas already covered by Regulation 725/2004.

2. Incorporation of the IMO measures into the Community law

2.1 Corresponding proposal from the Commission

Although different procedures are applied in the EC legislative process (the consultation procedure, the cooperation procedure, the co-decision procedure), every of them is started by the Commission proposing certain actions (this right of the Commission - or its monopole (Sydow, 1980, p. 50) - "to propose" follows from Art. 211 third dash EC Treaty (Buttlar, 2002, p.22)).

Thus, the exercise of the legislative power of the Community is almost fully dependent upon the existence of the proposal of the Commission (Jacqué, 2003, p. 371) and the Commission closely regulates the legislative activity of the Community. Undoubtedly, this fact politically colours the whole legislative procedure of the Community.

2.1.1 New legislative competence area for the Commission and competence areas of the Member States

With Regulation 725/2004 the European Commission exercised legislative competence in the field of maritime security for the first time. The necessity to regulate this new area on a Community level was called into question by Member States delegations , especially during the development of the Directive. They appealed to the principle of subsidiarity (Art. 5 EC Treaty and Art. 2 (2) of the EU Treaty as a particular case of the twelfth recital of the EU Treaty Preamble (Groeben, Schwarze, 2003, p. 630)) and expressed their doubts as to the Community's competence in these matters.

Those debates demonstrate in the best way possible one of the topical questions surrounding the political aspects of European integration: the increased concentration of power for the EC authorities in exchange for the (sometimes unjustified, unnecessary and ineffective) diminishing sphere of influence of its Member States. The subsidiarity principle limits Community competence (and thereby the "competence claims" of the Community) in the field of the non-exclusive (Dittert, 2001, p. 37) competence (Herdegen, 2004, p. 87) to the "necessaries", in the event when the Member States are not able to achieve the required results on a national level. A protocol on the application of the principles of subsidiarity and proportionality sets special criteria of the estimation of need to tackle this question at Community level.

Another limitation of the Community's sphere of influence is the principle of proportionality that requires restrictions on the actions of the EU. The Community's actions have to be really necessary to achieve the objectives of the Treaties (Art. 5 of the EC Treaty). This principle allows for the provision of a general framework at Community level, which would give member states the freedom to implement concrete security measures. During the development of the directive on port security and in the context of the directive itself, it was stressed that this directive was developed in full accordance with that principle. The Directive was concerned with the basic joint standards only and the detailed implementation of the Directive was left to the Member States.

2.1.2 Legal basis

The Commission's proposal should have a grounded legal basis (Jacqué, 2003, p. 371). For the issue of maritime security, a particular aspect of the Common Transport Policy – provision for sea transport of Art. 80 (2) EC – was chosen.

Art. 80(2) is a special rule for air and sea transport provided in the EC Treaty to regulate both sea and air transport within the Community. Generally both forms of transport fell from the common rules of the EC transport policy. Only after the Council agreed could appropriate provisions be laid down.

Art. 80 (2) contains the reference to the procedural provisions of Art. 71 (and accordingly to Art. 251 EC Treaty) (Groeben, Schwarze, 2003, p. 1974). Art. 251 EC Treaty presumes the application of the co-decision procedure during the legislative process.

The choice of Art. 80 (2) EC Treaty as a basis for security legislation classified maritime security as a sub-area of maritime transport policy within the common transport policy. However, security issues could or should rather fall under the sphere of national security or anti-terrorist measures. The choice of a legal basis, however, determines the applicable legislative procedure later (Buttlar, 2002, p. 28). So the use of one of the basics would be crucial for the future of the legislation, which has been developed. Namely as a part of national security ship and port security would have to be dealt with by Member States, not by the Community. Linked to the anti-terrorism measures in frames of Title VI EU Treaty, it would have to be dealt with on an intergovernmental basis (Lenz, Borchardt, 1994, p. 106), since Community legislative procedures are not provided for in this case.

It was stressed once more in the texts of the directive and regulation that basing both documents on Art. 80 (2) EC should occur "without prejudice to member states' national security legislation, and any measures that might be taken on the basis of Title VI of the Treaty on the European Union".

2.2 EC Regulation 725/2004 on enhancing ship and port facility security

Although a legislative monopoly in making a proposal belongs to the Commission, the contents of this proposal are by no means the result of its own considerations. Usually its development occurs with the close assistance of the economic circles concerned and corresponding officials of national governments. Besides, the structure of the Commission (Art. 213 EC Treaty) serves as an additional guarantee for the representation of different cultures, mentalities, approaches and political streams (Sydow, 1980, p. 51).

2.2.1 Regulation as a type of Community legislation

The EC Treaty provides for following formal methods (Craig, Búrca, 2003, p. 111) of legislation: regulations, directives, decisions, recommendations and opinions. Regulations with their general application are binding in its entirety and directly applicable.

In most cases the Treaty does not determine the method of legislation. Regulations are still the most appropriate means of regulating a whole sphere in detail. The underside of the regulations use would be the need of their complete and detailed development since they have to be prepared for the direct implementation in each of the legal systems of Member States (Trüe, 2002, p. 103). It follows that only the issues demanding identical regulation in Member States are settled by means of the regulations.

Since the first step of Community activity in the field of maritime security was to implement international standards, which in most cases was anyway binding for the Member States ratified the IMO conventions, the choice of Regulation seems to be adequate and accepted.

2.2.2 General provisions of the Regulation 725/2004

Along with implementing the ISPS Code within the Community, a single competent authority for coordinating and monitoring the application of shipping security measures at national level should be appointed by each member state. Verification of ships certificates is carried out in the port by a competent authority for the Member State or inspectors (Art. 8).

As for inter-Community short-sea traffic, the Member States could and should (recital 9 of the Regulation) conclude alternative security agreements, which should be applied to scheduled maritime traffic within the Community on fixed routes. These agreements do not have to compromise established security standards. For domestic shipping and associated port facilities equivalent security arrangements could be adopted (Art. 5 of the Regulation). These agreements have to be checked for the purpose of their compliance with Community law and general security standards: An "ex-post monitoring" procedure is set up for the Commission.

Further possible amendments to appropriate international instruments (Chapter XI-2 of the SOLAS Convention and the ISPS Code) should be integrated into Community legislation after the procedure of checking this compliance with the Community legislation (Art. 10.5). Checking is aimed exclusively at the

non-depreciation of the security level within the Community and obligatory compliance with the legislation of the Community. The unsettling question inevitably arises: what happens, if the new international standards do not "comply" with the intents or legislative acts of the EC?

The Regulation Commission supervises the inspections, collects the relevant information, checks compliance with Community law, i.e. fulfils the executive functions (as is expected in the Community) (Herdegen, 2004, p. 115). Also Regulation 725/2004 on the basis of Art. 211 EC and Council Decision 1999/468/EC of 28 June 1999 lays down procedures for the purpose of implementing powers conferred on the Commission. This grants the Commission the power to adopt detailed provisions implementing this Regulation.

2.3 Directive on enhancing port security

2.3.1 Directive as a Community legislation form

The Directive sets the final aim which needs to be achieved by the legislation. The form and method of the "aim's achievement" (implementation of the directive's provisions) are open to the Member States. Thus the choice of the directive, as a means of settlement in a certain legal area, presupposes the co-operation of the Community and its Member States (Trüe, 2002, p. 104) not only within the Council, but also by the immediate implementation.

2.3.2 General principles of the Directive 2005/65/EC

The IMO rules, incorporated into the Community legislation by means of a regulation, cover only port interface. As far back as the development of Regulation 725/2004 the questions arose as to whether the entire port area has to be covered by a new security regime.

The unambiguous answer was "yes". However the position of the national ports within the Member States was so heterogeneous, that the decision was made to leave the implementation of those provisions to the Member States.

In February 2004 a draft Directive "directly linked" (Wölk, 2002, p. 26) to the Regulation on security was adopted by the Commission. By 15 June 2007,Member States will have to comply with this Directive by means of bringing into force the laws, regulations and administrative provisions.

The Directive spreads its new obligations only on areas not covered by Regulation (EC) 725/2004. The expanded port areas also fall out from its effect.

3. Internal "concerns" of the Community

3.1 Harmonized interpretation and implementation of the security measures

New international security standards came into force on 1 July 2004. With the new regulations (Art. 15 provides for their application from the 1 July 2004),the EU ensured not only their obligatory entry into force for its Member States, but brought into force the uniform application of the new security standards immediately.

The Community has also declared that with the new legislation it will try to prevent any unilateral initiatives of thirds states (obvious hint to the US and its Container Security Initiative (CSI)).

The Regulation makes certain provisions for part B of the ISPS Code compulsory. It is not only to enhance port and ship security. The recommendatory character of these provisions could lead to different interpretations and as a consequence to distortions of competition.

As a result port security standards on a Community level would not only positively affect the inter-port competition within the EU, but also the interrelations with third states concerning security matters.

4. Correlation between international and Community law

4.1 Commission inspections

New maritime security legislation has created an inspection regime managed by the European Commission.

The draft of the directive on security issues (Art. 14 (2) – (4)) provided for similar inspections within the range of the Directive. This potential ability of the Commission became the most controversial issue during the development of the Directive and ran into heavy opposition from the majority of Member States. In particular European Sea Ports Organisation (ESPO) was concerned about the number of inspections in European ports including national, EU and US ones.

Besides, the general requirements of the Treaty establishing the European Community for the Commission to ensure the applications of the Treaty provisions and the measures of the institutions are made concrete through further articles of the Treaty. However, none of the foundation Treaties mentions the ability of the Commission to introduce "additional "on site" inspections".

Nevertheless, the Commission held for the introduction of Community inspections as a means to ensure the compliance by Member States and denied the creation of new competences for it. After prolonged debates during the first Reading the Council deleted inspections from the draft proposal, although the Commission had stressed their "fundamental importance" for the Commission. Instead a reference to the joint inspections with ones provided for in Art. 9(4) of Regulation (EC) No 725/2004 was made.

4.2 Primacy of the legislation in case of conflict between the obligations deriving from international and European law

Although it was observed in legal literature that the transformation of rules of international law into secondary Community law happens rarely (Wormuth, 2004, p. 175), in this case the international regulations on maritime security were indeed embodied as an EC Regulation. A theoretical model of a situation when the EU enacts the unilateral measures in this area is not without truth. The provision for checking on conformity of additional international rules with the Community law sounds alarming.

Another problem (for example, here) could be the transfer of certain competence in the international area from the Member States to the Community after the Member States adopted the international convention with the corresponding coverage. In the literature, particular concerns were expressed for the case of the IMO. Namely all the EC Member States are members of the IMO. Art. 80 EC Treaty delivers the competence in the shipping area (including international and external aspect) to the Community.

Thus, there could be a danger of intersection of the obligations of the Member States in respect of the IMO standards and EC requirements in the same area. In spite of the fact that the chances in such situations are good, the answer to this question remains disputable.

In legal writing, one can even find a proposal to delimit international agreements regarding human rights and the maintenance of peace and security (including maritime security?): the importance of those agreements could ground their exclusion from the rule about the Community's authority and their binding effect, which wouldn't depend on when they were adopted.

With the issue of Regulation on maritime security the aspects covered have become matters of exclusive Community competence with all the ensuing consequences. However, the Regulation provide a special procedure for the integration of the new security measures (Art. 10), which takes responsibility at the situation, when the Community does not follow the international standards(!). But one should stress once more the sincere efforts of the Community to avoid any negative consequences. Thus, Art. 10 (4) of the Regulation refers to the necessity of reduction "the risks of conflict between Community maritime legislation and international instruments" by means of cooperation with the aid of the coordination meetings and other means defining a common position or approach.

4.3 EC Membership in the IMO

Relying on the situation mentioned before the idea of the joint appearance of member states on an international level (EC membership in the IMO) suggested itself. The common position of the EC member states, supported by EC secondary legislation, would also give a firm basis for a united policy in frames of the international organization.

5. Commentary of the developments

With the exception of some aspects, the EU legislation implemented new IMO security measures uniformly within its member states.

It is constantly stressed that the issue of security is nothing new for international maritime legislation. The danger of terrorism for navigation was just underestimated before, but some measures against it already existed.

This protective concept was first developed in the Circular 443 of the IMO Maritime Safety Committee "Measures to prevent unlawful acts against passengers and crew on board ships" in 1986. These measures had a recommendatory character.

In the SOLAS, amendments on maritime security the states in fact repeated the already existed measures and made them obligatory. What's the reason? The necessary security measures had already existed and it was only necessary to make them compulsory or the states were unable to develop something new? For example, the threat of potential attacks from small boats, which approached the ships USS Cole in 2000 and Limburg in 2002, has not been addressed by those measures at all.

The new security regime already faced considerable criticism concerning cost, need and effectiveness. It is undeniable that one incident at sea similar to the 11th September could cost much more than all expenditure on preventive measures.

The questions raised are not new. All these fears and concerns have been expressed repeatedly by most states in response to the U.S. security initiatives and lobbying of the maritime security legislation. Nevertheless, the EU has made the decision to act as one unit regarding the matters of maritime security.

It is no secret that the main "victim" and "target" of terrorist activities is the United States of America. Consequently, initiatives in the development of international security legislation were prompted by the USA. To guarantee worldwide compliance with the new security standards the US threatened those who refused with trade restrictions to be imposed. Many view that the US in its role as world police forces others to accept their ideas even those who initially resist eventually give in and agree. The EU has stated that it will not only implement the existing measures but move one step further by enhancing security standards within its territory. Inevitably the question should be raised of whether the EU should be concerned at all.

It is notable that the EU uniformly implements security measures in all its member states before the appointed time. But is it really necessary?

In the absence of any objections from the SOLAS parties (to which all EU Member States belong),the security measures had to come into force by 1 July 2004. Part A of the ISPS Code was compulsory and Part B was of a recommendatory character. The EU made some sections of Part B compulsory also for its member states. In taking this action, the EU also claimed to guarantee the uniform implementation of the measures. However, this argument seems to be unconvincing. First, differences in implementing them, which could theoretically arise, would be the same differences which could arise between all the other Parties to the SOLAS amendments. These differences would allow members to finely tune the measures according to the individual situation of every state, rather than create some economic instability. Second, the differences in interpretation on application have already occurred.

Sometimes the coordinated actions of the EU Member States are really necessary. But were such coordinated actions necessary in this case? The nascent answer seems to be rather negative. This EU legislation closely resembles its "unilateral" tendencies within maritime affairs. The conclusion suggests that the issuance of the maritime security legislation at EU level was conditioned not only by economic concerns and the individual structure of the Community, but was also used to present itself once more in the world of (maritime) politics.

Conclusions

"Like it or not, the European Union is a world power, and should be prepared to share responsibility for security in the world", - declared *Javier Solana* in Thessaloniki in 2003. EC authorities did not fail to use this slogan in rationalising the Commission legislative initiatives , such as the development of a new regulation on ship and port security. It also seems that the EU intends to assert its authority and share responsibility for security on a global level. By the end of 2005,the Commission sent a reasoned opinion to Greece, which was accused of disregarding the exclusive external competence of the Commission in the field of the Common Transport Policy (Art. 71 EC, Art. 10 EC) of the Community. The Commission disagreed with Greece and presented a submission to the IMO concerning the implementation of the recent "security amendments" to the SOLAS convention and the ISPS Code since they have been incorporated into Community law. The EU's next step could be a reference to the Court of Justice. At the same time one should stress that the Contracting Governments to SOLAS are under legal obligation to submit certain information to the IMO...

One can really dispute the legal basis and competence for the independent play of the Community in the world maritime shipping policy. Unfortunately, this is the present situation. It is unlikely that changes will occur in the near future. In fact, the European Commission in close consultation with Member States and the European shipping industry is now preparing to present a legislative proposal which will cover all aspects of security in the intermodal transport chain.

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