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Fair wage and working conditions within the European Maritime Space

Report for the European Transport Worker's Federation

October 2019

Contents

Executive summary

From the perspective of international law, it is not problematic to impose EU employment conditions on seafarers with a nationality of a third State where either the vessel is flagged in an EU Member State or is operated by a company established in the Union.

Currently, the European Maritime Space is governed by EU primary law, the national law of the EU Member States, regulation 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, and regulation 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). Neither EU primary law nor EU secondary law provides free movement rights to actors from third countries. The purpose of the regulations on maritime transport services and maritime cabotage is to implement the right to free movement within their relevant fields. These regulations do not implement the flag state principle, which is a concept of international law.

The values on which the European Union rests demand a balance between economic rights, on the one hand, and social values, including workers' rights, on the other. The general principle underpinning the European Working Space is that the host state in which a service is delivered, is obliged to ensure the protection of a core set of workers' rights through the enactment of mandatory, prescriptive rules and by providing for the effective enforcement of these rules.

Currently the law of the EU Maritime Space differs from that of the European Working Space in general. We have not identified any legal arguments that can explain or justify this difference. In our view, the current state of the law is at odds with the fundamental legal values espoused by the Treaties and the key European policy on the establishment of a European Social Pillar.

The report presents recommendations upon which a European Maritime Space can be constructed and which can guide the drafting of a legal framework that strikes a fair balance between competition and free movement, on the one hand, and fair wages and working conditions, on the other.

We recommend the enactment of a Union standard, based on the principle that the same work in the same jurisdiction should be remunerated in the same manner:

- Crews employed on vessels that provide maritime services within or between EU Member States shall be covered by conditions of employment that are equal or superior to those applicable in the EU Member States concerned.

The Posting of Workers Directive is a key template for the construction of the European Working Space. Article 1.2 of the Directive states that it shall not apply to "merchant navy undertakings as regards seagoing personnel".

We recommend that

- the legal and political legitimacy of the exception clause in the Posting of Workers Directive is reassessed and reconsidered by reference to the fundamental legal principles on which the Union is based, by reference to the

policy choices that underpin the European Pillar of Social Rights and by reference to the legal and political considerations that guide the construction of EU Law in other sectors of the economy.

International law does not require the EU domestic right to free movement to be conferred on actors whose vessels are registered outside the Union. If such actors benefit from the right to free movement, there is a risk that European law will be used as a means to enjoy the free movement of third-country wages and working conditions within the Union. In our view, this is contrary to the basic idea that the Member States share a common set of values (Article 2 TEU), a premise upon which free movement rests. To reinstate the link between rights and obligations, and to ensure a fair balance between economic rights and social rights, we recommend that

- rights that flow from domestic EU law, the right to free movement in particular, should not be attributed to service providers that register their vessels in third countries and operate on the basis of third-country wages and working conditions.

With regard to the division of competences between the EU home state and the EU host state pertaining to issues relating to the protection of the working conditions of seafarers performing work temporarily within the territory of an EU Member State, we recommend the same distribution of powers as constituted by the Posting of Workers Directive. Article 3 of that directive establishes that whatever law is applicable to the employment relationship, the Member State where the work is carried out shall ensure that there exists regulation that covers the following:

- maximum work periods and minimum rest periods
- minimum paid annual holidays
- minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings
- health, safety and hygiene at work
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people
- equality of treatment between men and women and other provisions on non-discrimination.

In our view, the distribution of competences enshrined in the Posting of Workers Directive reflects a general principle of European Law, the purpose of which is to ensure that the balance between economic rights and social rights becomes a reality in practice.

The successful implementation and enforcement of the suggested framework presupposes the delegation of responsibilities to the Social Partners, in accordance with Article 152 of the Treaty on the Functioning of the European Union.

Based on the principle “that the same work at the same place should be remunerated in the same manner” we recommend in particular empowering the Social Partners to:

- declare that the principle is observed , or to enact collective agreements the observation of which shall be considered sufficient to ensure respect for the principle.
- establish agreements specifying to which territory the provision of a maritime service is to be attributed.
- decide that the provision of a maritime services should be attributed solely to the territory of one Member State even though the vessel occasionally operates in the waters of other EU member States
- represent EU and third-country seafarers before national bodies and EU bodies, including courts.

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1. The mandate

We have been asked by the European Transport Worker's Federation to analyse and answer the following question:

> *How can Fair Employment terms and conditions for Seafarers – irrespective of their nationality and/or place of residence – be efficiently applied for ships operating between ports within the European Economic Area (EEA) regardless of their flag or where the maritime service provider is situated?*

In that regard we were also asked

> *To take into consideration the main objectives of the ETF and ITF which includes the introduction of a system that ensures the application of a EEA member state's standards (on terms and conditions and wage levels) to be applied to seafarers on intra-EEA services (as defined by the LEG) thereby discouraging or preventing social dumping, improving attractive career opportunities for EEA seafarers and eradicating unfair competition amongst shipowners.*

2. Introduction. The values at stake

Pursuant to Article 3 of the Treaty on European Union (TEU), the aims of the Union are inter alia to promote the well well-being of its people and to work for the sustainable development of Europe based on a highly competitive social market economy aiming at full employment and social progress.[1] The Union shall promote the social protection of workers.[2]

[1] See also Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, recital 1 of the preamble.
[2] Case 201/15 *Aget Iraklis* (grand chamber) para 76; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, para 78.

Pursuant to Article 9 of the Treaty on the Functioning of the European Union (TFEU), in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.[3]

Further, when the Union constructs and implements its policies, it must respect the Charter of Fundamental Rights in the European Union. Article 31 of the Charter states that every worker shall have the right to working conditions which respect his or her health, safety and dignity, to a limit on the maximum of working hours, to daily and weekly rest periods, and to an annual period of paid leave.

Pursuant to TEU Article 3.3, the Union shall establish an internal market. Article 26.2 TFEU establishes that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaties. It is generally recognized that the economic rights constituted by the Treaties must be balanced against social rights. In the words of the ECJ,

> the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 151 TFEU, the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.[4]

At the Union level, a substantive amount of secondary legislation has been enacted to grant protection to workers and improve social standards within the Union. In the words of the Commission, "the completion of the European Single market in the last decades has been accompanied by the development of a solid social acquis".[5] In particular, it should be mentioned that Directive 2014/67 on the enforcement of the Posting of Workers Directive was enacted in 2014, to grant the effective surveillance of the Directive on the Posting of Workers. The Posting of Workers Directive was revised in 2018, to refine the balance between the freedom to provide services and the protection of posted workers – generally to the favour of the latter. Further, in 2017, the European Union decided to pursue the establishment of a *European Pillar of Social Rights*. The purpose of this key policy is to further promote the fundamental values listed in Article 3 of the Treaty on European Union.[6]

The Treaties respect the principle of subsidiarity in the process of realizing their aims. Pursuant to Article 147(1) TFEU

> the European Union is to contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action, while fully respecting the competences of the Member States". Further Article 152 TFEU provides that the Union "recognises

[3] See also Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights, recital 2 of the preamble.
[4] Case 201/15, *Aget Iraklis*, para 77.
[5] Commission recommendation of 26.4.2017 on the European Pillar of Social Rights, recital 8.
[6] Commission recommendation of 26.4.2017 on the European Pillar of Social Rights, recital 1.

> and promotes the role of the social partners at its level, taking into account the diversity of the national systems. It shall facilitate dialogue between them and respect their autonomy.

Until now, the provision of maritime services has not been (fully) included in the regulatory instruments that pursue the key policies and values listed above. Before we proceed, we find reason to ask why the regulatory framework for the provision of maritime services currently differs from the framework in other sectors with regard to the protection of wage and working conditions and social rights. There are, as far as we can see, no legal obstacles to the introduction of a system that ensures fair working conditions within the European Maritime Space. At least, these obstacles do not differ from those in other fields of the economy. Neither are there practical hindrances to the inclusion of the provision of maritime services in the European Pillar of Social Rights. The differences that do exist seem rather to be the result of (a lack of) political will.

Our view is that the provision of maritime services does not differ, and should not differ, from the provision of other services. Thus, the protection of workers' rights in the maritime sector should not differ from the protection offered workers in other sectors. This view may appear controversial to those who consider maritime services as something special; something that must be approached and regulated on its own terms. In our view, this view is, at least from a legal point of view, unfounded. We will approach the mandate on the basis of general principles of EU law. From the perspective of the general principles, it is not controversial to endorse fair competition, fair working conditions, and equal treatment and to argue in favour of a horizontal and balanced approach to the provision of any service whose provision is guarded by the fundamental right to free movement.

3. Approach and outline

The regulation of maritime services is exposed to a distraction that does not exist in other fields: *the flag state principle*. We refer to the "flag state principle" as a rule of international law subjecting all matters that are internal to a ship, including wages and working conditions on board, to the regulation of the state in which the vessel is registered. If a vessel is flagged in a country outside the European Union – a "third country" – resort to the flag state principle will pre-empt the effects of EU social policy in the maritime field. Further, if ships that operate in accordance with third-country standards are allowed to benefit from the right to free movement and to provide maritime services within the EU, it may create a race to the bottom. The alignment with external standards is the negation of the promotion of an autonomous EU policy, constructed upon the values referred to in the introduction above.

In Section 4 of this report, we explain the relationship between EU law and international law. To the extent that EU law regulates the provision of maritime services within an EU Member State or between EU Member States, it is to be regarded as "domestic law". In principle, the relationship between EU law and international law is the same as the relationship between national law and international law. Important in this regard is that the flag state principle does not shape the way in which national law must be constructed or applied within the domestic sphere.

The flag state principle is not among the general principles of (domestic) EU law. In section 5 of this report we show that the flag state principle does not exist within the ambit of regulation 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.[7] It is irrelevant to the interpretation of the regulation on maritime transport services. In section 6 of this report we show that the flag state principle does not exist within 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage). It is irrelevant to the interpretation of the regulation on maritime cabotage.

In section 7, we examine the general principles underpinning the European Working Space. Further, we show how Article 3 ("manning") in the regulation on maritime cabotage is to be understood when the general principles of EU law are applied as the main interpretative guideline. The analysis will prove that the provision is a straightforward application of the principle of free movement, the doctrine on mandatory requirements and the principle of proportionality.

In Section 8, we assess the impact of EU multi- and bilateral agreements.

In section 9, we assess how the current EU regulatory framework on the maritime sector can be further improved to secure free movement, fair competition, a level playing field, and fair employment conditions in a manner that reinforces the general principles of EU law and that fits into the creation of a *European Pillar of Social Rights.*

4. The relationship between the flag state principle and the general principles of European Law

4.1 Outline

The purpose of this Section is to analyse the relationship between the flag state principle, as a concept of international law, and EU law. The distinction between the two is crucial. As argued in an earlier report, presented to the European Commission,[8]

> *from the perspective of international law, it is not problematic to impose Community employment conditions on seafarers with a nationality of a third State where either the vessel is flagged in an EU Member State or the vessel is operated by a company established in the Community.*

We subscribe to the same view. In section 3.2 below we present the flag state rule as a concept of international law. Section 3.3 describes the relationship between international law and domestic EU law. Section 3.4 examines the distinction between physical and regulatory free movement; and between substantive legal principles and rules relating to jurisdiction. In section 3.5 we formulate a somewhat stronger version of the finding above. Not only is it

[7] OJ L 378, 31.12.1986, p. 1–3.

[8] "Study on the Labour Market and Employment Conditions in Intra-Community Regular Maritime Transport Services Carried out by Ships under Member State's or Third Countries Flags: Aspects of International Law", University of Utrecht, Report drafted for the European Commission, Utrecht 27 October 2008, page 5. (Hereafter Molenaar et. al.).

unproblematic to impose Community employment conditions on seafarers with a nationality of a third State where either the vessel is flagged in an EU Member State or is operated by a company established in the Community. EU law, the substantive right to free movement in particular, cannot, in our view, be invoked in combination with the flag state principle in international law.

4.2 The flag state principle as a concept of international law

The point of departure in international law is the United Nations Convention on the Law of the Sea.[9] Article 91 of the Convention is worded as follows:

> Nationality of ships
>
> 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
>
> 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Further, Article 92.1 of the Convention asserts that (emphasis added):

> 1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, *shall be subject to its exclusive jurisdiction on the high seas*. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

When the "flag state principle" is being referred to, it is normally short hand for a rule on "flag state jurisdiction". Ships – or at least every issue relating to the ship and its internal matters, including issues relating to manning – are subject to the legislation of the state of registry. The protection offered crew members by the law of the state of registry will depend on whether that legal system has prescriptive rules to the benefit of crew members. The protection offered may also vary depending on the nationality of the crew member. A basic protection of workers is however granted by minimum requirements in internationally agreed conventions, most importantly the Maritime Labour Convention.[10]

In itself, a rule on flag state jurisdiction is not only uncontroversial, it is a necessity. Ships are not fixed to a specific territory. In the absence of a rule on flag state jurisdiction, there is a risk that ships become lawless entities whenever they operate outside the areas of regular state jurisdiction. The flag state principle secures that there will always exist law that is applicable on board. A ship may leave land behind, but it can never sail away from the law.

[9] The Convention was signed at Montego Bay (Jamaica) on 10 December 1982 and came into force on 16 November 1994. The Convention was approved on behalf of the European Community by Council Decision 98/392/EC of 23 March 1998 (OJ 1998 L 179, p. 1). The Convention has also been ratified by all of the Member States of the European Union.

[10] Cf. Directive Directive 2009/16/EC on Port State Control.

Sometimes, the flag state principle is used not only to refer to the fact that a ship is subject to the legislation of its state of registry, but as a reference to a thicker rule, which establishes that the legislation of the state of registry shall prevail over concurrent legislation stemming from other jurisdictions. Concurrent jurisdiction is extremely practical. It occurs whenever a vessel that is registered in one state enters waters that are subject to the jurisdiction of some other state.

Whether and to what extent flag state jurisdiction prevails over competing claims for jurisdiction is an issue which cannot be solved on the basis of rhetorical arguments or references to "principles". Instead, the legitimacy and weight of the respective competing claims must be assessed on substantive terms. A strong argument in favour of (exclusive) flag state jurisdiction would exist if ships were regarded as floating islands. If the metaphor is valid, it implies that flag state jurisdiction is founded upon the principle of *territorial jurisdiction*. The latter principle is derived directly from the principle of sovereignty. To the extent that a rule of flag state jurisdiction is accepted as short hand for "sovereignty," it comes close to a principle in the thick sense: not only can the flag state exert jurisdiction; its jurisdiction is (almost) exclusive.

The floating island theory does not, however, find any support in current legal theory or in legal practice. The reason is obvious. A ship is no more part of the territory of its home state, than, say, a car, a company, or a tourist carrying his flag in his backpack. In modern times, the legitimacy of the "floating territory" metaphor has become even more questionable, due to the practice of convenience flagging. If the company that operates the ship is established in a different country than the country of registration, if it employs seafarers domiciled in other countries than the country of registration, and if the ship provides its services outside the country of registration, flag state jurisdiction comes close to being a mere circumvention of general principles of law.

From a substantive point of view, the claim of jurisdiction made by the country in the geographical area in which a ship operates may appear as the most convincing. As a matter of fact, it is the latter claim that is based upon the principle of territorial jurisdiction and/or sovereignty. Additional (extra-territorial) jurisdiction exercised by the state of registry is based upon the personality/nationality principle. The ECJ has taken a clear stance in this regard. The judgment in Case C-366/10, *Air Transport Association of America and Others* concerned the validity and reach of the scheme for greenhouse gas emission allowance training. With regard to the application of the scheme to aircrafts registered in third states, the ECJ established first that the European Union "must respect international law in the exercise of its powers".[11] The court continued:[12]

> On the other hand, European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union

[11] Case C-366/10, *Air Transport Association of America and Others*, para 123.
[12] Case C-366/10, *Air Transport Association of America and Others*, paras 124-125.

> In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.

Additional jurisdiction may to some extent be unproblematic, i.e., if the state of registry imposes rules on wages and working conditions that provide better protection than the rules in the country in the geographical area in which the ship provides its services. But if the argument is that inferior rules in the flag state prevail over competing rules in the geographical area in which the ship operates, e.g., that only one set of rules shall apply, the flag state rules will intrude upon the sovereignty of the country in which the vessel operates.

It would be wrong to argue that flag state jurisdiction is the fundamental principle. On the other hand, it would also be wrong to assume that, in general, the principle of territorial jurisdiction / sovereignty prevails. In the case of competing claims of jurisdiction, the conflict must be resolved on the basis of a concrete assessment. The most important guideline imposed by international law is that there must exist a sufficiently close connection between a fact, situation, thing, or event and the State that claims jurisdiction. In the case of conflicting jurisdictions, and provided that only one set of rules shall apply, the link on which the claim for flag state jurisdiction is based, must be measured against the relative strength of the competing link in favour of territorial jurisdiction.[13]

Whenever the "flag state principle" is invoked, it may not be meant as a reference to the principle of territorial jurisdiction (which is in fact the basis for the competing claim for jurisdiction). Instead, more pragmatically, it may be that the invocation of the principle refers to a seemingly strong presumption that matters that are internal to a ship, such as wages and working conditions, are of no particular interest to the country in which the ship currently operates. In our view, this presumption is unfounded. Wages and working conditions on board a ship are decisive to the competitive standard in the market in which the ship takes part. It is difficult to create a level playing field also catering for "the promotion of employment, improved living and working conditions"[14] without taking due regard to the conditions pursuant to which ships registered in third countries operate. Thus, the "internal" standard has external effects.

4.3 The relationship between international law and domestic EU law

Above we presented the flag state rule as a concept of international law. Further, we introduced the principles upon which competing claims for jurisdiction must be resolved. It

[13] Cf. Crawford, *Ian Brownlie's Principles of Public International Law*, Eight Edition, Oxford, p. 457; Ringbom, "National Employment Conditions and Foreign Ships – International Law Considerations", *Simply*, Oslo 2014, 109–151 (at 130, with further references).
[14] Case 201/15, *Aget Iraklis*, para 77.

would, however, be too hasty to resort to these principles and apply them as the basis for the remainder of the analysis. It cannot be assumed that international law imposes the legal framework on the basis of which the regulation of fair wages and working conditions within the EU maritime industry should be assessed.

The purpose of this section is to examine the relationship between international law and domestic EU law in more detail. Our aim is to demonstrate that regulatory conflicts that relates to the provision of cabotage maritime services within an EU Member State, or regulatory conflicts that relate to the provision of intra-EU maritime services must be approached in light of EU law, which in this respect must be regarded as domestic law. The flag state rule, as a concept of international law, does not shape the construction or application of domestic EU law.

Two basic premises must now be established to explain the relationship between international law and domestic EU law. First, pursuant to Article 216 (2) TFEU, international conventions that are signed and entered into by the EU, such as the United Nations Convention on the Law of the Sea, are binding upon the institutions of the EU and the Member States. The provisions of that convention "form an integral part of the Community legal order".[15]

Secondly, the pursuit of the EU's domestic objectives, as set out in Article 3 TEU, and as referred to in section 1 above,[16]

> is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute — each within its specific field and with its own particular characteristics — to the implementation of the process of integration that is the *raison d'être* of the EU itself.

In its opinion on the accession of the EU to the ECHR the Court explained the relationship between domestic EU law and the obligations of the Union and its Member States pursuant to international conventions in further detail:[17]

> [T]he Member States have, by reason of their membership of the EU, accepted that *relations between them* as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.
>
> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession

[15] Cf. Case C-459/03 *Mox Plant*, para 82.
[16] Opinion 2/13, ECHR, para 172.
[17] Opinion 2/13, ECHR, paras 193–194 (emphasis added).

is liable *to upset the underlying balance of the EU and undermine the autonomy of EU law*.

For our purposes it suffices to observe that the relationship *between the EU Member States* is defined by what we refer to as domestic EU law. Even though international obligations form an integral part of the EU legal order, they do not shape domestic EU Law and the relationship between the EU Member States as such.

To clarify the importance of the above observations, we will describe how three different situations are to be assessed:

1. A ship registered in Panama, and operated by a company established outside the EU, provides services in European waters, i.e. in Germany, and operates in accordance with the law of Panama. Conflicting jurisdiction must be resolved on the basis of international law, which forms an integral part of EU law.
2. A ship owned by a Greek company and registered in Greece provides services in European waters, i.e. in Germany, and operates in accordance with Greek law. Differences between Greek and German regulation must be resolved on the basis of domestic EU Law.
3. A company established in Greece provide services in European waters, i.e. in Germany. Its vessels are registered in a third-country. Further, for the sake of discussion, we assume that according to Greek law, the law of the flag state shall apply to every matter internal to ships that are operated by Greek companies, but registered abroad. To the extent that the application of the law of the flag state is *derived from Greek Law*, regulatory conflicts must be resolved on the basis of domestic EU Law.

The point we want to substantiate in the following is that the combined application of the freedom to provide services *and* the flag state jurisdiction (example 3) above, is a matter that must be assessed solely on the basis of domestic EU law. International law cannot provide for free EU movement rights. Conversely, the invocation of EU free movement rights establishes a link to the domestic regime that makes international law inapplicable.

4.4 The differences between the right to free movement and the flag state principle

The three examples above highlight important differences between the right to free movement as a fundamental principle of the EU legal order and the flag state rule, which is a concept of international law. In the current section we shall elaborate further on these differences.

- The difference between physical and regulatory free movement

In example 1 above, the company may invoke international law when it operates in European waters. The flag state principle, however, is a rule on jurisdiction, not on free movement. It does not establish a right to access the German market in the first place. The extent to which third country nationals are attributed EU free movement rights is, at least to a large extent, a political issue.

Admittedly, international law provides some free movement rights, but these are not comparable to free movement rights in domestic EU law. For example, international law

recognizes the right to innocent passage.[18] To the extent that the company in example 1 above invokes this right, internal matters on the ship may be subject to the law of Panama, even when the vessel passes through European waters. Notably, however, the right to innocent passage is a right to physical movement. EU free movement law provides market access, and is more concerned with free movement in the regulatory sense.

While international law provides a right to innocent passage, it is widely recognized that access to ports is solely, or largely,[19] defined by the principle of territorial jurisdiction, e.g., it is a matter about which it is for the host sate to decide upon. Arguably, the host state may make access to ports conditional upon the requirement that the foreign ship/company apply national wage and working conditions. This possibility is, however, a distraction we shall not pursue further. Even if a ship from a third country is allowed to access ports in the physical sense, this is not identical to a right to provide services, pursuant to the general principles of EU law.

The general point is that EU free movement rights (1) differ from the rights provided by international law and (2) cannot be claimed with reference to international law

- The difference between substantive rights and jurisdiction

In example 2 above, the mediation between home state rules and host state rules is based on domestic EU law, i.e., the principles of free movement and market access and the doctrines of mandatory requirements and proportionality. These are substantive legal principles, not rules on jurisdiction.

The basic regulatory idea on which the creation of the EU and the internal market rests is that, from a regulatory perspective, the whole of the EU should mirror a single state. Within a single state, the question of jurisdiction does not occur. The purpose of EU free movement rights is not to solve issues of jurisdiction, but to establish an internal market without borders.

The provision of maritime cabotage services within an EU Member State, or the provision of intra-EU maritime services, is by definition subject to the jurisdiction of the EU, understood as the totality of its Member states. EU law copes with a principally different problem than that addressed by international law. The EU single market is constituted by several different states, with different regulatory regimes. Different regimes produce multiple regulation. Multiple regulation is the negation of a single market. The doubling of regulatory burdens may restrict free movement.

In some regards, the specific purpose of EU law – to create a single market – may present strong arguments in favour of adhering to home state regulation. The principle of mutual recognition is particularly weighty when it is difficult for a provider of (maritime) services to adapt to the different legal regimes in the different EU Member States in which the services are delivered. The application of the principle of mutual recognition is based on the fundamental premise that the EU Member States share a set of common values on which the EU is founded, as stated in Article 2 TEU. Thus, the principle of mutual recognition is closely related to the principle of mutual trust.[20]

[18] UNCLOS art. 17 et seq.
[19] Except in case of emergency.
[20] See e.g. opinion 2/13, ECHR, para 168.

As we shall return to below, it may be argued that the case for mutual recognition evaporates where particular Member States allow domestic shipping companies to register their vessels in third countries and to apply third-country regulation on board. The values upon which third country regulation is based are not necessarily in conformity with the shared values of the Union. For now, the important point to emphasize is that the rationale on which the domestic, substantive principle on regulatory alignment rests is different from the rationale on which international conflicts over jurisdiction are being assessed. While EU free movement law is the negation of sovereignty, international law on jurisdiction takes this notion as its fundamental starting point.

In EU law, the application of free movement rights, and the process of regulatory alignment operates independently from rules and principles on jurisdiction. Directive 96/71/EC on the Posting of Workers presents a good example. An important purpose of the Directive is to strike a fair balance between the right to provide services, on the one hand, and the protection of workers, on the other – and between home state and host state regulation. Article 3 of the Directive is seminal in this regard. The provision is worded as follows (emphasis added):

> Member States shall ensure that, *whatever the law applicable to the employment relationship*, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, *in the Member State where the work is carried out*, are laid down:
>
> - by law, regulation or administrative provision, and/or
> - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex:
>
> (a) maximum work periods and minimum rest periods;
> (b) minimum paid annual holidays;
> (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
> (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
> (e) health, safety and hygiene at work;
> (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
> (g) equality of treatment between men and women and other provisions on non-discrimination.

As is evident from the passages in italics, the host Member State shall ensure the fundamental protection of workers, regardless of the jurisdiction to which the employment contract is subject. The distinction between regulatory alignment, on the one hand, and jurisdiction, on

the other, is in conformity with the Rome Convention in the preamble of which it is stated that:[21]

> The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC…

In the words of Advocate General Darmon:[22]

> [I]n no circumstances can the application of the law of the flag State to the rates of pay under contracts of employment for non-resident seafarers who are nationals of non-member countries be taken as the general rule. Legislation which merely permits the application of another law is not therefore at all in the nature of a derogation from what is, as it were, the 'legal norm'.

The reference to the "legal norm" marks the difference between the existence and application of the substantive law of the EU, on the one hand, and rules on jurisdiction on the other.

4.5 The flag state rule in international law and the substantive right to free movement in domestic EU law cannot be combined

We now return to the examples listed in Section 3.3 above. A careful reading of example 3 above will prove that it is in fact only an instantiation of example 2. The mediation between German Law and Greek law is a domestic matter which must be solved solely on the basis of EU law.

The principled point we would like to make is that the one and same situation cannot be assessed as a matter of domestic EU law and as a matter of international law at the same time. If the Greek company is allowed to invoke domestic EU law, e.g. to benefit from the right to free movement, it implies by definition that a sufficient connection between the company, the provision of maritime services, and EU law exists. As will further be explained in section 4 below, the fact that the Greek company has registered its vessels in a third country, does not necessarily break the link to the EU domestic sphere; thus, EU law does still apply. Effectively this means that the principle of mutual recognition is the basis for the mediation between the different regulatory frameworks. If, on the other hand, a conflict is resolved on the basis on international law, with recourse to the flag state rule, it implies that the connection with EU law is not sufficient. The right to free movement cannot be invoked on the basis of international law.

[21] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), recital 34, cf. Articles 3.3 and 9.
[22] Opinion of Advocate General Darmon in case C-72/91 *Sloman Neptune*, para 96.

5. The interface between the EU regulation on maritime transport services (4055/86) and the flag state principle

5.1 Introduction

The preamble of regulation 4055/86, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, establishes the purpose of the regulation as implementing the principle of freedom to provide services

> to maritime transport between Member States and between Member States and third countries so as progressively to abolish existing restrictions and prevent the introduction of new restrictions.[23]

Further, the preamble establishes that:

> [T]he structure of the Community shipping industry is such as to make it appropriate that the provisions of this Regulation should also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.[24]

Below, we examine the interface between the EU regulation on maritime transport services (4055/86) and international law. It is important to distinguish between the personal scope of the regulation (Section 4.2) and the substantive reach of the right to free movement that is attributed to persons and companies that are entitled to invoke the regulation (section 4.3). The analysis will show that the regulation, as its name indicates, is a mere application of domestic EU law. Domestic law applies where there is a "sufficiently close connection" between a provider of maritime transport services and an EU Member State. The binary relationship between the application of domestic and international law respectively, makes the flag state principle inapplicable, once a "sufficiently close connection" between a provider of maritime transport services and the European Union has been established.

5.2 The application rationae personae of the regulation on maritime transport services

The application rationae personae of the regulation on maritime transport services flows from its Article 1, according to which,

> 1. Freedom to provide maritime transport services between Member States and between Member States and third countries shall apply in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
>
> 2. The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in that Member State in accordance with its legislation.

[23] Recital 15 of the preamble, cf. the regulation Article 1.
[24] Recital 16 of the preamble.

Article 1 establishes the basic premise for the application of EU law. The party that invokes the regulation, and thus the right to free movement, must prove that a sufficient connection exists between him and an EU Member State.

Where an EU national or a shipping company controlled by an EU national is established outside the EU, the regulation cannot be invoked unless that national's vessels are registered in the home state of the EU national "in accordance with its legislation". I.e, a Greek provider of maritime transport services established on the Bahamas will not benefit from regulation 4055/86 unless it registers its ships in the Greek ships register. Whether that is possible depends on Greek law. The purpose of the requirement in the regulation is merely to define the circumstances pursuant to which a sufficient connection to the EU domestic sphere shall be deemed to exist, so as to legitimize the invocation of EU law.

The regulation on maritime transport services does not attribute free movement rights to third-country actors as such. In case C-83/13, *Fonnship,* the ECJ asserted that[25]

> Situations should not exist in which a shipping company established in a third country and providing maritime transport services from or to States that are parties to the EEA Agreement using vessels flying the flag of a third country enjoys, despite not meeting the connection requirement laid down in Article 1(2) of Regulation No 4055/86, the freedom to provide services by claiming that benefit through a company established in the EEA which it controls, under the pretext that that company is a provider of the services at issue, where, in reality, it is the company established in the third country which provides them.

Actors that do not meet the requirements in Article 1 of the regulation cannot invoke EU free movement rights ("domestic law"), only the legal protection that flows from international law.

The question in *Fonnship* was whether a Norwegian company,[26] whose ships were registered in Panama, could invoke the regulation on maritime services. The company provided its services in Sweden, mainly. Wages and working conditions on board were governed by the law of Panama. Neither the vessel nor the provision of services had any genuine link to Panama, except for the formal registration.

The advisory opinion of Advocate General Mengozzi provides important insights on how to approach the requirements established by Article 1 of the regulation:[27]

> [T]he clarification provided in Article 1(2) of Regulation No 4055/86 reflects what is commonly known as 'the Greek exception'. Since, under Greek law, Greek nationals established in third countries are permitted to register their vessels in the ship registry of that Member State, failure to take account of that situation would have removed from the scope of the regulation a significant proportion of the total tonnage belonging to nationals of EEA States.

[25] Case C-83/13, *Fonnship*, para 37.
[26] Norway is party to the Agreement on the European Economic Area (EEA) and takes part in the EU internal market on an equal footing as the EU Member States.
[27] Opinion of Advocate General Mengozzi in case C-83/13 *Fonnship*, paras 33-38.

> It is therefore beyond doubt that the EU legislature did not intend to make the application of Article 1(1) of Regulation No 4055/86 subject to a condition relating to the place of registration of the vessels.
>
> …in contrast to ST and SEKO's assertions in their written observations, the fact that nationals of EEA States falling within the scope of that provision may register their vessels in a third country does not mean that those nationals are no longer established in an EEA State.
>
> …the scope of Regulation No 4055/86 is determined by the provisions contained therein and is not dependent on the law applicable to the employment relations between a vessel's crew and the provider of maritime transport services who may be covered by that regulation. This is demonstrated by the fact that Regulation No 4055/86 does not, for example, contain any reference to the criteria for determining the law applicable to crew members' individual employment contracts, particularly as regards how that measure should relate to Article 6 of the Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 ('the Rome Convention').

Four observations can be deduced from this line of argument:

a) A genuine connection between the maritime service provider and an EU Member State must exist to legitimize the invocation of EU Law.

b) Provided the requirements as established by Article 1 of the regulation are fulfilled, the connection between the service provider, an EU Member State, and EU law is sufficient to legitimize the invocation of domestic EU law, the principle of free movement in particular. The connection between a provider of provider of maritime services and the EU domestic sphere is not broken although the person or company that invokes the regulation has chosen to register its ships in a third country.

c) While Article 1 of the regulation requires that a sufficient connection exists, the conditions are rather flexible. This is a deliberate political choice.

d) The invocation of regulation no 4055/86 "is not dependent on the law applicable to the employment relations between a vessel's crew and the provider of maritime transport services who may be covered by that regulation". The regulation is silent on the matter. As we shall return to, the silence cannot be interpreted antithetically. Matters that are not subject to harmonization in EU secondary law are governed by the combined application of national law and EU primary law.

We now turn to the judgment of the ECJ. The Court noted that

> "by including in that scope *ratione personae* the nationals of a Member State established in a third country or controlling a shipping company there, the EU legislature wished to ensure that a significant part of the commercial fleets owned by nationals of a Member State come under the liberalisation of the shipping industry established by that regulation, so that Member States' shipowners could better face, inter alia, the restrictions imposed by third countries".[28]

[28] Case C-83/13 *Fonnship*, para 33.

The Court substantiated its understanding of the political choice made by the legislature by referring to the twelfth recital of the regulation (quoted in the introduction to this section above).

The legislative choice does not imply that substantive matters are governed by international law. To the contrary, domestic EU law is constructed in conformity with international obligations to provide for the maximum reach, rationae personae, of domestic EU law. As mentioned above, Article 91.1 of the United Nations Convention on the Law of the Sea establishes that (emphasis added):

> Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship.*

The requirement that a genuine link must exist explains why, i.e., the regulation on maritime service asserts that (emphasis added)

> The provisions of this Regulation shall also apply to nationals of the Member States established outside the Community and to shipping companies established outside the Community and controlled by nationals of a Member State, if their vessels are registered in *that Member State in accordance with its legislation*.

The genuine link required by international law is considered to exist only if the EU national established abroad registers his vessels in his specific EU home state, in accordance with its legislation. In other words, registers governed by EU Member States are not open to anyone outside the Union.[29] Only those "foreigners" who can prove that a genuine link exists between himself and his EU home state and who makes that link operative in the regulatory sense by registering his vessels there, can invoke EU law.

While the requirement of a genuine link flows from international law, the presence of the required link does not imply that substantive issues are governed by international law. To the contrary, if a genuine link between a provider of maritime services and the Union can be proven to exist, it confirms that (domestic) EU law fully applies.[30]

5.3 The approach to wage and working conditions

An important purpose of the regulation on maritime transport services is to establish a level playing field through the implementation of a "policy aiming at safeguarding the continuing application of commercial principles in shipping".[31] Notably, this standard is not achieved by imposing community standards on wage and working conditions upon the beneficiaries of the right to free movement. As noted by Advocate General Mengozzi in *Fonnship*, the EU legislature did not wish to restrict the scope of application of the regulation to nationals

[29] As a matter of law. We have not investigated to what extent the requirement of a "genuine link" is being respected in practice.
[30] Cf. Case C-438/05 *Viking*, para 70 and also Case C-221/89 *Factortame and Others*, paras 20 to 22.
[31] Cf. recital 7 of the preamble.

"operating maritime transport services using vessels on board which the crew's employment relations are governed by the law of a Member State (or of an EEA State)".[32]

If an EU provider of maritime services meets the requirements in Article 1 of the regulation *and* chooses to register its vessel in a third country, it can *seemingly* combine the best of two worlds. It can invoke the right to free movement *and* benefit from advantageous (poor) regulation on wage and working conditions in the third country where its vessels are registered. The reality however, is more nuanced.

Actors that are able to prove that a "sufficient connection" exists are subject to domestic law: EU law and national law. In this sense, actors that legitimately can invoke the EU right to free movement are by definition domestic. The combined invocation of the flag state principle, which is a concept of international law, would be contrary to the finding that a sufficient connection to the domestic domain exists. Importantly, the extent to which *domestic* actors are allowed to register their vessels abroad and to resort to third country regulation, depends, essentially, *on the national law* in the respective EU Member States. "The Greek exception" as referred to above is illumining in this regard.

The EU regulation on the provision of maritime transport services is *silent* with regard to national wage and working conditions. It does not prohibit systems such as "the Greek exception", nor does it embrace such systems. The matter is simply not harmonized by secondary law. In the absence of harmonizing rules such matters must be resolved on the basis of national law, applied in conformity with EU primary law.

Within Greek territory "the Greek exception" applies, pursuant to Greek law. If, however, a service provider that operates on the basis of this exception, or similar exceptions, provides services to recipients in an EU host state, the situation becomes more complex. In the absence of harmonization by means of secondary legislation, it is clear that EU law does not require EU host states to impose national regulation on wage and working conditions on ships registered abroad.[33] Hence, the question is whether the EU host state may choose to enforce its national regime and still act in conformity with the general principles of EU law. Two observations are important in this regard.

First, the regulatory conflict must be solved on the basis of the general principles of free movement and mutual recognition and the doctrines on mandatory requirements and proportionality. This approach is confirmed in the *Fonnship* judgment. Strictly speaking, the judgment only concerned the application rationae personae of the regulation on maritime transport services. However, the Court did provide guidance on how to apply EU law, e.g., on the substantive *reach* of the right to free movement. In full conformity with the established orthodoxy, the Court maintained (emphasis added):[34]

> *any restriction which, without objective justification*, is liable to prohibit, impede or render less attractive the provision of those services must be declared incompatible with EU law. Where it is applicable, Regulation No 4055/86

[32] Opinion of Advocate General Mengozzi in case C-83/13 *Fonnship*, para 38. Still, an important qualification is that "for a company to be classed as a provider of maritime transport services, it must operate the vessel by which the transport is carried out" (para 38 of the judgment).
[33] For the opposite solution, cf. directive 96/71 on the posting of workers, Article 3.1.
[34] Case C-83/13 *Fonnship*, para 41.

transposes, in essence, the rules of the treaty relating to the freedom to provide services and the case-law relating thereto.

Second, the practice of the ECJ confirms that the protection of workers is a mandatory requirement that may justify the enforcement of host state rules on wage and working conditions.[35] With regard to the principle of proportionality, the division of competences as established by the Posting of Workers Directive provides strong evidence that host state protection of core workers' rights constitutes justifiable restrictions on free movement. This will be further explored below. It should be added that the opposite principle – mutual recognition – loses some of its weight when the regulation in the EU home state refers to, and allows, the application of third country legislation on wages and working conditions. Third country legislation is not necessarily in conformity with the values upon which the Union rests (Article 2 TEU). Arguably, the freedom to provide services cannot justify a right to free movement of third country wages and working conditions within the Union.

The regulation on maritime services *implements* the principle of free movement within its field of application. In the absence of an EU policy on wages and working conditions within the maritime sector, the market conditions may become fragmented. At Union level, a more ambitious approach would be to enact harmonizing legislation to strike a fair balance between free movement and fair working conditions. This would also provide clarity with regard to the division of competences and responsibilities between EU home states and host states to the benefit of both service providers and workers.

6. The interface between EU regulation on maritime cabotage (3577/92) and the flag state principle

6.1 Introduction

"Maritime cabotage" is the provision of maritime transport services within a Member State. Pursuant to Article 2 of regulation 3577/92 on maritime cabotage the term

> *shall in particular include:*
>
> *(a) mainland cabotage: the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of one and the same Member State without calls at islands;*
>
> *(b) off-shore supply services: the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State;*
>
> *(c) island cabotage: the carriage of passengers or goods by sea between:*
>
> *- ports situated on the mainland and on one or more of the islands of one and the same Member State,*
>
> *- ports situated on the islands of one and the same Member State*

[35] See, i.e. Case C-369/96 *Arblade*, para 36; Case C-438/05 *Viking*, para 77; Case 201/15, *Aget Iraklis*, paras. 73-74.

The main purpose of the regulation is to apply the freedom to provide services to the provision of maritime transport services. The enactment of the regulation is explained by the fact that from the outset, due to its distinct features, the transport sector was not made subject to the general principles established by the EC Treaty.[36] Instead, the general principles of EU law had to be introduced gradually by designated legislative acts.

The background explains why the ECJ has interpreted the scope of the regulation narrowly. For instance, the Court has ruled that towage services do not amount to a transport service.[37] This does not imply that the provision of such services is exempt from the application of the general principles of EU Law. To the contrary, to the extent that a maritime service is not regarded as a maritime *transport* service, the general principles of EU law are directly applicable. The purpose of regulation that specifically addresses transport services is not to treat such services differently from other services, but to subject them to the same principles.

Contrary to regulation 4055/86 on maritime transport services, regulation 3577/92 contains several instances where the term "flag" or "flag state" is used. For example, Article 3.1 of the regulation establishes that:

> 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.

The purpose of the remaining part of section 5 is to examine the meaning of these terms within the scope of the regulation, and to investigate the interface between the domestic right to free movement and the flag state principle as a concept of international law.

6.2 Personal scope

The beneficiaries of the freedom to provide services flow from the combined reading of Articles 1.1 and 2.2 of the regulation on maritime cabotage. Article 1.1 is worded as follows:

> 1. As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State, including ships registered in Euros, once that Register is approved by the Council.

Article 2.2 is worded as follows:

> 2. 'Community shipowner' shall mean:
>
> (a) nationals of a Member State established in a Member State in accordance with the legislation of that Member State and pursuing shipping activities;
>
> (b) shipping companies established in accordance with the legislation of a Member State and whose principal place of business is situated, and effective control exercised, in a Member State;

[36] See further, Greaves, "The application of the EC common rules on competition to cabotage, including island cabotage", in Antapassis (ed), *Competition and regulation in shipping and shipping related industries*, p. 169.
[37] Case C-251/04 *Commission v Greece*.

or

> (c) nationals of a Member State established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their ships are registered in and fly the flag of a Member State in accordance with its legislation.

The preamble of the regulation explains that "in order to avoid distortion of competition, Community shipowners exercising the freedom to provide cabotage services should comply with all the conditions for carrying out cabotage in the Member State in which their vessels are registered".[38] The basic principle is that companies and ships that are entitled to provide maritime cabotage services within their EU home state shall benefit from the right to free movement, and be allowed to provide similar services within an EU host state. The preamble specifies that "the beneficiaries of this freedom should be Community shipowners operating vessels registered in and flying the flag of a Member State whether or not it has a coastline".[39] The regulation does not attribute free movement rights to actors from third countries.

6.3 Interpretation of the term "flag state"

The provision of maritime cabotage services is intimately connected to EU territory, first because they are provided within a specific EU Member State, second because the beneficiaries of the right to free movement are actors that are entitled to provide maritime cabotage services within their EU home state. Against this background, it would be wrong to assume that the use of the term "flag state" within the regulation on maritime cabotage refers to the flag state principle as a concept of international law. Far from it, the term is used as a reference to EU law, and to the national law of the EU Member States. This is particularly evident in Article 2.2 of the regulation which, subject to some requirements, allows shipping companies established outside the Community to invoke the regulation on maritime cabotage "if their ships are registered in and fly the flag of a Member State in accordance with its legislation". The term is used to establish when a *genuine link* between the provision of the service and the domestic EU sphere exists, so as to legitimize the application of domestic EU Law.

The "domestic" interpretation is confirmed by Communication 2014/232 from the Commission on the interpretation of the regulation. According to the Commission:[40]

> The condition of registration in a Member State assumes that the register in question is located in a territory in which the Treaty and the laws deriving from it apply. Accordingly, ships entered in the registers of the Dutch Antilles, the Isle of Man, Bermuda or the Cayman Islands are not among the beneficiaries of the Regulation.
>
> By contrast, ships registered in Gibraltar are among the Regulation's beneficiaries as the Treaty applies to that territory.[12] Ships registered in Gibraltar are entitled to have access to maritime cabotage under the same conditions as any ship registered in a Member State.

[38] Regulation 3577/92, recital 11 of the preamble.
[39] Regulation 3577/92, recital 11 of the preamble.
[40] Communication 2014/232, Section 2.2.2.

Accordingly, ships that do not enjoy access to national cabotage market are not entitled to access the markets of other EU Member States either.

Although the term "flag state" might connote a specific use and interpretation within international law, the relevant context for the interpretation of the regulation on maritime cabotage is domestic EU law, regulation 4055/86 on maritime transport services in particular. Communication 1998/251 from the Commission asserts that,[41]

> Unlike cabotage, there is no flag requirement for the provision of maritime transport services between Member States. Council Regulation (EEC) No 4055/86 of 22 December 1986 provides that all Community established carriers may provide such services irrespective of whether they operate under Community or third-country flags.

Far from being a reference to international law, the Communication from the Commission shows that the use of the term "flag state" within the regulation on maritime cabotage is intended to establish even stricter requirements with regard to the *connection* to the national domain than those established by regulation 4055/86.

7. Applying the general principles underpinning the European working space to the maritime sector

7.1 Introduction

So far, we have established that the objective of the regulations on maritime transport services and on maritime cabotage services respectively, is to give full effect to the right to provide services. The right to free movement is a fundamental principle of domestic EU Law. While the two regulations respect international law, their purpose is not to give effect to the principle of flag state jurisdiction.

The analysis conducted so far proves the correctness of the assumption on which our report rests, i.e., that,[42]

> *from the perspective of international law, it is not problematic to impose Community employment conditions on seafarers with a nationality of a third State where either the vessel is flagged in an EU Member State or the vessel is operated by a company established in the Community.*

The extent to which the regulation of wages and working conditions constitutes a restriction on the right to provide cross-border services, is a matter that must be resolved solely on the basis of general principles of Union law. Section 6.2 below will describe how these principles have been applied to the European working space in general. In Section 6.3 we undertake a detailed analysis of Article 3 ("manning") of the regulation on maritime cabotage, to show by example how the general principles guide the interpretation of the regulatory framework on the maritime sector.

[41] Communication 1998/251, Section 3, para 15.
[42] Cf. Section 3.1 above.

7.2 General principles

The long-standing principle underpinning the distribution of regulatory powers within the European working space was introduced by the judgment in *Rush Portuguesa*. The judgment established, on the one hand, that an EU company that provides services in another Member State can post its workers to the territory of the host state. The right to post workers is derived from the right to provide services; host state regulation on migration is not applicable. On the other hand, the Court asserted that[43]

> Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means

It is generally accepted that Directive 96/71 on the Posting of Workers codified this jurisprudence.[44] Important in our regard is first that Article 2.1 of the Posting of Workers Directive establishes that "the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted". Secondly, not only does the Directive allow the host state to apply its national legislation, it *obliges* it to "guarantee workers posted to their territory the terms and conditions of employment covering the following matters": maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; equality of treatment between men and women and other provisions on non-discrimination.

The division of competences introduced in *Rush Portuguesa* and codified by the Posting of Workers Directive appears to have been established as a universal principle. I.e., the revised Directive on Public Procurement establishes that:

> Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.[45]

The preamble of the Directive establishes that (emphasis added):[46]

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[43] C-113/89, *Rush Portuguesa*, para 18.

[44] See. i.e., "The management of posted workers in the European Union", section 1, European Issue no 300, *Fondation Robert Schuman* and Van Hoek, "Re-embedding the transnational employment relationship: a tale about the limitations of (EU) law", 55 *Common Market Law Review* (2018) 446–488, at 464.

[45] Directive 2014/24/EU on public procurement, Article 18.2. Annex X refers in particular to ILO Convention 87 on Freedom of Association and Protection of the Right to Organise; ILO Convention 98 on the Right to Organise and Collective Bargaining; ILO Convention 29 on Forced Labour; ILO Convention 105 on the Abolition of Forced Labour; ILO Convention 138 on Minimum Age; ILO Convention 111 on Discrimination (Employment and Occupation); ILO Convention 100 on Equal Remuneration; ILO Convention 182 on Worst Forms of Child Labour.

[46] Directive 2014/24/EU, recital 37 of the preamble.

> With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, *social and labour law that apply at the place where the works are executed or the services provided* and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law….
>
> The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC…

In a former proposal for a Council regulation amending the regulation on maritime cabotage, the Commission actually suggested to resort to the general principle:

> The terms and conditions of employment (e.g. rates of pay, overtime rates, working time, annual holidays, etc.) of Community seafarers working on board ships under Member States flags are normally laid down by collective bargaining agreements and/or legal provisions of the flag State. It could be construed to be contrary to the principle of freedom to provide services to require that the terms and conditions of employment of the crew would have to be changed and brought in line with the corresponding provisions applying in the host State if a vessel under a Member States' flag were used for a certain period for the provision of regular passenger-cabotage services in another Member State (host State). However, in order to avoid any risk of social dumping the proposed revised text of Article 3(3) (see attached proposal for a Council Regulation) of Regulation (EEC) No 3577/92 provides that, where host States allow third-country nationals to be employed on vessels providing regular passenger services, the host State shall require that such seafarers shall be treated for the purpose of terms and conditions of employment as residents of the Member State in which the vessel is registered. In this context, it is recalled that Article 1 of Regulation (EEC) No 3577/92 guarantees freedom to provide services to Community shipowners who have their ships registered in, and fly the flag of a Member State.

It should be noted, first, that the proposal is related to the provision of passenger-cabotage services, not cargo-cabotage services, and second, that it was rejected due to opposition from certain Member States. From a strictly legal point of view there is, however, no reason to distinguish between the different categories of services as the purpose of combating "social dumping" is of a general character. Further, although the proposal was rejected on political grounds, its content expresses, and is in conformity with, general principles of EU Law. In our view, in the absence of specific Community legislation, the EU Member States (e.g. host states) may individually choose to enforce a similar policy aimed at combating social dumping within their territories. As the analysis has shown, there is nothing that makes the maritime sector different from other sectors of society.

7.3 The application of the general principles – Article 3 of the regulation on maritime cabotage

7.3.1 Introduction

The purpose of regulation 3577/92 on maritime cabotage is to implement the freedom to provide services within the maritime transport sector. Accordingly, the general principles of EU law:

- complement the regulation
- establish the context against which the provisions contained in the regulation must be interpreted.

The regulation on maritime cabotage is in many respects incomplete. Illustrating in this regard is that, on the one hand, the provision of off-shore supply services[47] is included in the scope of the regulation, while, on the other, the regulation is silent with regard to the approach to such services. Instead, the overarching principle of freedom to provide services must be applied. Obviously, the complementary function of the general principles is both foreseen and intended by the EU legislature.

In some respects, the provisions of the regulation provide quite detailed guidance on how the right to provide services shall be implemented and applied. For the purposes of this report, Article 3, which concerns issues relating to "manning", is of particular interest. The provision reads as follows:

> 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).
>
> 3. However, from 1 January 1999, for cargo vessels over 650 gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State).

In our view, any provision contained in the regulation on maritime cabotage must be regarded as an explication of how to apply the domestic right to free movement. In her opinion in Case C-456/04 *Agip Petroli*, Advocate General Kokott asserted that,[48]

> Contrary to the Italian Government's assumption, Article 3(2) consequently provides for the exception, Article 3(3) for the rule, since the Regulation does not contain two distinct principles – one for mainland cabotage and the other for island cabotage – as the Italian Government appears to assume in respect of Article 3 of the Regulation. The Regulation has in fact only one principle, which is enshrined in Article 1 of the Regulation.

The one principle referred to by the Advocate General is the principle of the freedom to provide services. We subscribe to the view of the AG.

[47] Article 2.1 litra b: "the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State".
[48] Opinion in case C-456/04 *Agip Petroli*, para 24.

As the Commission has correctly observed, Article 3 does not specify which matters relating to manning are the responsibility of the host state.[49] In the following we shall argue that the term "manning"

- must be construed as a reference to regulation that concerns the composition of the crew and/or issues relating to safety.
- does not relate to issues concerning wage and working conditions.

By reference to the general principles of EU law, we shall establish a distinction between the application of host state rules that would require physical adaptations of foreign ships or of the composition of their crew, and host state rules that affect everyone gaining access to a specific activity in an equal manner. Rules on wages and working conditions belong to the latter category. Those familiar with EU law will note that the distinction is in conformity with the Keck orthodoxy,[50] in that judgment expressed as a distinction between rules that affect the access to the market, on the one hand, and rules that constitute the general legal framework of the national market, on the other. National regulations on wages and working conditions belong to the latter category. They do not require the service provider to adapt his service, product or equipment to cross the border. Pursuant to established case law, the "rules of a Member State do not constitute a restriction within the meaning of the EC Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory".[51]

7.3.2 Issues that fall within the scope of Article 3

On the outset, we agree with the Commission that the term "manning" is not all-encompassing:[52]

> The Commission considers that host States are, among others, competent to specify the required proportion of Union nationals on board ships carrying out island cabotage (and ships smaller than 650 gt). A Member State may therefore require the crews of such ships to be composed entirely of Union nationals. Member States may also require the seafarers on board to have social insurance cover in the European Union. In terms of working conditions, they may impose the minimum wage rules in force in the country. As regards the rules on safety and training (including the languages spoken on board), the Commission considers that Member States may do no more than require compliance with the Union or international rules in force (STCW and SOLAS Conventions), without disproportionately restricting the freedom to provide services.

Arguably, The International Convention for the Safety of Life at Sea (SOLAS) (1974) is the most important context for the interpretation of the term "manning" within the EU maritime regulatory framework. Rule V/14 "Ships' Manning" states that:

> «1. Contracting Governments undertake, each for its national ships, to maintain, or, if it is necessary, to adopt, measures for the purpose of ensuring that, from the

[49] Com 2014/232, Section 4.1.
[5050] Joined cases C-267/91 and C-268/91 *Keck and Mithouard*. In the same vein, regarding services, case C-565/08 *Commission v Italy*, para 45.
[51] See, i.e., Case C-565/08 *Commission v. Italy*, para 49.
[52] Com 2014/232 section 4.1

> point of view of safety of life at sea, all ships shall be sufficiently and efficiently manned.[53]
>
> 2. Every ship to which chapter I applies shall be provided with an appropriate minimum safe manning document or equivalent issued by the Administration as evidence of the minimum safe manning considered necessary to comply with the provisions of paragraph 1.»

Resolution A.890 (21) on "principles of safe manning" provide further details with reference to Article 28(a). Article 28(a) of that Convention "which requires the Maritime Safety Committee to consider, inter alia, the manning of seagoing ships from a safety standpoint".

Safety issues are crucial with regard to the provision of maritime services. It is an aspect that requires particular regulatory attention, compared to the provision of intra-EU services in general. Safety benefits from clear rules. It is particularly important that the allocation of responsibilities is unequivocal and set out in advance. This is advantageous also with regard to the purpose of opening up the markets as the duplication of procedural requirements to ensure maritime safety would restrict free movement. Such considerations help explain why Article 3 is both detailed and rigid. Accordingly, we interpret the term "manning" in the cabotage regulation to refer to the manning of seagoing ships from a *safety standpoint*.

7.3.3 Issues that fall outside the scope of Article 3

In its interpretative Communication, the Commission notes that[54]

> any Member State wishing to avail itself of the possibility to apply its own rules to matters relating to manning should consult the Commission. The scope and content of envisaged measures will be subject to a case-by-case analysis in the light of the above mentioned principles of necessity and proportionality.

The notion of "necessity and proportionality" refers to the general principles of EU law. We agree with the Commission that matters that fall outside the scope of Article 3 must be approached from the perspective of the fundamental right to provide services and the doctrine on mandatory requirements, which, when applied in conjunction, will require the assessment of "necessity and proportionality".

In our view, the term "manning" in Article 3 of the regulation on maritime cabotage cannot be construed such as to include issues relating to wages and working conditions. In other words, the application of host state rules on wages and working conditions to ships and crew that provide maritime services in the territory of the host state, must be assessed solely on the grounds of the general principles of EU primary law.

To substantiate the position above, we refer firstly to the literal interpretation of the term "manning". In general, the manning of a ship does not differ from the manning of a construction company, for example. As a starting point, the company is entitled to choose how many employees it wants, to make decisions on qualifications, to sack people and so on. If a construction company offers its services abroad, the host state cannot require it to scale its workforce up or down, or to appoint specific employees that shall constitute its foreign work

[53] The Convention further refers to the *Principles of Safe Manning* adopted by Resolution A.890 (21).
[54] Com 2014/232 section 4.1.

force. Such matters relate to the *composition* of the work force.[55] On the other hand, pursuant to a plain, literal reading, it seems contrived to argue that host state regulation on wages and working conditions of general applicability, interfere with the prerogative of the company to enact decisions on "manning". While all European companies are in principle free to make decisions on manning, they are also subject to general rules on wages, social security and working conditions. Normally, such regulation is referred to as exactly that, namely regulation on wages and working conditions. It is not referred to as a regulation on "manning" or on the "composition" of the workforce. We are therefore persuaded that the use of the term "manning" within the EU maritime regulatory framework should be interpreted solely by reference to the particular meaning of this term within the maritime sector, e.g. as a reference to safety issues, including manning levels.[56]

Secondly, a broad construal of the term "manning" would arguably be contrary to the general principles of EU law. As proven by section 2 above, the general principles aim to strike a fair balance between the right to free movement, on the one hand, and the protection of workers, on the other. The competences (and obligations) that remain with the host state with regard to the issuing of such regulations and their enforcement, are seminal to identify and uphold this balance. Article 3 of the cabotage regulation is neither precise nor elaborate. It is not a sufficient basis for the introduction of specific principles within the EU maritime industry that deviate from fundamental principles that apply to the EU working space in general.

Thirdly, we refer to the purpose of the maritime cabotage regulation: to open the different markets to competition. If the term "manning" is construed broadly, it will exclude the exercise of host state competence to an extent that goes further than the purpose of market opening can justify. If the regulation of the home state allows the registration of vessels in third countries, and the application on board of third-country wages and working conditions, a broad construal of Article 3 will force the host state to accept the free movement of third-country wages and working conditions into their territories. Further, the host state may be unable to impose national conditions on its own nationals, as this will create unequal conditions and unfair competition. In the end, it could foster a race to the bottom. It should be noted in this regard that there is a huge difference between the opening up of the market, and full liberalization. There is no contradiction between market access and equal competition, on the one hand, and the protection of social values, on the other.

We conclude that the term "manning" in Article 3 of the regulation on maritime cabotage, and the division of competences therein, does not relate to issues concerning wages and working conditions. Further, by reference to the general principles of EU law, and the fundamental values underpinning the Union, we conclude that, as a matter of EU law, the host state, in the territory in which maritime transport services are provided/delivered, remains competent to issue and enforce regulations on wages and working conditions.

[55] Island cabotage requires specific considerations, due to the particularly close link between the provision of such services and the host state. We agree with the observations of the Commission on this issue, in Com 2014/232 section 4.1.

[56] The Maritime Labour Convention, regulation 2.7 refers to "manning levels".

8. Impact of EU multi- and bilateral agreements

8.1 GATS

The European Union and the EU Member States are members of the World Trade Organization. The General Agreement on Trade in Services (GATS) is a multilateral agreement that is included in the annexes to the WTO Agreement and is binding upon the EU and its Member States.

Before we describe the possible impact of GATS, some clarifications are necessary:

1. Neither GATS nor other international agreements establish requirements as to how EU Law should be constructed.
2. Neither GATS nor other international agreements regulate the relationship between the EU Member States.
3. Neither GATS nor other international agreements entered into by the EU attribute EU free movement rights to actors from third countries. Only actors that can prove a sufficiently close link to the Union to exist can benefit from EU domestic law.
4. GATS and other international agreements attribute autonomous rights to third-country actors. The relevant question with regard to such agreements is not how they affect the construction of EU law, but rather to what extent domestic EU law. e.g. on wage and working conditions can be applied and enforced against actors from third countries (non-EU actors). The question presupposes that such regulation exists.

GATS and other international agreements are irrelevant to the recommendations in Section 8 on how to *construct* EU Law.

To what extent mandatory rules in domestic EU can be *applied and enforced* against third country actors is both a political and a legal question. The legal issues introduced by GATS can be structured in a manner that is quite similar the application of EU Law: Somewhat simplified, the first question is whether the enforcement of domestic EU law against third country actors will constitute a restriction on their right to market access, as granted by GATS. If a restriction is found, the second question, somewhat simplified, is whether the restriction can be justified by reference to public policy. *If* the enforcement of domestic EU Law against third country actors constitutes a restriction that is not justifiable, domestic EU law does not need to be reconstructed or changed. At most, GATS may require the disapplication of domestic EU Law against third country actors. Whether the latter is necessary, must be assessed on a case-by-case basis.

The practice on the application and interpretation of GATS is scarce. From the outset it should be emphasized, first, that the precise reach of the rights provided by GATS is uncertain. Second, in general, it is fair to assume that GATS establishes a level of integration that is not intended to be as far reaching as the level of integration within the EU. Even though the structure and approach is somewhat similar, the reach of rights established by GATS is not as extensive as comparable rights within the EU legal order.

We now turn to the question as to whether the imposition of domestic EU legislation on third country actors will constitute a restriction on the right to market access as established by

GATS. A key requirement in this regard is the right to most favoured nation treatment.[57] The MFN right provides protection against both open discrimination and de facto discrimination. In principle, requirements on wage and working conditions apply equally to all actors. But it can also be argued that it is more difficult for foreign actors to comply with such requirements than it is for foreign actors. While we would argue that the application of such rules to third country actors does not constitute a restriction pursuant to GATS, there exist no practice that can substantiate either this position or the opposite position. As the thorough analysis of Molenaar et. al. shows, the answer to the question is to some extent uncertain.[58]

The wider the notion of a restriction is constructed, the more depends on the level of justification. A wide notion of a restriction cannot be equated with a prohibition, but is a means that provides for a detailed analysis of whether the restriction is necessary, consistent and applied in a fair and foreseeable manner. Molenaar et. al. establishes that the exception clauses in GATS are applied fairly broad.[59] In the Section that concludes their analysis on both GATS and GATT (General Agreement on Tariffs and Trade) they state that:[60]

> All the possible GATT violations set out above may be justified if the relevant measure imposing Community employment conditions with respect to crews employed on board third countries' ships carrying out intra-Community services falls within one of the policy grounds listed in the exceptions clause of Article XX of the GATT. As was the case with the GATS, whether such justification is possible will depend on the form the measure takes and the policy objective that it aims at. The less vital and important the policy interest protected by the measure, the more difficult it will be to justify a very trade restrictive measure. In addition, in order to benefit from these exceptions, the application of the measure may not result in arbitrary or unjustifiable discrimination or a disguised restriction on trade.

While we subscribe to the same view, we will add an important point: To the extent that the application of EU domestic regulation on the social protection of workers constitute a *prima facie* violation of WTO rights, the level of justification becomes more important. Thus, *if* the application of EU domestic regulation on the social protection of workers constitute a *prima facie* violation of WTO rights, it becomes even more important to observe the recommendations we make in the last part of this report. Under no circumstances does WTO law define how domestic EU law is to be constructed, but if the Union intends to impose its regulation on the social protection of workers on providers of maritime services from third countries, the quality and consistency of EU domestic regulation matter. Further, it is important that the values, upon which the domestic regulation is founded, are made visible.

8.2 Bilateral agreements

The observations made in Section 8.1 above applies also with regard to bilateral trade agreements entered into by the EU. The reason is twofold. First, the relationship and interface between EU domestic law and public international law is of a principled and thus general

[57] GATS Article II, XVI and XVII.
[58] Molenaar et. al. Chapter 7.
[59] Molenaar et. al. at 72.
[60] Molenaar et. al. at 83. We find it unneccessary to conduct a separate analysis of GATT to substantiate the more principled observations in this Section.

character. Second, with regard to issues that are of relevance to this report, the bilateral agreements concluded by the EU are constructed in a way that mirror GATS. We will concentrate on three examples below.

The agreement concluded between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part[61] excludes maritime cabotage (Article 7.4). It provides rights to shipping companies that can prove a sufficient link to either the EU or Korea to exist (Article 7.2 g):

> Notwithstanding subparagraph (f), shipping companies established outside the EU Party or Korea and controlled by nationals of a Member State of the European Union or of Korea respectively, shall also be covered by this Agreement, if their vessels are registered in accordance with the respective legislation of that Member State of the European Union or of Korea and carry the flag of a Member State of the European Union or of Korea.

On this issue, the Korea-agreement reflects the approach in the EU regulation on maritime transport services.

The Korea-agreement provides a right to market access (Article 7.5), a right to national treatment (Article 7.6) and a right MFN treatment. It prohibits both formal and de facto discrimination.[62]

Similarly, the Agreement between the European Union and Japan for an economic partnership excludes maritime cabotage (article 8.6.2 a). The agreement provides a right to market access (Article 8.7), a right to national treatment (Article 8.9) and a right to MFN treatment. Sub-section 6 on international maritime transport services provides quite detailed regulations. The key substantive principle is that each part shall "accord to ships flying the flag of the other Party or operated by service suppliers of the other Party treatment no less favourable than that it accords to its own ships".

The agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) includes a chapter on international maritime services (Chapter 14). According to Article 14.2, the chapter is not applicable to maritime cabotage services. The general principles; national treatment and MFN apply. The main operative principle is that a Party shall not adopt or maintain a measure in respect of (a) a vessel supplying an international maritime transport service and flying the flag of the other Party; or (b) an international maritime transport service supplier of the other Party,

> that accords treatment that is less favourable than that accorded by that Party in like situations to its own vessels or international maritime transport service suppliers or to vessels or international maritime transport service suppliers of a third country with regard to:
>
> (a) access to ports; (b) the use of infrastructure and services of ports such as towage and pilotage; (c) the use of maritime auxiliary services as well as the

[61] OJ 2011 L 127/6.

[62] Cf. Article 7.6.3: "Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of a Party compared to like services or service suppliers of the other Party."

> imposition of related fees and charges; (d) access to customs facilities; or (e) the assignment of berths and facilities for loading and unloading.

Other bilateral agreements concluded by the EU adopt a similar approach. Equal treatment is a key notion. The bilateral agreements do not affect the way in which domestic EU law is constructed. If the Union intends to impose its domestic regulation on the social protection of workers on providers of maritime services that can invoke EU bilateral agreements, the quality and consistency of EU domestic regulation matter. Further, it is important that the values upon which the domestic regulation is founded are made visible.

9. The creation of a European Maritime Space

The purpose of this section is to present recommendations about how to establish a sustainable European Maritime Space, the framework of which identifies a fair balance between the right to free movement and the protection of fair working conditions.

We reiterate that from the perspective of international law it is not problematic to impose Community employment conditions on seafarers with a nationality of a third State where either the vessel is flagged in an EU Member State or the vessel is operated by a company established in the Community.

From a legal perspective, the flag state principle, which is a concept of international law, is a distraction. The European Maritime Space must be founded on key *domestic* principles and policies. Below we establish four recommendations that, as a whole, can form the basis of an autonomous Union policy in the field of maritime services, while also respecting the principle of subsidiarity.

Recommendation 1: To adapt and pursue an overarching Union strategy

The creation of a European Maritime Space should be guided by the domestic policy establishing a European Pillar of Social Rights. Recital 1 in the recommendation of the Commission states that:[63]

> Pursuant to Article 3 of the Treaty on European Union, the aims of the Union are inter alia to promote the well-being of its peoples and to work for the sustainable development of Europe based on a highly competitive social market economy, aiming at full employment and social progress. The Union shall combat social exclusion and discrimination, promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

In essence, what Article 3 TEU requires is a coherent Union strategy that respects and promotes European values. A key problem with regard to the provision of maritime services is that no Union strategy exists in the true sense. In its Communication on a common policy on

[63] Commission Recommendation of 26.4.2017 on the European Pillar of Social Rights.

the manning of regular passenger and ferry services operating in and between Member States, the Commission noted that:[64]

> *Over the last decades the employment trend has gone down continuously, as a result of flagging out, replacement of Community crew by cheaper labour from third countries, and technical labour-saving rationalization measures.*

Referring to a prior strategy paper, the Commission noted that "the creation of a level playing field was seen as the best way to stop flagging out":[65]

> *This means that member states should be allowed to offer shipowners under their flag fiscal and labour conditions which are (as far as possible) comparable to those that can be obtained elsewhere."*

The Communication goes on to discuss in which regards exceptions to the flag state principle may be deemed justifiable.

The reference to conditions that are *comparable to those that can be obtained elsewhere* is a reference to labour conditions outside the EU. In our view, the reference to external standards, and the absence of an autonomous Union strategy are difficult to reconcile with Article 3 TEU. The equation with an external standard may foster a race to the bottom and, potentially, the free movement of social dumping.

While rules on flag state jurisdiction as established by public international law must be respected to the extent such sources require, we recommend that domestic EU law be constructed solely upon general principles of EU law. In that respect, we reiterate recital 3 in the preamble of the Commission recommendation on the European Pillar of Social Rights:

> Article 151 of the Treaty on the Functioning of the European Union provides that the Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.[66]

In practical terms, guided by the principle of equal treatment which is fundamental to the acquis of the European Union, the key principle is

- that the same work at the same place should be remunerated in the same manner.

This principle underpinned the targeted revision of the Posting of Workers Directive.[67] Applied within the European Maritime Space, this leads to the recommendation that

[64] Communication 1998/251, para 2.
[65] Communication 1998/251, para 3.
[66] Cf. in this regard Case 201/15, *Aget Iraklis*, para 77
[67] Com 2016/128 final, concerning the posting of workers in the framework of the provision of services, Section 1.1.

- Crews employed on vessels that provide maritime services within or between EU Member States shall be covered by conditions of employment that are equal or superior to those applicable in the EU Member States concerned.

The realization of this principle will require regulatory action on different levels.

Recommendation 2: Actions at Union level

There exists a substantial amount of EU secondary legislation the purpose of which is to strike a fair balance between the right to provide services, on the one hand, and the social rights and interests of workers, on the other. Historically, such directives have excluded certain seafarers from their scope or have allowed Member States to exclude them.[68] In 2015, some of these exemptions were lifted. Directive 2008/94/EC on the Protection of Employees in the Event of the Insolvency of their Employer, Directive 2009/38/EC on the Establishment of a European Works Council, Directive 2002/14/EC Establishing a General Framework for Informing and Consulting Employees in the European Community, and Directive 98/59/EC on the Approximation of the Laws of the Member States Relating to Collective Redundancies, were amended. The preamble of the amendment-directive (2015/1794) states that:

> The existence of, and/or possibility of introducing, exclusions may prevent seafarers from fully enjoying their rights to fair and just working conditions and to information and consultation, or limit the full enjoyment of those rights. Insofar as the existence of, and/or possibility of introducing, exclusions is not justified on objective grounds and seafarers are not treated equally, provisions which allow such exclusions should be deleted.

The way in which the amendments were carried out is of particular interest. Article 3 of the amendment directive stated that Article 3.3 of the Directive Establishing a General Framework for Informing and Consulting Employees in the European Community (the clause that allowed the Member States to exempt certain seafarers from the scope of that directive) should be "deleted". The framework established by that directive was thus made generally applicable.

In comparison, Article 4 of the amendment directive stated that Article 1(2) point c of Directive 98/59/EC on the Approximation of the Laws of the Member States relating to Collective Redundancies (the clause exempting seafarers) should be "deleted", and further that the following subparagraph should be added:

> Where the projected collective redundancy concerns members of the crew of a seagoing vessel, the employer shall notify the competent authority of the State of the flag which the vessel flies.

The approach marks first, that the mandatory rules underpinning the European Working Space shall apply equally to all workers, and to all companies established within the Union. Second, it reflects the distinction contained in Article 3.1 of the Posting of Workers Directive, between the mandatory rules of the Union and the law that is applicable to the employment contract as

[68] Cf. Directive (EU) 2015/1794 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

such. Mandatory Union Law, the purpose of which is to protect the social rights of workers apply, although the contractual relationship in the strict sense, is subject to the jurisdiction/legislation in a third state.

Directive 2008/104/EC on Temporary Agency Work does not exclude seafarers from its scope.[69] To the opposite, Article 1.2 of Directive 96/71/EC on the Posting of Workers establishes that the directive shall not apply to "merchant navy undertakings as regards seagoing personnel".

As explained in Section 6.1 above, the Posting of Workers Directive is a key template for the construction of the European Working Space. Further, by reference to Article 153 TFEU, the amendments that were carried out in 2015 were described as a "gradual implementation aiming to improve the working conditions" for seafarers.[70] Exception-clauses can be preserved only to the extent that they are objectively justifiable.[71] We recommend the gradual process of improving the social protection of seafarers to continue, and that

- the legal and political legitimacy of the exception clause in the Posting of Workers Directive is reassessed and reconsidered by reference to the fundamental legal principles on which the Union is based, by reference to the policy choices that underpin the European Pillar of Social Rights, by reference to the legal and political considerations that guide the construction of EU Law in other sectors of the economy and by reference to the considerations on which the amendments in 2015 were based.

The analysis above has proved that while the EU must respect obligations that stem from international conventions to which the Union is a party, the flag state principle does not affect the way in which EU domestic law is shaped and applied. Further, we have shown that to the extent a provider of maritime services is allowed to invoke EU law, the right to free movement in particular, a sufficiently close connection between the vessel and EU domestic law can by definition be said to exist. To preserve the autonomy of EU law, to promote European values and to ensure a fair balance between the right to free movement and the protection of workers

- We recommend that rights that flow from domestic EU law, the right to free movement in particular, should not be attributed to service providers that register their vessels in third countries *and* operate on the basis of third-country wages and working conditions.

The regulation on the provision of maritime transport services, and the practice of the ECJ,[72] confirms that the EU legislature has chosen a pragmatic approach. Currently, the registry of vessels in third countries is not regarded as breaking the link between a "domestic" provider

[69] Cf. i.e., the report of the Expert Group on the transposition of Directive 2008/104/EC on Temporary Agency Work, at 5-6.
[70] Cf. Directive (EU) 2015/1794 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, para 1 of the preamble.
[71] Cf. Directive (EU) 2015/1794 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers, para 4 of the preamble.
[72] See section 4.2 above.

of maritime services and EU law. The analysis above demonstrated that the legislative choice is founded solely on political considerations; the current approach is not in any sense a requirement that flows from international law. In our view, the emphasis of the current legislative framework on the "competitiveness" of the European maritime branch may to some extent appear as shorthand for "low cost". The balance between economic rights and workers' rights with regard to the provision of maritime services deviates from the European standard in general.

From a legal perspective it appears problematic to provide free movement rights to economic actors that, at least partly, operate on the basis of rules and values that are external to the Union. The mutual trust upon which the principles of free movement and mutual recognition are based, flow from the presupposition that those that benefit from such principles operate in accordance with domestic values, as enshrined in TEU Article 2. The registry of vessels in third countries, and the application of third-country legislation on wages and working conditions, both breaks the link between the service provider and the values on which the Union is based.

To reinstate the link between the fundamental right to free movement, on the one hand, and the fundamental values on which the Union is based, on the other, we recommend that;

- only ships the manned in accordance with EU or EU Member State rules,[73] should be attributed domestic EU rights – the right to free movement in particular.
- the host Member State is allowed to introduce higher standards with regard to the crew, provided that the ship provides services between the ports in the host Member State.
- rules on wages and working conditions are regulated in accordance with Recommendation 3 and 4 below
- other issues relating to free movement and the approximation of laws with regard to the provision of maritime services within an EU Member State or between EU Member States are not harmonized. Such issues must be resolved by the social partners, or, in the absence of an agreement, on the basis of the general principles of free movement, mutual recognition, mandatory requirements and proportionality.

Recommendation 3: To respect the principle of subsidiarity with regard to wages and working conditions

Regulation of wages and working conditions does not affect the composition of the crew. Thus, in this particular regard, the application of host state rules will not constitute a direct hindrance to free movement. Further, the application of host state rules provides for the efficient monitoring and enforcement of workers' rights.

[73] See in particular Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers.

The Communication from the Commission Establishing a European Pillar of Social Rights recognizes the importance of the principle of subsidiarity:[74]

> Member States, and for many domains the social partners, have primary or even exclusive competences in areas such as labour law, minimum wage, education, healthcare and the organisation of social protection systems. They also bear the bulk of the financing in the areas covered by the European Pillar of Social Rights. The principles and rights set by the Pillar will need to be implemented at Union and Member State level in full respect of their respective competences. This is also in line with the principles of subsidiarity and proportionality, which foresee that action at EU level will take place only when objectives can be better achieved at Union level and that such action will not exceed what is necessary to achieve the objectives of the Treaties.

With regard to the division of competences between the EU home state and the EU host state on issues relating to the protection of the working conditions of seafarers conducting work temporarily within the territory of an EU Member state, we recommend the same distribution of powers as constituted by the Posting of Workers Directive. Article 3 of the Directive establishes that whatever the law applicable to the employment relationship, the Member State where the work is carried out shall ensure the existence of regulation that covers the following:

- maximum work periods and minimum rest periods
- minimum paid annual holidays
- the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings
- health, safety and hygiene at work
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people
- equality of treatment between men and women and other provisions on non-discrimination.

We recommend the same distribution of competences within the European Maritime Space. The "core set" of rights as identified by the Posting of Workers Directive shall be subject to the regulation in the host state *in which the maritime service is provided*.

A vessel may provide maritime services in different EU states during the same journey. Thus it may be subject to different legal regimes. New technology makes it possible to log every movement of the ship. The continuous adjustment to different regimes on wages and working conditions is thus possible, and will not require physical adaptations of the crew or the ship. To reduce bureaucracy we do, however, recommend that the regulatory framework establishes mechanisms that facilitate a somewhat more schematic approach in instances where the provision of maritime services does not relate specifically to one particular EU Member State

[74] Com 2017/250, Section 3.

and where the service provider stays in the territory of a specific EU Member State only for a short period of time.

Recommendation 4: Delegation of responsibilities to social partners

Ships are moving entities. They are used to provide an array of different services. Sometimes the same vessel is being used to provide different kinds of services and alternates between the provision of maritime cabotage services, the provision of intra-EU maritime services and the provision of international maritime services. This makes it difficult to construct a European Maritime Space entirely upon the categorization of different types of maritime services. Some services are intrinsically linked to a specific territory, such as island cabotage, and may successfully be subject to specific regulation. In general however, we subscribe to a more a more synthetic approach, based on three important premises:

- the legal framework that constitutes the European Maritime Space (rights *and* obligations) should apply to service providers that invoke/benefit from the domestic EU right to provide services, regardless of the service provided.
- with regard to the protection of workers' rights, a provider of maritime services that invokes or benefits from the right to provide services should be subject to a core set of obligations, defined by the host state in which the service is provided, in accordance with EU law.
- the principles of free movement, mandatory requirements, and proportionality require other issues to be solved on a case by case basis.

The successful implementation and enforcement of the suggested framework presupposes the delegation of responsibilities to the Social Partners. The importance of the Social Partners is recognized by the Commission Recommendation on the European Pillar of Social Rights. Recital 4 of the preamble observes that:

> Article 152 of the Treaty on the Functioning of the European Union provides that the Union recognises and promotes the role of the social partners at its level, taking into account the diversity of the national systems. It shall facilitate dialogue between them and respect their autonomy.

Para 8 of the recommendation establishes:

> **Social dialogue and involvement of workers**
> a. The social partners shall be consulted on the design and implementation of economic, employment and social policies according to national practices. They shall be encouraged to negotiate and conclude collective agreements in matters relevant to them, while respecting their autonomy and the right to collective action. Where appropriate, agreements concluded between the social partners shall be implemented at the level of the Union and its Member States.
> b. Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies.
> c. Support for increased capacity of social partners to promote social dialogue shall be encouraged.

The proper implementation of this principle within the legal framework that constitutes the European Maritime Space is particularly important due to the vagueness of the legal provisions, due to the movement of vessels between different territories and due to the risk of fraud and circumvention.

Based on the principle "that the same work at the same place should be remunerated in the same manner" we recommend in particular that the social partners should be competent to:

- declare that the principle is fulfilled, or to enact collective agreements the observation of which shall be considered sufficient to regard the principle to be respected.
- establish agreements specifying to which territory the provision of a maritime service is to be attributed.
- decide that the provision of a maritime services should be attributed solely to the territory of one Member State although the vessel occasionally operates in the waters of other EU member State
- represent EU and third country seafarers before national bodies and EU bodies, including courts.[75]

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There are no judgments by international courts or tribunals that deal with the application of employment conditions on foreign ships. The most important precedent in the field is Australia's Fair Work legislation of 2009. The act brought seafarers aboard vessels substantially connected with Australia within the scope of Australian employment legislation, regardless of the flag of the vessel. Australia has not attempted to apply its employment standards to every foreign-flagged vessel that enters an Australian port. A substantial connection exists e.g. if the vessel is owned by Australian companies, or if it is engaged in Australia's cabotage trade.[76]

In some respects, the proposals in this report reflect the Australian approach. From the perspective of EU law it should be noted that, in the first place, the invocation of the right to free movement requires an analysis of whether a substantial connection to the EU exist. We have argued that the invocation of EU law is, or should be, intrinsically linked to the respect for the social values espoused by Union law. With regard to the competence of the Union to prescribe and enforce obligations that concern wage and working conditions, the specificities of Union law provide a particularly important means. In the absence of respect for the obligations that flow from Union law, economic actors should not be allowed to benefit from the EU domestic right to free movement.

[75] Cf. Directive 2014/67 EU on the enforcement of the posted workers directive Article 11.3.
[76] Cf. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Springer 2014, Chapter 6, pp. 161 and 173 in particular.