

# Competition, Regulation and Networks Briefing

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## EU Proposal for a Regulation on Safety of Offshore Oil & Gas Prospection, Exploration and Production Activities<sup>1</sup>

### Background

The 2010 blowout of the Macondo well and subsequent events in the deep waters of the Gulf of Mexico resulted in the deaths of eleven men and severe pollution of the surrounding environment<sup>2</sup>. This sparked a flurry of legislative activity and caused the review of regulatory frameworks and practices governing health & safety of offshore oil & gas operations in the US, the European Union and other parts of the world.

As in the case of the US, the European oil & gas industry is being transformed in response to the progressive depletion of “easy” oil and gas reservoirs and moving towards more complex environments characterised by high pressure/high temperature reservoirs, deeper waters and/or extreme climatic conditions that may complicate the control of subsea installations and incident responses. At the same time, production facilities in maturing fields are ageing and are often taken over by specialist operators with smaller capital bases.

A review undertaken by the European Commission<sup>3</sup> found that faced with these risks, current EU legislation does not cover all aspects of the offshore oil & gas industry and where it does, it is very much fragmented. This often results in different national environmental, health & safety laws and standards, and different liability regimes. The Commission identified five main areas where action was needed: ‘(i) thorough licensing procedures; (ii) improved controls by public authorities; (iii) addressing gaps in applicable legislation; (iv) reinforced EU disaster response; and (v) international cooperation to promote offshore safety and response capabilities worldwide’.<sup>4</sup>

The Commission proposes to implement the necessary provisions through a Regulation (rather than a Directive) due to its direct applicability to the industry thereby avoiding inconsistencies and delays that could be caused by member States transposing a new Directive into their national laws.<sup>5</sup>

- 1 European Commission – Proposal for a Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities (“draft Regulation”), 2011/0309 (COD), [http://ec.europa.eu/energy/oil/offshore/doc/com\\_2011\\_0688.pdf](http://ec.europa.eu/energy/oil/offshore/doc/com_2011_0688.pdf)
- 2 The Bureau of Ocean Energy Management, Regulation and Enforcement – Report Regarding the Causes of the April 20, 2010 Macondo Well Blowout – September 14, 2011
- 3 Communication and Commission Staff Working Document accompanying document to the Communication (COM(2010) 560 final)
- 4 Communication from the Commission to the European Parliament and the Council facing the challenge of the safety of offshore oil and gas activities/\*COM/2010/0560 final\*/ (“Communication”)
- 5 Explanatory Memorandum to the draft Regulation, point 3

## The October 2011 Draft Regulations

The resulting legislative proposal in its current form can be seen to address eight main heads which are reviewed in turn below:

### Licensing of Exploration and Production of Hydrocarbons

The Commission considers licensing of offshore operations as the first key tool to ensure the safety of new drilling activities in complex environments. The onus will be on licensing authorities in member States to ensure that only licensees with sufficient technical and financial capabilities are granted licences.<sup>6</sup>

In accordance with the Environmental Impact Assessment Directive<sup>7</sup>, the draft Regulation provides for *'the public to be given early and effective opportunities to participate'* in the licensing procedures.<sup>8</sup> The details of how to implement this provision are left to member States, however, the *'involvement of the public shall not pose risks to safety and security of the relevant installations and their operation.'*

### Liability

The draft Regulation distinguishes between a 'licensee' for the purposes of Directive 94/22/EC<sup>9</sup> and an 'operator'. 'Operator' under the draft Regulation includes the (i) operator of a production installation, (ii) owner of a non-production installation, and (iii) operator of a well operation. Whilst the operator under (i) and (iii) is defined as a person appointed by (and therefore different from) the 'licensee' to carry out certain tasks, the owner under (ii) is defined as the person legally entitled to control the operation of the relevant facility, which therefore could include the 'licensee' itself.

The Commission recognises that a strong licensing regime needs to be backed by an unequivocal liability regime.<sup>10</sup> Under the draft Regulation, *'[t]he licensee is liable for the prevention and remediation of environmental damage, pursuant to Directive 2004/35/EC [the ELD]<sup>11</sup> 12, caused by offshore oil & gas activities carried out by the licensee or any entity involved in those activities on the basis of a contract with the licensee.'*<sup>13</sup>

The draft Regulation purports to amend the ELD<sup>14</sup> and extend its geographical applicability to all EU marine waters including the exclusive economic zones (200 miles from the coast) and the continental shelves of the relevant member States, that is, bring it in line with the geographical applicability of the Marine Strategy Framework Directive<sup>15</sup>. By virtue of Article 7 (see above), this amendment extends the 'licensee's' liability under the draft Regulation also to all EU marine waters.

However, under the ELD, liability for environmental damage lies with an operator. Operator under the ELD confusingly is defined differently<sup>16</sup> from 'licensee' and from 'operator' under the draft Regulation. To overcome this discrepancy the draft Regulation states that *'[o]perator and licensee [under the draft Regulation] both come under the definition of [operator under the ELD].'*<sup>17</sup>

Although it is the 'licensee' who is liable for environmental damage under the draft Regulation, it is the 'operator' who must take all suitable measures to prevent major accidents from happening and who has to work with competent authorities to limit the consequences of any accident that may nevertheless have occurred. Where they have subcontracted specific tasks, 'operators' must ensure that their subcontractors will also act in accordance with the draft Regulation, whilst the 'operator' will retain its overall responsibilities.<sup>18</sup>

Whether these provisions amount to an 'unequivocal' liability regime, remains to be seen.

<sup>6</sup> Art. 4 (2) of the draft Regulation

<sup>7</sup> Directive 85/337/EEC of 27

June 1985 on the assessment of

the effects of certain public and

private projects on the

environment, as amended by

Directives 97/11/EC,

2003/35/EC and 2009/31/EC

<sup>8</sup> Art. 5 of the draft Regulation

<sup>9</sup> Directive 94/22/EC of 30 May

1994 on the conditions for

granting and using authorisations

for the prospection, exploration

and production of hydrocarbons

sets out the principal legal

framework for granting licences

for exploration and production

<sup>10</sup> Communication, point 1

<sup>11</sup> Directive 2004/35/EC of 21

April 2004 on environmental

liability with regard to the

prevention and remedying of

environmental damage

("Environmental Liability

Directive" or "ELD")

<sup>12</sup> The ELD contains a scope of strict

liability for operators who carry

out specific activities (which

includes those undertaken by or

on offshore hydrocarbon

installations and rigs) and a scope

of fault-based liability for damage

caused to protected species and

natural habitats. The operator has

to take the necessary preventive

action in case of immediate threat

of environmental damage and to

remedy any environmental

damage once it has occurred

("polluter pays" principle).

However, the ELD does not

apply to waters beyond the

coastal strip and the territorial

seas of the relevant member

State.

<sup>13</sup> Art. 7 of the draft Regulation

<sup>14</sup> Ibid, Art. 37

<sup>15</sup> Directive 2008/56/EC of 17 June

2008 establishing a framework for

Community action in the field of

marine environmental policy

<sup>16</sup> Under Art. 2(6) of the ELD,

operator means any natural or

legal, private or public person

who operates or controls the

occupational activity or, where

this is provided for in national

legislation, to whom decisive

economic power over the

technical functioning of such an

activity has been delegated,

including the holder of a permit

or authorisation for such an

activity or the person registering

or notifying such an activity'

<sup>17</sup> Art. 2.22 of the draft Regulation

<sup>18</sup> Ibid, Art. 3.1 and 3.2

### Competent Authorities

Member States with offshore oil & gas activities must set up a national independent competent authority to<sup>19</sup>, amongst other duties, assess and approve a Major Hazards Report (“MHR”) and related documents submitted to it, produce relevant reports, and perform inspections, conduct investigations and take enforcement action, which action can culminate in the prohibition of the offshore activities or operation of the relevant installation or any part thereof.<sup>20</sup> There are separate provisions for the operations of production installations, non-production installations (fixed and mobile) and well operations.<sup>21</sup>

### Obligatory ex ante Emergency Planning

Offshore installations may not commence or continue operations without the ‘operator’ having submitted a MHR to the national competent authority and received its approval.<sup>22</sup> The MHR must contain a risk assessment for the proposed installation(s). ‘Operators’ must also prepare an emergency response plan based on the major accident risk assessment undertaken as part of the most recent MHR.<sup>23</sup> Each MHR is subject to periodic review by the ‘operator’ at least every 5 years and the result of each review being notified to the competent authority.<sup>24</sup>

### Independent Third Party Verification

‘Operators’ have to establish a scheme for independent third party verification of the specified design and safety critical elements that are identified in the risk assessment for the relevant installation or proposed well as being suitable and up to date and the examination and testing of the major hazards control system operating as intended<sup>25</sup>.

The third party verifier has to fulfil certain requirements<sup>26</sup> but it is not clear whether this verifier may be identical to the independent competent authority that member States must set up under the draft Regulation, given particularly as competent authorities are given the obligation by a different provision<sup>27</sup> to develop annual plans for effective oversight, inspection and verification of major hazard activities and compliance with the MHR and related documents.

### Transparency

‘Operators’ and competent authorities must share certain information<sup>28</sup> about the standards of performance of the industry and the activities undertaken, including any unintended release of hydrocarbons, fatal accidents and serious injuries, loss of control over well operations and vessels on collision course or having collided with an offshore installation. Such information must be made publicly available as a matter of course<sup>29</sup> and included in annual reports by member States that will form the basis of bi-annual EU-wide reports published by the Commission.<sup>30</sup> In addition, competent authorities of the relevant member States have to regularly exchange certain knowledge, information and experience amongst them.<sup>31</sup>

### Ex post Emergency Response

The draft Regulation requires the ‘operator’ to prepare an internal emergency response plan<sup>32</sup> and maintain necessary equipment and expertise. In addition, member States must prepare external emergency plans covering all offshore oil & gas installations and potentially affected areas within their jurisdiction.<sup>33</sup> In the event of a major accident potentially overwhelming the national response capacities, an affected member State may request additional assistance from other member States and the European Maritime Safety Agency (EMSA).<sup>34 35</sup>

19 Ibid, Art. 8 and 19

20 Ibid, Art. 16

21 Ibid, Art. 10, 11 and 13

22 Ibid, Art. 6 and 9

23 Ibid, Art. 12 and 18

24 Ibid, Art. 10 and 11

25 Ibid, Art. 15

26 Ibid, Art. 15.2 and Annex II, part 5

27 Ibid, Art. 20.4

28 Ibid, Art. 22 and Annex VI

29 Ibid, Art. 23

30 Ibid, Art. 24

31 Ibid, Art. 27

32 Ibid, Art. 29

33 Ibid, Art. 30

34 Ibid, Art. 32

35 EMSA was established by Regulation 1406/2002/EC of 27 June 2002 establishing a European Maritime Safety Agency

36 (see next page)

The Communication and the European Parliament resolution of 13 September 2011 on facing the challenges of the safety of offshore oil and gas activities (2011/2072(INI))

37 But see Recital 48 of the draft Regulation

38 Directive 2010/75/EC of 24 November 2010 on industrial emissions (integrated pollution prevention and control)

39 Directive 94/22/EC of 30 May 1994 on the conditions for granting and using authorisations for the prospecting, exploration and production of hydrocarbons

- 40 Framework Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, as complemented by the Health & Safety at Work Directives 92/91/EEC (mineral-extraction through drilling) and 92/104/EEC (surface and underground mineral extraction), and Directive 2009/104/EC of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work
- 41 Directive 2008/1/EC of 15 January 2008 concerning integrated pollution prevention and control (IPPC Directive) and Directive 85/337 (see FN 5)
- 42 Recital 49 of the draft Regulation
- 43 Directive 2006/42/EC of 17 May 2006 on machinery, Directive 97/23/EC of 29 May 1997 on the approximation of the laws of the Member States concerning pressure equipment and Directive 94/9/EC of 23 March 1994 on the approximation of the laws of the Member States concerning equipment and protective systems intended for use in potentially explosive atmospheres
- 44 These units are considered seagoing vessels and their safety is subject to rules established by the International Maritime Organisation (IMO) in the IMO Code for the Construction and Equipment of Mobile Offshore Drilling Units (MODU Code) but the MODU Code does not cover drilling operations.
- 45 These conventions include the United Nations Convention on the Law of the Seas of 1982 (UNCLOS), the Convention for the Protection of the Marine Environment of the North-East Atlantic of 1992 (OSPAR), the Convention for the Protection of the Mediterranean Seas Against Pollution of 1976 (Barcelona Convention), the Convention on the Protection of the Marine Environment of the Baltic Sea Area of 1974, revised in 1992 (Helsinki Convention), the Convention on the Protection of the Black Sea Against Pollution of 1992 (Bucharest Convention), the International Convention on Oil Pollution Preparedness, Response and Cooperation, adopted in 1990 (OPRC Convention), and the Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (Espoo Convention).
- 46 Recital 39 of the draft Regulation

### Coordination with Third Countries

The Commission will promote (i) cooperation between the EU and third countries that undertake offshore activities in shared waters, and (ii) high safety standards for such operations at international level, including the Arctic waters.

### Next steps

Although a number of requirements previously identified by the EU Parliament<sup>36</sup>, such as geographical extension of the ELD, third party verification and the separation of licensing and health & safety functions were included in the Commission's proposal, others were not. Amongst those which were not included are, for example, the requirement for adequate and suitable insurance schemes or risk-coverage instruments to cover a 'licensee's' liabilities<sup>37</sup> or the inclusion of offshore oil & gas activities into the Industrial Emissions Directive<sup>38</sup>. The draft Regulation is currently being reviewed and will be debated in due course by Parliament and the Council and it remains to be seen what amendments the Commission will be asked to make as a result.

The draft Regulation should be viewed as complementing certain provisions of existing EU legislation, such as Directive 94/22/EC<sup>39</sup> on licensing activities, the Framework Council Directive 89/391/EEC<sup>40</sup>, as supplemented, on health and safety of workers in the offshore oil & gas industry, and current pollution prevention legislation<sup>41</sup>. In certain cases, however, the Commission's proposal amends existing EU legislation (for example the ELD, see above). In other cases, the Commission is still evaluating<sup>42</sup> whether amendments are required, for example to existing EU product safety legislation<sup>43</sup> to bring within its realm mobile offshore units and equipment installed thereon.<sup>44</sup>

The current draft Regulation should also be viewed within the framework of existing international conventions to which EU member States are contracting parties either directly or through the EU having signed up as a separate entity.<sup>45</sup> In this respect, the Commission intends to promote the ratification of further international law that covers offshore oil & gas activities, for example in the Mediterranean Sea.<sup>46</sup>

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