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the legal profession

20th May 2011

European Commission
DG Energy
Oil & Gas Health and Safety, Environment, Internal Market
B – 1049 Brussels

Sent by e-mail: ENER-CONSULT-OFFSHORE@ec.europa.eu

Re: Consultation response to Oil & Gas Offshore Safety

Dear Sir / Madam,

Introduction

The International Bar Association would like to take this opportunity to comment on the Oil & Gas offshore safety public consultation document launched by the European Commission on 16 March 2011 and available online at:
http://ec.europa.eu/energy/oil/consultations/2011_05_11_oil_gas_offshore_safety_en.htm

The International Bar Association (IBA), the global voice of the legal profession, includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with the European Commission's Register of Interest Representatives, ID # 55828722666-53.

We are submitting our comments on behalf of the IBA's Oil and Gas and Environment, Health and Safety Law Committees which together have nearly 1,100 members from around the world. This committee formed a Working Group to respond to this Consultation, and those Working Group members are named at the end of this document. The Working Group was formed to review of the EU's regulatory frameworks and practices currently governing the protection of health, safety and environment in the exploration and production activities of the offshore oil and gas sector.

The comments made in this report are the personal opinions of the Working Group members and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Oil and Gas and Environment, Health and Safety Law Committees of which they are a member.

Authorisations

1. Which changes, if any, would you recommend to the authorisation conditions for offshore prospection or exploration or production activities? Please specify which authorisations your recommendations concern (all authorisations, those in a specific

London

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country, those authorising only a certain stage(s) such as prospection, exploration or production etc.)

There should be a clear separation between the authority that grants and issues granting instruments and the authority that regulates the operations of those instruments.¹ There are often conflicting demands on the officials charged with those separate tasks. The first group has the responsibility to increase economic activity and government revenue through the payment of bonuses, royalties and taxes by companies. The second group is charged with the responsibility of ensuring the integrity of operations, the safety of workers and the protection of the environment in companies' offshore operations.

However, there should not be multiple separations of those authorisations. Doing so leads to unnecessary complexity and confusion, which results in increased risk to operations, the industry, the public and the environment. This is true both horizontally and vertically. Multiple agencies in individual countries combined with overlapping agencies in regional organizations such as the EU often result in redundancy, inefficiency, confusion and conflict. This should be reduced as much as practical.

The issuance of licences should focus on the general competence of the applicants and their financial capacity. Companies applying to act as an operator need to be scrutinised more carefully on their operational capabilities in the particular environment in which they plan to operate. Regulators need to strike a balance between requiring proven operational track records and encouraging new entrants and new technology. Otherwise economic growth may suffer or better extractive methods may be overlooked.

A specific review of all factors, including emergency response, safety criteria and other technical matters need to be undertaken at the operational stage. Authorities need to keep the rules for such operational matters (such as those for drilling permits and the development of oil & gas fields) under constant review without changing the basic conditions of those rules.

Regulators should avoid modifying the law purely in reaction to a particular event where this may result in an undue focus upon a past problem and thus serve to diminish the ability of industry and regulators to remain vigilant with respect to emerging problems. This is especially the case in the context of an industry that is characterised by constant innovation in its effort to maximise economic recovery in ever more difficult situations. Any mandatory additions to the technical and financial capacity requirements in EU Directive 94/22 risk this effect.

¹ Governments initially issue host government contracts or granting instruments, such as licenses, leases, production sharing contracts or risk sharing agreements to explore, develop and produce hydrocarbons. Governments then regulate the operations around such activities by issuing drilling permits, development approvals, etc.

Regulators are not able to keep ahead of technology and a changing operational environment. Regulations should therefore not be prescriptive or mandatory in nature. Instead, operators should be required to make a “safety case” for their operations. This should be required for preventing, responding to and rehabilitating health, safety and environmental risks.

2. European law foresees that the competent national authorities shall ensure that authorisations are granted on the basis of selection criteria which consider, among other things, the financial and technical capability of the companies wishing to carry out offshore oil or gas operations.

a) What key elements should this technical capacity requirement include in your view?

The UK’s experience with the Piper Alpha incident shows that the best regulatory route for assessing the technical capacity of a potential operator is by providing guidance that highlights the operational issues that should be considered based on existing best practice, which is subject to on-going review and improvement.

The present UK regulatory scheme provides for a marks based approach in published guidance for the award of licenses. Applicants are rewarded “for the use of relevant available technical data (wells, seismic, etc.), the quality of the work already done, the technical understanding demonstrated in the generation of valid prospectivity (over the whole block area and throughout the full stratigraphic column), and the proposed Work Programme”.

When considering requests for an Exploration Operator after a licence has been awarded, the UK includes such factors in deciding whether to approve the appointment of the company that carries out the operations on behalf of its joint venture partners. Its published guidance requires the following:

- Capability to plan, supervise, manage and undertake the proposed exploration operations including interfaces with contractors
- The arrangements for pollution liability;
- Details of the management of environmental responsibilities (including details of the Company’s environmental policy and Environmental Management System (EMS);
- Details of past record of compliance with environmental legislation; and
- Insurance coverage

Further detail is then provided under each of these headings.

A marks scheme rewards applicants demonstrating the best track record in terms of safety and environmental protection, the best environmental management arrangements, etc. Such an approach has the effect of encouraging and rewarding innovation rather than stipulating solutions that may be quickly out of date. Operators should be required to make a case that

their operations will be safe based upon best industry practices and emerging technologies rather than a prescriptive, inflexible regulatory regime

The proper assessment of these matters by the regulator is qualitative in nature and is based upon the specific knowledge and experience of the regulator in that particular operating environment. Multiple layers of regulators could therefore render the regulatory system less effective.

b) Similarly, what key elements should the financial capability requirement include in your view?

A similarly non-prescriptive approach is appropriate for the financial capability requirements. Experience on the UKCS has revealed the extent to which the industry is characterised by companies of very different sizes and experience as a result of the maturing of the North Sea as a hydrocarbon province. The fact that the UK has developed its approach over more than four decades and has had first-hand experience of the trend away from the domination by established majors and the growing activity of independents as well as new and innovative players, means that the approach adopted by DECC in relation to financial capability is instructive.

The UK regulator is clear that a licence will not be awarded to a company that “cannot demonstrate the financial capacity to meet its expected commitments, liabilities and obligations” and that the “capacity that must be demonstrated is the ability to meet in timely fashion the actual costs that may reasonably be expected to arise.” Given the range of companies involved, the regulator is flexible rather than prescriptive when it comes to the way in which financial capacity may be demonstrated and only offers general guidance dependent in particular on company size. Thus, where a company is very large, it may be sufficient to demonstrate that “the company’s net worth is greater than the estimated cost by a significant margin” whereas where such a demonstration is not possible, a company “will have to prove its capacity by reference to specific funding arrangements.” It would, however, be appropriate to consider whether “the actual costs that may reasonably be expected to arise” should now be interpreted in such a way as to include worst case scenarios that might previously have been considered to be of sufficiently low probability (albeit high impact) as to be discounted. This is an area where guidance from the Commission could well be appropriate and useful.

The UK, Norway and other North Sea countries with extensive experience regulating offshore operations require membership in OPOL, a voluntary industry mutual agreement which requires each operator to accept strict liability for pollution damage and reimbursement of third parties up to a limit of \$250 million. They also require the ability to pay for the operations and a reasonable level of emergency response. If every company was required to have the financial capability of a major oil company, less offshore economic activity would take place. That would eventually negatively impact Europe’s goal of energy self-sufficiency.

3. How (such as through legislation or voluntary measures at international, EU or national levels or by industry) should the adoption of state-of-the-art authorisation practices be best achieved throughout the EU? Should neighbouring EU Member States be consulted on the award of authorisations?

New EC regulations that ignore or attempt to override the regulatory regimes of the most active European offshore jurisdictions could be counterproductive. It is therefore important for any new regional regulatory regime to be inclusive with regards to the regulatory regimes of jurisdictions such as the UK and Norway.

There are other potential problems in imposing state-of-the-art authorisation practices on jurisdictions that have very little or no experience in regulating such offshore operations. They simply have no capacity to properly regulate such operations.

Regulatory authorities in countries such as the UK and Norway are well aware of their international obligations (e.g. through UNCLOS and OSPAR) and should be expected to exercise their licensing powers responsibly even if there is no consensus on an EU wide regulatory regime.

There is precedent for notification to neighbouring states under the OSPAR Convention as it relates to the decommissioning of offshore installations. Article 5(3) read with Decision 98/3 provides that where a Contracting Party intends to issue a permit allowing the leaving in place, partial removal or dumping of an installation (and thus a derogation from the general prohibition on the “dumping, and the leaving wholly or partly in place, of disused offshore installations within the maritime area”²), it “shall, through the medium of the [OSPAR] Commission, inform the other Contracting Parties of its reasons for accepting such dumping, in order to make consultation possible”. Accordingly, an analogous provision in relation to authorisations for hydrocarbon operations could be implemented. The precise implementation would require careful consideration, however, as producer states would feel uneasy if there were a suggestion that such consultation could lead to undue delay or a de facto veto on operations that would place the EU’s energy security at risk.

Prevention of accidents

4. Please describe here any recommendations or changes (to the current regulatory framework or practices) - if any - that you consider important to improve the prevention of accidents affecting the health or safety of workers on offshore oil and gas installations in the EU:

² OSPAR Decision 98/3, para 2.

The key lesson that emerges from the evolution of offshore safety regulation in the UK, the Member State with the longest experience, is that it is difficult and potentially dangerous for regulators to attempt to be overly-prescriptive in their requirements for technology and processes involved in the industry. This observation was made as early as 1967 in the inquiry into the first serious accident in the North Sea (the collapse of the Sea Gem drilling rig in 1965) but did not prevent the inquiry from recommending that the appropriate response was to introduce a detailed prescriptive regulatory regime.³ The difficulties with this approach were quickly evident. A similar approach was abandoned for the onshore industry even before the first offshore regulations were in place and by the time the regime was fully operational, a second inquiry (the Burgoyne Committee⁴) was hearing about the difficulties the regulators were encountering in keeping pace with developments. They simply could not draft and issue regulations quickly enough to keep up with new technology. However, the observation of the problem did not lead to an appropriate recommendation to abandon this approach. It was not until the Cullen Inquiry into the Piper Alpha disaster in 1988 that the problem was confronted head on and the new goal-setting, safety case approach emerged.⁵

The UK experience sounds a note of caution for any move towards greater prescription in either Council Directive 92/91/EEC or of entirely new European legislation. There is a risk that greater specification driven by the lessons from the Deepwater Horizon disaster may be entirely specific to that incident and thus reduce the openness of the industry and regulators to the need for vigilance with respect to emerging issues.

The Safety Case regime in the UK requires the operator of each installation to make the case that the design and operation of that installation is safe. In greater detail, they are required to include sufficient particulars to demonstrate that:

- (a) his management system is adequate to ensure—
 - (i) that the relevant statutory provisions will, in respect of matters within his control, be complied with; and
 - (ii) the satisfactory management of arrangements with contractors and sub-contractors;
- (b) he has established adequate arrangements for audit and for the making of reports thereof;
- (c) all hazards with the potential to cause a major accident have been identified; and

³ Ministry of Power, *Report of the Inquiry into the Causes of the Accident to the Drilling Rig Sea Gem* (Cmnd. 3409, 1967).

⁴ J H Burgoyne, *Offshore Safety: Report of the Committee* (Cmnd. 7866, 1980).

⁵ Lord Cullen, *The Public Inquiry into the Piper Alpha Disaster*, (Cm 1310, 1990).

(d) all major accident risks have been evaluated and measures have been, or will be, taken to control those risks to ensure that the relevant statutory provisions will be complied with.⁶

The safety case is regarded as a living document and must therefore be revised by the duty holder when appropriate.⁷ There are indications that the success of the safety case depends on the continued vigilance of the regulator. Thus, for example, the UK safety regulator, the Health and Safety Executive (HSE)'s observation of deterioration in the condition of the infrastructure on a number of installations on the UKCS led to an initiative directed towards asset integrity (designated Key Programme 3). This produced a number of findings, including a failure to recognise the significance of the "potential impact of degraded, non-safety-critical plant and utility systems on safety-critical elements in the event of a major accident",⁸ which called into question the ability of the industry to operate the safety case approach appropriately.

It is important to note, however, that there was no sense on the part of the UK regulator that the safety case approach itself was in question, but rather that developments in the industry had produced challenges to its operability. The regulator thus explained the deficiencies in terms of three underlying problems relating to learning, the engineering function and leadership. As regards the first, the HSE perceived a problem both of inadequate auditing and monitoring and of a lack of processes to allow learning to be embedded.⁹ As regards the second problem, the issue here was the relative strength of the engineering function which was seen to have declined "to a worrying level" against other functions within oil and gas companies.¹⁰ The report did not specify which other functions engineering had lost out to, but it can be inferred that these are related to finance. This conclusion is supported by the third underlying problem identified by the HSE. With regard to leadership, while senior management in setting priorities for spending had to balance safety and financial risks, the regulator observed that they often did not properly understand the impact on these risks of operating with "degraded [safety critical elements] and safety-related equipment".¹¹

It might be suggested that one way of dealing with these problems would be a return to prescriptive regulation, thus reducing the opportunities for senior management to make the wrong choices. The difficulty is, however, that this presupposes that the regulator always knows in advance what the right choices are—something that experience with detailed prescriptive regulation prior to Piper Alpha demonstrated was simply not realistic. The appropriate lesson to draw from Key Programme 3 is that the most appropriate approach for the offshore industry is goal-setting and the safety case. It is precisely this approach that

⁶ The Offshore Installations (Safety Case) Regulations 2005 (SI 2005/3117), Reg. 12.

⁷ Reg. 14(1)(a).

⁸ KP3, p6. See also KP3 p13.

⁹ KP3, p8.

¹⁰ KP3, p8.

¹¹ KP3, p8.

makes best use of the expertise within the industry and that significantly frees up the regulator to see the bigger picture and emerging problems.

5. Please describe here any recommendations or changes (to the current regulatory framework or practices) – if any – that you consider important in order to better prevent damage to the natural environment from accidents on offshore oil and gas installations:

The proper implementation of safety regulations dealing with the operation of offshore facilities will have the effect of preventing damage to the natural environment. It is important to note that the problems that gave rise to the Deepwater Horizon disaster were all related to the implementation of safety regulation rather than environmental regulation. The best approach is therefore to continue the work to reduce accidents on a safety case basis. Please also refer to the responses to questions 8 and 10.

Verification of compliance and liability for damages

6. Please describe here any recommendations you would like to make on how to improve compliance of the offshore oil and gas industry with applicable offshore safety legislation and other regulatory measures in the EU.

There have been recent changes and recommendations to change offshore safety legislation in the most active offshore jurisdictions.

Recent changes in UK law aim to make it easier to achieve convictions for corporate killing¹² as well as increasing the penalties for health and safety offences.¹³ Since 15 February 2010, sentencing guidelines have been in place in England and Wales for convictions for corporate manslaughter and for breaches of health and safety duties resulting in death.¹⁴ These guidelines provide courts with criteria with which to judge the seriousness of the offence they are dealing with, including the foreseeability of serious injury, the extent to which the defendant has fallen short of the appropriate standard, whether this is an isolated or more common event, and the level within the organisation at which the breach occurs.¹⁵ Other factors are provided in a non-exhaustive list as potentially aggravating the offence; including multiple deaths, deliberate failures, and injuries to the vulnerable.¹⁶

¹² The Corporate Manslaughter and Corporate Homicide Act 2007

¹³ The Health and Safety (Offences) Act 2008

¹⁴ Sentencing Guidelines Council, *Corporate Manslaughter and Health and Safety Offences Causing Death: Definitive Guideline*, February 2010. Available online at http://www.sentencingcouncil.org.uk/docs/web_guideline_on_corporate_manslaughter_accessible.pdf

¹⁵ Sentencing Guidelines, para 6.

¹⁶ Sentencing Guidelines, para 7.

On the other hand, where a convicted organisation has accepted responsibility without delay, cooperated in the investigation, tried genuinely to put right what has gone wrong, or has “a good health and safety record” or “a responsible attitude to health and safety”, UK courts are to consider these factors as having a mitigating effect.¹⁷

The Joint Investigation Team for the United States Coast Guard has recently recommended in its report on the Deepwater Horizon explosion that the Commandant of the Coast Guard pursue regulatory changes to provide clear designation of the person in charge under both operating and emergency conditions for all mobile offshore drilling units (MODUs) operating on the U.S. Outer Continental Shelf (OCS).¹⁸

These indicate a trend in those jurisdictions to increase penalties and require more accountability. However, it also indicates that regulatory regimes should provide for both the reward and punishment of operators in the offshore environment. This encourages good operators to continually implement best practices and discourages bad operators from unsafe practices.

7. In your view, which are the key measures to supervise and verify compliance of the industry with offshore health, safety and environmental rules and who should do the supervision and verification?

There should be an on-going obligation on the operator to demonstrate that it is implementing industry best practices in conjunction with an on-going inspection regime administered by the regulator. It should be done on a safety case basis rather than use a prescriptive formula.

8. In your view, should the existing environmental liability legislation (Directive 2004/35/EC) be extended to cover environmental damage to all marine waters under the jurisdiction of the EU Member States?

There should be consistent environmental liability in all marine waters under the jurisdiction of the EU Member States so that operators have clear standards to meet.

9. In your view, is the current legislative framework sufficient for treating compensation or remedial claims for traditional damage caused by accidents on offshore installations? If not, how would you recommend improving it?

Yes, it is sufficient.

¹⁷ Sentencing Guidelines, para 8.

¹⁸ USCG Report of Investigation into the Circumstances Surrounding the Explosion, Fire, Sinking and Loss of Eleven Crew Members Aboard the Deepwater Horizon (April 20-22, 2010) at p. xiii.

10. In your view what would be the best way(s) to make sure that the costs for remedying and compensating for the environmental damages of an oil spill are paid even if those costs exceed the financial capacity of the responsible party?

The underlying principle in any effective environmental liability scheme is that the “polluter pays.” However, a strict system that only allows companies with the balance sheets to pay for any potential risk, no matter how unlikely it might arise, will stifle new entrants and the necessary competition to meet Europe’s energy needs.

A balanced approach is therefore needed. Companies with strong balance sheets should have greater flexibility in operating in the more difficult and challenging environments. Smaller and less financially strong companies should still be allowed to operate in existing areas of operation where the risks are well known and more easily managed. Regulators should identify and clearly demarcate such different operating areas, apply appropriate risk profiles to each operating area and then determine whether an operator can meet its potential liability for such a risk profile.

In the UK, there has been some talk of setting up a voluntary fund among the oil companies. However, this has not been well received in the industry and has not gained traction. If there were a compulsory levy at EU or national level, it would be difficult to set the appropriate level. In addition, there could be a reduction in offshore activity if a compulsory EU level received a similar reaction as the UK voluntary initiative. As previously mentioned, there is already a voluntary industry mutual agreement (OPOL) that provides a significant level of protection, which should continue to be utilized in the future.

Transparency, sharing of information and state-of-the-art practices

11. What information on offshore oil and gas activities do you consider most important to make available to citizens and how?

There is already a great deal of information available on the licences issued. It is probably more important to know when and where wells are being drilled and development activities are taking place. That information is also available.

The need of the public to access this information needs to be balanced against the need to ensure security of the facilities. The information made available should thus focus on knowing what developments will impact the public and what measures have been taken to ensure the safety and protection of the environment, the workers and the public.

12. What is the most relevant information on offshore oil and gas activities that the offshore companies should in your view share with each other and/or with the regulators in order to improve offshore safety across the EU? How should it best be shared?

Companies should share the following kinds of information in an on-going, consistent and uniform manner: safety-related incidents, measures taken to prevent recurrence and best practice developed by companies. These are currently shared in industry international fora such as the International Association of Oil & Gas Producers (OGP) and between national industry organisations.

In addition, industry should share this information with regulators (which it currently does in its daily interaction with national regulators and in such international fora as OSPAR) and those regulators should share this information amongst themselves (which happens as described in question 13 below).

13. What information should the national regulators share with each other and how to improve offshore safety across the EU?

The International Regulators Forum on Global Offshore Safety already provides a means by which information can be shared among relevant national regulators. Its objectives are stated to be:

To promote best sustainable safety performance globally and the concept that it is inseparable from and interdependent with best sustainable economic performance.

To enable an exchange of information among regulators on:

- Offshore health and safety trends;
- Industry health and safety performance;
- Lessons from incidents;
- Industry best practice;
- Regulatory practice; and
- Measuring the effectiveness of regulatory activities.

To provide a network of offshore petroleum health and safety regulators for mutual support and advise when required.¹⁹

However, not every EU Member State with hydrocarbon operations in the North Sea and none with operations in the Mediterranean or the Black Sea is a member of this body. Member States should be encouraged to join this existing body, which already has long experience in sharing best practice among offshore safety regulators.

In addition, OSPAR collects a large amount of data from companies about safety-related issues. This information should be shared amongst regulators on a European wide basis.

14. Which means, if any, would you recommend using to promote, across the EU, the use of state of the art practices to protect occupational health and safety during offshore oil and gas operations?

¹⁹ <http://www.irfshoresafety.com/about/>

Sharing of information on best practices. See the answer to question 13 above.

15. Which means, if any, would you recommend using to promote, across the EU, the use of state of the art practices to protect the environment against accidents caused by offshore oil and gas operations?

Sharing of information on best practices. See the answer to question 13 above.

Emergency response and International activities

16. In your view what should be the role of the EU in emergency response to offshore oil and gas accidents within the EU?

Emergency response needs to be swift if it is to be effective. In the North Sea, the national industry organisations have a code, known as OCES, to provide assistance from any nearby resources where no other resources are available. This is in addition to resources, such as Oil Spill Response, which each operator must have available. It is not clear what the EU could add to this.

17. Please describe any recommendations you may have concerning cooperation with non-EU countries to increase occupational safety and/or environmental protection in offshore oil and gas operations internationally?

Sharing of information on best practices is the first step. See the answer to question 13 above. The next step is to move towards common standards amongst jurisdictions active in offshore operations. This may be accomplished through existing international conventions on a non-prescriptive basis.

18. Please describe here any recommendations you may have on how to incentivise oil and gas companies with headquarters in the EU to apply European offshore safety standards and practices in all their operations worldwide:

Oil and gas companies must first comply with the laws and regulations of the jurisdictions in which they operate. This is true of American companies operating in European waters or of European companies operating in American waters, or for that matter any company that operates internationally. Companies will also naturally gravitate to applying the standards and practices of their originating jurisdiction since that is the one with which they are most familiar.

However, if there is a conflict between the standards and practices of their originating jurisdiction and those of the jurisdiction in which they are operating, then they are obligated to apply the latter. It is therefore best that various offshore jurisdictions harmonize as much of their standards and practices as possible. An example is handrails on offshore facilities. Everyone agrees that they must be installed for safety reasons. But some jurisdictions specify that they must be square, while others specify that they must be round. Retrofitting handrails can cost millions of dollars/euros. So it can become quite expensive moving offshore equipment from one jurisdiction to another with limited benefit for the cost. This problem

can be multiplied many times over for what seem to be minor differences with no overall benefit in minimizing the most significant risks in offshore petroleum operations.

Sincerely yours

/s/ Tim Martin

Tim Martin

Co-Chair, Joint Working Group

IBA Oil and Gas Committee and IBA Environment Health and Safety Law Committee

Canada

/s/ Glen McLeod

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