

*Reprint Files*

THE NORTHERN SEA-ROUTE. CONDITIONS FOR SAILING  
 ACCORDING TO COMMUNITY LEGISLATION  
 - WITH A SPECIAL EMPHASIS ON PORT STATE JURISDICTION

WORKSHOP IN POLITICAL THEORY  
 AND POLICY ANALYSIS  
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## ABSTRACT

This paper is analysing the Community (European Union) law influence on Member States shipping legislative and enforcement competence, having its strong position due to the power of harmonizing Member State legal systems, preventing "ports of convenience". It is documented that Community law as it now stands, is affecting all third state ships - flag of convenience ship as well - including ships from the Asian far east, sailing along the NSR - when docking in an EU and EEA (European Economic Area) state harbour. This includes technical vessels provisions, rules for manning of ship and handling of goods, waste, equipment, etc. related to foreign ships. In the case of enforcement competence, the Community law does not make any explicit requirements, which means that Community Member Port States have control and surveillance competence within the framework of the Law of the Sea, solely. Further development is however in its way.

Fig. Competence vis-à-vis third state vessels when docking in EU og EEA harbours

	Legislation		Enforcement	
	EU	Port State	EU	Port State
Technical provisions				
Technical standards	x	x	0	x
manning	x	x	0	x
Handling of goods	x	x	0	x
Transportation	x	x	0	x

X = legal authority

0 = no legal authority

## INTRODUCTORY REMARKS

1. The EU safety and environmental legislation (Community law) is not directed towards third state vessels when sailing the NSR. The importance of Community law is related to the applicability to all ships when deliberately docking in an EU

or EEA harbour, including those arriving from the Asian far east along the NSR as well. Indirectly, the Community legislation is affecting the standard of ships, the manning and the transportation requirements when in the NSR.

The unik Community position (in relation to other legal systems) is tied

to its vast geographical area (including most waters from the Dardanelles Straight to the Norwegian-Russian border) and the power of harmonizing Member State legislation and law implementation, avoiding the development of "ports of convenience". All ships, substandard, flag of convenience ships as well, destined for all EU og EEA harbours does have to fulfill the Community law safety requirements.

The intention of this study, is to consider whether Community law, by transforming International Law of the Sea- and Ship Classification Societies requirements to Community law, is applicable to foreign ships when entering and docking in EEA and EU Member States harbours.

My task is to present valid types of minima standard vessel- and transportation requirements. Is Community legislation by extending Law of the Sea- and Ship Classification provisions to all ships arriving at a Member States, aiming at "throwing out" of business substandard ships of whatever nationality, non-convention states as well?

Being common in all EU- or EEA harbours, rather few vessels might avoid the Community harmonized set of legal shipping provisions. Taking certeparties to and from Community ports, register of convenience- and non-Convention ships are forced to relate to Community provisions. By the accomplishment of complete Port State jurisdiction, the problem of substandard ships might diminish or even vanish.

A Port State jurisdiction applicable to third states vessels, is therefor of basic importance preventing substandard ships from sailing, and thereby reduce unequal competition conditions. As the Port State regime

is undergoing a rapid and dynamic evolution, unilateral Community action is possibly bringing new bricks in the expanding wall of Port State jurisdiction.

2. Why study Community law and not Member State national legislation, the International Law of the Sea or the International Ship classification Societies rules? It is not a question of either or, but both classification rules and national-, International- and Community Law. The lack of instruments for the harmonization or approximation of rules under international law and the classification societies, is however the main reason to concentrate on the latter, solely.

3. Anyhow, taking the close Community Law perspective, the Law of the Sea- and International Ship classification Societies rules take propotional part, due to the Council Directive 93/75 (concerning minimum requirements for ships entering or leaving Community Ports carrying dangerous or polluting goods) Annex III provisions, explicitly fixing the Member State competence to the Law of the Sea. Analysing the Community law, Port State authority under the Law of the Sea provisions, is therefor an important factor of interpretation. Searching for the Community law subjects, especially whether foreign vessels are due to technical claims, Law of the Sea texts are both analytical basis and interpretation support. As such, Law of the Sea legislation does indirectly take part in the dissertation.

Referring to the International ship classification societies certificates [2], these extralegal rules are incorporate into the MARPOL- and Community legal systems. The class-certificates are the "door-opener" giving access to

Community harbours and other harbours as well. In concreto the Classification Societies Safety policy and -practice is playing a considerable role in combatting sub-standard ships.

The Community is rather ambitiously chasing the goal of bringing substandard ships out of business. The "Action Programme" is promoting such efforts [3]. Let me first - before entering into the delegata situation, make a brief contribution to the de lege ferenda picture.

## 1. THE COMMUNITY POLITICAL GOAL [4]

As exemplified by the present legislation of tankers technical standard entering or leaving Community Ports (EU-directive no 93/75, new proposals are introduced for improving i.a. marine equipment on board of commercial- and passenger vessels, convergent application of the International Maritime Organization (IMO) Resolutions, safety requirements for vessels not subject to international Conventions, control of ships by State of port etc.

The new and hopefully more prosperous legislation is provoked by heavy sea transport of poisonous and pollutious goods, the still increasing risk of serious accidents and the connection between substandard ships and casualties. The Commission understanding is that the existing international safety standards are giving an adequate framework for preventing the risk of casualties, but that problems still remain caused by "laxity in their application and enforcement" [5]. One of the remaining problems is the diversity in legislation and

surveillance in closely located harbours under different national legislation, creating "port of convenience". There is a need for convergent solutions preventing substandard ships - especially non-Convention vessels - from escaping the heavy duty harbours. One way of achieving this goal is to establish a Common Community Policy on Safe Seas.

As mentioned the Community political goal is to make legislation applicable to all ships, the third state vessels entering Community ports, as well. Is this efforts being effectuated by Community legislation recently established?

## 2. THE COMMUNITY LAW IS COMPULSORY

Community law is ruling EU and EEA Member States. Directives as well as regulations are compulsory. Since the end of the seventies the Community has adopted quite a few shipping provisions. The Community legislative position is unik, not caused by the competence of exclusively setting shipping standards, but by the potential of making approximate or harmonized legal solutions in all Member States, avoiding "ports of convenience". Some steps have already been taken. As reflected in this study, I think the emerging Common Community Policy on Safe Seas does reflect what's at stake, vitalizing the efforts of eliminating substandard ships [6].

Entering Community ports, ships directly og indirectly, must comply with the Community provisions. Being compulsory, Community law is of vital importance to all navigation between western Europe and the Asian far east, including

transportation along the Northern Sea Route (NSR).

Provisions on technical ship standards under Regulation 613/91, Directive no 93/75 - minimum standard provisions for ships and Regulation 259/93 - surveillance and control, is basic. Important is also rules on treatment and transportation of dangerous and poisonous freight and waste under Directiv 75/439 - oilspil, Directiv 75/442 - waste disposal, Directive 91/689 - dangerous waste, Directiv 718/319 - on poisonous and dangerous waste and Regulation 259/93 - transport surveillance and control.

These provisions are applicable to EEA-Member States according to EEA-agreement art. 38 and 47(2) and annex XIII no. V cf. protocol 19, as well. Accordingly, the EU-legislation is valid for ship docking in the two EFTA-countries (Iceland and Norway) being member of the EEA. Consequently EU or EEA-derived or destined ships sailing along NSR, do have to comply with Community Law requirements in Icelandic and Norwegian harbours too.

### 3. LEGISLATIVE COMPETENCE

The main task is to study the groups of persons being entitled to Community legislation. The question is whether Community law is applicable to foreign vessels when entering or docking in EU Member States harbours. The details are left out, as the important task is to show the kind of legislation being applicable to foreign vessels when entering and docking in an EU or EEA harbour. The underlying and carrying idea is that all vessels competing for certeparties to and

from the European Community "inner marked" along the NSR must at the end, stick to the advanced Community Port State standards. Consequently the vessels handling- and technical improvements whilst in ports, are also present when sailing the NSR.

#### 3.1 The Law of the Sea limitations

Today, costal states for some purposes, exercise full and unlimited jurisdiction in their ports. Ships deliberately docking in foreign harbour do have to comply with Port State legislation. Even outside the ports, new steps codified under the 1982 United Nations Convention on the Law of the Sea (UNLOSC), the provisions of articles 21(1), 21(1)(f), 22, 24, 56, 192, 211(4) & (5), 218, 219 and 221 are, by environmental and safety reasons, giving Member States competence to regulate ships destined for one of their ports, wherever those ships might be and whatever nationality they might have. The Community is competent to direct Member State legislation within the Law of the Sea framework.

Obviously, all Port States exercise jurisdiction over foreign merchant vessels. Shortly outlined the Port State authority regarding technical vessels- and handling requirements when in an harbour or in advance of entering, is the most complete, including notification requirements, the denial of access, restricting the route of sailing, enforcement etc. The ship handling and maneuvering provisions during the voyage, for goods, waste, equipment etc. is absent at the high seas and within the territorial sea, rather limited. Traversing the territorial water adjacent to the port, all ships are obliged to notify the

competent Port State Authority of vital ship characteristics, such as certifications, deficiencies or incidents which may decrease the normal safe manoeuvrability of the vessel, affecting the safety. The essential features is presented in Chapter 1.

### 3.2 The Community law minimum requirements. A Short outline

Having shortly pictured the outer limit of Port State competence, time has come to concentrate on Community law requirements for ships and handling of waste, cargo etc. entering Community ports, i.e. the standards for tankers (EU-directive no 93/75), disposal of waste oils (EU-directive 75/439), waste (EU-directive 75/442), toxic and dangerous waste (EU-directive 78/319), supervision and control of transfrontier shipment of hazardous waste (EU-directive 84/631 and Council Regulation no 259/93).

In the continuation discussions are related to jurisdiction vis-à-vis third state vessels - hereunder vessels from none International Transport Conventions states - when entering Community Port State harbours. The approximation of laws and convergent implementation in all Port States jurisdiction irrespective of nationality, is an explicitly part of the Community Safe Sea - policy: "The approach proposed in the present Communication seeks the enhancement of safety and prevention of pollution at sea through the elimination of substandard operators, vessels and crews from Community waters, irrespective of flag of the ships" [7].

The Community legislation adopted in the form of Directives, is addressed to Member States, see i.e. Council Directive 79/116 Article 4 and

Council Directive no 93/75 Article 16. That is; legislation should under the EU-treaty Article 189 be implemented in municipal law. The legal liability of the shipping industries is therefore dependent upon the Member State action. If implementation is not fulfilled, vessels docking at negligent Port States, is not affected by the Community legislation. In this dissertation the national proper implementation is however, anticipated.

The national implementation of Community Directives, is not necessarily prohibiting Member States from taking more stringent measures than provided for in the directive. In the case of Member State making provisions more rigorously, the competence must be made explicitly. See i.e. Council Directive no 78/319 on toxic and dangerous waste Article 8 and Council Directive no 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste Article 4(3). Otherwise, the directive is the maximum provision, which Member State may not penetrate. This is also the case, if urgent need is forcing Member State to derogate from any directive. See i.e. Council Directive no 78/319 Article 13.

If failing to notify the Coastal State Authorities or causing a situation or incident threatening the coast or coastal derived interests, the Port State is under Directive no 93/75 Article 6(3) c.f. annex III competent to restrict transportation or order the ship to use a specific traffic scheme.

The legislative- or decisive competence is due to the Coastal State free discretion; c.f. the notion "If the ... Member State affected ...

consider it necessary" to prevent, remedy or eliminate an impending or overwhelming threat to the coastal society, marine environment, other ships etc. If the Coastal States so considers, the Community could not override the Coastal State decision. The International Court of Justice, however, is - in principle - obviously competent to judge whether the Coastal State legislation is in defiance of the Law of the Sea.

### 3.3 Ships of all nationalities?

**The minimum technical requirements.** Under the Directive no 79/116 tankers solely, is affected. The notion include under Article 1 (1) all type of oil, gas and chemical tankers, however not less than 1.600 gross reg. ton. If it is a Segregated Ballast Tanker (ship with tanks solely used for carrying ballast) or not, is without importance. These provisions are applicable whether the tanker is fully or partly laden, also including empty tankers not yet degassed or purged of hazardous residues.

An empty tanker well cleaned, is excluded. Cargo-, passenger- and fishingvessels are excluded as well. Consequently each Member State enjoy exclusive authonomy regarding the execution of surveillance and enforcement competence, see Chapter 4.

The new legislation (Directive no 93/75 succeeding directive no 79/116) is directed to "ships entering or leaving Community Ports", including all type of vessels, tankers as well as cargo ferries and passenger vessels, with the exeption of war-ships and state-owned ships. The legal duties

are however limited to ships when transporting dangerous or polluting goods. Empty tankers degassed or purged of hazardous residues, are - as before - not affected.

No explicite provision under the Council-directive 79/116 is regarding the nationality of ships. However, indirectly the text is - throught the unlimited passus "tankers entering or leaving Community ports" and the scheme of notification of nationality of ships under Article 1(1A) litra b - making the application to all nationalities, manifest. Since the Amendment of 6. December 1979 (no 79/1034) is not affecting the sphere of legal subjects, all vessels of whatever nationality, are due to these provisions.

**Transfrontier shipment of hazardous waste and disposal of dangerous, oil or toxic waste.** The Council Directive 84/631 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste and the Council Regulation no 259/93 on the same subject, is affecting "shipment of waste" (Article 1) as such and is not limited to any specific kind of ships. In the same manner Council Directive no 78/319 on toxic and dangerous waste which is related to "carrige" which obviously includes seawards transportation. The rules on disposal of waste oils under Council Directive 75/439 c.f. the Council Directive no 87/101 (amendment) is affecting "the treatment, discharge and collection of waste oils" (the preamble). These provisions, which prohibit "any discharge of waste oils into ... territorial sea waters" (Article 4), clearly affect ships of all kinds, when in Community Member State waters.

Regarding the deposit of dangerous, oil, toxic etc. waste no provision under Council Directive no 75/442, is limiting its scope to Community Member State vessels. As already seen the expression "... transport and treatment ... and tipping", is obviously relating to all vessels. The situation is parallel in the case of dangerous, oil or toxic waste (Directive no 78/319, Council Directive 75/439), c.f. Council Regulation no 259/93 regarding the transfrontier shipment of hazardous waste. There seems to be no reason why foreign vessels should not be included.

### 3.4 Consequences

Flag of convenience ship in NSR transit, taking certeparties to and from EU or EEA harbours, do have to fulfill the community minimum technical, transportation, manning etc. provisions. As no "port of convenience" are available, substandard flag of convenience ships will no longer be able to take such certeparties without adopting the IMO, SOLAS etc. standards.

### 3.5 Conclusions

Concluding on the matter, the relevant Community legislation is applicable to all legal subjects. Obviously, third states vessels are included as well. The question then is what kind of liabilities floating from Community legislation, being properly implemented into national legislation.

## 4. THE ENFORCEMENT COMPETENCE

In the continuation I am looking into the elements of national surveillance- and enforcement competence. The first is a question of administrative and legislative competence. The latter is a question of expelling and arresting seagoing ships.

The Community law as it now stands, do not require Member State to enforce Community provisions vis-a-vis foreign ships actually or potentially trehening that states waters or coastline. Consequently each Member State may take advantage of the Law of the Sea option, allowing Port States to enforce national and Community safety and environmental provisions, but is not forced to do it.

Picturing the Law of the Sea legal framework is important in the case of Port State control and enforcement competence. The state exclusive authonomy according to coastal territorial sovereignty is the point of departure. The competence is complete if not otherwise is decided under conventions or customary international law. It is unanimously accepted that costal state competence is limited by the rules of innocent passage, the privileges of ships in distress and the right to free access to ports. According to new international customary law and maritime conventions, these traditionally accepted freedoms are today, in many ways however, limited.

Of course, several conventions do regulate Coastal State enforcement competence versus foreign ships in general or the discharge of wast from ships in special. The question is whether Community law are making

additional requirements which Member States do have to fulfill.

There are no such as a Community coast guard or enforcement task force. Consequently the Member Port State exercise enforcement competence within its territorial sea. For the purpose of environmental protection and preservation, the national state is entitled to control and enforce vessels entering Community harbours. Do Community law make surveillance or control compulsory? My purpose is to look up the Community surveillance and control provisions, with a special emphasis on the Member State more or less, free discretion.

#### 4.1 Technical requirements

Vessels of all nationalities are obliged - as mentioned under chapter 3 when entering an EU or EEA harbour - to comply with certain minimum technical requirements. The Coastal State enforcement competence, is according to Council Directive no 93/75 annex III tied to the Law of the Sea framework, under which the Coastal State is entitled to act. The Coastal State is under Community law, not obliged to enforce breach of technical requirements in any specific way. Obviously, the limited Coastal State competence of surveillance and enforcement under International Law, is not compulsory. The Port State is not forced by Community law to control or enforce the technical requirements put down in Council directive no 93/75 Article 6(3). The Port State enjoy free discretion in that matter. The community law as it no stands, does therefor not require any Member State to exercise jurisdiction over foreign ships being an actual or

potential treat to that states waters or coastline. Consequently the Community law do not establish claims additional to the Law of the Sea, reducing the national state exclusive competence according to the international law system.

Under the preamble of directive no 93/75 the Council however strongly recommend Member States to make all necessary measures to avoid incidents and in case of incidents occurred, reducing the effects. Additionally Member States is according to IMO-resolution A 648 (16) recommended to ascertain that all reporting systems or routines are in accordance with the requirements mentioned under Council Directive no 93/75 Annex I and II. These provisions are however recommendations solely, and are consequently not legal obligations.

#### 4.2 Shipment of waste

Council Regulation no 259/93 is affecting the transportation of waste within, into and out of the European Community. The competence of control is under Article 1 (3c) c.f. the preamble, placed at the Member State level. The control does include shipments of certain hazardous characteristics, as well as other waste when necessary for environmental or public health reason. Since there are no limitations, I conclude that Member State supervision and control competence does include all transportation, no matter which flag the vessels are flying and which legal person being the owner.

Do Community law require Member States to enforce this kind of Community legislation, or is the Member State executive competence optional? As a Community



Regulation, the "waste shipment"-legislation is directly applicable to all legal subjects affected, i.e. Member States and individuals. The Council is competent to establish new obligations and changing others, directing the Member States. The legal situation at present is necessarily not the future situation. An optional choice competence of today might turn into compulsory action of tomorrow.

What is the *de lege lata* situation? Is the Port State forced by Community law to control or enforce the shipments of waste? Do the Port States enjoy free discretion in that matter? There are no textual basis for the assertion that Member States are obliged to enforce Community law provisions. Obviously Member State competence is optional.

#### 4.3. Conclusion

The Community law as it now stands, does not require any Member State to enforce Community provisions vis-a-vis foreign ships being an actual or potential threat to that state's waters or coastline. Consequently each Member State may take advantage of the Law of the Sea option, allowing Port States to enforce national and Community safety and environmental provisions.

#### NOTES AND REFERENCES

1. Presented to the INSROP Symposium, Tokyo 1-6. October 1995. A full version is published in INSROP report "The Northern Sea-Route. Conditions for Sailing According to Community Legislation - with a Special Emphasis on Port State Jurisdiction (Oslo, May 1995).
2. Organized under the International Association of Classification Societies (IACS). See the Agreement on Joint marine safety initiatives and studies between Det norske Veritas (DNV), Lloyds Register of Shipping (LR) and American Bureau of Shipping (ABS) signed in New York 27. March 1995.
3. "Communication from the Commission - A Common Policy on Safe Seas" (February 1993).
4. For a closer look at the Community policy, see "Proposal for a Council Directive concerning the Enforcement, in Respect of Shipping using Community Ports, of International Standards for Shipping Safety and Pollution Prevention". COM(80) 360.
5. Communication from the Commission - A Common Policy on Safe Seas (February 1993) p. 10.
6. *Op.cit.*
7. *Op.cit.* p. 2.