

# *The EU-based companies in the Arctic Ocean: Normative Aspects*

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# Introduction

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## *EU-based companies in the Arctic Ocean:*

- The EU is a relevant actor in the Arctic even it has not coastline in the Arctic Ocean.
- EU main interests as maritime actor through EU based economic operators

## *Main normative aspects related to the making of EU Arctic policy*

### Legal basis:

- EU competences affecting the Arctic (Lisbon Treaty) and the related development of the EU Arctic Policy
- UNCLOS to which the EU is Part since 1994

### Soft law:

- Recent establishment of Arctic Economic Council;
- Corporate social responsibility with a focus on marine environment and sustainability – towards a new concept of **corporate ocean responsibility**

Legislation: The Offshore Safety Directive 30/2013

## EU-BASED COMPANIES IN THE ARCTIC OCEAN:

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- The EU is a relevant actor in the Arctic even it has not coastline in the Arctic Ocean
- The increasing interests on Arctic offshore activities bring to a major number of economic private actors operating within the Arctic Ocean: economic opportunities and a variety of industries (maritime industry and shipping and offshore industry, etc..)

### *Parallel initiatives at international level:*

- World Economic Forum- Global Agenda Council on Arctic 2014-16: both Arctic and international top business leaders in private sectors

- World Ocean Council (WOC), the international business leadership alliance on **corporate ocean responsibility**: role of responsible companies in addressing environmental concerns, more effectively engage in ocean policy and planning, and develop science-based solutions to cross-cutting environmental challenges that cannot be solved by one company or industry

- **EU interests** as maritime global actor are, inter alia, through EU based economic operators carrying economic activities at Arctic waters

# MAIN NORMATIVE ASPECTS RELATED TO THE MAKING OF EU ARCTIC POLICY

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- **Legal basis:**

EU competences affecting the Arctic (Lisbon Treaty) which are relevant for the making of EU Arctic Policy as stated in 2008:

- ✓ Protecting and preserving the Arctic in unison with its population
- ✓ Promoting sustainable use of resources
- ✓ Contributing to enhance Arctic multilateral governance based on UNCLOS

Applicable law in the Arctic: UNCLOS to which the EU is Part since 1994

**Geographical scope:** The notion “Arctic region” used by the EU “covers the area around the North Pole north of the Arctic Circle. It includes the Arctic Ocean and territories of the eight Arctic States: Canada, Denmark (including Greenland), Finland, Iceland, Norway, Russia, Sweden and the United States” [COM 2008].

# EU competences affecting the Arctic (Lisbon Treaty)

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Lisbon Treaty clarifies the EU competences: exclusive, shared and complementary. *The form of the EU competence will depend on the choice of legal basis for each specific actions*

- **3 DIMENSIONS OF COMPETENCES AFFECTING THE ARCTIC:**

1. **Internal competence:** EU Arctic territories: Finland and Sweden Member States (no Arctic coastline)

2. **Competences related to the European Economic Area:** Iceland and Norway. To what extent the EU legal competences will have a direct impact on the Arctic ~~States~~ Offshore Safety Directive n. 30/2013

1. **External competence**, alone or together with Member States

# Sectorial Competences relevant for the making of the EU Arctic Policy (1)

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- Most of sectorial competences relevant for the Arctic fall under shared competences between the EU and its Member States.

Main sectorial policy fields: regional policy, transport; environmental policy; common fisheries policy; energy policy; research policy; indigenous peoples; tourism..----

- ❖ EU Maritime Integrated Policy (2007): it seeks to coordinate, not to replace policies on specific maritime sectors—one of its pillar is the Marine Strategy Framework (2008), and more recently, with a focus on the safety of oil and gas operations the Offshore Safety Directive (2013) whose legal basis are Articles 191 and 192 TFUE setting out the environmental policy of the EU

- Particular attention is also paid to maritime industry sectors

- Our focus will be on the EU **environmental policy** which is a shared policy and it is also relevant for Norway and Island via EEA Agreement.  
Inter-sectorial aspects: transport and energy policies- maritime industry



# Sectorial Competences relevant for the making of the EU Arctic Policy (2)

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## International Agreements:

- Most important environmental problems facing the Arctic are regulated internationally: *Helsinki Convention*; *Transboundary effects of industrial accidents*, *OSPAR*, etc...
- **UNCLOS** : a comprehensive legal framework to regulate all ocean space, its uses and resources, **to which EU is Part since 1994**.



strikes a balance between the rights and obligations of coastal States and those of countries carrying on economic activity beyond national jurisdiction.  
**The main aim of such balance is the sustainable exploitation of resources**

Both MS's and EU have competence in protecting and preserving the Arctic Ocean and both also participate in UNCLOS (as well as other global conventions)

# The EU Arctic policy in the making (1)

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## ***Two focal points:***

Lack of internal coherence: between EP and EC –relevant for the co-decision process

Need for vertical and horizontal coherence: other EU policies (transport, energy, environmental, enterprise and industry (i.e. corporate social/environmental responsibility policies..)) that are relevant for the Arctic

## ***1st waves of documents: 2008-2010***

- **EP resolution (2008) and EC Communication (2008)**

The EP called for an Arctic Treaty ad modum of Antarctica Treaty

The EC called for the application of UNCLOS- **the priority goal is the environment preservation**

**2009 Conclusions on Arctic** issues supported the EC Communication and requested report on progress made.



# The EU Arctic policy in the making (2)

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- ***2nd waves of documents: 2010-2014***

## **2011 EP Resolution:**

- Abandoned the idea of Arctic Treaty
- Joined the EC and Council in recognizing that an extended legal framework exists in the Arctic
- Stronger accent on opportunities for resource exploitations

## **2012 EC/High Representative Joint Communication:**

- Progress since 2008 as requested by the Council
- Arctic multilateral governance is replaced by less ambitious “International Cooperation” in line with existing international law UNCLOS and cooperation with the Arctic Council and IMO.
- Arctic environment remains the cornerstone of the EU Arctic Policy
- Link to the Europe Agenda 2020 for smart, sustainable and inclusive growth

# The EU Arctic policy in the making (3)

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## 2013 Economic and Social Committee Opinion

- Investment in responsible economic activities
- Protect the region's fragile environment
- More transparency and public information

## 2014 EP Resolution

- Motion of 5 March 2015 –called for a ban on oil drilling in icy Arctic waters of EU and of EEA
- Resolution approved on 12 March 2014 **call for a binding instrument for pollution prevention** (paragraph 18) – *the 2013 Oil Spill Agreement by Arctic Council members does not include specific binding common standards*
- Need to undertake investment in an environmentally and socially responsible manner—indirect reference to the concept of corporate social responsibility with a focus on marine environmental issues
- Reconciliation between economic activities and viable socio-economic and environmental protection

## 2014 Council Conclusions

- Sustainable economic development and environmental protection with a focus also on the role of industries
- Further development of an integrated and coherent **Arctic Policy by December 2015**

# Soft Law related to economic private actors

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During Canada's Chairmanship (2013-15), the Arctic states and indigenous permanent participant organizations are facilitating the creation of a circumpolar business forum - the **Arctic Economic Council**:

The [Arctic Economic Council](#) will:

- ☐ foster business development in the Arctic,
- ☐ engage in deeper circumpolar cooperation, and
- ☐ provide a business perspective to the work of the Arctic Council.

The establishment of the Economic Council has been a very important issue during the Canadian chairmanship of the Arctic Council, **which is scheduled to end in April 2015.**

## ***Parallel initiative?***

- [Arctic Business Forum](#) (6<sup>th</sup> Forum, Rovaniemi March 2015)
- [Arctic Business Council](#) (Arctic Business 2014, the first Arctic event for business by business, took place from 8 to 10 October in Bodø, Norway, just north of the Arctic Circle)

# Crucial Developments both within EU and Arctic Council frameworks

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- The priority goal is the environment preservation
- To take account of the inter-connectedness of industries and human activities centered on the Arctic Ocean. Whether the issue is shipping and ports, offshore energy, marine research, fishing or tourism, **a decision in one area can affect all the others.**
- **Business development should indeed not forget the environmental challenges that corporations' activities are likely to bring as a consequence of increased economic activities in the Arctic.**
- According to the European Commission, '**corporate social responsibility**' refers to companies taking responsibility for their impact on society in terms of both human rights and environment.
- It is a multidimensional concept, through which corporations integrate – on a voluntary basis – social and environmental considerations in their business actions
  - ❖ *COM(2011) 681 final*
  - ❖ *2011 OCED Guidelines for Multinational Enterprises*
  - ❖ *Ruggie's UN Guidelines Principles*
  - ❖ *UN Global Compact*
  - ❖ *IMO Energy Efficiency Resolutions*
  - ❖ *G20-Global marine environmental protection Initiative*

**The focus here is on the impact on ocean following the initiative of the World Ocean Council (WOC), the international business leadership alliance on *corporate ocean responsibility***

# A modern understanding of CSR— Multidimensional nature: The Ocean Dimension

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- Better aligning EU approaches to global approaches to Corporate Ocean responsibility
- In this context responsibility is used in this context as, by analogy, in the framework on business and human rights not necessary refer to legal liability, but includes moral and political liability: ***it is a preventive tool***
- 1. Standards of conduct addressing private sectors
- 2. Recommendations to States to be complied with by private actors

Internationally recognized principles, standards and guidelines – they are established by non-binding instruments.

However they might contribute to the development of international and European law in the field of offshore related activities.

# Article 208 UNCLOS

## Pollution from seabed activities subject to national jurisdiction

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- Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.
- [...]
- 5. States, acting especially through competent international organizations or diplomatic conference, **shall establish global and regional rules, standards and recommended practices and procedures** to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.
- Might article 208 UNCLOS make corporate ocean responsibility binding?

# **De Lege ferenda**

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The **Offshore Safety Directive** 30/2013: legal aspects related to private actors and risk assessment documentation

The main part of the Directive concerns rules, such as the establishment of emergency plans and requirements for risk management to be complied by the private sector

The relevance of the Offshore Safety Directive in the Arctic Ocean:

1. Specific references to Arctic
2. Transboundary effects
3. EU operators outside the EU maritime space (i.e. Arctic)



# Is the Directive EEA relevant?

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- According to the official information provided by the **Mission of Norway** :

## Directive is not EEA relevant: .

1. geographical scope is wider than the scope of the EEA Agreement
2. material scope

## Geographical Scope

Directive applies to oil and gas operations in the waters of the Member States including their exclusive economic zones and on their continental shelves.

Article 126 of the EEA Agreement that the Agreement, on the other hand, applies to the “**territories of the EFTA States**”.

## Material scope:

In any event, the main objective of the Directive is – as the EEA EFTA States see it – to ensure safety in the offshore petroleum sector, and **not to ensure a well-functioning internal market**. Directive falls outside the material scope of the EEA Agreement.

Even though Norway does not consider the proposed regulation to be EEA-relevant, we will continue to contribute actively to the highest level of safety in offshore petroleum activities in the EU. Norway is participating on a regular basis in the European Offshore Authorities Group.

# Applicability of Offshore Safety Directive outside the Union

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Article 2 (2) of Directive: «Offshore menas situated in the territorial sea; EEZ or CS of Member States within the menaing of UNCLOS»

- No Arctic waters of EU Member States and EEA States
- **However the Directive reference explicity to the Arctic in the Preamble (52)** where stresses the importance of Arctic waters as adjacent water to EU
- *Member States who are members of the Arctic Council are encouraged to actively promote the highest standards with regard to environmental safety in this vulnerable and unique ecosystem, such as through the creation of international instruments on prevention, preparedness and response to Arctic marine oil pollution, and through building, inter alia, on the work of the Task Force established by the Arctic Council and the existing Arctic Council Offshore Oil and Gas Guidelines*

## **And article 33 (3) on coordinated approach at international level**

- *The Commission shall promote high safety standards for offshore oil and gas operations at international level in relevant global and regional fora, including those relating to Arctic waters*

# Offshore Safety Directive

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- Indirect reference to the concept of corporate ocean responsibility as prevention tool

## Preamble

(36): bets global practices and **private actors primary responsibility** for controlling the risks-  
implementing prevention policy in the union and outside the Union. (...)

it would be desirable for operators and owners registered in the territory of a Member State to apply the corporate major accident prevention policy when operating outside offshore waters of Member States as far as possible within the applicable national legal framework

## Mutatis mutandis 38 and 39

(41) : While Member States are not able to enforce rules outside the Union, means for confidential reporting should enable the reporting of concerns of persons involved in offshore oil and gas operations outside the Union.

61: where a company that is active, itself or through subsidiaries, in offshore oil and gas operations outside the Union is registered in a landlocked Member State, that Member State should request that company to provide a report on accidents occurring in such operations, which can be shared at Union level, in order for all the interested parties in the Union to benefit from the experience gained from such accidents.

# Prevention Policy and obligation to report

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- Article 19 Offshore Safety Directive:

Corporate major accident prevention policy: i.e. operators' primary responsibility (19.2): environmental management system should put into effect at corporate level (19.5a) (19.8) It also covers their production and non-production installations outside of the Union.

- Article 20 Offshore oil and gas operations conducted outside the Union : obligation to report

Member States shall require companies registered in their territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the Union as licence holders or operators to report to them, on request, the circumstances of any major accident in which they have been involved.

# Prevention Policy and obligation to report

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## Article 25: Reporting on safety and environmental impact

The functioning of the measures for risk management, major accident prevention, verification of compliance and emergency response relating to offshore oil and gas operations within the Union, as well as outside of the Union where appropriate.

## **Article 32 (4)**

Member States shall coordinate between themselves measures relating to areas outside of the Union in order to prevent potential negative effects of offshore oil and gas operations.

# Summing up

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## Legal basis related to the making of the EU Arctic Policy

- ❖ current issues related to the sustainable exploration and exploitation of Arctic resources by EU-based multinational corporations with particular focus on environmental and social impacts

## Complementary between the concepts of corporate social responsibility and corporate environmental responsibility

- ❖ To what extent may environmental interests be discussed in the realm of European company law?

## EU regulatory actions which address business activities in the Arctic: Limits of geographical scope of Offshore Directive

- ❖ It seems that corporate ocean responsibility policy is partially and indirectly integrated into the Offshore safety Directive

## Open Research Questions

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- ❑ How will corporate ocean responsibility policies be integrated into the EU's external action in the Arctic, with a particular focus on the environmental policy?
- ❑ How to can the vertical and horizontal coherence of the above-mentioned policies be assessed? In particular, how to assess whether they effectively work towards the goals of the EU external action? How may they be combined with the Arctic Council regulatory framework?
- ❑ Does European company law have a role in furthering Arctic sustainable development? To what extent may the conduct of EU-based companies contribute to determining an innovative approach to Arctic environmental governance?
- ❑ What are the available judicial and non-judicial remediation mechanisms for adverse environmental impacts caused by EU-based companies (e.g. transnational litigation, conciliation, mediation, compliance mechanisms)? Are they effective? Besides State-based remedies, are there any useful mechanisms at the company or sector level (e.g. multistakeholder initiatives)?



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# Thank you for your attention!

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