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## CHAPTER 15

# European Social Law of Seafarers: between common market and substantive law

**Olga FOTINOPOULOU BASURKO**

Senior Lecturer in Labour and Social Security Law, University of the Basque Country/Euskal Herriko Unibertsitatea

**Abstract:** *EC law built the single European market, on the basis of the economic freedoms, the principle of non-discrimination of EU nationals. He also sometimes sought to harmonize national legislation, for the proper functioning of the European market and a policy of full employment. The freedom of establishment of companies has changed the ship registration conditions; the freedom to provide services applies to maritime transport and the freedom of movement of workers to seafarers. Given the international dimension of maritime activity, a balance between competitiveness and maritime safety has to be found. European law incorporates IMO and ILO conventions on ships and seafarers pursuant a sectorial approach. European social law is sometimes applied to maritime armaments companies, like any company, in a joint approach. The European Union seems always in search of a maritime policy, inserted in a global economy.*

**Résumé:** *Le droit communautaire a construit le marché unique européen, à partir des libertés économiques, du principe de non-discrimination des ressortissants communautaires. Il s'est aussi efforcé d'harmoniser parfois les législations nationales, en vue du bon fonctionnement du marché européen et d'une politique de plein emploi. La liberté d'établissement des entreprises a transformé les conditions d'immatriculation des navires; la liberté de prestation de service s'applique au transport maritime et la liberté de circulation des travailleurs aux gens de mer. Compte tenu de la dimension internationale de l'activité maritime, il s'agit de trouver un équilibre entre compétitivité et sécurité maritime. Le droit européen incorpore les conventions internationales de l'OMI et de l'OIT concernant les navires et les gens de mer, dans une approche sectorielle. Le droit social européen s'applique parfois aux entreprises d'armement maritime, comme à toute entreprise, dans une approche commune. L'Union européenne semble toujours à la recherche d'une politique maritime, insérée dans une économie mondialisée.*



## 1. Introduction

It may seem trivial to start by stating the obvious: seafarers, or to be more exact<sup>1</sup>, the crew members on merchant ships, are a category of workers like any other for legal and employment purposes<sup>2</sup>. There is no doubt that that the same features are met as for the notion of worker, whether in internal law or, in so far as is of interest here, in European Union Law. Despite the above, it is also evident that this group of workers carry out their work in a special context. The undertaking of work on a moving object –a ship– which by definition navigates through various geographical spaces, together with the remoteness and traditional isolation to which crews are subjected, has meant that national laws have introduced special standards adapted to the special circumstances of the activity, as for example in working time regulation and the system for representing the workers. The general physiognomy to which reference has scarcely been made, has not changed in essence. What has really changed, and with great anticipation over the rest of the economic sectors, generating an impact on the living and working conditions of this workers, has been the maritime transport industry itself.

Nobody is unaware that this sector is the most strategic sector of all, since about 80%<sup>3</sup> of world trade takes place at sea. As a result of this, and as can easily be imagined, commercial competitiveness in both developed and developing countries, including landlocked countries, is at the expense of not only the effective access of international maritime services but also that the costs of maritime transport are as «tight» or reduced as possible. In a context in which the competition between the economic actors is so high and the underlying interests so relevant, it is by no means unusual that various formulas have been sought to try to «escape» or avoid national regulations, including the employment ones which concern us here, to which maritime

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1) It is necessary to specify the notions which will be employed in this contribution, since the seafarers concept in the MLC 2006 is wider than the collective of workers to whose this work is addressed, that is, the merchant navy exclusively.

2) The same question made by Chaumette, P (2009), «Les marins sont-ils des salariés comme les autres?» *Annuaire de Droit Maritime et Océanique*, T. XXVII, 471- 499.

3) If we use the data in Communication COM (2009) 8 final of 21 January 2009 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Regions Committee, Strategic objectives and recommendations for the maritime transport policy of the EU up to 2018. Although in agreement with other, more recent, documents from the European Commission itself, approximately 90% of world trade takes place by maritime means. This is stated in the working document of the Commission's services. Also, it can be observed in the Proposal for a Directive of the European Parliament and of the Council on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC. Document COM (2013) 798 final, 18 November 2013. In any case, and in relation with the classical difficulties of obtaining data on maritime transport, see Directive 2009/42/EC of the European Parliament and of the Council of 6 May 2009 on statistical returns in respect of carriage of goods and passengers by sea (Recast) (OJ L141, 6 June 2009), later regulation (EU) 1090/2010, 24 November (OJ L325, 9 December 2010).

transport has traditionally been subjected. This leads us to say, as has been stated on other occasions, that maritime transport has changed from being an international sector *per se* to a global one in which a ship's operational factors that were concentrated in a single country are now in a chain in which the ownership and management of the ship may be, and normally are, spread among many countries.

In such a special context as this, the question asked here is precisely that of arriving at an approach made and being made from our nearest regional ambit and regarding the regulations that apply to workers on ships. Recently, it appears that there is an unprecedented regulatory revulsion in the matter, as shown, for example, the set of Directives regarding the adoption of the 2006 ILO CTM 2006, notable among which is Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC<sup>4</sup>, but also, for example, the recently adopted Directive (EU) 2015/1794, of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC as regard seafarers<sup>5</sup>. In addition, and within the same context, there is the signing of the «Athens Declaration,<sup>6</sup>» arising from the meeting of maritime transport ministers on 7 May 2014 in Athens, the purpose of which is none other than driving and revising European maritime transport policy up to 2018, also taking into account the 2020 horizon, where the situation of the workers in the sector is explicit as the primordial axis to be taken into account.

However, despite the regulatory interventions or mere declarations produced recently, is it possible to state that there is a true regulatory about-face on the employment rights of seafarers? What role does and has the EU fulfilled in their establishment and/or development? Is this a mere «amanuensis» of the regulation issued by the international organisations with competence in the matter or does it go further? Answering these questions becomes a reflexion not without difficulties<sup>7</sup>, given that

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4) OJ L124, 20 May 2009.

5) The proposal can be consulted in the Document COM(2013) 798 final, 18 November 2013. The adopted Directive is in OJ L 263, 8 October 2015.

6) The Athens Declaration entitled «Mid-Term Review of the EU's Maritime Transport Policy until 2018 and Outlook to 2020». This can be consulted at the Web site <http://ec.europa.eu/transport/modes/maritime/consultations/doc/2015-mts-review/council-conclusions-on-mid-term-review-of-eu-maritime-policy.pdf>. The reaction – not exactly positive – can also be consulted at [http://www.etf-europe.org/files/extranet/-75/43694/ETF%20Position%20Paper\\_Mid-term%20review%20of%20the%20EU%20Maritime%20Transport%20Policy%20\(Athens%20Declaration\)\\_Final.pdf](http://www.etf-europe.org/files/extranet/-75/43694/ETF%20Position%20Paper_Mid-term%20review%20of%20the%20EU%20Maritime%20Transport%20Policy%20(Athens%20Declaration)_Final.pdf)

7) At least for me, since I understand that others have been perfectly capable of addressing the issue in a few lines; for this, see the paper by Chaumette, P. (2015), «L'impact du droit européen sur le droit social des gens de mer», *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 21, number 1. [www.cdmo.univ-nantes.fr](http://www.cdmo.univ-nantes.fr).

tackling the regulation developed in the EU for these purposes cannot be undertaken monolithically. The fact that precisely the construction of a common maritime transport policy has been a highly complex in which the resistance of the states individually to cede sovereignty to the EU has been raised as their *leitmotiv*, provoking the need to approach the object of the study from different dispositions in the treaty and from different policies, whether those specific to transport or those of social policy, without forgetting the regulations on European economic freedoms. In the absence of homogenous and uniform regulations for this specific industrial sector, either for legal difficulties but above all for economic ones or existing policies, it creates –it is insisted– the absolute need to apprehend the regulation of the social rights of the seafarers from diverse dimensions of the supra-national regional law in which we are immersed.

## 2. European economic freedoms and maritime transport: their impact on seafarers' working conditions

Probably the first thought of anyone reading the title of this section and not familiar with the «complications» of the maritime sector would be of the Viking Line case<sup>8</sup> and the enormous set of contributions arising about it<sup>9</sup>, from the debate in the confrontation of collective rights against European economical freedoms, whether the freedom of establishment or the free provision of services. Dispensing with this approach for the moment, to which we will return later, this case-law is an example of the freedom of flagging ships over the employment rights of the workers in the sector, given that the objective was none other than to register the ship in Estonia and thus reduce the social and employment costs involved in applying Finnish legislation, presumably higher than those of Estonia. Indeed, we referred succinctly

8) Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [OJ C60, 11 March 2006, p. 11; Conclusions of the General Advocate M. Poiares Maduro of 23 May 2007]. Judgement of ECJ of 11 December 2007.

9) It is sufficient to quote, *inter alia*, some of the earliest contributions: Orlandini, G. (2006), *Diritto di sciopero, azioni collettive transnazionali e mercato interno dei servizi : nuovi dilemmi e nuovi scenari per il diritto sociale europeo*, Working Papers, Centro Studi di Diritto del Lavoro Europeo «Massimo D'Antona», WP C.S.D.L.E. «Massimo D'Antona» INT – 45/2006, Facoltà di Giurisprudenza, Università degli Studi di Catania, 1-60; Blanke, T. (2006), «The Viking case», *Transfer*, 2, vol. 12, 251-266; Novitz, T. (2006), «The right to strike and re-flagging in the European Union: free movement provisions and human rights», *Lloyd's Maritime and Commercial Law Quarterly*, LMCLQ, 129-288, 242-256; Björkholm, M. (2007), «Safeguarding EC fundamental freedoms: are ship blockades exempt from the freedom of movement rules?», *Annuaire de Droit Maritime et Océanique*, Université de Nantes, T. XXV, 103-124. Chaumette, P. (2008), «Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises», *Diritto Social* number 2, 2008, 210-220. Lo Faro, A. (2008), «Diritti sociali e libertà economiche del mercato interno: considerazione minime in margine ai casi Laval e Viking, Lavoro e Diritto», *Lavoro e Diritto* number 1, 63-96.

above to the changes that have occurred in the maritime transport industry and stated that there are phenomena of circumvention of the legal regulations in the states to which the ship owners belong to reduce the operating and social costs of a ship. This happens without much difficulty with recourse to the so-called flags of convenience but also, and as a reaction to the massive fleeing of tonnage to third states, through the registration of ships in the so-called registers *bis*, international registers, second registers<sup>10</sup> created in some European states to offer similar attractiveness than the first mentioned regarding seafarers' conditions, whether by reducing social costs or by introducing the law of origin for the extra-communitarian workers as a way to obtain the same end. However, how has European law approached the flagging or re-flagging of ships in the context of the EU? Or how has coastal transport been liberalised and what is its repercussion on workers on ships? There are several question marks here regarding this matter.

## 2.1. The registering of ships as an act of exercising freedom of establishment

The European economic integration process and the construction of the internal market were created by, among others, the economic freedom of establishment (articles 49 to 55 TFEU) which includes, without doubt, the right of individuals or organisations to establish themselves in another member state to undertake an economic activity without restrictions for reasons of nationality.

Starting with the above, the viewpoint from which the registering of ships in the EU has been addressed has to date been confined to identifying the flagging of ships as a mechanism for exercising freedom of establishment, as determined in the famous case *Factortame II* on 25 July 1991<sup>11</sup>. This litigation faced the issue of the competence

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10) For an analysis of above mentioned issue, although the arguments are not completely convincing, see Christodoulou-Varotsi, I. (2012), «Flags of convenience or not? Challenging the Flag of Convenience Status of EU Registration States: An introductory contribution to a controversial debate,» *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 18, number 2. [www.cdmo.univ-nantes.fr](http://www.cdmo.univ-nantes.fr).

11) Case C-221/89 «*The Queen v Secretary of State for transport, ex parte: Factortame Ltd and others.*» González Giménez, J. (2000), «La aceptación por la Cámara de los Lores de la responsabilidad patrimonial del Reino Unido en el asunto Factortame (Comentario a la sentencia de 28 de octubre de 1999, Regina v. Secretary of State for Transport Ex Parte Factortame),» *Revista de Derecho comunitario europeo*, number 7, 2000, 95-208. García de Enterría Carande, E. (1998), «El fin del caso Factortame: la responsabilidad patrimonial del Reino Unido,» *Revista de administración pública* number 145, 117-144. Jiménez Blanco and Carrillo de Albornoz (1990), «De nuevo sobre el asunto Factortame, 2 *Civitas-Revista española de Derecho administrativo* number 66, 255-258. García de Enterría Carande, E. (1992), «La sentencia Factortame II del Tribunal de Justicia de las Comunidades Europeas, de 25 de julio de 1991, sobre el fondo de la compatibilidad con el Derecho comunitario de la Merchant Shipping Act of 1988, inglesa, de reserva de pesca. Derecho estatal de abanderamiento de buques y libertad de establecimiento según el Derecho comunitario,» *Civitas-Revista española de Derecho administrativo*

of member states –derived from international law– to set the conditions for attributing the nationality of ships and the right to fly their flags. This is because internal legislations required as conditions for registering ships in their countries<sup>12</sup> that the owners, charterers or operators be nationals of the state and/or that a more or less large percentage of the company capital be in the hands of national individuals or organisations of the member state. In addition, for the debate as to whether or not these internal provisions are compatible with community law, the ECJ will dedicate some lines to state that the registration of a ship is in itself an act of establishment in accordance with the then articles 43 and ff of the EC Treaty.

This finding strengthens the possibility not only of reflagging ships in the EU but also of the increase of intra-European competition, grounded –of course– in the search for those social and employment legislations that are more interesting when reducing costs within the framework of the possibilities open for open registrations created as a contraposition to the flags of convenience in what is one other than another manifestation of business relocation by this means. In fact, this reality is confirmed in the failed attempt to create a community register as an alternative to the flags of convenience, called the EUROS register<sup>13</sup> through a proposed but never adopted regulation in 1989<sup>14</sup>. As with the second, bis and international European registers, this Commission initiative based its strategy on offering a series to advantages for ship owners<sup>15</sup>. While this is so, one of the main motives wielded precisely to reject the proposal had to do with the attempt to harmonise on-board social questions at the European level, which convinced neither the ship owners nor the trade unions, whether because the former requested modifications in the proposal regarding the requirements and criteria for crews and the latter because they did not consider that the EUROS register would create more jobs or work positions<sup>16</sup>.

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number 73, 67-78.

12) The criteria are explained for the attributing of nationality to a ship in accordance with the British *Merchant Shipping Act* of 1988, the basis for the *Factortame* litigation. All these criteria can change in accordance to each domestic law in which the ship is going to be registered, since in relation to this issue, at it is known, it exists the freedom to determine the requirements to concede their flag to a ship.

13) Vid. Churchill, R.R. (1991): «European Community Law and the nationality of ships and crew», *European Transport Law* number 5, 591-617. Vialard, A. (1995), «L'Europe et les pavillons de navires», *Annuaire de Droit Maritime*, t. XIII, 39-50.

14) A future for the community shipping industry: measures to improve the operating conditions of Community Shipping. COM (89) 266 final. 3 August 1989.

15) Some critical comments on the EUROS register and proposals for its improvement are found in the middle of the debate in Heldring, B. (1993), «The EUROS Flag and Related Issues», *Droit Européen des transports*, 46-56 and Brownrigg, M. (1993), «The EUROS Flag and Related Issues», *Droit Européen des transports*, 57-61.

16) Pallis, A.A. (2002), *The Common EU Maritime Transport policy: policy europeanisation in the 1990s*, Aldershot- Ashgate, 74



In consequence, at the European level it is accepted and assumed that the flagging of ships and the resort of ship owners to the one considered the most attractive cannot suffer excessive restrictions that infringe the freedom of establishment consecrated in European law regulations. Further, they are endorsed and encouraged since despite not creating a homogenous market at the regional level, the underlying economic interests are sufficiently important to allow the existence of intra-community social dumping in this industry<sup>17</sup>.

And the chickens have come home to roost. The Viking case or, the most recent, Fonnship, of 2014<sup>18</sup>, although relating to the freedom to provide services, to which I will refer immediately, show that collective actions aimed at avoiding reflagging or at increasing the salaries of workers providing services on a Panamanian ship to more dignified ones, collide head-on with community economic freedoms, thus legitimising the resource and existence of the open registers within and outside the EU<sup>19</sup> and –incidentally– putting into question the policy of the ITF against flags of convenience, which would require reformulating to meet the requirements of European regulations. Even so, and as they say, where there's life there's hope, so it is necessary to consider the path opened by the general advocate in the Fonnship judgement, which witnesses or follows a previous ruling<sup>20</sup>, opening the possibility of considering the

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17) This idea is extracted without difficulties from the Sloman Neptun case law. Joined cases C-72/91 and C-73/91, *Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG*. Judgement of the Court of 17 March 1993. EC Reports-1993-I, pp 887-937 gave the European instance the possibility of pronouncing on the compatibility of German legislation on the second registration of ships with European law. The basis of the litigation was the claim of German trade unions regarding the contracting of extra-community seafarers with no fixed residence in the Community –specifically of Philippine nationalit – to whom lower working conditions were applied (above all salaries) than those guaranteed to Germans employed on ships registered in the GIS (German international register). The reason for the divergence was that German regulations granted ship owners registered in the GIS the possibility of subjecting maritime employment contracts to the regulations chosen by the parties', which coincided with the application of the legislation of the seafarers', in this case the Philippines, presumably cheaper than the German ones. The ECJ was asked regarding the compatibility or otherwise of this regulation with the limitations to the state aid policies established as per the then article 92 EEC Treaty, as well as to determine whether or not the contents of the social dispositions in the GIS were compatible with article 117 EEC treaty, that is, with the precepts of the treaty relating to community social policy. Unlike the Commission's opinion, the ECJ interpreted that the choice of law included in the maritime employment contracts with a non-community national established in the regulation that affects the GIS is perfectly compatible with the system of aids in article 92 EEC Treaty. As a consequence, the court stated that favouring a reduction in taxation, employment and social security charges –allowing the employment of Choice of Law conflict of law criteria to the maritime employment contracts– did not constitute a state aid in the sense of article 92 EEC Treaty, nor in consequence a infringement of the contents of article 117 EEC Treaty.

18) Judgment of the ECJ of 8 July 2014, Case C-83/13, *Fonnship*.

19) Overwhelmingly, Miranda Boto, J.M. (2014): » La sentencia Fonnship o el extraño incidente del perro por la noche», *Revista de Information Laboral* number 10, 103-119.

20) Specifically the ECJ conclusions of 6 April 2006, Case C-456/04, *Caso Agip Petroli SA v Capitaneria di porto di Siracusa*.

resort to flags of convenience as an abuse of community law<sup>21</sup> when the objective is to reduce the social costs that a ship owner must normally assume when artificial conditions are created for the application of community regulations and thus compromising the observance of fair competition among community of EES ship owners.

## 2.2. The freedom to provide services in maritime transport

The legitimising of open European registers and the resort to flags of convenience cannot be fully understood with referring to the other side of the coin of exercising freedom of establishment, that is, the freedom to provide services. This last community freedom is regulated for maritime transport and after multiple vicissitudes for the configuration of a common transport policy, in –fundamentally– various community regulations. Thus, firstly, it is necessary to refer to 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, modified by Council Regulation (ECC) 3573/94 of December 1990<sup>22</sup>. This standard applies the principle of the freedom to provide services exclusively in international maritime transport, that is, between member states and between member states and third countries, excluding transport between ports in the same member state<sup>23</sup>, excluding cabotage traffic in its ambit of application which, as is known, is the subject of regulation through Council Regulation (EEC) No 3577/92, of 7 December 1992 applying the principle of the freedom to provide services to maritime transport within member states (maritime cabotage<sup>24</sup>). The liberalising of this form of transport

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21) Fundamentally considering 93 and 94 of the opinion of Advocate General Mengozzi presented on 1 April 2014. On the abuse of law, vid. Ionescu, R.N (2012), *L'abus de droit en droit de l'Union européenne*, Bruylant, Brussels

22) Which was accompanied by Council Regulation (EEC) 4056/86 of 22 December 1986, applying Article 81 and 82 of the Treaty to maritime transport [Council regulation (EC) No 1419/2006 of 25 September 2006 repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services]; Council Regulation (EEC) No 4057/86 of 22 December 1986, on Unfair pricing in maritime transport and Council Regulation (EEC) 4058/86, 22 December 1986, on Free access to ocean trades. All can be consulted in OJ L378 of 31 December 1986. For a study of the above mentioned instruments, Beurrier, J-P. (2014): *Droits Maritimes*, Dalloz, Paris, 186 and ff.

23) In fact, according to article 1.4, «maritime transport services between member states and between member states and third countries» are considered intra-community maritime transport services, that is, the transport of passengers or products by sea between any port in a member state and any port or installation located on the continental shelf of another member state, as well as the traffic with third countries as long as remuneration is made in exchange. This implies the suppression of all existing restrictions on the transport of certain goods and of the restrictions arising from the cargo sharing clauses in the bilateral agreements between some member states and third countries.

24) OJ L364, 12 December 1992.

was the subject of more references<sup>25</sup> –if possible– relating to the process of creating an internal market applied to maritime transport. This is because in the EU context, cabotage maritime transport is of important weight from the general economic point of view, which makes it more visible for some states than others where goods and/or passenger traffic in this context is an important source of income<sup>26</sup>.

Both regulations play a relevant leading role in the framework of the maritime legal and employment relationship, whether because the former regulates and defined who must be considered a community ship owner<sup>27</sup>, or because –in the latter case– a divergent employment regime is also established with respect to the regulations for the free movement of workers in the framework of posted workers regulation which, as is known, specifically excludes the merchant navy from its ambit of application. This with regard to the concept of ship owner in Regulation (EEC) 4055/86, the fact is that the criteria set in article 1 of this standard allow not only national or shipping companies of member states or of the EEE established in the community but also those outside it as long as they are controlled by nationals of a member state or of the EES to enjoy the freedom to provide services. The important question that for the effects of the notion of establishment included here, the registration of ships is not consubstantial to it, such that it supports the possibility of resorting to flagging to third countries without this involved any difficulty from the point of view of enjoying this economic right<sup>28</sup>. Stated more clearly, from this perspective the nationality

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25) Regulation (EEC) N° 3577/92, applying the principle of freedom to provide services to maritime transport within member states (maritime cabotage) set a process for liberalising cabotage from 1993, although in steps by type of single transport for Spain, France, Portugal, Italy and Greece, opening the market to them all in 1999 except for Greece, whose extension was enlarged until 2004 for regular passenger and ferry transport services and for services undertaken by ships with a gross tonnage of less than 650. In accordance with COM (2014) 231 final Document, Greece liberalised coastal service by Law 2932/2001, published on 27 June 2001. However, Greece applied the regulation fully only in 2011 thanks to the amendments introduced by Ministerial Decision 3323.1/02/08, Presidential Decrees 38/2011 and 44/2011 and Law 3922/2011, 4 March. Greece has liberalised its coastal market to a much greater extent than required by the Regulation, opening it to cruise ships registered in third countries (Law 3872/2010). For this, vid. Mikroulea, A.P. (2009), «Competition and public service in Greek cabotage» in Antapassis, A; Athanassiou, L and Rosaeg, E: *Competition and regulation in shipping and shipping related industries*, Martinus Nijhoff publishers, Netherlands, 185-207.

26) Thus, for example, in the case of goods transport, the market is dominated by the United Kingdom (bulk liquids traffic), Spain (general cargo traffic) and Italy (bulk liquids traffic). For its part, Norway has a special hegemony in the offshore transport of hydrocarbons. In the case of passenger transport, the major markets are Greece and Italy followed by Spain, although both Greece and Spain have suffered an important drop in this traffic due to the economic crisis. This is noted in the Fifth Report of the Council Commission on the application of Regulation 3577/92 applying the principle of free provision of maritime transport services within the member states (cabotage) (2001-2010), COM (2014) 231 final Document, 6-7.

27) Chaumette, P. (2014): «L'armateur communautaire, bénéficiaire de la liberté de provision of services,» *Neptunus-e.revue*, Centre de Droit Maritime et Océanique, Université de Nantes, vol. 20, number 3. [www.cdmo.univ-nantes.fr](http://www.cdmo.univ-nantes.fr)

28) Thus, in the contract of a company established in a member state that operates a regular line

of the ship, that is, the flag it flies, is absolutely irrelevant for the ship owners to exercise the right to provide services according to the regulation analysed<sup>29</sup>. It is clear that this vision, closely connected to a literal interpretation of the standard, contrasts greatly with the classical application of the flagging law as a conflicts of law criterion applicable to seafarers so that while for these latter the flag is relevant for the effects of considering the employment conditions to be enjoyed<sup>30</sup>, the same would not occur from the viewpoint of the shipping business.

Secondly, the regime applicable to cabotage is designed to regulate gradually (by market segments) the access of European ship owners (article 2) who operate ships registered in a member state or in the failed attempt to create a European register (EUROS) to traffic traditionally reserved to national operators, that is, specifically, to the passenger or goods transport services provided by ship owners in exchange for remuneration<sup>31</sup> between ports located on the continent or in the main territory of a single and the same member state (mainland cabotage), between any port of a member state and the installations or structures located on the continental shelf of that member state (off-shore supply services) and that provided between ports located on the continental part and one or more islands of a single and same member state (island cabotage)<sup>32</sup>. As can be imagined, questions relating to the crew, that is, to the

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service with its destination in another member state but whose ships are registered in Panama and fly the Panamanian flag, the Court of Justice deduced from the wording of article 1, section 1, of Regulation 4055/86 that this «refers to nationals of member states established in a member state other than the receiver of the services and *not to the registration or flag of the ships operated by the transport company*». Judgment of 17 May 1994, *Corsica Ferries* (C 18/93, I 1783), section 29. The fact that the ships operated by that country were registered in Panama and flew the flag of that country is clear from paragraph 8 of the judgment. See also the Judgment of 18 June 1998, *Corsica Ferries France* (C 266/96, I 3949), section 3.

29) The precision of article 1, section 2, of Regulation 4055/86 reflects what is commonly known as «the Greek exception.» Indeed, given that under Greek law Greek nationals established in third countries are authorised to register their ships in the shipping register of that member state does not take into account that this situation would have removed a major proportion of the total tonnage belonging to nationals of EES state from the ambit of application of the Regulation. In this respect, vid. Bredima-Savopoulou A. and Tzoannos J. (1990), *The Common Shipping Policy of the EC*, North Holland, Amsterdam, 176, and Baena Baena P.J. (1995), *La política comunitaria de los transportes marítimos*, Marcial Pons, Madrid, 127.

30) However, it is true that the law of the flag criteria to resolve maritime employment conflict of law issues is in decline. Carbone, S.M. (2010): «Cap. III: La loi applicable aux contrats maritimes. II. Les rapports de travail maritime» in *Conflits de lois en droit maritime*, l'Académie de Droit International de la Haye, 147-202 and very especially in 185, which specifically states that «*En effet, à propos du travail maritime l'article 8, paragraphe 2, ne peut pas jouer parce que, d'une part, la nationalité du navire a perdu la connotation «territoriales» qui précédemment lui était dévolue et, d'autre part, les prestations de travail son exécutées habituellement dans le cadre de trafics que impliquent les intérêts de plusieurs Etats. Ce n'est qu'au cas où le navire est concerné par le trafic de cabotage national, relatif à un Etat spécifique, que la réglementation de ce système pourra être invoquée à titre de lex loci executionis laboris.*»

31) Thus excluding leisure craft from its scope of application.

32) Considering for these purposes that the treatment for Ceuta and Melilla is the same as for ports

work factor as a cost of operating a ship, will become a core question for those providing maritime services within the EU who wish to access certain markets in other member states. In fact, this Regulation, designed to equalise the conditions of access to these services for all community ship owners, sets a specific standard to determine which state is competent to apply its legislation to «*all questions relating to the crew*» (article 3<sup>33</sup>).

In this sense, the standard starts by considering that questions relating to the crew are traditionally the competence of the flag states, so that the applicable social and employment regulations will therefore depend on the legislation in which the ship is registered where the discrepancies at the regulator level –as the advanced reader can well imagine– translate into differences in the crew’s employment costs. As a consequence, article 3 of this Regulation cannot be understood without considering these extremes since its wording is based on the wish of European institutions to avoid distorting competition and also for social factors, in the most sensitive routes. The Regulation provides that the host member states can impose their own standards for the crews of ships carrying out island cabotage as well as the crew standards applicable to small vessels with a gross tonnage of less than 650<sup>34</sup>. On the other hand, the standard sets the application of the flag regulations for ships with a gross tonnage of more than 650 if the voyages involved are the continuation of a voyage or

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between islands.

33) This disposition states that, «*1. For vessels carrying out mainland cabotage and for cruise liners, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag state), except for ships smaller than 650 gt, where host State conditions may be applied. 2. For vessels carrying out island cabotage, all matters relating to manning shall be the responsibility of the State in which the vessel is performing a maritime transport service (host State)*»

34) Although the Commission presented a failed regulation proposal in compliance with the mandate set in article 3.4 of Council Regulation 3577/92, designed to generalise the responsibility of the flag state with regard to the crew, which was abandoned on 11 December 2001. Thus, article 3 of the regulation stated as amended, «*For vessels carrying out cabotage services other than those referred to in paragraph 2, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State), except for ships smaller than 650 gt, where the conditions in force in the State in which the vessel is performing its services (host State) may be applied. For vessels carrying out regular passenger and ferry services, including mixed passenger/cargo services and scheduled cruise services, the rules concerning the required proportion of Community nationals in the crew (namely all staff employed on board) as in force in the host State shall apply. All other matters relating to manning shall be the responsibility of the flag State. Where host States allow non-member-country nationals to be employed on board ships carrying out cabotage services as referred to in paragraph 2, they shall require that those crew members shall be treated in the terms and conditions of their employment as residents of the Member State being the flag State. The host State shall apply its own terms and conditions of employment to non-member-country seafarers on board its national vessels carrying out such services*». See, COM (1998) 251 final Document. OJ C213, 9 July 1998, p. 17. In fact, only six member states apply the regime of the host state, France, Italy, Spain and Portugal – where it’s applied to regular general cargo or container transport between the continent and the Azores and Madeira [Decree Law 7/2006. Vid. COM (2014) 231 final, p. 4]. In the cases of Greece and Bulgaria, the applicable regime is the Greek or Bulgarian, respectively. Vid. COM (2014) 231 final, p. 4.

come from a destination or origin in another state (consecutive cabotage). The same occurs with ships of more than 650 tonnes carrying out mainland cabotage or cruise ships of more than this gross tonnage. This has led to various questions being raised concerning this disposition, both with regard to the competences of the host state regarding the so-called consecutive cabotage<sup>35</sup>, and –above all– with regard to the regime applicable to the crews on cruise ships<sup>36</sup>.

Together with the above mentioned questions, the most important and interesting of them all consists of the analysis of article 3 of this regulation. Thus, the questions subject to approach include the scope of the expression «*all questions relating to the crew*» mentioned in article 3 of the cabotage Regulation, in order to know which social and employment questions are within the scope, whether of the flag state or the host state, although taking into account that this latter state can only apply its own law when it is essential to satisfy the general interest and when this need is not covered by the standards of the origin state<sup>37</sup>. The expression considered by itself is sufficiently wide as to apply to any type of social and employment condition that applies to seafarers in ships dedicated to European cabotage. However, we cannot forget that this regulation is inserted in the framework of the regulation applicable to the community freedom to provide services, so that requirements cannot be

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35) With regard to consecutive cabotage, the ECJ has clarified that the concept of «voyage which continues or comes from a cabotage voyage» must be understood as the voyage from another state or to another state, regardless of whether or not there is cargo on board [Judgment of 6 April 2006, Case C-456/04, *Agip Petroli v Capitaneria di Porto di Siracusa*, 2006-I, pp 3395 and ff]. Thus the standards of the flag state apply not only for ships carrying goods in the international part of the voyage from which they come or following the cabotage part of it but also when the ship sails without ballast.

36) In this regard, the application of article 3 of the Regulation to cruise ships, the ECJ has also had the opportunity to comment, noting that matters relating to cruise ships with a gross tonnage of over 650 that undertake continental or island cabotage are the competence of the flag state, relegating the application of the regulations of the host state to cruise ships with a tonnage less than that mentioned [Judgment of 21 October 2004, Case C-288/02, *Commission of the European Communities/Hellenic Republic*, 2004-I, pp 10071 and ff]. Likewise, we must mention that regarding cruise ships, there is the problem of determining which Regulation is applicable when an international cruise service has cabotage services in one or various member states. Thus, the question debated is when the cabotage regulation or, as relevant, Regulation 4055/86 being analysed, must be applied. In this sense, the ECJ has noted that the cabotage standard applies when there are passengers who boards and disembark in the member state in which the cabotage stage is carried out, which means that if the passengers do not board or disembark in this member state, the regulation relating to the free provision of international maritime transport services will apply [Judgment of the ECJ of 27 March 2014, case C-17/13, *Alpina River Cruises* case].

37) According to the doctrine of the ECJ on the regulations that apply to the freedom to provide services according to which in the case of the freedom to provide services, the offerer can carry out its activity according to the dispositions of the country of origin and the host member state may only apply its own law when this is essential to satisfy the general interest and then this need is not covered by the standards of its country of origin. ECJ Judgment of 17 December 1981, «*Webb*» case, case C-279/80, pp. 3305 and ff. Judgment of 25 July 1991 to the case «*Säger c. Dennemeyer & Co. Ltd.*», case C-76/90, 4221 and ff.

established that can obstruct or restrict its exercising, which in all cases would be screened under the application of the principles of proportionality and necessity<sup>38</sup>. That said, and continuing in this case, what was expressed by the European Commission regarding which issues are the competence of the host states, all questions relating to the proportion or percentage of community nationals who must provide services in these ships the requirements that they have social coverage in the EU or the imposition of the minimum salary in each country will come under the above mentioned expression. With regard to safety and training requirements, the Commission considers that the member states can only require compliance with current EU or international standards (STCW or SOLAS conventions) for preventing the freedom to provide services disproportionately. To the above it is easy to add that the member states may directly or indirectly set the law governing the seafarers' employment conditions<sup>39</sup>, leading in most assumptions to applying to extra-community works the legislation of their origin, thus encouraging ship owners and shipping companies to greater competitive capacity and at the same time generating social dumping. Not in vain do the second, bis and international registers fail to include any correction for the host states to apply, as relevant, the imperative dispositions that were more favourable to workers, as would occur if Directive 96/71/EC concerning the posting of workers in the framework of the transnational provision of services applied<sup>40</sup>.

Finally, I would not like to end these lines without including, albeit briefly, an aspect I consider to be of certain interest and that concerns the possibility of including social clauses in the conditions documents in the framework of inter-European cabotage transport<sup>41</sup> as regulated in article 4 of the 1992 Regulation. According to this disposition, the member states may sign public service contracts or impose public service obligations, as a condition for the provision of cabotage services on maritime companies that undertake regular services with their destinations or origins in islands

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38) Article 9 of Regulation 3577/92, which states that, «*Before adopting laws, regulations or administrative provisions in implementation of this Regulation, Member States shall consult the Commission. They shall inform the latter of any measures thus adopted*», which means as far as it interests us, that any member state that wishes to make use of the possibility of applying its own standards regarding the crew must first consult the Commission, which will study the request individually according to the mentioned principles of necessity and proportionality. For the details, Vid. ECJ of 9 March 2006, caser C-323/03, Commission v the Kingdom of Spain, 2006-I, pp 2161 and ff.

39) In favour of a wide interpretation of article 3 of the Regulation, Basedow, J. (1994), «*Política europea en el transporte marítimo, libertad de prestación de servicios y cabotaje marítimo*», in Eizaguirre (Coord): *El Derecho del maritime transport internacional*, Donostia, 99-100.

40) Which, as is known, excludes the merchant navy from its scope of application.

41) In application of European Parliament and of the Council Directive 2014/24/UE of 26 February 2014, on public procurement and repealing Directive 2004/18/CE (OJ L94 of 28 March 2014) and European Parliament and of the Council Directive 2014/25/EU of 26 February 2014, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L94, 28 March 2014).

and between islands. The obligations they may impose or establish include those relating to the crew, fundamentally by the host states, depending on whether or not the island cabotage is undertaken by ships of more or less than 650 gross tonnage. The introduction in the conditions document of, for example, the requirement to pay an equivalent minimum salary for community or extra-community crew members is not free of multiple risks of all types, but here we wish to refer to the danger of the possibility of extending the case-law issued by the ECJ itself regarding the state measures for preventing social dumping in the framework of public procurement to this specific ambit. As is known, the interpretation by the Luxemburg Court is moving towards considering that this type of requirement exceeds or, better said, restricts, the right to the free provision of services regulated in article 56 TFEU. This is clearly expressed in the litigation that gave rise to the Rüffert judgment<sup>42</sup> and was framed in the context of the application of Directive 96/71/EC on the matter, as in the case of the most recent judgment, *Bundesdruckerei*<sup>43</sup>, in which no movement of workers occurred in the framework of the transnational provision of services. The case-law panorama, mentioned above, and that exponentially affirms that the introduction of this type of clause unjustifiably obstructs article 56 TFEU enters into open or relative contradiction to the regulatory reality of the receiving countries in the framework of cabotage with its destination or origin in islands or between islands. Not in vain do the legislations of certain states such as Spain<sup>44</sup> and France<sup>45</sup> set employment conditions with which these public services must in all cases comply for access to this traffic. This type of imposition, more restrictive in some cases than in others, raises the question of whether or not they contradict the above mentioned economic freedom or if they are covered by the 1992 Regulation itself, which for these purposes requires the member states to guarantee certain services –such as supply and transport to the islands– which would otherwise probably be negatively affected. Certainly it will be necessary to wait until the ECJ decides on the question in the future, if there is a preliminary ruling on the matter. Meanwhile, I think that we can be optimistic in this sense; because of the latest ECJ judgment about this issue of 17 November 2015<sup>46</sup> seems to bring together two different approaches and regulations of the same issue, that is, maritime and terrestrial in the same way.

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42) Judgment of 3 April 2008, Case C-346/06.

43) Judgment of 18 September 2014. Case C-549/13.

44) Article 6 of Royal Decree 1516/2007, 16 November, determining the legal regime of regular cabotage lines and navigations of public interest (Official State Bulletin number 283, 26 November), with which the providers of regular cabotage lines must comply, among others requirements, and with regard to the crew in the Order of the Ministry for Development of 22 July 1999, setting the manning conditions for ships undertaking island cabotage services, whatever the ship's flag (Spanish Official State Bulletin number 182, de 31 July).

45) Vid. article L. 5561-1 of the French Transport Code.

46) Case C-115/14, *RegioPost GmbH & Co KG / Stadt Landau in der Pfalz*



### 3. Free movement of seafarers: between maritime safety and competitiveness

If there is one ambit in community regulations to which a certain interest and relevance has been paid in the framework that concerns us, it is without doubt that of regulation aimed at improving the training and qualifications of seafarers and of encouraging employment mobility in European maritime industries, whether by establishing a system for the mutual recognition of diplomas and certificates for providing services on board ships in the European context<sup>47</sup> or removing the obstacles which, for nationality reasons, are imposed by some national laws for access to the most highly qualified posts on ships, whether the captain or in his place the first officers<sup>48</sup>. In addition, the enormous regulations developed for the purpose result in a type of «mantra» that can be found in numerous Commission communications since the end of the 1980s<sup>49</sup> and that are concerned with the need to increase the

47) Which starts with the now replaced Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, but it was only applicable to merchant navy chief engineering officers, first and second merchant navy engineering officers and to first and second radio officers. This Directive was replaced to enlarge the ambit on numerous occasions. Without trying to be exhaustive in relation to this question, it is sufficient to quote Council Directive 94/58/CE of 22 November, relating to the minimum level of training of seafarers, which incorporated into EU legislation for the first time the International Maritime Organisation Convention on Standards and Training, Certification and Watchkeeping for Seafarers 1978, as amended in 1995 (STCW 78/ 95), later modified by Council Directive 98/35/EC of 25 May 1998 and replaced by Directive 2001/25/EC of 4 April 2001. Directive 2001/25/EC was the subject of two important modifications and finally replaced by Directive 2008/106/EC. This last one has been replaced to introduce the 2010 Manila amendments to the STCW Convention, produced through Directive 2012/35/EU of 21 November, which updated it in the way described without replacing the prior 2008/106.

48) ECJ Judgment of 30 September 2003 (case C-405/01), Spanish Merchant Navy and State Administration Officers' Association. Commented by Björkholm, M. (2004), «Free movement – A threat or an opportunity? A view on nationality requirements for the ship's master,» *Marlus-Scandinavian Institute Maritime Law Yearbook*, 183-207. Grimaldi, M. (2004), «Il rapporto tra normativa interna e normativa comunitaria in campo marittimo. Brevi osservazioni sulla situazione italiana,» *Il Diritto Marittimo I*, 65-69. Also, Fotinopoulou Basurko, O. (2013), «Cuando lo que importa es un buen capitán de buque; el caso del Colegio de oficiales de la Marina Mercante española,» *Revista del Ministerio de Empleo y Seguridad Social* number 102, 165-183. Unfailingly connected to the above mentioned Judgment is the judgment of the same date that answers another preliminary ruling asked in the case of Anker & Co, case C-47/02, in which the Court of Justice found on whether the internal regulations of the member states that set reserves by reason of nationality for ships' captains can be considered as contrary to community law for discrimination. This was a case in which three Dutch seafarers challenged their right of access to the post of captain of fishing vessels registered in Germany. Meanwhile, the question of discrimination for reasons of nationality for the rest of the crew members was shown in the famous Judgment Commission against France of 4 April 1974, case 167/73, Rec. 1974, 359.

49) For example in the document *A future for the Community Shipping Industry: Measures to improve the operating conditions of Community Shipping*, COM (89) 266 final, 3 August 1989 and of course they can be confirmed in the latest published communications. Such is the case of the Communication to the Council, to the European Economic and Social Committee and to the Regions Committee. *Strategic*

competitiveness of the European shipping companies in the world-wide context by in turn encouraging the mobility of workers in the sector. We start from an incontestable reality, the reduction of maritime jobs in the European countries with the resort to labour from third countries on the one hand, but also –as a core fact– the great concern caused by the fleeing of tonnage from European registers to the flags of convenience, reducing as a consequence the previous hegemony of European fleets in the global panorama.

For its part, this set of regulations gives rise to the need to match community law with international requirements (fundamentally set by the ILO and by the IMO) relating to maritime safety. Since the 1990s, European institutions have shown their concern regarding the economic consequences caused by maritime accidents such as, for example, the cases of the *Erika* in 1999 and the *Prestige* in 2002, both on the maritime industry itself and on the economic sectors that directly or indirectly depend on the sea. Thus, the encouragement of seafarers' training and qualifications cannot be understood without the need to protect maritime and human safety at sea. Not in vain has it been noted that a large part of these accidents is due to human errors. With time and also as a consequence of the above mentioned reality, EU law has adopted a large number of standards that modify –as with their counterparts internationally– the distribution of the governmental powers concerned in the verification of technical, administrative and – as interests us here – social questions regarding ships. This last process, the main bastion of which lies in the incorporation of the contents of the ILO's MLC06 into the internal regulations of the member states through the clear leadership of the EU in the matter<sup>50</sup>, has had as its purpose the transfer of the social aspects from the flag state<sup>51</sup> to the port states<sup>52</sup> firstly, in a

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*goals and recommendations for the EU maritime transport policy up to 2018.* COM (2009) 8 final document, which specifically refers once more to the lack of professionals in the maritime sector, facilitating employment mobility and encouraging the training of the workers in the sector

50) COM (2006) 287 final, 15 June 2006, on the strengthening of maritime labour standards, in accordance with article 138, section 2 of the EC Treaty, stating that The Commission considers it essential to reflect on the community legislative framework with regard to the social standards applicable to seafarers in order to develop the competitiveness of the maritime sector, make the seafarer's profession more attractive and, in the long term, conserve the specialised European knowledge in this ambit. This Communication led to the adoption of Council Decision 2007/431/EC of 7 June 2007 authorising member states to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organization (OJ L161 of 22 June 2007).

51) Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006 (OJ L329 of 10 December 2013).

52) Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC on port State control (OJ L218 of 14 August 2013). Although the adoption of this standard has not been achieved to date, a 1989 Commission Communication observed the wish of European institutions that the member states ratify the 1976 ILO Convention 147 Merchant Shipping (Minimum Standards) to open the control of the state port to social questions too, a wish that, advanced

current reading, to second certain verification competences to the states supplying maritime labour. In this context, while the relevant Directives on the control of the flag state or port state have already been adopted, it still remains to undertake the relevant standard with regard to labour supplying, which it appears will not occur in the near future<sup>53</sup>, without our knowing the reasons for the delay.

#### 4. Community social policy and seafarers

We said at the start of these pages that seafarers are a category of workers like any other, while above we also referred to the leading role that EU regulations give to maritime safety. It is possible that in joining both proposals, the community institutions have not considered it necessary to issue specific standards for the workers in the merchant navy<sup>54</sup> beyond the regulations for the organization of working time of seafarers regulated in Directive 1999/63/EC of 21 June 1999<sup>55</sup>, amended by Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners' Associations (ECSA) and the European Transport Workers' Federation (ETF) on the Maritime Labour Convention, 2006, as well as Council Directive 92/29/EEC, of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on board vessels<sup>56</sup>. This regulation, regarding its legal base in the ambit of occupational health and safety where working time, for example, stands as a highly important factor for avoiding fatigue and thus preventing the accidents referred to above. From the technical point

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for its time, has delayed – it is insisted – in appearing until the incorporation into European law of the MLC 2006.

53) Note in this sense, article 6.2 of Directive 2013/54/EU which states, « No later than 31 December 2018, the Commission shall submit a report to the European Parliament and to the Council on the implementation and application of Regulation 5.3 of MLC 2006 regarding labour-supplying responsibilities. If appropriate, the report may include proposals for measures to enhance living and working conditions in the maritime sector»

54) Something similar occurs with the maritime/fishing sector where the following specific Directives can be quoted: Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels (thirteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 307 of 13 December 1993) modified by European Parliament and Council Directive 2007/30/EC of 20 June 2007 (OJ L165, 27 June 2007), Council Directive 97/70/EC of 11 December 1997 setting up a harmonised safety regime for fishing vessels of 24 metres in length and over, amended on various occasions, the last by European Parliament and Council Regulation (EC) 219/2009 of 11 March 2009 (OJ L87 of 31 March 2009).

55) OJ L167, 2 July 1999 accompanied by Directive 1999/95/EC of the European Parliament and of 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 L014 of 20 January 2000).

56) OJ L113, 30 April 1992, modified on various occasions, the last being through Regulation (EC) 1137/2008 of 22 October 2008.

of view, this is a sparse regulation of international origin or source<sup>57</sup>. Not in vain in the case of the working time Directive does it do nothing but incorporate ILO Convention 180, now in the MLC 2006, into community law, the situation of the latter reproduced with the annotated 2009 Directive.

Stated clearly, in the framework of the community social policy, the special or different regulation of the situation of workers in the maritime sector, as has traditionally occurred in national rights, has not been considered necessary but neither has the increasing of the protection of workers providing services on board ships with respect to the minimum international standards in the ILO or those of the IMO been considered a priority. But to this somewhat daunting image must be added that seafarers have not seen equality or parity regarding the application of the social Directives with respect to workers in the rest of the sectors. Thus, although in general all the directives apply to them<sup>58</sup>, there are some regulations from which seafarers have been traditionally excluded from their scope of application or states are allowed to exclude them with no apparent specific justification. In these circumstances, it must be noted that among the set of Directives from which seafarers can be excluded is, «curiously,» the set of social Directives connected to cases of business or economic crisis. This is the case of Directive 2008/94/EC relating to the protection of employees in the event of the insolvency of their employer<sup>59</sup>, Directive 98/59/EC on the approximation

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57) For example, the situation is clear regarding the regulation of noise and vibration where European Parliament and of the Council Directive 2003/10/EC of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC), amended by Regulation (EC) 1137/2008 of 22 October 2008, which specifically refers to the Code on noise levels on board ships in IMO Resolution A468(12). To the above must be added that although this Directive recognises the special problems of noise on board ships, it grants the member states a transition period for its application so that in the case, for example, of Spanish regulations, the result has been that the specific regulations on the limits of exposure to noise on board ships has taken years to be applied (eight since the adoption of the Directive and five since the adoption of the Royal Decree transposing it to our country).

58) Vid. the case of the ECJ Judgement of 3 July 2014. Joined cases C-362/13, C-363/13 and C-407/13, *Fiamingo and others v Rete Ferroviaria Italiana SpA*, which interprets the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP included in the Directive 99/70/EC to seafarers.

59) Although in this case there is a finding in which the ECJ condemned Greece for failing to guarantee equivalent protection to seafarers with respect to the rest of the workers in Directive 80/987/EEC. I refer to the judgement of 8 November 1990, *European Communities Commission v Hellenic Republic*, Case 53/88. At the time these lines were started writing, there was a preliminary rule submitted by the *Symvoulío tis Epikrateias (Greece)* on 13 June 2014 — *Elliniko Dimosio/Stéfanos Stroumpoulis and others (Case C-292/14)* which asks the ECJ whether seafarers of a member state who have undertaken maritime work on a ship with the flag of a state not a member of the European Union for the credits unpaid by the company owning the ship, which has its registered office in the third state but its real headquarters in the member state in question, declared insolvency by a court of that member state, applying the law of that member state precisely because it has its real headquarters there, are included in the scope of application of the protecting dispositions of that Directive, in view of its objective and independently of the employment contracts being regulated by the law of the third country and if the member state can require the contribution of the ship's owner from the financing of the guarantee

of the laws of the Member States relating to collective redundancies or Directive 2001/23/EC 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. Likewise, they are or may be excluded from the Directives in matters of representation and participation, such as is the case of Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. Finally, they are absolutely excluded in the case of Directive 96/71/EC about posting of workers<sup>60</sup>.

Currently, the modification of the above mentioned Directives has been done, as we have noticed at the start of this article, but this reality hasn't been easy given that the exhibit positions of the various member states in relation to these changes. Thus while, for example, Greece, Cyprus and the Netherlands were not favourable to the approval of the proposal, other states were more favourable to seeking a point of agreement or convergence that can overcome the existing differing interests, such as Germany, but for example, which preferred to study the proposals<sup>61</sup>.

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organisation. According to Council Directive 80/987/EEC, is the payment described in article 29 of Law 1220/1981 by Naftiko Apomachiko Tameio (ÍÁÔ) of the retributions up to a maximum of three months for the amount set as basic salaries and compensation determined in the collective agreements for Greek seafarers on ships with the Greek or a foreign flag under agreements with NAT, in accordance with that article, considered equivalent protection, that is, only in the case of abandonment abroad. These questions have been recently answered in the ECJ Judgment of 25 february 2016, Case C-292/14 .

60) Not so in Belgium, since the Belgian transposition standard of Directive 96/71/EC provides its application to the crew and its employers. *Moniteur belge* 86, 13 March 2003, pp 10638-10641. In this sense, it must be noted that in COM (2007) 591, p. 7, the Commission recognised that it was necessary to consider movement situations in the case of the merchant navy. Thus it pointed out that this situation occurs when a worker providing services on board a ship flying one flag is transferred to a ship flying another flag, something that happens very rarely. Recently, and so that the preparatory work for modifying certain social policy Directives relating to the dismissal of groups, bankruptcy, transmission of companies and information and consultation to include seafarers in them, that the group of workers who provide services on board a ship sailing the high seas cannot be considered as workers transferred to the territory of another member state, insofar as the application of the flagging law is based on the notion of the ship's nationality more than on an assimilation of the provision of services in the territory that grants its nationality to the ship. See Document SWD (2013) 462 final of 18 December 2013.

61) The various postures relating to the Directives involved can be read in the report prepared by the Permanent Representative of Spain to the European Union, Department of Employment and Social Security, in relation to the proposal mentioned above based on the meeting of the Social Affairs Group on 23 September 2014. Vid. the Web site Euskadi.net <http://www.ccaa-epssco.com/node/2289>.

## 5. Conclusion

The EU is constantly concerned with the social and employment regulation applicable to seafarers. The need to tackle the problem of the total or generally occasional exclusion of the maritime sectors from some social Directives has been admitted repeatedly but above all it has understood that it is necessary to tackle the situation of the social and employment conditions of seafarers in order to make maritime work more attractive and to combat the increasing lack of professionals in the sector. Likewise, it has been giving a primordial role to seafarers' training and qualification<sup>62</sup>. Beyond the above, and from the perspective of substantive regulation, the EU has not shown special interest in increasing the protection of these workers by creating regulations that go beyond the minimum prescriptions regulated by the international organisations (notably the ILO and the IMO). This is because although the need to guarantee sufficient levels of protection to seafarers is recognised, at the same time, in all these speeches and arguments, the slogan that this protection cannot involve weakening the shipping companies' competitiveness always stands out. Therein lies the crux of the matter. Even so, and for a touch of optimism, «*Eppur si muove*» as Galileo said.

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62) It is clearly a single theme. In addition, in the documents mentioned in other sections of this article, this «mantra» can be followed in the 2006 European Commission Green Book *Towards a future maritime policy for the Union: European perspective of the oceans and seas* and also in the Communication of the European Commission to the European Parliament, the Council, the Economic and social Committee and the Regions Committee on the harmonising between the member states of a common policy in matters of work at sea, Document COM (2007) 591 final.

