

Scandinavian Institute of Maritime Law Yearbook

# SIMPLY 2007



Marlus nr. 360

Sjørettsfondet  
Scandinavian Institute of Maritime Law  
Universitetet i Oslo

**Part III**  
**Anonymity of shipowners as a**  
**maritime security problem – EU**  
**law implications**

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## 1 Introduction

### 1.1 Beneficial shipowner: an old problem in a new light

This article discusses the anonymity of beneficial shipowners in the light of the maritime security problems it brings about. The article focuses on the implications of European Union (EU) law for national measures requiring the disclosure of the beneficial shipowner's identity in the Member States' ship registers. More specifically, it analyses whether such measures can amount to a restriction on the freedom of establishment and whether Member States are entitled to impose such restrictions in order to prevent, or contribute to the prevention of, terrorist activities in shipping.<sup>1</sup>

We will first consider the general background to the discussion of the legal issues.

The beneficial owner of a vessel is the natural person or organisation that has the ultimate financial benefit of the vessel's operations and has the ultimate right to take decisions on the way the vessel will be used and the appointment of managers and operators of the vessel or that assigns this function to other companies or persons. It is frequently the case that the identity of the beneficial shipowner is hidden behind a chain of shell companies and is not immediately apparent from the ship register of the flag State. Such corporate arrangements, combined with relaxed ship register requirements, make it possible for shipowners completely to avoid liability arising from tax claims, unsafe

<sup>1</sup> This article is based on the trial lecture for the dr. juris degree delivered by the author on the 6<sup>th</sup> September 2007 at the Faculty of Law, University of Oslo.

incidents and damage caused to persons or property by ship operations.<sup>2</sup>

Although complex corporate schemes can ensure virtually full anonymity for the shipowner, it is actually ship registers, by allowing registration of a ship legally owned by a company, that provide cover for the actual owners. Ship registration conditions and procedures – including standards of transparency – are not harmonised at an international level. Flags of convenience – are not ship registers, allow anonymity – some of them even advertise anonymity as an advantage of their flag. However, registration rules and routines at traditional ship registers may also contain loopholes that allow strategies by which the identity of beneficial shipowners can remain unknown.

Modern political reality makes the traditional veil of secrecy protecting shipowners look even more alarming. Since the September 11 attacks, and even prior to that, the problem of maritime terrorism has been on the agenda.

It is now common knowledge that terrorist groups have long sought to develop maritime capability. For example, al-Qaeda and Tigers is a terrorist group with proven maritime capability that owns a substantial number of ships that sail across the oceans under the flags of different countries.<sup>3</sup> Engagement in shipping

<sup>2</sup> See OECD, *Ownership and Control of Ships*, March 2005, for a description of schemes for concealing the identity of shipowners. Available at [www.oecd.org](http://www.oecd.org), last visited 19 November 2007.

<sup>3</sup> OECD (2005), *op. cit.*; Whitlow, Jon (International Transport Workers' Federation), *Transparency of Ownership and the Impact of Security on Seafarers* (OECD Workshop on Maritime Transport), Paris, 8-9 January 2005. See also references by Fox Jr. (n. 8 *infra*), at p. 98 *et seq.* to discussion of the matter in the United States.

activities by terrorist organisations will only grow in the future unless it is prevented by appropriate measures.

Ships whose owners or operators are affiliated to terrorist organisations can be used to further those organisations' objectives in a number of ways. For example, such ships can be used to transport persons, weapons and equipment for the purposes of conducting an inland terror attack. They can also be used as floating bombs to attack other ships, ports and other maritime targets. To reduce the risk of ships being used in this way, the International Maritime Organisation (IMO) in 2002 adopted amendments to the International Convention for the Safety of Life at Sea (SOLAS 1974) and the International Code for the Security of Ships and of Port Facilities (the ISPS Code) which increase transparency in relation to ship operators. These rules entered into force in 2004. The IMO decided that the central and fundamental question in matters relating to the ownership and control of vessels for maritime security purposes was the identity of the party with effective operational control of the ship. The new maritime security rules therefore oblige the shipping company to have certain information on board. This information is limited to the identity of those persons responsible for appointing the members of the crew and other employees on board the ship, for deciding on the employment of the ship and, in cases where the ship is employed under the terms of a charterparty, the parties to such charterparty.<sup>4</sup>

<sup>4</sup> For more information and discussion on maritime security regulation generally see Kaare André Kopperud and Moritz Askildt, *Security at Sea. The International Ship and Port Facility Code (ISPS Code) with comments*, Norwegian Shipping Security ANS, 2003; Balkin, Rosalie, "The International Maritime Organization and Maritime Security", 30 (2006) *Tul.Mar.L.J.* 1-34; Hartmut Hesse and Nicolas L. Charalambous, "New Security Measures for the International Shipping Community", *WMLU Journal of Maritime Affairs*, 2004, Vol. 3, No. 2, 123-136; Forrest Booth and Larry Altenbrun, "Maritime and Port Security, Piracy and Stowaways:

Regulatory measures aimed at preparedness and the prevention of terrorism in general and at the enhancing of maritime security have also been adopted at an EU level.<sup>5</sup>

However, while the identity of ship operators and registered owners is being made sufficiently transparent, the matter of the beneficial ownership of ships remains outside IMO and EU regulation.

In addition to these measures, steps should also be taken to ensure the disclosure of the beneficial owners of ships because this will contribute to the improvement of maritime security and to the efforts of non-maritime organisations engaged in the prevention of terrorism. A system whereby the owners of a vessel can remain completely concealed poses a considerable security risk not only – and not so much – because ships can be used as, or to carry, weapons. Research conducted by the Organisation for Economic Co-operation and Development (OECD) has established that the ownership of vessels has great money-laundering potential and ships beneficially owned by persons or organisations affiliated with terrorists can operate within lawful trades to generate funds to finance terrorist activities.<sup>6</sup> Furthermore, the OECD has indicated that traditional registers may be particularly interesting for illegal

<sup>5</sup> Renewed Concerns Over Old Problems", 15 (2002-2005) *U.S.F. Mar.L.J.* 1-48; Justin S.C. Mellor, "Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism", 18 (2002-2005) *Amr. U. Int'l L.Rev.* 341-397. See also the IMO's website <[www.imo.org](http://www.imo.org)> under section "Maritime security".

<sup>6</sup> Regulation 725/2004 on enhancing ship and port facility security, OJ [2004] L 129/6. On general EU security policy since 2001 see, e.g., Konrad Dwojak, "European Union's Security with Regard to the International Situation After September 2001. How has the EU responded to terrorist threats?", 2006-2007, <[www.analyzingeu.eu/konrad/2007/europeanunion-security-after-september-2001](http://www.analyzingeu.eu/konrad/2007/europeanunion-security-after-september-2001)>, last visited 13 September 2007. OECD (2005), n. 2, *supra*, para. 14.

organisations and persons involved in money-laundering and the financing of terrorist activities due to the good reputation of such registers.<sup>7</sup> The OECD has recommended flag States to adopt measures to increase shipowner transparency and to make ship registers harder for criminals to penetrate. Shipowners' anonymity has also been criticised by the International Transport Workers' Federation, and by national governments, notably the United States.<sup>8</sup>

## 1.2 Further discussion

Transparency in relation to beneficial shipowners can be achieved by improving the transparency of international corporate vehicles – a problem outside the realms of this article – and by improving the transparency of ship registers. The adoption of international uniform standards for ship registers would be the most adequate response to the problem and would help to avoid problems caused by differences in regulation. However, no such rules exist at an international or European level and their adoption in the near future appears unlikely. In the absence of uniform international standards, it is up to individual flag States to adopt the appropriate rules and procedures for their ship registers.<sup>9</sup> It should also be

<sup>7</sup> See OECD, *Maritime Security – Options to Improve Transparency in the Ownership and Control of Ships: Final Report*, June 2004, para. 4. Available at <[www.oecd.org](http://www.oecd.org)>, last visited 16 September 2007.

<sup>8</sup> See Whitlow, n. 3, *supra*. However, for a contrary view on the need for disclosure of the identity of beneficial shipowners see J. Bennett Fox Jr., "Vessel Ownership and Terrorism: Requiring Disclosure of Beneficial Ownership is Not the Answer", 4 (2005) *Loy. Mar. L.J.* 92-110.

<sup>9</sup> Case 221/89 *The Queen v. Secretary of State for Transport, ex parte (Factorama II)* [1991] ECR I-3905, para. 15. See also Case "M/V "Saiga" (no. 2) 38 *I.L.M.* 1325 (1999), para. 85, where the International Tribunal of the Law of the Sea denied that states may rely on the concept of a genuine

pointed out that, in practice, the role of individual states, their national governments and intelligence services in the prevention of terrorism is extremely important and must not be underestimated or viewed as less important than the role of international bodies.

Transparency in relation to beneficial shipowners in ship registers could be achieved in a number of ways. On the one hand, flag States might decide to implement a policy of transparency in their ship registration procedures. For example, they might require the unconditional disclosure of the beneficial shipowner's identity, or they might impose reporting obligations on shipowners, who could be offered confidentiality in exchange. Ship registers could be assigned to undertake their own research to the extent practical and necessary (for example, introducing more stringent scrutiny in relation to foreign ships).

On the other hand, flag States might reject registration of a vessel whose owner's identity is unclear or where the owner is suspected of having unlawful affiliations. It is obvious that neither open nor traditional registers will be willing to register ships that may be owned by persons with terrorist affiliations. Flag States that are Member States of the EU are also free to determine the conditions that must be fulfilled in order for a vessel to be registered in their registers. However, in doing so they must comply with EU law.

Both ship registration rules that require the disclosure of the beneficial shipowner and a refusal to register a ship whose beneficial ownership is obscure or suspicious may come into conflict with the principle of freedom of establishment as laid down in the EU Treaty.

In this connection we will discuss the following legal issues.

link to challenge the validity of ship registration in a flag State (see also n. 10 *infra*).

Firstly, we will analyse whether measures undertaken by Member States to ensure and improve transparency in relation to the beneficial ownership of the ships registered in their ship registers may restrict the freedom of establishment as laid down in the EU Treaty (see 2 below).

Secondly, we will discuss whether, and under what conditions, such measures – if they do infringe the freedom of establishment – may be justified and lawful because they are an attempt to improve maritime security. In this context we will discuss the exceptions to the freedom of establishment expressly provided for in the Treaty and developed in EU case law (see 3 below).

We will conclude this article by summarising its main findings in the form of recommendations for the EU Member States concerning transparency requirements for beneficial shipowners, which the States may wish to consider introducing in their ship registers (4 below).

The sources of law used in the following analysis are the relevant provisions of the EU Treaty, one piece of secondary legislation (Regulation 789/2004) and the jurisprudence of the European Court of Justice (the Court). The problem of a possible conflict between freedom of establishment and the right of the Member States to adopt their own transparency requirements in relation to shipowners has not been addressed as such by the Court. However, there is general case law on the freedom of establishment and a number of cases addressing restrictions on ship registration. In addition, the Court's practice confirms that it is possible to construe the freedom of establishment in the light of case law on other fundamental freedoms.

## 2 Ship register transparency rules that hinder the freedom of establishment

### 2.1 Introduction

The provisions of the international conventions governing ship registration state only that there must be a “genuine link” between the flag State and the ship and that States are obliged to maintain registers of ships containing the names and particulars of ships flying their flags.<sup>10</sup> These provisions have been interpreted and applied in rather different ways and in practice do not ensure transparency in relation to beneficial shipowners in all flag States.

States running traditional ship registers commonly require ships flying their flags to be owned legally and beneficially by their nationals, either directly or through companies. This is believed to ensure that the relevant State exercises sufficient control over ships flying its flag. This also, in practice, ensures that the flag State's ship register contains sufficient information to identify the ship's beneficial owners. However, nationality requirements made by the Member States' ship registers may come into conflict with Art. 45 EC if they concern a vessel from another Member State.

<sup>10</sup> UN Convention on the Law of the Sea, 21 (1982) *Int'l Legal Materials* 1261-1354, Arts. 91(1), 94(1). See also the 1958 Geneva Convention on the High Seas, Art. 5. For a comprehensive discussion of the concept of “genuine link” and the relevant international case law see, e.g., Robert Churchill and Christopher Hedley, “The Meaning of the “Genuine Link” Requirements in Relation to the Nationality of Ships” (a study prepared for the International Transport Workers' Federation), October 2000. Available at <[www.oceanlaw.net](http://www.oceanlaw.net)> under section “Projects”, last visited 19 November 2007.

## 2.2 Prohibition of discrimination on the grounds of nationality

Art. 43 EC states that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. By virtue of this provision, EU nationals have the right to carry on business under the conditions laid down by a Member State for its own nationals. That means that direct and indirect discrimination against the nationals of other Member States is not allowed.

The concept of establishment involves the actual pursuit of economic activity through a fixed establishment in another Member State for an indefinite period.<sup>11</sup> Consequently, registration of a vessel does not necessarily involve establishment within the meaning of the Treaty, in particular where the vessel is not used to pursue an economic activity or where the application for registration is made by, or on behalf of, a person who is not established, and has no intention of becoming established, in the Member State concerned.<sup>12</sup> However, where a vessel constitutes an instrument for pursuing an economic activity that involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be dissociated from the exercise of the freedom of establishment.<sup>13</sup> It follows that conditions laid down for the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Art. 43 EC.<sup>14</sup>

Art. 43 EC is understood as prohibiting restrictions on ship registration on the grounds of nationality. A Member State is not allowed to adopt legislation requiring that the legal or beneficial

<sup>11</sup> Case C-246/89 *Commission v. UK* [1991] ECR I-4585, para. 21.

<sup>12</sup> *Ibid.*, para. 22.

<sup>13</sup> *Ibid.*, para. 23.

<sup>14</sup> *Ibid.*, para. 24.

owners of a vessel are nationals of that Member State or companies incorporated in that state and, in the latter case, that such companies are fully or partly owned by nationals of that State.<sup>15</sup>

Furthermore, a Member State may not prevent registration of a vessel that is owned by a company set up in another Member State. Art. 48 EC provides that

“Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.”

According to *Commission v. Netherlands*, it follows from Art. 48 EC that the right to freedom of establishment is guaranteed not only to Community nationals but also to companies formed in accordance with the legislation of a Member State.<sup>16</sup> It follows that if an EU-registered company is controlled or owned by nationals of third states, this has no bearing on the company's freedom of establishment within the EU and, in particular, its right to register its vessel in the register of another Member State. In effect, this means that a Member State may not prevent the registration of a ship whose beneficial owners are unknown provided the above-mentioned criteria are met, *i.e.*, the ship is formally owned by a company set up in another Member State, even one whose corporate laws permit the registration of shell companies.

Prohibition of discrimination also implies that Member States are not allowed to single out foreign-owned vessels when requiring the disclosure of beneficial ownership or for stricter checking routines. Insofar as the registration of vessels owned by nationals or companies of EU Member States is concerned, the only way for a

<sup>15</sup> *Factoritane II*, n. 9, *supra*, para. 17; *Commission v. UK*, n. 11, *supra*.

<sup>16</sup> Case C-299/02 *Commission v. Netherlands* [2004] ECR I-9761, para. 16.

Member State to introduce transparency in relation to beneficial shipowners, while complying with Art. 43 EC, is to apply these requirements equally to all EU entities willing to register a vessel in that Member State's register.

However, in certain cases, even rules that are applied *without* any discrimination can restrict freedom of establishment within the meaning of Art. 43 EC.

### 2.3 Prohibition of other (non-discriminatory) restrictions on the freedom of establishment

A conflict with the freedom of establishment may arise in cases where a national of a Member State where ship registration conditions, and, in particular, transparency standards, are more relaxed, wishes to register his vessel in another Member State that has stricter transparency requirements. In such a situation, the shipowner may be put in a less advantageous position in comparison to his position in his home country. His access to the market of the other Member State may be hindered, even if the disclosure rules are applicable to all shipowners without discrimination. The shipowner may wish to remain anonymous for reasons that may range from reduced liability exposure and other economic considerations to a desire to avoid being traced because the person behind the registered owner, or chain of owners, has connections with illegal organisations. Apparently, from the shipowner's subjective point of view, the extent of the disadvantage that may be suffered may be significant.

The question arises whether the freedom of establishment encompasses a broader range of rights than a right to equal treatment. The jurisprudence suggests, with the support of legal writers, that the freedom of establishment implies the right to resist the application of national measures that are *liable to hinder or*

*make less attractive* the exercise of the right of establishment guaranteed by the Treaty.<sup>17</sup>

The scope of this right is less clear, but it appears to catch all national measures that affect access to the market by nationals of other Member States (including companies established in other Member States). If a disclosure of identity is a pre-condition for exercising the freedom of establishment, it can be argued that the reporting obligations, or other transparency conditions, imposed on beneficial shipowners by a Member State's ship register amount to a restriction on their access to the market. In addition, if a shipowner risks losing the anonymity he currently enjoys, or may have enjoyed in another Member State, he may lose interest in entering the new market altogether.

Two interests need to be balanced to determine whether a non-discriminatory national measure concerning shipowner transparency infringes Article 43 EC.

On the one hand, it is necessary to decide whether the transparency requirements amount to *conditions for market access* for the persons or companies concerned. If they do, their effect must be sufficiently certain and direct for the measure to be considered as hindering the freedom of establishment.

On the other hand, Member States are still competent to adopt their own conditions for ship registration in the absence of harmonisation. This right cannot be deprived of any significance by an extremely broad construction of Article 43 EC. To consider *any* ship registration rule that differed from other Member States' rules as limiting the freedom of establishment would apparently be going too far.

<sup>17</sup> See Arnulf, Anthony; Dashwood, Alan; Dougan, Michael et al., *Wyatt & Dashwood's European Union Law*, 5<sup>th</sup> Ed., London: Sweet&Maxwell, 2006, pp. 754 *et seq.*



Taking account of shipowners' arguments justifying their need for anonymity would also help in finding a balanced and comprehensive solution in cases of non-discriminatory restrictions. Such arguments would have to be based on shipowners having lawful interests so vital to them that a requirement for disclosure of identity would amount to a restriction on market access. Why is anonymity so essential for beneficial shipowners? It is common knowledge that, irrespective of the innocent grounds many shipowners might attempt to rely on, anonymity protects them from being traced in the case of incidents giving rise to liability. In addition, more recently, terrorist affiliations have become a feature of the shipping industry. The Treaty does not allow reliance on the freedom of establishment to justify the wrongful avoidance of national rules.<sup>18</sup> Shipowners should not, therefore, be allowed to manipulate a fundamental right guaranteed by the EU Treaty to promote unlawful objectives.

## 2.4 Transfer of a ship to another Member State's ship register: Regulation 789/2004

Refusal by a Member State to register a vessel, because its beneficial owners are either unidentified or suspicious, may conflict with Regulation 789 of 2004.<sup>19</sup> The Regulation does not harmonise conditions for ship registration in the EU, but was adopted to make it easier to transfer cargo and passenger ships between registers within the Community. The Regulation may be understood as making it unlawful to prevent a vessel from being re-flagged in

<sup>18</sup> Wyatt & Dashwood's *European Union Law*, p. 793 *et seq.*

<sup>19</sup> Regulation No 789/2004 of the European Parliament and Council on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation No 615/91, OJ [2004] L 138/19.

another EU Member State. This, accordingly, opens up a possibility to demand the transfer of a ship that is already registered in one Member State's ship register (in a register, say, with no transparency obligations as to the beneficial ownership) to another Member State's register without complying with the latter's rules on disclosure.

Regulation 789/2004 prohibits Member States from rejecting the transfer to their registers of vessels for technical reasons arising from differences in the interpretation of the IMO conventions, provided such vessels comply with the requirements of those conventions and have the appropriate certificates.<sup>20</sup> It appears from the wording of the Regulation that a refusal to accept transfer will be prohibited if it amounts to such a "technical reason" and, in line with the wording of the Regulation, such a technical reason can be defined by reference to an international convention governing shipping safety – and security.

As mentioned earlier, international regulations concerning maritime security do not address the question of the beneficial shipowner's identity. At the same time, the Regulation expressly allows a Member State accepting a ship to apply rules that *differ* in scope and nature from those referred to in the Conventions concerning shipping safety.<sup>21</sup> It can, therefore, be concluded that national rules preventing the transfer of vessels owned by anonymous shipowners between EU Member States' ship registers are not addressed by the Regulation.

<sup>20</sup> *Ibid.*, Art. 4.

<sup>21</sup> *Ibid.*, Rec. 6.

### **3 Impact on maritime security of the anonymity of beneficial shipowners**

#### **3.1 Introduction**

Member States may even be allowed to adopt discriminatory measures restricting the freedom of establishment in respect of shipowners whose true identity is unclear, provided these measures serve to fulfil certain legitimate objectives.

Firstly, Member States can justify non-discriminatory transparency rules by the need to take into account imperative requirements of general interest. Secondly, Member States can apply transparency requirements in a discriminatory manner if this is necessary in the interests of public policy or public security.

The Court has confirmed on a number of occasions that it is for the Member States to decide the level of protection they will provide in relation to the objectives set out in Art. 46(1) EC and the general interest and also the way in which that level of protection is to be attained. However, Member States can only act within the limits set by the Treaty and, in particular, must observe the principle of proportionality, which requires the measures adopted to be appropriate for ensuring attainment of the relevant objective, but not to go beyond what is necessary for that purpose.<sup>22</sup>

We will firstly consider whether maritime security and measures to combat terrorism fall within the scope of the objectives that the exceptions to the freedom of establishment are designed to protect. The wording of the Treaty does not give any details concerning how the objectives of "general interest" and "public policy and

security" must be interpreted. It appears that these three objectives are, in principle, rather similar, although it is also clear that public policy and public security arguments are subject to a more restrictive interpretation than a general interest argument because they protect Member States' rights to discriminate on the grounds of nationality.

Secondly, we will examine whether (and how) the Member States observe the principle of proportionality when imposing transparency measures in relation to beneficial shipowners, *i.e.*, whether the measures are appropriate for ensuring attainment of the objectives they pursue and do not go beyond what is necessary for that purpose.

#### **3.2 Justifications for transparency measures or for refusal to register anonymous ships**

##### **3.2.1 Imperative requirements of general interest**

A Member State can rely on certain imperative requirements of "general interest" to justify imposing conditions on ship registration that require disclosure of the beneficial ownership. The wording of Art. 45 EC, or of other provisions on the freedom of establishment, does not expressly provide for such an exception, which has been developed in the jurisprudence of the Court. However, imperative requirements of general interest cannot be acted on by the taking of measures that amount to discrimination on the grounds of nationality. Therefore, transparency requirements applicable only to vessels owned by nationals of other Member States or by companies owned by nationals of other Member States or third countries cannot be justified by such "general interest". Only measures that make market access less attractive for shipowners from other Member States, because they will be subject to stricter disclosure rules, can be allowed on general interest grounds.

<sup>22</sup> Case C-55/94 *Reinhard Gebhard* (Reference for a preliminary ruling) [1995] ECR I-4165, para. 37; Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663, para. 32; *Commission v. Netherlands*, n. 16, *supra*, paras. 15-18.

If a Member State adopts a transparency rule that is restrictive within the meaning of Art. 43 EC, it should first of all examine the aims and interests that this rule is designed to protect. The Court has, in principle, accepted a broad range of aims protecting imperative requirements of "general interest", although it has not always been possible for the party claiming that the restriction was justified to show that the proportionality requirement has been met. In particular, maintenance of the social order has been accepted as a justification.<sup>23</sup> The need to protect the interests of creditors and the effectiveness of fiscal supervision have also been taken into account.<sup>24</sup> One Advocate General has suggested that the "objectives of ensuring safety at sea and preventing, reducing and controlling marine pollution", pursued through the provisions of the international conventions, to which the Community has acceded, may be thought to constitute imperative reasons of general interest or even grounds of public policy within the meaning of Art. 46(1).<sup>25</sup>

<sup>23</sup> See, e.g., Case C-275/92 *Schindler* [1994] ECR I-1039, para. 58.

<sup>24</sup> *Wyttje/Dashwood's European Union Law*, pp. 804-805.

<sup>25</sup> Opinion of Advocate General Léger in *Commission v. Netherlands*, n. 16, *supra*, para. 61. On Art. 46, see 3.2.2 *infra*. The Advocate General also lists a number of judgments in the transport sector where the public safety and security exceptions were construed. Thus, in the inland transport sector, it is settled case law that road traffic safety is among the imperative reasons of public interest that may justify a restriction on fundamental freedoms guaranteed by the Treaty. See Case C-55/93 *Van Schaijk* [1994] ECR I-4837, para. 19; Case C-514/98 *Snellers* [2000] ECR I-8633, para. 55; Case C-246/00 *Commission v. Netherlands* [2003] ECR I-7485, para. 67. In the maritime transport sector, the Court has held, with regard to mooring or nautical services, that the maintenance of public security in coastal waters, as well as in ports, could be justified by considerations of public security within the meaning of Article 46(1) EC. See Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paras. 60 and 61, and Joined Cases C-430/99 and C-431/99 *Sea-Land Service and Nedlloyd Lijnen* [2002] ECR I-5235, paras. 41 and 42.

The general interest protected by non-discriminatory transparency measures is the prevention of the financing of terrorism through shipping activities and – at least indirectly – the protection of society against terrorist attacks. The absence of internationally binding regulations aimed specifically at increasing transparency in ship registers is not sufficient to exclude it from the range of interests that can justify at least a non-discriminatory restriction on the freedom of establishment. In any case, transparency of beneficial shipownership has been recently put on the political agenda by the OECD and other organisations, which consider such transparency necessary in the light of threats to maritime security and anti-terrorism policy.

### 3.2.2 Public policy and security

These considerations can be developed further in the context of the first paragraph of Article 46, which lays down exceptions on the grounds of "public security" and "public policy".

Art. 46(1) EC states:

"The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health". (italics added)

It follows from the very wording of this provision that the objectives of public policy and security are designed to justify discriminatory measures restricting freedom of establishment. The wording of the Treaty and Article 46(1) does not explain in more detail what constitutes grounds of "public policy" or "public security." However, exceptions justifying discriminatory restrictions on the fundamental freedoms must be narrowly construed. That is why the interests to be protected on the grounds of public policy and security must be rather serious. At the same time, it is not

always possible or, indeed, necessary to draw a very clear distinction between objectives concerning public policy, on the one hand, and objectives concerning public security, on the other.

In case law it has been mentioned that a discriminatory measure can be justified if it prevents a "threat affecting one of the fundamental interests of the society."<sup>26</sup> In addition, such a threat must be "genuine and sufficiently serious".<sup>27</sup> A similar provision is included in the Regulation on the transfer of ships between Community registers. This allows Member States to suspend registration of a vessel for reasons relating to *serious* danger to safety, security or to the environment.<sup>28</sup> The risk must also be current.<sup>29</sup>

In one case, the Court authorised prohibition of an economic activity consisting of the commercial exploitation of games simulating acts of manslaughter on the grounds of protecting public policy due to the fact that that activity was an affront to human dignity and the prohibition was therefore regarded as imposing a justified restriction on a fundamental freedom.<sup>30</sup>

As mentioned at the start of this article, terrorists and their affiliates have two basic purposes for using ships and engaging in shipping activities: first, to conduct terror attacks and, second, to support terrorism by raising funds and money laundering. Terrorist attacks involve an immediate danger of large-scale loss of life and other damage. Terrorism is a broader concept that also involves other conduct to promote terrorist objectives, including the financing and other support of terrorists. Terrorist ideology and

support for it are a less immediate but no less significant danger. Both terror attacks and terrorism in general disregard a number of fundamental values: most importantly, the sanctity of human life and the physical integrity of the population. The prohibition of, and sanctions for, terror attacks and certain other activities related to terrorism (notably, financing), as well as the need to prevent such activities, are all set down in several international and European documents. National laws also impose sanctions, both for the carrying out of terror attacks and for the financing of terrorism.

Maintaining the anonymity of shipowners where this may facilitate either terrorist activities or the financing of such activities is clearly not in the interests of security and the general good of society. In addition, the large-scale damage that a successful terrorist attack may bring about makes terrorism a much more significant threat than the other types of unlawful activity in which shipowners may be involved (such as tax evasion or breaches of maritime safety requirements). However, it is apparent that not all (or indeed most) anonymous shipowners whose freedom would be restricted by transparency rules will have any connections with terrorism. This question will be also touched on in the context of proportionality. Instead of targeting a *specific* person or company, transparency standards and refusals to register vessels owned by anonymous persons will be likely to have a general character. Could such *general* preventive measures be allowed under Article 46(1)?

In the context of the freedom of movement of persons, restrictions on the grounds of "public security" have been construed as permissible only in relation to *personal* conduct committed by an individual affected, whereas generally preventive considerations could not serve as justification for the restriction of this freedom.<sup>31</sup>

<sup>26</sup> See, e.g., Case C-466/98 *Commission v. UK* [2002] ECR I-9427, para. 57.

<sup>27</sup> *Ibid.*

<sup>28</sup> Art. 6(2) of the Regulation.

<sup>29</sup> *Commission v. UK*, n. 26, *supra*, para. 57.

<sup>30</sup> Case C-356/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>31</sup> *Wyatt & Deatwood's European Union Law*, p. 689.

Such personal conduct must also constitute a present threat to security or be contrary to public policy.<sup>52</sup> However, it appears that such a narrow construction would not take into account the differences between, on the one hand, an individual criminal act of a “regular” nature, such as theft, causing personal injury or damage to property, or even murder, and, on the other hand, engaging in terrorist activities. In the latter case, it is the general prevention of the crime, and not the reaction *post factum* that is vitally important. However, for the sake of legal certainty and the more effective practical implementation of preventive measures, Member States are recommended to elaborate more detailed requirements for achieving the desired standard of transparency in their ship registers and to develop criteria for determining what amounts to anonymous or suspicious shipownership, leading to the refusal or suspension of the registration of the vessel in their ship registers. These standards could be based on the OECD recommendations for ship registers mentioned at the start of this article. International and EU laws in the field of terrorism and security should also be consulted.

An in-depth review of such laws and their possible usefulness in formulating transparency standards as regards beneficial shipownership is not possible in this short lecture, but some of them can be mentioned briefly. Thus, the International Convention for the Suppression of the Financing of Terrorism provides for certain measures to combat such financing and imposes obligations on the contracting states in this respect.<sup>53</sup> Council Regulation 881/2002 imposes specific restrictive measures directed against certain persons and entities associated with bin Laden, the al-

<sup>52</sup> *Ibid.*

<sup>53</sup> The full text of the Convention is also available at <[www.un.org/law/cod/finter.htm](http://www.un.org/law/cod/finter.htm)>, last visited 19 November 2007.

-Qaeda network and the Taliban.<sup>54</sup> The Regulation requires that all funds and economic resources – sufficiently broadly defined also to include ships owned or held by the specific persons listed shall be frozen. In my view, these and other relevant documents on the prevention of terrorism can be used by Member States’ ship registers as guidance for construing and applying the exceptions to the freedom of establishment laid down in Article 46 EC to anonymous and suspicious shipowners.

### 3.3 Proportionality of the transparency measures

#### 3.3.1 Overview

From the above we may conclude that terrorism, and the use of ships to further terrorist aims, is clearly a threat to public security and will be covered by the exceptions to the freedom of establishment. But do transparency requirements imposed on shipowners by ship registers *actually* help in the pursuit of maritime security objectives? Proportionality is the second criterion that both non-discriminatory and discriminatory national measures concerning transparency of beneficial shipownership must fulfil, if such measures are to be justified on the grounds of the general interest or public policy or security.

To be proportional, these measures must, on the one hand, be suitable for the attainment of the objective they pursue. On the other hand, they must not go beyond what is necessary in order to attain it.<sup>55</sup>

<sup>54</sup> OJ [2002] L139/9.

<sup>55</sup> *Reinhard Gebhard*, n. 22, *supra*, para. 37; *Dieter Kraus*, n. 22, *supra*, para. 52; *Commission v. Netherlands*, n. 22, *supra*, para. 15 *et seq.*

### 5.3.2 Causal link

It is necessary for Member States introducing requirements on shipowner transparency in their ship registers to explain how these measures will contribute to improvements in the field of maritime security or anti-terrorism generally.

The question arises whether the proportionality requirement can only be met if the Member State in question shows that the transparency measure will influence directly the maritime security situation or prevent terrorists from deriving funds from shipping. On a number of occasions, the Court has said that there must be a direct link between the threat and the measures infringing the right of establishment<sup>56</sup> and that a hypothetical threat is not in any event sufficient to justify a discriminatory measure that restricts the freedom of establishment.<sup>57</sup>

It can be (and has been) argued that a requirement to disclose the beneficial ownership of a vessel will not *directly* improve maritime security and will not help prevent terrorist attacks from happening or terrorist organisations from collecting funds and generating revenues. It has also been argued that terrorists will not willingly disclose their identities or political affiliations in any ownership records. Terrorists can, in any case, derive income indirectly from a vessel-owning corporation through the transfer of funds to charity and similar activities. In practice this means that disclosure of the beneficial shipowner will have no impact on the current process of investigation but costs will rise both for shipowners, on whom will be imposed a reporting obligation and who will be deprived of their veil of secrecy, and for ship registers, which will have to conduct more thorough examinations. The argument goes further that shipowners are very often not the actual

operators of the vessel and it is unnecessary to impose a burden of transparency on them as long as operators have an obligation to reveal their identity.

In my view, the requirement for there to be a link between the restrictive national measure and the threat should be seen in the light of the limited competence of ship registers and it should be sufficient to show that there is an indirect link. First of all, the primary objective (and effect) of transparency measures is to prevent the registration of a ship that is beneficially owned by an anonymous person with suspected terrorist affiliations in the ship register of the Member State in question. Given the limited extent of their competence, ship registers can only contribute to some aspects of maritime security and anti-terrorism policy.

It can be argued that it is the beneficial shipowner that, from the outset, decides how its vessels will be used. Owners are also the ultimate beneficiaries of the revenues generated by the vessels they own and can put these revenues to any use they wish, including activities that may be inimical to security interests. The OECD also reports that, in many cases, terrorist-related activities (especially those that are complex and logistically difficult) could only be executed with the knowledge or agreement of the shipowner.<sup>58</sup> The beneficial shipowner can, therefore, be held responsible for the uses to which his vessels are put. In addition, transparency requirements would make it more difficult for terrorists to own ships.

If the ownership of vessels were perfectly transparent, then owners who were known or suspected of being terrorists would find it much more difficult to use their vessels for such purposes without at least raising the suspicions of security agencies. Perfect transparency would force terrorists into complex and convoluted

<sup>56</sup> *Commission v. UK*, n. 26, *supra*, para. 57.

<sup>57</sup> *Commission v. UK*, *op. cit.*

<sup>58</sup> OECD (2005), n. 2, *supra*, para. 15.

ways of hiding their involvement in such ships, which would increase their risk of being uncovered.

Beneficial owners may seek anonymity for a variety of reasons, legal or otherwise, that have nothing to do with security. However, the reality is that the cloak of anonymity can assist those who wish to remain hidden because they engage in illegal or criminal activities, including terrorism.<sup>39</sup>

### 5.3.5 Only necessary measures

Lastly, transparency measures introduced by Member States' ship registers must not go beyond what is necessary to attain the envisaged objective: *i.e.*, it is always necessary to consider whether a less restrictive measure could resolve the problem. Apparently, the most restrictive measure would be a decision to refuse or suspend registration of a vessel owned by a person or a company who is not a national of the Member State operating the register. Discriminatory disclosure rules obliging only non-resident shipowners to identify themselves would be less restrictive than an outright refusal, whereas generally applicable (non-discriminatory) reporting requirements should, respectively, be considered the least restrictive.<sup>40</sup>

Furthermore, rules requiring such a standard of transparency that the only course of action for anonymous shipowners hiding behind shell companies would be to alter their corporate structure, share capital or their management may entail serious disruption within a company and also require the completion of numerous formalities with financial consequences. Such rules may impose an unnecessarily

<sup>39</sup> *Ibid.*, para. 18.

<sup>40</sup> See *Commission v. Netherlands*, n. 22, *supra*, para. 19, where the Court discusses the burden imposed on shipowners by the nationality requirements of the ship register.

heavy burden on shipowners. Instead, requirements for transparency can be fulfilled by beneficial shipowners without it being necessary for them to re-structure their businesses completely. For example, they could be allowed to preserve their corporate structure, but could reveal their identities by reporting to the ship register. This appears to be a sufficiently inexpensive and the least restrictive way of ensuring that the beneficial shipowners of a vessel are known.

## 4 Summary and concluding remarks

From the foregoing we can conclude that opportunities for shipowners to remain anonymous make it possible for terrorist organisations to use ships to further their objectives, in particular to raise funds and launder money. International and EU law do not provide for uniform ship registration rules, including rules requiring transparency as to the identity of beneficial shipowners. To minimise the exposure of their ship registers to misuse by terrorists, flag States, including EU Member States, should introduce national transparency standards for beneficial shipowners in their ship registers. In doing so, Member States must ensure that they do not infringe EU law.

Firstly, Member States are recommended to apply requirements as to the disclosure of beneficial shipownership equally to vessels owned by nationals of Member States, including those owned by companies. In cases of corporate ownership, companies established in another Member State and owned by non-EU nationals must also be treated equally.

Secondly, a Member State should assess whether non-discriminatory transparency requirements have the effect of restricting the access of shipowners to the market, so that their freedom of establishment may still be infringed. Non-discriminatory rules that restrict the freedom of establishment can still be justified by imperative requirements of "general interest". The prevention of

terrorists gaining financing through shipping activities can fulfil such requirements.

Further, if a Member State considers that, because of security concerns, registration of a vessel owned by a registered owner from another Member State is not possible at all, or at least not until the identity of the beneficial shipowner is disclosed, the Member State may take appropriate measures, even if its own nationals are not subject to them. In doing so, the Member State must rely on "public policy" or "public security" considerations, as laid down in Article 46 of the Treaty.

The Member State must show that the discriminatory transparency requirement or its refusal to register the ship serve to counter a sufficiently serious threat to the fundamental interests of society. It must also show that the measure is proportional to the threat. In principle, prevention of terrorist financing by shipping operations qualifies as an exception to the fundamental freedoms on the grounds of public policy or security.

Finally, Member States can be recommended – in the absence of international or EU harmonisation – to develop more detailed transparency standards and formulate clearly disclosure requirements for beneficial shipowners wishing to register vessels in the Member State's ship register. Member States should take into account international and EU documents on maritime security and the prevention of terrorism when they interpret the relevant Treaty provisions and adopt the appropriate legislation.

## **Part IV**

### **EU intermodal transport and carrier liability – content and context**

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