

FLAGS OF CONVENIENCE REGULATION WITHIN THE EUROPEAN UNION AND ITS FUTURE ON INTERNATIONAL TRADE *

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The practice of flags of convenience, where owners register vessels in countries other than their own in order to avoid binding regulations or controls, is a serious menace to today's maritime world."
Franz Frischler, *European Union Fisheries Commissioner* (2002)

ABSTRACT

This article contents a study of relevant judgment and legislation about flags of convenience within the European Union and its international legal framework. Therefore, decisions from the European Court of Justice have been studied as well as the role played by shipping regulators which seek to avoid infringements by Flag of Convenience vessels. Furthermore, it is described possible measures that will be taken by European States which lead to the permanence of these registries instead of their disappearance despite all controversies around them, taking into account the influence of globalization over international trade regulation. This research used deductive, analytical and non-experimental methods so as to obtain the results.

Key words: Flags of Convenience- Future Regulation- European Union- International Trade- Maritime Registries.

RESUMEN

Este artículo comprende un estudio relevante de la jurisprudencia y legislación sobre Banderas de Conveniencia dentro de la Unión Europea y su marco jurídico internacional. Por esta razón, se ha estudiado la jurisprudencia de la Corte Europea de Justicia, así como el papel desempeñado por los reguladores de la industria naviera que buscan evitar infracciones por parte de los buques con banderas de conveniencia. De igual forma, se describen las posibles medidas que serán tomadas por los Estados Europeos que conllevan a la permanencia de estos registros marítimos en vez de su desaparición a pesar de todas las controversias que los rodean, teniendo en cuenta la influencia de la globalización en la regulación del comercio internacional. Esta investigación utilizó los métodos deductivo, analítico y no experimental con la finalidad de obtener los resultados.

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RESEARCH PROBLEM

The establishment of Flag of Convenience system in the shipping world have aroused much criticism as it is usually regarded as a haven where there is a lack of regulation or where existing regulations are poorly enforced. Therefore, it is appropriate to make questions such as; to what extent does EC law control the register of ships, how will be FOC vessels regulated in the future?

METHODOLOGY

As it was mentioned above, there are several complaints in regard to the use of flags of convenience within the shipping industry (40% of world tonnage as of 2010). Many governments have complained about there is no a legal fulfilment to the rule of genuine link, which demands a real connection between the flag register and their administrators or shipowners. This situation has allowed proliferation of a lot of vessels from countries which do not comply with international labour and environmental rules. Many times those real shipowners are not easy to identify, hence difficult to enforce. Therefore, flags of convenience vessels are regarded as unseaworthy and unlawful. Thus, the aim of this research is to find whether or not such arguments are valid from an European Union perspective.

In order to find answers for those problems, this research firstly started with a compilation of many authors and legislations about the subject of flags of convenience, using documental and historical method, so as to determine the order of European and

international legal decisions. The deductive method also played an important role through this research as allows knowledge about extensive concepts and problems leading to detailed situations. Moreover, legal interpretation of jurisprudence was determinant so as to understand the issues of law in regard to Flags of Convenience.

This methodology allowed to get the following findings such as the prevail of European Community Treaty principles over others provisions from international law such as UNCLOS; the lack of connection between unseaworthiness and flags of convenience; the corroboration of economic trends to reduce tax for enhancing world market conditions and the superiority of economic interests over environmental and labour interests.

INTRODUCTION

Traditional registers have relied upon the rule of the *genuine link* to control register of ships. However, the judgement of *Factortame*¹ constitutes a legal boundary for EU members as European countries are not easily able to set out the conditions of ship registration. The *Factortame litigation* impacted over domestic law. Consequently, other shipping jurisdictions such as Greece or Germany were found in breach of the EC Treaty. Member States allege that masters or shipowners of their ships must have a legal connection with the flag state otherwise public interest could be infringed. However, the European Court of Justice ECJ ratifies a different position. This might lead to say that the “*genuine link*” concept is not clearly defined by the international law and requires a careful interpretation by the ECJ and domestic jurisdictions. Furthermore, it might seem that *Factortame* justifies the choice of FOC registers in certain manner within the EU.

1 Case C-221/89, Regina v. Secretary of State for Transport 1991 ECR I-3905; [1991] 2 Lloyd's Rep 648.

This article will firstly describe the early decisions in the EU regarding shipping policy; scrutiny the relevant current case law and the regulation of shipping register in Malta and Cyprus. Moreover it will examine the role of some shipping regulators such as Classification Societies and PortStates. Finally, this piece of work will find out how globalization has influenced over shipping registers, what measures the EU might undertake so as to achieve fair competitiveness and also some conclusion remarks. The purpose is to clarify the EU policy in regard to FOC registers taking into account the changes in international trade.

EARLY APPROACHES IN THE EUROPEAN UNION

The EC involvement in shipping policy measures was practically inexistent before 1973. However, the Commission brought to ECJ the question of whether free movement of labour applied to seamen. This was discussed in the landmark judgment of *Commission v. France*², also known as the “French Seamen’s case”. The Court approved the opinion of the Commission that the general rules of the EC treaty do apply to shipping. Although the former case was the starting point as to embrace maritime transport under EC provisions, there was not a common policy. Therefore, several problems arise *inter alia*, that there was a need to establish a link between the Community’s Commercial policy and action on shipping. Nonetheless, it had been the *Muscat Dhows*³ case which had constituted that registration had a juridical life

independent of ownership⁴. Thus, it might be said that questions of the link between the register and the vessel arose before the beginning of the EC.

THE REGISTER OF SHIPS IN THE EUROPEAN UNION AND SOME EU-FOC JURISDICTIONS

1. The *genuine link* issue.

It is practically unavoidable to mention the considerable role of the genuine link in ship registration and its controversy around the FOC issue. The rule was firstly established in Article 5 of the Geneva Convention on the High Seas in 1958 which states that:

(...) 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. (...) There must be a genuine link between the State and the ship; in particular the State must effectively exercise its jurisdiction and control in administrative, technical and social matters.

This provision was also embraced by the UNCLOS⁵ in Article 91. However, this concept has prompted discussions in regard to its real meaning. Due to this uncertainty, the United Nations celebrated a convention on conditions for regulation of ships in 1986. The convention clearly constitutes a framework for ships’ registration. The issue with this Convention was its enforcement. Article 19 stipulates that at least 40 states become contracting parties with a combined

2 Case 167/73 [1973] ECR 359.

3 *France v. Great Britain/Muscat Dhows* Permanent Court of Arbitration (1905) 11 RIAA 83 Retrieved 21st July 2008 From The Hague Justice Portal <http://www.haguejusticeportal.net/eCache/DEF/6/926.html>

4 Frenco M (2000) “The future of open registries in the European Union” *Lloyd’s Maritime and Commercial Law Quarterly* August 383-393.

5 United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay on 10 December 1982.

tonnage of at least 25 per cent of the World Tonnage as to the Convention entry into force. A report of the UNCTAD⁶ in 1995 said that only 11 countries (any of them is a FOC recognized country) have signed the treaty, therefore its enforcement has been threatened. Articles 7 to 10 of the Registration Convention established that there must be an economic link between the flag state and those who own, man, and manage a vessel. The Convention did not succeed as some provisions were difficult to enforce. For example, the level of national participation of ownerships and the Convention demanded a certain number of nationals in the crew from the flag state. Obviously developed countries and some Open Registries did not agree with these stipulations and hence they did not become signatories. These conventions constitute the international framework for ships registration. The issue is also that EU members have to comply with the EC treaty; hence it is pertinent to examine the approach of the ECJ in order to determine the extent of ships regulation in the European Union.

2. The ship's registration under European Community Law.

The ECJ has been adamant to say that all member states have to comply with Community law. This was the landmark case of *Factortame* where it was held that in exercising their powers to determine the conditions for registration of vessels, member states must follow rules of Community law. Section 14 of *UK Merchant Shipping Act 1988* constituted a violation of the freedom of establishment provisions set out in the EC Treaty Art. 52 in respect of vessels which were pursuing an economic activity through a fixed establishment in the UK. The freedom of establishment was also protected

in *Commission v. Greece*⁷ where the Court found maritime register Greek legislation against EC law.

The judgment of the Court in this case points up the decision in *Factortame* saying that whether the vessel is considered an instrument of economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be detached from the exercise of freedom of establishment. Nevertheless, the Greek Government does not share the same opinion; Greece argued that the UNCLOS gave them the right to set out their own criterion in terms of ships' registration. Greece defended their arguments based upon article 5 of Geneva Convention although the Court did not follow their point of view. The Court said that indeed States have the power to determine the conditions of ship registration; Member States must comply with Community law.

A similar situation was discussed in *Anker and others v Germany*⁸, in this case German law *Schiffsbesetzungsverordnung [Ship's Crew Regulation]* establishes that irrespective of the gross of the registered tonnage, the master must be a German national and hold a German certificate of competence. The applicant argues that this law is against Article 39 of EC Treaty which lays down the principle of freedom of movement and abolition of discrimination based on nationality. The Case pointed out that the Master of the vessel is not considered *prima facie* a job involving public service. However, taking into account that German law allows the Master of vessels several duties such as police powers, coercion, powers of investigation, registration of birth and so on; it was considered that a Master of vessel is a representative of the general interests of the

6 United Nations Conference on Trade and Development (UNCTAD) Status of multilateral treaties 13 July 1995 noted by UNCTAD secretariat.

7 Case C-62/96 *Commission v. Hellenic Republic* [1997] ECR I-6725 133.

8 Case C-47/02 [2003] ECR-I 10447; [2004] 2 CMLR 845; [2003] All ER (D) 62 (Oct).

flag state. Notwithstanding the former statement, the Court also said that the abolition of freedom of establishment cannot be justified for this reason. The advocate general also points out that the UNCLOS did not state that the master of the ship must be a national from the flag state. Finally, the Court decided that each Member State has the right ... *to reserve for its nationals the post of master of vessels flying its flag and engaged in small-scale maritime shipping (Kleine Seeschiffahrt) only if the rights under powers conferred by public law granted to masters of such vessels are in fact exercised on a regular basis and do not represent a very minor part of their activities.*

3. The supremacy of European Community Law over the *genuine link*.

Indeed *Anker* case highlights that when the requirement of the genuine link in this case is not discussion over standard vessels. The problem arises in regard to small fishing vessels which the Court widely stated that do not involve public service. Thus, it might be said that domestic regulations in Europe (such as Germany or the United Kingdom) have the control over the management of the ships. Furthermore, in *Commission v. Netherlands*⁹ is also stated by the ECJ that the right of establishment can be restricted by reasons of general interest. One of the principal arguments of Netherlands was Article 91(1) and 94 (1) of the UNCLOS. However, the Court did not agree with Netherlands and it said that:

for the purposes of effective control by flag state, which is required by article 94 (1), it is not necessary to establish a genuine link between the state and the actual owner; it is sufficient to provide that the management of the ship be carried

out from a place of business in the Netherlands by a person with powers of representation. (Bold letters are not in the original text).

The ECJ found disproportionate Netherlands Code of Commerce in regard to demand EEA¹⁰ nationals to run the day-to-day management of a ship. The Court again stressed that the exercise of effective jurisdiction is fulfilled if the management of the ship is carried from the Netherlands by a person authorized to represent the ship owner. This case followed the decision in *Factortame* which states that regarding nationality of ships the prohibition of discrimination must be supported by all EC members and the competence to determine the conditions for the registration of vessels is vested in the Member States. In assessing whether or not Article 91(1) of the UNCLOS obligated Netherlands to ensure the existence of a “genuine link” the Court concluded that there is no such obligation¹¹.

The Court also supported its decision in *M/V Saiga (No. 2)*¹² when it was said that

...the genuine link... is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag state may be challenged by other States.

The most important conclusion of the ECJ in this case was that the nationality is not a requirement within the rule of “genuine link”. It might seem that the Court observes the exercise of effective control as the only justifiable dimension of the genuine link requirement. However, the ECJ was very concerned in regard to the flag states’

9 Case C-299/02 [2004] 2 All ER (D) (206) (Oct).

10 European Economic Area.

11 Kan A (2005) “Commission v. Netherlands Case C- 299/02” 99 *The American Journal of International Law* October 867-873.

12 *M/V Saiga (No.2) (Saint Vincent v. Guinea)*, Judgment ITLOS Case No.2, para 83 (July 1 1999).

supervision powers under Article 94 of the UNCLOS. The Court recommends that States interested in high standards in seafaring will have to undertake necessary arrangements as to prevent that Article 91(1) of the UNCLOS remains without effect. The former statement recognizes that the genuine link requirement depends strictly upon the administrative control of flag states. This opinion was pointed out by the UNCTAD¹³ which said that the existence of genuine link between the vessel and the flag state is reflected in the extent of administrative control which a State exercises over its national shipping industry. This might lead to say that the enforcement to FOC vessels is a responsibility for local governments; as the international community has not firmly assumed this commitment yet.

4. The case of Cyprus and Malta regulations.

A special attention is drawn to Malta and Cyprus as they are FOC countries which are also part of the EU. In 2000, after the *Erika*¹⁴ crisis, the European Commission regards as a priority the improvement of maritime administration in Malta and Cyprus¹⁵. In regard to Malta, the ship management and maritime operation is regulated by the *Maltese Merchant Shipping Act 1973*, this law is based on UK legislation but it has been amended since it was enacted until 2007. The Maltese law allows many advantages for the registration of ships such as there no restrictions on the nationality of crew, no restrictions on trading and foreign port entry and no age limit for ships. Maltese shipping law is flexible in regard to sale or mortgaging of

ships. After provisional registration, mortgages can be registered, transferred or discharged to the Maltese Register. Despite Maltese shipping law flexibility, it could be difficult to say that there is no an effective administrative control in Malta. In 19 June of 1995 the European Council enacted the 95/21 directive which concerns *inter alia* the enforcement in Community ports of international standards for ship safety. Malta made the transposition to its domestic legislation on the 1st of May 2004. According to Council Directive 95/21 and their following-up amendments, severe measures have to be undertaken by Member States, for example, EU members *are obliged to establish and maintain national maritime administrations for the inspection of ships in their ports or in the waters under their jurisdiction*. This means that the effective administrative control in Malta is compulsory otherwise it would be in breach of European law provisions.

In the case of Cypriot registry is governed by the Merchant Shipping Laws 1963-2004 (Register of ships, Sales or mortgages); the Merchant Shipping Laws 1992-2004 (Fees and Taxes), and the Merchant Shipping Laws 1963-2002 (Masters and Seamen). These laws are also in harmony with EU provisions as from 1st May 2004. It might be said that Malta and Cyprus offer many tax advantages but it does not indicate that their registries and the authorities which control them have not had any relation with the shipowners or vessels. Since Malta and Cyprus became part of the EU the quality of their register has been improved considerably. This is supported by declarations made by Salvarini¹⁶ who said

13 United Nations Commission on Trade and Development; the subject was discussed at the 2nd Session of UNCTAD in 1968, see UNCTAD Doc. TD/ NGO/2.

14 It was an oil tanker which sank in December 1999. The vessel spilled thousands tons of oil over the English Channel.

15 Question of Cypriot and Maltese flags of convenience following the wreck of Erika Official Journal 280 E , 03/10/ 2000 P. 0171-0171.

16 Salvarani R Head of Maritime Safety in the European Commission Transport Directorate, at the Conference "Is There a better way to regulate?" in Oslo, Norway, 23-24 June 1998 *Conference Proceedings* 21.

that many national EU flag states perform worse than traditional FOC registers.

THE ROLE OF SHIPPING REGULATORS

Although primary source in regard to the enforcement of ships registration and their safety corresponds to flag states; there are two institutions which have fostered self-regulation in the shipping industry: Port State Control (PSC) and Classification Societies.

1. Port State Control (PSC).

PSC started in 1982 with the UNCLOS in their articles 211, 220 and 226. It might be said that the role of PSC has increased the enhancement of shipping safety. It might seem that the main reason has been the implementation of the MOUs¹⁷. In the case of Europe, it was established The Paris Port State Control MOU. This institution has demonstrated that it might be possible to target sub-standard shipping much easily. They share information between the regional states (in this case the Mediterranean Sea) and they can know much rapidly which vessels could be unseaworthy. However, it is arguable that the registration of ships is a faculty which remains only in flag states. This fact consequently prompts the growth of FOC vessels. Furthermore, PSC is criticized because is used as a political tool; it has lack of uniformity and also has a subjective element in it. This situation makes that there are still some failures in the PSC system¹⁸.

Additionally, the PSC system bears the difficulty that the MOUs are not legal

binding. The MOUs are not international treaties therefore any non-compliance with the MOU will not constitute legal responsibility. Nevertheless, formulation of EC Directive 95/21 caused that the Paris MOU 1982 has been strengthened and it can be possible a legal binding within the EU. Moreover, the provisions about the right to appeal in case of unexpected detention are protections against the abuse of powers. Thus, the PSC system within EU has proven to be more effective because of EC directives.

2. Classification Societies

Classification Societies also have a preponderant part in shipping regulation. As it is stated in an Annex to EC Directive 95/21 classification societies have the duty to certify whether or not a ship is able to sail in safety conditions or without any possible threat to marine environment. Regulation of classification societies within the EC did not start until 1994 with the implementation of Council Directive 94/57/EC. Nevertheless, their role has been questioned several times due to the accidents such as *The Erika* or *The Prestige*¹⁹. Therefore the European Commission has adopted amendments as to improve the failures. Although Directive 2001/105/EC stressed that there will be a closer monitoring of classification societies' activities; the Commission is concerned with a possible conflict of interest in their functions. It is arguable that Classification Societies issue seaworthiness certificate on behalf of either shipowners or flag states. The Commission said that these practices must be changed but there are not specific measures²⁰.

17 Memorandums of Understanding.

18 Ozcayir, Z (2000) "The role of Port State Control" 8 *The Journal of International Maritime Law* November, 147-159.

19 It was an FOC vessel where an accident occurred at the end of 2002 causing massive oil pollution of the European Atlantic Coast.

20 Hui, W (2004) "The EU Marine Oil Pollution Prevention Regime-Recent Developments" *European Environmental Law Review* November 292-303.

THE FUTURE OF FLAGS OF CONVENIENCE

1. Globalization and the Flag of Convenience market

The globalization process is undoubtedly connected with FOC market as those vessels dominated the world merchant fleet at 52% of the total tonnage as early of 2000²¹. The reasons for using FOC vessels are widely known: lower taxes, lack of trade restrictions and flexible labour conditions. Therefore, the regulation of FOC hardly would be the same compared to past years. Furthermore, the fact that shipping is a global industry makes its regulation more difficult. For example, De Sombre²² said that globalization has a strong influence over domestic laws.

Due to this phenomenon, governments could take different ways: low their own standards, work to raise standards internationally, or choose an intermediate level of regulation that makes sense for them domestically and yet offer them some possibility to compete in an internationalized market. The globalization in the economy prompts that the domestic regulation be so weak that the current regulation should relax even more their standards and requirements in the register of ships. As it was pointed out by H. Jeffrey Leonard *artificial factor endowments [such as low levels of regulation] created by governments have become at least as important as natural factor endowments*²³. In

other words, globalization causes the application of the *race to the bottom* theory which was coined in *Ligget Co. v. Lee*²⁴ or the *pollution haven hypothesis (PHH)*.

This argument is also followed by Murphy²⁵ who said that the shipping industry enjoys an *extreme ease and low cost of relocation*. Nevertheless, the research by De Sombre regarding regulation and standards in twenty largest flag states demonstrates that open registers such as Panama has optimum labour and environmental standards of shipping. The outcome of this discussion seems to be that globalization indeed prevails over FOC regulation positively rather than negatively. As globalization in the shipping industry arose, several institutions have intervened in the control of substandard ships. This includes Port State Control PSC, international trade unions such as ITF²⁶, insurance and classification societies²⁷. These institutions have decreased the level of substandard ships within the FOC market. On the other hand, some other authors like Sampson and Boor estimate almost the same approach. They said that globalization has prompted the application of 'smart regulation' within the shipping industry. They claimed that PSC is an attempt of smart regulation in the shipping industry. Thus, they overlap with De Sombre on saying that PSC is direct consequence of globalization in shipping. However, Sampson and Boor describe that the PSC is not fully effective. The main problems of PSC are its

21 This figure was provided by ITF official website www.itfglobal.org

22 De Sombre, E (2003) Globalization and Environmental Protection on the High Seas August Retrieved 21st June 2008 from Central European University http://web.ceu.hu/polsci/Illicit_Trade-CEU/Week5-DeSombre.doc

23 H. Jeffrey Leonard (1988) *Pollution and the Struggle for World Product: Multinational Corporations, Environment, and International Comparative Advantage* Cambridge, Cambridge University Press, 6.

24 288 U.S. 517 (1933).

25 Murphy D (2004) "The structure of regulatory competition: Corporations and Public Policies in a Global Economy" 29(5) *European Law review* 730-731.

26 International Transport Workers' Federation.

27 De Sombre, E (2003) Globalization and Environmental Protection on the High Seas August Retrieved 21st June 2008 from Central European University http://web.ceu.hu/polsci/Illicit_Trade-CEU/Week5-DeSombre.doc

inconsistency and wrongful detentions. It is also important to point up that globalization has allowed the creation of global information networks such as EQUASIS²⁸. The EU is also concerned about the globalization process and therefore it has endeavoured to adjust the regulation in several manners.

2. Attempts to regulate effectively European FOC market

In 1997 the European Commission adopted a new guideline in order to solve the disadvantages in the market mainly arose by FOC vessels. The Commission decided that Member States would be allowed to exempt shipping from fiscal and social charges or to reimburse these charges. Corporate tax relief for earnings derived from shipping is also allowed under certain conditions. The European Commission believes that the new guidelines will reduce the competitive disadvantage. In the same year the European Parliament taking into account the situation and observed that 56% of EC tonnage was registered in foreign countries thus, it was decided to approach a new maritime strategy within the EU. The parliament proposed a target to reduce FOC in 25% by the year 2005. They also suggested that the owners or hirers of vessels did not have to bear the entire burden of costs and they consider important the role of Port State Control. The new strategy deems that it is necessary to clarify the legal status of dual registers and their compliance with EC competition rules. The parliament says in this resolution that it will condemn the State aid created through the FOC system at international level²⁹. The Commission states hence that for all EC Members with large fleets: *the creation of conditions which allow fair competition with flags of convenience seems the best way forward*³⁰.

Initially, EC competition rules applied to maritime transport since Regulation 4056/86. This regulation did have many limitations and therefore EC competition rules were applied to maritime industry in a different manner than the other industries. A review of Regulation 4056/86 demonstrated that there was no stability of freight rates or shipping services and hence it was decided to bring maritime sector to the EC general competition enforcement regime through Regulation 1419/2006.

As a corollary Tramp Shipping Services and Cabotage are now embraced by Regulation 1/2003. In these kinds of businesses fixed regular schedule and freight rate are freely negotiated. This point particularly raises importance as cabotage services are mainly used by FOC shipowners. In other words, FOC shipowners might loss certain advantages as they will have to comply with the standard competition measures.

Furthermore, it is also relevant to mention the incorporation of State Aid to Maritime Transport. The major development in recent years regarding State Aid to Maritime Transport is the implementation of the flat rate tonnage system (*'tonnage tax'*). The Commission said that the policy adopted in 1997 reduced the trend of EU shipowners to flagging out, although the increase of FOC vessels continues. The new guideline was established in 2004 and considers the following measures *inter alia*: accelerate depreciation on investments in ships; the right to reserve profits made on the sale of ships and replace the regular corporate tax for the tonnage tax –which means that the shipowners pays an amount of tax linked directly to the tonnage operated–. However, *as a matter of principle, tax relief schemes require*

28 EQUASIS is an industry database on ship safety, it was set up following the international quality shipping Conference in Lisbon in 1998 and financially supported by the EC, France, Spain, Singapore and Japan.

29 Resolution on the Commission 'Towards a new maritime strategy' (COM (96) 0081-C4-0237/96).

30 Community Guidelines on State Aid to Maritime Transport [1997] O.J. C205/05.

a link with the flag of one of the member states. The scheme must develop the shipping industry exclusively. Thus, whether a shipping company is engaged in other commercial activities, it will not be embraced by the tax relief. In respect of labour costs, it was established that there will be rate reduction of social protection contributions and income tax for EC seafarers. Another approach for State Aid is that governments prefer to make direct payments instead of tax reduction³¹.

In terms of safety and environment some changes might affect FOC vessels. For example, PSC will require the inspection 100 per cent of ships entering their ports. Moreover, the changes in Classification Societies regime within EC will introduce independent quality control system (with the possible of some economic penalties) for monitoring the work of Classification Societies³².

Notwithstanding the provisions mentioned above, the European Commission has issued a Green Paper for the future of maritime policy within the EU and thereby it will affect FOC vessels. There are two important objectives in the document: the need to maintain Europe's Competitiveness in maritime transport given the social and economic importance to the industry; and the protection of marine environment³³. The Green Paper highlights the importance to

globalize the regulation on maritime affairs within the EU. The Commission outlined in the paper that the EU will undertake a better implementation of international instruments. It also has expectations in regard to the "genuine link" issue which is discussed by the IMO³⁴ which might impose potential consequences of non-compliance with duties and obligations of flag states in international instruments³⁵. The Consultation process brought the following results: the endorsement by stakeholders regarding an integrated approach to Maritime Policy; the relevance to establish a Marine Thematic Strategy as the environmental pillar of the EU maritime policy; the need for coordination in management for competing uses of the Seas and also the development of a European Data Network³⁶.

Consequently, it was recently issued a set of guidelines for integrated governance frameworks for Europe's Seas and Oceans³⁷. These guidelines include a massive integration of several aspects in the maritime sector. It is highlighted the incorporation of the policy into national legislations; the role of coastal regions and above all the participation of stakeholders. Nonetheless, some NGOs do not agree with the provisions in the Blue Paper. They suggest that the Blue Paper on Maritime Policy does not have a "holistic approach" and it is narrow instead³⁸.

Finally, it might be said that all these strict regulations might proliferate the increase of

31 Commission Communication C (2004) 43 –Community Guidelines on State Aid to maritime transport [2004] O.J. C 013, 17/01/204 P 0003-0012.

32 Greaves R (2007) "European Union Law Current developments" 56 *International and Comparative Law Quarterly* April 415 ICQL 56; 2 (415).

33 *Ibidem*.

34 International Maritime Organization.

35 Green Paper 'Towards a future Maritime Policy for the Union: A European vision for the oceans and the seas' COM (2006) 275 final Brussels 7.6.2006 .

36 Conclusions from the consultation on European Maritime Policy COM (2007) 574 final Brussels 10.10.2007.

37 Guidelines for an Integrated approach to Maritime Policy: Towards a best practice in integrated maritime governance and stakeholder consultation COM (2008) 395 final Brussels 26.6.2008.

38 Unknown author (2007) "WWF's response to EU Maritime Policy Blue Paper" October Retrieved 26th July 2008 from WWF http://assets.panda.org/downloads/wwf_positionpaper_maritimepolicy.pdf

international registers such as Denmark or Germany, which was supported by the ECJ in *Firma Sloman*³⁹ case where it was stated that German Second Register is not against EC Competition law. Thus, it is likely that traditional shipping registers will be weakened within the shipping market in the forthcoming years.

CONCLUSIONS

The rule of genuine link has proved that it is not an effective argument against FOC vessels. The ECJ's position is overwhelming; the most important element is the effective administrative control by flag states even though there is no nationality link between shipowners and vessels. Although flag states have sovereignty to determine their own rules, they have to comply with the non-discrimination principle.

It might seem that the control in ship registration is effectively regulated within the EU. The use of FOC vessels is a matter of customary law. Although FOC vessels are not clearly accepted or regulated in maritime international conventions or European legislation, the shipping community endorses them as a normal practice in their business. However, the European Community has set out many rules which maximize the quality of EU shipping registers.

Moreover, it might be said that there is a slight consent of FOC vessels in the EU. The rules regarding control of ships' registration and the case law do not manifest that the EU regulators pretend to penalise FOC vessels. The most important concern is that the vessels are in optimum conditions to sail. For example, there was not political pressure

against Malta or Cyprus to halt their FOC services. It was ascertained that Maltese and Cypriot jurisdictions are now in harmony with EC provisions and they have made an effort to enhance their inconveniences.

It was also examined the role of PSC and Classification Societies so as to assess the control of ship registration within the EU. It was found that PSC although have some failures, the system has achieved the harmonization in most of the shipping world. PSC is applied in the majority of countries around the world and is also fairly well-managed in the EU. PSC has fostered the decrease of sub-standard shipping of FOC vessels. In regard to Classification Societies it might be said that there are some weaknesses in terms of conflict of interest and also liability. However, the EU Commission is preparing a regulation package to deal with these issues.

On the other hand, several factors have prevailed to change the current maritime policy in the European Union and thereby FOC vessels. The influence of globalization in the shipping industry is quite notorious. The globalization has caused that domestic jurisdictions relax their tax and environmental regulations to attract more customers and investors. Furthermore, this phenomenon has prompted that many global institutions are involved in the control of the maritime sector. Due to the globalization in shipping, there is an improved exchange of information and also institutions such as PSC are reinforced. There is a tendency of flag states to use '*smart regulation*'. In other words, when there is a wide range of instruments available to use such as stakeholders or technology in order to achieve effectiveness in regulation⁴⁰. It might be said that

39 Cases C-72/91 and C-73/91 *Firma SlomanNeptunSchiffahrts AG v. SeebetriebsratBodoZisemer, de la SlomanNeptunSchiffahrts AG* (1994) 31 CMLR 137

40 Leiss W (2003) "Smart regulation and risk management" November Retrieved July 27th 2008 from William Leiss http://www.leiss.ca/images/stories/Articles/smart_regulation_and_risk_management.pdf

according to the new guidelines the EU is not apathetic of this effect.

The regulation in the future will bring more tax relieves for shipping investors. However, it might seem that these incentives would not stop the choice to flagging out. Labour costs are still underlying for the decision of shipowners to prefer crew from other countries outside the EU. Albeit European governments are planning to reduce the contributions for EC seafarers in social protection, EC labour costs will endure very expensive. Shipowners will therefore continue to hire crew from outside Europe.

Moreover, if there is an eventual reduction of some labour contributions; the measure will not be followed by international trade unions or NGOs. It might seem that FOC vessels as majority of vessels in the world will be under harder safety requirements. The proposals are destined to increase inspection in the EU. The maritime policy will be more integrated to international standards. The concern of the EU is to globalize the regulation involving IMO standards into EC legislation. The purpose of this approach is to achieve the compliance of FOC registers which are outside the EU and thereafter emphasize the commitment of the international community.

In conclusion, despite the shipping industry will have less fiscal restrictions, fairer competition rules and safer and controlled ship operations; FOC vessels could remain in use within the EC. It might be suggested that to offset the competitiveness in the shipping market it would be advisable to adopt the registration of ships in international registers or so-called *quasi-flag of convenience*.

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