

PORT LABOUR IN THE EU

**Labour Market
Qualifications & Training
Health & Safety**

Volume I – The EU Perspective

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EXECUTIVE SUMMARY

of the initial study (2012)

In the seaports of the 22 maritime Member States of the European Union, some 2,200 port operators currently employ around 110,000 port workers or 'dockers' who are engaged in the loading and unloading of ships and a number of ancillary port-based services such as warehousing and logistics.

Traditionally, port work has been regarded as a low-skilled manual profession. In order to cope with the irregularity of port traffic and the ensuing fluctuations in labour demand, the port labour market has in many places been subject to specific laws, regulations and collective agreements. In most cases, these rules entail the reservation of temporary labour for a steadily available complement ('pool') of registered workers who enjoy unemployment benefit or similar pay when there is no work. Even if these arrangements take on very different shapes, in 16 out of 22 Member States (*i.e.* 73 per cent), access to the port labour market is restricted under rules which depart from general labour law.

In a considerable number of ports, the specific employment rules are characterised by restrictions on employment (including priority for registered workers or recognised workforce suppliers, closed shop situations, strict job demarcations, mandatory manning scales, restrictions on temporary agency work and on self-handling) and restrictive working practices. These restrictions impact negatively on trade, competition and/or employment. However, the problems do not occur in every Member State or with the same intensity in all ports. Several States have reformed port labour, while some ports are completely restriction-free. What is more, not every registration or pool system is *per se* inefficient, and not every restriction goes *per se* against EU law. However, in many cases serious doubts about the compatibility of the national or local port labour regime with EU law are warranted in the light of available EU and national case law on internal market and competition rules. In sum, restrictive pool or registration systems can only be justified under EU rules if the general interest and especially the social protection of workers demonstrably require such an exceptional labour market set-up, if the system is non-discriminatory and fully compatible with human rights, if restrictions on access to the market for the provision of workforce are proportionate and do not go beyond what is necessary in order to attain the public interest objective concerned, and, more specifically, if the system is kept free of any additional restrictions on employment, restrictive working practices and abuses. Vague references to social protection or safety objectives which do not explain why applicable restrictions are indeed necessary will not suffice. EU law allows Member States and social partners to choose between a free and open port labour market or an efficient and sustainable registration or pool system which is not affected by restrictive excesses, either in the law or in practice.

Qualification and training arrangements are very diverse across the EU. A growing number of ports and terminals organise sophisticated training programmes but elsewhere workers are still poorly trained. In a large number of Member States, certification systems for port workers are

in place, even if these are not always fully operational. A number of recent best practices are available.

A majority of States have enacted specific laws and regulations on health and safety in port work. Despite signs of considerable improvement in the past decades, scattered data suggest that the port worker continues to have one of the most dangerous occupations in the entire EU economy. However, specific national accident statistics on port labour are only available in a minority of Member States.

Seen from an EU perspective, the port labour market can be described as a market in transition, with a trend towards the application of general labour law rather than specific laws and regulations. Opinions on the need to maintain specific laws and regulations for port labour diverge widely.

For the European policy and law makers, alternative approaches present themselves. Leaving aside the do-nothing scenario, future EU action might include: research, cooperation and PR projects; social dialogue; clarification through soft law; imposing conditions in the context of related policies; infringement procedures; the adoption of a Port Services Directive (or Regulation); and the adoption of a specific Port Labour Directive (or Regulation). The choice between these options is delicate. First of all, the rejection of two earlier proposals for a Port Services Directive is still fresh in the minds of stakeholders. In some Member States, an EU intervention is today eagerly awaited by at least some parties, while in others, there are concerns that EU measures will disturb well-functioning regimes. Even so, EU policy can significantly contribute to the overarching aim of ensuring the sustainability of national and local port labour systems throughout the Union, thereby contributing to the professionalisation of port labour, the employability of workers, better working conditions and maximum performance of EU ports.

In line with the subsidiarity principle, the EU should not strive to introduce a common port labour regime for all EU ports, but doing nothing would not seem a sensible scenario either. In some Member States, EU institutions could usefully intervene in order to restore compliance with fundamental principles on free market access and free competition and, in some cases, also with EU health and safety rules. In addition, minimum EU requirements for those national or local port labour arrangements which depart from general labour law could be formulated (by way of either guidance or legislation), explicating existing primary EU law and promoting best practices. Finally, there is no reason why the social partners could not take the lead in an attempt to generalise and propagate new national qualification, training and certification systems for the entire EU.

In the event that EU policy makers would consider new initiatives, they may find inspiration in some or all of the following possible approaches:

- leave well-functioning port labour systems undisturbed;
- require a fresh and adequate justification for all regulated registration or pool systems and ensure that these systems are free from all unnecessary restrictive and/or abusive rules and practices;

- require market access for temporary work agencies unless a thorough and treaty-compliant justification is effectively submitted;
- where necessary, launch infringement procedures or impose reform in the context of other EU policies before resorting to new legislative initiatives;
- in a first step, leave the elaboration of a certification and qualifications framework as well the implementation of the principle of mutual recognition to the forthcoming social dialogue;
- investigate the possibility of legally obliging Member States to maintain specific OHS statistics on port labour;
- monitor compliance by Member States with existing EU requirements in relation to safety training by temporary work agencies and enforcement of OHS rules by national labour inspectorates.

EXECUTIVE SUMMARY

of the update (2014)

Major developments between January 2013 and September 2014 include:

- in 2013, the European Commission presented a new port policy vision including a proposal for a Regulation on market access to port services and financial transparency of ports which does not deal with labour-related matters however;
- also in 2013, the social partners, with the assistance of the European Commission, launched a formal social dialogue process which will look into, *inter alia*, training, certification, health and safety, but not labour market issues;
- at the international and EU level, the automation of shipping and port operations is attracting increasing attention and can be considered a major issue for the immediate future;
- in the broader context of economic reform and under the supervision of the IMF, the ECB and the European Commission, Greece and Portugal recently introduced substantially modernised laws and regulations on port labour;
- the European Commission has undertaken formal infringement procedures against Spain and Belgium, with the latter Member State standing out as the only one in the EU where port labour never underwent any fundamental reform;
- Member States where further reform measures were introduced or prepared include Bulgaria and France;

- newly acceded Croatia has no *lex specialis* on port labour, which supports an EU-wide trend described in the first version of the present study;
- developments in Member States such as France, Greece, Ireland, Italy, Malta, the Netherlands, Poland, Portugal and the UK suggest that ports where port labour undergoes serious reform and old-style restrictions are removed become more attractive and are successful in attracting additional business and securing employment;
- we noticed a growing awareness among social partners and other stakeholders that labour in ports still needs to be made more attractive and that the image and appeal of port work as an interesting profession for younger generations needs to be strengthened.

Pending the outcome of the political debate on the EU Ports Regulation, the EU Social Dialogue on ports and the infringement proceedings against Spain and Belgium, we have, following consultation with the European Commission, omitted our policy recommendations from the updated version of the study. Depending on future developments, the parties concerned may wish to revisit these initial recommendations later on.

TABLE OF CONTENTS OF VOLUME I

EXECUTIVE SUMMARY OF THE INITIAL STUDY (2012)	2
EXECUTIVE SUMMARY OF THE UPDATE (2014).....	4
1. CONTEXT AND PURPOSE	10
2. SCOPE AND TERMINOLOGY.....	12
2.1. A legal assessment of port labour regimes in the European Union	12
2.2. The notions of ‘port labour’ and ‘dock work’	14
2.3. The notions of ‘qualifications’ and ‘training’	22
2.4. The concept of ‘health and safety’	24
2.5. Aspects not covered	25
3. RESEARCH PROCESS.....	27
3.1. Methodology.....	27
3.2. Acknowledgements	31
3.3. Disclaimer.....	32
4. THE SPECIFICITY OF PORT LABOUR	33
4.1. A contentious issue	33
4.2. The (ir)regularity of demand for labour	34
4.3. From corporatism to banalisation	39
4.4. The docker's subculture	47
4.5. From unskilled work to multi-skilling.....	52
4.6. Diverse occupational risk levels	56
5. PORT LABOUR GLOBALLY	57
5.1. Port system	57
5.2. Sources of law	59
5.2.1. Port labour-specific sources	59
5.2.2. General sources	64
5.3. Labour market	66
5.3.1. Historical background.....	66
5.3.2. Regulatory set-up	68
5.3.3. Facts and figures	77
5.4. Qualifications and training.....	81
5.4.1. Historical background.....	81
5.4.2. Regulatory set-up	82
5.4.3. Facts and figures	85
5.5. Health and safety	87
5.5.1. Historical background.....	87
5.5.2. Regulatory set-up	89

5.5.3. Facts and figures	105
5.6. Policy and legal issues	106
5.6.1. Labour market issues	106
5.6.2. Qualification and training issues	129
5.6.3. Health and safety issues	130
5.7. Appraisals and outlook	132
5.8. Developments between January 2013 and September 2014	143
5.9. Synopsis	144
6. PORT LABOUR IN THE EUROPEAN UNION	145
6.1. Port system	145
6.2. Sources of law	146
6.2.1. Port labour-specific sources	146
6.2.2. General sources	146
6.2.3. The inter-relation between EU law and international instruments	149
6.2.4. The inter-relation between EU law and collective agreements	153
6.3. Labour market	159
6.3.1. Historical background	159
6.3.2. Regulatory set-up	169
6.3.3. Facts and figures	208
6.4. Qualifications and training	211
6.4.1. Regulatory set-up	211
6.4.2. Facts and figures	213
6.5. Health and safety	217
6.5.1. Regulatory set-up	217
6.5.2. Facts and figures	220
6.6. Policy and legal issues	222
6.7. Appraisals and outlook	231
6.8. Developments between January 2013 and September 2014	253
6.9. Synopsis	257
7. SYNOPSIS OF PORT LABOUR IN EU MEMBER STATES AND INDIVIDUAL PORTS	258
7.1. Port system	258
7.2. Sources of law	260
7.3. Labour market	269
7.4. Qualifications and training	280
7.5. Health and safety	286
7.6. Policy and legal issues	289
7.7. Appraisals and outlook	305
7.8. Developments between January 2013 and September 2014	313
7.9. Synopsis of port labour regimes in the EU	314

La vague qui vient mourir sur un musoir, la houle qui pénètre par un chenal, viennent aussi modeler l'âme des hommes qui, chaque jour, vivent là; et elles les regroupent en un milieu à part que le terrien ne comprend jamais totalement, s'il ne renonce pas à la terre, c'est-à-dire s'il ne se tourne pas, et définitivement, vers l'Océan.

(André Vigarié, *Ports de Commerce et Vie Littorale*, Paris, Hachette, 1979, 420)

Più banalmente si potrebbe dire che secondo le imprese terminaliste il modo migliore per essere competitivi, sia non avere concorrenti.

(ISFORT, *Il futuro dei porti e del lavoro portuale*, II, 2012,
http://www.isfort.it/sito/pubblicazioni/Rapporti%20periodici/RP_17_luglio_2012.pdf, 28)

La mer a ses mystères, le droit portuaire aussi !

(Robert Rézenthel, annotation of Cour d'appel de Rouen, 7 June 1990, *Droit maritime français* 1992, (373), 373)

1. CONTEXT AND PURPOSE

1. This study describes the current regime of port labour in the 22 maritime Member States of the European Union, identifies policy and legal issues and formulates recommendations for future action by European decision-makers.

The study focuses on three aspects of the port labour system: (1) the organisation of the labour market; (2) qualifications and training; and (3) health and safety.

2. Since the regime of port labour has an undeniable impact on transportation and trade flows, the subject is of utmost economic importance.

Ports are vital to the economic health and future prosperity of the European Union. The European Commission estimates that Europe's ports handle 90 per cent of EU trade with third countries and 40 per cent of internal market exchanges. Ports handle more than 3.6 billion tonnes of cargo annually, and they service more than 400 million passengers. The Commission assumes that there are about 800,000 enterprises in EU ports which generate, directly and indirectly, approximately 3 million jobs¹.

Ports are central nodes in an increasingly multimodal transport system which ensures the interconnection of maritime, inland waterway, road and rail carriage. Hence, the organisation of port operations impacts on the entire transport chain and, consequently, on the economic systems of the Member States and the Union as a whole. Optimising the performance of the port sector is a key tool to further economic integration within the EU, to boost the competitiveness of the EU and its Member States in the world economy, and to fuel economic growth and job creation.

It is widely accepted that both the day-to-day efficiency and the medium and long-term dynamics of port competition are strongly influenced by the regime of port labour. Depending on the type of terminal, port labour represents between 15 and 75 per cent of the operational terminal costs for terminal operators (15 to 20 per cent at dry bulk terminals; between 40 and 75 per cent at general cargo terminals). Even in the capital intensive container sector this percentage is believed to reach 50 or even 70 per cent², which explains that the labour factor

¹ Communication from the Commission on a European Ports Policy, 18 October 2007, COM(2007) 616 final, 2; compare European Commission, *Green Paper of 10 December 1997 on Sea Ports and Maritime Infrastructure*, 10 December 1997, COM(97) 678 final; Theologitis, D., *Future of EU Ports Policy*, ppt presentation for the Apulian Distinguished Lecture Series, 26 March 2012; see further details *infra*, paras 161, 234 and 239.

² See and compare Barton, H. and Turnbull, P., *Labour Regulation and Economic Performance in the European Port Transport Industry. Full Report of Research Activities and Results*, Cardiff, Cardiff Business School, May 1999, www.esrc.ac.uk, 27; Barton, H. and Turnbull, P., "Labour Regulation and Competitive Performance in the Port Transport Industry: The Changing Fortunes of Three Major European Seaports", *European Journal of Industrial Relations* 2002, Vol. 8, No. 2, (133), 138; Kagan, R., "How much does law matter? Labor law, competition and waterfront labor relations in Rotterdam and U.S. ports", *Law & Society Review* 1990, Vol. 24, No. 1, (35), 53; Notteboom, T.,

also determines, for example, investment decisions on terminal lay-out and equipment³. Our study confirms that labour arrangements can have a tremendous impact on the proper functioning of ports and on trade flows.

The current economic and financial crisis notwithstanding, expectations are that the coming decades will see further growth in trade and port throughput, together with a far-reaching innovation in handling technologies and a growing demand for well-trained and versatile port workers. The port industry will continue to function as one of the European Union's most powerful prosperity and job generators. The findings of our study suggest that labour issues are set to challenge policy makers, public and private port operators, port users and social partners for many years to come.

3. The present study was undertaken in a highly charged political context.

Two earlier proposals by the European Commission for an EU Port Services Directive, launched in 2001 and 2004 and containing measures for the liberalisation of the port labour market, proved highly controversial. They provoked a heated debate and serious industrial unrest across Europe, which culminated in an unseen double rejection of the Directive by the European Parliament⁴. In the course of our research, we noted that these antecedents are still fresh in the memories of all concerned parties.

In 2007, the European Commission adopted a Communication on a European Ports Policy which however announced few concrete initiatives in respect of port labour. In 2011, the White Paper on EU transport policy laid a broad foundation for new initiatives to improve the performance of the European port sector. Today, the Commission is preparing a new vision on a European ports policy and is assessing the need for specific measures on, *inter alia*, port labour. Our study is intended to help the Commission assess the current situation and elaborate well-considered proposals.

From the outset, we were aware of the particularly delicate nature of our task. To an extent, our study rests on – often contradictory – assessments of the current state of port labour in the EU by directly involved parties. We accepted the challenge of reporting in an objective manner on a difficult, contentious and even taboo-ridden, subject, on individual, indeed often subjective or polemic, appraisals of the current situation, and on ongoing discussions and controversies. We can only hope that our inventory of data, policy and legal issues and positions by stakeholders will facilitate a fresh debate on the basis of rational arguments and a better understanding by stakeholders of each other's concerns.

Dock labour and port-related employment in the European seaport system, Brussels / Antwerp, ESPO / ITMMA, 2010, www.porteconomics.eu, 49; Vonck, I. and Notteboom, T., *Economic Analysis of Break Bulk Flows and Activities in Belgian Ports*, Brussels / Antwerp, ING Bank / ITMMA, 2012, 80.

³ See, for example, Chambreuil, A., *Productivité des terminaux à conteneurs*, Compiègne, CETMEF, 2011, http://www.cetmef.developpement-durable.gouv.fr/IMG/pdf/P_11-01_cle288f2a.pdf, 18.

⁴ See *infra*, para 178 *et seq.*

2. SCOPE AND TERMINOLOGY

2.1. A legal assessment of port labour regimes in the European Union

4. The present study analyses specific port labour regimes in the European Union.

As we have explained⁵, it examines three aspects of port labour: (1) the regulation of the labour market; (2) qualifications and training of port workers; and (3) occupational health and safety.

For each of these aspects, the study provides facts and figures, an overview of sources of law, a description of current organisational arrangements, an inventory of the most pressing policy and legal issues, a policy-oriented appraisal and outlook, and a synopsis.

5. The study's main focus was to examine the national port labour systems of the 22 maritime Member States of the European Union: Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom. Chapter 7 of the current Volume I provides a synopsis of these country analyses. The reader will find detailed country chapters in Volume II of the study.

The other EU Member States (Austria, the Czech Republic, Hungary, Luxembourg and Slovakia) have no maritime ports and are not discussed in this study, as labour arrangements in inland ports were beyond the scope of our task. Moreover, very few, if any, specific labour arrangements seem to exist in inland ports⁶. Conversely, in some country chapters we did pay special attention to the handling of barge traffic in maritime ports.

Neither have we paid attention to the organisation of port labour in a number of important European sea ports which are located in countries that have not joined the European Union. These include, for example, Albania, Croatia, Iceland, Norway⁷ and Russia.

The specificity of port labour and the international and European regulatory and policy context of port labour are outlined in introductory chapters (Chapters 4, 5 and 6 respectively).

⁵ See already *supra*, para 1.

⁶ Yet it should be noted that some non-maritime Member States, such as Austria, took an active interest in the debates on the previous proposals for a Port Services Directive.

⁷ Information gathered on port labour in Norway, which is bound by ILO Convention No. 137, suggest that in this country the issues are more or less similar to those in other Scandinavian countries and Finland.

Clarification on the scope and terminology and the conduct of our research will be provided as well (present Chapter and Chapter 3).

Policy-oriented conclusions on persisting problems as well as recommendations for possible action by the European institutions will be formulated at the end of the study (Chapter 8).

6. The present study is primarily a legal study. Its main purpose is to assess the current port labour regime from a legal perspective, to identify policy and legal issues and to suggest concrete policy and legal measures which may help solve these problems and improve the overall performance of the European port system, taking due account of the interests of employers and workers.

This is not to say that the study is purely legal. First of all, we used as background material a number of historical, economic and social studies published by authorities in these fields. In addition, we collected, with the help of numerous organisations and individuals, a considerable amount of non-legal data, including statistics and policy statements. Finally, we were aware from the outset that facts do not always conform to what the law requires or presupposes. As our research proceeded, our suspicions were borne out, and thus we identified this discrepancy between law and reality as a separate policy issue.

7. Last but not least, the study focuses on the existence of *specific* port labour arrangements, *i.e.* laws, regulations, agreements and usages which specifically deal with port labour and depart from general labour law.

This also explains the substantial differences in length of the individual country chapters in Volume II. In an increasing number of EU Member States, specific port labour arrangements are being abolished. As a result, port labour gradually becomes subject to the rules of general labour law. To the extent that no specific rules remain in place, we have briefly outlined the main sources of general labour law as applied in the port sector. A substantive description of employment conditions under the general labour law of the 22 Member States of course exceeded our mission.

2.2. The notions of ‘port labour’ and ‘dock work’

8. The study deals with the employment of port workers or 'dockers', *i.e.* predominantly manual workers engaged in the loading and unloading of ships in ports, ancillary services such as the checking, storage and intra-port transportation of cargo, and operations at passenger terminals.

9. In our study, we use the words 'port worker' and 'docker' interchangeably, although in most cases we preferred the former, more neutral and general term. Some experts indeed argue that, today, the word docker, which came into use with the opening of closed dock and warehouse areas in the first half of the 19th century⁸, has a pejorative or at least outmoded ring and that it should be replaced by port worker as the latter term acknowledges that the profession now requires special skills and qualifications and relies on the use of sophisticated technology⁹. However, workers' organisations continue to call their members dockers, and the famous anti-liberalisation slogan used by European unions was 'Proud to be a Docker'. In some Member States, including France, the English word 'docker' still serves as the official, legal title of the port worker. But other lawmakers expressed a preference for the word 'port worker' or 'port labourer'¹⁰.

10. The meaning of the word 'stevedore' is somewhat ambiguous, as it may refer, in a general sense, to any port worker¹¹; more narrowly, to a general port labourer working on the ship (or a 'holdsman', as opposed to the 'docker' or 'port worker' *sensu stricto* who works on shore)¹²; or,

⁸ See Barzman, J., "Gens des quais", in X., *Sur les quais. Ports, docks et dockers de Boudin à Marquet*, Paris / Le Havre / Bordeaux, Somogy / Musée Malraux / Musée des Beaux-Arts, 2008, (47), 48. Remarkably, the word 'docker' is also used in ports which have no system of (wet) docks in the strict engineering sense of the word, such as open tidal harbours.

⁹ Compare, on the use of 'dokwerker' in Flanders, Brugge, J., "*Die niet zuipt of koopt, wordt niet gerekend om te werken.*" *Het sociaal overleg met betrekking tot de Gentse haven tijdens het interbellum (1919-1939)*, Masters thesis, Ghent University, 2008-2009, http://lib.ugent.be/fulltxt/RUG01/001/361/037/RUG01-001361037_2010_0001_AC.pdf, 56; on the avoidance of the word docker in French, Galbrun, X., *La manutention portuaire en 2001. Rapport annuel d'activités*, Paris, UNIM, http://www.unim.org/cgi-bin/client/modele.pl?shop=unim&modele=agenda&cat=188&manuel_menu=gamme_188&manuel_par=33, 21; and, on the replacement of the 'dockers' by 'port operative workers' or 'cargo handlers' after the repeal of the UK Dock Labour Scheme, Turnbull, P.J., "The docks after deregulation", *Maritime Policy and Management* 1991, Vol. 18, No. 1, (15), 19.

¹⁰ 'Port worker' is used, for example, in current Maltese port labour legislation; 'port labourer' was the official term in the (repealed) Maltese Ordinance No. XXI of 1939 (see *infra*, para 1321 *et seq.*)

¹¹ In this sense, see <http://www.thefreedictionary.com/stevedore>. In Spain, port workers are still called 'estibador'.

¹² For example, the (repealed) Maltese Ordinance No. XXI of 1939 (Section 2) distinguished as follows:

"Stevedore" means a person employed in the handling of cargo between the hold and rail of a ship in the process of loading and unloading of this cargo.

"Port labourer" means a person employed in the handling of cargo between the rail of the ship and any lighter, vessel, wharf or any place on land in the process of loading and unloading of this cargo.

conversely, to the employer of such workers. In Ireland, for example, the word (master) stevedore specifically refers to the 19th century middlemen who leased the dockers' labour to the ship owners¹³, and in the United States a 'stevedore' acts an employer of 'longshoremen'¹⁴. To get around this source of confusion, we only used the terms stevedoring company or operator and avoided the word stevedore.

11. A generally accepted definition of the term 'port labour' does not exist.

Port labour can be considered narrowly as the loading or unloading of ships, or broadly, as all forms of cargo handling in a port zone, including the stuffing and stripping of containers, the loading and unloading of inland waterway vessels, lorries and railway wagons, the storage and semi-industrial processing of goods in warehouses and logistics areas, etc.¹⁵ In ports where port labour is governed by specific regulations or agreements, employee organisations traditionally try to extend the notion as widely as possible, while employers' organisations aim to restrict it.

12. The term port worker is generally used to designate blue collar workers engaged in the handling of goods at docks, quays, wharves or warehouses in ports. It is a generic term¹⁶ which includes general workers (operatives) working on board ship as well as those on land, and specialised workers such as operators (or drivers) of various types of machinery such as forklifts, straddle carriers, reach stackers, bulldozers, bobcats, conveyor belts and cranes (also called winchmen); signalmen (hatchmen, hatch tenders or deck hands); lashers; tallymen (also called tally clerks or checkers); (gang) foremen, chief tallymen and chief foremen (supervisors). Signalmen are stationed at the hatchway opening, give the necessary signals to the winchman and supervise the raising and lowering of slingloads. Lashers are men who lash, unlash, secure and release cargoes stowed in the ship's hold or on deck. Checkers or tallymen

Compare also Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 6, where "much confusion" with the terminology is noted.

¹³ O'Carroll, A., "'Every ship is a different factory'. Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", http://www.academia.edu/226953/Every_ship_is_a_different_factory_Work_Organisation_Technology_Community_and_Change_The_Story_of_the_Dublin_Docker, 3.

¹⁴ Kagan, R., "How much does law matter? Labor law, competition and waterfront labor relations in Rotterdam and U.S. ports", *Law & Society Review* 1990, Vol. 24, No. 1, (35), 38, footnote 3.

¹⁵ See and compare, *inter alia*, Dombois, R. and Wohlleben, H., "The negotiated change of work and industrial relations in German seaports - The Case of Bremen" in Dombois, R. and Heseler, H. (eds), *Seaports in the context of globalization and privatization*, Bremen, Kooperation Universität-Arbeiterkammer, 2000, (45), 49; Helle, H.J., *Die unständig beschäftigten Hafentarbeiter in den nordwesteuropäischen Häfen*, Stuttgart, Gustav Fischer Verlag, 1960, 5 and 9; Verhoeven, P., "Dock labour and the European Union", in Dempster, J., *The rise and fall of the dock labour scheme*, London, Biteback, 2010, (129), 130.

¹⁶ See Green, A., "The work process", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (560), 570, referring to Taplin.

keep a tally of quantity or weight of goods shipped or received, and check for apparent damage and shortages. Foremen are responsible for the management and supervision of a gang of workers and may have authority to hire the required number of casual workers for a day or a shift. Typically, one gang of workers is used per ship's hatch or hold, or per shoreside crane.

Cargo handling companies also employ office staff involved in administration, sales, marketing, information technology, legal matters *etc.*, but these white collar employees are considered neither 'dockers', nor 'port workers' for the purposes of this study.

On the other hand, it should also be noted that, in some ports, crane and other equipment operators are legally treated as white collar workers, and that the typical docker's professions of tallyman, chief tallyman, chief foreman entail partly or mainly office work, so that the distinction between blue and white collar is often blurred. Regardless of their blue or white collar status under national or local legal arrangements, we have treated all these 'classical' categories of dockers as port workers.

In many ports, cargo handlers also employ mechanics (also called maintenance or repair men, including electricians) who are responsible for keeping equipment in running condition; these workers often have the same or similar status as port workers proper. Where relevant, we have included them in our study.

Figure 1. A kaleidoscope of port labour jobs in Europe today



General cargo work

(photo by Hafen Hamburg Marketing /
H.J. Hettchen)



General cargo work

(photo by Karine Le Petit /
www.metiers-portuaires.fr)



General cargo work

(photo by Cargo Service A/S, www.aask.dk)



General cargo work

(photo by www.docksete.fr)



General cargo work

(photo by Danny Cornelissen)



General cargo work

(photo by Hafen Hamburg Marketing /



Ro-ro work

(photo by www.port.cci-brest.fr)

H.J. Hettchen)



Ro-ro work

(photo by Copenhagen Malmö Port)



Container work

(photo by www.portodesetubal.pt)



Container work

(photo by www.portofgothenburg.com)



Container work

(photo by Copenhagen Malmö Port)



Container work

(photo by Danny Cornelissen)



Container work

(photo by APMT)



Liquid bulk work

(photo by Hafen Hamburg Marketing)



Dry bulk work

*(photo by Karine Le Petit /
www.metiers-portuaires.fr)*



Dry bulk work

(photo by Hafen Hamburg Marketing)



Cruise terminal work

*(photo by Karine Le Petit /
www.metiers-portuaires.fr)*



Logistics work

(photo by Michael Van Giel)

13. Since port labour is by definition carried out within a 'port' or a 'port area', the definition of port labour has an important geographical dimension to it.

Where port labour is governed by specific laws or collective agreements, it is well-nigh inevitable to expressly determine the exact geographical scope of such instruments. The delimitation may be left vague (e.g. the 'port' and its 'vicinity', or the 'maritime public domain') or it may be elaborated in detail (e.g. based on a detailed map or a predefined distance from the waterfront); it may be defined either narrowly as the quayside, the waterfront, or, in ISPS terms, the 'ship/shore interface', or widely, so as to include adjacent warehousing and logistics areas, inland container depots ('dry ports') and industrial plants behind the waterfront.

14. Similarly, some specific port labour regimes distinguish between different types of cargo and exclude some categories from their scope, for example own-account (industrial) cargo, liquid bulk or fish.

15. Yet another issue is whether specific port labour regimes apply to all ports in a given country, or only to important commercial ports or ports attaining a certain cargo volume threshold.

16. From the outset, readers should also be aware that port workers are employed by a variety of employers. Increasingly, port services are provided by private terminal operators holding a lease, concession, licence or authorisation issued by a landlord port authority. In many but not all ports, several terminal operators are in competition with one another. Some workers are employed by public port authorities (especially, crane drivers) or by companies controlled by a state-owned entity. Yet other port workers are self-employed and hired by ship owners or their agents; these workers may at the same time act as employers of other workers.

Port workers include not only permanent workers employed under an employment contract for an indefinite or a definite term fully governed by general labour law, but also permanent workers registered as port workers under specific port labour arrangements. Many ports rely on registered pool workers who are hired on a daily basis (or for a shift or a half shift) and who are entitled to an unemployment benefit while they are not working. Finally, many ports use various categories of more or less irregularly employed supplementary workers (occasional or auxiliary workers, including, in some ports, seasonal workers and/or temporary agency or interim workers).

17. The exact meaning of the notion of 'dock work' was repeatedly discussed at the level of the International Labour Organization (ILO), but the invariable outcome was that the term can only be defined according to national law or practice, and this compromise solution has been enshrined in, for example, ILO Dock Work Convention No. 137¹⁷. Currently, there does not exist a generally applicable definition of the notion of 'port labour' at EU level either.

18. In our study, we started from a broad definition of port labour as set out above¹⁸, and saw no reason to exclude any types of port labour *a priori*. The country chapters in Volume II will indicate which definitions of port labour, if any, prevail in the individual EU Member States.

¹⁷ See *infra*, para 72.

¹⁸ See *supra*, para 8 *et seq.*

2.3. The notions of ‘qualifications’ and ‘training’

19. The second component of the regime of port labour in the EU which we discuss in the present study is qualifications and training of port workers.

20. First of all, our study investigates which EU port labour regimes are based on a sector-specific regulation of professional qualifications; in other words, whether access to the labour market is reserved for those workers who possess specific qualifications attested by evidence of formal qualifications (especially, diplomas or certificates), an attestation of competence and/or professional experience¹⁹. The ILO defines the notion of qualifications as "a formal expression of the vocational or professional abilities of a worker which is recognized at international, national or sectoral levels"²⁰.

As we will see, qualifications systems in the port sector may rest on official laws and regulations, collective agreements or self-regulation by the sector.

21. As today's port labour must be regarded as skilled labour, the implication is that port workers need training²¹. In the port labour market, qualification and training systems are of course very closely connected.

There is a plethora of definitions which have been used to describe training and related concepts²². Meletiou defines training in the context of port labour as "a process in which learning opportunities and experiences are designed and implemented, which aim [at] developing the knowledge, skills and attitudes related to the present job of the learner"²³. With regard to port labour, training is first of all necessary to achieve improvements in work performance, particularly when ports invest in specialised machinery, introduce new work

¹⁹ Compare the definition of "professional qualifications" in Art. 3(1)(b) of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ 30 September 2005, L 255/22) and the further definitions mentioned *infra*, para 281, footnote.

²⁰ See art. 2(c) of the Human Resources Development Recommendation, 2004 (R195).

²¹ See *infra*, para 44 *et seq.*

²² See Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", 22nd International Port Conference "Human Resources and Sea Ports Performance", 12-14 March 2006, Alexandria, www.ppiaf.org, 3.

²³ Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", 22nd International Port Conference "Human Resources and Sea Ports Performance", 12-14 March 2006, Alexandria, www.ppiaf.org, 4.

procedures or redesign the workplace²⁴. Training is one of the key variables determining physical productivity of ports²⁵.

In view of the dangerous nature of port work, training is also provided in order to increase occupational safety. Various international and European legal instruments oblige employers to provide specific health and safety training.

22. Port training institutes all over the world and, increasingly, individual port operators, offer specific job-related training both at management (e.g. port operations management, port equipment planning, etc.) and at operational or technical level (e.g. operation of cranes, equipment maintenance, lashing, etc.). Some of these programmes are organised routinely, while other courses are tailor-made²⁶.

Training of port workers comes in different forms. A basic distinction must be made between learning on-the-job and formal instruction or training. The latter may comprise various schemes such as training between school and work, (induction) courses for new entrants, courses for the established docker, training in safety and first aid and the retraining of injured and redundant dockers. Another important distinction can be made between specialist courses for certain categories of port workers and training aimed at the availability of multi-skilled or all-round port workers²⁷.

Finally, workers may make use of formalised training opportunities on either a voluntary or compulsory basis. In our study, we have tried to indicate which qualification and training requirements are imposed by laws, regulations or collective agreements.

²⁴ Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", *22nd International Port Conference "Human Resources and Sea Ports Performance"*, 12-14 March 2006, Alexandria, www.ppijaf.org, 4.

²⁵ Barton, H. and Turnbull, P., "Labour Regulation and Competitive Performance in the Port Transport Industry: The Changing Fortunes of Three Major European Seaports", *European Journal of Industrial Relations* 2002, Vol. 8, No. 2, (133), 138; see also Notteboom, T. *Dock labour and port-related employment in the European seaport system. Key factors to port competitiveness and reform*, Report prepared for European Sea Ports Organisation, 2010, 46 and 57.

²⁶ Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", *22nd International Port Conference "Human Resources and Sea Ports Performance"*, 12-14 March 2006, Alexandria, www.ppijaf.org, 4.

²⁷ For an overview, see Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 81 *et seq.*

2.4. The concept of ‘health and safety’

23. A third aspect of port labour regimes analysed in the present study relates to the health and safety of port workers. Here too, available specific arrangements find their origin in the operational characteristics of port labour, which continues to involve, *inter alia*, dangerous manual work in difficultly accessible workplaces, intense interaction with heavy machinery, hazardous cargoes and dense traffic and movement.

As the authors of ILO's latest Code of Practice on Safety and Health in Ports note, technical developments, including the introduction of increasingly sophisticated cargo handling equipment have greatly increased capacity and reach. While many of these changes in cargo handling methods have resulted in significant improvements of the safety of port workers, some changes have introduced new hazards and port work is still regarded as an occupation with very high accident rates²⁸.

24. The present study provides an overview of specific health and safety laws and regulations which pertain to port labour in the EU Member States. Where health and safety is governed by general rules, we limited ourselves to briefly outlining the applicable instruments. Although we give some randomly selected examples, we have not attempted to inventory and analyse internal health and safety regulations of individual terminal operators.

In addition, we attempted to collect facts and figures on occupational accidents and diseases in ports. In some rare cases, we were able to compare the health and safety record of ports with that of other industries such as construction or that of the economy as a whole.

²⁸ See X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, 1.

2.5. Aspects not covered

25. As the study focuses on the three aspects of EU port labour systems outlined above, it does not go into matters such as:

- port labour in inland ports, *i.e.* ports which exclusively accommodate inland waterway vessels²⁹;
- the organisation of labour engaged in other port services, such as technical-nautical services (even if, in some rare ports, the same workers are involved in cargo handling and mooring services);
- the status, structure and powers of port authorities (including representation of workers in boards of port authorities) and of port operators;
- rules on access to the port services market;
- labour management relations (including rules and practices of social dialogue and collective bargaining, settlement of industrial disputes, strike propensity, *etc.*);
- conditions of work (remuneration, wage supplements, working and rest times, shift systems, holidays, social security, welfare);
- general labour law, except to the extent necessary to understand the port labour regime³⁰;
- the financial regime of port labour pools;
- state aid aspects of port labour regimes and port labour reform schemes;
- port labour-related aspects of port privatisation schemes;
- the protection of workers in the event of a transfer of undertaking³¹;
- procedural issues relating to infringements, complaints, enforcement, and the competences of EU and national authorities in this respect;
- demographical trends and the general situation on the labour market;
- economic and social aspects of port labour regimes such as the productivity and cost of port labour, the relation between labour cost and stevedoring tariffs, competition in and among ports and port ranges, the impact of the cost of port labour on the overall cost of products and on the economy as a whole, and overall job desirability for workers;
- a comparison with labour markets in other, more or less similar, sectors;
- a global benchmark.

It goes without saying that all these issues are of considerable importance. In a number of country chapters in Volume II we could not avoid marginally touching upon them.

²⁹ See already *supra*, para 5.

³⁰ See *supra*, para 7.

³¹ See, however, the general reference to Council Directive 2001/23/EC *infra*, para 165. Even if our questionnaire contained a general question on this issue, we decided not to investigate it further as, at the time of writing, the matter was the subject of a separate policy debate on the position of workers upon termination of port concessions. In a few country chapters, we added some information however. It is also worth mentioning that the 2013 Proposal for a Port Services Directive mentions that employees' rights should be safeguarded and that the Member States should have the option to further strengthen these rights in the event of a transfer of undertakings and the relevant staff working for the old undertaking. However, the proposal does not apply to port labour.

To outline the broader context of the study, we first of all added some data on port throughput in the individual Member States. As we also provide figures on the number of port workers in each country, the temptation might be great to calculate national ratios of productivity per port worker. Upon closer scrutiny, any useful assessment of labour productivity should be based on substantially more factual detail and much more sophisticated formulae. For example, a large part of total port throughput, especially wet bulk and industrial cargo, is commonly not handled by port workers but by staff of refineries, chemical plants or manufacturing companies. On the other hand, in many ports port workers are also used to load and unload barges, lorries and trains, so non-maritime cargo volumes should be taken into consideration as well. Port workers are often also deployed at warehouses and logistics areas, where volumes handled are not reflected in maritime throughput figures at all. A further difficulty is that data on the number of port workers are in most cases exclusive of occasional workers. Finally, labour productivity is of course highly influenced by other, external, factors such as available port equipment, terminal lay-out and procedures, and even climate. Any realistic productivity estimate should be based on additional data such as, for example, working hours performed, the scope of the port labour regime vis-à-vis volumes handled, technical characteristics of the ports, *etc.*

In order to offer readers insight into the relationship between employers, workers and their respective organisations, we had to include, in several country chapters, information on access to the cargo handling market in ports, since the port labour system is often inextricably bound up with the regulatory set-up of the services market (in some cases with a monopoly of stevedoring companies or with an ongoing scheme for the privatisation of formerly state-owned ports).

We also had to cross the boundaries of the study where stakeholders complained that the inadequacy of the port labour regime materialises in an unacceptable strike frequency, a lack of elementary social protection or low job quality.

Yet other issues would appear to deserve further attention, such as the need for many ports to rejuvenate their workforce, which has immediate consequences for the organisation of the labour market. In our policy recommendations, we shall identify a number of pressing issues which may inspire useful additional research activities in the future³².

³² See *infra*, para 355.

3. RESEARCH PROCESS

3.1. Methodology

26. Our research followed a step-by-step approach including an in-depth desk study, a questionnaire, numerous interviews with stakeholders and experts and a number of on-site visits.

Data obtained through the questionnaire are valid for the beginning of 2012, but we tried to update them in the course of that year. Unless otherwise specified, references to legal instruments are to the currently applicable version (in other words, to the initial text as modified).

Details on our methodology and sources are set out in the following annexes to the present study:

- Annex A: Selected bibliography;
- Annex B: Inventory of conventions, laws, regulations and collective agreements;
- Annex C: Questionnaire form;
- Annex D: Methodology of questionnaire and overview of individual responses.

Quotations from existing English sources and translations were left unedited.

27. The partners in the Portius Port Labour Consortium, Prof Dr Stefano Zunarelli and Dr Elena Orrù of the law firm Zunarelli e Associati and Global Port Training, contributed to the review of the Italian country chapter and a preliminary high-level internet screening of available port training programmes respectively.

27A. Following the publication of the first version of the present study, the authors received from ETF a 27-page paper in which Professor Peter Turnbull severely criticises our methodology. Below we quote the Executive Summary of this paper in full and insert our reaction to these allegations under the heading 'Author's reaction'.

*- The ETF has maintained a consistent position on port labour arrangements, namely that **the way labour is organised in European ports is not an issue for Europe.***

Author's reaction

This observation should be addressed to the European Commission, who commissioned the present study. In any case, the author of the study has

correctly and objectively reported on ETF's (and IDC's) well-known position on the absence of any need for EU initiatives dealing with port labour (see, for example, paragraphs 266, 271, 273, 278, 287 and 290).

- *The ETF expressed **unease about the study** of port labour in Europe when the Commission first announced the contract to tender, fearing that the concerns of port workers and the input of trade unions, at both the national and international levels, might be overlooked. This has proven to be the case.*

Author's reaction

The study certainly not 'overlooked' the concerns of port workers and the input of trade unions. All input received from the workers' organisations was duly integrated into the study in a comprehensive and perfectly neutral manner (see the country chapters), and in addition the author actively contacted trade union representatives to obtain more data and opinions. However, a (very limited) number of trade union representatives refused to cooperate from the outset for reasons beyond the author's control and responsibility.

- *PORTIUS has **redefined the terms of reference of the study** and focused on 'restrictions on employment' and 'restrictive work practices' instead of a more neutral and objective consideration of 'port labour regulations'.*

Author's reaction

The scope of the study was not limited to a mere description of applicable legal regulations. The terms of reference expressly required the author to formulate policy recommendations. It is methodologically impossible to prepare substantiated policy recommendations without first identifying and analysing problems that must be resolved.

- *The study of Port Labour in Europe **displays bias throughout** in respect of language and more importantly the selective collection and presentation of data, which gives too much weight to the (unsubstantiated) opinions of port employers and users whilst denigrating various union sources.*

Author's reaction

The study displays no bias at all. Under paragraphs 26-30, we have clearly set out our methodology and indicated that we would report in an objective manner on – often conflicting – opinions of stakeholders (including employers, workers, port authorities, port users and state officials) on current port labour arrangements and practices. We treated all parties and opinions equally and bear no responsibility for the sometimes very outspoken views put forward by stakeholders. We also indicated that several interviewees expressed concern that their views would provoke strong reactions if not sanctions from the other side (for example, many employers demanded anonymity and/or confidentiality while others even refused interviews for fear of disruptions of their business

activities). This only confirms that in certain ports the subject of port labour remains taboo-ridden. The author believes that ultimately the taboo-breaking information contained in his study can and should be conducive to a better understanding by the social partners and other interested parties of each other's concerns and to targeted policy initiatives which serve the public interest.

*- Instead of an objective review of the legal position in EU ports, the PORTIUS report appears to be more concerned with **providing ammunition** to port users, employers or indeed any individual who might want to challenge or 'test' port labour arrangements against the freedoms of the Treaty. As such, Port Labour in Europe represents **incitement to social conflict** rather than inducement to social dialogue.*

Author's reaction

We do not agree for the reasons explained in the previous point.

*- The ETF shares the concerns recently expressed by the ETUC that EU policy-making now accords supremacy to economic freedoms over fundamental social rights. This imbalance is epitomised in the PORTIUS report, which seeks to establish a **purely market-based mode of governance** for the ports sector to the detriment of social conditions.*

Author's reaction

Once again we cannot agree. The academic institution Portius does not seek to promote any particular 'mode of governance' at all. To the extent that the criticism refers to the treatment in the study of the fundamental freedoms enshrined in the Treaty on the Functioning of the European Union, the author would like to underscore that this treaty is a major source of existing European Union law and that it was his task as a lawyer to explain its impact on the sector of port labour.

27B. The present updated version of the study comprises the following new elements:

- as far as the necessary information could be obtained from publicly accessible sources or with the assistance of third parties, all statistical data as well as the descriptions of the applicable legal framework were updated;
- we reported on major legal and policy-relevant developments in additional paragraphs which we inserted before the 'synopsis' in each of the international, EU and national chapters;
- subsequently, the synoptical information was updated as well;
- a new chapter on port labour Croatia was added;

- the main trends were summarised in an additional Executive Summary for the updated version, inserted immediately after the initial Executive Summary.

Pending the outcome of the political debate on the EU Ports Regulation, the EU Social Dialogue on ports and the infringement proceedings against Spain and Belgium, we have, following consultation with the European Commission, omitted our policy recommendations from the updated version of the study. Depending on future developments, the parties concerned may wish to revisit these initial recommendations later on.

3.2. Acknowledgements

28. First of all, we sincerely thank the countless authorities, professional organisations, companies, trade unions and experts who contributed massively to our work.

Because several interviewees and experts asked us not to disclose their names, we decided not to include a list of contributors, as such information might invite readers to proceed to an identification of the persons we spoke to and as such an exercise would inevitably give rise to misunderstandings. However, we can assure readers that all anonymous – even if often highly subjective – statements are based on detailed notes taken during interviews or other verified information.

We also extend our gratitude to the European Commission, in particular to Dimitrios Theologitis, Bernardo Urrutia, Roberto Ferravante and Pieter De Meyer of the Unit Ports & Inland Navigation of the Mobility Network Directorate, for a pleasant and always constructive cooperation. Finally, special thanks go to my colleagues at Eric Van Hooydonk Lawyers (especially Wim Naudts, Björn Cloots and Joris Van Raemdonck), the partners in the consortium and, last but not least, Mia, for offloading shiploads of patience and love at my all too congested little legal wharf along the Scheldt.

3.3. Disclaimer

29. In all modesty, we can say that this study is quite ambitious, since – at least to our knowledge – a comprehensive legal analysis of port labour regimes in the European Union has never been undertaken before. The assistance of countless organisations and individuals notwithstanding, we encountered serious difficulties in accessing data. In addition, a large number of national sources were not available in any official or even unofficial translation, and a few stakeholders were a bit reluctant to cooperate, for fear of lending support to any future liberalisation proposals by the European Commission, or did not respond to requests for information. For want of better sources, we often had to rely on non-academic sources, including numerous media reports and even informal internet sources. Finally, any study of foreign legal systems inevitably bears the risk of misinterpretations. Even if we sought assistance from local experts, we cannot guarantee that all information is perfectly accurate or complete; errors will almost certainly have crept in, for which we apologise.

30. As its perspective is mainly legal, the study focuses on the regulatory set-up of the port labour market and on a number of critical issues which would appear to deserve further legal attention, especially possible incompatibilities with EU law. We beg the reader to understand that this emphasis on restrictions, inefficiencies, substandard working conditions, *etc.* does not stem from any personal prejudice against employers or workers or their organisations, but is only due to the Terms of Reference of the study which obliged us to identify policy issues and to propose recommendations on how to solve these issues. We would like to stress that we always had a great sympathy for the world of stevedores and dockers and that, through our research, and all the methodological difficulties notwithstanding, our affinity with the world of ports has only become stronger.

Furthermore, as our inventory of policy and legal problems is to an extent based on subjective, sometimes widely diverging, opinions of stakeholders, neither the authors of the study, nor the European Commission should be held responsible for reporting these opinions. Neither are the authors intending to express any personal judgment on the legality of given situations. Their intention is to provide competent authorities, in particular the European Commission, with factual data, information on difficulties and complications, an insight into the positions of stakeholders, and a menu of legal tools which will allow them to further investigate critical issues and decide on appropriate measures to improve the current situation. To that end, we have also outlined a number of possible policy options, without stating a personal preference for any particular solution.

4. THE SPECIFICITY OF PORT LABOUR

4.1. A contentious issue

31. As we have explained³³, the focus of this study is on *leges speciales* (including agreements and unwritten usages) governing port labour. As our findings suggest a slow but certain trend towards 'generalisation' or 'banalisation' of port labour regimes – *i.e.*, a replacement of sector-specific rules by general labour law conditions – the question arises which peculiarities continue to characterise the profession today. Replies to our questionnaire and interviews revealed strongly opposing views on the specificity of port labour today and on the need to maintain specific legal and organisational arrangements. Moreover, as many *leges speciales* on port labour entail far-reaching restrictions on fundamental socio-economic freedoms guaranteed under both international and EU law, they can only be deemed compatible with these higher rules of law if a special justification is available. For these reasons, assessing the peculiarities of port labour is of capital importance.

³³ See *supra*, para 7.

4.2. The (ir)regularity of demand for labour

32. The fundamental problem underlying the organisation of the labour market in ports, and indeed all special laws and regulations on port labour, is the irregular demand for workers, which is itself a direct result of the intermittent and to an extent unpredictable arrival of ships and cargoes in ports. Demands for labour are affected by daily, weekly, seasonal and cyclical variations and moreover fluctuate with each ship and type of cargo.

As John Dempster explains,

Port operators say that the biggest problem with running a port is that ships behave like buses – they come in bunches. Even modern round-the-world container ships which seek to operate to a timetable are apt to be delayed by bad weather, mechanical problems, labour problems and so on. Many vessels do not operate to a timetable – they travel around from port to port as the business takes them. But once a ship enters a port there is great pressure to have it unloaded and loaded quickly. The shipowner and the cargo owner have capital tied up in the ship and its cargo. They want the cargo dispatched as soon as possible, and the ship on its way to earn more revenue. Thus, a traditional port operator needs a flexible supply of labour to load and unload the ships. One day he may need every man he can get hold of; the next day he needs hardly anyone³⁴.

In addition, traffic flows in ports often depend on the time of harvest of agricultural products such as grain, cotton and fruit. Further irregularities may result from nautical constraints such as draught limitations, tidal, ice and weather conditions, congestion at locks and bridges, voluntary or forced deviations, technical failures, nautical incidents, political and industrial conflicts, fluctuations of trade in commodities, etc. Inevitably, any delay encountered in one place will impact on planning in the next port of call. Developments since the outbreak of the current economic crisis illustrate that general economic slumps and upturns may impose sudden, quite substantial, adjustments of the workforce as well.

Exactly half a century ago, the Rochdale report on UK ports policy argued that the intermittent nature of port work can be overstressed; some degree of irregularity there will always be, but most service industries are subject to fluctuation in the level of demand and yet have found reasonably successful ways of contending with it while maintaining a more or less regular labour force³⁵. Today, the demand for port workers has in many ports and terminals become relatively stable and programmable as a result of containerisation, improved means of communication and ICT-supported planning processes. For this reason, many port companies are now able to offer normal, in particular permanent, employment conditions to a majority if not all of their workers. But in tramp ports and ports handling only small volumes, work remains largely irregular. Also elsewhere, peaks in demand are inevitable due to the uncertainties

³⁴ Dempster, J., *The rise and fall of the Dock Labour Scheme*, London, Biteback Publishing, 2010, 5.

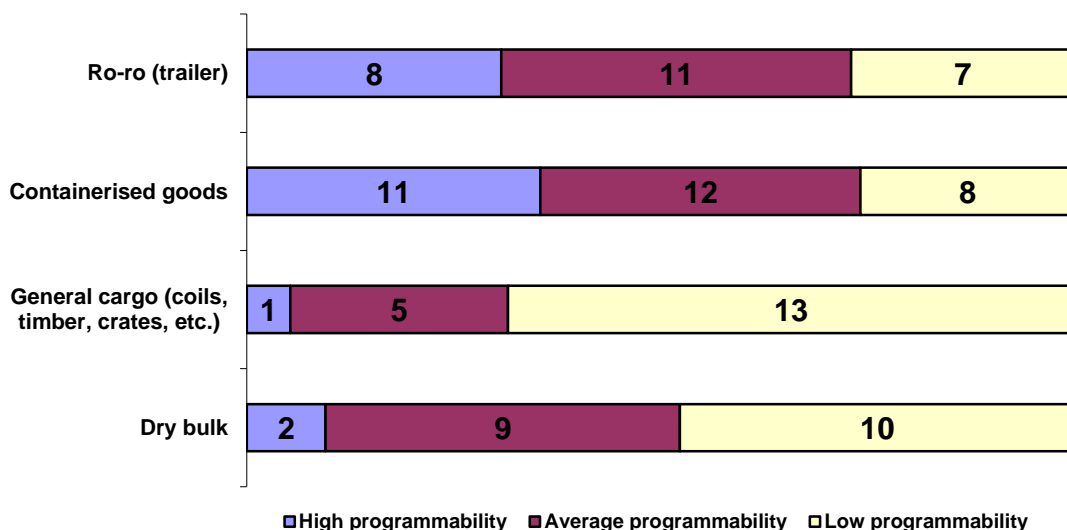
³⁵ Ministry of Transport, *Report of the Committee of Inquiry into the Major Ports of Great Britain*, London, Her Majesty's Stationery Office, 1962, 129, para 356.

mentioned above, which can never be ruled out entirely. What is more, in some trades irregularity seems to be on the rise again: at container terminals, the big 18,000 TEU box ships make less frequent calls but require an ever stronger concentrated deployment of large numbers of port workers, and there are no signs that the trend towards increasing ship sizes is about to end.

To address this eternal irregularity problem of port operators, overtime and extra shifts offer only a partial solution. In a large majority of ports, the core workforce must still be supplemented by casual workers who may be port pool workers, workers temporarily hired out by other cargo handling companies, workers supplied by subcontractors, temporary agency workers, or occasional workers (such as taxi or bus drivers, farmers or students). To respond to the more cyclical changes, temporary lay-offs and reductions of working time may also be considered.

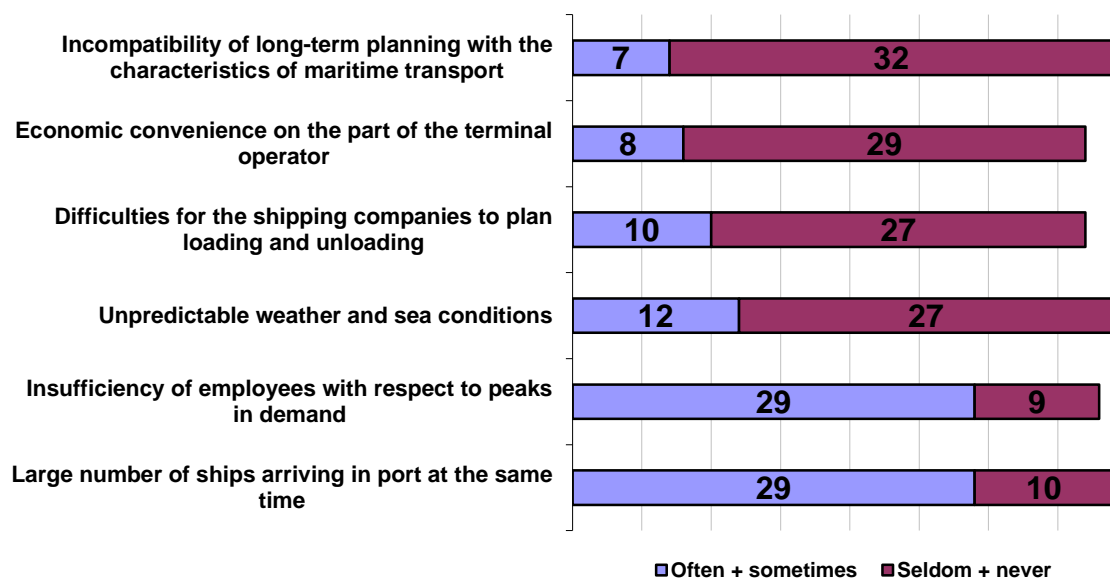
An interesting illustration of the present-day relevance of the irregularity issues is provided by the following data on the programmability of the demand for port labour and the reasons for the use of temporary workers in Italian ports in 2012, collected by the research institute ISFORT.

Figure 2. Programmability of the demand for port labour in Italian ports by cargo category, 2012 (source: ISFORT³⁶, our translation)



³⁶ ISFORT, *Il futuro dei porti e del lavoro portuale*, II, 2012, http://www.isfort.it/sito/pubblicazioni/Rapporti%20periodici/RP_17_luglio_2012.pdf, 42.

Figure 3. Reasons to rely on temporary workers in Italian ports, 2012 (source: ISFORT³⁷, our translation)



33. In this regard, we should draw attention to a further terminological problem. The notions of 'casual work' and 'decasualisation', which are central to academic research but also to the law and policy relating to port labour, can easily lead to confusion.

In a first, historical, meaning, the concept of casual labour refers to the employment of workers plucked from the street corner or hired from a recruitment agency, and put to work in the port for a period of time without any proper training or supervision, also called 'true casualisation'³⁸. According to Rayner, the cost of capital equipment and customer expectations seem to have ensured that nowadays there is no place within the vast majority of ports and cargo handling facilities for this type of casualisation³⁹. Our analysis of port labour systems in the European Union reveals, however, that, in order to meet peaks in demand and supplement the regularly employed port workforce and/or, where it exists, the formal pool of port workers, a large number of well-organised ports and port employers continue to rely on supplementary workers. In most cases, these casually employed workers enjoy no income guarantee, and are also referred to as 'occasional' or 'auxiliary' workers.

³⁷ ISFORT, *Il futuro dei porti e del lavoro portuale*, II, 2012, http://www.isfort.it/sito/pubblicazioni/Rapporti%20periodici/RP_17_luglio_2012.pdf, 44.

³⁸ See McNamara, T. and Tarver, S., "The strengths and weaknesses of dock labour reform – ten years on", *Economic Affairs* 1999, Vol. 19, No. 2, (12), 15; Rayner, J., "Raising the portcullis: repeal of the National Dock Labour Scheme and the employment relationship in the docks industry", *Economic Affairs* 1999, Vol. 19, No. 2, (5), 9.

³⁹ Rayner, J., "Raising the portcullis: repeal of the National Dock Labour Scheme and the employment relationship in the docks industry", *Economic Affairs* 1999, Vol. 19, No. 2, (5), 9.

In a second interpretation, the notion of casual labour is limited to professional and well-trained pool workers employed for short periods as required. These pool workers belong to the regular workforce of the port and may either be permanently employed by the pool agency and hired out to user companies for a day, a shift, a half shift, *etc.*, or merely be registered with such agency and be allocated to short-term employers, with the proviso that they enjoy an income guarantee in periods of unemployment. Here, the term casualisation merely refers to the intermittent nature of the work performed by port workers who are either regularly employed or at least protected against temporary unemployment by social security arrangements.

The term 'decasualisation', then, can be interpreted in two different ways as well⁴⁰. In the UK, for example, it has been equated with a scheme for the mere registration of workers and the maintenance of unemployed labour, where the dockworkers still have no permanent employer and where their actual earnings continue to depend on the amount of available work. Full or real decasualisation only occurs where dockworkers are employed permanently, on the basis of a normal full-time contract of employment concluded with either a pool agency or an individual employer. Often used, more or less accurate, synonyms for decasualisation are 'regularisation' and 'stabilisation', which may refer to either the provision of full-time regular employment or a scheme for the registration and allocation of port workers designed to provide adequate guarantees of employment or income.

34. Below, particularly in the chapters describing national port labour regimes in Volume II, we will have to distinguish between different kinds of casually employed port workers. As a rule, we shall reserve the term 'casual' port worker to professional port workers employed on a daily (or shift) basis. Whether these workers are merely registered and enjoy an income guarantee, or are employed permanently by a pool agency, is irrelevant. Their employment is 'casual' in the sense that they do not work for one single employer but can be allocated to different

⁴⁰ On the meaning of casualisation and decasualisation, see and compare, *inter alia*, Barzman, J., "Commentary on the papers of Vanfraechem and Nijhof", in Loyen, R., Buyst, E. and Devos, G. (Eds.), *Struggling for Leadership: Antwerp–Rotterdam Port Competition between 1870-2000*, Heidelberg, Physica-Verlag, 2003, (289), 296-297; Baudez, L., "Evolutie in de organisatie van de havenarbeid", *Arbeidsblad* 1984, 467-475; Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 53; Dempster, J., *The rise and fall of the Dock Labour Scheme*, London, Biteback Publishing, 2010, 17; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 41; Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 18, para 51; International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 33, para 77; Jackson, M.P., *Labour Relations on the Docks*, Westmead, Saxon House, 1973, 22 and 39; O'Carroll, A., "'Every ship is a different factory'. Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", http://www.academia.edu/226953/Every_ship_is_a_different_factory_Work_Organisation_Technology_Community_and_Change_The_Story_of_the_Dublin_Docker, 3-4; Vigarié, A., *Ports de Commerce et Vie Littorale*, Paris, Hachette, 1979, 419.

operators for short assignments⁴¹. In the terms of ILO Convention No. 137, these workers are "regularly available for work as dockworkers" and "depend on their work as such for their main annual income"⁴².

With the term 'occasional' worker, we refer, as a rule, to workers who fill shortages but enjoy no income guarantee. Usually, these workers have other jobs, so that their earnings in the port are not their principal means of livelihood, or have not yet entered the full-time labour market (*cf.* students). A third, related, category are 'seasonal' workers. The notions of occasional and seasonal workers are also used, for example, in ILO Recommendation No. 145⁴³.

Workers supplied by regular employment agencies will be designated as 'temporary agency workers'.

⁴¹ Compare, on the meaning of "unständig" in the German language, Helle, H.J., *Die unständig beschäftigten Hafentarbeiter in den nordwesteuropäischen Häfen*, Stuttgart, Gustav Fischer Verlag, 1960, 10.

⁴² See *infra*, para 72.

⁴³ See *infra*, para 72.

4.3. From corporatism to banalisation

35. Throughout the centuries, lawmakers and/or social partners have sought to absorb the characteristic fluctuations in the demand for port workers through the adoption of special regulations and agreements, which tried to balance the need for guaranteed availability of labour with concerns over livelihood security for workers. As a result, many of today's *leges speciales* on port labour, including the typical restrictive rules and practices, are deeply rooted in history⁴⁴.

36. In socio-economic studies of port labour regimes, the historical perspective is usually limited to developments since the second half of the 19th century and in the course of the 20th century, which saw a trend towards decasualisation of port labour under pressure of emerging trade unionism and other factors such as mechanisation and unitisation of maritime cargoes.

However, specific port labour arrangements emerged much earlier. The *Codex Theodosianus*, a compilation of the laws of the Roman Empire since 312 which was first published in 429, contained the following provision on the regime of port workers in Rome (the *saccarii portus Romae*):

Porters of the port of Rome.

*If private citizens should convey anything to the Port of the Eternal City, Your Magnificence shall command that all of it shall be transported by the porters themselves, or by those persons who desire to unite with that guild. In accordance with the variations produced by different seasons, the merchandise shall be assessed with a well considered and just appraisal, so that if it should appear that any private citizen had transported his imported wares through his own helpers, a fifth part of said ware shall be vindicated to the profit of the fisc*⁴⁵.

⁴⁴ In the same vein, the Rochdale report on UK ports policy of 1962 noted, with regard to port labour:

[...] few other industries are so burdened with the legacy of the past. We, like everyone else who has ever studied the dock labour problem, have been struck by the extent to which many facets have to be understood against the background of history. Practices and attitudes can often be traced back a long way; old traditions die hard. It is no use deploring this—the problem has its roots in human nature and also perhaps in British suspicion of change—but it clearly places a special responsibility on management in the industry (Ministry of Transport, Report of the Committee of Inquiry into the Major Ports of Great Britain, London, Her Majesty's Stationery Office, 1962, 128, para 355).

⁴⁵ C.Th. XIV.22. The Latin original reads:

De saccariis portus Romae.

Omnia, quaecumque advexerint privati ad portum urbis aeternae, per ipsos saccarios vel eos, qui se huic corpori permiscere desiderant, magnificentia tua iubeat comportari et pro temporum varietate mercedes considerata iusta aestimatione taxari, ita ut, si claruerit aliquem privatum per suos adventicias species comportare, quinta pars eius speciei fisco lucrativa vindicetur.

This provision brings us immediately to the heart of the matter: in imperial Rome, port labour was controlled by a corporation of porters who enjoyed a legally protected monopoly which was however challenged by competition, especially by merchants who employed their own personnel (self-handling *avant la lettre*, as it were). For that reason, a heavy fine was imposed on citizens who bypassed the official monopoly of the *saccarii* and employed their own workers. Obviously, no tradesman would seriously consider handing over one fifth of the merchandise a realistic alternative⁴⁶.

Also in Rome, the specialised corporation of the *mensores (frumentarii)* controlled the weighing of cargoes, especially grain and other dry bulk cargoes. Yet other guilds were in charge of ancillary port services such as intra-port barge traffic and towage.

In places in the Roman Empire where no *lex specialis* on port labour applied, unskilled and badly paid port labourers were freely recruited on an *ad hoc* basis from the lowest classes of society, and the demand for port labour fluctuated with the seasons⁴⁷.

These elements indicate that the issue of accommodating supply and demand for port labour and debates on casualisation vs. decasualisation, regulation vs. deregulation and free market access vs. exclusive or priority rights are of all times and probably inherent to the world of ports.

37. If we pass over port labour in ancient history, a more or less Europe-wide historical pattern can be discerned which evolved through five main organisational or regulatory stages: corporatism (1200-1800); deregulation (1800-1900); pooling (1900-1945); regularisation (1945-1980); banalisation (1980-current), whereby 'pooling' and 'regularisation' can be seen as two consecutive phases of the decasualisation process⁴⁸.

⁴⁶ See further, *inter alia*, Bleyne, F., *Droit romain et droit français des corporations*, Limoges, Chapoulaud, 1875, 44; Pharr, C., *The Theodosian Code*, Princeton (New Jersey), Princeton University Press, 1952, 421; Waltzing, J.P., *Étude historique sur les corporations professionnelles chez les Romains*, Louvain, C. Peeters, 1900, 58-78.

⁴⁷ See Rougé, J., *Recherches sur l'organisation du commerce maritime en méditerranée sous l'Empire romain*, Paris, S.E.V.P.E.N., 1966, 179 *et seq.*, 295 *et seq.* and 478 *et seq.* To avoid confusion, we should add that in the ancient Roman world the tasks of loading and unloading in the strict sense were often performed by the seafarers.

⁴⁸ History Professor John Barzman made a more or less comparable distinction between periods: (1) "Studied neglect" (19th century); (2) "Precise knowledge of dock labour" (1880s-1890s); (3) "Promoting conciliation and implementing protective legislation on the docks" (1900s-1920s); (4) "Registration and monopoly of work" (interwar years); (5) "Maintenance pay to dockers in addition to welfare benefits" (post-WW2-1960); (6) "Reduce the number of irregular workers, decasualise and professionalise" (1960s) (see Barzman, J., "States and dockers: from harbour designers to labour managers", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (580), (627), 641-642). For the post-WW2 era, HRM Professor Peter Turnbull proposed a slightly different historical perspective. He argues that port labour arrangements have in most industrialised countries passed through three stages of development. In a first stage (1940s-1960s), the problems of casual labour were dealt with by introducing some form of dock labour scheme or system of labour market regulation (e.g. union hiring hall). In a second stage (1960s-1970s) new technology agreements or changes to the dock labour scheme were negotiated to accommodate the changes wrought by containerisation. A third stage (1980s-1990s) was marked by a more commercial approach to port authority management and administration, accompanied by greater levels of private sector

38. In a first phase, roughly spanning from 1200 to 1800, port labour was in many European countries organised by corporations or guilds of port workers. These organisations typically enjoyed an exclusive right to carry out port labour in the port. The monopolies mainly covered shoreside operations and transportation to and from warehouses in the city centre. In some cases, the monopoly was limited to a specific port-related profession and/or a geographically limited part of the port or the city. The corporations financed social security benefits for their members, invested in loose handling equipment and were regulated by public (mostly local) authorities. Some municipalities organised port labour (or certain segments of it) as a public office the exercise of which by individuals required an authorisation (which was in some cases granted to the highest bidder).

In the country chapters in Volume II, we have collected some elementary background information on corporatist systems in countries such as Belgium, France, Germany, Italy, the Netherlands, Poland, Spain and the UK. In some countries, traces of these old port labour regimes still survive. Historical sources indicate that several issues surrounding current port labour arrangements, such as the demarcation with other types of work, the right for merchants and ship masters to self-handle and complaints over high rates and wages were vital themes centuries ago.

39. The second period, which lasted from approximately 1800 to 1900, was the heyday of unregulated hiring of port workers, first in legal theory, and in the second half, and especially the last decades of the century, also in practice.

In a number of European countries, the abolition of corporations and the transition to deregulation was triggered by French revolutionary laws on freedom of association and freedom of trade and commerce⁴⁹. In many ports, resistance by the old corporations was strong and some of them were able to continue their existence well into the 19th or even the 20th century. In some cases, they cooperated and/or competed with new types of service providers, in particular the master stevedores and stevedoring companies employing casual workers and/or

investment and involvement in port operations (Turnbull, P., *Social dialogue in the process of structural adjustment and private sector participation in ports: a practical guidance manual*, Geneva, International Labour Organization, 2006, 10). Boot identifies no fewer than 10 different stages in the development of port labour in Amsterdam (see Boot, H., *Opstandig volk: neergang en terugkeer van losse havenarbeid*, Amsterdam, Stichting Solidariteit, 2011, 480 *et seq.*). For Rotterdam, compare Nijhof, E., "Dock-work is a skilled profession. Decasualization and the Rotterdam labour market (1945-1970)" in Loyen, R., Buyst, E. and Devos, G. (eds), *Struggling for leadership: Antwerp-Rotterdam port competition between 1870-2000*, Heidelberg, Physica-Verlag, 2003, (275), 286-287. A systematic historic comparison at global level has never been undertaken (Cooper, F., "Dockworkers and labour history", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (523), 523, although precisely the latter volumes edited by Davies *et al.* are an excellent attempt).

⁴⁹ See esp. *infra*, paras 385 and 833.

the new dock or warehousing companies. Ultimately, some corporations also transformed into commercial cargo handling companies.

The advent of the steamship, the dramatic increase in ship sizes and cargo volumes in relation to the manning levels of ships, the introduction of scheduled calls, the mechanisation of handling equipment and the need to shorten port turnaround times made it impossible for ship's crews to perform loading and unloading operations and required the continuous availability of large numbers of local port workers. The latter were often hired by local middlemen or master stevedores (often experienced sailors) to which ship operators and master mariners, also due to language barriers, subcontracted the handling. Thus, employers could rely on an unregulated and oversized labour market which guaranteed a swift execution of unloading and loading as and when required, while they had no obligation whatsoever to remunerate casual workers during periods of inactivity⁵⁰.

Due to the lack of regulation, anyone could present himself for dock work at the place of recruitment. As A.A. Evans summarises, those offering their services included men whose main usual source of income was port work, but also other unemployed and occasional workers. In periods of unemployment, large numbers of workers would come forward in the hope of being selected. In addition, when earnings on a ship were expected to be good, a number of men with other jobs would come along in the hope of good pickings. The chances of all were prejudiced and the men who sought to live by port work resented the intrusion of outsiders who rendered their livelihood even more precarious than it would otherwise have been⁵¹.

In the climate of exploitation and abuse of the second half of the century, dockers' unions took on the defence of workers' interests. Dockworkers were among the first workers to form unions⁵².

40. Between 1900 and WW2, European Governments started regulating health and safety in port work and in many European ports the social partners soon agreed on the creation of monopolistic pools or cartels of unionised and/or registered port workers which ensured a steady availability to employers of experienced staff as well as an elementary form of job security for registered, but still casually employed workers. To ensure a fair distribution of work, daily hiring was organised at hiring halls run by employers, by unions, or jointly. This system of exclusive 'pooling' of port labour was a first step in the long process towards towards

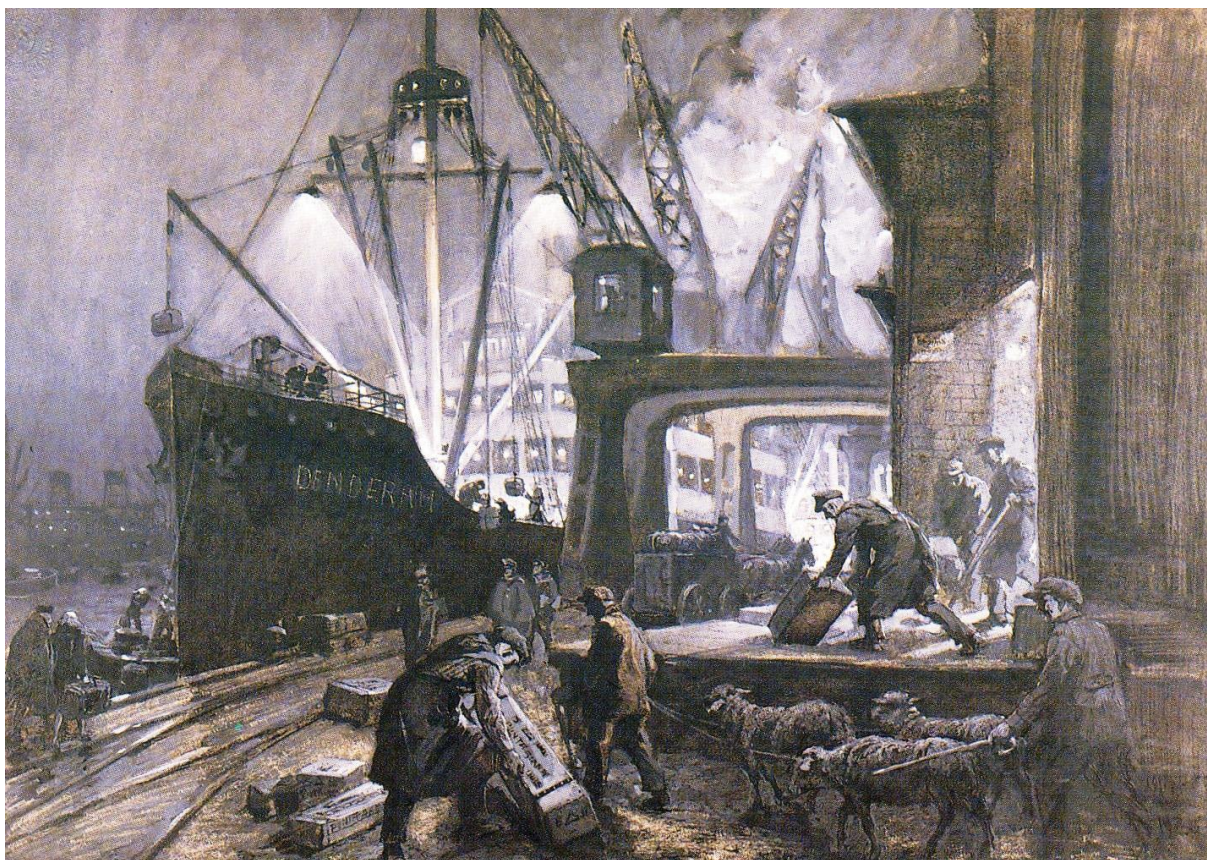
⁵⁰ See, *inter alia*, Davis, C.J., "Formation and reproduction of dockers as an occupational group", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (542), 545; Suárez Bosa, M., González de la Fé, P. and Jiménez González, J.L., *Introduction of New Techniques and Changes in Work Organization at the Port of Las Palmas: An Historical Review*, Documento de trabajo 2002-01, La Laguna / Las Palmas de Gran Canaria, Fac. CC. Económicas y Empresariales Universidad de La Laguna / Fac. CC. Económicas y Empresariales Univ. de Las Palmas de Gran Canaria, <http://fceve.ull.es/invest/docum/ull-ulpgc/2002-01.pdf>, 5.

⁵¹ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 43.

⁵² Kagan, R., "How much does law matter? Labor law, competition and waterfront labor relations in Rotterdam and U.S. ports", *Law & Society Review* 1990, Vol. 24, No. 1, (35), 40.

full decasualisation. In many cases, the new arrangements were backed by state regulations. However, discussions on further decasualisation through the granting of fall-back pay in case of unemployment or guaranteed weekly wage remained largely fruitless.

Figure 4. Nocturnal harbour activity at Hamburg's Hansahöft in 1926, painted by Martin Frost (1875-1928). By that time, the port could already rely on a formalised pool of temporary workers supplementing regular workers (source: Kunsthalle Hamburg)



41. The post-WW2 years have been described as "the real breakthrough of decasualisation in the ports all over the world"⁵³. Roughly between 1945 and 1980, the pools of registered port workers were continued, but employment and working practices were further regulated and workers gained attendance money, unemployment benefit or other forms of income guarantee financed by employers, port users and/or the state, in addition to various other social security rights such as paid holidays. In an increasing number of cases, pool workers were continuously

⁵³ Thus Weinbauer, K., "Power and control on the waterfront: casual labour and decasualisation", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (580), 597.

re-hired by the same employer and no longer had to report to the hiring hall. To understand the development of port labour systems in (mainly) eastern Europe, it should also be recalled that, in the aftermath of WW2, some European countries nationalised the port industry, including cargo handling operations.

In the same period, port work entered the era of unitisation: forklifts and pallets were introduced around 1950, containers around 1965; in addition, trucks, trailers and cars were increasingly carried on board ro-ro vessels. As Professor Haralambides explains, containerisation's major breakthrough was, apart from improvements in port safety and the limitation of pilferage, damages and cargo claims, in reducing ship turnaround time and cutting down on labour cost⁵⁴. Reductions in port employment forced many labour unions all over the world to strongly resist the introduction of the new techniques. But there was also an additional reason for this: the 'through-transport' concept and the door-to-door possibilities that the new system afforded, shifted a considerable part of what was previously considered as dock work to areas outside the port domain. This development particularly had to do with the stuffing and stripping of containers that could now be performed at the consignor's/consignee's premises by their own staff. Even when that was not the case, containerisation allowed the detachment of stuffing and stripping activities from the usually congested waterfront and its rigid and strongly unionised labour, towards inland container depots, where ample and cheaper space was available, often conveniently located close to main road junctions. Haralambides also recalls another significant development that came together with containerisation, namely the remarkably enhanced accuracy in ship sailing schedules which further reduced the irregularity and unpredictability of employment⁵⁵.

Confronted with these developments, and especially the threat of unemployment through unitisation, automation and relocation of handling activities, the trade unions insisted on a reinforcement of protective measures, especially registration. In some countries, attempts were made at replacing the system of casual employment of registered pool workers by regular employment under contracts for an indefinite term with an individual employer; in other ports, the pool workers concluded permanent employment contracts with the pool agency itself. The transition towards stable employment relationships, income guarantees and social protection which took place between WW2 and around 1980 may be termed the period of 'regularisation', understood as a further phase of 'decasualisation'.

⁵⁴ Haralambides, H.E., "Port Structural Adjustment and Labour Reform", http://www.academia.edu/2037483/Port_Structural_Adjustment_and_Labour_Reform, 3. On containerisation generally, see, *inter alia*, Abendroth, M., Dombois, R. and Heseler, H., *Vom Stauhaken zum Container. Eine vergleichende Untersuchung der tariflichen und betrieblichen Regelungen der Hafendarbeit in der norddeutschen Häfen*, Bremen, Ötv, 1981; Levinson, M., *The Box. How the Shipping Container Made the World Smaller and the World Economy Bigger*, Princeton / Oxford, Princeton University Press, 2006, 376 p.; Lindner, E., *Die Herren der Container*, Hamburg, Hoffmann and Campe, 2008, 287 p.; Witthöft, H. J., *Container. Die Mega-Carrier kommen*, Hamburg, Koehlers Verlagsgesellschaft, 2004.

⁵⁵ Haralambides, H.E., "Port Structural Adjustment and Labour Reform", http://www.academia.edu/2037483/Port_Structural_Adjustment_and_Labour_Reform, 5-6.

By the 1960s or 1970s, exclusive rights for registered workers, central pool or hiring halls and maintenance payments were common to ports throughout the world⁵⁶. From a global perspective, between 1960 and 1980, registration systems continued to be extended⁵⁷. There is also sufficient evidence world-wide that port workers on average have enjoyed earnings above comparable grades of workers⁵⁸.

42. Around 1980, ports entered an era of gradual rationalisation, modernisation, liberalisation and/or privatisation of ports and port labour, which continues to this day⁵⁹.

Over the past decades, the relatively low-tech and labour intensive cargo handling sector transformed into a high-tech and highly capital-intensive business controlled by large, often multinational cargo handling companies, which have interests in more than one port region of range. Through mergers, acquisitions, inter-corporate investments and cooperation with major ship operators, stevedoring companies in the container branch concentrated into a relatively small group of global terminal operators (GTOs) such as Hutchison Port Holdings, APM Terminals, PSA International, DP World and Eurogate. When GTOs, international shipping lines and other private companies invest in port facilities and provide port services for users, they invariably demand changes to employment (*i.e.*, deregulation) and work practices (*e.g.*, flexibility)⁶⁰. Ship operators expect a 24/7 service, as a result of which the staff must be employed according to flexible working schedules⁶¹. In return for uninterrupted and efficient cargo handling, port workers worldwide received guarantees of high wages and regular pay, regardless of fluctuations in the need for dock labour⁶². In addition, cargo handling systems at container terminals became increasingly automated and computer-controlled. At terminals in Hamburg and Rotterdam, containers are transported by unmanned, computer-controlled vehicles (so-called Automated Guided Vehicles or AGVs). Optical Character Recognition (OCR) at container cranes and gates allows quick and accurate identification of container, truck plates and chassis numbers and a more efficient use of labour, yard space and handling equipment⁶³,

⁵⁶ Kagan, R., "How much does law matter? Labor law, competition and waterfront labor relations in Rotterdam and U.S. ports", *Law & Society Review* 1990, Vol. 24, No. 1, (35), 41; Turnbull, P. and Sapsford, D., "Hitting the Bricks: An International Comparative Study of Conflict on the Waterfront", *Industrial Relations* 2001, Vol. 40, No. 2, (231), 236.

⁵⁷ See the data in Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 54 *et seq.*

⁵⁸ Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 65.

⁵⁹ For Peter Turnbull, the contemporary era is marked by "commercialization of port activities" (Turnbull, P., "Port Labor", in Talley, W.K., *The Blackwell Companion to Maritime Economics*, Chichester, Wiley-Blackwell, 2012, (517), 519 and 536-541). In our view, this is likely to cause confusion, as the purpose of port operations, as a link in the chain of international maritime business, has of course always been 'commercial' by its very essence, even in bygone eras where public intervention and regulation were predominant.

⁶⁰ Turnbull, P.J. and Wass, V.J., "Defending Dock Workers—Globalization and Labor Relations in the World's Ports", *Industrial Relations*, 2007, Vol. 46, No. 3, (582), 588.

⁶¹ Poot, E and Luijsterburg R., *Arbeidsverhoudingen in de Rotterdamse haven: Is de syndicalistische onderstroom nog steeds aanwezig in de periode 1990-2009 ?*, diss. Universiteit Tilburg, 2009, 60.

⁶² Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 65.

⁶³ See already Elovic, P., "Implementation of Gate and Crane OCR Systems for Container Terminal Automation and Security", 26 February 2003, <http://www.htsol.com/Files/TOCAAsia2003.pdf>.

but is still not widespread in the EU. It goes without saying that the introduction of such innovations will often depend on a comparison of the required investment and operation costs with existing labour costs and on the willingness of workers and their unions to accept these changes. In the near future, technological developments are expected to transform the landscape of ports even further. For example, the introduction of remote-controlled container gantry cranes may allow terminal operators to use off-port based staff.

Changes in the port labour regime during the last decades of the 20th century and the beginning of the 21st century, are summarised by the ILO in the following table:

Figure 5. *The Changing World of Port Work* (source: ILO)⁶⁴

From	→	Towards
General labourers	→	Multiskilled/specialist workers
Labour-intensive operations	→	Capital-intensive operations
Break-bulk handling	→	Specialized operations
Casual hiring	→	Permanent employment
Informal on-the-job training	→	Formalized training
Male workforce	→	Diversified labour force

Focusing on the regulatory set-up of the port labour market, the current development phase is marked, in places, by the abolition or reduction of port labour pools, the replacement of specifically regulated casual port work with regular permanent employment (a continuation of the decasualisation process) but also by the use of temporary agency work, subcontracting and also regular self-employment (with wages and working conditions not covered by collective agreements on port work), and, further, by the relaxing of exclusivity or priority rights for pool or registered workers, the opening up of the port services market to competition, and the transition towards landlord port authorities cooperating with GTOs.

From a legal perspective, it would seem that the trend is one of 'banalisation', meaning a progressive abolition of sector-specific rules and regulations on recruitment, training and health and safety of port workers. In other words, an increasing number of governments, ports and terminals now believe that port labour can be adequately, efficiently and safely organised on the basis of general labour law. Today, this trend is by no means generally spread, and even within one country, some ports or terminals may have moved to a *lex generalis* system while others cling to classical *leges speciales* on port labour. Generally, port workers and their unions hold on to their cherished *leges speciales* as long as they can, and prefer to remain outside the orbit of general labour law⁶⁵, whereas many employers, especially GTOs, see no

⁶⁴ International Labour Organization, *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 6.

⁶⁵ On the latter preference of port workers, see already Bordereaux, L., "Statut du docker et relations contractuelles de travail", *Droit maritime français* 1995, (606), 606.

legitimate reason to depart from general employment conditions, provided they can rely on a flexible workforce. One interviewed employers' association insisted that port labour should be "demystified"⁶⁶.

4.4. The docker's subculture

43. Countless historians, economists and social scientists have confirmed the, apparently universal⁶⁷, validity of Miller's famous 1969 description of the dockworker subculture⁶⁸. The main characteristics of this subculture are:

- (1) extraordinary solidarity and undiffused loyalty to fellow dockworkers;
- (2) suspicion of management and outsiders;
- (3) militant unionism;
- (4) appearance of charismatic leaders from the ranks;
- (5) liberal political philosophy but conservative view of changes in work practices; and
- (6) 'casual frame of mind' (free men or irresponsible opportunists)⁶⁹.

Other authors added characteristics such as masculinity, toughness, a physical habitus, camaraderie, hard drinking, hard work, but also laziness, opportunism, independence, wilfulness, volatility, rebelliousness and strike proneness⁷⁰. Workers who are frequently

⁶⁶ See *infra*, para 1495.

⁶⁷ In addition, a CGT secretary confirmed that the mentality of dockers from the north and the south of France is very similar: see Gurrea, A., "Résumé de l'activité syndicale depuis le début du siècle des Dockers du Port de Bordeaux", <http://bacalanstory.blogs.sudouest.fr/media/02/01/160491036.pdf>, 4.

⁶⁸ Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, 302-314. The term subculture refers to "a culture within a culture, that is, an identifiable human group sharing some of the characteristics of the sur-rounding dominant culture but separated from it by the special sets of behavior, norms, loyalties, beliefs, etc., manifested and internalized by its members" (Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 302).

⁶⁹ Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 308.

⁷⁰ See Anderson, S.A., "Danish dock workers: Aarhus, 1870-1970", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, 1, Aldershot, Ashgate, 2000, (15), 27-28 and 37; Barzman, J., "Dock labour in Le Havre 1790-1970", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, 1, Aldershot, Ashgate, 2000, (57), 66; Boot, H., *Opstandig volk: neergang en terugkeer van losse havenarbeid*, Amsterdam, Stichting Solidariteit, 2011, 95-96; Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 52 and 75; Hamark, J., *Strikingly Indifferent: The Myth of Militancy on the Docks prior to World War II*, paper presented at the 6th International Congress of Maritime History in Ghent 2012; Helle, H.J., *Die unzeitig beschäftigten Hafentarbeiter in den nordwesteuropäischen Häfen*, Stuttgart, Gustav Fischer Verlag, 1960, 1; Levinson, M., *The Box. How the Shipping Container Made the World Smaller and the World Economy Bigger*, Princeton / Oxford, Princeton University Press, 2006, *passim*, esp. 24-26; Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 312, referring to Crichton; O'Carroll, A., "Every ship is a different factory". Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", http://www.academia.edu/226953/Every_ship_is_a_different_factory_Work_Organisation_Technolo

switched from one employer to another, may develop loyalty to no one, save only to their trade union, and a feeling of "them and us" will persist⁷¹. An Irish trade union official said that dockers do not see it as an occupation, but as a way of life, and that they joke that "every ship is a different factory"⁷². This attitude is reinforced by ties of kinship (and/or ethnicity) that integrated dockers into a clan-like structure⁷³, yet did not prevent relations with foremen from appearing quite patriarchal⁷⁴. In many parts of the world, docking communities are not only tightly-knit and self-contained, but isolated and marginalised; their pariah status in the wider society is matched by a strong community identity and occupational pride⁷⁵. On the other hand, even if the typical docker is a person accustomed to hard work and hard bargaining in order to improve his conditions⁷⁶, port workers are often also accused of having a "civil servant" mentality⁷⁷.

For Miller, the conditions that have been identified as producing the dockworker subculture are:

- (1) the casual nature of employment;
- (2) the exceptional arduousness, danger, and variability of work;
- (3) the lack of an occupationally stratified hierarchy and mobility outlets;
- (4) lack of regular association with one employer;
- (5) continuous contact with foreign goods, seamen, and ideas;
- (6) the necessity of living near the docks; and
- (7) the belief shared by longshoremen that others in the society consider them a low-status group⁷⁸.

Again, the origin of the specificity can be traced back to the irregularity of port work and the extremely variable levels of demand for labour. As a UK Parliamentary Report noted, the

[gy Community and Change The Story of the Dublin Docker](#), *passim*; Teräs, K. and Bergholm, T., "Dockers of Turku, c. 1880-1970", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, I, Aldershot, Ashgate, 2000, (84), 87; compare also Nijhof, E., "Undeserving casuals: the Rotterdam dockers and their unions, 1880-1965", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, I, Aldershot, Ashgate, 2000, (405), 410.

⁷¹ Goss, R., "British Ports Policies Since 1945", *Journal of Transport Economics and Policies*, 1998, Vol. 32, No. 1, (51), 63.

⁷² O'Carroll, A., "'Every ship is a different factory'. Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", <http://nuim.academia.edu>, 1, footnote 1.

⁷³ Andersen, S.A., "Dockers' Culture in Three North European Port Cities: Hamburg, Gothenburg and Aarhus, 1880-1960. A study of subcultures and their social contexts", in Holm, P. and Edwards, J., *North Sea Ports and Harbours – Adaptations to Change*, Esbjerg, Fiskeri- og Søfartsmuseets Forlag, 1992, (133), 139; compare, *inter alia*, Turnbull, P., "Port Labor", in Talley, W.K., *The Blackwell Companion to Maritime Economics*, Chichester, Wiley-Blackwell, 2012, (517), 518.

⁷⁴ Helle, H.J., *Die unständig beschäftigten Hafentarbeiter in den nordwesteuropäischen Häfen*, Stuttgart, Gustav Fischer Verlag, 1960, 14.

⁷⁵ O'Carroll, A., "'Every ship is a different factory'. Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", http://www.academia.edu/226953/Every_ship_is_a_different_factory_Work_Organisation_Technology_Community_and_Change_The_Story_of_the_Dublin_Docker, 9.

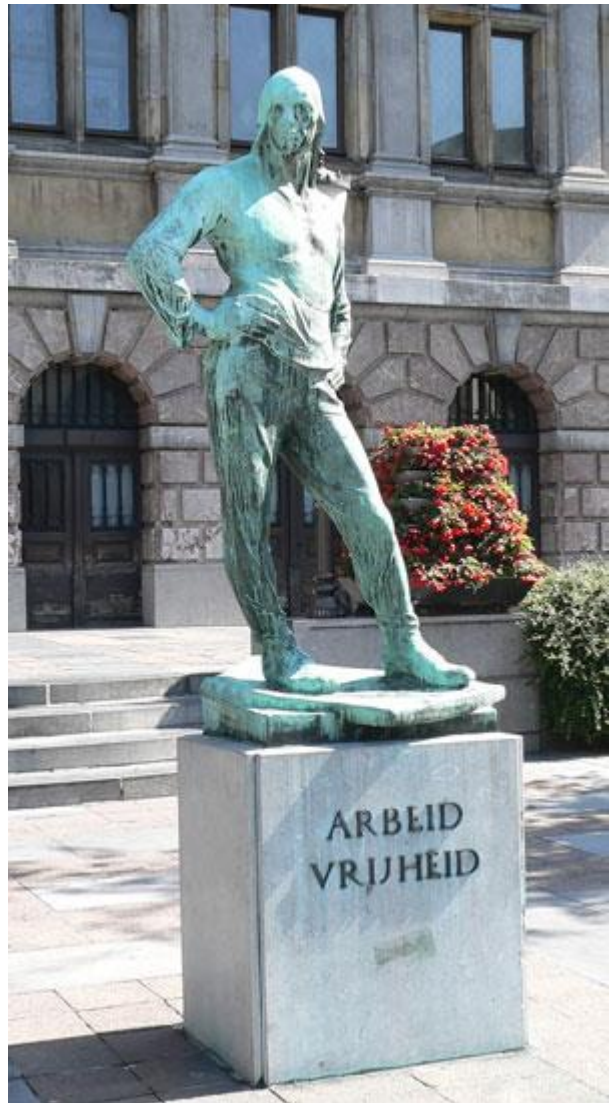
⁷⁶ See Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 52.

⁷⁷ See, for example, Haralambides, H.E., "Port Structural Adjustment and Labour Reform", http://www.academia.edu/2037483/Port_Structural_Adjustment_and_Labour_Reform, 6. Compare, on the importance of the "statut" of French dockers, Hilaire, L., "Le droit commun du travail conduit-il à la disparition du métier de docker ?", in *Annuaire de droit maritime*, Vol. XIII, 1995, Paris / Nantes, A. Pédone / Centre de droit maritime, (147), 153.

⁷⁸ Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 305.

traditional response to this was "casual employment, the result of which was a casual attitude on the part of management to labour, [and] a reciprocal casual attitude on the part of labour"⁷⁹.

Figure 6. Statues of The Dockworker (De Dokwerker) in Amsterdam (left) and The Porter (De Buildrager) in Antwerp (right) expressing not only the typical professional pride of the dockers but also the sincere affection for these workers among port city inhabitants (photos by S. Sepp and the author)



⁷⁹ House of Commons Transport Committee, *Ports. Ninth Report of Session 2002-03*, I, <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmtran/783/78302.htm>, para 42.

In a recent paper, Michel Pigenet writes that today, after three decades of reforms and in the wake of technological changes entailed by containerisation, the organisation of work on the dockside appears to be modelled on continuous-flow factory mass production. Workplace relations are now stamped by the increasing standardisation that is taking its toll against a background of convergence in Europe and in the world at large. Whether it is a question of hiring practices or of the nature of their actual work, which has become less 'physical' and less collective, the dockworkers of the year 2010 have very little in common with those of the 1960s⁸⁰.

Nonetheless, in the course of our study and especially in numerous interviews with employers, workers and their organisations, we found that in many European ports, the dockworker subculture continues to impact heavily on current rules and practices as well as on collective bargaining processes and on policy discussions about reform proposals. Many individual employers complain that they are unable to exercise normal authority over casual port workers who only recognise the anonymous collectivity of the port as their master⁸¹.

In many cases, the trade unions have resisted decasualisation or regularisation – the workers because they anticipated the loss of jobs and of the independence and freedom inherent in casual work: freedom to organise the work, freedom from working a continuous five-day week and freedom from working for any one employer in particular⁸² (initially, employers were not keen on regularisation either, because they feared the costs and responsibilities of regular employment obligations)⁸³. Other manifestations of the docker subculture, which continue to provoke complaints by employers, are the numerous restrictive working practices (which are said to belong to the "folk lore" of dock work⁸⁴ but have serious economic effects), the

⁸⁰ Pigenet, M., "Labour and trade union cultures: the idiosyncratic experience of the European dockworkers in the 19th to the 21st centuries", *European Review of Labour and Research* 2012, Vol. 18, (143), 153.

⁸¹ Compare Bordereaux, L., "Auxiliaires terrestres du transport maritime. Manutention portuaire. Commentaires", *Recueil périodique des jurisclassesurs: transport*, Fasc. 1192, Paris, LexisNexis, 2005, 3, para 6, referring to H. Grellet.

⁸² O'Carroll, A., "'Every ship is a different factory'. Work Organisation, Technology, Community and Change: The Story of the Dublin Docker", http://www.academia.edu/226953/Every_ship_is_a_different_factory_Work_Organisation_Technology_Community_and_Change_The_Story_of_the_Dublin_Docker, 5. It is often said that dockworkers wanted the security of the permanent worker and the freedom of the casual (see, for example, Cooper, F., "Dockworkers and labour history", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (523), 533). Port workers have been described as "casuals by birth", displaying "an unconquerable distaste or incapacity for regular work" (Turnbull, P., "Port Labor", in Talley, W.K., *The Blackwell Companion to Maritime Economics*, Chichester, Wiley-Blackwell, 2012, (517), 521). If a longshoreman chose not to work on any particular day, if he decided to go fishing rather than shaping, he was entirely within his rights (Levinson, M., *The Box. How the Shipping Container Made the World Smaller and the World Economy Bigger*, Princeton / Oxford, Princeton University Press, 2006, 24) – a depiction which still is valid in many EU ports today.

⁸³ See, *inter alia*, Barzman, J., "Commentary on the papers of Vanfraechem and Nijhof", in Loyen, R., Buyst, E. and Devos, G. (Eds.), *Strugglin.g for Leadership: Antwerp–Rotterdam Port Competition between 1870-2000*, Heidelberg, Physica-Verlag, 2003, (289), 296-297; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 42; Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 306.

⁸⁴ Thus Nicholas Finney: see *infra*, para 1894, footnote.

persistence of closed shop situations⁸⁵, and the ineradicable lack of safety discipline among workers⁸⁶.

Finally, it would in our view be wrong to believe that as soon as employment conditions are banalised – for example, through the introduction of permanent employment contracts with a single employer – the docker's subculture immediately vanishes without a trace. Reform schemes aimed at the creation of regular employment are in many cases a step-by-step process and often entail long-term transitional regimes. In addition, it is not uncommon that the implementation and enforcement of new organisational rules meet resistance by existing workers, or even remain a dead letter. But in many, especially newly constructed or privatised, ports and terminals where work has been (re-)organised along the lines of general labour law and where port workers have been recruited in the general labour market, the impact of the docker's subculture is considerably weaker or largely absent, and makes way for a normal enterprise culture. In sum, the mentality of port workers seems to banalise as well.

⁸⁵ See *infra*, para 128 *et seq.*

⁸⁶ See, for example, the statement by Mr Everard before a Committee of the House of Commons in 2007 (<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmtran/61/6112210.htm>):

I think the whole health and safety issue has come much higher up on people's minds. For instance, in my little port in Plymouth we have ISO 18000 which is health and safety, the ISO 9000. We take it as an absolute priority that we look after our people. Everybody who works there, because we have got heavy machinery going around, has in their minds that they should be looking out all the time in case there is something wrong. That comes through the management to the workforce and gets the whole workforce behind it. I know that is how the other ports work. It is a matter of getting an ethos, that is much the most important thing. Ethos is what this is all about. As people who manage businesses, safety to us is absolutely paramount and we take that extremely seriously.

4.5. From unskilled work to multi-skilling

44. Even if the stowing of breakbulk in general cargo holds or the handling of heavy and difficult loads certainly requires special expertise, port work was in the past often considered an unskilled manual profession – or not a profession at all⁸⁷. Be that as it may, technological development has dictated a need for better trained workers. Whereas there are, even in the container system, still repetitive tasks (such as coupling and uncoupling, lashing and delashing, etc.) which can be learned relatively easily, jobs concerned with the use of gantry cranes, straddle carriers, tugmasters and other pieces of equipment need skill, judgment and initiative⁸⁸. These port workers operate expensive machinery, receive instructions through radio communication, computer printouts and computer screens⁸⁹, and often participate directly in digital data base management. With the cost of ship-to-shore gantry cranes, straddle carriers, top-loaders and other equipment running to several million euros, it is hardly surprising that terminal operators prefer to employ regular, dedicated workers to operate such expensive equipment⁹⁰. Generally, port workers also tend to work more individually than in the past⁹¹, and the distinction between blue and white collar port worker is fading⁹². At the same time, some classical port worker's jobs such as tallymen are being reduced as checking and security are computer directed and electronically aided. Similarly, the specific experience and judgment of general cargo supervisors and foremen has become redundant in the container system⁹³.

⁸⁷ In the latter sense, Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 322.

⁸⁸ Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 29; in the same sense, for example, Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 12; Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 46.

⁸⁹ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 41.

⁹⁰ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 12.

⁹¹ See X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 27; compare Poot, E and Luijsterburg R., *Arbeidsverhoudingen in de Rotterdamse haven: Is de syndicalistische onderstroom nog steeds aanwezig in de periode 1990-2009 ?*, diss. Universiteit Tilburg, 2009, 42.

⁹² See already Pieters, L.J., "Havenwerk in de peiling", *Tijdschrift voor Vervoerswetenschap* 1984, (138), 148.

⁹³ Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 30.

Figure 7. Two extremes of technological development in the year 2012: manual unloading of timber in the Mekong Delta, Viet Nam, January 2012 (top; photo by the author) vs. the largely automated Europe Container Terminals at Rotterdam (bottom, source: www.ect.nl)



In 1986, A.D. Couper summarised that the port worker's job has moved from predominantly physical effort and improvisation to manual dexterity and mechanical skills, and is progressing towards a greater requirement for specific types of mental aptitudes within a system of high technology⁹⁴. Today, this transition is still ongoing⁹⁵, but it appears that the pace of change has been quicker at container terminals, many of which have reached extremely advanced levels of technical sophistication and automation, while general cargo terminals often continue to rely on more classical handling technologies.

45. In order to enhance both quality and safety of work and to cope with the speed of technological change, formal vocational training is now of the essence. While classical on-the-job training and informal tutoring by experienced workers (including relatives), which sufficed up until about 1950⁹⁶, remain common in many ports, a growing number of ports and individual terminal operators offer elaborate training programmes for new entrants as well as existing workers. It seems that supervisors, foremen and equipment operators are the groups most in need of training, followed by checkers, tallymen and clerical staff⁹⁷.

46. In order to increase efficiency and flexibility, many port employers step up efforts to promote multi-skilling among their workers. At ports which have moved to highly mechanised systems there is indeed a need for more versatility of manpower, and related training to achieve this. Multi-skilled terminal workers can perform three or four different functions; for example, container lashers may be trained to drive forklifts, and gantry crane operators may be certified to drive straddle carriers, and on that basis receive higher wages or bonuses and enrich their jobs⁹⁸. The development towards multi-skilling could be interpreted as contrary to specialisation, but this is not necessarily so, since workers can be given specialised training in related occupations⁹⁹. Of course, multi-skilling presupposes the abolition of job demarcation rules and may initially lead to a reduction of the number of jobs.

⁹⁴ Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 93.

⁹⁵ For data on the perception of port labour as general, professional or skilled work, see Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 14-15.

⁹⁶ See International Labour Organisation, *Vocational training and retraining of dockworkers*, Tripartite technical meeting on dock labour, April 1969, Geneva, International Labour Office, 1969, 5.

⁹⁷ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 27.

⁹⁸ On this trend, see already Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 97; compare X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 21.

⁹⁹ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 40.

47. Today, port work also requires constant learning in order to keep pace with new technologies. However, retraining is used not only to adjust the skills of the existing workforce to changed needs, but to increase labour market mobility, which is especially important in times of labour market turbulence during periods of economic reform¹⁰⁰.

48. Although internal company training is, in general, looked upon positively by both trade unions and management, national trade unions often maintain that institution-based, enterprise-external vocational training should be expanded. Institutional training is said to be produce skills which are more transferable than those developed within the enterprise. This would broaden employment possibilities for the individual worker. Contrary to this, others suggest that the direction of technological development is such that skills are becoming more enterprise-specific¹⁰¹. Whatever the case, the recent organisation of company-specific training for permanent staff by a number of large employers, especially global container terminal operators, is in conformity with the trend towards banalisation of port labour systems described above.

¹⁰⁰ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 29.

¹⁰¹ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 29.

4.6. Diverse occupational risk levels

49. Port labour has traditionally been considered a hard, dirty, unpleasant, arduous, unhealthy and dangerous mode of employment¹⁰². There are indications that, over the past decades, the safety level has improved considerably. This is due to automation, substantially reduced exposure to risks of several categories of workers, a strengthening of safety standards, policies and awareness in the ports industry and at individual port terminals, and targeted campaigns by Labour Inspectorates. Despite this improvement of the safety record, port labour remains a particularly dangerous profession.

Risk levels increasingly differ between categories of workers. It is obvious that the holdsman in a general cargo ship is exposed to higher risks than a gantry crane driver or a container yard planner or chief tallyman operating ICT equipment (supposing that the latter can be classified as a port worker). There are also differences between types of terminals. Many dry bulk terminals, for example, are largely automated and employ fewer staff than a car terminal where considerable numbers of drivers are needed.

50. From a legal point of view, in matters of health and safety the same banalisation trend can be discerned as, in an increasing number of countries, ports and terminals, port labour-specific health and safety regulations are replaced by general occupational health and safety laws and regulations.

¹⁰² See, inter alia, Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 45.

5. PORT LABOUR GLOBALLY

5.1. Port system

51. We have no knowledge of reliable and up-to-date data on the number of commercial ports worldwide, but it is clear that there must be several thousands of them, ranging from small wharves and jetties to international megahubs¹⁰³.

According to UNCTAD's authoritative Review of Maritime Transport¹⁰⁴, total seaborne trade reached an estimated 9.2 billion tons in 2012, while world container port throughput totalled 601.8 million TEU.

52. As the World Bank explains in its Port Reform Toolkit, four main port administration models have emerged over time: the public service port, the tool port, the landlord port and the fully privatised port. Each of these models has direct implications for the organisation of port labour.

Under the service port model, the port authority offers the complete range of services required for the functioning of the seaport system. The port owns, maintains, and operates every available asset (fixed and mobile), and cargo handling activities are executed by labour employed directly by the port authority. Service ports have a predominantly public character. The number of service ports is declining worldwide.

In the tool port model, the port authority owns, develops, and maintains the port infrastructure as well as the superstructure, including cargo handling equipment such as quay cranes and forklift trucks. Port authority staff usually operates all equipment owned by the port authority. Other cargo handling on board vessels as well as on the apron and on the quay is usually carried out by private cargo handling firms contracted by the shipping agents or other principals licensed by the port authority. Whereas the port authority owns and operates the cargo handling equipment, the private cargo handling firm usually signs the cargo handling contract with the shipowner or cargo owner. The cargo handling firm however, is not able to fully control the cargo handling operations itself. To prevent conflicts between cargo handling firms, some port authorities allow operators to use their own equipment (at which point it is no

¹⁰³ ILO's 2002 General Survey of dock work states that there are probably over 2,000 ports in the world, varying in size from wharves handling at most a few hundred tonnes of cargo a year, to large international ports being true multi-modal hubs in which are concentrated the full range of logistical services, from warehousing to total management of the supply chain, and through which "up to 300,000 tonnes of cargo" [which should of course read "300 million tonnes of cargo"] may pass each year" (International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 14, para 29.

¹⁰⁴ UNCTAD, *Review of Maritime Transport 2013*, New York / Geneva, United Nations, 2013.

longer a true tool port). The tool port has a number of similarities to the service port, both in terms of its public orientation and the way the port is financed.

The landlord port is characterized by its mixed public-private orientation. Under this model, the port authority acts as regulatory body and as landlord, while port operations (especially cargo handling) are carried out by private companies. Today, the landlord port is the dominant port model in larger and medium-sized ports. In the landlord port model, infrastructure is leased to private operating companies or to industries such as refineries, tank terminals, and chemical plants. The private port operators provide and maintain their own superstructure including buildings (offices, sheds, warehouses, container freight stations, workshops). They also purchase and install their own equipment on the terminal grounds as required by their business. In landlord ports, port labour is employed by private terminal operators or through a port-wide labour pool system.

Fully privatised ports (which often take the form of a private service port) are few in number, and can be found mainly in the United Kingdom and New Zealand. In these ports, port land is privately owned, unlike the situation in other port management models. This requires the transfer of ownership of such land from the public to the private sector. In addition, along with the sale of port land to private interests, some governments may simultaneously transfer the regulatory functions to private successor companies¹⁰⁵.

¹⁰⁵ The above is almost literally taken from The World Bank, *Port Reform Toolkit, Second Edition, Module 3. Alternative Port Management Structures and Ownership Models*, Washington, The International Bank for Reconstruction and Development / The World Bank, 2007, http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/03_TOOLKIT_Module3.pdf, 81-83.

5.2. Sources of law

5.2.1. Port labour-specific sources

53. The main sources of sector-specific port labour law are national and local laws and regulations, national, local and company collective labour agreements (in some cases extended by government to non-contracting parties) and, last but not least, unwritten customs and usages of the port¹⁰⁶. To a considerable extent, the national regulatory frameworks and their underlying principles are similar around the world¹⁰⁷. This is because (1) the characteristics of port labour and the ensuing specific organisational requirements are essentially identical across the globe; (2) ports are, obviously, internationally oriented places, and relations between ship owners, cargo handlers and unions are also shaped through cross-border cooperation and industrial action¹⁰⁸; and (3) early European examples of port labour arrangements offered guidance to other continents. To the extent that port labour is not regulated by specific arrangements, it is subject to national general labour law¹⁰⁹ but, here again, the general principles are often more or less comparable.

54. The 'spontaneous' international harmonisation of port labour systems was complemented by various binding and non-binding instruments adopted within the International Labour Organization (ILO).

Today, the four key ILO instruments specifically related to port labour are:

- the Convention concerning the Social Repercussions of New Methods of Cargo Handling in Docks, adopted at Geneva on 25 June 1973 (the 'Dock Work Convention, 1973'), which we shall refer to as 'ILO Convention No. 137';
- the Recommendation concerning the Social Repercussions of New Methods of Cargo Handling in Docks (the 'Dock Work Recommendation, 1973'), which we shall refer to as 'ILO Recommendation No. 145';
- the Convention concerning Occupational Safety and Health in Dock Work, adopted at Geneva on 25 June 1979 ('the Occupational Safety and Health (Dock Work) Convention, 1979'), which we shall refer to as 'ILO Convention No. 152';
- the Recommendation concerning Occupational Safety and Health in Dock Work (the 'Occupational Safety and Health (Dock Work) Recommendation, 1979'), which we shall refer to as 'ILO Recommendation No. 160'.

¹⁰⁶ Compare Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 2.

¹⁰⁷ Compare Vigarié, A., *Ports de Commerce et Vie Littorale*, Paris, Hachette, 1979, 413.

¹⁰⁸ Compare on this aspect Cooper, F., "Dockworkers and labour history", in Davies, S. et al. (Eds.), *Dock Workers. International Explorations in Comparative Labour History, 1790-1970*, II, Aldershot, Ashgate, 2000, (523), 524.

¹⁰⁹ See also Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 162.

55. ILO Convention No. 137 entered into force on 19 June 1976. Currently, the Convention is binding upon 24 States, including the following 8 EU Member States: Finland, France, Italy, Poland, Portugal, Romania, Spain and Sweden. The Netherlands ratified the Convention in 1976 but denounced it in 2006¹¹⁰.

Since 2011, Convention No. 137 and Recommendation No. 145 are labelled in ILO's own online legal database NORMLEX as having "interim status"¹¹¹. This indicates that the instrument is not considered fully up-to-date but remains relevant in certain respects¹¹².

Earlier, ILO produced two important resolutions on the organisation of the port labour market, namely Resolution No. 25 concerning the Regularisation of Employment of Dockworkers of 27 May 1949¹¹³ and Resolution No. 66 concerning Methods of Improving Organisation of Work and Output in Ports of 22 March 1957¹¹⁴.

56. ILO Convention No. 152 entered into force on 5 December 1981 and was ratified by 26 States, including the following 9 EU Member States: Cyprus, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain and Sweden.

In ILO's online legal database NORMLEX, Convention No. 152 and Recommendation No. 160 are labelled "up-to-date"¹¹⁵.

Convention No. 152 (Art. 43) revised the Protection against Accidents (Dockers) Convention, 1929 (ILO Convention No. 28) and the Protection against Accidents (Dockers) Convention (Revised), 1932 (ILO Convention No. 32). Ratification of Convention No. 152 *ipso jure* involves the immediate denunciation of Convention No. 32¹¹⁶. Earlier, ILO Convention No. 32 had

¹¹⁰ See *infra*, para 1438.

¹¹¹ See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312282:NO; see also also ILO document GB.312/LILS/5 of November 2012, 'Improvements in the standards-related activities of the ILO. ILO standards policy: The establishment and the implementation of a standards review mechanism', http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_166502.pdf, 25.

¹¹² On the debate between employers and workers in this respect, see *infra*, para 148 *et seq.*

¹¹³ Full text in Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 235-237.

¹¹⁴ Full text in Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 241-249.

¹¹⁵ See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312297:NO and ILO document GB.312/LILS/5 of November 2012, 'Improvements in the standards-related activities of the ILO. ILO standards policy: The establishment and the implementation of a standards review mechanism', http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_166502.pdf, 25.

¹¹⁶ See ILO Document GB.279/LILS/WP/PRS/4 of November 2000, 'Examination of Recommendations (fourth stage)', <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/prs-4.pdf>, 10.

already revised ILO Convention No. 28. Also in 1932, the Protection against Accidents (Dockers) Reciprocity Recommendation, 1932 (ILO Recommendation No. 40) was adopted.

Other health and safety-related ILO instruments, all adopted in 1929, include the Marking of Weight (Packages Transported by Vessels) Convention, 1929 (ILO Convention No. 27), the Protection against Accidents (Dockers) Reciprocity Recommendation (ILO Recommendation No. 33) and the Protection against Accidents (Dockers) Consultation of Organisations Recommendation (ILO Recommendation No. 34). In 1954, the ILO adopted Resolution No. 52 concerning Welfare Facilities for Dockworkers¹¹⁷.

Upon preparation of Convention No. 152, Convention No. 32 was considered "manifestly out-of-date", as several of its provisions were not only markedly inferior to those obtaining in many countries, but were also inadequate to meet the new conditions arising out of technological changes since the Second World War¹¹⁸. Today, the ILO considers ILO Convention No. 32 and ILO Recommendation No. 40 "outdated", while ILO Convention No. 27 is labelled "to be revised", ILO Convention No. 28 has been "shelved" and ILO Recommendation No. 33 and 34 were withdrawn¹¹⁹.

Nonetheless, ILO Convention No. 32 is today still binding upon the following 6 EU Member States (which did not ratify ILO Convention No. 152): Belgium, Bulgaria, Ireland, Malta, Slovenia and the United Kingdom¹²⁰.

57. It hardly needs clarification that the ILO Conventions are binding upon the Contracting Parties only. The Recommendations are "supplementary" non-binding guidance instruments ('soft law') which are addressed to the same States (and the social partners).

To our knowledge, the question whether the ILO conventions on dock work reflect customary international law and confirm unwritten rules which are as such binding on other states, has never been addressed. Below, we shall present our findings on the situation at the level of the European Union¹²¹.

¹¹⁷ Full text in Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 237-241.

¹¹⁸ International Labour Conference (64th Session 1978), *Revision of the Protection against Accidents (Dockers) Convention (Revised), 1932 (No. 32). Report VI (1)*, Geneva, International Labour Office, 1977, 35.

¹¹⁹ See <http://www.ilo.org/dyn/normlex/en/f?p=1000:12030:0::NO>; ILO document GB.312/LILS/5 of November 2012, 'Improvements in the standards-related activities of the ILO. ILO standards policy: The establishment and the implementation of a standards review mechanism, http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_166502.pdf, 25.

¹²⁰ See *infra*, para 295 and the individual country chapters.

¹²¹ See *infra*, para 319.

58. In addition, the International Labour Office published a number of Codes of practice and Guidelines, such as:

- the ILO Code of Practice 'Accident prevention on board ship at sea and in port' (1996)¹²²;
- the ILO-IMO Code of Practice on security in ports (2003)¹²³;
- the ILO Code of Practice 'Safety and health in ports' (2005)¹²⁴;
- the ILO Port Safety and Health Audit manual (2005)¹²⁵;
- the ILO Guidelines on training in the port sector (2011)¹²⁶.

59. Another international organisation which has developed a number of relevant instruments is the International Maritime Organization (IMO). Particularly worth mentioning are:

- the International Convention for Safe Containers (CSC) (1972);
- the International Maritime Dangerous Goods Code (IMDG Code) (1965, but updated every two years, and now binding);
- the (Revised) Code of Safe Practice for Cargo Stowage and Securing (CSS Code) (1991);
- the Code of Practice for the Safe Loading and Unloading of Bulk Carriers (BLU Code) (1997);
- the (Revised) Recommendations on the Safe Transport of Dangerous Cargoes and Related Activities in Port Areas (2006).

It should be pointed out, however, that the main objective of these maritime conventions and guidance instruments was not to regulate the situation of port workers, but to improve safety of shipping and the protection of the marine environment.

60. The applicability of coastal or port and coastal state laws and regulations, including on port labour, on board foreign ships in ports is defined by customary international law.

In practice, matters that concern the 'internal economy' (including labour) on board of a foreign ship lying in the internal waters (such as ports) of another State are left to the law and the authorities of the flag State. Besides, the master bears personal responsibility for the safety of the vessel, especially the safe stowage of cargo. On the other hand, local law governs the

¹²² X., *ILO Code of practice Accident prevention on board ship at sea and in port*, Geneva, International Labour Office, 1996, http://www.ilo.org/public/libdoc/ilo/1996/96B09_305_engl.pdf.

¹²³ X., *Code of practice on security in ports*, Geneva, IMO/ILO, 2003, <http://www.imo.org/ourwork/security/instruments/documents/iloimocodeofpracticeenglish.pdf>.

¹²⁴ X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf.

¹²⁵ Roos, H.-J., *ILO Port Safety and Health Audit manual*, Geneva, International Labour Office, 2005, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_161214.pdf.

¹²⁶ X., *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf (link found broken upon updating).

organisation, the policing and the safety of the port, and local authorities can and do intervene when the peace and tranquillity of the port is disturbed or when an offence affects strangers to the vessel¹²⁷.

In a number of instances, frictions between flag and port state laws have arisen. For example, the master of a ro-ro vessel may wish to entrust his crew with lashing and unlashings operations, whereas the laws and regulations of the port require that such activities be carried out by registered port workers. In a number of EU Member States, this issue has given rise to court proceedings¹²⁸.

61. Finally, a number of non-governmental organisations have actively contributed to the regulation of port labour-related matters through the adoption of standards, research, publications, conferences and training courses¹²⁹.

A good example is the International Safety Guide for Oil Tankers and Terminals (ISGOTT). This Guide was first published in 1978 and combined the contents of the Tanker Safety Guide (Petroleum), published by the International Chamber of Shipping (ICS), and the International Oil Tanker and Terminal Safety Guide of the Oil Companies International Marine Forum (OCIMF). In 2006, the fifth edition of ISGOTT was published by ICS, OCIMF and the International Association of Ports and Harbors (IAPH). The Guide provides operational advice to directly assist personnel involved in tanker and terminal operations, including guidance on, and examples of, certain aspects of tanker and terminal operations and how they may be managed.

ISO standards may have considerable relevance for port operations as well. For example, ISO 12482-1, which regulates the technical inspection of cranes, also applies to port cranes. The EU Bulk Terminals Directive¹³⁰ even requires that all dry bulk terminal operators develop, implement and maintain an ISO-certified or equivalent quality management system (Art. 5(4)).

Some port operators voluntarily adhered to the OHSAS 18001 Standard and have their Occupational Health and Safety certified by a competent body. OHSAS 18001 was developed by an international group of bodies and institutions and its use is not regulated in any international regulatory instrument either.

¹²⁷ For brief overviews, see for example Churchill, R.R. and Lowe, A.V., *The law of the sea*, Manchester, Manchester University Press, 1999, 65-69; Daillier, P., Forteau, M. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2009, 1292-1293, para 669; Jennings, R. and Watts, A., *Oppenheim's International Law*, I, Parts 2 to 4, London / New York, Longman, 1996, 622-624, para 203; Van Hooydonk, E., *Beginnselen van Belgisch havenbestuursrecht*, Bruges, die Keure, 1996, 37-43, para 29; Vitzthum, W. Graf, "Maritimes Aquitorium and Anschlusszone", in Vitzthum, W. Graf (Ed.), *Handbuch des Seerechts*, München, C.H. Beck, 2006, (63), 103, para 80.

¹²⁸ See, *inter alia*, *infra*, paras 714 and 996.

¹²⁹ In this respect, see also International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 39, para 92.

¹³⁰ See *infra*, para 251.

The International Cargo Handling Co-ordination Association (ICHCA) has published a large number of pamphlets, research papers and other documents on health and safety aspects of port work¹³¹.

PIANC developed a guidance document entitled 'Dangerous goods in ports – recommendations for port designers and port operators'.

In the present report, we shall not pay further attention to these self-regulation instruments¹³².

5.2.2. General sources

62. Port labour is subject to a large number of non-sector specific international legal instruments, a selection of which is mentioned below.

63. The following international instruments adopted under the auspices of the United Nations or the ILO guarantee freedom of association, the right to bargain collectively and/or other fundamental rights of workers:

- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (ILO Convention No. 87);
- the Universal Declaration of Human Rights, adopted on 10 December 1948;
- the Right to Organise and Collective Bargaining Convention, 1949 (ILO Convention No. 98);
- the International Covenant on Civil and Political Rights, adopted on 16 December 1966;
- the International Covenant on Economic Social and Cultural Rights, adopted on 16 December 1966;
- the Workers' Representatives Convention, 1971 (ILO Convention No. 135);
- the Labour Relations (Public Service) Convention, 1978 (ILO Convention No. 151);
- the Collective Bargaining Convention, 1981 (ILO Convention No. 154).

In addition to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the following instruments also guarantee equality of treatment and the principle of non-discrimination:

- the Charter of the United Nations of 26 June 1945;
- the Equal Remuneration Convention, 1951 (ILO Convention No. 100);
- the Equal Remuneration Recommendation, 1951 (ILO Convention No. 90);

¹³¹ See <http://www.ichca.com/publications>.

¹³² See, however, *infra*, paras 795, 1090 and 1968 on OHSAS 18001.

- the Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention No. 111);
- the Discrimination (Employment and Occupation) Recommendation, 1958 (ILO Convention No. 111);
- the UN Convention on the Elimination of All Forms of Discrimination Against Women adopted on 18 December 1979.

Also relevant to this study, particularly in view of the existence in many EU Member States of registration or pool systems, is ILO Convention No. 181 on Private Employment Agencies of 1997¹³³.

Working conditions at ports may also be subject to ILO standards, such as:

- the Weekly Rest (Industry) Convention, 1921 (ILO Convention No. 14);
- the Night Work Convention, 1990 (ILO Convention No. 171);
- the Night Work Recommendation, 1990 (ILO Convention No. 179).

64. With regard to the training of workers, the following ILO-instruments deserve special mention:

- the Paid Educational Leave Convention, 1974 (ILO Convention No. 140);
- the Human Resources Development Convention, 1975 (ILO Convention No. 142);
- the Human Resources Development Recommendation, 2004 (ILO Convention No. 195).

65. With regard to health and safety, attention should be drawn to, *inter alia*,

- the Labour Inspection Convention, 1947 (ILO Convention No. 81);
- the Protocol of 1995 to the Labour Inspection Convention, 1947;
- the Labour Inspection Recommendation, 1947 (ILO Convention No. 81).

¹³³ This Convention entered into force on 10 May 2000 and was ratified by 23 countries, including 11 EU Member States (Belgium, Bulgaria, the Czech Republic, Finland, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal and Spain).

5.3. Labour market

5.3.1. Historical background

66. The International Labour Organization (ILO) repeatedly directed its attention to the special situation of dockworkers¹³⁴. Throughout its history, ILO's International Labour Conference (ILC) adopted various conventions and recommendations relating to the safety and health of dockworkers. The ILC examined matters relating to dockworkers for the first time in 1929, and again in 1932, when instruments on the prevention of accidents to workers engaged in loading and unloading ships were adopted, which have by now lost much of their significance¹³⁵. Subsequently, ILO's Inland Transport Committee specifically examined the problems of the regularisation of employment (1949), welfare (1954) and the organisation of dock work (1957). For each of these issues, the Inland Transport Committee adopted resolutions and conclusions which provided guidance for governments, port authorities, employers and trade unions.

67. ILO Resolution No. 25 concerning the Regularisation of Employment of Dockworkers of 27 May 1949, which aimed at greater regularity of employment for dockworkers and at ensuring an adequate supply of labour for the efficient performance of the work of the ports, recommended that registers of regular dockworkers should be established in the ports, and that no person other than a registered regular docker should be employed in dock work until all registered regular dockers available for work had been engaged for employment (Art. 1-2). The Resolution also advocated the granting of a minimum guaranteed income for registered regular dockers (Art. 10).

68. The main objective of ILO Resolution No. 66 concerning Methods of Improving Organisation of Work and Output in Ports of 22 March 1957 was to speed up the turn-round of shipping and to improve efficiency in ports.

With regard to labour-management relations, ILO Resolution No. 66 reiterated that schemes for the regularisation of employment of dockworkers, where they do not already exist, should be developed along the lines of Resolution No. 25 (Art. 5).

ILO Resolution No. 66 further states that the most desirable solution, where practicable, is for dockworkers to be employed on a regular basis (Art. 17).

¹³⁴ The present paragraph is, almost literally, based on the overview in International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 1-2, para 2.

¹³⁵ See *supra*, para 56.

Systems of allocation should aim at ensuring that every operator is able to obtain, when needed, the labour required in order to secure a quick turn-round of ships, or, in case of shortage, his fair share of such labour. They should also aim at reducing the idle shifts for the dockworkers to the lowest limit compatible with the necessity of maintaining a number of registered dockworkers sufficient, but not more than sufficient, to meet the needs of the port (Art. 18).

The means of achieving this aim will vary according to local traditions and circumstances. Allocation by rotation, whilst having the advantage of ensuring to all an equal share of the work, may be a matter of particular importance where there is unemployment or extensive underemployment; however, the right of the operator to pick workers of his choice may be conducive to efficiency in that the workers selected will include many familiar with the warehouses of that operator and the ships and types of cargo handled by him. Whichever method is selected and where assembly of dockworkers is involved, allocation arrangements should take place through suitable hiring halls, administered either by a competent authority or by the employers' and workers' organisations separately or jointly, with a view to preventing recourse to arbitrary methods, favouritism and other abuses (Art. 19).

Also, every effort should be made to enable dockworkers to be available when and where needed with as little delay as possible. For this purpose central hiring arrangements are usually required, involving the establishment of call stands suitably located and equipped (Art. 20).

Recourse to the engagement of labour outside the registration scheme should be avoided as far as possible. In any case, such additional labour should only be engaged after all available registered dockworkers of the category required have been employed (Art. 22).

According to the Resolution, a number of practices are detrimental to efficiency and to good labour management relations:

- (1) kickbacks on wages to hiring foremen or recruiting agents should not be tolerated;
- (2) recruitment through labour contractors, where still practised, should be eliminated;
- (3) transfers of workers employed on a regular basis by one employer to temporary work with another employer (where the latter is not working for the former or under him) should only be effected by agreement or, where appropriate, with the approval of a competent authority. The first employer should not receive a commission or similar monetary reward as a result of the arrangement (Art. 30).

69. In accordance with a resolution adopted by the Inland Transport Committee at its Eighth Session (1966), the Governing Body of ILO decided to convene a Tripartite Technical Meeting on Dock Work to undertake a global examination of the various aspects of dockworkers' employment and work. That Meeting, held in Rotterdam in April 1969, examined in particular the question of the social repercussions of introducing unitisation systems, with special

reference to the regularisation of employment and stabilisation of earnings¹³⁶. A major study on these matters by A.A. Evans¹³⁷ provided input for new ILO initiatives which culminated in the ILO Dock Work Convention No. 137 and the accompanying Recommendation No. 145, which we shall discuss immediately.

5.3.2. Regulatory set-up

70. Today, the main international instrument on the organisation of port labour is ILO Convention No. 137 (the 'Dock Work Convention, 1973'). It is supplemented by ILO Recommendation No. 145 (the 'Dock Work Recommendation, 1973'). In the following paragraphs, we shall summarise both instruments, even if, as we have mentioned above¹³⁸, they enjoy only "interim status" within the ILO, and the Convention could only attract a modest number of ratifications.

71. First of all, the context and purpose of both instruments are set out in the introductory recitals, which recall that important changes have taken place and are taking place in cargo handling methods in docks – such as the adoption of unit loads, the introduction of roll-on roll-off techniques and the increase of mechanisation and automation – and in the pattern of movement of freight, and that such changes are expected to become more widespread in the future. On the one hand, such changes, by speeding up freight movements, reducing the time spent by ships in ports and lowering transport costs, may benefit the economy of the country concerned as a whole and contribute to the raising of the standard of living. On the other hand, these changes also involve considerable repercussions on the level of employment in ports and on the conditions of work and life of dockworkers, and measures should be adopted to prevent or to reduce the problems consequent thereon. For these reasons, dockworkers should "share in the benefit secured by the introduction of new methods of cargo handling" and, accordingly, action for the lasting improvement of their situation, by such means as "regularisation of employment and stabilisation of income, and other measures relating to their conditions of work and life, as well as to safety and health aspects of dock work", should be planned and taken concurrently with the planning and introduction of new methods.

¹³⁶ The agenda of the Tripartite Meeting on Dock Work also included vocational training and retraining of dockworkers and safety, health and welfare of dockworkers.

¹³⁷ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 264 p.

¹³⁸ See *supra*, para 55.

72. ILO Convention No. 137 does not provide its own definition of “dock work” and “dock worker” but refers for this purpose to national law or practice¹³⁹. It indeed stipulates:

1. *This Convention applies to persons who are regularly available for work as dockworkers and who depend on their work as such for their main annual income.*
2. *For the purpose of this Convention the terms dockworkers and dock work mean persons and activities defined as such by national law or practice. The organisations of employers and workers concerned shall be consulted on or otherwise participate in the establishment and revision of such definitions. Account shall be taken in this connection of new methods of cargo handling and their effect on the various dockworker occupations (Art. 1).*

The same definitions apply for the purpose of Recommendation No. 145 (Para 1 and 2). The latter adds, however, that appropriate provisions of the Recommendation should, as far as practicable, also be applied to occasional and to seasonal dockworkers in accordance with national law and practice (Para 36).

In his preparatory study for the ILO, A.A. Evans noted that it is internationally accepted that the validity of a registration scheme will not be prejudiced if workers in specialised ports and installations, such as those handling liquid fuel or ores, are not covered, particularly if the numbers involved are small and if those who are so employed are, as is often the case, given full-time permanent employment. There may also be some grounds for leaving out of a registration scheme, as is the practice in some places, ports which deal exclusively with short sea ferries at which the work is done by men having regular employment, for example with a railway company. Finally, there may be great difficulty in including very small ports, handling only small tonnages, in which it may prove impossible or unnecessary to aim at decasualisation, particularly if the work is carried out by men who are normally otherwise employed¹⁴⁰.

Nonetheless, the question whether the Convention should have contained a definition of dock work or dockworker gave rise to a heated debate during the preparation of the Convention. In a questionnaire, the International Labour Office submitted the following question to ILO members:

3. *Do you consider that for the purpose of this instrument–*
 - (a) *the term “dockworker” should be defined to mean any worker engaged in handling cargo in a port, whether on shore or on board ship?*
 - (b) *the term “regular dockworker” should be defined to mean any worker regularly available for the work described in (a) of this question and depending on such work for his main income ?¹⁴¹*

¹³⁹ See already *supra*, para 17.

¹⁴⁰ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 43-44.

¹⁴¹ International Labour Conference (57th Session 1972), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(2), Geneva, 1972, 13.

Among the 63 members who replied to this question, 38 did so in the affirmative, and 11 in the negative, while the other 14 members replied with a comment, without stating whether they agreed or not. While a clear majority of Governments who replied to question 3(a) agreed that the term “dockworker” should be defined to mean any worker engaged in handling cargo in a port, both on shore and on board ship, a number of them qualified their replies by pointing to practical implementation difficulties in the light of existing legislation or collective agreements. Similar difficulties were raised in even stronger terms by those Governments which could not accept the definition proposed or which preferred that the definition of the term “dockworker” be left to national legislation or practice¹⁴². For example, the Government of France noted:

*The term “dockworker”, which may have a different legal definition in the legislation of different countries, should not be retained in the text of an international Recommendation. In fact it does not always cover all workers engaged in cargo handling in ports and this applies in particular to French ports, where workers other than dockworkers as defined and governed by the relevant Act are engaged in the work described in question 3 (a)*¹⁴³.

The United Kingdom replied as follows to question 3(a):

*No. The variations in the definition of dock work noted by the Tripartite Technical Meeting are so wide and so widespread that any definition which must be specifically applied would greatly reduce the prospects of acceptance of the Recommendation. It would be a serious obstacle to acceptance by, for example, the United Kingdom*¹⁴⁴.

Taking into consideration the replies by Governments, the International Labour Office concluded that the definition of the term “dockworker” should indeed be left to national law or practice (e.g. collective agreement)¹⁴⁵.

During the further preparation of the Convention, the workers insisted that a (broad) definition was necessary, but the employers concurred with the draughtsmen that the definition should be left to national law or practice¹⁴⁶.

However, the Convention does not require Member States to define the terms “dockworker” and “dock work” in a law. On the contrary, full latitude is left to national practice to address this question¹⁴⁷. Likewise, the decision to apply the provisions of the Convention and the

¹⁴² International Labour Conference (57th Session 1972), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(2), Geneva, 1972, 19.

¹⁴³ International Labour Conference (57th Session 1972), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(2), Geneva, 1972, 16.

¹⁴⁴ International Labour Conference (57th Session 1972), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(2), Geneva, 1972, 19.

¹⁴⁵ International Labour Conference (57th Session 1972), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(2), Geneva, 1972, 20.

¹⁴⁶ International Labour Conference (58th Session 1973), *Social Repercussions of New Methods of Cargo Handling (Docks)*, Report V(1), Geneva, 1972, 7, para 25.

¹⁴⁷ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 44, para 101.

Recommendation to workers in inland ports should be left to the national law and practice of each Member State¹⁴⁸.

The authors of ILO's 2002 General Survey of the implementation of the Convention again concluded that "there can be no universal and absolute definition of dockworker or dock work"¹⁴⁹.

73. The provisions of ILO Convention No. 137 must be given effect by national law or regulations, except in so far as they are otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice (Art. 7).

74. The Convention provides that it "shall be national policy to encourage all concerned to provide permanent or regular employment for dockworkers in so far as practicable" (Art. 2(1); Para 7 of Recommendation No. 145) and that, in any case, dockworkers "shall be assured minimum periods of employment or a minimum income, in a manner and to an extent depending on the economic and social situation of the country and port concerned" (Art. 2(2); Para 8(1) of Recommendation No. 145).

The Recommendation specifies that guarantees of employment or minimum income might include any or all of the following:

- (1) employment for an agreed number of hours or shifts per year, per month or per week, or pay in lieu thereof;
- (2) attendance money, payable for being present at calls or otherwise available for work when no employment is obtained, under a scheme to which no financial contribution from the dockworkers is required;
- (3) unemployment benefit when no work is available (Para 8(2)).

Positive steps should be taken by all concerned to avert or minimise as far as possible any reduction of the workforce, without prejudice to the efficient conduct of dock work operations (Para 9).

Adequate provision should be made for giving dockworkers financial protection in case of unavoidable reduction of the workforce by such means as:

- (1) unemployment insurance or other forms of social security;
- (2) severance allowance or other types of separation benefits paid by the employers;

¹⁴⁸ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 44, para 102.

¹⁴⁹ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 43, para 100.

(3) such combination of benefits as may be provided for by national laws or regulations, or collective agreements (Para 10).

75. Again pursuant to the Convention, registers shall be established and maintained for all occupational categories of dockworkers, "in a manner to be determined by national law or practice" (Art. 3(1)). The latter qualification leaves considerable liberty to decide on the appropriate form and shape of the register. The ILO has confirmed that no national or central register is required, and that registration may be organised at the level of the individual employer¹⁵⁰. This left some parties quite perplex, as every employer can be reasonably expected to keep some sort of record of people employed by him; if the registration requirement can be interpreted with such laxity, it does not seem to offer much added value.

In its central provision, the Convention then proclaims that registered dockworkers shall have priority of engagement for dock work (Art. 3(2)). That the Convention does not grant an absolute or exclusive right of employment to registered port workers, is confirmed in Recommendation No. 145¹⁵¹. The ILO Committee of Experts on the Application of Conventions and Recommendations pointed out that the Convention does not imply the introduction or maintenance of a monopoly for one cargo handling company¹⁵².

Further, registered dockworkers shall be required to be available for work in a manner to be determined by national law or practice (Art. 3(3)). The strength of the registers shall be periodically reviewed, so as to achieve levels adapted to the needs of the port (Art. 4(1)). Any necessary reduction in the strength of a register shall be accompanied by measures designed to prevent or minimise detrimental effects on dockworkers (Art. 4(2)). Here, it is worthy of note that in some countries, it is extremely difficult if not impossible to scale down the register.

76. ILO Recommendation No. 145 clarifies that the registers should be established and maintained in order to:

- (1) prevent the use of supplementary labour when the work available is insufficient to provide an adequate livelihood to dockworkers;
- (2) operate schemes for the regularisation of employment or stabilisation of earnings and for the allocation of labour in ports (Para 11).

The Recommendation goes on to specify that the number of specialised categories should be reduced and their scope altered as the nature of the work changes and as more dockworkers become able to carry out a greater variety of tasks (Para 12), that the distinction between work on board ship and work on shore should be eliminated, where possible, with a view to achieving greater interchangeability of labour, flexibility in allocation and efficiency in

¹⁵⁰ See *infra*, para 1852.

¹⁵¹ See *infra*, para 76.

¹⁵² See *infra*, para 1852.

operations (Para 13) and that, where permanent or regular employment is not available for all dockworkers, the registers should take the form of either (1) a single register; or (2) separate registers for those in more or less regular employment and those in a reserve pool (Para 14).

The Recommendation also provides that no person should "normally" be employed as a dockworker unless he is registered as such but that, exceptionally, when all available registered dockworkers are employed, other workers may be engaged (Para 15). It also reiterates that the registered dockworker should make himself available for work in a manner determined by national law or practice (Para 16).

On the adjustment of the strength of the registers, the Recommendation explains that the strength of the registers should be periodically reviewed by the parties concerned, "so as to achieve levels adequate, but not more than adequate, to the needs of the port". In such reviews, account should be taken of all relevant factors and in particular the long-term factors such as the changing methods of cargo handling and changing trends in trade (Para 17). Where the need for particular categories of dockworkers decreases, every effort should be made to retain the workers concerned in jobs within the port industry by retraining them for work in other categories; the retraining should be provided well in advance of any anticipated change in the methods of operation (Para 18(1)). If reduction in the over-all strength of a register becomes unavoidable, all necessary efforts should be made to help dockworkers to find employment elsewhere through the provision of retraining facilities and the assistance of the public employment services (Para 18(2)). In so far as practicable, any necessary reduction in the strength of a register should be made gradually and without recourse to termination of employment. In this respect, experience with personnel planning techniques at the level of the undertaking can be usefully applied to ports (Para 19(1)). In determining the extent of the reduction, regard should be had to such means as:

- (1) natural wastage;
- (2) cessation of recruitment, except for workers with special skills for which dockworkers already registered cannot be trained;
- (3) exclusion of men who do not derive their main means of livelihood from dock work;
- (4) reducing the retirement age or facilitating voluntary early retirement by the grant of pensions, supplements to state pensions, or lump-sum payments;
- (5) permanent transfer of dockworkers from ports with excess of dockworkers to ports with shortage of such workers, wherever the situation warrants and subject to collective agreements and to the agreement of the workers concerned (Para 19(2)).

Termination of employment should be envisaged only after due regard has been had to the means referred to above and subject to whatever guarantees of employment may have been given. It should be based as far as possible on agreed criteria, should be subject to adequate notice, and should be accompanied by severance payments (Para 19(3)).

More generally, the Recommendation also invites concerned parties to monitor the impact of changes in cargo handling methods. In each country and, as appropriate, each port, the probable impact of changes in cargo handling methods, including the impact on the employment opportunities for, and the conditions of employment of, dockworkers, as well as on the

occupational structure in ports, should be regularly and systematically assessed, and the action to be taken in consequence systematically reviewed, by bodies in which representatives of the organisations of employers and workers concerned and, as appropriate, of the competent authorities participate (Para 3). The introduction of new methods of cargo handling and related measures should be co-ordinated with national and regional development and manpower programmes and policies (Para 4). For these purposes, all relevant information should be collected continuously, including in particular:

- (1) statistics of freight movement through ports, showing the methods of handling used;
- (2) flow charts showing the origin and the destination of the main streams of freight handled, as well as the points of assembly and dispersion of the contents of containers and other unit loads;
- (3) estimates of future trends, if possible similarly presented;
- (4) forecasts of manpower required in ports to handle cargo, taking account of future developments in methods of cargo handling and in the origin and destination of the main streams of freight (Para 5).

As far as possible, each country should adopt those changes in the methods of handling cargo which are best suited to its economy, having regard in particular to the relative availability of capital, especially foreign exchange, and of labour, and to inland transport facilities (Para 6).

77. Recommendation No. 145 also elaborates on the allocation of workers.

Except where permanent or regular employment with a particular employer exists, systems of allocation should be agreed upon which:

- (1) subject to the other provisions¹⁵³, provide each employer with the labour required to secure a quick turn-round of ships, or in case of shortage, a fair share of such labour consistent with any established system of priorities;
- (2) provide each registered dockworker with a fair share of available work;
- (3) reduce to a minimum the necessity for attending calls for selection and allocation to a job and the time required for this purpose;
- (4) ensure that, so far as practicable and subject to the necessary rotation of shifts, dockworkers complete a task begun by them (Para 20).

Subject to conditions to be prescribed by national laws or regulations or collective agreements, the transfer of dockworkers in the regular employment of one employer to temporary work with another as well as the temporary transfer of dockworkers on a voluntary basis from one port to another should be permitted when required (Para 21 and 22).

¹⁵³ More particularly, Para 11, 15 and 17.

78. ILO Convention No. 137 also provides that, in order to secure the greatest social advantage of new methods of cargo handling, "it shall be national policy to encourage co-operation between employers or their organisations, on the one hand, and workers' organisations, on the other hand, in improving the efficiency of work in ports, with the participation, as appropriate, of the competent authorities" (Art. 5).

The Convention obliges each Member to ensure that "appropriate safety, health, welfare and vocational training provisions" apply to dockworkers (Art. 6).

79. ILO Recommendation No. 145 contains further Parts on labour-management relations, the organisation of work in ports and conditions of work and life.

First of all, discussions and negotiations between employers and workers concerned should aim not merely at settlement of current issues such as wages and conditions of work, but at "an over-all arrangement encompassing the various social measures required to meet the impact of new methods of cargo handling" (Para 23). The existence of organisations of employers and of dockworkers established in accordance with the principles of the Freedom of Association and Protection of the Right to Organise Convention, 1948, and the Right to Organise and Collective Bargaining Convention, 1949, able freely to enter into negotiations and to ensure the execution of agreements arrived at, should be recognised as being important for this purpose (Para 24). Where it does not already exist, appropriate joint industrial machinery should be set up with a view to creating a climate of confidence and co-operation between dockworkers and employers in which social and technical change can be brought about without tension or conflict and grievances promptly settled in accordance with the Examination of Grievances Recommendation, 1967 (Para 25). Employers' and workers' organisations, together as appropriate with the competent authorities, should participate in the application of the social measures required, and in particular in the operation of schemes for the regularisation of employment or stabilisation of earnings (Para 26). Effective policies of communication between employers and dockworkers and between the leaders of workers' organisations and their members should be established in accordance with the Communications within the Undertaking Recommendation, 1967, and implemented by all possible means at all levels (Para 27).

On the organisation of work, the Recommendation first of all confirms that, in order to secure the greatest social advantage of new methods of cargo handling, agreements should be concluded between employers or their organisations, on the one hand, and workers' organisations, on the other hand, with a view to their co-operation in improving the efficiency of work in ports, with the participation, as appropriate, of the competent authorities (Para 28).

The measures to be covered by such agreements might include:

- (1) the use of scientific knowledge and techniques concerning the work environment with particular reference to conditions in ports;
- (2) comprehensive vocational training schemes, including training in safety measures;
- (3) mutual efforts to eliminate outdated practices;

- (4) increased flexibility in the deployment of dock labour between hold and hold, ship and ship, and ship and shore, and between shore jobs;
- (5) recourse, where necessary, to shift work and weekend work;
- (6) work organisation and training designed to enable dockworkers to carry out several related tasks;
- (7) the adaptation of the strength of gangs to agreed needs, with due regard to the necessity of ensuring reasonable rest periods;
- (8) mutual efforts to eliminate unproductive time as far as practicable;
- (9) provision for the effective use of mechanical equipment, subject to the observance of relevant safety standards and the weight restrictions required by the certified safe working capacity of the machine (Para 29).

Furthermore, such measures should be accompanied by agreements concerning the regularisation of employment or stabilisation of earnings and by the improvements in conditions of work referred to below (Para 30).

With regard to conditions of work and life, the Recommendation stresses that laws and regulations concerning safety, health, welfare and vocational training applicable to industrial undertakings should be effectively applied in ports, with such technical variations as may be necessary; there should be adequate and qualified inspection services (Para 31).

Standards as regards hours of work, weekly rest, holidays with pay and similar conditions should be not less favourable for dockworkers than for the majority of workers in industrial undertakings (Para 32).

Also, measures should be adopted in regard to shift work, which include:

- (1) not placing the same worker on consecutive shifts, except within limits established by national laws or regulations or collective agreements;
- (2) special compensation for the inconvenience caused to the worker by shift work, including weekend work;
- (3) fixing an appropriate maximum duration and an appropriate timing of shifts, regard being had to local circumstances (par. 33).

Where new methods of cargo handling are introduced and where tonnage rates or other forms of payment by results are in use, steps should be taken to review and, where necessary, revise the methods and the scales of pay. Where possible, the earnings of the dockworkers should be improved as a result of the introduction of the new methods of cargo handling (Para 34).

Finally, appropriate pension and retirement schemes should be introduced where they do not already exist (Para 35).

80. In addition to specific ILO instruments on port labour, we should mention that the International Covenant on Economic Social and Cultural Rights provides that the States Parties

recognise the right to work, which includes "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts", and that the Parties will take appropriate steps to safeguard this right (Art. 6(1)). The steps to be taken include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual (Art. 6(2)).

5.3.3. Facts and figures

81. The authors of ILO's 2002 survey of the implementation of ILO Convention No. 137 reported that it had proved "very difficult" to obtain precise figures concerning the number of dockworkers in specific countries or in the world. They noted that only a few countries responding to their questionnaire provided in their replies an estimate of the number of dockworkers in their national ports. According to the survey, several factors may explain this lack of statistics, in particular the diversity of methods of defining dockworkers, which may vary from country to country or from one port to another, and also the existence or otherwise of a system of registration or maintenance of statistics¹⁵⁴.

A decade later, there is no indication whatsoever that this situation has changed and that the ILO or any other organisation is able to provide reliable up-to-date figures or even a reasonable estimate of the number of port workers worldwide. Neither are we aware of data on the number of employers of port workers.

82. A major difficulty is that international classification systems do not identify port labour and port workers as separate categories.

The United Nations' International Standard Industrial Classification of All Economic Activities (ISIC)¹⁵⁵ contains a Section H 'Transportation and storage', under which Division 52 'Warehousing and support activities for transportation' comprises the Groups 521 'Warehousing and storage' and 522 'Support activities for transportation'. This division includes "warehousing and support activities for transportation, such as operating of transport infrastructure (e.g. airports, harbours, tunnels, bridges, etc.), the activities of transport agencies and cargo handling". Group 522 includes "activities supporting the transport of passengers or freight, such as operation of parts of the transport infrastructure or activities related to handling freight

¹⁵⁴ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 14, para 29.

¹⁵⁵ ISIC Rev.4 has been officially released on 11 August 2008.

immediately before or after transport or between transport segments. The operation and maintenance of all transport facilities is included".

ISIC Class 5224 'Cargo handling' includes:

- *loading and unloading of goods or passengers' luggage irrespective of the mode of transport used for transportation*
- *stevedoring*
- *loading and unloading of freight railway cars.*

Class 5222 'Service activities incidental to water transportation' includes:

- *activities related to water transport of passengers, animals or freight:*
- *operation of terminal facilities such as harbours and piers*
- *operation of waterway locks etc.*
- *navigation, pilotage and berthing activities*
- *lighterage, salvage activities*
- *lighthouse activities.*

As a result, services relying on port labour are subsumed under the (broader) ISIC Class 5224, while Class 5222 comprises the management of port infrastructure and terminals, with the exclusion of port labour for the purposes of the present study.

The International Standard Classification of Occupations ISCO-08 adopted by the ILO does not identify port workers as a separate group. However, minor group 933 'Transport and storage labourers' comprises a unit group 9333 of 'Freight handlers'. Major group 9 contains 'Elementary occupations' which involve "the performance of simple and routine tasks which may require the use of hand-held tools and considerable physical effort"¹⁵⁶.

Unit group 9333 is explained as follows:

9333 Freight handlers

Freight handlers carry out tasks such as packing, carrying, loading and unloading furniture and other household items, or loading and unloading ship and aircraft cargoes and other freight, or carrying and stacking goods in various warehouses.

Tasks include -

- (a) *packing office or household furniture, machines, appliances and related goods to be transported*
- (b) *from one place to another;*
- (c) *carrying goods to be loaded on or unloaded from vans, trucks, wagons, ships, or aircraft;*
- (d) *loading and unloading grain, coal, sand and similar goods by placing them on conveyor-belts, pipes, etc.;*

¹⁵⁶ ISCO-08 Draft definitions, <http://www.ilo.org/public/english/bureau/stat/isco/isco08/index.htm>, 543.

- (e) connecting hoses between main shore installation pipes and tanks of barges, tankers and other ships to load and unload petroleum, liquefied gases and other liquids;
- (f) carrying and stacking goods in warehouses and similar establishments;
- (g) sorting cargo prior to loading and unloading¹⁵⁷.

Related occupations classified elsewhere include 'Operator, crane' (No. 8343) and 'Operator, truck/lifting' (No. 8344).

83. A major difficulty in estimating the number of port workers is the diverse nature of employment relationships, which includes various forms of casual, occasional and temporary work. Some ports maintain statistics on the number of "manshifts utilised", but these figures fluctuate with the traffic and work pattern¹⁵⁸.

In 1996, the majority of respondents to an ILO questionnaire on port labour (74 per cent) indicated that port labour is permanently employed; 21 per cent reported the existence of a labour pool, while 11 per cent used 'casual' (in the sense of unregulated or occasional) labour¹⁵⁹.

ILO's 2002 survey confirmed that such 'casual' labour is still widespread in ports throughout the world, even if it concerns a minority of workers. It also mentions that more than two-thirds of the replies to a questionnaire sent out by the International Transport Workers' Federation reported the existence of unregulated work estimated at less than 10 per cent of the total workforce¹⁶⁰.

84. At global level, no representative organisation of employers in the port cargo handling sector seems to exist. However, employers do meet in associations such as the International Cargo Handling Co-ordination Association (ICHCA)¹⁶¹, which has consultative status with, *inter alia*, the International Labour Office and the International Maritime Organization, and the General Stevedoring Council (GSC)¹⁶². From time to time, the International Association of Ports and Harbors (IAPH)¹⁶³ also tackles labour issues.

¹⁵⁷ ISCO-08 Draft definitions, <http://www.ilo.org/public/english/bureau/stat/isco/isco08/index.htm>, 566.

¹⁵⁸ Compare Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer?WDSPath=IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 5, para 11.

¹⁵⁹ X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 19.

¹⁶⁰ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reln/ilc/ilc90/pdf/rep-iii-1b.pdf>, 33, para 77 and footnote 30.

¹⁶¹ See <http://www.ichca.com>.

¹⁶² See <http://www.gscouncil.com>.

¹⁶³ See <http://www.iaphworldports.org/>.

Unions of port workers are affiliated to either the International Transport Workers' Federation (ITF) or the International Dockworkers Council (IDC). The ITF states that its Dockers' Section is made up of 221 affiliated unions that represent 350,000 port workers worldwide¹⁶⁴. The militant International Dockworkers Council (IDC) was officially founded in 2000 and claims to represent over 90,000 dockworkers¹⁶⁵.

¹⁶⁴ See <http://www.itfglobal.org/dockers/about.cfm>.

¹⁶⁵ See <http://www.idcdockworkers.org/en/what-is-the-idc>.

5.4. Qualifications and training

5.4.1. Historical background

85. As Professor Notteboom summarises, changing ship and terminal technology and new port labour decasualisation policies in countries worldwide contributed to a growing need for specialised port training after the Second World War. Since the 1960s, dockworker training centres at port or national level were established and formal safety programs for dockworkers were introduced. These initiatives were soon followed by the first recognised training schemes and higher qualifications in the industry. Port training schemes became a global phenomenon in the late 1970s and 1980s largely through public sector funding with the support of the United Nations (UNCTAD, ILO and IMO) and the World Bank. ILO, in particular, has been very instrumental in developing a global policy on the establishment of national or regional port worker training centres in developing countries. The 1990s brought a major extension and upgrading of the quality of port training materials¹⁶⁶.

86. Training programmes in many ports have been adapted to the changing pattern of labour supply and the demand for new and/or combined skills. In recent years there has been a shift from job analysis used to reveal the skills needed for a particular job, to identifying the competencies required for a given function. Many of these competencies are common to a significant number of functions in ports and indeed throughout the transport and logistics chain. Competencies can therefore be combined to create recognised qualifications for port workers as part of a national qualifications framework, although it should be noted that a sector-based approach is often more viable than an attempt to create one education and training system for all, applying to all industries¹⁶⁷. The new competency-based training qualifications-based approach is the *leitmotiv* of the 2011 ILO Guidelines on training in the port sector.

¹⁶⁶ Notteboom, T., *Dock labour and port-related employment in the European seaport system. Key factors to port competitiveness and reform*, ESPO / ITMMA, 2010, www.porteconomics.eu, 58. For a general overview of ILO initiatives in the field of port training, see Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", 22nd *International Port Conference "Human Resources and Sea Ports Performance"*, 12-14 March 2006, Alexandria, www.ppiarf.org. On port training at international level, see also Coltof, H. (ed.), *Port organisation and management*, Rotterdam, IMTA, 1999, 87-104.

¹⁶⁷ X., *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 6, para 16.

5.4.2. Regulatory set-up

87. ILO Convention No. 137 obliges each Member to ensure that "appropriate safety, health, welfare and vocational training provisions" apply to dockworkers (Art. 6).

88. ILO Convention No. 152 provides that no worker shall be employed in dock work unless he has been given adequate instruction or training as to the potential risks attaching to his work and the main precautions to be taken (Art. 38(1)). A lifting appliance or other cargo handling appliance shall be operated only by a person who is at least 18 years of age and who possesses the necessary aptitudes and experience or a person under training who is properly supervised (Art. 38(2)).

89. The ILO Code of Practice on Safety and Health in Ports emphasises that all portworkers should be trained to develop the knowledge, psychomotor and attitude skills which they need to enable them to do their work safely and efficiently, as well as to develop general safety awareness. Port workers should be aware of the potential effects of their actions on others, as well as the specific hazards of their work and methods to control them. Training should include both general induction training and training relevant to their specific work. Consideration should be given to the need for continuation or refresher training in addition to initial training. This may be necessary to deal with technological advances and the introduction of new plant or working practices. It may also be necessary to eradicate bad practices that have developed with time and to remind workers of basic principles. Records should be maintained of the training that each portworker has received and the competencies that have been attained.

The Code further elaborates on induction training, job-specific training, training methods, evaluation of training and information for workers¹⁶⁸.

90. In 2011, the ILO adopted Guidelines on Training in the Port Sector¹⁶⁹.

These Guidelines present a competency-based framework for port worker training methods designed to:

- protect and promote health and safety in ports;

¹⁶⁸ X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, 32 *et seq.*

¹⁶⁹ The Guidelines are largely based on the following background study: Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf.

- improve the skills development of port workers and enhance their professional status and welfare;
- secure the greatest possible social and economic advantages from advanced methods of cargo handling and other port operations;
- improve cargo handling efficiency and enhance the quality of service to port clients;
- protect the environment and promote decent work and sustainable jobs in ports¹⁷⁰.

The Guidelines were produced for all organisations and individuals involved in any aspect of port worker training. This includes, but is not restricted to: government ministries of transport and labour/employment; training schools/institutions, whether broadly-based (national) or dedicated (industry, port or company-specific) organisations involved in the provision of port worker training; port and terminal operators as well as specialist port service providers; individual trainers employed by training schools/institutions and port managers, especially those in human resources (HR)/training functions; and trade union officials and other (port-based) worker representatives (e.g. port safety committee members, works councillors and the like)¹⁷¹.

The Guidelines set out the general approach and key processes for competency-based training in the port sector; they are not designed to provide a detailed syllabus for training or training materials. The latter are available from other sources, such as the ILO's Portworker Development Programme (PDP) or materials provided by well-established training providers in the industry¹⁷².

The model for port worker training, which is described in the Guidelines, follows a sequential process or cycle that starts with competency profiling; identifies any gaps between the competencies required and the competency profile of the workforce; and develops individual learning plans to close the gap through a systematic process of training, subject to appropriate assessment and accreditation. At the heart of the cycle is the training policy, an explicit statement of intent that may be part of a national (government-inspired) policy on training, either in alignment with cross-sector VET policy in general or ports policy in particular. If no such national policy on training exists, or if it is deemed too general for the port sector, then the industry and/or individual ports/operators are advised to develop their own policy to set out the commitment of different stakeholders to training, with appropriate rules and regulations to facilitate the universal objectives of safe and efficient port operations that provide a timely, cost effective and high quality service for all port users¹⁷³.

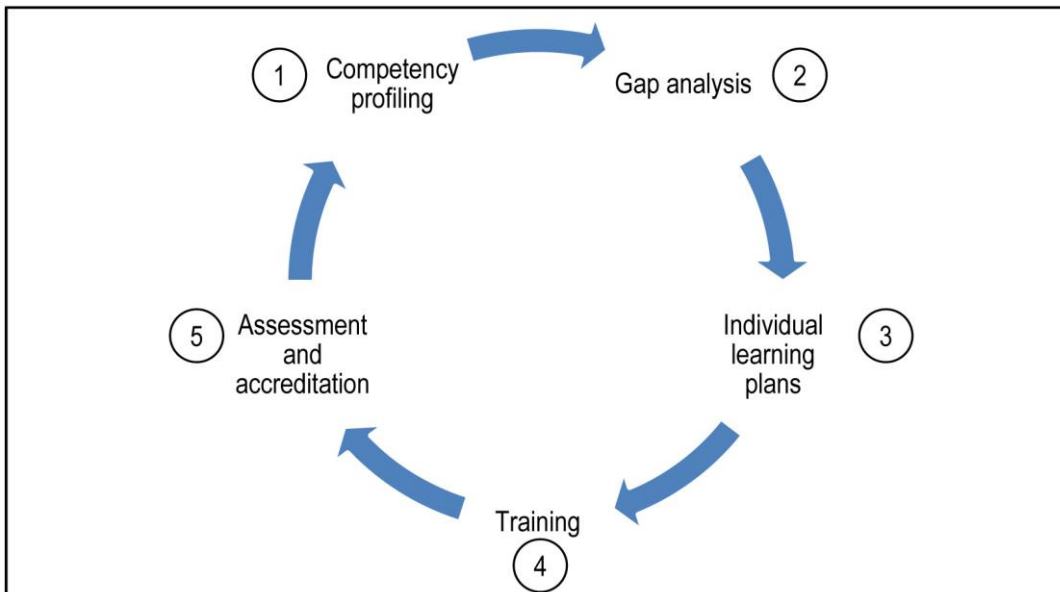
¹⁷⁰ X., *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 1, para 1.

¹⁷¹ X., *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 1, para 3.

¹⁷² International Labour Organization, *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 1-2, para 5.

¹⁷³ International Labour Organization, *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 3, para 10.

Figure 8. The port worker training cycle as set out in the ILO Guidelines on Training in the Port Sector, 2011 (source: ILO¹⁷⁴)



If a national qualifications framework (NQF)¹⁷⁵ exists, port worker training can be developed within this framework with the involvement of the social partners, specialist training institutes and other stakeholders. Some port jobs will share competencies with jobs in other sectors of the economy, most notably other transport modes, distribution and logistics, but increasingly also IT (e.g. data processing skills) and the service sector (e.g. document processing skills). With a modular training system, common or basic modules shared across sectors can be complemented with industry-specific (specialist or elective) modules¹⁷⁶.

91. Several IMO instruments require that port workers receive training in safety matters¹⁷⁷.

¹⁷⁴ International Labour Organization, *Guidelines on training in the port sector*, TMEPS/2011/10, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175376.pdf, 24.

¹⁷⁵ A NQF is defined as "an instrument for the development, classification and recognition of skills, knowledge and competencies along a continuum of agreed levels, typically between eight and ten levels" (see Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 32, with further references).

¹⁷⁶ Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 97.

¹⁷⁷ See *infra*, para 109 et seq.

92. The ILO-IMO Code of Practice on security in ports (2003) highlights the desirability of security training for cargo handling personnel (item 10).

93. General ILO instruments such as the Paid Educational Leave Convention, 1974 (ILO Convention No. 140), the Human Resources Development Convention, 1975 (ILO Convention No. 142) and the Human Resources Development Recommendation, 2004 (ILO Recommendation No. 195) aim at the promotion of education, training and facilities for lifelong learning, in the interest of individual workers, enterprises, the economy and society as a whole.

For example, the Human Resources Development Recommendation recommends States to develop a national qualifications framework including a certification system which will ensure that skills are portable and recognised across sectors, industries, enterprises and educational institutions (Art. 5(e) and 11). The same instrument recommends that States should develop a framework for the certification of qualifications of training providers (Art. 14).

The Private Employment Agencies Recommendation (ILO Recommendation No. 188) mentions that private employment agencies "should have properly qualified and trained staff" (Art. 14).

The duty of States to ensure that training programmes are available is also mentioned in the International Covenant on Economic Social and Cultural Rights (Art. 6(2)).

5.4.3. Facts and figures

94. ILO's own Portworker Development Programme (PDP) was developed following a survey on the implications of new cargo handling techniques carried out in 1985. The objective of the PDP is to enable governments of and port authorities in developing countries to establish training programmes to improve the efficiency of cargo handling, conditions of work, safety and the status and welfare of dockworkers¹⁷⁸. The PDP training materials, which are constantly updated, comprise a total of 30 Learning Units based on best international practice and covering a wide variety of topics plus an instructor's guide and a glossary of technical terms¹⁷⁹.

¹⁷⁸ See International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reim/ilc/ilc90/pdf/rep-iii-1b.pdf>, 37, para 88.

¹⁷⁹ Meletiou, M., "Improved port performance through training: The contribution of the International Labour Organization", 22nd International Port Conference "Human Resources and Sea Ports Performance", 12-14 March 2006, Alexandria, www.ppiaf.org, 14.

Although the PDP is believed to mainly meet the needs of ports in developing countries¹⁸⁰, EU-based users of ILO's Portworker Development Programme (PDP) included, in 2011:

- United Stevedoring Co. Ltd., Cyprus;
- Thessaloniki Port Authority, Thessaloniki, Greece;
- Ministry of Competitiveness and Communications, Malta;
- HZ Safety B.V., Netherlands;
- Shipping and Transport College, Rotterdam, Netherlands;
- TEMPO, Port of Rotterdam Consulting, Rotterdam, Netherlands;
- Wubeling and Partners, port safety consultants, Rotterdam, Netherlands;
- Luka Koper, Port of Koper, Slovenia;
- Fundacion Puertos De Las Palmas, Spain;
- FUNESPOR, Spain;
- World Maritime University, Malmo, Sweden;
- Bestshore Business Solutions, United Kingdom¹⁸¹.

95. In addition to ILO activities, the Rotterdam-based International Port Training Conference (IPTC) organised 20 meetings of experts on port training between 1970 and 2007¹⁸².

¹⁸⁰ International Labour Office (Governing Body), 282nd Session, GB.282/2/1, November 2001, Second Item on the Agenda. (a) Proposals for the agenda of the 92nd Session (2004) of the International Labour Conference, <http://www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/gb-2-1.pdf>, 56, para 179.

¹⁸¹ Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 148-149.

¹⁸² See <http://www.iptc-online.net/main/mprofile.html>.

5.5. Health and safety

5.5.1. Historical background

96. As we have explained¹⁸³, the ILO has been devoting attention to health, safety and welfare of port workers since its early days and has produced a variety of binding and non-binding instruments, many of which are however considered outdated today.

For example, the Protection against Accidents (Dockers) Convention, 1929 (ILO Convention No. 28) prescribed detailed technical measures to ensure safety of work in ports. ILO Convention No. 28 was supplemented by the Protection against Accidents (Dockers) Reciprocity Recommendation (ILO Recommendation No. 33) and The Protection against Accidents (Dockers) Consultation of Organisations Recommendation (ILO Recommendation No. 34) and revised by ILO Convention No. 32. The latter was supplemented by the Protection against Accidents (Dockers) Reciprocity Recommendation, 1932 (ILO Recommendation No. 40).

The Marking of Weight (Packages Transported by Vessels) Convention, 1929 (ILO Convention No. 27) introduced the principle that any package or object of 1,000 kilograms or more gross weight consigned within the territory of any Contracting Party for transport by sea or inland waterway must have its gross weight plainly and durably marked upon it on the outside before it is loaded on a ship or vessel.

Resolution No. 52 concerning Welfare Facilities for Dockworkers of 1954 set out general principles as well as detailed technical measures to ensure the welfare of dockers.

¹⁸³ See *supra*, paras 56 and 66 *et seq.* See also the summary in X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, 2-3.

Figure 9. Acrobatic manual dock work in Antwerp's southern barge docks in the days of old



In 1958, the first edition of the Code of Practice *Safety and health in dock work* was published. It complemented ILO Convention No. 32 which in the opinion of experts needed no revision. The Code of Practice was conceived as "simply a body of advice for the guidance of persons with responsibilities in the promotion of occupational safety and health in dock work" and was not intended to have binding force¹⁸⁴.

In 1976, a separate volume, *Guide to safety and health in dock work*, was published as a complement to the Code of Practice. A second, updated edition of the Code was published in 1977 to take into account developments in the industry during the preceding 20 years.

In 1979, Convention No. 32 was revised by the adoption of the Occupational Safety and Health (Dock Work) Convention (ILO Convention No. 152), and the accompanying Recommendation (No. 160).

5.5.2. Regulatory set-up

97. The Protection against Accidents (Dockers) Convention (Revised), 1932 (ILO Convention No. 32), which is considered outdated by the ILO but is still binding upon a number of EU Member States, describes a set of safety measures of a technical nature on, *inter alia*, approaches to working places, access to ships, transport by water, means of access from the deck to the hold, the condition of hatch coverings and beams, the condition of hoisting machines or gear, the competence of operators of lifting or transporting machinery and signalmen, hoisting operations, dangerous goods, and first-aid facilities.

98. Below, we shall outline ILO Convention No. 152 concerning Occupational Safety and Health in Dock Work and its accompanying Recommendation No. 160, both of which are regarded as up-to-date instruments.

99. First of all, ILO Convention No. 152 defines dock work as "all and any part of the work of loading or unloading any ship¹⁸⁵ as well as any work incidental thereto" but adds that the definition of such work shall be established by national law or practice, and that the organisations of employers and workers concerned shall be consulted on or otherwise participate in the establishment and revision of this definition (Art. 1).

¹⁸⁴ X., *Safety and health in dock work*, Geneva, International Labour Office, 1971, 3.

¹⁸⁵ The term ship covers any kind of ship, vessel, barge, lighter or hovercraft, excluding ships of war (Art. 3(h)).

100. A Member may grant exemptions from or permit exceptions to the provisions of ILO Convention No. 152 "in respect of dock work at any place where the traffic is irregular and confined to small ships, as well as in respect of dock work in relation to fishing vessels or specified categories thereof", on condition that (1) safe working conditions are maintained and (2) the competent authority, after consultation with the organisations of employers and workers concerned, is satisfied that it is reasonable in all the circumstances that there be such exemptions or exceptions (Art. 2(1)).

Particular requirements of Part III of the Convention – which sets out detailed technical requirements – may be varied if the competent authority is satisfied, after consultation with the organisations of employers and workers concerned, that the variations provide corresponding advantages and that the over-all protection afforded is not inferior to that which would result from the full application of the provisions of the Convention (Art. 2(2)).

Any exemptions or exceptions and any significant variations, as well as the reasons therefor, shall be indicated in the reports on the application of the Convention submitted in pursuance of Article 22 of the Constitution of the International Labour Organisation (Art. 2(3)).

101. National laws or regulations of Contracting Parties shall prescribe that measures complying with Part III of Convention No. 152 be taken with a view to:

- (1) providing and maintaining workplaces, equipment and methods of work that are safe and without risk of injury to health;
- (2) providing and maintaining safe means of access to any workplace;
- (3) providing the information, training and supervision necessary to ensure the protection of workers against risks of accident or injury to health arising out of or in the course of their employment¹⁸⁶;
- (4) providing workers with any personal protective equipment and protective clothing and any life-saving appliances reasonably required where adequate protection against risks of accident or injury to health cannot be provided by other means;
- (5) providing and maintaining suitable and adequate first-aid and rescue facilities;
- (6) developing and establishing proper procedures to deal with any emergency situations which may arise (Art. 4(1)).

The measures to be taken in pursuance of the Convention shall cover:

- (1) general requirements relating to the construction, equipping and maintenance of dock structures and other places at which dock work is carried out;
- (2) fire and explosion prevention and protection;

¹⁸⁶ Recommendation No. 160 specifies that, with a view to preventing occupational accidents and diseases, workers should be given adequate instruction or training in safe working procedures, occupational hygiene and, where necessary, first-aid procedures and the safe operation of cargo-handling appliances (Para 6).

- (3) safe means of access to ships, holds, staging, equipment and lifting appliances;
- (4) transport of workers;
- (5) opening and closing of hatches, protection of hatchways and work in holds;
- (6) construction, maintenance and use of lifting and other cargo handling appliances;
- (7) construction, maintenance and use of staging;
- (8) rigging and use of ship's derricks;
- (9) testing, examination, inspection and certification, as appropriate, of lifting appliances, of loose gear, including chains and ropes, and of slings and other lifting devices which form an integral part of the load;
- (10) handling of different types of cargo;
- (11) stacking and storage of goods;
- (12) dangerous substances and other hazards in the working environment;
- (13) personal protective equipment and protective clothing;
- (14) sanitary and washing facilities and welfare amenities;
- (15) medical supervision;
- (16) first-aid and rescue facilities;
- (17) safety and health organisation;
- (18) training of workers;
- (19) notification and investigation of occupational accidents and diseases (Art. 4(2)).

The practical implementation of the requirements shall be ensured or assisted by technical standards or codes of practice approved by the competent authority, or by other appropriate methods consistent with national practice and conditions (Art. 4 (5)).

Recommendation No. 160 specifies that, in developing measures under the Convention, each Member should take into consideration the technical suggestions in the latest edition of the Code of Practice on safety and health in dock work published by the International Labour Office in so far as they appear to be appropriate and relevant in the light of national circumstances and conditions (Para 4).

102. National laws or regulations shall make appropriate persons, whether employers, owners, masters or other persons, as the case may be, responsible for compliance with the measures referred to above (Art. 5(1)).

Whenever two or more employers undertake activities simultaneously at one workplace, they shall have the duty to collaborate in order to comply with the prescribed measures, without prejudice to the responsibility of each employer for the health and safety of his employees. In appropriate circumstances, the competent authority shall prescribe general procedures for this collaboration (Art. 5(2)).

103. The Convention further provides that there shall be arrangements under which workers:

- (1) are required neither to interfere without due cause with the operation of, nor to misuse, any safety device or appliance provided for their own protection or the protection of others;
- (2) take reasonable care for their own safety and that of other persons who may be affected by their acts or omissions at work;
- (3) report forthwith to their immediate supervisor any situation which they have reason to believe could present a risk and which they cannot correct themselves, so that corrective measures can be taken (Art. 6(1)).

Workers shall have a right at any workplace to participate in ensuring safe working to the extent of their control over the equipment and methods of work and to express views on the working procedures adopted as they affect safety. In so far as appropriate under national law and practice, where safety and health committees have been formed, this right shall be exercised through these committees (Art. 6(2)).

104. In giving effect to the provisions of Convention No. 152 by national laws or regulations or other appropriate methods consistent with national practice and conditions, the competent authority shall act in consultation with the organisations of employers and workers concerned (Art. 7(1)).

Provision shall be made for close collaboration between employers and workers or their representatives in the application of the required measures (Art. 7(2)).

105. Part III of ILO Convention No. 152 (Art. 8 to 40) prescribes detailed technical measures with regard to safety and health in dock work. These relate to, *inter alia*, fencing of unsafe workplaces, lighting of workplaces, suitability of stacking areas, width of passageways, fire-fighting means, guarding of dangerous parts of machinery, electrical equipment, access to ship's holds and cargo decks, hatch covers, lifting appliances, loose gear, lay-out of container terminals, packing of dangerous cargoes, excessive noise, personal protective equipment, rescue of persons in danger, medical examinations, safety and health committees, safety training, reporting of accidents and diseases, and sanitary and washing facilities.

Recommendation No. 160 contains supplementary technical provisions (Para 5 and 7 *et seq.*).

106. Each Member which ratifies Convention No. 152 shall:

- (1) specify the duties in respect of occupational safety and health of persons and bodies concerned with dock work;
- (2) take necessary measures, including the provision of appropriate penalties, to enforce the provisions of the Convention;

(3) provide appropriate inspection services to supervise the application of the measures to be taken in pursuance of the Convention, or satisfy itself that appropriate inspection is carried out (Art. 41)¹⁸⁷.

107. The 2005 version of the ILO Code of Practice on Safety and Health in Ports provides practical recommendations. This instrument comprises about 500 pages and includes some 120 illustrations. Its table of contents not only illustrates the encyclopaedic approach towards the regulation of health and safety followed by its authors, but also gives a fair overview of specific health and safety-relevant aspects of port labour:

Figure 10. Table of contents of the ILO Code of Practice on Safety and Health in Ports (source: ILO¹⁸⁸)

- 1. Introduction, scope, implementation and definitions
 - 1.1. *Introduction*
 - 1.1.1. *General overview of the port industry*
 - 1.1.2. *Reasons for the publication of this code*
 - 1.2. *Scope*
 - 1.3. *Implementation*
 - 1.4. *Innovations in ports*
 - 1.5. *Definitions*
- 2. General provisions
 - 2.1. *Responsibilities*
 - 2.1.1. *General requirements*
 - 2.1.2. *Competent authorities*
 - 2.1.3. *Port employers*
 - 2.1.4. *Contractors and labour or service providers*
 - 2.1.5. *Ships' officers*
 - 2.1.6. *Management*
 - 2.1.7. *Supervisors*
 - 2.1.8. *Portworkers*
 - 2.1.9. *Self-employed persons*
 - 2.1.10. *Safety and health advisers*

¹⁸⁷ National laws or regulations shall prescribe the time-limits within which the provisions of the Convention shall apply in respect of:

- (1) the construction or equipping of a ship;
- (2) the construction or equipping of any shore-based lifting appliance or other cargo-handling appliance;
- (3) the construction of any item of loose gear (Art. 42(1)).

However, these time-limits shall not exceed four years from the date of ratification of the Convention (Art. 42(2)).

¹⁸⁸ X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, XIII-XXX.

- 2.1.11. *Other persons at work*
- 2.1.12. *Passengers and other non-workers*
- 2.2. *Management of safety and health*
 - 2.2.1. *General requirements*
 - 2.2.2. *Risk assessment systems*
 - 2.2.3. *Safety and health management systems*
- 2.3. *Safe systems of work*
- 2.4. *Organization*
 - 2.4.1. *Organization for safety and health in ports*
 - 2.4.2. *Safety and health committees*
 - 2.4.3. *Safety representatives*
- 2.5. *Reporting and investigation of accidents*
 - 2.5.1. *In-house reporting of accidents*
 - 2.5.2. *Statutory reporting of accidents*
 - 2.5.3. *Investigation of accidents*
- 2.6. *Selection and training*
 - 2.6.1. *Selection of portworkers*
 - 2.6.2. *Training needs*
 - 2.6.3. *Induction training*
 - 2.6.4. *Job-specific training*
 - 2.6.5. *Training methods*
 - 2.6.6. *Evaluation of training*
- 2.7. *Information for portworkers*
- 2.8. *Special facilities for disabled persons*
- 3. *Port infrastructure, plant and equipment*
 - 3.1. *General provisions*
 - 3.1.1. *Separation of people and vehicles*
 - 3.1.2. *Surfaces*
 - 3.1.3. *Lighting*
 - 3.1.4. *Fire precautions*
 - 3.1.4.1. *General requirements*
 - 3.1.4.2. *Fire protection*
 - 3.1.4.3. *Fire alarms*
 - 3.1.4.4. *Fire-fighting equipment*
 - 3.1.5. *Means of escape in case of fire*
 - 3.2. *Traffic routes*
 - 3.2.1. *Roadways*
 - 3.2.2. *Walkways*
 - 3.2.3. *Other matters*
 - 3.3. *Cargo-handling areas*
 - 3.3.1. *Layout*
 - 3.3.2. *Edge protection*
 - 3.3.3. *Quay edges*

- 3.3.4. *Fencing*
- 3.3.5. *Quayside ladders*
- 3.3.6. *Life-saving equipment*
- 3.4. *Shore-side access to ships*
 - 3.4.1. *General requirements*
 - 3.4.2. *Shore ramps and passenger walkways*
 - 3.4.3. *Landing stages*
 - 3.4.4. *Steps and stairways*
 - 3.4.5. *Quayside ladders*
- 3.5. *Access to terminal buildings, structures and plant*
 - 3.5.1. *General requirements*
 - 3.5.2. *Stairways and steps*
 - 3.5.3. *Fixed ladders and walkways*
 - 3.5.4. *Portable ladders*
 - 3.5.5. *Rope ladders*
 - 3.5.6. *Lifts*
- 3.6. *Terminal plant and equipment*
 - 3.6.1. *General requirements*
 - 3.6.2. *Mobile equipment*
 - 3.6.2.1. *Internal movement vehicles*
 - 3.6.2.2. *Visual display screens in vehicles*
 - 3.6.2.3. *Skeletal trailers*
 - 3.6.2.4. *Trestles*
 - 3.6.2.5. *Goosenecks*
 - 3.6.2.6. *Roll trailers and cassettes*
 - 3.6.2.7. *Hand trucks and trolleys*
 - 3.6.2.8. *Cargo platforms*
 - 3.6.2.9. *Access or lashing cages*
 - 3.6.3. *Conveyors*
 - 3.6.4. *Electrical equipment*
 - 3.6.5. *Hand tools*
 - 3.6.6. *Machinery*
 - 3.6.7. *Mooring dolphins and bollards*
 - 3.6.8. *Vehicle sheeting facilities*
 - 3.6.9. *Other equipment*
- 3.7. *Bulk cargo terminals*
 - 3.7.1. *Bulk solids*
 - 3.7.2. *Bulk liquids and gases*
- 3.8. *Container terminals*
 - 3.8.1. *Definitions*
 - 3.8.2. *General requirements*
 - 3.8.3. *Segregation*
 - 3.8.4. *Reception facilities*
 - 3.8.5. *Control rooms*
 - 3.8.6. *Grids*

- 3.9. *Passenger terminals*
- 3.10. *Roll-on-roll-off (ro-ro) terminals*
- 3.11. *Warehouses and transit sheds*
- 3.12. *Gatehouses and quay offices*
 - 3.12.1. *Gatehouses*
 - 3.12.2. *Quay offices*
- 3.13. *Port railways*
- 3.14. *Tenders and work boats*
- 3.15. *Personal protective equipment*
 - 3.15.1. *General requirements*
 - 3.15.2. *Storage and maintenance of personal protective equipment*

- 4. *Lifting appliances and loose gear*
 - 4.1. *Basic requirements*
 - 4.1.1. *General requirements*
 - 4.1.2. *Brakes*
 - 4.1.3. *Electrical supply*
 - 4.1.4. *Safe working load (SWL)*
 - 4.1.5. *Controls*
 - 4.1.6. *Limiting devices*
 - 4.1.7. *Lubrication*
 - 4.1.8. *Operator's cab*
 - 4.1.9. *Overhauling weight*
 - 4.1.10. *Swivels*
 - 4.1.11. *Tyres*
 - 4.1.12. *Access*
 - 4.1.13. *Winch and rope drums, leads and anchorages*
 - 4.1.14. *Maintenance*
 - 4.2. *Testing, thorough examination, marking and inspection of lifting appliances and loose gear*
 - 4.2.1. *Introduction*
 - 4.2.2. *Testing of lifting appliances*
 - 4.2.3. *Testing of loose gear*
 - 4.2.4. *Thorough examination*
 - 4.2.5. *Test and examination reports, registers and certificates*
 - 4.2.6. *Marking*
 - 4.2.7. *Inspection*
 - 4.3. *Lifting appliances*
 - 4.3.1. *Ships' lifting appliances*
 - 4.3.2. *Shore cranes*
 - 4.3.3. *Lift trucks*
 - 4.4. *Loose gear*
 - 4.4.1. *General requirements*
 - 4.4.2. *Chains and chain slings*
 - 4.4.3. *Wire ropes and slings*

- 4.4.4. *Fibre ropes and slings*
- 4.4.5. *Blocks*
- 4.4.6. *Other loose gear*
- 4.5. *Lifting devices forming an integral part of a load*
 - 4.5.1. *General requirements*
 - 4.5.2. *Flexible intermediate bulk containers (FIBCs)*
 - 4.5.3. *Pallets*
- 5. *Safe use of lifting appliances and loose gear*
 - 5.1. *Basic requirements*
 - 5.1.1. *General requirements*
 - 5.1.2. *Planning and control of lifting operations*
 - 5.1.3. *Training*
 - 5.1.4. *Inspection*
 - 5.1.4.1. *General inspection requirements*
 - 5.1.4.2. *Daily checks*
 - 5.1.4.3. *Weekly checks*
 - 5.1.4.4. *Blocks*
 - 5.1.4.5. *Equipment not in regular use*
 - 5.1.5. *Weather conditions*
 - 5.2. *Lifting appliances*
 - 5.2.1. *General requirements*
 - 5.2.1.1. *Safe use*
 - 5.2.1.2. *Care and maintenance*
 - 5.2.2. *Ships' lifting appliances*
 - 5.2.2.1. *Ships' derricks*
 - 5.2.2.2. *Use of coupled derricks (union purchase)*
 - 5.2.2.3. *Ships' cargo lifts*
 - 5.2.2.4. *Ships' mobile lifting appliances*
 - 5.2.2.5. *Cranes temporarily installed on ships*
 - 5.2.3. *Shore cranes*
 - 5.2.4. *Lift trucks*
 - 5.2.4.1. *General requirements*
 - 5.2.4.2. *Safe use*
 - 5.2.4.3. *Reach trucks*
 - 5.2.4.4. *Side-loading forklift trucks*
 - 5.2.4.5. *Batteries*
 - 5.2.4.6. *Pedestrian-controlled pallet trucks*
 - 5.2.5. *Other lifting appliances*
 - 5.2.6. *Use of more than one lifting appliance to lift a load*
 - 5.3. *Loose gear*
 - 5.3.1. *Safe working load*
 - 5.3.2. *Safe use*
 - 5.3.3. *Ropes and slings*
 - 5.3.3.1. *Use*

- 6.10.2. *Internal movement vehicles*
 - 6.10.3. *Trailer operations*
 - 6.10.4. *Trestles*
 - 6.10.5. *Goosenecks*
 - 6.10.6. *Roll trailers*
 - 6.10.7. *Cassettes*
 - 6.10.8. *Parking*
 - 6.10.9. *Refuelling*
 - 6.11. *Liquid bulk cargoes*
 - 6.12. *Logs*
 - 6.13. *Mooring operations*
 - 6.14. *Pallet handling*
 - 6.15. *Passenger terminals*
 - 6.16. *Rail operations*
 - 6.16.1. *General requirements*
 - 6.16.2. *Loading and unloading of rail wagons*
 - 6.16.3. *Moving rail wagons*
 - 6.17. *Roll-on-roll-off (ro-ro) operations*
 - 6.18. *Scrap metal*
 - 6.19. *Solid bulk cargoes*
 - 6.20. *Stacking and stowing of goods*
 - 6.21. *Steel and other metal products*
 - 6.21.1. *General requirements*
 - 6.21.2. *Storage*
 - 6.21.3. *Handling*
 - 6.22. *Trade vehicles*
 - 6.23. *Traffic control*
 - 6.24. *Warehouses and transit sheds*
 - 6.25. *Confined spaces*
 - 6.25.1. *General requirements*
 - 6.25.2. *Hazards and precautions*
7. *Operations afloat*
- 7.1. *General provisions*
 - 7.2. *Access to ships*
 - 7.2.1. *General requirements*
 - 7.2.2. *Accommodation ladders*
 - 7.2.3. *Gangways*
 - 7.2.4. *Portable ladders*
 - 7.2.5. *Rope ladders*
 - 7.2.6. *Bulwark steps*
 - 7.2.7. *Access to the decks of bulk carriers and other large ships*
 - 7.2.8. *Access to barges and other small ships*
 - 7.2.9. *Access to ro-ro ships*
 - 7.2.10. *Ship-to-ship access*

- 7.2.11. *Access by water*
- 7.3. *Access on board ships*
 - 7.3.1. *General requirements*
 - 7.3.2. *Access to holds*
 - 7.3.3. *Access to deck cargo*
- 7.4. *Hatches*
 - 7.4.1. *Hatch coverings*
 - 7.4.2. *Handling hatch coverings*
 - 7.4.3. *Stacking and securing of hatch coverings*
 - 7.4.4. *Protection of hatches*
- 7.5. *Work in holds*
 - 7.5.1. *General requirements*
 - 7.5.2. *Working practices*
- 7.6. *Work on deck*
 - 7.6.1. *General requirements*
 - 7.6.2. *Lashing and securing of cargo*
- 7.7. *Shot cargo*
- 7.8. *Container ships*
 - 7.8.1. *General requirements*
 - 7.8.2. *Deck working*
 - 7.8.3. *Container top working*
- 7.9. *Ro-ro ships*
 - 7.9.1. *General requirements*
 - 7.9.2. *Vehicle movements*
 - 7.9.3. *Passenger movements*
 - 7.9.4. *Vehicle lashing operations*
 - 7.9.5. *Cargo lifts*
- 7.10. *Bulk carriers*
- 7.11. *Hot work*
- 8. *Dangerous goods*
 - 8.1. *Packaged dangerous goods*
 - 8.1.1. *General requirements*
 - 8.1.2. *International arrangements*
 - 8.1.3. *United Nations classification*
 - 8.1.4. *IMDG Code*
 - 8.1.5. *Checking of packaged dangerous goods*
 - 8.2. *Solid bulk cargoes*
 - 8.3. *Bulk liquids and gases*
 - 8.4. *Operational precautions*
 - 8.4.1. *General requirements*
 - 8.4.2. *Training*
 - 8.4.3. *Control of entry and presence*
 - 8.4.4. *Notification of dangerous goods*
 - 8.4.5. *Checking the information*

- 8.4.6. *Handling and stowage*
- 8.4.7. *Emergency arrangements in the port area*
- 8.4.8. *Special provisions*
- 8.4.9. *Repair and maintenance work*

9. Health

9.1. Health hazards

- 9.1.1. *General requirements*
- 9.1.2. *Dangerous goods and fumigation*
- 9.1.3. *Dusty cargoes*
- 9.1.4. *Other cargoes*
- 9.1.5. *Noise*
- 9.1.6. *Fatigue*
- 9.1.7. *Fumes*
- 9.1.8. *Vibration*
- 9.1.9. *Abnormal environments*
- 9.1.10. *Other health aspects*
- 9.1.11. *Ergonomics*

9.2. Occupational health services

- 9.2.1. *General principles*
- 9.2.2. *First-aid personnel*
- 9.2.3. *Personnel providing occupational health services*

10. Personnel welfare facilities

- 10.1. *General provisions*
- 10.2. *Toilet facilities*
- 10.3. *Washing facilities*
- 10.4. *Clothing accommodation*
- 10.5. *Drinking water*
- 10.6. *Mess rooms and canteens*
- 10.7. *Hiring halls and waiting rooms*

11. Emergency arrangements

11.1. Emergency arrangements on shore and ship

- 11.1.1. *General requirements*
- 11.1.2. *Injuries and ill health*
- 11.1.3. *Rescue*
- 11.1.4. *Property damage*
- 11.1.5. *Fire*
- 11.1.6. *Cargo spillage*
- 11.1.7. *Falls into water*
- 11.1.8. *Failure of services*
- 11.1.9. *Severe weather and other natural hazards*
- 11.1.10. *Major hazard installations*

11.2. Emergency planning

- 11.2.1. *General requirements*
- 11.2.2. *Scope*
- 11.2.3. *Responsibilities*
- 11.2.4. *Liaison*
- 11.2.5. *Emergency plans*
 - 11.2.5.1. *General requirements*
 - 11.2.5.2. *Essential personnel*
 - 11.2.5.3. *Roles*
 - 11.2.5.4. *Emergency control centre*
 - 11.2.5.5. *Publication, exercise and review*

11.3. *Emergency equipment*

12. *Other relevant safety matters*

12.1. *Environment*

- 12.1.1. *General requirements*
- 12.1.2. *Environmental management systems*
- 12.1.3. *Environmental aspects of port operations*
- 12.1.4. *Precautions*

12.2. *Security*

References

Appendices

- A. *Testing of lifting appliances*
- B. *Testing of loose gear*
- C. *Thorough examination of lifting appliances and loose gear*
- D. *Test loading*
- E. *Factor of safety (coefficient of utilization)*
- F. *Steel quality grade mark*
- G. *Heat treatment of wrought iron*
- H. *Marking of single-sheave blocks*

List of figures

[...]

Figure 11. Cargo handling symbols as explained in the ILO Code of Practice on Safety and Health in Ports (source: ILO¹⁸⁹)

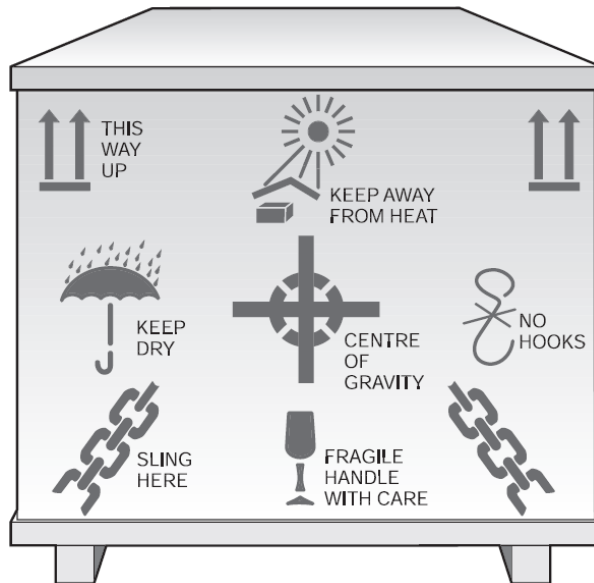
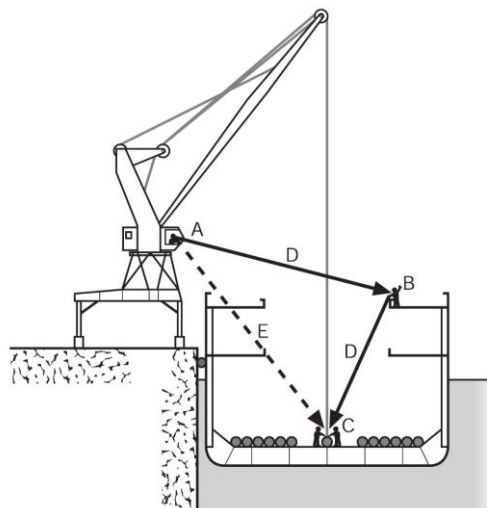


Figure 12. Correct position of signaller as explained in the ILO Code of Practice on Safety and Health in Ports (source: ILO¹⁹⁰)



A. Crane driver. B. Signaller. C. Portworkers in hold. D. Direct line of sight. E. Direct line of sight impossible.

¹⁸⁹ X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, 174, Figure 53.

¹⁹⁰ X., *ILO code of practice Safety and health in ports*, Geneva, International Labour Office, 2005, http://www.ilo.org/public/libdoc/ilo/2005/105B09_39_engl.pdf, 239, Figure 72.

108. Turning to IMO instruments, the Container Safety Convention (CSC) first of all lays down rules for the maintenance of containers. Its objectives are (1) to maintain a high level of safety of human life in the transport and handling of containers by providing generally acceptable test procedures and related strength requirements; and (2) to facilitate the international transport of containers by providing uniform international safety regulations, equally applicable to all modes of surface transport.

109. The International Maritime Dangerous Goods Code (IMDG Code) sets safety standards for, *inter alia*, the handling of dangerous goods in ports. It contains provisions on training, focusing on three main training elements: general awareness training, role specific training and safety training (Chapter 1.3). It provides that shore based personnel engaged in the transport of dangerous goods intended to be transported by sea shall receive training in the contents of the dangerous goods provisions commensurate with their responsibilities (Section 1.3.1.1).

110. The Revised Recommendations on the Safe Transport of Dangerous Cargoes and Related Activities in Port Areas are aligned with the provisions of the (now binding) IMDG Code. They are intended to set out a standard framework within which legal requirements can be prepared by governments to ensure the safe transport and handling of dangerous cargoes in port areas.

111. The CSS Code provides that personnel commissioned to tasks of cargo stowage and securing should be properly qualified and experienced (General Principles).

112. The IMO Recommendations on the Safe Transport of Dangerous Cargoes and Related Activities in Port Areas provide that every person engaged in the transport and handling of dangerous cargoes should receive training commensurate with his responsibilities. To this end, regulatory authorities should establish minimum requirements for training and, where appropriate, qualifications for each person involved (Section 4.1.1, 4.2.1 and 4.3.1). The Recommendations describe the training content (Section 4.4.1.1 *et seq.*)

113. The BLU Code provides, *inter alia*, that solid bulk terminal operators should ensure that they only accept ships that can safely berth alongside their installation. Terminal equipment should be properly certificated and maintained in accordance with the relevant national

regulations and/or standards, and only operated by duly qualified and, if appropriate, certificated personnel. Where automatic weighing equipment is provided, this should be calibrated at regular intervals. Terminal personnel should be trained in all aspects of safe loading and unloading of bulk carriers, commensurate with their responsibilities. The training should be designed to provide familiarity with the general hazards of loading, unloading and carriage of bulk cargoes and the adverse effect improper cargo handling operations may have on the safety of the ship. Terminal operators should ensure that personnel involved in the loading and unloading operations are duly rested to avoid fatigue (item 2.3).

114. In addition to the specific regulations outlined above, safe and healthy working conditions are guaranteed by a number of general treaties (see, for example, Art. 7(b) of the the International Covenant on Economic Social and Cultural Rights).

5.5.3. Facts and figures

115. To our knowledge, no worldwide figures or statistics on occupational health and safety in port labour are maintained. Even so, port labour continues to be widely regarded as a particularly dangerous occupation¹⁹¹.

¹⁹¹ See already *supra*, paras 23 and 49.

5.6. Policy and legal issues

5.6.1. Labour market issues

- *Importance and outline*

116. As we have explained¹⁹², the identification of restrictions affecting the functioning of the port labour market is one of the main objectives of our, primarily legal, analysis of current European port labour regimes.

In the course of the 20th century, many pool and worker registration systems became encrusted with far-reaching restrictive rules and practices which substantially increased cost and affected the competitiveness of ports, led to incessant complaints by employers, attracted the attention of several international institutions such as the International Labour Organization and the World Bank, and of course did not go unnoticed by academic researchers. Below, we shall outline the problem in general terms. We will discuss, in that order, the terminology, typical examples of both restrictions on employment and restrictive working practices, policy responses to date, and the specific international regulation of closed shop situations and access to the market for temporary agency work.

In the EU chapter, we shall highlight a number of cases where restrictions were tested against EU law. In the country chapters in Volume II, then, we shall try to inventory restrictions as they occur in the EU's ports today¹⁹³.

117. Our focus on restrictions should of course not obscure the fact that many port workers take serious pride in delivering quick and high-quality work¹⁹⁴ and that, in many ports, reform processes have succeeded in eradicating most, if not all, remaining restrictions. In addition, not all restrictions are *per se* against the law; if certain conditions are met, a number of restrictions may find a justification¹⁹⁵. Finally, one should not forget that, all international regulations notwithstanding, the fluctuating nature of port traffic still results in job insecurity and/or temporary unemployment for many, especially casually employed, workers.

¹⁹² See *supra*, paras 3 and 30.

¹⁹³ For more details, see esp. the Belgium and UK chapters, *infra*, para 439 *et seq.* and 1889 *et seq.* respectively.

¹⁹⁴ Compare already Pieters, L.J., "Havenwerk in de peiling", *Tijdschrift voor Vervoerswetenschap* 1984, (138), 149.

¹⁹⁵ See already *supra*, para 31.

- Terminology

118. Alan S. Harding defines restrictive practices as

*those practices, not themselves necessary for the health or safety of the workforce, which cause an enterprise to operate in a less productive way or at a higher cost than is possible and reasonable*¹⁹⁶.

The same author explains that such practices may originate from government regulations, from management decisions, from labour agreements or, in many cases, from the unwritten custom of the port. Clearly cost is central to any consideration of restrictive practices, whether on the output side as cost per ton handled, or on the input side as cost of labour. Usually cost is affected by the restrictive practice as a derived variable, for example when twelve men have to be allocated to a task that technically requires only ten. However, there are other practices where cost enters directly, for instance in the percentage increase in the normal rate that is required for overtime work (where the hours classed as overtime have been defined elsewhere); this is where the borderline between a reasonable or normal practice and a restrictive practice begins to be subjective. For example, extra payment for the evening shift or for night work may be considered "reasonable" and is certainly common, even though it militates against three shift working. The ideal is to have equal payment on all shifts, with a shift rotation in order to achieve equitable treatment for all members of the workforce¹⁹⁷.

Harding also notes that port workers, protected by restrictions, and given the crucial role of ports in the national economy, have tended to achieve a privileged wage level compared with those employed in similar though arguably less arduous jobs in warehousing and other occupations. There have been several examples where this privileged position has resulted finally in a negative attitude towards the port workers on the part of the general public and - probably more importantly - on the part of the other unions affiliated with the central union organisation¹⁹⁸.

Recently, Michel Pigenet stressed that restrictive practices which have been in existence, in some cases, from time immemorial, derive from a culture grounded in the need to evade and resist exploitation¹⁹⁹. Likewise, in interviews, several trade union representatives tended to

¹⁹⁶ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 2, para 4.

¹⁹⁷ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 2, para 4.

¹⁹⁸ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 14, para 35.

¹⁹⁹ Pigenet, M., "Labour and trade union cultures: the idiosyncratic experience of the European dockworkers in the 19th to the 21st centuries", *European Review of Labour and Research* 2012, Vol. 18, (143), 152.

dismiss all complaints about restrictive practices, which they legitimise as 'protective' practices²⁰⁰. Often the workers cling to the restrictions in order to keep up the numbers employed on a job beyond the level really required. The whole issue of restrictive practices is indeed directly related to the fear of underemployment. The port workers seek to protect themselves in many ports by recourse to "make-work" policies or rules designed to ensure that one gang does not deprive another one of a possible job²⁰¹. Peter Turnbull concedes that, while most working practices, when first introduced, seemed reasonable, they often became restrictive with the passage of time as methods of work organisation changed and new technology was introduced²⁰². Jean-Georges Baudelaire points out that restrictions are often rationalised on the basis of safety requirements while their real purpose is indeed to ensure maximum employment and remuneration²⁰³.

Our research suggests that, whereas historically restrictions came into being as a response to the casual nature of employment, they often continue to characterise employment relationships at ports where work has been re-organised along the lines of general labour law. This may be due to several factors, such as tradition and customs, transitional rules in reform schemes, or simply strong union power. Here again, a formal-legal banalisation of employment conditions is surely no guarantee that all specificities of port labour will be rooted out.

119. Below, we have tried to distinguish between (1) restrictions on employment and (2) restrictive working practices. Restrictions on employment limit the freedom of an employer to hire staff, to decide where and when he does so, to select candidates and to decide on the number and composition of teams or groups needed for a particular job. Restrictive working practices, then, concern restrictive arrangements which are implemented once the workers are employed. In other words, the first type of restrictions operates before workers are engaged, the second in the course of work. Even if this distinction may appear a bit academic, we believe that it might be helpful in the context of future legal assessments of the various types of restrictions in the context of both international and EU law. In the context of EU law, for example, restrictions on employment are probably more likely to impact on free movement, while restrictive working practices may, in certain circumstances, be conducive to abuses of a dominant position by a pool agency or a terminal operator. Still, the distinctions will not always be an easy one. For example, restricted working hours (daily working time, overtime rules, shift systems, limitations on night and weekend work, etc.), which are a typical example of a restrictive working practice, may entail serious constraints of the freedom of employers to engage labour.

²⁰⁰ See, for example, Turnbull, P. and Weston, S., "Employment regulation, state intervention and the economic performance of European ports", *Cambridge Journal of Economics* 1992, (385), 394.

²⁰¹ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 208.

²⁰² Turnbull, P., *Social dialogue in the process of structural adjustment and private sector participation in ports: A practical guidance manual*, Geneva, International Labour Organization, 2006, <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/reference/ILO%20ports-socialguidelines.pdf>, 6.

²⁰³ Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 325.

- *Examples of restrictions on employment*

120. The following restrictions on employment in the port labour market seem to occur commonly (and may be combined with one another):

- *compulsory registration*: regular port workers, whether permanently employed or not, must be registered and enjoy priority of employment. This requirement is central in ILO Dock Work Convention No. 137;

- *mandatory pool system*: port workers (or certain categories of port workers) can only be recruited through a pool and employers are not allowed to contract employees of their choice;

- *closed shop*: union membership is a legal or at least a factual requirement to become a port worker²⁰⁴;

- *kin-based recruitment (nepotism)*: recruitment in ports is based on ties of kin-ship, whereby access to the profession is often reserved for relatives of union leaders or members;

- *prohibition on permanent employment*: all port workers are allocated to employers on a daily basis and there is no possibility for employers to employ workers on a permanent basis (while stakeholders consider permanent or at least regular employment of general workers, but especially crane drivers and other machinery operators a key determinant of commitment and physical productivity, as familiarity with equipment increases the speed of operations and reduces downtime and damage²⁰⁵);

- *prohibition on self-employment*: self-employed persons are not allowed to perform port labour; conversely, some ports reserve port work for (registered) self-employed workers;

- *job demarcation*: certain tasks can only be performed by specific subgroups of port workers (for example, crane drivers, forklift drivers, coal trimmers, lashers, tallymen, etc.), which prevents multi-tasking and hinders flexibility (in addition, in some ports, separate registers are kept for the men who work in the hold, who must have special

²⁰⁴ See more *infra*, para 128 *et seq.*

²⁰⁵ Barton, H. and Turnbull, P., "Labour Regulation and Competitive Performance in the Port Transport Industry: The Changing Fortunes of Three Major European Seaports", *European Journal of Industrial Relations* 2002, Vol. 8, No. 2, (133), 138.

skills, and for those on shore, but in the case of container ships or ro-ro ships, such a distinction has long been considered inappropriate)²⁰⁶;

- *allocation by seniority or rota (work sharing)*: where pool workers are allocated to employers on a daily (or shift) basis through a pool, employers have no control over the choice of the men they employ, as priority may be given on the basis of seniority or as workers may be allocated on the basis of a rota system which ensures a fair distribution of jobs among all workers but may prevent specialisation and hinder productivity improvement²⁰⁷;

- *mandatory manning levels (fixed manning)*: irrespective of the actual demand for labour, the number and composition of gangs are fixed by regulations, agreements or customs and shrouded by concerns of work demarcation, status, group cohesion and safety factors²⁰⁸. While the technological evolution which has marked port labour in the 20th century has led to a reduction in labour force, some ports have not changed their manning practices in line with the new conditions and employ more workers per gang than are actually needed²⁰⁹;

- *prohibition on transfer of workers to another hatch of the same ship*: port workers working a particular hatch are prevented from being transferred to another hatch of the same ship during a given shift, meaning that a gang finishing a hatch early will stand by idle and be paid for the remainder of the shift or half-shift as the case may be, and that the workforce in different holds cannot be adjusted to the respective volumes of work²¹⁰;

- *prohibition on transfer of workers from one ship to another (one shift, one ship)*: a similar ban may apply to the transfer of port workers from one ship to another during a shift²¹¹;

- *prohibition on transfer of workers from ship to shore and conversely (no-transfer)*: there may be considerable advantage in being able to reduce the number of men in the

²⁰⁶ See, for example, Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 45; Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 12, para 29; X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 21.

²⁰⁷ See, *inter alia*, Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 61-62; X., *Social and labour problems caused by structural adjustments in the port industry*, Geneva, International Labour Office, 1996, 21.

²⁰⁸ See Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 62; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 114.

²⁰⁹ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 1-3, para 2, 4 and 6; compare Vigarié, A., *Ports de Commerce et Vie Littorale*, Paris, Hachette, 1979, 420.

²¹⁰ See Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 325; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 104.

²¹¹ See Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 105.

hold at a certain stage of operations and transfer some of them to quayside. In wet weather, if work on board is held up, it is useful to transfer the men to warehouse work. In some ports, any such transfers run into serious obstacles²¹²;

- *prohibition on self-handling*: in many ports shipping companies or merchants are not allowed to employ their own personnel for the loading or unloading of their ships or for various specific tasks such as lashing and unlashings of lorries on board short-sea ferries. In this respect, it should be noted that even where self-handling is not allowed, stowage of cargo is always carried out under the direction of the master of the ship and that cargo must be loaded, stowed and trimmed to the master's satisfaction with a view to the seaworthiness of the vessel²¹³;

- *prohibition on a temporary transfer of workers from one employer to another*: regardless of general labour law provisions on the hiring out of workers, port labour-specific restrictions may apply on the temporary exchange of workers between port operators;

- *prohibition on working in other ports*: it may not be possible for port workers registered or employed in one port to perform port work in another port, even if their employer runs terminals in different port areas in the same country;

- *extension to other areas*: port labour-specific rules, including restrictions on employment, may be extended to other areas such as warehousing and logistics areas.

- Examples of restrictive working practices

121. Typical examples of restrictive work practices include:

- *restrictive working hours* (which may also be regarded as a restriction on employment): work is limited to official working hours set by local rules or usages, leading to excessive use of overtime charged at increased rates; shift work ensuring non-stop operations may be discouraged, penalised or prohibited²¹⁴;

²¹² See Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 326; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 105; Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 3, para 6.

²¹³ See Cartner, J.A.C., Fiske, R.P. and Leiter, T., *The international law of the shipmaster*, London, Informa, 2009, 138, § 8.17.

²¹⁴ Compare, *inter alia*, Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 326; Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 3, para 6.

- *unproductive time and time-wasting practices*: delays in starting work, returning home as soon as the initial task is completed (English *job-and-finish*, French *fini-parti*, Antwerpian *gedaan-gedaan*²¹⁵), bad time-keeping, unauthorised rest periods, inefficient use of available time, including deliberate slowing down of normal operations; well-known historical examples are 'spelling' or the 'welt', where gang members alternate, working for two hours then resting for two hours, and 'continuity', where a gang once formed cannot be modified until its task – usually emptying one hatch on a ship – has been completed, even if the nature of the cargo changes or there are more urgent priorities²¹⁶ (the latter rule being another example of a restriction which can at the same time be considered a 'restriction on employment', as mentioned above);

- *unwillingness to increase efficiency*: workers may be unwilling to increase efficiency, e.g. made possible by technological innovations; a typical example is the refusal to make use of new cranes or other – often quite costly – equipment. Sometimes equipment is used below its technical capacity²¹⁷;

- *lack of discipline*: impossibility for employers to exercise normal authority, to impose compliance with safety standards and to sanction unacceptable behaviour; in extreme cases, pilfering²¹⁸.

- *International policy responses*

122. A number of restrictive working practices were addressed in ILO Resolution No. 66 concerning Methods of Improving Organisation of Work and Output in Ports of 1957.

For example, ILO Resolution No. 66 states that maintenance of discipline is necessary to efficiency, and that employers' and workers' organisations should accept responsibility, where necessary, for ensuring that discipline is observed by all participants, either employers or workers, according to such systems as may have been agreed upon. Any person affected is entitled to a fair hearing (Art. 14).

²¹⁵ As an incentive to complete tasks as quickly as possible, this practice also has a positive effect on productivity, which explains its acceptance by employers.

²¹⁶ See Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 107 and 113-114; Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 3, para 6; Miller, R.C., "The Dockworker Subculture and Some Problems in Cross-Cultural and Cross-Time Generalization", *Comparative Studies in Society and History*, Vol. 11, No. 3, 1969, (302), 311 and 312.

²¹⁷ Compare Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 326; Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 208.

²¹⁸ See already *supra*, para 43.

With regard to unproductive time, the Resolution provides that it is desirable that a concerted effort should be made to reduce unproductive time to a minimum. Among the many matters which may call for consideration mention is made of the following:

- (1) late starts and early knocking off;
- (2) arrangements for preparatory and complementary work, for example removal and replacement of beams and hatch covers and adjustment of gear;
- (3) interruption of work without sufficient justification owing to rain or bad weather;
- (4) over-frequent and unsuitably timed breaks;
- (5) spelling or unauthorised absences from work, for example due to slack supervision or covering up by fellow workers;
- (6) cargo handling and cargo delivery so planned as to minimise delays;
- (7) careful co-ordination between activities on board ships and on shore, for example to ensure a regular flow of slings or pallets, an adequate supply of lighters or of vehicles on shore, and adequate co-ordination of shunting with other handling operations;
- (8) adjustment of working periods and of breaks, including the possibility of staggering the breaks, with a view to minimising delays (Art. 27).

The Resolution goes on to insist that productivity can also be promoted by increased mobility of labour, for example between hold and hold, ship and ship, ship and shore, and between shore jobs (Art. 28).

It is also desirable that there should be agreed arrangements for greater flexibility in regard to the strength of gangs in relation to the job and for dealing with the problem of incomplete gangs (Art. 29).

On the introduction of new equipment, the authors of the Resolution found it desirable to accept new types of mechanical equipment, whether they are for use on board ship or on the quayside, and new methods of work, when they are efficient, economic and safe. It is also desirable that they should contribute to easing the work of the dockworker and to speeding up the turnaround of ships (Art. 37).

When new types of equipment and new methods are introduced, suitable procedures should be established between employers and workers for making adjustments in the strength of gangs, piece rates and labour mobility consequent upon the introduction of such new equipment and methods (Art. 39).

123. In his major study of 1969 on the impact on port labour of new handling technologies, especially containerisation, A.A. Evans of the International Labour Office argued that, as restrictions are often the result of fear of unemployment, and flourish particularly where there is no guarantee of employment or income, they should logically disappear when such guarantee is given²¹⁹.

²¹⁹ See Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 104 and also 208.

Inspired by the new UK Dock Labour Scheme of 1967, which had ensured regular employment on a weekly basis for a given employer²²⁰, the author advocated the conclusion of a New Deal along the following lines:

On the one hand, the workers' organisations may agree to accept the new cargo-handling techniques, to abandon all or many of their work rules or restrictive practices, and to agree, if necessary, to a reduction in the total labour force, provided that it is carried out otherwise than by redundancy dismissals.

In exchange, the employers may agree to the operation of a scheme for the registration of dockers (if it does not already exist) and the regularisation of their employment, to guarantees against redundancy (or at any rate to a satisfactory method of dealing with it), and to guarantees of minimum employment or income²²¹.

124. In response to the 1969 report, the issue of restrictions was addressed in ILO Convention No. 137 and ILO Recommendation No. 145, both of which we have summarised above²²².

However, the Convention does not mention the issue of restrictions with a single word. In veiled terms, it only says that, in order to secure the greatest social advantage of new methods of cargo handling, "it shall be national policy to encourage co-operation between employers or their organisations, on the one hand, and workers' organisations, on the other hand, in improving the efficiency of work in ports, with the participation, as appropriate, of the competent authorities" (Art. 5).

Recommendation No. 145, which is a non-binding instrument, cautiously suggests that the social partners, where appropriate with the participation of competent authorities, consider concluding agreements on measures to re-organise work which "might include", *inter alia*, "mutual efforts to eliminate outdated practices", "increased flexibility in the deployment of dock labour between hold and hold, ship and ship, and ship and shore, and between shore jobs", "recourse, where necessary, to shift work and weekend work", "work organisation and training designed to enable dockworkers to carry out several related tasks", "the adaptation of the strength of gangs to agreed needs, with due regard to the necessity of ensuring reasonable rest periods", "mutual efforts to eliminate unproductive time as far as practicable", and "provision for the effective use of mechanical equipment, subject to the observance of relevant safety standards and the weight restrictions required by the certified safe working capacity of the machine" (Para 29(c)-(i)).

²²⁰ See Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 223 and further *infra*, para 1889.

²²¹ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, ILO, 1969, 212.

²²² See *supra*, para 70 *et seq.*

125. In 1990, the World Bank published a Working Paper by Alan S. Harding on restrictive labour practices in ports which confirmed that these practices continue to beset traditional port labour arrangements and have a serious negative impact on port performance and competitiveness²²³.

The author concluded that the increasing specialisation of port labour and the sharply reduced numbers required have meant that the previous organisation with labour pools, the rotation of work, fixed gang allocations and so on, can no longer be accepted. At the same time, the previous practice of regular working hours with an expensive premium for overtime work is not suitable for high productivity ships, whose time in port may be measured in hours rather than in days. The aim now is to have smaller numbers of more specialised workers, available on a more flexible time basis²²⁴.

Harding found that restrictive practices – in the broad meaning he attaches to the term²²⁵ – are "a major feature of traditional dock work". Their growth over the years was originally in response to the nature of the work and the desire to achieve stability in the face of fluctuating demand. The cost of restrictive practices was tolerable during the period of conventional cargo handling, and a process of gradual change by means of negotiations was adopted in most cases. The benefit associated with a major restructuring of labour agreements was not seen to be worth the cost of such changes²²⁶. However, the introduction of bulk and container cargo handling methods has changed the situation. Restrictive practices are no longer aimed primarily at making acceptable the demands of dock work. They are used now much more to protect employment in the face of the substantial productivity increases made possible by the new methods. The cost of restrictive practices has increased sharply on account of the higher costs of specialised berths and ships. There is now a strong economic pressure to achieve greater flexibility in working practice by the removal of the restrictive practices. Associated with this greater flexibility is an inescapable decline in employment²²⁷. The changes in technology associated with bulk handling and containerisation have led to major changes in the organisation of work, the organisation of labour and in the employer organisation. Work previously divided by ship work, quay work and shed work is now organised on a terminal basis. This has facilitated the entry of the private sector into areas traditionally the

²²³ According to Harding, the restrictive practices that most affect ship productivity are restrictive hours, restrictions on tonnage output and job demarcation. Work sharing (*i.e.*, job rotation) may also extend ship time by the impact of less experienced staff on ship productivity (Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 12, para 29).

²²⁴ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 18, para 49.

²²⁵ See *supra*, para 118.

²²⁶ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 20, para 57.

²²⁷ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 21, para 58.

responsibility of the port authority and has been the incentive for major policy changes on the part of government. Labour, previously organised in a general pool, is now required to be more specialised with a strong trend towards its allocation to individual employers. The traditional pattern of numerous port employers with minimal capital investment, whose main business was to hire labour from the pool as required, is giving way with the emergence of larger and financially more solid groupings, capable of investing in equipment and possibly installations and of offering permanent employment to their workforce²²⁸.

Given the worldwide spread of containerised and bulk transport, the World Bank expert argued that no country can afford the luxury of continuing with traditional port labour arrangements and their associated restrictive practices. The cost of their abolition is a major reorganisation of the port industry of the country, the payment of substantial sums in compensation and the risk of industrial stoppages, but this cost must be faced if the development of exports and imports is not to be constrained by port inefficiency²²⁹.

Turning to possible policy responses, Harding identified three basically different approaches in the effort to eliminate restrictive practices:

- (1) *gradualist*: in this approach, the existing labour agreements are modified by negotiation, in the attempt to achieve the progressive elimination of restrictive practices;
- (2) *reformist*: in this approach the existing labour agreements are replaced by a new agreement, which represents a major departure from previous practices; and
- (3) *drastic*: in this approach a radical change is made to the way labour is organised and contracted, with a resulting *de facto* change in the labour agreements²³⁰.

On the preferable option, the author argued that changes in restrictive practices have to be made in step with changes in the organisation of work. In his view, a piecemeal or gradualist approach is unlikely to be able to respond sufficiently quickly to the needs of a changing technology. Typically successful change has come from industry-wide changes, affecting all aspects of work, and a reconsideration of the role of public and private sectors. Privatisation usually implies some transfer of responsibility from one union or working group to another and in this process offers the possibility of reform of working practices. Changes themselves have varied according to circumstances but share the characteristics or major changes in labour

²²⁸ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 21, para 59.

²²⁹ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 21, para 60.

²³⁰ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 16-17, para 43.

agreements and in labor organisation, a substantial reduction in the labour force and substantial compensation payments²³¹.

Finally, Harding commented that government participation in the financing of the changes has been necessary in most cases. In addition the achievement of such major changes in the port sector has required the firm determination of government in the face of opposition from entrenched labour and other local interests. The investment in compensation payments has proved to be very cost effective and this will normally be the case provided the changes are irreversible. This need, to ensure irreversibility, is one important reason why institutional changes have to go in step with labour changes²³².

126. The World Bank's current Port Reform Toolkit identifies the following restrictions among "key labour issues to be addressed" in countries which are preparing a reform of their port management system:

- restrictions on which entities can offer cargo handling and other services in the port;
- reducing overstaffing by adapting gang sizes and other staffing to generally accepted levels;
- rigid and outdated job descriptions and duties;
- limitations on working hours and days;
- inefficient overtime allocation at excessive wage rates;
- hiring of port labour exclusively through the unions;
- restrictions on output;
- unsettled and combative workplace culture;
- lack of clear and meaningful productivity objectives²³³.

127. The present-day relevance of the theme of restrictive working practices was highlighted in a devastating special report on the port of New York published by the Waterfront Commission of New York Harbor in March 2012²³⁴. This Commission was created in 1953 because of the

²³¹ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 21, para 61.

²³² Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 22, para 62.

²³³ The World Bank, *Port Reform Toolkit, Second Edition, Module 7. Labor Reform and related social issues*, Washington, The International Bank for Reconstruction and Development / The World Bank, 2007, http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/07_TOOLKIT_Module7.pdf, 317-318.

²³⁴ Waterfront Commission of New York Harbor, *Special report of the Waterfront Commission of New York Harbor to the Governors and Legislatures of the States of New York and New Jersey*, March 2012, <http://www.waterfrontcommission.org/news/Waterfront%20Commission%20of%20New%20York%20Harbor%20Special%20Report.pdf>.

pervasive corruption on the waterfront in the Port of New York-New Jersey, and has a Licensing Division which processes applications filed by individuals and firms required to be registered or licensed in the port, supervises the hiring of longshorepersons, checkers and pier guards in the port, makes employment information available to these dockworkers; and administers the decasualisation program which, according to law, removes from the longshore register those dock employees who, without good cause, fail to work or apply for work on a regular basis²³⁵.

In its 2012 report, which is based on information gathered through official public hearings, the Commission concludes that certain hiring practices, achieved primarily through calculated provisions of collective bargaining agreements, illogical interpretations of other provisions, and claims of 'custom and practice', have created within the port no-work and no-show positions generally characterised by outsized salaries. According to the Commission, the privileged few that are given those jobs are overwhelmingly connected to organised crime figures or union officials. Indeed, many of the individuals discussed herein had been indicted or arrested recently on charges ranging from racketeering, to conspiracy, to theft to loan sharking. The Commission mentions the names of twelve individuals²³⁶.

In its Findings and Recommendations, the Commission states that the current system by which the collective bargaining agreement is structured and interpreted creates "a significant number of prime positions on the waterfront that require little or no work and that command outsized salaries". Those positions are almost always filled with "favored individuals – those who are connected to union leaders or organized crime figures". The Commission recognises that in every industry there will be some jobs that are more desirable than others and that where one person sees an enlarged workforce to be the result of unsupportable featherbedding another sees those "excess" jobs to be the result of safety concerns and a legitimate insistence on job security. The Commission does not take a definitive position on the tension between the two, believing that this is a subject for real collective bargaining between the union and employer associations. It does, however, take a strong position against "the ability of mob figures and labor racketeers to create and fill prime positions for the purpose of maintaining their influence on the docks, and withdrawing from the waterfront large amount of money at the expense of efficient Port operations". If legitimate negotiations produce desirable positions (but ones that require real work for fair pay), access to those positions should be "as a result of seniority and merit, not association with organized crime figures and labor leaders".

The Commission also found that shop stewards are not assigned specific job duties, despite the fact that the applicable collective bargaining agreement clearly states that they are to perform work or services assigned to them by the employers. Employers pay shop stewards some of the highest salaries on the docks, well beyond what is required by any the collective bargaining agreements, and justify it with "the oft-repeated refrain of 'custom and practice'".

²³⁵ See <http://www.wcnyh.org/>.

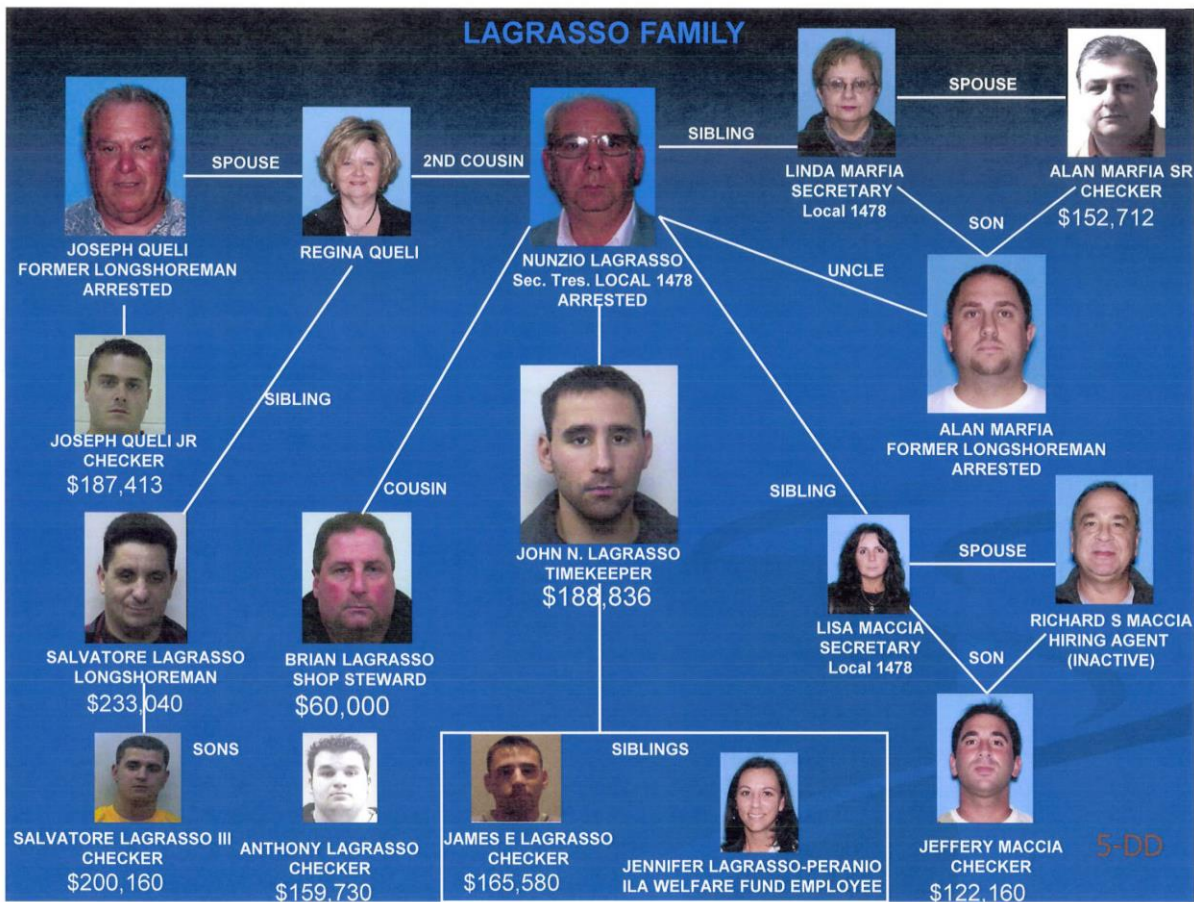
²³⁶ Waterfront Commission of New York Harbor, *Special report of the Waterfront Commission of New York Harbor to the Governors and Legislatures of the States of New York and New Jersey*, March 2012, <http://www.waterfrontcommission.org/news/Waterfront%20Commission%20of%20New%20York%20Harbor%20Special%20Report.pdf>, 28.

The Commission concludes that this creates an incentive for shop stewards to protect the employers' interests and not those of their fellow union members. These problems are only exacerbated by shop stewards being generally appointed or "elected" through "sham and undemocratic procedures often for as long as they wish to maintain their position". Moreover, even if a job steward wished to fulfill his or her responsibilities, there are no educational programs and no apparent effort on the part of union locals to educate shop stewards as to their proper role.

Finally, the Commission asserts that timekeepers and other checkers earn exorbitant salaries, yet do not perform the work contemplated by the collective agreements. Often the role of checkers, as exemplified by timekeepers, is based upon "historic realities no longer valid in a world of containers, computers and scanners". While there are duties that need to be performed in those areas, new job descriptions need to be created and used to design appropriate staffing and compensation requirements. Utilising "vestigial roles to mandate the existence of prime positions filled by mob and union favorites" merely adds to organized crime influence and makes the port less competitive²³⁷.

²³⁷ Waterfront Commission of New York Harbor, *Special report of the Waterfront Commission of New York Harbor to the Governors and Legislatures of the States of New York and New Jersey*, March 2012, <http://www.waterfrontcommission.org/news/Waterfront%20Commission%20of%20New%20York%20Harbor%20Special%20Report.pdf>, 29-30.

Figure 13. Port workers belonging to the Lagrasso family who are supposedly involved in restrictive working practices and crime, according to an official 2012 report by the Waterfront Commission of New York Harbor. The amounts in USD indicate annual earnings. 'ILA' refers to the union International Longshoreman's Association (source: Waterfront Commission of New York Harbor²³⁸)



Commenting on the report in the media, Joseph C. Curto, president of the New York Shipping Association, which represents the companies that operate the cargo terminals, admitted that the ports had been burdened by "excessive staffing and overtime payments that can no longer be sustained or rationalized". Those costs "have made the port unnecessarily expensive and less competitive", Mr. Curto said. But he did not welcome the Commission's call for putting an end to those practices. Instead, he urged the Commission to back off, because these issues

²³⁸ Waterfront Commission of New York Harbor, *Special report of the Waterfront Commission of New York Harbor to the Governors and Legislatures of the States of New York and New Jersey*, March 2012, <http://www.waterfrontcommission.org/news/Waterfront%20Commission%20of%20New%20York%20Harbor%20Special%20Report.pdf>, Attachment A.

should be addressed during labour negotiations without governmental interference. James McNamara, a spokesman for the union, said in response to the report that the union had been successful in previous negotiations, that the cost of dealing with the Waterfront Commission was an expense that shippers in other ports did not have to shoulder and that the union is particularly concerned about the increasing automation of ship loading and unloading. Union leaders also announced that the union would resist technological innovations and protect their work and their jurisdiction. Reportedly, the union also put up resistance to the Commission's campaign to diversify the work force in the ports. The union has repeatedly questioned the Commission's authority to press for the hiring of more minorities and women. A union spokesman also denied that shop stewards have no clearly defined duties and that they worked 24 hours a day to ensure that there were no labour problems in the port. He added that 400,000 USD was "not a lot of money today"²³⁹.

Later in 2012, labour negotiations between employers and the union threatened to break down. The employers complained again about "archaic work rules and manning practices, and the system of guarantees and overtime pay practices that result in millions of dollars being paid for time not worked". According to employers, who wished to bring barcode scanners, fast passes for toll booths and cargo tracking in the terminals, these inefficiencies were causing many US ports to become prohibitively expensive, harming competitive ability and threatening the long-term viability of operations. The unions reiterated that they are against automation because it destroys employment²⁴⁰. At the time of writing, a nation-wide strike had been averted.

- *Trade union freedom and closed shops*

128. In many ports around the world, union membership continues to be a legal or at least factual prerequisite to enter the profession of port worker.

In some places, the union membership card has served or indeed still serves as a valid professional card entitling its holder to enter the port.

Elsewhere, workers may be granted registration through a joint decision by the employers' organisation and the union(s). In some ports, employers leave it to the unions to submit names for registration. Where employers are free to recruit workers of their choice and conclude

²³⁹ McGeehan, P., "No-Show Jobs and Overstaffing Hurt New York Harbor, a Report Says", *The New York Times* 21 March 2012, http://www.nytimes.com/2012/03/22/nyregion/no-show-jobs-taint-new-york-harbor-waterfront-commission-says.html?_r=0.

²⁴⁰ See, *inter alia*, Horowitz, C., "Longshoremen Set to Strike; Seek to Retain Archaic Practices", 10 September 2012, <http://nlpc.org/stories/2012/09/10/longshoremen-set-strike-retain-archaic-practices>; see also Akdag, R., "How Dock Strikes Have Effected [*sic*] the Economy Historically and Today", *More Than Shipping* 23 July 2012, <http://morethanshipping.com/dock-strikes-and-the-economy/>.

permanent employment contracts, these workers are practically often pressured to join the union afterwards.

129. In our inventory of common restrictions on employment above²⁴¹, we termed such arrangements a 'closed shop'. However, a further distinction may be drawn between several types of closed shop situations.

Sensu stricto, a (pre-entry) closed shop is a form of union security agreement under which the employer agrees to hire union members only, and employees must remain members of the union at all times in order to remain employed²⁴². Closed shops may operate at a formal or informal level; they may be the result of written agreements or they may find their origin in work floor practices²⁴³.

A related arrangement is that of a so-called *union shop* (or a 'post-entry closed shop'), *i.e.* a union security clause under which the employer agrees to hire either labour union members or non-members but all non-union employees must join an appropriate union within a specified period after taking up employment²⁴⁴.

A *preferential shop* is a form of union security agreement under which the employer agrees to grant priority of recruitment to union members.

130. As Simon Deakin and Gillian S. Morris explain, debate about whether closed shops should be permitted has been highly polarised and founded, from each side, upon both pragmatism and principle. Supporters have argued that closed shops strengthen unions' bargaining power, remove a source of alternative labour during strikes, and avoid 'free riders' who take the benefits of collective bargaining without contributing to union funds. Opponents have cited their allegedly harmful economic consequences and their unwarranted interference with individual liberty. The former have been said to include restricted output; resistance to change; maintenance of outdated skills differentials; and damaging strikes, leading to escalating production costs, uncompetitive pricing, depressed profit margins and closures²⁴⁵.

²⁴¹ See *supra*, para 120.

²⁴² Deakin, S. and Morris, G.S., *Labour Law*, Oxford / Portland, Hart Publishing, 2009, 735-736, para 8.27.

²⁴³ See, for example, <http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/CLOSEDSHOP-EN.htm>.

²⁴⁴ Compare <http://www.eurofound.europa.eu/emire/UNITED%20KINGDOM/CLOSEDSHOP-EN.htm>.

²⁴⁵ Deakin, S. and Morris, G.S., *Labour Law*, Oxford / Portland, Hart Publishing, 2009, 736, para 8.27.

131. As we have explained²⁴⁶, militant unionism is a major feature of the traditional dockworker subculture. Because of the vital position of port labour in the flow of commerce, unions have the power "to cork the bottleneck of trade"²⁴⁷. The monopoly exercised by cargo handling unions often contributed to the further development of restrictions and excessive wages²⁴⁸.

132. In 1997, ITF-affiliated unions adopted declarations whereby they (1) agreed "to support, in any way possible, any ITF-affiliated union fighting against the replacement of trade union dock workers with nonunion labour" and (2) requested the ITF Secretariat to develop a world-wide campaign in favour of increased trade union involvement in steering developments in the port industry and against the increasing use of non-union labour in the port industry, by, *inter alia*, "selecting and targeting ports and terminals where serious attempts are undertaken to de-unionise the port operations and to introduce non-union labour"²⁴⁹.

133. In 2007, Turnbull and Wass analysed the following 'structural and associational dimensions of trade union power' in ports:

- the union shop (100 per cent membership density);
- legal or collectively agreed restrictions on the employment of recognised dockworkers;
- the proportion of port workers employed on permanent contracts or union-regulated 'casual' contracts (such as longshore workers allocated from the hiring hall at U.S. West Coast ports);
- multi-employer collective bargaining;
- union involvement in setting health and safety standards;
- recognition of union health and safety representatives²⁵⁰.

The authors however note that there is "no simple additive relationship between these variables", as very often strength in one element of union influence might substitute for weakness in another. For example, some unions rely more heavily on a 'logic of membership' (via the mobilisation of rank-and-file members, a strict enforcement of union work rules, and the exclusion of nonunion workers) rather than a 'logic of influence' (via collective bargaining, works councils or specific provisions of the 'dock labour scheme' that facilitate social dialogue)²⁵¹.

²⁴⁶ See *supra*, para 43.

²⁴⁷ Kagan, R., "How much does law matter? Labor law, competition and waterfront labor relations in Rotterdam and U.S. ports", *Law & Society Review* 1990, Vol. 24, No. 1, (35), 40.

²⁴⁸ See, *inter alia*, Diaz, J.J., Martinez, E. and Jaras, S., "Parametric estimation of efficiency in cargo handling in Spanish ports", <http://www.cnc-logistica.org/congreso-cnc/documentos/118.pdf>, 2.

²⁴⁹ Marges, K., "Privatisation of the Seaports as a Challenge for Trade Unions", in Dombois, R. and Heseler, H. (Eds.), *Seaports in the context of globalization and privatization*, Bremen, Kooperation Universität-Arbeiterkammer, 2000, (147), 166 *et seq.* (esp. Art. 2 of the International Solidarity Contract and Art. 9(b) of Resolution No. 2).

²⁵⁰ Turnbull, P.J. and Wass, V.J., "Defending Dock Workers—Globalization and Labor Relations in the World's Ports", *Industrial Relations*, 2007, Vol. 46, No. 3, (582), 591-592.

²⁵¹ Turnbull, P.J. and Wass, V.J., "Defending Dock Workers—Globalization and Labor Relations in the World's Ports", *Industrial Relations*, 2007, Vol. 46, No. 3, (582), 592. On the basis of their

134. Generally, union density among general temporary agency workers is considerably lower²⁵², and this seems also valid in the port sector.

135. Several international legal instruments which we have inventoried above guarantee trade union freedom, which includes the so-called negative freedom of association, *i.e.*, the right of workers to refuse to associate with others in collective organisations and, especially, to join a trade union. Negative freedom of association is particularly jeopardised where access to the labour market is legally or factually reserved for members of a trade union. In legal doctrine, such practices are often associated with labour in ports²⁵³. It is needless to say that negative freedom of association is inseparable from other fundamental rights such as freedom of opinion, freedom of expression and equal treatment of workers' organisations.

ILO Conventions Nos. 87, 98, 135, 151 and 153, the Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights²⁵⁴ do not contain explicit provisions on the negative freedom of association. Such a provision is however included in the (non legally binding) Universal Declaration of Human Rights (UDHR) of 10 December 1948, which stipulates that “[n]o one may be compelled to belong to an association” (Art. 20(2)). The UDHR, although not legally binding, is considered an internationally powerful moral yardstick.

After considerable debate on this issue, the ILO adopted a neutral stance concerning the validity of closed shop, union shop and preferential shop agreements. The Conference endorsed the view that Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, which grants workers the right to join organisations of their own choosing, neither authorises nor prohibits union security arrangements, such matters being reserved for regulation by national practice. However, the supervisory bodies within the ILO have concluded that where such arrangements are imposed by law rather than by voluntary

questionnaire, the same authors also proceeded to an assessment of the level of trade union influence in ports, in relation to the extent of restructuring processes. According to the authors, the countries with lesser union influence in ports include Antigua, Bermuda, Brazil, Chile, Croatia, France, Guyana, Hong Kong, India, Jamaica, New Zealand, Nigeria, Papua New Guinea, Singapore, St. Lucia, St. Vincent, South Africa, Trinidad, Turkey, Ukraine, and the UK. Countries with greater union influence in port include Australia, Belgium, Cyprus, Denmark, Finland, Germany, Ireland, Italy, Japan, Latvia, Malta, the Netherlands, Portugal, South Korea, Spain, Sweden, and the USA. These results only partly correspond with our own findings for EU Member States.

²⁵² On the latter aspect, see, *inter alia*, Quinlan, M., Mayhew, C. and Bohle, P., "The global expansion of precarious employment, work disorganisation and occupational health: a review of recent research", *International Journal of Health Services* 2001, Vol. 31, No. 2, www.istas.net, unpagued.

²⁵³ See, for example, Deakin, S. and Morris, G.S., *Labour Law*, Oxford / Portland, Hart Publishing, 2009, 736, para 8.27; Engels, C., "The European Social Charter: Freedom of Association and Free Collective Bargaining. European and Belgian Implementation", in Blanpain, R. (Ed.), *The Council of Europe and the Social Challenges of the XXIst Century*, The Hague, Kluwer Law International, 2001, (169), 204.

²⁵⁴ Art. 8 recognises the right of workers to join a trade union.

agreement, this constitutes a breach of Convention Nos. 87 and 98²⁵⁵. The Committee on Freedom of Association has confirmed this position in several cases pertaining to alleged closed shop arrangements²⁵⁶ as well as in a case regarding an alleged preferential shop²⁵⁷.

During the preparation of the International Covenant on Economic, Social and Cultural Rights no discussion about the negative freedom of association took place, but the UN Supervisory Committee, in common with the Committee of Independent Experts (now the ECSR), inferred that the right to join a trade union implies the right not to join²⁵⁸.

136. In sheer contrast with closed shop situations, in many parts of the world, such as Central America, port workers tend not to be members of a trade union, nor are they routinely involved in social dialogue with their employer or the public port authorities²⁵⁹. In some ports, trade unionism has encountered and still encounters organisational difficulties due to the nature of the work of port workers, which is casual and dispersed in its location and content. Moreover, attention should be drawn to the fact that industrial relations machinery depends on very diverse factors, such as the structure of the port industry in each country, its weight in national economic development, the scale of regular employment, the multiplicity of trade unions, the attitudes of the public authorities and employers, etc. To ensure the maximum success of consultations, certain elementary conditions must be present, such as a stable political climate, respect for the rights of freedom of association and the proper conduct of collective bargaining, a genuine will to reach a consensus and communication to the social partners of sufficient information. All these basic principles apply equally to the port sector²⁶⁰.

²⁵⁵ Deakin, S. and Morris, G.S., *Labour Law*, Oxford / Portland, Hart Publishing, 2009, 736-737, para 8.28.

²⁵⁶ CFA case No. 120, Report No. 17, *National Federation of Christian Publishing, Paper, Cardboard and allied Trade Unions / France*; CFA case No. 188, Report No. 34, *Swiss Printing Workers' Union and the Swiss Federation of National Christian Trade Unions / Denmark*.

²⁵⁷ CFA case No. 1226, Report No. 234, *Christian Labour Association of Canada / Canada*.

²⁵⁸ See Deakin, S. and Morris, G.S., *Labour Law*, Oxford / Portland, Hart Publishing, 2009, 737, para 8.28.

²⁵⁹ Thus Turnbull, P., *Social dialogue in the process of structural adjustment and private sector participation in ports: A practical guidance manual*, Geneva, International Labour Organization, 2006, <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/reference/ILO%20ports-socialguidelines.pdf>, 6.

²⁶⁰ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 78, para 190-191.

- *Priority for relatives and gender discrimination*

137. Priority for relatives (nepotism) and gender discrimination have been held contrary to human rights as well. In particular, these restrictions are incompatible with fundamental non-discrimination principles²⁶¹.

- *Restrictions on the use of temporary agency work*

138. As we have mentioned above²⁶², the existence of registration or pool systems for port work may entail restrictions, if not an outright prohibition, on the use by port employers of general temporary agency workers²⁶³.

According to ILO Convention No. 181 concerning Private Employment Agencies, private employment agencies are any natural or legal persons, independent of the public authorities, which provide one or more of the following labour market services:

- (1) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationship which may arise therefrom;
- (2) services for employing workers with a view to making them available to a third party (“user enterprise”) which assigns their tasks and supervises the execution of these tasks; or
- (3) other services relating to jobseeking, such as the provision of information, that do not aim to match specific employment offers and applications (Art. 1).

ILO Convention No. 181 applies to all private employment agencies (Art. 2(1)) and to all categories of workers and all branches of economic activity. However, the Convention is not applicable to the recruitment and placement of seafarers (Art. 2(2)).

One purpose of Convention No. 181 is to allow the operation of private employment agencies as well as the protection of the workers using their services (Art. 2(3)).

²⁶¹ See *infra*, paras 230, 889 and 1394.

²⁶² See *supra*, para 116.

²⁶³ The ILO clarifies the notion of temporary agency work as follows:

Temporary agency employment is where a worker is employed by the temporary work agency, and then hired out to perform his/her work at (and under the supervision of) the user company. There is considered to be no employment relationship between the temporary agency worker and the user company, although there could be legal obligations of the user company towards the temporary agency worker, especially with respect to health and safety. The relevant labour contract is of limited or unspecified duration with no guarantee of continuation. The hiring firm pays fees to the agency, and the agency pays the wages (even if the hiring company has not yet paid the agency). Flexibility for both worker and employer is a key feature of agency work (see <http://www.ilo.org/sector/activities/topics/temporary-agency-work/lang--en/index.htm>).

Market access for private employment agencies is regulated as follows:

After consulting the most representative organizations of employers and workers concerned, a Member may:

(a) prohibit, under specific circumstances, private employment agencies from operating in respect of certain categories of workers or branches of economic activity in the provision of one or more of the services referred to in Article 1, paragraph 1;

(b) exclude, under specific circumstances, workers in certain branches of economic activity, or parts thereof, from the scope of the Convention or from certain of its provisions, provided that adequate protection is otherwise assured for the workers concerned (Art. 2(4)).

A Member State which ratifies this Convention must specify, in its reports under article 22 of the Constitution of the International Labour Organization, any prohibition or exclusion of which it avails itself, and give the reasons therefor (Art. 2(5)).

Quite strikingly, the criteria that may be invoked to justify prohibitions or exclusions on the use of employment agency workers are specified in neither Convention No. 181, nor the accompanying Recommendation No. 188.

- *Self-handling*

139. In US ports, alien crewmen must be permitted to perform longshore work if (1) the vessel is registered in a country that by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels; and (2) nationals of a country (or countries) which by law, regulation, or in practice does not prohibit such activity by crewmembers aboard United States vessels hold a majority of the ownership interest in the vessel. The Secretary of State must compile and annually maintain a list, of longshore work by particular activity, of countries where performance of such a particular activity by crewmembers aboard United States vessels is prohibited by law, regulation, or in practice in the country²⁶⁴. The currently applicable list, which is based on reports from US diplomatic posts abroad (embassies and consulates) and submissions from interested parties in response to a notice-and-comment process (to which especially the trade union ILWU actively participates), mentions 129 countries which restrict longshore work by crewmembers aboard US ships²⁶⁵, including 19, out of 22, maritime Member States of the European Union²⁶⁶. This suggests that restrictions on self-

²⁶⁴ 8 USC 1288 (e) Reciprocity exception.

²⁶⁵ 22 CFR 89.1 - Prohibitions on Longshore work by U.S. nationals; listing by country, <http://www.law.cornell.edu/cfr/text/22/89.1>.

²⁶⁶ In the country chapters below, we shall quote the exact legal provisions.

handling by ship's crews remain an internationally widespread phenomenon, and that the European Union is in this respect by no means an exception.

140. Nevertheless, it would be wrong to assume that ILO Convention No. 137 requires the introduction of a ban on self-handling. In 2002, the US Department of State found that most countries party to the Convention had not restricted the longshore activities of foreign crewmembers as an implementation measure²⁶⁷.

141. ITF fiercely opposes self-handling by ship's crews. It argues that, while seafarers are increasingly being asked to stow or secure cargo, this is dangerous work that should only be done by trained and experienced dockers. Although there may be some extra cash for seafarers – tempting, as it boosts low pay – the larger incentives are often for the officers on-board who get the seafarers to handle the cargo. ITF mentions that seafarers are even being asked to start unlash containers before entering port, with the aim of speeding up port operations, which is very dangerous.

For ITF, cargo handling by seafarers is part of the wider deregulation and liberalisation of the maritime industry being pushed by many employers and the governments that support them:

Their aim is to compete by lowering cost. They want to squeeze more from seafarers and dockers through 'flexible' working practices, longer working hours and/or less pay. In the process they undermine the protective regulations that workers have fought long and hard for. They are trying to displace the trained, experienced and registered port workers. In some cases they take on casual, unregistered and inexperienced labour in the terminals. Or they get seafarers to do the job.

Employers are especially keen to weaken the trade unions of dockers. Organised dockers have the power, which they do use from time to time, to refuse to load or unload goods. They can bring to a halt the just-in-time supply chain that is vital to the production and distribution of goods around the world.

Still according to ITF, cargo handling is dangerous for seafarers because these workers are not trained for the work. Cargo handling also adds to the stress and fatigue that seafarers already suffer through long working hours, tight sailing schedules and fast turnaround times. It means even less rest time in port, when the seafarer hopes to make contact with family and friends back home. Fatigue has also been highlighted as a major factor behind accidents in port and at sea. Furthermore, if a seafarer does the work, it takes jobs away from qualified dockers. Cargo handling is work for professionals. It should only be done by those who have been specifically trained to do it, so that it is done in a safe and efficient way. It is dangerous, too, for dockers when they have to unload cargo that has been loaded by untrained workers. Last but not least,

²⁶⁷ *Federal Register*, Vol. 67, No. 29, 12 February 2002, Proposed Rules, 6448.

ITF stresses that it erodes the power of dockers' trade unions, the natural allies of the seafarer²⁶⁸.

5.6.2. Qualification and training issues

142. The availability, level and quality of training for port workers directly impacts on overall safety, reliability, quality of work and productivity, but also on job quality.

In a number of countries and ports, training of port workers may still be inadequate. The World Bank's Port Reform Toolkit reminds that insufficient training and retraining opportunities may emerge as an important issue during a port reform process²⁶⁹.

As Peter Turnbull recalls in his recent ILO report on training in the port sector, under a casual system of employment formal (certified) training programmes are rare given the disincentives for employers to train dockworkers with whom they have no long-term relationship whereby the returns on investment in training can be fully recovered. In the early 1990s, almost a third of the trade unions affiliated to the ITF who responded to a survey on structural adjustment in the world's ports reported that new recruits to the industry did not receive any (formal) basic training when entering the job and only two-thirds of the sample reported specialist training for more experienced workers (e.g. the acquisition of mechanical equipment skills). Today, major GTOs provide extensive training for new recruits. Although training provision and training standards still vary enormously around the world, there is at least now widespread recognition that dock work is skilled and highly responsible work. In a commercial operating environment, today's ports can no longer afford to neglect training and employee development. However, Turnbull mentions one area that is still neglected, which is the training and development of women dockworkers²⁷⁰.

²⁶⁸ X., "Cargo Handling by Seafarers", <http://www.itfseafarers.org/ITI-cargo-handling.cfm>.

²⁶⁹ The World Bank, *Port Reform Toolkit, Second Edition, Module 7. Labor Reform and related social issues*, Washington, The International Bank for Reconstruction and Development / The World Bank, 2007, http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/07_TOOLKIT_Module7.pdf, 317-318.

²⁷⁰ Turnbull, P., *An international assessment of training in the port sector*, Geneva, International Labour Office, 2011, http://www.ilo.org/public/libdoc/ilo/2011/111B09_336_engl.pdf, 45, 51, 58 and 59, and the extensive further references; see also Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 94.

5.6.3. Health and safety issues

143. As we have already mentioned, port work is still widely regarded as an occupation with very high accident rates²⁷¹. In addition, the handling of certain cargoes or fumigated containers may pose serious risks to human health. To a certain extent, there also seems to exist a high acceptance of accidents at work²⁷². In some ports, occupational risks are increased by overmanning and lack of discipline, and/or a lack of attention on the part of the labour inspectorate. Owing to the dispersion of the work over a large area and its varied nature, and understaffing or other priorities, labour inspectorates may indeed neglect the docks unless some difficulty arises and the inspector is called upon to intervene²⁷³.

Despite these facts, over the past decades the health and safety level has tremendously improved in most ports and terminals as a result of, *inter alia*, improved health and safety management, training and automation.

144. The World Bank's Port Reform Toolkit draws attention to the importance of problems relating to inadequate occupational health and safety procedures²⁷⁴.

145. ITF considers ports "one of the most dangerous places in the world to work"²⁷⁵.

ITF regularly monitoring safety levels in port terminals. In November 2011, for example, it published the following results of a survey asking a selection of dockers worldwide if they are supplied with – what they consider to be – adequate safety equipment on the job.

²⁷¹ See *supra*, paras 23, 49 and 115.

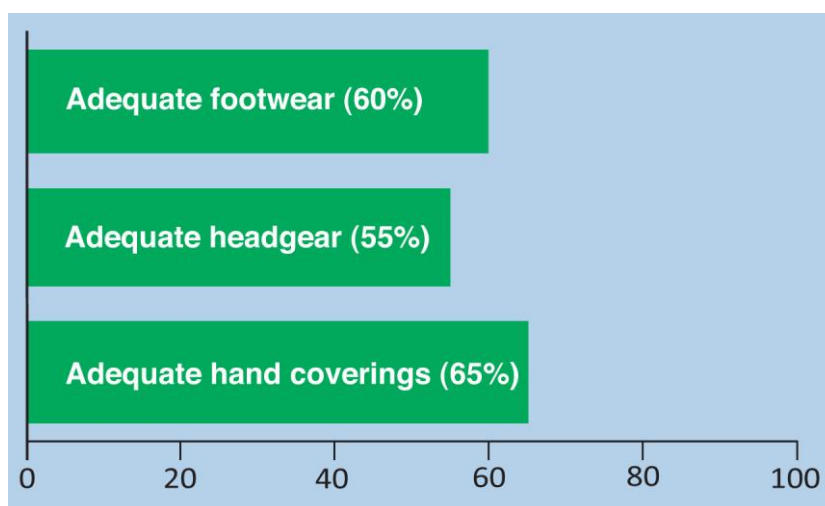
²⁷² Vigarié, A., *Ports de Commerce et Vie Littorale*, Paris, Hachette, 1979, 420.

²⁷³ Evans, A.A., *Technical and social changes in the world's ports*, Geneva, International Labour Office, 1969, 163.

²⁷⁴ The World Bank, *Port Reform Toolkit, Second Edition, Module 7. Labor Reform and related social issues*, Washington, The International Bank for Reconstruction and Development / The World Bank, 2007, http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/pdf/modules/07_TOOLKIT_Module7.pdf, 317-318.

²⁷⁵ X., "You told us", *GNT Bulletin* August 2011, http://www.itfglobal.org/files/extranet/-/1/30482/ITF_GNT_news_Eng_10-1.pdf.

Figure 14. Results of a survey by the International Transport Workers' Federation on the supply of adequate safety equipment, November 2011 (source: ITF²⁷⁶)



Health and safety are at the centre of ITF's Global Network Terminals campaign²⁷⁷.

146. The lack of adequate statistics on occupational health and safety in port labour should be mentioned as a serious separate issue. The absence of reliable official data is largely due to the fact that port operations and port labour are not identified under a separate code under standard industry and occupational classifications²⁷⁸.

²⁷⁶ X., "You told us", *GNT Bulletin* November 2011, <http://www.itfglobal.org/files/extranet/-/1/31954/november%20GNT%20bulletin%20.pdf>. The publication does not explain the methodology of the survey, so it may also have a certain propaganda value.

²⁷⁷ See *infra*, para 155.

²⁷⁸ See *supra*, para 82.

5.7. Appraisals and outlook

147. Already in 1986, A.C. Couper noted that, even in countries where ILO Convention No. 137 was not ratified, its Articles had been used as guidelines²⁷⁹.

148. In 2002, the implementation of ILO Dock Work Convention No. 137 and the related Recommendation No. 145 were the subject of a General Survey by an ILO Committee of Experts on the Application of Conventions and Recommendations, and of a subsequent debate within the Committee on the Application of Standards.

149. In the General Survey, the Committee of Experts identified "many points of convergence" between national regulations respecting dock work and the ILO's instruments. It welcomed the fact that its examination had revealed that "the fundamental principles which are contained in the instruments are implemented in practice, even where the Convention has not been ratified". The Committee also noted that the global nature of dock work has had the effect of extending around the world the protection contained in the instruments. In this respect, the Committee concluded that the instruments had at least served a function of guidance even to the States that had not ratified them²⁸⁰.

150. On the central issue of registration, the Committee of Experts did not provide global data either, but made a number of general observations of a qualitative nature:

113. There are several arguments in favour of registering dockworkers. First, modern cargo-handling methods increasingly require the use of multiskilled dockworkers, trained and able to use expensive equipment safely and efficiently. To ensure a constant supply of skilled personnel, it is essential to control access to the profession by an appropriate registration and allocation system. Furthermore, to gain the maximum benefit from the introduction of the new cargo-handling methods, it is vital to have the full commitment of the workers. This means offering them sufficient guarantees of employment and income. It is to be noted in this connection that, echoing the conclusions adopted by the tripartite technical meeting in Rotterdam, Paragraph 11 of the Recommendation [i.e., Recommendation No. 145] provides that the establishment or revision of registers is intended, in particular, to "operate schemes for the

²⁷⁹ Couper, A.D., *New cargo-handling techniques: Implications for port employment and skills*, Geneva, International Labour Office, 1986, 123.

²⁸⁰ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 92-93, para 230.

regularisation of employment or stabilisation of earnings and for the allocation of labour in ports”.

114. Second, although the greatest difficulty created by the adoption of new cargo-handling methods is undoubtedly that they exacerbate any preexisting problem of surplus labour in the ports, it is important to consider how to spread as widely as possible the risk of underemployment which could arise initially. The registration of dockworkers would make it possible to avoid imposing the cost of modernization arbitrarily on any particular worker who had previously been regularly employed.

115. However, the registration of dockworkers is not an alternative to the ideal situation in which they would enjoy or be guaranteed permanent employment. It has been a long-term objective to either guarantee dockworkers permanent employment, or failing that, at least regularity of employment or stabilization of their earnings, and registration has been the primary means of identifying workers for that purpose. [...]

116. The stabilization of employment in ports can only be achieved if there is an efficient system of allocating registered dockworkers. The efficiency of the system depends on several factors, such as the number of cargo-handling firms, the extent and organization of the port, and the diversity of cargoes handled. In modern ports handling a wide variety of cargoes through several cargo-handling firms, the allocation system must ensure that labour is used in the most efficient manner possible. To achieve this, it is necessary to determine the proportion of labour that must be employed regularly, while at the same time creating a reserve pool. Obviously the best solution is to be able to employ all dockworkers regularly. However, when employment cannot be guaranteed on a regular basis, the most common practice is to distribute work between workers in regular or permanent employment and a reserve of casual workers. In this respect, the Recommendation provides for the possibility of establishing separate registers for those with more or less regular employment and those in a reserve pool (Paragraph 14)²⁸¹.

151. On the need for casual workers, the Committee noted:

135. In most ports, it is still necessary to have casual workers available. The Committee has already had occasion to point out that the proportion of casual workers is not insignificant. The International Transport Workers’ Federation indicated in its 1995 report that over two-thirds of the replies to its questionnaire reported the existence of casual work, even if it generally only affected a small proportion of workers (normally fewer than 10 per cent of the total workforce). Moreover, the more casual work is used, the more it is regulated. Among casual workers, certain groups can be distinguished for whom irregular work is not a disadvantage, and particularly those who

²⁸¹ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 49-51, para. 113-116.

work in the docks to earn a secondary wage or those who are working while they look for another job²⁸².

[...]

139. However, the introduction of a system of registration and allocation is not always sufficient to guarantee the employment or incomes of dockworkers. Stabilizing employment for a given number of workers often means reducing the labour surplus. Analysis of the replies to the ILO's 1995 questionnaire on employment trends shows that workforces in ports have declined considerably since the early 1990s. The measures taken to reduce the workforce do not vary from one port to another around the world. They consist of encouraging early retirement, retraining and staff reductions. A State which resorts to such adjustment measures must take into account both their social and financial cost²⁸³.

152. In its final remarks, the Committee of Experts noted:

233. The Committee's previous discussion reveals that there are many States which do not have any form of registers. In some instances this situation may be the result of a lack of awareness of the flexibility contained in the Convention as to the type of registers which may be maintained. In other instances this situation may be due to a failure to appreciate the benefits of registers, while in still other cases the development of dock work systems and the protections already available to dockworkers do not require the maintenance of registers. However, when the systems of registration are not yet developed and alternative protections not yet available, registers remain an indispensable tool for providing the protection afforded by these instruments.

234. In view of the developments which led up to the adoption of the Convention and the Recommendation and the diversity in local and national methods of organizing ports, the Committee fully appreciates that, for many countries today, certain of the measures envisaged by these instruments which were adopted in 1973 have lost their relevance. Among them, the Committee has noted situations where a permanent job and a minimum income are assured for dockworkers on the same terms as are applicable to other workers, both with regard to their employment (placement and vocational training) and their conditions of work (working time, wages, social security, etc.). Some of the reports examined show clearly that such conditions of employment and work will be applied in a growing number of countries. While welcoming this development, the Committee nevertheless believes that it is necessary to guard against any risk of a void

²⁸² International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reln/ilc/ilc90/pdf/rep-iii-1b.pdf>, 58, para 135.

²⁸³ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145)*, 1973, <http://www.ilo.org/public/english/standards/reln/ilc/ilc90/pdf/rep-iii-1b.pdf>, 59, para 139.

which might deprive these workers of the necessary regulatory framework where the situation has not changed. It is also important to bear in mind that in many countries, and in some ports in some countries, this modernization has not yet taken place.

235. It is the view of the Committee that Convention No. 137 and Recommendation No. 145, which are the only instruments addressing the questions of employment and conditions of work of dockworkers in detail, retain their relevance, both where the nature of dock work has not changed and in situations of transition. This occupation continues to require specific protection measures, and the instruments offer alternative means of addressing situations of, often massive, workforce reductions. The three major principles of permanent or regular employment, of a minimum income and of the system of registration prescribed by the Convention, have proven to be relevant, even in countries which have a highly developed mechanized port system requiring only a small number of dockworkers. The instruments also remain relevant to countries and ports which continue to remain outside the process of modernization, where the protection of the workers through the application of the instruments remains essential. Moreover, the need to adapt to the changes, as foreseen in the instruments, is of the greatest importance for all dockworkers affected by port reforms²⁸⁴.

153. The report of the subsequent discussion of the General Survey within the ILO Committee on the Application of Standards²⁸⁵ reveals that opinions of employers and workers on the viability of ILO Convention No. 137 diverged widely. Employers regarded the Convention as an obsolete failure and argued that port labour can be adequately organised on the basis of general labour law, while the workers insisted that the profession of dockworker remains specific and that a campaign to promote ratification and application of the Convention was needed. Because the debate within the Committee touches upon the fundamentals of the international regulation of port labour, we quote a number of passages of the report in their entirety²⁸⁶:

119. The Employer members commended the Committee of Experts for the General Survey on Convention No. 137 and Recommendation No. 145. While General Surveys tend to be tedious, the first part of this survey read much like a well-written novel in which the reader could not wait to get to the next page because of the dramatic changes taking place. However, the Employer members were troubled by the use of mandatory words such as “must” or “prescribe” to clarify the provisions of the instruments, keeping in mind that the Convention was a general set of principles and

²⁸⁴ International Labour Conference (90th Session 2002), *General Survey of the reports concerning the Dock Work Convention (No. 137) and Recommendation (No. 145), 1973*, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/rep-iii-1b.pdf>, 93-94, para 233-235.

²⁸⁵ International Labour Conference (Ninetieth Session, 2002), No. 28, Part One, *Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations. Report of the Committee on the Application of Standards*, Provisional Record, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/pr-28p1.pdf>, 28-40.

²⁸⁶ In the country chapters below, we also quote a number of statements by national representatives of EU countries.

that the Recommendation was far more detailed and lengthy. These instruments could only suggest alternative means of implementation within a wide range of actions. It was also striking that the Committee of Experts referred to the Preamble of the instruments as providing guidelines for action. Finally, in the chapter dealing with the provisions of the Convention and the Recommendation, the focus was mainly on the Recommendation, highlighting the generality of the Convention itself.

120. The Employer members pointed out that much of the content of the Convention and Recommendation was covered in more general Conventions on such issues as social security, safety and health, working time, freedom of association, collective bargaining and remuneration. This raised questions regarding whether there in fact needed to be a specific Convention related to dock work. As indicated in the General Survey, the casual nature of employment, which was the main driving force for the dock work Convention, was rapidly disappearing.

[...]

123. The Worker members felt it was important to recall that work in ports was also covered by a large number of other ILO instruments, including the fundamental Conventions covered by the Declaration of 1998, as well as other Conventions and Recommendations of general application such as the instruments on tripartite consultation, employment policy, social security, and occupational safety. Finally, other standards specifically covered safety and health in ports.

[...]

128. The Worker members regretted that the General Survey did not adequately emphasize the way in which certain governments wished to undermine the status of workers in ports under the pretext of free competition and the liberalization of markets. It was being indicated to workers, for instance, when they demanded guarantees in the process of discussion of a new European Union directive on the “port package”, that the situation would be as beneficial for enterprises as for consumers and workers. The representative workers’ organizations were opposed to the proposed directive because such measures had negative consequences for the dockworkers as concerned their status, employment, safety and health. Regulation which aimed to “liberalize ports” always had the effect of eliminating a certain number of jobs, rendering employment more precarious and lessening the importance for employers of the rules on safety and health.

130. The Employer members were of the view that devising a universal dock work standard was difficult since the diversity of port organizational models reinforced the position that only general principles on the port industry were possible. Moreover, there existed a great variety of definitions of dock work. In this regard, the Employer members welcomed the common-sense view in paragraph 101 of the General Survey that Article 1 of the Convention should not be interpreted as requiring member States to

define the terms “dockworker” and “dock work” in law. In fact, since their adoption, Convention No. 137 and Recommendation No. 145 had not been appropriate because they dealt with a minority of the world’s workers. To date, the Committee of Experts was only able to estimate the number of ports in the world and was unable even to guess the number of dockworkers worldwide. Convention No. 137 and Recommendation No. 145 were the product of an earlier era of managed economies. Because they were not market based, these instruments had proven to be a disaster. Convention No. 137 was an attempt to counterbalance the cost savings and productivity improvements created by the efficiencies of technological change through permanent employment and guaranteed incomes in an industry in which the work was episodic.

131. The Employer members considered that Convention No. 137 was aimed at limiting the supply of workers through a system of registration to control the flow of new entrants. Yet, the weakness of the system of registration set out in the Convention was precisely to assume stable employment levels. Furthermore, by indicating in paragraph 162 of the General Survey that, even if dockworkers still worked well in excess of normal hours in the course of the same day or week, the casual nature of their work did not in any way justify unduly prolonged hours of work, the Committee of Experts seemed to be calling for employment to be guaranteed while not permitting periods of extended hours of work even if the circumstances called for them. This view seemed unrealistic in a global, competitive world. The Employer members noted that the Committee of Experts had pointed out that, for many countries, several aspects of the instruments might have lost their relevance. In a growing number of countries, jobs and income were being provided to dockworkers on the same terms as were applicable to other workers in terms of placement, vocational training, working time, wages and social security, among others. Against these facts, the Employer members were struck by the Committee of Experts’ assertion that Convention No. 137 and Recommendation No. 145 continued to be relevant.

[...]

144. The Worker members and the Government members who took the floor on this question emphasized the continued relevance of the Convention and the Recommendation even in the changing context of the port sector. They stressed the need for a ratification campaign in favour of the Convention. In the opinion of the observer representing the International Transport Workers’ Federation, a greater effort was needed to put Convention No. 137 to good use and ensure that it was more widely understood. He regretted that the Employer members appeared to be painting a picture of a Convention that they claimed was both inflexible and obsolete. The national practice in certain countries refuted this contention.

[...]

146. The Employer members laid great emphasis on the fact that permanent employment and guaranteed income were not viable in a global economy in which

technology was changing rapidly. This was highlighted by the fact that just 22 countries had ratified the Convention after 30 years. In paragraph 220, the General Survey concluded that the prospects for future ratifications were low, particularly because the majority of governments had provided no indication on ratification intentions. The low level of ratification of the Convention was illustrative of a problem that was endemic across most technical Conventions adopted by the ILO over the last 30 years. There was clearly no connection between voting for the adoption of ILO Conventions and the actual commitment of governments to ratifying them.

147. The Employer members welcomed the discussion, which had generated a great deal of participation. They strongly believed that international labour standards, and in particular Conventions, should be “high impact” standards that sought to address fundamental workplace issues on which there was a broad consensus on applicable policies or principles. The Convention on the Elimination of the Worst Forms of Child Labour, 1999 (No. 182), which had the fastest rate of ratification in the ILO’s history offered a good example. Standard-setting was not the answer to every workplace issue. In assessing the appropriateness of standard-setting, account should be taken of criteria such as the suitability of a given topic for regulation, the prospects of ratification, its utility as a benchmark, and the extent of consensus. The dock work instruments under review failed these tests, as would a revised set of instruments. The General Survey had clearly demonstrated that dock work should be addressed under other ILO instruments of broader applicability.

148. The Employer members considered that there was agreement on the accelerating technological changes that were taking place in the field of dock work. The disagreement concerned the viability of Convention No. 137 today. The main argument which had been put forward in favour of a “specific” dock work Convention was that legislation was needed to ensure quality work, to build infrastructure and ensure stable labour relations. Yet most countries with ports had accomplished these objectives without ratifying the Convention. This said something about the regulatory benefit of the instruments under examination. Numerous comments had been made on the flexibility of the Convention. In the opinion of the Employer members, however, the question of flexibility was irrelevant since the Convention had a totally impracticable purpose, that is to attempt to guarantee employment and provide stable income to a few workers in the environment of rapid technological change that characterized the port industry. Although it was the tradition to have some disagreement on different aspects of a General Survey, the Employer members were astonished by the degree to which some Worker members disagreed with the overall direction of the General Survey, particularly the reflection on the dynamic market-based changes taking place. As the Employer members had said during the general discussion, the Secretary-General of the International Confederation of Free Trade Unions had spoken at the General Council of the International Organization of Employers in June about the need for a strategic partnership between the Workers’ and Employers’ groups. Perhaps such a partnership could be established relative to the experts’ views on the meaning, purpose and scope of ILO Conventions. The survey was clear that dock work was increasingly becoming

like other work requiring multiskilling and ongoing learning. It was also clear that governments saw no need to ratify the Convention because it was increasingly not applicable to such circumstances. Overall, the survey supported the Employer members' view that the ILO should only adopt high-impact standards of general applicability on which there was a consensus in order to give them a greater prospect of ratification.

149. The Worker members noted the low number of ratifications of the Convention, even considering the number of countries where there were no ports. Even though the Committee of Experts welcomed the fact that the principles contained in the instruments were implemented in practice, even where the Convention had not been ratified, the Worker members wondered why the member States whose legislation and practice were in conformity with the Convention did not ratify it. The General Survey offered some conclusions, however. It was necessary to recognize the crucial role of the ports and their effective operation for the social and economic development at the regional or national level. Moreover, the profession of dockworker was so specific that it was always necessary to have specific regulations both at the national level and at the level of the ILO. The principles laid down in the Convention and the Recommendation were still relevant and had to be borne in mind today in regions affected by waves of liberalization and privatization. Finally, the International Labour Organization and the Office should conduct a campaign to promote the ratification and application of the instruments in the field of dock work, and particularly, the Dock Work Convention, 1973 (No. 137). The continued relevance of the Convention could not be called into question. In this regard, any attempt to discuss the possibility of revising the instruments was not timely. It was because of a misunderstanding of these instruments that certain speakers among the Employers and the Governments considered them as too rigid. The Convention and the Recommendation under examination must be maintained, since they were essential for dockworkers in the whole world.

154. In a Statement on ILO Convention No. 137 of 2005²⁸⁷, the ITF asked all affiliated dockers' unions to support the trade union FNV Bondgenoten of the Netherlands in their campaign against the Dutch Government's plans to denounce the Convention, as this step could have "negative consequences for unions around the world". In its Statement, ITF declared (*verbatim*):

- 1. ILO Convention 137 is an important instrument to encourage technological development while involving consultation between employers and employees, and the system of registration of dockers laid down in the convention is crucial in order to maintain safety and social standards. De-ratification of the Convention would be an unnecessary attack on the fundamental rights of dockers.*
- 2. The FNV Bondgenoten does not stand alone in its fight to defend dockers rights and has the support of the ITF family around the world.*

²⁸⁷ <http://www.itfglobal.org/solidarity/iloconvention.cfm>.

The Dutch Government denounced the Convention nonetheless²⁸⁸.

155. In 2006, the ITF launched a long term, worldwide campaign against “Ports of Convenience”²⁸⁹. The aim of the campaign is to ensure that acceptable standards apply in ports and terminals around the world. The terms 'port of convenience' and 'terminal of convenience' refer respectively to ports or terminals that allegedly fail to meet these standards. The campaign focuses on the following key themes, which have been consistently identified by affiliates as the most important issues that they face:

- confronting Global Network Terminal Operators (GNTs);
- competition;
- privatisation;
- casualisation;
- lack of trade union rights, or lack of respect for such rights by either governments or employers.

On its website, ITF explains that the issues, especially privatisation, casualisation and lack of trade union rights, have played a key role in the fragmentation of the union movement in many countries. ITF is now seeing a multiplicity of weaker unions, including the creation of employer-dominated ('yellow') unions. The POC campaign aims to strengthen the dockers' union movement by tackling the problems that can undermine it.

ITF is promoting the conclusion of International Framework Agreements (IFAs) with GNTs which would minimally include the core labour standards covered in the eight fundamental ILO Conventions:

- Convention No. 87 on freedom of association;
- Convention No. 98 on the right to organise and to bargain collectively (which ITF says must incorporate a neutrality clause which prevents the employer from obstructing organising activities);
- Conventions Nos. 29 and 105 on forced labour;
- Conventions Nos. 111 and 100 on discrimination;
- Conventions Nos. 138 and 182 on child labour.

An IFA could also include, for example, an equality clause and general clauses addressing working time, what constitutes fair wages, occupational health and safety, security, and professional standards. In addition, a section of the agreement should be devoted to the means of implementation, which would cover monitoring and infringements and build in an annual review and reporting process. ITF adds that an IFA is "of no value" unless it can be made to deliver real benefits to the unions concerned, in terms of removing obstacles to organising. The IFA would be between the company and the ITF on behalf of the relevant

²⁸⁸ See *infra*, para 1438.

²⁸⁹ The information below is taken from ITF's website: see <http://www.itfglobal.org/transport-international/ti25-ports.cfm>.

affiliates. It would set out only the broad minimum acceptable standards that should apply throughout the company's operations. It would still be up to unions to negotiate workplace CBAs.

The campaign would focus on the biggest operators which due to their dominance are likely to have an impact on the largest number of affiliates. They are also the industry's standard setters. However, attention is also to be paid to other companies that are important regional players.

The decision to initiate a GNT campaign is taken by the dockers' section committee, and in consultation with the home country union, and affiliates with a presence in other ports where the company operates. The priorities are:

- (1) where collective bargaining agreements (CBAs) are in place, to ensure that these are respected and there is a commitment to ongoing collective bargaining;
- (2) where there are no CBAs or no recognition of unions, or where anti-union policies are in place, to seek respect for freedom of association, the right to recognition and collective bargaining, and to call for dialogue to begin with any affiliated unions working in the port; and
- (3) to discuss the conclusion of an International Framework Agreement with the global management of the company. This would also facilitate organising in terminals where affiliates do not yet have a presence.

ITF's campaign for trade union rights is also said to promote ratification and implementation of ILO Convention No. 137.

ITF does not mention Europe among the sub-regions identified as requiring urgent action.

We have no information on the number of IFAs which were concluded since the campaign was launched.

156. According to an international survey published by Turnbull and Wass in 2007, trade unions found that recent port reform schemes had had a clearly negative impact on port workers' terms and conditions of employment. Privatisation and employment deregulation and their impact on employment levels and employment security had the greatest impact. Earnings and pensions were less likely to be adversely affected, with a significant number of trade unions reporting higher earnings and pensions for those who retained their jobs in the wake of port restructuring²⁹⁰.

²⁹⁰ Turnbull, P.J. and Wass, V.J., "Defending Dock Workers—Globalization and Labor Relations in the World's Ports", *Industrial Relations*, 2007, Vol. 46, No. 3, (582), 595.

157. In addition, researchers such as Turnbull and Sapsford²⁹¹ and Barzman²⁹² argue that reliability of port operations and industrial peace largely depend on adherence to ILO Convention No. 137, together with principles on collective bargaining. To our knowledge, the presence of a causal link between compliance with ILO Convention No. 137 and social peace (or, for that matter, labour productivity, labour cost or port efficiency) has never been seriously examined, and the firm rejection of the Convention and port worker registration systems by many employers' organisations warrants a presumption that the results of such an investigation might not be so unambiguous as suggested.

158. Although it has not produced any specific legal instruments pertaining to port labour, the United Nations Conference on Trade and Development (UNCTAD) is persuaded that, within ports, competition should be allowed in port services, labour and pricing²⁹³.

159. In our conclusions on the port labour systems of individual EU Member States below²⁹⁴, we shall undertake a fresh assessment of global legal instruments on port labour from a European perspective.

²⁹¹ Turnbull, P. and Sapsford, D., "Hitting the Bricks: An International Comparative Study of Conflict on the Waterfront", *Industrial Relations* 2001, Vol. 40, No. 2, (231), 239. See also *infra*, para 505 on the appraisal of the Belgian port labour regime.

²⁹² Barzman, J., "Conflits et négociations au Havre avant et après les grandes réformes portuaires", *L'Espace Politique*, 16 | 2012-1, <http://espacepolitique.revues.org/index2242.html>, para 33.

²⁹³ UNCTAD Secretariat, *Comparative analysis of deregulation, commercialization and privatization of ports*, UNCTAD/SDD/PORT/3, 24 May 1995, http://unctad.org/en/docs/sddport3_en.pdf, 11, para 28.

²⁹⁴ See *infra*, para 295 *et seq.*

5.8. Developments between January 2013 and September 2014

159A. Mid-2013, ITF published a resource pack for tackling HIV/AIDS in port worldwide²⁹⁵. The three key recommendations of an underlying study concern the need for the ITF to start HIV activities in an integrated way with the affiliates in ports and docks, including producing materials to guide their action on advocacy, collective bargaining, training and peer education; encouraging partnerships with employers and other key stakeholders; and taking advantage of the opportunities offered by international standards such as International Labour Organization (ILO) Recommendation 200 on HIV and AIDS in the world of work and the 2011 UN general assembly declaration on HIV and AIDS²⁹⁶.

159B. Shall crewless ships soon be handled by dockerless ports ? As a major international trend, we would like to highlight the growing interest in automation of both shipping and port operations. A growing number of container terminals relies on AGVs (in the EU, Hamburg and Rotterdam) and remotely controlled shoreside cranes (in the EU, Rotterdam²⁹⁷) while technological and legal studies are exploring the feasibility of unmanned merchant shipping²⁹⁸. The impact of these developments on port labour in a perhaps not too distant future seem perhaps to deserve more attention than they enjoy now.

²⁹⁵ See <https://www.itfglobal.org/HIV-Aids/port-study.cfm>.

²⁹⁶ See X., *ITF Study on: Hiv/Aids, Ports and Port Workers*, ITF, 2013, https://www.itfglobal.org/files/extranet/-1/32338/HIV-AIDS_Ports_ENG.pdf.

²⁹⁷ For the USA, see for example Moore, M.A., "Cargo Handling is a Hot Topic for Ports", *Pacific maritime Magazine*, 2014, Vol. 32, No. 07.

²⁹⁸ See <http://www.unmanned-ship.org/munin/> and Van Hooydonk, E., "The Law of Unmanned Merchant Shipping. An Exploration", forthcoming.

5.9. Synopsis

160.

SYNOPSIS OF PORT LABOUR GLOBALLY LABOUR MARKET

Facts	The Law	Issues
<ul style="list-style-type: none"> 8.7 billion tonnes of seaborne cargo (2011) 572.8m TEU (2011) Thousands of ports Transition to landlord management model Spread of global terminal operators No data on number of port employers and workers available Integrated, tool and landlord ports 	<ul style="list-style-type: none"> ILO Convention No. 137 ILO Recommendation No. 145 	<ul style="list-style-type: none"> Lack of statistics on employment Restrictions on employment Restrictive working practices Freedom of association and closed shops ILO C137 ratified by only few States ILO C137 not accepted by employers 'Interim status' of ILO C137

TRAINING AND QUALIFICATIONS

Facts	The Law	Issues
<ul style="list-style-type: none"> Mix of institutional, company and on-the-job training 	<ul style="list-style-type: none"> Obligations to provide training in Conventions and Recommendations on Dock Work ILO Guidelines (2011) 	<ul style="list-style-type: none"> Different levels of training Reluctance of individual employers to provide training for casual workers Insufficient training for female port workers

HEALTH AND SAFETY

Facts	The Law	Issues
<ul style="list-style-type: none"> No data on occupational diseases and accidents available 	<ul style="list-style-type: none"> ILO Convention No. 152 ILO Recommendation No. 160 ILO Code of Practice 	<ul style="list-style-type: none"> Partly dangerous and healthy nature of port labour Compliance with health and safety standards by employers and workers Priorities of Labour Inspectorates Lack of statistics on health and safety Few ratifications of ILO C152 Outdated ILO C32 still binding on number of States

6. PORT LABOUR IN THE EUROPEAN UNION

6.1. Port system

161. The European Union counts hundreds of ports, ranging from main international transshipment hubs such as Rotterdam, Antwerp and Hamburg to terminals used by one shipping line only and small harbours serving a local community. As we have mentioned above²⁹⁹, Europe's ports handle 90 per cent of EU trade with third countries and 40 per cent of intra-EU traffic³⁰⁰.

In 2010, the ports of the European Union handled approximately 3,641 million tonnes of maritime cargo³⁰¹. Data collected by UNCTAD suggest that in 2011 ports in the 23 maritime Member States (including Croatia) handled approximately 92.3 million TEU, representing a share of 15.9 per cent of world container throughput³⁰².

162. European ports are managed by a variety of organisations. Traditionally, a rough distinction is made between municipal ports (the Hanseatic model, prevalent in North Europe), state-controlled ports (the Latin model, commonly used in the South) and ports owned by commercial businesses (the Anglo-Saxon model). Within countries or even ports, combinations may occur, however, and in addition there is a trend towards corporatisation of publicly owned ports. As in other parts of the world, EU ports now prefer to operate as landlords who manage port infrastructure but leave the provision of handling and terminal services to private operators, where possible to several competing companies. In the country chapters in Volume II, we shall briefly indicate how port management and operations are structured, because this organisational substratum determines the set-up of the port labour market.

²⁹⁹ See *supra*, para 1.

³⁰⁰ A particularly interesting collection of recent surveys of the European ports industry can be found on the website of the European Sea Ports Organisation in Brussels: see http://www.espo.be/index.php?option=com_content&view=article&id=93&Itemid=86.

³⁰¹ <http://epp.eurostat.ec.europa.eu/portal/page/portal/transport/data/database>. Data published by Eurostat may deviate from figures provided by port authorities and national agencies. On Eurostat's methodology, see http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Maritime_ports_freight_and_passenger_statistics.

³⁰² Our calculations, based on the container throughput ranking in UNCTAD, *Review of Maritime Transport 2013*, New York and Geneva, UNCTAD / UN, 2013, <http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=753>, 179-180.

6.2. Sources of law

6.2.1. Port labour-specific sources

163. Today, there are no specific EU regulations on port labour.

In the 2000s, two proposals for a Port Services Directive, which aimed to open up access to the market of port services and would also have liberalised, to some extent, the port labour market, were voted down by the European Parliament³⁰³. It is as yet unknown whether new legislative proposals will be brought forward in the near future. Below, we shall briefly describe different possibilities in this respect³⁰⁴.

6.2.2. General sources

164. The absence of specific EU regulations on port labour does not mean that port labour remains beyond the reach of EU law.

First of all, national (including, as the case may be, regional or local) port labour regimes, including those based on collective agreements between social partners and port usages, must comply with primary EU law as laid down in the treaties which form the constitutional basis of the European Union, especially the provisions on the four freedoms and free competition of the Treaty on the Functioning of the European Union (TFEU)³⁰⁵. The European Commission is entrusted with the task of ensuring that national port labour regimes are compatible with these treaty rules. To an extent, individuals may directly rely on the treaty rules to challenge aspects of existing port labour regimes.

Secondly, it should be noted that a number of existing secondary EU legal instruments on maritime and social matters and non-discrimination, while not specifically elaborated with the port sector in mind, are equally applicable and indeed particularly relevant to that sector.

Thirdly, national port labour regimes may be affected by fundamental European rules on the protection of human rights.

³⁰³ See *infra*, para 178 *et seq.*

³⁰⁴ See *infra*, para 353 *et seq.*

³⁰⁵ The TFEU is the current, renamed version of the initial Treaty establishing the European Economic Community (TEEC), signed at Rome on 25 March 1957, which is commonly referred to as 'the Treaty of Rome' or simply 'the Treaty'.

165. As a rule, horizontal EU legislative instruments on social matters also apply to port work. The following EU legal acts are of particular importance:

- Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community³⁰⁶;
- Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications³⁰⁷;
- Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families³⁰⁸;
- Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health³⁰⁹;
- Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (the 'Working Time Directive')³¹⁰;
- Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (the 'Posted Workers Directive')³¹¹;
- Council Directive 2008/104/EC of 19 November 2008 on temporary agency work (the 'Temporary Agency Work Directive')³¹²;
- Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship³¹³;
- Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the 'Transfers of Undertakings Directive')³¹⁴.

166. Health and safety of workers is guaranteed by a large number of EU directives, which include, first and foremost, Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (the 'OSH Framework Directive')³¹⁵. This Directive was supplemented by an impressive number of Directives on specific aspects of occupational health and safety, such as, to mention only one,

³⁰⁶ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ* 19 October 1968, L 257/2.

³⁰⁷ *OJ* 30 September 2005, L 255/22.

³⁰⁸ *OJ* 19 October 1968, L 257/13.

³⁰⁹ *OJ* 4 April 1964, 56/850.

³¹⁰ *OJ* 18 November 2003, L 299/9.

³¹¹ *OJ* 21 January 1997, L 18/1.

³¹² *OJ* 5 December 2008, L 327/9.

³¹³ *OJ* 29 July 1991, L 206/19.

³¹⁴ *OJ* 22 March 2001 L 82/16.

³¹⁵ *OJ* 29 June 1989, L 183/1.

Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace³¹⁶.

Although it was not specifically elaborated with a view to enhancing the safety of port workers, mention should also be made of Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers ('hereinafter: 'Bulk Terminals Directive')³¹⁷. This Directive complements IMO's BLU Code.

167. With regard to equality of treatment and the principle of non-discrimination, the following secondary anti-discrimination legislation may be of relevance³¹⁸:

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin³¹⁹;
- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation³²⁰.

168. Directive 2006/123/EC on services in the internal market (commonly referred to as the 'Services Directive' or the 'Bolkestein Directive')³²¹ applies neither to "services in the field of transport, including port services, falling within the scope of Title V of the Treaty" (Art. 2(2)(d)), nor to "services of temporary work agencies" (Art. 2(2)(e)).

169. National port labour regimes must not go against the European Convention for the Protection of Human Rights and Fundamental Freedoms³²² which was prepared under the auspices of the Council of Europe and to which all maritime Member States of the EU are Parties. The Convention guarantees, *inter alia*, freedom of association and equality of treatment. The Treaty on European Union (Art. 6(3)) provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, constitute "general principles of the Union's law". Pursuant to Article 6(2) of the Treaty on European Union, the EU will in the future accede to the European Convention for the Protection

³¹⁶ OJ 30 December 1989, L 393/1. For an overview of other relevant instruments, see http://www.oshnet.eu/index.php?option=com_content&view=article&id=94&Itemid=78.

³¹⁷ OJ 16 January 2002, L 13/9.

³¹⁸ See also the sources mentioned *infra*, para 1394, in relation to discrimination of female port workers in Malta.

³¹⁹ OJ 19 July 2000, L 180/22.

³²⁰ OJ 2 December 2000, L 303/16.

³²¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 27 December 2006, L 376/36.

³²² The Convention was signed at Rome on 4 November 1950.

of Human Rights and Fundamental Freedoms. This may have consequences with regard to the judicial review of EU policies by the European Court of Human Rights³²³.

Meanwhile, the Court of Justice has ruled that “respect for human rights is a condition of the lawfulness of Community acts”³²⁴. National measures of Member States that fall within the scope of EU law or that implement EU law may also be reviewed by the Court. In both respects, some uncertainties remain however³²⁵.

Principles such as equality, non-discrimination, freedom to conduct a business, freedom of association and rights of workers are also guaranteed by the Charter of Fundamental Rights of the European Union³²⁶, which has the same legal value as the European treaties (Art. 6(1) of the Treaty on European Union). However, the Charter stipulates that its provisions are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law (Art. 51 of the Charter).

The European Social Charter³²⁷, which was also prepared under the Council of Europe and by which all maritime Member States of the EU are bound, sets out various social rights which may be of relevance to the subjects treated in the present study, including the right to choose an occupation, the right to training and the right to healthy and safe working conditions. The European Court of Justice appears to have recognised the European Social Charter as a (secondary) source of fundamental rights³²⁸.

6.2.3. The inter-relation between EU law and international instruments

170. As we have explained³²⁹, port labour is governed by a set of international, especially ILO, instruments, some of which are binding upon EU Member States. With a view to both the interpretation of the EU *lex lata* and the determination of the scope for any EU *lex ferenda*, it is important to clarify the inter-relation between relevant international and EU rules of law.

³²³ See Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 259-262.

³²⁴ ECJ 3 September 2008, Kadi, C-402/05 and C-415/05, *ECR* 2008, I-6351, para 284.

³²⁵ See more in Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 248-256; Lenaerts, K. and Van Nuffel, P., *Europees recht*, Antwerp / Cambridge, Intersentia, 2011, 547-549, paras 720-721.

³²⁶ The Charter was solemnly proclaimed at the Nice European Council on 7 December 2000 and became binding on 1 December 2009, with the entry into force of the Treaty of Lisbon.

³²⁷ The European Social Charter was opened for signature in Turin on 18 October 1961. Its revised version was opened for signature in Strasbourg on 3 May 1996 (see <http://www.coe.int/T/DGHL/Monitoring/SocialCharter/>).

³²⁸ ECJ 2 February 1988, Blaizot, 24/86, *ECR* 1988, 379, para 17; ECJ 15 June 1978, Defrenne, 149/77, *ECR* 1978, 1365, para 28; ECJ 18 December 2007, Laval, C-341/05, *ECR* 2007, I-11767, para 90; for context, see Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 235.

³²⁹ See *supra*, para 53 *et seq.*

171. International agreements which are only concluded by EU Member States – and not by the EU as such – remain outside the EU legal order, notwithstanding potential Union competences in the field³³⁰. With regard to the ILO and IMO agreements mentioned above³³¹, it must however be noted that the lack of formal adherence by the EU does not necessarily mean that these agreements are entirely beyond the reach of EU law.

172. In areas where the European Union has no exclusive competence but shares competence with the Member States – including internal market and social policy³³² – Member States are in principle free to conclude international agreements. Nevertheless, the ‘loyalty clause’ contained in Article 4(3) of the Treaty on European Union (TEU) requires EU Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. Article 4(3) furthermore requires the Member States to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives. This means that EU Member States have to exercise their competencies at the international level without infringing (primary or secondary) EU Law³³³.

173. A specific regime applies to international agreements concluded by EU Member States before the provisions of the European Treaties became binding on these Member States. This situation is dealt with in Article 351 TFEU, which stipulates:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby

³³⁰ Ringbom, H., *The EU Maritime Safety Policy and International Law*, Leiden / Boston, Martinus Nijhoff Publishers, 2008, 123.

³³¹ See *supra*, para 53 *et seq.*

³³² See Art. 4(2) TFEU.

³³³ See, *inter alia*, Lenaerts, K. en Van Nuffel, P., *Europees recht*, Antwerp / Cambridge, 2011, 575, para 743.

inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

This provision is particularly relevant to those EU Member States which ratified ILO conventions before acceding to the EU. This is the case, for example, with Finland, which ratified ILO Convention No. 137 in 1976 and ILO Convention No. 152 in 1981 before acceding to the EU in 1995, with Spain, which ratified ILO Convention No. 137 in 1975 and ILO Convention No. 152 in 1982 before becoming a member of the EU in 1986, and for Sweden, which ratified ILO Convention No. 137 in 1974 and ILO Convention No. 152 in 1980 before joining the EU in 1995. With regard to ILO Convention No. 137, the provision is also relevant to Poland³³⁴, Portugal³³⁵, and Romania³³⁶. With regard to ILO Convention No. 152, it is also relevant to Cyprus³³⁷. In addition, the following Member States are still bound by ILO Convention No. 32: Belgium³³⁸, Bulgaria³³⁹, Ireland³⁴⁰, Malta³⁴¹, Slovenia³⁴² and the United Kingdom³⁴³.

Article 351 TFEU has a general scope: it applies to any international agreement, irrespective of the subject matter, which is capable of affecting the application of the TFEU³⁴⁴. The aim of the article is to enable the Member States, so far as possible, to respect the rights of non-member countries under agreements concluded before the entry into force of the Treaty. Thus although the Article may justify a Member State taking action which would otherwise be contrary to the TFEU in order to perform obligations towards a third state, it does not allow a Member State to assert its rights under such an agreement, if to do so would violate the Member State's obligations under EU law. Consequently, agreements concluded prior to the entry into force of the Treaty may not be relied upon in relations between Member States to justify restrictions on trade within the Union³⁴⁵.

Article 351 implies that the institutions of the Union are under a duty not to impede the performance of the obligations of Member States under pre-existing agreements³⁴⁶.

³³⁴ Poland ratified ILO Convention No. 137 in 1979 and became a member of the EU in 2004.

³³⁵ Portugal ratified ILO Convention No. 137 in 1981 and became a member of the EU in 1986.

³³⁶ Romania ratified ILO Convention No. 137 in 1975 and became a member of the EU in 2007.

³³⁷ Cyprus ratified ILO Convention No. 152 in 1987 and became a member of the EU in 2004.

³³⁸ Belgium ratified ILO Convention No. 32 on 2 July 1952.

³³⁹ Bulgaria ratified ILO Convention No. 32 in 1949 and became a member of the EU in 2007.

³⁴⁰ Ireland ratified ILO Convention No. 32 in 1972 and became a member of the EU in 1973.

³⁴¹ Malta ratified ILO Convention No. 32 in 1965 and became a member of the EU in 2004.

³⁴² Slovenia ratified ILO Convention No. 32 in 1992 and became a member of the EU in 2004.

³⁴³ The United Kingdom ratified ILO Convention No. 32 in 1935 and became a member of the EU in 1973.

³⁴⁴ ECJ 14 October 1980, *Burgoa*, 812/79, *ECR* 1980, 2787, para 6; see also Macleod, I., Hendry, I.D. and Hyett, S., *The External Relations of the European Communities*, Oxford, Clarendon Press, 1996, 229; Van Hooydonk, E., *The impact of EU environmental law on ports and waterways*, Antwerp / Apeldoorn, Maklu, 2006, 105, para 93.

³⁴⁵ Macleod, I., Hendry, I.D. and Hyett, S., *The External Relations of the European Communities*, Oxford, Clarendon Press, 1996, 230; see also ECJ 11 March 1986, *Conegate*, 121/85, *ECR* 1986, 1007, para 24-26.

³⁴⁶ ECJ 14 October 1980, *Burgoa*, 812/79, *ECR* 1980, 2787, para 9. See also, *inter alia*, Manzini, P., "The priority of pre-existing treaties of EC Member States within the framework of international law", *European Journal of International Law*, 2001, Vol. 12, No. 4, (781), 783; Ringbom, H., *The EU Maritime Safety Policy and International Law*, Leiden-Boston, Martinus Nijhoff Publishers, 2008, 126; Van Hooydonk, E., *The impact of EU environmental law on ports and waterways*, Antwerp / Apeldoorn, Maklu, 2006, 105, para 93.

The provision also implies that Member States should continually monitor the agreements to which that Article applies, so that these agreements are amended or even denounced as soon as possible to minimise the conflict between a Member State's obligations under the Treaty and its obligations under the agreements. Moreover, where an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure³⁴⁷.

174. Specifically with regard to the relation between the European Union and the ILO it should be noted that the EU is not a member of the ILO but has the status of a non-voting observer³⁴⁸. This regularly causes problems when conventions are negotiated in the ILO concerning matters covered by Union law³⁴⁹. The Union institutions and the Member States have tried to find some *modus vivendi* in order to enable the Union's position, where relevant, to be voiced and defended.

During the annual sessions of the ILO Conference and meetings of the Governing Body, Member States meet to co-ordinate views on an informal basis, and the Presidency of the EU will often express any consensus reached among the Member States and the Commission on matters under discussion within the ILO. Member States remain free to express national positions. More formal coordination takes place for the negotiation of proposed conventions relating to matters within EU competence³⁵⁰.

In practice, it has not always been easy to reach agreement. Attempts to establish co-ordination arrangements for the participation of the Member States and the Community in ILO Convention No. 170 on safety in the use of chemicals at work led to the Commission seeking an opinion from the ECJ. In its Opinion 2/91, the ECJ stressed the importance of close co-operation between the Community and the Member States in the negotiation and implementation of conventions drawn up within the ILO³⁵¹.

The opinion did not however resolve the differences between the Member States and the Commission. In 1994, the Commission adopted a proposal for a Council Decision on the exercise of the Community's external competence at international labour conferences in cases

³⁴⁷ ECJ 28 March 1995, *Evans Medical Ltd and Macfarlan Smith Ltd*, C-324/93, *ECR* 1995, I-563, para 32.

³⁴⁸ Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, 69; 126; 201;.

³⁴⁹ See Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, 69; Macleod, I., Hendry, I.D. and Hyett, S., *The External Relations of the European Communities*, Oxford, Clarendon Press, 1996, 191.

³⁵⁰ Macleod, I., Hendry, I.D. and Hyett, S., *The External Relations of the European Communities*, Oxford, Clarendon Press, 1996, 191.

³⁵¹ See Macleod, I., Hendry, I.D. and Hyett, S., *The External Relations of the European Communities*, Oxford, Clarendon Press, 1996, 191.

falling within the joint competence of the Community and its Member States³⁵². The Council however did not act upon this proposal, which was withdrawn on 9 June 2000.

The issue whether the EU can take action in areas covered by ILO (and IMO) Conventions will be briefly dealt with in the chapter on policy recommendations below³⁵³.

6.2.4. The inter-relation between EU law and collective agreements

175. As we have already mentioned and will explain further in the country chapters, port labour is to a large extent regulated by means of collective bargaining agreements, which may be concluded at national, regional, sector³⁵⁴, port or company level. In this respect, a fundamental issue is whether provisions in these agreements (for example, on restrictions on employment and restrictive working practices) can be tested against EU law. For this reason, we shall briefly discuss the inter-relation between such agreements and EU law.

176. In *Albany*³⁵⁵, *Brentjens*³⁵⁶ and *Drijvende Bokken*³⁵⁷ the ECJ clarified that, in principle, EU competition law (or at least the prohibition on anti-competitive agreements) does not apply to collective labour agreements³⁵⁸. In *Albany*, the ECJ considered:

59. It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to [current Article 101(1)] of the

³⁵² COM(94) 2 final. See Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, Oxford, Oxford University Press, 2004, 203, footnote 58.

³⁵³ See *infra*, para 366, footnote.

³⁵⁴ For example, for the broader transport sector.

³⁵⁵ ECJ 21 September 1999, *Albany*, C-67/96, *ECR* 1999, I-5751, para 60.

³⁵⁶ ECJ 21 September 1999, *Brentjens*, C-115/97, C-116/97 and 117/97, *ECR* 1999, I-6025, para 57.

³⁵⁷ ECJ 21 September 1999, *Drijvende bokken*, C-219/97, *ECR* 1999, I-6121, para 47.

³⁵⁸ On this issue, see, *inter alia*, Bruun, N. and Hellsten, J., *Collective Agreements on the Competitive Common Market. A Study of Competition Rules and Their Impact on Collective Labour Agreements*, COLCOM Report, June 2000, 192 p.; Ichino, P., "Collective Bargaining and Antitrust Laws: an Open Issue", *International Journal of Comparative Labour Law and Industrial Relations* 2001, 185-197; Evju, S., "Collective Agreements and Competition Law. The Albany Puzzle, and *van der Woude*", *International Journal of Comparative Labour Law and Industrial Relations* 2001, 165-184; Hellsten, J., *On the Social Dimension in the Context of EC Competition Law*, Helsinki, Finnish Ministry of Labour, 2006, 90; Stege, A., *De CAO en het regelingsbereik van de sociale partners*, Deventer, Kluwer, 2004, 108-116; Van Drongelen, J., *Collectief arbeidsrecht*, II, Zutphen, Uitgeverij Paris, 2009, 107 *et seq.*; Vousden, S., "Albany, Market Law and Social Exclusion", *Industrial Law Journal* 2000, 181-191; Wirtz, M.S., *Collisie tussen CAO's en mededingingsrecht*, doctoral dissertation, Utrecht, Utrecht University, 2006, <http://igitur-archive.library.uu.nl/dissertations/2006-1204-200112/full.pdf>, 367 p. The Court reaffirmed its position in ECJ 3 March 2011, *Beaudout*, C-437/09, *ECR* 2011, page unknown, para 29. Available ECJ judgments deal with Article 101, not 102 of the Treaty.

Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [current Article 101(1)] of the Treaty.

61. The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of [current Article 101(1)] of the Treaty.

62. First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

63. Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

64. Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of [current Article 101(1)] of the Treaty.

Even if the immunity of collective agreements from competition law is only granted if a double 'nature and purpose' test is passed – the arrangement must (1) result from a genuine collective bargaining process and (2) contribute to improving conditions of work and employment – and even if it is conceded that all exceptions must be interpreted restrictively, the practical effect of the ECJ's doctrine is that nearly every collective bargaining agreement will meet these conditions and remain beyond the reach of the prohibition on cartels.

Unsurprisingly, the rationale behind the ECJ's case law has been criticised. According to the ECJ, a collective labour agreement is *a priori* excluded from the cartel provisions as soon as its stipulations are aimed at the amelioration of working and employment conditions. However, provisions limiting business hours, or the introduction of new technologies, or the taking on of personnel by a new contractor, or segmenting the productive process, are all strongly connected with working conditions and may all considerably reduce freedom of competition in the goods or services market. As to the aim of the stipulation, it is easy to claim that all collective agreements are stipulated with the declared purpose of protecting workers. Also in port and airport services, competition among workers may directly translate into a competition among enterprises, whereby any restriction of the former may immediately result in a restriction of the latter³⁵⁹.

Decisions by the Dutch Competition Authority and the Court of Utrecht confirm that far-reaching restrictions on employment in the port labour market laid down in collective agreements cannot

³⁵⁹ Ichino, P., "Collective Bargaining and Antitrust Laws: an Open Issue", *International Journal of Comparative Labour Law and Industrial Relations* 2001, (185), 190-191.

be tested against cartel provisions³⁶⁰. Monica Wirtz commented, however, that the restrictions at hand were a clear case of abuse of a dominant position³⁶¹. What is more, the Spanish Competition Authority did not hesitate to fine members of a national stevedoring association who had signed a collective labour agreement which went beyond the defence of social rights as it erected barriers to competitors and reserved ancillary port services for the association's members³⁶². By contrast, the Swedish Competition Authority found no proof of any anti-competitive intention in the decision by the national association of stevedoring companies to conclude a collective labour agreement which supported the monopolies which cargo handlers traditionally enjoy in Swedish ports³⁶³. In a case which did not strictly concern collective agreements, the Hellenic Competition Commission dismissed the defence by an association of self-employed porters to the effect that it only pursued social goals, because the association had behaved as an undertaking³⁶⁴.

In any case, the immunity of collective agreements is not absolute. For example, the prohibition on cartels may be found fully applicable to anti-competitive agreements concluded by a trade union providing an economic service against payment (such as vocational training)³⁶⁵, and collective labour agreements entailing restrictions on access to the labour market for third workforce suppliers, enabling the collectivity of terminal operators to charge excessive prices to users or to impose unreasonable conditions upon port users, or imposing such high labour costs that prospective competitors are deterred from entering the market may all run counter to the ban on abuses of a dominant position³⁶⁶.

177. Moreover, the rulings of the ECJ on the inter-relation between competition law and collective labour agreements do not imply that collective labour agreements remain 'outside the internal market'³⁶⁷. In several cases, which related to regulations issued by sports organisations³⁶⁸ and professional organisations³⁶⁹, the ECJ held that rules which are not public in nature but are designed to regulate, collectively, self-employment and the provision of services, must comply with the freedom of establishment and the freedom to provide services. In *Walrave and Koch*³⁷⁰ for instance, the Court ruled:

³⁶⁰ See *infra*, para 1435 and 1440.

³⁶¹ Wirtz, M.S., *Collisie tussen CAO's en mededingingsrecht*, doctoral dissertation, Utrecht, Utrecht University, 2006, <http://igitur-archive.library.uu.nl/dissertations/2006-1204-200112/full.pdf>, 283.

³⁶² See *infra*, para 1776.

³⁶³ See *infra*, para 1853.

³⁶⁴ See *infra*, para 1068.

³⁶⁵ Compare Wirtz, M.S., *Collisie tussen CAO's en mededingingsrecht*, doctoral dissertation, Utrecht, Utrecht University, 2006, <http://igitur-archive.library.uu.nl/dissertations/2006-1204-200112/full.pdf>, 217-222 and 266-267.

³⁶⁶ Compare the general discussion in Wirtz, M.S., *Collisie tussen CAO's en mededingingsrecht*, doctoral dissertation, Utrecht, Utrecht University, 2006, <http://igitur-archive.library.uu.nl/dissertations/2006-1204-200112/full.pdf>, 277 *et seq.* and see further *infra*, para 218.

³⁶⁷ See Prechal, S. and de Vries, S.A., "Viking/Laval en de grondslagen van het internemarktrecht", *Tijdschrift voor Europees en economisch recht (Sociaal-economische wetgeving)* 2008, (425), 425.

³⁶⁸ See ECJ 12 December 1974, *Walrave and Koch*, 36/74, *ECR* 1974, 1405; ECJ 15 December 1995, *Bosman*, C-415/93, *ECR* 1995, I-4921.

³⁶⁹ ECJ 19 February 2002, *Wouters*, C-309/99, *ECR* 2002, I-1577.

³⁷⁰ ECJ 12 December 1974, *Walrave and Koch*, 36/74, *ECR* 1974, 1405, para 21.

21. It is established [...] that [current article 45], relating to the abolition of any discrimination based on nationality as regards gainful employment, extends likewise to agreements and rules which do not emanate from public authorities.

The reason for this extension is obvious: in some countries, labour conditions and access to employment are regulated through legislative or regulatory action, whereas elsewhere they are left to rules adopted by non-governmental bodies. The abolition, as between Member States, of obstacles to the fundamental freedoms would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law³⁷¹.

In *Viking*³⁷², the ECJ ruled:

33. [...] according to settled case-law, [current Articles 45 EC, 49 EC and 56 EC] do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services [...].

34. Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, limiting application of the prohibitions laid down by these articles to acts of a public authority would risk creating inequality in its application.

[...]

50. The Court inferred from this, in [...] Albany, that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of [current Article 101(1)] of the Treaty.

51. The Court must point out, however, that that reasoning cannot be applied in the context of the fundamental freedoms set out in Title III of the Treaty.

[...]

53. [...] the fact that an agreement or an activity are excluded from the scope of the provisions of the Treaty on competition does not mean that that agreement or activity also falls outside the scope of the Treaty provisions on the free movement of persons or services since those two sets of provisions are to be applied in different circumstances [...].

54. [...] the Court has held that the terms of collective agreements are not excluded from the scope of the Treaty provisions on freedom of movement for persons [...].

[...]

57. [...] the Court would point out that it is clear from its case-law that the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be

³⁷¹ See ECJ 18 December 2007, *Laval*, C-341/05, ECR 2007, I-11767, para 98.

³⁷² ECJ 11 December 2007, *Viking*, C-438/05, ECR 2007, I-10779, paras 33-34, 50-51, 53-54 and 57-59.

neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy [...].

58. Moreover, the Court has ruled, first, that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down, and, second, that the prohibition on prejudicing a fundamental freedom laid down in a provision of the Treaty that is mandatory in nature, applies in particular to all agreements intended to regulate paid labour collectively [...].

59. Such considerations must also apply to [current Article 49] EC which lays down a fundamental freedom.

It thus follows from established case law of the ECJ that the fundamental freedoms – at least free movement of persons and freedom to provide services – equally apply to collective labour agreements³⁷³. As a result, collective agreements on port labour may be tested against these freedoms.

The fact that fundamental freedoms apply to collective labour agreements implies a direct obligation upon professional organisations, including trade unions, to observe these freedoms³⁷⁴. The level at which the collective labour agreement is concluded (national, regional, sectoral or at the level of the undertaking) and the issue whether the agreement is declared generally binding, seem irrelevant.

The applicability of the fundamental freedoms to collective labour agreements is reaffirmed in the Charter of Fundamental Rights of the European Union (Art. 28), which provides that workers and employers, or their respective organisations, have the right to negotiate and conclude collective agreements "in accordance with Community law and national laws and practices"³⁷⁵.

Furthermore, it would appear that an individual is entitled to invoke the incompatibility of a collective labour agreement with fundamental freedoms in a case before a national judge³⁷⁶. In this respect, the ECJ noted in *Viking*:

³⁷³ See further, *inter alia*, Barnard, C., "Internal market v. labour market: a brief history", in De Vos, M. (Ed.), *European Union Internal Market and Labour Law: Friends or Foes ?*, Antwerp / Oxford / Portland, Intersentia, 2009, 19-43; Barrett, G., *EU Law and Workers' Rights: The Legal Significance of Viking, Laval, Rüffert and Luxembourg*, Dublin, UCD Dublin European Institute, September 2009, unpagged; Blanpain, R., *Europees arbeidsrecht*, Bruges, Die Keure, 2012, 184-192, para 428-442; Lagercrantz Varvne, K., *Free movement of services and non-discriminatory collective action*, Masters thesis, University of Gothenburg, 2011, 94 p.; Malmberg, J., "Trade union liability for 'EU-unlawful' collective action", *European Labour Law Journal* 2012, 5-18; Orlandini, G., "Trade union rights and market freedoms: the European Court of Justice sets out the rules", *Comparative Labor Law & Policy Journal* 2008, 573-603; Watson, P., *EU Social and Employment Law*, Oxford, Oxford University Press, 2009, 20-24, para 2.35-2.49.

³⁷⁴ Prechal, S. and de Vries, S.A., "Viking/Laval en de grondslagen van het internemarktrecht", *Tijdschrift voor Europees en economisch recht (Sociaal-economische wetgeving)* 2008, (425), 431.

³⁷⁵ Compare ECJ 11 December 2007, *Viking*, C-438/05, *ECR* 2007, I-10779, para 44 *et seq.*

³⁷⁶ See Prechal, S. and de Vries, S.A., "Viking/Laval en de grondslagen van het internemarktrecht", *Tijdschrift voor Europees en economisch recht (Sociaal-economische wetgeving)* 2008, (425), 431.

[...] that the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in compliance with the obligations thus laid down [...]³⁷⁷.

Finally, the Member States have a general duty to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the treaties or resulting from the acts of the institutions of the Union (Article 4(3) of the Treaty on European Union). Logically, national courts should refuse to apply a collective labour agreement which infringes EU law. In addition, we see no reason why an EU Member State which neglects to take appropriate action against the conclusion or implementation of such an agreement should not be held responsible before the Court of Justice.

³⁷⁷ ECJ 11 December 2007, Viking, C-438/05, ECR 2007, I-10779, para 58.

6.3. Labour market

6.3.1. Historical background³⁷⁸

178. Until the 1980s, the European Commission took the view that there was no need for a specific ports-oriented policy.

The 1991 judgment issued by the European Court of Justice in *Merci* regarding the monopoly of port labour supply in the port of Genoa³⁷⁹ drew attention to the EU legal regime of ports and prompted a debate on the need for a specific EU port policy.

In 1997, the European Commission published a Green Paper on Sea Ports and Maritime Infrastructure³⁸⁰ which highlighted several pressing policy and legal issues relating to, *inter alia*, port charging, state aid and free access to the port services market. With respect to port labour, the Commission stated:

83. [...] port labour rigidities remain characteristic of the sector, mainly related to the registration of port workers and the existence of labour pools in a number of EU ports, They have their origin in the past, at times when port work was highly irregular, in order to cope with the peaks, mainly due to the unpredictable pattern of ship arrivals. Nowadays, pools constitute the bridge between the former labour-oriented type of port organisation, based on casual employment, and the present capital-intensive one where direct and long-term employment relationships with the operator becomes [sic] the rule, In any case, they imply participation and financing on the part of all operators in the port in which they are established,

84. Independently from the existence of labour pools, a priority of employment for registered port workers still prevails in some Member States; as recommended in the ILO Dock Work Convention 137 of 1973, Generally, restrictions or conditions for registration do not pose problems as long as they are non-discriminatory, necessary and proportional. An obligation for port operators to participate in the pools and/or use exclusively workers who are members of the pool for their port operations may, however, under certain circumstances constitute a de-facto restriction to market access³⁸¹.

³⁷⁸ See generally Van Hooydonk, E., "The regime of port authorities under European law including an analysis of the Port Services Directive", in Van Hooydonk, E. (Ed.), *European Seaports Law*, Antwerp / Apeldoorn, Maklu, 2003, (79), 88-89, para 8, also in Delwaide, L. (Ed.), *Liber amicorum R. Roland*, Brussels, Larcier, 2003, (467), 473-475, para 8.

³⁷⁹ See *infra*, para 1171.

³⁸⁰ European Commission, *Green Paper on Sea Ports and Maritime Infrastructure*, Brussels, 10 December 1997, COM(97) 678 final.

³⁸¹ European Commission, *Green Paper on Sea Ports and Maritime Infrastructure*, Brussels, 10 December 1997, COM(97) 678 final, 23-24, paras 83-84.

The Green Paper suggested various policy alternatives, ranging from a case-by-case investigation on the basis of treaty rules to establishing a specific regulatory framework for the liberalisation of port services³⁸².

In 1999, a Working Paper published by the European Parliament denied that European legislation on port services was necessary, as the present enforcement powers of the Commission were sufficient. With regard to port labour, the paper noted that recent national liberalisation measures had already brought the regime "into line with the general conditions of private employment in a modern industrial economy"³⁸³ (a very dubious statement, as will become apparent further on in this study).

In 2001 and 2004 the European Commission launched proposals for a Directive on market access to port services, which contained a number of provisions on, *inter alia*, port labour³⁸⁴. After a particularly fierce political debate, both proposals were voted down by the European Parliament. It is rare for the Parliament to reject any (basically compromise-oriented) proposal for a Directive that is subject to a co-decision procedure; for such a proposal to be turned down twice, as happened in the case of the Ports Directive, is most likely a unique event³⁸⁵. As both proposals inevitably serve as a historical backdrop to the current policy debate and as they will be repeatedly referred to in the country chapters below, it is useful to recall the provisions of both Directive proposals which specifically pertained to port labour.

³⁸² See European Commission, *Green Paper on Sea Ports and Maritime Infrastructure*, Brussels, 10 December 1997, COM(97) 678 final, 26-27, paras 98-103.

³⁸³ European Parliament, *Working Paper European Sea Port Policy*, Transport Series, TRAN 106 EN, Luxembourg, 1999, 38 and 60.

³⁸⁴ European Commission, *Communication from the Commission to the European Parliament and the Council 'Reinforcing Quality Service in Sea Ports: A Key for European Transport'. Proposal for a Directive of the European Parliament and of the Council On Market Access to Port Services*, Brussels, 13 February 2001, COM(2001) 35 final; European Commission, *Proposal for a Directive of the European Parliament and of the Council on market access to port services*, Brussels, 13 October 2004, COM(2004) 654 final. For comprehensive legal and policy analyses of the proposed Directives, see Van Hooydonk, E., "The regime of port authorities under European law including an analysis of the Port Services Directive", in Van Hooydonk, E. (Ed.), *European Seaports Law*, Antwerp / Apeldoorn, Maklu, 2003, 79-185 and in Delwaide, L. (Ed.), *Liber amicorum R. Roland*, Brussels, Larcier, 2003, 467-570; Van Hooydonk, E., "Prospects after the rejection of the European Port Services Directive", *Il Diritto Marittimo* 2004, 851-873; Van Hooydonk, E., "The European Port Services Directive: the good or the last try?", *The Journal of International Maritime Law*, 2005, 188-220, also in *Il diritto marittimo*, 2006, 65-111 as well as in Ringbom, H. (Ed.), *The Emerging European Maritime Law. Proceedings from the Third European Colloquium on Maritime Law Research, Ravenna, 17-18 September 2004 (Marlus No. 330)*, Oslo, University of Oslo, 2005, 47-118. For other commentaries, see, *inter alia*, Power, V., "European Union Seaports Law: The general principles of European Union Law", in Van Hooydonk, E. (Ed.), *EU Law of Ports and Port Services and the Ports Package*, Antwerpen, Maklu, 2003, (17), 56-69; Turnbull, P., "The War on Europe's Waterfront – Repertoires of Power in the Port Transport Industry", *British Journal of Industrial Relations* 2006, Vol. 44, No. 2, 305-326.

³⁸⁵ Van Hooydonk, E., *The law ends where the port area begins. On the anomalies of port law. Inaugural lecture at the launch of Portius - International and EU Port Law Centre*, Antwerpen / Apeldoorn, Maklu, 2010, 47, para 50.

Figure 15. Protests from port workers against the second proposal for an EU port liberalisation directive



179. The key principle of the 2001 Directive proposal was explicated in the following terms:

Freedom to provide port services shall apply to Community providers of port services under the provisions set out in this Directive. Providers of port services shall have access to port installations to the extent necessary for them to carry out their activities (Art. 1).

The notion of "port services" was defined as "services of a commercial nature that are provided, for payment, to port users, and this payment is not normally included in the charges collected for being allowed to call at or operate in a port". More in particular, the Directive would have applied to (1) technical-nautical services (pilotage, towage, mooring), (2) cargo handling, including stevedoring, stowage, transshipment and other intra-terminal transport, storage, depot and warehousing and cargo consolidation, (3) passenger services (including embarkation and disembarkation) (Art. 4(4) and the Annex).

The proposal regulated the granting of authorisations to port service providers in the following terms:

- 1. Member States may require that a provider of port services obtains prior authorisation under the conditions set out in par. (2), (3), (4) and (5). Authorisation shall be automatically granted to service providers selected under Article 8³⁸⁶.*
- 2. The criteria for the granting of the authorisation by the competent authority must be transparent, non-discriminatory, objective, relevant and proportional. The criteria may only relate to the provider's professional qualifications, his sound financial situation and sufficient insurance cover, to maritime safety or the safety of installations, equipment and persons. The authorisation may include public service requirements relating to safety, regularity, continuity, quality and price and the conditions under which the service may be provided.*

³⁸⁶ The latter Article dealt with selection procedures.

3. Where the required professional qualifications include specific local knowledge or experience with local conditions, the competent authority must provide adequate training for applicant service providers.

4. Criteria referred to in paragraph (2) shall be made public and providers of port services shall be informed in advance of the procedure for obtaining the authorisation. This requirement applies equally to an authorisation linking the provision of service to an investment into immobile assets which will revert to the port upon expiry of the authorisation.

5. The provider of port services has the right to employ personnel of his own choice to carry out the service covered by the authorisation (Art. 6).

At first sight, the latter paragraph seemed to require the abolition of all existing schemes for the registration of port workers. In an alternative reading, however, registration systems could be maintained and service providers would merely acquire the right to freely select their personnel from existing groups or pools of registered port workers, provided the system is compatible with primary EU law³⁸⁷.

Further, the proposal introduced a general right of port users to self-handle:

1. Member States shall take the necessary measures to allow self-handling to be carried out in accordance with this Directive.

2. Self-handling may be subject to an authorisation for which the criteria must not be stricter than those applying to providers of the same or a comparable port service (Art. 11).

The concept of self-handling was defined as follows:

'self-handling' means a situation in which a port user provides for itself one or more categories of port services and where normally no contract of any description with a third party is concluded for the provision of such services (Art. 4(7)).

The idea of self-handling was transposed from the Airport Groundhandling Directive³⁸⁸. Its inclusion in the proposal seemed to be the result of a rather dogmatic approach, since it had not been established whether there was a real economic need or rationale for a general right to self-handle in seaports³⁸⁹. In addition, the concrete implications of the self-handling provision for port worker registration systems remained rather obscure.

The proposal devoted a special provision to social protection, which read:

³⁸⁷ See on this issue Van Hooydonk, E., "The regime of port authorities under European law including an analysis of the Port Services Directive", in Van Hooydonk, E. (Ed.), *European Seaports Law*, Antwerp / Apeldoorn, Maklu, 2003, (79), 155-156, para 52.

³⁸⁸ Art. 7 of Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ 25 October 1996, L 272/36.

³⁸⁹ Van Hooydonk, E., "The regime of port authorities under European law including an analysis of the Port Services Directive", in Van Hooydonk, E. (Ed.), *European Seaports Law*, Antwerp / Apeldoorn, Maklu, 2003, (79), 173, para 66.

Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States shall take the necessary measures to ensure the application of their social legislation (Art. 15).

Especially the provisions on self-handling turned out to be highly controversial and the ensuing debate sparked protest. Largely because of the controversy on port labour issues, the Directive proposal was rejected by the European Parliament in 2003.

180. The second proposal for a EU Port Services Directive from 2004 pursued the following objectives:

1. Freedom to provide port services in sea ports shall apply to Community providers of port services under the provisions set out in this Directive.

[...]

3. Providers of port services, and self handlers, shall have non discriminatory access to port infrastructure that is generally accessible, to the extent necessary for them to carry out their activities (Art. 1).

This time, a more prominent article was inserted on social protection:

This Directive shall in no way affect the application of the social legislation of Member States, including relevant national rules on health, safety and employment of personnel. Social standards must not be below those laid down by applicable Community legislation (Art. 4).

The new proposal again organised the granting of authorisations to port service providers. Among the permitted authorisation criteria, it mentioned:

compliance with employment and social rules, including those laid down in collective agreements, provided that they are compatible with Community law. In any case, those minimal rules set out in European social law will be respected (Art. 7(3)(c)).

On the choice of personnel by authorised providers, it contained the following rule:

The provider of port services carrying out the service covered by the authorisation shall have the right to employ personnel of his own choice provided that he fulfils the criteria laid down in accordance with paragraph 3 and with the legislation of the Member State in which the service provider is providing the services in question, provided that such legislation is compatible with Community law (Art. 7(6)).

The provision on self-handling³⁹⁰ was now formulated as follows:

1. Member States shall take the necessary measures to allow self-handling to be carried out, wherever possible, in accordance with this Directive.

Member States shall ensure that the competent authority refuses self-handling for one or more categories of port services only where there exist objective reasons or constraints relating to available space or capacity, safety considerations or requirements deriving from environmental regulations.

2. Concerning cargo handling operations and passenger services for an authorised regular shipping service carried out in the context of Short Sea Shipping and Motorways of the Seas operations, Member States shall recognize the right to selfhandle using also the vessel's regular sea-faring crew.

3. Self-handling shall be subject to an authorisation. The criteria for such authorisation must be the same as those applying to providers of the same or a comparable port service and as referred to in Article 7 (3), provided these are relevant. Competent authorities shall grant such authorisations to self-handlers in an efficient and expedient manner. They shall remain in force so long as the self-handler complies with the criteria for granting them.

4. This Directive shall in no way affect the application of national rules concerning training requirements and professional qualifications, employment and social matters, including collective agreements, provided that they are compatible with Community law and the international obligations of the Community and the Member State concerned.

5. Where self-handling is subject to the payment of a fee as a contribution to public service obligations for technical-nautical services which cannot be met by self-handlers, the fee shall be determined in accordance with relevant, objective, transparent and non-discriminatory criteria and shall be proportional to the costs of maintaining the public service obligations (Art. 13)).

The new definition of self-handling read:

"self-handling" means a situation in which an undertaking (a self-handler), which normally could buy port services, provides for itself, using its own land-based personnel, with the exception of the situation foreseen in Art. 13.2, and its own equipment, one or more categories of port services in accordance with the criteria set out in this Directive (Art. 3(9)).

³⁹⁰ On self-handling, the Explanatory Memorandum explained, *inter alia*:

Use of land-based personnel to carry out self-handling will increase employment in ports, with the local communities the first beneficiaries. Needless to say that this personnel will have to be employed in full respect of the applicable national and Community rules dealing with employment and social issues, following the same general rules and conditions set for all other personnel involved in cargo handling.

In addition to using land-based personnel, ships providing an authorised regular shipping service in the context of Short Sea Shipping or operating on Motorways of the Sea may, in addition, carry out self-handling using the ship's regular sea-faring crew (European Commission, Proposal for a Directive of the European Parliament and of the Council on market access to port services, Brussels, 13 October 2004, COM(2004) 654 final, 6).

The Commissioner assured Parliament that the self-handling provision did not intend to lower safety and social standards³⁹¹.

A 'Complementary Economic Evaluation study' on the Directive proposal carried out in 2005 confirmed that little evidence was available that the labour market showed signs of market failure and that labour conditions were generally considered relatively good when compared to other job opportunities in the economy. The authors concluded that the social effects of the Port Directive could be diverse and that there was no consensus among the stakeholders³⁹².

As we have mentioned³⁹³, in 2006 the second proposal failed as well.

181. On 18 October 2007, the European Commission adopted a new Communication on a European Ports Policy³⁹⁴ in which it set out views on social dialogue, training and health and safety. This time, no legislative proposals were put forward however. Instead, the Commission announced the preparation of several 'soft law' guidance instruments.

As the 2007 Communication is the Commission's most recent policy document which deals with port labour issues, we quote the relevant passages in their entirety:

4.5. Cargo-handling

Cargo-handling has significantly evolved during the last years. It has become a service based on advanced technologies and is now much less labour-intensive. Its role has also evolved, along with the role of ports, gateways in the logistic chain and not only the starting and ending points of a maritime trade. Cargo-handling is performed according to different settings across the Community and even within one Member State. Port workers are often directly employed by terminal operators, while in some ports they are contracted via "pools", entities in charge of recruiting and training port workers.

Like cargo-handling in general, pooling arrangements can be very different across the Member States. Moreover, they can be based on national or local legislation or entirely governed by local practices. The Treaty rules on freedom of establishment and freedom to provide services can fully apply to the activities carried out by the pools.

³⁹¹ See Written Question E-0868/03 by Joaquim Miranda (GUE/NGL) to the Commission, OJ 15 January 2004, C 11E/150.

³⁹² Depending on the source, the size of the labourforce was expected to decrease with 1 per cent or to increase with 3.5 per cent, while the number of worked hours was expected to decrease with 16 per cent or to increase with 3.5%. Neither was the consultant able to assess the effect of the proposed Directive on workers' health and safety (see Ecorys and Trademco, *Complementary Economic Evaluation study on the Commission proposal for a Directive on market access to port services. Final Report*, Rotterdam / Athens, November 2005, http://ec.europa.eu/transport/modes/maritime/studies/doc/2005_11_complementary_economic_analy sis.pdf, 6, 30 and 46-50).

³⁹³ See *supra*, paras 3 and 163.

³⁹⁴ European Commission, *Communication on a European Ports Policy*, Brussels, 18 October 2007, COM(2007) 616 final.

Pools often provide sound training to workers and are an efficient tool for employers. However, such arrangements should not be used to prevent suitably qualified individuals or undertakings from providing cargo-handling services, or to impose, on employers, workforce that they do not need, since this could under certain circumstances fall foul of the Treaty rules on the Internal Market, and in particular of Article 43 on freedom of establishment and Article 49 on freedom to provide services³⁹⁵.

[...]

6. WORK IN PORTS

6.1. Dialogue

Different arrangements for stevedoring exist in European ports. The Commission considers that a dialogue between stakeholders can contribute significantly to a better understanding between the parties concerned and a successful management of change. In this context, dialogue between the social partners can play a particularly powerful role towards more and better jobs in the ports sector. The Commission welcomes all initiatives aiming at undertaking or promoting a dialogue between stakeholders at different levels, including the initiatives already taken by some ports at local level providing models for "best practices". The recent agreements concluded between all stakeholders in the ports of Dunkirk and Valletta are a demonstration of this. Furthermore, the Commission will encourage a structured social dialogue at European level.

The Commission will encourage the establishment of a European sectoral social dialogue committee in ports within the meaning of Commission Decision 98/500/EC28. If such a committee is established, the Commission will promote an active contribution of the social partners to management of change, modernisation and more and better jobs.

6.2. Training

There are currently no specific Community rules on training for port workers. The Commission recognizes that training of port workers has become of primary importance for the safe and efficient operation of ports. Port equipments have become technologically advanced and often complex tools. Work in port has consequently evolved and, as the consultation has shown, a set of common requirements for training of port workers should be established at Community level. This will also enhance the mobility of European port workers by means of the mutual recognition of their qualifications.

³⁹⁵ European Commission, *Communication on a European Ports Policy*, Brussels, 18 October 2007, COM(2007) 616 final, 11-12.

At a Community level Directive 89/391/EEC (the "Framework" Directive) lays down rules on safety and health related training of workers which fully apply to work in ports. In this respect, Directive 89/391/EEC sets the responsibility of the employer to ensure that each worker receives adequate training on safety and health matters.

The Commission will propose a mutually recognizable framework on training of port workers in different fields of port activities.

6.3. Health and Safety at Work

At the European Union level, the general rules for the protection of health and safety of workers at work are laid down in the above-mentioned "Framework" Directive, which has been supplemented by 19 individual Directives covering specific sectors and risks. Most of these directives are relevant for work in ports. Full respect and enforcement of these rules is crucial for improving working conditions.

Furthermore, in February 2007 the Commission adopted a communication inter alia encouraging a risk prevention culture at work which was supported by Council resolution. As any other work environment, ports are covered by this communication. It should be noticed that a significant number of occupational accidents including fatal ones still occur in ports.

The Commission will closely monitor the implementation to ports of Community rules on safety and health of workers at work.
The Commission will also closely follow the proper collection of statistics relating to accidents according to the ESAW and EODS methodologies established by the Commission (EUROSTAT)³⁹⁶.

182. More background to the Commission' viewpoint and its preference for a soft law approach was provided in the accompanying Commission Staff Working Document³⁹⁷. As they remain relevant to the present-day context, we shall revert to the Commission's assessment of EU port labour systems and its consideration of different policy options in our subchapter on 'Appraisals and outlook' below³⁹⁸.

³⁹⁶ European Commission, *Communication on a European Ports Policy*, Brussels, 18 October 2007, COM(2007) 616 final, 13-15.

³⁹⁷ European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339.

³⁹⁸ See *infra*, para 277.

183. In a resolution of 2008, the European Parliament supported the creation of a social dialogue committee and a further consideration of qualification and training requirements, but did not speak out on market access issues³⁹⁹.

184. Also in 2008, the European Transportworkers' Federation reportedly 'discovered' an initiative within the European Commission to explore the legality of port labour pools, with a view to invoking a legal challenge under Community competition rules. ETF warned the Commission that any legal challenge to labour pools would be met with by pan-European strike action. According to Peter Turnbull, the Commission immediately agreed to abandon the review, especially when it became clear that the Federation of European Private Port Operators (FEPOR) had no appetite for a fight⁴⁰⁰.

185. In the 2011 Transport White Paper⁴⁰¹, the European Commission again raised the issue of restrictions on the provision of port services as a subject of possible future EU action. The objective of the present study is exactly to provide an input to the current work of the Commission on a future port policy. We shall discuss the White Paper in further detail below⁴⁰².

³⁹⁹ European Parliament resolution of 4 September 2008 on a European ports policy (2008/2007(INI)), OJ 4 December 2009, C 295E/74, in which the EP:

47. Welcomes the emphasis placed on dialogue in the port sector; calls for a European social dialogue committee to be set up and considers that it should deal with subjects related to ports, including workers' rights, concessions and the 1979 International Labour Organisation Convention No 152 on occupational safety and health (dock work);

48. Stresses the importance of protecting and securing the highest possible level of training for port workers; supports the Commission's desire to provide port workers with a mutually recognisable basic qualification so as to foster flexibility in the sector; with this in mind and, as a first step, considers that a comparison should be made between the different existing systems of professional qualifications for port workers; considers, however, that this basic qualification must not have the effect of lowering the average level of qualification of port workers in a Member State;

49. Proposes that the topic of professional qualifications and lifelong training be addressed together with the social partners within the future European social dialogue committee;

50. Urges the Commission to promote the exchange of good practice in the port sector in general and with regard to innovation and the training of workers in particular in order to improve the quality of services, competitiveness and the level of investment attracted;

⁴⁰⁰ Turnbull, P., "From social conflict to social dialogue: Counter-mobilization on the European waterfront", *European Journal of Industrial Relations* 2011, Vol. 16, No. 4, (333), 345.

⁴⁰¹ European Commission, *White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, COM(2011) 144 final.

⁴⁰² See *infra*, para 284.

6.3.2. Regulatory set-up

- *Outline*

186. The organisation of port labour in the EU differs from country to country. As we have mentioned⁴⁰³, there is currently no specific EU legal framework on this matter. In Chapter 7 below, we shall provide a synopsis of national port labour arrangements in the 22 EU maritime Member States, while Volume II contains elaborate country chapters.

In the present subchapter, we will briefly describe the implications of existing primary and secondary EU law on the organisation of port labour.

187. One of the core purposes of the European Union remains the development of an internal market. The foundations of the internal market are laid down in the Treaty on the Functioning of the European Union (TFEU), which proclaims that the internal market shall comprise "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties" (Art. 26(2)). The Treaty goes on to define, *inter alia*, the regimes of free movement of goods (Art. 28-37), free movement of persons (Art. 45-55), free movement of services (Art. 56-62) and free movement of capital (Art. 63-66). These provisions aim at enabling market participants to use labour and capital, supply and acquire goods and perform and receive services across the borders of the EU Member States without being hindered by national regulations⁴⁰⁴. The internal market presupposes the existence of a space without internal borders, within which production factors are freely put into use. EU Member States may only establish or maintain limits to free movement under strict conditions.

As we will see below, all these general principles may have far-reaching, and very concrete, implications for national port labour regimes. It is worthy of note that the treaty provisions on workers, establishment and services are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by EU law and the prohibition of all discrimination between them on grounds of nationality⁴⁰⁵.

Furthermore, the Treaty sets out basic principles on free competition which apply to undertakings: a prohibition on anti-competitive agreements (cartels) (Art. 101) and a prohibition on abuses of a dominant position (Art. 102). It also regulates, *inter alia*, the granting of aids to undertakings by states (Art. 107). As we have explained⁴⁰⁶, state aid remains outside the scope of this study however.

⁴⁰³ See *supra*, para 163.

⁴⁰⁴ Lenaerts, K. and Van Nuffel, P., *Europees Recht*, Antwerpen-Cambridge, Intersentia, 2011, 135-136, para 168-170.

⁴⁰⁵ ECJ 8 April 1976, Royer, 48/75, ECR 1976, 497, para 12.

⁴⁰⁶ See *supra*, para 25.

In addition to these fundamental treaty rules on the functioning of the internal market, we shall highlight the importance to the sector of port labour of the Temporary Agency Work Directive and of European instruments on human and social rights, including freedom of association.

- *Free movement of goods*

188. Free movement of goods rests on the following prohibitions set out in the TFEU:

Article 30

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

Article 34

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

These provisions apply to products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions⁴⁰⁷, regardless of whether they originate in Member States or come from third countries and are in free circulation in Member States⁴⁰⁸.

189. Charges having equivalent effect as customs duties have been described as "any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense", even "if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product"⁴⁰⁹.

⁴⁰⁷ ECJ 10 December 1968, *Commission / Italy*, 7/68, *ECR* 1968, 423; see also, *inter alia*, Fallon, M., *Droit matériel général de l'Union européenne*, Louvain-la-Neuve, Bruylant-Academia, 2002, 107-111.

⁴⁰⁸ See Art. 28 (2) TFEU.

⁴⁰⁹ ECJ 1 July 1969, *Commission / Italy*, 24/68, *ECR* 1969, 193, para 9.

Quantitative restrictions on imports and exports are measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit⁴¹⁰. The limit may be constructed in various ways, by reference to value, or physical quantity, or some other factor⁴¹¹.

All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are considered measures having an effect equivalent to quantitative restrictions⁴¹². This definition is very broad, and potentially makes the prohibition applicable to measures which affect imported and domestic goods equally⁴¹³.

190. In its famous *Merci* judgment of 1991⁴¹⁴, the European Court of Justice tested the port labour system of Genoa against free movement of goods. The case concerned the double monopoly of a port labour pool and a cargo handling company, which had prevented a port user from discharging cargo using the ship's crew during a series of strikes⁴¹⁵. With regard to (current) Article 34 TFEU, the Court recalled that a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with that article "in so far as such a measure has the effect of making more difficult and hence of impeding imports of goods from other Member States" (para 21). The Court noted that it may be seen from the national court's findings "that the unloading of the goods could have been effected at a lesser cost by the ship's crew, so that compulsory recourse to the services of the two undertakings enjoying exclusive rights involved extra expense and was therefore capable, by reason of its effect on the prices of the goods, of affecting imports" (para 22). Implicitly, the Court held that the organisation of port labour in the port of Genoa was incompatible with the free movement of goods.

Today, it seems unlikely that restrictions in the port labour market can be tested against free movement of goods in any useful manner⁴¹⁶. First of all, it should be noted that the prohibition on measures having equivalent effect only applies, as a rule, to measures taken by public bodies⁴¹⁷. In addition, the scope of the provisions on free movements of goods has been restricted by the ECJ's ruling in *Keck and Mithouard*. In this case the ECJ decided that rules restricting or prohibiting certain selling arrangements, by contrast with indistinctly applicable

⁴¹⁰ ECJ 12 July 1973, *Geddo*, 2/73, *ECR* 1973, 865, para 7.

⁴¹¹ Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 746.

⁴¹² ECJ 11 July 1974, *Dassonville*, 8/74, *ECR* 1974, 837, para 5.

⁴¹³ See further Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 748-752.

⁴¹⁴ ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889.

⁴¹⁵ See further *infra*, para 1171.

⁴¹⁶ Compare Bordereaux, L., "Droit communautaire et manutention portuaire française. Une confrontation sans heurts", *Annuaire de droit maritime et océanique*, XVIII, 2000, Nantes / Paris, Centre de droit maritime et océanique / A. Pédone, 2000, (47), 88-92.

⁴¹⁷ See further Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 757-758; see also *supra*, para 177 on collective labour agreements.

rules concerning production and marketing, are not generally measures of equivalent effect⁴¹⁸. In *Corsica Ferries III*, the Court noted that Italian legislation imposing the use of mooring services made no distinction according to the origin of the goods transported, that its purpose was not to regulate trade in goods with other Member States and that the restrictive effects which it might have had on the free movement of goods were too uncertain and indirect for the obligation which it imposes to be regarded as being capable of hindering trade between Member States⁴¹⁹. In *Raso*, Advocate-General Fennelly considered that, since the restrictive effects of national rules on the provision of temporary labour by a monopolistic port workers' company on imports were speculative at best, no issue concerning free movement of goods arose⁴²⁰.

In interviews, trade union representatives highlighted the absence of any impact of (allegedly, marginal) port labour costs on trade flows and concluded that port labour should be of no concern to the European Commission⁴²¹. On the other hand, we identified cases of port traffic being diverted as a result of prohibitive port labour conditions⁴²², and several Member States based proposals for port labour reform schemes on the negative impact of existing arrangements on the foreign trade of the country⁴²³.

- *Free movement of persons*

191. In the context of free movement of persons, two separate freedoms can be discerned: free movement of workers and freedom of establishment.

With regard to free movement of workers, the Treaty provides:

Article 45

1. *Freedom of movement for workers shall be secured within the Union.*
2. *Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
3. *It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:*
 - (a) *to accept offers of employment actually made;*

⁴¹⁸ ECJ 24 November 1993, Keck and Mithouard, C-267/91, *ECR* 1993, I-6097, para 16.

⁴¹⁹ ECJ 18 June 1998, Corsica Ferries, C-366/96, *ECR* 1998, I-3949, para 31.

⁴²⁰ Opinion of Advocate-General Fennelly for ECJ 12 February 1998, Raso, C-163/96, *ECR* 1998, I-533, para 33.

⁴²¹ See *infra*, para 1503.

⁴²² See *infra*, para 527 and 714.

⁴²³ See, for example, Bolliet, A., Gressier, C., Laffitte, M. and Genevois, R., *Rapport sur la modernisation des ports autonomes*, Inspection générale des Finances / Conseil général des Ponts et Chaussées, July 2007, http://cgedd.documentation.developpement-durable.gouv.fr/documents/cgedd/005126-01_rapport.pdf, 4.

- (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

On the right of establishment, the Treaty provides:

Article 49

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

192. Employment of port workers under a contract of employment is governed by free movement of workers, whereas freedom of establishment will apply to the situation of self-employed port workers⁴²⁴. Whereas free movement of workers only applies to natural persons, freedom of establishment also applies to legal persons such as companies⁴²⁵. In *Merci*⁴²⁶, the Court specified that the concept of 'worker' within the meaning of Article 45 of the Treaty presupposes that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. That description is not affected by the fact that the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association (para 13). In our view, however, the situation of self-employed port workers being hired out by their professional associations to port users such as stevedoring companies, shipping agents or shipowners⁴²⁷, should logically fall under the ambit of freedom of establishment.

⁴²⁴ On the distinction, see, *inter alia*, Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 832-834.

⁴²⁵ See Art. 54 TFEU and further, *inter alia*, Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 831 and 860-861.

⁴²⁶ ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889, para 13.

⁴²⁷ Such situations occur in Cyprus, Greece and Malta (see *infra*, paras 597, 1041 and 1334 respectively).

193. First and foremost, under the treaty provisions at hand Member States may not reserve port labour to their nationals. Again in *Merci*⁴²⁸, the Court confirmed that (current) Article 45 TFEU precludes rules of a Member State which reserve to nationals of that State the right to work in a cargo handling undertaking of that State (para 13). Apparently, cases of explicit nationality requirements for port workers continue to occur in the EU, and were unsurprisingly held contrary to the Treaty⁴²⁹.

194. The Treaty not only precludes any form of discrimination between nationals of different Member States in the exercise of the free movement of workers and the freedom of establishment, but also any national legislation which might place Union citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State⁴³⁰. Even measures which restrict the activities of all potential market actors equally, but discriminate against new market entrants, may be forbidden under freedom of establishment⁴³¹. As a rule, all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" must be regarded as restrictions⁴³². The principle of non-discrimination set out in the treaty provisions on free movement of workers and freedom of establishment are drafted in general terms, are not specifically addressed to the Member States and must be regarded as applying to private persons as well⁴³³, which implies that working conditions imposed by employers or in a collective agreement can be tested against free movement principles⁴³⁴. Free movement of workers is directly effective and may be directly relied upon by both workers and employers⁴³⁵. Freedom of establishment is directly applicable as well⁴³⁶.

195. Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community specifies that any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State (Art.

⁴²⁸ ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889, para 13.

⁴²⁹ See *infra*, paras 1040 and 1068 on Greece.

⁴³⁰ ECJ 7 July 1988, *Wolf*, 154-155/87, *ECR* 1988, 3897, paras 9-14; ECJ 31 March 1993, *Kraus*, C-19/92, *ECR* 1993, I-1663, para 32.

⁴³¹ ECJ 5 October 2004, *Caixa Bank France*, C-442/02, *ECR* 2004, I-8961, paras 12-14; see also Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 859-860.

⁴³² ECJ 30 November 1995, *Gebhard*, C-55/94, *ECR* 1995, I-4165, para 37 (on establishment, but the rule is general).

⁴³³ See, for example, ECJ 12 December 1974, *Walrave and Koch*, 36/74, *ECR* 1974, 1405, para 17; ECJ, *Bosman* 15 December 1995, C-415/93, *ECR* 1995, I-4921, para 82; ECJ 6 June 2000, *Angonese*, C-281/98, *ECR* 2000, I-4139, paras 30 and 36.

⁴³⁴ See *supra*, para 177.

⁴³⁵ See, for example, ECJ 8 April 1976, *Royer*, 48/75, *ECR* 1974, 497, para 23; ECJ 4 December 1974, *Van Duyn*, 41/74, *ECR* 1974, 1337, para 7.

⁴³⁶ ECJ 21 June 1974, *Reyners*, 2/74, *ECR* 1974, 631, para 25.

1(1)). In particular, he shall have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State (Art. 1(2)). Provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered. However, this provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled (Art. 3(1)). The engagement and recruitment of a national of one Member State for a post in another Member State shall not depend on medical, vocational or other criteria which are discriminatory on grounds of nationality by comparison with those applied to nationals of the other Member State who wish to pursue the same activity (Art. 6(1)). Nevertheless, a national who holds an offer in his name from an employer in a Member State other than that of which he is a national may have to undergo a vocational test, if the employer expressly requests this when making his offer of employment (Art. 6(2)). A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment (Art. 7(1)). He shall enjoy the same social and tax advantages as national workers (Art. 7(2)). He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres (Art. 7(3)). Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States (Art. 7(4)). A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking (Art. 8(1)).

The removal of restrictions on movement and residence of workers and their families is organised through Directive 68/360/EEC⁴³⁷. Measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health, must conform to Directive 64/221/EEC⁴³⁸.

Restrictions on movement and residence for self-employed individuals were abolished on the basis of Council Directive 73/148/EEC⁴³⁹.

⁴³⁷ See *supra*, para 165.

⁴³⁸ See *supra*, para 165.

⁴³⁹ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ 28 June 1973, L 172/14.

196. The treaty provisions on free movement of workers and freedom of establishment set limits to the discretion of Member States to impose professional qualifications for certain activities. In *Vlassopoulou*⁴⁴⁰, the Court ruled that, even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment. That could be the case if the national rules in question took no account of the knowledge and qualifications already acquired by the person concerned in another Member State. Consequently, a Member State which receives a request to admit a person to a profession to which access, under national law, depends upon the possession of a diploma or a professional qualification must take into consideration the diplomas, certificates and other evidence of qualifications which the person concerned has acquired in order to exercise the same profession in another Member State by making a comparison between the specialised knowledge and abilities certified by those diplomas and the knowledge and qualifications required by the national rules. That examination procedure must enable the authorities of the host Member State to assure themselves, on an objective basis, that the foreign diploma certifies that its holder has knowledge and qualifications which are, if not identical, at least equivalent to those certified by the national diploma. That assessment of the equivalence of the foreign diploma must be carried out exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates. In the course of that examination, a Member State may, however, take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. In the case of the profession of lawyer, for example, a Member State may therefore carry out a comparative examination of diplomas, taking account of the differences identified between the national legal systems concerned. If that comparative examination of diplomas results in the finding that the knowledge and qualifications certified by the foreign diploma correspond to those required by the national provisions, the Member State must recognise that diploma as fulfilling the requirements laid down by its national provisions. If, on the other hand, the comparison reveals that the knowledge and qualifications certified by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking. In this regard, the competent national authorities must assess whether the knowledge acquired in the host Member State, either during a course of study or by way of practical experience, is sufficient in order to prove possession of the knowledge which is lacking. If completion of a period of preparation or training for entry into the profession is required by the rules applying in the host Member State, those national authorities must determine whether professional experience acquired in the Member State of origin or in the host Member State may be regarded as satisfying that requirement in full or in part. Finally, the examination made to determine whether the knowledge and qualifications certified by the foreign diploma and

⁴⁴⁰ ECJ 7 May 1991, *Vlassopoulou*, C-340/89, *ECR* 1991, I-2357, para 15.

those required by the legislation of the host Member State correspond must be carried out by the national authorities in accordance with a procedure which is in conformity with the requirements of EU law concerning the effective protection of the fundamental rights conferred by the Treaty on EU subjects. It follows that any decision taken must be capable of being made the subject of judicial proceedings in which its legality under EU law can be reviewed and that the person concerned must be able to ascertain the reasons for the decision taken in his regard (paras 15-22).

Today, the matter is regulated in considerable detail by Directive 2005/36/EC on the recognition of professional qualifications⁴⁴¹.

197. National legislation which makes access to the profession of port worker conditional upon registration and/or the fulfilment of certain formalities may come under the ambit of the provisions on free movement of persons as well. The same is true for national rules imposing a specific type of relationship (a contract of employment or self-employment). In *Becu*⁴⁴², the ECJ suggested that, to the extent that national port labour law – which reserves all port labour for registered dockworkers – imposes the legal form of a contract of employment, it may be contrary to the free movement of workers and/or the freedom of services (paras 34-36)⁴⁴³. In *Raso*, which focused on amendments of Italian port labour laws following *Merci*, the Advocate-General saw a possible infringement of the free movement of workers as the combined effects of the reconstitution of the formerly monopolistic port workers' pools (the *compagnie portuali*), which, by their very nature as cooperatives of workers of Italian nationality, were exclusively Italian enterprises, and rules requiring reconstituted pools, terminal operators and authorised port operators to engage on a priority basis the workers formerly employed by the *compagnie portuali*, could result in an effective perpetuation of the infringement of free movement of workers which resulted from the old legislation⁴⁴⁴. French doctrine questions the compatibility with free movement of persons of French port labour law, especially the *priorité d'embauche*⁴⁴⁵.

198. In a reasoned opinion sent to Spain in 2012, the European Commission stated that the legal obligation on cargo handling companies to financially participate in the capital of private pool companies which enjoy an exclusive right, is contrary to freedom of establishment. The Commission added that, while pools often provide sound training to workers and are an efficient tool for employers, they should not be used to prevent suitably qualified individuals or

⁴⁴¹ See *infra*, para 241.

⁴⁴² ECJ 16 September 1999, *Becu*, C-22/98, *ECR* 1999, I-5665, paras 34-36; on this case, see also *infra*, para 466.

⁴⁴³ The Brussels Labour Court decided that the (supposed) Belgian ban on self-employed port labour violates freedom to provide services (see *infra*, para 468).

⁴⁴⁴ Opinion of Advocate-General Fennelly for ECJ 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, para 34.

⁴⁴⁵ See *infra*, para 913.

undertakings from providing cargo handling services, or to impose on employers workers they do not need⁴⁴⁶.

- *Freedom to provide services*

199. Free movement of services is also guaranteed under the TFEU. The relevant treaty provisions read as follows:

Article 56

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

Article 57

Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

'Services' shall in particular include:

- (a) activities of an industrial character;*
- (b) activities of a commercial character;*
- (c) activities of craftsmen;*
- (d) activities of the professions.*

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

200. A fundamental preliminary issue is whether the treaty rules on freedom to provide services also apply to port services.

Article 58(1) TFEU provides:

⁴⁴⁶ See *infra*, para 1811.

Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.

It follows that the general rules concerning the freedom to provide services, enshrined in Article 56 of the Treaty, do not automatically apply to services in the field of transport⁴⁴⁷.

Article 100 TFEU, which is the final provision of the Title on Transport (Title VI of Part Three), reads:

- 1. The provisions of this title shall apply to transport by rail, road and inland waterway.*
- 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.*

As a result, the substantive provisions of Title VI do not apply *ipso jure* to sea transport. It is up to the Council to lay down appropriate provisions for sea transport in secondary legislation. As Article 56 TFEU and the Title on transport policy cannot apply cumulatively, either freedom of services applies directly to a service by virtue of Article 56, or it remains dormant until it is rendered operational through a secondary instrument adopted under Article 100(2).

Practically speaking, freedom to provide maritime transport services was brought into operation through Regulation 4055/86 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries⁴⁴⁸ and through Regulation 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)⁴⁴⁹.

⁴⁴⁷ See, *inter alia*, Opinion of Advocate-General Sharpston in *Commission / Greece*, C-251/04, E.C.R. 2007, para 28; Barents, R. and Brinkhorst, L.J., *Grondlijnen van Europees Recht*, Deventer, Kluwer, 2006, 511; Craig, P. and de Búrca, G., *EU Law. Text, Cases and Materials*, Oxford, Oxford University Press, 1998, 764; Greaves, R., *EC Transport Law*, Harlow, Longman/Pearson, 2000, 17; Ortiz Blanco, L. and Van Houtte, B., *EC Competition Law in the Transport Sector*, Oxford, Clarendon Press, 1996, 5; Power, V., "European Union Shipping Law", in X., *Shipping Law faces Europe: European Policy, Competition and Environment*, Antwerp / Apeldoorn / Brussels, Maklu / Bruylant / Juridik & Samhäll, 1995, (43), 50; Tromm, J.J.M., *Juridische aspecten van het communautair vervoerbeleid*, The Hague, TMC Asser Instituut, 1990, 117; Truchot, L., "Article 51", in Léger, Ph. (ed.), *Commentaire article par article des traités UE et CE*, Basel / Geneva / Munich, Helbing & Lichtenhahn, 2000, 471-472, para 1-5.

⁴⁴⁸ Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ 31 December 1986, L 378/1. It is noteworthy that in *Haahr Petroleum, Texaco and GT-Link* Advocate-General Jacobs suggested that, even prior to the entry into force of Regulation 4055/86, explicitly discriminatory measures relating to maritime transport services may not have been permissible. The Advocate-General made no mention of the legal basis of this proposition and did not consider it necessary to decide on this point (Opinion in cases C-90/94, C-114 and 115/95 and C-242/95, E.C.R. 1997, I-4085, para 74). Accordingly, the European Court of Justice did not rule on it.

⁴⁴⁹ Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ 12 December 1992, L 364/7.

As we have explained above⁴⁵⁰, attempts at introducing a specific Directive for the liberalisation of port services failed twice. The issue whether port services are "services in the field of transport" in the sense of Article 58(1) TFEU and/or "sea transport" services within the meaning of Article 100(2) TFEU determines the legal basis which should underlie possible future legislative proposals on ports.

201. A literal interpretation of the Treaty would suggest that Article 58(1) and Article 100(2) do *not* apply to port services, as these are no transport services *sensu stricto*. In principle, transport services only cover the carriage of goods or persons from one place to another, whereas port services are provided directly or indirectly to a carrier once his vessel has entered a port area. Even if port services are of course closely linked to transport services, it can be argued that they do not themselves constitute transport services within the meaning of Articles 58(1) and 100(2) of the Treaty. As a result, Article 56 of the Treaty, which guarantees the freedom of services in general terms would be automatically applicable to port services, and no need for any specific secondary legislation on port services would arise in order to render that freedom applicable to these services.

202. At first sight, statements on this issue by the European Commission are not wholly consistent.

The view that Article 56 of the Treaty is applicable to port services was confirmed in the Communication from the Commission to the European Parliament and the Council entitled "Reinforcing Quality Service in Sea Ports: a Key for European Transport"⁴⁵¹ of 2001, where the Commission declared:

*Nobody is contesting that all port services of a commercial nature are governed by the competition rules of the Treaty as well as the rules on the major freedoms: the freedom of establishment, the free movement of workers, of goods and services (emphasis added)*⁴⁵².

In a similar vein, the Explanatory Memorandum to the first Proposal for a Directive on Market Access to Port Services, which was attached to the above-mentioned Communication, contained an unambiguous statement that "national port services regimes have to be in

⁴⁵⁰ See *supra*, para 163.

⁴⁵¹ See *supra*, para 178.

⁴⁵² European Commission, *Communication from the Commission to the European Parliament and the Council 'Reinforcing Quality Service in Sea Ports: A Key for European Transport'. Proposal for a Directive of the European Parliament and of the Council On Market Access to Port Services*, Brussels, 13 February 2001, COM(2001) 35 final, 4.

conformity with the freedoms guaranteed by the Treaty (freedom of establishment, free movement of workers, goods *and services*) as well as the Treaty's competition rules"⁴⁵³.

Three years later, in the Explanatory Memorandum to the second Proposal for a Directive on Market Access to Port Services⁴⁵⁴, the Commission reiterated:

*The EU Treaty's fundamental freedoms (freedom of establishment, free movement of workers, goods and services) as well as its competition rules apply to this port services sector as well (emphasis added)*⁴⁵⁵.

In its 2007 port policy Communication, the Commission specified, *inter alia*, that the treaty rules on freedom of establishment and freedom to provide services may apply to the provision of cargo handling services and to the provision by labour pools of port workers to employers⁴⁵⁶.

Earlier on, during negotiations on Malta's accession to the EU, the Commission likewise assumed that freedom of services is applicable to the organisation of port labour, in particular registration schemes for port workers⁴⁵⁷.

In view of the preceding positions, it is quite striking that the Commission indicated (current) Article 100(2) TFEU as the legal basis for both its proposals for a Port Services Directive, and that the introductory recitals explained that, in accordance with (current) Article 58(1) of the Treaty, the objective of (current) Article 56 of the Treaty to eliminate the restrictions on freedom to provide services in the Community, is to be achieved within the framework of the common transport policy⁴⁵⁸. As for terminology, the Commission distinguished between "maritime transport services as such" – which were already liberalised by Regulations (EEC) No. 4055/86 and 3577/92 – and port services, which the Commission deemed "essential to the proper functioning of maritime transport since they make an essential contribution to the efficient use of maritime transport infrastructure"⁴⁵⁹.

Article 100(2) TFEU, for that matter, served as legal basis to the Directive on access to the groundhandling market at Community airports⁴⁶⁰ and the Directive on port reception facilities for ship-generated waste and cargo residues⁴⁶¹ (which is not a liberalisation directive). Here, the

⁴⁵³ European Commission, *Communication from the Commission to the European Parliament and the Council 'Reinforcing Quality Service in Sea Ports: A Key for European Transport'. Proposal for a Directive of the European Parliament and of the Council On Market Access to Port Services*, Brussels, 13 February 2001, COM(2001) 35 final, 14.

⁴⁵⁴ See *supra*, para 178.

⁴⁵⁵ European Commission, *Proposal for a Directive of the European Parliament and of the Council on market access to port services*, Brussels, 13 October 2004, COM(2004) 654 final, 3.

⁴⁵⁶ See *supra*, para 181.

⁴⁵⁷ See *infra*, para 1326.

⁴⁵⁸ See introductory recital (1) of both proposals.

⁴⁵⁹ Recitals (2) and (3) of both proposals.

⁴⁶⁰ Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, *OJ* 25 October 1996, L 272/36.

⁴⁶¹ Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues, *OJ* 28 December 2000, L 332/81.

Union lawmaker apparently considered port and airport services closely linked to actual sea and air transport, respectively.

203. European and national case law on the matter do not seem entirely homogeneous either.

In *Corsica Ferries III*, the Court of Justice tested Italian laws requiring shipping companies established in another Member State, when their vessels make port calls in Italy, to use mooring services supplied by a monopolistic service provider, against freedom to provide services in maritime transport as regulated by Regulation (EEC) No 4055/86⁴⁶². To avoid confusion, this case did not concern the freedom to provide mooring services, but the effect of a mooring monopoly on the freedom of services enjoyed by maritime carriers⁴⁶³.

In *Merci*, Advocate-General Van Gerven took the view that "dock work", as a port service, must be distinguished from actual maritime transport properly so called and that it is a service within the meaning of Article 56 of the Treaty⁴⁶⁴.

In its opinion in *Raso*, Advocate-General Fennelly likewise assumed that freedom of services may be relied on by port terminal operators in order to challenge restrictions on employment flowing from national port labour laws⁴⁶⁵.

In *Commission v. Greece*, Advocate-General Sharpston argued that, as the category of 'services in the field of transport' within the meaning of Article 58(1) of the Treaty EC forms an exception to the general rule, it should, by the normal canons of construction, be interpreted narrowly. That implies that "only services whose essence is that they are 'transport'" fall within the exception. It seemed to her that

there is a plausible case for saying that services that are related, or incidental, or ancillary to (but separable from) transport do not require specific provisions to bring them within the scope of the normal rules on freedom to provide services, because they are already covered by those rules. That argument would seem strongest in respect of services that are only tangentially associated with transport. Perhaps there are other services that are so intimately associated with 'core' transport services that they too should (and could) be liberalised only through a regulation adopted on the basis of [current Article 100(2)] EC⁴⁶⁶.

⁴⁶² ECJ 18 June 1998, *Corsica Ferries*, C-366/96, ECR 1998, I-3949, paras 55-61.

⁴⁶³ Similarly, the Court decided in *Corsica Ferries I* that the Treaty did not, before the entry into force of Council Regulation No 4055/86, prevent a Member State from levying, in connection with the use by a ship of harbour installations situated within its island territory, charges on the embarkation and disembarkation of passengers arriving from or going to a port situated in another Member State, whilst in the case of travel between two ports situated within national territory those charges were levied only on embarkation at the island port (ECJ 13 December 1989, *Corsica Ferries*, C-49/89, ECR 1989, 4441, para 16).

⁴⁶⁴ Opinion in *Merci*, C-179/90, ECR 1991, I-5889, paras 11 and 16.

⁴⁶⁵ Opinion of Advocate-General Fennelly in *Raso*, C-163/96, ECR 1998, I-533, para 39.

⁴⁶⁶ Opinion in *Commission / Greece*, C-251/04, ECR 2007, 67, para 28-29. Here again, the Court did not rule on the issue at hand.

Turning to the interpretation of the Regulation No. 3577/92, the Advocate-General expressed the opinion that the words "maritime transport" "naturally connote carriage of passengers and/or freight by sea between a point of departure and a point of destination" and that seagoing towage services do not, as a rule, fall within that definition⁴⁶⁷.

Although it does not relate to the scope of freedom of services, an interesting parallel may be drawn with the judgment of the Court of First Instance in *Aéroports de Paris*, where the Court had to decide whether airport management activities were covered by Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector⁴⁶⁸ or by the general Regulation No. 17⁴⁶⁹. The Court of First Instance held that Regulation 3975/87 is not applicable to the levying of commercial fees charged by the Paris airport authority on suppliers of groundhandling services in return, *inter alia*, for making airport infrastructures and management services available to them. The airport authority provided neither air transport services, nor groundhandling services, but was active in the upstream market of airport management. The Court held that "[the] activities inherent in the management of the Paris airports have only an indirect link with air transport, since they constitute neither transport services nor even activities directly relating to the supply of air transport services"⁴⁷⁰. Upon appeal, the Court of Justice found that the Court of First Instance had rightly held that the airport authority's activities, although falling within the transport sector, did not constitute air transport services within the meaning of Regulation No 3975/87⁴⁷¹. Early on, the European Commission examined practices relating to ground-handling services in airports under the general Regulation No. 17⁴⁷².

In *Compagnie Générale Maritime*⁴⁷³, the Court of First Instance applied a similarly restrictive interpretation of the concept of "maritime transport services" which is central to Regulation 4056/86 laying down detailed rules for the application of Articles 101 and 102 of the Treaty to maritime transport⁴⁷⁴. According to the Court, the notion of "maritime transport services" ordinarily refers, precisely, to transport by sea, and

there is nothing to warrant interpreting 'maritime transport services' as including inland transport, consisting of the on- or off-carriage of containers, provided in combination with other services as part of an intermodal transport operation (para 81).

The Court went on to say that

⁴⁶⁷ Paras 38 and 45-49.

⁴⁶⁸ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector, OJ 31 December 1987, L 374/1.

⁴⁶⁹ Regulation No 17 implementing Articles 85 and 86 of the Treaty, OJ 21 February 1962, 13/204.

⁴⁷⁰ CFI 12 December 2000, *Aéroports de Paris*, T-128/98, ECR 2000, II-3929, paras 34-58.

⁴⁷¹ ECJ 24 October 2002, *Aéroports de Paris*, C-82/01 P, ECR 2002, I-9297, paras 14-27.

⁴⁷² See Ortiz Blanco, L. and Van Houtte, B., *EC Competition Law in the Transport Sector*, Oxford, Clarendon Press, 1996, 172 and the further references.

⁴⁷³ CFI 28 February 2002, *Compagnie Générale Maritime*, T-86/95, ECR 2002, II-1011, paras 81-82.

⁴⁷⁴ Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, OJ 31 December 1986, L 378/4.

Since the meaning of "maritime transport services" is clear, it follows that if the Council had wanted to include within that term other services provided in conjunction with maritime transport, such as the inland on- or off-carriage of cargo, it would have said so expressly (para 82)⁴⁷⁵.

In yet another competition case, the Court of First Instance did not clarify whether the Commission had correctly considered that port services, land transport services and stevedoring services, which were invoiced by the maritime carrier as part of the maritime tariff, are only services ancillary to maritime transport⁴⁷⁶.

In 2002, the Brussels Labour Court ruled that port labour does not fall under the transport services exception of Article 58(1) of the Treaty, and that it is fully governed by the freedom of services under the general rules⁴⁷⁷.

Conversely, in a judgment issued in summary proceedings in 2007, the Dutch Court of Rotterdam found that the plaintiff – a prospective new entrant into the local market for the collection, storage and processing of ship-generated waste in the port of Rotterdam – had not put forward any facts or circumstances which entailed, under the Treaty, an obligation upon the Municipality to grant service concessions on a competitive basis. The Court accepted the reasoning by the Municipality that, in the absence of a secondary instrument applying freedom to provide services to the port sector, it was not subject to any obligation under EU law to put contracts out to tender⁴⁷⁸.

204. To our knowledge, legal doctrine tends to argue that port services fall under Article 56 of the Treaty and not under Article 58(1).

Vincent Power, for one, wrote:

One of the critical issues relates to whether the "freedom to provide services" principle in the context of seaports is the principle embodied in Title III or embodied in Title V of the EC Treaty. [Current Article 58(1)] of the EC Treaty provides that "freedom to

⁴⁷⁵ We shall not go into the scope of either EEC Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (OJ 28 November 1962, 124/2751) – the third recital of which mentions that "the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services" or Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ 23 July 1968, L 175/1) – which applies "also to operations of providers of services ancillary to transport which have any of the objects or effects listed above" (Art. 1, *in fine*). See Ortiz Blanco, L. and Van Houtte, B., *EC Competition Law in the Transport Sector*, Oxford, Clarendon Press, 1996, 63-67 and especially CFI 6 June 1995, UIC, T-14/93, ECR 1995, II-1503 and ECJ 11 March 1997, UIC, C-264/95, ECR 1997, I-1287.

⁴⁷⁶ CFI 19 March 2003, CMA CGM, T-213/00, ECR 2003, II-913, paras 83-84.

⁴⁷⁷ See *infra*, para 468.

⁴⁷⁸ Civil Court of Rotterdam, 15 November 2007, unreported.

provide services in the field of transport shall be governed by the provisions of the Title relating to transport". [Current Article 58(1)] is the exception to a principle and therefore it is submitted that "port activities" would be regulated by Title III and not Title V. This is because Title V relates to modes of transport (i.e. air, maritime, road, rail and inland waterway) rather than ancillary activities to transport modes⁴⁷⁹.

In the same vein, Tromm considered it "tenable" that transshipment and storage of goods in ports are directly governed by (current) Articles 56 and 57 the Treaty. He argued that Article 100(2) is not a proper legal basis for a ports policy, as maritime transport ends where the port begins⁴⁸⁰.

Essers and Törrönen wrote that "all port services are governed by the competition rules of the Treaty as well as the rules on the freedom of establishment, the free movement of goods and services and state aid". They described the first proposed Port Services Directive as "an addition" to the legal framework for issues of market access to port services⁴⁸¹.

Without any further explanation, Bieber, Maiani and Delaloye mention that port services which are "intrinsically" connected with sea transport, such as pilotage, towage, mooring and the handling of cargo and passengers, are governed by Article 100(2) of the Treaty⁴⁸².

In our view, the most authoritative source on the issue at hand remains the now almost forgotten thesis by Jürgen Erdmenger from 1962, which rested on a thorough analysis of the preparation and the wording of the original treaty provisions. Erdmenger convincingly argued that ports are not covered by (current) Article 100(2) TFEU, as this provision only targets the 'main trade' (*Hauptgewerbe*) and not the 'ancillary business' (*Nebengewerbe*) of sea transport. For him, a connection with the main trade of sea transport cannot be inferred from the mere location of an activity in a seaport area. In the context of port economics, a distinction could be envisaged between businesses which directly support the carriage of goods or passengers (such as stevedoring services) and activities related to the manufacturing of or the trade in goods (such as storage services). In ordinary parlance, however, the notion of transport always refers to carriage, and never to ancillary services such as stevedoring, and there is no indication whatsoever that the draughtsmen of the Treaty wished to depart from the ordinary meaning of the words. Writing a mere five years after the conclusion of the Treaty of Rome, Erdmenger also asserted that the draughtsmen of (current) Article 100(2) could in no way have intended to lay a basis for, e.g., a separate European seaport or stevedoring policy. This is all the more so because, in his opinion, port services are permanently located in a port and entail no cross-border issues which needed specific attention. For these reasons, Article 100(2) of

⁴⁷⁹ Power, V., "European Union Seaports Law: The general principles of European Union Law", in Van Hooydonk, E. (ed.), *EU Law of Ports and Port Services and the Ports Package*, Antwerp / Apeldoorn, Maklu, 2003, (17), 30.

⁴⁸⁰ Tromm, J.J.M., *Juridische aspecten van het communautair vervoerbeleid*, The Hague, TMC Asser Instituut, 1990, 406.

⁴⁸¹ Essers, M.J.J.M. and Törrönen, E.M., "The EC Port Package", in Essers, M.J.J.M., (Ed.), *Concurrentie in en tussen havens*, Rotterdam, Loyens & Loeff, 2001, (12), 12.

⁴⁸² Bieber, R., Maiani, F. and Delaloye, M., *Droit européen des transports*, Munich / Brussels / Paris, Helbing & Lichtenhahn / Bruylant / L.G.D.J., 2006, 272, para 34.

the Treaty should never come into play as a legal basis for a European seaport policy⁴⁸³. Erdmenger also stressed that even maritime carriers are not covered by Article 100(2) whenever they perform other activities than sea transport⁴⁸⁴. Even if some assumptions by Erdmenger (such as the absence of cross-border aspects) may sound somewhat outdated in the context of current economic reality and the case law of the Court, the logic of his reasoning would appear to have retained its value.

205. During discussions with stakeholders in the course of our research, some observers argued that the provision of the Services Directive which expressly excludes port services from its scope⁴⁸⁵ confirms that port services remain outside the general regime of freedom to provide services, and that Article 56 TFEU cannot be directly applied to this sector.

In our view, the argument is particularly unconvincing. First of all, the exclusion of ports from the Services Directive was the result of a political compromise, based on the assumption that ports would soon be covered by their own liberalisation directive (a prospect which, as we have seen, has not materialised, but that is irrelevant here). Historically, the exclusion stands in no relation whatsoever to the interpretation of the treaty provisions on freedom of services which concern us here. Actually, the Services Directive also excludes several other services such as services of temporary work agencies and audiovisual services (Art. 2(2)(e) and (g)) which have no specific status whatsoever under the Treaty. Secondly, the wording of a secondary instrument can never determine, let alone alter, the interpretation of a treaty provision, as the treaties always take precedence. Thirdly, upon closer scrutiny, the rules of ordinary grammar and logic preclude any interpretation of the exclusion paragraph in the Services Directive to the effect that all port services are *a priori* excluded from its scope and, in addition, by way of reflection, from the services freedom guaranteed by Article 56 of the Treaty. The provision says, literally, that "services in the field of transport, including port services, falling within the scope of Title V of the Treaty" remain outside the scope of the Services Directive (Art. 2(2)(d)). At first sight the intended category of services indeed fully coincides with the one mentioned in Article 58(1) TFEU. This seems all the more so since the phrase "services in the field of transport" is identical to the one used in Art. 58(1) TFEU. But this is not the case in all language versions⁴⁸⁶. More importantly, in order for a given port service to be exempt from the provisions of the Services Directive, it must be demonstrated that the service falls "within the scope of Title V of the Treaty". Our report on available opinions on the latter issue presented above shows that several authorities have assumed that port services are not or, at least not

⁴⁸³ Erdmenger, J., *Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt*, Hamburg, Cram, de Gruyter & Co., 1962, 39-43, 46, 137-138, 140-144 and 146.

⁴⁸⁴ Erdmenger, J., *Die Anwendung des EWG-Vertrages auf Seeschifffahrt und Luftfahrt*, Hamburg, Cram, de Gruyter & Co., 1962, 117.

⁴⁸⁵ In addition, recital (21) to the Directive reads:

Transport services, including urban transport, taxis and ambulances as well as port services, should be excluded from the scope of this Directive.

⁴⁸⁶ While the French version of the Services Directive refers to "les services dans le domaine des transports", the Treaty mentions "des services, en matière de transports". The German versions, to give but one more illustration, concern "Verkehrsdienstleistungen einschließlich Hafendienste, die in den Anwendungsbereich von Titel V des Vertrags fallen" (Services Directive) and "Dienstleistungsverkehr auf dem Gebiet des Verkehrs" (Treaty) respectively.

always, covered by Title V of the Treaty, and that the opposite view runs counter to common parlance and cannot be based on any explicit or even supposed intention on the part of the Contracting Parties to the Treaty.

206. To conclude, we would like to present our own interpretation. We respectfully submit that, up till now, the political and legal question whether port services should be considered a component of (sea) transport services within the meaning of Articles 58(2) and 100(2) TFEU was perhaps debated at a wrong level. The issue at stake is not whether 'port services' are a part of 'transport services' or whether 'ports' are a part of either 'sea' or 'land' transport (all of which would amount to debating the gender of angels anyway). The mere location of the service or, for that matter, the headquarters of its provider are entirely irrelevant; and a distinction between ship and goods-related services would not bring us any further, as many of today's port terminal operators are integrated businesses which take care of loading and unloading as well as of storage services.

The rationale of the exclusion of sea transport services from the general scope of freedom to provide services is that the Contracting Parties recognised that carriage of goods and persons by sea (and by air) were specific sectors the liberalisation of which needed further political consideration⁴⁸⁷. What the draughtsmen had in mind, and here we fully concur with Jürgen Erdmenger, was the provision of maritime transport services by ship owners and operators (maritime carriers) to their customers. To the extent that such maritime transport services to shippers and consignees comprise cargo handling services in ports (provided, in most cases, by specialised local cargo handlers acting as subcontractors or 'performing parties' of carriers), it is safe to say that 'ports' or 'port services' are covered by the exception relating to sea transport services.

But it is an entirely different matter whether the same exception should apply to the upstream provision of port services by port service providers (such as the cargo handler) to maritime (or other) carriers. In our opinion, such an extension of the exception is not warranted. Even less so should the sea transport exception be applied to (even further upstream) services of the providers of workforce to stevedores or terminal operators (who in their turn provide services to the maritime carriers). If it were otherwise, consistency would require that companies renting out forklifts to stevedores, providing ICT support or legal assistance to them, or cleaning and maintaining their welfare accommodation, should also be exempt from freedom of services by virtue of the 'sea transport' exception.

In sum, a realistic, and necessarily narrow, interpretation of the sea transport exception can only be arrived at if one takes into account the position of the sea carrier in the contractual chain of transport-related services; transport-related services which are not *provided* but

⁴⁸⁷ On this aspect, see, *inter alia*, Farantouris, N.E., *European Integration and Maritime Transport*, Athens / Brussels, Ant. N. Sakkoulas / Bruylant, 2003, 89-92 and the further references.

procured by the sea carrier (*i.e.*, upstream services provided to him by his subcontractors or 'performing parties'), must remain outside the scope of the exception⁴⁸⁸.

For all these reasons, we believe that services provided by cargo handlers in ports or, *a fortiori*, by workforce providers, are subject to the general freedom of services rule enshrined in Article 56 of the Treaty.

207. Assuming that port and port labour services provided by port service and workforce providers are fully subject to freedom to provide services, we shall now turn to the practical implications of this freedom.

208. First of all, it follows from Article 57 TFEU that the provisions on the free movement of services have a residual character. The provision indeed says that services shall be considered services within the meaning of the Treaty "in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons".

209. The difference between the provision of services in another Member State and establishment in that Member State lies in the temporary character of the former, whereas the right of establishment connotes permanent integration into the host State's economy, being generally exercised by a shift of a sole place of business, or by the setting up of agencies, branches, subsidiaries or even a permanent office⁴⁸⁹. Free movement of services does not apply when a person has his main residence in a Member State in order to provide services there for an unspecified duration. However, the fact that an activity is temporary does not mean that the service provider may not equip himself with some form of infrastructure in the host Member State for the purpose of performing the services. The temporary nature of the activity has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. It is impossible to make the distinction in an abstract manner⁴⁹⁰.

⁴⁸⁸ This is of course not invalidated by the general rule that freedom to provide services includes the right to receive services. If it were otherwise, consultancy or legal services to maritime carriers would also come under Article 100(2) TFEU. An additional argument is that under a FIOS (Free In, Out, Stowed) charter party clause the shipper, not the ship owner, is responsible for the expenses of loading and unloading operations. If cargo handling is bought by cargo interests, there is even less reason to subsume this activity under the legal heading of "maritime transport" within the meaning of the Treaty.

⁴⁸⁹ Dashwood, A., Dougan, M., Rodger, B., Spaventa, E. and Wyatt, D., *Wyatt and Dashwood's European Union Law*, Oxford and Portland, Oregon, Hart Publishing, 2011, 532.

⁴⁹⁰ See, for example, ECJ 30 November 1995, Gebhard, C-55/94, *ECR* 1995, I-4165, para 27; ECJ 11 December 2003, Schnitzer, C-215/01, *ECR* 2003, I-14847, paras 27-28; Barnard, C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 2004, 343; Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 787-788.

210. For freedom of services to find application, a cross-border situation is required, but this condition is broadly interpreted. The same can be said of the requirement that the service must be provided for remuneration⁴⁹¹.

211. It is settled case-law that Article 56 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services⁴⁹². Again, all "national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty" are to be seen restrictions⁴⁹³. The principle is that a service provider should be able to do business throughout the EU in the same way, and with the same products, as he provides in his home state⁴⁹⁴. Even if Article 56 is addressed primarily to Member States, it may also be directly applied to private actors, including trade unions⁴⁹⁵.

212. The free movement of services implies access rights for the service provider's workforce, irrespective of its nationality. The employees of the service provider have the right to perform work in the Member State where the service is provided, even though they are not direct beneficiaries of the free movement of services⁴⁹⁶. In *Rush Portuguesa*⁴⁹⁷, the ECJ held that the provisions on the free movement of services preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement *in situ* or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service (para 12). However, the Court added that EU law does not preclude Member States from extending their legislation, or collective labour agreements

⁴⁹¹ For a general introduction, see Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 788-792.

⁴⁹² See, for example, ECJ 23 November 1999, Arblade, C-369/96 and C-376/96, *ECR* 1999, I-8453, para 33.

⁴⁹³ ECJ 30 November 1995, Gebhard, C-55/94, *ECR* 1995, I-4165, para 37; Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 793.

⁴⁹⁴ Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 797.

⁴⁹⁵ See Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 797-802; see already *supra*, para 177.

⁴⁹⁶ See, *inter alia*, Barnard, C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 2004, 344-346.

⁴⁹⁷ ECJ 27 March 1990, *Rush Portuguesa*, C-113/89, *ECR* 1990, I-1417, para 12.

entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does EU law prohibit Member States from enforcing those rules by appropriate means (para 18). In more recent judgments, the Court has carefully examined whether the restrictive measures taken by the host State can be justified on the ground of worker protection (especially the interests of the posted workers) and whether the steps taken are proportionate⁴⁹⁸.

Since 1996, the Posted Workers Directive protects workers sent by their employer on a temporary basis to carry out work in another Member State. The Directive establishes a core of mandatory rules regarding the terms and conditions of employment which must be observed by providers of services who post employees in another Member State⁴⁹⁹. The Directive equally applies to the port sector, but not to "merchant navy undertakings as regards seagoing personnel" (Art. 1(2)). As a result, it would not seem to apply to ship's crews engaged in cargo handling work on board ships berthed in EU ports⁵⁰⁰.

213. As we have mentioned before⁵⁰¹, the ECJ suggested in *Becu* that a national rule which reserves port labour for persons engaged under a contract of employment might be incompatible with the freedom to provide services. For this, and also other reasons, the Brussels Labour Court declared the Belgian Port Labour Act, which reserves all dock work for registered port workers, indeed contrary to the freedom of services⁵⁰².

- Free competition

214. In order to ensure the proper functioning of the internal market⁵⁰³, the TFEU also contains competition rules which prohibit anti-competitive behaviour by undertakings, particularly cartels and abuses of a dominant position. The relevant treaty provisions read as follows:

Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as

⁴⁹⁸ See, for example, ECJ 23 November 1999, *Arblade*, C-369/96 and 376/96, *ECR* 1999, I-8453; see for context Barnard, C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 2004, 345-346 and the further references.

⁴⁹⁹ See Cremers, J. and Donders, P. (Eds.), *The free movement of workers in the European Union*, Brussels, CLR/Reed Business Information, 2004, 144 p.

⁵⁰⁰ In addition, in such a situation no services are provided for another undertaking.

⁵⁰¹ See *supra*, para 197.

⁵⁰² See *infra*, para 468.

⁵⁰³ On the essential role of competition law with a view to achieving single market integration, see Whish, R. and Bailey, D., *Competition Law*, Oxford, Oxford University Press, 2008, 23-24.

their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) limit or control production, markets, technical development, or investment;*
- (c) share markets or sources of supply;*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,*
- any decision or category of decisions by associations of undertakings,*
- any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.*

Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting production, markets or technical development to the prejudice of consumers;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

The Treaty also regulates the implementation of these principles (Art. 103). Regulation No. 1/2003⁵⁰⁴ defines the powers of the European Commission and national competition authorities to apply the competition rules in individual cases, for example, to require that an infringement be brought to an end, order interim measures or impose fines.

⁵⁰⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 4 January 2003, L 1/1.

The Treaty also imposes specific obligations on Member States:

In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109 (Art. 106(1)).

More generally, the Treaty on European Union (Art. 4(3)) requires the Member States not to introduce or maintain in force measures, whether legislative or regulatory, which may render ineffective the competition rules applicable to undertakings⁵⁰⁵.

215. EU competition law applies to “undertakings”. The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed⁵⁰⁶. In *Merci*⁵⁰⁷ and *Raso*⁵⁰⁸, the Court confirmed that monopolistic cargo handlers and a port workers' corporation are undertakings which are fully subject to competition law. In *Becu*, however, the Court pointed out that individual port workers employed under a contract of employment cannot be considered undertakings, and the collectivity of registered port workers is not an undertaking either⁵⁰⁹. A Dutch Court refused to regard a port workers' union as an undertaking even where it exercised a right to grant permissions to third workforce providers in the port⁵¹⁰. The Cyprus Competition Commission decided that self-employed licensed porters are undertakings, and that their association is an association of undertakings⁵¹¹. Likewise, the Hellenic Competition Commission considered an association of self-employed porters as an undertaking; its non-profit character was irrelevant⁵¹². Despite *Becu*, it is safe to add that an agency or a workers' corporation⁵¹³ supplying pool workers to port operators or an employers' association managing a pool of workers can be considered undertakings subject to competition law, even if they do not seek commercial profits. In other words, it would be wrong to infer from *Becu* that nobody can be called to account about abusive port labour regulations.

216. EU competition rules do not apply unless the practice in question has an appreciable actual or potential effect on trade between Member States. The test is extremely broad,

⁵⁰⁵ Settled case law: see, for example, ECJ 3 March 2011, *Beaudout*, C-437/09, *ECR* 2011, page unknown, para 24.

⁵⁰⁶ See, *inter alia*, ECJ 23 April 1991, *Höfner and Elser*, C-41/90, *ECR* 1991, I-1979, para 21.

⁵⁰⁷ ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889. See *infra*, para 1171.

⁵⁰⁸ ECJ 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, para 26.

⁵⁰⁹ See *infra*, para 466. This was confirmed in Commission Decision 2001/834/EC of 18 July 2001 on the State aid implemented by Italy in favour of the port sector (*OJ* 29 November 2001, L 312/5, no. 58).

⁵¹⁰ See *infra*, para 1440.

⁵¹¹ See *infra*, para 642.

⁵¹² See *infra*, para 1068.

⁵¹³ See also *infra*, para 1218.

however⁵¹⁴, and anti-competitive behaviour in the port sector, including in port-labour related matters, has invariably been considered to have an effect on trade⁵¹⁵.

217. Article 101 TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. These prohibited agreements, decisions or practices may be horizontal, between competitors at the same market level, or vertical, between firms at different levels of the supply chain. As we have mentioned⁵¹⁶, collective bargaining agreements having social objectives cannot be regarded as anti-competitive agreements. The Spanish Competition Authority ruled that this immunity does not extend to collective agreements whereby cargo handlers reserve for themselves the market for ancillary services and erect barriers to competitors⁵¹⁷.

218. Article 102 TFEU applies to dominant undertakings. This category includes entities enjoying an exclusive right given by the state, such as a public employment agency vested with a legal monopoly⁵¹⁸. The dominance must extend to the entire internal market EU or at least to a substantial part of it. In *Merci*, both a monopolistic cargo handler and a monopolistic corporation of port workers were considered to enjoy a dominant position on the relevant market. In view of the traffic volume in the port of Genoa and the latter's role in Italian import and export operations, both the local cargo handling and port labour markets were regarded as a substantial part of the internal market⁵¹⁹. Generally, it would appear that the 'substantial part of the internal market' threshold is easily attained in ports. In *Raso*⁵²⁰, the Court regarded the container handling market in the port of La Spezia as a substantial part of the common market given the traffic volumes, its importance in intra-Community trade and its role as the leading Mediterranean port for container traffic⁵²¹. The European Commission considered the ports of Taranto, Venice, Livorno, Naples and Ravenna substantial parts of the internal market as well. Furthermore, it argued that a dominant position in a substantial part of that market may also be created by a contiguous series of monopolies territorially limited but together covering the

⁵¹⁴ See, generally, Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 966-967.

⁵¹⁵ See, for example, ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889, para 20; ECJ 17 July 1997, *GT-Link*, C-242/95, *ECR* 1997, I-4449, para 45; Commission Decision 21 December 1993, *Rødby*, *OJ* 26 February 1994, L 55/52, para 17; Commission Decision 21 December 1993, *Holyhead*, *OJ* 18 January 1994, L 15/8, para 77; Commission Decision 28 June 1995, *Regie der Luchtwegen*, *OJ* 12 September 1995, L 216/8, para 19; Commission Decision 21 October 1997, Italian port labour, *OJ* 5 November 1997, L 301/17, para 22-23; Commission Decision 14 January 1998, Frankfurt Airport, *OJ* 11 March 1998, L 72/30, para 106-107; Commission Decision 1999/199/EG, 10 February 1999, Portuguese Airports, *OJ* 16 March 1999, L 69/31, para 20.

⁵¹⁶ See *supra*, para 176.

⁵¹⁷ See *supra*, para 1776.

⁵¹⁸ See ECJ 23 April 1991, *Höfner and Elser*, C-41/90, *ECR* 1991, I-1979, paras 23-24.

⁵¹⁹ See *infra*, para 1771.

⁵²⁰ ECJ 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, paras 23 and 26.

⁵²¹ See more *infra*, para 1173.

entire territory of a Member State, so that a national port labour scheme must be assessed in respect of all national ports dealing with intra-Union traffic⁵²². Even if we are unaware of such cases having been dealt with by courts or competition authorities, we should add that several undertakings (for example, cargo handlers) may also enjoy a collective or joint dominant position on the relevant market, for example where they conclude collective agreements through a professional organisation⁵²³.

The simple fact of creating a dominant position by granting exclusive rights is not as such incompatible with Article 102 TFEU. However, the Court decided in *Merci* that a Member State is in breach of the (current) Articles 102 and 106(1) TFEU if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position or when such rights are liable to create a situation in which that undertaking is induced to commit such abuses. Such abuse may in particular consist in imposing on the persons requiring the services in question unfair purchase prices or other unfair trading conditions, in limiting technical development, to the prejudice of consumers, or in the application of dissimilar conditions to equivalent transactions with other trading parties. Because it appeared that the undertakings enjoying exclusive rights in *Merci* were, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involved an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers, the ECJ concluded that Italy had created a situation contrary to Article 102 TFEU⁵²⁴.

In *Raso*, the Court held that in so far as the new Italian port labour scheme adopted after *Merci* did not merely grant the former port workers' corporation the exclusive right to supply temporary labour to terminal concessionaires and to other authorised port operators but also enabled it to compete with them on the cargo handling market, such a corporation had a conflict of interest. Merely exercising its monopoly would enable it to distort in its favour the equal conditions of competition between the various operators on the cargo handling market. The result was that the company in question was led to abuse its monopoly by imposing on its competitors in the cargo handling market unduly high costs for the supply of labour or by supplying them with labour less suited to the work to be done. The Court considered it immaterial that the national court had not identified any particular case of abuse and concluded that EU competition law precludes a national provision which reserves to a port workers' corporation the right to supply temporary labour to port operators in the port in which it is established, when that corporation is itself authorised to carry out cargo handling services⁵²⁵.

⁵²² Commission Decision 97/744/EC of 21 October 1997 pursuant to Article 90 (3) of the EC Treaty on the provisions of Italian ports legislation relating to employment, OJ 5 November 1997, L 301/17, para 17-21.

⁵²³ Compare Wirtz, M.S., *Collisie tussen CAO's en mededingingsrecht*, doctoral dissertation, Utrecht, Utrecht University, 2006, <http://igitur-archive.library.uu.nl/dissertations/2006-1204-200112/full.pdf>, 276.

⁵²⁴ See *infra*, para 1171.

⁵²⁵ See *infra*, para 1173.

In France, some authorities likewise considered that the functioning of the pool agencies which functioned as single hiring office for port workers, was contrary to competition law, as this monopoly automatically led to an abuse of a dominant position⁵²⁶.

The Italian Competition Authority found that a monopolistic port workers' corporation which was also authorised by law to perform cargo handling services, had acted abusively by refusing to supply workers to a competing handler, delaying the completion of certain operations and supplying personnel without proper qualifications and skills⁵²⁷.

The Hellenic Competition Commission held that a monopolistic porters' association had committed abuses by making it difficult for other providers to gain market access, by reserving access to national citizens, by imposing arbitrary, unfair and unreasonable prices based on obsolete tariffs, and by charging fees even where no services were requested or performed due to a shortage of workers at peak times⁵²⁸.

Generally, we should recall that, according to well-established case law, an abusive practice contrary to Article 106(1) TFEU exists where a Member State grants to an undertaking an exclusive right to carry on certain activities and creates a situation in which that undertaking is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind⁵²⁹. This rule may be relevant to cases where pool agencies are unable to supply sufficient workers ordered by employers or by port users, who are nonetheless prevented from hiring workers elsewhere.

The Cyprus Competition Commission saw an abuse of a dominant position in the refusal by a licensed porters' association owning essential equipment and machinery to grant membership to self-employed workers who had been licensed by the competent authority⁵³⁰.

- Equal treatment and non-discrimination

219. An exhaustive discussion of all instruments at European level guaranteeing equality of treatment⁵³¹, is beyond the scope of this study.

However, special mention should be made of Article 18(1) TFEU, which reads as follows:

⁵²⁶ See *infra*, para 913.

⁵²⁷ See *infra*, para 1210.

⁵²⁸ See *infra*, para 1068.

⁵²⁹ See, recently, ECJ 3 March 2011, Beaudout, C-437/09, *ECR* 2011, page unknown, para 69.

⁵³⁰ See *infra*, para 642.

⁵³¹ See already *supra*, paras 167 and 169.

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

This Article lays down as a general principle a prohibition of discrimination on grounds of nationality but applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific rules prohibiting discrimination⁵³². In other words, the Article fulfils a subordinate function with regard to other more specific treaty provisions⁵³³. Article 18 only prohibits discrimination on the grounds of nationality. However, it may also be relevant to cases of indirect or covert discrimination where non-nationals are likely to be affected more than nationals. It may also be invoked by legal persons⁵³⁴.

A plethora of other EU rules ensures equal opportunities, including in the labour market⁵³⁵.

In ports, equal treatment and non-discrimination rules may be relevant where priority of employment is granted to relatives of port workers or union members, or where these priority rights are reserved for male workers. In this context, legal issues have arisen in, for example, France⁵³⁶ and Malta⁵³⁷. In Belgium, equal treatment has been at stake in a case concerning medical fitness of port workers⁵³⁸.

- Derogations

220. In exceptional cases, restrictions of the free movement of goods, persons and services, anti-competitive agreements, abuses of a dominant position or discriminatory practices may be justifiable. We have brought these cases together in the paragraphs below.

⁵³² ECJ 14 July 1994, *Peralta*, C-379/92, *ECR* 1994, I-3453, para 18; ECJ 10 December 1991, *Merci*, C-179/90, *ECR* 1991, I-5889, para 11; ECJ 16 September 1999, *Becu*, C-22/98, *ECR* 1999, I-5665, para 32.

⁵³³ See, *inter alia*, Davies, G., *European Union Internal Market Law*, London / Sydney / Portland, Oregon, Cavendish, 2003, 118.

⁵³⁴ ECJ 26 September 1996, *Data Delecta Aktiebolag and Ronny Forsberg / MSL Dynamics Ltd*, C-43/95, *ECR* 1996, I-4661.

⁵³⁵ For an excellent overview, see Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 534-580.

⁵³⁶ See *infra*, para 889.

⁵³⁷ See *infra*, para 1394.

⁵³⁸ See *infra*, para 452.

221. First of all, the Treaty provides for a number of specific exceptions to the rules of free movement. They allow the Member States to ignore free movement "in cases of real urgency, when important national interests are under threat"⁵³⁹.

With regard to movement of goods, the Treaty provides that the Articles which prohibit quantitative restrictions and measures having equivalent effect, shall not preclude "prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property". Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States (Art. 36 TFEU).

The rights enjoyed under free movement of workers are "subject to limitations justified on grounds of public policy, public security or public health" (Art. 45(3)).

The provisions on the freedom of establishment shall not prejudice "the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health" (Art. 52(1)). This rule equally applies to freedom of services (Art. 61).

As derogations from fundamental freedoms, the foregoing provisions must be interpreted narrowly⁵⁴⁰. The measure must be necessary, effective, not arbitrary, and the least restrictive option⁵⁴¹. Purely economic reasons, such as economic difficulties brought about by increased competition, cannot justify restrictions⁵⁴².

A justification on the grounds of public policy and public security has rarely been invoked and has in an even smaller number of cases been successful⁵⁴³. The treaty-based public health exception is mainly used in connection with measures affecting the health of the general public, such as measures in the healthcare sector or the regulation of the sale of foodstuffs and pharmaceuticals⁵⁴⁴, but sometimes the health of workers is also taken into account⁵⁴⁵. The

⁵³⁹ Thus Davies, G., *European Union Internal Market Law*, London / Sydney / Portland, Oregon, Cavendish, 2003, 99.

⁵⁴⁰ Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 877; Snell, J., *Goods and Services in EC Law. A Study of the Relationships Between the Freedoms*, Oxford, Oxford University Press, 2002, 174.

⁵⁴¹ For a general discussion, see Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 879-

⁵⁴² Chalmers, D., Davies, G. and Monti, G., *European Union Law*, Cambridge, Cambridge University Press, 2010, 875-876; Snell, J., *Goods and Services in EC Law. A Study of the Relationships Between the Freedoms*, Oxford, Oxford University Press, 2002, 174.

⁵⁴³ Snell, J., *Goods and Services in EC Law. A Study of the Relationships Between the Freedoms*, Oxford, Oxford University Press, 2002, 176.

⁵⁴⁴ See e.g. ECJ 2 December 2004, Dutch vitamins, C-41/02, ECR 2004, I-11375; ECJ 25 July 1991, Aragonese, C-1/90 and C-176/90, ECR 1991, I-4151; ECJ 12 March 1987, German beer, 178/84, ECR 1987, 1227; ECJ 28 April 1998, Decker, C-120/95, ECR 1998, I-1831; ECJ 28 April 1998, Kohll, C-158/96, 1998, I-1931. See also Barnard, C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 2004, 73-77; see further Art. 4 and the Annex of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

slightly different wording of the health-related exception in the treaty provisions above has no significance⁵⁴⁶. In *Corsica Ferries III*, the Court did not rule out that the requirement to use a local mooring service – which was essential to the maintenance of safety in port waters and had the characteristics of a public service – even if it may have constituted a hindrance or impediment to freedom to provide maritime transport services, could be justified by considerations of public security⁵⁴⁷. Whether restrictions on free movement can be accepted merely in order to avoid social unrest and civil disturbances caused by private interest groups is highly doubtful⁵⁴⁸.

222. In addition to the aforementioned treaty-based exceptions, the ECJ developed the so-called 'rule of reason' which allows Member States to save a restriction on the basis of an objective and proportional justification related to the general interest (also termed, depending on the context, 'mandatory', 'imperative' or 'public interest' requirements' or 'objective justifications'). This additional possibility to justify restrictions on the fundamental freedoms was first developed by the ECJ in *Cassis de Dijon*, which related to free movement of goods⁵⁴⁹. Later on in its case law, the ECJ also applied the 'rule of reason' to restrictions of the free movement of persons and services⁵⁵⁰. Neither is there any reason why the rule of reason could not justify restrictions which result from collective labour agreements⁵⁵¹.

For the rule of reason to apply, four cumulative conditions must be met. the measure concerned must (1) relate to matters which have not been harmonised within the European Union; (2) be justified by imperative requirements in the general interest; (3) be applied in a non-discriminatory manner, without distinction as to nationality; and (4) be proportional, which means that it should be suitable for securing the attainment of the objective which it pursues and that it should not go beyond what is necessary in order to attain it⁵⁵².

⁵⁴⁵ In *Kemikalieinspektionen*, which concerned the Swedish prohibition to use trichloroethylene in industrial processes, the ECJ took the risk to workers' health into consideration to accept a restriction of the free movement of goods, but risks for consumers, the population in general and the environment were involved as well (ECJ 11 July 2000, *Kemikalieinspektionen*, C-473/98, *ECR* 2000, I-5681, para 12).

⁵⁴⁶ ECJ 23 September 2003, *Commission / Denmark*, C-192/01, *ECR* 2003, I-9693, paras 42-45; ECJ 2 December 2004, *Dutch vitamins*, C-41/02, *ECR* 2004, I-11375, para 47; Snell, J., *Goods and Services in EC Law. A Study of the Relationships Between the Freedoms*, Oxford, Oxford University Press, 2002, 177-178.

⁵⁴⁷ ECJ 18 June 1998, *Corsica Ferries*, C-366/96, *ECR* 1998, I-3949, para 60.

⁵⁴⁸ See Snell, J., *Goods and Services in EC Law. A Study of the Relationships Between the Freedoms*, Oxford, Oxford University Press, 2002, 176-177 and the further references.

⁵⁴⁹ ECJ 20 February 1979, *Cassis de Dijon*, 120/78, *ECR* 1979, 649, para 8:

Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

⁵⁵⁰ See, for example, ECJ 25 July 1991, *Collectieve Antennevoorziening Gouda*, C-288/89, *ECR* 1991, I-4007, para 14; ECJ 30 November 1995, *Gebhard*, C-55/94, *ECR* 1995, I-4165, para 37.

⁵⁵¹ See, for example, ECJ 11 December 2007, *Viking*, C-438/05, *ECR* 2007, I-10779; ECJ 15 January 1998, *Kalliope Schöning*, C-15/96, *ECR* 1998, I-47; ECJ 6 June 2000, *Angonese*, C-281/98, *ECR* 2000, I-4139; ECJ 16 September 2004, *Merida*, C-400/02, *ECR* 2004, I-8471; ECJ 15 July 2010, *Commission / Germany*, C-271/08, *ECR* 2010, I-7091.

⁵⁵² See, for example, ECJ 30 November 1995, *Gebhard*, C-55/94, *ECR* 1995, I-4165, para 37.

Important differences between the rule of reason and the treaty exceptions are that the former can only be used to excuse a non-discriminatory measure while, on the other hand, the same category is also an open one, and is more loosely interpreted. As a result, a non-discriminatory measure is easier to save using the rule of reason than it is using the Treaty⁵⁵³.

Grounds of public interest which have been accepted by the ECJ include the improvement of working conditions⁵⁵⁴, the protection of workers⁵⁵⁵, including social protection⁵⁵⁶, guaranteeing the quality of skilled trade work and protecting those who have commissioned such work⁵⁵⁷, and societal order⁵⁵⁸. Language requirements may be justified as a restriction of the free movement of persons when they relate to the linguistic knowledge necessary for the exercise of a given profession in the Member State⁵⁵⁹. Economic reasons, including maintaining industrial peace, are not accepted⁵⁶⁰, but the need to ensure the adequacy of regular maritime transport services to, from and between islands, was positively looked at⁵⁶¹. Work licensing mechanisms involving formalities and periods which are liable to discourage the free provision of services have been considered inappropriate means to protect workers⁵⁶².

Reasons of public interest can only be invoked to justify a national measure if it is compatible with fundamental rights⁵⁶³. This may be relevant to port labour systems which rest on overt or covert closed shop situations or on discriminatory rules⁵⁶⁴.

223. Returning to the *Merci* case which triggered the whole debate on a European liberalisation policy for ports, it should not be left unmentioned that some authors were struck by the almost complete disregard in the Court's judgment for the social arguments which could have been put in favour of the dock labour monopoly. The picture of inefficiency and abuse of position appears to have gone largely unchallenged. Simon Deakin, for one, wonders whether it can really be the case that a strike of transport workers which causes extra expense affecting imports will lead to a breach of the State's obligations under the Treaty⁵⁶⁵. Apparently, these

⁵⁵³ Davies, G., *European Union Internal Market Law*, London / Sydney / Portland, Oregon, Cavendish, 2003, 101.

⁵⁵⁴ ECJ 14 July 1981, Oebel, 155/80, *ECR* 1981, 1993, para 12.

⁵⁵⁵ ECJ 17 December 1981, Webb, 279/80, *ECR* 1981, 3305, paras 18-19; ECJ 5 November 2002, Überseering, C-2088/00, *ECR* 2002, I-9919, para 92; ECJ 12 October 2004, Wolff & Müller, C-60/03, *ECR* 2004, I-9553, para 35; ECJ 21 October 2004, Commission / Luxembourg, C-445/03, *ECR* 2004, I-10191, para 29.

⁵⁵⁶ ECJ 28 March 1996, Guiot, C-272/94, *ECR* 1996, I-1905, para 16.

⁵⁵⁷ ECJ 3 October 2000, Corsten, C-58/98, *ECR* 2000, I-7919, para 38.

⁵⁵⁸ ECJ 24 March 1994, Schindler, C-275/92, *ECR* 1994, I-1039, para 58.

⁵⁵⁹ ECJ 4 July 2000, Haim, C-424/97, *ECR* 2000, I-5123, paras 59-60. On language requirements, see also *supra*, para 195 and *infra*, para 241.

⁵⁶⁰ ECJ 5 June 1997, Greek tourist guides, C-398/95, *ECR* 1997, I-3091, paras 22-23.

⁵⁶¹ ECJ 20 February 2001, Analir, C-205/99, *ECR* 2001, I-1271, para 27.

⁵⁶² See ECJ 21 October 2004, Commission / Luxembourg, C-445/03, *ECR* 2004, I-10191 para 30.

⁵⁶³ See Barnard, C., *The Substantive Law of the EU*, Oxford, Oxford University Press, 2004, 244-245.

⁵⁶⁴ See *supra*, paras 128 *et seq.* and 219 and *infra*, paras 230-232.

⁵⁶⁵ Deakin, S., "Labour Law as Market Regulation: the Economic Foundations of European Social Policy", in Davies, P., Lyon-Caen, A., Sciarra, S. and Simitis, S. (Eds.), *European Community Labour Law: Principles and Perspectives. Liber Amicorum Lord Wedderburn of Charlton*, Oxford,

critical comments were inspired by the (ineffectual) defence by Italy in *Raso*, where the Court held the (amended) Italian regime (again) incompatible with the Treaty⁵⁶⁶. Even if the Court did not rule on these issues, it is worthy of note that, in *Raso*, Advocate-General Fennelly insisted that the restrictive effects on service providers of indistinctly applicable national measures must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. Thus, even if the effects of the monopoly of port workers' companies were capable, in a general way, of enhancing the protection of the port workers, it had to be demonstrated that the monopoly was either indispensable for the attainment of such enhanced protection or that the same level of protection could not be achieved through less restrictive means. In short, unless it could be established that the monopoly was indispensable for the protection of port workers, its application to the activities of terminal operators constituted an impermissible restriction on freedom to provide intra-Union port services contrary to Article 56 of the Treaty⁵⁶⁷. With less ado, other observers denounced the Italian port labour scheme as a "living fossil"⁵⁶⁸.

Finally, whilst the objective of ensuring a steady availability of workers for individual port operators, which is often mentioned as an additional justification of pool or registration systems, would appear in most cases to amount to an economic objective which is not eligible as an overriding reason of general interest, the Court has accepted the avoidance of disturbances on the labour market as a valid justification⁵⁶⁹. But here as well, the measure must be necessary, non-discriminatory and effective in order to pass the test.

224. Next, the Treaty provides that "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly" shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union (Art. 106(2)).

Practically, the provision allows a derogation from Treaty obligations if this is necessary for the proper functioning of entities charged with the provision of a public service. In *Merci*, the Court found no indication that dock work is of a general economic interest exhibiting special characteristics as compared with the general economic interest of other economic activities or, even if it were, that the application of the rules of the Treaty, in particular those relating to

Clarendon Press, 1996, (63), 75-76, where the author wrongly assumes that the workers were employed in a 'State undertaking'; see also Barnard, C., "Internal market v. Labour Market: a Brief History", in De Vos, M. (Ed.), *European Union Internal Market and Labour Law: Friends of Foes?*, Antwerp / Oxford / Portland, Intersentia, 2009, (19), 27.

⁵⁶⁶ See Opinion of Advocate-General Fennelly for ECJ 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, paras 36 and also 45-46.

⁵⁶⁷ Opinion of Advocate-General Fennelly for EC, 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, paras 46-47.

⁵⁶⁸ X., "Aucune notion d'intérêt public ne peut justifier le monopole docker", *Navigation ports & industries*, 1991, (321), 321.

⁵⁶⁹ See ECJ 27 March 1990, *Rush Portuguesa*, C-113/89, *ECR* 1990, I-1417, para 13; ECJ 21 October 2004, *Commission / Luxembourg*, C-445/03, *ECR* 2004, I-10191, para 38.

competition and freedom of movement, would be such as to obstruct the performance of such a task⁵⁷⁰. In *Raso*, the Advocate-General was confident that the provision of temporary port workers constituted no service of general economic interest⁵⁷¹. As a result, it is safe to assume that port services involving port labour are economic services which cannot be exempted from the application of the treaty provisions on, for example, competition on the grounds of public service obligations. Italian law even provides explicitly that companies and agencies enjoying an exclusive right to supply temporary port workers cannot be considered undertakings within the meaning of Article 106(2) TFEU⁵⁷².

- *Temporary agency work*

225. As we have mentioned above⁵⁷³, registration or pool systems for port labour may entail restrictions on temporary agency work, which is regulated in the European Union by Directive 2008/104/EC of 19 November 2008 on temporary agency work. As we have also mentioned⁵⁷⁴, the general Services Directive does not apply to services of temporary work agencies.

226. The purpose of the Temporary Agency Work Directive is to ensure the protection of temporary agency workers and to improve the quality of temporary agency work by ensuring that the principle of equal treatment is applied to temporary agency workers, and by recognising temporary work agencies as employers, while taking into account the need to establish a suitable framework for the use of temporary agency work with a view to contributing effectively to the creation of jobs and to the development of flexible forms of working (Art. 2).

227. The Temporary Agency Work Directive applies to workers with a contract of employment or employment relationship with a temporary work agency who are assigned to user undertakings to work temporarily under their supervision and direction (Art. 1(1)). It applies to public and private undertakings which are temporary-work agencies or user undertakings engaged in economic activities whether or not they are operating for gain (Art. 1(2)). A 'temporary agency worker' is defined as "a worker with a contract of employment or an employment relationship

⁵⁷⁰ See *infra*, para 1171. In the context of the right to strike, the ILO Committee on Freedom of Association considered "general dock work" not an essential service (Committee of Freedom of Association, *Interim Report - Report No. 268, November 1989*, Case No. 1493 (Cyprus), para 666). As we have explained, the regime of port labour strikes is beyond the scope of this study (see *supra*, para 25).

⁵⁷¹ Opinion of Advocate-General Fennelly for ECJ 12 February 1998, *Raso*, C-163/96, *ECR* 1998, I-533, para 51, footnote 63.

⁵⁷² See *infra*, para 1173.

⁵⁷³ See *supra*, para 138.

⁵⁷⁴ See *supra*, paras 168 and 205.

with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction" (Art. 3(1)(c)). As a result, the Directive would not only apply to commercial temporary agencies supplying workers to port operators, but also to special agencies managing a pool of port workers, even if they these agencies do not seek commercial profits. The only difficulty is that, for the Directive to apply, the worker must have some kind of "employment relationship" with the pool agency, which leaves it unclear whether the mere registration with a pool organisation is sufficient.

228. Under the principle of equal treatment, the basic working and employment conditions of temporary agency workers must be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job (see Art. 5). The Directive also ensures access to employment, collective facilities and vocational training for temporary agency workers (Art. 6).

229. Market access for private employment agencies is governed by the following provision of Directive 2008/104/EC:

- 1. Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented.*
- 2. By 5 December 2011, Member States shall, after consulting the social partners in accordance with national legislation, collective agreements and practices, review any restrictions or prohibitions on the use of temporary agency work in order to verify whether they are justified on the grounds mentioned in paragraph 1.*
- 3. If such restrictions or prohibitions are laid down by collective agreements, the review referred to in paragraph 2 may be carried out by the social partners who have negotiated the relevant agreement.*
- 4. Paragraphs 1, 2 and 3 shall be without prejudice to national requirements with regard to registration, licensing, certification, financial guarantees or monitoring of temporarywork agencies.*
- 5. The Member States shall inform the Commission of the results of the review referred to in paragraphs 2 and 3 by 5 December 2011 (Art. 4).*

Importantly, this provision limits the grounds which may be invoked to justify prohibitions or restrictions on the use of temporary agency work. The provision is the result of a difficult political compromise. According to the initial directive proposal, which was seriously watered down in the course of the legislative process, the Member States would have been under an obligation to review restrictions or prohibitions periodically and to discontinue them if the

specific conditions underlying them no longer obtained⁵⁷⁵. While some commentators insist that the final version of the provision at hand does not state that, should the review show incompatibility between the national rules and the European legislation, the unjustified restrictions and prohibitions need be lifted⁵⁷⁶, the introductory recitals to the Directive still emphasise that the instrument should be implemented "in compliance with the provisions of the Treaty regarding the freedom to provide services and the freedom of establishment and without prejudice to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services" (Recital (22)). An Expert Group set up by the European Commission confirmed in this context that, irrespective of Article 4(4) of the Directive, and as recalled by Recital (22), Articles 49 and 56 TFEU, as interpreted by the ECJ, impose on Member States to respect the freedom of establishment and the freedom to provide services respectively. This implies that in order to be compatible with prevailing Union law, the national rules concerned (imposed at any level) that make the access or the exercise of temporary agency work subject to an authorisation regime (such as an obligation on the provider to register, to have a licence or be certified before it can exercise its activities) or an obligation to make a deposit or to have a financial guarantee, or any other type of restrictions or prohibitions (e.g., an obligation on the provider to take a specific legal form, requirements that relate to the shareholding, prohibition on the provider to carry out other activities, restrictions or prohibitions on the use of temporary agency work) must be justified and proportionate to the aim to be achieved, in the light of the ECJ case law on the freedom of establishment or freedom to provide services. Moreover, the Commission recalled that regardless of the provisions of Article 4(4) of the Directive, a Member State which makes the activity of temporary work agencies within its territory conditional upon those agencies being established in the country is in breach of the provisions of the Treaty on the freedom to provide services⁵⁷⁷. In addition, in the context of EU free movement law, the onus of proof is on the Member State, which means that the review required by the Temporary Agency Work Directive should in our view include an in-depth assessment of the present-day justification of any restriction or prohibition.

In the country chapters in Volume II, we shall examine the prohibitions or restrictions on temporary agency work which apply in the ports or the 22 maritime Member States. Such prohibitions or restrictions may take the form of, for example, a complete ban on temporary agency work, a priority of registered port workers over temporary agency workers (if the latter may be hired in the event of a shortage of port workers only), an exclusive right for port workers' pool agencies to rely on general temporary work agencies, or, conversely, and to the extent that a port workers' pool can itself be considered a temporary work agency within the

⁵⁷⁵ See Art. 4 of the Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, Brussels, 20 March 2002, COM(2002) 149 final, OJ 27 August 2002, C 203E/1.

⁵⁷⁶ See Eklund, R., "Who Is Afraid of the Temporary Agency Work Directive?", in Eklund, R., Hager, R., Kleineman, J. and Wängberg, H.-Å. (Eds.), *Skrifter till Anders Victorins minne*, Uppsala, Iustus, 2009, (139), 147-148; Warneck, W., *Temporary agency work – guide for transposition at national level*, Brussels, European Trade Union Institute, 2011, <http://www.etui.org/Publications2/Reports/Temporary-agency-work-guide-for-transposition-at-national-level>, 21.

⁵⁷⁷ Expert Group Transposition of Directive 2008/104/EC on Temporary agency work, *Report*, August 2011, Brussels, European Commission, 33, and the further references to ECJ judgments.

meaning of Directive 2008/104/EC, an obligation on port employers to hire temporary workers from this pool and a concomitant ban on permanent employment under employment conditions governed by general labour law.

Relevant criteria to assess the legitimacy of prohibitions or restrictions on temporary agency work in favour of a port workers' pool might include: (1) the necessity of such arrangements in view of the irregularity of port traffic and the specific characteristics of port labour which cannot be met by temporary work agencies; (2) the voluntary nature of the decision by employers to grant an exclusive or preferential right to the pool, the right for employers not to participate in a pool system, and the right to directly rely on work agencies if the pool is unable to supply sufficient workers; (3) the necessity of the exclusive or preferential right to maintain the economic viability of the pool; (4) guarantees by the pool in terms of continuous availability of port workers and quality and safety of work, through the organisation of specific training.

- *The European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and the European Social Charter*

230. As we have explained above⁵⁷⁸, legal instruments protecting freedom of association may become relevant where, as a result of the existence of a closed shop, a union shop or a preferential shop, access to the port labour market is legally or factually reserved for members of a trade union.

The European Convention on Human Rights guarantees freedom of association, including the right to form and to join trade unions for the protection of one's interests (Art. 11(1)). The Convention does not contain explicit provisions on the right not to join a trade union. The draughtsmen of the European Convention deliberately did not mention negative freedom of association, because they were aware that this could cause problems with regard to closed-shop systems in certain countries. However, this did not prevent the European Court of Human Rights (ECHR) from taking a clear stance on closed shop situations. The ECHR's first decision dealing with a closed shop was *Young, James and Webster v UK*, where the applicants had been dismissed because they refused to join the trade unions with which their employer, British Rail, had signed a closed shop agreement when they were already employed. The Court decided that a threat of dismissal involving loss of livelihood is a most serious form of compulsion and that the limitation imposed upon the applicants' negative freedom of association was disproportionate and in breach of Article 11 of the Convention⁵⁷⁹. In *Sibson v UK*⁵⁸⁰, the applicant would have had to move to another depot should he decide not to join a particular trade union. The facts differed from *Young, James and Webster* in at least three respects. Firstly, Sibson used to be a union-member, but resigned following a personal dispute.

⁵⁷⁸ See *supra*, para 128 *et seq.*

⁵⁷⁹ ECHR, 13 August 1981.

⁵⁸⁰ ECHR, 20 April 1993.

He was willing to rejoin the union if he received a public apology, which showed that he did not oppose rejoining the union on account of any specific convictions. Secondly, the closed shop agreement was not yet in force when the applicant resigned. Thirdly, the Court noted that Young, James and Webster were faced with threat of dismissal involving loss of livelihood, whereas Sibson had the option to move to a nearby depot, where he would have no obligation to join the union, and where his working conditions would not be much different than before. These factors led the majority of the Court to decide that there had been no violation of Article 11 of the ECHR. In *Sigurjonsson v Iceland*⁵⁸¹, the applicant was obliged to join a specific association, Frami, in order to retain a taxi driver's licence, which would be revoked if he left the association. In this case, the obligation to join a union was imposed by national legislation. The Court held that Iceland could promote Frami's aims in some other way, and that imposing a duty of membership contrary to the applicant's convictions was a disproportionate interference with his right under Article 11 of the ECHR. In *Sørensen and Rasmussen*⁵⁸², the applicants claimed that Danish legislation, which permitted the existence of closed shop agreements in the private sector, breached the negative aspect of the right to associate. They argued that the compulsion to become members of a trade union, although they disagreed with its political views, violated Article 11 of the Convention. The Danish Government contested that the right to freedom of association, as interpreted by the Court in *Young, James and Webster*, encompassed a right for the applicant not to be member of an association. The ECHR reiterated that Article 11 has to be viewed as encompassing a right not to be forced to join an association as well as the right to join an association. It concluded that Denmark had failed to protect the applicants' negative right to trade union freedom and that there had, therefore, been a violation of Article 11.

Under the European Convention on Human Rights and Fundamental Freedoms, no distinction is made between 'legal' and 'voluntary' closed shop arrangements and, what is more, States have a duty to guarantee effective enjoyment of freedom of association. In *Sorensen and Rasmussen v. Denmark*, the Court observed that, by virtue of Article 1 of the Convention, each Contracting Party shall secure to everyone within its jurisdiction the rights and freedoms defined in the Convention. The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. Thus, in the context of Article 11, although the essential object is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, the national authorities may in certain circumstances be obliged to intervene in the relationship between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of those rights, such as the negative right to freedom of association⁵⁸³.

There are no ECHR rulings on the compatibility with Article 11 of a preferential shop.

In 2009, the European Court of Human Rights held that Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees non-discrimination, taken together with Article 11 on freedom of association, had been violated by Russia in a case

⁵⁸¹ ECHR, 30 June 1993.

⁵⁸² ECHR, 11 January 2006.

⁵⁸³ ECHR 11 January 2006, *Sorensen and Rasmussen v. Denmark*.

where the Kaliningrad seaport company had used various techniques to encourage employees to relinquish their union membership, including their re-assignment to special work teams with limited opportunities, dismissals subsequently found unlawful by the courts, decrease of earnings, disciplinary sanctions, *etc.* In addition, despite the existence in domestic civil law at the time of a blanket prohibition against discrimination on the ground of trade-union membership or non-membership, the judicial authorities had refused to examine the applicants' discrimination complaints having held that discrimination could only be established in criminal proceedings⁵⁸⁴.

Exclusive or preferential rights for relatives and male workers may be held contrary to the Convention as well⁵⁸⁵.

Finally, it should be mentioned that a personal licence to perform port labour may be considered a "possession" the peaceful enjoyment of which is guaranteed by the First Protocol to the European Human Rights Convention (Art. 1), which protects the right to property. As a result, state measures for the revocation of such licences may be challenged under this Protocol⁵⁸⁶.

231. Several rights recognised under the Charter of Fundamental Rights of the European Union can be particularly be relevant to port labour-related issues as well.

First of all, the Charter expressly mentions the freedom to choose an occupation and to conduct a business:

Article 15. Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16. Freedom to conduct a business

The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.

In addition, the Charter guarantees, *inter alia*, non-discrimination (Art. 21), freedom of assembly and of association (Art. 12), the workers' right to information and consultation within

⁵⁸⁴ ECHR 30 July 2009, *Danilenkov vs. Russia*, Application no. 67336/01.

⁵⁸⁵ See *infra*, para 889 and 1394.

⁵⁸⁶ Maltese case law: see *infra*, para 1397.

the undertaking (Art. 27), the right of collective bargaining and action (Art. 28), the right of access to placement services (Art. 29) and fair and just working conditions (Art. 31).

232. The European Social Charter confirms, for example, that everyone shall have the opportunity to earn his living in an occupation freely entered upon, conditions (Part I, item 1). It recognises freedom of association and the right to bargain collectively (Part I, items 5 and 6). The nationals of any one of the Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons (Part I, item 18).

On the right to choose an occupation, the Charter provides the following:

Article 18 – The right to engage in a gainful occupation in the territory of other Parties
With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:

- 1. to apply existing regulations in a spirit of liberality;*
 - 2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;*
 - 3. to liberalise, individually or collectively, regulations governing the employment of foreign workers;*
- and recognise:*
- 4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.*

A separate article deals with the right of migrant workers and their families to protection and assistance (Part II, Art. 19).

On several occasions, the European Committee of Social Rights, a supervisory body of the European Social Charter, investigated possible closed shop situations in the port sector, especially in Belgium⁵⁸⁷ and France⁵⁸⁸.

In Malta, the European Social Charter was referred to in the context of discrimination of female port workers⁵⁸⁹.

⁵⁸⁷ See *infra*, para 470.

⁵⁸⁸ See *infra*, para 886.

⁵⁸⁹ See *infra*, para 1394.

- Summary of EU law requirements

233. Simplifying existing EU law, it would appear that restrictive pool or registration systems can only be justified under EU rules if the general interest and especially the social protection of workers demonstrably require such an exceptional labour market set-up, if the system is non-discriminatory and fully compatible with human rights, if restrictions on access to the market for the provision of workforce are proportionate and do not go beyond what is necessary in order to attain the public interest objective concerned, and, more specifically, if the system is kept free of any additional restrictions on employment, restrictive working practices and abuses. Vague references to social protection or safety objectives which do not explain why applicable restrictions are indeed necessary will not suffice as justification. In sum, EU law allows Member States and social partners to choose between a free and open port labour market or an efficient and sustainable registration or pool system which is not affected by restrictive excesses, either in the law or in practice.

6.3.3. Facts and figures

234. The number of employers and workers involved in port labour in the EU is extremely difficult to assess. First of all, there is a wide variety of possible employment relationships, and in an increasing number of Member States, port workers are employed under general labour law conditions, which makes it nigh impossible to identify port workers as a special occupational category. In addition, few Member States maintain specific official statistics on port labour.

235. In the European Union, statistics on economic activities are commonly based on the NACE⁵⁹⁰ classification. NACE is derived from the United Nations' International Standard Industrial Classification of all Economic Activities (ISIC)⁵⁹¹. ISIC and NACE share the same high-level items, but NACE is more detailed at lower levels. Statistics produced on the basis of NACE are comparable at European and, in general, at global level⁵⁹².

NACE Code 52.24 deals with "cargo handling", and may at first sight appear relevant to the present study. However, NACE Code 52.24 includes, in addition to stevedoring activities in ports, all loading and unloading of goods or passenger luggage irrespective of the mode of

⁵⁹⁰ From the French 'Nomenclature statistique des activités économiques dans la Communauté européenne', or 'Statistical Classification of Economic Activities in the European Community').

⁵⁹¹ See *supra*, para 82.

⁵⁹² Eurostat, *NACE Rev. 2. Statistical classification of economic activities in the European Community*, Luxembourg, Office for Official Publications of the European Communities, 2008, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-07-015/EN/KS-RA-07-015-EN.PDF, 14.

transport as well as the loading and unloading of freight railway cars. On the other hand, the Code excludes the operation of terminal facilities, which is dealt with under Codes 52.21 ('Service activities incidental to land transportation'), 52.22 ('Service activities incidental to water transportation') and 52.23 ('Service activities incidental to air transportation'). Code 52.22, then, comprises, *inter alia*, the operation of terminal facilities such as harbours and piers, but generally the latter code seems to concern typical port and waterway authority functions rather than on the handling of goods⁵⁹³. In sum, statistics collected under NACE Code 52.24 do not appear to provide sufficiently focused information on cargo handling in ports or on port labour within the meaning of the present study.

However, individual EU Member States may adopt a more detailed classification. As a matter of fact, NACE regulations allow Member States to use a national version derived from NACE for national purposes. Such national versions must, however, fit into the structural and hierarchical framework of NACE. Most of the Member States have developed national versions, usually by adding a fifth digit for national purposes. In the country chapters in Volume II, we shall investigate which EU Member States created a separate national NACE Code for cargo handling in ports.

236. The European Union adheres to the ISCO-08 classification of occupations⁵⁹⁴, which however does not identify port labourers as a specific category either⁵⁹⁵.

237. With the help of a questionnaire and based on our own research, we have attempted to collect figures on port labour in the 22 maritime Member states. On that basis, the total number of port workers in the EU may be very roughly estimated at some 110,000. The number of port employers is even more difficult to estimate; a reasonable guess based on imperfect data may arrive at some 2,200 such employers.

238. Most European port workers' unions are affiliated to the European Transport Workers' Federation (ETF), which was created in 1999. ETF, which is affiliated to ITF, unites trade

⁵⁹³ See Eurostat, *NACE Rev. 2. Statistical classification of economic activities in the European Community*, Luxembourg, Office for Official Publications of the European Communities, 2008, http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-RA-07-015/EN/KS-RA-07-015-EN.PDF, 241.

⁵⁹⁴ Commission Regulation (EC) No 1022/2009 of 29 October 2009 amending Regulations (EC) No 1738/2005, (EC) No 698/2006 and (EC) No 377/2008 as regards the International Standard Classification of Occupations (ISCO), OJ 30 October 2009, L 283/3; Commission Recommendation No. 2009/824/EC of 29 October 2009 on the use of the International Standard Classification of Occupations (ISCO-08), OJ 10 November 2009, L 292/31. A paper from 2009 mentions that not all EU Member States made use of ISCO and that France, Germany, the Netherlands and the United Kingdom maintained their own classifications of occupations (Brousse, C., "The 2008 edition of the International Classification of Occupations (ISCO) and its implications for France", *Courrier des statistiques* 2009, No. 15, http://www.insee.fr/fr/ffc/docs_ffc/cse15c.pdf, (17), 17.

⁵⁹⁵ See *supra*, para 82.

unions in the sectors of railways, road transport and logistics, maritime transport, inland waterways, civil aviation, ports and docks, tourism and fisheries. However, a number of important left-wing unions in France, Greece, Spain and Sweden have joined the European Zone of the International Dockworkers Council (IDC).

ETF was unable to state the total number of port workers represented by their affiliates⁵⁹⁶. IDC informed us in 2012 that they have 17,750 European members (in Cyprus, Denmark, France, Greece, Italy, Malta, Portugal, Spain, Sweden and the United Kingdom)⁵⁹⁷. As we shall see below⁵⁹⁸, trade union density among port workers is almost everywhere higher than the average for the national economy as a whole.

239. In 2006, the European Commission noted that fixed term contracts, part-time work, on-call and zero-hour contracts, hiring through temporary employment agencies and freelance contracts had become an established feature of the European labour market, accounting for 25 per cent of the workforce⁵⁹⁹. A 2009 report indicates that in the EU, Belgium, France, Germany, Italy, the Netherlands, Spain, and the United Kingdom have a particularly well-developed temporary agency work sector⁶⁰⁰. The report however did not pay specific attention to temporary agency work in ports. In several of the countries just mentioned prohibitions or restrictions on temporary agency work apply. In the absence of reliable statistics, we were unable to provide an estimate of the number of temporary agency workers in EU ports.

Further data for 2009 – which are not specific to port labour either, yet provide interesting background information – indicate that the Member States registering higher numbers of fixed-term workers in proportion to the total number of employees were Poland (26.5 per cent), Spain (25.4 per cent), Portugal (22 per cent), Netherlands (18.2 per cent), Slovenia (16.4 per cent), Sweden (15.3 per cent), Finland (14.6 per cent) and Germany (14.5 per cent). Also in 2009, the highest shares as to temporary agency workers in relation to total active working population could be found in the UK (3.6 per cent), Netherlands (2.5 per cent), Belgium (1.7 per cent), France (1.7 per cent) and Germany (1.6 per cent)⁶⁰¹.

⁵⁹⁶ For ETF affiliates, see <http://www.itfglobal.org/etf/etf-affiliates.cfm>.

⁵⁹⁷ For a list of IDC affiliates, see http://www.idcdockworkers.org/en/?option=com_content&view=article&id=100&catid=20&lang=en.

⁵⁹⁸ See *infra*, no. 309.

⁵⁹⁹ "Commission launches open debate: Modernizing labour law to meet the challenges of the 21st century", Press release, Brussels, 22 November 2006, IP/06/1604, http://europa.eu/rapid/press-release_IP-06-1604_en.htm?locale=fr; see also European Foundation for the Improvement of Living and Working Conditions, *Temporary agency work in an enlarged European Union*, Luxembourg, Office for Official Publications of the European Communities, 2006, <http://www.eurofound.europa.eu/publications/htmlfiles/ef05139.htm>, 45 p.

⁶⁰⁰ European Foundation for the Improvement of Living and Working Conditions, *Temporary agency work and collective bargaining in the EU*, 2009, <http://www.eurofound.europa.eu/docs/eiro/tn0807019s/tn0807019s.pdf>.

⁶⁰¹ European Commission, *Implementation by Member States of Council Directive 91/383/EC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship*. Commission Staff Working Paper, Brussels, 22 July 2011, SEC(2011) 982 final, 51.

6.4. Qualifications and training

6.4.1. Regulatory set-up

240. There are currently no specific EU rules on training for port workers.

The only exception is the Bulk Terminals Directive which requires that personnel at solid bulk terminals in EU ports be trained in safety matters⁶⁰².

241. Directive 2005/36/EC on the recognition of professional qualifications establishes rules according to which a Member State which makes access to or pursuit of a regulated profession in its territory contingent upon possession of specific professional qualifications (the host Member State) shall recognise professional qualifications obtained in one or more other Member States (the home Member State) and which allow the holder of the said qualifications to pursue the same profession there, for access to and pursuit of that profession (Art. 1).

It applies to all nationals of a Member State wishing to pursue a regulated profession in a Member State, including those belonging to the liberal professions, other than that in which they obtained their professional qualifications, on either a self-employed or employed basis (Art. 2(1)).

A 'regulated profession' is defined as "a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications" (Art. 3(1)(a)).

The Directive ensures the free provision of services (Art. 5) as well as freedom of establishment (Art. 10 *et seq.*), esp. equal treatment and recognition of qualifications (Art. 12 and 13).

If, in a Member State, access to or pursuit of certain activities, including loading and unloading of vessels, is contingent upon possession of general, commercial or professional knowledge and aptitudes, that Member State shall recognise previous pursuit of the activity in another Member State as sufficient proof of such knowledge and aptitudes. The activity must have been pursued for a certain number of years (Art. 16 *j*° Art. 18 and List II of Annex IV).

The Directive expressly states that persons benefiting from the recognition of professional qualifications shall have a knowledge of languages necessary for practising the profession in the host Member State (Art. 53).

⁶⁰² See *infra*, para 251.

242. As we have seen, Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community⁶⁰³ confirms the right of workers of other Member States to have access to training in vocational schools and retraining centres under the same conditions as national workers (Art. 7(3)).

243. The Occupational Health and Safety Framework Directive (Directive 89/391/EEC) obliges employers to ensure that each worker receives adequate training on safety and health matters (Art. 12).

244. The Temporary Agency Work Directive obliges Member States to take suitable measures or promote dialogue between the social partners, in accordance with their national traditions and practices, in order to (1) improve temporary agency workers' access to training and to child-care facilities in the temporary-work agencies, even in the periods between their assignments, in order to enhance their career development and employability; and (2) improve temporary agency workers' access to training for user undertakings' workers (Art. 6(5)).

245. As we will explain below⁶⁰⁴, a European Qualifications Framework (EQF) is currently being developed, which may also be relevant to port workers.

246. According to the European Social Charter, everyone has the right to appropriate facilities for vocational training (Part I, item 10). In its Part II, the Charter devotes a special article to this matter:

Article 10 – The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;

⁶⁰³ Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ 19 October 1968, L 257/2.

⁶⁰⁴ See *infra*, para 281.

2. *to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;*
3. *to provide or promote, as necessary:*
 - a. *adequate and readily available training facilities for adult workers;*
 - b. *special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment;*
4. *to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed;*
5. *to encourage the full utilisation of the facilities provided by appropriate measures such as:*
 - a. *reducing or abolishing any fees or charges;*
 - b. *granting financial assistance in appropriate cases;*
 - c. *including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;*
 - d. *ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.*

6.4.2. Facts and figures

247. In a 2009 report for the ETF, Peter Turnbull found a wide variety of port training systems in the EU. Bases on a survey among eighteen trade unions from fourteen Member States⁶⁰⁵, he summarised the current situation in the following graphs.

⁶⁰⁵ Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Italy, the Netherlands, Romania, Spain, Sweden, and the UK.

Figure 16. Provision of port worker training in 14 EU Member States, 2009 (source: Turnbull⁶⁰⁶)

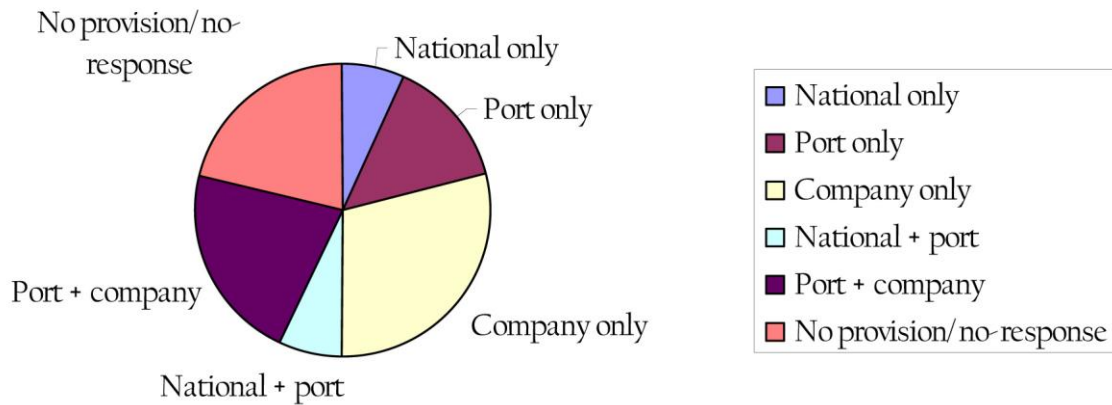
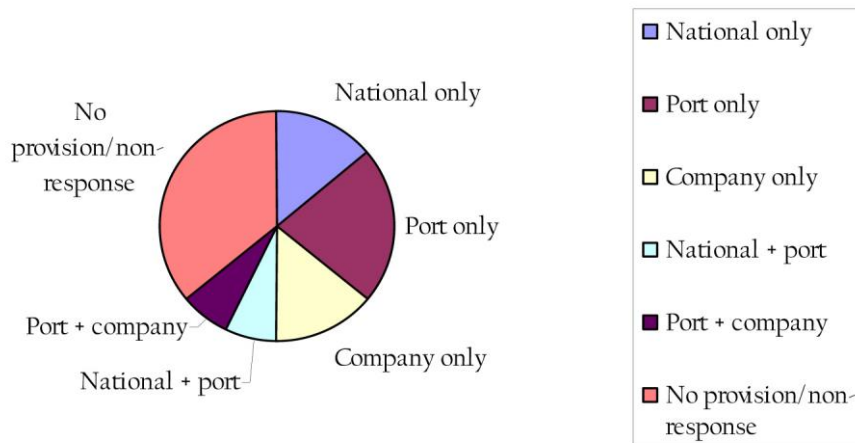


Figure 17. Accreditation of port worker training in 14 EU Member States, 2009 (source: Turnbull⁶⁰⁷)



Almost two-thirds of Member States included in the sample had some form of accreditation, despite the fact that in most countries included in the survey (57 per cent) there is no statutory

⁶⁰⁶ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 20.

⁶⁰⁷ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 21.

obligation to train port workers. Where training was mandated by law, this was more likely to be specified in port industry law as opposed to general employment law⁶⁰⁸.

248. In 2008, the EU-supported Optimus project aimed at filling the existing gaps between EU ports in simulation-based training in ports, by developing, testing and disseminating a common European approach on how-to-apply simulation techniques and devices for the operational training of port and logistic sector workers⁶⁰⁹.

249. In 2010, Central, another EU-funded project, undertook the tasks of drawing up an inventory of logistics and transport jobs in Europe, preparing common job definitions, better defining the skills required for representative jobs, setting up a European certification reference for the selected jobs, and developing a training course design based on the above skills certification process which is linked to the ECVET system⁶¹⁰. This project covers, for example, warehousing activities and the jobs of warehouse operator and forklift driver, but it does not seem to give specific attention to port labour.

250. Between 2009 and 2012, ports of the Adriatic, Aegean and Black Seas developed common training modules for several categories of port workers in the context of the EU-funded Watermode project which was led by the Venice Port Authority. The final Memorandum of Understanding signed by the partners provides a blueprint for the creation of a training system in the field of safety in logistics facilities, based on sharing methods, tools, and consistent classifications, and was supported by the ILO.

⁶⁰⁸ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 20.

⁶⁰⁹ See <http://www.adam-europe.eu/adam/project/view.htm?prj=3867>.

⁶¹⁰ See <http://www.adam-europe.eu/adam/project/view.htm?prj=7432> and <http://logisticsqualifications.eu/>.

Figure 18. Training paths for safety in logistics developed under the EU-funded Watermode project, 2012 (source: Watermode⁶¹¹)

	Qualification/Title	PREREQUISITES			hh/ pre-work SAFETY training	SAFETY: hh/safety training at work	Exam	Minimum work period with acquired qualifications	Level
		Educational	Psycho-physical	Other					
11	Generic Port Operator	Junior High School Diploma	Medical, eye, and psychological exams	Previous training course	8	8 hh	Theoretical and practical exam	6 months	First Basic Level
10	Lasher	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	9 hh	Theoretical, Practical, and on the job exam	6 months	
9	Reach Staker Operators	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	5 hh	Theoretical, Practical, and on the job exam	3 months	Second Basic Level
8	Transtainer crane operator	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	8 hh	Theoretical, Practical, and on the job exam	3 months	
7	Truck driver	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator" proper driving license	0	5 hh	Theoretical, Practical, and on the job exam	3 months	
6	Ship-to-shore crane operator	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	10 hh	Theoretical, Practical, and on the job exam	6 months	
5	Signalman	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	8 hh	Theoretical, Practical, and on the job exam	3 months	
4	Stevadore	Junior High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator"	0	10 hh	Theoretical, Practical, and on the job exam	6 months	
3	Ship manager	High School Diploma	Medical, eye, and psychological exams	Qualifications for "Generic Port Operator" + "Lasher/Stevador" and "Ship to Shore crane Operator"	0	12 hh	Theoretical, Practical, and on the job exam	12 months	Inter-medium Level
2	Terminal/Yard manager	High School Diploma	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator" + two second basic level qualifications: "Lasher/Stevador; Ship to Shore crane Operator"	0	12 hh	Theoretical, Practical, and on the job exam	12 months	
1	Planner	Adequate Degree	Medical, eye, and psychological exams	Possession of qualifications for "Generic Port Operator" + two second basic level qualifications: "Lasher/Stevador; Ship to Shore crane Operator" + one of inter-medium level qualifications	0	9 hh	Theoretical, Practical, and on the job exam		High Level

⁶¹¹ Brochure Watermode Project. Content and Results, s.d., s.l., 14.

6.5. Health and safety

6.5.1. Regulatory set-up

251. The Bulk Terminals Directive requires, *inter alia*, that terminals in EU ports where solid bulk cargoes are loaded or unloaded only accept bulk carriers that can safely berth alongside the loading or unloading installation, taking into consideration water depth at the berth, maximum size of the ship, mooring arrangements, fendering, safe access and possible obstructions to loading or unloading operations (Annex II, Art. 1). Terminal loading and unloading equipment shall be properly certified and maintained in good order, in compliance with the relevant regulations and standards, and only operated by duly qualified and, if appropriate, certified personnel (Annex II, Art. 2). Terminal personnel shall be trained in all aspects of safe loading and unloading of bulk carriers commensurate with their responsibilities. The training shall be designed to provide familiarity with the general hazards of loading and unloading of solid bulk cargoes and the adverse effect improper loading and unloading operations may have on the safety of the ship (Annex II, Art. 3). Terminal personnel involved in the loading and unloading operations shall be provided with and use personnel protective equipment and shall be duly rested to avoid accidents due to fatigue (Annex II, Art. 4).

252. General rules for the protection of health and safety of workers at work are laid down in OSH Framework Directive 89/391/EEC of 12 June 1989 and in a large number of supplementing Directives on specific aspects such as the workplace, the use of work equipment, personal protective equipment, machinery, chemical agents, asbestos, carcinogens and mutagens, physical agents, the manual handling of loads, which we cannot deal with here⁶¹².

As a rule, all these EU regulations equally apply to the port sector. They contain no specific provisions on port labour.

253. The OSH Framework Directive describes basic obligations on employers and workers. Nevertheless, the workers' obligations shall not affect the principle of the responsibility of the employer.

It is the employer's obligation to ensure the safety and health of workers in every aspect related to work and he may not impose financial costs to the workers to achieve this aim. Alike, where an employer enlists competent external services or persons, this shall not discharge him from his responsibilities in this area.

⁶¹² See *supra*, para 166.

The general principles of prevention listed in the Directive are the following:

- avoiding risks;
- evaluating the risks;
- combating the risks at source;
- adapting the work to the individual;
- adapting to technical progress;
- replacing the dangerous by the non- or the less dangerous;
- developing a coherent overall prevention policy;
- prioritising collective protective measures (over individual protective measures);
- giving appropriate instructions to the workers.

The employer shall:

- evaluate all the risks to the safety and health of workers, *inter alia* in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of work places;
- implement measures which assure an improvement in the level of protection afforded to workers and are integrated into all the activities of the undertaking and/or establishment at all hierarchical levels;
- take into consideration the worker's capabilities as regards health and safety when he entrusts tasks to workers;
- consult workers on introduction of new technologies;
- designate worker(s) to carry out activities related to the protection and prevention of occupational risks;
- take the necessary measures for first aid, fire-fighting, evacuation of workers and action required in the event of serious and imminent danger;
- keep a list of occupational accidents and draw up and draw up, for the responsible authorities reports on occupational accidents suffered by his workers;
- inform and consult workers and allow them to take part in discussions on all questions relating to safety and health at work;
- ensure that each worker receives adequate safety and health training.

The worker shall:

- make correct use of machinery, apparatus, tools, dangerous substances, transport equipment, other means of production and personal protective equipment;
- immediately inform the employer of any work situation presenting a serious and immediate danger and of any shortcomings in the protection arrangements;
- cooperate with the employer in fulfilling any requirements imposed for the protection of health and safety and in enabling him to ensure that the working environment and working conditions are safe and pose no risks.

Health surveillance should be provided for workers according to national systems. Particularly sensitive risk groups must be protected against the dangers which specifically affect them⁶¹³.

⁶¹³ Summary taken from <http://osha.europa.eu/en/legislation/directives/the-osh-framework-directive/1>.

254. Even if it only indirectly relates to health and safety, we should mention that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (the 'Working Time Directive') obliges each Member State to ensure that every worker is entitled to a limit to weekly working time, a minimum daily rest period, a rest break during working time, a minimum weekly rest period, paid annual leave, and extra protection in the case of night work. The Directive allows certain derogations for certain categories of workers, including dock and airport workers (Art. 17(3)(c)(ii)).

255. The Charter of Fundamental Rights of the European Union recognises the right of every worker to working conditions which respect his or her health, safety and dignity (Art. 31(1)) and to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Art. 31(2)).

256. The European Social Charter confirms that all workers have the right to just conditions of work and that all workers have the right to safe and healthy working conditions (Part I, items 2 and 3). In its Part II, it elaborates on these rights in the following terms:

Article 2 – The right to just conditions of work

With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake:

- 1. to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit;*
- 2. to provide for public holidays with pay;*
- 3. to provide for a minimum of four weeks' annual holiday with pay;*
- 4. to eliminate risks in inherently dangerous or unhealthy occupations, and where it has not yet been possible to eliminate or reduce sufficiently these risks, to provide for either a reduction of working hours or additional paid holidays for workers engaged in such occupations;*
- 5. to ensure a weekly rest period which shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest; to ensure that workers are informed in written form, as soon as possible, and in any event not later than two months after the date of commencing their employment, of the essential aspects of the contract or employment relationship;*
- 6. to ensure that workers performing night work benefit from measures which take account of the special nature of the work.*

Article 3 – The right to safe and healthy working conditions

With a view to ensuring the effective exercise of the right to safe and healthy working conditions, the Parties undertake, in consultation with employers' and workers' organisations:

- 1. to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment. The primary aim of this policy shall be to improve occupational safety and health and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment;*
- 2. to issue safety and health regulations;*
- 3. to provide for the enforcement of such regulations by measures of supervision;*
- 4. to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions.*

Article 11 – The right to protection of health

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia:

- 1. to remove as far as possible the causes of ill-health;*
- 2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;*
- 3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.*

6.5.2. Facts and figures

257. The harmonised methodology for European Statistics on Accidents at Work (ESAW) notwithstanding, no EU-wide statistical data on health and safety in port labour are available. This is caused by the absence of a port labour-specific NACE Code⁶¹⁴. The European Agency for Safety and Health at Work collects no statistics on port labour either⁶¹⁵.

⁶¹⁴ See *supra*, para 235.

⁶¹⁵ In 2011, the European Agency for Safety and Health at Work published a report on health and safety in the transport sector, which contains little information on ports however (see Schneider, E. and Irastorza, X., *OSH in figures: Occupational safety and health in the transport sector – an overview*, Luxembourg, Publications Office of the European Union, http://osha.europa.eu/en/publications/reports/transport-sector_TERO10001ENC, 256 p.).

258. We are unaware of recent comparative analyses of health and safety statistics on port labour in European ports. In a remote past, a number of modest attempts at comparing the health and safety record in selected European ports were undertaken⁶¹⁶.

259. We should also mention that regularly EU-wide health and safety campaigns are organised some of which may be of particular relevance to ports.

In 2007 and 2008, for example, the 'Lighten the Load' campaign aimed to promote an integrated management approach to tackle musculoskeletal disorders (MSDs)⁶¹⁷.

260. Since 2009, Dutch, Belgian and German labour inspectors with practical experience on inspection working conditions in ports hold annual meetings to exchange data and discuss issues. The aim is to enlarge this group with representatives of other European countries.

⁶¹⁶ See, for example, Helle, H.J., *Die un stetig beschäftigten Haf enarbeiter in den nordwesteuropäischen Häfen*, Stuttgart, Gustav Fischer Verlag, 1960, 46 *et seq.*

⁶¹⁷ See <https://osha.europa.eu/en/topics/msds>.

6.6. Policy and legal issues

- Overview

261. In the present subchapter, we shall inventory – although in a non-exhaustive manner – a number of policy and legal issues which have emerged over the past decade or so. Later on⁶¹⁸, we shall present our own policy and legal recommendations which are based on a fresh analysis of national port labour regimes in the EU.

- Absence of any EU regulation on port labour

262. As a result of the rejection by the European Parliament of two consecutive proposals for an EU Port Services Directive, port labour is not regulated by any specific EU legislation.

This contrasts with the liberalisation of all other transport and transport-related sectors as well as of various utilities sectors, which was to a large extent accomplished in the 1980s and 1990s.

As we have explained⁶¹⁹, the present study investigates the scope and need for further initiatives to elaborate specific EU instruments on port labour.

- Legal uncertainty over the implications of primary EU law for port labour

263. In the absence of a secondary instrument on port services and port labour, considerable legal uncertainty continues to loom over the implications of the Treaty. Confusion reigns, for example, over the applicability of freedom to provide services to port services and the provision of labour in ports, as well as over the compatibility with the Treaty of pool and registration systems. Inevitably, available case law is *ad hoc* and fragmentary, and offers insufficient legal certainty for Member States, public and private port operators and social partners.

⁶¹⁸ See *infra*, no. 353 *et seq.*

⁶¹⁹ See *supra*, paras 3 and 5.

- *Uncertain relationship between EU law on ILO Conventions on dock work*

264. In 1999, the European Parliament observed that the fact that ILO Convention No. 137 had been ratified by only a small number of states, excluding the most important maritime states, was probably indicative of a concern that legislation on port labour "could introduce a degree of rigidity at a time when great changes were taking places in this sector in countries where the market was not already protected"⁶²⁰.

This did not prevent the European Commission from inviting the Member States to ratify ILO Conventions No. 137 and 152 in its second proposal for a Port Services Directive⁶²¹.

With regard to self-handling in Community ports and ILO Convention No. 137, further clarification was provided through a parliamentary question by Joaquim Miranda to the then European Transport Commissioner Loyola de Palacio. The question and answer read as follows:

WRITTEN QUESTION E-0869/03 by Joaquim Miranda (GUE/NGL) to the Commission. Self-handling in Community ports and ILO Convention 137.

Subject: Self-handling in Community ports and ILO Convention 137

On 25 June 1973, in view of changes identified in the port sector thanks to the introduction of new techniques and increased mechanisation, the ILO's General Conference adopted Convention 137 on dock work, supplemented by Recommendation R145 and ratified by various Member States; the objective is to guarantee that the rights of workers whose annual income essentially depends on dock work are safeguarded.

The Convention lays down that permanent or regular work must be guaranteed, and that dockers must be given guarantees of income stability; it further lays down that the use of supplementary workers must be prevented when the work to be carried out would be insufficient to guarantee an acceptable standard of living for the dockers properly speaking thus giving them the right to priority.

The forthcoming directive on access to the market in port services will allow handling to be carried out by the vessels' own crews. This means that this handling might not be

⁶²⁰ European Parliament, *Working Paper European Sea Port Policy*, Transport Series, TRAN 106 EN, Luxembourg, 1999, 37.

⁶²¹ See European Commission, *Proposal for a Directive of the European Parliament and of the Council on market access to port services*, Brussels, 13 October 2004, COM(2004) 654 final, 4:

Finally and in order to enhance the application of the proposed Community legal framework, the Commission wishes to invite Member States to ratify conventions adopted in international organisations, in particular the relevant ILO conventions.

The accompanying footnote referred to:

ILO Convention C 137 of 1973 on Dock Work; ILO Convention C152 of 1979 on Occupational Safety and Health (Dock Work); ILO Convention C145 of 1976 on Continuity of Employment (Seafarers).

carried out by the port concerned's own registered dockers which would cause employment problems; such an approach therefore contradicts what is laid down in the aforesaid ILO Convention.

How does the Commission intend to make these two texts compatible, particularly in respect of those Member States which ratified Convention 137 in good time?

Answer given by Mrs de Palacio on behalf of the Commission
(25 April 2003)

There is no contradiction between the common position adopted by the Council for the adoption of the Directive of the European Parliament and of the Council on market access to port services(1) and International Labour Organisation (ILO) Convention 137 on dock work.

Article 19 of the Council's common position indicates that it in no way affects the application of social legislation in the Member States. As previously, the latter still have the authority to adopt ILO Convention 137, if they wish. They are not required to renounce the Convention if they have adopted it⁶²².

- *Restrictions on employment and restrictive working practices*

265. In its Green Paper of 1997, the European Commission stated that the market for port labour in the EU is still characterised by rigidities⁶²³. Our analysis of national port labour regimes below will reveal that this concern was, and still is, fully justified.

266. As we have mentioned⁶²⁴, the liberalisation of self-handling by ship's crews was the big stumbling block to the adoption of a Directive on access to the market for port services in the European Union.

With hindsight, some stakeholders feel that during the discussions on the proposed Port Services Directive, the self-handling provision perhaps received disproportionate attention and that this issue was certainly not essential to the Directive⁶²⁵.

⁶²² Written Question E-0869/03 by Joaquim Miranda (GUE/NGL) to the Commission, OJ 7 November 2003, C 268E/157.

⁶²³ See *supra*, para 178.

⁶²⁴ See *supra*, para 179.

⁶²⁵ See Leiren, M.D., *When EU Liberalisation Fails: The Case of the Port Directive*, ISL Working Paper 2012:4, Agder, University of Agder, 2012, 11, where the following anonymous interview is reported:

The effects of self-handling were largely exaggerated by the unions. Nobody in the industry believed the stories that Filipino seafarers would come to European ports to take over the jobs of the dockers. Honestly, if you see those big container vessels that have very small

Even so, self-handling continues to unlock emotions. In 2010, an ITF inspector reported as follows on the trend to charge ship's crews with lashing and unlash operations:

Don't do dockers' work

[...]

Nowadays, and especially with the aftershocks of the credit crunch still being felt, seafarers are increasingly being asked to lash or unlash cargo. And employers are becoming more and more inventive in avoiding potential "interference" from dockers' unions in those ports where there is an active union.

Seafarers are often requested to unlash prior to arrival, or to lash cargo after leaving berth, when the ship is at sea. And sometimes these forms of cargo handling are even done inside the port, while the vessel is still berthed or while the vessel is shifting, with cargo ramps or holds closed for unwanted visitors. Reports from dockers and seafarers to the ITF Inspectorate confirm the above.

When cargo handling by seafarers is ascertained, the master of the vessel will receive a warning from the ITF Inspectorate and/or the local ITF-affiliated dockers' union. In some ports the vessel may even be subject to actions from ITF-affiliated dockers' unions who want to protect the jobs of their members.

Afterwards begins a kind of "shift-the-blame" game. The captain is normally the person that decides if the crew will handle the cargo. But he, in turn, receives orders from the owners, operators, customers, charterers and agents; or perhaps the crew handled the cargo without asking the captain. Owners are pointing fingers at charterers. The credit crunch and poor economy is often used as an excuse. Charterers point fingers at agents. And so it goes on. Everybody is blaming somebody else.

But that does not change the fact that if the vessel is covered with an ITF-approved collective bargaining agreement (CBA), or in some cases with a national CBA, there is a breach of agreement. Under the terms of this agreement a ship's crew must not undertake "cargo handling and other work traditionally or historically done by dock workers without the prior agreement of the ITF dockers' union concerned". This includes lashing and unlash, loading and unloading.

The same goes for almost all national flagged vessels – a dockers' clause similar to the one in the ITF CBAs prevents crew from handling cargo.

And to complete it, some countries have a law for cargo handling and others countries may have ratified ILO 137, the Dockwork Convention. So if the seafarers are handling cargo, it means even more breaches have taken place.

Whatever the excuses and reasons used to justify cargo handling by seafarers, what's in it for the seafarers?

crew onboard, how on earth could they load and unload a ship themselves? But the story was eagerly absorbed by the media and the perception was difficult to fight. [...] In the end we even suggested to delete the entire reference to self-handling to save the good elements that were in the Directive. But such a compromise was not possible and the unions preferred to drown the entire Directive instead.

Not a lot. For this job, seafarers are paid peanuts – if they get any extra pay at all. Every time they do it they jeopardise their health and risk their life for the benefit and profit of the ones above them. Not to mention the stress and fatigue this extra non-seafaring work brings them. At the same time, dockers are losing work.

Both seafarers and dockers are losing out. The only winners are the bosses, the employers, the shipping companies and the port operators who will do what they can to squeeze another dollar of profit at the expense of the workers.

Crew cargo handling is an area in which the maritime industry and its shareholders have already been busy for many years, trying to find ways to boost their profits and to breach one of the strongest bonds of solidarity that exists among the working class.

In Europe, for the last few years, dockers have been winning the fight for their jobs against two European directives also known as Port Package I & II. But now it seems the game has been brought to the waterfront. It begs the question: Is the industry trying to pit these two natural allies against each other?

A lot of seafarers are working under the terms and conditions and the protection of an ITF CBA. In some cases the CBA came into place with the support of dockers⁶²⁶.

In 2012, ITF-affiliated port workers' unions FNV of the Netherlands and UK-based Unite teamed up in a campaign to reassert lashing as a docker's job and, in the process, protect jobs for young people coming into the industry. There have been concerns from both unions that lashing work on some short sea vessels is being done by seafarers who are forced into carrying out the task by shipping companies because they are cheaper than dockers. In other instances casual staff who are not trained dockers, are being used to carry out lashing and other work in the ports⁶²⁷.

267. By 5 December 2011, the EU Member States had to report to the European Commission on their review of prohibitions and restrictions on temporary agency work⁶²⁸. On the same day, the European Confederation of Private Employment Agencies Eurociett noted that a number of Member States had not yet transposed the Directive, or had not yet removed unjustified restrictions on agency work as a result of the review⁶²⁹. In an interview mid 2012, a policy advisor with Eurociett informed us that, as far as he could ascertain, few, if any, national reviews had focused on prohibitions or restrictions in ports, but also that so far ports have not considered a priority sector by his organisation. As regards the construction sector, Eurociett believes that lifting bans on temporary agency work could be conducive to the improvement of

⁶²⁶ X., "Don't do dockers' work", 16 April 2010, <http://www.itfseafarers.org/fusetalk/blog/index.cfm?month=4&year=2010>.

⁶²⁷ X., "Unions join forces over protection of dockers' jobs", 5 July 2012, <https://www.itfglobal.org/news-online/index.cfm/newsdetail/7581/region/1/section/0/order/1>.

⁶²⁸ See *supra*, para 229.

⁶²⁹ Eurociett, "Eurociett warning: Implementation of Agency Work Directive unbalanced. Too many unjustified restrictions to agency work remain as implementation deadline reached", Press release, Brussels 5 December 2011, http://www.eurociett.eu/fileadmin/templates/eurociett/docs/press_releases/111205_AW_Directive.pdf

the sector's flexibility and competitiveness, the reduction of undeclared work, the easing of the integration of immigrants and the improvement of workers' health and safety⁶³⁰.

268. In 2008, the European Information and Resource Centre for Employers' Alliances (CERGE) was established by representatives from Belgium, France and Germany. Employers' alliances (EAs) rest on a cooperation of public and/or private employers who share personnel. The aims of EAs are to provide the participating companies with qualified and reliable personnel, to transform insecure employment relationships into guaranteed full-time positions and to strengthen the economic development of a region through the range of professional perspectives. To an extent, EAs can be compared to workers' pools. To our knowledge, so far only very few attempts were undertaken to set up EAs for port labour, which is perhaps due to current restrictions on employment in the sector⁶³¹.

- *Qualification and training issues*

269. In 2006, Ana Paixão Casaca investigated port training systems in eight new EU Member States (Cyprus, Estonia, Latvia, Lithuania, Malta, Poland and Slovenia). The study indicates that port authorities and port operators need to improve their port training schemes. The most important challenges included 'meeting customers' needs, wants and values' and 'safety and security'⁶³².

270. In its 2007 Communication on ports policy, the European Commission proposed the introduction of European-wide training standards⁶³³. Apparently, it regarded the variations in training arrangements among EU ports as an obstacle to mobility of port workers.

271. In a 2009 report on training and qualification systems in the EU port sector prepared on behalf of ETF, Professor Turnbull concludes that, on paper, training provision and the protection of port workers' health and safety in EU ports appear comprehensive. But not all ports meet an acceptable standard and there are major question marks over the efficacy of port

⁶³⁰ See Eurociett, *More work opportunities for more people. Unlocking the private employment agency industry's contribution to a better functioning labour market*, Brussels, Eurociett, 2007, http://www.ciett.org/fileadmin/templates/ciett/docs/20071126_strategic_report.pdf, 36.

⁶³¹ See one example *infra*, para 457.

⁶³² Paixão Casaca, A.C., "Insights into the port training of the new European Union member states", *Maritime Policy and Management* 2006, Vol. 33, No. 3, 203-217.

⁶³³ See *supra*, para 181.

training and the enforcement of health and safety standards, especially in relation to new recruits to the industry. The starting point for any future EU policy in these areas should be the collection, and publication, of more systematic and ideally comparable data for all twenty-seven Member States. This should be just one obligation of a legal framework for training and health and safety in EU ports. Current inconsistencies in terms of both standards of protection and the enforcement of health and safety regulations within different Member States highlight the potential benefit of Community action in this area. The author also argues that, if progress is to be made on the idea of 'mutual recognition' for qualifications in the European port transport industry, as proposed in the 2007 Communication from the Commission on a European Ports Policy, then this must be based on the concept of 'training quality standards' or 'reference standards' and not 'minimum standards'⁶³⁴.

- Health and safety issues

272. A meeting of EU port labour inspectors convened in Hamburg on 2010 concluded that the accident frequency in ports is almost three times higher than in other sectors, and that the highest safety risks occur at the handling of maritime containers⁶³⁵. This corroborates the statement by the European Commission in 2007 that the frequency of labour accidents in ports is unacceptably high⁶³⁶.

273. According to a 2009 report for ETF, the majority of port unions characterise the approach of employer groups as "minimum compliance" with existing legal obligations on health and safety⁶³⁷.

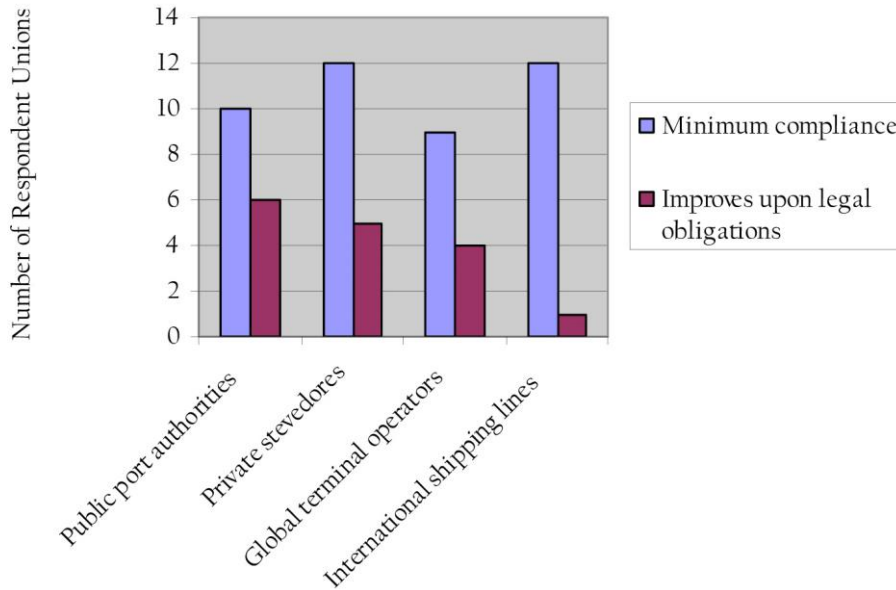
⁶³⁴ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 1.

⁶³⁵ See X., "Unfallrisiken bei der Hafearbeit erkennen und reduzieren", <http://www.hamburg.de/arbeitschutz/2673906/epi-2010.html>.

⁶³⁶ See *infra*, para 277.

⁶³⁷ Turnbull, P., "Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision", Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 25.

Figure 19. The approach of port employers towards health and safety policy, according to trade unions affiliated to the European Transport Workers' Federation, 2009 (source: Turnbull⁶³⁸)



Most ETF-affiliated unions responding to a questionnaire (56 per cent) regarded general health and safety laws to be “fully comprehensive” in terms of the protection they offer to port workers from the full range of health and safety hazards at work. The remaining unions claimed that general health and safety legislation provided “moderate coverage”. Port-specific health and safety laws were less favourably evaluated – 39 per cent reported these laws to be “fully comprehensive”, a third cited “moderate coverage”, and 11 per cent reported that the law was “not at all comprehensive”. Further, the report confirmed that nine European countries have ratified ILO Convention No. 152, and a majority of unions (61 per cent) reported that preventative measures to guard against accidents and occupational diseases, as specified in the EU’s Framework Directive (89/39/EEC) have been fully implemented. Other measures provided for in the Framework Directive – on information, consultation and balanced participation, as well as the training of workers and their representatives – had also been fully implemented in a majority of cases (56 and 67 per cent respectively)⁶³⁹.

⁶³⁸ Turnbull, P., “Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision”, Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 25.

⁶³⁹ Turnbull, P., “Training and Qualification Systems in the EU Port Sector: Setting the State of Play and Delineating an ETF Vision”, Brussels, ETF, July 2009, <http://www.itfglobal.org/files/extranet/-75/17739/Final%20report%20EN.pdf>, 29.

274. In an overview of occupational health and safety in the transport sector of 2011, the European Agency for Safety and Health at Work drew attention to the fact that some transport workers, including port workers, may be exposed to extreme climate conditions, especially during loading and unloading activities. The report also stresses the health risks by bromoethane and other toxic gases in import cargo ship containers. Gaseous pesticide concentrations and other toxic gases in undeclared freight containers represent an increasing health risk during transportation, inspection and unloading. Investigations in different countries showed at least 5 per cent of all import containers to have concentrations of bromomethane, phosphine and/or other fumigants above the respective Occupational Exposure Limit. Almost no import containers with detectable levels of fumigants display the required International Maritime Organisation warning sticker, although according to the IMO Recommendation for the Safe Use of Pesticides in Ships (IMO 267E) fumigated containers or cargo transport units and ship cargoes have to be labelled and appropriately certified⁶⁴⁰.

275. A 2011 Commission Staff Working Paper on the implementation of Directive 91/383/EC on safety and health of fixed-term and temporary workers – which does not focus on ports – confirms that these workers are still comparatively more exposed to occupational health and safety risks. A number of factors contribute to this outcome, including age, sectoral assignment and level of skills. Data corroborate a correlation between atypical forms of employment and overexposure to risk factors⁶⁴¹.

276. The lack of reliable and up-to-date EU-wide figures on the number of port workers and especially on the frequency, incidence and frequency rate of occupational accidents among port workers, as well as on occupational diseases, should be mentioned as a separate policy issue.

⁶⁴⁰ See Schneider, E. and Irastorza, *OSH in figures: Occupational safety and health in the transport sector – an overview*, Luxembourg, Publications Office of the European Union, http://osha.europa.eu/en/publications/reports/transport-sector_TERO10001ENC, 94-95 and 103-104.

⁶⁴¹ European Commission, *Implementation by Member States of Council Directive 91/383/EC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship*. Commission Staff Working Paper, Brussels, 22 July 2011, SEC(2011) 982 final, 51-52 and 59.

6.7. Appraisals and outlook

277. As we have mentioned above⁶⁴², the 2007 Communication on ports policy by the European Commission remains a useful starting point to assess the current situation of the port labour market in the European Union. However, as we shall explain later on, the Commission proposed fresh policy proposals in the course on 2013, which were still being discussed at the time of finalising the updated version of the present study⁶⁴³.

In the Commission Staff Working Document accompanying the 2007 Communication, the Commission summarised the main problems surrounding port labour in Europe as follows:

Labour accidents in ports are unacceptably high and action is needed to reduce them. A safety culture must become part of port work and the enforcement of health and safety rules, as well as proper investigation of all accidents is needed.

It is in the ports' own interest to ensure that all workers are properly trained for their jobs, in view of the technical complexity of the equipment they operate. However, there is considerable variation in the levels of training provided by different enterprises and there are no common European-wide standards.

Many ports operate labour pools to protect workers against market instability and fluctuations in demand, whilst ensuring that employers always have access to sufficient labour to meet peak workload requirements. Labour pools and strong trade unions have been instrumental in ensuring that port workers receive reasonably good wage rates (relative to the industrial average in each country). However, they are seen by some stakeholders as a source of restrictive practices undermining port efficiency and productivity. Some employers argue that mandatory use of labour pools might be incompatible with the EC Treaty. If European ports are to operate efficiently, an appropriate balance needs to be found between employers' freedom to select and negotiate with their own workforce, and the protection of workers' rights. This is likely to involve either redefining the role of labour pools, or seeking a gradual reduction in their importance and powers. The issue of port work is extremely sensitive and there is general consensus among stakeholders that it can only be addressed through a social dialogue between the various partners involved. Failing to address the labour issues might be failure to get the best possible performance out of Europe's ports. Overmanning is likely to be absorbed by traffic growth, but low training and safety levels will depress productivity and lead to avoidable accidents. Failure to introduce more flexible working practices might lead to higher unit costs⁶⁴⁴.

The Commission identified the creation of greater freedom for port employers to select their workforce and negotiate their own conditions of employment, whilst protecting the interests of

⁶⁴² See *supra*, para 181.

⁶⁴³ See *infra*, para 291A *et seq.*

⁶⁴⁴ European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339, 9.

port workers and the promotion of more flexible employment patterns and social dialogue as important objectives for a new European ports policy⁶⁴⁵.

Finally, the Commission considered different policy options and stated its preference for the soft law alternative:

4.2. Work in Ports

4.2.1. Introduction

The current practice for stevedoring is extremely diversified across the Community, in many cases also within a same Member State. The issue at stake for this specific aspect is mainly the one of 'pooling'. Port 'pools' are entities providing staff to terminal operators. Pools may provide whole or part of the staff needed, at all times or only on the occasion of peaks in demand for stevedoring. Where pools are very powerful, not only terminal operators are obliged to use pool staff, but the pool also decides the number of workers to be employed for a given job. This decision may be based on criteria other than the objective need for manpower, with obvious consequences on cost. In other ports pools are less powerful. They only provide less skilled personnel, and/or staff temporarily needed for facing traffic peaks. In the container business most staff is therefore permanent, which is also in line with their advanced training (e.g., for cranes).

4.2.2. Policy options

4.2.2.1. Do nothing option. *Without any intervention the described scenario would probably continue to gradually evolve towards the overcoming of the pool system, as it is slowly happening in many ports. It should be recalled, however, that in some parts of the Community this evolution could be slower, due to the opposition by unions. The described trend could also affect the attractiveness of the port system as a whole, and therefore, the development of ports and the progress of modal shift. Any legislation in force in the Member State imposing the use of pools could be challenged by means of infringement procedures. However, it should be noticed that in some cases pools are used because of pressure by unions, rather than on the basis of legal provisions.*

4.2.2.2. Legislative option. *A legislative proposal could establish that any independent provider (individual or agency) should be able to be hired by terminal operators. The market for work in port would be liberalised.*

4.2.2.3. Soft law option. *In an interpretative Communication the Commission might come to the conclusion that any legislation imposing the use of staff originating from the pools is in conflict with the Treaty principles. In practice, any terminal operator needing new staff should be entitled to hire properly trained independent staff or staff*

⁶⁴⁵ European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339, 15 and 16.

from temporary work agencies. It should be noticed that the practice of pooling appears to be less in conflict with the Treaty principle of free movement of workers, since the pools make no discriminations based on nationality.

4.2.2.4. Voluntary-mixed option. In the course of the consultation it has appeared that both workers and employers (terminal operators) are willing to engage in a dialogue, in particular concerning contractual issues ("social dialogue"). Furthermore, as it has been mentioned above, all the progress on flexibility that has been achieved in some countries has been made possible by years-long negotiations by social partners. Encouraging social dialogue should also be taken into consideration and separately assessed. Should this option be chosen, social partners would be invited to set up a dialogue process, if necessary in the form of a structured "social dialogue" such as it exists for maritime transport, aimed at overcoming the least fruitful constraints that still exist in some ports. This option has been named as "mixed-voluntary", because the voluntary approach would not be entirely independent from the "soft law option". In fact, social partners would be invited to negotiate once the Community law framework has been clarified by the Communication.

4.2.3. Assessing the options

Experiences with the past proposals for a port services Directive, and the views expressed by stakeholders during the consultation process suggest that there would be considerable opposition to the legislative option. However, many of its benefits could be achieved through the soft law option, which would also be less costly. The costs and benefits of the soft option are more difficult to quantify. As a result, the legislative option has been object of assessment. The primary objective of the options for work in ports is to increase labour flexibility at ports where employers are obliged to use labour pools for the supply of regular and casual workers, rather than being able to select their own staff and negotiate their own terms and conditions of employment.

4.2.3.1. Scale of problem. The first task of the analysis is to define the dock labour regime for different European countries and to identify the Member States/ports where the use of labour pools is still mandatory⁶⁴⁶.

Port labour practices have been gradually liberalised in several Member States over the last 10-20 years but there is no common and clear European labour scheme.

Annex IV⁶⁴⁷ summarises the current labour schemes in several European countries. It shows that many aspects must be considered to define how work in ports is organised, for instance:

- Presence of labour pool and how the entry of workers into the pool is controlled.*

⁶⁴⁶ "The expression "mandatory" labour pool can be interpreted in different ways:

- compulsory by national or local legislation as in the case of the Port of Antwerp, or
- business agreements/partnerships run jointly by employers and unions such as in Hamburg and in Lisbon (footnote in the original).

⁶⁴⁷ Annex V (not IV) gives "Examples of European labour schemes" (see European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339, 90-91).

- *How workers are assigned to employers (shift patterns, minimum hours of work, ability to employ pool workers on a semi-permanent basis)*
- *How workers are paid (attendance allowances, minimum guaranteed income or hours of employment, payment per hour worked, overtime provisions, social security provisions and other benefits).*
- *How employers pay for the labour they use.*
- *Negotiating procedures for terms and conditions of employment.*
- *Training arrangements.*
- *How the pool recovers any financial deficits (revenues received from employers less payments made to workers).*

All these aspects have a direct influence on ports' productivity and competition among ports and must be considered in order to improve the efficiency of the port industry.

Container traffic development has also influenced port labour productivity in the last 20 years. Container terminals are a capital intensive business characterised by higher labour productivity with respect to conventional cargo. The common aspect that has characterised the development of workers' performances has been negotiating procedures for terms and conditions of employment among employers, unions, employees and other public bodies. This seems to indicate that labour schemes have a limited impact on labour productivity. Social dialogue among stakeholders therefore looks to be the most important driver to improve productivity in European ports.

4.2.3.2. Costs. The main "one-off" costs of abolishing or substantially modifying compulsory labour pools will be compensation payments and/or loss of earnings for redundant workers, and the costs of transferring labour to individual employers. If the EU proposal is strongly opposed, there could also be a significant loss of earnings caused by strike action. Worse perhaps, if this is not done properly, these measures could also lead to bad social relations and to a negative appeal of ports.

Labour costs may increase if employers have to hire more labour on a permanent basis in order to cover traffic peaks, and if they provide better terms and conditions of employment. However these additional costs are likely to be offset by higher productivity rates, and slower increases in the size of the workforce over time as a result of more flexible manning arrangements.

There could also be significant costs in terms of use of less skilled labour, and the reduced power of the unions to intervene when employers do not meet agreed standards.

4.2.3.3. Benefits. The main benefits associated with more flexible employment patterns include:

- *Higher labour productivity due to selective employment of the best workers/widening of the search area for new employees, and regularity of employment (increased familiarity of the labour force with the employer's business).*
- *Greater flexibility in the use of labour, with a closer correlation between hours paid and hours worked, less idle time spent waiting for work or waiting (unemployed) for the end of the shift, more use of multi-skill to enable the same worker to do several different jobs, and more cost-effective use of overtime working.*

4.2.4. Comparing the options

The primary objective of the policy options for the “work in ports” regulation is to increase labour flexibility. The port situation is very heterogeneous, so the implementation of a Directive is unlikely to meet the approval of all stakeholders. In summary, the lack of any clear relationship between port labour schemes and work force productivity, the heterogeneous characteristics of each port, and the total estimated costs of the transition programmed do not support a Directive.

The common aspect that has characterised the improvement of workers’ performance has been the use of negotiating procedures for terms and conditions of employment, involving employers, unions, employees and other public bodies. Social dialogue among stakeholders looks to be the most important driver to improve productivity in European ports, reducing negative effects such as labour redundancy. Negotiation and social dialogue allow a better balance to be maintained between the needs, characteristics, and particular history of each port.

The issue of social dialogue emerged from the consultation. There are examples of ports with labour-related difficulties that have overcome these through social dialogue (e.g. Rotterdam, Dunkirk). Therefore, a formal social dialogue at Commission level will be proposed. This can indeed help to achieve the long-term objective of improving productivity and, ultimately, make ports more attractive for customers, and contribute, in this way, to the development of maritime transport, leading in turn to more and better jobs. The idea of setting up a formal social dialogue has been discussed with the competent Commission services.

Moreover, there are currently no specific Community rules on training for port workers. Training of port workers has become of primary importance for the safe and efficient operation of ports. Port equipments have become technologically advanced and often complex tools. Work in ports has consequently evolved and, as the consultation has shown, a set of common requirements for training of port workers could be established at Community level.

One of the most important actions that could mitigate these health and safety costs is the planning and development of periodic training programme. Different solutions are developed in European port, for instance in Hamburg and Bremen port enterprises and unions have established a joint Dockworker Training School. The following objectives should be pursued in order to mitigate negative impacts:

- Upgraded quality standards*
- professional skills and*
- increase “safety culture”.*

The implementation of action on these aspects could generate, among others, the following benefits:

- professional efficiency*
- reduction in overall work fatalities.*

The implementation of a training system implies initial and operational costs. The initial costs are related to the development of a training scheme (e.g. ILO Dockworker training

programme). The operational costs include training costs for port workers. The training costs can be divided into three main components:

1. costs of training scheme design;
2. operational cost (costs of the training itself);
3. costs of evaluation (monitoring system).

The initial cost of a training scheme design depends on the type of courses to be provided according to the needs of port workers that change port by port.

The training operational cost depends on the number of port workers that need to be trained to carry out a new labour. Dockworker training is mainly organised by the private port companies for their employees. Nevertheless, port workers are not all permanently allocated to individual port employers (e.g. casual workers). A training system is particularly important for casual workers to avoid lowering safety standards due to higher labour turnover rates and less skilled labour. The number of casual workers depends on work organization in each European port or in each European country and cannot be easily estimated at European level (macro level).

An estimation of the costs and the net outcome of this approach is thus not possible at this stage of the analysis and in the time frame given.

Furthermore, it should be noticed that a significant number of occupational accidents including fatal ones⁶⁴⁸ still occur in ports. A close monitoring of the implementation in ports of Community rules on health and safety at work would be desirable.

Finally, the issue of flexicurity should be further assessed, also in the light of the Commission Communication on Flexicurity⁶⁴⁹.

The following table summarizes the main costs and benefits that could be generated by a Directive which focuses on greater freedom and flexibility of employment.

Cost and benefit of policy option

Cost	Benefit
<p>□ The main “one-off” costs are for abolishing or substantially modifying compulsory labour pools (compensation payments and/or loss of earnings for redundant workers, costs of transferring labour to individual employers). If the EU proposal is strongly opposed, there could also be a significant loss of earnings caused by strike action.</p> <p>□ Labour costs: may increase if employers have to hire more labour on a permanent basis in order to cover traffic peaks, and if they provide better terms and conditions</p>	<p>□ Higher labour productivity: due to selective employment of the best workers/widening of the search area for new employees, and regularity of employment.</p> <p>□ Labour training programmes: enlarged and better targeted.</p> <p>□ Greater flexibility in the use of labour: closer correlation between hours paid and hours worked, less idle time spent waiting for work or waiting (unemployed) for the end of the shift, more use of multi-skill to enable the same worker to do several</p>

⁶⁴⁸ Three port workers were reported during the six month consultation process that led to this communication (footnote in the original).

⁶⁴⁹ Communication "Towards Common Principles of Flexicurity: More and better jobs through flexibility and security", COM(2007) 359 (footnote in the original).

<i>of employment. (these costs could be offset by higher productivity rates).</i>	<i>different jobs, and more cost-effective use of overtime working.</i>
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4.2.5. Choice of option

Experiences with the past proposals for a port services Directive, and the views expressed by stakeholders during the consultation process suggest that there would be considerable opposition to the legislative option concerning labour arrangements in ports. However, many of its benefits could be achieved through the soft law option, which would also be less costly. Therefore, the soft law option has been chosen.

There are currently no specific Community rules on training for port workers. The Commission recognizes that training of port workers has become of primary importance for the safe and efficient operation of ports. Therefore, the legislative option has been chosen.

At the European Union level, the general rules for the protection of health and safety of workers at work are laid down in the Directive 89/391/EEC⁶⁵⁰ (the "Framework" Directive), which lays down rules on health and safety related training of workers which fully apply to work in ports. Full respect and enforcement of these rules is crucial for improving working conditions.

4.2.6. Conclusion

The Commission will encourage the establishment of a European sectoral social dialogue committee in ports within the meaning of Commission Decision 98/500/EC. If such a committee is established, the Commission will promote an active contribution of the social partners to management of change, modernisation and more and better jobs.

The Commission will propose a mutually recognizable framework on training of port workers in different fields of port activities.

The Commission will closely monitor the implementation in ports of Community rules on health and safety of workers at work. The Commission will also closely follow the proper collection of statistics relating to accidents⁶⁵¹.

278. Interestingly, the Commission Staff Document also summarised the positions of the main stakeholders:

⁶⁵⁰ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29.6.1989, p. 1), Article 12 (footnote in the original).

⁶⁵¹ European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339, 22-28.

Figure 20. Positions of main stakeholders on port labour in 2007, according to the Accompanying document to the European Commission's 2007 Communication on a European Ports Policy (source: European Commission⁶⁵²)

ESPO

Social dialogue exists at local level already; at EU level only if relevant stakeholder organisations, including port authorities, agree on a common agenda;
Compare systems of professional qualifications for port workers and consider system of mutual recognition;
no need for sectoral legislation on health and safety, enforce legislation;
support training programmes

FEPOR

Creation of structured social dialogue, restricted to social partners;
Existence of pools should not compromise the basic employer freedom to choose its own personnel;
Health and safety: differences on implementation of common rules have a reason of existence.

EFIP

Support actions to promote the sector in order to encourage and attract people to the port sector

ECSA

Respect freedom of service providers to engage personnel of own choice;
cargo handling should be subject to normal market conditions and competition.
Assess existing arrangements against EU legislation;
proper qualification essential criteria to be left to national authorities;
users of ports and port services to be involved in social dialogue on policy issues;
need to pursue mutual recognition of training qualification for port workers and free movement of workers

EMPA

Some health and safety risks for pilots due to incorrect handling of material by ship crews

⁶⁵² European Commission, *Accompanying document to Communication on a European Ports Policy. Full Impact Assessment*, Brussels, 18 October 2007, SEC(2007) 1339, 60-85.

ECASBA

*support the provision of training for all sectors of the port industry ;
abandon restrictive practices and adopt the social dialogue*

ETF

*Introduce standardized health and safety rules for ports;
Strategy to improve health and safety at work with focus on education and training,
dissemination of a prevention culture, improvement of risk assessment procedures;
Pools created for the benefit of workers not of employers; sufficient legislation on
access and competition; promote social dialogue for port workers; in Germany social
dialogue for ports works, this model should be extended to Europe; need for specific
safety rules for port workers; ratification by Member States of ILO Conventions 137 and
152; no need for mutual recognition*

IDC

*Implement formal social dialogue;
Create certification system with minimum standards to join the profession; need for
clear rules on access to profession; design specific professional occupational training
programmes for dockworkers; European funding;
Health and safety: implement a European code for the prevention of occupational
hazards in ports
Pools not created for the benefit of workers but of employers; need for protection of
workers' rights in the event of tender procedure leading to a new terminal operator;
harmonisation at European level of professional requirements for dockers; promote
safety culture and training; need for proper monitoring of accidents; Ratification of ILO
137*

ESC

*Restrictive labour practices within ports can cause significant delays and costs; Ports
policy should focus on removing bureaucracy, removing restrictive labour practices,
encouraging more investments in transport infrastructure, facilitating communication
initiatives*

Zentral-Verband Deutscher Seehafenbetriebe (ZDS)

*No general legislation on pools for temporary dockers by COM, rather – where
applicable – case by case decisions. Use of pools for temporary dockers where such
pools are based on and build according to national legislation, without confinement of
the liberty of employers to hire personnel of their own choice.*

Federation of European Tank Storage Associations (FETSA)

Little to complain about

Flemish Ports

Minimum standards for health and safety and their enforcement; Training to be left to MS; self-handling unacceptable

Port of Gijón Spain

*is not clear that an Europeanwide regulation regarding port labour services would be efficient for all countries;
A general European framework, but a specific national customized approach could be best*

Unistock

*No need for COM action on training, but promote mutual recognition of training certificates allows mobility of workers
No compulsory permanent cargohandling services (24/7)
Monopolies for recruitment of port workers no longer justified*

279. In a response to the 2007 Communication from the Commission, ESPO stated:

6.5. Cargo-handling

ESPO agrees with the Commission's interpretation of Treaty rules as regards labour pools.

The interpretation coincides with the principle that service providers in ports should have full freedom in engaging qualified personnel of their own choice and employ them under conditions required by the service, provided all applicable social and safety legislation is respected⁶⁵³.

280. As the 2007 ports policy Communication suggests, the organisation of port labour markets in the EU should also be considered in the broader context of the European Commission's policy on 'flexicurity', which attempts to reconcile employers' need for a flexible workforce with workers' need for security. As the Commission summarises,

⁶⁵³ X., *Communication from the European Commission on a European Ports Policy. General response of ESPO*, 31 October 2007, http://www.espo.be/images/stories/policy_papers/Previous_policy_papers/07-10-31ECPortpolicy-GeneralresponseofESPO.pdf, 10-11.

The concept is a response to the needs European labour markets are facing. On the one hand, the EU has to come to terms with changes in the world economy. Technological developments are becoming ever more rapid. Products and services are developed at an ever quicker pace. If Europe wants to strengthen its economy and create jobs, it has to be in the forefront of these developments. Enterprises have to move towards innovative product and service development. They have to master new skills and production techniques. This is a continuous process, affecting employers and workers alike. Jobs change more quickly than before. The ability to adapt and readiness for change are becoming more and more important.

On the other hand, the EU needs to reinforce the European social models, which are committed to social protection, social cohesion and solidarity. Workers need sufficient security to plan their lives and careers with support to make it through all these changes and stay in employment. They need opportunities to master new skills and help to move from one job to another. They need protection against bad working conditions. They need good social protection in case a new job is not easily at hand or when employment is no longer a realistic option.

Flexicurity is an attempt to unite these two fundamental needs. It promotes a combination of flexible labour markets and adequate security. Flexicurity can also help provide an answer to the EU's dilemma on how to maintain and improve competitiveness whilst reinforcing the European social model.

Flexicurity should not be misconceived as giving employers freedom to dissolve their responsibilities towards the employee and to give them little security. Flexicurity does not mean 'hire and fire'; nor does it imply that open-ended work contracts are a thing of the past. Flexicurity is about bringing people into good jobs and developing their talents. Employers have to improve their work organisation to offer jobs with future. They need to invest in their workers' skills. This is part of 'internal flexicurity'. However, keeping the same job is not always possible. Sometimes it is better to focus on finding a new job rather than preserving the job one has at the moment. 'External flexicurity' attempts to offer safe moves for workers from one job into another, and good benefits to cover the time span, if needed.

Rather than job security, flexicurity focuses on 'employment security'. Employment security means staying in employment, within the same enterprise or into a new enterprise. The philosophy behind flexicurity is that workers are more prepared to make such moves if there is a good safety net⁶⁵⁴.

In 2007, the Council of Ministers adopted the 'Common Principles of Flexicurity', which read as follows:

(1) Flexicurity is a means to reinforce the implementation of the Lisbon Strategy, create more and better jobs, modernise labour markets, and promote good work through new

⁶⁵⁴ European Commission, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, Brussels, 27 June 2007, COM(2007) 359 final, 7.

forms of flexibility and security to increase adaptability, employment and social cohesion.

(2) Flexicurity involves the deliberate combination of flexible and reliable contractual arrangements, comprehensive lifelong learning strategies, effective active labour market policies, and modern, adequate and sustainable social protection systems.

(3) Flexicurity approaches are not about one single labour market or working life model, nor about a single policy strategy: they should be tailored to the specific circumstances of each Member State. Flexicurity implies a balance between rights and responsibilities of all concerned. Based on the common principles, each Member State should develop its own flexicurity arrangements. Progress should be effectively monitored.

(4) Flexicurity should promote more open, responsive and inclusive labour markets overcoming segmentation. It concerns both those in work and those out of work. The inactive, the unemployed, those in undeclared work, in unstable employment, or at the margins of the labour market need to be provided with better opportunities, economic incentives and supportive measures for easier access to work or stepping-stones to assist progress into stable and legally secure employment. Support should be available to all those in employment to remain employable, progress and manage transitions both in work and between jobs.

(5) Internal (within the enterprise) as well as external flexicurity are equally important and should be promoted. Sufficient contractual flexibility must be accompanied by secure transitions from job to job. Upward mobility needs to be facilitated, as well as between unemployment or inactivity and work. High-quality and productive workplaces, good organisation of work, and continuous upgrading of skills are also essential. Social protection should provide incentives and support for job transitions and for access to new employment.

(6) Flexicurity should support gender equality, by promoting equal access to quality employment for women and men and offering measures to reconcile work, family and private life.

(7) Flexicurity requires a climate of trust and broadly-based dialogue among all stakeholders, where all are prepared to take the responsibility for change with a view to socially balanced policies. While public authorities retain an overall responsibility, the involvement of social partners in the design and implementation of flexicurity policies through social dialogue and collective bargaining is of crucial importance.

(8) Flexicurity requires a cost effective allocation of resources and should remain fully compatible with sound and financially sustainable public budgets. It should also aim at a fair distribution of costs and benefits, especially between businesses, public authorities and individuals, with particular attention to the specific situation of SMEs⁶⁵⁵.

In 2010, the European Parliament adopted a Resolution on "atypical contracts, secured professional paths, and new forms of social dialogue" in which it noted that non-standard employment has grown significantly since 1990 and that the jobs lost as a result of the present economic crisis were primarily those in the atypical sector. New types of contract with one or

⁶⁵⁵ Council of the European Union, Brussels, 23 November 2007, 15497/07 / SOC 476 / ECOFIN 483, Towards Common Principles of Flexicurity - Draft Council Conclusions, <http://register.consilium.europa.eu/pdf/en/07/st15/st15497.en07.pdf>.

more of the following characteristics are classified as 'atypical' employment: part-time work, casual work, temporary work, work under fixed-term contracts, home working and teleworking, part-time employment of 20 hours or less per week.

In its Resolution, the European Parliament considers, *inter alia*, that all employees, regardless of their employment status, should be guaranteed a set of core rights; recommends that the priorities for labour law reform, where it is needed, should focus on: urgent extension of the protection of workers in atypical forms of employment; grouping atypical contracts together for the purpose of simplification; the sustainable creation of normal employment relationships; clarification of the situation of dependent employment, including preventive action with regard to the health and safety of atypical workers; action against undeclared work; support for the creation of new jobs, including under atypical contracts, and the facilitation of transitions between various types of employment and unemployment, through the promotion of policies such as special employment allowances, lifelong learning, retraining and on-the-job training; and encourages steps to clarify the situation of dependent employment.

The Parliament also notes that atypical forms of employment must contractually provide workers with a course of training, and stresses that non-standard forms of work can, if they are properly protected and include support in the area of social security, workers' rights and the transition to stable, protected employment, constitute an opportunity, but that they must go hand in hand with support for workers who find themselves in situations of transition from one job or employment status to another through targeted active employment policies; deplores the fact that this is often neglected.

Further, Parliament emphasises that not all forms of atypical employment necessarily lead to unstable, insecure, casual labour with lower levels of social security protection, lower wages and restricted access to further training and lifelong learning; it points out, however, that such insecure forms of employment are often linked to atypical contractual arrangements.

The Parliament believes it essential that current thinking on flexicurity be updated at European level in the light of the present crisis, so as to help increase both productivity and the quality of jobs by guaranteeing security and the protection of employment and workers' rights, with special support for people who are disadvantaged on the labour market, while allowing firms the organisational flexibility needed to create or reduce jobs in response to the changing needs of the market. It takes the view that a fair and balanced implementation of flexicurity principles can help to make labour markets more robust in the event of structural changes⁶⁵⁶.

⁶⁵⁶ European Parliament resolution of 6 July 2010 on atypical contracts, secured professional paths, and new forms of social dialogue (2009/2220(INI)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0263&language=EN&ring=A7-2010-0193>.

281. In a Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning⁶⁵⁷, Member States were called upon to create links between their national qualifications systems⁶⁵⁸ and the newly established European Qualifications Framework (EQF)⁶⁵⁹.

By making competences and qualifications⁶⁶⁰ more transparent, the European Qualifications Framework (EQF) is an instrument for the promotion of lifelong learning. This framework covers both higher education and vocational training. It will make it easier for individuals in the EU to communicate the relevant information concerning their competences and their qualifications. Increasing the transparency of qualifications will enable individual citizens to judge the relative value of qualifications and improve employers' ability to judge the profile, content and relevance of the qualifications in the labour market. Education and training providers will also be able to compare the profile and content of their courses and ensure their quality. The adoption of the EQF will increase the mobility of workers and students. The EQF will allow workers to be mobile and at the same time to have their qualifications recognised outside their own country. The tool will facilitate the transition from work to training and *vice versa*, on a lifelong basis.

The EQF is a tool based on learning outcomes rather than on the duration of studies. The main reference level descriptors are: skills⁶⁶¹, competences⁶⁶² and knowledge. The core element of the EQF is a set of eight reference levels describing what the learner knows, what the learner understands, what the learner is able to do, regardless of the system under which a particular qualification was awarded. Unlike systems which guarantee academic recognition based on the duration of studies, the EQF covers learning as a whole, in particular learning which takes place outside formal education and training institutions.

⁶⁵⁷ Recommendation of the European Parliament and of the Council of 23 April 2008 on the establishment of the European Qualifications Framework for lifelong learning, OJ 6 May 2008, C 111/1.

⁶⁵⁸ Defined here as

all aspects of a Member State's activity related to the recognition of learning and other mechanisms that link education and training to the labour market and civil society. This includes the development and implementation of institutional arrangements and processes relating to quality assurance, assessment and the award of qualifications. A national qualifications system may be composed of several subsystems and may include a national qualifications framework.

⁶⁵⁹ For the broader context, see also, on the New Skills and Jobs initiative, <http://ec.europa.eu/social/main.jsp?catId=822&langId=en> as well as the Council conclusions on the role of education and training in the implementation of the 'Europe 2020' strategy (2011/C 70/01), OJ 4 March 2011, C70/1.

⁶⁶⁰ Defined here as

a formal outcome of an assessment and validation process which is obtained when a competent body determines that an individual has achieved learning outcomes to given standards.

⁶⁶¹ Defined here as

the ability to apply knowledge and use know-how to complete tasks and solve problems. In the context of the European Qualifications Framework, skills are described as cognitive (involving the use of logical, intuitive and creative thinking) or practical (involving manual dexterity and the use of methods, materials, tools and instruments).

⁶⁶² Defined here as

the proven ability to use knowledge, skills and personal, social and/or methodological abilities, in work or study situations and in professional and personal development. In the context of the European Qualifications Framework, competence is described in terms of responsibility and autonomy.

The EQF is not designed to replace national qualifications systems but to supplement the actions of the Member States by facilitating cooperation between them. The European initiative is based on national qualifications frameworks, although these are themselves not based on any single model.

Today, the EQF is being put in practice across Europe. It encourages countries to relate their national qualifications systems to the EQF so that all new qualifications issued from 2012 carry a reference to an appropriate EQF level. An EQF national coordination point has been designated for this purpose in each country⁶⁶³.

282. A 2009 study for the European Commission (DG Employment) described scenarios, implications and options in anticipation of future skills and knowledge needs in the sector of transport and logistics.

The researchers found that, especially in the scenarios of economic growth and globalisation, logistics becomes international and complex, requiring more social and management skills. In the scenarios with major legal restrictions, legislative and regulatory knowledge becomes especially important for 'logistics professionals'. In general, logistics require team working skills and high analytical capacities. As logistics becomes more complex in global scenarios, analytical skills will be a central capability for the profession.

The category of 'freight handlers', on the other hand, traditionally comprises large numbers of rather low qualified or unskilled workers. Many of their tasks, however, are becoming increasingly automated as is already the case in most modern cargo ports, where most people work as planners, controllers or ICT specialists and almost all formerly manual work is now done by machines. Therefore, a very large portion of the job category 'freight handlers' may disappear or transform into machine operators, controllers, planners or ICT specialists who need more cognitive and analytical than physical skills. In general, e-skills and technical knowledge will become more important for this job category as more machines will enter the work domain. In scenarios of increasing economic growth and globalisation, language skills and intercultural aptness will become more important as supervisors and clients will become more international. In scenarios with increased regulation, knowledge about legal and regulatory frameworks will also gain in relevance. Even if the overall requirements for skills changes are lowest for freight handlers, the whole job category may require a general 'upskilling'. Because of the general low-skill level of freight handlers and the common training-on-the-job, recruiting workers from other sectors, other Member States and non-Member States are seen as "quite viable options", while recruiting unemployed and young people from the education system is also a possible strategy. Training the existing workforce will become a necessity to address the emerging demand for e-skills technological knowledge. Changing the work organisation,

⁶⁶³ See http://ec.europa.eu/education/lifelong-learning-policy/eqf_en.htm.

outsourcing and off-shoring are probably less viable options. To cope with automation, the organisation of new training courses will be essential⁶⁶⁴.

283. Another relevant policy concern of a more general nature is the prevention of injury and the promotion of safety in the European Union. In 2007, the Council adopted a Recommendation which invited both the Member States and the European Commission to step up efforts to increase safety in all areas of society, not only at the workplace, and to make better use of available data, in order, *inter alia*, to reduce the huge financial burden on health and welfare systems caused by injury, which constitutes a major factor for reduced productivity⁶⁶⁵.

284. As we have mentioned above⁶⁶⁶, the European Commission published in 2011 a White Paper on transport policy entitled *Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, in which the Commission stated that market access to ports needs to be further improved announced new initiatives to review restrictions on the provision of port services and to establish a mutually recognisable framework on the training of port workers in different fields of port activities⁶⁶⁷.

For the transport sector in general, the Commission highlighted:

Market opening needs to go hand in hand with quality jobs and working conditions, as human resources are a crucial component of any high quality transport system. It is also widely known that labour and skill shortages will become a serious concern for transport in the future. It will be important to align the competitiveness and the social agenda, building on social dialogue, in order to prevent social conflicts, which have proved to cause significant economic losses in a number of sectors, most importantly aviation⁶⁶⁸.

The accompanying Commission Staff Working Document mentions, on the issue of market access to ports:

⁶⁶⁴ Davydenko, I., Gijsbers, G., Leis, M., Maier, D., Verweij, K., Li, X. and van der Zee, F., *Investing in the Future of Jobs and Skills. Scenarios, implications and options in anticipation of future skills and knowledge needs. Sector Report Transport and Logistics*, THO / SEOR / ZSI, May 2009, 120, 136 and 173.

⁶⁶⁵ Council Recommendation of 31 May 2007 on the prevention of injury and the promotion of safety, OJ 18 July 2007, C 164/1.

⁶⁶⁶ See *supra*, para 185.

⁶⁶⁷ European Commission, *White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, COM(2011) 144 final, 11, paras 36, 19 and 21.

⁶⁶⁸ European Commission, *White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, COM(2011) 144 final, 11, para 37.

While many ports operate in a competitive environment, technical-nautical and cargo-handling services are often restricted to monopolies or to a few established operators. The Commission's attempts to open market access to port services were rejected by the European Parliament. In line with stakeholders' requests, the Commission has not put forward any further legislative proposal. It is currently applying and enforcing the basic rules of the Treaty in the port sector, and closely monitoring the market development. Should this situation reveal to be insufficient or generate uncertainty, legislative proposals might be considered again⁶⁶⁹.

The Commission Staff Working Document mentions "Review restrictions on provision for port services" as a proposed action⁶⁷⁰ and also stresses that well trained port workers, satisfied with their working conditions, are essential for the safe, secure and efficient operation of ports. Both issues will be equally addressed in the Social Agenda, and that a mutually recognisable framework on the training of port workers in different fields of port activities should be established⁶⁷¹.

285. As we have explained, it is outside the scope of our mission to investigate labour productivity in ports⁶⁷². It should not be left unnoticed, however, that a 2011 report by the French Centre d'Etudes Techniques Maritimes et Fluviales suggests that container terminal productivity in European ports is considerably lower than in Asian ports. However, it does not go into the possible impact of the labour factor. In 2015, the productivity gap will still exist⁶⁷³.

286. In an interview mid-2011, a FEPORT representative said that the organisation would welcome a harmonised European system for training and qualifications based on the new French model, but that the introduction of port labour-specific EU safety rules should be avoided. European port employers would also support the maintenance of adequate statistics and initiatives to promote multi-skilling, which is already common practice in German ports. The ILO Guidelines on training are too general for the EU and should be elaborated further.

⁶⁶⁹ European Commission, *Commission Staff Working Document Commission Staff Working Document Accompanying the White Paper - Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, SEC(2011) 391 final, 45, para 166.

⁶⁷⁰ European Commission, *Commission Staff Working Document Commission Staff Working Document Accompanying the White Paper - Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, SEC(2011) 391 final, 45, para 166.

⁶⁷¹ European Commission, *Commission Staff Working Document Commission Staff Working Document Accompanying the White Paper - Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, SEC(2011) 391 final, 53, para 204, and 54.

⁶⁷² European Commission, *Commission Staff Working Document Commission Staff Working Document Accompanying the White Paper - Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system*, Brussels, 28 March 2011, SEC(2011) 391 final, 46.

⁶⁷³ See Chambreuil, A., *Productivité des terminaux à conteneurs*, Compiègne, CETMEF, 2011, http://www.cetmef.developpement-durable.gouv.fr/IMG/pdf/P_11-01_cle288f2a.pdf, 31 p.

Our interviewee confirmed that many FEPORT members consider the ILO dock work conventions outdated.

287. Responding to our questionnaire, the International Dockworkers Council (European Zone) made the following general statement on the need for EU action in the field of port labour⁶⁷⁴:

In general, IDCE is in favour of the “soft law” approach of the 2007 Ports Policy Communication and feels that there is little need for EU action or legislation in the field of port labour since most issues can be dealt with in the scope of Sectoral Social Dialogue.

European ports have a diversity of ownership and organisational structures based on local, regional or national characteristics and legal regulations. This reflected in the different systems that exist in member states for the organisation of port labour. It is we feel, a natural development which we do consider to be a hinder for European port efficiency. On the contrary, this diversity stimulates competition within and between ports. This in turn encourages innovation and the incorporation of new techniques and technologies in the field of cargo handling. Nothing is static in this industry and most European Ports have shown a remarkable capacity for their workforces to adapt to change. This becomes apparent when comparisons of costs, effectiveness (manning scales, moves per hour etc) and the general quality of port work are made between European ports and ports in United States, Japan, Australia and elsewhere. European ports are leading in all these comparisons.

With this in mind, we think it both unnecessary and detrimental to port efficiency for the Commission to introduce legislation or take legal actions aimed at imposing internal market rules and competition Treaty rules Those who argue for such intervention are more likely doing so for ideological reasons rather than for the sake of port efficiency. *This not withstanding, we feel however that the European port industry might well benefit from some actions by the Commission, for example:*

- *Mandatory ratification of ILO 137 by all member states. This would make for more stable conditions of employment and social protection and would enhance industrial relations and smooth the path for technologic changes. it would help create a favourable atmosphere for social dialogue by which means adaptive and organisational changes in port labour systems might easier be made.*
- *Measures to check and enforce standards of health and safety and professional-training standards in all ports will be necessary after agreement on these issues by the social partners. This in order to ensure efficiency and professionalism in our ports, help to create the often sought-after "level playing field" and also to enhance the quality of port services. The agreed upon standards will play an important role in the authorisation of Dockworkers with which to form the basis for the implementation of ILO 137.*

⁶⁷⁴ Regular text is bold in the original.

- Actions to protect the rights of a workforce following privatisation of ports or port activities or when authorisations pass from one service provider to another. *In such circumstances, workers should be guaranteed their freedom to build or join trade unions and be guaranteed their rights to enjoy decent standards of employment, health and safety and regulated working hours.*

All service providers in a port must comply with the same national requirements and legislation in regards to the hiring, training or retraining of their workforce and must comply with all relevant social legislation and collective bargaining agreements.

Recent experience of the flagrant and persistent disregard for these basic rights by a foreign company following an authorisation to run a container terminal in a large, previously publicly-owned European port highlights the necessity for EU intervention.

In the example described above, change of ownership- has been used to deteriorate conditions of employment. Regular employment has to a great extent been replaced by dubious forms of subcontracting and by the use of casual labour. After case studies, the Commission should examine necessary measures with which to deal with this situation and prevent it spreading to other member state ports.

On these, or any other issues that the Commission deems important for special actions, we are only too happy to discuss further.

288. Upon adoption of the new ILO Guidelines on Training in the Port Sector in 2011, a representative of the European Commission announced that these Guidelines would be "adapted" at the European level⁶⁷⁵.

289. On 11 May 2012, European Commissioner Siim Kallas declared, before the annual conference of the European Sea Ports Organisation convened at Sopot:

Today's many bottlenecks are often due to low efficiency and sometimes to restrictive labour and other non-competitive regimes operating inside the port.

Ports act as major logistics hubs linking waterborne and land-based transport to deliver cargo smoothly door-to-door. This is our objective and the reason why ports are so important for the Trans-European Network as we build a single joined-up transport area for Europe.

It is also crucial if ports are to be properly efficient and compete globally against rival ports in North Africa or in Asia - particularly China.

We cannot afford constraints at seaports or inland ports. This is important for Europe's economy to recover and enjoy long-term growth. For the future, I believe we need to improve access to ports as well as raise their efficiency and overall performance.

⁶⁷⁵ International Labour Organization, *Tripartite Meeting of Experts for the Review and the Adoption of ILO Guidelines on Training in the Port Sector (Geneva, 21–25 November 2011). Final Report*, TMEPS/2011/11, Geneva, International Labour Office, 2012, http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_175206.pdf, 3, para 13.

The sector needs pro-business reforms. And also more transparency.

With so many different operating models and lack of clear EU-wide rules which - in some cases - prevents a fair competition environment, it is now time to set a more coherent European ports policy.

It is also time to give legal clarity to port operators and service providers, not least as an incentive to attract long-term investments.

Let me now underline some specific areas:

There are issues to be resolved over state aids, port charges and concessions to provide services. In addition, port workers do not have enough social protection. And the relationship between port authorities and providers is not always very clear.

These are all, of course, extremely sensitive areas. I am also aware there is a great deal of concern within the port community about making changes. But changes are needed to make sure the sector stays competitive in the long term.

The proposed policy review is not about micro-management, nor about disrupting longstanding business models if they are working well. And if we see a problem at one port, there should be no need for all ports to be penalised.

So this will not be a 'one size fits all approach'. After all, there must be sufficient flexibility to take local circumstances into account.

[...]

Finally - labour issues.

This works well in some ports. But in others, some of the practices are highly restrictive and amount to what is, in effect, a 'closed shop' where service providers may not employ personnel of their own choice. So we need to learn from best practices. And we need to find a balance where there can be clear guarantees of social protection⁶⁷⁶.

⁶⁷⁶ Kallas, S., "Steering a course for the future: Europe's ports in the 21st century", Sopot, 11 May 2012, SPEECH/12/352, http://europa.eu/rapid/press-release_SPEECH-12-352_en.htm.

290. Mid-2012, EU trade unions voiced concerns over supposed new plans of the European to liberalise port labour.

Figure 21. On 15 June 2012, a conference of ETF- and IDC-affiliated port workers' unions from 11 different countries who convened at Antwerp discussed possible further EU initiatives relating to port labour. The unions branded these initiatives as a further attempt at port liberalisation and an attack on organised labour in European docks, and not in fact an effort at improving efficiency and competitiveness as the European Commission has represented (photos by BTB, Antwerp).



291. In September 2012, the European Commission organised a major conference on port policy where the preliminary results of the present study were presented. Among the few stakeholders who spoke out clearly on port labour issues, Juan Riva, president of the European Community Shipowners' Associations, said:

Labour issues have rightly or wrongly been the most sensitive issue in the previous discussions on a European Port policy.

Proper qualification of all involved in port services is without doubt a must. However, the qualification criteria should be relevant. The four Freedoms of the Treaty are applicable on port services.

The principle that service providers in ports have full freedom to engage qualified personnel of their own choice without imposed conditions except relevant conditions on qualification, safety, and national social legislation in line with the Treaty, should be fully respected. Existing arrangements that have been questioned should be assessed against existing EU legislation.

At the same conference, EU Transport Commissioner Siim Kallas said:

The challenges that ports face in productivity, investment needs, sustainability, human resources, integration with cities and regions can in no way be

underestimated.

Today's many bottlenecks are often due to low efficiency and sometimes to restrictive labour and other non-competitive regimes operating inside the port.

[...]

Finally - labour issues.

This works well in some ports. But in others, some of the practices are highly restrictive and amount to what is, in effect, a 'closed shop' where service providers may not employ personnel of their own choice. So we need to learn from best practices. And we need to find a balance where there can be clear guarantees of social protection.

6.8. Developments between January 2013 and September 2014

291A. On 23 May 2013, the European Commission adopted a new Communication entitled *Ports: an engine for growth*⁶⁷⁷. With respect to port labour, the Commission stated the following:

3.4. Promote the Social Dialogue

EU Ports employ more than 3 million people (directly and indirectly). Economic research has directly linked growth in port throughput with the creation of jobs in surrounding regions.

To succeed and adapt to the changing demands on the workforce, ports must offer good working conditions and improve the quality of the working environment to attract skilled personnel. Industrial disputes that affect relations may damage the image and competitiveness of ports and should be dealt with proactively. Good social climate and genuine social dialogue between the concerned parties is required.

Social Dialogue

Both the day-to-day efficiency and the long-term dynamics of port competition are influenced by the port labour regime. Depending on the type of terminal, port labour can represent a significant share of the operational costs for terminal operators.

In 16 Member States, as is the case in other sectors, port labour regimes depart from general labour law⁶⁷⁸. In some cases, those regimes may place restrictions that have an effect on the creation of new jobs or undermine the working environment in the port.

After a prolonged negotiation process, the social partners of the port sector have asked for the creation of a port sector Social Dialogue Committee in line with the competences recognised in the Union by Article 152 of the TFEU⁶⁷⁹. This is the first time that such a dialogue has been requested in the sector and will allow for key issues, including those that may lead to contractual relations to be addressed. If the social partners so desire, they may then request jointly that agreements concluded by them at Union level be implemented by a Council decision on a proposal from the Commission in accordance with Article 155(2).

At this stage, the Commission does not propose to introduce particular provisions on port labour regimes. It should be stressed that the Social Dialogue at Union level supplements but does not replace social dialogue at national, local and corporate levels.

Action 6

⁶⁷⁷ European Commission, *Communication Ports: an engine for growth*, Brussels, 23 May 2013, COM(2013) 295 final.

⁶⁷⁸ Here, the Commission refers to the first version of the present study.

⁶⁷⁹ See also the Commission Decision of 20 May 1998 on the establishment of Sectoral Dialogue Committees promoting the Dialogue between the social partners at European level (COM(1998)322 final).

In line with Articles 151 and 154 of the TFEU, the Commission is willing to facilitate the Social Dialogue at Union level by providing technical and administrative support. The EU social partners have already agreed rules of procedures and an open joint work programme and expect the Committee to be formally established on 19 June 2013. While respecting the autonomy of the social partners, the Commission expects that the EU social partners will be in the capacity to tackle issues related to work organisation and working conditions. The Commission in coordination with all the EU social partners foresees a review in 2016 that will assess the functioning and progress of the European Social Dialogue for the ports sector and the situation in respect of the provision of both cargo handling and passenger services.

Health, safety and training

Port work remains an occupation with a high risk of accidents and health implications for workers. It is essential to have a system in place to protect the health, safety and welfare of port workers and users, in line with applicable health and safety legislation. Every port needs to develop working practices that safeguard the safety and health of port workers. This requires good cooperation and coordination between all employers and employees who operate within the port. Technological changes and new transport and logistics needs will drive requirements for mastering innovative port operations and the need for employees with the right skills, training and qualifications to understand, master and exploit all the advantages provided by the new technologies.

Action 7

Under the 7th RTD framework programme for transport, the Commission will launch before the end of 2013 a concerted action project to examine health and safety, training and qualification challenges in EU ports. Social partners will be full involved in this action. The Social Dialogue committee for the port sector will be regularly consulted and informed on these issues.

291B. On the same day, the European Commission published a Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports⁶⁸⁰. The new proposal contains provisions on market access to a number of port services – but not cargo-handling and passenger services⁶⁸¹ – and on financial transparency and autonomy. Port labour is not covered by the Regulation at all. At the time of writing (October 2014), discussions of the proposal in the European Parliament and the Council of Ministers had not yet led to a final political agreement.

⁶⁸⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports*, Brussels, 23 May 2013, COM(2013)296 final.

⁶⁸¹ See esp. Art. 11 which is entitled 'Exemption'.

Initial reactions by stakeholders varied substantially. FEPORT welcomed the decision to exclude social elements from the regulation. It believes that it is best to let the European social dialogue run its course in this regard. ETF welcomed the fact that port labour is not considered in the proposed Regulation but voiced concern over targeted Commission interventions in individual Member States. ECSA questioned why cargo handling and port labour are not covered. ESPO did not take an explicit position on the social aspects of the proposal.

291C. On 19 June 2013, the inaugural meeting of the Social Dialogue Committee for Ports was held in Brussels. The Rules of Procedure and the Work Programme 2013 -2015 of the Ports social dialogue committee were adopted and signed. In the meantime the Committee has looked into issues such as health and safety indicators, female employment and the impact of low sulphur fuel on the port industry. So far, labour market-related issues have not been put on the agenda of the Committee.

291D. The European Portworkers Training Scheme (EU-PORTRAItS) started on 1 December 2013⁶⁸². The project seeks to promote the training of port workers, thereby analysing national training models and ensuring successful implementation of the ILO Guidelines. Secondly, EU-PORTRAItS facilitates dialogue with the social partners, promotes cooperation and builds consensus on the next steps to be made for achieving an efficient EU port system. Thirdly, EU-PORTRAItS identifies and analyses the future trends in port and maritime related sectors and their influence on the formulation of the future port labour demand profiles. Finally, impacts related to conducting research are expected⁶⁸³.

291E. A joint questionnaire initiated by the social partners in 2013 revealed that a vast majority of port workers are male (97.08 per cent), that no country recorded a proportion over 10 per cent and that a number of ports/terminals registered 0 per cent on female port workers. Most employers do not have systems in place to attract more female workers. A number of countries stated it was illegal under national law to have separate “systems” under gender. Culture and Nature of Work clearly the main barriers to female employment in the port sector. While it happens rarely that women being excluded from the job market, respondents claimed women were not made aware of jobs. One respondent stated there was union opposition due to the physical nature of the work. The main issue amongst respondents not expecting an increase is culture (lack of female candidates, females not considered due to stereotypes).

⁶⁸² <http://euportraits.eu/index.php/project/overview>.

⁶⁸³ <http://euportraits.eu/index.php/project/impacts>.

291F. In response to the first version of the present study, FEPORT and ECSA said that it would be helpful if the updated version focused more on the need to address new challenges and to improve the image of work in ports and to make the profession of port worker more attractive. Although these aspects already received due attention in the initial version, we have taken the comments into account in the Executive Summary of the updated version.

6.9. Synopsis

292.		
SYNOPSIS OF PORT LABOUR IN THE EUROPEAN UNION		
LABOUR MARKET		
Facts	The Law	Issues
<ul style="list-style-type: none"> • Hundreds of ports • Mix of management models, landlord model prevalent • 3,641m tonnes (2010) • 76.5m TEU, 16% of world throughput • Appr. 2,200 employers • Appr. 115,000 port workers • Trade union density higher than in the economy as a whole 	<ul style="list-style-type: none"> • No specific EU regulations • Applicability of general EU principles: <ol style="list-style-type: none"> (1) Free movement of goods (2) Free movement of workers (3) Freedom of establishment (4) Free movement of services (5) Ban on cartels (6) Ban on abuse of a dominant position • Regulation on temporary agency work • Fundamental rights, including on freedom of association 	<ul style="list-style-type: none"> • Absence of liberalisation instrument on port services • Uncertainty over applicability of freedom to provide services • Uncertain relationship between EU law and ILO Conventions • Uncertainty over implications of Treaty for port labour • Restrictions on employment and restrictive working practices • Restrictions on self-handling • Restrictions on temporary agency work • Position of port labour in context of EU 'flexicurity' policy • Gender issues
TRAINING AND QUALIFICATIONS		
Facts	The Law	Issues
<ul style="list-style-type: none"> • Variety of qualification and training systems 	<ul style="list-style-type: none"> • No specific EU requirements except on safety training for dry bulk terminal workers (Bulk Terminals Directive) • Mutual recognition of qualifications • Duty on employers to provide safety training • European Qualifications Framework 	<ul style="list-style-type: none"> • Integration of national qualification systems into EQF
HEALTH AND SAFETY		
Facts	The Law	Issues
<ul style="list-style-type: none"> • No EU-wide statistics on occupational accidents 	<ul style="list-style-type: none"> • No specific EU requirements except for dry bulk terminals (Bulk Terminals Directive) • Elaborate general EU OHS regulations 	<ul style="list-style-type: none"> • Lack of statistics • High accident rates • Compliance with EU health and safety obligations

7. SYNOPSIS FOR THE 23 MARITIME MEMBER STATES

7.1. Port system

293. Based on the data collected in the country chapters in Volume II, the table below gives an overview of current port systems in the individual Member States. It indicates that cargo volumes handled in the EU vary considerably between Member States and that the landlord management is prevalent, but not universally applied.

Table 1. Overview of maritime cargo throughput (2012⁶⁸⁴), EU port ranking (2011), EU and world container ranking (2011) and prevalent management models (2012) in EU ports, by Member State (sources: Eurostat, Portius Port Labour Questionnaire, UNCTAD)

Member State	Maritime cargo throughput 2012, in million tonnes	EU ranking	EU container ranking	World container ranking	Prevailing management model
Belgium	224.0	7	4	13	Landlord
Bulgaria	26.0	20	22	103	Landlord
Croatia	19.0	21	23	105	Landlord
Cyprus	6.2	23	18	80	Tool
Denmark	87.8	11	15	61	Mixed
Estonia	43.4	16	21	96	Landlord
Finland	105.1	10	12	50	Mixed
France	303.0	5	7	26	Landlord
Germany	298.8	6	1	8	Landlord
Greece	153.0	9	9	44	Mixed
Ireland	47.6	15	14	60	Mixed
Italy	476.8	3	5	15	Landlord
Latvia	72.7	12	20	88	Landlord
Lithuania	41.0	17	19	86	Landlord
Malta	37.8	19	8	37	Landlord
Netherlands	543.2	1	3	12	Landlord
Poland	58.8	14	13	51	Landlord
Portugal	67.9	13	10	46	Landlord
Romania	39.5	18	16	67	Landlord
Slovenia	16.9	22	17	73	Service
Spain	422.2	4	2	10	Landlord
Sweden	173.0	8	11	47	Mixed
United Kingdom	500.9	2	6	17	Mixed

⁶⁸⁴

See [http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/File:Gross_weight_of_seaborne_goods_handled_\(inward_and_outward\)_in_main_ports\(1\)_in_2012_by_type_of_cargo\(2\)_in_%25_of_total_cargo_handled\).png](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/File:Gross_weight_of_seaborne_goods_handled_(inward_and_outward)_in_main_ports(1)_in_2012_by_type_of_cargo(2)_in_%25_of_total_cargo_handled).png).

7.2. Sources of law

- *A variety of sources*

294. Our inventory of the sources of law in the EU Member States shows a wide variety in the legal arrangements.

First of all, there is no harmony in the implementation of ILO instruments on dock work.

Secondly, there are States where rules on port labour are laid down in specific national laws and regulations (*lex specialis*), while other countries lack such special instruments and rely entirely on the framework of general labour law (*lex generalis*). Generally, *leges speciales* entail a higher level of regulation or, seen from an employer's perspective, more rigidities⁶⁸⁵.

Thirdly, there are considerable differences in the practice of collective bargaining, which may take place at national, sectoral, port or company level, while there are also ports and terminals where no collective agreements apply at all.

The level of detail in laws, regulations and collective agreements may vary as well.

In many EU ports, unwritten customs or usages continue to play a significant role.

All these specificities notwithstanding, in most if not all Member States, port labour is also governed, either exclusively or only subordinately, by general laws and regulations on employment, qualifications and training and/or health and safety.

- *Implementation of ILO Dock Work Conventions*

295. In the graphs below, we have summarised the status of ILO Conventions on dock work in the 23 maritime Member States of the EU. It appears that only a minority of EU States is bound by these instruments. We shall return to the relatively limited success of the ILO rules below.

⁶⁸⁵ However, a transition to a port labour system governed by the *lex generalis* may, for specific aspects, also be a pitfall. In some respects, the application of general labour law may not be adapted to the specific requirements of port operators and result in new rigidities see *infra*, para 1703 with regard to Slovenia).

Figure 22. EU Member States bound by ILO Convention No. 137, 2013

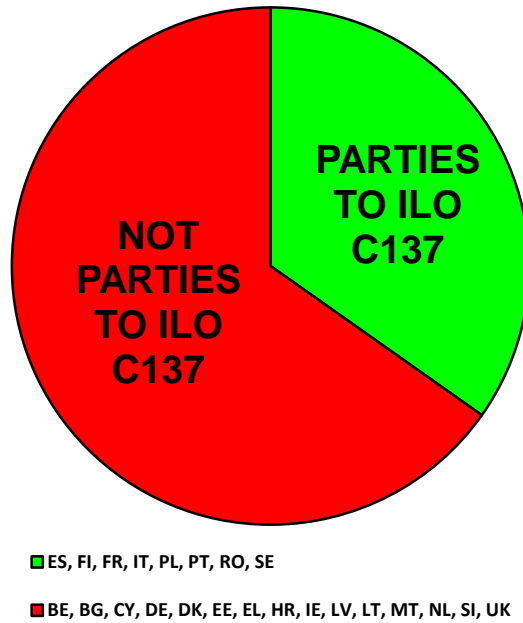
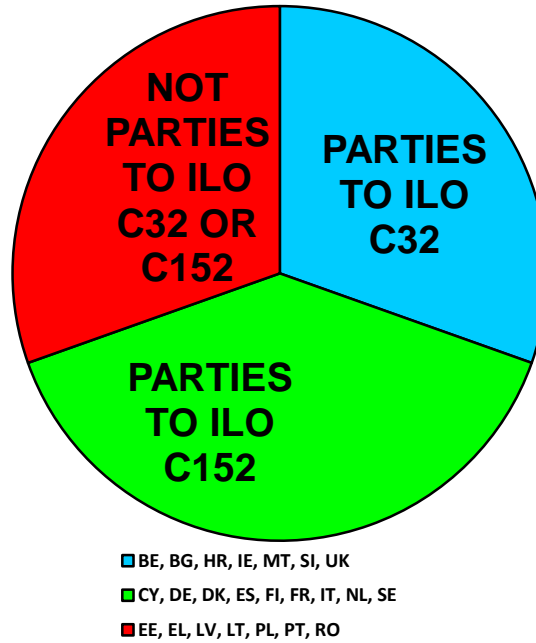


Figure 23. EU Member States bound by ILO Conventions No. 32 and No. 152, 2013



296. With a view to the solution of theoretically possible incompatibilities between ILO Conventions and EU law in accordance with Article 351 TFEU, the graphs below provide insight into the anteriority or posteriority of Member States' ratifications of ILO Dock Work Conventions vis-à-vis their membership of (as the case may be, accession to) the European Union.

Figure 24. EU Member States bound by ILO Convention No. 137 by dates of ratification vs. EU membership, 2013

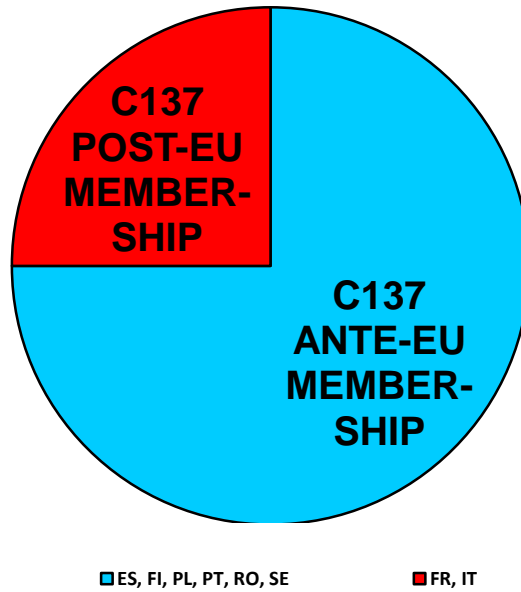


Figure 25. EU Member States bound by ILO Convention No. 32 by dates of ratification vs. EU membership, 2013

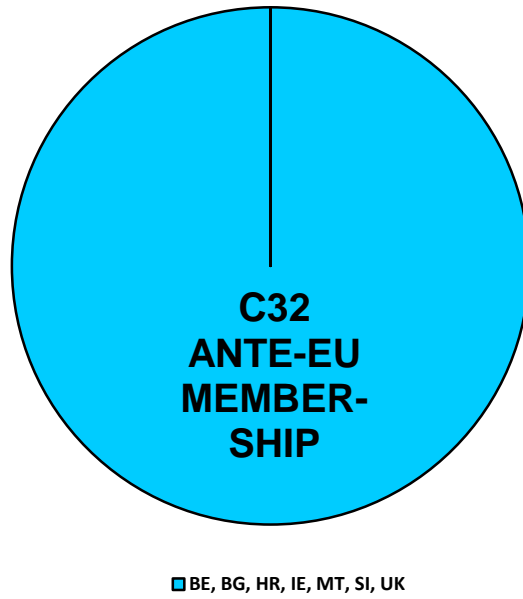


Figure 26. EU Member States bound by ILO Convention No. 152 by dates of ratification vs. EU membership, 2013

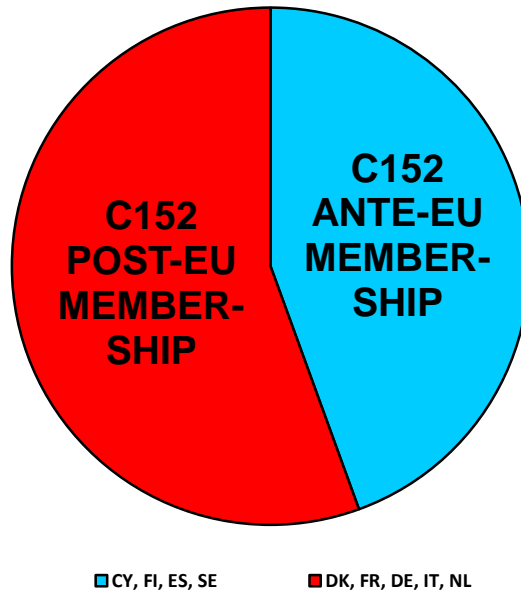
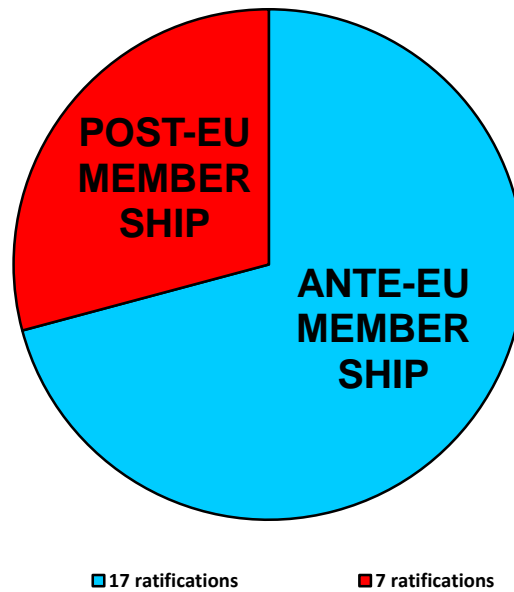


Figure 27. EU Member State ratifications of ILO Conventions No. 32, 137 and 152 by date vs. date of EU membership, 2013



297. Finally, in order to allow an assessment of the extent to which port labour is today still subject to specific laws and regulations, the next figure shows which EU Member States apply *leges speciales* (with the exclusion of sector or port-specific collective agreements) on port labour. Strikingly, the groups have an equal share.

Figure 28. Leges speciales on employment of port workers in the EU by Member State, 2013



- Levels of collective bargaining

298. Finally, we were able to prepare the following overview of levels of port labour-specific collective bargaining. It reveals that in 11 out of 22 Member States, port-specific agreements (or service level agreements) are concluded at national level. Six States have port-wide agreements, at least 15 company-specific agreements. In some 10 States, agreements are concluded at more than one level. Estonia is the only Member State where currently no collective agreements are in place.

Figure 29. Levels of port labour-specific collective bargaining in the European Union by Member State, 2013

	National	Port	Company
BE			
BG			
HR			
CY			
DE			
DK			
EE			
EL			
ES			
FI			
FR			
IE			
IT			
LV			
LT			
MT			
NL			
PL			
PT			
RO			
SE			
SI			
UK			
Total	11	6	15

	Collective bargaining agreement in existence
	No agreements or no data

7.3. Labour market

- Historical background

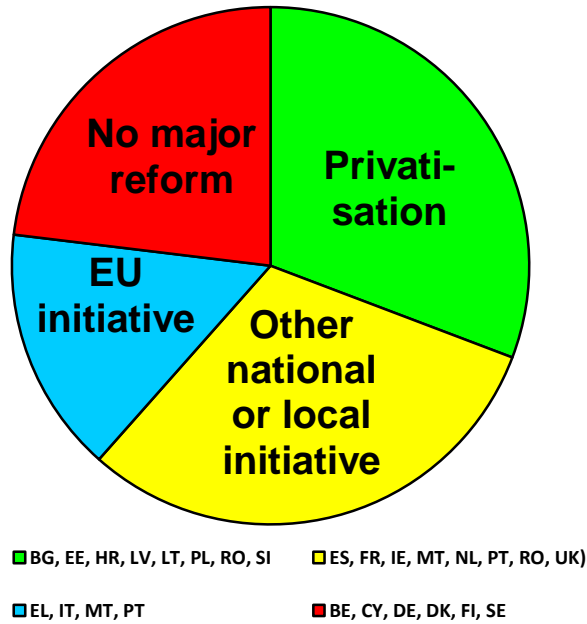
299. Our overview of the evolution of national port labour regimes in Volume II reveals that most specific port labour arrangements in the European Union took their present shape in the 20th century. Over the past 25 years several systems underwent major reform. The great variety of reform measures has resulted in considerable organisational differences between Member States and even between individual ports within the same State. It should also be noted that in several Member States, the port labour system has been modernised under pressure of the European institutions (Court judgments, interventions by the European Commission, voluntary adaptation to EU trends). In some Member States and ports, reform schemes are currently being prepared or implemented (Belgium, Greece, Portugal).

The figure below presents an overall picture of recent developments across the Union. It should be mentioned that several Member States have seen several consecutive reforms, which may have been induced by initiatives at different levels. As a result, some countries appear more than once in the table.

The historical lesson seems to be that major reforms were triggered more often than not by interventions by external parties or fundamental changes of course in national economic policy (European Court cases, interventions by the European Commission, the European Central Bank and/or the International Monetary Fund, privatisation of state economies, and major economic reform measures; in the context of the latter two, EU port policy concepts and trends often provided additional inspiration for national lawmakers, so that the real impact of EU policy is in fact larger than the table suggests). Only in a very few cases was reform driven by 'spontaneous' collective bargaining between the social partners, even if the latter may of course play an important role in the implementation of reform schemes. This finding essentially corroborates an earlier analysis by the World Bank⁶⁸⁶.

⁶⁸⁶ See *supra*, para 125.

Figure 30. Port labour reform schemes in the EU by Member State and trigger, 1987-2013



- Regulatory set-up

300. The analysis of national port labour arrangements shows a considerable variety of employment systems.

First of all, the port workers of the EU are employed by a diversity of employers. Increasingly, port services are provided by private terminal operators holding a lease, concession, licence or authorisation issued by a landlord port authority. In most but not all ports, several terminal operators are in competition with one another. Some workers are still employed by public port authorities (especially, crane drivers, for example in Cyprus, to a limited extent also in Belgium, Denmark, Finland and France) or by commercial service providers controlled by a state-owned entity (Poland). Yet other port workers are self-employed (Cyprus, Greece, Malta); these workers are mostly united in professional associations, some of which at the same time act as employers of other workers.

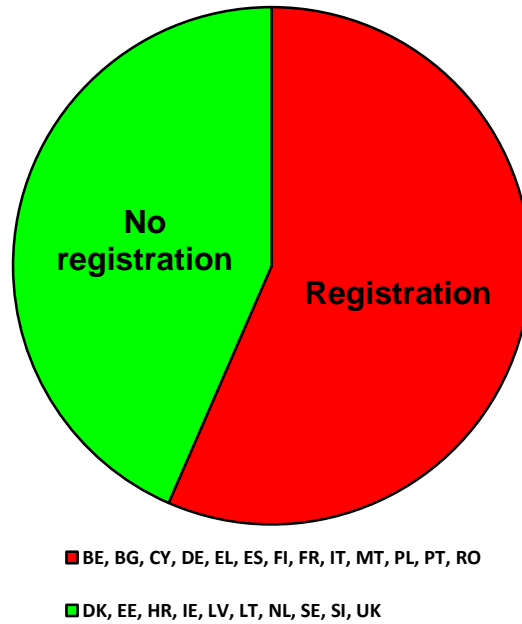
The workers include not only permanent workers employed under an employment contract for an indefinite or a fixed term concluded with an individual employer, but also casual workers employed under specific port labour arrangements who are entitled to unemployment benefit or

a similar payment when they are not working. Next, many ports also rely on more or less irregularly employed supplementary workers (auxiliary or occasional workers, including, in some ports, seasonal workers or temporary agency or interim workers).

301. Port labour arrangements in the EU are extremely varied in terms of the level of regulation. The two extremes in the spectrum are (1) a strictly regulated pool system based on a reservation of market access for authorised operators-employers and an exclusive or preferential right of employment for registered pool workers; and (2) a fully liberalised or deregulated system, where individual port employers are free to select workers, to rely on general temporary work agencies, and where employment is fully governed by general labour law.

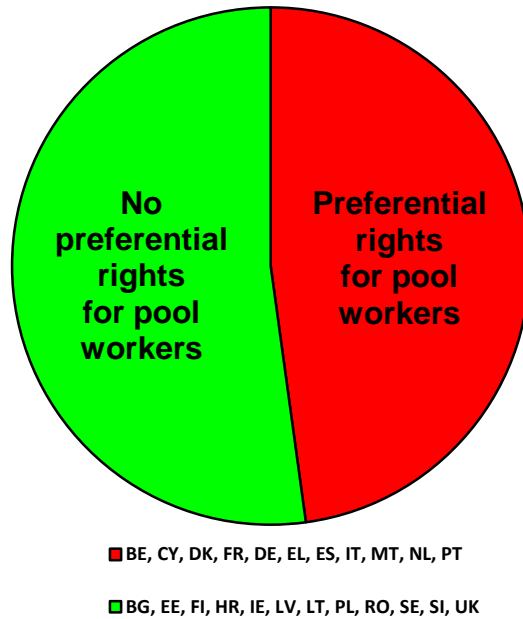
302. Some EU Member States indeed have a regime of registration of port workers, which may be based on either law or agreement, while other countries have no such arrangements at all. In most but not all cases, registration entitles the worker to exclusivity or priority of employment. However, the actual situation is not always as straightforward as the diagram below suggests. In some countries, registration is no longer applied or has fallen into disuse at privatised terminals (Greece, Poland), while in others there is some debate over whether registration actually takes place (Finland, Sweden).

Figure 31. Registration of port workers in the EU by Member State, 2013



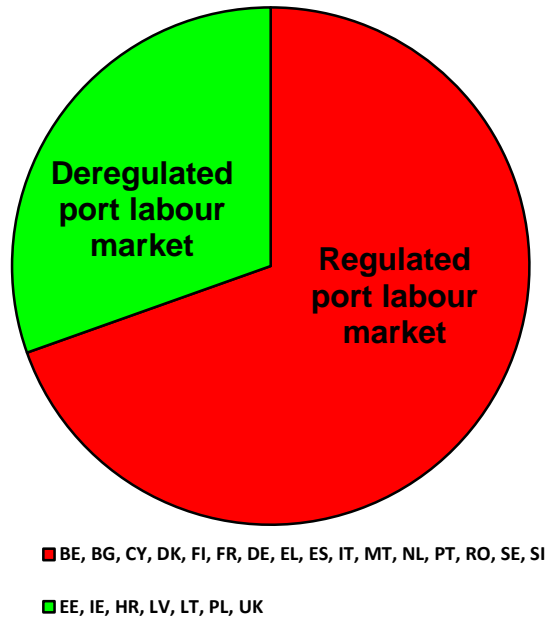
303. The next figure gives an impression of the prevalence of exclusive or priority rights for pool workers. The classification is no less hazardous, as in some countries there are no pools in the proper sense of the word, yet operators grant preferential rights to unionised casual workers (Sweden), and in another country (the Netherlands), terminals rely on preferred workforce suppliers which can be considered commercial successors to a previously existing pool.

Figure 32. Exclusive or preferential rights of pool workers in EU ports by Member State, 2013



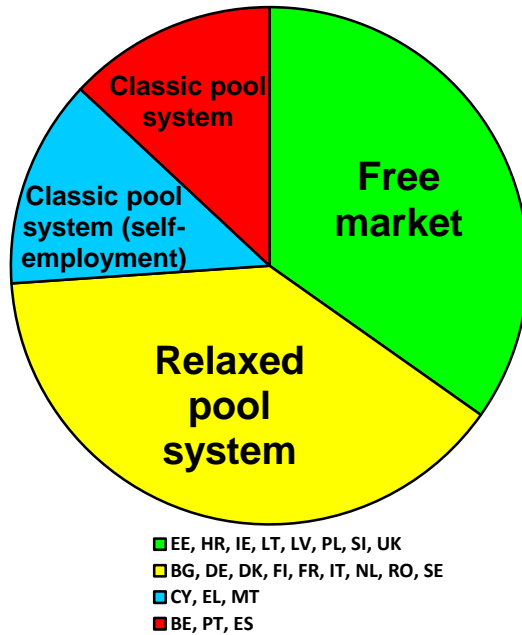
304. Summing up the data gathered above, it is possible to distinguish between Member States with a regulated port labour market and States with an deregulated market. The first category is characterised by the presence of *leges speciales*, registration of workers, preferential rights for pool or otherwise pre-identified workers and/or a service port model. The graph below shows that a large majority of EU States (16 out of 22 or almost 75 per cent) have a regulated port labour market. Needless to say, the epithet 'deregulated' does not imply that employment is not regulated by general EU and national laws and regulations.

Figure 33. Regulated and deregulated port labour markets in the EU by Member State, 2013



305. A further distinction can be made between (1) classic, fully regulated pool or registration systems (of which Belgium, more in particular Antwerp, clearly applies the most rigid system); (2) classic pool or registration systems based on self-employment; (3) relaxed pool or registration systems (characterised by less absolute restrictions or partly liberalised rules); and (4) free labour markets (for the sake of simplification, we have included Slovenia in the latter category although here a considerable number of workers are employees of a publicly owned comprehensive port authority, so the case may also be considered a category in its own right).

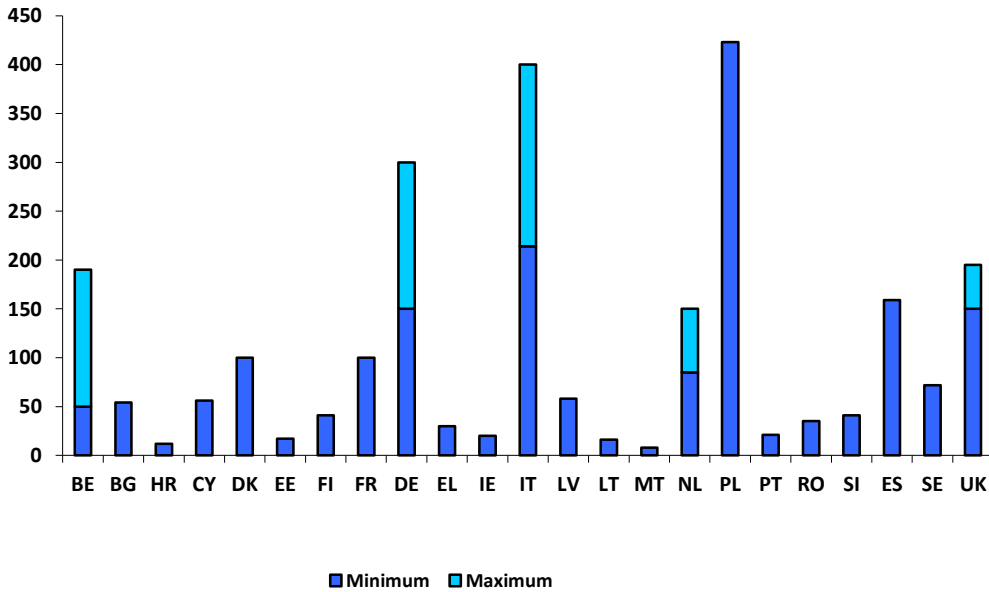
Figure 34. Port labour systems in the EU by category, 2013



- Facts and figures

306. Based on scattered, indeed hardly comparable, data of very uneven quality and reliability gathered in the course of our research, we present below an overview of the number of employers of port workers in EU Member States. One of the main difficulties with these figures is that in some countries they concern regularly active employers or employer groups only, while in others all registered or otherwise formally identified companies are included. In some States, temporary work agencies are counted in, in others not. For all these reasons, the result should be treated with extreme caution, and in our view it does not allow any useful conclusion on the status and characteristics of the employers' side of the port labour market in the EU. Nevertheless, countries with particularly large numbers of employers seem to include Poland, Germany, Italy, the United Kingdom and Belgium.

Figure 35. Estimated number of employers of port workers in the EU by Member State, 2013

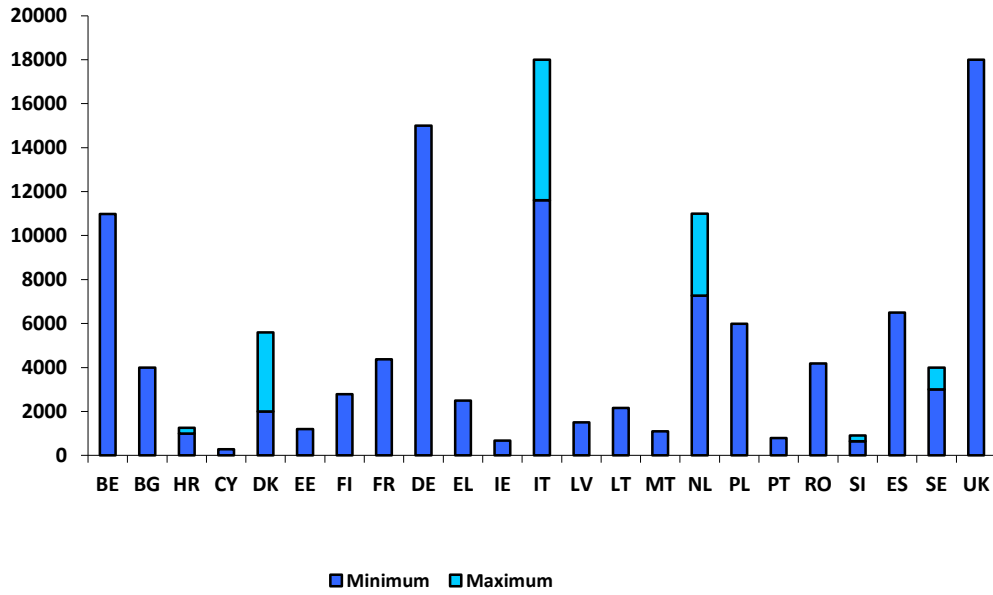


307. The following graph indicates the number of port workers in the EU Member States.

These data are slightly more reliable, as in a number of Member States port workers are individually registered or otherwise separately identified. In most cases, the data do not include temporarily employed occasional workers. In some countries, it was almost impossible to obtain even a fair estimate. Further caution is needed because in some Member States, the figures include warehousing, 'distribution' and/or 'logistics' workers the employment of which is also governed by port labour arrangements. For some countries, it cannot be excluded that some part-time workers were counted in.

According to the graph, the Member States with the largest numbers of port workers are the United Kingdom, Italy, Germany, Belgium and the Netherlands.

Figure 36. Estimated number of port workers in the EU by Member State, 2012



308. Given the wide array of employment relationships, the number of employers of port workers in the 23 maritime Member States of the European Union is extremely difficult to estimate, but it is probably in the order of 2,200. The number of port workers totals around 115,000.

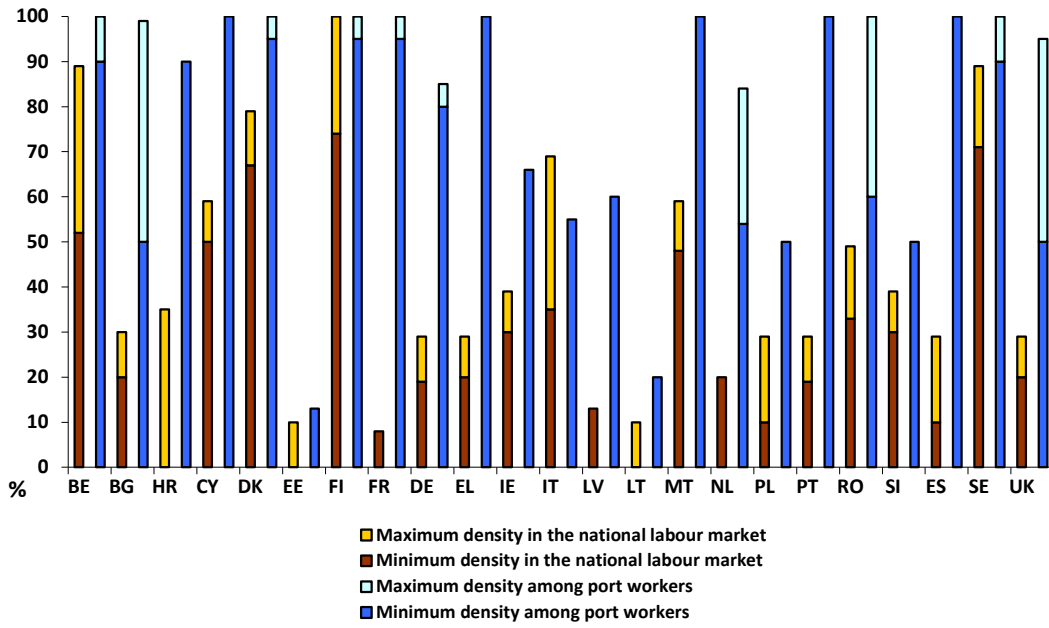
The table below summarises available estimates on the numbers of port employers and port workers in the EU Member States.

Table 2. Numbers of port employers and workers in the European Union by Member State, 2012

Member State	Number of employers	Number of port workers
Belgium	50-190	10,988
Bulgaria	54	4,000
Croatia	12	1,000-1,250
Cyprus	56	274
Denmark	100	2,000-5,600
Estonia	17	1,200
Finland	41	2,790
France	100	4,370
Germany	150-300	15,000
Greece	30	2,500
Ireland	20	677
Italy	214-400	11,615-18,000
Latvia	58	1,500
Lithuania	16	2,159
Malta	8	1,100
Netherlands	85-150	7,275-11,000
Poland	423	5,990
Portugal	21	796
Romania	35	4,187
Slovenia	41	640-900
Spain	159	6,500
Sweden	71	2,900-3,900
United Kingdom	150-195	18,000
Total EU	1,911 - 2,497	107,571 - 122,681

309. Finally, we can provide rough estimates of trade union density among port workers as compared with the situation in the labour market as a whole. It goes without saying that these data, too, should be used very carefully, because official data on union membership are unavailable and in many cases indeed kept strictly confidential. As a result, none of the percentages provided below could be verified by us. Even so, one significant conclusion emerges from this table, namely that – despite local signs of declining membership – in (almost) all countries union density among port workers is still higher than the average and often reaches very high percentages (between 90 and 100 per cent).

Figure 37. Estimated trade union density among port workers and all employees in the EU by Member State, 2013

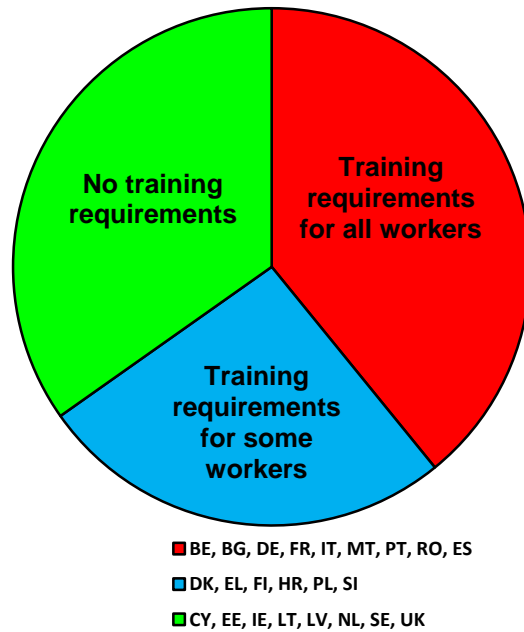


7.4. Qualifications and training

310. As far as qualification and training systems are concerned, the data collected proved to an extent incomplete, ambiguous and/or inconsistent. Not only may errors may have crept into the synoptical diagrams below, but they also ignore the fact that training arrangements can vary from port to port, and that in some States several organisational models are combined. At any rate, the overall picture is again very diverse.

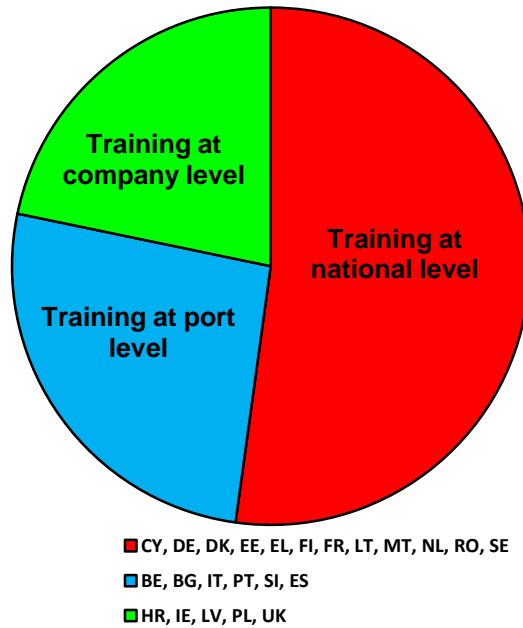
311. The figure below indicates the extent to which national training requirements are in place. In a first group of countries, all port workers must be specifically trained under either legal, contractual or factual requirements. Existing legal requirements do not seem in all of these States to have been fully implemented. In a second group of States, equipment operators such as crane drivers must obtain a special training certificate (which is often governed by non-port specific regulations; we should add that our data are probably incomplete in this respect). Finally, there are States where no training requirements seem to apply (except health and safety training as required under general laws and regulations on occupational health and safety). It goes without saying that the diagram gives no indication on either the substance of applicable requirements or the actual intensity and quality of training courses.

Figure 38. Specific training requirements for port workers in the EU by Member State, 2013



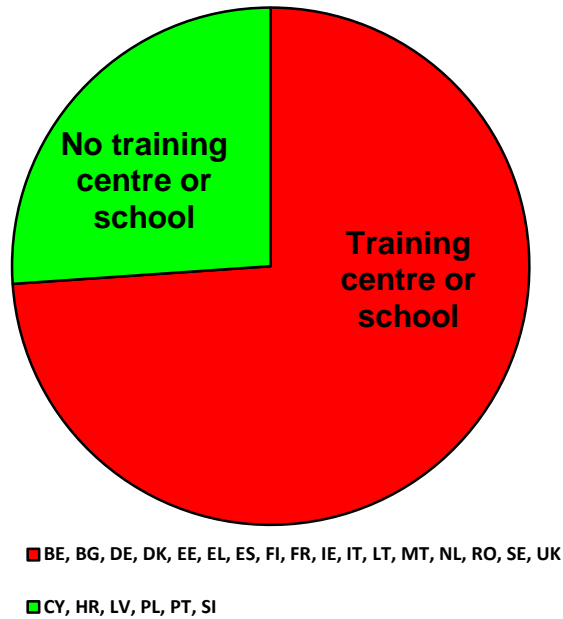
312. The next figure shows the level at which specific training for port workers is practically organised. In a majority of Member States, training is organised by institutions at national level, while in others the centre of gravity is the port community or the individual employer. Again, the diagram seriously oversimplifies the situation. The first group includes, for example, countries where training is organised *ad hoc* by a national ports authority as well as countries where a port training school located in a major port caters for the training needs of employers in different ports, and countries where a variety of training providers is operating without being linked to one specific port. The second group comprises countries where the focus is on training arrangements for the local port community, but here too, a local training centre may offer its services to other ports. In the third group, the bulk of responsibility is on individual employers but this does not prevent the provision of training for workers in more than one port either. To avoid confusion, the diagram does not indicate whether there are limitations on access to the market for the provision of training services.

Figure 39. Geographical level of specific training provision for port workers in the EU by Member State, 2013



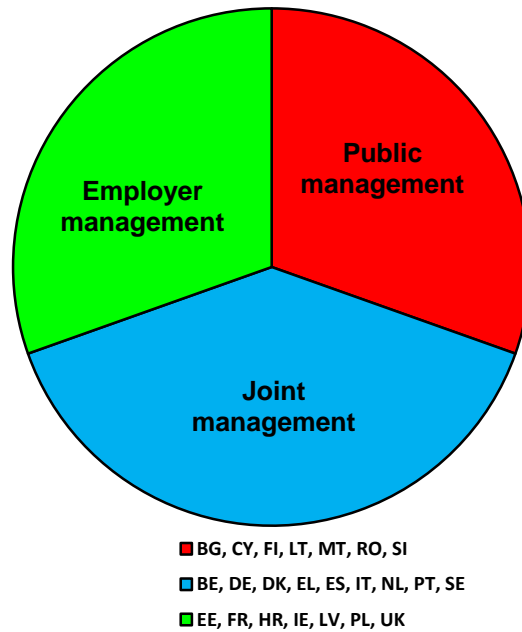
313. The following diagram distinguishes between those countries where training for port workers is organised in an educational institution, school or training centre (regardless of whether this entity deals with port training only or also with other programmes), and countries where no such entity seems to exist. Needless to say this diagram should also be interpreted with particular caution given the wide range of possible arrangements and combinations. In the first group, we have included, for example, countries where an educational institution offers bespoke training courses but where in practice training is mainly if not solely organised by individual employers. The same group includes cases where we were informed that training is only available in general schools but were unable to verify to what extent this education focuses on port labour. The diagram again ignores the fact that in several Member States (for example, in Denmark, Greece, Poland and the UK), global container terminal operators organise well-structured in-house training.

Figure 40. Existence of port worker training centres or schools in the EU by Member State, 2013



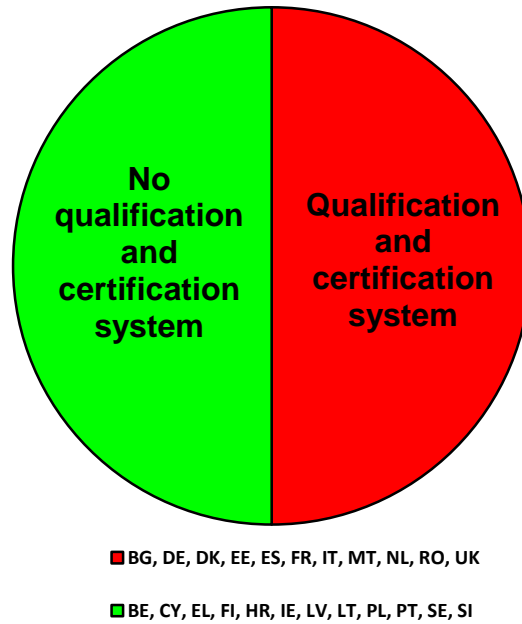
314. Whether port worker training is mainly managed by (1) the State, a public agency or a port authority, (2) jointly by employers' and workers' organisations, or (3) by employers or employers' organisations is summarised in the next diagram. Again, we had to simplify the situation as some countries rely, for example, on both a jointly managed school and on private training providers. In other States, training is organised by port authorities as well as by labour pools. The few cases of tripartite management were grouped under the first category. Countries where training is organised by a worker-controlled labour pool are classified in the second group, and States where training centres were set up by industry organisations can be found in the last group. For some States, we could not verify the scant information obtained.

Figure 41. Public, joint and employer management of training for port workers in the EU by Member State, 2013



315. Finally, we can distinguish between EU Member States where national (either legally imposed or voluntary) national qualification and certification systems are in place for all port workers, and States where no such system has been developed (or only for specific jobs such as equipment operators). The diagram below should be treated with caution because in some States the certification system is not yet fully operational. The diagram ignores the existence of qualification and certification requirements for specific functions such as crane operators. Nor does it indicate whether the system allows or promotes multi-skilling.

Figure 42. Availability of national qualification and certification system for port labour in the EU by Member State, 2013



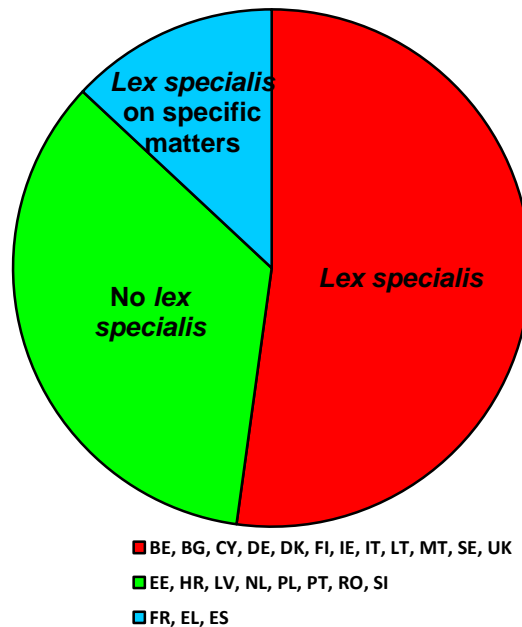
Belgian law imposes attendance on training courses before workers can be registered (Bulgaria has similar legal provisions but their implementation is unclear). Ports in Denmark, France, Germany and the United Kingdom rely on a non-legally binding yet sophisticated national vocational qualifications and/or certification system. In a number of ports, the right to training is enshrined in collective agreements.

7.5. Health and safety

- Regulatory set-up

316. As regards the legal arrangements on occupational health and safety in port labour, we can again distinguish between those Member States which have enacted port labour-specific laws and regulations, and those which solely rely on general occupational health and safety laws. To avoid confusion, in the former States general rules apply as well, and the *leges speciales* for the port supplement the general framework. The category of States with *leges speciales* on specific matters comprises States which have enacted, for example, special rules on the handling of dangerous goods. The graph indicates that a majority of EU Member States still have specific laws and regulations on occupational health and safety in port work.

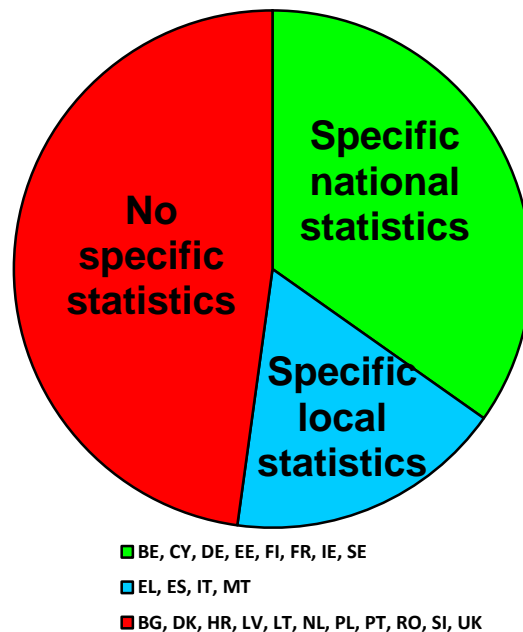
Figure 43. *Leges speciales on health and safety of port workers in the EU by Member State, 2013*



- Facts and figures

317. First of all, we have tried to assess the availability of specific statistics on the frequency, incidence and severity of occupational accidents at cargo handling companies and/or involving port workers. The table below rests on a simplification in that specific statistics on port labour maintained by Member States (1) may be based on different classifications or codes of branches and occupations ('cargo handling', 'port worker', etc.); (2) show very diverse levels of detail; and (3) are mostly difficult if not impossible to compare. Locally maintained statistics may cover one port or even one terminal only. Countries which do not maintain port labour-specific data may have statistics on, for example, water transportation, cargo handling regardless of the transportation mode, or transportation and warehousing in general. The graph below highlights that only a minority of EU Member States do maintain national port labour-specific statistics.

Figure 44. Availability of specific statistics on occupational accidents involving port workers in the EU by Member State, 2013



318. Even in the absence of complete and comparable data, it seems safe to conclude that port labour is one of the most dangerous occupations in the European Union. Detailed statistics for countries such as Belgium, Cyprus, France, Germany and Italy justify the presumption that,

even if the safety record has considerably improved over the past decades, the frequency and severity of accidents involving port workers remain among the highest in the economy.

7.6. Policy and legal issues

- Implementation of ILO instruments on dock work

319. We identified serious issues in relation to the implementation of ILO instruments on port labour in the EU.

Firstly, only 8 out of 23 Member States are today bound by ILO's central Dock Work Convention No. 137 which requires registration of port workers. Within the ILO, the Convention is firmly rejected by most employers' organisations, and today it only enjoys 'interim status' at ILO level. One EU Member State (the Netherlands) denounced the Convention, and recent attempts in other countries to start the ratification process failed (Belgium, Greece). What is more, the often heard claim by ILO that the Convention has served its purpose anyway, because it inspired many non-Contracting Parties to set up a registration system along its lines⁶⁸⁷, is certainly not valid for the EU as very few, if any, Member States seem to have introduced such arrangements after they ratified the Convention. On the contrary, among the 8 EU countries still bound, most have since relaxed their port labour laws, or are no longer observing the Convention's provisions (see especially developments in France, Italy, Poland, Portugal, Romania and Sweden). Although in 2004 the European Commission was still inviting the Member States to ratify the Convention and today trade unions in several Member States trade unions continue to advocate such a step, it seems that over the past years the instrument has lost much of its appeal in the European Union.

An additional problem with the Convention is that the underlying New Deal between employers and workers, which entailed, *inter alia*, the abolition of unnecessary restrictions, has in many EU Member States not materialised at all.

Similar conclusions are warranted in relation to ILO Convention No. 152 on health and safety in dock work. In the EU, only 9 out of 23 Member States are bound by this instrument. More worryingly, 7 Member States are still bound by its predecessor, ILO Convention No. 32 of 1932, which has long been considered officially outdated by the ILO. This situation does not lend those Member States' policies in relation to health and safety in port labour any additional credibility, nor does it enhance the aura of ILO initiatives in the field of dock work.

Finally, even if we did not specifically examine the impact of ILO guidance instruments on employment, training and health and safety, in only a disappointing number of instances did EU Member States report to us that they had taken specific measures to implement these international norms. One cannot avoid the impression that the impact of ILO soft law in relation to port labour is rather limited, which is regrettable as these rules certainly deserve serious interest from all public and private parties concerned.

⁶⁸⁷ See *supra*, para 147 *et seq.*

From a technical legal perspective, we could identify no apparent *a priori* incompatibilities between ILO instruments on dock work and EU law. If the assumption that both regimes can be reconciled is correct, Article 351 TFEU on the interrelation of international treaties and EU law would not even be relevant. This is not to say, however, that every national implementation measure or practice based on the ILO instruments will automatically be in conformity with EU requirements. As we have concluded above⁶⁸⁸, the maintenance of a restrictive pool or registration system can only be justified under EU rules if the general interest and especially the social protection of workers demonstrably require such an exceptional labour market set-up, if the system is non-discriminatory and fully compatible with human rights, if restrictions on access to the market for the provision of workforce are proportionate and do not go beyond what is necessary in order to attain the public interest objective concerned, and, more specifically, if the system is kept free of any additional restrictions on employment, restrictive working practices and abuses.

Finally, the ILO Conventions on port labour in all likelihood do not amount to a confirmation of any unwritten international customary law in the field of port labour (at least not in Europe). As a consequence, it would be impossible to argue in any serious manner that the principles reflected in these instruments are also binding on non-Contracting EU States.

- Restrictions on employment and restrictive working practices

320. Our synopsis of the sources of law and the regulatory set-up of the port labour market in EU Member States already suggests that serious restrictive rules continue to prevail. The graphs on the existence of registration, preferential pool systems and special laws and regulations on port labour which we showed above⁶⁸⁹ indicate that, roughly speaking, more than half of the Member States continue to apply a restrictive port labour regime.

321. More concretely, in a considerable number of EU Member States and ports, one or more of the following restrictions on employment prevail:

- compulsory membership of labour pool for service providers;
- exclusive right of labour pool to supply (all or some) workers;
- mandatory registration of port workers;
- compulsory membership of trade union (closed shop);
- compulsory appointment or nomination of pool members, employees or registered workers by trade union (closed shop);

⁶⁸⁸ See *supra*, para 233.

⁶⁸⁹ See *supra*, para 302 *et seq.*

- preferential shop (priority of engagement for unionised workers);
- privileges for relatives of workers (nepotism);
- specific training and/or qualification requirements;
- special or discriminatory minimum age requirements;
- language skills requirements;
- lack of transparency in definition of (territorial or functional) scope of exclusive rights or other restrictions;
- extension of territorial scope to dry areas beyond ship/shore interface;
- extension of the scope of restrictive rules to logistics work;
- lack of transparency in granting of membership, employment, nomination or registration of workers;
- limitation of the number of pool or registered workers;
- impossibility of scaling down the pool or to deregister workers;
- prohibitions or restrictions on subcontracting between port operators;
- prohibitions or restrictions on the supply of workers by temporary work agencies;
- overmanning resulting from mandatory manning scales;
- decision on manning levels taken by public authority and/or unions;
- strict demarcations between jobs (exclusive or preferential rights of subgroups; ban on multi-skilling);
- compulsory classification of workers in one shift only;
- prohibition or restrictions on self-handling;
- prohibition or restrictions on permanent employment contracts (including minimum or maximum percentage of permanent employment);
- restrictions on access to handling services market (exclusive rights or limitation of number of authorised operators, either legal or factual);
- compulsory financial contributions to, or shareholder status in, the pool agency;
- exclusive right of pool to provide training (prohibition or restrictions on market access for other training providers);
- inefficiency of sanctioning system ('job for life', often caused by conflict of interest of trade unions sitting on board of sanctioning committee or similar);
- ancillary restrictions on conditions of permanent employment at individual operators (for example, in relation to job promotion).

322. Furthermore, in a number of Member States and ports instances of restrictive working practices were found. These include, for example:

- limited working days and hours;
- non-respect of official working hours;
- restrictions on the use of new cargo handling technologies.

The diagram below summarises (only partly verified) information submitted by stakeholders on the occurrence of restrictive working practices.

Figure 45. Reported occurrence of restrictive working practices in port labour in the EU by Member State, 2013



323. As a rule, the identified restrictions substantially increase costs, affect productivity and efficiency, act as a barrier to the creation of jobs and/or impact negatively on the competitive position of the port. In several Member States, we found cases where traffic flows shifted to other ports as a result of restrictive port labour arrangements. But we also detected examples where employers were not overly concerned about the additional costs as they controlled a captive market or enjoyed an individual or either collective monopoly and could charge almost any sum to shipowners or locally established industries. In addition, it does happen that major international customers such as global shipping lines or industrial conglomerates prefer to abide by local idiosyncrasies (and high tariffs) rather than disrupt their global sailing schedules or supply chains. In other ports where fewer restrictive practices survive, these are not always seen as major competitive issues. Several ports declared themselves restriction-free.

324. However, not all restrictions are *a priori* incompatible with EU law. As we have explained in the general EU chapter above⁶⁹⁰, certain restrictions on the fundamental freedoms may indeed be considered justified either (1) on the strength of specific treaty exceptions such as

⁶⁹⁰ See *supra*, para 220 *et seq.*

official authority functions, public policy, public security or public health, or (2) if applicable conditions (including proportionality and non-discrimination) are met, on other reasonable grounds such as social protection (*rule of reason*). In the context of competition law, derogations are less likely to apply.

Our inventory of restrictions above is not intended to express any judgment on whether ultimately such situations are compatible with EU law or not. However, in many cases serious doubts are warranted in the light of available case law⁶⁹¹. It should also be clear that the traditional character of restrictions cannot in itself be considered a sufficient justification. Depending on the circumstances of the case, the responsibility for infringements will rest with the Member State, the employer or port operator, an employers' organisation, a pool agency or even the union(s).

325. As we have indicated⁶⁹², the persistence of restrictions in many EU ports throws additional doubt on the effectiveness of ILO Convention No. 137, which rested on a supposed New Deal between employers and workers to adapt to new technologies but also to do away with traditional restrictions⁶⁹³.

326. In a number of Member States and ports, employers complain about closed shop issues and, generally, an extremely strong bargaining position and high militancy of trade unions. Practically speaking, trade unions often control access to the labour market for newcomers, or have a veto right with which they can prevent the imposition of sanctions upon registered workers in the case of misconduct. The casual nature of employment and the ineffectiveness of the sanctioning system prevent employers from exercising normal authority over pool workers. Many employers feel powerless against the constant threat that their operations will be disrupted through work stoppages, while their clients insist that their ships must never be blocked as a result of industrial action. In a number of ports, the closed port labour pool is seen as a power base for the unions. Finally, we can confirm the validity for the EU of S. Harding's finding that the privileged position of trade unions in ports may result finally in a negative attitude towards the port workers on the part of the general public and on the part of the other unions⁶⁹⁴. In some Member States, perceived privileged employment conditions in ports, exorbitant union demands and the frequency of strikes have aroused popular anger.

⁶⁹¹ For an overview, see *supra*, para 186 *et seq.* We found few, if any, cases where a monopolistic pool is allowed to compete with its clients in a neighbouring market (*Raso* situation), except perhaps where a port labour pool competes in the logistics sector. On the other hand, in several cases the pool monopoly is extended to neighbouring markets (especially training services).

⁶⁹² See *supra*, para 319.

⁶⁹³ See *supra*, para 123.

⁶⁹⁴ Harding, S., *Restrictive Labor Practices in Seaports*, Washington, World Bank, October 1990, http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1990/10/01/000009265_3960929231915/Rendered/PDF/multi_page.pdf, 14, para 35.

But in other Member States and ports, trade unions complain that they have no say whatsoever and are prevented from defending workers at individual companies, that employers refuse to conclude company-specific or port-wide collective agreements and that workers are exploited at sub-standard wage and labour conditions.

The figure below indicates in which Member States possible closed shop situations may deserve further attention. To avoid misunderstanding, we do not assert that closed shops actually arise in these countries and their ports; the graph merely identifies Member States where we found indications that a possible legal and/or factual obligation to join a trade union might usefully be reassessed by competent authorities and social partners. What is more, the situation may differ from port to port and even within one port. In Member States classified as closed-shop free, union membership may locally still be a prerequisite to become a port worker, while in the other category of countries there may be terminals where no worker is unionised at all.

Figure 46. Possible occurrence of closed shop situations in EU ports by Member State, 2013



As we have explained above⁶⁹⁵, closed and preferential shop situations in ports but also the denial of trade union rights and refusals to bargain collectively may be at odds with fundamental rights guaranteed at international and European level.

⁶⁹⁵ See *supra*, paras 128 *et seq.* and 230 *et seq.*

327. As we have explained in the general chapter on EU law, language requirements may be justified as a restriction of the free movement of persons when they relate to the linguistic knowledge necessary for the exercise of a given profession in the Member State⁶⁹⁶. A general rule imposing knowledge of the local language may seem disproportionate because what really matters is efficient and safe communication between members of a given team (or gang) of workers, between the competent representative of the workers and the ship's crew and, in those cases where they actually cooperate, between crew members and port workers themselves. To achieve this end, it is not in all circumstances necessary to use the local language of the port⁶⁹⁷. More in particular, it would appear reasonable to assume that today shipboard and shoreside workers in non-English speaking countries and port localities will, in certain circumstances, be able to communicate sufficiently safely in English.

328. Self-handling, which was a particularly contentious issue during the debates over the proposals for an EU Port Services Directive, should certainly not be considered the major issue at EU level. We received no signs whatsoever that ship operators are demanding a general right to handle their ships in EU ports using their own crew⁶⁹⁸. However, in certain cases, mandatory use of port workers causes serious problems and considerable anti-competitive distortions, for example (1) where port workers must be hired and paid to handle special purpose vessels (heavy lift ships) while the work must and actually is performed by the crew; (2) where self-unloading ships and barges call at a port; (3) where certain ship owners are allowed to lash and unlash rolling stock on board short sea ro-ro vessels while competitors are forced to use port workers; or (4) where ship owners wish to operate 24/7 even if port workers are unavailable at certain times.

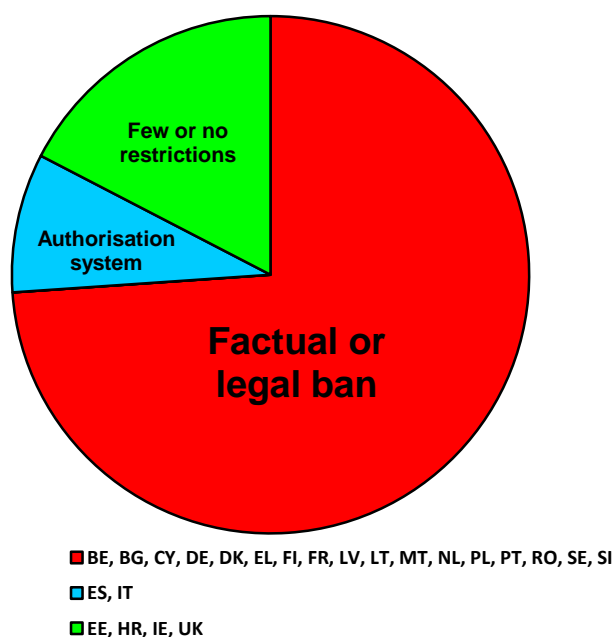
The figure below is a very imperfect attempt at summarising the situation in EU Member States. First of all, prohibitions or restrictions may result from either legal rules or factual conditions, and may not always be absolute. Next, in those few countries (Italy, Spain) where the lawmaker, inspired by EU developments, introduced an authorisation system for self-handling, serious factual restrictions seem to persist, and locally the possibility to grant authorisations has remained a dead letter. In the restriction-free countries, self-handling may not be allowed at all terminals. For these reasons, this graph should not be taken at face value either.

⁶⁹⁶ See *supra*, para 222 on case law and Art. 3(1) of Regulation (EEC) No 1612/68 respectively; compare also Art. 53 of Directive 2005/36/EC.

⁶⁹⁷ Compare the Danish rule mentioned *infra*, para 712.

⁶⁹⁸ We pass over cases of shipowners using their own dedicated port facilities where they employ their own shore-based workers.

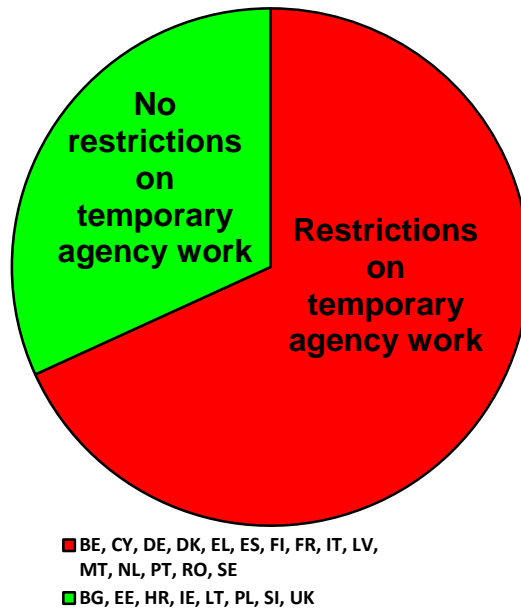
Figure 47. Prohibitions and restrictions on self-handling in EU ports by Member State, 2013



329. In several Member States, employers commonly rely on workers supplied by general temporary work agencies (interim workers), while in other Member States or ports, the exclusive or preferential rights of pools or registered port workers entail a ban on the use of temporary agency workers, to which an exception is sometimes granted in the case of a shortage of pool or registered workers or for specific jobs (for example in logistics). In the latter countries and ports, we noted diverging comments on the need to open up the port labour market to temporary work agencies. Several interviewees, including employers, stated that general temporary agency workers are unsuited for specialised jobs (for example, the operation of gantry cranes or tugmasters), that there is a serious risk that they will cause damage to equipment and cargo, and that port labour pools still offer the advantage of guaranteeing a steady availability of skilled workers. Other stakeholders insist that market access for temporary work agencies would increase flexibility, that the only prerequisite should be adequate skills, and that free competition can help remove restrictive rules and practices. As we have explained above⁶⁹⁹, free market access for temporary work agencies is already regulated at EU level today and certain situations in ports may not pass the test.

⁶⁹⁹ See *infra*, para 225 et seq.

Figure 48. Prohibitions and restrictions on temporary agency work in port labour in the EU by Member State, 2013



330. Restrictions, in particular overmanning, may also impact negatively on the development of shortsea and inland shipping in maritime ports. In several Member States, port labour arrangements are a disincentive to the development of barge traffic, which is then diverted to distant river and canal berths outside port areas. It regularly occurs that substantial volumes of waterborne traffic are shifted to road for the sole reason that disproportionately large gangs of unnecessary port workers have to be hired.

331. In certain ports, mandatory use of registered port workers to work at dry terminals operated by logistics companies is considered a major issue. There are instances of logistics companies which relocated to other ports or to places beyond port boundaries, causing an increase in freight transportation by road.

332. Last but not least, in Member States and ports where port labour is governed by specific laws, regulations and/or collective agreements, the competitiveness of ports is hampered by legal uncertainty, a lack of transparency or even the absence of the rule of law.

While some legal debate seems inevitable wherever a demarcation line has to be drawn between the respective scopes of specific port labour rules and general labour rules, at places legal uncertainty can become excessive, leading to numerous, lengthy and costly legal disputes, arbitrary if not discriminatory joint decisions or agreements by social partners in individual cases, and fundamental uncertainty for prospective investors.

Furthermore, in certain Member States and ports, the port labour system seems to lack elementary transparency. Examples include:

- the wide application of unwritten customs and usages which may take priority over official rules, be implemented in an arbitrary manner, and have serious restrictive effects;
- lack of clear and objective criteria and procedures for the granting of registration as a port worker;
- non-publication of collective agreements and similar instruments setting out restrictions on employment or supporting restrictive working practices which may impact on the position of third parties, especially potential competitors as well as prospective port users and investors.

The lack of an official publication of all applicable employment conditions prevents port users from assessing whether they are being treated correctly and without discrimination. There is no reason why the requirement to publicise all port regulations and tariffs, which has been a fundamental principle since the adoption of the International Statute of Maritime Ports of 1923⁷⁰⁰, should not be transposed to the port labour market. In addition, transparency is a general requirement of EU law.

Finally, our survey of port labour regimes revealed cases where applicable laws and regulations are blatantly ignored and where trade unions, through industrial action, impose illegal practices at individual companies. In several ports, authorisation schemes for self-handling introduced in line with EU policy trends remain a dead letter. In extreme situations, companies are forced to hire and pay registered port workers even if applicable laws and regulations do not oblige them to do so.

333. Notwithstanding the above, there are also ports which rely on a highly regulated pool system yet succeed in operating very efficiently. Apparently, the wide acceptance of these monopolies rests on the absence of any ancillary restrictions or restrictive working practices, and on a constructive cooperation between employers and unions (Germany). It should also be highlighted that an increasing number of Member States and ports have successfully eradicated most if not all restrictions and opened their markets for the provision of port services and of

⁷⁰⁰ See Art. 4 of the Statute on the International Regime of Maritime Ports, attached to the Convention signed at Geneva on 9 December 1923.

workforce to new entrants (Ireland, United Kingdom). As a rule, such measures have improved the competitiveness of ports and generated growth. Recently, several national governments announced a further modernisation of their port labour system. On the other hand, reform often seems a step-by-step process. Some hard-won improvements only had or have a partial or limited effect on restrictions.

334. We also received a limited number of complaints by unions about social dumping practices in certain ports. In most cases, these complaints relate to job insecurity, low pay rates or undeclared work. Some employers retorted that such allegations are no more than union rhetoric and that all workers in the EU are protected by EU and national labour laws. Although we did not focus on this aspect, we found ample evidence that in some ports wage levels for port workers are relatively high and above the average for comparable jobs in other sectors, with cases of extremely high salaries for certain job categories. On the other hand, the EU has identified the increasing use of atypical employment contracts as a major policy concern for the EU, and there is no reason to assume that these problems will not equally occur in the port sector.

In sum, pay rates and working conditions seem to differ considerably between Member States. Of course, this is also a general problem of EU economic and social policy, which is well beyond the scope of our study.

- Qualification and training issues

335. The type and intensity of training arrangements for port workers is extremely varied across the EU. Common national training programmes and curricula are rare. Not every Member State considers port labour a regulated profession access to which should be subject to the possession of specific professional qualifications. In some Member States, training for port workers is regulated by law and/or collective agreement, while in others it is entirely left to the discretion of the individual employer. In rare instances (Germany), the training scheme for port workers is geared to the European Qualifications Framework. In a substantial number of countries (France, UK, shortly the Netherlands), the authorities or the sector elaborated a national qualification and certification framework. Some national laws and regulations expressly confirm the principle of mutual recognition of competences acquired by port workers in other Member States. All these differences in training arrangements seem to contribute to a low frequency of job mobility among port workers, even between ports within the same Member State.

336. A number of ports, pools, companies and training institutions offer extensive training courses for port workers belonging to different job categories. A few renowned training providers offer their services to port employers based outside the EU. Many companies consider proper training of workers essential in order to prevent damage to expensive specialised port equipment and cargoes. Collective agreements may also impose duties on employers to provide training. A few cases were reported where social partners or workers' pools maintain an exclusive right to provide training at their own vocational school, denying access to competing providers.

337. In some cases, training is attended on a voluntary basis, while other programmes are compulsory. The latter also include certification for drivers of port equipment. But even here, no uniformity exists.

338. In some ports and companies, workers are encouraged to acquire certifications for different jobs (for example, Germany, the Netherlands, Portugal, Spain), but in other places multi-skilling remains impossible as a result of strict job demarcation rules.

339. Some individual employers find it unattractive to invest in training of casual workers. In one Member State, employers and unions introduced a new national training scheme in an overt attempt at preventing self-handling by ship's crews. Locally, issues have arisen in relation to insufficient training provided by temporary work agencies active in ports.

340. Finally, the qualifications and certification issue cannot be detached from the debate on the need to maintain registration systems which ensure priority of employment for registered (pool) workers.

In 1999, Harry Barton and Peter Turnbull questioned why the European Commission still regarded labour regulation in ports as simply a 'rigidity', citing in particular the registration of port workers and the existence of labour pools. They argued that such provisions are still extensive in the EU, even among the most efficient ports in Europe, which suggested, *prima facie*, that employers derive significant benefits from such arrangements. For these authors, registration of port workers is in fact part of a process of 'certification' or 'professional status' granted when the docker has demonstrated a particular level of technical competency. As a result, registration schemes not only control aggregate labour supply, and if they operate effectively prevent any persistent shortages or surpluses of labour, but also ensure a supply of suitably qualified workers. If these workers can be hired as and when required from a regulated labour pool, jointly financed by the employers (with possible contributions from users and/or

the state), then the employer can secure significant cost savings. Equally important, regulation provides an element of employment security for dockworkers, typically via provisions for guaranteed income and/or hours of work, which is crucial to employee welfare, human dignity and organisational commitment⁷⁰¹.

However, not everybody seems to agree with this analysis. In his 1979 treatise on port management, Jean-Georges Baudelaire first of all pointed out that, traditionally, rules on registration of port workers rarely imposed any objective conditions on access to the profession, in some cases even not medical fitness⁷⁰². The thesis that ILO Convention No. 137 requires that private port operators only employ "qualified or recognized dockworkers"⁷⁰³ is not entirely convincing either, as the main purport of this instrument was to ensure stability of employment for either permanent or registered casual port workers (even if, additionally, it requires that vocational training be organised)⁷⁰⁴. Paradoxically, under some highly regulated pool systems workers are both registered and well trained but cannot acquire certificates attesting their professional competencies. Be that as it may, our investigation into current port labour regimes in the EU indicates that most (but not all) 'classical' registration systems are under fire and that many port operators are looking for alternatives yet attach great attention to proper training and competencies.

At an ILO meeting in 2002, the French Government representative said that the emphasis should shift from the notion of registration to objective professional qualification criteria recognised by an international standard. This is all the more important since cargo handling has become a task requiring greater qualifications in view of the development of handling techniques, based on increasingly expensive machinery. This evolution implies additional training needs⁷⁰⁵. At the same meeting, employers argued that in the 21st century, port labour requires constant learning, adaptation and the acquisition of new skills to keep pace with emerging technologies, new methods of operation and new forms of workplace organisation that place more responsibility on individuals at all levels of an organisation⁷⁰⁶.

It seems that today many workers' organisations are welcoming the introduction of objective qualification and certification arrangements. In several Member States, the social partners

⁷⁰¹ Barton, H. and Turnbull, P., *Labour Regulation and Economic Performance in the European Port Transport Industry. Full Report of Research Activities and Results*, Cardiff, Cardiff Business School, May 1999, www.esrc.ac.uk, 27.

⁷⁰² Baudelaire, J.-G., *Administration et exploitation portuaires*, Paris, Eyrolles, 1979, 344.

⁷⁰³ Turnbull, P., *Social dialogue in the process of structural adjustment and private sector participation in ports: A practical guidance manual*, Geneva, International Labour Organization, 2006, <http://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/Portoolkit/Toolkit/reference/ILO%20port-s-socdialguidelines.pdf>, 18.

⁷⁰⁴ Compare also *infra*, para 883.

⁷⁰⁵ International Labour Conference (Ninetieth Session, 2002), No. 28, Part One, *Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations. Report of the Committee on the Application of Standards*, Provisional Record, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/pr-28p1.pdf>, 28, para 137; see already *supra*, para 44 *et seq.*

⁷⁰⁶ See International Labour Conference (Ninetieth Session, 2002), No. 28, Part One, *Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations. Report of the Committee on the Application of Standards*, Provisional Record, <http://www.ilo.org/public/english/standards/reIm/ilc/ilc90/pdf/pr-28p1.pdf>, 28, no. 138.

indeed found common ground on these matters. Today, thousands of European port workers already possess modern professional certificates. The debate on whether these qualification and training systems should be open to every candidate for a job in the port, whether access to the profession should be legally reserved for certificate holders and whether this needs EU regulation remains open.

- Health and safety issues

341. Generally, it seems that sufficient legal instruments to guarantee health and safety of port workers are available in the Member States of the EU. However, there is a clear contrast between the regulatory approaches of individual States. Some States and ports continue to rely on specific and prescriptive – in some cases hopelessly outdated – safety regulations for port labour, while others resort to the introduction of soft law standards (Guidelines or similar). Yet other Member States have abolished every port-specific safety regulation and only apply general rules on occupational health and safety. In many countries, health and safety is further regulated by collective agreements or other jointly adopted instruments. As we have explained, no fewer than 6 EU Member States remain bound by the fundamentally outdated ILO Convention No. 32.

342. In the context of maritime policy and especially with a view to enhancing safety of ships and their crews, several IMO and EU instruments recommend if not impose the organisation of safety training for port workers engaged in the handling of dangerous goods, stowage and securing, and the loading and unloading of solid bulk vessels. But no such training requirements have been adopted for port labour as such, or with a view to the health and safety of the port worker.

343. As we have explained, port labour (or cargo handling in ports) is not identified as a separate economic activity or occupation under available international and European standard classification systems. As a result, no EU-wide statistics on occupational health and safety in port labour can be provided. The European Statistics on Accidents at Work (ESAW) do not yield relevant data either. National codes are highly diverse and not every Member State has identified port labour or cargo and passenger handling in ports, or the profession of port worker, as a separate item for statistical purposes. In the absence of detailed and uniform data for all Member States, it is currently impossible to provide a clear insight into the safety level of port labour in the EU as a whole or to formulate any substantiated conclusion.

344. In several Member States, workers' organisations consider the lack of detailed statistical data on accidents among port workers a major issue, especially where official authorities deny that port labour is today a particularly dangerous or strenuous profession which needs specific health and safety regulation. In the absence of precise and reliable statistics and in the light of anecdotal evidence on the frequency of accidents and illnesses, unions say that such an approach is unjustified (United Kingdom).

345. As we have mentioned, scattered data collected in the course of our research confirm that the frequency, incidence and severity rates of occupational accidents involving port workers are very high and often significantly above levels in other comparable sectors.

346. Of course, a high standard of health and safety cannot be ensured by laws and regulations alone. To an extent, safety risks are increased by insufficient risk prevention management by employers, lacking safety awareness on the part of the workers ('machismo') and overmanning. In some Member States, the Labour Inspectorate is said to neglect the port sector due to staffing problems or wrong priorities. Under Directive 89/391/EC on safety and health of workers, Member States have a duty to ensure adequate controls and supervision. In addition, ILO Recommendation No. 145 requires that adequate labour inspection services be organised in ports (Para 31). Meanwhile, several observers insist that there is nothing exceptionally dangerous about port labour, the only specificity being that many occupational hazards come together in port work⁷⁰⁷.

347. Trade unions tend to legitimise exclusive rights of labour pools and registered workers and other restrictions by referring to special safety risks. However, it appears that the national and local legal arrangements which underpin these employment systems are in some cases not based on safety objectives at all, or that they only deal with safety as a subordinate element. Many employers are skeptical about the continuous reference to safety arguments by workers and their unions. Allegedly, these arguments are defeated by the right of employers to use totally untrained occasional workers in the event that no registered workers are available and by the non-application of safety standards to other types of workers who are also allowed to work in ports. Here, not only a discrimination issue may arise, but also a possible infringement of Directive 89/391/EC on safety and health of workers which obliges every employer to ensure adequate training in health and safety matters. Rhetoric also played a key part in one Danish case where port workers claimed an exclusive right to perform lashing on board ro-ro vessels

⁷⁰⁷ Statement by Brenda O'Brien of the European Agency for Safety and Health at Work at the European Ports Policy Review Conference 'Unlocking the Growth Potential' in Brussels on 25 September 2012; compare the observations reported *infra*, para 495.

even if not one worker had ever carried out such work before while the shipowner regularly used its crew for lashing work in other ports of the country⁷⁰⁸.

⁷⁰⁸ See *infra*, no. 714.

7.7. Appraisals and outlook

- Appraisal by stakeholders

348. In the course of our study, we tried to inventory opinions of directly concerned parties on the merits and inadequacies of national port labour regimes. The figures below provide an overview of our findings, but for several reasons their validity is very limited. First of all, our study was not intended to be a poll, but a mainly qualitative investigation undertaken from a legal perspective. In addition, many stakeholders only spoke out in veiled or diplomatic terms, some declined to comment, and while some appraisals rested on detailed accounts of employment conditions, others remained extremely succinct, if not superficial. As the reader will notice in the country chapters in Volume II, we were often confronted with rhetoric (from both sides), and many statements were hard to interpret or verify. In some countries a very limited number of stakeholders responded to our questionnaire or accepted invitations for interviews. For all these reasons, the substantive appraisals of the current labour regimes in the individual country chapters above should carry greater weight than the graphs below. Even so, the latter are broadly indicative of the widely diverging judgments of the current labour systems in EU ports, and of the presence of a certain number of problems.

Figure 49. Overall appraisal of national port labour regimes in the EU by employers, by Member State, 2013

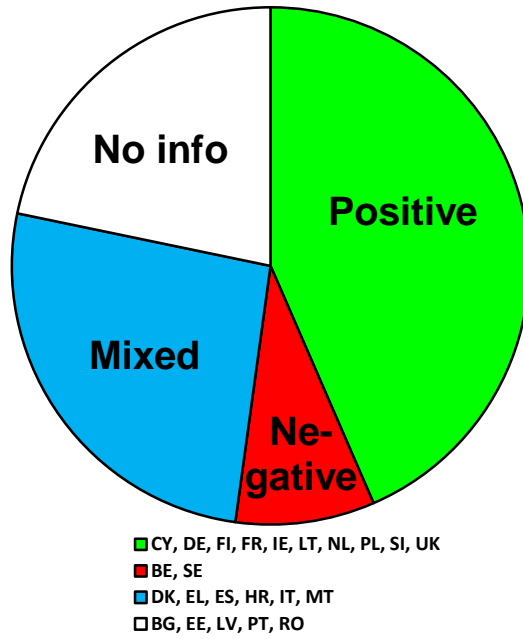


Figure 50. Overall appraisal of national port labour regimes in the EU by trade unions, by Member State, 2013

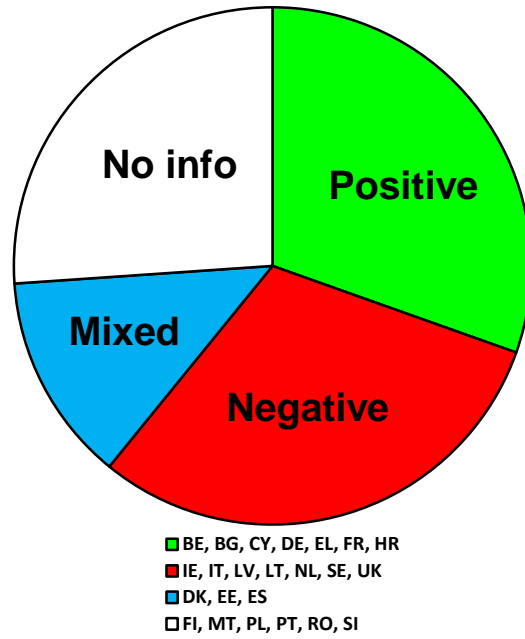


Figure 51. Overall appraisal of national port labour regimes in the EU by port authorities and national administrations, by Member State, 2013

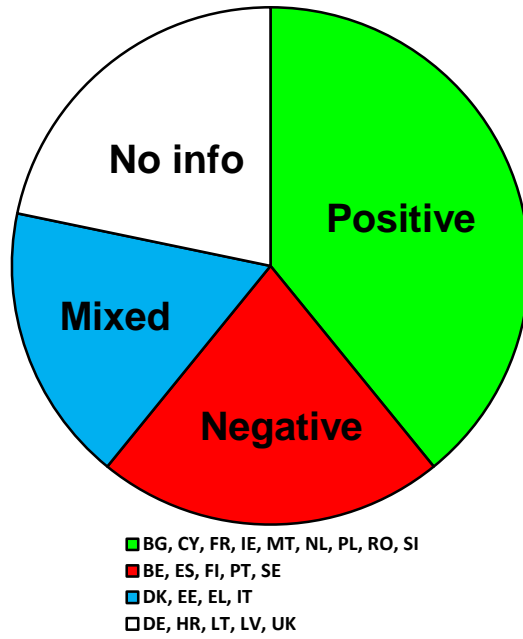
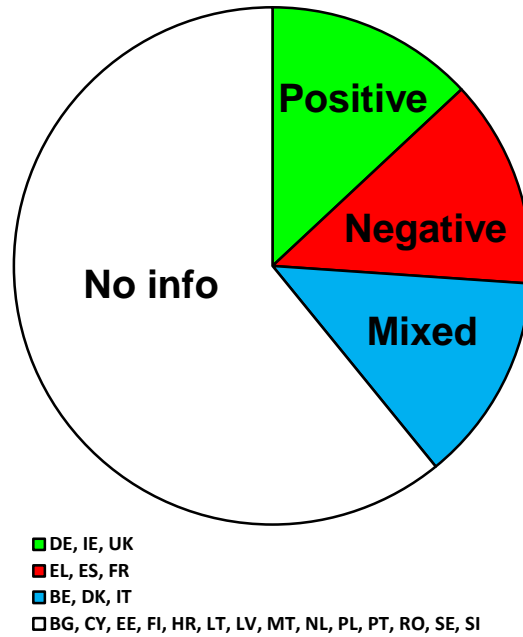


Figure 52. Overall appraisal of national port labour regime in the EU by ship owners, by Member State, 2013



- Support for future EU initiatives by stakeholders

349. Quite a number of respondents and interviewees spoke out on the need for EU initiatives on the organisation of the port labour market, qualifications and training and/or health and safety. As expected, opinions again differ. Several employers, shipowners, port authorities and national administrations would favour EU liberalisation initiatives. Among unions, some fiercely oppose attempts at liberalisation, while others, mainly in countries where only the *lex generalis* applies, would welcome EU rules reserving access to the labour market for registered or certified workers. The confusion only gets more Babylonian as some stakeholders advocate regulatory action by the EU while others would only accept social dialogue at EU level and oppose any attempt at legislation. The table below gives an impression of the divergence of opinions. For more details on their tenor, we refer to the country chapters.

Figure 53. Support for future EU initiatives in the field of port labour among stakeholders, 2013

	Employers	Unions	Port authorities and public administrations	Shipowners
BE	pro	mixed opinions, depending on respondent or subject	pro	pro
BG	no opinion or no information	no opinion or no information	pro	no opinion or no information
CY	no opinion or no information	against	no opinion or no information	no opinion or no information
HR	against	against	against	no opinion or no information
DK	against	against	no opinion or no information	pro
EE	no opinion or no information	against	pro	no opinion or no information
FI	pro	no opinion or no information	pro	no opinion or no information
FR	mixed opinions, depending on respondent or subject	against	mixed opinions, depending on respondent or subject	pro
DE	mixed opinions, depending on respondent or subject	against	no opinion or no information	no opinion or no information
EL	no opinion or no information	no opinion or no information	pro	pro
IE	no opinion or no information	no opinion or no information	against	pro
IT	no opinion or no information	pro	mixed opinions, depending on respondent or subject	no opinion or no information
LV	no opinion or no information	pro	no opinion or no information	no opinion or no information
LT	no opinion or no information	pro	pro	no opinion or no information
MT	no opinion or no information	no opinion or no information	pro	no opinion or no information
NL	no opinion or no information	pro	against	no opinion or no information
PL	no opinion or no information	no opinion or no information	against	no opinion or no information
PT	no opinion or no information	no opinion or no information	pro	no opinion or no information
RO	no opinion or no information	no opinion or no information	pro	no opinion or no information
SI	no opinion or no information	no opinion or no information	against	no opinion or no information
ES	pro	against	pro	no opinion or no information
SE	against	against	against	no opinion or no information
UK	no opinion or no information	no opinion or no information	no opinion or no information	pro

pro
 against
 mixed opinions, depending on respondent or subject
 no opinion or no information

- Reappraisal of EU port policy initiatives to date

350. Based on our investigation into national port labour system in the European Union, it is possible to reassess EU ports policy initiatives to date.

Earlier, we expressed serious doubts over the adequacy of both proposals for a European Port Services Directive, as they lacked a convincing justification, while a number of basic concepts were surrounded by obscurity as to their exact meaning and purport⁷⁰⁹. The proposed rules on port labour were not only ambiguous but proved politically controversial as well⁷¹⁰. On the basis of our newly acquired knowledge of national port labour regimes, it seems unlikely that the Directives would have been able to solve the serious issues which continue to surround this important aspect of port operations today. Neither did the proposals explicitly ensure market access for port labour suppliers and open the labour market up for competition, nor did they address specific problems such as restrictions on employment, restrictive working practices, closed shop situations, etc. On qualifications, training, health and safety the proposals remained entirely silent. This only confirms that the Directives rested on a rather dogmatic belief in the validity of very general principles (including self-handling) and did not target the real problems.

Another astonishing finding is that none of the Commission's proposals in the field of port labour put forward in its 2007 Ports Policy Communication became reality: after more than 5 years, the social dialogue has not even made a start, and no progress whatsoever seems to have been made in relation to the announced mutually recognisable framework on training of port workers, the monitoring of the implementation in ports of EU rules on safety and health of workers at work, and the proper collection of statistics in relation to port labour.

On the other hand, there can be no doubt that the underlying assessments of problems put forward by the European Commission in its four major consecutive policy communications since 1997 (lastly in its Communication of 2007), were entirely justified in that they identified the priority issues of (1) severe labour market restrictions in many ports; (2) a lack of harmonised qualification and training systems; and (3) unacceptably high accident rates.

Finally, we also noted the absence to date of any systematic EU policy to enforce the Treaty rules. This is surprising as the Treaty provides powerful tools to address most issues and as infringement campaigns have been announced on various occasions. Today, a more or less systematic campaign seems underway: crisis-driven conditions on economic reform were imposed on Greece and Portugal, and first steps towards infringement procedures were made in respect of Belgium and Spain.

⁷⁰⁹ See Van Hooydonk, E., "The regime of port authorities under European law including an analysis of the Port Services Directive", in Van Hooydonk, E. (Ed.), *European Seaports Law*, Antwerp / Apeldoorn, Maklu, 2003, 79-185 and in Delwaide, L. (Ed.), *Liber amicorum R. Roland*, Brussels, Larcier, 2003, 467-570; Van Hooydonk, E., "Prospects after the rejection of the European Port Services Directive", *Il Diritto Marittimo* 2004, 851-873; Van Hooydonk, E., "The European Port Services Directive: the good or the last try?", *The Journal of International Maritime Law*, 2005, 188-220, also in *Il diritto marittimo*, 2006, 65-111 as well as in Ringbom, H. (Ed.), *The Emerging European Maritime Law. Proceedings from the Third European Colloquium on Maritime Law Research, Ravenna, 17-18 September 2004* (Marlus No. 330), Oslo, University of Oslo, 2005, 47-118.

⁷¹⁰ See *supra*, para 178 *et seq.*

- *A port labour market in transition*

351. The overall picture of port labour arrangements in the EU is that of a traditional and specifically organised sector of irregular manual work which remains to a large extent governed by restrictive employment arrangements but which is, due to changes in the economic, technological and political context, also in full transition to a new regulatory and organisational era which is increasingly based on general employment rules. Qualification and training systems continue to diverge widely across the EU, with a trend towards professionalisation and multi-skilling. Even if health and safety levels are steadily improving, the frequency and severity of occupational accidents remain worryingly high in the port sector.

It does not come as a surprise, then, that today some stakeholders remain convinced of the need for specific rules on port labour while others categorically deny that port labour should continue to be governed by any *leges speciales*.

7.8. Developments between January 2013 and September 2014

351A. We refer to our reports on developments in the country chapters in Volume II of the updated study and to the Executive Summary of the updated study above.

7.9. Synopsis of port labour regimes in the EU

352.														
SYNOPSIS OF PORT LABOUR IN EU MEMBER STATES														
	Prevailing port management model	Seaborne cargo in 2013 in million tonnes	No. of employers of port workers	No. of port workers	Party to ILO C137	Party to ILO C152	<i>Lex specialis</i> on employment	Level of port labour-specific CBAs	Registration of port workers	Priority for pool workers	Restrictions on temporary agency work	National qualification system	<i>Lex specialis</i> on OHS	Availability of specific national OHS statistics
BE	Landlord	265	50-190	1,988	No	No	Yes	National, port	Yes	Yes	Yes	Yes	Yes	Yes
BG	Landlord	26	54	4,000	No	No	Yes	National, company	Yes	No	No	Yes	Yes	No
HR	Landlord	19	12	1,000-1,250	No	No	No	Company	No	No	No	No	No	No
CY	Tool	6,2	58	342	No	Yes	Yes	National	Yes	Yes	Yes	No	Yes	Yes
DK	Landlord	87,8	100	2,000-5,600	No	Yes	No	National, port	No	Yes	Yes	Yes	Yes	No

	Prevailing port management model	Seaborne cargo in 2013 in million tonnes	No. of employers of port workers	No. of port workers	Party to ILO C137	Party to ILO C152	<i>Lex specialis</i> on employment	Level of port labour-specific CBAs	Registration of port workers	Priority for pool workers	Restrictions on temporary agency work	National qualification system	<i>Lex specialis</i> on OHS	Availability of specific national OHS statistics
EE	Landlord	43,4	17	950-1200	No	No	No	None	No	No	No	Yes	No	Yes
FI	Mixed	105.1	41	2,790	Yes	Yes	No	National, company	Yes	No	Yes	No	Yes	Yes
FR	Landlord	303	100	4,370	Yes	Yes	Yes	National, port, company	Yes	Yes	Yes	Yes	No	Yes
DE	Landlord	298.8	150-300	15,000	No	Yes	Yes	National, port, company	Yes	Yes	Yes	Yes	Yes	Yes
EL	Mixed	153	30	2,500	No	No	Yes	Company	Yes	Yes	Yes	Yes	No	No
IE	Mixed	47.6	20	677	No	No	No	Company	No	No	No	No	Yes	Yes
IT	Landlord	476.8	214-400	11,615-18,000	Yes	Yes	Yes	National, company	Yes	Yes	Yes	No	Yes	No

	Prevailing port management model	Seaborne cargo in 2013 in million tonnes	No. of employers of port workers	No. of port workers	Party to ILO C137	Party to ILO C152	<i>Lex specialis</i> on employment	Level of port labour-specific CBAs	Registration of port workers	Priority for pool workers	Restrictions on temporary agency work	National qualification system	<i>Lex specialis</i> on OHS	Availability of specific national OHS statistics
LV	Landlord	72.7	58	1,500	No	No	No	Company	No	No	Yes	No	No	No
LT	Landlord	41	16	2,159	No	No	No	Company	No	No	No	No	Yes	No
MT	Landlord	35.75	8	1,100	No	No	Yes	National, company	Yes	Yes	Yes	No	Yes	No
NL	Landlord	543.2	85-150	7,275-11,000	Nor	Yes	No	Company	No	Yes	Yes	No	No	No
PL	Landlord	58.8	423	5,990	Yes	No	No	Company	Yes	No	No	No	No	No
PT	Landlord	67.9	21	796	Yes	No	Yes)	Port	Yes	Yes	Yes	No	No	No
RO	Landlord	39.5	35	4,187	Yes	No	Yes	Company	Yes	No	Yes	Yes	No	No

	Prevailing port management model	Seaborne cargo in 2013 in million tonnes	No. of employers of port workers	No. of port workers	Party to ILO C137	Party to ILO C152	<i>Lex specialis</i> on employment	Level of port labour-specific CBAs	Registration of port workers	Priority for pool workers	Restrictions on temporary agency work	National qualification system	<i>Lex specialis</i> on OHS	Availability of specific national OHS statistics
SI	Service	16.9	41	640-900	No	No	No	Company	No	No	No	No	No	Yes
ES	Landlord	422.2	159	6,500	Yes	Yes	Yes	National, port	Yes	Yes	Yes	Yes	No	No
SE	Mixed	173	71	2,900-3,900	Yes	Yes	No	National, company	No	NO	Yes	No	Yes	Yes
UK	Mixed	500.9	150-195	18,000	No	No	No	Company	No	No	No	Yes	No	No

