SIMPLY

SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK

2017

502

SIMPLY 2017

Scandinavian Institute of Maritime Law
Yearbook

MarIus nr. 502
Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

ISSN: 0332-7868

Sjørettsfondet
University of Oslo
Scandinavian Institute of Maritime Law
P.O. Box 6706 St. Olavs plass 5
N-0130 Oslo
Norway

Phone: 22 85 96 00
E-post: sjorett-adm@jus.uio.no
Internet: www.jus.uio.no/nifs

Editor: Professor dr. juris Trond Solvang –
e-mail: trond.solvang@jus.uio.no

For subscription and single-copy sale, please see Den norske bokbyen
– The Norwegian Booktown
Internet: http://bokbyen.no/en/shop/
E-mail: post@bokbyen.no

Print: 07 Media AS

Content overview

Director's Preface

2017 has been a challenging but mainly successful year for the Scandinavian Institute of Maritime Law. Two leading textbooks have been published in English: the 4th revised edition of *Scandinavian Maritime Law. The Norwegian Perspective* (756 pages) by Thor Falkanger, Hans Jacob Bull and Lasse Brautaset, and the 2ed revised edition of *Handbook in Hull Insurance* (376 pages) by Trine-Lise Wilhelmsen and Hans Jacob Bull. Other new books include *European Energy Law Report*, Volume XI, co-edited by Catherine Banet, *The Reach of Free Movement*, co-edited by Tarjei Bekkedal, and a textbook in Norwegian tort law co-authored by Trine-Lise Wilhelmsen and Birgitte Hagland (of the Institute of Private Law, University of Oslo). In the publication series MarIus, 15 new issues were published.

Research at the Institute has covered the traditional wide field from maritime law as well as ocean law, petroleum law and energy and climate law to different aspects of EU and EEA law. Stian Øby Johansen successfully defended his PhD dissertation *The Human Rights Accountability Mechanisms of International Organizations. A Framework and Three Case Studies* and likewise, Paula Bäckdén defended her PhD dissertation *The Contract of Carriage – multimodal transports and unimodal regulations.* New areas of research include legal aspects of autonomous ships and legal regulation of the aquaculture industry. On the field of energy law, the Institute's participation in the large project Norwegian Carbon Capture and Storage (NCCS), lead by SINTEF in Trondheim, is pointing towards the future with its combined energy and climate law focus.

Among larger conferences worth special mention, the biannual 27th Nordic Maritime Law Conference took place over three days on board the coastal steamer Hurtigruten. The main topic concerned modern organization of ship owning companies. Further, the traditional OST (Oslo/Southampton/Tulane) colloquium was held in Panama, organized by Tulane University Law School. On the field of energy law, the Institute, partnering with the university wide energy initiative, UiO:Energy and

the private organization Energy Norway, held a conference on EU and EEA aspects of the energy market. On a completely different field, Alla Pozdnakova was the main organizer behind the faculty's conference on the Russian Revolution in the Nordic perspective, marking the centennial of the Russian revolution.

The challenges of the Institute during 2017 relate to financing of the activities. The Institute has several excellent long-term partners in government and the private sector. However, the Nordic Council of Ministers, a really long-term partner, has for several years considered its support to Nordic institutions and through this created uncertainty which is detrimental to planning of research initiatives and Nordic activities more generally. Still, it is uncertain what the outcome will be. In addition, after the oil price crisis, the important yearly funding that the Institute used to receive from The Norwegian Oil and Gas Association has been phased out. These two developments make it even more imperative to work for further external funding.

On the personnel side, Professor Christophe Hillion has accepted a position as professor at the Centre for European Law and Professor Angus Johnston of the University of Oxford, has accepted a position as part time professor of energy law. Further, during 2017, Professor Erik Røsæg has been attached to PluriCourts Centre of Excellence and Professor Alla Pozdnakova has moved internally from the Centre for European Law to the Department of Maritime Law. As of 1 September 2017, Professor Ola Mestad took over as director of the Institute after Professor Trine-Lise Wilhelmsen who, impressively, had served as director since 2006.

Ola Mestad

Editor's Preface

We are pleased to offer a variety of topics in this edition of the Yearbook, reflecting the diversity of research fields in which the Institute is involved, and comprising contributions from the Institute's own academic staff as well as associated academics.

First, there is Thor Falkanger's article with comments on the Norweigian Supreme Court case, the "Eimship", involving choice of law questions in ship labor law. Next is Henrik Ringbom's article discussing the EU policy and regulatory aspects of Arctic shipping. Thereafter follows Kristina Siig and Birgit Feldtmann's article in the area of law of the seas, offering perspectives on the methodology/construction of the UNCLOS in conjunction with other law of the seas instruments. Next is another article by Thor Falkanger, this time with an analysis of the concept of the subcarrier in the Nordic Maritime Codes. Thereafter follows an energy law article by Henri van Soest, discussing the prosumer (producer-consumer) concept in EU law, and clarifying which activities and actors are covered by that concept, and the legal sources of EU energy law involved. Next, there is an article by Henrik Bjørnebye and Ivar Alvik touching on legal interfaces between administrative law, tort law and energy law – more specifically: on governmental liability for changing tariffs in the energy sector. Finally there is another Arctic shipping article, by William E. Butler (Pennsylvania State University), based on his presentation at a seminar held at the Institute in November 2017, and discussing various factors which may have implications on the developments of shipping along the Northern Sea Route.

We are grateful for these contributions which, as illustrated, cover an impressive width of legal areas – and wish our readers joyful reading!

Trond Solvang

Ship registration and choice of law in relation to contracts of employment

Comments on the Supreme Court's decision in the Eimskip case – HR-2016-1251-A[1]

By Thor Falkanger,
Professor Emeritus, Scandinavian Institute
of Maritime Law, University of Oslo

[1] This article is based upon a presentation given in Panama City in October 2017, during a seminar arranged by Tulane Law School as a link in the ongoing cooperation between Tulane Law School and the maritime institutes in Southampton and Oslo.

Contents

1 Introduction

In 2016, the Norwegian Supreme Court decided that the law applicable to a seaman's employment contract is the law of the flag of the vessel on which he served – HR-2016-1251-A.

At this stage it is sufficient to state the basic facts of the case: a Norwegian citizen was engaged by a Norwegian company – Eimskip – as a second mate, and he served on a vessel registered in Antigua.[1] The vessel was on bare boat charter party to a Faroe Islands[2] company and rechartered to Eimskip on time charter terms. The mate was discharged for breach of contract, and the correctness of this action by the employer should – according to the Supreme Court – be decided on the basis of Antiguan law. Further details of the case will be presented later on.

2 The traditional position

When deciding choice of law questions in shipping-related matters, the country in which the vessel is registered has – undoubtedly – played an important role. This is particularly true in relation to public law/administrative law questions, such as safety, pollution, access to harbours, seizure, applicability of criminal law, neutrality in times of war, etc. However, the law of the flag has also been applied in the private law sector, and the Supreme Court decision is a confirmation of its continuing importance today.

Before discussing the *Eimskip* case, it is necessary to give an outline of Norway's historical development as regards registration and the seaman's

1 Antigua and Barbuda is an island state in the Caribbean, with an area of approx.. 280 km^2 and a little more than 80.000 inhabitants.

2 The Faroe Islands are a semi-independent part of Denmark.

employment contract – a development which is not dramatically different from what has happened in other countries.

In the latter part of the 19th century Norwegian shipping was expanding: Vessels were being built right along the Norwegian coast. They were to a great extent owned locally, and manned by people from the same district as where the owner or owners were domiciled. Boys went to sea when they were 14–15 years old, and the parents knew that their young boy would meet a crew recruited from their neighborhood, perhaps even relatives. Non-Norwegian crew members were exceptions.

Putting this in other words: the vessel was tightly connected to Norway. The non-Norwegian element was carriage from or to non-Norwegian harbours, often with non-Norwegian goods. There was no particular interest from abroad in investing in Norwegian shipping; consequently, on the ownerside side too, shipping was Norwegian. Therefore, the expression that the vessel was a floating part of Norway was not an overstatement. Since the vessel was undoubtedly Norwegian, the vessel should of course fly the Norwegian flag and be registered in the Norwegian ship register.

With the First World War, the picture changed: Norway was a neutral country during those tragic years, with unrestricted submarine warfare and the capture of vessels carrying contraband cargo. In order to protect Norwegian shipping, it was deemed necessary to have strict rules on nationality: the right to fly the Norwegian flag and to be registered in the Norwegian register, required – broadly speaking –at least 60 percent of the equity capital to be owned by Norwegian persons or companies, and that the operation of the vessel should be handled from Norway. Basically, flying the Norwegian flag was a privilege.

The difficult period after the First World War and the Second World War, followed by the cold war, gave no reason to loosen the reins: On the contrary, the rules were made stricter – no exceptions should be allowed.

The post war period, however, brought in other factors of importance. Currency and taxation considerations led to the consequence that a vessel fulfilling the Norwegian registration requirements had to stay in the Norwegian register. An additional consideration was preparedness

for war or warlike situations, where urgent transport requirements might necessitate requisitioning of the national fleet. Further, the employment situation for seamen became an issue. The international trends, for "flags of convenience" or open registers, threatened the traditional Norwegian flag and Norwegian crew. The seamen's unions were an important political pressure group in those days, trying to protect the Norwegian seaman.

The former privileges became obligations on the industry!

However, in the 1980's, the pressure from other directions became too strong. The obligation to register in Norway disappeared, and we even introduced an international ship register, in addition to the traditional one reserved for Norwegian owned tonnage.[3]

The important finding – in our context – is that the solid connection between registration and the registry state disappeared in Norway in the latter part of the 20th century, and we will find the same development – earlier, simultaneously or later – in other countries. In short: in matters of ship registration, Norway is today in line with the majority of shipping countries. Regarding private law, this means that we often have the situation where the vessel – apart from its registration – has all its connections to another country, or to a number of other countries.

The conclusion is clear: the real and good grounds for emphasis on the registration country, when deciding on choice of law issues in the private law sector, have eroded. However, applying the law of the flag gives a plain, unambiguous, foreseeable rule.

3 The Eimskip decision –the facts

It is now time for a more detailed description of the *Eimskip* case:

A contract for employment as a mate, between a Norwegian citizen and a Norwegian shipping company, Eimskip, was concluded in 2010 and

[3] See Act 12th June 1987 no. 48 on Norwegian International Shipsregister (NIS).

renewed in 2012. The 2010 contract was on a standard form prepared by the Norwegian Maritime Directorate; at the top of the document was inserted: "According to Seamen's act of 30 May 1975 §3 with regulations." From the renewed contract of 2012, which was not on a standard form, I mention the first clause, which related to the mate's duty to serve on the ship designated by Eimskip. Further, I quote (my translation):

> "2. LEGAL REGULATION
> With the limitations which are explicitly stated in this agreement the employment is subject to the wage agreement between the Small Vessel Owners' Association and the respective unions, the Norwegian Marine Officers' Association for NOR [NOR = The Norwegian Ordinary Ship Register], the Norwegian Seamen's Union and the Norwegian Engineers' Union to the extent appropriate.
>
> 10. CHOICE OF LAW AND JURISDICTION
> Disputes in connection with this agreement or otherwise in the employment relationship shall be brought before a Norwegian Court. The accepted venue is Vesteraalen District Court."

The mate served on two vessels, both Antiguan registered. At the time of dismissal he worked on board MS Svartfoss (gross tonnage 2.990, built in Norway in 2004–2005).

The vessel was, as already mentioned, bare boat chartered to a company on the Faroe Islands, and this company was required to crew and run the ship. These tasks were – as regards manning and technical operations – outsourced to an Icelandic company. As part of fulfilling such tasks, the Icelandic company hired the services of the mate from Eimskip. In this way, the mate came to work on board MS Svartfoss, which traded in Norwegian waters, with some voyages to England and the Netherlands while he was on board.

This set-up was basically Islandic: The Faroe Islands company, as well as the Norwegian company, were owned by the Icelandic company.[4]

[4] In "Technical and Crew Management Agreement" between the Faroe company and Eimskipafelag Islands, article 4 says: "Since both Faroe Ship and Eimskip are owned

When the mate did not accept his dismissal and instigated court proceedings before a Norwegian District Court, in conformity with the quoted jurisdiction clause, the question arose: which country's law should govern? In an intermediate decision, the District Court held that it was the law of the flag.[5] The Court of Appeal agreed and also rejected an assertion that Norwegian law had been agreed.[6] The Supreme Court was solely asked to decide on the choice of law question, and it came – as already indicated – to the same conclusion as the lower courts.

4 De lege ferenda – or a common sense discussion

Before investigating the reasons given by the Supreme Court, it is – in my view – useful to mention some of the arguments that would have required consideration, if the law had been open. In short: what does common sense indicate?

At the outset, it is important to mention that it is possible to agree on choice of law in a contract for a mate's services. There are, however, certain safety mechanisms, protecting the mate against preposterous results (briefly considered below in 5.5).

Let us start with the basics: we have a Norwegian citizen engaged by a Norwegian company to serve as a mate on a ship to be designated by the Norwegian shipping company.

Of course, there is no slave-master relationship here, but clearly the mate is the weaker of the two parties, even where the shipping company is a minor one. It would appear reasonable that the shipping company should make it clear for the person to be employed that his rights and

fully by Eimskipafelag Islands hf. no agent fee is payable under this Agreement". I add that the names Svartfoss and Eimskip clearly have an Icelandic "flavour".

5 TVTRA-2016-808.

6 LH-2015-95334.

obligations are not necessarily dependent upon Norwegian law. In our case, the shipping company made Antiguan law applicable by choosing the vessel on which the mate should serve. If the company had chartered a vessel from, say, India or Madagascar, the mate would, if necessary, have had to make himself conversant with one of those countries' laws.

I say nothing detrimental to Antiguan and Indian law or the law of Madagscar. They are illustrations of unpredictability for our mate. In all fairness, the company should have made it clear for the mate that he could not expect that his home law – Norwegian law – would necessarily apply.

In my view there is also another objection to Antiguan law – once again, I am not suggesting in any way that Antiguan law is substandard. When the employer – the shipping company – pleads that the dismissal is acceptable under Antiguan law, a heavy burden is placed on the mate contesting the dismissal. It is much easier for the shipping company, than for a Norwegian sailor, to obtain relevant information in such a form that it will be accepted by the Norwegian Court. Without the financial support of a union, it will be virtually impossible for the mate to contest the dismissal. To put it very strongly: when the company pleads Antiguan law, it might be said that this is tantamount to a denial of justice. The company may know that this man has neither the guts nor the money to put up a fight for his possible rights. I do not say that Eimskip subjectively acted in this way. My point is that there is such a possibility and that the effect may be as indicated.

The most serious objection is, as indicated, the uncertainty: one month on an Antiguan vessel, the next month on a vessel flying another flag. The application of the flag state principle presents further problems if the dismissal is based upon a succession of events while serving on differently flagged vessels. The conclusion is that the predictability, seen from the mate's point of view, is zero, if he has not been informed beforehand of his employer's chartering plans!

The underlying difficulty is that the rule of the flag state law was developed at a time when the seaman was engaged for service *on a named, identified vessel*, with no right for the employer to demand his services on another vessel and, on the other hand, if the vessel was sold or lost,

the employment was ended. In Norway this rule was changed in 1985 – primarily for the protection of the seaman.

In any case, the indicated demands of fairness, together with the wording in the contracts, in particular the last one (quoted in section 3 above) would, in my world, be sufficient to find that there was at least a presumption for Norwegian law. Arguments along these lines were rejected by the District Court and the Court of Appeal – essentially because the courts found that the flag law has such a solid standing that the arguments were not sufficient for the application of Norwegian law. This construction issue was not argued before the Supreme Court.

5 Why the Supreme Court reached its decision on the applicability of Antiguan law

5.1 Introduction

After these considerations – if I may use the phrase, of a natural justice character – it is time to explain the reasons given by the Supreme Court for its conclusion.

The opening remark of the Court is that when law, custom or other established rules do not apply, the task is to find the law of the state to which the dispute, according to a total evaluation, has its closest connection (para. 27).[7] However, if the choice of law question is not solved by Norwegian legislation, "there is reason to take into account the EU's choice of law rules in the two Rome regulations" (para. 27).

[7] The Court refers to the so-called "Irma-Mignon-formula", deriving its name from a Supreme Court decision in Rt. 1923.II p. 58 regarding a collision between the vessels Irma and Mignon. This formula has since been applied in a number of private law issues.

The possible arguments in respect of our problem may be divided into three groups:

(i) Contractual regulation
(ii) National regulation
(iii) International regulations, i.e. conventions to which Norway is a party and rules in other countries, in particular in EU.

5.2 Contractual regulation

As mentioned above, it was not argued on the part of the mate that Norwegian law was expressly or implicitly agreed. Nevertheless, the Court states that it may be agreed that the main rule, viz. that the employment legislation is governed by the law of the flag state, is not applicable (para. 31). It is then a little surprising that the Court shortly thereafter subscribes to a statement from the Department of Justice "that it is doubtful to what extent international law allows Norwegian legislation to be applied on foreign vessels which are used by a Norwegian shipping company on other terms than bare boat terms" (para. 33). The basis for this reservation is apparently that the application of Norwegian law might be considered an infringement of the rights vested in the state of Antigua. However, if this restriction is accepted, the application of Norwegian law should not be problematic, as the link to Antigua was broken by the bare boat charter to the Faroe company.

5.3 National regulation

The Maritime Employment Act of 2013 Section 1-2 says that the act is applicable for employment on board a "Norwegian vessel", and whether a ship is, in this sense, Norwegian, depends upon the requirements of the Maritime Code – which basically means that the vessel needs to be owned by Norwegians and operated from Norway.

Section 1-2 is, the Court says, a choice of law rule (para. 29 and 30), and this is supported by a detailed examination of the preparatory

works (*travaux préparatoires*), both to the act and to earlier legislation on maritime employment. The conclusion is that the national factors support the view that Section 1-2 is intended to be in conformity with the flag state principle of international law.

5.4 International regulation

Regarding the international situation, the Court states that UNCLOS (the United Nations Convention on the Law of the Sea of 1982) codifies the flag state principle, and that both Norway and Antigua have ratified the Convention. And I quote:

> "The flag state principle is codified in UNCLOS of 1982 – with entry into force in 1994. The flag state has according to Article 92 exclusive jurisdiction on the high sea, while the coastal state's jurisdiction on its own sea territory is limited by Articles 17 et seq. on the right to innocent passage. The Convention is in other words built upon an interplay between jurisdiction based upon personnel connection – flag state jurisdiction – and territorial connection – coastal state jurisdiction" (para. 36, my translation)".

5.5 The exceptions of ordre public, fraus legis and international mandatory rules

There are a few exceptions regarding the application of foreign law; the catchwords are *ordre public*, *fraus legis* and international mandatory rules.

In the *Eimskip* case it was argued that the special rules in the Maritime Employment Act on protection of employment – i.e. rules on dismissal etc. – were of such a nature that Antiguan law could not be applied.

As for international mandatory rules, the Court stated that one aspect of this doctrine is that:

> "a Norwegian rule of law can be so fundamental that it has to be applied irrespective of which law is applicable in other respects" (para. 39, my translation).

The condition is, however, the Court continued, that the Norwegian rule is applicable in the present instance, and here there are no grounds for holding that the rules on job protection should have a wider application than the other rules of the Maritime Employment Act – and the Act, according to the Court's findings, is not applicable to employment on a non-Norwegian vessel.

The remaining possible exception is *ordre public*: when application of foreign law gives a *result* contrary to "fundamental principles" in the state where judgment is given, foreign law will not be applied. However, whether the application of Antiguan law will give such a result is not a question of choice of law: it is a substantive question to be decided in the principal case (para. 40).

6 Some concluding remarks on Norwegian law

It is time to sum up:

We have a long tradition of applying the principle that the contract of employment is subject to the law of the flag state – unless there is an agreement that the law of another country shall apply. The basis for this principle is – as I see it – twofold:

(i) There was a strong connection between vessel and the flag state: The vessel was owned and operated from the flag state by nationals – individual persons or legal entities domiciled in the flag state. And the seaman was a national of the flag state.
(ii) The employment contract was strictly bound to a specific vessel – when the vessel was sold or lost, the contract came to an end.

Both of these two premises have slowly eroded. Open registers are not a rare exception today, and even with the traditional registers, the vessels

therein have, in most cases, strong financial and operative connections with other countries.

The most striking feature in the *Eimskip* case is – as I see it – that the choice of law depends upon the decision of the employer: The employee is not informed beforehand and is not required to consent when the employer has made his decision.[8]

7 Modern principles – Rome 1

The Supreme Court's reference to the EU rules of law (see 5.1 above) requires some remarks. Our question is what result the rules promulgated in Rome I (Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008) would lead to if applied in the *Eimskip* case.

The rules apply to "contractual obligations", with general rules and special rules for i.a. "individual employment contracts" (Art. 8).

Art. 3 on freedom of choice says, in sub. 1, that a choice "shall be made expressly" or shall be "clearly demonstrated by the terms of the contract or the circumstances of the case". In the *Eimskip* case there was no express choice, and in the circumstances – as presented in the descriptions given by the courts – it is doubtful whether the criteria "clearly demonstrated" is met. Accordingly, we have to turn to Art. 8 on individual employment contracts, with its three layers of rules.

The first rule of Art. 8 is in sub. 2, referring to "the law of the country in which or from which the employee "habitually carries out his work in performance of the contract". Since the vessel did not fly the Norwegian flag, the greater part of the work was, technically speaking, not performed

[8] If the employee were to protest when informed that he is to serve on a vessel registered outside Norway, I suggest that the issue of whether his objections are sound would need to be decided in accordance with Norwegian law.

in Norway, even though the vessel, for the better part of the relevant period, was in Norwegian waters.

Then we come to the second layer in sub. 3, referring to the law of the country "where the place of business through which the employee was engaged is situated". This means Norwegian law for our mate.

The last resort is that failing a decision according to sub. 2 or sub. 3, sub. 4 states that the applicable law is that of the country "that the contract is more closely connected with", than one of the countries indicated in sub. 2 or sub. 3. In the present case, this country is obviously Norway: We have a Norwegian mate, engaged by a Norwegian company, signing the contract in Norway, working on board a vessel that only occasionally trades outside Norwegian waters, and when outside the Norwegian area sailed to England and the Netherlands, i.e. countries that clearly are of no significance when deciding upon the choice of law question.

The indicated rules are, however, subject to "overriding mandatory provisions", as spelled out in Art. 9. But this reservation is of no interest in the present context.

One possible objection may be based on Art. 25, which says that the Rome 1 rules "shall not prejudice the application of international conventions to which one or more Member States are parties". Assuming that Norway is a Member State, it may be questioned whether UNCLOS' principle in Art. 92, on the exclusive jurisdiction of the flag state, prevents the Norwegian court from applying the employment laws of another state than Antigua. As I see it, the answer is clearly no.

Arctic Shipping from an EU Perspective

By Henrik Ringbom[1]

[1] Professor II, Scandinavian Institute of Maritime Law, Faculty of Law, University of Oslo, Norway; Adjunct Professor (Docent) Department of Law, Åbo Akademi University, Turku/Åbo, Finland. This article is based on a longer text by the author ‹The EU and Arctic Shipping› published in N. Liu (ed.) The European Union and the Arctic (Martinus Nijhoff Publishers, Leiden, 2017, forthcoming). All website references are accessed on 30 December 2016.

Contents

Introduction

The European Union (EU) has, to date, taken a cautious stance with respect to shipping in the Arctic. There is no EU shipping legislation specifically targeting or extending to the Arctic, and the policy documents on the Arctic, which have been adopted by various EU institutions in the past decade, have been quite restrained with respect to the policy that the EU wishes to implement in respect of maritime transport in the area. This is despite the significant policy and economic interests that the EU has in Arctic shipping. The EU is the principal destination for goods and natural resources from the Arctic region and is among the prime regions to profit from the Arctic sea routes, which could reduce the distance between Northern Europe and Asia by as much as half.[1]

The EU normally regulates shipping through the collective exercise by its member states of port state jurisdiction or – less commonly – coastal state jurisdiction. In other words, EU maritime safety and environmental legislation normally targets ships based on the region in which they operate, rather than on the basis of the ship's flag. Transposing this to the Arctic involves obvious difficulties, as the EU does not have coastal (or port) states in the region. Geographical factors therefore place clear limitations on the EU's possibilities for exercising influence over shipping in the Arctic, at least in a traditional manner.

However, the absence of a direct geographical link to the Arctic does not on its own justify the relative absence of an EU policy for Arctic shipping. First, there are a number of ways, other than regulation, in which the EU could exert influence, which might be at least as effective for achieving its policy goals. Second, even within the regulatory field, there may be options that have not yet been fully explored.

The focus of this article is on the regulatory relationship between the EU and the Arctic. Following a brief review of the recent Arctic policy

[1] Generally on the EU's economic interests in Arctic shipping, see A. Raspotnik and B. Rudloff, 'The EU as a Shipping Actor in the Arctic', Working Paper FG 2, 2012/Nr. 4, Stiftung Wissenschaft und Politik, Berlin, 2012. Available at www.swp-berlin.org/fileadmin/contents/products/arbeitspapiere/FG2_2012Nr4_rff_raspotnik.pdf

documents from a shipping perspective, the following section assesses the applicability of the EU's current maritime safety and environmental legislation to shipping activities in the Arctic. Since it is concluded that current EU shipping legislation does not make much of an impact in the Arctic, the following section explores the legal challenges standing in the way of a more active regulatory approach of the EU towards Arctic shipping. The jurisdictional limitations imposed by existing rights and duties in the law of the sea are reviewed, with a view to exploring to what extent there is legal scope for a more active role for the EU in this area. It is concluded that there is such scope, even if there is little to suggest that an EU-based regulatory approach for the Arctic is currently required. Yet, as is noted in the concluding section, the lack of a clear indication of the EU's goals or ambitions for Arctic shipping limits the Union's possibilities for playing a more active role in this area, both within and outside regulation, and both at regional level as well as globally.

The Arctic policy documents

The Arctic policy documents adopted by the various EU institutions over the past decade have never been particularly radical, as far as shipping is concerned.[2] In general, they have highlighted issues on which there

[2] The first document of this kind was the Commission's Communication on the European Union and the Arctic Region COM(2008) 763 final, adopted in 2008, which has since been followed by:
- Council conclusions of 8 December 2009 on Arctic issues;
- European Parliament resolution of 20 January 2011 on a sustainable EU policy for the High North (2009/2214(INI)) (hereinafter the '2011 European Parliament Resolution');
- Joint Communication from the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, 'Developing a European Union Policy towards the Arctic Region: progress since 2008 and next steps' (JOIN(2012) 19 final);
- European Parliament resolution of 12 March 2014 on the EU strategy for the Arctic (2013/2595(RSP), hereinafter the '2014 European Parliament resolution');

is large political agreement and kept the discussion at a very general level, so as to avoid concrete issues of potential controversy. Instead, the documents have emphasised the more general benefits that an increased involvement by the EU in Arctic shipping could bring about, notably in terms of technical and economic tools.

The tendency to avoid controversies has strengthened over time. While the earlier policy documents – by all institutions – were more specific, both with respect to the policies and the measures they would like to see implemented for shipping, subsequent documents have gradually toned down any indications of a potential role for the EU as a driver of Arctic shipping initiatives. Substantive regulation is left to the global maritime community, notably the International Maritime Organization (IMO), and, in contrast to tensions between the IMO and the EU about the regulatory initiative on other key regulatory issues,[3] the EU policy documents on the Arctic appear to be quite comfortable with the current global regulatory situation. With one small exception,[4] the documents

- Council conclusions of 12 May 2014 on developing a European Union policy towards the Arctic Region;
- Joint Communication of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy 'An Integrated European Union Policy for the Arctic' (JOIN(2016) 21 final) of 27 April 2016 (hereinafter the '2016 Joint Communication'); and
- Council conclusions on the Arctic of 20 June 2016 endorsed the policies outlined in the Joint Communication.
- European Parliament resolution of 16 March 2017 on an integrated European Union policy for the Arctic (2016/2228(INI)

[3] Starting from its 1993 'Common policy for safe seas' (COM(93) 66 final), the Commission has emphasised the complementary role of EU legislation and its preparedness to resort to regional legislation should international rules be considered inadequate: "the Community needs to ensure that the IMO's work develops in a way which will produce adequate solutions for ships sailing in its waters" (para. 61). Most recently on this matter, see the Commission white paper 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system', COM(2011) 144 final and Communication 'Strategic goals and recommendations for the EU's maritime transport policy until 2018' COM(2009) 8 final.

[4] The only exception to this cautious stance has been the European Parliament, which has twice called for potential supplementary measures by the EU. Para 67 of its 2011 resolution specifically called for the EU to adopt supplementary port-state measures "with a view to imposing a strict regime limiting soot emissions and the use and carriage of heavy fuel oil" if the international negotiations at the IMO did not produce the

include no reference to a complementary role for the EU, should the global maritime community fail to adopt certain key standards.

With respect to more general principles of the law of the sea, all three main EU institutions have highlighted "the importance of respecting international law principles, including the freedom of navigation and the right of innocent passage".[5] This contrasts with the EU's general maritime policy, which is distinctively port and coastal state-oriented. Moreover, the documents include no indication as to *how* those international law principles should be respected in the Arctic, or how the navigational and environmental interests should be balanced. Existing controversies about maritime delimitation and zones involved in Canadian and Russian waters along the main Arctic sea routes are not mentioned at all.

In terms of substantive standards, the Arctic policy documents generally emphasise the need to implement global rules, including the recently adopted Polar Code, as well as regulatory initiatives by the Arctic States, in particular the Arctic SAR and MOPPR Conventions.[6] EU initiatives in the region are limited to issues where the participation of the Union could provide benefits to the Arctic region as a whole. A particular emphasis has been placed on the monitoring capabilities developed by the EU and their potential usefulness for inducing compliance with existing

desired results for the Arctic. While this element no longer featured in the Parliament's next resolution of 2014, it reappeared in part in 2017. Para. 58 of the 2017 resolution "calls on the Commission, in the absence of adequate international measures, to put forward proposals on rules for vessels calling at EU ports subsequent to, or prior to, journeys through Arctic waters, with a view to prohibiting the use and carriage of HFO".

5 2014 Council conclusions (n 2), para 10. Similar statements were made in the Council Conclusions [I've capitalized "Conclusions here to match its use in footnote 6] of 8 December 2009 on Arctic issues, (n 2), para. 16; 2012 Joint Communication n 2 para. 17; and 2014 European Parliament Resolution n 2, para. 48. The European Parliament came closest to criticising the Arctic coastal states, when calling on "the states in the region to ensure that any current transport route – and those that may emerge in the future – are open to international shipping and to refrain from introducing any arbitrary unilateral obstacles, be they financial or administrative, that could hinder shipping in the Arctic, other than internationally agreed measures aimed at increasing security or protection of the environment" (*Ibid*., para. 50).

6 2014 Council Conclusions (n 2) para. 9. This aspect no longer features in the 2016 Conclusions n 2.

(international) rules in the region.[7] The role of the European Maritime Safety Agency (EMSA) has been specifically highlighted in this respect.[8]

The most recent Joint Communication for the Arctic, issued in April 2016, is remarkably free from topics that could generate controversy, both generally and in respect of the Union's maritime policy. It merely states that the EU "should encourage full respect for the provisions of UNCLOS … including the obligation to protect and preserve the marine environment" (p. 7) and encourages states to ratify the IMO's 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (p. 8). Under the heading of sustainable development, the Communication only refers to research and development tasks. The EU should, for example, "contribute to enhance the safety of navigation in the Arctic through innovative technologies and the development of tools for the monitoring of … the increasing maritime activities in the Arctic" (p. 12).[9]

The only proposal for a regulatory initiative which is even remotely relevant for shipping is the promotion of biodiversity protection through the establishment of Marine Protected Areas (MPAs).[10] How these areas are to be established, by whom and on what jurisdictional basis, is not clarified, nor is their effect, if any, on both the shipping and navigational freedoms that the document also seeks to ensure.

More recently still, the Commission and the High Representative for Foreign Affairs and Security Policy adopted a more general policy document on oceans' governance.[11] This covers oceans more generally

---

7 NO TEXT FOR THIS FOOTNOTE?

8 See 2014 Council Conclusions [see my comment above in footnote 5] (n 2) para. 9 and the 2014 European Parliament Resolution (n 2), para. 49. See also Joint Communication 'International ocean governance: an agenda for the future of our oceans' (JOIN(2016) 49 final (hereinafter the 'Oceans' Governance Communication'), at pp. 9–10.

9 2016 Joint Communication (n 2). Interestingly, the Communication in this context refers to research programmes designed to cope "with maritime security threats resulting from the opening of the North East passage", section 2.5.

10 In *ibid.* at p. 7 it is states that the EU "should promote establishing marine protected areas in the Arctic, these areas being an important element in the effort to preserve biodiversity".

11 N 7.

and does not have a specific Arctic focus, although it is noted that the Arctic Ocean is "one of the most fragile sea regions on the planet" and that the Union, in line with its integrated Arctic policy, "should seek to ensure sustainable development in and around the region on the basis of international cooperation".[12] This document also supports the promotion of biodiversity protection through the establishment of Arctic MPAs.

The Ocean Governance Communication includes more concrete policy statements than the corresponding documents on the Arctic policy. It foresees an important role for the Union in contributing to international oceans policy, and it includes 14 different actions which must be pursued to strengthen the international ocean governance framework. These actions will form an integral part of the EU's response to the UN 2030 Agenda for Sustainable Development, with UNCLOS being its "main legal driver".[13]

The institutions consider that the EU "is well placed to shape international ocean governance on the basis of its experience in developing a sustainable approach to ocean management, notably through its environment policy (in particular its Marine Strategy Framework Directive), integrated maritime policy (in particular its Maritime Spatial Planning Directive), reformed common fisheries policy, action against illegal, unregulated and unreported (IUU) fishing and its maritime transport policy".[14] However, despite this starting point, maritime transport policy features very sparingly in the document. Even though one of the 14 actions listed is to "ensure the safety and security of the oceans", the ship-based activities focus almost exclusively on fisheries and maritime security. Commercial shipping is hardly addressed at all.

In summary, Arctic shipping has clearly not been at the centre of the EU's attention, either in the different institutions' Arctic policy documents or in its recent first general policy document on oceans' governance.

---

[12] *Ibid*., pp. 6–7. The passages appear under the heading 'regional fisheries management and cooperation' and do not seem intended to affect maritime transport.

[13] *Ibid*., p. 5 The UN's 2030 Agenda for Sustainable Development identified conservation and sustainable use of oceans as one of the 17 Sustainable Development Goals (see e.g. at www.un.org/sustainabledevelopment/oceans/)

[14] *Ibid.,* p. 4.

On the contrary, the documents are very cautious on regulatory issues, whether at global or regional level, though some emphasis is given to other forms of steering mechanisms, such as making technology or research findings available.[15] As a result, very little in the documents indicates a desire by the EU, or at least by the Commission and the Council, to take an active role in steering Arctic shipping policy, and the level of ambition- or at least specificity – appears to be decreasing. Instead, the EU views itself mainly as a facilitator with a set of useful tools that could benefit the Arctic states and the region as a whole, should the key stakeholders (which do not appear to include the EU itself) wish to make use of them.

The EU maritime regulation and Arctic shipping

General on EU shipping rules

The general rights and obligations under the law of the sea have been instrumental for shaping the EU's shipping policy and legislation. From the very early days of EU's maritime safety regulation in the 1990's until today, the policy has been based on a careful balancing between the rights and obligations of flag, coastal and port states under the law of the sea. As

[15] For example, it has been emphasised by various EU institutions in their Arctic policy documents that the EU already holds a great deal of data on ship standards and movements. In addition to port state control and other compliance data on ships, a series of databases on ship movements are being hosted by the EMSA which acquire data by satellites, AIS and other means, which could prove useful not only for monitoring and surveillance of shipping activities in the Arctic, but also for assisting in rescue operations etc. EMSA also manages a small fleet of oil recovery vessels that can be brought in to assist with pollution emergencies in EU waters. Extending their potential scope of activity to the Arctic Ocean has not been proposed, but the collaboration between EMSA and the Arctic Council, notably through the Emergency Prevention, Preparedness and Response (EPPR) Working Group, which was established under the Arctic Environmental Protection Strategy (AEPS), is an indication of close collaboration between the two institutions in this field.

a consequence, an equally careful relationship has had to be established with the global shipping rules, notably the conventions adopted within the framework of the IMO.

Shipping is an international business and there is therefore a long-standing tradition of regulating it at international (global) level, leaving little space for regional bodies like the EU. The preference for global rule-making is also confirmed in numerous articles of UNCLOS.[16] In substantive terms, maritime safety and environmental protection is heavily regulated at international level, leaving relatively few 'gaps' for additional regional legislation. The IMO has adopted some 60 international treaties, covering anything from technical standards for ship design and construction and standards for discharge, to rules on dangerous goods and salvage, as well as search and rescue liability for pollution damage.[17] Global shipping rules have traditionally not singled out the Arctic as an area where specific rules apply, but this partially changed in 2017, now that the Polar Code has entered into force.[18]

Despite this very globally-oriented starting point, the EU's maritime safety legislation has developed rapidly over the past 25 years, and now comprises some 50 directives and regulations.[19] Roughly half of these acts relate in some way to marine environmental protection, which is an objective closely associated with maritime safety. Most of the EU rules are based on – or are even direct copies of – rules that also feature at international level (laid down in an IMO convention). Over time, the EU measures have tended to extend beyond the global rules by

16 Eg. UNCLOS Articles 94, 211, 218 and 220.

17 See www.imo.org/en/About/Conventions/ListOfConventions/Documents/Convention%20titles%202016.pdf

18 International Code for Ships Operating in Polar Waters (IMO Doc. MEPC 68/21/Add.1 Annex 10, full text available at www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf). The Code signifies amendments to three main IMO Conventions: the International Convention for the Safety of Life at Sea (SOLAS); the International Convention for the Prevention of Pollution from Ships (MARPOL); and the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW). It entered into force on 1 January 2017.

19 For a list, see https://ec.europa.eu/transport/sites/transport/files/modes/maritime/safety/doc/maritime_safety_legislation.pdf

providing some regional 'added value', by advancing their entry into force, strengthening their enforcement within the Union, or sometimes by adding substantive requirements to the IMO rules.[20]

Even EU rules that merely copy the international standards are far from pointless, however. In this case, the added value of EU legislation is that it harmonises implementation across the Union. Irrespective of formal adherence to the international rule in question, it brings the international obligations into the realm of EU law,[21] and it significantly strengthens the legal tools available against member states that fail to implement the international rules.[22] The presence of EU rules in a given field also transfers the competence for dealing with other issues in that field from the member states to the Union itself, as well as in respect of future international negotiations on the topic concerned.

Flag states

As a matter of policy the EU has not generally favoured regulating international shipping by means of flag state rules. Requirements that only apply to ships flagged in member states involve the risk of subjecting these ships to a competitive disadvantage in relation to ships of other flags. In view of the ease with which ship operators may change the flag of their ships, such an approach involves a risk of 'out-flagging', which in turn would reduce both the impact of the requirement and the size of the EU's fleet. With respect to ships operating in the Arctic, the prospect of out-

[20] See H. Ringbom, *EU Maritime Safety Policy and International Law, (*Martinus Nijhoff Publishers, Leiden/Boston, 2008).

[21] Features such as the direct applicability/effect of EU law and its supremacy over national laws will strengthen the legal status of the rules concerned and widen the range of persons who may rely on them. This is particularly the case as EU rules will normally impose the obligations concerned directly onto the persons addressed in the conventions (such as ship masters, classification societies, companies etc.) without relying – as the IMO conventions do – on the flag state to implement these matters in their national systems.

[22] The Commission supervises the rules being complied with and may, if not, bring member states to court. Member states may even face lump-sum penalties for non-compliance with EU law requirements. See Treaty on the Functioning of the European Union (TFEU) Article 260.

flagging seems particularly real, as this type of trade supposedly involves a relatively low number of ships, which are specifically constructed and equipped for the trade.

However, while the EU rules that apply *exclusively* to ships flagged in a member states are relatively few, and usually target the administration rather than ships,[23] many EU acts *also* apply to this category, in addition to their focus on foreign ships operating in the coastal waters and/or ports of member states. Most EU rules that apply to ships flagged in member states do not include a geographic limitation of their applicability, although in some cases it follows from the nature of the requirements that their scope is limited to ships operating in, or in the immediate vicinity of, the EU.[24] In the absence of such a limitation, the rules for ships flagged in EU member states therefore apply wherever the ship in question operates, including in the Arctic. Thus, for example, the requirements to have proper insurance for maritime claims,[25] to have international safety management procedures in place,[26] or to use environmentally friendly anti-fouling paints on board ships' hulls,[27] all apply to ships flying the flag of an EU member state in the Arctic.[28] On the other hand, all of the EU flag state requirements which apply without geographical

[23] See notably Directive 2009/15 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administration requirements [2009] OJ L131 47; Directive 2001/25 on the minimum level of training for seafarers [2001] OJ L136/17; and Directive 2009/21 on compliance with flag state requirements [2009] OJ L131/132.

[24] This is the case e.g. with respect to Directive 2002/59 establishing a Community vessel traffic monitoring and information system [2002] OJ L 208/10 (hereinafter, the VTMIS Directive) and Directive 2000/59 on port reception facilities for ship-generated waste and cargo residues [2009] OJ L332/81.

[25] Directive 2009/20 on the insurance of shipowners for maritime claims [2009] OJ L131/128

[26] Regulation 336/2006 on the implementation of the International Safety Management Code within the Community [2006] OJ L64/1.

[27] Regulation 782/2003 on the prohibition of organotin compounds on ships [2003] OJ L115/1

[28] On the more complex question as to whether the EU's double hull requirements on oil tankers applied to EU flagged ships which did not trade in EU waters, see Ringbom note 19 above, at pp. 172–173.

limitation do implement widely accepted IMO rules, and therefore do not add completely new substantive requirements.

Coastal states

EU maritime legislation does not usually address foreign ships that merely pass through member states' waters without entering their ports. The main reasons are twofold. First, the law of the sea imposes quite strict limitations on the kind of rules that coastal states may adopt and enforce in their different coastal zones. Outside the territorial sea, it is essentially only those rules that have been adopted at international level which may then be adopted by member states, and even with those rules, there are very tight limitations on what kind of enforcement measures are permitted.[29] Second, enforcing such rules at sea is complicated in practical terms, as it involves complex, costly and potentially dangerous actions at sea.

There are a few exceptions to the general absence of coastal state requirements at EU level. Three EU directives extend to ships that are merely passing through the waters of the member states.[30] The emphasis of all three lies in events taking place in the coastal zones of the member states, which means that their applicability in an Arctic context is limited to the coastal waters of the EEA member states Norway and Iceland.[31] That in turn presumes that the geographical applicability of the directives

[29] See in particular UNCLOS Articles 21, 211 and 220.

[30] VTMIS Directive (n 23), Articles 8, 13 and 17; Directive 2016/802 relating to a reduction in the sulphur content of certain liquid fuels (codification), [2016] OJ L 132/58, Article 6. The scope of Directive 2005/35 on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences [2005] OJ L 255/11 as amended, extends, under its Article 3(1) to violations that have taken place in the coastal waters of member states and on the high seas.

[31] All Arctic states implement a 200 nm EEZ, but this type of zone has not been established around the Svalbard Archipelago.

from an EEA perspective has been specifically acknowledged,[32] which does appear to be the case.[33]

However, in normative terms, these requirements are not very demanding. The relevant requirements of the VTMIS Directive relate to ship reporting systems, ships' routing systems and vessel traffic services, and are closely linked to the rules and guidelines adopted for such systems by the IMO.[34] The discharge standards of Directive 2005/35 and sulphur in fuel requirements of Directive 2016/804 are similarly closely modelled on IMO rules, notably Annexes I, II and VI of MARPOL. Moreover, the main obligations of the latter directive concern 'Sulphur Emission Control Areas', which currently cover the North Sea and the Baltic Sea, but do not extend to Arctic waters.

Interestingly, all three directives to some extent even extend beyond member states' coastal waters, to the high seas. None of them, however, significantly affects rights and obligations in an Arctic context. First, the EU rules providing for sanctions for pollution violations specifically extend to violations in the high seas, but the main parts of the Arctic sea routes pass through the coastal waters of Russia or Canada. These

---

[32] The Agreement on the European Economic Area, ([1994] OJ L 1/1, as amended) guarantees the main elements of the internal market throughout the area. For an EU act to apply in the EEA, the act needs to be EEA relevant (i.e. belong to the substantive and geographical scope of the EEA Agreement). These elements were recently challenged by EEA states in connection with Directive 2013/30/EU on safety of offshore oil and gas operations [2013] OJ L 178/66. See e.g. C. Cinelli, 'Law of the Sea, The European Union Arctic Policy and Corporate Social Responsibility', 30 A. Chircop *et al.* (eds.) *Ocean Yearbook* (Brill/Nijhoff, Leiden/Boston 2016) 245–254, at p.247 *et seq.*

[33] According to a Norwegian Government Report (White Paper), entitled 'The EEA Agreement and Norway's other agreements with the EU', the EEA Agreement does not apply to the Norwegian EEZ or continental shelf, unless specifically extended to those areas "if Norway, after an assessment of a particular matter, decides to assume specific EEA obligations outside its territory" (p. 13). Several EU maritime instruments which extend beyond the territorial sea have been incorporated into the EEA Agreement and hence apply in these areas. More recent instruments outside maritime regulation have met some resistance, however. See e.g. the oil and gas directive referred to in the previous footnote and Directive 2008/56 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] L164/19 as referred to in the White Paper, Meld. St. 5 (2012–2013), at p. 15 (Available at www.regjeringen.no/en/dokumenter/meld.-st.-5-2012-2013/id704518/)

[34] VTMIS Directive (n 23), Articles 5, 7 and 8.

rules have a specific foundation in UNCLOS, but since they are to be implemented exclusively by port state authorities, they will be discussed in the next section. Second, the sulphur in fuel directive only extends beyond the coastal states' waters in an optional form, through a vague enforcement provision referring to enforcement measures "in compliance with international maritime law".[35] Third, Article 19 of the VTMIS directive indirectly obliges member states to take measures that are "necessary to ensure the safety of shipping ... and to protect the marine and coastal environment" following incidents or accidents, even if that were to involve areas beyond their coastal waters. This follows from the reference to "appropriate measures consistent with international law", in combination with the well-established right of states to take intervention measures on the high seas.[36] On the other hand, this obligation includes significant flexibility for the coastal state and is in any case itself linked to hazards for the coastal states, and hence only applies to EU/EEA member states with an Arctic coastline, i.e. Norway and Iceland.

Port states

The bulk of the EU's shipping rules apply to ships, independently of their nationality, which (voluntarily) enter a port of a member state. Many of these rules implement international rules and hence serve to give effect by strengthening and harmonizing the enforcement of international (IMO and ILO) rules throughout the entire Union and EEA.

The most important EU measure aimed at enforcing international rules is the port state control (PSC) directive, which establishes a very elaborate control regime for any ship visiting EU/EEA ports, together with related databases, information tools, training programs etc.[37] Even if the PSC merely enforces international rules, it represents a very powerful tool for ensuring that the rules are implemented in practice. The entry

35 Directive 2016/802 (n 29), Article 6(4).

36 As established in the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Damage and UNCLOS Article 221.

37 Directive 2009/16 on port state control OJ [2009] L131/57.

into force of the Polar Code in 2017 has provided increased opportunities to implement requirements that specifically apply to Arctic shipping through PSC.

The enforcement measures taken in EU ports in cases of non-compliance have been strengthened over time and now include quite drastic consequences, such as the "banning" of a ship from an entire region's ports.[38]

Apart from enforcing international rules in EU ports, some of the EU requirements have included EU standards (which go beyond their international counterparts) to be met by any ship entering an EU/EEA port. Many of those EU requirements relate to matters that are 'static' and do not change during the voyage of ships. In these cases, port state requirements may have a considerable impact on shipping worldwide, including in the Arctic. If, for example, an oil tanker entering an EU port is required by EU rules to be of a double hull construction, then even if those rules do not apply elsewhere,[39] tankers that intend to visit EU port will have to comply, wherever they operate. Other examples of regional EU port state requirements with similarly widespread effects include carriage requirements of voyage data recorders for certain categories of ships[40] and the early application of some international instruments, such as the AFS convention.[41]

The EU has also imposed requirements of a 'non-static' (operational) nature on foreign ships visiting its ports. Examples include reporting requirements, prohibitions on illegal discharges and fuel quality requirements. The geographical extent of the requirements needs to be mentioned here, but depending on a variety of factors which are discus-

38 *Ibid*., Article 16, and similarly in section 4 of the 1982 Paris Memorandum of Understanding on port state control, as amended.

39 This used to be the case on the basis of the requirements of EU Regulation 1726/2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers OJ [2003] L326/28 until the 2003 amendments to MARPOL Annex I, Regulation 20 entered into effect in July 2005.

40 VTMS Directive n 23, Article 10 and Annex II(2).

41 Regulation 782/2003 on the prohibition of organotin compounds on ships, OJ [2003] L115/1.

sed more closely in the port states section below, this does not exclude the possibility that such requirements may extend beyond the coastal waters of the port states, including to Arctic waters. The best existing example is probably directive 2005/35, which specifically obliges port states to consider instituting proceedings with respect to violations of MARPOL Annexes I and II thattake place on the high seas. The relevance of this requirement in an Arctic context is limited by the fact that the directive does not extend to the coastal waters of other states, while the key maritime routes in the Arctic specifically run through the coastal waters of Canada and Russia.

A more recent example of how the EU has used port state jurisdiction for promoting concerns that extend beyond its own geographical borders is the regulation for monitoring, reporting and verification of CO2 emissions by ships entering EU ports, that was adopted in 2015.[42] The Regulation introduces obligations for ship owners to plan, monitor and report to the EU their estimated CO2 emissions and it includes strong enforcement measures for non-compliers, including – as a measure of last resort – the banning of the ship in question from all EU ports.[43] The regulation has proven controversial as it is commonly considered to be the first step towards a future regional market-based regulatory regime for GHGs in shipping,[44] which also raises several difficult questions of international law.[45]

---

42 Regulation 2015/757 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, OJ [2016] L 123/55.

43 *Ibid.*, Article 20(3).

44 Along these lines, the European Parliament, in its first reading report on the revision of the EU Emissions Trading System of 15 February 2017, demanded that the IMO should have a system comparable to the EU ETS system available for global shipping by 2021. If that is not put in place, then shipping shall, according to the Parliament, be included in the European ETS as from 2023. See EP Doc. P8 TA(2017)0035, proposed new chapter IIa (articles 3ga-3ge).

45 See H. Ringbom 'Global Problem—Regional Solution? International Law Reflections on an EU CO2 Emissions Trading Scheme for Ships' (2012) 26(4) *International Journal of Marine and Coastal Law (IJMLC)* 613-6

Conclusion

So far, at least, the EU's shipping legislation has not made much impact in the Arctic. Current legislation has not been developed with the Arctic in mind and includes no references to the Arctic area. More generally, too, the existing body of EU shipping rules adds only few obligations to those that already apply through the international rules. Some EU rules apply to ships flying the flag of EU/EEA member states irrespective of their location and some rather light operational EU requirements may extend to ships transiting the territorial seas and EEZs of Norway and Iceland. Requirements for ships entering EU/EEA ports have formed the main mechanism for the EU to implement its maritime policies, but even in this area, the more important discrepancies between EU and IMO requirements that emerged in the beginning of the millennium have largely been eradicated through subsequent flexibility on both sides. However, as is illustrated by the recent legislative activities in relation to greenhouse gas reductions from ships, this remains a potential mechanism for implementing particularly important regional rules, if global progress is not satisfactory.

Jurisdictional opportunities and restraints

General

The brief review given above of the present applicability of EU rules in the Arctic already indicates that there is some scope for a regional regulatory body, such as the EU, to influence shipping outside its own region. In this chapter, that scope will be explored in greater detail. What, in other words, would be feasible for the EU to do if it decided to regulate Arctic shipping more actively? What are the jurisdictional opportunities and limitations for potential EU rules in this field? In other words, is the EU's

cautious policy on Arctic shipping dictated by legal necessity, or is there scope for a more assertive stance? The availability of legal options to the EU is necessary for knowing the limitations on the EU's ability to act and – hence – for assessing its Arctic shipping policy in political terms.

The starting point for finding the answers to those questions is, as has been highlighted by the EU itself, the international law of the sea as codified in UNCLOS.[46] The five Arctic coastal states have similarly emphasised that the UNCLOS framework "provides a solid foundation for responsible management by the five coastal States and other users of this Ocean through national implementation and application of relevant provisions" and "therefore see no need to develop a new comprehensive international legal regime to govern the Arctic Ocean".[47]

This branch of international law is particularly stable for the moment, due to the high authority and broad formal acceptance of UNCLOS. The convention has 168 contracting parties, including the EU and all its member states. The same rights and obligations apply to the EU as to any other party to the convention; being an intergovernmental organization offers no jurisdictional advantages or disadvantages as compared to individual state parties.[48]

The on-going negotiations to establish a new implementing agreement to UNCLOS dealing specifically with the protection of biodiversity

---

[46] This approach features in all documents listed in note 2, as well as in the recent Ocean Governance Communication referred to above at notes 10–12.

[47] The 2008 "Ilulissat Declaration", available at www.oceanlaw.org/downloads/arctic/Ilulissat_Declaration.pdf.
The Arctic coastal states' emphasis on the adequacy of UNCLOS for Arctic governance had its background in the growing worldwide interest in Arctic resources, uncertainty over the precise maritime borders that apply in the Arctic and growing calls for a special treaty regime for the Arctic Ocean, similar to the one governing Antarctica.

[48] UNCLOS, Annex IX. When acceding to UNCLOS, the EU provided a declaration on the division of competences on the basis of Annex IX (see Council Decision 98/392 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof 2008] OJ L 179/1). That declaration has not been updated and no longer reflects the internal division of competence between the EU and its member states.

beyond national jurisdiction may certainly be of relevance for the Arctic,[49] but it is not expected to fundamentally alter the rights and obligations as laid down in UNCLOS.[50]

Flag states

The main responsibility for ensuring the safety and environmental performance of ships, irrespective of the area concerned, lies with the ship's flag state. UNCLOS imposes a number of minimum criteria on flag states' legislation, by reference to the "generally accepted" international rules and standards.[51] For example, UNCLOS requires flag states to adopt such measures regarding the construction, equipment and seaworthiness of ships as are necessary to ensure safety at sea.[52] Equally, under the IMO conventions, the agreed international standards, which apply irrespective of where a ship navigates, normally represent minimum standards for flag states. From an international law point of view, it is accordingly uncontroversial to complement or exceed the international (IMO) requirements, by imposing requirements that apply to ships flying the flag of EU/EEA member states when operating in the Arctic.

In practice, the effect of EU-based flag state requirements could be significant. By tonnage, roughly a fifth of the world's fleet flies the flag

[49] In its resolution 69/292 of 19 June 2015, the UN General Assembly decided to develop an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. According to para. 2 of the resolution, "negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology". For subsequent progress, see www.un.org/depts/los/biodiversity/prepcom.htm

[50] The 'package' referred to in the previous note did not include issues related to navigation of commercial ships and alterations of the jurisdictional regime for navigation have not been on the agenda at the first two meetings of the Preparatory Committee and therefore seem unlikely to feature prominently in the potential future agreement.

[51] UNCLOS, Articles 94(5) and 211(2).

[52] UNCLOS Article 94(3).

of an EU/EEA member state,[53] though a somewhat smaller proportion appears to apply to ships operating in the Arctic.[54] However, as already noted above, stringent flag state rules run the risk of causing reflagging of ships outside the EU, which would defeat the purpose of the rules and generate a number of additional concerns. The limits on how far the EU (or any individual state) may go in imposing additional requirements for its own ships operating in the Arctic are not therefore legal in nature, but rather formed by the practical consequences and risks to which demanding flag state rules may give rise.

Coastal states

Alongside flag states' jurisdiction, UNCLOS offers certain prescriptive and enforcement powers to coastal states, in the form of jurisdictional rights (rather than obligations) over foreign ships that transit their waters. The balance between the coastal and maritime interests differs in respect of each maritime zone, depending on the geographical proximity of the zone in question to the coastal state.

In brief, the general legal possibility for a coastal state to impose its own national rules on foreign ships navigating in its coastal waters is mainly limited to ships within its own internal waters.[55] Beyond that, national rules are permissible only to the extent that they do not relate to the design, construction, equipment and manning of ships within the territorial sea, and even such rules must not have the practical effect of denying or impairing foreign ships' right of innocent passage.[56] Beyond the territorial sea, unilateral coastal state legislation is essentially ruled out.[57] However, rules that give effect to "generally accepted international rules and standards", in particular if they are established "through the

53 See e.g. www.ecsa.eu/images/files/STAT_ECSA_2013_4.pdf.

54 29 out of the 207 transits of the Northern Sea Route in 2011–2015 were made by ships flagged in an EU/EEA member state. See www.arctic-lio.com/nsr_transits.

55 UNCLOS Article 2(1).

56 UNCLOS Article 24(1)(a).

57 UNCLOS Article 211(5), (6).

competent international organization", can be established by the coastal states in their EEZ, but not beyond that. In addition to these limitations, a range of other UNCLOS provisions limit the ability of states to take enforcement measures against ships that fail to comply with the rules while in transit through their coastal waters.[58]

However, in the Arctic context an additional UNCLOS article specifically dedicated to 'ice-covered waters', Article 234, does admit a broader environmental prescriptive and enforcement jurisdiction for coastal states for environmental purposes.[59] Even if several of the conditions imposed by the article are unclear and subject to divergent views in legal literature,[60] it is clear that the article – by removing the reference to international rules – significantly strengthens the jurisdiction of coastal states in the Arctic. So far, Canada and Russia have made use of this jurisdiction by adopting special legislation for Arctic shipping,[61] and Denmark has

58 See e.g. Articles 220 and 24(1).

59 Under Article 234, coastal states specifically "have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence".

60 See e.g. K. Bartenstein: 'The "Arctic Exception" in the Law of the Sea Convention: A contribution to safer Navigation in the Northwest Passage' (2011) 42(1-2) *Ocean Development & International Law* (2011) 22–52 at p. 24 and A. Chircop: 'The Growth of International Shipping in the Arctic: Is a regulatory Review Timely?' (2009) 24(2) *IJMLC* 355–380 at p. 372. See also E.J. Molenaar 'Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region' (2014) 45(3) *Ocean Development & International Law* 272–298 at p. 276, T. Henriksen, 'Protecting Polar Environments: Coherency in Regulating Arctic Shipping', in R. Rayfuse (ed.) *Research Handbook on International Marine Environmental Law* (Edgar Elgar Publishing, Cheltenham, 2016) 363–384 at pp. 380–381.

61 Arctic Waters Pollution Prevention Act, R.S.C. 1985, c. A-12 (AWPPA), available at http://laws-lois.justice.gc.ca/eng/acts/A-12/. The Russian Federal Laws from 2012 and 2013 related to Governmental regulation of merchant shipping in the water area of the Northern Sea Route are available at www.arctic-lio.com/nsr_legislation.

indicated its preparedness to use the jurisdiction provided under Article 234 for Greenland's coastal waters.[62]

In the absence of Arctic coastlines of the EU member states,[63] the option of using this article is limited to the EEA member states, Norway and Iceland. However, neither country can rely on it for climatic reasons, in view of the article's condition that the waters concerned are ice-covered for most of the year, a condition which is not met by Iceland or (mainland) Norway.[64]

Port states

General

In light of the above, the principal option that remains available to the EU for regulating shipping in the Arctic would be in the port state capacity, which is also the jurisdictional mechanism preferred by the EU for regulating shipping more generally.[65] Roughly one third of the ships making use of the transpolar routes today have their point of departure or arrival in the EU,[66] and it can be expected that if trans-Arctic traffic were to boom, one of the end ports would very often be an EU/EEA member state.

---

62 See e.g Kingdom of Denmark Strategy for the Arctic 2011–2020 http://naalakkersuisut.gl/~/media/Nanoq/Images/Udenrigsdirektoratet/100295_Arktis_Rapport_UK_210x270_Final_Web.pdf, at p. 18.

63 Greenland belongs to EU member state Denmark, but has exited from the EU and is hence not subject to EU laws; rather, it is associated with the Union as one of the overseas countries and territories (OCTs) with a specific Partnership Agreement governing the mutual relationships. See Council Decision 2014/137/EU on relations between the European Union on the one hand, and Greenland and the Kingdom of Denmark on the other [2014] OJ L76/1.

64 The exercise of jurisdiction based on Article 234 by Norway in the Svalbard Archipelago would be justified from a climate point of view, but would have to be subject to the 1920 Treaty concerning the Archipelago of Spitsbergen.

65 See Ringbom (n. 19) at chapter 5.

66 According to statistics provided by the NSR Information Office (www.arctic-lio.com/nsr_transits), 36 per cent of the transits that were not heading for Russia in 2011–2015 were destined for a European port.

By contrast to the detailed regime for coastal states' jurisdiction over ships, UNCLOS does not provide much guidance on the extent to which (port) states may impose requirements on foreign ships that visit their ports. While it is widely acknowledged that ships have no general right of access to ports and that the port state may accordingly impose conditions on access,[67] the more precise limitations as to how port states may exercise their jurisdiction are not clear. The question is particularly unsettled with respect to a port state's jurisdiction over matters that take place beyond its own maritime zones.[68]

Options

Using port state jurisdiction as a basis for the EU to regulate Arctic shipping offers several possibilities. Even without any change of legislation, it is feasible to target Arctic shipping through special attention to port state control, such as through 'concentrated inspection campaigns', for ships coming from or heading towards Arctic waters. More permanent targeting arrangements that raise inspection priorities for ships operating in the Arctic would probably necessitate a change to the EU's PSC Directive,[69] but even such measures would not be problematic in terms of international law. The strengthening of the PSC at EU-level could be carried out in close cooperation with the Arctic coastal states, as all of them participate in, or collaborate closely with, the Paris MOU,[70] which is very closely calibrated with the EU's PSC legislation.

---

67 See e.g. UNCLOS Articles 25(2) and 211(3).

68 See e.g. Ringbom n 44, R. Churchill, 'Port State Jurisdiction Relating to the Safety of Shipping and Pollution from Ships – What Degree of Extraterritoriality?' (2016) 31(3) *International Journal of Marine and Coastal Law (IJMCL)* 442–469.

69 N 36.

70 Paris Memorandum of Understanding on Port State Control, 1982, latest amendment from 27 May 2016. See www.parismou.org. The text of the MOU does not include a geographical scope of coverage, but operates with the (undefined) terms 'region of the memorandum' or 'Paris MOU region'. Under section 9.2, the MOU is open to participation for maritime authorities of "a European coastal State and a coastal State of the North Atlantic basin from North America to Europe". Maritime authorities of all Arctic states except the US are already signatories to the Paris MOU, and there is

The PSC Directive provides an administrative tool to enhance maritime safety and environmental protection, but port states could go further by imposing judicial penalties for violations of the international rules in the Arctic. For pollution discharge violations, this could also be done without further regulatory change, as there is a specific legal basis for such extra-territorial jurisdiction in UNCLOS. Article 218 permits port states to institute proceedings in respect of violations of international pollution rules (i.e. the MARPOL standards), even if there is no link between the spill and the state in question. This possibility has already been implemented in Directive 2005/35,[71] as far as oil and noxious liquid substances are concerned, and could easily be expanded to cover other forms of discharges regulated by MARPOL, such as garbage and sewage. While this Directive extends to the high seas, it does not include discharges made in other states' coastal waters. This is a crucial omission in an Arctic context, given that both sea routes largely run through Canadian or Russian coastal waters. However, on the basis of UNCLOS' article 218(2), such discharges could also be subject to proceedings in a port state within the EU, if so requested by the coastal state(s) concerned or by the ship's flag state. A more practical concern relates to the collection of information and evidence of unlawful spills in remote locations. Existing satellite-based remote detection systems, such as EMSA's 'CleanSeaNet' system,[72] are optimised for oil discharges only and even those are difficult to detect in icy conditions.[73]

The examples given above concern the implementation and enforcement of *international* rules in EU ports. It has already been noted that shipping is heavily regulated at international level and that a further strengthening of the standards has recently been agreed through the

close cooperation with the US Coast Guard. There are thus no immediate legal hurdles for extending the application of the regime to the Arctic region.

71 Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L 255/11.

72 See www.emsa.europa.eu/csn-menu.html

73 Hänninen & Sassi, 'Acute Oil Spills in Arctic Waters – Oil Combating in Ice' Study, VTT, 2010, available at www.uscg.mil/iccopr/files/Acute_Oil_Spills_in_Arctic_Waters_11JAN2010.pdf, at pp. 17–19.

adoption of the Polar Code. In view of this, and of the likelihood that a significant share of Arctic traffic in the future will have an EU/EEA port as a point of departure or arrival, such measures may be expected to be quite effective for ensuring that high standards are met by the ships that operate in the Arctic.

Nonetheless, the EU might also wish to consider implementing less widely accepted or even unilaterally imposed rules for Arctic shipping. One possibility, which has been used by the EU in the past as a port state requirement, is to require the implementation of international rules that have been adopted, but not yet widely ratified, by ships visiting EU ports.[74] In an Arctic context, the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments could be a case in point.[75] It entered into force in September 2017, but at first only applies to flag states representing some 35% of the world's tonnage. Within the EU, the Convention has only been ratified by less than one in three EU/EEA member states.[76] Requiring ships that operate in the Arctic and enter EU ports to have the necessary equipment on board to prevent the introduction of non-indigenous species through their ballast waters, could be one way of speeding up the implementation of this convention.

Another, more far-reaching, alternative would be to implement rules that have been adopted only in the form of recommendations at the international level. Here, too, past EU shipping regulation offers examples.[77] In an Arctic context, the Polar Code's Part B includes several potential examples, including a ban on the carriage and use of heavy grades of oil

---

74 See notes 25 and 26 above.

75 See also N. Liu 'The European Union's Potential Contribution to Enhanced Governance of Arctic Shipping' (2013) 73(4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 705–733 at p. 727.

76 In December 2016, 10 out of 31 EU/EEA member states had ratified the convention. See www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx

77 See e.g. Council Regulation 2978/94 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers, OJ [1994] L319/1 and Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers OL [2002] L13/9.

in the Arctic,[78] which has also been repeatedly mentioned as a potential EU measure by the European Parliament.[79]

More controversially still, the EU could implement rules for Arctic shipping that have no counterparts at all at global level. A hypothetical example could be EU-based requirements for ships operating in the Arctic to have specific equipment on board to reduce emissions of soot and 'black carbon'; requiring ships operating in the Arctic to have a special extended form of insurance to cover the greater risks; mandatory contributions to an EU-based emission trading system for reducing greenhouse gas emissions, etc. An example of an 'operational' requirement could be an EU-based 'no go' area for commercial ships in the high seas area of the Arctic, as a means of implementing the Arctic MPAs, as proposed by the recent ocean governance and Arctic policy documents.[80]

Legal limits – some considerations

The legal limits on how far the EU, as a group of port states, could go in requiring ships operating in the Arctic to comply with its own requirements are not clear. The overall assessment depends on a series of considerations, but generally speaking, a weaker link to international rules, or to the territorial interests of the EU itself, will normally also weaken the legal case for the EU's regulatory jurisdiction. Some relevant considerations are mentioned below.

First, the substantive nature of the rule in question is relevant. In particular, whether a port state may legally assert jurisdiction depends at least in part on whether the rules in question relate to 'static' features of

78 But see also the Polar Code, n 17, Part II-B, section 1.1 recommending that ships apply its rules when operating in Arctic waters. See also Liu n 74 at pp. 714–15 and the 2009 Arctic Marine Shipping Assessment (AMSA), n 36 60, considering the prospect of banning the carriage of heavy grades of oil and of discharging other hazardous substances as potential future IMO measures to protect the Arctic environment. The 2009 AMSA and related follow-up work undertaken by the Arctic Council's working group Protection of the Arctic Marine Environment (PAME) are available at www.pame.is/index.php/projects/arctic-marine-shipping/amsa.

79 See note 4 above.

80 See text at ns 9–11.

the ship or to questions of operation or behaviour.[81] In the former case, e.g. ice-class or equipment requirements for ballast water treatment, it is easier to find a jurisdictional basis for the requirement, given that any violation of the requirement will 'follow' the ship and hence also occur within the port where the state's jurisdiction is undisputed. Conversely, it is more difficult for a port state to assert jurisdiction in respect of (non-static) operations or behaviour that occur outside its coastal waters, where it has no prescriptive jurisdiction. Potential examples include an obligation to *use* certain equipment or procedures beyond the port state's coastal waters, a zero discharge policy on oil discharges[82] and rules relating to 'grey water' discharges from ships in the Arctic.[83] Discharge rules without an international counterpart will not be covered by the jurisdiction provided to port states under UNCLOS article 218(1). Potential, though less certain, alternative bases for jurisdiction could be one of the accepted bases for extra-territorial jurisdiction under general international law or merely the requirement for a sufficient 'substantive connection' between the matter under regulation and the port state.[84]

Second, the choice of enforcement measures to make the requirement effective plays a role. For example, refusing a ship the right of access to a port (or other losses of entitlement to which the ship or its flag state has no specific right) must be presumed to require a less solid prescriptive basis than punitive enforcement measures, such as fines and other types of sanctions.[85] A measure's legal basis may be easier to establish where the consequence of non-compliance is denial of (subsequent) access to the port state. Measures of this type are particularly effective in a regional

---

81 See e.g. Churchill n 67, pp. 450 *et seq*.

82 See e.g. Canadian Arctic Shipping Pollution Prevention Regulations (ASPPR) C.R.C., c. 353, s. 29. Available at http://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._353/

83 This matter is not regulated in MARPOL, but the ASPPR (n 82), s. 28 prohibits the discharge of any waste, with the exception of untreated sewage, in the Arctic waters.

84 See in particular B. Marten 'Port State Jurisdiction, International Conventions and Extraterritoriality: An Expansive Interpretation' in H. Ringbom (ed.) *Jurisdiction over Ships – Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff, Leiden/Boston, 2015) p. 105.

85 E.J. Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38(1-2) *Ocean Development & International Law* 225–257 at p. 229.

context, such as in the EU, where the refusal could be jointly implemented by all EU/EEA states, thus extending the ban to all ports in the region. Moreover, coordinated implementation of port state jurisdiction among a larger group serves to avoid the risk of 'ports of convenience', whereby ship operators could evade the requirements by simply choosing another port of destination.

Third, other types of legal obligations may limit a state's options to exercise port state jurisdiction against foreign ships. First, treaty obligations may impose such limitations. While this is not a common feature in the IMO conventions, other areas of international law, notably international trade law, may impose important limitations on port states' freedom in this respect.[86] Second, more general international law principles impose certain general reasonableness criteria, which may also serve as limitations. Port entry requirements may, for example, not be discriminatory or constitute an abuse of right by the port state.[87] The measures must be adopted in good faith and must be proportional to their objectives. In this respect it has been suggested that the objective of a measure in itself should play a role in its legal justifiability, and that a measure that aims at protecting common values or resources should enjoy a stronger claim to legality.[88] Measures aimed at protecting the Arctic against the risks involved with shipping are likely to score highly in such an assessment. Also, measures that serve to implement standards with an international basis (e.g. in the form of non-binding measures, or international rules that have not yet entered into force) will be easier to justify than purely unilateral port state requirements.

In conclusion, port state measures, unlike coastal state requirements, are not constrained by precise standards or clear legal limitations. Gene-

[86] See Churchill n 67, pp. 450 *et seq*. See also A. Serdy, 'The Shaky Foundations of the FAO Port State Measures Agreement: How Watertight Is the Legal Seal against Access for Foreign Fishing Vessels?' (2016) 31(3) *International Journal of Marine and Coastal Law (IJMCL)* 422–441.

[87] UNCLOS Article 300.

[88] See e.g. S. Kopela, 'Port-State Jurisdiction, Extraterritoriality, and the Protection of Global Commons', (2016) 47(2) *Ocean Development & International Law* 89–130 and C. Ryngaert & H. Ringbom 'Introduction: Port State Jurisdiction: Challenges and Potential', (2016) 31(3) *International Journal of Marine and Coastal Law* p. 379–374.

rally speaking, port state requirements appear to work best – in a practical sense as well as in terms of legal justification – for 'static' requirements. Yet the lawfulness of any requirement will need to be assessed based on all the interests involved, including those of ship operators in the region and of the Arctic coastal states, depending on the design and effects of the individual requirement. Nevertheless, it is clear that port states have considerable latitude in implementing such requirements and hence that the EU also has some regulatory leeway when implementing port state requirements aimed at improving safety and protecting the environment in the Arctic, should it wish to do so.[89]

Conclusion

International law offers more jurisdictional opportunities for the EU to regulate shipping in the Arctic than has so far materialised in existing legislation or envisaged in recent EU policy documents. In an Arctic context, there are no signs of jurisdictional challenges by the EU of the kind that have been commonplace in its 'normal' shipping legislation, usually following major pollution accidents.

Possibilities exist for targeting Arctic shipping, even without a change of regulation, notably in the field of implementing and enforcing the international standards in EU ports. This option generates significant potential, not least since the global rules for Arctic navigation have recently been strengthened through the adoption of the Polar Code. Moreover, the solid legal basis of the EU's port state control regime allows EU member states acting collectively to implement very powerful enforcement measures against ships which fail to comply with the rules. Violations of international pollution rules that have taken place in the Arctic can similarly be enforced by port states on the basis of the unusually broad UNCLOS Article 218, but in this case, close participation by the (Arctic) coastal state concerned is a precondition for its successful implementation.

[89] Generally, see B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer, Heidelberg 2014), Molenaar n 85 and Ringbom, n 19, section 5.1.

Requirements that are more independent from the international rules require a different legal justification. However, even such rules could be adopted for the Arctic, the jurisdictional connection being that ships that operate in the Arctic in the future will often either fly the flag of an EU/EEA member state or travel to or from an EU/EEA port. In the former case, the limits of the jurisdiction are purely political, while the precise jurisdictional limits of how far the port state(s) can go in this area are relatively unclear.

Concluding remarks on the EU and Arctic shipping

The EU's relationship to the Arctic is often problematic, as is illustrated by a number of other current articles on this topic. The relationship involves many types of political issues at different levels, and there is often a mismatch between the policy priorities of the Arctic countries and the role that the EU sees for itself in the region. As a relatively new player on the Arctic policy scene, without a policy tradition to lean back on or a direct geographical link that would justify its seat at the negotiation table, the EU has struggled to find its position in international Arctic cooperation.

Internally, too, the coordination of Arctic issues within the EU is complicated by the fact that 'Arctic issues' cut across a series of EU policy sectors (trade, energy, environmental protection, fisheries, shipping, security etc.) which are guided by very different principles, competences and traditions, and, hence, present variable preparedness for elaborating specific Arctic dimensions of the EU policies. In addition, in the absence of 'hard' legislation in the field, different EU institutions have their own policy ambitions which will not always match and may also result in confused messages as to what the EU's Arctic policy should be.

Equally, the study of the EU Arctic policy for a single relatively well-established sector like shipping, reveals a number of competing interests and policy ambivalences.

On the one hand the EU's maritime safety and environmental policy to date has been distinctively coastal in nature, clearly emphasising environmental and coastal concerns over shipping interests and navigational rights. In view of this and of the general emphasis of sustainability and environmental values of the Arctic in the policy documents, one might expect that the inclination of the EU would be to place Arctic shipping under a particularly heavy regulatory burden. This has not been the case, and the review of jurisdictional options and limitations above illustrates that the absence of an Arctic dimension to the EU's shipping regulation cannot be explained solely by the Union's relative geographical remoteness from the Arctic. Even in the absence of an Arctic coastline, the EU has legal possibilities for regulating Arctic shipping, should it wish to do so.

On the other hand, it might be considered that the EU's caution in respect of Arctic shipping has to do with its navigational interests in the area. Europe's economic interests in Arctic shipping are significant, both due to its focus on Arctic resources and the benefits provided by shorter shipping routes. From this perspective, the Union's interests could be expected, apart from ensuring that all shipping operations that take place in the region are safe and environmentally sustainable, to be on ensuring the navigational concerns and passage rights of ships and on achieving general legal certainty for shipping operations in Arctic waters.

So far, however, the EU has also not taken an active stance on issues relating to Arctic navigation. It has not, for example, adopted a view on key issues of maritime delimitation, which are critical for determining the scope of the navigational rights, in both of the principal navigational routes in the Arctic, i.e. the 'Northern Sea Route' along the Russian coastline and the North-West Passage in Northern Canada. There are still legal uncertainties as to which maritime zones are involved in both

routes, as both coastal states claim sovereignty over parts of their Arctic waters based on historical title.[90]

Despite the contested nature of these Arctic maritime claims, the EU has not taken a firm view on either of them.[91] Nor has it made a pronouncement on the regulatory reach of Article 234, which is equally relevant for understanding the extent of Arctic coastal states' jurisdictional rights,[92] or on the relationship between that article and the regime for transit passage through straits used for international navigation under UNCLOS Part III, Section 2. The latter question would be relevant if the Canadian and Russian straight baseline claims were held to be invalid and key parts of the Arctic sea routes were hence considered to be international straits through the Canadian and Russian territorial seas.[93]

[90] The Canadian system of straight baselines around the Arctic islands was established in 1985 and effectively causes large parts of the Northwest Passage to lie within Canadian internal waters, where Canada has full sovereignty. Similarly, Russia has established straight baselines to enclose some of the Russian Arctic straits that form part of the NSR and that would otherwise form part of the territorial sea. See e.g. R. D. Brubaker, 'Straits in the Russian Arctic', (2001) 32(3) *Ocean Development & International Law* 263–287. See also the laws referred to in n 60.

[91] The Canadian straight baseline claim is contested by many parties, including the US and several EU member states who lodged diplomatic protests when Canada established the baselines, regarding them as inconsistent with international law and rejecting Canada's claim that historical title could provide an adequate justification for them. See e.g. Ted L. McDorman, *Salt Water Neighbors, International Ocean Law Relations Between the United States and Canada*, (Oxford University Press, Oxford 2009) at pp. 236–244 and Molenaar (n 59) p. 275. See also J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims* (Brill Nijhoff, Leiden/Boston 2012, 3rd ed.) at p. 112, which includes an excerpt from a communication by several European Community member states to Canada dated 9 July 1986, in which the EC member states conclude that they "cannot … in general acknowledge the legality of these baselines".

[92] The only recent international discussion on the reach of Article 234 in relation to Arctic Shipping was a debate at the IMO's Maritime Safety Committee in 2010 on the legality of Canada's mandatory 'Northern Canada Vessel Traffic Services Zone Regulations' (NORDREG). The debate centred on whether or not Canada was obliged to seek IMO approval before making NORDEG mandatory. Before this debate, which was ultimately inconclusive, certain EU member states had issued *Notes Verbales* to Canada. The European Commission, however, declined to do so, reportedly due to a lack of certainty as to whether Canada's action warranted a diplomatic protest and because of potential broader implications for the EU's Arctic policy. See Molenaar (n 59) p. 278

[93] While it seems plausible to argue, as Molenaar has done (n. 59, p. 275), that the regime for ice-covered waters constitutes *lex specialis* over the straits regime, states with large

It is possible, of course, that the absence of an active Arctic shipping policy by the EU is due to the consideration that there is no need for a regional approach in this field and that many of the key matters are better and more efficiently regulated at global level. Indeed, global measures adopted by the IMO or another competent international organisation would no doubt score higher than EU rules in terms of both coverage and political legitimacy. Indeed, many of the issues referred to in the policy documents (such as securing passage rights and navigational freedoms) even require global measures to have effect.

However, by failing to set out its Arctic priorities in a concrete manner, the EU also reduces its chances of making an impact at global level. One of the key strengths of the EU lies in its capacity to exert pressure on organisations to implement their rules in a harmonised manner, and to act on its own if required to avoid results that are unacceptable from the point of view of its own policy objectives. It is at international negotiations at the IMO or, even more so, in UN-based negotiations on jurisdictional rules, such as the on-going negotiations for the BBNJ Agreement, that the EU has greatest possibility for influencing international shipping laws and policies.

In view of this, the limited substantive direction in the EU's shipping policy for the Arctic is unfortunate. The most recent Arctic policy documents issued by various EU institutions include no reference to regulatory initiatives or to substantive targets or ambitions, either at regional or global level. This not only contrasts with the EU's own vision – as set out in the policy documents – of its role in the Arctic and general ocean governance,[94] but also makes it more difficult to make

navigational interests in those areas have sometimes taken an opposite approach. See Roach and Smith (n 91) at pp. 318–320, 478–479 and 494. See also the position paper on Arctic shipping issued by the International Chamber of Shipping (ICS) in 2014: "ICS believes that the UNCLOS regime of transit passage for straits used for international navigation (as codified in Part III of UNCLOS) takes precedence over the rights of coastal States under Article 234". Available at www.ics-shipping.org/docs/default-source/resources/policy-tools/ics-position-paper-on-arctic-shipping.pdf. However, the paper provides no further justification for this belief.

[94] See text at note 13 above. See also *ibid*. at p. 5: "Action by the EU and its Member States needs to be more 'joined-up' across external and internal policies. Their combined

a substantive impact in the relevant international fora. The failure to indicate its policy ambitions or priorities for Arctic shipping – and the absence of any reference to its preparedness to use its own regulatory instruments for this purpose – hence represent a missed opportunity for the EU to play a key role in shaping the future of one of the Earth's most unique and vulnerable regions.

weight will significantly increase the potential for positive change. The EU should ensure coherent action between its internal and external policies in accordance with its commitment to enhance policy coherence for sustainable development.".

UNCLOS as a system of regulation and connected methodology – some reflections

By professor MSO Kristina Siig,
University of Southern Denmark
and professor MSO Birgit Feldtmann,
Aalborg University

Contents

1 Introduction

According to its preamble, the drafting of the United Nations Convention of the Law of the Sea (UNCLOS) was "*[p]rompted by the desire to settle … all issues relating to the law of the sea*".[1] This is a direct reference to the mandate of the Third UN Conference on the Law of the Sea (1973–1982), which led to the adoption of UNCLOS.[2] The UN General Assembly Resolution 3067/1973 stated that "*the mandate of the Conference shall be to adopt a convention dealing with all matters relating to the law of the sea (…)*". Given this approach, it is not surprising that since the 1980's, legal scholars have described UNCLOS as the "constitution of the oceans",[3] providing a "*comprehensive*" system for the governance of the law of the sea.[4]

The inference from the taxonomy should not be drawn too widely. If one expects that, by studying UNCLOS, one will be able to answer any question of law relating to the law of the sea, disappointment may ensue. For example, some major issues relating to the protection of the marine environment are only regulated to a very limited extent in UNCLOS and are addressed more specifically in other specific regulation, such as

---

1 Preamble of UNCLOS, 1st sentence.

2 On the Third UN Conference on the Law of the Sea (1973–1982) and the process towards the adoption of UNCLOS see *Tanaka*, The International Law of the Sea, 2nd edition, 2015, p. 20 ff. (24 ff.); *Rothwell & Stephens*, The International Law of the Sea, 2nd edition, 2016, p. 14 and *Tanaka*, The International Law of the Sea, 2nd edition, 2015, p.6 ff. (12 ff.).

3 *Rothwell, Oude Elferink, Scott & Stephens*, "Charting the Future for the Law of the Sea", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 904 ff. See also *Scott*, "The LOS Convention as a Constitutional Regime for the Oceans", in Elferink (ed.),"Stability and Change in the Law of the Sea: The Role of the LOS Convention", 2005, p. 9 ff.

4 See for example *Rothwell & Stephens*, The International Law of the Sea, 2nd edition, 2016, p. 14 and *Tanaka*, The International Law of the Sea, 2nd edition, 2015, p. 30 f. A different approach is taken by *Churchill*, "The 1982 United Nations Convention on the Law of the Sea", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 29 f.

the regulations issued under the MARPOL[5] and SOLAS[6] conventions, dealing with maritime pollution and safety at sea respectively.

However, if one instead regards UNCLOS as providing a general framework regulation and switchboard-system, designed to indicate which law,[7] treaty,[8] system of laws,[9] or practice,[10] should regulate a given question of relevance to the law of the sea, one might then argue that the goal of *settling all issues of the law of the sea* has generally been achieved. Thus, it may be argued that the *system in itself,* if not the minutia of the regulation, is comprehensive. Furthermore, within certain core areas of the law of the sea, such as e.g. the division of resources and territories[11] and certain issues regarding law enforcement,[12] UNCLOS provides not

---

5 The International Convention for the Prevention of Pollution from Ships, 1973, with later protocols and annexes.

6 The International Convention for the Safety of Life at Sea, 1974.

7 See e.g. Art. 211(4), indicating that the coastal state may "*…adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage […]*", insofar as such rules do not hamper the right of innocent passage.

8 See e.g. Art. 110(1) on the right of visit, or art. 138 which specifically refers to the application of the UN Charter.

9 UNCLOS continuously states that the convention should be seen in the light of, and should respect, international law in general ("international law" is referred to over 30 times in the entire convention text).

10 See e.g. Art. 39(2): Ships in transit passage shall: (a) comply with generally accepted international regulations,
procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
(b) comply with generally accepted international regulations, *procedures and practices* for the prevention, reduction and control of pollution from ships. [Writer's emphasis]. The word "practices" must be seen as referring to accepted practices in the relevant trade, and thus goes beyond what is found in officially issued guidelines and rules.

11 Generally, the zonal system provided for in UNCLOS must be seen as providing both a comprehensive system of regulation and an exhaustive regulation of the conditions under which states may claim jurisdiction based on the principle of territoriality and also a regulation of who may appropriate resources available in the different zones. See further below in point 3.1.

12 See e.g. Art. 27 regarding criminal jurisdiction on foreign ships passing through the territorial sea, or Art. 105 on the possibility that a state seizing a suspected pirate vessel may e.g. also impose its criminal jurisdiction on the persons onboard the vessel.

only what can reasonably be described as a "comprehensive system",[13] but also – in practical terms – an exhaustive one.

Attempting to create a "comprehensive system of regulation", and thereby setting in stone such a wide spectrum law, relating to a multitude of possible issues, as has been done in UNCLOS, creates the inherent risk of fossilizing the development of the law. This was already foreseen at the drafting stage, resulting in a procedure for amendment of the existing convention text being inserted into its Article 311. So far, however, this provision has not been invoked, and it has been argued that the procedure is quite challenging, meaning that amendments are not the most likely option.[14] As a result, the wording of the existing provisions in UNCLOS seems firmly set. Nonetheless, the Convention has to operate in a factual setting, influenced by changing political agenda, new emerging challenges and developments, as well as increasingly rapid climate change. As a consequence, the question has been raised of how to develop and interpret UNCLOS, so that it is remains appropriate in ever changing circumstances – and thereby hopefully maintains the political support and legal legitimacy it is considered to have[15].

Against this background this article will therefore present our initial reflections on two supposedly simple, interconnected questions concerning the understanding and development of UNCLOS: 1) *What is UNCLOS intended to regulate and which general principles govern that regulation, and 2) What is the legal methodology which should be applied to UNCLOS when we reach the limit of specific, clear-cut regulation?* Our purpose here is to provide some general reflections on UNCLOS as a system of regulation and connected methodology, by focusing on selected issues of the law of the sea. We are neither claiming to provide an in-depth analysis of all questions posed, nor to provide the final answers, as our preliminary thoughts presented here are part of our on-going research

[13] See above, footnote 4.

[14] See *Buga*, "Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction", in Rothwell et al, Oxford Handbook on the Law of the Sea 2015, p. 46 ff. (p. 47).

[15] See *Buga* op.cit. and *Boyle*, "The Law of the Sea, Progress and Prospects" in *Freestone, Barnes and Ong*, Oxford 2006, p. 1, ff. and Boyle in the same work on p. 40 ff.

project: "Policing at Sea (PolSEA)".[16] Our aim at this juncture is therefore to provide some examples to introduce the issue at stake as a starting point for our considerations and thereby to invite further reflection and discussion. We start our reflections in section 2, by raising some general questions in connection with UNCLOS and developing our framework of considerations. This is followed in section 3 by our reflections on the scope of UNCLOS, as well as the central underlying principles illustrating UNCLOS as a system of regulation, followed by reflections on methodological challenges in section 4. We conclude our considerations in section 5, with an attempt to offer a new methodical approach.

2 The system and the methodology: General questions

One way to perceive UNCLOS is to understand its many provisions as being framework of provisions, creating a general system for the governance of the oceans. Therefore, by and large, the framework-provisions may remain and the updating of the system takes place in the underlying legal instruments, which may then be amended to accommodate technological development or environmental changes.[17] However, as already indicated above, a significant number of the provisions of UNCLOS contain specific, exhaustive regulation, not just framework-setting, indicating

[16] The issues raised here will be further examined and developed, partly by applying some of these initial thoughts to case studies, partly by returning at intervals to the actual questions of how the methodology may be developed. This work is conducted under our interdisciplinary research project "Policing at Sea (PolSEA)", under the Danish Council for Free Research involving four Danish universities (University of Aalborg, University of Aarhus, University of Southern Denmark and Copenhagen Buisness School).

[17] Notably in the MARPOL and SOLAS systems, see above footnotes 5 and 6. The existence of the two convention systems, with their extensive annexes and protocols, is envisaged in UNCLOS Art. 94(5), as regards the SOLAS Convention, and in UNCLOS Art. 194, regarding the MARPOL Convention system.

that any new development of the law will necessitate an amendment of UNCLOS. Furthermore, despite the preamble's indication that UNCLOS provides a comprehensive regulation of "all areas of the law of the sea", some factual circumstances are simply not explicitly regulated in the Convention, raising the question of whether "new regulation" can only be created through new convention texts.

Such new conventions have already been made. New supplementary convention texts, indicating their respect for the UNCLOS framework, but some of them in reality amending it, have been introduced. From the outset, it was envisaged that the Convention should be supplemented with the 1994 Implementation Agreement and that the 1995 UN Fish Stock Agreement[18] should be introduced, the latter providing for clear changes to the existing regime.[19] Later on, instruments such as the UNESCO Convention on the Protection of the Underwater Cultural Heritage again indicate their respect for the UNCLOS system, even if the Convention provides for international regulation in an area which, under UNCLOS, is quite clearly left to be governed by national law.[20]

Even if the new conventions within the UNCLOS system provide for a way to develop the law of the sea in keeping with the factual changes which the law is supposed to regulate, they also entail a risk of fragmenting the law. Repeated attempts have been made to update existing conventions, e.g. within the private law areas of international law, leading to extensive fragmentation of the law at international level, rather than

---

[18] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995.

[19] See e.g. *Buga*, "Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification, and Regime Interaction", in Rothwell et al, Oxford Handbook on the Law of the Sea 2015, p. 54.

[20] See e.g. *Poznakova*, "Historic shipwrecks- contemporary challenges: Protection of underwater cultural heritage" in Wilhemsen, SIMPLY 2015 (Marius 473), p. 97 ff. (p. 108). For a different opinion see *Scovazzi*, "The entry into force of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", Aegean Rev Law Sea (2010) 1:19–36 (p. 32).

achieving the up-to-date unification of the law that had been envisaged.[21] Given all this, there is an inherent risk that a focus on the development of UNCLOS through new ad hoc conventions, as and when the need arises, may ultimately lead to a fragmented and internally inconsistent state of the law, counteracting the unification of laws intended by UNCLOS' drafters. Further, recent experience with the marine biodiversity in the area beyond national jurisdiction[22] suggests that open processes, which take into account the interests and opinions of a plethora of stakeholders, an approach which is probably necessary in the 21st century in order to achieve legitimacy, may effectively hinder a timely international legislative response, even on ad hoc basis.[23]

Against this background, we suggest that, instead of focusing on how UNCLOS may be amended, being ultimately a question of diplomacy and international legislative procedures, one might benefit instead by focusing on the internal mechanisms for development or change within the existing provisions of UNCLOS. Taking this approach, the question of the development of UNCLOS becomes a matter of legal methodology, rather than a question of political will or diplomatic possibilities. Also, arguably, developments within the existing regulation are more likely to receive general acceptance, and less likely to create legal fragmentation.

---

21 An example of this would be the Haag-system of regulation of carriage of goods by sea, where attempts at updating the convention system have led to states being bound by e.g. the Hague Rules (1924), the Hague-Visby Rules (1968), the Hamburg Rules (1978) or the Rotterdam Rules 2009. To complicate the issue further, a number of states have formally acceded to one convention, whilst incorporating (in whole or in part) later conventions into their national law. (For example, Germany is in principle a Hague Rules 1924 State, however, national law has implemented a regulation based on the Hague-Visby Rules 1968. As for the Scandinavian States, they are at present formally bound by the Hague-Visby Rules; however, they have incorporated as much of the Hamburg Rules 1978 as has been deemed possible, without breaking the obligations provided for in the Hague-Visby Rules 1968.) The situation is not unique, and similar confusion exists within the regulation of other types of international carriage of goods by sea.

22 See http://www.un.org/depts/los/biodiversity/prepcom.htm#69/292 for further materials and references.

23 See list of opinions submitted by state, non-state and other delegations at http://www.un.org/depts/los/biodiversity/prepcom_files/Prep_Com_webpage_views_submitted_by_delegations.pdf for an indication of the attention the issue is attracting.

In order to maintain real uniformity of the law – to the extent that such may ever be said to exist – pinpointing the relevant methodologies, and applying them to the existing regulation, will give a clearer view as to how flexible the provisions of UNCLOS really are, both as regards changing and new facts, so that the introduction of new ad hoc regulations can be limited to situations and facts which currently cannot be dealt with within the existing framework.

Reviewing the existing literature, it seems to us that the questions about UNCLOS as a system of regulation, as well as the connected questions of methodology raised here, have, with few exceptions, attracted much less attention from scholars than the question of how the UNCLOS system may be amended and expanded.[24] Perhaps the question is rather easier to pose than to answer, especially with regards to the legal conglomerate that UNCLOS ultimately turned out to be. In order to answer the question, we have identified the following methodological sub-questions which we will develop briefly in section 4:

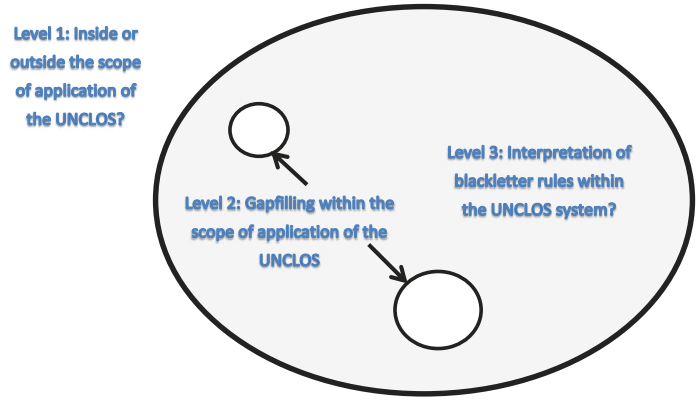
Level 1 question:
Are there areas of fact, which are related to the sea, but which are simply not governed by UNCLOS at all? This is a question as to the scope of application of UNCLOS.

Level 2 question:
Are there areas of fact that may be said to be within the scope of application of UNCLOS as such, but which are neither a) specifically regulated there, nor b) specifically referred to as being regulated elsewhere, by one of the "switch-board"-provisions? This is a question of how gap-filling may occur under UNCLOS.

[24] The subject of how new state practice or case law, as well as new regulation, might help to develop the UNCLOS system seems to be a recurrent focus of legal anthologies, see e.g. *Freestone, Barnes and Ong (eds.),* "The Law of the Sea, Progress and Prospects", Oxford 2006; *Symmons (ed.),* Selected Contemporary Issues in the Law of the Sea, Publications on Ocean Development, vol. 68, Brill – Nijhoff 2011, and *Andreone* (ed.), The Future of the Law of the Sea, Bridging Gaps Between National, Individual and Common Interest, Springer Open 2017. However, it is only to a very limited extent that questions of the convention's methodology as it stands are discussed in detail.

Level 3 question:
When interpreting the blackletter rules of UNCLOS, what are the applicable rules of interpretation? The question involves two sub-questions, namely a) the importance of the general rules of the interpretation of treaties, and b) whether or not there are special rules of interpretation that may be applicable, due to the particular nature of UNCLOS.

In a visual illustration, the different questions may be described like this:



However, before turning to those three levels of questions, the first question raised in the introduction, namely: "*what was UNCLOS actually intended to regulate and on which general principles is UNCLOS based?*", must be considered. The general principles of UNCLOS are potentially – albeit to differing degrees – of importance for the answer to all of the above three-level-questions and must therefore be addressed ab initio; this will take place in the following section.

3 UNCLOS as a system of regulation part 1: The intended scope of UNCLOS regulations and the underlying general principles

Contemporary work on the law of the sea, and on UNCLOS in particular, usually draws on the line from Grotius with his argument for the freedom of the sea, *Mare Liberum*, with the contrasting position arguing for the importance of state sovereignty and dominion, *Mare Clausum*, to present the modern codification and understanding of the law of the sea.[25] The essence of this idea is that the law of the sea deals with two underlying contrasting state-focused interests: the interest of coastal states in extending their sovereignty from the coastline seawards, and the interest of other states in extending the freedom of the use of the oceans coast-wards. Or to put it with Dupuy's words: "*The sea has always been lashed by two major contrary winds: the wind from the high seas towards the land is the wind of freedom; the wind from the land toward the high sea is the bearer of sovereignties. The law of the sea has always been in the middle between these conflicting forces.*"[26]

In this sense, the foremost function of UNCLOS is to "cut the cake" and strike a balance between those conflicting interests. This includes above all the question of territory and exercise of sovereignty, as well as rights and privileges in connection with living and non-living resources on the one hand, and, on the other hand, the interest of others in navi-

[25] See *Treves*, "Historical Development of the Law of the Sea", in Rothwell et.al, (eds.), The International Law of the Sea, 2nd edition, 2015, p. 4. See also *Pinto*, "Hugo Grotius and the Law of the Sea", in del Castillo, Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, p. 2015, p.18 ff., *Guilfoyle*, "The High Seas", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 203 f. and *Scovazzi*, "The Origin of the Theory Sovereignty of the Sea", in del Castillo (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, p. 48 ff.

[26] *Dupuy,* "The Sea under National Competence", in Dupuy (ed.), A Handbook on the Law of the Sea, 1991, p. 247.

gating freely on the oceans and participating in the use of the ocean's resources.

In addition to those two "state-focused" principles, a third is brought into the debate: the principle of the oceans as a "*common heritage of mankind*", as codified in Part XI of UNCLOS.[27] This principle is, by contrast with the other two, not directly taking the interest of states as such into account, but instead the interest of all people, both present and future.[28] It is argued that "*mankind*" is established in UNCLOS as a "*novel actor in the law of the sea*", for example being represented by the International Seabed Authority.[29]

On the basis of these interests, it can be argued that the chief function of UNCLOS is to create a general legal regime for the oceans and to balance the interests at stake. The approach in this context is holistic, as is somewhat clearly expressed in the Preamble to UNCLOS, which remarks: "*(…) that the problems of ocean space are closely interrelated and need to be considered as a whole*". Thus, UNCLOS is aiming, "*with due regard for the sovereignty of all States*", to establish "*a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment (…)*". This means, in summary, that UNCLOS is trying to achieve a balance between a number of interests and considerations, with the aim of providing a coherent legal system for the use and governance of the oceans.

The above quote from the preamble to UNCLOS also indicates that state interests/state sovereignty are a leading concept in the legal regime created by UNCLOS. In the following discussion we will reflect both on the content of UNCLOS, and on some selected underlying considerations

---

27 *Millicay*, "The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept", in del Castillo (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, p. 272 ff.

28 See *Tanaka*, The International Law of the Sea, 2nd edition, 2015, p. 19.

29 *Tanaka*, The International Law of the Sea, 2nd edition, 2015, p. 19 and *Feldtmann & Harhoff*, "Den Internationale Havret", in Harhoff et.al. (ed.), Folkeret, 2017, p. 450 f. and 472 f.

and principles. Our focus will be reflections on UNCLOS as a system of regulation, based on the state-centered principles of UNCLOS. The perspectives we raise here are, however, not to be understood as being isolated from each other; they are interconnected and overlapping.

3.1 Providing a truly comprehensive and exhaustive zonal approach

The central concept of UNCLOS, which is closely linked to the concept of states, sovereignty and jurisdiction, is, as mentioned above, connected to the question of how to "cut the cake" by defining both the maritime zones, and the connected rights and duties of different actors, and particularly states, within those zones. This concept is by no means a new invention of UNCLOS, its roots go far back to the history of the law of the sea[30] and has, to some extent, already been codified in the law of the sea conventions of 1958.[31] However, those conventions could not provide a truly comprehensive regulation of the issues at stake. One major gap in the system of regulation by those conventions is, for example, the fact that the Convention on the Territorial Sea and Contiguous Zone does not include a clear limit of the territorial sea. This has led to on-going extension of the territorial sea by some states and a multitude of approaches, ranging from some states keeping a 3 NM limit, to other states going beyond a 12 NM zone.[32]

On this point, UNCLOS' approach is to create a clear and exhaustive system for maritime claims, on the one hand by clearly defining which maritime zone can be established, and on the other hand by providing absolute maximums for the width of those zones. This approach is further

30 See *Treves*, "Historical Development of the Law of the Sea", in Rothwell et.al, (eds.), The International Law of the Sea, 2nd edition, 2015, p. 3 ff.

31 Convention on the Territorial Sea and Contiguous Zone (entry into force: 10 September 1964), Convention on the Continental Shelf (entry into force: 10 June 1964), Convention on the High Seas (entry into force: 30 September 1962) and Convention on Fishing and Conservation of Living Resources of the High Seas (entry into force: 20 March 1966).

32 *Noyes*, "The territorial sea a contiguous zone", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p92 f.

supported by specific regulation, such as specific rules on the drawing of baselines as a borderline between internal waters and the territorial sea, as well as a base for the width of the outer territorial sea.[33]

In this context, a new concept introduced and codified in UNCLOS was the exclusive economic zone. The attempt here was to end the ongoing discussions around rights to and privileges concerning living and non-living resources, by creating an exhaustive system, which takes different interests into account.[34]

The zonal approach of UNCLOS is comprehensive and exhaustive, in the sense that only those zones defined in UNCLOS can be legally claimed by states under the defined circumstances. That does not, of course, mean that the issue of maritime claims and delineations cannot be at the root of conflicts between states, as clearly indicated by the conflict in the South China Sea.[35] However, those conflicts are basically not rooted in uncertainties concerning the system provided by UNCLOS as such, but are rather an issue of interpretation and use (or over-extensive use) of the existing rules.

3.2 Providing a specific system for duties and right in maritime zones

Closely linked to UNCLOS' approach to, so to speak, "once and for all" provide a settled legal system for "cutting the cake" by defining maritime zones, are the issues of balancing interests and providing a clearer system concerning duties and rights connected to the specific maritime zone at hand. The main approach seems to be that on the one hand, the zonal system includes some specific rights and duties for the coastal states. On the other hand, it balances those coastal states' interests with the interests of others, for example, the interest in freely navigating the oceans

[33] See Arts. 3 ff., 7 ff. etc.

[34] See *Andreone*, "The Exclusive Economic Zone", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 160 ff.

[35] See Feldtmann & Harhoff, Den internationale Havret, in Harhoff et.al., Folkeret, s. 486 ff.

(see more on this below under 3.3.) or in participating in the use and exploration of the oceans and its resources.

The system concerning the exclusive economic zone (EEZ) illustrates this point rather well. On the one hand, the introduction of the EEZ into UNCLOS is a clear step towards granting coastal states substantial rights to resources. On the other hand, the system provided by UNCLOS does not include an acceptance of further sovereignty within the relevant maritime zone. The rights of the coastal states are only considered with a view to resources, nothing else. Thus, the rules of the high sea are applicable to the extent that they do not collide with the specific regime of the EEZ.[36]

While providing such a legal regime for the specific parts of the oceans, by balancing different interests, the question remains as to how detailed the regime provided by UNCLOS really is. UNCLOS often uses general terminology when referring to general principles, for example in Art. 56 (2), which states that the coastal State "*shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention*" when exercising its rights and duties in the EEZ.

The potential difficulties in balancing colliding interests within the EEZ is also raised in Article 59 of UNCLOS, which intends to provide a "*basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*", by stating that emerging conflicts "*should be resolved on the basis of equity and in light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole*.". However, this provision does not really provide a solution; it instead merely summarises the issues at stake, which are to be counter-balanced. Due to this, Article 59 is described as "one of the most controversial" provisions in the UNCLOS.[37]

---

[36] Art. 58 (2) UNCLOS, see also *Andreone*, "The Exclusive Economic Zone", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 165 f.

[37] *Andreone*, "The Exclusive Economic Zone", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 166.

3.3 Guarding the principle of freedom of navigation

It can be argued that UNCLOS, by codifying the maritime zones approach and thereby cementing coastal states' claims on sovereignty over considerable parts of the oceans and substantial rights concerning the management and exploitation of the oceans' resources, does, at least to a certain extent, favour the interest of coastal states. However, as mentioned above, the system of maritime zones defined in UNCLOS tries to balance coastal states' interests against the interests of others, for example by conserving flag states' privileges by limiting the coastal state's criminal jurisdiction over acts committed on foreign flagged vessels in the territorial waters of the coastal state.[38]

One very central interest which is dominant as a constant counterpart to coastal states' interests in ruling over maritime spaces, is the principle of the freedom of navigation. This principle, which at its core grants a relatively unlimited right to freely navigate the oceans in a peaceful manner, without intruding on the rights of others. The freedom of navigation is clearly codified in the provisions on innocent passage in territorial waters[39] and transit passage through international straights.[40] UNCLOS attempts here to achieve basically two things: firstly, to cement the general right for everybody to freely and peacefully navigate the oceans, even though coastal waters. Secondly, it seeks to clearly define the underlying concepts of "passage" and "innocence" etc.,[41] and codify a general principle of non-interference by coastal states. This system is only slightly modified in view to specific interests, such as the safety of navigation or the protection of the environment, or of underwater cables or installations. This means that coastal states can only regulate (and enforce) on specific and clearly defined issues connected to the

[38] See Article 27 UNCLOS.

[39] Articles 17 ff. UNCLOS.

[40] Articles 37 ff. UNCLOS.

[41] See for example Articles 18 ff. UNCLOS.

innocent passage.[42] Beyond those specifically codified issues, the principle of non-interference applies.

In conclusion, it can be argued, in relation to the concept of innocent passage etc., that UNCLOS is exhaustive, in the sense that the principle as such cannot be challenged. Conflicts in connection with innocent passage etc. between coastal states and flag states will therefore most likely be rooted in different interpretations of UNCLOS' provisions, rather than in a lack of regulation as such. This is at least partly due to the fact that UNCLOS uses some general terminology, for example in connection with the coastal state's right to exercise criminal jurisdiction in cases where "*the crime is of a kind to disturb the peace of the country or the good order of the territorial sea*", Art. 27(1)(b) UNCLOS. The question of what is potentially able to "*disturb the peace of the country*" or "*the good order of the territorial sea*" might vary, in the view of different coastal states. Thus, wordings like those could be an invitation to further interpretation, leaving the risk of variations in interpretations and state practice.

3.4 The particular role of flag states

Another central underlying concept of UNCLOS is the concept of the flag state. UNCLOS provides rules on the flagging of vessels and connected rights and obligations.[43] One central element in the concept of flag states is there must be "*a genuine link*" between the vessel and the flag state[44]. UNCLOS emphasises the concept of exclusive jurisdiction of the flag state over its ships. This means, for example, that many of the provisions of UNCLOS concerning the different maritime zones, as well as the coastal states' interest in governing its maritime zones, are counter-balanced by the principle of exclusive rights and jurisdiction of the flag state and the subsequent principle of non-interference. The idea, here, that each flag state is responsible for all issues concerning its ships

[42] See Articles 21 and 22 UNCLOS, which provide an exhaustive list of possible subjects/objectives.

[43] Art. 91 ff. UNCLOS

[44] Art. 91 UNCLOS.

and that the coastal states (or others) only have jurisdiction if their specific interests are at stake.[45] One exception to this division of responsibilities is certain specific forms of crime which UNCLOS defines as being the responsibility of all states when occurring on the high seas, such as slavery and piracy. Concerning piracy, the concept of exclusive jurisdiction of the flag state is challenged, insofar as *all states* are granted counter-piracy law enforcement powers against pirate vessels.[46] Furthermore, Art. 100 of UNCLOS even defines a general obligation on all states to "*cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State*".

The strong influence of the flag state principle and the non-interference principle can be briefly illustrated by the issue of collisions outside the territorial sea. In 1927 the Permanent Court of International Justice ruled in the Lotus case[47] that, in cases where navigational misconduct/ negligence on one ship leads to a collision and the subsequent death of a person on the other ship, the criminal conduct can be seen as having occurred on both vessels and therefore the flag states of both vessels could claim criminal jurisdiction. This was basically an application of classical jurisdictional principle of the effect of the crime. However, the Lotus decision was opposed by seafarers and the idea of multiple criminal jurisdiction in cases of collision was strongly opposed and later limited by treaty law.[48] Today, Article 97 limits criminal jurisdiction to the flag state of the vessel causing the collision or the state of which the suspected offender is a citizen. UNCLOS attempts here to provide a clear division of responsibilities.

The idea of the exclusive jurisdiction of the flag state, as found in a number of UNCLOS' provisions, is convincing in the sense that it can

---

45 See for example Art. 27 UNCLOS on criminal jurisdiction in territorial waters.

46 See *Feldtmann*, Fighting Maritime Piracy; On Possible Actions and Consequences, in Thomas Eger and others (eds.), Economic Analy*sis of International Law; Contributions to the 13th Travemünde Symposium on the Economic Analysis of Law (March 29–31, 2012)*, Mohr-Siebeck Verlag 2014 p. 177 ff.

47 SS "Lotus" (France vs. Turkey), Judgment (1927) PCIJ (ser A) No. 10, 4.

48 See *Guilfoyle*, "The high seas", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 218 f. with further references.

avoid conflicts of jurisdiction and can also be seen as a counter-balance to the rights granted to the coastal states. However, the idea of a responsible flag state with a "genuine" connection to and interests in its vessels is, in the reality of today, strongly challenged. The phenomena of "*flags of convenience*" and "*flags of secrecy*" is quite widespread and well-established.[49] Not all flag states are in fact able and willing to enforce their obligations under UNCLOS. This means that in specific situations there may be jurisdictional vacuums, in the sense that the flag state is not living up to its obligations and all other states are prohibited by UNCLOS from taking action. Here, the system intended by the UNCLOS is challenged by the realities of vessel registration.

3.5 Other principles

The principles briefly raised above are all selected based on a state-centered approach and are closely linked to UNCLOS' zonal management approach. However, UNCLOS can also be perceived from other perspectives. One central point in UNCLOS is, as mentioned above, the idea of the oceans as being a "*common heritage of mankind*", as codified in Part XI of UNCLOS.[50] Here, UNCLOS is moving away from a mainly state-centered interest and is taking into account the interest of everyone, both present and future. In this sense, UNCLOS' function is to contribute to the protection of the oceans and its resources beyond simply individual interests. In this context, UNCLOS tends to only provide a general legal framework, supplemented by specific regulation such as the 1995 UN Fish Stock Agreement.[51] The idea of the oceans as a "*common heritage of mankind* also influences the zonal approach of UNCLOS, since the

[49] See *König*, "Flag of Convenience", Max Planck Encyclopedia of Public International Law.

[50] *Millicay*, "The Common Heritage of Mankind: 21st Century Challenges of a Revolutionary Concept", in del Castillo (ed.), Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, p. 272 ff.

[51] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995. See also above under point 1, footnote 20–21.

rights of coastal states and flag states can be limited, for example with a view to the marine ecosystem.

In the context of the idea of the oceans as being a "*common heritage of mankind*", another aspect should briefly be mentioned: one of the newer perspectives of UNCLOS was the strengthening of the status of landlocked states. The development of the law of the sea has traditionally been dominated by coastal states and their interests. UNCLOS is, in other words, opening up the oceans for all, including for non-coastal states, and thus contributing to a wider sharing of the oceans and their resources as such.[52]

Finally, when presenting the general functions of UNCLOS, another perspective should be mentioned: one central function of UNCLOS is to provide for a system for conflict resolution. The system is binding as such, but provides for different options and for a conflict resolution procedure.[53] One new creation connected to UNCLOS is the International Tribunal for the Law of the Sea (ITLOS), which since its establishment has contributed both to the interpretation of UNCLOS and also to the development of the law of the sea in general. As mentioned above, UNCLOS often operates with opposing interests and general terminology, and therefore creates a need for jurisprudence which clarifies the particular issues at stake.

3.6 Summing up the core general principles of UNCLOS

Even if the balancing of opposing interests and the general language used in UNCLOS contributes to uncertainties, some principles of a general nature may nonetheless be distilled from the convention text. Other principles may be seen to exist within more specific areas of the

[52] On the development concerning landlocked states see *Tuerk*, "Landlocked and geographically disadvantaged states", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 325 ff.

[53] See *Oxman*, "Courts and Tribunals: the ICJ, ITLOS and Arbitral Tribunals", in Rothwell et.al, (eds.), The Oxford Handbook of the Law of the Sea, 2015, p. 394 ff.

regulation, but the following, at least, must be seen as being of general application:

1) That the zonal system is intended to be both comprehensive and exhaustive: No maritime zones other those envisaged by UNCLOS may be claimed by States;
2) That within the different maritime zones, a rough but deliberate division of the rights and obligations of states has been made;
3) That considerable weight must be attached to the principle of free navigation;
4) That specific obligations are allocated to flag states, and in particular that certain responsibilities are connected solely to the flag state;
5) That a general regard should be had to the common heritage of mankind; and finally
6) That peaceful dispute resolution is required.

These principles permeate UNCLOS as a system of governance and should therefore be allocated considerable weight in case of doubt as to the scope and content of the UNCLOS regulation. We will return to these principles below, once we have revisited the three levels of questions of methodology which were brought into the debate in section 2.

4 UNCLOS as a system of regulation part 2: The methodological challenges

Returning to the three levels of questions illustrated above in section 2, these questions are difficult to answer due to the very structure of the convention, and the content/wording applied within it.

As for the Level 1 question, namely *what is the scope of application of UNCLOS*?, its scope is hard to delineate. One approach to answering

this question could be to turn to the preamble and conclude that the scope of application is "*all issues relating to the law of the sea*". However, this would be an insufficient answer. More generally speaking, from the perspective of the law of treaties, it can be expected that a treaty will contain a rather well-defined regulation of the scope of application of the treaty.[54] It may be that the subject matter of the treaty in question is so narrow that the scope of application may be taken for granted;[55] however, most conventions contain provisions defining when they should be applied – often containing criteria of both geographical and substantive nature. Article 1 of UNCLOS defines its "use of terms and scope", but the wording does not provide for a traditional definition of the scope of application of the convention. Whether or not the provisions of the convention apply to a certain question can therefore not be answered on a general level, but will instead have to be considered by scrutiny of the relevant provisions. These provisions may define their scope of application either in a substantive manner, by referring to a particular problem, or by more objective means of a geographical nature. However, it is characteristic of UNCLOS that the term "scope" is rarely used. An exception may be found in Art. 134,[56] which indicates a distinct regime for the area beyond national jurisdiction, but apart from that, the scope of both the convention and the provisions within it must generally be determined by interpretation. On this basis, the question of whether an issue of fact or law is indeed governed by the convention will, to some extent, depend upon the interpretation of the sometimes rather broad and vague provisions of the convention.

---

54 See e.g. Vienna Convention on the law of treaties 1969, Art. 1, 3, and 5; United Nations Convention for the Carriage of Goods by Sea 1978, Art.2; Hague Convention on the Law Applicable to the International Sale of Goods 1986, Art.1-Art.6; United Nations Convention for the International Sale of Goods 1980, Art.1-Art.6.; Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance 2007, Art.2.

55 See e.g. Vienna Convention on Diplomatic Relations, agreed at Vienna on 18 April 1961. The convention does not contain traditional provisions on the scope of application; however, the subject matter of the convention is so narrow that the scope may be said to follow from the convention's title.

56 See e.g. Art. 134, regarding the scope of application of the rules on the Area.

The need to interpret a convention text which is focused on substantive regulation, before one can determine the area of application of the selfsame rule, involves a certain level of circularity. This could indicate that the application of UNCLOS is presumed until proven otherwise. This would also be in line with the intention of UNCLOS, as stated in the preamble. Combining this with the fact that, due to the zonal system, the Convention will have at least some regulation for all sea areas, it may by argued that all marine and maritime activity is ultimately – to some extent – covered by UNCLOS; if nothing else, through the "switchboard system". On adopting such a standpoint, the question of how to fill the gaps (the level 2 question) in the convention becomes pivotal, since it is clear, as has already been stated, that the level of black letter regulation in UNCLOS, even when including its framework and switchboard provisions, cannot realistically (and does not) provide for regulation of all possible factual scenarios. Or in other words: the more all-encompassing the scope of application that one allocates to UNCLOS, the more questions one is going to encounter regarding the gap-filling between, and the interpretation of, the blackletter regulations, as the UNCLOS is stretched (too?) thin. On the contrary, defining the scope of UNCLOS as narrowly as possible will generally leave fewer uncertainties within its scope, but on the other hand will leave more areas of fact or law to be dealt with by national law in the different states, so giving rise to less overall uniformity in the regulation, and contradicting its overall intention.

Turning to the Level 3 question of interpretation, the general regulation on the interpretation of treaties is the Vienna Convention on the Law of Treaties 1969 (VCLT), and this also applies to UNCLOS. According to the VCLT Art. 31(1), *"[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."* The provision takes its starting point in the ordinary meaning of the "terms" in question, including, according to Art. 31(2), its preamble and annexes. In this way, "ordinary meaning" is chosen rather than e.g. "literal interpretation", and furthermore the importance of the ordinary meaning is put on a par

with the context and object and purpose of the convention.[57] All three interpretative tools are thus to be seen as being of equal importance. Even so, the provision focuses primarily on the text that is already in the treaty/the black letter rules of the treaty, and the effectiveness of Art. 31(1) with regard to actual gap filling is somewhat limited. Still, as regards interpretation, the provision allows for regard to be given to the treaty's object and purpose and emphasises the relevance of these by requiring that the treaty be interpreted in good faith.

This emphasis on a textual but always teleological approach[58] leaves the road open to applying considerations as to the purpose of UNCLOS, when left with doubts as to the meaning of the Convention's provisions. In our view, this would indicate that the interpreter may take the general principles distilled above under point 3 into consideration and that the teleological interpretation may be on the basis of not only the stated purposes of the different parts of the convention, but also its general principles. However, the extent to which the same approach may also be used in situations of actual gap-filling within the Convention's scope is less clear. Basically, it may be argued that there needs to be a convention text to interpret, in order for the VCLT Art. 31(1) to be relevant.

The law of the sea has been described as an "*ever-growing body of additional treaties, frameworks, and state practice for the governance and the management of the world's oceans*".[59] As already indicated, this means that the law of the sea is becoming more detailed over time in regulating various specific aspects connected to the oceans, such as fish stocks, military use of the oceans and marine environmental protection, to name but a few. This raises the further question of the relationship between, respectively, UNCLOS and other international legal acts of the law of the sea, and international law in general. The VCLT Art. 31(3) indicates that when interpreting a convention, "*[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its*

---

57 *Aust*, Handbook of International Law, 2nd ed., Cambridge 2010, p. 83 f.

58 *Crawford*, Brownlie's Principles of Public International Law, 8th ed., Oxford University Press 2012.

59 *Rothwell & Stephens*, The International Law of the Sea, 2nd edition, 2016 p. 1.

provisions…" as well as *"[a]ny relevant rules of international law applicable in the relations between the parties…*" should be taken into account. The idea that a convention system develops over time is therefore not foreign to the VCLT, and in particular, international agreements and regulations made according to one of UNCLOS' framework provisions, may therefore reflect back on the understanding of UNCLOS itself. However, UNCLOS continuously underlines that it is in keeping with and respects existing rules and bodies of international law. So, the question is, which interpretative rule exists if the regulation of such a body of law overlaps with UNCLOS's rules? Is UNCLOS in this sense a *lex generalis* to be supplemented by more specific regulations, and in keeping with this view: should UNCLOS give precedence to such other rules? Or is UNCLOS instead, being perceived as "the constitution of the oceans" as raised above in point 1, rather to be understood as being a *lex superior,* overruling other regulation? Obviously, the two starting points are mutually exclusive as an overall rule of interpretation. At the present point of our research, however, it seems that it is not a question of choosing once and for all between the two starting points, but instead that the starting point will need to be dealt with on a case by case basis, depending on which part of the UNCLOS we are dealing with. To the extent that one considers the parts of UNCLOS that provide for exhaustive and comprehensive regulation, a *lex superior*-approach may be appropriate, whereas the *lex generalis* principle seems more fitting when considering the framework and switchboard provisions.

5 A suggested way forward: Increasing focus on general principles as both an interpretative tool and a gap-filler? An approach stolen from private law conventions

In section 4 above, the uncertainties caused by the unclear interaction between the application and interpretation of UNCLOS, as well as the lack of clarity as to the relevant interpretative rules, have been outlined briefly. The question is then how to break this circularity when going forward in developing a consistent methodological framework for the application and use of UNCLOS.

At this point, it is tentatively suggested that inspiration could be drawn from international private law treaties and model regulations. In the UN Convention for the International Sale of Goods (CISG) 1980, Art. 7 provides

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
>
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Thus, this methodological approach provides for the use of general principles, not only as interpretative tools, but also as gap-fillers. If such an approach was also applied within the UNCLOS system, it would provide for an increased focus on the underlying principles of the convention,

rather than just a textual approach. Furthermore, it would allow for gap-filling *within* the convention system, rather than for gap-filling with rules that are external to UNCLOS, such as e.g. rules of national law, and thereby potentially decrease the risk of fragmentation of the law.

In our continued work on the questions of how best to perceive UNCLOS as a system of regulation and which methodology should most appropriately be applied to it, we will investigate the possibility of whether an approach, such as the one exemplified in the CISG Art. 7, will be consistent with both UNCLOS as such and the VCLT, and furthermore, whether applying such an approach will lead to more consistency and relevance when using UNCLOS as an effective tool for governance of the oceans.

In the meantime, we hope that the above has sparked interest and will give rise to discussions.

The sub-carrier concept in the Norwegian Maritime Code Chapter 13

By Thor Falkanger,
Professor Emeritus, Scandinavian Institute
of Maritime Law, University of Oslo

Contents

1 The topic

The Norwegian Maritime Code (MC)[1] Chapter 13, on the carriage of general cargo, primarily regulates the relationship between the carrier and the cargo. There are also, however, important rules on the obligations – and rights – of a sub-carrier when the cargo is damaged or delayed during the time that he is in some way involved in its carriage. In this article, these sub-carrier rules are described briefly, so that the background is reasonably clear when we come to the main theme: Who is a sub-carrier in the eyes of the law and what are the legal consequences of being a sub-carrier?

2 A preliminary description of the sub-carrier

The definition of a sub-carrier in MC Section 251 must be read in light of the definition of a carrier in the same Section: the carrier is someone "who enters into a contract with a sender[2] for the carriage of general cargo by sea" – in order to avoid mistakes, we often call this person the contracting carrier. A sub-carrier is defined as "the person who, pursuant to an assignment by the carrier, performs the carriage or part of it".

1 The Code of 24th June 1994 no. 39 (MC) is quoted from the English translation in MarIus no. 435 (2014). In relation to the matters discussed in this article, MC conforms to similar provisions as in the Danish, Finnish and Swedish Codes, all of 1994. Other translations are by the present author.

2 The *sender* is correspondingly defined as «the person who enters into a contract with a carrier for the carriage of general cargo by sea". General cargo (Norw.: stykkgods) is not defined in the MC. In the previous code – MC 1893 as amended in 1973 – the concept was indirectly defined in Section 71 paragraph three: "Voyage chartering may be for the whole or a part of the vessel or for general cargo. It is part chartering where the agreement encompasses less than the whole vessel or a complete cargo and charter party is used". In other words, the nature of the cargo is not decisive; the categorisation depends upon the actual transport agreement.

3 An outline of the rules on cargo liability when a sub-carrier is involved

3.1 The background

This outline is limited to a consideration of liability towards the cargo owner when the cargo is physically damaged or delayed; thus it does not address either questions related to issuance and presentation of bills of lading, or questions related to delivery to unauthorized receiver.

3.2 Has the cargo owner a claim against the sub-carrier in respect of damage or delay?

When the cargo is damaged or lost while in the custody of a sub-carrier, general principles of tort law may be applicable as regards the sub-carrier's liability. The main rule is that the cargo owner needs to prove that the sub-carrier, or someone for whom he is responsible, has caused the damage through negligence. Such principles may also cover the loss caused by delayed delivery of the cargo.[3]

However, MC Section 286 has regulated the sub-carrier's liability parallel to that of the contractual carrier:

> "A sub-carrier is liable for such part of the carriage as he or she performs, pursuant to the same rules as the carrier. The provisions of Section 282 and 283 apply correspondingly"[4] (paragraph one).

Difficult questions may arise in determining when the incident (or number of incidents) occurred which resulted in the loss: Was it while

[3] Cf. Wilhelmsen & Hagland, *Om erstatningsrett* (2017) pp. 323-333 on monetary loss without connection to physical damage.

[4] As stated in the text below, the contracting carrier is liable for the sub-carrier, cf. Section 285, and Section 282, to which it refers, protects "anyone for whom the carrier is responsible". Thus, Section 286 paragraph one is superfluous, but is a convenient introduction to paragraph two.

the cargo was in the custody of the sub-carrier?[5] In this respect, the cargo owner has the burden of proof: He needs to show that the incident occurred while the cargo was in the sub-carrier's custody.

If this first hindrance is overcome, the sub-carrier then needs to prove that neither he, nor a person for whom he is responsible, has caused the damage or delay through negligence. This potential liability is balanced by the sub-carrier's right to plead the exceptions regarding error in navigation and management of the vessel and fire (Section 276), as well as his right to limit liability according to the unit and kilo limitation rules (Section 280).[6]

The liability of the sub-carrier does not exclude liability of the contracting carrier. Section 285 paragraph one says that when the carriage "is performed wholly or in part by a sub-carrier, the [contracting] carrier remains liable according to [Chapter 13]". Thus, both the contracting carrier and the sub-carrier may be held liable for the same damage or delay, and in such circumstances they are jointly liable (Section 287 paragraph one). However, the cargo owner cannot hereby obtain the limitation amount as per Section 280 twice (Section 287 paragraph two).[7]

MC has no rules on recourse actions between the contracting and performing carriers, except that Section 287 paragraph three, which states that the Code does not preclude agreements on this issue.

---

5 However, acts or omissions, occurring prior to the actual custody period, may be relevant. Typically, making the vessel seaworthy for the voyage may require extensive preparations before receiving the cargo.

6 This works both ways: The sub-carrier cannot insist upon being adjudged in accordance with tort rules (e.g. claim that liability for servants in tort does not encompass the person who has caused the damage).

7 If a suit is instigated against the contracting carrier and the sub-carrier before the same court, the Civil Procedure Act of 2005 Section 15-6 has rules on joining the two cases: "Cases raising similar questions and shall be treated with the same composition of the court and according to mainly the same procedural rules, may be joined for a joint handling and for a joint decision." Whether the cases shall be joined, is within the discretion of the court.

4 An analysis of the elements in the sub-carrier definition in MC Section 251

4.1 Introduction

How important is it to decide whether A, who, in one way or another, is involved in the carriage of cargo from the port of loading to the port of destination, is a "sub-carrier"? If A is not considered to be a sub-carrier, he will then in most instances fall within the group of persons (entities) for whom the carrier has vicarious liability (A is "a servant"). In that event, the rules appear to be the same regarding liability for the cargo, see MC Section 282 paragraph three:

> "The provisions relating to the carrier's defences and the limits of the carrier's liability apply correspondingly if the claim is brought against anyone for whom the carrier is responsible, and that person shows that he or she acted in the performance of his or her duties in the service or to fulfil the assignment."

In this section 4, the elements of the sub-carrier definition, being: "the person who, pursuant to an assignment by the carrier, performs the carriage or part of it", will be discussed in 4.2 to 4.6 of this section, and are followed by an attempt to draw some conclusions, in particular regarding the necessity of distinguishing a sub-carrier from a "servant" (section 4.7). The questions concerning forum require some final remarks in section 5.

4.2 "the person" – who may be a sub-carrier?

Anyone – a natural person or a company – can be "sub-carrier", just as anyone can give a cargo owner a promise of carriage. Whether the undertaking will be fulfilled, as promised or as obligated by law, is another matter. As an example, the sub-carrier's vessel might not be sufficiently cleaned and the cargo is therefore damaged, or the loaded voyage is not

performed "with due dispatch". Such failures may lead to a claim from the contracting carrier,[8] and/or a claim from the cargo owner.

4.3 "pursuant to an assignment" – contract of carriage?

Usually, the sub-carrier performs on the basis of a contract with the contracting carrier, which may be a lengthy, complicated document in writing, e.g. a time charter party. The assignment may take the form of a request, which is accepted by actually carrying out the transport.

Acceptance of the assignment is, in most instances, a contractual promise of carriage on the part of a sub-carrier as against the contracting carrier. He is also, by the rule of law, a carrier as against the cargo owner, and thus Chapter 13 applies.

4.4 Further on: "pursuant to"

The sub-carrier acts as a result of an assignment, which may have very precise rules governing his duties. However, non-compliance with such rules does not necessarily mean that we are outside the remit of the sub-carrier rules of Chapter 13.

In short, there are many persons contributing to the carriage for whom the carrier may be held responsible, and they may all happen to act negligently. According to court practice, the carrier is on the one hand vicariously liable where e.g. the mate acts negligently, but on the other hand he is not deprived of his right to limit liability. In this respect the answer may depend upon difficult evaluations; the tendency is, however, to accept higher degrees of negligence as being "within the scope of the service", than was previously the case.[9] The important point in the present context is that the contracting carrier is liable for the acts of the sub-carrier, even if the sub-carrier's (or his servants') performance is not within the required legal framework. However, with regard to sub-

[8] E.g. a claim for extra expenses when chartering substitute tonnage, or a recourse claim where the contracting carrier is held liable for cargo damage.

[9] See Falkanger, Bull & Brautaset *Scandinavian Maritime Law* (4th ed. 2017). pp. 202–206.

carrier's liability as against the contracting carrier, we have to distinguish between the acts of "the sub-carrier himself" and those of his servants.[10]

4.5 "performs the carriage or part of it" – actual performance

The most typical, straightforward situation where the identified sub-carrier questions arise is:

A, who has given a promise of transportation to cargo owner B, engages C to undertake the transportation, e.g. according to a voyage or time charter party. C's undertaking may cover the total transport distance, or part of it: A carries the cargo to an intermediate port, and C takes the last leg to the contractual destination.

Now, if C assigns his duty to D, is C still a sub-carrier within the definition in Section 251, or is it D that deserves the title, or should both be characterized as sub-carriers? The answer seems to depend upon the construction of the word *perform* (Norw.: utfører): Does it refer to physical performance (in which case D is the sub-carrier) or to the obligation to have the cargo transported from x to y (in which case both C and D are sub-carriers)?

The issue is discussed in the *travaux preparatoires* to the definition in Section 251:

> "In the definition, which corresponds to the Hamburg Rules Article 1 no. 2,[11] the sub-carrier is 'the one who in conformity with an assignment from the carrier performs the carriage or a part thereof'. In this way the definition also comprises successive links in the assignment chain, e.g. the person that performs the carriage or part thereof in accordance with an agreement with the person to whom the carrier first assigned the carriage. That the definition, depending upon the circumstances, may comprise more than one person

[10] See e.g. Falkanger, Bull & Brautaset *op. cit*. pp. 353–354.

[11] This article says, "actual carrier means any person to whom the performance of the carriage has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted".

> does not mean that they all are liable for damage as per the draft Section 286. It follows from Section 286 that the person having the cargo in his custody at the time when the damage occurred, will usually be responsible as sub-carrier according to the rules of Chapter 13" (NOU 1993: 36 p. 20).

In ND 2003 p. 83 (Linda), the Finnish Supreme Court had to rule on the sub-carrier concept:[12]

Two ship owners – Engskip and Langh – had jointly time chartered two vessels to Jit-Trans. Under this agreement, the vessel Linda – owned by Langh and operated by Engskip – carried a cargo of steel from Finland to Germany in accordance with a contract between Jit-Trans (the carrier) and Rautaruukki. The cargo was damaged, and the cargo insurer, who had covered the loss, presented a claim against Engship as sub-carrier. A number of objections were presented – one being that the actual performance was not by Engship. To this, the Court said:

> "As against the person giving him the assignment the sub-carrier is clearly responsible for the carriage undertaken, regardless of whether he performs the voyage himself or engages someone else for the actual performance or part thereof. Thus, the question is whether the direct liability of a sub-carrier towards the cargo owner – which is a liability not founded in contract but in law – should in this respect be more limited and only apply to the person actually performing the voyage. On this, there are different opinions, as well as in the international transport literature. There is no certain legal practice; this is the situation not only in Scandinavia, but also in other countries. …
>
> … From a general point of view it does not seem rational that a carrier should be able to escape a direct liability towards the cargo owner by leaving the actual performance of the transport to another, when he cannot in this way avoid liability towards his own contractual counterparty."

On this basis, Engship was held liable.

[12] The decision is discussed by Selvig in ND 2003 pp. x–xiii.

4.6 "performs the carriage or part of it" – what is "part of it"?

In the above, we have first of all discussed what may be described as a type of successive carriage: A performs the first leg, and B undertakes the final one to the port of destination. However, performing "part of" the carriage may be construed to encompass a number of other situations. Some of these will now be considered.

4.6.1 Lighterage

Lighterage may be seen as a type of successive carriage: the cargo is carried by the lighter from land to ocean-going vessel which is lying on the roads, and the cargo is loaded directly from the lighter to the ocean-going vessel. However, here we have two different situations: either (i) the lighterage may be part of the carrier's undertaking, or (ii) his period of responsibility may start on receiving the cargo from the lighter (MC Section 274). It is the first situation that is relevant in the present context: is the lightering company, engaged by the carrier, a sub-carrier? It seems difficult to avoid the conclusion that in such circumstances, the lightering company would be seen as a sub-carrier in the eyes of the law – even where the lightering distance is short.

4.6.2 «moving the cargo»

The central element in cargo carriage is *movement* of the cargo, and such movement is not necessarily directly connected to movement of the vessel.

One typical example: the cargo received, for example at the line's warehouse, needs to be moved from there to be next to the vessel, and this is done by an independent contractor engaged by the carrier. Perhaps another person (company) is engaged to perform the actual loading and to secure the cargo on board the vessel. We may have similar movements of the cargo when the cargo is carried to an intermediate port and there

transferred to another vessel – sometimes by truck from one terminal to another, some distance away.

Do these contractors perform "part of" the carriage, with the consequence that their liability towards the cargo owner is that of a sub-carrier's?

The question is discussed in Wilhelmsen, *Rett i havn* (2006) pp. 106-111, with the conclusion that the "most common sense answer" is that the sub-carrier rules are not applicable.

Given this conclusion, the question then arises of a possible basis for a claim against e.g. the stevedore. Does his liability depend upon general tort rules, or is his tort liability modified by general principles of contract law?

If in our example the stevedore is considered as being a servant, the answer is – as said above (section 4.1) – found in MC Section 282 paragraph two, which states that the carrier's defences and limits of liability are available for the servant. We should also bear in mind Section 282 paragraph three, which sets out a regulation parallel to Section 287 paragraph two: the cargo owner is not entitled to receive the limitation amount twice by suing both the carrier and his servant.[13]

4.6.3 «moving the vessel»

In the lightering example, we may have a tug boat taking the lighter to the side of the ocean-going vessel, and when loading is completed, a tug boat may take the vessel from, say, an estuary, to the open sea. Now, the question is whether such a tug boat, engaged by the carrier, is a sub-carrier. We have an extreme example of "moving the vessel" when the vessel suffers major damage in the early stage of the voyage and is then towed, perhaps for days, to the final destination.[14] Practically speaking,

[13] Where there is no specific legislation – as we have in MC Sections 282 and 286 – the law is uncertain regarding the possibility for the tortfeasor to plead the terms of the contract between the cargo owner and the person who has engaged his services. See in particular Rt. 1998 p. 656 (Veidekke) pp. 661–662 and from the transport sector, Rt. 1976 p. 1117 (ND 1976 p. 1) (Siesta). See further Lilleholt, *Kontraktsrett og obligasjonsrett* (2017) pp. 374–390.

[14] For an example of such long towage, see ND 1983 p. 309 (Arica) Norwegian arbitration: The loaded vessel was towed across the Pacific.

the tug master is essential in such cases; he has nautical control over the vessel's movement, but not direct care of the cargo.

The general view is that tug services are of such a subsidiary nature that the carrier has vicarious liability – the tug is a servant. As regards tort, the tug is mentioned in MC Section 151 as being an entity for which the carrier has vicarious liability, and the same appears to be the case under Section 276, regarding non-liability for cargo damage due to fault or neglect in the navigation of the vessel.

4.6.4 Other modes of transport

It may be the case that the carriage or part of it is performed by another mode of transport. For example, when a vessel suffers damage it may be expedient or necessary for it to go to an intermediate port, discharge the cargo there and have it forwarded to the final destination by truck. We assume that this is not contrary to the transport agreement with the cargo owner.

The truck company's liability towards the contracting carrier depends upon its undertaking, supplemented (usually) by the rules in the Act on Road Transport 1974 (which is based upon the rules in the Convention on Road Transport 1956 (CMR)). Regarding the truck company's direct liability towards the cargo owner, here we are clearly outside the scope of MC – in other words: MC Section 286 on sub-carrier's liability is not applicable.

4.7 Some conclusions on the sub-carrier issues

We have seen that:

In order to fulfill a promise of transportation, the promisor (the contracting carrier) will need to be assisted, sometimes by a great number of persons (companies/institutions). Our concern relates to those who are participating according to "an assignment" from the carrier – practically speaking: on the basis of a contract. In most instances, these assignees fall into two groups: sub-carriers and "servants" – the latter is overwhel-

mingly dominant in number. However, there may be assignees that can be characterized neither as sub-contractor, nor as servants, see section 4.6.4.

In most instances, there is no doubt about the classification as sub-carrier or servant. Nevertheless, we have tried to clarify when an assignee is a sub-carrier, in the eyes of the law. We have examined how the importance of this distinction is minimal or non-existent, with regard to liability towards the cargo owner: Regardless of classification, the cargo owner can sue the assignee, and in both instances, the rules in Chapter 13 are applicable – both as the basis for a claim and as the basis for limitation of liability. In addition, suits against the contracting carrier and the sub-carrier do not result in the cargo owner receiving the limitation sum twice. Furthermore, the cargo owner cannot improve his recovery by pleading tort rules, cf. Section 282 paragraph one.

However, before concluding, there are two areas of law requiring some remarks. The first area, on identification when deciding cargo liability questions, is discussed below, and the second area, on the question of forum in cargo liability cases, is considered separately in section 5 below.

The first one concerns cargo liability:

MC Section 285 states that the contracting carrier (A) is liable "as if [he] had performed the voyage him- or herself". The obvious interpretation is that the contracting carrier shall be adjudged as if he had performed the acts and errors that have in fact been made by the sub-contractor (B): the mate's negligence is considered negligence on the part of his (A's) own mate, i.e. as a servant of the contracting carrier A. Further, if the sub-contractor's (B's) vessel left the port in an unseaworthy condition, the exceptions for error in management of the vessel and for fire do not apply when "a person for whom the carrier is responsible" has not taken "proper care".[15] Likewise, the exceptions do not protect the contracting carrier A when B, the owner of the performing vessel, is "personally" to blame for the unseaworthiness. Finally, if B, the owner of the performing vessel, has personally caused the loss by such serious

[15] Cf. the rules on liability for initial unseaworthiness in MC section 276. We may have some specific problems here in relation to the concept of "seaworthiness by stages"; however, these are outside the scope of this article.

acts as are described in MC Section 283, this is also to the detriment of the contracting carrier A: he will not be protected by the unit limitation rules when sued by the cargo owner.

If the person who has negligently caused the damage is considered a servant of the contracting carrier, the contracting carrier will not be exposed to the indicated extended liability.

Conversely, when the sub-contractor is sued, his liability depends upon the "same rules" that apply to the contracting carrier (Section 286). Accordingly, the sub-carrier cannot plead the exceptions if the cause of damage is negligence, by himself or by one of his servants, in making the vessel seaworthy before departure. The decisive point is that the sub-carrier is liable when the contracting carrier is liable. An example of this: the cargo owner has given the contracting carrier information on how to handle the cargo, e.g. in order to prevent fire. The consequence of the contracting carrier's failure to convey the relevant information to the sub-carrier is that the contracting carrier cannot plead the fire exception. The complementary construction is that neither can the sub-carrier make such a pleading, even if he has acted professionally and correctly, based upon the information at hand.

5 Which court is competent when the cargo owner wishes to start legal proceedings?

We have now considered some of the substantial questions related to sub-carriage. This topic requires some additional remarks on the procedural issues.

When the cargo owner sues the contracting carrier, the sub-carrier and the servant, we may have a number of forum questions. The main principles for this are found in the Civil Procedure Act (CPA) of 2005 Chapter 4, with its rules on venue. The cargo owner may instigate proceedings against a physical person where that person is domiciled, and if the

defendant is a company/a corporation, at the place where the main office is situated – according to the registration in the Registry of Businesses (CPA Section 4-4). However, the parties have freedom to decide which court should be competent (CPA Section 4-6).

The contracting carrier's contract with the cargo owner may have derogatory clauses, but in the interests of the cargo owner, the freedom has been restricted, see MC Section 310. For our purpose, it is sufficient to quote the first part of paragraph one:

> "Anyagreement in advance which limits the right of the plaintiff to have a legal dispute relating to the carriage of general cargo subject to the present Chapter settled by legal proceedings, is invalid in so far as it limits the right of the plaintiff at his own discretion to bring an action before the Court at the place where [it is reasonably convenient for the cargo owner to start proceedings]."

An example could be: a jurisdiction clause that refers to the place of delivery as venue is valid, cf. paragraph one letter d, provided, however, that the cargo owner also has the options given in letters a, b and c.

The sub-carrier's procedural position is, of course, not identical to the contracting carrier's. When the contracting carrier has his main office in A and the sub-carrier's is in B, the latter is not obliged to accept a suit in A. Liability in accordance with the rules applicable to the contractual carrier, cf. Section 286, does not include the procedural rules. The rules in Section 310 are also not applicable.

The conclusion is that a suit against the sub-carrier must be brought before a court that has jurisdiction according to the general rules in CPA Chapter 4.

The procedural position of the servant is, of course, not the same as that of the contractual carrier, and if he is a servant of the sub-contractor he is not bound by the procedural rules for the sub-carrier. The servants' position when sued by the cargo owner depends upon the rules in CPA Section 4-4.

To sum up: if X – who is not the contracting carrier – has caused cargo damage and is sued by the cargo owner, he is not bound by the

same venue rules as the contracting carrier. Whether he is characterized as sub-carrier or servant is, in this respect, immaterial. He can insist that the rules in CPA Chapter 4 are decisive: the suit has to be instigated either where he is domiciled or where his main office is situated.

The Prosumer in European Energy Law

By Henri van Soest,
Researcher in energy law,
Scandinavian Institute of Maritime Law,
University of Oslo

Contents

Abstract

This article examines the use of the prosumer concept in European energy law. The prosumer is a participant in the energy system who both produces and consumes energy. While academic interest in the prosumer in an energy context has risen over the past few years, there remains some confusion as to the correct use of the term and the limits of the prosumer concept. The article clarifies which activities and actors are covered by the prosumer concept and compares this analysis to the relevant legal sources of EU energy law.

1 Introduction

The energy transition within the European Union is now well under way. It is clear that this transition will have a major impact on the structure of the electricity grid, not only in physical terms, but also with regard to the roles and responsibilities of the different market participants. Advances in technology and drastic cost reductions have enabled the widespread implementation of new grid technologies, such as solar panels and battery storage. This enables consumers to be more active in the grid, and to become 'prosumers'.

In a European legal context, the prosumer concept is still in its infancy. In its Framework for the Energy Union and several subsequent communications, the European Commission has made it clear that the future of energy will be citizen-oriented.[1] Nevertheless, the academic literature on prosumption is not consolidated and many different definitions of the prosumer are in circulation. This has led to confusion around the limits and proper use of the prosumer concept.

[1] European Commission, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM (2015) 80 final 2.

This paper aims to explore and clarify the scope and boundaries of the prosumer concept in European energy law. In the first part, the paper will give a brief overview of the origins of the prosumer concept. In the second part, we will look at the coverage and limitations of the prosumer concept in an energy context. In the final part, we will assess the extent to which prosumer activities are recognized by European energy law.

2 The prosumer concept in general

Using the Google Books Ngram Viewer, we tracked the use of the term 'prosumer' over the years. The term 'prosumer' was first used in 1970 by futurist Alvin Toffler in his book *Future Shock*,[2] further expanded in his 1980's follow-up *Third Wave*.[3] The concept was also developed by Marshall McLuhan and Barrington Nevitt in their 1972 work *Take Today*,[4] where they defined the prosumer as the 'consumer who becomes a producer'.[5] After an initial gentle growth in popularity, the concept fell out of fashion in the second half of the 1980's. From 1995 onwards, it has experienced a steady revival.

In the English language, the word 'prosumer' can mean two very different things. Depending on its meaning, the word also has a different etymological origin. In both cases, however, the word 'prosumer' is a portmanteau of two words that denote the qualities of two previously distinct individuals or entities that are combined in a single new personage, called the prosumer.

In the first instance, the word prosumer combines the words 'professional' and 'consumer'. A prosumer in this sense is defined by the

2 Alvin Toffler, Future Shock (Pan Books 1970).

3 Alvin Toffler, Third Wave (William Morrow 1980).

4 Marshall McLuhan and Barrington Nevitt, Take Today (Harcourt Brace Jovanovich 1972).

5 George Ritzer, Paul Dean and Nathan Jurgenson, 'The coming of age of the prosumer' (2012) 56 Am Behav Sci 379.

Cambridge dictionary as *"a customer who wants to buy high quality technical products or equipment*."[6] The term references the trend of amateur hobbyists buying increasingly professional equipment. The paradigmatic example is the amateur photographer, who buys a high-end single-lens reflex camera, even though, given his practical needs, a cheaper digital camera would suffice.

In a second meaning of the word, prosumer is a combination of the word 'producer and 'consumer.' The Cambridge dictionary defines a prosumer in this sense as "*a customer who helps a company design and produce its products*".[7] The paradigmatic example in this context is Wikipedia, where the content is produced, consumed and monitored by a community of users.[8]

For completeness' sake, we mention that Gerhardt introduces a third use of the term 'prosumer', to indicate someone who makes little distinction between his home life and his work life.[9] The prosumer is someone who is flexible in his work and can work from multiple locations at irregular times, by making use of new enabling technologies. This use of the term 'prosumer' has seemingly not been adopted in the mainstream, and it is not included in the dictionary definition of the word 'prosumer'.

Apart from the term 'prosumer', we highlight two derived terms. First of all, 'prosumption' denotes the act of engaging in prosumer activities. It exists on the same level as production and consumption, and has a neutral, scientific usage. 'Prosumerism', on the other hand, denotes a societal current or school of thought that emphasizes prosumption. This term has similar connotations to consumerism (and the less-common producerism) and could be viewed in a positive or negative light, depending on one's political preferences and worldview.

---

6 See <http://dictionary.cambridge.org/dictionary/english/prosumer> accessed 30 November 2017.

7 Ibid.

8 George Ritzer and Nathan Jurgenson, 'Production, Consumption, Prosumption' (2010) 10 J. Consumer Cult 13, 19.

9 William Gerhardt, 'Prosumers: a new growth opportunity' (Cisco 2008) <https://www.cisco.com/c/dam/en_us/about/ac79/docs/wp/Prosumer_VS2_POV_0404_FINAL.pdf> accessed 16 November 2017.

3 The prosumer concept in energy

Whereas the prosumer term has been circulating in futurist literature and sociology since the 1970s, the adoption of the word in an energy context is much more recent. The earliest trace we could find of this usage was in a paper from 2009 by Timmerman and Huitema, who describe the inclusion of prosumers in the design of energy-management services.[10] They define prosumers as being 'energy-producing consumers'. It is immediately clear that, contrary to its rather theoretical use in sociology, the prosumer in an energy context denotes a specific type of participant in the energy system.

The concept of prosumption in an energy context goes back thousands of years and historically, most people or households provided their own energy. Even when energy began to be used in a systematic way, such as through watermills and windmills, the converted energy was usually used to power one specific machine, for example a flourmill or a spinning machine. In this way, the production and consumption of usable energy remained part of the same enterprise. Vertically integrated energy monopolies only began to arise at the beginning of the 20th century, when highly capital-intensive fossil fuels began to take an increasingly important place in the energy system and the specific nature of electricity led to a centralization of generation.[11] It was only at that point in time that the roles of producer and consumer were clearly split.

We are currently witnessing a return to a distributed energy system. However, the start of this development also precedes the introduction of the word 'prosumer'. The strength of the economic argument for centralized generation had already begun to wane in the 1960s, as the development of decentralized technologies reduced the importance of economies of scale in electricity generation. Technologies that are inherently prone to decentralization, such as solar power, were developed

[10] Wim Timmerman and George Huitema, 'Design of energy-management services – supporting the role of the prosumer in the energy market' (CAiSE-DC'09 doctoral consortium, Amsterdam, 2009).

[11] Jeremy Rifkin, The zero-marginal cost society (Palgrave McMillan 2014) 47.

as early as the 1950s. Mention of local micro-generation, which is in essence a form of prosumer activity, goes back to the late 1980s.

It is clear that the relatively recent word 'prosumer' is only a label for a concept that is significantly older. Today's evolution towards greater decentralization and increased prosumer participation is not a new phenomenon, but harks back to the classic way of energy provisioning. However, the circumstances in which prosumption takes place today are radically different, because the electricity grid offers a fully functioning alternative to prosumption, thereby changing prosumption from a need to a choice.

4 Definition of the prosumer term in an energy context

Since the first use of the word 'prosumer' in an energy context, the academic literature has accepted and adopted the concept and today there is a whole body of work surrounding the prosumer in the energy context. Unfortunately, most academic contributions use the term 'prosumer' very liberally, and often provide only a brief and incomplete definition.

We list a few select definitions, in order to give the reader an idea of the disparity between the different definitions in use in the literature. Jacobs uses 'prosumer' as a general term that not only encompasses generation but also other essential grid services, such as storage, grid balancing and demand response.[12] Lavrijssen and Carrillo Parra limit themselves to stating that "*energy consumers are becoming more active as they are able to produce electricity themselves, for instance by installing solar panels, and supplying it to the energy network, thereby becoming prosumers*",[13] while later on in the article referring to demand

[12] Sharon Jacobs, 'The Energy Prosumer' (2017) 43 Ecology LQ 519, 524.

[13] Saskia Lavrijssen and Arturo Carrillo Parra, 'Radical Prosumer Innovations in the Electricity Sector and the Impact on Prosumer Regulation' (2017) 9 Sustainability 1207.

response as a form of prosumption. Ford, Stephenson and Whitaker list several definitions of the prosumer concept from the non-legal energy literature. These definitions are very wide-ranging in scope. They also provide their own definition: "*An energy prosumer is a consumer of energy who also produces energy to provide for their needs, and who in the instance of their production exceeding their requirements, will sell, store or trade the surplus energy.*"[14] This definition is very detailed and quite restrictive. It also emphasizes the requirement of electricity production to provide for the producer's own needs, which is not commonly found in other definitions.

Defining a new concept inevitably means abstracting the different elements of the concept to their common core.[15] As a result, every definition is faced with a tradeoff between broad applicability and concreteness. Because the prosumer is a fundamental participant within the dynamics of the electricity system, on a par with the producer and the consumer, the term should be given a general definition that is able to encompass the various kinds and degrees of possible prosumption. For that reason, we think the best approach is to define prosumption as broadly as possible, all the while ensuring that the concept does not become so broad as to lose its relevance.

The core of the prosumer concept is its negative relationship with the classic producer and consumer concept: the prosumer combines elements of both, and is therefore neither.[16] Being true to the etymological origins of the word, a 'prosumer' can be defined as 'someone who both produces and consumes energy'.[17] The resulting conceptualization is the following:

---

[14] Rebecca Ford, Janet Stephenson and Juliet Whitaker, Prosumer collectives: a review (University of Otago 2016).

[15] Tom Ginsburg and Nicholas Stephanopoulos, 'The Concepts of Law' (2017) 84 Univ. Chic. Law Rev. 147, 150.

[16] This is an example of differentiation: Ibid. 154.

[17] This definition is used by the European Commission: European Commission, 'Staff Working Document: Best Practices on Renewable Energy Self-consumption' COM (2015) 339 final, 2; The definition is also found in academic literature: Yael Parag and Benjamin Sovacool, 'Electricity market design for the prosumer era' (2016) 1 Nat. energy 1; and Peter Kästel and Bryce Gilroy-Scott, 'Economics of pooling small local electricity prosumers – LCOE and self-consumption' (2015) 51 RSER 718, 719.

everyone who only produces energy is a producer, everyone who only consumes energy is a consumer, and everyone who both produces and consumes energy is a prosumer.[18]

5 The expansion of the prosumer concept

Several of the academic definitions of the prosumer include activities that are neither production nor consumption, such as demand response, energy efficiency and grid services. These definitions are examples of a trend in the literature to expand the concept of the prosumer. Taken on their own, these activities relate to the active consumer, rather than to the prosumer.

The active consumer is a consumer who makes active decisions related to his energy consumption, i.e. a consumer who engages in demand-side management. As we have already seen, the prosumer is a market participant who both produces and consumes energy, and consequently engages in both supply and demand management. This means that all prosumers are also active consumers. Conversely, all active consumers need to undertake production activities in order to be considered prosumers.

Strictly speaking, there is a clear delineation between these two concepts, based around the necessity to engage in production activities. In reality, however, there are several arguments that justify a partial or complete overlap between the active consumer concept and the prosumer concept.

First of all, production and consumption are not two opposites, but rather two sides of the same coin.[19] It makes no difference to the electricity system whether a participant reduces his reliance on the energy grid by

[18] Regardless of the balance between the two elements: someone who produces a lot but only consumes very little is a prosumer, as is someone who consumes a lot but only produces very little.

[19] Kaisa Huhta, 'Prioritising energy efficiency and demand side measures over capacity mechanisms under EU energy law' 2017 35 JENRL 7, 10.

increasing his own supply of energy by 10 KWh through own generation, or by reducing his demand by 10 KWh through demand response. The effect is the same: the person in question takes 10 KWh less electricity from the grid. Applications of this principle can be seen in the creation of a level playing field between supply- and demand-side measures in capacity mechanisms,[20] and the intention of the European Commission to treat energy efficiency as an energy source, representing the value of energy saved.[21]

Secondly, we posit that all acts of demand-side management — the defining element of the active consumer — are also forms of prosumption.[22] By its very definition, prosumption combines supply and demand management within a single personage. There is an evolution to a situation where prosumers will switch fluently between different technologies, to the extent that there will be a continuous management of energy that integrates elements of all these activities. The distinction between the activation and non-activation of these activities will be reduced. For example, there will no longer be clear demand response events, but rather a continuous adaptation of demand to supply. Accordingly, it is more useful and more accurate to talk about different levels of prosumer interaction, rather than different forms of demand-side management.

Thirdly, some authors include the provision of services to the grid, such as balancing services, in the prosumption concept. At first sight, these services stand apart from the production-consumption dichotomy. However, all services provided by participants to the grid can ultimately be defined as either a production or a consumption of electricity. In the case of balancing services, the service rendered is simply a swift adaptation of the prosumers' production/consumption routines to the changing

---

20 Capacity Mechanisms Working Group, 'The Participation of Non-Generation Activities, Demand-Side, and Storage in Generation Adequacy Measures' (European Commission 2015) <http://ec.europa.eu/competition/sectors/energy/capacity_mechanisms_working_group_4.pdf> accessed 18 November 2017.

21 European Commission, 'A Framework Strategy for a Resilient Energy Union' (n 1) 12.

22 Stamatis Karnouskos, 'Demand side management via prosumer interactions in a smart city energy marketplace' (2nd IEEE PES international conference and exhibition on innovative smart grid technologies, Manchester, 2011).

circumstances of the electricity grid. A responsive energy storage system can provide frequency response services by quickly storing or releasing energy.[23]

Finally, the role of energy storage cannot be clarified through the strict production-consumption dichotomy. Energy storage is a zero-sum activity, as it does not produce or consume energy, but merely moves energy in a temporal dimension. Given its increasing importance, the difficulties of including energy storage in the producer-consumption framework plead against the continued applicability of this dichotomy.

We propose the following solution. Instead of the classical producer-consumer dichotomy, we advocate classifying prosumer activities according to a trichotomy of positive generation, negative generation and reduced consumption. By positive generation, we mean increasing the supply of electricity in the grid. This can be done by selling electricity back to the grid or by P2P trading. Negative generation means reducing the demand of electricity in the grid. This can be done through increased generation for own use. In a situation of reduced consumption, the aggregated energy demand is reduced. Examples are demand response and energy efficiency measures.

The key difference between negative generation and reduced consumption is that negative generation does not reduce the overall demand for energy, but merely moves the source of the energy to a location behind the meter. Through negative generation, an entity can reduce its reliance on the grid, without changing its energy use behind the meter. Negative generation is somewhat paradoxical, as it is simultaneously an increase in production and a decrease in consumption. The solution to the paradox is that these two actions take place on two different sides of the meter.

This trichotomy can also accommodate energy storage, albeit as two different actions. Energy storage can be a form of positive generation, if the energy stored is fed back into the grid at a later point in time, or negative generation, if the energy stored is used for own use (thereby reducing the need for power from the grid).

---

[23] David Greenwood, Khim Lim, Haris Patsios et al, 'Frequency responsive services designed for energy storage' (2017) 203 Applied Energy 115.

With short term and long-term measures, we point to the length of the activity undertaken. Typical prosumer generation capacity cannot be easily switched on or off. For that reason, generation is classified as a long-term activity. The state of energy storage, on the other hand, depends on the balance between supply and demand and the market price and is therefore a short-term activity. The modalities of peer-to-peer (P2P) trading are still being developed. While P2P trading could in theory be used both as a short-term and as a long-term activity, it remains to be seen whether both of these forms will be used in practice.

	Positive Generation	Negative Generation	Reduced Consumption
Short Term	- Energy Storage (sell to grid) - P2P Trading	- Energy Storage (own use)	- Demand Response
Long Term	- Generation (sell to grid) - P2P Trading	- Generation (own use)	- Energy Efficiency

Classification of different prosumer activities

6 Forms of prosumer activity

Above, we clarified that production should be understood in the broadest possible sense. In the following paragraphs, we will clarify what this means in practice, and which activities are covered by this extended notion of production. This list starts with the most passive form of engagement through increased energy efficiency and concludes with the most active form of peer-to-peer electricity trading.

a. Energy efficiency measures

Energy efficiency measures are generally considered the most cost-effective way of reducing the demand for electricity and increasing the

efficiency of the electricity system.[24] Accordingly, they have a large role to play in reducing the emissions of the energy system. Energy efficiency measures are very accessible, as they do not require the installation of smart meters, storage or generation capacity. Even in off-grid situations, energy efficiency measures are an important asset, as they reduce the need for additional generation and storage capacity and make going off-grid a more viable alternative.

Energy efficiency measures are on the borderline of the active consumer concept. One could question whether the use of energy efficiency measures displays enough activity to be considered as more than a normal consumer. However, energy efficiency measures reduce the demand for power, albeit on a long term and permanent basis, and are therefore an active intervention by consumers in the demand structure of the energy market. Consequently, energy efficiency measures fall within the extended scope of prosumption.[25]

Energy efficiency measures are not necessarily a passive endeavour. Already in the early 1990's, Lovins proposed the creation of a market for energy efficiency — the so-called 'negawatt market' — where the potential for energy savings could be traded.[26] In this market-based logic, energy efficiency is not treated as a goal in itself, but as a means of closing the 'energy efficiency gap' between the current energy use and the optimal energy use. In this way, the energy efficiency market leads to an optimal allocation of resources.[27]

The European Commission is becoming more accepting of the idea that energy efficiency is a resource in itself.[28] The proposed Energy Efficiency Directive confirms that energy efficiency should be treated as

---

24 Yael Parag, 'Beyond energy efficiency: a prosumer market as an integrated platform for consumer engagement with the energy system' (ECEEE summer study proceedings, Toulon, 2015) 15, 16.

25 Ibid.

26 Named after the 'negawatt', or negative watt, which expresses the amount of energy saved: Amory Lovins, 'Negawatt revolution' (1990) 27 Across the board 18.

27 Adam Jaffe and Robert Stavins, 'The energy-efficiency gap: what does it mean?' (1994) 22 Energy Policy 804.

28 See higher (n 21).

an energy source in its own right and that it should be able to compete on equal terms with generation capacity.[29]

b. Demand response

Demand response is the oldest form of demand-side flexibility recognized as such. Developed in the 1970's as an emergency measure to avoid blackouts, demand response was originally limited to large companies manually reducing their electricity use. Today, the process has largely been automated for commercial and industrial customers, and residential demand response programs are becoming increasingly common and accepted. Evidence of this is the inclusion of aggregated demand response resources in capacity mechanisms.

The granularity of demand response continues to increase: after the shift from industrial to commercial and later to residential demand response, mechanisms are being developed for the operation of demand response at the appliance level. The large-scale introduction of smart metering has been instrumental in activating the demand response potential of market participants.[30]

Demand response is closely linked to the issue of peak demand, where demand is temporarily so high that the supply side cannot match it. The imbalance might be due to practical concerns (there is physically not enough generation capacity) or financial concerns (there is in theory enough capacity, but it is cheaper to pay consumers to reduce demand than to engage the reserve capacity). Usually, the use of the specific amount of electricity is not abandoned altogether, but is instead moved to another time, when there are no peak demand concerns. For these reasons, demand response is qualified as a short-term event.

While demand response measures commonly react to the adequacy of an external energy supply, in today's energy system this is not a necessity.

---

[29] Preambule 2 Proposed Energy Efficiency Directive COM (2016) 761 final.

[30] Datong Zhou, Maximilian Balandat and Claire Tomlin, 'A Bayesian perspective on residential demand response using smart meter data' (54th Annual Allerton conference on communication, control, and computing, Monticello, 2016).

For example, demand response measures can be used within a single household, in order to balance the domestic consumption of energy with the supply from the solar panels on the roof. It flows from this that demand response measures do not require a connection to the electricity grid, but can instead also be used in a microgrid and off-grid context.[31]

c. Electricity storage

It has long been accepted wisdom that electricity cannot be stored due to its physical qualities. However, the development of new storage technologies and a dramatic decrease in price have made electricity storage a plausible option. Accordingly, we can expect electricity storage to become an integral part of the future electricity grid.

Electricity storage delays the use of electricity and can play an important role in electricity balancing. As we have said above, energy storage can be seen as positive or negative generation, depending on its use. This is notwithstanding the fact that the overall electricity balance of energy storage is zero: no new energy is created, and the overall demand for energy is not reduced, as the use of the stored energy is merely delayed.

Energy storage does not only play an important role in grid-connected situations, but it is arguably even more important in off-grid or semi off-grid situations. Indeed, for many market actors, going off-grid only becomes an option if energy storage is available. Energy storage provides a solution for the variability of most renewable energy technologies.

d. Generation for own use

While the generation of one's own electricity is a novelty in the modern electricity grid, it has historically been the standard way of provisioning energy. The immediate use of self-generated electricity is arguably the most well-known form of prosumer activity.

---

[31] For example: Benny Talbot, 'Off-grid Demand Response' (Knoydart Foundation 2016) <https://www.localenergy.scot/media/98365/Knoydart-Final-Report.pdf> accessed 17 November 2017.

Generation for own use is a form of negative generation, as it allows a market player to reduce their energy intake from the grid, while leaving their own level of demand untouched. As the generation from distributed renewable sources tends to be variable, it is often combined with another form of prosumer activity, such as energy storage or the possibility of selling excess energy to the grid.

e. Selling electricity to the grid

Due to the variable nature of renewable electricity generation, a prosumer will in most cases be unable to exactly balance his internal supply and demand. In the case of a supply surplus, the prosumer can feed his electricity back to the grid.

Usually, the prosumer is compensated for selling his electricity to the grid. A traditional way of remunerating the prosumer is through feed-in tariffs, but this method has proven expensive to maintain as the cost of electricity from renewable sources has fallen. Another possibility is to use net metering, where a participant's electricity meter turns backwards if electricity is fed back into the grid. Today, the adequate remuneration is usually determined in a more market-based way, based on the price on the wholesale markets, in a similar manner to the way the utility price is determined.

The sale of electricity back to the grid requires a two-way electricity connection, so that the electricity can flow back to the grid. In addition, utilities might not be keen on this type of interaction, as it complicates the central balancing and control of the electricity grid. These concerns make the sale of electricity to the grid less accessible than other forms of prosumer engagement.

f. P2P trading

A more novel way of dealing with supply and demand balancing involves peer-to-peer (P2P) trading. In this case, a customer can interact and trade with another customer directly, bypassing the traditional utility.

The buying of electricity from a peer is, in most cases, a financial operation, taking place in the virtual grid. While the trade is accounted as taking place between two peers, the electricity that is traded will still flow over the classic distribution grid, and the receiving peer has no way of receiving the exact same electricity for which he contracted. Although the distribution system operator (DSO) plays a reduced role in these transactions, it will still be important for the maintenance of the distribution infrastructure that is needed for P2P transactions to take place.[32]

In addition, the specific entity has to provide a trading platform where bids and offers of electricity can be matched, complete with validation and settlement of the trades. The DSO or the energy retailer could act as an intermediary for these transactions.[33] Using blockchain technology, this process could take place in a decentralized way, and only the requirement for a common trading interface would remain.

Selling electricity through a P2P trade is a form of positive generation. In theory, P2P trading can occur as both short term and long term. Short-term trades rely on a trading platform to match prosumers for specific trades. While this would be time and labour intensive for a human, it is something that can be achieved by an autonomous entity. Long-term trades are similar to the supply contracts for an indeterminate term that are traditionally concluded with a utility. One example is the situation when a neighbour buys a share of the electricity produced by a windmill on the participant's property.

The mere element of buying electricity from a peer is not an activity covered by the prosumer concept. This is because the buyer does not have an impact, as such, on the supply and demand of electricity in the grid. Even though he changes supplier, he will still receive his electricity through the standard electricity grid. Consequently, the buying party in a P2P trade will still be qualified as a standard consumer.

---

[32] Chao Long, Jianzhong Wu, Chenghua Zhang et al., 'Feasibility of peer-to-peer energy trading in low voltage electrical distribution networks' (2017) 105 Energy Procedia 227.

[33] For an interesting example from Finland, see: European Commission, 'Working Group Report "Consumers as Energy Market Actors"' (2015) <https://ec.europa.eu/energy/sites/ener/files/documents/Draft_WG_report_consumers_market_agents_TC_110315_web_version3.pdf> accessed 16 November 2017, 16.

7 Limits of the prosumer concept

In the previous paragraphs, we highlighted the range of possible prosumer activities. In this part, we will discuss some questions relating to the coverage and limitations of the prosumer concept.

a. Ownership of the generation

The paradigmatic example of the prosumer concept is the individual household that owns its house and owns capacity that is clearly installed on its property. While such a household is clearly a prosumer, the question as to who can be considered a prosumer when the ownership of the generating capacity is less straightforward.

Many people do not own the house they live in, but instead have a different ownership situation, such as renting a house, renting an apartment, owning an apartment, living in a co-housing space etc.[34] Excluding these people from the prosumer definition would limit the applicability of the concept, which does not make sense from a teleological point of view. For that reason, these other forms of habitation should also be covered by the prosumer concept.

The development of distributed generation has given rise to new market participants who act as the intermediaries in prosumer transactions. One example is solar service providers, who install, maintain and operate solar panels on the roofs of their clients.[35] Another example is aggregators who combine distributed generation capacity into a virtual power plant or a demand response block.[36] In these cases, the user transfers most of the responsibility for managing its electrical assets to

[34] The European consumer organization BEUC gives an excellent overview of the possible prosumer architectures in a tenant context: BEUC, 'Tenants' access to solar self-generation' (2017) <http://www.iut.nu/EU/Energy/BEUC_%20IUT_solar_self_consumption_March2017.pdf> accessed 16 November 2017, 6.

[35] Jacobs (n 12) 526.

[36] European Parliament, Competition policy and an internal energy market (European Union Publications Office 2017), 68.

a third party.[37] Nevertheless, the user can still be considered a prosumer, as he still takes an initial decision to engage with the electricity markets, even if it is through contracting with a third party to manage the assets. Conversely, the aggregator cannot be considered a prosumer, since he is not the legal owner of the generating capacity. This situation should not be confused with the situation where a prosumer acts as an aggregator of his own capacity.[38] Such a case will most often occur in the case of large-scale prosumers with diverse capacity. Since the user retains full ownership and control over the capacity, he will be a prosumer. The fact that he also takes on the role of aggregator does not change this qualification.

Issues of ownership can also arise in energy cooperatives. If the energy cooperative owns a windmill that supplies the neighbourhood, can the individual cooperants be considered prosumers? The answer is yes: even though the ownership of the windmill cannot be physically allocated to an individual cooperant (since the individual only owns a virtual share in the windmill), he will still be considered a prosumer.[39]

b. Legal persons

Because prosumption is rooted in the idea of consumers becoming more active in the electricity system, prosumers are most commonly understood to be natural persons. However, as in other areas of law, legal persons are to a certain extent equated with natural persons. Can we extend this equation to prosumption? In other words, can legal persons be prosumers too?

In principle, there does not seem to be any obstacle to legal persons being prosumers. There are cases where a legal person acts as a prosumer that should clearly be covered by the definition. For example, the use of solar panels installed on a factory building owned by a company will

37 Jacobs (n 12) 526.

38 Ruben Verhaegen and Carlos Dierckxsens, 'Existing business models for renewable energy aggregators' (BestRES studies 2016), 24.

39 Janusz Pietkiewicz, 'Prosumer energy and prosumer power cooperatives: opportunities and challenges in the EU countries' (European Economic and Social Committee 2016), 10.

be an act of prosumption by that company. However, the geographical presence of a company is often not limited to a single location, and a company might have several establishments that have consumption and generation capabilities. In this case, the overarching legal person will be the prosumer, and not the separate factories, since they do not have legal personality. This determination can have important consequences if regulation imposes maximum limits on energy prosumption.[40] However, the prosumer qualification remains linked to the original legal person and cannot be transferred through a chain of ownership.[41]

c. Generation for own need/use

In most cases, a prosumer will use their own generated electricity primarily to fulfill their own current electricity needs, before selling the surplus back to the grid, to another market participant, or to store it. However, we need to clarify whether generation for own need, in addition to being a common feature of prosumption, is also a requirement for prosumption.

Some definitions of the prosumer concept presume that the use of the generated electricity for own need is indeed a precondition to be qualified as a prosumer.[42] However, this condition does not hold up in practice. For example, a prosumer can engage in energy storage for arbitrage purposes, by storing energy when the price is low and releasing energy when the price is high. In such a case, the primary purpose of the storage is engaging with the markets, rather than fulfilling a personal need.

Usually, the prosumer actions will be undertaken as an additional activity. However, new technologies make it possible for market players to use prosumption as a primary activity. In principle, these enterprises will

40 See below in the case of European energy law.

41 The activities that give rise to the prosumer qualification are linked to the original player and exist independent of the investor's own energy use. An extensive interpretation taking into account the entire chain of ownership would not have a clear end, and would risk hollowing out the prosumer concept.

42 For example: Eurelectric, Prosumers: an integral part of the power system and the market (Eurelectric 2015), 5; Nikolina Šajn, 'Electricity prosumers' (2016) European Parliament Briefing PE 593.518.

be covered by the definition of the prosumer. If this type of prosumption were not allowed, the potential role of prosumers in increasing competition in the electricity market would be greatly diminished.[43]

d. Connection to the grid

The proliferation of prosumption has increased the possibility for market players to reduce their reliance on the electricity grid. The combination of own generation and storage capacity even makes it possible for players to go off-grid altogether. Some sources see interaction with the electricity market as an essential part of the prosumer definition.[44] We need to clarify whether actors with either a reduced or no connection to the grid can still be considered prosumers or whether, by definition, prosumers are connected to the electricity grid and interact with it.

In the first option, the prosumer remains connected to the grid, but relies less on electricity from the grid to fulfill its electricity needs. This can result in an almost off-grid scenario, where a prosumer is in principle self-sufficient, only using the grid to match exceptional changes in supply or demand. Since these people remain connected to the grid, albeit marginally, they are definitely covered by the prosumer concept. In practice, this case is likely to occur quite often in the future electricity grid, more so than the off-grid scenario.

The question of whether self-relying persons who go off-grid can be considered prosumers is a trickier question. According to the basic definition, these persons are indeed prosumers, since they are both a producer and consumer of electricity. However, some definitions refer to the active participation of 'prosumers' in the electricity market, for example by selling electricity back to the grid.[45] While these are indeed common traits of prosumers, they are not a part of the prosumer defi-

43 Lavrijssen and Carrillo Parra (n 13) 1211

44 Josh Roberts, Prosumer rights: options for a legal framework post-2020 (ClientEarth 2016), 6

45 Bernt Bremdal, 'The impact of prosumers in a smart grid based energy market' [should this title be in italics? It seems inconsistent with the approach generally.(2014) 2 Metering International 71

nition. Prosumers in different situations will interact with the electricity market to different degrees, and there does not seem to be any particular reason to exclude players in the lowest possible category of interaction, namely being off-grid, from the prosumer definition. For that reason, players who go off-grid are still covered by the prosumer concept.[46]

The prosumer can also be connected to a separate electricity grid, such as a microgrid. The actions taken by the prosumer and the services provided to the other members connected to the grid in the context of a micro-grid are similar to those actions performed in the context of the main grid (apart from the difference in size of the grids). Consequently, there is no reason to exclude participants in microgrids from the prosumer definition.

e. Intent to prosume

The literature surrounding prosumption makes an implicit assumption that becoming a prosumer requires an active decision on the part of the consumer: a decision to transcend the passive state of consumerism and become a prosumer. Definitions including language such as 'active participation in the market' and 'active customers' are examples of this assumption.[47] However, this is not necessarily the case. Ford, Stephenson and Whitaker distinguish between active and passive prosumers.[48] Active prosumers invest in the necessary prosumer infrastructure, inspired by environmental or economical motives. Passive prosumers are persons who become a prosumer 'by accident', for example by moving into a house with solar panels on the roof, where the presence of these solar panels was not a core part of their decisions to move into this particular house. Accordingly, there is no requirement of 'intent' to be considered a prosumer.

46 Jacobs (n 12) 526

47 For example: Bremdal (n 45) 71

48 Ford, Stephenson and Whitaker (n 14) 6.

8 The prosumer concept in the Winter Package

The development of the prosumer concept is part of a broader movement in EU energy law and policy towards greater participation of citizens in the electricity system.[49] While market regulation traditionally looks at consumers as passive players,[50] the initial liberalisation of the electricity markets[51] made it clear that consumers have an essential role to play in well-functioning markets.[52] Open and flexible electricity markets require consumers to behave like rational economic participants and take active decisions about their electricity use.[53]

The 2007 communication 'An Energy Policy for Europe' was one of the first major EU documents to recognise the role of consumers.[54] Notable reiterations include the EU's Energy 2020 strategy,[55] the Energy Roadmap 2050[56] and the annual Citizens' Energy Forum.[57]

---

49 European Commission, 'A Framework Strategy for a Resilient Energy Union' (n 1) 2.

50 Anna Butenko and Kati Cseres, 'The Regulatory Consumer: Prosumer-Driven Local Energy Production Initiatives' (Social Science Research Network 2015) SSRN Scholarly Paper ID 2631990 4 <https://papers.ssrn.com/abstract=2631990> accessed 15 January 2018; Lavrijssen and Carrillo Parra (n 13) 1208.

51 For an overview of the liberalisation process, see: Angus Johnston and Guy Block, EU Energy Law (Oxford University Press 2012).

52 Lucia Reisch and Hans Micklitz, 'Consumers and Deregulation of the Electricity Market in Germany' (2006) 29 Journal of Consumer Policy 399, 406.

53 Butenko and Cseres (n 50) 7.

54 European Commission, 'An Energy Policy for Europe' (2007) COM(2017) 1 final; Malte Fiedler, 'The Making of the EU Internal Energy Market' (Rosa Luxemburg Stiftung 2015) 6.

55 European Commission, 'Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy' (2011) COM(2010) 639 final 5.

56 European Commission, Energy Roadmap 2050 (Publications Office of the European Union 2012).

57 European Commission, 'Citizens' Energy Forum' (Brussels 2009) Press release MEMO/09/429 <http://europa.eu/rapid/press-release_MEMO-09-429_en.htm?locale=EN> accessed 18 January 2018.

The Winter Package greatly expands the role of the consumer.[58] The consumer should not only act as a rational market participant; he is also expected to engage in prosumer activities.[59] However, the Winter Package does not mention the words prosumer, prosumption or prosumerism. Instead, the concept of prosumption is captured by several different terms, spread out over the legislative proposal.

In the paragraphs below, we will discuss these different terms. We will focus on three recurring issues: the personal scope of the term, the material scope of the term, and whether the prosumer activities can constitute a 'primary commercial or professional activity'. Our thesis is that the significant overlap between these terms shows that the expression of the prosumer concept does not warrant four different terms. Instead, it would be better to develop one overarching prosumer definition.

a. The different prosumer concepts in the Winter Package

The Winter Package contains four main concepts related to prosumption. The first two terms are found in the proposed electricity directive.[60] First, the active customer is defined in article 2(6) of the proposed electricity directive as 'a customer or a group of jointly acting customers who consume, store or sell electricity generated on their premises, including through aggregators, or participate in demand response or energy efficiency schemes provided that these activities do not constitute their primary commercial or professional activity'. Article 15 of the same directive clarifies the measures that Member States should take to ensure fair grid access for active customers.

Second, article 2(7) of the proposed electricity directive addresses local energy communities, which are defined as 'an association, a cooperative,

58 Officially known as the Clean Energy for All Europeans Package; however, the colloquial Winter Package name is well known and its use is widespread.

59 European Commission, 'New Electricity Market Design: A Fair Deal for Consumers' (2016) 2 <https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_marketsconsumers.pdf> accessed 18 January 2018.

60 Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity COM(2016) 864 final/2.

a partnership, a non-profit organisation or other legal entity which is effectively controlled by local shareholders or members, generally value rather than profit-driven, involved in distributed generation and in performing activities of a distribution system operator, supplier or aggregator at local level, including across borders'. Article 16 of the directive provides outlines for Member States for the design of a national regulatory framework for local energy communities.

The proposed renewable energy directive contains two additional terms.[61] Article 2(aa) of the proposed renewable energy directive defines the renewable self-consumer as 'an active customer as defined in the [proposed electricity directive] who consumes and may store and sell renewable electricity which is generated within his or its premises, including a multi-apartment block, a commercial or shared services site or a closed distribution system, provided that, for non-household renewable self-consumers, those activities do not constitute their primary commercial or professional activity'. Article 21 stresses that renewable self-consumers maintain their rights as consumers and that they should receive fair conditions when interacting with the market.

Finally, the renewable energy community is defined in article 22 of the proposed renewable energy directive as 'an SME or a not-for-profit organisation, the shareholders or members of which cooperate in the generation, distribution, storage or supply of energy from renewable sources'. In addition, the renewable energy community has to meet four out of five criteria relating to corporate governance and limits on installed capacity.[62]

---

61 Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources 2017 COM(2016) 767 final/2.

62 Art 21§1(a) to (e) ibid.

b. Personal scope: who can be a prosumer?

First, we need to determine who can be a prosumer. In most cases, prosumers will be individuals. However, groupings of individuals in different forms are also possible.[63]

The definition of the active customer covers both individual customers and groups of customers acting jointly. There is no geographical limitation on the location of group members. It is unclear whether the definition also covers groupings with a separate legal personality.

The local energy community covers groups, which can take a variety of forms.[64] Article 16 of the directive states that 'shareholders or members of a local energy community shall not lose their rights as household customers or active customers', which shows that the local energy community can consist of active customers. As its name suggests, the local energy community has a strong local dimension.

The renewable self-consumer only mentions individuals. The article clarifies that the renewable self-consumer is a specific type of active customer. Although the definition of the renewable self-consumer includes more details about the location of the activities, the difference in personal scope between the two concepts is slight.[65]

The renewable energy community covers SME's and non-for-profit organisations. Although the directive does not explicitly mention it, in practice all renewable energy communities are also local energy communities.[66] As a result, the renewable energy community will also have a strong local connection.

---

63 Pietkiewicz (n 39) 4; Nikolina Šajn (n 42) 2 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/593518/EPRS_BRI(2016)593518_EN.pdf> accessed 18 January 2018.

64 Art. 2(7) of the proposed electricity directive offers a non-exhaustive list.

65 Lavrijssen and Carrillo Parra (n 13) 1216.

66 Because three out of five additional requirements set out in art 22§1 of the proposed renewable energy directive contain local elements, it is impossible to combine four requirements that do not contain a local element: Eurelectric, 'European Commission's Legislative Proposal on Common Rules for the Internal Market in Electricity' (2017) Position paper <http://www.eurelectric.org/media/318372/eurelectric_positionpaper_electricity_directive_final-2017-030-0242-01-e.pdf> accessed 18 January 2018.

In conclusion, the European framework covers individuals, unincorporated groups and groups with a separate legal personality. However, the coverage of the different terms overlaps to a certain extent. This analysis reveals a strong link between the active customer and the renewable self-consumer on one hand, and the local energy community and the renewable energy community on the other. However, this distinction is not clear-cut, as the local energy community also refers back to active customers.

The active customer seems to have the broadest application among the different prosumer concepts within European energy law. It is unfortunate that the definition of the active customer addresses both individuals and groups of consumers acting jointly. The role of groups is better addressed by the concepts of the local energy community and the renewable energy community, which deal explicitly with this.

c. Material scope: which activities are prosumer activities?

The material scope of the prosumer concept is more contentious than the personal scope. There are two main positions in the debate. Some authors stay true to the original definition of the prosumer as someone who both produces and consumes energy. Accordingly, they limit the prosumer concept to the core activities of generating one's own energy and potentially storing and selling this energy.[67] We will call this view prosumption *sensu stricto*. Others take a more expansive view and include all activities that an engaged consumer can undertake.[68] In this case, activities undertaken by a consumer that do not strictly have to do with the production of energy are nevertheless included in the prosumer concept.[69] The most common example is participation in demand response activities. We will address this opinion as prosumption *sensu lato*.

The active customer covers a broad range of activities and takes a *sensu lato* approach. In comparison, the local energy community includes a

[67] For example: Whitaker, Ford and Stephenson (n 14) 5.

[68] For example: Jacobs (n 12) 524.

[69] Lavrijssen and Carrillo Parra (n 13) 1210.

narrower range of activities but adds aggregation. The renewable self-consumer follows the *sensu stricto* approach. As the definition of the renewable self-consumer builds on the active customer concept, this means that active customers who engage in prosumption *sensu stricto* are also renewable self-consumers, whereas active customers who engage in prosumption *sensu lato* do not fall within the renewable self-consumer definition.[70] The renewable energy community, to conclude, also uses the strict approach. Interestingly enough, the renewable energy community is allowed to buy or sell renewable energy through power purchase agreements, which counteracts its otherwise strong local connection.

It is clear that the European legislator adopts both the prosumption *sensu stricto* and the prosumption *sensu lato* points of view. Several terms float between the two extremes, for example where aggregation is added to an otherwise strict approach. Is there a reason why the active customer and the local energy community can act as an aggregator, but not the renewable energy community? Is there a reason why only the active customer can engage in energy efficiency schemes? Unfortunately, the directives leave these questions unanswered.

d. Prosumption as a 'primary commercial or professional activity'

The requirement that prosumer activities are not undertaken as a 'primary commercial or professional activity' (PCPA) is a recurring theme throughout the Winter Package. This requirement allows for a distinction between the established professional electricity market players and small-scale prosumers. This barrier serves two purposes. On the one hand, it allows prosumers to maintain the benefits of being a consumer, such as coverage by consumer protection rules. On the other hand, it enables prosumers to escape the heavy financial and administrative burdens imposed on professional electricity market players.

[70] ibid 1216.

The definition of the active customer excludes prosumption as a PCPA. The threshold above which prosumer activities can be considered as someone's PCPA is not determined. Unfortunately, this limits the potential of prosumers to participate in the energy market, which goes against the broader goals of the European energy union.[71] In addition, it creates a lot of uncertainty for entrepreneurs and investors and stymies the development of new, creative business models based on prosumption.[72]

The definition of the local energy community does not explicitly mention any limitations on the exercise of prosumer activities as a PCPA. In addition, even though local energy communities are most often value-driven, the existence of profit-driven local energy communities is not excluded, and local energy communities can be incorporated. It therefore seems possible for the local energy community to undertake prosumer activities as a PCPA.

Renewable self-consumers are not allowed to undertake prosumer activities as a PCPA, except in cases where he or she is a non-household renewable consumer. This implies that households could make their prosumer activities a PCPA. However, the renewable self-consumer is a special type of active customer, as was mentioned earlier. Consequently, the exception for households seems to contradict the more restrictive active customer definition, which excludes all prosumption as a PCPA. As a result, it is not clear in which situations (if any) the household exception could apply. In the case of the renewable self-consumer, the threshold for determining when prosumption becomes a PCPA is quantified. Households are considered prosumers if they feed less than 10 MWh into the grid on an annual basis. For legal persons, the threshold is 500 MWh of electricity fed into the grid on an annual basis.[73] While this quantification provides welcome clarity compared to the open-ended prohibition in

---

71 European Commission, 'Transforming Europe's Energy System – Commission's Energy Summer Package Leads the Way' (2015) <http://europa.eu/rapid/press-release_IP-15-5358_en.htm> accessed 18 January 2018.

72 Lavrijssen and Carrillo Parra (n 13) 1211.

73 Art 21§1(c) proposed renewable energy directive; however, Member States can set a different threshold.

the active customer definition, it is not clear why the threshold was set at this specific level.

Finally, the renewable energy community does not rule out prosumer activities constituting a PCPA.

It appears that the restriction on prosumer activities as a PCPA only applies to individuals, except in the case of active customers acting jointly. The directives do not explain why the PCPA threshold is determined for renewable self-consumers, while it remains undetermined for active customers.

9 Conclusion

In this paper, we have investigated the prosumer concept in European energy law. We have first looked at the origin of the word 'prosumer' and its use to describe a pre-existing phenomenon in the energy market. Next, we have studied the coverage and limitations of the prosumer concept. Finally, we have looked at the concepts introduced in the Winter Package that relate to prosumption, and analysed how these concepts relate to each other.

The prosumer concept remains a novelty in the energy sector. Both the academic literature and European policymakers do not yet agree on the concrete coverage of the concept and many different definitions circulate. Several stakeholders have tried to remediate the current confused situation. For example, the Council of European Energy Regulators (CEER) has made good proposals for clarifying the definitions.[74] However, because these proposals retain the four different prosumer definitions of the Winter Package, they tackle the symptoms but not the cause.

[74] Council of European Energy Regulators, 'Renewable Self-Consumers and Energy Communities' (2017) VIII 3 <https://www.ceer.eu/documents/104400/5937686/Renewable+Self-Consumers+and+Energy+Communities-2/2f7ffa53-9b81-dbad-d49a-a6331d6d5150> accessed 18 January 2018.

We believe that the most appropriate solution is to have one broad prosumer definition. This will create legal certainty for prosumers and encourage greater prosumer participation. It would also capture the fundamental nature of the prosumer as one of the core players in the electricity system. In addition, a general definition would be more future-proof and technology-neutral, two essential qualities in such a fast changing environment.

10 Bibliography

BEUC, 'Tenants' access to solar self-generation' (2017) <http://www.iut.nu/EU/Energy/BEUC_%20IUT_solar_self_consumption_March2017.pdf> accessed 30 November 2017

Bremdal B, 'The impact of prosumers in a smart grid based energy market' (2014) 2 Metering International 71

Butenko A and Cseres K, 'The regulatory consumer: Prosumer-driven local energy initiatives' (2015) Amsterdam law school legal studies research paper 2015-31 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631990> accessed 30 November 2017

Capacity Mechanisms Working Group, 'The Participation of Non-Generation Activities, Demand-Side, and Storage in Generation Adequacy Measures' (European Commission 2015) <http://ec.europa.eu/competition/sectors/energy/capacity_mechanisms_working_group_4. pdf> accessed 30 November 2017

Council of European Energy Regulators, 'Renewable Self-Consumers and Energy Communities' (2017) VIII 3 <https://www.ceer.eu/documents/104400/5937686/Renewable+Self-Consumers+and+Energy+Communities-2/2f7ffa53-9b81-dbad-d49a-a6331d6d5150> accessed 18 January 2018

Eurelectric, Prosumers: an integral part of the power system and the market (Eurelectric 2015)

——, 'European Commission's Legislative Proposal on Common Rules for the Internal Market in Electricity' (2017) Position paper <http://www.eurelectric.org/media/318372/eurelectric_positionpaper_electricity_directive_final-2017-030-0242-01-e.pdf> accessed 18 January 2018

European Commission, 'An Energy Policy for Europe' COM(2007) 1 final

——, 'Citizens' Energy Forum' (2009) Press release MEMO/09/429 <http://europa.eu/rapid/press- release_MEMO-09-429_en.htm?locale=EN>

——, 'Energy 2020: a strategy for competitive, sustainable and secure energy' COM(2010) 639 final

——, Energy Roadmap 2050 (Publications Office of the European Union 2012)

——, 'A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy' COM(2015) 80 final

——, 'Staff Working Document: Best Practices on Renewable Energy Self-consumption' COM (2015) 339 final

——, 'Working Group Report "Consumers as Energy Market Actors"' (2015) <https://ec.europa.eu/energy/sites/ener/files/documents/Draft_WG_report_consumers_market_agents_TC_110315_web_version3.pdf> accessed 16 November 2017

——, 'Transforming Europe's Energy System – Commission's Energy Summer Package Leads the Way' (2015) <http://europa.eu/rapid/press-release_IP-15-5358_en.htm> accessed 18 January 2018

——, 'New electricity market design: a fair deal for consumers' (2016) <https://ec.europa.eu/energy/sites/ener/files/documents/technical_memo_marketsconsumers.pdf> accessed 30 November 2017

European Parliament, Competition policy and an internal energy market (European Union Publications Office 2017)

Fiedler M, The Making of the EU Internal Energy Market (Rosa Luxemburg Stiftung 2015)

Ford R, Stephenson J and Whitaker J, Prosumer collectives: a review (University of Otago 2016)

Gerhardt W, Prosumers: a new growth opportunity (Cisco 2008) <https://www.cisco.com/c/dam/en_us/about/ac79/docs/wp/Prosumer_VS2_POV_0404_FINAL.pdf> accessed 30 November 2017

Ginsburg T and Stephanopoulos N, 'The Concepts of Law' (2017) 84 Univ. Chic. Law Rev. 147

Greenwood D, Lim K, Patsios H et al, 'Frequency responsive services designed for energy storage' (2017) 203 Applied Energy 115

Huhta K, 'Prioritising energy efficiency and demand side measures over capacity mechanisms under EU energy law' (2017) 35 JENRL 7

Jacobs S, 'The Energy Prosumer' (2017) 43 Ecology LQ 519

Jaffe A and Stavins R, 'The energy-efficiency gap: what does it mean?' (1994) 22 Energy Policy 804

Johnston A and Block G, EU energy law (Oxford University Press 2012)

Karnouskos S, 'Demand side management via prosumer interactions in a smart city energy marketplace' (2nd IEEE PES international conference and exhibition on innovative smart grid technologies, Manchester, 2011)

Kästel P and Gilroy-Scott B, 'Economics of pooling small local electricity prosumers – LCOE and self- consumption' (2015) 51 RSER 718

Lavrijssen S and Carrillo Parra A, 'Radical Prosumer Innovations in the Electricity Sector and the Impact on Prosumer Regulation' (2017) 9 Sustainability 1207

Long C, Wu J, Zhang C et al., 'Feasibility of peer-to-peer energy trading in low voltage electrical distribution networks' (2017) 105 Energy Procedia 227

Lovins A, 'Negawatt revolution' (1990) 27 Across the board 18

McLuhan M and Nevitt B, Take Today (Harcourt Brace Jovanovich 1972)

Parag Y, 'Beyond energy efficiency: a prosumer market as an integrated platform for consumer engagement with the energy system' (ECEEE summer study proceedings, Toulon, 2015) 15

—— and Sovacool B, 'Electricity market design for the prosumer era' (2016) 1 Nat. energy 1

Pietkiewicz J, 'Prosumer energy and prosumer power cooperatives: opportunities and challenges in the EU countries' (European Economic and Social Committee 2016)

Reisch L and Micklitz H, 'Consumers and deregulation of the electricity market in Germany' (2006) 29 JCP 399

Rifkin J, The zero-marginal cost society (Palgrave McMillan 2014)

Ritzer G and Jurgenson N, 'Production, Consumption, Prosumption' (2010) 10 J. Consumer Cult 13

——, Dean P and Jurgenson N, 'The coming of age of the prosumer' (2012) 56 Am Behav Sci 379

Roberts J, Prosumer rights: options for a legal framework post-2020 (ClientEarth 2016)

Šajn N, 'Electricity prosumers' (2016) European Parliament Briefing PE 593.518

Talbot B, 'Off-grid Demand Response' (Knoydart Foundation 2016) <https://www.localenergy.scot/media/98365/Knoydart-Final-Report.pdf> accessed 30 November 2017

Timmerman W and Huitema G, 'Design of energy-management services – supporting the role of the prosumer in the energy market' (CAiSE-DC'09 doctoral consortium, Amsterdam, 2009)

Toffler A, Future Shock (Pan Books 1970)

Toffler A, Third Wave (William Morrow 1980)

Verhaegen R and Dierckxsens C, 'Existing business models for renewable energy aggregators' (BestRES studies 2016)

Zhou D, Balandat M and Tomlin C, 'A Bayesian perspective on residential demand response using smart meter data' (54th Annual Allerton conference on communication, control, and computing, Monticello, 2016)

State liability for regulatory changes – the special case of regulated tariffs in infrastructure sectors

By Henrik Bjørnebye, Professor
and Ivar Alvik, Professor,
Scandinavian Institute of Maritime Law,
University of Oslo

Contents

1 Introduction

Concessions to operate essential infrastructure, such as energy or transport, will often create an effective monopoly, where market forces are unable to achieve reasonable and efficient pricing. To prevent abuse of the monopoly position, the government may require third party access and regulated prices through tariffs. Today we particularly see this in the energy sector, where both electricity grids and also pipelines for the transportation of gas constitute monopolies. Historically however, price regulation is a well-known phenomenon in Norway, and the question of whether price regulation interferes with established rights or expectations has been the subject of several Supreme Court cases.[1] This question has received new attention through the so called Gassled case, which concerned a change in tariffs for the upstream pipeline network for transportation of natural gas on the Norwegian continental shelf. This case was recently decided by the Supreme Court, in favour of the State.[2]

If the concession gives a definitive right to charge a certain price throughout the concession period, a subsequent change of tariffs may be held invalid, either as lacking a legal basis or as an illegitimate reversal of an administrative decision ("enkeltvedtak"). It may also constitute a form of established right or property protected by the constitution, sections 97 or 105, or article 1 of the first additional protocol to the European Convention on Human Rights. However, even if the concession does not give any such fixed or definitive right to a certain tariff, the concessionaire may have certain reasonable expectations regarding the level of future tariffs. The concessionaire will have made considerable investments in reliance on the concession, and will have calculated on the basis of a certain tariff level, in order to get sufficient revenues to recover its investment with a reasonable profit. For this reason, it is generally advisable that changes of tariffs are subject to transparent, fair and predictable criteria. This is largely the case in the energy sector, as we consider further

1 See e.g. Rt. 1924 p. 949, Rt. 1929 p. 771; Rt. 1933 p. 1041 and Rt. 1950 p. 87.

2 HR-2018-1258-A.

below. Despite this, the concessionaire may, however, have a reasonable expectation that tariffs, although subject to change, will nonetheless be reasonably stable and predictable. Moreover, the government may, through its representations or conduct, have contributed to the creation of certain expectations about the future level of tariffs.

In this article, we discuss potential bases of government liability for such disappointed expectations in the event of changed tariffs. In principle, this issue is relevant for all kinds of regulated infrastructure. We will nonetheless mainly focus on the energy sector, where the issue seems to have the greatest current interest and attention. The question of whether established economic positions enjoy constitutional protection as established rights or property, has been the subject of much academic attention, and will not be further discussed in what follows. Rather, our focus is on potential bases of government liability for disappointed expectations falling below the level of a proprietary interest enjoying constitutional protection.

More specifically, we shall explore two different lines of reasoning that may come together as a possible basis of government liability for breach of reasonable expectations regarding a certain level of tariffs. The first line of reasoning focuses on distinct standards for tariff regulation of transmission and distribution networks in the energy sector, and discusses whether such standards may, more generally, be considered as saying something about what can be deemed the normal and reasonable expectations of someone investing in infrastructure dependent on regulated tariffs. The second line of reasoning discusses breach of legitimate expectations as a basis of liability under Norwegian law. While such liability under Norwegian law has traditionally been perceived as an ordinary delictual liability for creating false expectations, we discuss whether it should instead be seen as a distinct basis of state liability that may also protect reasonable expectations of regulated tariffs having some level of stability, predictability and fairness.

The article is structured as follows: In section 2 we discuss the general basis of liability for government acts. In section 3 we discuss special considerations relating to tariff regulation, including the special criteria

developed for electricity and gas transmission networks within the EU. In section 4 we discuss the reach of legitimate expectations as a distinct basis of state liability under Norwegian law. In section 5 we provide a short summary and conclusion.

2 The basis of liability for government acts

2.1 Introduction

Tort liability under Norwegian law for a protected interest requires a basis for liability, an economic loss and adequate causality between the liable act and the loss arising from it. In the following we will focus on the basis of liability.

Liability under Norwegian law may, in principle, be based either on liability due to negligence or on some form of strict liability. A question in this respect is whether the government's liability due to unlawful exercise of public authority is strict or based on negligence. This is discussed in section 2.2 below.

The State's negligence liability can arise either on the basis of the principle of director's liability ("organansvar") or that of employer liability due to negligence of employees, on the basis of Section 2-1 of the Norwegian Tort Act. In practice, the question of employer liability is in many cases likely to be the most practical alternative and we will therefore focus on this basis for liability in relation to potential negligent behaviour in section 2.3 below.

Another question is whether a particular category of strict liability, on the basis of breach of established expectations, could potentially apply to the State. This question is discussed in more detail below in section 4.

2.2 Strict liability and illegality/wrongfulness as basis of government liability

Legal academics have debated whether the government has strict liability for unlawful exercise of public authority, or whether the government's liability is founded on the ordinary bases of liability – in practice being the ordinary employer's liability based on culpa in section 2-1 of the Torts Act. In administrative law theory, most writers historically tended to consider the government's liability as being strict, partly based e.g. on the Supreme Court's decision in Rt. 1965 p. 712 (*Rådhushospits* or *Georges-dommen*). By contrast, Viggo Hagstrøm in his doctoral thesis about government liability advocated the view that the government's liability was, in principle, based on culpa.[3]

This difference between strict liability and liability based on culpa may in some cases be of limited practical significance, where the exercise of public authority is concerned. The government may in many cases legitimately impose quite considerable economic loss on private parties through its exercise of government power without incurring any liability. Whether the government can be held liable for loss arising from exercise of its authority must in general be determined on the basis of objective standards, relating to the lawfulness of such exercise of government power. In such cases, the assessment may not differ much, whether it is based on strict or on culpa liability as a point of departure.

In what follows, we will focus on section 2-1 of the Torts Act as a basis for government liability.

2.3 Section 2-1 of the Torts Act as a basis for government liability

Section 2-1 paragraph 1 of the Norwegian Tort Act reads as follows (our translation):

"An employer is liable for damages caused wilfully or negligently by an employee during the carrying out of work or tasks for the employer, having

[3] Viggo Hagstrøm, *Offentligrettslig erstatningsansvar* (TANO, 1987), p. 43 et seq.

regard to whether the claimant's reasonable expectations of the activity or service have been neglected. The liability does not comprise damages arising as a result of employee conduct beyond what may reasonably be expected on the basis of the nature of the enterprise or field of responsibility and the work or tasks."

The provision also comprises liability for public authorities. This is specifically mentioned in Section 2-1 (2) and follows from a number of Supreme Court decisions. It is clear that the provision also comprises so-called anonymous and cumulative mistakes by employees, meaning that it is not necessary to identify which specific employee(s) has caused a loss through negligence. The conduct of several employees may also be considered jointly under the negligence assessment.[4] A more controversial question has been that of how the level of negligence should be determined for different forms of public activities.

The preparatory works to Section 2-1 emphasise that the wording of the provision – "whether the claimant's reasonable expectations of the activity or service have been neglected" – signifies that certain categories of public control, service and aid activities and consultation practice should be made subject to a more lenient assessment of negligence, i.e. a higher threshold than would apply normally for imposing liability.[5] The question of which categories of public institutions should be subject to such assessment has been discussed in a number of Supreme Court decisions, where the Court has applied a standard assessment of negligence in some cases, while applying a more lenient approach in others.[6] Several of the Supreme Court decisions seem to indicate that the question of assessment must be made on the basis of the specific situation in each case.[7] This approach also complies well with the wording of Section 2-1.

---

4 See, as one example of cumulative mistakes, Rt. 2012 p. 146 (mobbedom III).

5 Ot.prp. nr. 48 (1965–66), see inter alia p. 79.

6 See, inter alia, Rt. 1970 p. 1154 (Tirranna), Rt. 1991 p. 954 (reisegaranti), Rt. 2011 p. 991 (ulmebrann), which can be seen as examples of where a lenient negligence assessment applied, and Rt. 1992 p. 453 (furunkulose), Rt. 1999 p. 1517 (Selbusjøen) and Rt. 2000 p. 253 (asfaltkant), where a regular norm was applied.

7 See, for example, Rt. 2000 p. 253 (asfaltkant), at p. 265.

In Rt 2009 p. 1237 (dykkerdommen) para 89, the Supreme Court summarized the state of law as follows (our translation):

> *"It is assumed in the preparatory works to the Tort Act and in case law that a more lenient norm of negligence shall apply to certain categories of public control, aid and service activities than what which follows from the ordinary rules of employer liability. Such lenient norm was, inter alia, not applied in the mentioned judgment in Rt. 1992 p. 453. As emphasized in Rt. 2000 p. 253 and Rt. 2002 p. 654, it must be determined specifically which requirements may reasonably be expected from the enterprise. Relevant aspects of significance are, inter alia, the general risk of harm within the area at issue, what economic resources are available to the authorities, the nature of the harmed interests and what possibilities the claimant had for insuring against loss. In addition, a distinction must be made between the public entity's failure to act and its active steps taken, see Rt. 2000 p- 253."*

The above paragraph was also quoted by the Supreme Court in Rt. 2011 p. 991 (ulmebrann), para 30. The question of whether a specific norm applies at all for certain categories of public actors, or if it is instead merely a matter of determining the specific threshold of negligence in each individual matter, whether a public or private tort feasor is involved – has been discussed in legal literature. The Supreme Court has not taken a clear stand on the issue.[8]

For the purposes of our present topic, the question of negligence by State employees arises in relation to the exercise of public authority, through the process of amending infrastructure tariffs. It is clear that an invalid public decision by a public authority may and often will lead to liability for the State. The answer is less clear in cases of valid administrative decisions that nonetheless disappoint reasonable expectations.

Rt 1992 p. 453 (furunkulose) concerned a case where several salmon farmers were awarded damages from the State for economic loss arising from imported salmon smolt being infected with the furunculosis disease. The Ministry of Agriculture had permitted the imports pursuant to the

[8] See Rt. 2011 p. 991, para 32.

Fish Disease Act, and this was considered negligent by a majority of 3 out of 5 judges in the Supreme Court case. The majority held, *inter alia*, that the unlawful use of public authority, including whether the requirements for a proper proceeding and lawful exercise of discretion have been met, will normally be a condition for concluding that loss caused by exercise of public authority shall lead to liability.[9] Nevertheless, he Court found in that case that there was a basis for State liability despite that the public permit as such was not invalid.

Graver holds that a fundamental requirement for imposing liability on public authorities in connection with the exercise of public authority is that the action or act by the authority in question is unlawful ("urettmessig").[10] His point of departure is thus that the State has the right to inflict an economic loss on other entities or individuals without incurring liability, unless the action inflicting the loss is unlawful. One example could be where the State prohibits an economic activity, without acting in breach of the Constitution Sections 97 and 105, with the effect that certain market players involved in the sector incur a loss. In this respect, Graver also emphasises that invalidity of a public decision is not a prerequisite for liability, but rather that unlawfulness in principle may lead to both invalidity as well as liability, where assessment of one of the questions is not necessarily decisive for the other.[11] Consequently, invalidity is not a prerequisite for concluding that an action or decision is unlawful.[12] *Hagstrøm and Stenvik* offers a similar view, stating that procedural faults can lead to economic loss, even if the mistake does not lead to invalidity; for example in cases of inexcusable delay on the part of the public administration.[13]

Hagstrøm also emphasises, with further references to case law, as a point of departure, that the State cannot be liable for loss on the basis

9 Rt. 1992 p. 453, at p. 476.

10 Hans Petter Graver, *Alminnelig forvaltningsrett* (Universitetsforlaget, 2015 (4th ed.)), pp. 546–547.

11 Op.cit., p. 547.

12 Op.cit., p. 547.

13 Viggo Hagstrøm and Are Stenvik, *Erstatningsrett* (Universitetsforlaget, 2015), p. 259, with reference to Rt. 2006 p. 1519, commented upon in further detail below.

of negligence, when the action at issue is lawful.[14] He does then hold, however, that the State will incur liability even if it has a legal basis for inflicting a loss, if the loss could have been avoided or reduced through the exercise of sufficient duty of care. According to Hagstrøm (referring here to English law), the appropriate view must be that statutory powers must be exercised with due care and skill. Hagstrøm holds that such a view is applied in Rt. 1973 p. 4,60 and is taken as an assumption in several other cases referred to.[15] He argues that the latter decision establishes a proportionality principle. A public decision will, however, not lead to liability solely because it can be characterized as unfortunate or unsuitable. A decision must instead, according to Hagstrøm, be clearly unreasonable or disproportionate, based on the situation at issue.[16] The public administration will have a rather wide margin of discretion, although a limit must be drawn where the intervention is disproportionate, given the loss incurred by the sufferer and the objectives behind the exercise of public authority.[17]

The Supreme Court decision in Rt 2006 p. 1519 confirms that the State may also incur liability due to negligence in cases where the exercise of public authority has not been unlawful. The case concerned a diver who suffered from disabilities after being involved in diving operations in the petroleum sector on the Norwegian Continental Shelf. The diver would qualify for financial support from a specific scheme established by Statoil, if he could substantiate his lasting disability. In order to qualify for support, the diver needed to provide evidence of the decision by the National Health Insurance Office of his right to public disability pension. This decision had to be presented to the Statoil support scheme committee prior to the final meeting of the committee, which took place on 26 May 2002. The National Health Insurance Office was informed several times about the importance of adopting a disability decision prior to the final Statoil committee meeting. Despite assurances from the office that the

14 Viggo Hagstrøm, *Offentligrettslig erstatningsansvar* (TANO, 1987), p. 246.
15 Op.cit., pp. 251–252.
16 Op.cit., pp. 256–257.
17 Op.cit., p. 255.

decision process would be handled rapidly, a decision was not made before the deadline, due to the negligent behaviour of an office employee. The processing time did not contradict public law requirements, but the five Supreme Court judges nevertheless found that the State was liable pursuant to Section 2-1 of the Tort Act for the diver's economic loss, due to the late decision and subsequent loss of Statoil support. The Court based liability on the failure to fulfil the diver´s particular expectations on priority and rapid processing time.[18] In this respect, the Court held that the conduct of the National Health Insurance Office employee represented a serious breach of the diver's legitimate expectations as to the handling of the case.[19] The Court criticised the State employee in strong terms, holding that the employee´s conduct was indefensible in several respects.[20] On this basis, the Court found that the employee had exercised clear negligence and had acted manifestly in breach of what the claimant reasonably could expect from the office. It was therefore not necessary to consider further which level of negligence should be required in order to incur liability for the public activities in question.[21]

Rt. 2006 p. 1519 illustrates that the State may incur liability for negligent behaviour under the exercise of public authority, despite the public decision in question not being invalid and the State not having acted in breach of distinct public law requirements. However, the Court also emphasised the graveness of the negligence involved in this particular case. This conduct, combined with the fact that the case concerned the financial situation of a person with disabilities, distinguishes it as a rather special case. Consequently, the threshold for imposing State liability, in cases where the public body has not acted unlawfully in the exercise of its public authority, is likely to remain high.

In conclusion, as a clear point of departure, a pre-requisite for imposing State liability for the exercise of public authority is that the action or act of authority is unlawful. Rt. 2006 p. 1519 illustrates, however, that it is

18 Rt. 2006 p. 1519, para 37.
19 Rt. 2006 p. 1519, para 47.
20 Rt. 2006 p. 1519, para 47.
21 Rt. 2006 p. 1519, para 48.

not necessary for a decision to be invalid, or to breach distinct public law requirements, in order to incur liability. Case law and literature would seem to suggest that an otherwise valid decision, which is clearly disproportionate or manifestly fails to show due care for private interests and expectations, may also give rise to liability. Below we discuss further the extent to which breach of reasonable expectations, created or facilitated by the government in some manner, may provide a more distinct basis of liability along such lines. First, however, we shall discuss some special considerations, standards and criteria that apply to tariff regulation in the energy sector.

3 Normative requirements applicable to tariff regulation

3.1 Introduction

In determining lawfulness and the threshold for negligence, the standards of behaviour applicable to the situation at issue serve as an important point of departure for the assessment. Such standards may follow from laws and regulations, standard business practice and customs, etc. The application of written and unwritten standards of behaviour to negligence assessments in tort law raises a number of questions, which have been the subject of much attention in legal literature and numerous court decisions.[22] The overall topic covers a variety of situations. On the one hand, negligence will clearly be established in cases where the wrongdoer has acted in breach of laws or regulations, which have been adopted with a view to avoiding this kind of damages arising, by prohibiting the behaviour exercised by the wrongdoer in that situation. On the other

[22] See for example Viggo Hagstrøm, Offentligrettslig erstatningsansvar (TANO, 1987), pp. 272–353 and Viggo Hagstrøm and Are Stenvik, Erstatningsrett (Universitetsforlaget, 2015), pp. 75–92.

hand, situations may arise where the laws or regulations have other rationales than the avoidance of damages, or do not have the protection of individuals as their aim at all, and where the relevance of the breach to an assessment of negligence is less clear. Furthermore, the existence of standard business practices and standards raises specific questions, such as their dissemination and the level of acceptance by relevant market participants, as well as the courts' view on the reasonableness of the standards.

In this article we will focus on what impact the standards for the conduct of energy regulatory authorities may have, on determining a possible basis for state liability. The most relevant rules for the conduct of the Norwegian energy regulatory authorities within the energy sector follow from EU law, and in particular from the directives and regulations included in the EU's third energy market package from 2009. This package consists of the Electricity Directive 2009/72/EC, the Electricity Regulation (EC) No. 714/2009, the Gas Directive 2009/73/EC, the Gas Regulation (EC) No. 715/2009 and Regulation (EC) No. 713/2009 for the establishment of ACER.[23] The Directives and Regulations for both the electricity and gas markets set out comprehensive rules for transmission and distribution activities in each sector, including requirements for energy regulatory authorities. The electricity market legislation applies in full to the Norwegian electricity sector. Consequently, these provisions are or will be implemented in Norwegian law, and the exercise of public authority in breach of the rules will be unlawful. In cases where such unlawful exercise of public authority is considered invalid, there will, at the outset, exist a basis for liability.

The gas market legislation, on the other hand, does not apply in full to the gas pipeline infrastructure on the Norwegian Continental Shelf, as this is considered an upstream pipeline network within the meaning

[23] The Norwegian Parliament gave its consent to the implementation of this package in the EEA Agreement on 22 March 2018. The decision of the EEA Committee to implement the package in the EEA Agreement will enter into force the day after all Contracting Parties have notified their consent in accordance with national Constitutional requirements. In the following we will assume that this decision enters into force with the effect that the third energy package is implemented into the EEA Agreement.

of the Gas Directive.[24] Most of this infrastructure is owned by the joint venture Gassled. The Norwegian State has taken the view that EU regulation of gas transmission and distribution activities, including the requirements for regulatory authorities, does not apply to the regulation of Gassled, and that Gassled is only subject to the specific upstream pipeline network provision of the Gas Directives.[25] The Directives' defininition of "upstream pipeline network" is not entirely clear. Furthermore, it is not clear from the wording and structure of the Directives whether the overall requirements for energy regulatory authorities only apply to regulators responsible for transmission and distribution systems, or also to regulators responsible for upstream systems. In what follows we will not discuss these questions of interpretation in more detail, but will instead assume that the rules at issue are not directly applicable to the Norwegian offshore gas infrastructure. On this basis, the question is whether the EU requirements may nonetheless have some relevance in determining the overall norms for regulatory conduct, and what consequences this has for the question of liability.

In the following, we will first consider some fundamental considerations behind the regulatory function below in section 3.2 before we review the requirements for regulators in more detail in sections 3.3 and 3.4. In section 3.5 we summarize our findings.

3.2 Tariff regulation – fundamental considerations

Netbound markets, such as gas and electricity markets, are characterised by the fact that suppliers and customers depend on access to a grid that, in practice, constitutes a monopoly infrastructure. On this basis, much regulatory effort has been put into the task of regulating the grid monopoly in otherwise competitive markets, in order to ensure that grid owners do not reap monopoly profits and that all market participants can

[24] See the definition of "upstream pipeline network" in Article 2(2) of Gas Directive 2009/73/EC.

[25] See Article 20 in Gas Directive 2003/55/EC and the corresponding provisions in Article 34 of Gas Directive 2009/73/EC.

compete on transparent and non-discriminatory terms. It is generally recognised that not only access to the infrastructure as such, but also the economic terms for such access, need to be regulated in some form, in order to ensure a level playing field for market participants.

Transportation tariff regulation can be structured in many ways. One fundamental distinction may be drawn between negotiated access regimes, where the owner is required to provide access on reasonable terms, which are then subject to negotiation and agreement between the parties, and regulated access regimes, where public authorities regulate the tariff – or at least the tariff methodology. EU and EEA laws require the application of regulated tariff schemes for gas and electricity transmission and distribution systems in EU/EEA Member States. Although the Gassled system has been considered to be an upstream gas pipeline system not formally bound by the rules applicable to transmission and distribution systems, a regulated tariff system has been chosen for this system as well.

Tariff regulation needs to balance, on the one hand, the legitimate expectations of the infrastructure owner in receiving a reasonable rate of return on the infrastructure investment and, on the other hand, the need of other market participants to have access to the infrastructure on fair terms. Moreover, given that a regulated tariff scheme substitutes for ordinary market pricing, it is important that the scheme ensures both predictability for the infrastructure owners and users, and sensitivity to other concerns that would ordinarily have been taken into account in a functioning market. In the absence of a predictable tariff scheme, owners cannot calculate whether future revenues will be sufficient to cover potential new investments, and users cannot assess the future marginal price of their product. Given that tariff regulation represents a heavy-handed intervention in the asset management of infrastructure investors, it is clearly important that the function is exercised with due care towards the long-term interests of both the owners and the system.

The public authority in charge of grid access and tariff issues is typically referred to as an energy regulatory authority. In practice, these regulatory authorities often have a number of tasks and responsibilities

beyond access and tariff regulation, such as supervision and licensing tasks throughout the value chain, but tariff regulation is arguably among the most central tasks of the authorities. Given that the authorities decide on the infrastructure owners' return on investment, it is of great importance that this task is carried out in a fair and predictable manner.

Two categories of requirements are typically imposed on energy regulatory authorities, in order to promote good regulatory conduct. These categories are first, the institutional requirements for independence of the authority, discussed below in section 4.3, and second, the requirements relating to the tasks and conduct of the authorities, discussed in section 4.4.

3.3 Independence of regulatory authorities

In principle, a regulatory authority may be part of the ordinary public administration, such as a Ministry of Energy. This has, in practice, been the case for the Norwegian upstream oil and gas resources, where the Ministry of Petroleum and Energy acts as regulator. However, given the fundamental need for a transparent, non-discriminatory and predictable regulatory scheme, international development has gone in the direction of requiring the establishment of independent energy regulatory authorities. This development is clearly stated in EU energy law.

The overall aim of the Electricity and Gas Directives is to promote the development of secure, sustainable and competitive internal electricity and gas markets, where free movement between Member States is ensured. In order to achieve this goal, both Directives establish common rules for transmission and distribution systems. Requirements relating to the organisation and conduct of national regulatory authorities are among the means introduced by the Directives in this respect.

The second Gas and Electricity Directives required the establishment of one or more regulatory authorities that were wholly independent of market interests.[26] These regulatory authorities were to be responsible

[26] See the Gas Directive 2003/55/EC, Article 25 and the Electricity Directive 2003/54/EC, Article 23.

for at least a minimum set of tasks, including tariff regulation. The third generation of Gas and Electricity Directives then introduced a much more stringent approach, where the Member State must designate a single regulatory authority, which shall be legally distinct and functionally independent from both public and private entities. The regulatory authority shall, *inter alia*, have budgetary autonomy and cannot be instructed by other public bodies.[27]

The EU's efforts to strengthen the independence requirements for national regulatory authorities must be seen in light of the fundamental aims of the regulatory institutions. The more restrictive approach to independence included in Electricity Directive 2009/72/EC and Gas Directive 2009/73/EC was essentially introduced for two reasons: first, to avoid the regulatory authorities acting in favour of publicly owned utilities to the detriment of other market participants, and, second, to avoid market distortion through short-term political decision-making.[28] This underlines the importance of ensuring non-discrimination, transparency and predictability in the decision-making of energy regulatory authorities.

3.4 Tasks and conduct of regulatory authorities

The next question is then whether certain norms or rules apply in relation to the specific conduct of regulatory authorities in tariff setting decisions, given the fundamental considerations outlined above. The rules of conduct for regulatory authorities under traditional Norwegian law follow from the general principles of public administrative law, i.e. the requirements in the Public Administration Act and other related legislation, as well as non-statutory law. The energy specific legislation does not set out to any great extent more specific rules of conduct for energy regulatory authorities. The guidelines are rather of a more general nature, such as the resource management provision in Section 1-2 of the

[27] See the Gas Directive 2009/73/EC, Article 39 and the Electricity Directive 2009/72/EC, Article.

[28] See Henrik Bjørnebye, *Investing in EU energy security* (Kluwer Law International, 2010), p. 178 with further references.

Petroleum Act and the third party access provision in Section 4-8. This corresponds to the national approach in the electricity sector, where the guidelines are of a general nature, such as the objects clause in the Energy Act Section 1-2.

The EU gas market legislation, on the other hand, governs the roles, responsibilities and conduct of energy regulatory authorities in more detail. With respect to tariff regulation, Article 41(1)(a) of Gas Directive 2009/73/EC and Article 37(1)(a) of Electricity Directive 2009/72/EC both require that the regulatory authorities be responsible for "fixing or approving, in accordance with transparent criteria, transmission or distribution tariffs or their methodologies". The tariffs or methodologies must allow the necessary investments in the networks to be carried out in a manner that allows them to ensure the viability of the networks.[29] Regulatory authorities must also have authority to require transmission and distribution system operators to modify their tariffs or methodologies, in order to ensure that they are proportionate and applied in a non-discriminatory manner.[30]

Gas Regulation No. (EC) 715/2009, Article 13 also includes rules on tariff setting and sets out, *inter alia*, in paragraph 1 that tariffs:

> "[…] *shall be transparent, take into account the need for system integrity and its improvement and reflect the actual costs incurred, insofar as such costs correspond to those of an efficient and structurally comparable network operator and are transparent, whilst including an appropriate return on investments, and, where appropriate, taking account of the benchmarking of tariffs by the regulatory authorities. Tariffs, or the methodologies used to calculate them, shall be applied in a non-discriminatory manner.*"

Electricity Regulation No. (EC) 714/2009 includes similar requirements in Article 14.

It follows from these provisions that the regulatory authority must approve tariffs or tariff methodology in advance and that the tariffs must

[29] Article 41(6)(a) of the Gas Directive and Artice 37(6)(a) of the Electricity Directlve.

[30] Article 41(10) of the Gas Directive and Article 37(1) of the Electricity Directive.

be transparent and non-discriminatory and allow for an appropriate return on investment. It also follows from the provisions that regulators must have the competence to modify tariffs when necessary to ensure proportionality and non-discrimination. On this basis, an important question which arises is whether any norms apply to the regulatory authorities' procedures for possible amendment of tariffs.

In case C-274/08, *Commission v. Sweden*, the European Commission argued that Sweden had acted in breach of its obligations under Electricity Directive 2003/54/EC.[31] Electricity Directive 2003/54/EC Article 23 included requirements which to a large extent correspond to the requirements of Article 37 of Electricity Directive 2009/72/EC and Article 41 of Gas Directive 2009/73/EC. Electricity Directive 2003/54/EC Article 23(2)(a), reads as follows:

> *"The regulatory authorities shall be responsible for fixing or approving, prior to their entry into force, at least the methodologies used to calculate or establish the terms and conditions for: […] connection and access to national networks, including transmission and distribution tariffs. These tariffs, or methodologies, shall allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks".*

The Commission held, *inter alia*, that Article 23(2)(a) of the Electricity Directive had not been correctly implemented under Swedish law, since the regulatory authority Energimarknadsinspektionen had not been given the task of fixing or approving, at minimum, the methodologies used to calculate electricity tariffs prior to their entry into force. Sweden held that its legislation complied with the Directive, since it contained the tariff methodologies, combined with the possibility for the regulatory authorities to correct the tariffs a posteriori. This system, in Sweden's view, satisfied the objective of the Electricity Directive.

The Court began by emphasising that the necessary grid investments referred to in the provision *"can be expected from economic operators only if those tariffs or methodologies are sufficiently precise and give a*

[31] [2009] ECR I-10647.

satisfactory level of predictability".[32] It then pointed to the fact that Swedish legislation did not include any provision concerning prior approval by the regulatory authorities, and that a Member State cannot disregard a directive provision, even if other arrangements put in place by the Member State serve the same purposes.[33]

Furthermore, the Court held:

> *"36. Under recital 15 in the preamble to the Directive, the national regulatory authorities are to fix or approve those tariffs, or at least, the methodologies underlying their calculation. Under recital 18 in the preamble to the Directive, those regulatory authorities must ensure that transmission and distribution tariffs so fixed or approved are nondiscriminatory and reflect the costs actually incurred in the transmission or distribution of electricity.*
>
> *37. In the light of those recitals, which define the objectives which the Community legislature sought to achieve, there is no reason to interpret Article 23(2)(a) of the Directive in a manner which departs from the wording of that provision. It is apparent from the very wording of that provision that, firstly, the national regulatory authorities are to fix or approve, before their entry into force, at least the methodologies used to calculate or establish the terms and conditions for connection and access to national networks, including transmission and distribution tariffs, and, secondly, that those tariffs or methodologies must allow the necessary investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the networks.*
>
> *38. Article 23(2)(a) of the Directive thus requires a level of predictability of the abovementioned tariffs sufficient to ensure that the necessary investments in the networks are carried out in a manner allowing these investments to ensure the viability of the electricity transmission and distribution networks.*
>
> *39. Even if, contrary to the Commission's submissions, that provision does not require the Member States to lay down a formula including a set of parameters permitting precise and direct calculation of the tariffs, it must be held that the legislative framework referred to by the Kingdom of Sweden contains only general principles*

[32] Case C- 274/08, para 29.

[33] Case C-274/08, paras 30–33.

> *and criteria which the network tariffs must meet and therefore does not contain any methodology allowing operators to predict, even approximately, the applicable tariffs.*
>
> *40. The objective of the Directive can be achieved only by the establishment of precise tariffs or of elements of a methodology of tariff calculation of a level of precision such as to allow economic operators to estimate their cost of access to the transmission and distribution networks.*
>
> *41. It follows that the Swedish legislative framework does not meet the requirement for predictability of tariffs under the Directive, necessary to allow investments in the networks to be carried out in a manner allowing these investments to ensure the viability of the electricity transmission and distribution networks. In any event, it does not introduce in the domestic law the mechanism for review in advance laid down in Article 23(2)(a) of the Directive. The Swedish legislation does not put into place a system under which tariff proposals are submitted to the regulatory authority before their entry into force." (emphasis added)*

Consequently, the Directives must be interpreted as setting out a requirement for predictability of tariffs. In our view, such requirement must apply both for original tariff setting and for later amendments. This entails that the regulator should also seek to ensure sufficient level of predictability when an amendment of the principles for tariff regulation is being considered.

In the Norwegian electricity sector, Norway is required to implement the provisions in Electricity Directive 2009/72/EC and Electricity Regulation No. (EC) 714/2009 in national legislation, with a resultant effect for the independent national regulatory authority RME. If the principles in the Directive and the Regulation are not implemented correctly in the Energy Act, with appurtenant regulations, and a party incurs a loss due to wrongful implementation, the State may incur liability based on EEA law principles, if the conditions developed under EEA for such liability are fulfilled.[34]If the principles are correctly implemented, but the national regulatory authority fails to fulfil those requirements, the State

[34] See, *inter alia*, the EFTA Court case E-4/04, Karlsson and Rt. 2005 s. 1365.

may incur liability on the basis of Section 2-1 of the Tort Act. The setting of income frames in the Norwegian electricity sector may provide one example. The Energy Law Regulation Section 4-4 (b) provides that the regulator NVE shall determine yearly income frames for each licensee, where the income over time shall cover operational and depreciation costs and provide a reasonable return on investment, assuming efficient use and development of the system. Furthermore, the provision sets out that the main principles for the determination of the income frame shall be reviewed at intervals, where each interval shall be no less than 5 years, and the licensee shall be guaranteed a minimum rate of return. If these principles are not observed and a market participant incurs a loss, the question of liability under Section 2-1 of the Tort Act might arise. For the Gassled infrastructure on the Norwegian Continental Shelf, however, the point of departure is different, given that the principles in Gas Directive 2009/73/EC and Gas Regulation No. (EC) 715/2009 may not apply directly to upstream gas pipeline networks. Nonetheless, the underlying objectives of these principles are just as important for the management of the gas pipeline system. This raises the question of whether the fundamental requirements relating to non-discrimination, transparency and predictability are relevant and may be considered a form of industry standard. In the latter case, it could be argued that a failure by a regulatory authority to observe these principles in cases of tariff adjustments may be considered negligence under Section 2-1 of the Tort Act. It is clear, however, that the scope for imposing liability in such cases will be more limited, compared to a similar case in the electricity sector, where directly binding standards of conduct are not fulfilled. Below we will therefore also consider another possible basis for liability, namely the breach of legitimate expectations.

4 Legitimate expectations as a basis of state liability

4.1 Introduction

Norwegian law recognises a general basis of liability in torts, in principle also applicable to the State, for the creation of false expectations that cause someone to suffer a loss.[35] The general perception seems to be that the State is liable for false expectations created by misleading information, according to the same conditions as for private persons.[36] As discussed above, the general basis of government liability is generally considered to be wrongfulness and/or negligence in accordance with the Torts Act section 2-1. In the following, we shall however discuss somewhat further the basis of government liability for breach of legitimate expectations.

A limited basis for such liability is recognised in principle under EU-law, and somewhat more extensively under international law relating to protection of foreign investments.[37] EU law normally requires "precise and specific assurances" causing someone to "entertain justified hopes", for a legitimate expectation to exist.[38] Under normal circumstances, this excludes anyone being able to entertain legitimate expectations on the basis of a general regulation or government policy, which it must ordinarily be expected can be subject to change.[39] To a limited extent,

---

35 See Viggo Hagstrøm, 'Informasjonsansvar – Om villedning av annen enn kontraktspart' TfR 1989 pp. 196–220, especially p. 206.

36 See e.g. Bjarte Thorson, *Erstatningsrettslig vern for rene formuestap* (Gyldendal Akademisk, 2011), p. 91 et seq.

37 Also under the first additional protocol to the European Convention of Human Rights, a principle of legitimate expectations is recognised, where it serves to broaden the scope of what constitutes a protected possession, cf. *Kopecky v Slovakia,* Application no. 44912/98 Judgment 28 September 2004; *Pine Valley Development and others v. Ireland,* Application no. 12742/87, Judgment 29 November 1991; and see generally Stig Solheim, *Eiendomsbegrepet i den europeiske menneskerettighetskonvensjon* (Cappelen, 2010) p. 285.

38 Paul Craig, *EU Administrative Law* (Oxford University Press, 2nd edn. 2012) p. 567.

39 Ibid. p. 573.

the ECJ has however held that regulations may also provide legitimate expectations that they will be reasonably and consistently applied, although primarily in the form that individual departures from a general policy may violate legitimate expectations.[40] It is more uncertain whether a change in regulatory policy may in itself violate legitimate expectations, although it does not seem inconceivable that the ECJ might, in special circumstances extend the principle to seemingly disproportional and arbitrary changes of policy which fail to take into account reasonable expectations created by an existing regulatory framework. Underlying the principle in EU law is a general proportionality standard, which will allow for the disregarding of prima facie legitimate expectations if required by overriding public interests.[41] Presumably, one may also envisage this standard as having some bearings on the question of whether there is a legitimate expectation in the first place.

A somewhat more extensive principle of respect for legitimate expectations has been developed by arbitral tribunals, interpreting the so called fair and equitable treatment standard under international law in relation to the protection of foreign investments.[42] An example is a recent SCC[43] case against Spain, concerning a change of regulated tariffs for solar power plants. Here, the tribunal found that a change of tariffs could violate legitimate expectations "even in the absence of specific commitments, when the receiving State performs acts incompatible with a criterion of economic reasonableness, with public interest or with the principle of proportionality." And it further held that "an investor has a legitimate expectation that, when modifying the existing regulation based on which the investment was made, the State will not act unreasonably, disproportionately or contrary to the public interest."[44]

---

40 Ibid. p. 578.

41 Ibid. p. 584.

42 See generally Ivar Alvik, *Contracting with Sovereignty* (Hart Publishing, 2011) p. 159–237 and p. 261–272.

43 The Arbitration Institute of the Stockholm Chamber of Commerce.

44 *Charanne and Construction Investments v. Spain*, SCC Case No. V 062/2012 (unofficial translation from Spanish by Mena Chambers) available at https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf, para. 513–514.

These international sources illustrate that it is not inconceivable that a concessionaire may, under certain circumstances, be deemed to have legitimate expectations regarding a certain tariff level, even if there are no specific commitments or assurances from the government in this regard. In the following we shall discuss the basis under Norwegian law for such a liability for breach of legitimate expectations. It should be emphasised that the kind of liability we envisage here is distinct from a contractual liability, or a protection of the expectation interest as such. What we envisage is a liability for the negative interest, i.e. loss and damage that the concessionaire has suffered through relying on the legitimate expectation. We first discuss some fundamental considerations before examining legal literature and case law.

4.2 Fundamental considerations

As mentioned above, it has sometimes been held that a lower standard of accountability should apply to questions of state liability, and such concerns may also have some application to expectations created by the conduct or representations of state organs. In particular where information is provided as a part of public service and control functions exercised by state organs, it is not necessarily reasonable that the same high standards of care may be expected as from a private service rendered for payment on a commercial basis. The state has a multitude of functions that have to be prioritised against each other, on the basis of limited public funds. What can be expected of a particular public function or service is, to a large extent, dependent on how much is invested in building the capacity of that function, which, to a very large extent, is of course and should be a matter of political priorities. Such concerns were, *inter alia*, relied on by the Supreme Court in Rt. 1991 p. 954, where the State was not considered liable for insufficient control measures against a travel agency that operated without a so-called travel guarantee, later causing loss to its customers. Since it was proven that the relevant authority had known that the travel agency operated without a guarantee, the case applies a quite lenient standard.

A special concern relating to government power is also that the government must have a large measure of freedom to regulate in the public interest at any given time. Government power is exercised in the public interest, and it is therefore not subject to private autonomy in the same manner as the freedom of action of private legal persons. For this reason, contractual restrictions on the future exercise of government powers have generally been considered problematic under Norwegian administrative law, and the extent to which government organs may undertake such commitments is generally held to be quite restricted.

Many of the same concerns that underlie this restrictive approach to government commitments also apply to the state's liability for legitimate expectations. The required freedom of the government to act in the public interest at any given time, suggests that the scope is quite limited as to how far anyone should be able to legitimately expect the government to act in a given manner, based on an existing policy or conduct. Public interest may require a change of government policy, even if it disappoints settled private expectations. Moreover, it is first and foremost up to the government to determine what the public interest requires at any given time. As long as a change of policy is applied consistently and indiscriminately to everyone affected, the underlying principle, that the government must be free to act in the public interest at any given time, will often strongly suggest that the mere change of policy in itself does not provide a legitimate ground for complaint.

However, it is also a general concern that information provided as an element of exercise of public authority should be trustworthy. Moreover, private parties may expect that information received from the government is generally adequate for assessing and predicting their legal position with some certainty. In Rt. 2009 p. 1357 (Nordea), the Supreme Court held that what could be expected from the government in this regard had to be determined, *inter alia*, on the basis of the guidance requirement in the Administration Act section 11. The guidance requirement entails that government authorities have a general duty to provide guidance "within their area", in order to give parties and third parties the opportunity to take care of their interests in the best possible manner. This entails at

its core a duty to provide correct, sufficient and adequate information to a party or third parties that is or will be affected by a decision in an individual case. The guidance requirement may consequently suggest a heightened standard of government accountability for disappointed expectations due to inaccurate or inadequate information, in circumstances where it does apply.[45]

A requirement of respect for legitimate expectations is already part of the administrative law protection against revocation of favourable government decisions, and the constitutional protection of property and established rights that follows from §§ 97 and 105 of the Constitution and the ECHR, first protocol article 1. Whether a given legal position is protected against legislative or regulatory change, may sometimes be seen as a question of legitimate expectations. The crucial question will then usually be whether the legitimate expectation is sufficiently strong and conclusive to constitute a kind of property right of which the concessionaire cannot be deprived unless adequate compensation is paid. In cases of regulatory interference with concessionary rights, the concept of legitimate expectations will mainly be an argument about the interpretation or content of the allegedly protected right, and whether it is sufficiently clear and conclusive to enjoy constitutional protection.

Even though a legitimate expectation does not in this sense constitute a protected right, some of the same concerns underlying constitutional protection could also be seen as requiring that the state could be liable for loss or damage suffered by someone through reliance on legitimate expectations. A fundamental concern is that government entails power being exercised over individuals and private legal persons in the interest of the public at large, but it does not mean that anyone should have to sacrifice their individual interests for this reason. If the public interest requires an individual to suffer damage, the principle of equality, underlying e.g. § 105 of the constitution, requires that the individual should be fully compensated. If someone has acted *reasonably* in reliance on government representations or conduct, and the government later changes

[45] A similar argument was made by the claimants in the Gassled-case before the Court of Appeal, although without success, cf. LB-2016-5707.

policy, perhaps even for valid reasons, it could thus be argued on the basis of the principle of equality that the damage sustained should nonetheless be borne by the public at large.

Such an argument is, moreover, further strengthened by the concern that private persons should generally be able to trust the government to act consistently, transparently and in a predictable manner. Crucially, this is not only out of concern for the individual suffering damage after having acted in reliance on some government conduct or representation. It also undoubtedly represents a significant public value, that every private person is able to conduct his affairs in reliance on the government acting consistently, *and* that the government is able to *assume* that its conduct and representations are trusted by the public.

This concern for trust and predictability does not of course mean that the government should be unable to change policy. It is possible to consider freedom of authority to be a main concern, while at the same time considering that legitimate expectations ought to be protected. Holding the state liable for breaching legitimate expectations can in this regard be seen as an intermediate position between considering the state's authority to be completely restricted, on the one hand, or completely without restriction, on the other.

4.3 Literature

The government's failure to respect legitimate expectations may entail a certain government measure being invalid, for instance if a valid decision or license giving someone a legal right is cancelled without taking sufficient account of established expectations and the loss caused to the private party. This would seem to be the main circumstance firmly established in the literature as a consequence of breach of legitimate expectations. It is less clearly established in the literature whether legitimate expectations can give rise to liability in cases of valid decisions.

Smith and Eckhoff seem to assume such a liability lacks a legal basis, at least *de lege lata*, although the question is not discussed in any depth.[46]

Other writers are more positive. Hagstrøm, in his extensive treatment of public liability, writes that breach of "special expectations" may provide a distinct basis of liability in certain cases of valid government measures, referring to the established principles of public liability in cases relating to errors of registration in public property registers, but also to an established principle of public liability in cases of reliance on planning regulations that are subsequently changed.[47] Hagstrøm seems to assume that this is a strict liability, i.e. irrespective of culpa, and he also argues that it may be extended to other cases where "the citizens have such legitimate expectations that violations ought to incur objective liability towards the public".[48]

Graver does not discuss government liability for breach of legitimate expectations as such.[49] His view may nonetheless be seen as assuming that creation of false expectations can lead to liability for the government under ordinary principles of tort law, which is also the view taken in Bjarte Thorson's doctoral thesis on liability for pure economic loss (*formuestap)*.[50] This fails, however, to differentiate a distinct government liability for violation of legitimate expectations from the ordinary liability for negligent misrepresentation.

Hagstrøm and Stenvik also seem to consider a liability for disappointed expectations as being mainly an information liability based on the creation of false expectations, and they do not differentiate between government liability and the liability of individuals and other legal persons.[51] Their analysis nonetheless in reality goes quite far towards

---

46 Thorstein Eckhoff and Eivind Smith, *Forvaltningsrett* (Universitetsforlaget, 10th edn., 2014) p. 315, and see also p. 483 et seq.

47 Viggo Hagstrøm, *Offentligrettslig erstatningsansvar* (Tano, 1987) pp. 240–241.

48 Ibid. p. 242.

49 Hans Petter Graver, *Alminnelig forvaltningsrett* (Universitetsforlaget, 4th edn., 2015) p. 547.

50 Thorson (2012) p. 91 et seq.

51 Viggo Hagstrøm and Are Stenvik, *Erstatningsrett* (Universitetsforlaget, 2015) p. 56 et seq.

arguing for a principle of legitimate expectations, specifically relying on the criteria established in Rt. 1981 and Rt. 1990 p. 1235, to which we revert below.

The fact that a principle of legitimate expectations has yet to become firmly established in the literature as a distinct basis of government liability, does not seem to reflect any deeply entrenched opinion against such a principle. Hagstrøm is the only writer discussing such a principle at any length, and he seems to maintain that Norwegian law does recognize such a principle, even irrespective of fault. Moreover, as we revert to immediately below, there is quite strong support in court practice for the existence of a principle of legitimate expectations as a distinct basis of government liability. In view of this, it is actually somewhat surprising that such a principle has not been more clearly recognized in the literature.

4.4 Case law

A liability for breach of legitimate expectations through valid government acts has long been recognised in relation to changed planning regulations. In Rt. 1911 p. 444, the owner of a building site was given compensation for costs spent in reliance on planning regulations that were subsequently changed. Similarly, in Rt. 1968 p. 62, compensation was given to an owner for reliance on a building permit that had been issued in an unregulated area. The area was subsequently regulated, which meant that the owner could not after all carry out his building plans according to the permit. In both of these cases, the Supreme Court seems to have considered that the liability was strict and served to protect established, reasonable expectations, i.e. it did not depend on fault or wrongfulness. In the latter case, the court indicated that it considered the liability to follow directly from §§ 97 and 105 of the Constitution, the reasoning presumably being that the changed regulation, although legitimate, nevertheless disturbed established legitimate expectations under the old regulation.

This reasoning was upheld in a more recent decision in Rt. 1994 p. 813, where the Supreme Court nonetheless emphasised that what was at

issue was a relatively narrow exception from the main rule that change of regulations must be expected and does not give a right to compensation. The court specified here that the exception was limited to reliance on existing and settled planning regulations, and did not cover disappointed expectations in relation to every kind of regulatory changes. Specifically, it required that the regulatory change could not reasonably have been foreseen, and that the costs in reliance on the existing regulation were significant. To this effect, the court seems to have affirmed that liability was strict and followed from §§ 97 and 105 of the Constitution.

One case which goes quite far in imposing liability for disappointment of expectations is Rt. 1925 p. 988. Here compensation was granted for the loss caused to a farmer, by virtue of a permit to import muskrats being withdrawn. The rationale may have been that the permit was apparently valid and therefore reasonably relied on, even though it was in fact invalid due to a lack of authority on the part of the permitting authority and therefore validly withdrawn. The case stands as a quite striking example of compensation being granted for loss caused by a valid decision overturning a prior invalid decision, because the latter had created legitimate expectations. The decision has however been criticised in the literature for going too far.[52]

In more recent case law, the Supreme Court may also appear more sceptical about imposing such a seemingly strict liability for disappointment of established expectations. In Rt. 1975 p. 620 (*Eskemyr*), a municipality had sold a number of housing sites subject to a specific area plan. The plan was subsequently changed, in order to make it possible to build more and bigger houses (e.g. apparently an apartment block), which led to the owners of the other sites claiming compensation because this had allegedly negatively affected the value of their properties. Although the Supreme Court found that the owners had a reasonable expectation that future buildings in the area would be in accordance with the area plan, it nevertheless held that this was not a legally protected interest. Specifically, it reasoned that the municipality had a right and a duty to adapt its planning regulations to changing needs, and that this could not

[52] See Hagstrøm (1987) p. 371, referring to critique by both Castberg and Eckhoff.

give anyone relying on a given regulation the right to compensation. The difference from the previously cited case law relating to changed planning regulations, seems to be that in this latter case the owners claimed compensation for their expectation interest, i.e. the alleged reduced value of their housing sites, as a result of the changed regulation.

What must still be considered the central criteria for a liability for disappointed expectations was introduced in Rt. 1981 p. 462 (*Malvik*).[53] A building society had acquired a large property in expectation of being allowed to build houses there, based at least to a large extent on a perceived understanding with the municipality that the necessary permits would be obtained. The Supreme Court found that no agreement had been formalised, and that representations and decisions by the municipality that clearly assumed the project would go ahead could not be interpreted as a binding commitment from the municipality. As regards non-contractual liability, the court nevertheless considered it "conceivable that an expectation created by the municipality that the plan would be implemented, should be legally protected" (470) and that "there may be situations where compensation should be awarded irrespective of fault" (p. 471). This seems to have derived from a more general principle set out by the court, where it considered that a possible liability for disappointed expectations needed to depend on an evaluation of the "basis and strength of the expectation and on the circumstances that led the municipality not to decide in accordance with the expectation" (p. 469).

The majority of the court nonetheless found that on the one hand the building association did not have a reasonable expectation that the municipality had committed itself, since the association had experience as a builder and was itself well placed to assess the risk factors, and on the other hand that the decision of the municipality not to go ahead with the plans was based on a prudent weighing up of different concerns, where other public concerns (in this case, the location of a planned highway) had eventually won out. There was, however, dissent. The minority found that the conduct and representations of the municipality had created a very strong basis for a legitimate expectation regarding the municipality's

[53] See also to this effect Hagstrøm and Stenvik (2015) p. 56.

intention, and that the fact that the decision of the municipality not to go ahead with the plans was based on a mere change of policy therefore suggested the municipality was liable. Although the majority's reasoning was that there was no basis for liability in this specific case, partly because the government had acted without fault, the broad evaluative criterion that it set out does also seem to suggest that fault on the part of the government in creating the expectations in the first place was not an absolute criterion for liability.

This was followed up in Rt. 1990 p. 1235 (*Fiskarbank*). A ship-owning company had relied on a subsidy scheme for shipbuilding in order to enter into a contract with a Norwegian shipyard. The Supreme Court found that that the ship was in fact not eligible for a subsidy under the applicable regulations, and consequently that the refusal to grant a subsidy was valid. At the same time, it was clear that similar ships had in the past obtained subsidies under the arrangement, and thus the question was whether the ship-owning company, irrespective of the correct interpretation of the regulations, had at least a legitimate expectation that it would receive subsidies, based on past government practice. The court referred to the same principle set out in the *Malvik case,* stating that liability depended both on the "basis and strength of the expectation", and on the "circumstances which led to the decision not being in accordance with the expectation" (p. 1241). Although the court considered that the company did have good reasons to believe the application would be successful, based on past practice, it nonetheless found this insufficient for liability, as the past practice was based on an incorrect interpretation of the applicable regulation, and it considered there to be "strong concerns against imposing liability on public authorities for discontinuing a practice in breach of regulations, provided no specific promise has been given to the person whose expectations are disappointed" (p. 1241). While this past practice was the government's fault, it did not constitute wrongfulness in relation to the ship owner. Moreover, the ship owner's expectations did not have their basis in any direct contact with the relevant authority. In addition, in this case, the lack of fault on the part of the government in relation to the claimant was a factor in the broad evaluation by the court

that led to no liability being found, but here it also seems that the court did not consider fault an absolute requirement for liability.

In Rt. 1992 p. 1235 (*fiskekvote*), the Supreme Court similarly held in an *obiter dictum* that government representations and promises giving the appearance of a government commitment could lead to the government being liable, even if the relevant authority did not have capacity to restrict its powers in this manner (p. 1240–41).

A number of other cases appear to rely more clearly on negligent misrepresentation as the basis for government liability in cases of disappointed expectations.

In Rt. 1915 p. 721, a permission to import cloth free of duties for a period of three years was withdrawn, because the relevant authority lacked competence to give such a permit for a longer period than one year. The court found that the government was liable for wasted costs spent in reliance on the permit, on the one hand because the private party had reasonably and without fault relied on the permit, and on the other hand because the relevant authority had not shown "necessary diligence" when the permit was given.

In Rt. 1952 p. 475, the government was considered liable towards an association of forest owners for its request that the association enter into a number of contracts for wood, meant to be used for the drying of fish in the upcoming season. As it turned out, the wood was not needed for this purpose after all, and the association suffered a considerable loss. Although no contract had been entered into between the association and the government, the latter was considered liable. It had specifically requested the association beforehand "to do its utmost to provide the necessary quantum of wood material". Although the association was not legally required to act, it had reasonably relied on the request as an assurance that there would be a pressing demand for the requested quantum of wood. But in finding in favour of liability, the court also held that the relevant authority was to be blamed for having misled the forest owners' association, stating that it "placed considerable weight" on this (p. 477).

In the previously mentioned Rt. 2006 p. 1519, a former offshore diver was deemed to have a legitimate expectation that treatment of his application for public disability insurance would be prioritised by the social security office. He had informed the authority that he needed a decision within a certain date to qualify for a private insurance from his employer, and had also been given assurances by the head of the authority that he would do what he could, in order to ensure treatment of the application before the relevant date. In finding that there was a basis for liability, the Supreme Court assumed that government fault was a necessary requirement for liability (see in particular para 44). Applying the law to the facts, it was found that one of the employees at the social security office had rather recklessly failed to prioritise the application, with full knowledge of both the promise that had been given and the consequences for the former diver of not meeting the specified date. Thus, there was little doubt that there was negligence on the part of the government.

In Rt. 2009 p. 1356, the court referred to the criteria developed in Rt. 1981 p. 462 and Rt. 1990 p. 1235 as part of the evaluation of negligence under the Torts Act section 2-1, but did not develop this much further.

4.5 The liability criteria

The main principle that emerges through case law is that a liability for breach of established expectations depends on a relatively broad evaluation and balancing of, on the one hand, the *basis and strength* of the disappointed expectation, and on the other hand, the *reason* why the government failed to act in accordance with it. These criteria can be seen in connection with the more general requirements elucidated above, that government should act with due care towards private interests, which includes a general requirement of proportionality in public decision making.

In relation to the first criterion, it seems to be particularly relevant whether the expectation is induced by the relevant government authority through a clear and distinct representation, or promise meant to be relied

on by specific individuals (cf. especially Rt. 1990 p. 1235), but this does not rule out that the possibility that other types of expectations which have a less distinctive basis may also be legitimate. It is, for instance, conceivable that this may include expectations as to a minimum measure of stability and predictability of future tariff policy, based on an existing regulatory framework or tariff structure.

In relation to the second criterion, assuming a certain expectation has been reasonably relied on in the first place, it will be of particular relevance whether the relevant government authority had both a good reason for disappointing the expectation, and was also to blame for creating it in the first place, although the latter is not necessarily a requirement. This can be seen both under the heading of a principle of proportionality and a duty of care. A possible line of reasoning would be that the government acts disproportionality or without due care if it does not take into account reasonable expectations relied on by a private party, which the government, through its acts or omissions, has contributed to creating.

It is also clear that the two criteria must be seen in tandem. If the government has made a strong and unambiguous promise, which is clearly meant to be relied on, towards an individual legal person, there must presumably be quite strong and overriding public reasons for disappointing the expectation, in order to escape liability. If, on the other hand, there are no distinct commitments or representations by the government, but instead merely expectations about a certain regulatory stability and continuity, it does not necessarily rule out liability if the government acts arbitrarily, outside the ordinary scope of actions, and disregards private interests without good cause. But this assumes a more lenient assessment requiring something equivalent to manifest unreasonableness and disproportionality, since the reasonable expectation in the first place is that the government has a general power to enact regulatory changes.

5 Conclusion

Above, we have explored the possible basis of state liability in a case of changed tariffs, where no definite right to a specific tariff level can be ascertained, and the setting of tariffs is consequently subject at first instance to the discretion of the relevant government authority.

We have shown that while public liability will usually require breach of some objective standard of legality, Norwegian law also recognises a more general requirement of due care and proportionality in the exercise of government power, which may provide a possible basis for liability irrespective of the validity of a government act.

The regulation of tariffs in net bound services, such as in the energy sector, while necessarily subject to regulatory discretion, does also, and for precisely that reason, raise particular concerns in relation to the interests of infrastructure owners, and their reasonable expectations as to some measure of predictability and stability of future tariffs. This has led to distinct EU standards and criteria for the setting of tariffs in energy transmission and distribution networks, with respect to both electricity and gas. But the imposition of these standards and criteria also reflect more general concerns, which might provide for at least some basis of reasonable expectations regarding a certain level of fairness, predictability and stability in the regulation of tariffs.

Finally, we have shown how Norwegian law may be seen as recognising a distinct liability for breach of legitimate expectations. Although liability on such grounds ordinarily requires breach of a clear and unambiguous assurance or representation, it does not rule out, as a ground for liability, such general and reasonable expectations as an infrastructure owner may have, under an existing regulatory or policy framework, that changes in tariffs will take due account of its interests, and not be unfair, arbitrary or disproportionate. There is nevertheless little doubt that the threshold for government liability will generally be higher in the absence of distinct criteria or standards, such as under the EU rules on electricity and gas.

Some reflections on the Northern sea route

By W. E. Butler[1]

[1] John Edward Fowler Distinguished Professor of Law, Dickinson Law, Pennsylvania State University; Foreign Member, National Academy of Sciences of Ukraine and National Academy of Legal Sciences of Ukraine; Foreign Member, Russian Academy of Natural Sciences; Associate, International Academy of Comparative Law.

The times are well within memory that a distinction was drawn between the Northeast Passage in the Arctic and the Northern Sea Route.[1] The latter term had a specialized meaning in the doctrinal writings of the day: it referred to a cabotage internal sea route between – sailing eastward – the White Sea to a Russian Arctic port located on the northern coastline before the Bering Strait (small cabotage) or to a route from the White Sea to an eastern seaport of Russia southward of the Bering Strait (great, or large, cabotage). The Northern Sea Route, in brief, was a domestic route by which cargoes were carried from one Russian (Soviet) seaport to another and a monopoly of the coastal State.[2]

The Northeast Passage referred to what was generally regarded as an international sea route from the Atlantic to the Pacific whose path, depending upon ice conditions, may or may not overlap with the path traversed by vessels sailing the Northern Sea Route. Whether non-Russian flag vessels enjoyed the right to sail these seas turned upon whether the Arctic seas were regarded as internal or historic waters of the coastal State with a concomitant right to bar or limit passage or whether these seas were subject to the international law of the sea. If the latter, the ordinary rules operated of high seas, deep seabed, exclusive economic zone, continental shelf, contiguous zone, territorial sea, historic bays, internal sea waters, baselines, and so on.

The melting of the Arctic icepack so noticeable in recent years happens to have coincided with other maritime developments which have far-reaching implications for transport by sea and exploitation of the continental shelf. The enhancement in the size of the Panama Canal

---

1 See generally W. E. Butler, *The Soviet Union and the Law of the Sea* (1971); Butler, *Northeast Arctic Passage* (1978); Douglas Brubaker, *The Russian Arctic Straits* (2005).

2 In October 2017 the Russian Government announced that the Ministry of Transportation of the Russian Federation had taken the initiative to advance a proposal that foreign flag vessels under charter would no longer be allowed to undertake cabotage carriage on the Northern Sea Route. See Российская газета [Russian Newspaper], 7 September 2017, p. 4, cols. 2-6. This suggests that the State monopoly on cabotage long extant during the Soviet period was eliminated in the post-Soviet years and may be reintroduced. The proposal is believed in Russian shipping circles to be directed against offshore registrations of directly or indirectly Russian-owned vessels with a view to encouraging Russian owners to register their vessels under the Russian flag.

already is proving to increase traffic by lowering voyage times well in excess of predictions and promises to invigorate maritime commerce in the Gulf of Mexico and eastern seaboard of the United States.[3] Turkey is on the verge of building an alternative larger access to the Black Sea in the form of a canal. If completed, such a canal cannot fail to influence (and perhaps reduce?) the stature of the Suez Canal as a major international waterway.

For countries extensively engaged in or dependent upon maritime trade, the Northeast Passage offers attractively shorter voyage times between the Atlantic and Pacific, assuming that the ice permits a shipping season of from eight to twelve months each year. The larger canals will allow the deployment of larger ships, ice-reinforced to be sure, in Arctic waters. Whether the warming trend in the Arctic will continue is, within the world of shipping, a speculative proposition, but the likelihood seems high.

Coastal infrastructure in the Arctic will become more of a key factor then at present. There will be basic infrastructure essential to support any Arctic navigation and habitation and special-purpose infrastructure inspired by the sundry particular uses that are made of the Arctic. At an Arctic Circle Forum held in June 2017 at the Wilson Center in Washington D. C., the western, particularly the Alaskan, participants emphasized the need for investment funds for Arctic projects.[4] There remains in place, however, a bifurcation in Arctic affairs that is perhaps intensifying rather than weakening.

The "bifurcation", roughly drawn, is from the Nordic States and possessions and Russia, as one domain, and Canada and the United States, as the other. Traversing the Nordic/Russian segment is to cross these northern lands by ship off their coast via the Northeast Passage; to cross from the Bering Strait eastward by traversing the Arctic waters north of Alaska and Canada is to travel the Northwest Passage, with no cabotage

[3] The increased capacity of the Panama Canal is changing "… the way the world's shipping lanes ply their global routes …". "Panama Canal Expansion", *Journal of Commerce*, 13 October 2017. joc.com

[4] See the *Proceedings*, Wilson Center – Arctic Circle Forum, 21–22 June 2017, Washington D. C. (Washington D. C., Wilson Center, 2017). iv, 28 p.

route ever singled out for Canada and Alaska equivalent to the Northern Sea Route northward of the Nordic/Russian segment.

The differences multiply: the population in the Nordic/Russian segment is substantially larger than in the Alaskan/Canadian segment. It would appear that the ice conditions are marginally superior in the Nordic/Russian segment. The presence of shipping and port infrastructure is greater along the Northeast Passage than available on the Northwest Passage. The attitude of Russia and Canada to the presence of vessels in the respective Passage ranges from welcoming in the Russian portion to indifferent or even hostile in the Canadian segment. Russia is committed, and has been for decades, to invest in its northern territories, whereas Canada and the United States place considerably less emphasis and dedication of resources to their own Arctic spaces.

Russia is actively marketing the Northern Sea Route as an expeditious and less expensive route to the Far East and return in comparison with the alternatives. This has long been a dream of the Soviet Union and post-Soviet Russia. To the extent that sea lanes in the Arctic are available, they offer a much preferred mode of access to coastal populations and installations. There is a considerable record of experimentation and support which, given better ice conditions, more infrastructure, a modern icebreaker fleet, advanced technology, and a genuine desire to exploit Arctic resources, set Russia apart from the other major Arctic powers.

Choosing to ratify the 1982 Law of the Sea Convention will not have been an easy decision for Russia if viewed solely from the standpoint of Arctic interests. The alternative would have been to continue to advance doctrinal claims to an "Arctic sector", or to "historic bays and sea", and similar claims that would have assimilated the Arctic seas bordering northern Russia to a regime of "internal waters". And while the Soviet State and post-Soviet Russia have been careful not to espouse those doctrinal claims in their extreme form as State practice, they will have been an alternative that had its attractions.

Accepting a law of the sea regime for the Arctic expanses north of Russia has proved to be a more than satisfactory outcome, it would seem. When the ratification formalities of the 1982 Law of the Sea Convention

were completed in 1997, Russia and all other Arctic powers had only the most basic understanding of the configuration of the continental shelf and deep seabed underlying Arctic waters. Subsequent research, mostly conducted in order to substantiate Russian claims to the Arctic continental shelf, have revealed a shelf far more extensive than was previously realized, extending to the North Pole, depending upon what mathematical model and projection is used. Russia has emerged from this exercise with vastly more continental shelf domain than could have been imagined and thereby achieved much of what the claims to internal waters or historic seas would have achieved while nonetheless preserving the freedoms of the seas so vital to Russian maritime interests in other parts of the globe.

It would seem that there is genuine value in retaining the traditional distinction between the Northeast Passage and the Northern Sea Route. Some vessels are able to navigate the Northeast Passage with minimal coastal State assistance; others will require pilots, icebreaker escort, air reconnaissance, and other coastal State services at a reasonable fee. It will not be surprising if the coastal State insists that passing vessels comply with environmental, technical, and ice-reinforcement standards consistent with the Law of the Sea Convention as a condition of being present in Arctic waters. On the other hand, nothing to date suggests that Russia is interested in removing its monopoly on small and large cabotage along its Northern Sea Route. That is an option open to Russia at any time and may potentially be an investment inducement under certain conditions.

Nonetheless, the gap may well be widening between those who favor, support, and invest in the development of the Nordic/Russian Arctic and those who prefer a Canadian/United States Arctic with minimal human presence and limited support for economic development.

There is another bifurcation in Arctic matters that is perhaps relatively latent for the moment but nonetheless present. This is the question of who should govern or administer the Arctic: the Arctic countries physically contiguous to the Arctic (Iceland, Denmark, Norway, Finland, Canada, United States, Russia), plus (or not) Sweden close by, or whether the Arctic

is an area of the globe in which the entire international community has a legitimate interest. Both competing trends are in evidence.

International navigation through the Bering Strait, for example, might be regulated on a multilateral international basis, either the Arctic powers or the international community as a whole, or on a bilateral basis by the two littoral States – Russia and the United States. As the "Strait States", Russia and the United States would have priority in regulating passage through the Strait if they were so minded.[5] Indeed, one could adjust the scenario a step higher and suggest that the Arctic region as a whole might be governed by the Arctic States alone, to the exclusion of any non-Arctic powers.

At least one precedent works against the Arctic powers deciding to manage the Arctic by themselves: the international legal regime of Svalbard (Spitsbergen). The international community has asserted an interest in that archipelago pursuant to a multilateral treaty dating back to 1920.[6] Even in recent years non-Arctic States have acceded to the Svalbard arrangements and thereby evidenced an interest in the management of Arctic affairs.

The establishment in 1996 of The Arctic Council plays, in this context, an ambivalent role. Initially, the Arctic Council was intended to be an organization of the eight littoral Arctic States and appropriate organizations representing indigenous peoples of the Arctic. In addition, provision was made for "observers", of whom there are now several, including the Chinese People's Republic.

It might be argued that the law of the sea, conceptually at least, is responsible for the presence of non-Arctic powers in the Arctic Council. Svalbard is land territory; none of the powers who are parties to the 1920 Spitsbergen arrangements has a claim to the waters adjacent to the islands forming the archipelago. The Arctic Ocean is another matter; once claims to continental shelves and exclusive economic zones are resolved in those

---

5 See A. N. Vylegzhanin, "Legal Status of the Bering Strait: Historical and Legal Context", *Jus Gentium*, II (2017), pp. 505–522.

6 See A. N. Vylegzhanin and V. K. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas,* ed. & transl. W. E. Butler (2007).

polar regions, the balance of superjacent waters consists of high seas presumably, under the 1982 Convention, open to all States. As of 2017, twelve States have been accepted as observers: People's Republic of China, France, Germany, India, Italy, Japan, Republic of Korea, Netherlands, Poland, Singapore, Spain, and the United Kingdom.[7]

The observers potentially bring investment capital to the Arctic, among whatever other research, scientific, or other polar interests they may have. The smallest and shallowest of the world's oceans, the Arctic Ocean via the Northeast Passage and the Northwest Passage links Asia, Europe, and North America. At present, approximately 90% of international trade takes place in the northern hemisphere. About 80% of the ca. four million inhabitants of the Arctic live in the Eurasian Arctic composed of Russia and the Scandinavian countries.

While Russia, including the former Soviet Union, invested substantially in its own Arctic possessions throughout much of the twentieth century, the scale of investment acquired to take full advantage of the Northeast Passage shipping lanes is tremendous. In 2013 a non-Arctic power declared an interest in those shipping lanes and, by inference, in the infrastructure required to support safe and even year round maritime transport. In September 2013 China introduced a plan to finance the Belt and Road Initiative (BRI) with investments initially projected to amount to US$5 trillion. By 2017 sixty-five countries had become part of the BRI initiative, although Russia is the only Arctic power to have done so and is likely to become the principal beneficiary of investment flows.

The question is whether, on balance, the Nordic countries will become active in BRI initiatives, including with their own capital investments, and what balance may be struck between the Northeast Passage and the Northern Sea Route.

[7] Article 6, Annex 2, of the Rules of Procedure of The Arctic Council, in admitting an observer, recognizes that an extensive legal framework applies to the Arctic Ocean, including the Law of the Sea, and that this framework provides a solid foundation for responsible management of the Arctic Ocean.

THE SCANDINAVIAN INSTITUTE OF MARITIME LAW is a part of the University of Oslo and hosts the faculty's Centre for European Law. It is also a part of the co-operation between Denmark, Finland, Iceland, Norway and Sweden through the Nordic Council of Ministers. The Institute offers one master programme and several graduate courses.

The core research areas of the Institute are maritime and other transport law as well as petroleum and energy law, but the members of the Institute also engage in teaching and research in general commercial law.

In SIMPLY – The Scandinavian Institute's Maritime and Petroleum Law Yearbook – the Institute would like to present some examples of the research of its members and friends in English.

ISSN: 0332-7868

07 Media