

European Network on Free Movement of Workers

THEMATIC REPORT

Seafarers

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A. Introduction

Context

The seafaring sector is special. It has the following distinctive characteristics:

- In accordance with UNCLOS, the law regulating employment relationships on board vessels is the law of the flag of the ship. Many EU ship owners opt for so-called flags of convenience outside the EU (such as Bermuda, Panama, Liberia).
- 2) Employment relationships of seafarers are fragmented. An individual seafarer may hold the nationality of an EEA state A, be employed through an agency in EEA state B, work on a vessel plying the routes between EEA States C and D on a vessel registered in non-EEA State E. Often employment relationships are short.
- 3) Some EEA states are providers of seafarers to other EEA states (eg Latvia and Lithuania), others are receivers (eg Malta, Norway).
- 4) The seafaring sector covers a wide gamut of activities from short ferry trips to long distance voyages on tankers carrying dangerous cargo.
- 5) Seafaring is a genuinely global business.
- 6) There is a significant variation between what the laws provide and what happens in practice. Absent a robust system of enforcement, many legal provisions go unenforced.

The Commission's request

The Commission posed four specific questions to be answered by the correspondents. These were:

- 1) Do national rules on seafarers pay have a nationality condition?
- 2) Do national rules on seafarers pay have a residence condition?
- 3) Do national rules discriminate on grounds of nationality/residence in respect of working conditions?
- 4) Are there any reported cases?

These specific questions were answered to a greater or lesser extent in respect of all reports. The information provided below (section B) reflects the answers given in those reports as supplemented by information received by follow up questions and information provided at the conference on free movement of workers in Bucharest 3-4 November 2011.

In addition to answering the questions posed by the Commission, some additional points were raised by some of the correspondents, especially in respect of access to the post of seafaring; these answers will also be covered in the report (section C) but this section does not contain a comprehensive review. The final section raises other issues which came out of the national reports which might be of interest to the Commission (Section D). Section E concludes

B. The Commission's questions

1. Whether the national rules (legislation and /or collective agreements) on seafarer's pay envisage a condition of nationality

Discrimination against EEA nationals

The answer to this question, at least in terms of formal legislation/collective agreements (see section D below for a discussion of experience in practice), in most Member States is no: states do not discriminate against EEA nationals (see Table 1). However, there are exceptions.

- vessels rated at over 1,500 GRT registered under the Greek flag are deemed foreign capital. Instruments of registration may provide for derogations from national law including collective agreements in respect of foreign seafarers.
- In **the Netherlands**, there may be discrimination in respect of the pay of captains. The captain of the Dutch fleet is not usually covered by a *collective agreement (CAO)*, and his salary is established on an individual basis. With foreign captains, the aim is to determine their wages above those of the first mate. Such a scheme is and remains an agreement between social partners. Therefore, the union Nautilus Netherlands recommends adding a wage-equal-norm to the Zeevaartbemanningswet or elsewhere in the system.

- Nautilus argues that this provision should state that foreign captains may/can only work for the same wages as their Dutch colleagues.¹
- In Slovakia the Act on Maritime Navigation provides that the labour relationships of foreign nationals (ie non-Slovaks including EEA citizens) are governed by conditions of their labour contract and not by the labour code.

Discrimination against TCNs

Where discrimination is permitted

In some countries, such as **Italy** and **the UK**, discrimination against third country nationals in respect of pay continues. In the Netherlands discrimination against non-EU seafarers takes two forms. First, a distinction is made between (1) seafarers insured under the Dutch benefit (ZW) or under the system of a European Member State and (2) seafarers who are not. During the first 12 weeks of sickness, both groups receive 100% of their pay/salary. However, discrimination then occurs: the Dutch/EU group receives 70% for a total of 104 weeks, while the non-EU group receives 80 % of pay for 52 weeks. Furthermore, for Dutch and European seafarers, the same working conditions apply. They fall - with a few exceptions – under the general Dutch collective agreement; there is a special agreement for non-European seafarers. The national collective agreement is the Collective agreement of Commercial Boats (handelsvaart) up to 9000 gross tonnage. ² However, Art 3 paragraph 1 of the collective agreement of Commercial Boats (handelsvaart) up to 9000 gross tonnage³ provides that employees from the Philippines and Indonesia are subject to the pay and working conditions as agreed between the trade union of the country of residence and the employer. The Commission on equal treatment ruled in 1997 that this did not constitute a case of unjustifiable discrimination.⁴

Where discrimination is not permitted

Some countries take a very different view. For example, in **Sweden**, collective agreements do not discriminate, even against TCNs. Levels of pay in Sweden are based on length of service and levels of education. Service on board vessels registered in Sweden and those registered in other countries counts equally. Education qualifications obtained in other States, including third countries are also considered. Other Member States do the same eg **Lithuania**, **Poland**.

¹ Evaluatie versoepeling nationaliteitseis kapitein op Nederlandse zeeschepen, 30 november 2006, ministerie verkeer en waterstaat, available at http://parlis.nl/pdf/bijlagen/BLG12182.pdf

² Cao tekst, available at docs.minszw.nl/pdf/174/2006/174_2006_13_1951.pdf.

³ Cao tekst, available at docs.minszw.nl/pdf/174/2006/174_2006_13_1951.pdf.

⁴ Commissie gelijke behandeling 1997-13.

2. Whether the national rules (legislation and /or collective agreements) on seafarer's pay envisage a condition of residence

The answer to this question across most Member States is no. There are, however, two notable exceptions: the UK and Denmark.

The UK

The position in **the UK** is complex. The relevant Regulations apply the principle of equality in Part V (work) of the Equality Act 2010 to three situations or scenarios:

- 1) UK ships/hovercraft wholly or partly in UK waters adjacent to GB.
- 2) EEA ships/hovercraft but only when they are in UK waters adjacent to GB
- 3) UK ships/hovercraft wholly outside GB waters

Looking at the detail of these three situations in turn, Part V of the Equality Act 2010 applies to:

Looking at the detail of these three situations in turn, Part V of the Equality Act 2010 applies to:

- 1. A seafarer working wholly or partly within Great Britain if the seafarer is on:5
 - a. A UK ship, and the ship's entry in the register specifies a port in GB as the ship's port of choice; or
 - b. A hovercraft registered in the UK and operated by a person whose principal place of business or ordinary residence is in GB.
- 2. Seafarers working wholly or partly within Great Britain (including UK waters adjacent to GB) who are on:⁶
 - a. An EEA registered ship (other than a UK registered ship); or
 - b. An EEA registered hovercraft (other than a UK registered hovercraft) and
 - The ship or hovercraft is in UK waters adjacent to GB (this is particularly important and narrows the scope of the provision)
 - The seafarer is a British citizen or a national of an EEA or designated state (so even TCN seafarers recruited inside GB are excluded from protection where they are working on an EEA vessel), and
 - The legal relationship of the seafarer's employment is (1) located within GB (ie the contract under which the seafarer is employed was entered into in GB or takes effect in GB⁷) or retains a sufficiently close link with GB (the question of sufficient closeness is to be determined by reference to all factors including where the seafarer is subject to tax; where the employer or principal is incorporated;

6 Reg 3(2).

⁵ Reg 3(1).

⁷ Reg. 2(2)(a).

where the employer or principal is established; where the ship or hovercraft on which the seafarer works is registered.

The concern raised by the unions about this second scenario is that some UK (and EEA) seafarers may fall outside its scope where they serve on eg a German ship but do not have a sufficient employment connection with the UK. And even if they do have an employment connection they are protected only for so long as they are in UK waters.

This provision creates a further problem: it does not cover seafarers who are "based" in the UK (within the common law meaning of the term?) but who serve on foreign flagged vessels. Nautilus expresses its concerns in the following terms:

'The only non-UK vessels covered are EEA vessels when the legal relationship of the seafarers employment is located within GB or retains a significantly close link with GB (see Regulation 3(3)(c)). Furthermore in that context the Act only applies when the EEA vessel is in UK waters adjacent to GB. However there is another problem which I think should be emphasised more. The Act does not apply at all to non-UK/non-EEA vessels even when the seafarer is based in the UK (see page 4 of my letter dated the 20th October 2011) which sets out my reasons as to why section 81 of the Act may prevent its application by base test. In other words Mr Diggins would not get the protection of the Act if he had a discrimination claim on a Bahamian-flagged vessel even with the UK-base connections he had in his unfair dismissal claim. This cannot be right for someone who lives in the UK.

'This base test point is a real concern as shipowners' have already threatened to flag out to avoid the Act and it would be very easy for instance for large cruise ships which operate out of Southampton to re-flag to Bermuda. In fact yesterday's maritime press reported that Cunard's "three Queens" are to be taken off the UK register and flagged in Bermuda.¹⁰

'Therefore there are two problems: (i) the limited extent to which the Act applies to EEA vessels; and (ii) the fact that it does not apply to non-EEA vessels at all even when the seafarer is based in the UK. In other words if a seafarer is embarking/disembarking their vessel in Portsmouth, lives in Portsmouth and never leaves UK territorial waters they will not be covered

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⁸ Reg, 2(2)(b).

⁹ See eg Diggins v Condor Marine Crewing Services [2009] EWCA 1133, para. 30 'In my view, if one asks where this employee's base is, there can only be one sensible answer: it is where his duty begins and where it ends. The company may have been based in Guernsey but Mr Diggins had no real connection with that place and he had even less with the Bahamas, where the ship is registered. I do not accept that the considerations of where the company operates or where the ship is registered are likely to have any significant influence on the question where a particular employee was based. In my judgment, HHJ Burke correctly reached the conclusions he did, essentially for the reasons he gave. The question must be asked and answered as a practical matter, as Lord Hoffman made plain. On that approach, it seems to me that the base was in Great Britain.'

¹⁰ 'Cunard cruiseships to reflag in Bermuda', *Lloyd's List*, 24 October 2011.

under the Act if they are working on a vessel registered in say Bermuda, Panama, the Bahamas, etc.'11

- 3. Seafarers working wholly outside GB and adjacent waters if the seafarer is on:12
 - a. a UK ship, and the ship's entry in the register specifies a port in GB as the ship's port of choice; or
 - b. a hovercraft registered in the UK and operated by a person whose principal place of business or ordinary residence is in GB

and

- the seafarer is a British citizen or a national of an EEA state or a designated state (and so the provision does not cover a TCN, even one recruited in GB), and
- the legal relationship of the seafarer's employment is located within GB (ie if the contract under which the seafarer is employed was entered into in GB or takes effect in GB¹³) or retains a sufficiently close link with GB (to be determined by reference to all factors including where the seafarer is subject to tax; where the employer or principal is incorporated; where the employer or principal is established; where the ship or hovercraft on which the seafarer works is registered¹⁴)

Nautilus complains that, given the fragmentation in the industry with key aspects of the employment spread across a number of EU/non-EU states, the current drafting of the legislation in scenario 3 makes it difficult even for EEA seafarers to establish an employment connection with the UK.¹⁵

Denmark

The collective agreements on wages and working conditions concluded by a Danish trade union can cover only persons having residence in Denmark, or who must be put on equal footing with persons considered having residence in Denmark pursuant to EU law or other concluded international obligations. This can be seen in Danish International Ship[ping Register (DIS) section 10(2). Its original version provided:

'Collective agreements as mentioned in subsection 1 [regarding wages and working conditions on board ships] concluded by a Danish trade union can cover only persons who are considered having residence in

¹¹ Email on file with the author dated 25 October 2011.

¹² Reg 4.

¹³ Reg 2(2)(a).

¹⁴ Reg 2(2)(b).

¹⁵ Cf UNCLOS which requires merely that it is sufficient for the seafarer to be serving on an (eg British) ship. See also SI 2002/2125 The Merchant Shipping (Hours of Work)Regulations 2002 where no employment connection is required.

Denmark or who should be put on equal footing with Danish nationals according to international obligations.'

Following negotiations with the Commission, the rule was amended to provide that:

'Collective agreements as mentioned in subsection 1 [regarding wages and working conditions on board ships] concluded by a Danish trade union can cover only persons having residence in Denmark, or who must be put on the same footing as persons considered having residence in Denmark pursuant to EU law or other concluded international obligations.'

As our expert explains, by the amended provision, the residence criterion is thus retained, the reference to Danish nationals is removed and the reference to EU law is now explicit. According to the explanatory remarks to the amending provision, 'the amendment of Section 10 (2) is thus merely a clarification of the Danish legislation's compliance with EU law'. Further, it is stated that pursuant to EU law, a person may be considered having residence in Denmark when the person has a sufficiently close connection with Denmark. As part of the assessment of whether the person has a sufficiently close connection with Denmark, the practice from CJEU must be included. In the explanatory remarks to the amending Bill it is noted that 'the clarification of the provision creates a clearer basis for carrying on and further developing the practice from the Industrial Court', (namely the judgment of 1997 in the so-called 'Winston Churchill' case. In that case the Industrial Court took the view that the residence criterion reflected the relevant objective differences in the employee's living conditions, such as taxation, in their respective home countries, and thereby provided a reasonably justification for differences in the terms and conditions as laid down in the respective collective agreements and individual employment contracts.

In the hearing note from the Ministry of Economic and Business Affairs, the Ministry thus states that the purpose of the amendment of the Act solely is to adopt a clarification of Section 10 (2) in order to rule out any possible doubt on the compliance with EU law and to close the infringement case. The Bill does not aim to change the existing state of law.

3. Do legislation and/or collective agreements (binding at national and /or at sector level) establish different legal treatment of seafarers from other Member States on the basis of their nationality/residence in relation to working conditions in general

The answer to this question across most Member States is generally no, at least as far as formal legal rules/collective agreements are concerned, except in the UK and Denmark where the position is as outlined above. However, even in those countries which do generally respect the principle of equal treatment, there may be elements of indirect discrimination. For example, in **Sweden**, seafarers are entitled to free travel back home which, in practice, means to the place where they are relieved from their duty. Such a rule would favour Swedish seafarers.

Lithuania reports specific problems in respect of trade union membership. While general trade union legislation does not limit the access of other EU nationals to trade union membership (Law on Trade Unions of 2001), the Statute of the Lithuanian Seamen's Union (paragraph 3) provides that the members of the Union must be:

- 1) Lithuanian citizens
- 2) other persons (i) permanently residing in Lithuania, (ii) having a diploma of seafarer or certificate confirming the maritime profession qualifications (iii) working in ships carrying the flag of the Republic of Lithuania and other countries.

Thus, the residence condition is a restriction for foreigners working on Lithuanian ships to enter the trade union if they do not have a permanent residence in Lithuania. As a result, their pay and conditions may not be well represented in the event of a conflict.

4. Case law

Most jurisdictions report none, or next to no case law in this area. Where there is case law, as in Germany, it is generally only tangentially relevant eg interpreting the German rules in the light of EU rules on professional qualifications. 16

There are, however, exceptions. We have already examined the Dutch and Danish cases above. In Italy there has been case law on the requirement of holding Italian

¹⁶ Hamburgisches Oberverwaltungsgericht, Decision of 3.9.2010, 1 Bs 146/10.

nationality for the post of master.¹⁷ In Sweden our correspondent notes that the Labour Court has dealt with three cases concerning legal disputes and collective agreements in the maritime sector. Two cases dealt with industrial action and the third case concerned the question whether an agreement concluded int eh Bahamas should apply on Swedish territory.

In the UK the main cases have raised questions of jurisdiction. For example, Haughton v Olau Line (U.K.) Ltd. ¹⁸ concerned a stewardess on a ship registered in Hamburg and owned by Olau Line, a company registered in England with offices in Sheerness in Kent, which sailed between Sheerness and Flushing. She complained that she had been subjected to harassment and discrimination on board ship by one of Olau Line's officers, contrary to the provisions of the Sex Discrimination Act 1975. That Act, which predates the Equality Act 2010, had a provision on territorial scope. Based on that provision, the tribunal held that since the ship was "an establishment" outside Great Britain the applicant was not able to treat the employers' English offices as the relevant establishment under s.10(4) and that since she worked wholly or mainly outside Great Britain within the meaning ofs.10(1), the tribunal had no jurisdiction. The EAT upheld this decision.

Finally, in Denmark there have been a number of cases, in particular a decision of the High Court of 18 Mar 2011. The details of this case are spelt out in Annex I

C. Other Matters arising from the reports

1. Whether the national rules discriminate in respect of access to the post or master and chief mate

Basic position

Following the Court of Justice's decisions in cases such as Case C-405/01 Colegio de Oficiales de la Marina Mercante Española v. Administración del Estado and Case C-47/02 Albert Anker, Klaas Raas, Albertus Snoek v. Bundesrepublik Deutschland or infraction proceeding started against defaulting states (eg Portugal), as well as the need to implement various Directives such as Directive 2005/45/EC and 2001/25, a number of Member States have amended their legislation to remove direct

¹⁷ Court of Appeal Genoa, judgment of 5 may 2002, iForto Italiano, 2002, I, 3196; Court of First Instance of genoa, judgment of 8.9.2005, Diritto Marittimo, 2007, 859.

¹⁸ [1985] ICR 711.

discrimination on the ground of nationality in respect of these posts. For example, in **Germany** the law was changed in 2006 to remove discrimination on the grounds of nationality for appointment to the post of captain or first officer, and in **France** the law was changed in 2008. In **Belgium** the law was changed in 1996 by Royal Decree, rather than by legislation. Nevertheless, our correspondent considers the law to be compatible with EU law and research has not revealed any breaches of the decree. In **Italy** the law (the regulation implementing the Sea and Air Navigation Code) requiring Italian nationality has not been amended but the Code itself requires equal treatment and that has been confirmed by the Italian case law. The Regulation must be interpreted in the light of the code.

Recent changes have also been made to the laws of **Lithuania** and **Denmark**.

Denmark still retains the exceptional possibility to require a Danish captain. In

October 2006, the Executive Order on Exemption from the Requirement on Danish

Nationality Pursuant to the Act on the Manning of Ships for Captains of Merchant

and Fishery Vessels (Access for Captains of Ships from EU and EEA) was issued by the

Danish Maritime Authority: 19

The Order exempts persons comprised by the EU rules on free movement from the requirement on nationality, cf. Sections 1 (1) and 2.

Captains of merchant ships must be in possession of a Danish recognition certificate, cf. Section 1 (2).

According to Section 1 (3) of the Order, there is an exception to the exemption from the requirement on nationality. Thus, the Danish Maritime Authority may - upon consultation with the organizations of ship owners and mariners - require the captain to hold Danish citizenship when it is recognised that rights under powers conferred by public law granted to the captain of a passenger ship or a ship transporting troops, military material or nuclear waste are in fact exercised on a regular basis and do not represent a minor part of their activities.

Spanish law is drafted in similar terms. Law 25/2009 of 22 December 2009 (Article 23) amended Article 77 (2) following the CJEU decisions. It now provides that

(2). The captain and first mate of national ships must be nationals of a Member State of the European Economic Area, except in cases where it is

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¹⁹ Executive Order No. 1010 of 9 October 2006, entering into force on 18 October 2006.

provided by the Maritime Administration that these jobs are to be filled by Spanish nationals, because a great part of their activities involves public powers competences. In the case of merchant vessels, at least 50 percent of the crew must be from Spain or from another Member State of the European Economic Area.

The new paragraph Six, letter a) of the Fifteenth Additional Provision reads as follows:

Nationality: The Captain and first mate of the vessel must have, in any case,
the nationality of a Member State of the European Union or European
Economic Area, except in cases in which it is established by the Maritime
Administration, that these jobs must be filled by citizens of Spanish nationality
because a great part of their activities involves public powers competences.

Our correspondent that the new rules give the Spanish authorities a 'wide discretion' in fact to require Spanish nationality given the breadth of the phrase 'an activity [involving] public powers'.

Indirect discrimination

Some Member States impose indirectly discriminatory requirements in respect of language or other matters. For example, in the **Czech Republic** captains of a ship must either be (1) a Czech national or (2) a national of an EU state who has sufficient knowledge of Czech to exercise the powers of being a captain. The language requirement does have certain exceptions but these apply only in rare cases.

The Czech Republic is not alone in this. **France**, **Greece**, **Ireland**, **Lithuania** all have a language requirement. While this might not be so important to a landlocked state such as the Czech Republic it is more significant for the other countries. In **Ireland** the expert notes that the English language requirements are 'quite demanding, and appear to go beyond those required in other jurisdictions, but the Irish courts have stated that the levels required are consistent with evolving international requirements (the STCW-F Convention), the status of English in the language of international maritime life and the need to secure the safety of seafarers.' ²⁰ There is a language requirement in the maritime field in **Lithuania**. The Law on Safety of Navigation requires that at least one of deck officer of a liner ship sailing by regular passage to ports of Lithuania must know the Lithuanian language, if the captain has permission to sail without a pilot assistance. But this requirement would not be

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 $^{^{20}}$ See Skellig Fish Limited v Minister for Transport [2010] IEHC 190 (High Court, 20 May 2010).

applied if the ship is led by a pilot (Art. 12(2)). Further, Article 11(2) of the Law on Trade Navigation provides that "the master of the ship or at least one of his mates shall know the Lithuanian language".

Some states, notably **France**, **the Czech Republic and Poland**, also require knowledge of national maritime law. For example, applicants for management posts (senior officer and captain) on Polish ships must pass an exam on Polish maritime law.

2. Whether the national rules discriminate in respect of access to the post of seafarer

Likewise, most Member States no longer have nationality requirements for the post of seafarer although some retain language requirements (eg **France**, **Lithuania**, **Bulgaria**, **Greece**) and impose a requirement as to permanent residence (**Lithuania**).

However, discrimination continues in the field of quotas. While some states, like **France and** Spain, have a quota for a minimum number of EEA/EU/Swiss Federation nationals working on vessels, other states confine that quota to nationals only. For example, in **Bulgaria** at least 25% of the posts at governing and operational level are reserved for Bulgarian citizens. Only in exceptional circumstances can the owner of the ship fill the 25% quota with foreign nationals (EU nationals are given priority) and only after permission is granted by the Maritime Administration Executive Agency. In **Italy** there is a softer quota system. For new vessels and vessels already registered in a foreign register there is a preference for Italian nationals to be engaged as ordinary crew.

Other states have registration requirements. In **Lithuania** seamen need to have a permanent residence in Lithuania before they can be registered in the Lithuanian register. In **Belgium**, again in response to CJEU case law, the residence requirement was removed from the law for EU nationals. However, the Belgian Royal Decree establishes priority registration for applicants to be seafarers who are EU nationals in a descending order. Criteria (c) prioritises 'former members of the Belgian navy who produce a certificate of good service'. Criteria (d) refers to holders of a Belgian diploma issued by a lower secondary technical school in, for example, shipbuilding. It is likely that these criteria are indirectly discriminatory on the grounds of nationality.

3. Other discriminatory rules

In reading through the reports various other matters arose which might be of interest to the Commission. For example, in Greece, a per capita levy is imposed on ships flying the flag of third countries operating cruises to and from Greek ports. The amount of this levy is reduced by 20% if the number of employed Greek (but not other EEA national) seamen is higher than 1% of the total number of the crew.

4. Other matters

The reports produced a wealth of other information which provided a broader context for the situation on the ground. The **Slovenian** report provides a good example of (mis)use of flags of convenience. There is one international shipping and chartering firm, Splošna plovba, which operates 20 vessels, all of which are under flags of convenience (primarily Liberia) to benefit from the application of the principle of the law of country of the ship's flag.

In **Ireland** too, reflagging of vessels has also been problematic. As our expert notes, 'One of the most high profile cases concerning seafarers in Ireland in recent years concerned Irish Ferries in 2004/2005. Irish Ferries unilaterally terminated its arrangements with the trade union, SIPTU and, after considerable industrial unrest, made its Irish workers redundant and outsourced its crewing requirements. Subsequently, Irish Ferries decided to reflag its vessels. A number of Irish Ferries' vessels are currently flagged in Cyprus and its most recently acquired vessel is flagged in the Bahamas.

'The Irish Government has made it clear that "it is as a matter of international law clear (as reflected in United Nations Convention on the Law of the Sea – UNCLOS) that the terms and conditions of the employed seafarers on such vessels are to be decided exclusively by the flag State". It was also clear that Ireland could not prevent a reflagging by Irish Ferries as reflagging was an integral part of exercising a right of establishment in another Member State.

'As matters stand, no ferry company is flagged in Ireland. There are ongoing concerns by Irish and other national and international trade unions and others regarding the scale of reflagging that has occurred in recent years and the detrimental effect that this can have on labour standards in the Irish maritime industry. Concerns about a possible "race to the bottom" continue to surface and

have spread to other Member States – in 2007 Irish Ferries suffered from industrial unrest in Cherbourg in France with claims from French trade unionists that there was unfair competition from "underpaid seafarers who work longer hours than the French".²¹

A number of reports highlight a difference between laws which require equal treatment and practice. Again, this can be seen in Ireland where our expert notes, that 'The treatment of non-EU nationals on board Irish fishing vessels has also given rise to concern. According to newspaper reports, the National Employment Rights Authority has investigated working conditions on a number of Irish fishing vessels.' He continues that 'Newspaper reports also indicate that vessels are being abandoned in Irish ports with inadequate supplies of food and fuel and no pay for the seafarers on board.²² This in effect results in seafarers, in one particular case Russian and Ukrainian seafarers, being left out on a limb in Irish ports. In a 2008 report published by the International Transport Federation, it was reported that the Services, Industrial, Professional and Technical Union (SIPTU) was investigating allegations that non-EU workers on fishing vessels were being "exploited, abused and employed illegally" in Ireland.²³ The majority of seafarers on Irish-flagged ships are either from Eastern Europe or from outside the EU and are subject to the same conditions of employment regardless of their nationality. However, where seafarers were employed illegally on Irish flagged ships, they were not benefitting from the legislative protections available in relation to pay and working conditions.'

Concerns about discriminatory treatment in practice have been particularly articulated by states which are traditional exporters of seafarers. For example, in **Lithuania** our expert reports: 'There are a number of problems indicated by sailors working in ships of EU/EEA countries concerning differential pay based on nationality'. However, the expert continues that 'formal complaints are rarely raised as the salaries are considered generally better in ships with flag of these countries than in ships of third countries.'

²¹ See Irish Times, "Irish ferry firms face dispute in France", 7 June 2007.

²² Irish Times, "Ship 'abandoned' in Dundalk Port", 21 August 2009.

²³ International Transport Federation, Report on Migrant Workers in the Scottish and Irish Fishing Industry, 25 November 2008.

Latvia has experienced a similar phenomenon. Its report records some interesting statistics provided by Latvian Trade Union of Merchant Fleet.²⁴ 'The fleet registered under the Latvian flag is small in size. There are several small fishing vessels which operate generally in territorial waters while the merchant fleet consists of around four ships which are passenger ferries of company 'Tallink''. At the same time the Latvian seafarer register has around 12 000 registered Latvian seafarers. A small number of them are employed on ships under Latvian flag: the merchant fleet registered under Latvian flag has only around 400 posts. Therefore a large number of Latvian seafarers are employed on ships registered under flags of other countries, including about 3500 Latvian seafarers employed on ships registered under flags of EU and EEC countries, such as Germany, Italy and Norway.

The majority of Latvian seafarers who are employed on ships registered in EU and EEA countries are employed on the Norwegian fleet. Their number is estimated at around 3,000 people. The Norwegian fleet consists of two registers – the National and the International register. Seafarers employed on ships under the Norwegian National register enjoyed the same rights as seafarers of Norwegian nationality. However, due to the requirement of equal treatment there are around only 20 Latvian seafarers employed in Norway under the domestic register, because it is costly for employers. Those employed under the International register did not enjoy Norwegian labour standards.

When Latvia become an EU Member State on 1 May 2004 it became unprofitable for the Norwegian fleet to employ Latvian seafarers due to the principle of equal treatment. To avoid some of the obligations of equal treatment and taking into account the lower social protection standards in Latvia, a *Temporary* Agreement between the Ministry of Welfare of the Republic of Latvia and the Royal Ministry of Labour and Social Affairs of Norway pursuant to Article 17 of Council Regulation (EEC) of 14 June 1971 No 1408/71 (now Regulation 883/2004) on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community concerning Latvian seamen employed on board of ships registered in the Norwegian International Ship's Register was agreed. It provided that Latvian seafarers employed on Norwegian ships

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²⁴ Telephone interview with vice-president of Latvian Trade Union of Merchant Fleet on 25 August 2011.

registered under International register were to be provided with social security protection not under Norwegian law but under Latvian law. Such agreement leads in substance to discrimination between seafarers of Norwegian and Latvian nationality because social security benefits under Latvian system are, of course, lower than under Norwegian system. Seven years later the agreement is still in force.

Outside this particular problem with Norway, the Latvian report does conclude with the positive view that generally seafarers from Europe enjoy more or less the same employment rights, because they require almost the common standard with regard to employment condition under which they are willing to work. This is not the case with TCNs.

Seafarers entering **Lithuania** have a different problem. In 2000, Lithuania ratified the FAL convention and so now applies simplified immigration procedures for seafarers: seafarers, holding valid seamen's books, regardless of their nationality, can stay for up to 90 days per half year while their ship is laying in a Lithuanian port. Where they have to stay longer (eg a ship is being repaired or modernized) a residence permit (max. up to 1 year) has to be obtained. However, such formalities add bureaucracy and take time. Therefore, in practice shipowners are forced to change crew.

There are also problems when the family members (third countries citizens) sailing together with the crew members are not allowed to exit the ship to the port. This situation may affect EU/EEA nationals in the sense that they are also allowed to stay without formalities for up to 3 months within a calendar half a year, after which they have to obtain an EU residence permit (this period may be extended for another 3 months in case of job seeking or other legal activity).

D. Conclusions

Generally Member States take a pro-Union law line on interpreting their provisions and ensuring compatibility with the demands of EU law. For example, in a number of Member States, such as Hungary, the relevant authorities will take into account certificates of proficiency issued by other Member States prior to granting a permit to operate vessel under the Hungarian flag. The major concerns for trade unions remain the treatment of non-EEA nationals and discriminatory treatment in practice

of EEA nationals, especially from the new Member States. The major concern for the EU should be the stark difference between the law and practice.

Annex I

Danish cases brought before the national jurisdiction challenging the seafarer's pay and working conditions

II.I.a) Cases brought before the Industrial Court

In October 2004, the Commission filed an opening statement regarding breach of the then Article 39 (2) of the EC Treaty and Articles 7 and 8 of Regulation 1612/68. The disputed issue was the fact that the Act on the Danish International Shipping Register Section 10 (2) determined that:

'Collective agreements as mentioned in subsection 1 [regarding wages and working conditions on board ships] concluded by a Danish trade union can cover only persons who are considered having residence in Denmark or who should be put on equal footing with Danish nationals according to international obligations.'

In practice this provision has been construed by the Danish authorities to mean that the *place of residence* is the decisive factor, which has been upheld by the Industrial Court ('Arbejdsretten').²⁵

Consequently, in the so-called 'Winston Churchill case' of 1996:

It was argued that the entire crew, consisting mainly of Dutch seafarers not residing in Denmark, should be covered by the collective agreement entered into by a Danish labour union, which the Court turned down in 1997. The Court thus took the view that the residence criterion reflected the relevant objective differences in the employee's living conditions, such as taxation, in their respective home countries, and hereby provided a reasonable justification for differences in the terms and conditions as laid down in the respective collective agreements and individual employment contracts. The Court found that there were no international obligations at the time of the ruling according to which persons residing outside Denmark should be treated as Danish nationals, and thus should be covered by Danish collective agreements.²⁶

At the end of 2004, another case on this question was submitted to the Industrial Court by the Confederation of Danish Labour Unions ('LO') on behalf of Polish seafarers:

²⁵ Official website <u>www.arbejdsretten.dk</u>. Cf. cases No. 96.017, No. 2001.335, No. 2004.435, No. A2007.250 and A2007.255; see more below.

²⁶ Judgment of 24 April 1997 in Case No. 96.017; upheld by judgment of 31 August 2006 in case No. 2001.335.

The LO claimed that around 4,000 Polish seafarers had been underpaid since 1994. The case was dismissed by the Industrial Court on 27 October 2005 on the grounds of *lacking industrial dispute*. The subject of the competence of the Industrial Court is cases concerning disputes relating to collective agreements or individual contracts, and since the subject of this case was found by the Court to be more of a general and principled character regarding Section 10 (2) and its relation to EU law, the case was dismissed as being outside the scope of the Industrial Court's competence.²⁷

Subsequent to that decision, the LO was corresponding with the European Commission regarding this matter and gathering documentation.²⁸ This resulted in the LO filing 2 new cases on the same matter to the Industrial Court, and on 24 January 2008 the Industrial Court passed its judgment:²⁹

In its judgment, the Industrial Court referred to the abovementioned judgments and in particular the dismissal of 2005. The Court stated that the fact that the LO now had authorization from 2 Polish seafarers did not constitute any changes to the Court's competence as regards the evaluation of Section 10 (2) and the case from 2005. Hence, the Industrial Court repeated its judgment of 2005 by dismissing the case as being outside the scope of the Industrial Court's competence. Furthermore, the Industrial Court noted that a case of this character which has as its purpose to extend or overrule Section 10 (2) must be processed as a lawsuit against the Danish State - in the form of the competent Ministry - at the ordinary courts.

This lawsuit has now been processed, and on 18 March 2011 the High Court ruled on the matter; see below para. II.b.

According to the Danish government, the Commission claimed in its opening statement that Section 10 (2) constituted differential treatment on the grounds of nationality. The Danish government on the other hand stated in its reply that the provision did not constitute discrimination on the grounds of nationality, but merely determined the negotiation competence of Danish and foreign trade unions regarding salary on board ships recorded in the DIS. Also, the provision did not govern the content of collective agreements or the size of the salary for employees. Moreover, the provision did not prevent citizens from other countries from becoming members of Danish trade unions or trade unions from other EU countries. Thus, the residence criterion was selected in order to determine the scope of the negotiation competence of trade unions, according to the Danish government. The Danish government further stated that it was willing to enter into deliberations with the Commission with the purpose of performing minor

²⁷ Case No. 2004.435.

²⁸ Information obtained from the LO in May 2006 for the purpose of the FMoW-report 2007.

²⁹ Cases No. A2007.250 and A2007.255.

adjustments of the Act, as the government had become aware that having 1 affiliation criterion (i.e. the residence criterion) determine the negotiation competence may not be sufficiently varied.30

II.I.b) Cases brought before the ordinary courts

As described above para. I.I.a, a lawsuit against the Danish State - in the form of the competent Ministry, the Minister of Economic and Business Affairs³¹ - at the ordinary courts has been processed on the background of the judgment passed by the Industrial Court on 24 January 2008.32 On 18 March 2011, the High Court ruled on the matter:33

> In the case, the trade unions LO and 3F on behalf of 2 Polish seafarers claimed that the residence criterion in the previous Section 10 (2) of the Act on the Danish International Shipping Register and the corresponding provisions of the applicable DIS-collective agreements constituted indirect or direct discrimination on grounds of nationality and thus contravened the EU rules on free movement (the then Article 39 (2) of the EC Treaty and Articles 7 and 8 of Regulation 1612/68) and thus should be rendered void. The reasoning behind this view was the fact that the provision prevented the Danish trade union from negotiating salary on behalf of the 2 Polish seafarers although the seafarers resided in an EU member state. On this basis, the LO and 3F demanded compensation from the Ministry – corresponding to the difference between the salary paid out for the 2 seafarers and the salary as determined by the Danish collective agreements.

The facts of the case:

- The 2 seafarers were Polish citizens with residence in Poland. Apart from their employment, they had no affiliation to Denmark of a more personal nature.
- The 2 Polish seafarers worked for periods of time for Danish shipping companies on board ships flying the flag of Denmark, recorded in the DIS.
- Plaintiff A was employed by contract concluded in Denmark for 1 year and 2 months, and plaintiff B was employed by contract concluded through a Polish staffing bureau for 2 years and 10 months.
- Plaintiff A primarily signed on and off in Danish harbors, while plaintiff B primarily signed on and off in European harbors outside of Denmark. Both primarily sailed European service.

³⁰ Cf. Notification from the Danish Ministry of Economic and Business Affairs of 30 March 2005, available at http://euoplysningen.dk/upload/application/pdf/84a06631/20050077.pdf, accessed on 14 August 2011.

³¹ Official website http://erhvervsministeriet.dk/.

³² Cases No. A2007.250 and A2007.255.

³³ Case No. B-2931-08 (unpublished by August 2011), Eastern High Court judgment of 18 May 2011.

- The 2 seafarers' working conditions (social security, holidays, working environment, taxation³⁴ etc.) were governed by Danish law, cf. the Act on the Danish International Shipping Register Section 3.
- The salary of the Polish seafarers was lower than that following from the collective agreements concluded by a Danish trade union.

The High Court's judgment and premises:

While referring to the Da Veiga case (C-9/88) and the various points stated by the CJEU to be considered when determining whether a person has sufficiently close connection with Denmark, the High Court found that the working conditions of the 2 Polish seafarers had such connection with Denmark resulting in the 2 Polish seafarers to be considered migrant workers employed in Danish territory. Consequently, the seafarers were comprised by the EU rules on free movement.

Subsequently, the High Court proceeded by determining whether Section 10 (2) was in contravention with EU law in relation to the 2 Polish seafarers.

The majority of the High Court (2 judges) stated that Section 10 (2) provided a statuary differential treatment of workers within the EU. This was based on the fact that the worker's entitlement to be comprised by collective agreements concluded by a Danish trade union was dependent on the worker either being considered having residence in Denmark or whether the worker should be put on equal footing with Danish citizens pursuant to international obligations.

The High Court further found that citizenship was not the decisive factor as an alternative to the requirement on residence in Denmark when determining whether a Danish collective agreement was applicable.

Moreover, the High Court stated that Section 10 (2) allows for ships recorded in the DIS to hire foreign crew on conditions of remuneration applicable in the crew's home countries. While referring to a number of parameters, such as the differences in living costs and the Winston Churchill-case, special conditions for international shipping trade, the competiveness of the shipping companies, TFEU Art. 3, the division of competence between foreign and Danish trade unions and the preparatory work on the Act on the Danish International Shipping Register, the High Court found that the residence criterion in Section 10 (2) was substantiated by

³⁴ The salary earned through employment on board a ship recorded in the DIS is exempted from taxation, cf. *Taxation of Seafarers Act Section 5.*

creditable, general considerations, which as the point of departure had to be considered objectively and reasoned substantiated, also because the criterion reflected the relevant objective differences in the employees' living conditions, such as the costs of living in the employees' home countries. In addition, the High Court stated that Section 10 (2) was suitable in achieving the aims of the provision and did not go further than necessary. The majority further found that the 2 Polish seafarers with their limited affiliation to Denmark were not in such situation being objectively comparable with the situation of seafarers having residence in Denmark.

Consequently, the High Court ruled that the 2 Polish seafarers had not been subject to discrimination on grounds of nationality contrary to EU law, and Section 10 (2) was not void.

The minority of the High Court (1 judge), however, found that the residence criterion in Section 10 (2) constituted indirect discrimination on grounds of nationality which was not sufficiently substantiated in considerations on avoiding competence disputes between Danish and foreign trade unions. Thus, Section 10 (2) was void. The judge, however, acquitted the Ministry of the charges on compensation.