

**FLAG OF CONVENIENCE OR NOT?  
Challenging the Flag of Convenience Status of EU Registration States:  
An Introductory Contribution to a Controversial Debate**

*Iliana CHRISTODOULOU-VAROTSI*

**I. Introduction to the problem**

The freedom of States to determine the conditions of registration of vessels flying their flag is enshrined in international law currently in force, as reflected in the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS 1982)<sup>1</sup>. This freedom, however, is subject to the need to ensure that effective control is exercised by flag States over their vessels concerning administrative, technical, and social matters<sup>2</sup>. This delicate balance has given rise to the discussion on the “genuine link”<sup>3</sup> that relates the flag State and the shipowner. While UNCLOS 1982 provides that the genuine link between the flag State and the vessel must exist, it does not define the said concept, thus giving rise to different interpretations<sup>4</sup>, and opening Pandora’s box for varying practices. The

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*The author is an Associate Professor at the School of Business of Deree-The American College of Greece where she teaches shipping and business law. In her capacity as a lawyer affiliated with the Athens Bar Association, she is a counsel at Kremalis Law Firm, Greece. She is the holder of a Maîtrise, DEA, and Doctorat (highest distinction) in European and Maritime law from the Faculty of Law of the Université de Paris I Panthéon-Sorbonne (France). The author would like to express her thanks to the Business School of Deree for the reassigned teaching time schedule granted to her for the conduct of the research required by the present paper. The author would like to gratefully acknowledge Captain Andreas Constantinou, General Secretary, Cyprus Union of Shipowners, and Ms. Deirdre Fitzpatrick, Executive Director of Seafarers’ Rights, UK, for useful exchanges concerning clarification of the topic. The views and opinions expressed in this article are those of the author and do not necessarily reflect the policy or position of any institution.*

Contact details of the author: christovar@acg.edu and christodoulou.i@dsa.gr

<sup>1</sup> According to Article 91 of UNCLOS 1982 “Every state shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship”.

<sup>2</sup> Article 94 of UNCLOS 1982 reads as follows: “1. Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. 2. In particular every State shall: (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship. 3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to [...]”.

<sup>3</sup> See Ademun-Odeke, *An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law*, 36 Ocean Dev. & Int’l L. 2005, at. 346. Also see McConnell, Moira L, *Darkening Confusion Mounted Upon Darkening Confusion: The Search for the Elusive Genuine Link*, 16 J. Mar. L. & Com. 365, 1985.

<sup>4</sup> It should be noted that the High Seas Convention (HSC) 1958, which was the international legal regime of reference prior to the entry into force of UNCLOS 1982, incorporated in the same provision the requirement on the genuine link and the prerequisite affecting each State to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag (Article 5) without, however, determining the content of the concept in question; Article 91 of UNCLOS 1982 prescribes the genuine link, but reference to the exercise of control in administrative, technical and social matters over ships flying a State flag is placed in a different provision (Article 94). The United Nations Convention for the Conditions of the Registration of Ships (UNCCROS) 1986 was more specific and demanding about the genuine link by setting ownership and manning requirements, but so far the said instrument has not entered into force, and it is most probably not likely to do so.

challenges relating to the genuine link were of interest in the past to the International Court of Justice<sup>5</sup>. Beyond the legal constraints, from a business point of view, nowadays, a pure requirement on a genuine link<sup>6</sup> seems to be blurred by the nature of a globalised economy governed by liberalism, where economic groups have no geographical barriers. As illustrated below, some of the facets of the discussion continue to be at the epicenter of the rationale on flags of convenience (FOCs), i.e. ships flying the flag of a country other than that of the beneficial owner<sup>7</sup>, which are also generally considered as ships of low standards. The term FOC is usually associated with bad or even unacceptable shipping practices.

In the 70s, a British inquiry committee into shipping, known as the Rochdale committee, had clearly identified the criteria of FOCs<sup>8</sup>. A lot of ink has been spent on the latter both by academia, the press, and the industry, especially in the aftermath of serious maritime casualties provoked by vessels flying the flag of a country referred to as an FOC. International *fora* seem to avoid using the term FOC in their official instruments even though they are aware of the challenges raised by them. The International Transport Workers Federation (ITF) has undertaken a long-standing campaign against FOCs, and reserves the right to qualify a number of registries as FOCs. Shipowners with poor safety and social performance contribute to the *raison d'être* of this campaign, which is also enhanced by the existence of sub-standard vessels.

Where are the boundaries between legitimate international registration practice and unacceptable registration practices justifiably giving rise to the negative qualification FOC? What is the impact of legal constraints stemming from EU law on international registration practiced by EU member States? The economic integration entailed in EC law includes the right of EC persons to register a vessel in another member State and to be employed aboard vessels flying the flag of a member State different than the one of their nationality<sup>9</sup>. Prohibiting such right would activate the control of the European Commission, and this could involve the European Court of Justice, on the grounds of a violation of EC law<sup>10</sup>. The full picture on European FOCs cannot be explored without considering the criteria on safety and social standards. Do European member States qualified as FOCs adhere sufficiently to such standards, so as to invalidate the qualification FOC attached to them?

It should be noted that international registration in the European Union, i.e. registration effected by owners that do not hold the nationality of the flag State, is notably practiced under registries that are traditionally referred to as open registries, i.e. Cyprus and Malta, and by numerous second international registries which operate in parallel with standard/traditional registers (e.g. the German International Register, the French International Register, etc.). A number of member States of the EU, such as the United Kingdom, have created off-shore registries practicing international registration in territories which enjoy a degree of autonomy which varies depending on the case concerned (e.g. Isle of Man, Cayman Islands, etc<sup>11</sup>). While the present discussion places the focus on

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<sup>5</sup> See *Liechtenstein v. Guatemala*, ICJ Reports [1955] 4 and *IMCO*, ICJ Reports [1960] 150, cited in G. P. Pamborides, *INTERNATIONAL SHIPPING LAW*, 1999 (Kluwer Law International/Ant. N. Sakkoulas Publishers), 2 and 5.

<sup>6</sup> E.g. a Greek-owned vessel would have to be registered under Greek register only.

<sup>7</sup> See Herbert R. Northrup and Peter B. Scrase, *The International Transport Workers' Federation Flag of Convenience Shipping Campaign: 1983-1995*, 23 *Transp. L. J.* 369 (1995-1996), 371. A classical source on flags of convenience is the one by B.A. Boczek, *FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY* (Cambridge, Mass, Harvard University Press, 1962).

<sup>8</sup> Committee of Enquiry into Shipping: Report, London, HMSO 1970, Command 4337, 151, as cited in Pamborides, *supra* note 5, at 10. The said criteria are discussed below.

<sup>9</sup> Notably see Article 18 (ex Article 12 TEC), Article 49 (ex Article 43 TEC), Article 54 (ex Article 48 TEC), and Article 55 (ex Article 294 TEC) of the Treaty on the Functioning of the EU (TFEU).

<sup>10</sup> See the case-law of the European Court of Justice notably including Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905, and Case C-246/89 *European Commission v. United Kingdom (Quota Hopping)* [1991] ECR I-4607.

<sup>11</sup> On the register of the Isle of Man, see Renan Le Mestre, *Île au trésor ou îles mystérieuses? Le statut juridique de l'île de Man et des îles anglo-normandes*, tome XXVII, ADMO, university of Nantes, 2009, 277-307. On the

the case of Cyprus and Malta, EU international second registries are secondarily concerned, and in any case only to the extent that they present some similarities with open registries. Off-shore registries are not affected by the present discussion, as the discussion is confined to the registries which function in the territory of a member State that, as a general rule, is subject to EC law and, in which case, the applicability of EC law is not exceptional or effected in a fragmented manner<sup>12</sup>. It should be recalled that the ITF notably considers Cyprus, Malta, the German International Register, and the French International Register as FOCs.

The purpose of this article is to provide an introductory platform for academic discussion on the limitations to the qualification of certain EU member States as FOCs; the paper will illustrate a number of challenges, some of which of legal nature, concerning the qualification of flag States that are members of the European Union as FOCs<sup>13</sup>. The article will first briefly address the background of FOCs, including the involvement of ITF, before tackling the position of EU law. Safety and social standards will also be included in the discussion. The author will endeavour to identify and briefly discuss the points which advocate a review of the said qualification with respect to the European flags concerned, as well as the limitations to such approach. Concluding remarks will point out that the anticipated entry into force of the International Labour Organisation Maritime Labour Convention (ILO MLC) 2006 is likely to further enhance the arsenal of arguments which question the qualification FOC for the EU member States concerned, thus bringing the issue one step nearer to a maturity level.

## II. The background of FOCs

Registering vessels under a flag different than the one of the owner is not a new phenomenon, as this practice actually predates World War One. According to Metaxas, “there is ample historical evidence to support the view that shifts of maritime activity from one flag to another are as old as the modern national States, and that in some cases they have preceded their creation”<sup>14</sup>. Pragmatic reasons both of economic and political nature have acted as a catalyst for such development. Unstable political conditions in the home country of ownership, high costs of maritime labour, nationalistic manning provisions, negative national tax policies towards shippers<sup>15</sup>, and the need to escape detection by the Allies<sup>16</sup>, are some of the reasons that have contributed to the flourishing of FOCs before and after the Second World War<sup>17</sup>. Profit maximization is the guiding rule for most firms opting for FOCs<sup>18</sup>. Traditionally, the creation of FOCs is associated with the desire of the flag State to obtain revenues from the registration process<sup>19</sup>; it should be noted, however, that in many cases the revenue generated by the shipping activity under FOCs is deposited or exploited outside the country of registration<sup>20</sup>. What is a certainty is that access to these registers is easy, in many cases the control of the flag State is not stringent, manning requirements are flexible, and taxation is favourable to shipping interests. Anonymity of beneficial owners is also often associated with FOCs.

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challenges raised by international registration in general, see Patrick Chaumette, *Les Transformations au Sein de la Marine Marchande – Une Relation de Travail Sans Attaches ?*, tome XIX, ADMO, university of Nantes, 2001.

<sup>12</sup> On the extent, for example, to which EC law is applicable in the Isle of Man, see Le Mestre, *supra* note 11, 287. On the positive position of the European Court of Justice concerning the legality of second international registries in EU law, see Case 72&73/91 *Stoman Neptune* [1993] ECR I-887.

<sup>13</sup> This debate is not new. See reflections in this direction notably by Capt. Andreas Constantinou, Lloyd’s List dated 10 September 2004.

<sup>14</sup> See B. N. Metaxas, *FLAGS OF CONVENIENCE* (Gower 1985), 1. Also see Gelinas Harlaftis, *A HISTORY OF GREEK OWNED SHIPPING* (Routledge 1996).

<sup>15</sup> See John Hannigan, *Flags of Convenience and Maritime Labour*, 15 *Industrial Relations Journal* 2 (1984) at 36.

<sup>16</sup> See Ademun-Odeke, *supra* note 3, 349.

<sup>17</sup> See Hannigan, *supra* note 15, 36.

<sup>18</sup> See Metaxas, *supra* note 14, 36. Even though profit maximization, according to the same author, is not always achieved, 19.

<sup>19</sup> See Ademun-Odeke, *supra* note 3, 351

<sup>20</sup> *Id.* at 354.

It is interesting to note at this point that the principal vehicle of anonymity is not the registration process of the vessel as such but the corporate instruments that are used in FOC countries via a number of legal mechanisms. The latter include the possibility provided by the legal system concerned to use bearer shares, nominee shareholders, nominee directors, and intermediaries in order to cloak the identity of the beneficial owner<sup>21</sup>. In a report by the Organization for Economic Co-operation and Development (OECD) adopted on March 2003, “no value judgement is made as to whether such anonymity is desirable or undesirable”<sup>22</sup>, even though in practice one may be inclined to question the motives for such anonymity.

In the 70s, the Rochdale Committee of Inquiry into Shipping in the United Kingdom had identified FOCs via the following criteria, namely:

- the registration country allows ownership and/or control of its merchant vessels by non-citizens;
- access to the registry is easy; a vessel may usually be registered via consulate services abroad; transfer from the registry at the owner’s discretion is not subject to restrictions;
- taxes on the income from the exploitation of vessels are not levied locally, or are very low; a registry fee and an annual fee, which are tonnage-based, are normally the only charges made; a guarantee or acceptable understanding regarding future freedom from taxation may also be given;
- the registration country does not need the shipping tonnage for its own purposes, but is keen to earn the tonnage fees;
- manning of vessels by foreigners is freely permitted;
- the country of registration does not have the power or the administrative machinery to effectively impose any government or international regulation; nor has the country even the willingness to consult the companies themselves.

The above criteria are presented by the Committee in a relatively impersonal tone while, generally speaking, in several cases the terminology used in other sources to describe FOCs confers a stigma; in addition to the identification of the difference between the flag State and the citizenship of the shipowner, FOCs are identified as flags where the shipowner proceeds to this kind of registration “in order to escape high domestic wages and taxation, and stringent regulations on safety, manning, employment and related requirements”<sup>23</sup>. As will be discussed below, the Rochdale criteria are not reflected in a cumulative manner in European Union member States’ flags. The ITF seems to adhere to the above-mentioned criteria, with the emphasis placed on low social standards.

### **III. The challenge of FOCs by the ITF**

The ITF has been particularly active in the battle against FOCs, and sub-standard ships in particular. Its positive contribution to decent working and living conditions aboard sub-standard vessels is a fact. The position adopted by the ITF on FOCs is crucial to the discussion.

The ITF represents transport workers at world level, and is run by its member unions<sup>24</sup>; it was founded in 1896 in London by European seafarers’ and dockers’ union leaders<sup>25</sup>; it is a federation of 779 transport trade unions in 155 countries, representing around 4,668,950 workers in the transport sector<sup>26</sup>. According to ITF, the latter aims to support its member trade unions and find ways of protecting the interests of transport workers in the global economy<sup>27</sup>. The ITF’s work is financed from

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<sup>21</sup> See the Report of the Organisation for Economic Co-operation and Development (OECD, Maritime Transport Committee) dated March 2003 entitled *Ownership and Control of Ships*. Even though the aim of the report is to explore the possibilities available to beneficial owners to mask or hide their identity if they have a reason for doing so more specifically in the context of terrorist activities, the report is of interest to the understanding of FOCs from the point of view of the corporate mechanisms which support FOCs.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> See Ademun-Odeke, *SHIPPING IN INTERNATIONAL TRADE RELATIONS* (Avebury, Brookfield, 1988), 64-125, cited in Ademun-Odeke, *supra* note 3,344.

<sup>24</sup> See <http://www.itfglobal.org/about-us/whatis.cfm>, last visit 23.3.2012.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

the affiliated fees of its member unions<sup>28</sup> and special funding is provided for maritime activities<sup>29</sup>. The position of the ITF is to improve the conditions of seafarers of all nationalities, and to ensure adequate regulation of the shipping industry to protect the interests and rights of the workers<sup>30</sup>. In the process, ITF's early policy of endeavouring to prevent the use of FOC registries was gradually replaced by one of trying to secure terms of employment and working conditions on tonnage registered under these flags either directly through collective agreements with the owners or indirectly through the national unions affiliated to the Federation<sup>31</sup>. Northrup and Scrase analyse the involvement of the ITF as "an attempt to overcome by direct action the market effect of lower costs, and thereby to prevent the loss of registries and jobs by developed countries and their seamen to Third World countries and their seamen".<sup>32</sup>

The ITF defines FOCs as the ships whose beneficial ownership is found to be elsewhere than in the flag State<sup>33</sup>. It should be noted that the concept of beneficial ownership refers to ultimate beneficial ownership or interest by a natural person<sup>34</sup>. Furthermore, the following criteria are taken into consideration when determining whether to declare a register as an FOC, namely:

- "The ability and willingness of the flag state to enforce international minimum social standards on its vessels, including respect for basic human and trade union rights, freedom of association and the right to collective bargaining with *bona fide* trade unions.
- The social record as determined by the degree of ratification and enforcement of ILO Conventions and Recommendations.
- The safety and environmental record as revealed by the ratification and enforcement of IMO Conventions and revealed by port state control inspections, deficiencies and detentions"<sup>35</sup>.

In addition to the power of the ITF to declare a flag State as an FOC<sup>36</sup>, the role of the affiliated unions in the flag State is crucial in that respect. Affiliated unions may request that the ITF declare the register as an FOC<sup>37</sup>.

The ITF's range of tools for the shipping industry include a number of ITF approved collective bargaining agreements with the aim of ensuring decent working conditions aboard FOC vessels, including wages. This platform renders ITF a negotiator of rights and responsibilities for FOC vessels<sup>38</sup>. The agreements in question include:

- ITF Standard CBA 2012;
- ITF Uniform TCC CBA 2012-2014 agreement;
- ITF Offshore Collective Agreement 2012;
- TCC Special Agreement, and;
- Seafarer's Employment Contract September 2011.

The study of the above-mentioned ITF agreements goes beyond the scope of the present paper. Indicatively, the standard collective agreement, as per 1 January 2012, sets the standard terms and conditions applicable to all seafarers serving on any ship in respect of which there is in existence a special agreement made between an affiliated union and the shipping company (owner/agent). The

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> See Metaxas, *supra* note 14, 56.

<sup>32</sup> See *supra* note 7, at 371.

<sup>33</sup> See *ITF Mexico City Policy-ITF Policy on Minimum Conditions on Merchant Ships*, para. 8 *seq.*, available at <http://www.itfglobal.org/> (last visit 23.3.2012).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at para.12.

<sup>37</sup> *Id.*

<sup>38</sup> On the characteristics of these agreements and the ITF consultation procedures for the signing of agreements covering FOC vessels, see *ITF Mexico City Policy-ITF Policy on Minimum Conditions on Merchant Ships*, *supra* note 33, para. 24 and para. 28 *seq.* Also see Alexandre Charbonneau, *L'Action d'ITF Dans le Secteur du Transport Maritime – Bilan et Devenir d'une Inspection Collective Internationale*, tome XXIX, ADMO, university of Nantes, 2011.

standard collective agreement is considered to be incorporated into and to contain the terms and conditions of employment of any seafarer whether or not the owner has entered into an individual contract of employment with the seafarer. The special agreement notably requires the company/owner to employ the seafarers on the terms and conditions the standard collective agreement, and to enter into individual contracts of employment with each seafarer incorporating the terms and conditions of the standard collective agreement. The company/owner agrees, under the standard collective agreement with the affiliated union and the ITF to comply with all the terms and conditions of the instrument in question<sup>39</sup>.

According to Northrup and Scrase<sup>40</sup>, in practice, a shipowner under FOC will be in contact with the ITF for the issue of blue certificate. The ITF will consult unions in the country of beneficial ownership to see whether they wish to sign an agreement for the ship. If not, the ITF consults unions in other relevant countries, such as the labour supply country. With the approval of the beneficial ownership country, ITF affiliated unions may sign an ITF approved national agreement, or the ITF agreement. It should be noted that if no ITF union claims jurisdiction or if the ITF does not consider the union *bona fide*, the ITF signs an agreement directly with the shipowner. The issue of the blue certificate may also result from a crew member complaint to the ITF. The procedure in question is currently described in the ITF Mexico City Policy which is the instrument reflecting the principles and values of the ITF, and which constitutes the backbone of its FOC campaign<sup>41</sup>.

As it will be seen below, the emergence of a number of EU law principles blurs the clear-cut distinction between vessels beneficially owned and manned by nationals, and vessels owned and manned by non-nationals, which is the essence of the concept of FOC.

#### **IV. Vessel registration and EU law: a new perspective?**

Economic integration at the EU level includes a number of economic rights that are granted both to EC natural and legal persons within the legal order of the member States of the European Union<sup>42</sup>. These rights are enshrined in the EC Treaties, as amended, and guaranteed by the case-law of the European Court of Justice (ECJ). The rights in question are also safeguarded by the European Commission, which verifies proper implementation of EC law, including economic rights, in the EC member States. The right of EC persons to register a vessel in a member State different than the one of their nationality is technically assimilated to an act of establishment<sup>43</sup>, and as such is governed by the Treaty on the Functioning of the EU (TFEU)<sup>44</sup>.

Article 18 of the TFEU (ex Article 12 of the Treaty on the European Community, referred to as TEC) states the principle of non-discrimination on the grounds of nationality. It would not be an exaggeration to say that this principle is the cornerstone of the European legal edifice.

Article 49 of the TFEU (ex Article 43 TEC) grants the very important right of the freedom of establishment. Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. According to the same provision, restrictions to the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State are prohibited. Article 49 is of particular interest to entities involved

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<sup>39</sup> See <http://www.itfglobal.org/> under FOCs Campaign and Agreements (last visit 28.4.2012).

<sup>40</sup> See *supra* note 7, 375.

<sup>41</sup> See *supra* note 33, para. 24 *seq.*

<sup>42</sup> See Guy Isaac et Marc Blanquet, *DROIT GÉNÉRAL DE L'UNION EUROPÉENNE*, Sirey, Paris, 10<sup>e</sup> éd., 2012.

<sup>43</sup> The European Commission considers that vessel registration constitutes a form of establishment or a corollary to it. See COM (86)523 final, 25 September. According to Farantouris, Article 43 TEC (now Article 49 TFEU), as a directly applicable rule of Community law, should apply to the member State even though in the absence of Community legislation, member States retain legislative jurisdiction in the field of vessels' registration. See *infra* note 45, 145.

<sup>44</sup> Notably see Article 18 TFEU (ex Article 12 TEC), Article 49 TFEU (ex Article 43 TEC), Article 54 TFEU (ex Article 48 TEC), and Article 55 TFEU (ex Article 294 TEC).

with shipping<sup>45</sup>. The European Commission considers that vessel registration constitutes a form of establishment or a corollary to it<sup>46</sup>.

According to Article 54 of the TFEU(ex Article 48 TEC), companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union shall, for the purposes of the Chapter on the Right of Establishment, be treated in the same way as natural persons who are nationals of Member States. In virtue of this provision, ‘companies or firms’ means those constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55 of the TFEU (ex Article 294 TEC) states that member States shall accord nationals of the other member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54 TFEU (ex Article 48 TEC).

In addition to the above framework it should be noted that numerous member States had to adapt their legislation to EC requirements with respect to the right of EC interests to register a vessel in their register. In other words, the corporate mechanism supporting registration was not adequate. It was also necessary, wherever the right to register a vessel was restricted to nationals, to make necessary amendments in order to extend such right to EC interests<sup>47</sup>.

Hindering the above-mentioned rights via discriminatory practices would activate the control of the European Commission, and this could involve the European Court of Justice, on the grounds of violation of EC law<sup>48</sup>. Consequently, a qualification on FOCs based on this criterion is by definition in conflict with EC law. In other terms, if a member State refuses to ensure the right of EC interests to register a vessel under its legal order or the right of EC nationals from other member States to be employed aboard the vessels flying its flag, in order to avoid being qualified as an FOC, this would place the said member State on illegal grounds from the perspective of EC law, entailing the risk of legal proceedings against it from the European Commission<sup>49</sup>.

The weight of the involvement of the ITF with respect to FOCs was also illustrated in the decision of the European Court of Justice C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line*, held in December 2007<sup>50</sup>. The dispute involved Viking, a company governed by Finnish law, which operated the *Rosella*, a Finnish-flagged vessel, on the route between Tallinn (Estonia), and Helsinki (Finland). The crew of the *Rosella* were members of the Finnish Union of Seamen (FSU), and their wages were at the same level as those applicable in Finland. As the *Rosella* was running at a loss due to direct competition from Estonian vessels operating on the same route at lower wages, Viking sought in October 2003 to reflag the *Rosella* by registering it either in Estonia or in Norway. The FSU did not adhere to the plans under consideration. It should be noted that on 1 May 2004 the Republic of Estonia became a member of the EU. Viking brought an action

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<sup>45</sup> On maritime transport, freedom of establishment, and free movement of maritime labour, notably see Nikolaos E. Farantouris, *EUROPEAN INTEGRATION & MARITIME TRANSPORT* (Ant. N. Sakkoulas/Bruylant 2003).

<sup>46</sup> *See supra* note 43.

<sup>47</sup> An example of such amendment is the one concerning Greek legislation. Article 5 of the Greek Code of Public Maritime Law, which initially restricted the right to register a vessel in Greece to Greek nationals, had to be amended in order to accommodate the right of EC interests to proceed to registration of vessels in Greece. See Iliana Chistodoulou-Varotsi, *L’ADAPTATION DU DROIT MARITIME HELLENIQUE ET DU DROIT MARITIME CHYPRIOTE AU DROIT COMMUNAUTAIRE* (Ant. N. Sakkoulas/Bruylant 1999) 67 *seq.*

<sup>48</sup> *See the case-law of the European Court of Justice notably including Case 167/73 Commission v France* [1974] ECR, [1974] 2 CMLR 216; Case C-221/89 *The Queen v Secretary of State for Transport, ex part Factortame Ltd and others* [1991] ECR I-3905, and Case C-246/89 *European Commission v. United Kingdom (Quota Hopping)* [1991] ECR I-4607.

<sup>49</sup> *Id.*

<sup>50</sup> Case C-438/05 *ITF & Finnish Seamen’s Union v. Viking Line* [2007] ECR I-10779. See Patrick Chaumette, *Reflagging a Vessel in the European Market and Dealing with the Transnational Collective Disputes: ITF & Finnish Seamen’s Union v. Viking Line*, 14 *Ocean&Coastal LJ* 2 (2009). It should be noted that the present Court decision uses the numbering of the Treaty on the European Community (TEC).

before the High Court of Justice of England and Wales requesting it to declare that the action taken by the ITF and the FSU was in violation with Article 49 TFEU (Article 43 TEC). According to the latter, restrictions on the freedom of establishment of nationals of a Member state in the territory of another member State shall be prohibited. By decision of 16 June 2005, the English Court granted the form of order sought by Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on freedom of establishment contrary to Article 49 TFEU (Article 43 TEC), and in the alternative, constituted unlawful restrictions on freedom of movement for workers and freedom to provide services under Article 45 TFEU and Article 56 TFEU (respectively Articles 39 and 49 TEC)<sup>51</sup>. An appeal was then brought by the ITF and the FSU contending that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title XI of the EC Treaty, and in particular Article 151 TFEU (Article 136 TEC). The first paragraph of the latter provides that “the Community and the member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonization while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion”<sup>52</sup>.

The European Court of Justice ruled that Article 49 TFEU (Article 43 TEC) is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article. Article 49 TFEU (Article 43 TEC), according to the Court, is capable of conferring rights on a private undertaking which may be relied on against a trade union or an association of trade union. Article 49 TFEU (Article 43 TEC) is to be interpreted to the effect that collective action such as that at issue in the main proceedings, which seeks to induce a private undertaking whose registered office is in a given member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another member State, constitutes a restriction within the meaning of that article. European judges also added that restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve the objective.

The complexities of the above case are indicative of the delicate balance to be achieved between the imperatives of social protection and economic freedoms. However, legal principles alone cannot resolve the problem of the qualification of EU registration States as FOCs. The parameters concerning safety and social standards need to be viewed.

## **V. The parameter on safety and social standards: progress achieved and limitations**

Safety and social standards constitute a crucial parameter in the qualification of a register as an FOC<sup>53</sup>. Safety and social standards do not only raise the question of the signing and ratification of the legal instruments concerned by States, but they involve an ongoing process where both State mechanisms and shipping companies or other stakeholders concerned, such as classification societies, have a role to play; the emphasis is placed on the need to ensure the transposition of international provisions in the domestic legal order, in parallel with proper implementation by the persons concerned, and the existence of enforcement mechanisms with the aim of ensuring surveillance, imposition of sanctions, and remedies of deficiencies<sup>54</sup>. Obviously, this is a complex process, which

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<sup>51</sup> See para. 22, *id.*

<sup>52</sup> See para. 24, *id.*

<sup>53</sup> See *ITF Mexico City Policy on Minimum Conditions on Merchant Ships* (2010), *supra* note 38, notably see para. 11.

<sup>54</sup> In the Shipping Industry Flag State Performance Table 2011 by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF), the following criteria are used for flag State performance,

is, however, relevant to the assessment of the performance of a flag State. The paper does not aim to assess the performance of the registries involved with the discussion but to provide a platform for discussion where a meticulous analysis of the findings briefly mentioned below would have to be analysed and synthesized.

Safety standards revolve around a plethora of international maritime conventions adopted by the International Maritime Organisation (IMO)<sup>55</sup>, and are basically reflective of, but not limited to, the International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto and by the Protocol of 1997 (MARPOL), and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), as amended, including the 1995 and 2010 Manila Amendments. These are the three pillars of maritime safety legislation. Social standards at the international level stem from a plethora of ILO instruments comprising 68 Conventions and Recommendations pertaining to seafarers.

The ILO MLC 2006, i.e. the convention which has consolidated and modernized the ILO conventions on seafarers in a single instrument, is the anticipated cornerstone of the future legal regime on maritime labour<sup>56</sup>. The new ILO Convention will enter into force twelve months after the date on which there have been registered ratifications by at least 30 ILO member States with a total share in the world gross tonnage of ships of 33 per cent. So far, the convention has been adopted by 26 States, and the criterion on tonnage has already been satisfied. The ILO MLC 2006 provides a comprehensive legal framework on maritime employment and clearly identifies the obligations of the stakeholders concerned, including shipping companies, flag States and labour supply countries. One of the aims of the Convention will be to suppress unfair competition. The Convention is expected to enhance the legal regime governing seafarers, especially in the legal systems which are less protective.

The ratification of relevant international maritime conventions reflects one aspect only, which is easily measurable as the number of international instruments that have been ratified by the State concerned is easily identifiable on the basis of the data provided by the IMO<sup>57</sup>. The other aspect has to do with the enforcement of relevant instruments, which is complementary to the parameter on the formal adhesion to the standards. In other words, if the adoption of IMO and ILO conventions is easily verifiable, the degree of effectiveness in the implementation process is another issue which goes beyond the formal transposition of relevant international instruments in the domestic legal order. The ratification record of European Union member States of the IMO conventions in their capacity as flag States is to a large extent similar but not identical: for example, as at 23 March 2012, Cyprus ratified 37 IMO conventions, Malta 31 conventions, France 46 conventions, and Greece 41 conventions.

With respect to ILO standards, the latter comprise a plethora of ILO maritime conventions, which, upon the anticipated entry into force of the ILO MLC 2006 will be superseded by the latter. A comparison on the basis of a leading instrument like ILO Convention No. 147 on minimum standards of seafarers, which was adopted in 1976, reveals a varying effort of adhesion to ILO standards,

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namely port State control, ratification of major international maritime treaties, use of recognised organizations complying with IMO Resolution A.739, age of fleet, reporting requirements, and attendance at IMO meetings. See <http://www.marisec.org/> (last visit 29.5.2012).

<sup>55</sup> For the full list of IMO maritime conventions, see <http://www.imo.org/>, under Conventions (last visit 29.4.2012).

<sup>56</sup> On ILO MLC 2006, notably see Iliana Christodoulou-Varotsi & Dmitry A. Pentsov, *MARITIME WORK LAW FUNDAMENTALS: RESPONSIBLE SHIPOWNERS, RELIABLE SEAFARERS* (Springer 2008), 300 *seq.* Also see J. I. Blanck, *Reflections on the Negotiation of the Maritime Labor Conventions at the ILO*, 31 *TUL. MAR. L. J.* 35, 2006, and <http://www.ilo.org/> under Labour standards and Maritime Labour Convention (last visit 29.4.2012).

<sup>57</sup> See <http://www.imo.org/> under Conventions (last visit 29.4.2012).

depending on the criterion under consideration. Cyprus ratified ILO Convention No. 147 on 19.9.1995, whereas Malta ratified the said instrument seven years later. Traditional maritime countries like Greece and France had respectively ratified the said convention only a few years after its adoption, namely in 1979 and in 1978. As at April 2012, none of the four countries used in the example had ratified the ILO MLC 2006. If we narrow down the focus on Cyprus, the latter had ratified a small number of ILO maritime Conventions<sup>58</sup>, and the expected adherence to MLC standards, via a bill that is currently pending before the House of Representatives of the Republic of Cyprus, is expected to place Cypriot social standards for seafarers at the level required by ILO MLC 2006.

It should be noted that IMO and ILO instruments are relevant to States both in their capacity as flag and port States via regional instruments on port State control referred to as Memoranda of Understanding (MOUs). The findings pertaining to port State control are relevant to the discussion on FOC qualification. Regional MOUs constitute international agreements between national administrations which collaborate via the assistance of a common secretariat in order to monitor more effectively and in a more uniform manner the conduct of inspections over vessels calling at their ports. There are numerous regional MOUs around the world. The Paris MOU consists of 27 participating maritime Administrations and covers the waters of the European coastal States and the North Atlantic basin from North America to Europe<sup>59</sup>. The aim of the Paris MOU is to eliminate the operation of sub-standard vessels on the grounds of a uniform port State control system. Some of the findings of the Paris MOU are reflected in the performance lists that are referred to as White, Grey or Black Lists. The inspections reveal deficiencies which concern the marine environment (e.g. MARPOL-related annexes), working and living conditions (e.g. food and catering-related problems), certification of crew, operational deficiencies, and management-related deficiencies (e.g. ISM Code).

Flags appearing on the black list are obviously the ones with the most problematic performance, while flags with an average performance are shown on the Grey List, and those with a consistently low detention record are included in the White List. Cyprus and Malta have shifted progressively from the Black List to the Grey List, and they currently appear on the White List. More specifically, in the annual report 2003, covering the period prior to the accession of Cyprus and Malta to the EU, both countries were on the Paris MOU Black List (medium risk). In the Paris MOU annual report 2004, Cyprus and Malta, which had joined the EU in 2004, shifted on the Grey list. In the annual report 2005, for the first time both flag States figure on the White List<sup>60</sup>. This development should be related to the overall impact of the adaptation of the maritime systems of the new member States to EC maritime law<sup>61</sup>.

According to the annual report 2010 of Paris MOU, none of the European Union member States qualified as FOCs were on the Black or Grey lists<sup>62</sup>. It should be recalled at this stage that European off-shore registries are not included in the present discussion. Inspections, detentions, and deficiencies in the 2010 list by flag, revealed 2.66% of detentions for Cypriot flagged vessels, and 2.68% of detentions for Maltese flagged vessels. Greek flagged vessels, for example, were subject to 0.84% of detentions, French flagged-vessels were subject to 0.00% of detentions, and Norwegian flagged vessels were subject to 1.91% of detentions. Black-listed flag States like Togo or Moldova, for example, were respectively attributed 23.08% and 16.18% of detentions, whereas grey list flag States such as the United States of America or Switzerland, were attributed 2.27%, and 3.33% of detentions. It should be noted that a Cypriot flagged vessel was refused access (banning) during the

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<sup>58</sup> See Iliana Christodoulou-Varotsi & Dmitri A. Pentsov, *Labor Standards on Cypriot Ships: Myth and Reality*, 37 VAND. J. TRANS. L. 3, 2004, 647 seq.

<sup>59</sup> See <http://www.parismou.org> Last visit 29.4.2012.

<sup>60</sup> See *id.* under Publications and Annual reports.

<sup>61</sup> See Iliana Christodoulou-Varotsi, *Ensuring Qualitative Shipping in Cyprus: Recent Developments in Cypriot Maritime Law in the Light of the Acquis Communautaire*, tome XXIV, ADMO, university of Nantes, 2006.

<sup>62</sup> The data provided by Paris MOU does not distinguish between standard/traditional and second/international registers. Consequently, in the context of the German or Norwegian international register, the findings concern the flag and cannot be broken down on the basis of this criterion (standard or international).

period 2008-2010. It is obvious that an exhaustive analysis, which is not, however, undertaken by the present paper, should include the corresponding findings in other MOUs, like, e.g. the Black Sea MOU, the Tokyo MOU, etc.

The findings of the Paris MOU also concern the capacity of the countries concerned to operate as port States, i.e. effect inspections over foreign vessels calling at their ports. This aspect entails the capacity of enforcement of applicable standards to vessels whose flag State has failed to do so, or whose deficiencies appeared at a time where flag State control could not detect such risk. Inspection efforts of members compared to target are included in the Paris MOU annual report for the period 2009 and 2010<sup>63</sup>. As can be observed, the European ports administrations in countries generally referred to as FOCs like Cyprus and Malta have reached or even exceeded the target in terms of the inspection efforts made during the period under consideration<sup>64</sup>.

According to recent data provided by the International Chamber of Shipping (ICS) and the International Shipping Federation (ISF), Cyprus and Malta present a satisfactory performance in their capacity as flag States with respect to the criteria on port State control, ratification of major international maritime treaties, use of recognised organization complying with IMO Resolution A.739, age of fleet, reporting requirements, and attendance at IMO meetings. Nevertheless, Cyprus and Malta do not appear on the United States Coast Guard (USCG) Qualship 21 program; Malta does not appear on the White List of the Tokyo MOU<sup>65</sup>.

In addition to the parameter on maritime safety, reference to the social sphere is necessary. The latter comprises several facets including legislation and practice, both at the individual (seafarer-related) and collective (representation-related) level. It should be noted that the very limited number of seafarers on vessels registered at open registries holding the nationality of the flag State<sup>66</sup>, may be explained to a lesser degree by the fact that small countries usually have limited populations, and, to a greater extent, by the business choice to have the vessel manned by foreign maritime labour. Such labour tends to be remunerated with differentiated, i.e. lower, wages than those of seafarers residing in the territory of the flag State. This situation may explain the representation of seafarers on these vessels by local trade unions in the flag State which is superseded by their representation in the country of origin of maritime labour.

However, in view of the accession to the EU, both Cyprus and Malta had to adhere to the *acquis communautaire* concerning EC maritime safety policy and social standards<sup>67</sup>. In practice, a plethora of EC safety and environmental protection-related instruments had to be transposed in the domestic legal order of EU member States, which aligned the standards of these countries to the European standards. This comprised measures vested in the form of EC Regulations or EC Directives having an impact on classification societies, traffic monitoring, double hull requirements, port reception facilities for ship-generated waste and cargo residues, ship-source pollution, marine equipment, and port State control<sup>68</sup>. The standards in question were reflective of existing international standards or modeled by the EC legislature according to the priorities of the EC maritime agenda<sup>69</sup>.

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<sup>63</sup> See the annual report 2010 of the Paris MOU, at 26, at <http://www.parismou.org> (last visit 29.4.2012).

<sup>64</sup> *Id.*

<sup>65</sup> See the Shipping Industry Flag State Performance Table 2011, *supra* note 54.

<sup>66</sup> According to the data provided by a *Study on EU Seafarers Employment*-Final Report by Guy Sulpice for the European Commission (Directorate C-Maritime Transport), 20 May 2011, in Cyprus the number of seafarers represented 0,36% of the population, and in Malta, the number of seafarers represented 0,58% of the population.

<sup>67</sup> See *supra* note 47.

<sup>68</sup> Notably see [http://ec.europa.eu/transport/maritime/index\\_en.htm](http://ec.europa.eu/transport/maritime/index_en.htm) under Safety and Environment (last visit 29.4.2012).

<sup>69</sup> Notably see Iliana Christodoulou-Varotsi, MARITIME SAFETY LAW AND POLICIES OF THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA: ANTAGONISM OR SYNERGY? (Springer 2009), 30-39, Uwe K. Jenisch, *EU Maritime Transport-Maritime Policy, Legislation and Administration*, 3 WMU Journal of Maritime Affairs 1, 2004, 67 *seq.*

As far as social rules are concerned, the general corpus of EC social law is in principle applicable to seafarers. A plethora of provisions has been adopted at this level by the European Union, covering health and safety of workers against exposure to chemical and biological agents, carcinogens, asbestos and ionizing radiation, the use of personal protective equipment, equal treatment for men and women, and coordination of social security systems<sup>70</sup>. With respect to the conditions of employment, seafarers are covered by all the adopted EC Directives with the exception of those pertaining to the protection of workers in the event of transfer of undertakings or collective redundancies and to posting of workers in the framework of the provision of services<sup>71</sup>. Furthermore, there is a specific body of EC rules which applies to seafarers concerning employment and working conditions, such as seafarers' working time, the protection of their health, including the medicines which have to be carried on board ships, and safety<sup>72</sup>. It should be noted that the European Commission has been positive towards the ILO MLC 2006 and some parts of the MLC have been transposed in EU law via a social agreement concluded by the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF).

The *acquis communautaire* specifically adopted for seafarers is currently a developing platform for the discussion on European FOCs. To what extent are existing gaps, which advocate in favour of the qualification FOC, likely to be fulfilled by the ILO MLC 2006? This is a direction to be explored upon entry into force of the new Convention and its anticipated impact on the legal systems of the member States concerned. It should be recalled that the Convention aims at the establishment of a comprehensive worldwide protection of the rights of seafarers, and of a level playing field for countries and shipowners committed to providing decent working and living conditions for seafarers. Even though the ILO MLC 2006 sets minimum social standards and does not provide for a mandatory minimum wage for seafarers, the Convention will enhance the legal regime of maritime labour in the open registries concerned, and give a new impetus to social protection.

## VI. Concluding remarks

The qualification FOC concerning the above-mentioned European registries puts in the shade the very important progress accomplished for enhancing quality in international registration in Europe. The qualification presents some weaknesses on the grounds of EC law notably with respect to the freedom of establishment and the freedom of movement of EC persons. The said qualification is also debatable on the grounds of safety standards, as a result of the adhesion of the member States concerned to the bulk of the standards of the IMO, and the transposition of EC maritime safety standards. This is corroborated by the positive findings of the Paris MOU.

The qualification FOC is not equally blurred at present from the point of view of social standards, which, depending on the flag concerned, are subject to a varying degree of applicability and enforcement. To a large extent, this aspect is likely to be influenced by the anticipated entry into force of the ILO MLC 2006, where the open registries under consideration will apply and enforce a comprehensive regime towards seafarers. In the anticipated context, wouldn't the FOC qualification with respect to the EU members concerned have to be revisited?

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<sup>70</sup> See [http://ec.europa.eu/transport/maritime/seafarers/employment\\_en.htm](http://ec.europa.eu/transport/maritime/seafarers/employment_en.htm) under Employment and Working Conditions (last visit 29.4.2012). Also see *Communication from the Commission to the Council and the European Parliament on the training and recruitment of seafarers*, COM/2001/0188 final, para. 2.

<sup>71</sup> See COM/2001/0188, *id.*

<sup>72</sup> See Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organization of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST), OJ L 167, 2.7.1999, p. 33, and Directive 1999/95/EC of the European Parliament and the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports, OJ L 14, 20.1.2000, p. 14.