

## **THE EFFECT OF FLAG STATE WARNING LETTERS AS A MEANS OF ENFORCING IMO REC. 263 ON PILOTAGE IN THE DANISH STRAIGHTS**

**PHILIP MAX COSSEN, MASTER MARINER, LLM**

Svendborg International Maritime Academy (SIMAC)

Graaesvej 27, DK-5700 Svendborg, Denmark

e-mail: [pmc@simac.dk](mailto:pmc@simac.dk), <http://www.simac.dk/en/frontpage/>

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**Abstract:** A ship operator wishing to transit the Danish Straights faces two options. He may choose to adhere to IMO's recommendation to take a pilot and spend up to US \$11,000 (DanPilot) each way, or he may instruct his master to navigate through these complex waters in dense traffic and varying depths and face the consequences of being reported to his flag state by the Danish Maritime Authority (DMA). In principle, either choice is legal. This paper bases its research upon statistical data presented by the Danish Maritime Authority (DMA) combined with post-graduate research data generated via interviews of major stakeholders engaged in the maintenance of safe marine traffic through the Danish Straights. The Paris Memorandum of Understanding on Port State Control (Paris MoU) database (Thetis) has been analyzed against flag state warning letters issued by the DMA to ships not adhering to the IMO recommendation SN.1/Circ.263 in 2017. The DMA data consists of statistical data on the name, nationality and type of ships transiting various stretches of Route T between 2013 and 2017. The DMA data analyses the interrelationship between nationality, owner, type of ship and contraventions to the IMO Recommendation. The purpose of this analysis was to ascertain whether the flag state letters had triggered an additional PSC inspection.

Preliminary results indicate that ship owners opting not to adhere to the IMO recommendation face no immediate legal or financial consequences whatsoever.

### **1. INTRODUCTION**

The number of vessels adhering to IMO Recommendation SN.1/Circular 263 to engage a pilot when transiting Route T or the Sound through Danish waters has decreased steadily during the past five years. Route T starting at Skaw in the northernmost part of Denmark and ending in Gedser at the southernmost part is regarded as one of the busiest shipping lanes in

the world. Vessels transiting through the Sound between Sweden and Denmark navigate through dense traffic with ferries crossing the narrow, 2 nm wide straight. An average of 27,000 vessels each year entering or leaving the Baltic Sea transit one of the Danish Straights. In 2017, 325 of these were deep draught vessels with a draught exceeding 11 meters. The increase in traffic is partly due to the Russian Government's extension of the trans-Russian pipelines to St. Petersburg on the Baltic Sea (Wandel, J, 2017). DanPilot, which is the largest supplier of pilots in the Danish Straights, estimates that 800,000 tons of oil outbound from the Baltic port of Primorsk is piloted through Danish waters each day.

Route T and the Sound are regarded as challenging passages for navigators due to a series of sharp bends, dense traffic and shoals. Despite these factors, no mandatory pilotage regulations exist. This is due to the UNCLOS right to innocent passage combined with the Copenhagen Treaty of 1857, which both leave the decision to engage a pilot to the prerogative of the ship master. In recognition of the huge environmental impact that a polluting incident would have in the Danish Straights, the IMO has published an official recommendation, Circular 263, (IMO, 23.10.2007) in which all deep draught ships are recommended to engage a pilot when transiting Route T and the Sound. In an attempt to enforce this IMO Recommendation, the DMA issues flag state warning letters to the flag state of any vessel failing to adhere to the Recommendation. The number of flag state warning letters increases annually as the number of non-piloted vessels decreases.

## **2. RESEARCH METHODS**

The paper aggregates qualitative data gathered by the DMA combined with results from an existing research paper (Mathias Bjørn Ørsted Christensen, 2018). In this research paper, the Paris Memorandum of Understanding on Port State Control (Paris MoU) database (Thetis) was analyzed against flag state warning letters issued by the DMA to ships not adhering to the IMO Recommendation in 2017. The DMA data consists of statistical data on the name, nationality and type of ships transiting various stretches of Route T between 2013 and 2017. The DMA data analyses the interrelationship between nationality, owner, type of ship and contraventions to the IMO Recommendation. Using this data, a search in the Thetis database was undertaken for every violating ship that was issued a flag state warning letter in 2017. The purpose of this analysis was to ascertain whether the flag state letters had triggered an additional PSC inspection.

## **3. REGULATION**

In order to understand the decision the master faces when opting not to engage a pilot, we must attempt to understand the background of maritime law which regulates the waters surrounding Route T and the Sound.

The doctrine that the sea by its nature must be free to all has always been a long standing tradition. In recognition of this fact a coastal state is allowed to exercise only limited jurisdiction in the waters adjacent to its shores. Initially, the area of jurisdiction was confined to a cannon-shot range creating a belt along the entirety of its coast. In the late 18th century this concept was replaced by a fixed limit of 3 nautical miles. In the course of legal development many nations have now standardized their jurisdiction to 12 nautical miles which coincides with the maximum allowable limit of Article 3 in UNCLOS (The United Nations Convention on the Law of the Sea). UNCLOS which was adopted in 1958, contains the most widely recognized set of international rules regulating the rights of the coastal state in matters regarding protection of its waters and natural resources.

A fundamental cornerstone of UNCLOS is the right to Innocent Passage (Article 17), which allows a ship or aircraft the right to enter and pass through the territorial waters of another state so long as the passage complies with the Article 19 definition: *“Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.”*

In other words, no fishing, spying, polluting, transfer of cargo, persons or illegal trade of any nature whatsoever may be conducted in the territorial waters of a foreign nation. The right of Innocent Passage of foreign ships through the territorial waters of a coastal state is one of the oldest and most universally recognized rules of public international law.

Any attempt at imposing mandatory pilotage in Route T or the Sound would thus constitute an infringement of the right to Innocent Passage and in conflict with UNCLOS. Those unfamiliar with this area of international law may consider this an unreasonable restriction on the options available to a coastal state wishing to protect its waters from, drunken masters, pollution or hazards to navigation.

As a matter of fact, UNCLOS allows for the right to Innocent Passage to be overruled by the coastal state if the deems necessary due to the above mentioned risks. Article 21 states that:

*“The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: “... (a) the safety of navigation and the regulation of maritime traffic; ... (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;”*

Additional other safety and environmentally related factors are mentioned in Article 21.

Reading Article 21, most people would agree that the DMA have the necessary jurisdiction to regulate the movement of vessels transiting the Danish Straights based on the interest of the safety of navigation and or/the preservation of the marine environment, and thus *can* impose mandatory pilotage in order to protect their waters.

This assumption is quite understandable and a widespread misconception. Article 35 imposes an irrevocable stalemate situation on the flexibility introduced under Article 21 by stating that:

*“Nothing in this Part affects: (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits”.*

Such a *long-standing international convention* has existed in Danish waters since the enactment of the Copenhagen Convention of 1857 Abolishing Tolls and Mandatory Pilotage in Danish Waters (Hugo Caminos, 2014). The Convention abolished three centuries of mandatory dues forced upon all foreign vessels transiting any of the Danish Straights. Failure to pay the dues, which were calculated as a percentage of the value of the cargo, led to the sinking or confiscation of the ship and/or her cargo. The Copenhagen Convention of 1857 thus made the Danish Straights international waterways free to all military and commercial shipping. The convention forbids mandatory pilotage or tolls and expressly states that the decision to take a pilot rests solely with the ship’s captain or owner. Pilot fees must be:

*“...moderate and equal to foreign as well as national vessels” (Article 3 Copenhagen Convention 1857).*

The above restrictions set upon the DMA’s authority to impose mandatory pilotage ultimately led to IMO Recommendation SN.1/Circ.263 December 2003: *Amendments to the recommendation on navigation through the entrances to the Baltic Sea* in which pilotage is recommended:

### ***Route T***

*3. Ships with a draught of 11 metres or more... and*

*4. Ships irrespective of size or draught, carrying a shipment of irradiated nuclear fuel, plutonium and high level radioactive wastes on board ships (INF-Code materials) should:*

*.1 use for the passage the pilotage services locally established by the coastal States;*

### ***The Sound***

*Loaded oil tankers with a draught of 7 metres or more, loaded chemical tankers and gas carriers, irrespective of size, and ships carrying a shipment of irradiated nuclear fuel, plutonium and high level radioactive wastes (INF-Code materials), when navigating the Sound... should:*

*.I use the pilotage services established by the Governments of Denmark and Sweden;*

With its' hands tied, the DMA attempts to enforce IMO Recommendation SN.1/Circ.263, by issuing so-called flag state warning letters to the flag states of all vessels navigating through the Danish Straights in violation of this Recommendation (Mortensen, 2014). The desired effect of these warnings is to persuade the flag state authority to take disciplinary action against the owner or operator of a violating ship in its flag register.

#### 4. FLAG STATE WARNING LETTERS AND PORT STATE CONTROL

Having established that the Danish Government does not have the legal authority to impose mandatory pilotage on vessels transiting the Danish Straights, this paper will now consider how the DMA's flag state letters of warning draws violating ships to the attention of Port State Control (PSC) inspectors.

Under the regime of the Paris MoU, a vessel reported to another member state for violating IMO Recommendation 263 is upgraded to a Priority II ship. This reporting process, which takes place via the Danish Maritime Assistance Services (MAS) is defined as an Unexpected Factor within the realms of Paris MoU. This Unexpected Factor upgrades the ship to a Priority II ship and which can trigger an additional PSC inspection in the next Paris MoU port. The need to undertake an additional inspection is however for the professional judgement of the PSC Authority (MoU, Paris).

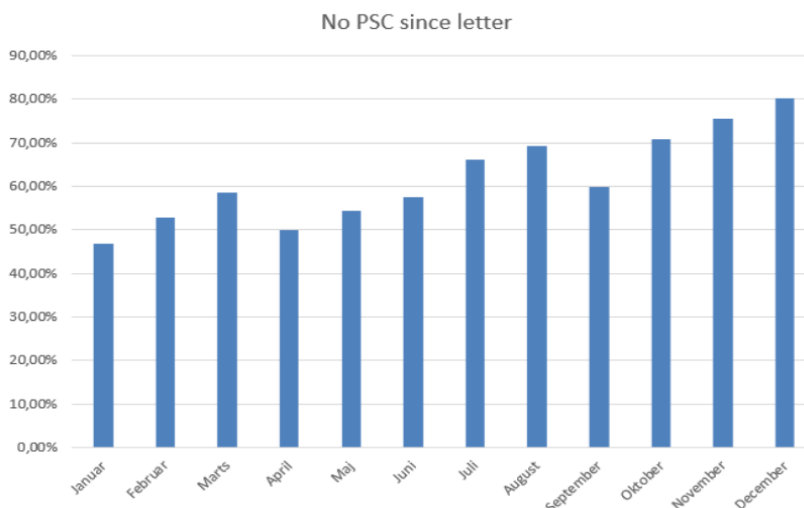


Figure 1: Illustrates the percentage of ships in 2017 that did NOT undergo a PSC inspection following issuance of a Flag State Letter. (Christensen, Jakobsen and Juhl, 2018)

Results of analytical research (Christensen, Jakobsen and Juhl, 2018) concluded that there was next to no evidence that PSC inspections were conducted as a direct result of the flag state

letters. Furthermore, there was conclusive evidence, that the more recent the issuance of the flag state letter, the more unlikely it was that an additional PSC inspection would occur. Instead, vessels were selected for inspection through the standard selection criteria and ship risk profiles.

## 5. DATA ANALYSIS

This section will provide a brief consolidated analysis of the qualitative data gathered by the DMA. The intensity of heavy traffic entering and leaving the Baltic through the Danish Straights has increased steadily during the last decade. Since 2013, the number of vessels encompassed by IMO's Recommendation to take a pilot in the Danish Straights has increased by 20% and yet the actual number of vessels taking a pilot in 2017 fell from 3282 to 2732. The DMA data on violating vessels and flag state letters revealed that 654 letters were issued in 2017. This is an increase of 174% since 2013 where only 239 letters were issued.

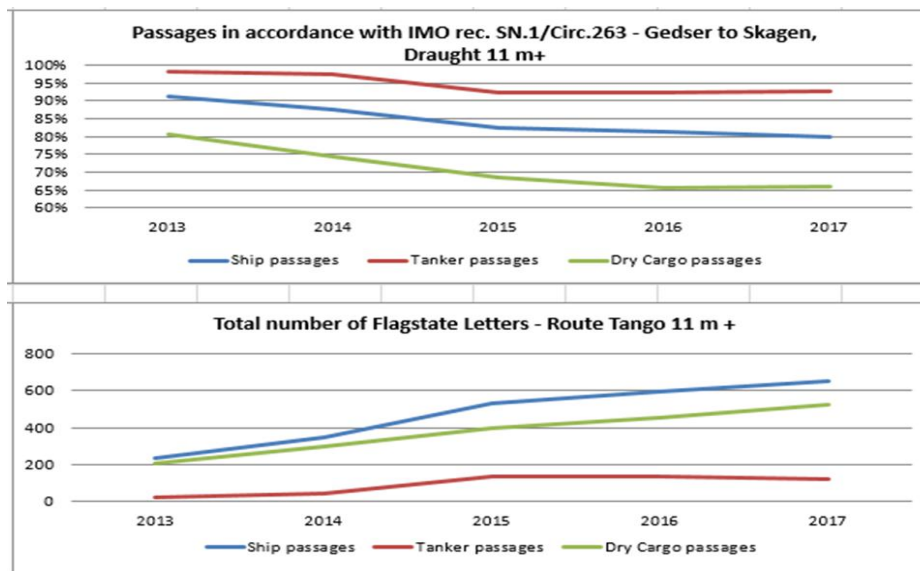


Figure 2. Danish Maritime Authority: Transits of Route Tango 2013 to 2017 (Hansen, S, 2018)

The number of vessels transiting Route T that were encompassed by the IMO Recommendation also increased steadily from 2732 ships in 2013 to 3251 in 2017. Interestingly, the number of vessels not adhering to the Recommendation has seen a greater increase in comparison to the number of transiting ships, see Figure 2.

Data analysis revealed that the majority of ship owners still choose to take a pilot for part of the transit, but opt to save costs by not taking a pilot for the entire 278 nautical mile transit of Route T as per the IMO Recommendation, see Figure 3. Instead, vessels now transit long stretches of Route T unassisted by local pilot knowledge. In what appears to be systematic compliance with

company instructions not to engage a pilot, one Greek tanker owner/operator chose not to take a pilot 23 times in 2014 (Andersen, O. 2014).

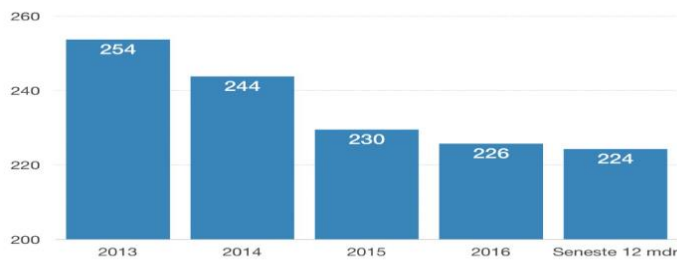


Figure 3. Danish Maritime Authority: Average distance per ship with a pilot through Route T in nautical miles 2013 - 2017 (Hansen, S, 2018)

Further analysis revealed that 81% of the 652 flag state warning letters issued to deep draught vessels in 2017 were issued to dry bulk vessels and 19% to tankers. This is due to oil major requirements and restrictive charter party clauses making pilotage compulsory for ship operators. Of the flag state warning letters issued, 20.1% went to Panama, 16.9% to Greece, 15.3% to Liberia, 13% to the Marshall Islands, 8.6% to Hong Kong and 7.8% to Malta. Interestingly, all of the violating flag states are on the latest Paris MoU White list published in June 2016, (2016 Paris MoU performance list, June 2017). From this, it can be concluded that the issuance of the flag state warning letters does not have a detrimental effect on the overall PSC performance of violating flag states.

## 6. CONCLUSION

Research on the effects of flag state warning letters issued to the flag states of vessels violating IMO Rec. 263 when transiting the Danish Straights can conclude that the intention of flag state warning letters appears to have little effect. This has been verified by the fact that there is an increase in the number of flag state letters issued to the same ship owners despite the fact that their flag states receive recurring warning letters. Furthermore, the increase in issued warning letters is proportionally greater than the increase in traffic indicating that more vessels choose not to take a pilot for the whole of Route T. The option available to PSC inspectors to conduct an additional PSC inspection is not systematically utilized within the Paris MoU regime and therefore fails to pose a threat of sanctions upon the ship operators. Finally, there is an increase in ships taking a pilot for considerably shorter stretches of Route T than recommended by IMO Rec. 263.

All of the above results lead to the conclusion that the warning letters issued by the Danish Maritime Authority have little effect on the enforcement of IMO Recommendation 263.

The question remaining to be answered is therefore: Is the financial benefit gained by ship owners and charterers opting not to take a pilot through the Danish Straights counterbalanced by the overriding risk and consequences of a marine disaster?

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