

# Civil liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area

## Final Report

# Document Information

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# Executive Summary

Offshore oil and gas operations are being carried out further from land and, in some cases, in much deeper waters than has previously been the case. Some operations are taking place in harsh environments, such as the Arctic, and in locations that depend on tourism for a large part of their income, such as the Mediterranean Sea and the Aegean Sea.

Experience has shown that offshore oil and gas operations can be carried out in the most sensitive environments while minimising the damage that might be caused to them. The production of oil since 1987 from the Mittelplate field in the Wadden Sea, a World Heritage Site, is a prime example. The risk of an incident can never, however, be eliminated entirely, particularly accidents caused by human error.

Following the explosion and oil spill from Deepwater Horizon on 20 April 2010, the European Union (EU) adopted the Offshore Safety Directive (2013/30/EU) (OSD)<sup>1</sup> to establish minimum requirements for preventing major accidents in offshore oil and gas operations in the EU and to limit the consequences of such accidents. The major accidents on which the OSD focusses are:

- accidents involving an explosion, fire, loss of well control, or release of oil, gas or dangerous substances, in particular accidents that may cause fatalities or serious personal injury to people on the offshore installation and serious damage to the installation and connected infrastructure; and
- any of the above accidents that may also result, or be likely to result, in environmental damage under the Environmental Liability Directive (ELD).<sup>2</sup>

In adopting the OSD, the EU recognised that no “existing financial security instruments, including risk pooling arrangements [could] accommodate all possible consequences of major accidents” (OSD, recital 63). Article 39 of the OSD, therefore, directs the European Commission to submit two reports to the Council and the European Parliament on the effectiveness of the liability systems in the EU for damage caused by offshore oil and gas operations, regimes for handling compensation claims, and the availability of financial security instruments for such claims.

In order to assist the Commission in preparing the reports, this study<sup>3</sup> examines the following topics in 20 EU Member States and European Economic Area (EEA) States (Target States) that are carrying out, or are planning to carry out, offshore oil and gas operations:

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<sup>1</sup> Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178/66 (28 June 2013).

<sup>2</sup> Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. OJ L 143/56 (30 April 2004). It is outside the remit of this study to examine liability regimes for preventing and remedying environmental damage other than to note that liability under the ELD includes the costs of compensation for lost services to the public such as bird watching and fishing following environmental damage.

<sup>3</sup> This study is a follow-up to a report by the Maastricht European Institute for Transnational Legal Research which was prepared before the EU had adopted the OSD and, thus, before the European Commission's obligations

- the effectiveness of liability regimes for bodily injury, property damage and economic loss (referred to as “traditional damage”);
- the handling of compensation claims; and
- financial security instruments for compensation for traditional damage from offshore oil and gas operations.

The 20 Target States are:

- 18 EU Member States (Bulgaria, Croatia, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom); and
- two EEA States (Iceland and Norway).<sup>4</sup>

The study does not discuss in any detail the liability regimes for compensation concerning fatalities or serious personal injury to people who are on an offshore installation when an accident occurs. Such accidents include the Alexander Kielland platform, which capsized in Norway’s Ekofisk oil field during a storm in March 1980 with the loss of 123 lives, and the Piper Alpha platform, on which explosions and fire in July 1988 caused the loss of 167 lives.

All Target States have effective liability regimes for claims for compensation arising from fatalities or serious personal injury suffered by employees. Further, most Target States require employers, including operators of offshore oil and gas installations and their contractors, to have financial security to cover such claims. Disputes arising out of such accidents may involve the law applicable to such claims (due to its potential effect on the amount of compensation), but not the operator’s or contractor’s liability for, or its ability to pay, compensation for them.

In contrast, it is highly uncertain whether the law applicable to third-party claims for traditional damage for harm from a release of oil, gas or dangerous substances from an offshore oil and gas accident would cover such claims in a substantial number of Target States. The applicable law varies substantially between the Target States.

The reason for the uncertainty is a legal rule known as the exclusionary rule for pure economic loss, that is, a bar on the payment of compensation for economic loss in the absence of bodily injury or property damage. As described by Professors Palmer and Bussani, pure economic loss:

“is loss without antecedent harm to plaintiff’s person or property. Here the word ‘pure’ plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called *consequential* economic loss and the whole set of damages may be recovered without question. *Consequential* economic loss (sometimes also termed parasitic loss) is recoverable because it presupposes the

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under it were known. See Maastricht European Institute for Transnational Legal Research (2013), Civil Liability and Financial Security for Offshore Oil and Gas Activities, Final Report. (Metro Report); available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>4</sup> The other EU and EEA States are either landlocked (Austria, the Czech Republic, Hungary, Liechtenstein, Luxembourg, and Slovakia) or do not have, and are not currently planning, offshore oil and gas operations (Belgium, Finland, Estonia, Slovenia and Sweden).

existence of physical injuries, whereas pure economic loss strikes the victim's wallet and nothing else".<sup>5</sup>

The following examples demonstrate the problems associated with claims for harm from an accident involving the release of oil, gas or other dangerous substances from offshore oil and gas operations if the liability system of a Target State does not recognise pure economic loss.

- A claim by a fisherman who lost revenue because he could not fish due to a fishing ban following an offshore oil and gas accident would fail because the fisherman would not have suffered any damage to property owned by him; he does not own the fish in the sea.
- A claim by a hotel that suffered a substantial loss in income because guests cancelled their holidays due to an oil spill resulting in oil washing up on nearby beaches would also fail. Again, the hotel would not have suffered any property damage.
- Claims by other coastal businesses, including businesses that supplied, processed or sold seafood or that supported the fisheries and tourism sector, would also fail.

The relevance of pure economic loss to claims for compensation for harm from an offshore oil and gas is illustrated by the Deepwater Horizon accident. As stated by Professor Robertson,

"it seems apparent that in sheer magnitudes of dollars, economic-loss damages far exceed all of the other losses combined. In the aftermath of the disaster, BP Exploration & Production, Inc. created the Gulf Coast Claims Facility (GCCF) as a mechanism for settling damages and other claims against BP. In its April 13, 2012 status report, the GCCF reported that it had paid out a total of \$6,316,458,256, and that about 96% of that amount – \$6,053,660,113.42 – had gone to economic-loss claimants".<sup>6</sup>

The compensation payments from Deepwater Horizon were, of course, based on US law. More specifically, the payments for property damage and economic loss were based on provisions of the Oil Pollution Act (OPA), which introduced liability for pure economic loss for compensation from oil spills from offshore oil and gas installations (and other installations and vessels). In the absence of the OPA, such claims would not have been recognised. State law in the USA does not recognise pure economic loss; neither does general maritime law, with the exception of claims from the fisheries sector.

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<sup>5</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 7 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>6</sup> See David W. Goldberg, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) Texas Journal of Oil, Gas, and Energy Law, vol. 7, 241, 242. In July 2011, the percentage of claims for pure economic loss filed with the GCCF was 99 per cent. See Vernon Valentine Palmer, The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability, (2011) Penn State Law Review, vol. 116, 105, 109, 116 n.49; available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>

The GCCF did not account for all of the costs and expenses paid by BP. Other costs include those for remediating the oil spill, natural resource damages, sanctions for pollution from the well blowout, etc. It has been estimated that BP's costs from the incident exceed US\$ 42.7 bn. See Tom Borden, BP's legal bill for the Gulf oil spill disaster soars to \$1bn, The Independent (5 February 2014); available at <http://www.independent.co.uk/news/business/news/bps-legal-bill-for-the-gulf-oil-spill-disaster-soars-to-1bn-9107849.html> This estimate was made before Judge Barbier's ruling of 4 September 2014 that BP was grossly negligent under the Clean Water Act (see section 3.5.2).

The major argument against the recognition of pure economic loss is the “floodgates” issue, that is, if liability for pure economic loss is recognised, the floodgates to claims would open. As Professors Palmer and Bussani have commented, this argument:

“is not only pervasive but has proved persuasive in many quarters. It usually links up with and reinforces the other arguments. Common law countries, mixed jurisdictions and a number of civil law countries all share similar concerns about the danger of excessive liability entailed by pure economic loss claims. In this context, another frequently invoked explanation for the exclusionary rule concerns the problems of open-ended liability and derivative litigation, i.e., the extension of liability for the remote consequences of a wrongful act. The common premise of this argument is that in a complex economy, pure economic losses are likely to be serially linked to one another. The foregone production of a good, for example, often generates losses that affect several downstream individuals and firms who would have utilized the good as an input in their production process, and so on. In such a world of economic networking, it becomes necessary to set reasonable limits to the extent to which remote economic effects of a tort should be made compensable”.<sup>7</sup>

There is no easy answer to this argument although the commentators noted that it does not seem to have affected claims in France, where the law recognises claims for pure economic loss.<sup>8</sup>

Deepwater Horizon shows the stark consequences for BP that resulted from the introduction of pure economic loss in the OPA. Equally stark, however, are the consequences for claimants if pure economic loss is not recognised. That is, if some liability for pure economic loss is not recognised, the vast majority of third-party claims for compensation for traditional damage from a major offshore oil and gas accident would fail. If the communities affected by the oil spill were dependent upon tourism or fishing for their livelihoods, the consequences would be disastrous, not only for people in the communities but also for the Target State. For example, a Target State that has promoted offshore oil and gas operations to repair its debt deficit from the economic recession could find itself having to pay huge amounts of compensation to people affected by the accident as well as having to subsidise the communities in the affected area until they could become self-sufficient again.

The non-recognition of pure economic loss by some Target States is not the only factor affecting the effectiveness of liability regimes for compensation for harm from an offshore oil and gas accident. The tort law<sup>9</sup> of most Target States recognises only “direct” claims; it does not recognise remote claims, that is, claims for harm that is remote from the event causing the harm. This requirement means that it is unlikely that claims by businesses in sectors other than the fisheries sector, and perhaps the tourism sector, would succeed. Further, the likelihood of a claim by a business in the tourism sector succeeding is significantly less than that of a claim by a business in the fisheries sector. This is because a claim for loss of income by the inability to fish from polluted waters is more “direct” than a claim for loss of income by, say, a hotel or a restaurant on a polluted coastline. The reason is that the pollution directly affects the fish whilst the harm to the hotel or restaurant may be considered to be indirect. As Professor Perry states, however, “no rational distinction can be made between the

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<sup>7</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 18-19 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>8</sup> Ibid, 22.

<sup>9</sup> Tort law is the name for the civil law that provides a remedy for persons who suffer harm from the person (wrongdoer) who caused the harm.

interests of fishermen and the interests of other victims (such as fish restaurants, bait shops, tourist guides, hotels, and other businesses in the area)".<sup>10</sup>

Further, most Target States require proof of negligence, not only for claims for pure economic loss but for all claims for traditional damage. This requirement exists in Target States such as Bulgaria, Croatia, Cyprus, France, Greece, Ireland, Italy, Latvia, Malta and Romania. The need to prove fault means that it would be more difficult for compensation claims for traditional damage to succeed, as well as extending the length of time for their payment. Strict liability<sup>11</sup> for traditional damage tends to exist only for so-called "dangerous" activities, which tend to be a separate category in Civil Codes or for which specific legislation has been enacted. Examples include the German Environmental Liability Act, the Polish Environmental Protection Law, the Lithuanian Law on Environmental Protection, and Portuguese Law No. 11/87 of 7 April 1987. It is arguable whether offshore oil and gas operations are a "dangerous" activity under the law of some Target States because, among other things, such claims have never arisen. In other Target States, the relevant provisions would simply not include them as a "dangerous" activity.

Only Norway has legislation that specifically authorises compensation to fisheries affected by offshore oil and gas operations, including a release of pollutants. Norway has also instituted a claims system if a loss should occur. Danish law imposes strict liability for traditional damage, including pure economic loss, caused by the exploration for, and production of, hydrocarbons. Portuguese law balances the right to prospect, explore, develop and produce petroleum with rights, or uses, in connection with other natural resources in the same area by stating that they should not be carried out in a manner that is incompatible with such rights and uses. Unlike Norway, however, Portugal has not established a specific liability system for claims arising from an offshore oil and gas accident.

Another major issue is the application of tort law to accidents that occur in the continental shelf and exclusive economic zone (EEZ). Our research indicated that it is not certain that the Civil Codes and other laws that impose liability for traditional damage in the Target States would actually apply to claims for compensation from an offshore oil and gas accident. The legislation of some Target States specifically applies jurisdiction for tort law, and other civil laws, to the continental shelf and EEZ. Our research did not, however, locate laws that extended jurisdiction for the relevant civil legislation in all Target States. It thus appears that at least some Target States have not enacted such legislation. It further appears that jurisdiction for at least some of the environmental laws that impose liability for traditional damage from pollution does not apply beyond the territorial sea.

The differences between the liability systems of the Target States raise the potential for forum shopping (that is, seeking to apply more favourable law) if a release of oil, gas or another dangerous substance caused by an offshore oil and gas accident was to occur. Under Rome II,<sup>12</sup> a person seeking compensation for damage from a transboundary incident in the EU may select the law of the

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<sup>10</sup> See Ronen Perry, Relationship Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, (2004) Rutgers Law Review, vol. 56, 711, 786.

<sup>11</sup> Fault is not a necessary element of a strict liability tort. A wrongdoer may be liable to a claimant who suffers harm due to a condition that the wrongdoer created or allowed to continue regardless of whether the wrongdoer was negligent, intended to harm the claimant, or even knew that the harm had occurred.

Strict liability is not, however, absolute liability; the claimant must still prove all elements of the tort.

<sup>12</sup> Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II). OJ L 199/40 (31 July 2007). Rome II applies when there is a conflict in laws so as to determine the applicable choice of law.

Member State where the damage, or the event giving rise to the incident that caused the damage, occurred.<sup>13</sup>

None of the Target States explicitly sets out a broad range of financial security instruments that applicants for licences for offshore oil and gas operations may select to meet the requirement for financial security concerning compensation for claims for traditional damage, although the competent authorities in some, if not many, Target States will consider the adequacy of any instruments submitted to them.

Instead of a wide range of financial security instruments from which to choose, the majority of Target States prescribes only one mechanism for compensation for claims for traditional damage – insurance. Twelve Target States specify insurance, of which nine do not specify any other type of financial security mechanism. This high proportion of Target States that require insurance may be even higher because the model contractual agreements for offshore oil and gas operations for six Target States were not available for review and information concerning them was not provided. These six States did not specify any type of financial security mechanism in their licensing legislation so it may well be the case that they specify insurance in their model contractual agreements. The reliance on insurance could potentially result in a closed market for financial security instruments for compensation for traditional damage, with the corollary potential for a lack in competition and increased cost.

Further, it is not clear whether the insurance policies accepted by competent authorities in the Target States include cover for pure economic loss. It would obviously make little sense for a licensee of offshore oil and gas operations to have financial security for a liability that does not exist in the State in which the licensee is carrying out operations. It would also make little sense for providers of financial security instruments to develop products to offer financial security for such a liability.

The focus on insurance for financial security concerning compensation for claims for traditional damage from an offshore oil and gas incident is in sharp contrast to the mechanisms that may be selected by a licensee of offshore oil and gas operations to meet the obligations of a licence or contractual agreement. The most common financial security instruments required for such obligations are bank guarantees, performance bonds, insurance and, if appropriate, parent company guarantees. Applicants for licences virtually always have more than one instrument from which to choose for these obligations.

In summary, if an accident such as Deepwater Horizon – or even much less severe than Deepwater Horizon – was to occur in EU waters, there is currently:

- no liability in many Target States for most third-party claims for compensation for traditional damage caused by the accident;
- no regime in the vast majority of Target States to handle compensation payments; and
- no assurance in many Target States that operators, or other liable persons, would have adequate financial assets to meet such claims.

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<sup>13</sup> Rome II, article 7. Article 7 provides: “The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1) [that is, the law in which the damage occurs], unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred”. Denmark has opted out of Rome II.



# List of Acronyms

|                 |  |
|-----------------|--|
| ART             | Alternative Risk Transfer  |
| boe             | Barrels of oil equivalent  |
| bcm             | Billion cubic metres   |
| CERCLA          | Comprehensive Environmental Response, Compensation, and Liability Act (US)   |
| CLEE            | Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources |
| COFR            | Certificate of Financial Responsibility (US)   |
| COW             | Control of Well  |
| DECC            | Department of Energy and Climate Change (UK)   |
| D&F             | Direct and Facultative (Re)insurance   |
| DOJ             | Department of Justice (US)   |
| EEA             | European Economic Area   |
| EEZ             | Exclusive Economic Zone  |
| EIA             | Environmental impact assessment  |
| ELD             | Environmental Liability Directive (2004/35/EC)   |
| EMSA            | European Maritime Safety Agency  |
| EPA             | Environmental Protection Agency (US)   |
| FOSC            | Federal on-scene coordinator (US)  |
| FPSO            | Floating Production Storage and Offloading unit  |
| FRSE            | Fellows of the Royal Society of Edinburgh  |
| FSO             | Floating Storage and Offloading unit   |
| Fund Convention | Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage                                 |
| GCCF            | Gulf Coast Claims Facility (US)  |
| IADC            | International Association of Drilling Contractors  |

|                      |  |
|----------------------|--|
| IOPCF                | International Oil Pollution Compensation Funds   |
| IUMI                 | International Union of Marine Insurance  |
| JOA                  | Joint Operating Agreement  |
| LMA                  | Lloyd's Market Association   |
| LLMC                 | Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the LLMC 1996 Protocol  |
| MAP                  | Mediterranean Action Programme   |
| Metro Report         | Report by Maastricht European Institute for Transnational Legal Research, on Civil Liability and Financial Security for Offshore Oil and Gas Activities (2013) |
| MODU                 | Mobile Offshore Drilling Unit  |
| MPF                  | Ministério Público Federal (Brazil)  |
| NOAA                 | National Oceanic and Atmospheric Administration (US)   |
| OCIL                 | Oil Casualty Insurance Ltd   |
| OCT                  | Overseas Countries and Territories   |
| OEE                  | Operator's Extra Expense   |
| OIL                  | Oil Insurance Ltd  |
| OPA                  | Oil Pollution Act of 1990 (US)   |
| OPOL                 | Offshore Pollution Liability Association   |
| OSD                  | Offshore Safety Directive (2013/30/EU)   |
| OSLTF                | Oil Spill Liability Trust Fund (US)  |
| PER                  | Permis Exclusif de Recherches  |
| RESTORE Act          | Resources and Ecosystems Sustainability Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (US)                                 |
| RO-RO vessel         | Roll on/Roll off vessel  |
| SDR                  | Special Drawing Rights   |
| SEA                  | Strategic Environmental Impact Assessment  |
| SEC                  | Securities and Exchange Commission (US)  |
| SIR                  | Self-Insured Retention   |
| SM <sup>3</sup>      | Standard cubic metre   |
| Sm <sup>3</sup> o.e. | Standard cubic metres oil equivalent   |

|          |  |
|----------|--|
| SOSCover | Sudden Oil Spill Cover proposal by Munich Re         |
| SPE      | Special Purpose Entity                               |
| SPR      | Special Purpose Reinsurer                            |
| TEPCO    | Tokyo Electric Power Company                         |
| tcm      | Trillion cubic metres                                |
| UNCLOS   | United Nations Convention on the Law of the Sea 1982 |
| VoO      | Vessel of Opportunity                                |

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# 1. Context of the study, objectives and approach

This chapter presents the general context of the study, together with its objectives and approach, to assist the European Commission by providing them with, and analysing information on, civil liability, financial security and compensation claims for harm from offshore oil and gas activities.

## 1.1. Context of the study

Over 90 per cent of oil and over 60 per cent of gas produced in the European Economic Area (EEA) comes from offshore operations. Offshore operations (prospecting and exploration) are planned or ongoing on the continental shelves and, to a lesser extent, the territorial waters of 20 EEA States; production is ongoing in 12 EEA States. In total, over 1,000 offshore installations are operating in EEA waters. There are more than 6,000 wells, over 400 of them in Italian and Spanish waters. These numbers are growing despite an overall decline in hydrocarbon production in the European Union (EU).<sup>14</sup>

The Macondo (Deepwater Horizon) drilling rig disaster which occurred on 20 April 2010 in the Gulf of Mexico provided an impetus for examining the lessons to be learned about the nature of hazards from the oil and gas industry in EU waters, the ability of industry to prevent them being realised and, if there are major accidents, preparedness to limit and remediate the consequences.

In the aftermath of the Deepwater Horizon oil spill,<sup>15</sup> the European Commission submitted, in October 2011, a legislative proposal in order to reduce the risks of a major accident from offshore oil and gas operations, and, if such an incident would nevertheless occur, to ensure that a mechanism exists to respond effectively to emergencies and to compensate for damage caused by the incident.

On 18 July 2013, Directive 2013/30/EU (OSD: Offshore Safety Directive)<sup>16</sup> entered into force, requiring Member States to ensure that applicants for licences related to offshore oil and gas operations meet specific technical and financial criteria.

The OSD defines basic elements for the implementation of an EU-wide precautionary framework related to offshore oil and gas operations establishing rules for concerned Member States in order to overcome potential problems that might result from diverging national legislation.

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<sup>14</sup> European Commission (2011), Impact Assessment accompanying the document 'Proposal for a Regulation on safety of offshore oil and gas prospecting, exploration and production activities' (SEC(2011) 1293 final); available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2011:1293:FIN:EN:PDF>

<sup>15</sup> The Deepwater Horizon oil rig was the drilling rig for the Macondo exploration well.

<sup>16</sup> Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178/66 (28 June 2013).

The main goal of the Directive is to prevent major accidents from offshore oil and gas operations. If such an incident nevertheless occurs, a prompt response should exist to limit its overall impacts. For this purpose, comprehensive measures should be provided to ensure that liability is solely ascribed to the licensee(s) and to further develop financial security instruments and compensation for damages.

While the OSD was being prepared, the Commission awarded a tender to the Maastricht European Institute for Transnational Legal Research to conduct a general study on civil liability and financial security for offshore oil and gas operations (the “Metro Report”).<sup>17</sup> The main objective of the Metro Report was to find out:

- The extent to which liability can play a role in preventing accidents and compensating victims of offshore oil and gas operations, focusing on environmental as well as bodily injury, property damage and economic loss (referred to as “traditional damage”);<sup>18</sup>
- How such a civil liability regime should be formulated in order to make it efficient, effective and insurable;
- The kind of options that already exist for offshore oil and gas operators to cover the costs resulting from such liabilities and mechanisms that are either already available or could be developed in the future; and
- How mechanisms could be developed immediately to compensate victims after an accident.<sup>19</sup>

The present study is a follow-up to the Metro Report.

## 1.2. Objectives

The main objectives of the study are to assist the European Commission in preparing two reports it must submit to the European Council and the European Parliament under Article 39 of the OSD, namely:

- A report on the availability of financial security instruments and handling of compensation claims, accompanied by proposals (to be submitted by the Commission by 31 December 2014); and
- A report on the assessment of the effectiveness of the liability regimes in the EU in respect of damage caused by offshore oil and gas operations, accompanied by proposals (to be submitted by the Commission by 19 July 2015).

This follow-up study fills gaps in the Metro Report as follows:

- When the Metro Report was commissioned, the OSD had not been adopted and the Commission’s obligations under Article 39 were hence not fully known; and

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<sup>17</sup> Maastricht European Institute for Transnational Legal Research (2013), Civil Liability and Financial Security for Offshore Oil and Gas Activities, Final Report. (Metro Report); available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>18</sup> The term “traditional damage” is not a term of art nor is its use so intended. The term is used simply as short-hand for the longer term “bodily injury, property damage and economic loss”, with the term “economic loss” including consequential as well as pure economic loss unless specified otherwise.

<sup>19</sup> Maastricht European Institute for Transnational Legal Research (2013), Civil Liability and Financial Security for Offshore Oil and Gas Activities, Final Report. pp. 9, 21-22 (Metro Report); available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf),

- Consequently, the Metro Report does not provide all the information necessary to comply with the requirements under OSD, Article 39, as it does not cover all offshore-active States in the EEA – which include 18 European Union (EU) Member States – and does not always provide an analysis of the issues under consideration.

This follow-up study therefore aims to provide the Commission with the necessary input (background information) to allow it to carry out its own analysis. The structure of the study is as follows.

Chapter 2 sets the context for the discussion of the liability systems for compensation for harm from an offshore oil and gas incident and the financial security regimes for such compensation in place in 20 States in the EU and the EEA (the “Target States”). It sets the context for the report by briefly describing the United Nations Convention on the Law of the Sea 1982 (UNCLOS), Directive 98/22/EC on the conditions for using authorisations for the prospection, exploration and production of hydrocarbons (Hydrocarbons Licensing Directive),<sup>20</sup> the licensing systems for offshore oil and gas operations and contracts applicable to such operations, and Joint Operating Agreements (JOAs). The chapter then provides an overview of the status of offshore oil and gas operations by Target States, and indicates the type of licences and contracts applicable to those operations in each Target State.

The Target States are the 20 EEA countries: 18 EU Member States (Bulgaria, Croatia, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Spain and the United Kingdom), and Iceland and Norway. The other EEA States are either landlocked (Austria, the Czech Republic, Hungary, Liechtenstein, Luxembourg, and Slovakia) or do not have, and are not currently planning, offshore oil and gas activities (Belgium, Finland, Estonia, Slovenia and Sweden).

The summaries of the Target States indicate, but do not discuss in any detail, offshore oil and gas operations in EU Overseas Countries and Territories (OCTs), that is, operations in the Falkland Islands (UK), the Faroes and Greenland (Denmark), and Saint-Pierre-et-Miquelon (France). The summaries also indicate, but do not discuss in any detail, offshore oil and gas operations in the EU’s Outermost Regions, that is, operations in Guiana and Guadeloupe (France), and the Canary Islands (Spain).

Chapter 3 describes and analyses the liability systems in the Target States for claims for compensation for traditional damage (that is, bodily injury, property damage and economic loss, including pure economic loss)<sup>21</sup> which may be suffered by individuals and businesses in coastal areas affected by pollution from an offshore oil and gas incident. The activities most at risk from a pollution incident from offshore oil and gas operations include fishing, fish farms, tourism, shellfish harvesting, ports, and other coastal businesses. Activities covered by the study are all activities related to prospecting, exploring, and producing offshore oil and gas.

Chapter 3 also discusses the regimes that exist in the Target States to handle compensation claims for such damage.

The summaries for the Target States indicate the application of the Strategic Environmental Assessment Directive (2001/42/EC) and the Environmental Impact Assessment Directive

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<sup>20</sup> OJ L 164/3 (30 June 1994).

<sup>21</sup> Pure economic loss is financial (economic) loss in the absence of bodily injury or property damage; see section 2.1.4 for a fuller description.

(2011/92/EU, as amended by Directive 2014/52/EU)<sup>22</sup> in the context of article 4(2)(a) of the OSD, that is, the direction to competent authorities, “when assessing the technical and financial capability of the applicant for a licence” for offshore oil and gas operations to take “due account ... of ... the risk, the hazards and any other relevant information relating to the licensed area concerned, including, where appropriate, the cost of degradation of the marine environment”. It is noted that Directive 2014/52/EU, which is to be transposed into the national law of Member States by 16 May 2017, refers to seismic surveys using active sonars as a characteristic to be taken into account for projects in the marine environment.<sup>23</sup>

Chapter 4 describes and analyses financial security requirements by the Target States for traditional damage from an offshore oil and gas incident and the financial security instruments available to meet these requirements. Liability and financial security for decommissioning offshore oil and gas facilities are not within the scope of the study and are, thus, mentioned incidentally only when relevant.

### 1.3. Approach

The overall approach in carrying out this study is based on a combination of literature review (including a review and analysis of legal sources) and interviews with experts and stakeholders.

#### 1.3.1. Literature review (legal analysis)

The literature review has focussed on primary legal sources and available academic literature, including articles, research papers, and books, as well as past research carried out by the project team. Both specific and generalised literature was researched, addressing financial security instruments, civil (and common) law provisions and liability and financial security regimes in the context of industrial activities, in particular offshore oil and gas activities.

The Metro Report, the peer review carried out by Professor Peter Cameron, FRSE, and Metro’s response to the peer review served as a starting point for the follow-up study, based on:

- Issues raised, but not analysed, in the Metro Report; and
- The gap analysis included in the peer-review report.

The Metro Report comprises generic information about existing legal regimes, pooling mechanisms, financial market instruments and potential financial instruments, including insurance. However, it contains information on only seven of the 20 Target States covered by this study, namely: the UK, Norway, Denmark, Cyprus, Italy, France and the Netherlands. Further, the information for the seven Member States described is limited. The literature review therefore reviews and analyses relevant information regarding the 20 Target States.

The aim of the literature review is to provide an overview and clear understanding of the national frameworks that are in place in the different Target States, to analyse the information discovered through carrying it out, and to reach conclusions.

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<sup>22</sup> Annex I, point 14, of Directive 2011/92/EU lists the “[e]xtraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas” as being subject to an environmental assessment.

<sup>23</sup> Directive 2014/52/EU, recital 12. A consolidated version is available from <http://ec.europa.eu/environment/eia/eia-legalcontext.htm>



### 1.3.2. Empirical analysis

The empirical analysis is based on an expert/stakeholder consultation. Its aim was to fulfil the following objectives:

- To better understand the national frameworks in the respective Target States;
- To become acquainted with common practices in those Target States;
- To provide, where available, illustrative examples; and
- To collect opinions from various experts and stakeholders on each issue addressed in the study.

Contacted experts and stakeholders fall within the following categories:

- National competent authorities in the Target States;
- Academics and other individual experts;
- Experts in the (re-)insurance sector; and
- Environmental Non-Governmental Organisations (NGOs).

The final report is structured as follows:

- Chapter 1: The introduction to the study regarding its context, objectives and the approach taken to perform it;
- Chapter 2: The status of prospecting, exploring and producing offshore oil and gas in the Target States and the licensing regimes and contractual agreements for them;
- Chapter 3: Effectiveness of the liability regimes in the Target States for traditional damage caused by offshore oil and gas operations;
- Chapter 4: Available financial security instruments and financial security requirements for compensation for traditional damage under oil and gas licensing regimes in the Target States;
- Chapter 5: Findings and conclusions;
- An exhaustive bibliography;
- Acknowledgements; and
- An annex, consisting of 20 Target State summaries.

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# 2. Offshore oil and gas operations in the Target States

As indicated in Chapter 1, this chapter briefly describes UNCLOS and the Hydrocarbons Licensing Directive. The chapter then discusses the different types of licensing systems and contracts applicable to offshore oil and gas operations, and JOAs. The discussion is not intended to be comprehensive. Instead, it focusses on the issues in this study, namely, compensation for traditional damage and mandatory financial security for such compensation.

The chapter then provides an overview of the status of offshore oil and gas operations by Target States, and indicates the type of licences and contracts applicable to those operations in each Target State.

## 2.1. United Nations Convention on the Law of the Sea 1982

Offshore oil and gas operations in the Target States take place in the territorial sea, continental shelf, and exclusive economic zone (EEZ). Sovereignty over these areas is established pursuant to UNCLOS.

UNCLOS provides a legal framework for its Contracting States for ownership rights and jurisdiction concerning their territorial seas, continental shelves, and EEZs. The legal framework covers, among other things, a Contracting State's rights to natural resources in those three areas, its right to exercise jurisdiction over them, controls to protect and preserve the marine environment in them, and claims for compensation. All the Target States are parties to UNCLOS, which has been ratified by 162 States and the EU.<sup>24</sup>

The Metro Report describes the legal framework established by UNCLOS.<sup>25</sup> The following section simply notes the provisions that specifically apply to this study, that is, the provisions concerning a State's sovereignty and jurisdiction over its territorial sea, continental shelf and EEZ, its right to prospect, explore and produce oil and gas in those areas, and the liability regime for claims for compensation for traditional damage caused by pollution damage.

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<sup>24</sup> See United Nations Division for Ocean Affairs and the Law of the Sea; chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013; available at [https://www.un.org/depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm)

<sup>25</sup> See Metro Report, 70-71; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

UNCLOS provides that the sovereignty of a State extends to its territorial sea (article 2(1)), which may be established up to a limit of 12 nautical miles from the coast (article 3), subject to States allowing the innocent passage of ships within the territorial sea (section 3). States may also exercise control over the contiguous zone, which must not extend beyond 24 nautical miles from the territorial sea (article 33). The EEZ may extend up to 200 miles from the territorial sea (article 57), as may the continental shelf (article 76(1)).

UNCLOS further provides that “[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources” (article 77(1)). Such natural resources specifically include minerals (article 77(4)).

Still further, UNCLOS provides that a State may establish, in its EEZ:

“sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone ...” (article 56(a)).

A State’s sovereign rights extend to installations and structures in its EEZ (article 56(b)) including the exclusive right to authorise, construct and regulate such installations and structures (article 60(1)).

Further,

“[a] coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with [UNCLOS]” (article 73(1)).

Article 76(1) of UNCLOS defines the continental shelf of a coastal State, in pertinent part, as comprising “the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the *natural prolongation* of its land territory to the outer edge of the continental margin” (emphasis added). A State may, thus, claim sovereignty to its continental shelf beyond the EEZ, and thus claim the right to oil and gas in the continental shelf beyond that limit, if the continental shelf is a “natural prolongation” of its land territory. The concept arises from the case of *North Sea Continental Shelf Cases*.<sup>26</sup> As indicated in the summaries for the Target States, France and Ireland are carrying out projects to determine the extent of their continental shelves.

Various disagreements over the delimitation of continental shelves and EEZs have occurred between Target States and between Target States and other States. Some of these disagreements have deterred the exploration of offshore oil and gas in Target States. Agreements have been reached in some, but not all, instances. Examples of disagreements, and agreements, are as follows; further details are included in the summaries for Target States.

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<sup>26</sup> North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) , I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, available at: <http://www.refworld.org/docid/50645e9d2.html>; see International Tribunal for the Law of the Sea, The Outer Continental Shelf: Some Considerations Concerning Applications and the Potential Role of the International Tribunal for the Law of the Sea, Statement by H.E. Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, at the 73rd Biennial Conference of the International Law Association, Rio de Janeiro, Brazil (21 August 2008); available at [https://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/ila\\_rio\\_210808\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/ila_rio_210808_eng.pdf)

Ongoing disagreements include a lengthy dispute between Latvia and Lithuania. Progress on this was, however, made in June 2014 when the countries agreed to continue discussions on the development of economic cooperation in the Baltic Sea.

A lengthy dispute also exists between Greece and Turkey over the limits of their borders in the Aegean Sea; the dispute has nearly resulted in war between the two countries on several occasions.<sup>27</sup>

Cyprus has entered into agreements with Egypt and Israel. On 12 December 2013, Cyprus and Egypt also signed a unitisation agreement on the joint exploitation of hydrocarbon reserves on the median line between their EEZs. The agreement was ratified by Egypt in September 2014.<sup>28</sup> Meanwhile, an agreement between Cyprus and Syria had not been signed as of October 2014. Further, Turkey has disputed some of Cyprus' rights to offshore hydrocarbon deposits.

Agreements between Norway and Iceland on the Jan Mayen Ridge, which includes parts of the Norwegian and Icelandic continental shelves, were signed in 1981 and 2008. As a result, both States have the right to participate up to 25 per cent in licences granted by the other State, as occurred in 2013 and 2014.

Further, Italy has entered into agreements with Albania, Croatia, France, Greece, Libya, Malta, Montenegro, Slovenia, Spain and Tunisia concerning the extent of its continental shelf.<sup>29</sup> Still further, Romania extended its offshore exploratory activities for oil and gas after 2009, when the dispute with Ukraine over the limitations of the continental shelf and EEZ in the Black Sea ended.

UNCLOS also provides that States shall take "all measures consistent with [UNCLOS] that are necessary to prevent, reduce and control pollution of the marine environment from any source" (article 194(1)). UNCLOS refers specifically to "pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices" and other installations and devices that operate in the marine environment (article 194(3)).

UNCLOS does not specify the nature of the legislation that Contracting States must enact to implement it. As indicated above, it provides a legal framework for that legislation. In addition, UNCLOS does not set out details of the liability regime for compensation for damage caused by pollution of the marine environment. Instead, it establishes a framework that gives considerable discretion to States.<sup>30</sup> In this respect, UNCLOS provides as follows:

- "1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

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<sup>27</sup> See Hellenic Republic, Ministry of Foreign Affairs Greek-Turkish dispute over the delimitation of the continental shelf (last update 17 April 2013); available at <http://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/delimitation-of-the-continental-shelf.html>

<sup>28</sup> See Leigh Elston, Sisi ratifies Egypt-Cyprus unitisation deal, *Natural Gas Daily* (12 September 2014); available at <http://interfaxenergy.com/gasdaily/article/13568/sisi-ratifies-egypt-cyprus-unitisation-deal>

<sup>29</sup> See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, *The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 7* (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

<sup>30</sup> See A.L.C. de Mestral, *The Prevention of Pollution of the Marine Environment Arising from Offshore Mining and Drilling*, (1979) *Harvard International Law Journal*, vol. 20, 469, 501-02.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds” (article 235).

## 2.2. Hydrocarbons Licensing Directive (94/22/EC)

The hydrocarbons licensing systems of the Target States, including Norway<sup>31</sup> and Iceland,<sup>32</sup> are based, in part, on national legislation transposing the Hydrocarbons Licensing Directive.<sup>33</sup> The main purpose of that Directive is to prevent Member States “distorting completion by discriminating against persons from other [Member States]”.<sup>34</sup>

Article 1 of the Hydrocarbons Licensing Directive authorises Member States to retain the right to determine the areas within their territory that they make available for prospecting, exploring, and producing hydrocarbons subject to ensuring, as indicated above, that they do not discriminate between entities in respect of access to and exercise of them.

Article 3 provides two methods for a Member State to grant authorisations to prospect, explore for and produce hydrocarbons; a licensing round, and an “open door” system, as well as a combination of both methods. A licensing round consists of publishing a notice in the Official Journal to invite interested entities to apply for a licence within the time limit specified in the notice. The open door system, for which a notice must also be published in the Official Journal, allows interested entities to apply, and competent authorities to grant, a licence at any time. The Target States have used both methods, as described in the individual summaries.

Article 4 specifies measures that Member States must take to ensure that the geographical limit of areas subject to prospecting, exploration, and production of hydrocarbons do not exceed the area justified technically and economically. Article 4 further provides that authorisations must not exceed the period necessary to carry out activities granted by them, subject to an extension if necessary to complete the activities.

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<sup>31</sup> See Report from the Commission to the Council on Directive 94/22/EC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons 2 (COM(1998) 447 final, 29 July 1998).

<sup>32</sup> See News, The First Licensing Round on the Icelandic continental shelf in the northern Dreki area is closed (18 May 2009) (referring to Hydrocarbons Licensing Directive); available at: <http://www.nea.is/the-national-energy-authority/news/nr/779>

<sup>33</sup> Directive 94/22/EC on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons. OJ L 164/3 (30 June 1994); available from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994L0022>

<sup>34</sup> Greg Gordon, Petroleum Licensing 65, 72, in Oil and Gas Law: Current Practice & Emerging Trends (Greg Gordon, John Paterson and Emre Usenmez, editors, Oxford University Press, 2<sup>nd</sup> edition, 2011).

Article 5 directs Member States to take necessary measures to ensure that:

“authorisations are granted on the basis of criteria concerning, in all cases:

- (a) the technical and financial capability of the entities; and
- (b) the way in which they propose to prospect, to explore and/or to bring into production the geographical area in question;

and, where applicable:

- (c) if the authorisation is put up for sale, the price which the entity is prepared to pay in order to obtain the authorizations”.

If more than one application has equal merit, a competent authority must apply “relevant objective and non-discriminatory criteria, in order to make a final choice” between them, taking into account “any lack of efficiency and responsibility displayed by the applicants in operations under previous authorizations” (article 5(1)(d)).

Competent authorities must determine the composition of an entity to which they may grant an authorisation, and the operator of that entity, on the basis of objective and non-discriminatory criteria. Such criteria must be drawn up and published in the Official Journal before the start of the period for submission of applications. Member States that have already published the criteria in their national official journals may limit the publication in the Official Journal to a reference to that publication. Any change in criteria, however, must be published in full in the Official Journal (article 5(1)(d)).

### 2.3. Licensing, contracts and agreements for offshore oil and gas operations

Various types of licensing systems, contractual agreements, and hybrids of licences and contracts for offshore oil and gas operations exist in the Target States.<sup>35</sup> Some Target States enter into contractual agreements with private-sector companies in the form of production sharing agreements or service contracts. Other Target States base the operations on a licensing system or concessions. Still other Target States use a hybrid that involves elements of a licence and a contract.<sup>36</sup> In a licensing system, the licensee must have a licence granted by the State in order to carry out prospecting, exploration, or production (also called exploitation) activities in the offshore area of the State. In effect, the licence regulates the licensee’s activities authorised by it and establishes obligations and rights. Some Target States issue separate licences for each phase; others issue licences for more than one phase; for example, a prospecting licence and an exploration and production licence. Most licences are issued to co-ventures, sometimes joint ventures, of more than one licensee, with one licensee being designated as operator.

The licences have a specified duration, generally with optional extensions. If an exploration licence is renewed, a specified percentage of the licensed area tends to have to be relinquished. An exploration licence tends to grant the licensee the right to be granted a production licence for the area in which it discovers oil or gas.

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<sup>35</sup> The discussion of licensing, contracts and agreements for offshore oil and gas operations is based largely on Greg Gordon, Petroleum Licensing 65-109, in *Oil and Gas Law: Current Practice & Emerging Trends* (Greg Gordon, John Paterson and Emre Usenmez, editors, Oxford University Press, 2<sup>nd</sup> edition, 2011).

<sup>36</sup> See *ibid*, 66.

Prospecting and exploration licences tend to be non-exclusive, thus more than one licence may be granted for the same licenced area. Production licences are exclusive as to the area – or block – for which they are granted.

Licences set out, among other things, the licence area, the licence period, the identity of the operator, conditions and terms, including fees, restrictions on transfer and assignment, and reporting. A model JOA may be attached to the model licence. Provisions on damages may indicate the type of damages, including in some cases traditional damage, for which licensees are liable under it in the event of an accident. There may also be a provision by which the licensees agree to indemnify the State for any liabilities or harm arising from operations carried out pursuant to the licence. Some licences also include provisions specifying the insurance, or other forms of financial security, to be taken out by the licensees, including – in some cases – parent company guarantees.

A production sharing agreement (or production sharing contract), or concession agreement, is a contract between the State and the company – or co-venture – that is carrying out exploration and production activities.

A production sharing agreement has been well described as follows:

“Under a [production sharing agreement] the state as the owner of mineral resources engages a foreign oil company (FOC) as a contractor to provide technical and financial services for exploration and development operations. The state is traditionally represented by the government or one of its agencies such as the national oil company (NOC). The FOC acquires an entitlement to a stipulated share of the oil produced as a reward for the risk taken and services rendered. The state, however, remains the owner of the petroleum produced subject only to the contractor's entitlement to its share of production. The government or its NOC usually has the option to participate in different aspects of the exploration and development process. In addition, [production sharing agreements] frequently provide for the establishment of a joint committee where both parties are represented and which monitors the operations”.<sup>37</sup>

A production sharing agreement sets out issues such as the area covered by the agreement, its duration, the minimum works programme to be carried out, fees and payment details including taxation, restrictions on transfer and assignment, ownership and transfer of assets used in the works programme, and the identity of the operator. The model production sharing, and concession, agreements may also set out details concerning liability and financial security requirements,

The competent authorities of some Target States, such as Cyprus and Iceland, provide links to model licences and model agreements on their websites (see Bibliography, Target State Licensing Documentation). The competent authorities of other Target States, such as Malta, indicate that model agreements are available to companies interested in applying for them. Still other competent authorities do not indicate the availability of model licences or agreements on their websites.

### 2.4. Joint operating agreements

A JOA is a contractual agreement between licensees in a joint venture to carry out oil and gas operations. The JOA sets out the structure of the joint venture, appoints one of the licensees as the

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<sup>37</sup> Kirsten Bindemann, Production-Sharing Agreements: An Economic Analysis 1 (Oxford Institute for Energy Studies, October 1999); available at <http://www.oxfordenergy.org/wp-content/uploads/2010/11/WPM25-ProductionSharingAgreementsAnEconomicAnalysis-KBindemann-1999.pdf>



operator, and specifies the percentage interest of each party, including the method by which production and profit is allocated.<sup>38</sup> Liability under a JOA may be allocated according to each joint venturer's percentage interest in the licence.

JOAs usually operate on the knock-for-knock principle. Under this principle, each party agrees to be responsible, and to indemnify other parties and their contractors and sub-contractors, for losses suffered by its personnel and property, as well as consequential losses.<sup>39</sup> In effect, the knock-for-knock principle displaces tort liability between the joint venturers by a voluntary agreement not to bring actions against each other.<sup>40</sup>

The most common standard model form JOA is the Association of International Petroleum Negotiators' Model International Operating Agreement.<sup>41</sup> The 2002 model was updated in 2012 by a new model to respond to new legislation and experience.<sup>42</sup> The most common standard model form JOA in the UK continental shelf is the Oil & Gas UK Standard Form Joint Operating Agreement, dated January 2009.<sup>43</sup> Other standard form JOAs exist in the US, Canada, and other jurisdictions.

There are also standard model form service contracts for the various services connected with offshore oil and gas operations. They include the US International Association of Drilling Contractors standard contract, the UK's LOGIC contract and BP's Global Model Well Services Contract.<sup>44</sup>

Competent authorities have not traditionally pursued contractors for damages or prosecuted them following incidents involving offshore oil and gas facilities; instead they have pursued only the operator or, sometimes, other licensees. This situation changed with the Deepwater Horizon incident when the US Department of Justice (DOJ) pursued not only BP but its contractors, as described in section 3.5.2.

Litigation may also ensue between operators and contractors. For example, the contract between BP and Transocean Offshore Deepwater Drilling Inc included an indemnification from BP to Transocean for

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<sup>38</sup> See Nkaepe Etteh, Joint Operating Agreements: Which Issues are Likely to be the Most Sensitive to the Parties and How can a Good Contract Design Limit the Damage from such Disputes?; available at [http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp\\_car14\\_27\\_215967689.pdf](http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car14_27_215967689.pdf)

<sup>39</sup> See Tim Taylor, Knock for Knock Revisited (20 February 2013; available at <http://offshore.clydeco.com/shipping/knock-for-knock-revisited/>; Barbara Jennings, Offshore Contracting, Standard Bulletin (November 2008); available at [http://www.standard-club.com/media/23525/14292\\_SB\\_report\\_NOV\\_08\\_disclaimer.pdf](http://www.standard-club.com/media/23525/14292_SB_report_NOV_08_disclaimer.pdf)

<sup>40</sup> See Gideon Parchomovsky and Endre Stavang, Contracting around Tort Defaults: The Knock-for-Knock Principle and Accident Costs 9; available at [http://lawf.biu.ac.il/library/mb/13Parchomovsky\\_Stavang.pdf](http://lawf.biu.ac.il/library/mb/13Parchomovsky_Stavang.pdf)

<sup>41</sup> See Shane Bosna, The Regulation of Marine Pollution Arising from Offshore Oil and Gas Facilities – An Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime, (2012) Australian & New Zealand Maritime Law Journal, vol. 26, 89, 102.

<sup>42</sup> See Ashurst, Energy briefing, AIPN releases new 2012 version of its model Joint Operating Agreement; available at [http://webcache.googleusercontent.com/search?q=cache:GPJrLKvFzyYJ:www.ashurst.com/doc.aspx%3Fid\\_Content%3D7443+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:GPJrLKvFzyYJ:www.ashurst.com/doc.aspx%3Fid_Content%3D7443+&cd=1&hl=en&ct=clnk&gl=uk)

<sup>43</sup> See Shane Bosna, The Regulation of Marine Pollution Arising from Offshore Oil and Gas Facilities – An Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime, (2012) Australian & New Zealand Maritime Law Journal, vol. 26, 89, 102.

<sup>44</sup> See Peter Cameron, Liability for Catastrophic Risk in the Oil and Gas Industry, (2012) International Energy Law Review 207, 208.

costs and liabilities arising from the oil spill.<sup>45</sup> Further, the drilling contract between Transocean and BP required Transocean to list BP and its affiliated companies "as additional insureds in each of [Transocean's] policies, except Worker's Compensation for liabilities assumed by [Transocean] under the terms of this Contract."<sup>46</sup> Transocean took out US\$ 50 million (EUR 36,695,900) in general liability insurance from Ranger Insurance Company and four layers of excess insurance from London market underwriters for an additional US\$ 700 million (EUR 513,743,000). BP subsequently claimed US\$ 750 million (EUR 550,439,000) under the policies for the losses arising from the Deepwater Horizon oil spill.

Judge Barbier ruled against BP. In March 2013, however, the federal Court of Appeals for the Fifth Circuit ruled in BP's favour, holding that the insurance policies (which included similar language) provided cover because, unlike the drilling contract which did not include an indemnity from Transocean to BP for pollution-related liabilities, the policies did not exclude liability arising from pollution.<sup>47</sup> The Fifth Circuit subsequently withdrew its decision and certified questions to the Texas Supreme Court for a ruling, under Texas law, as to whether, in essence, the drilling contract or the insurance policies provide cover to BP for the indemnities provided by Transocean to BP under the drilling contract.<sup>48</sup>

The prosecutions against contractors following a spill from an offshore facility have not only occurred in the USA. In November 2011, the Brazilian Government prosecuted a contractor, as well as the operator, Chevron Brasil Upstream Frade Ltd, an affiliate of Chevron Corporation, following releases of oil in the Frade offshore oil field, approximately 370 kilometres northeast of Rio de Janeiro and 120 kilometres offshore. Over 3,000 barrels of oil had been released from the oil field, followed by further seepage in March 2012. The Brazilian Government subsequently brought criminal charges against Chevron, Transocean Ltd, the owner of the drilling rig, and 17 employees of Chevron and Transocean. In addition, civil actions by the Ministério Público Federal (MPF) sought 40 billion reais (EUR 13.2 billion) in compensation.<sup>49</sup> The civil actions settled for 300 million reais (EUR 98.9 million) in October 2013.<sup>50</sup> The Brazilian Government did not bring actions against Petróleo Brasileiro S.A. (the State-owned company), which owned 30 per cent of the well, or Frade Japão Petróleo Ltda., a joint-venture

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<sup>45</sup> See Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, (2011) *Washington Law Review*, vol. 86, 1, 51 ("According to Transocean officials, the company's contract with BP obliges the latter to indemnify the former for the costs and liabilities incurred following the spill").

<sup>46</sup> See Keith B. Letourneau, *United States: The \$750,000,000 Missing Comma?* (15 October 2013); available at <http://www.mondaq.com/unitedstates/x/269290/Insurance/The+750000000+Missing+Comma>

<sup>47</sup> *In re Deepwater Horizon (Ranger Insurance, Limited v. Transocean Offshore Deepwater Drilling, Inc.)*, 710 F.3d 338 (5th Cir. 2013); available at [http://scholar.google.co.uk/scholar\\_case?case=3313755025606592267&q=In+re+Deepwater+Horizon+\(Ranger+Insurance,+Limited+v.+Transocean+Offshore+Deepwater+Drilling,+Inc&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=3313755025606592267&q=In+re+Deepwater+Horizon+(Ranger+Insurance,+Limited+v.+Transocean+Offshore+Deepwater+Drilling,+Inc&hl=en&as_sdt=2003)

<sup>48</sup> See Margaret Cronin Fisk and Laurel Brubaker Calkins, *Court Reverses OK for BP to Access Transocean Insurance to Pay Oil Spill Costs*, *Insurance Journal* (29 August 2013); available at <http://www.insurancejournal.com/news/national/2013/08/29/303454.htm>

<sup>49</sup> See Jeb Blount, *Chevron, Transocean say Brazil drops criminal oil spill charges* (17 September 2013); available at <http://www.offshoreenergytoday.com/brazil-chevron-pays-41-6-mln-in-frade-spill-settlement/>; *Brazil: Chevron Pays \$41.6 Mln in Frade Spill Settlement*, *Offshore Energy Today* (17 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:mmgHU7i7GTkJ:www.offshoreenergytoday.com/brazil-chevron-pays-41-6-mln-in-frade-spill-settlement/+&cd=1&hl=en&ct=clnk&gl=uk>

<sup>50</sup> See Jeb Blount, *Update 2-Brazil judge dismisses case against Chevron, Transocean* (1 October 2013); available at <http://uk.reuters.com/article/2013/10/01/brazil-chevron-lawsuit-idUKL1N0HR0JA20131001>

company of Inpex Corporation and Sojitz Corporation, which owned 18 per cent.<sup>51</sup> In April 2014, an appellate court in Brazil reinstated the criminal prosecution against Chevron and 11 employees.<sup>52</sup>

The competent authorities' changed approach in the USA and Brazil focusses attention on JOAs between joint venture parties in offshore operations as well as contracts with contractors. The contractual arrangements may be critical because, as Professor Cameron states,

“[t]he international oil industry is now populated with a combination of Big Oil companies such as BP and ExxonMobil, medium to large oil companies such as Anadarko and many [National Oil Companies], and numerous ‘new entrant’ companies, including service companies, which certainly do not have the access to capital to pay the kind of large claims which BP faced following the Macondo oil spill. In the event that the operator fails, it is clear that contractors will be exposed to claims for payments, especially large contractors. Even if the operator does not fail, contractors may be faced with prohibitive amounts of regulatory fines”.<sup>53</sup>

Professor Cameron describes the situation in the UK North Sea in which several small to medium sized companies, as well as large companies, are operators. He noted that there has been at least one default concerning the decommissioning of an oil rig, raising the potential for non-operators to be held liable in certain circumstances.<sup>54</sup>

## 2.5. Status of offshore oil and gas operations in the Target States and type of licensing system

The status of offshore oil and gas operations in the Target States varies widely from States that are in the preliminary stages of prospecting and exploration to States that have a long history of prospecting, exploration and production (see Figure 1).

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<sup>51</sup> See Jeb Blount, Brazil judge dismisses case against Chevron, Transocean (1 October 2013); available at <http://www.reuters.com/article/2013/10/01/us-brazil-chevron-lawsuit-idUSBRE9900PR20131001>

<sup>52</sup> See Brazil renews criminal charges against Chevron, 11 employees in ‘settled case’, Petro Global News (4 April 2014); available at <http://petroglobalnews.com/2014/04/brazil-renews-criminal-charges-against-chevron-11-employees-in-settled-case/>

<sup>53</sup> Ibid, 213.

<sup>54</sup> Peter Cameron, Liability for Catastrophic Risk in the Oil and Gas Industry (2012) International Energy Law Review 207.

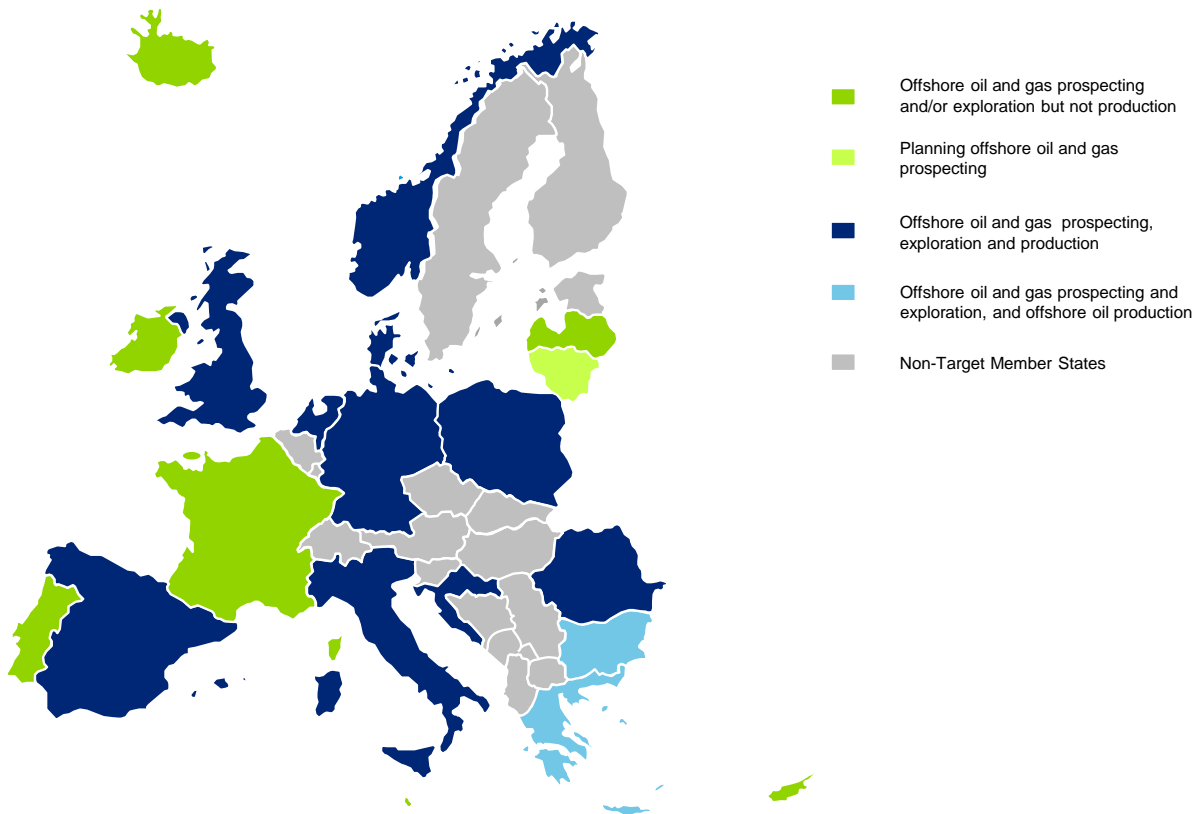


Figure 1: Status of offshore oil and gas prospecting, exploration and production in Target States in October 2014

The type of operations carried out by the Target States is also wide-ranging. For example, Germany produces gas from its major offshore field from an artificial island located in mudflats in the Wadden Sea. In addition, Germany has extended-reach wells that produce oil from offshore to onshore-based facilities. Greece is planning the same type of wells. Other Target States, such as Bulgaria, Italy, Norway and the UK carry out prospecting, exploration or production operations in deep water that is, in waters in excess of 1,000 feet.<sup>55</sup>

The areas in the EU in which oil and gas operations are carried out also vary significantly, from operations in northern regions to operations in the Mediterranean Sea, Aegean Sea and Adriatic Sea.

Further, the licensing systems vary widely. In some Target States, the main legislation is a mining law that applies to onshore and offshore minerals which include, but are not limited to, oil and gas. Other Target States have enacted legislation specifically for oil and gas licensing (see Table 1 below).

<sup>55</sup> See Lloyd's, *Drilling in extreme environments: Challenges and implications for the energy insurance industry* 9 (2011) (*Drilling in extreme environments*); available at <http://www.lloyds.com/~media/lloyds/reports/emerging%20risk%20reports/lloyds%20drilling%20in%20extreme%20environments%20final.pdf> Water in excess of 5,000 feet is regarded as ultra-deep waters. *Ibid.*

Table 1: Main laws for offshore oil and gas operations in the Target States

| Target State       | Main legislation   |
|--------------------|--|
| <b>Bulgaria</b>    | Underground Resources Act  |
| <b>Croatia</b>     | Act on the Exploration and Exploitation of Hydrocarbons  |
| <b>Cyprus</b>      | Hydrocarbon (Prospection, Exploration and Exploitation) Law  |
| <b>Denmark</b>     | Subsoil Act  |
| <b>France</b>      | Mining Code  |
| <b>Germany</b>     | Federal Mining Act   |
| <b>Greece</b>      | Law No. 2289/95 (Prospecting, Exploration and Exploitation of Hydrocarbons)  |
| <b>Iceland</b>     | Act No. 13/2001 on Prospecting, Exploration and Production of Hydrocarbons   |
| <b>Ireland</b>     | Petroleum and Other Minerals Development Act   |
| <b>Italy</b>       | Royal Decree No. 1443 laying down the legislative framework on mining activities (plus Legislative Decrees on offshore oil and gas operations) |
| <b>Latvia</b>      | Law on Subterranean Depths   |
| <b>Lithuania</b>   | Law on Subsoil   |
| <b>Malta</b>       | Petroleum (Production) Act   |
| <b>Netherlands</b> | Mining Act   |
| <b>Norway</b>      | Act of 29 November 1996 No. 72 relating to petroleum activities  |
| <b>Poland</b>      | Mining Law (the Hydrocarbons Act, which amends the Mining Law and other laws, will enter into force on 1 January 2015)                         |
| <b>Portugal</b>    | Decree-Law 109/94 (Petroleum Law)  |
| <b>Romania</b>     | Petroleum Law  |
| <b>Spain</b>       | Act 34/1998 on the Hydrocarbons Sector   |
| <b>UK</b>          | Petroleum Act 1998   |

More details of the status of offshore oil and gas operations and the licensing systems are in the summaries for the Target States.

### **2.5.1. Bulgaria**

Bulgaria has produced natural gas from its continental shelf in the Black Sea since 2001; oil production is onshore only and is insignificant. Exploration for oil and gas, and production of gas, in the Black Sea has increased since 2012, including exploration in water depths between 100 and 2,000 metres. Estimates in 2013 were for a five-fold increase in the production of natural gas by 2023.

The main legislation for offshore (and onshore) oil and gas licensing is a mining Act that also applies to other minerals.

There are two types of authorisations for offshore oil and gas operations; a prospection and exploration permit, and a concession agreement.

The maximum length of a prospection and exploration permit is five years, with the potential for two extensions, each for a period of two years. The maximum length of a concession agreement is 30 years, with the potential for a 15-year extension.

### **2.5.2. Croatia**

Croatia currently produces offshore gas, and plans to expand exploration and production activities substantially.<sup>56</sup> In accordance with these plans, Croatia established a dedicated hydrocarbons agency in February 2014. On 2 April 2014, Croatia launched its first international offshore licensing round for exploration.

The main legislation in Croatia for offshore oil and gas licensing is the Hydrocarbons Act, which was enacted in July 2013, and which specifically focusses on the exploration and production of hydrocarbons. Prior to adoption of the Hydrocarbons Act, the Mining Act was the main legislation for oil and gas licensing.

There are two types of offshore oil and gas licences in Croatia. They are:

- An exploration licence for five years with two optional extensions of six months, if justified; and
- A production concession for up to 30 years.

The agreements entered into by an “investor” (licensee) in Croatia are:

- An exploration and production sharing agreement;
- An exploration and production agreement with fees and taxes payments obligation; and
- A hybrid of the above two agreements.

### **2.5.3. Cyprus**

In August 2007, Cyprus completed a first licensing round for offshore exploration rights in which it awarded one licence for the 13 exploration blocks designated by it. In February 2012, it announced a second licensing round in which it awarded licences for the exploration of oil and gas in a further five blocks. Further exploration for gas is scheduled to begin in late 2014. This further exploration was aided on 12 December 2013, when Cyprus and Egypt signed a unitisation agreement on the joint exploitation of hydrocarbon reserves on the median line between their EEZs. Egypt ratified the

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<sup>56</sup> Comment by Barbara Doric, Croatian Hydrocarbons Agency (11 September 2014).

agreement in September 2014.<sup>57</sup> The agreement is pursuant to the Framework Agreement Concerning the Development of Cross-Median Line Hydrocarbon Reserves, which was signed by Cyprus and Egypt in May 2006.<sup>58</sup>

As of October 2014, Cyprus was still in the exploration phase, with no production having begun.

The main legislation for offshore oil and gas licensing in Cyprus is the Hydrocarbon (Prospection, Exploration and Exploitation) Law of 2007, which is accompanied by the Hydrocarbons (Prospection, Exploration and Exploitation) Regulations of 2007 and 2009.

There are three types of licences for offshore oil and gas operations. They are:

- A prospecting licence, which is granted for up to one year;
- An exploration licence, which is granted for up to three years, with two optional extensions up to two years each; and
- An exploitation licence, which is granted for up to 25 years, with one optional extension up to 10 years.

#### 2.5.4. Denmark

The first exploration well in the Danish continental shelf area of the North Sea was drilled in 1966. The first field to produce oil, the Dan field, continues to produce oil and gas, accounting for nearly 28 per cent of total oil production for Denmark since 1972. The Danish Energy Agency considers that large quantities of oil and gas are still to be discovered on the Danish continental shelf.

In 1997, an open door procedure was introduced for unlicensed areas east of 6° 15' east longitude that is, the entire onshore and offshore area of Denmark except for the western most part of the North Sea. There have been no discoveries of oil and gas in the open door areas as of October 2014. A seventh licensing round covering areas to the west of 6°15' east longitude is being held in 2014.

The Subsoil Act, a mining law, is the main Act that controls exploitation and recovery activities for raw materials and hydrocarbons in the Danish subsoil and on the Danish continental shelf, including prospecting for, exploring, and producing them.

The following types of licences for offshore oil and gas operations are issued in Denmark:

- A licence for preliminary investigations for up to three years;
- An exploration licence;
- A production licence; and
- An exploration and production licence.

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<sup>57</sup> Elston, Leigh, Sisi ratifies Egypt-Cyprus unitisation deal, Natural Gas Daily (12 September 2014); available at <http://interfaxenergy.com/gasdaily/article/13568/sisi-ratifies-egypt-cyprus-unitisation-deal>

<sup>58</sup> See Stefanos Evripidou, Cyprus and Egypt sign unitisation deal on the joint exploitation, Cyprus Mail (13 December 2013); available at <http://cyprus-mail.com/2013/12/13/cyprus-and-egypt-sign-unitisation-deal-on-the-joint-exploitation/>

### 2.5.5. France

Offshore oil and gas operations in France are still in their exploratory phase. Some areas in which exploration is being carried out are not in the continental shelf off the French mainland but, rather, in France's overseas territories. The main areas in which exploration was focused in October 2014 were French Guiana and the Mozambique Canal. Exploration has also been carried out off the French coast in, the English Channel, the Iroise Sea, the Gulf of Gascogne, the Gulf of Lion and the Corsican Canal.

The Mining Code, which also governs operations concerning minerals other than hydrocarbons, and related legislation apply to the hydrocarbons licensing regime. The Mining Code is being reformed. Revisions will include a separate chapter on offshore oil and gas operations.

In some overseas territories, specific legislation applies instead of, or to supplement, the Mining Code and its accompanying legislation.

Two main approvals are required for prospecting, exploration and exploitation of offshore oil and gas. They are:

- The exploration or research licence (*permis exclusif de recherches* or PER), which is granted for a maximum period of five years, with two optional renewals for up to five years each without going through the bidding process (with an automatic renewal for at least three years or the same length as the previous licensing period if the holder has complied with the obligations of the licence); and
- A mining concession agreement with optional renewals for up to 25 years.

In addition, the holder of a licence or concession is under an obligation to request specific authorisation for all the works it must carry out.

The current system of exploration licence and concession agreement will be replaced by an exploration permit (*permis d'exploration*) and an exploitation permit (*permis d'exploitation*). when the Mining Code has been reformed.

### 2.5.6. Germany

Germany has produced offshore oil and gas for many years, with its largest oil field being the offshore Mittelplate field, located in the tidal flats of the Wadden Sea, a World Heritage Site. Oil is produced from the field by means of an artificial drilling and production island, constructed of a rain and water proof concrete and steel basin protected by high sheet pile walls. Beginning in mid-2000, production of oil from the eastern parts of the Mittelplate field began by means of a deep drilling rig on the island. Seven highly deviated extended-reach production wells, some of which are over nine kilometres in length, extend horizontally from onshore based facilities. Exploration for offshore oil is continuing. Natural gas is also being produced from an offshore platform in the German North Sea.

The legislation for oil and gas licensing (onshore and offshore) is the Federal Mining Act of 1980, as amended, that also applies to other minerals.

Germany implements the open door licensing system; it does not hold formal licensing rounds.

The categories of mining authorisations for oil and gas (and other minerals) are:

- An exploration licence (sometimes called an exploration concession); and
- A production licence or a mining proprietorship.



A mining proprietorship is similar to a production licence, with the inclusion of additional rights.

A mining permit, which authorises the actual exploration and production operations, may also be required.

The exploration licence is granted for a period of up to five years with optional extensions for a further three years.

The production licence grants the exclusive right to explore and produce oil and gas (and other minerals) within a specified area for a maximum period of 50 years. A simplified procedure applies if the applicant has an exploration concession.

The mining proprietorship confers the same rights as a production licence, also for a maximum period of 50 years; it may only be granted to the current holder of a production licence, which then terminates.

### **2.5.7. Greece**

Greece has a long history of offshore oil and gas exploration and production. By October 2014, however, some of these sources had declined or finished; resulting in Greece producing oil (no gas) from a single area off the northern island of Thassos, for a total of about 2,000 barrels of crude oil per day. The exploration licences, as of October 2014, include a 30-year licence for an offshore block that would involve extended-reach drilling from onshore if production ensues. The Ministry of Environment, Energy and Climate Change announced that a second offshore licensing round, that includes 20 blocks in the Ionian Sea off western Greece, would be launched following publication of the Notice of the Call for Tenders in the *Official Journal*. The launch, which occurred in October 2014, covers approximately 200,000 square kilometres.<sup>59</sup>

A lengthy dispute concerning the limits of the maritime borders with Turkey has deterred the exploration of oil and gas in the Aegean Sea.

The legislation for offshore (and onshore) oil and gas licensing is a Hydrocarbons Law.

Three types of licences are granted for offshore oil and gas operations:

- A prospecting licence for up to 18 months;
- An exploration licence for seven years with the potential for extension; and
- An exploitation licence for 25 years with the potential for extension for gas and in deep waters.

The exploration licence may result in either a lease agreement or a production sharing agreement. The relevant agreement as of October 2014 is a lease agreement.

### **2.5.8. Iceland**

Offshore oil and gas operations in Iceland are in the prospecting and exploratory phase, with no commercial production having begun as of October 2014. Iceland launched the second licensing

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<sup>59</sup> See Adam Dann and David Cook, Greek Oil & Gas – Second offshore licencing round – key dates and considerations, Expert Legal Insights, Berwin Leighton Paisner (6 October 2014; available at <http://www.blplaw.com/expert-legal-insights/articles/greek-oil-gas-second-offshore-licensing-round-key-dates-considerations/>)

round for hydrocarbon exploration and production licences on its continental shelf in 2011 in the Dreki Area, which is shared with Norway. Iceland also accepts applications for prospecting licences, and considers applications for other licences, under the open door system.

The main Act for offshore oil and gas licensing is Act No. 13/2001 on Prospecting, Exploration and Production of Hydrocarbons, as amended.

There are two types of licences for offshore oil and gas. They are:

- A prospecting licence for a maximum period of three years; and
- An exploration and production licence for a maximum period of 12 years, with optional extensions up to two years each for a maximum total length of 16 years. If the holder of an exploration licence satisfies the conditions specified in it, the holder has priority for an extension of the licence for production for up to 30 years.

### **2.5.9. Ireland**

Ireland is still mainly in the prospecting and exploration phase for offshore oil and gas. The fourth licensing round was held in 2011. This round differed from previous rounds in that, whereas the previous rounds had covered specific basins or blocks, the 2011 round covered the whole of Ireland's Atlantic seabed, except for previously licensed areas.

The main legislation for offshore oil and gas licensing is the Petroleum and Other Minerals Development Act, 1960.

The Petroleum and Other Minerals Development Act provides for three types of licences: a prospecting licence for a maximum period of three years, an exploration licence, and a reserved area licence. A reserved area licence is a licence adjacent to or surrounding the leased area that is not subject to an authorisation other than a prospecting licence.

There are three categories of exploration licence:

- A standard exploration licence for water depths to 200 metres, which may be granted for a maximum period of six years, divided into two phases of three years each;
- A deepwater exploration licence for water depths over 200 metres, which may be granted for a maximum period of nine years, divided into three phases of three years each; and
- A frontier exploration licence, which may be granted for a maximum period of 12 years, divided into four phases of three years each.

In addition, there is a licensing option, which is granted for a maximum period of three years, and which grants the holder the option to an exploration licence(s) over part or all of the area covered by the option.

### **2.5.10. Italy**

Italy has a long history of exploring for, and producing oil and gas, with the first offshore well in Europe having been drilled in Italy in 1959. Most oil and gas operations are carried out onshore, with a relatively small percentage being carried out offshore. The offshore production is mostly gas, with a much smaller percentage of oil being produced.

Since the Macondo incident, Italy has imposed a ban on drilling within 12 miles of its coastline and protected marine areas. There is an exception for existing licences and licences for which the procedure was ongoing when the legislation was adopted.<sup>60</sup>

The legislation for oil and gas licensing is mining legislation that also applies to licensing for prospecting for, exploration and production of other minerals.

There are three types of permits for offshore oil and gas operations under Italian law. They are:

- A prospecting permit, which may be granted for one year;
- An exploration licence, which may be granted for a maximum of six years with two optional extensions of three years; and
- A production licence for a maximum of 20 years, with an optional extension for 10 years.

### **2.5.11. Latvia**

In 1996, Latvia issued an exploration and production licence for its southwest offshore area. There has, however, been a delay in operations pursuant to the licence due to the longstanding dispute between Latvia and Lithuania over maritime boundaries in the Baltic Sea. Measures are underway between Latvia and Lithuania to resolve that dispute. It has been estimated that the offshore area contains 100 million tonnes of oil.

In 2001, Latvia launched the first offshore licensing round for prospecting, exploring and production. Since that time, Latvia has issued prospecting licences and exploration and production licences for its offshore area. Production of offshore oil and gas had not commenced as of October 2014.

The main law for offshore (and onshore) oil and gas (and other minerals) licensing in Latvia is the Law on Subterranean Depths, a mining law.

Latvia has two types of hydrocarbon licence: a prospecting licence, and an exploration and production licence.

A prospecting licence may be issued for a maximum of five years. An exploration and production licence may be issued for a maximum of 30 years, including an exploration phase of up to 10 years.<sup>61</sup>

### **2.5.12. Lithuania**

Lithuania has produced onshore oil since 1991. As of October 2014, however, Lithuania was not producing offshore oil, there were an estimated 80 million tonnes of prognostic oil offshore, with 20 to 30 million tonnes of recoverable offshore reserves in 1996.<sup>62</sup> In May 2014, the Director of the

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<sup>60</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014); see Law Decree 22/06/2012, n. 83, converted into Law 07/08/2012 n. 134, art 35; available at

[http://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-08-11&atto.codiceRedazionale=12A08941](http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-08-11&atto.codiceRedazionale=12A08941). Comment by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (16 September 2014).

<sup>61</sup> Comment (information provided) by Raimonds Vite, Department of Energy Market and Infrastructure, Ministry of Economics of the Republic of Latvia (1 October 2014).

<sup>62</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014).

Geological Services referred to Lithuania's intent to begin the exploration of its Baltic Sea area when the longstanding dispute with Latvia over maritime borders has been resolved.

As of October 2014, Lithuania did not have any natural gas production but it has potential shale gas reserves on its continental shelf in the Baltic Sea.

The exploration and production of offshore (and onshore) oil and gas (and other minerals) is governed by the Law on Subsoil, a mining law. In 2013, the law was amended to facilitate the licensing of shale gas operations.

There is one type of permit for mining operations; a hydrocarbon utilization (production) permit. The permit includes the right to carry out the prospecting and exploration of conventional and unconventional hydrocarbons.<sup>63</sup> The exploration and production permit is accompanied by a production sharing agreement.

### **2.5.13. Malta**

The offshore oil and gas industry in Malta is in its infancy. Although exploration for oil began in 1958, as of October 2014, there was no commercial production of either oil or gas on Malta's continental shelf.

The main Act governing offshore oil and gas operations is the Petroleum (Production) Act.

There are two types of licences; an exploration licence, and an exploration and production licence. An exploration licence is granted pursuant to an exploration study agreement; an exploration and production licence is granted pursuant to a production sharing agreement. An exploration and production licence has a maximum period of 30 years.

### **2.5.14. Netherlands**

In 1959, the onshore Groningen natural gas field was discovered, resulting in the Netherlands subsequently becoming the largest producer and exporter of gas in the EU. The Groningen field is one of the 10 largest gas fields in the world.

Until 1970, the focus on exploration for oil and gas was onshore. In 1973, gas was discovered in the Dutch continental shelf, with production beginning in 1977. The production of gas in the Netherlands is in decline; the Netherlands is anticipated to become a net importer of gas between 2020 and 2025. The production of oil is much lower than the production of gas.

The Mining Act, which applies to other minerals as well as hydrocarbons, is the main Act governing the exploration and production of hydrocarbons.

There are two types of offshore oil and gas licences. They are:

- An exploration licence; and
- A production licence.

Prospecting may be carried out pursuant to prior notification and submission of specified information to the competent authority unless the authority requires a licence, for example, due to the safety of shipping.

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<sup>63</sup> Ibid.

### 2.5.15. Norway

In 2011, Norway was the world's seventh largest oil exporter and fourteenth largest oil producer, and the world's third largest gas exporter and sixth largest gas producer. Oil and gas have been produced from Norway's continental shelf since 1971 and 1977, respectively.

The Petroleum Act establishes the legal basis for licensing the exploration, production and transport of petroleum from offshore oil and gas operations.

The production licence grants the right to explore for, and produce, oil and gas. The licence may be granted for up to 10 years, with an extension of the period specified in the licence (typically 30 years) if the licensees comply with the obligations in the licence. Production licences are generally granted for an initial exploration period of six years.

When the competent authority grants a production licence, the licensees enter into a standard JOA that regulates the relationship between them and the State of Norway.

According to Bellona, the Norwegian offshore oil and gas market has changed within the last few years: smaller companies are now operating, raising the question of the capacity of competent authorities to adapt the economic requirements to such companies. Bellona further indicated that in Norway, any small blowout could potentially be handled, but there is no current capacity for a major blowout.<sup>64</sup>

However, according to the Ministry of Petroleum and Energy, companies do not often take over existing installations, and the companies that do so are not small. This is mainly because there is a legal obligation to produce as much hydrocarbons as possible on the field for which the licensee obtains a licence. In practice, there are more examples of fields that produced more than expected than fields that did not produce as much hydrocarbons as expected. Abandonment of a field has therefore only happened a few times in Norway, as there are still large oil and gas resources to be produced on the Norwegian Continental Shelf. An example of this practice was made by Wintershall production which was taken over by Statoil. Also one of Statoil's production fields was taken over by Det Norske, a small Norwegian company, which was quite successful in taking over the field.<sup>65</sup>

Professor Ivar Alvik, from the Scandinavian Institute of Maritime Law, also indicated that the tendency to re-take old exploitation fields to extract the remaining oil is not an exclusive tendency for smaller companies. Smaller companies are in fact more active because of the maturity of offshore oil and gas activities in Norway.<sup>66</sup>

### 2.5.16. Poland

Commercial production of oil in Poland began in 1854 in the Carpathians, in southeast Poland. Exploration and production has occurred mostly on onshore areas. Very little oil and gas, in comparison to the onshore areas, has been produced from Poland's Baltic Sea Shelf.

The Mining Law applies to concessions for, and the licensing of offshore oil and gas, as well as concessions for, and the onshore and offshore licensing of other minerals. In July 2014, the

<sup>64</sup> Telephone interview with Karl Kristensen, from Bellona, on 29 April 2014.

<sup>65</sup> Telephone interview with Mette K. Gravdahl Agerup, Ministry of Petroleum and Energy (Norway), on 23 April 2014.

<sup>66</sup> Telephone interview with Professor Ivar Alvik, Scandinavian Institute of Maritime Law, University of Oslo, on 1 April 2014.

Hydrocarbons Act, which amends the Mining Law and other laws, was adopted, mostly with the purpose of regulating and facilitating hydraulic fracturing. The Act will enter into effect on 1 January 2015.<sup>67</sup>

There are two types of approvals. They are:

- A prospection, exploration and production licence which may be granted for a fixed period between three and 50 years, or a shorter period if requested by the applicant; and
- A concession agreement.

Prospection and exploration licences are usually granted for three to eight years; production licences are usually granted for 25 to 40 years.

When the Hydrocarbons Act enters into force on 1 January 2015, the above system will be replaced by a unified prospecting, exploration and exploitation licence system. Licences will be issued for a specified period of between 10 and 30 years. Prospecting and exploration operations will have a maximum period of five years, with a possible extension of the prospecting period of up to one year if necessary to complete this phase. Transitional provisions apply to existing prospecting, exploration and exploitation licences.<sup>68</sup>

#### **2.5.17. Portugal**

Portugal began substantial prospecting for offshore oil and gas in the 1970s following the introduction of legislation to facilitate its exploration and production. In the licensing round of 1973 and 1974, 30 contracts were signed. Although exploratory wells produced small amounts of oil, the contracts were terminated due to the failure to discover commercial quantities of oil or gas. Exploration subsequently declined during the 1980s.

In 2002, Portugal launched a further licensing round, followed, in 2007, by concessions awarded by direct negotiations.<sup>69</sup> Exploration on the Portuguese continental shelf is continuing but, as of October 2014, had not resulted in commercial discoveries of oil or gas.

The main legislation for offshore oil and gas licensing is Decree-Law 109/94, a petroleum law.

There are two types of offshore oil and gas licences. They are:

- A preliminary evaluation licence for a maximum period of six months, with no optional extensions; and
- A concession agreement, with periods specified in it for:
  - An exploration phase up to eight years, with two optional extensions up to one year each; and
  - A production phase (if commercial amounts of oil and gas are discovered) for a period of up to 25 years, with optional extensions of a minimum of three years up to a total extension period of 15 years.

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<sup>67</sup> See See Adam Kozłowski, Polish shale gas (r)evolution to be reinvigorated, Norton Rose Fulbright Piotr Strawa i Wspólnicy Spk (27 October 2014); available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?q=1fac5d43-afb9-4edc-8aec-b3fc7c0c550d>

<sup>68</sup> See *ibid.*

<sup>69</sup> Comment by Jose Miguel Martins, Entidade Nacional para o Mercado de Combustíveis (15 September 2014).

### **2.5.18. Romania**

Romania has a long history of oil and gas production. Onshore production of oil and conventional gas has been in decline since 1976 and 1986, respectively. Since 2009, when the dispute with Ukraine over the limitations of the continental shelf and EEZ in the Black Sea ended, Romania has extended its offshore exploratory activities. Romania estimates that gas reserves in the Khan Asparouh block in the Black Sea are between 40 billion and 80 billion cubic metres.

The main legislation for offshore oil and gas operations in Romania is the Petroleum Law, which is accompanied by Methodological Rules, which set out procedures for bidding for petroleum agreements and related matters.

The permitting system is a hybrid of a concessionary system with aspects of a licensing regime.

Two types of permit may be granted: a prospecting permit; and a petroleum agreement, which may be issued for exploration-development-production, development-production, or production activities.

A prospecting permit is granted for a maximum term of three years, with no right to extend it. A petroleum agreement is granted for a maximum period of 30 years, with the potential for extension for a further 15 years.

### **2.5.19. Spain**

Spain has a long history in the commercial production of oil and gas. Exploration began in the 1940s, with discoveries of oil in the 1950s in onshore Spain. Most of the offshore fields were discovered in the 1970s and 1980s. Since then, less than 10 offshore exploration wells have been drilled, none of which has been successful.

Currently, less than one per cent of the oil used by Spain is produced in Spain. Small amounts of oil are still produced onshore and offshore but there does not appear to be the potential for further discoveries. Gas production is also very limited or has ceased from onshore and offshore regions.

Large offshore deposits of oil are considered to exist near the Canary Islands, an autonomous community of Spain and an Outermost Region of the EU. On 24 June 2014, the Spanish Supreme Court rejected seven challenges to an exploration permit granted to Repsol about 12 years ago.<sup>70</sup> The challenges were brought by, among others, environmental NGOs, including Greenpeace, Oceana, and the World Wildlife Fund, as well as the Government of the Canary Islands, which had initially been in favour of exploration.<sup>71</sup>

The main legislation in Spain for hydrocarbons licensing is Act 34/1998 of 7 October 1998 on the Hydrocarbons Sector.

There are three types of licences for offshore (and onshore) oil and gas operations in Spain. They are as follows:

- An investigation permit of up to six years with an option for a three year extension;

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<sup>70</sup> See Todd White, Repsol Cleared by High Court to Drill off Spain's Canary (24 June 2014); available at <http://www.bloomberg.com/news/2014-06-24/repsol-cleared-by-high-court-to-drill-off-spain-s-canary.html>

<sup>71</sup> See Andrés González, UPDATE 2-Spain's Repsol given go-ahead to drill for oil off Canary Islands (24 June 2014); available at <http://uk.reuters.com/article/2014/06/24/spain-canaryislands-drilling-idUKL6N0P534Y20140624>

- An exploration authorisation of up to six years with an option for a three year extension; and
- An exploitation concession of up to 30 years with two optional renewals of 20 years each.

#### **2.5.20. United Kingdom**

Offshore oil and gas operations in the UK began in 1964, when the UK Government issued the first licences to produce oil and gas from the UK continental shelf. In 2012, offshore oil produced 67 per cent of the UK's demand for oil and 53 per cent of its demand for gas. It has been estimated that by 2030, 70 per cent of the UK's primary energy supplies will continue to be provided by offshore oil and gas. The 28th Offshore Oil and Gas Licensing Round was launched in 2014; it includes applications for seaward production licences for designated acreage on the UK continental shelf. Oil and gas exploration is also taking place in the Falkland Islands, which is an overseas territory of the UK, and an Overseas Country and Territory (OCT) of the EU.

There is a substantial amount of UK legislation governing offshore oil and gas operations. The main law is the Petroleum Act 1998.

Various types of offshore licences may be granted, each for a specific area and a fixed term. There are three types of licences: traditional, frontier and promote licences.

A traditional licence grants the right to "search and bore for and get" petroleum in a specified area on the UK continental shelf.

A frontier licence grants the right to carry out an initial screening phase at a substantial discount from the normal lease fee at specified difficult / unexplored areas of the UK continental shelf, and then relinquish three quarters of the acreage.

A promote licence grants the right to assess and promote the prospectivity of the licenced acreage for an initial two year period at a cost of 10 per cent of a traditional licence, subject to meeting specified criteria before being allowed to drill any wells and also subject to agreeing to complete a specified work programme.



# 3. Effectiveness of Target State liability regimes for damage caused by pollution from offshore oil and gas operations

In this chapter, information is provided on the liability system in each Target State for claims for traditional damage (bodily injury, property damage and economic loss) resulting from an offshore incident and the system for handling such claims if one exists.

The chapter is structured as follows.

First, it briefly describes the legal terminology relevant to claims for traditional damage to place the discussion in context, with an explanation, in particular, of economic loss (3.1). Second, it provides an overview of the nature of third-party claims that are likely to arise from an offshore oil and gas accident (3.2). Third, it briefly describes the liability system in the USA that applies to pollution from an oil and gas incident from an offshore facility (as well as incidents involving vessels) (3.3). Fourth, it provides an overview of the claims that arose from the Macondo (Deepwater Horizon) incident, and the system for handling them (3.4). This is followed, fifth, by a brief discussion of offences and sanctions for pollution from offshore oil and gas incidents in the USA and their application to the Macondo incident (3.5). The purpose of the review of US legislation and the Macondo incident is to provide a comparison for the liability systems in the Target States.

Sixth, the chapter reviews the potential impact of international and regional agreements entered into by the EU and Target States on claims for traditional damage from an oil or gas incident in EEA waters (3.6). Seventh, conflict of laws issues that may result in forum shopping are discussed (3.7).

Eighth, the chapter discusses differences between Target States in their liability systems for traditional damage, in particular, for pure economic loss (3.8). Ninth, the application of tort law to the continental shelf and EEZ is briefly discussed (3.9).

Tenth, the chapter discusses the liability systems in each Target State that would apply to claims for traditional damage from an offshore oil and gas incident in order to evaluate their effectiveness in the event of such an incident (3.10).

The chapter then briefly discusses offences and sanctions related to pollution from offshore oil and gas incidents in the Target States (3.11), followed, tenth, by a discussion of the regimes for handling claims for compensation for traditional damage in the Target States (3.12).

Finally, the chapter analyses and compares the liability systems for traditional damage, offences and sanctions, and compensation regimes for claims for traditional damage in the Target States, including a comparison with the liability systems and regimes in the USA (3.13).

Environmental damage, including the costs of preventing and remedying such damage under the Environmental Liability Directive (ELD, 2004/35/EC),<sup>72</sup> the OSD,<sup>73</sup> and other EU and national legislation is not discussed because it is outside the scope of the study. We simply note that liability for causing environmental damage under the ELD includes liability for services provided by natural resources to the public as well as natural resources (ELD, art 2.13). A liable operator may, therefore, be required to remedy and pay for damaged services to the public such as watching birds protected by the Birds Directive or recreational activities in Natura 2000 areas.

## 3.1. Legal terminology concerning claims for traditional damage

Claims for bodily injury, property damage and economic loss are commonly called tort claims. In EEA States, they are brought under the civil (or common) law depending on the law in a particular State. The following is a brief description of the legal principles involved in such claims. The description is necessarily general due to differences in the applicable law in the various Target States.

### 3.1.1. General principles

Liability for torts may be fault-based, or it may be based on strict liability.

#### 3.1.1.1. *Fault-based liability*

The vast majority of torts are based on negligence or fault. The negligence or fault is the wrongful act or omission that breaches the duty owed by the defendant (often known as a tortfeasor or wrongdoer) to the claimant. Civil liability systems, including Civil Codes, are virtually always based on negligence or fault, as are most common law claims. Exceptions apply, generally for “dangerous activities” (see section 3.1.1.2 below).

If the law of the relevant Target State requires a claimant to prove negligence or fault to succeed in a claim from an offshore oil and gas incident, the claimant would need to prove that the operator of the offshore facility was at fault in its act or omission that caused harm. This may be difficult to prove, especially because it would require detailed evidence of the nature of the incident. The requirement could, thus, mean that claimants who suffered loss from the incident would fail in their claims for compensation.

The application of fault-based liability also necessarily lengthens the time for resolving disputes.

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<sup>72</sup> Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage. OJ L 143/56 (30 April 2004).

<sup>73</sup> Directive 2013/30/EU on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178/66 (28 June 2013).

### **3.1.1.2. Strict liability (dangerous activities)**

Fault is not a necessary element of a strict liability tort. A tortfeasor may be liable to a claimant who suffers harm due to a condition that the tortfeasor created or allowed to continue regardless of whether the tortfeasor was negligent, intended to harm the claimant, or even knew that the harm had occurred.

Strict liability is not absolute liability; the claimant must still prove all elements of the tort. Strict liability does, however, make it much easier for an injured person to gain compensation than under a fault-based tort.

Strict liability tends to apply to so-called dangerous activities. In this respect, the legislature has made a decision, in a civil law jurisdiction, that the activity that is carried out should not be subject to a fault-based liability system due to the inherent nature of the activity or, in some cases, the thing or substance that is used.

The principles behind the concept of strict liability for dangerousness are that: (1) liability should be imputed to the person who benefits from carrying out the permitted dangerous activity; (2) that person has the means to control the danger; and (3) the victim has a generally recognised interest that it should not be harmed by the activity.

The main defences to claims based on dangerousness are *force majeure*, a third party action, an unavoidable event (that is, the harm would have occurred even if the tortfeasor had exercised the maximum possible care to prevent it), and the victim's contributory negligence. The number of defences tends to decrease as the risk posed by an activity increases. This is because, as the probability that harm will occur increases, the extent of possible harm increases, and the tortfeasor's ability to control the risk also increases.<sup>74</sup> These defences may also apply to fault-based claims.

Civil Codes typically include a small category of claims for dangerous activities or things. Common law jurisdictions may have causes of action that impose strict liability for abnormally dangerous activities or under the rule in *Rylands v Fletcher* (in which a person who controls land is strictly liable for the natural consequences of the escape of a substance that it brought onto, or that accumulated on, the land, provided that the use of the land is "non-natural").

Some jurisdictions also include a middle ground of torts between fault-based and strict liability in that there is a rebuttable presumption of harm. That is, the tortfeasor bears the burden of proving that it was not negligent in order to avoid liability, rather than the claimant having to prove that the tortfeasor was negligent.

Further, many Target States have enacted legislation that imposes strict liability for harm from pollution. This specific legislation, however, tends to focus on compensation for damage from pollution within the land-based territories of Target States and, in some cases, specific installations; it is not focused on pollution from offshore oil and gas operations. The result is that most of the legislation either does not apply to offshore incidents or is unclear whether it does so.

### **3.1.1.3. Direct versus remote damage**

A claimant may prevail in a tort action only if there has been a wrongful act or omission that has breached his (or her) legally protected right. For example, a person has a legally-protected right not to be injured and for their property not to be damaged.

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<sup>74</sup> See Helmut Koziol, Basic Questions of Tort Law from a Germanic Perspective 230-238 (Jan Sramek Verlag, 2012).

If the defendant did not know, or should not have known, that the act or omission would breach the claimant's right, the defendant may have committed a wrong, but will not have committed a tort. The first element focuses on the subjective knowledge of the defendant; the second element focuses on the defendant's objective knowledge. That is, even if the defendant did not know that its act or omission would breach a right of the claimant, would a so-called "reasonable person" have known that it would do so. Liability attaches under either criterion.

Further, the defendant's wrongful act or omission must have been wrongful as to him or her. In other words, the claimant must have reasonably apprehended that there was a risk that the wrongful act or omission would harm him or her. The issue concerning reasonable apprehension is a legal issue except when varying inferences are possible, in which case, it becomes an issue of fact.<sup>75</sup> In negligence and fault-based liability, the issue is generally phrased as determining the scope of the duty owed by the defendant to a claimant. If the harm is too remote (indirect) for there to be a duty, there is no tort.

The following are examples of direct and indirect harm in respect of claims for traditional damage from oil pollution from offshore oil and gas operations. A court may consider that a fisherman's loss of income due to a ban on fishing is direct because the oil directly affects the fish in the sea or ocean. There is no person between the fish and the fisherman to make the harm indirect.

A court may, however, consider that a claim for lost income by a company that processes fish is indirect because the company does not do the fishing itself. Instead, it purchases the fish from a business in the fisheries industry. There is thus a legal or natural person between the fish that are in the sea and their purchase (or inability to purchase them) by the company, which makes the claim more remote than the claim of a fisherman. Somewhat similarly, a hotel or restaurant that loses income due to oil having polluted nearby beaches is not physically damaged itself. Instead, the loss of income is due to the negative decisions of people that would have come to the hotel or restaurant but for the oily beaches. Again, there is a person between the polluted beach and the hotel or restaurant that makes the claim more remote.

The issue is somewhat similar to the prerequisite of reasonable foreseeability in nuisance claims. That is, if the defendant could not reasonably have foreseen that its act or omission would cause harm to the claimant, the defendant could not have carried out measures to prevent it. This issue is more complicated, however. That is, the issue is not merely whether an offshore oil and gas operator knew or should have known that an oil spill from the offshore facility would poison fish or cause pollution on a beach. The scope of damage must also be considered, that is, whether the seafood support industry, the hotel, or the restaurant should reasonably have apprehended that there was a risk from pollution to them. If such apprehension did not exist, which may be a legal or a fact issue depending on the circumstances, the defendant is not liable to them because the harm is indirect / remote.

#### **3.1.1.4. Joint and several liability or several liability**

The scope of liability for a tort may be several or joint and several. Liability is several but not joint and several when two or more tortfeasors have each conducted a wrongful act or omission that has caused harm to the claimant. In some States, a court determines the harm attributable to each tortfeasor. Liability is joint and several when two or more tortfeasors are responsible for a single injury or damage suffered by the claimant.

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<sup>75</sup> See *Palsgraf v Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99 (New York Court of Appeals, 1928); available at [http://www.courts.state.ny.us/reporter/archives/palsgraf\\_lirr.htm](http://www.courts.state.ny.us/reporter/archives/palsgraf_lirr.htm)

If a tortfeasor is severally liable, it is liable for only its share of the damage. If one or more of the other tortfeasors cannot pay their share, the claimant will not recover 100 per cent of the damages.

If a tortfeasor is jointly and severally liable, it is liable for 100 per cent of the damages if, say, one or more of the other tortfeasors is not financially viable or is otherwise unable to pay the claim. In such a case, the claimant would recover 100 per cent of the damages depending, of course, on the financial viability of at least one of the tortfeasors.

If, say, the operator of an offshore facility could not pay the entire claim from an incident that caused injury, damage or loss, and if the liability system of the Target State imposed joint and several liability on all licensees in a co-venture, each licensee, including the operator, would be liable to pay 100 per cent of the claim.

Legal systems in which joint and several liability applies, typically provide a tortfeasor who has paid more than its share of a claim with the right to seek contribution / recourse against other tortfeasors. The legal system may, or may not, set out the methodology for allocating the shares between tortfeasors.

#### **3.1.1.5. Types of monetary payments for tort claims**

Regardless of the jurisdiction, the claimant in a tort claim involving bodily injury, property damage or economic loss typically seeks monetary compensation for the injury, damage or loss. That is, the claimant seeks to be “made whole” to the state the claimant would have been in if the injury, damage or loss had not occurred. Such damages are known as compensatory damages.

Punitive damages, also known as exemplary damages, are available in some jurisdictions. Punitive damages are not compensatory. Instead, they are intended to punish the tortfeasor by awarding an additional amount of money to a claimant. In this respect they are, in effect, a windfall for a claimant.

The concept of punitive damages is recognised across, and is an accepted legal tradition in, the EU. For example, recital 32 of Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), specifically refers to “punitive damages” in respect of Member State law as follows:

“Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum”.<sup>76</sup>

This does not mean, however, that punitive damages are available in most Target States; they are not. As stated by Dr Helmut Koziol, “it is true that, in principle, the continental civil law systems disapprove of punitive damages (although one has to confess that there are some departures from this idea)”.<sup>77</sup>

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<sup>76</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations. OJ L 199/40 (31 July 2007).

<sup>77</sup> Helmut Koziol, Punitive Damages - A European Perspective, *Louisiana Law Review*, vol. 68, 740, 748 (2008). Dr Koziol is a retired law professor of the University of Vienna, Director of the Research Unit for European Tort Law of the Austrian Academy of Sciences, Managing Director of the European Centre of Tort and Insurance Law, and a member of the European Group on Tort Law. See *ibid*, 741.

Aggravated damages may also be available in a limited number of Target States. Aggravated damages are awarded if a tortfeasor compounds or aggravates the harm caused by it to a claimant by high-handed, insulting or oppressive conduct. Aggravated damages are not available in most Target States.

#### **3.1.1.6. Limits of liability**

It is rare for a limit of liability to apply to a tort. As a general rule, a tortfeasor is liable to compensate the claimant for all the harm caused by its act or omission to the person(s) harmed because of it.

An exception to this general rule is Germany, in which a limit of liability may exist under a tort cause of action to which strict liability applies. The reason for the limit is the application of strict, rather than fault-based, liability to the action.<sup>78</sup>

#### **3.1.1.7. Limitation periods**

Tort claims, like other types of claims, have limitation periods (or in some jurisdictions, prescription periods), that is, a period of time in which a claim may be brought. The length of limitation periods varies depending on the jurisdiction and also on the type of claim.

Claims for bodily injury tend to have a so-called discovery date. That is, the time limit may run from the date (the accrual date) on which the claimant discovers that he/she has a claim by becoming aware of the bodily injury or the person who caused it. There is typically a long-stop limitation period, sometimes called a statute of repose, to such claims of, say, 10 or 15 years. The purpose of the discovery date is the existence of latent disease claims, that is, claims such as, say, mesothelioma, that do not manifest themselves for many years after the victim has been exposed to a pollutant. In such a case, a limitations period without a discovery trigger could well have expired before the claimant could have become aware of the injury.

When the limitation period for a claim has expired, a claim may no longer be brought.

#### **3.1.2. Bodily injury and property damage**

The tort law of all Target States imposes liability for bodily injury and property damage.

##### **3.1.2.1. Bodily injury**

If an individual suffers bodily injury, that is, an injury in the form of personal injury or death from an accident, or from a disease due to exposure to pollutants, the individual may seek compensation from the person(s) who allegedly caused the injury.

In respect of an offshore oil and gas incident, personal injury or death could result from the incident itself, especially for employees of the operator located on the offshore facility when the incident occurred. In addition, individuals could suffer an injury from exposure to oil, or from dispersants used to remediate the pollution.

##### **3.1.2.2. Property damage**

An individual (that is, a natural person) or a company or other organisation (that is, a legal person) may suffer damage to property owned by them. The property may be “real” property, that is, land,

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<sup>78</sup> See Ulrich Magnus, The Reform of German Tort Law, InDret 2/2003 6 (Working Paper No. 127, April 2003); available at <http://www.raco.cat/index.php/InDret/article/download/82541/107387>

buildings or other structures, or it may be “personal” property. Personal property is property other than real property, sometimes known as “chattels” or moveable property.

In the context of an offshore oil and gas incident, property damage could result from oil poisoning fish in a fish farm (the fish being the property of the fish farmer), oil coming ashore onto a person’s land and resulting in a loss in its value, or fishing vessels anchored in a harbour being covered in oil.

### **3.1.3. Economic loss**

Two types of economic loss are applicable to tort law; consequential economic loss, and pure economic loss.

#### **3.1.3.1. Consequential economic loss**

A person who suffers property damage may also suffer economic loss, or consequential damage. The term consequential damage is most often used in contract law but it also applies to tort law. Economic, or consequential, loss is harm suffered as a consequence of bodily injury or property damage. In some jurisdictions, it is referred to as indirect harm or loss, as opposed to direct harm or loss.

In the context of an offshore oil and gas incident, a fish farmer may be entitled to damages for property damage because oil from the incident poisoned his fish (as indicated above). He may not, however, be entitled to damages for lost income due to being unable to sell fish that have not been poisoned but that restaurants are unwilling to purchase because of the perception that they may also have been affected by the oil. If the loss is sufficiently “direct”, it is economic loss related to the property damage and is compensable. Much, obviously, depends on the facts of a case.

#### **3.1.3.2. Pure economic loss**

The term “pure economic loss” has long been used in the legal tradition of continental Europe, as reflected in the many comparative research studies that have been carried out into the topic in tort systems in Europe and other jurisdictions.<sup>79</sup>

As stated by Professors Palmer and Bussani in one of the comparative studies on this topic:

“[a]cross façades, regimes and traditions [in jurisdictions including Belgium, Croatia, France, Germany, Greece, Poland, Portugal, Romania and Spain], pure economic loss is recoverable whenever the latter is a direct consequence of the infringement of a right or of an interest that the legal system means to protect”.<sup>80</sup>

<sup>79</sup> See, e.g., Preface, in *Pure Economic Loss in Europe* xiii (Cambridge University Press, 2003, Mauro Bussani and Vernon Valentine Palmer, editors) (including case studies of 13 European jurisdictions by 22 scholars; “we are confident that the essential picture of pure economic loss in Europe has been captured”); Mauro Bussani, Vernon Valentine Palmer, Francesco Parisi, *Liability for Pure Financial Loss in Europe: An Economic Restatement*, *American Journal of Comparative Law*, vol. 51, 113, 118 (2003) (“tracing the most recurrent and typical patterns, as recognized by modern European legal systems”); see also Jan M. van Dunne, *Liability for Pure Economic Loss: Rule or Exception? A Comparist’s View of the Civil Law – Common Law Split on Compensation of Non-physical Damage in Tort Law*, *European Review of Private Law*, vol. 4, 397 (1999); Thanassis Liakopoulos and Georgios Mentis, *Civil Liability for Pure Economic Loss in Greece*, *Revue Hellenique de Droit International*, vol. 51, 61 (1998).

<sup>80</sup> Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, *Netherlands Comparative Law Association, Electronic Journal of Comparative Law*, vol. 11(3), 4, 77 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

Pure economic loss is loss in the absence of bodily injury or property damage, that is, claims for lost revenue that does not result from bodily injury to the claimant or property owned by the claimant. Pure economic loss differs from consequential economic loss because it is not consequent on any injury or damage suffered by the claimant.

As described by Professors Palmer and Bussani, pure economic loss:

“is loss without antecedent harm to plaintiff’s person or property. Here the word ‘pure’ plays a central role, for if there is economic loss that is connected to the slightest damage to person or property of the plaintiff (provided that all other conditions of liability are met) then the latter is called *consequential* economic loss and the whole set of damages may be recovered without question. *Consequential* economic loss (sometimes also termed parasitic loss) is recoverable because it presupposes the existence of physical injuries, whereas pure economic loss strikes the victim’s wallet and nothing else”.<sup>81</sup>

There are various types of pure economic loss.<sup>82</sup> The type that applies to claims for compensation for lost income and other losses as a result of pollution from offshore oil and gas operations is sometimes called relational economic loss. Relational economic loss is “pure economic loss that stems from physical injury to the person or property of a third party, or to an ownerless resource”.<sup>83</sup> Liability for this type of loss tends to be based on fault or negligence.<sup>84</sup>

Relational economic loss is not confined to claims for losses from offshore incidents. Cases for relational economic loss have included claims arising from the following:

- outages in the supply of water, gas and electricity due to accidental cuts in cables;
- cattle auctioneers who lose income when cattle markets closed as a result of a negligent viral infection of cattle in their area;
- loss of salary by employees when their workplace was damaged and closed for repair; and
- blockage of a navigable waterway resulting in merchant ships losing profits or incurring additional expenses to sail by an alternative route.<sup>85</sup>

This report refers to relational economic loss simply as pure economic loss due to it being the only type of pure economic loss examined in it.

The non-recognition of pure economic loss in some of the Target States as well as other States tends to arise from the exclusionary rule, which excludes liability for economic loss in the absence of bodily injury or property damage. The major argument against the recognition of pure economic loss is the

<sup>81</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 7 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>82</sup> The other types of pure economic loss due to negligence are: Negligent misrepresentation; ... Negligent performance of a service; ..., Defective products or structures; ... and “Public authority’s failure to confer an economic benefit”. Ronen Perry, Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, (2004) Rutgers Law Review, vol. 56, 711, 713.

<sup>83</sup> Ronan Perry, The Economic Bias in Tort Law, (2008) University of Illinois Law Review, 1573, 1574.

<sup>84</sup> Ronen Perry, Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, (2004) Rutgers Law Review, vol. 56, 711, 713.

<sup>85</sup> See *ibid*, 713-16.



“floodgates” argument, that is, if liability for pure economic loss is recognised, the floodgates to claims would open. As Professors Palmer and Bussani have commented, this argument:

“is not only pervasive but has proved persuasive in many quarters. It usually links up with and reinforces the other arguments. Common law countries, mixed jurisdictions and a number of civil law countries all share similar concerns about the danger of excessive liability entailed by pure economic loss claims. In this context, another frequently invoked explanation for the exclusionary rule concerns the problems of open-ended liability and derivative litigation, i.e., the extension of liability for the remote consequences of a wrongful act. The common premise of this argument is that in a complex economy, pure economic losses are likely to be serially linked to one another. The foregone production of a good, for example, often generates losses that affect several downstream individuals and firms who would have utilized the good as an input in their production process, and so on. In such a world of economic networking, it becomes necessary to set reasonable limits to the extent to which remote economic effects of a tort should be made compensable”.<sup>86</sup>

As Justice Cardozo also commented, the recognition of claims for pure economic loss may expose a wrongdoer to “an indeterminate amount for an indeterminate time to an indeterminate class”.<sup>87</sup>

Professors Palmer and Bussani have identified the following three strands of the floodgates argument, with the first argument echoing Justice Cardozo. The strands are as follows:

- “in some cases [it] would unleash an infinity of actions that would burden if not overwhelm the courts”;
- “the fear that widespread liability would place an excessive burden upon the defendant who, for purposes of the argument, is treated as the living proxy of human initiative and enterprise. The potentially staggering liability would be out of all proportion to the degree to which the defendant was negligent”; and
- “pure economic loss is simply part of a broad modern trend toward greater and greater tort liability, a trend that must be kept under control. Allowing exceptions to the exclusionary rule is a slippery slope that may lead to reversal of the rule and may also encourage the development of other types of tort liability”.<sup>88</sup>

There are other arguments for, as well as against, the exclusionary rule. For example, the counter argument to an argument that the exclusionary rule should apply because economic interests are inferior to people’s lives, health, bodily integrity and property is that it is difficult to justify a distinction between property damage and pure economic loss as well as many people preferring “a slight and transient physical injury to losing their life savings”.<sup>89</sup> Further, the counter argument to an argument that the exclusionary rule provides a bright line, that is, “a certain and easily applicable limitation on

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<sup>86</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 18-19 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>87</sup> *Ultramares Corp v Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (US); available at <http://www.uniset.ca/other/cs3/174NE441.html>

<sup>88</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 18-20 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>89</sup> Ronen Perry, The Economic Bias in Tort Law, (2008) University of Illinois Law Review, 1573, 1587-88.

tort liability” is that justice is more important than certainty. That is, “[l]iability should be limited in a just and principled manner, not through arbitrary bright lines”.<sup>90</sup>

Two further arguments against the exclusionary rule are that:

- In order “to maintain efficient precaution incentives, parties should under most circumstances face the full range of economic consequences of their activities [n]o matter how severe the harm”; and
- “given the experience of the Liberal [pure economic loss] regimes, where the floodgates argument has not been a restraint and yet no dire consequences have resulted, it is not clear that the argument rests upon an empirical foundation”.<sup>91</sup>

Some of the above arguments for and against the exclusionary rule mix the potential for flooding courts with claims and the potential for flooding a particular defendant with claims. Professor van Boom considers that the first issue does not have any clear empirical support. He states that:

“If we look at continental jurisdictions that allow claims for pure economic loss, it must be admitted that the ‘admissive’ continental courts are in fact *not at all* flooded with pure economic loss claims [although] the second meaning possibly deserves more attention [because] in practice [courts] limit the extent of liability with other instruments such as causation, proof of damage, the duty of the victim to mitigate damages, etc”.<sup>92</sup>

Professor van Boom concludes that, in his opinion,

“there should be no fundamental or dogmatic obstacle to claims for pure economic loss. The tortfeasor should not be allowed to walk free merely because of the nature of the damage he caused. The exclusionary rule does not provide any incentives for damage avoidance. Denying a claim in tort to victims of pure economic loss would not only leave them without any compensation, but would also lead to a lack of incentives for careful behaviour”.<sup>93</sup>

The existence – or not – of liability for pure economic loss in a Target State is highly significant in the context of an incident from offshore oil and gas operations. For example, a claim by a fisherman who lost revenue because he could not fish due to a fishing ban following an incident would fail if the law did not allow pure economic loss. This is because the fisherman would not have suffered any damage to property owned by him; he does not own the fish in the sea. In addition, a claim by a hotel that suffered a substantial loss in income because guests cancelled their holidays due to an oil spill resulting in oil washing up on nearby beaches would not succeed. Again, the hotel would not have suffered any property damage.

Professor Palmer succinctly explained the importance of pure economic loss claims in the context of oil spills and their recovery under the OPA (see section 3.3.3 below). He stated that:

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<sup>90</sup> Ibid, 1595-96.

<sup>91</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 23 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>92</sup> Willem H. van Boom, Pure Economic Loss; a Comparative Perspective, 44 (emphasis original).

<sup>93</sup> Ibid, 48-49.

“Oil spills afford a critical vantage point from which to observe the evolution of liability rules and a shift of attitude toward the recoverability of economic loss. Spills are excellent engines of pure economic loss. They cause relatively little damage to private property or to human life. Instead, they devastate something un-owned – natural resources, wildlife, the shores, the environment – and that devastation causes severe disruption to the surrounding co-dependent economy. The resulting loss to individuals and businesses is a massive economic ricochet. Consequently, it is no surprise to learn, for example, that 99% of the claims filed with the Trust Administrator in the BP spill thus far are for lost earnings and profits while only 1% are for property damage. There is no scarier example of the dreaded floodgates which inspired and informed the common law’s economic loss rule”.

Professor Palmer further explained the relevance of the rule to the protection of the oil and shipping industry from the costs of oil spills, that is, for externalising the full costs of oil spills. He stated that:

“Instrumentally and historically, the effect of this rule is to protect the oil and shipping industry from the secondary and tertiary costs of oil spills. The rule shielded the industry from nearly all of the ricochet losses that arose. These losses were not unrecoverable because they were unforeseeable. Rather, they were unrecoverable because the scope of liability appeared to be overwhelming and limitless: the ultimate example of the nightmare scenario. The fear was also of disproportionate liability arising from minor blameworthiness”.<sup>94</sup>

The relevance of pure economic loss to claims for compensation for harm from an offshore oil and gas is illustrated by the Deepwater Horizon accident. As explained in more detail by Professor Robertson,

“it seems apparent that in sheer magnitudes of dollars, economic-loss damages far exceed all of the other losses combined. In the aftermath of the disaster, BP Exploration & Production, Inc. created the Gulf Coast Claims Facility (GCCF) as a mechanism for settling damages and other claims against BP. In its April 13, 2012 status report, the GCCF reported that it had paid out a total of \$6,316,458,256, and that about 96% of that amount – \$6,053,660,113.42 – had gone to economic-loss claimants”.<sup>95</sup>

As discussed further in this chapter, however, the imposition of liability for pure economic loss by a Target State does not necessarily mean that lost income (and other pure economic loss) is necessarily

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<sup>94</sup> Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, Penn State Law Review, vol. 116, 109-10 (2011); available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>

<sup>95</sup> See David W. Goldberg, *Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990*, (2011) Texas Journal of Oil, Gas, and Energy Law, vol. 7, 241, 242. In July 2011, the percentage of claims for pure economic loss filed with the GCCF was 99 per cent. See Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, (2011) Penn State Law Review, vol. 116, 105, 109, 116 n.49; available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>. The GCCF did not account for all of the costs and expenses paid by BP. Other costs include those for remediating the oil spill, natural resource damages, sanctions for pollution from the well blowout, etc. It has been estimated that BP’s costs from the incident exceed US\$ 42.7bn. See Tom Borden, *BP’s legal bill for the Gulf oil spill disaster soars to \$1bn*, The Independent (5 February 2014); available at <http://www.independent.co.uk/news/business/news/bps-legal-bill-for-the-gulf-oil-spill-disaster-soars-to-1bn-9107849.html>. This estimate was before Judge Barbier’s ruling of 4 September 2014 that BP was grossly negligent under the Clean Water Act (see section 3.5.2).

recoverable for harm caused by pollution from an offshore oil and gas incident. Other prerequisites for a claim, some quite strict, must also be satisfied.

This report intentionally does not address the issue of where to draw the line between pure economic loss that must be compensated by the tortfeasor and loss that remains for the account of the victim. Following our extensive and detailed research in comparative tort law of the 20 Target States, the project team concluded that it would be impossible to address this issue in any meaningful way across the Target States. For example, as commented by Professors Palmer and Bussani, in a study of comparative law of pure economic loss in jurisdictions including Belgium, Croatia, France, Germany, Greece, Poland, Portugal, Romania and Spain:

“it is clear that the legal systems under review [in] are particularly divided over methodology, theories of relief, and causes of action. There is no methodological consensus, for the systems retain their distinctive façades and their characteristic ways of controlling or regulating the issue. Further, and now approaching the question at a more substantive level, legal systems are also split over the outcomes that should occur in a number of loss situations. Here it is apparent that metalegal factors, such as the floodgates, philosophical values and historical conservatism, drive the outcomes”.<sup>96</sup>

As further stated by Professors Palmer and Bussani:

“Methodologically speaking, the tort scene strikes us as diverse and unsettled. Our research reveals that four principal methodologies dominate the European landscape, and though some countries resort to more than one of these methods (thus adding to the complexity) generally each has one characteristic means of dealing with the issue of pure economic loss. Thus the compensation issue may be left to (1) flexible causal determinations (the characteristic method found in the Liberal Regimes) (2) preliminary judicial screening using a ‘duty of care’ analysis (the approach particularly prominent in all the pragmatic regimes) (3) recourse (in Croatia and Poland) to causation techniques aiming to exclude ‘third party loss’ and (4) a scheme of absolute rights that, by deliberate omission, leaves this interest unprotected (the approach of Germany and Portugal)”.<sup>97</sup>

The inherent difficulty in, or impossibility of, drawing a line between pure economic loss that must be compensated by the tortfeasor and loss that remains for the account of the victim in the Target States does not, of course, mean that such a line could not be drawn if tort law on this issue was to be harmonised and codified. Work has already been done on the potential for codification of tort law, including pure economic loss, in the EU.<sup>98</sup>

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<sup>96</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 4, 77 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>97</sup> Ibid, 73.

<sup>98</sup> See, e.g., Mauro Bussani and Vernon Valentine Palmer, The Recoverability of Pure Economic Loss within the Perspective of a European Codification, in Pure Economic Loss in Europe, 537-48 (Cambridge University Press, 2003, Mauro Bussani and Vernon Valentine Palmer, editors).

## 3.2. Likely third-party claims from an oil and gas incident

In order to determine whether the liability regimes of the Target States are adequate to cover claims for compensation for bodily injury, property damage and economic loss from a spill of oil or chemicals from offshore oil and gas operations or the inappropriate use of dispersants, it is necessary first to provide an overview of likely claims.

There are six main categories of likely claims for bodily injury, property damage and economic loss from marine spills. They are:

- bodily injury;
- property damage;
- governmental claims;
- loss by commercial fisheries and aquaculture / mariculture;
- loss by businesses in the tourism industry; and
- loss by other coastal businesses.

Other categories, as evidenced by the BP spill, include investors whose shares in BP and other companies involved in the spill declined in value following it. A description of claims brought following the Deepwater Horizon incident is discussed in section 3.4 below.

### 3.2.1. Bodily injury

Bodily injury claims may arise from injuries, or even death, suffered by persons on the offshore facility at which a spill occurs. They may also arise from injuries suffered by persons from the effects of a spill when oil or chemicals reach land, as well as from persons who suffer harm from dispersants or whilst cleaning up a spill.

The claims may be made against an operator or other companies engaged in offshore activities by employees (or employees' families in the event of death), in which case the appropriate liability regime may be an employers' liability regime or workers' compensation scheme. In addition, they may be made by third parties, in which case the civil (common) law regime, a non-statutory liability regime, or a compensation scheme would apply.

### 3.2.2. Property damage

A spill may cause property damage to persons involved in commercial fisheries and aquaculture / mariculture. Examples include damage to boats, equipment used to catch fish or to cultivate mariculture, especially floating equipment, fixed traps, submerged nets, pots, lines and bottom trawls. Such damage may be caused by sub-surface or surface oil or by lifting items through such oil.<sup>99</sup> Fish farmers may also suffer property damage by the loss of fish. Further, the owners of, or other persons with a legal interest in, oyster or other shellfish beds may suffer property damage. The property in such a case may be their right to harvest the shellfish, not necessarily the shellfish itself.

Yachts and other boats that are not involved in fishing may also suffer damage from an oil spill if, say, the oil enters harbours, marinas or other locations where the boats are moored, or affects them at sea.

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<sup>99</sup> See OPOL and Oil & Gas UK, Oil Spill Cost Study – OPOL Financial Limits 14 (February 2012); available at [www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182](http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182)

Onshore industries, such as harbours and desalination facilities may also suffer property damage if oil or other chemicals from a spill enters their location. In addition, farmers may be affected if oil or other chemicals damage agricultural land located by the shore or an estuary. Offshore industries such as windfarms may also suffer property damage.

Still further, residential and commercial property and wetlands located on the coast may suffer damage from oil or other chemicals from a spill or the use of dispersants.

### **3.2.3. Governmental economic claims**

Governmental authorities may incur costs or lose income from a marine spill. Direct costs include the cost of measures carried out to respond to a spill, such as clean-up costs, measures to abate oil, or measures to prevent the oil or other chemicals affecting the shoreline or properties near the shore.

Indirect costs include the loss of taxes or other revenues from coastal industries, such as fisheries, aquaculture / mariculture, and the tourist industry due to lost employment and lost profits resulting from a spill.

### **3.2.4. Loss by commercial fisheries and aquaculture / mariculture**

Commercial fisheries and persons involved in aquaculture / mariculture may suffer pure economic loss if they cannot carry out their occupations due to bans on fishing and the sale of oysters, scallops, mussels and other shellfish. They may also suffer pure economic loss by a reduction in, or the loss of, markets due to the presence of oil or other chemicals or their inability to carry out occupational activities due to measures being carried out to remediate a spill in their locality.

### **3.2.5. Loss by businesses in the tourism industry**

Businesses in the tourism industry may suffer pure economic loss due to lost profits from the lack of customers due to, among other things, oil and other chemicals having been washed up on beaches as well as oil and chemicals in the sea. Affected tourism businesses include, but are not limited to, hotels, restaurants, coffee shops, ferries, cruise ships, charter fishing boats, boat tours, cafes, and souvenir shops.

Economic loss is not limited to a loss of profits; in the context of harm from an offshore incident, it also includes losses suffered by businesses that fail due to the inability to operate or trade, or businesses that are starting up but cannot withstand the economic downturn caused by a spill due, among other things, to a lack of customers for their goods and services because of the depressed local economy.

### **3.2.6. Loss by other coastal businesses**

A wide range of coastal industries may suffer pure economic loss. Examples include power stations and desalination facilities that use large quantities of sea water in their operations and which may malfunction if oily water is drawn into the facilities. Shipyards, ports and harbours may also suffer lost profits due to the effects of an oil spill and measures to remediate it.<sup>100</sup>

In addition, a ban on offshore oil and gas operations following a spill will result in a loss of profits by offshore operators and related businesses.

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<sup>100</sup> See OPOL and Oil & Gas UK, Oil Spill Cost Study – OPOL Financial Limits 14 (February 2012); available at [www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182](http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182)

The wide variety of claims following Deepwater Horizon shows that the range of coastal industries that may be affected is vast. For example, claims were made against BP by a business conducting weddings on the beach, festival organisers, taxi firms, photo studios, timeshares, a wide variety of shops and other businesses located in coastal areas, and real estate agents whose income from selling and leasing beachfront and other properties declined following the spill (see section 3.4.1).<sup>101</sup>

### 3.3. Liability for claims for harm from pollution from an offshore oil and gas incident in the USA

This section describes claims for traditional damage and civil liabilities under US law that may arise as a result of pollution damage from offshore oil and gas operations. The primary purpose of the description is to set the scene for the overview of the claims from the Deepwater Horizon incident which follows. Secondary purposes of this section are to show the wide-ranging and diverse nature of the claims in order to compare them with the claims that would (or would not) be covered under the liability systems in the Target States, and to show how the compensation scheme in the US worked in practice..

There are four main categories of claims for compensation for traditional damage and civil liability for pollution damage from offshore oil and gas operations in the USA: State common law; general maritime law; the Oil Pollution Act of 1990 (OPA); and State oil pollution legislation.

#### 3.3.1. State common law

Liability for bodily injury and property damage in the USA is established by State common law. Punitive, as well as compensatory, damages are available.<sup>102</sup>

Damages for pure economic loss (that is claims for lost revenue that does not result from bodily injury to the claimant or property owned by the claimant) are not recoverable under State common law. A person may claim damages for economic loss only if the loss is derived from bodily injury or property damage. If, say, a fisherman or coastal tourism business loses revenues because they cannot catch fish or tourism is badly affected, respectively, due to an offshore spill of oil or other chemicals, they do not have a claim against the person responsible for the incident because the oil has not damaged property owned by them.<sup>103</sup>

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<sup>101</sup> See, e.g., Understanding the New BP Settlement; A Guide for Gulf Coast Business Owners About the \$7.8 Billion BP Settlement; available at [http://webcache.googleusercontent.com/search?q=cache:0X2ZOp6a\\_K4J:cdn2.hubspot.net/hub/218458/file-24566139-pdf/docs/e-book\\_bp\\_settlement\\_for\\_business\\_owners.pdf%253Ft%253D1363794569000+&cd=50&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:0X2ZOp6a_K4J:cdn2.hubspot.net/hub/218458/file-24566139-pdf/docs/e-book_bp_settlement_for_business_owners.pdf%253Ft%253D1363794569000+&cd=50&hl=en&ct=clnk&gl=uk)

<sup>102</sup> See Thomas J. Schoenbaum, Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon, (2012) *Journal of Environmental Law*, vol. 24(3), 395, 403 (referring to *Exxon Shipping Corporation v Baker*, 554 U.S. 471 (2008)); available at [http://scholar.google.co.uk/scholar\\_case?case=10899207720436348081&q=exxon+shipping+baker&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=10899207720436348081&q=exxon+shipping+baker&hl=en&as_sdt=2003), in which the US Supreme Court held that punitive damages are not pre-empted by the federal Clean Water Act 1972).

<sup>103</sup> See Thomas J. Schoenbaum, Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon, (2012) *Journal of Environmental Law*, vol. 24(3), 395, 409.

### 3.3.2. General maritime law

Claims for federal maritime torts are brought under admiralty law (also known as general maritime law). General maritime law applies if a tort occurs in the navigable waters of the USA.<sup>104</sup> If the tort does not involve a vessel, there must be a significant connection to a traditional maritime activity.<sup>105</sup> Punitive, as well as compensatory, damages are available.<sup>106</sup>

Liability for claims for pure economic loss does not exist under general maritime law, with an exception for claims by commercial fishermen for lost profits. The general inability to claim pure economic loss arose from the so-called *Robins* rule; a ruling by the US Supreme Court that persons who have suffered only pure economic loss are not entitled to damages.<sup>107</sup> Intermediate federal appellate courts subsequently recognised an exception from the doctrine for commercial fishermen and other businesses that harvest marine resources such as fish, oysters, crabs and other marine life as seafood.<sup>108</sup> Other losses from marine pollution, including losses by tourist businesses and other coastal businesses “are utterly irrecoverable”.<sup>109</sup>

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<sup>104</sup> The term “waters of the United States” has a very broad and confusing meaning. See *Rapanos v United States*, 547 U.S. 715 (2006); available at [http://scholar.google.co.uk/scholar\\_case?case=6892271506340161224&q=rapanos&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=6892271506340161224&q=rapanos&hl=en&as_sdt=2003); US Environmental Protection Agency, Clean Water Act Definition of “Waters of the U.S.”, Proposed Rule; available at <http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

<sup>105</sup> See *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982); available at [http://scholar.google.co.uk/scholar\\_case?case=8544251075543232816&q=foremost+richardson&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=8544251075543232816&q=foremost+richardson&hl=en&as_sdt=2003); *Sisson v Ruby*, 497 U.S. 358 (1990); available at [http://scholar.google.co.uk/scholar\\_case?case=13329519182101446661&q=sisson+ruby&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=13329519182101446661&q=sisson+ruby&hl=en&as_sdt=2003)

<sup>106</sup> See Thomas J. Schoenbaum, Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon, 403 (2012) *Journal of Environmental Law*, vol. 24(3), 395, (referring to *Exxon Shipping Corporation v Baker*, 554 U.S. 471 (2008), in which the US Supreme Court held that punitive damages are not pre-empted by the federal Clean Water Act 1972); see also *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, 808 Federal Supplement 2d 943, (Eastern District Louisiana, 2011); available at <https://www.courtlistener.com/laed/bQip/in-re-oil-spill-by-the-oil-rig-deepwater-horizon/>; *McBride v Estis Well Service, LLC*, 731 F.3d 505 (5<sup>th</sup> Circuit 2013); available at [http://scholar.google.co.uk/scholar\\_case?case=10947525625649745963&q=mcbride+estis+well&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=10947525625649745963&q=mcbride+estis+well&hl=en&as_sdt=2003)

<sup>107</sup> *Robins Dry Dock & Repair Company v Flint*, 275 US 303 (1927); available at [http://scholar.google.co.uk/scholar\\_case?case=3852571882520571626&q=robins+dry+dock&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=3852571882520571626&q=robins+dry+dock&hl=en&as_sdt=2003)

<sup>108</sup> See, e.g., *Union Oil Company v Oppen*, 501 F.2d 558 (9<sup>th</sup> Cir 1974) (allowing claims by commercial fishermen following Santa Barbara oil spill); available at [http://scholar.google.co.uk/scholar\\_case?case=10288445608907748181&q=union+oil+oppen&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=10288445608907748181&q=union+oil+oppen&hl=en&as_sdt=2003); *State of Louisiana ex rel. Guste v M/V Testbank*, 752 F.2d 1019 (5<sup>th</sup> Cir. 1985) (claims by shipping interests, marina and boat rental operators, wholesale and retailers, seafood enterprises not actually engaged in fishing, seafood restaurants, tackle and bait shops, and recreational fishermen not recoverable); available at [http://scholar.google.co.uk/scholar\\_case?case=18381699162453773906&q=guste+testbank&hl=en&as\\_sdt=2003](http://scholar.google.co.uk/scholar_case?case=18381699162453773906&q=guste+testbank&hl=en&as_sdt=2003); see also Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, *Penn State Law Review*, vol. 116, 105, 114-26 (2011) (analysing extent of pure economic loss); available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>

<sup>109</sup> Ronen Perry, *The Economic Bias in Tort Law*, (2008) *University of Illinois Law Review*, 1573, 1616-88.



### 3.3.3. Oil Pollution Act of 1990

The OPA, which was enacted following the oil spill from the *Exxon Valdez* in Prince William Sound, Alaska, established a liability regime for remediating oil spills and restoring damaged natural resources in the marine environment and the inland zone, compensatory damages for persons harmed by an oil spill, a programme to clean up the spills, and financial security requirements. Liability under the OPA extends to oil spills from, among other things, offshore facilities and vessels; it specifically includes the EEZ where most offshore oil and gas operations are carried out.<sup>110</sup>

Crucially, in respect of this report as discussed below, the OPA introduced liability for loss of profits and impairment of earning capacity. That is, the OPA introduced liability for pure economic loss. Whereas such loss was not traditionally recognised, as discussed above, it is now well-settled that US law provides for it in respect of claims arising from a release of oil from an offshore oil and gas facility.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) imposes liability for remediating pollution from “hazardous substances” other than oil, and for restoring damaged natural resources, including natural resources in the EEZ.<sup>111</sup> The term “hazardous substances” is broadly defined and includes most other substances.<sup>112</sup> Unlike the OPA, CERCLA does not impose liability for property damage or economic loss.

The OPA does not bar a person from bringing a claim under State law or general maritime law.<sup>113</sup>

#### 3.3.3.1. Liability

The OPA establishes strict and joint and several liability on a “responsible party”. Responsible parties in respect of an “offshore facility” include the lessee, permittee and owner and operator of the facility, the owner and operator of a pipeline, and the licensee of a deepwater port.<sup>114</sup>

An “offshore facility” is defined as “any facility of any kind located in, on, or under any of the navigable waters of the United States, and any facility of any kind which is subject to the jurisdiction of the United States and is located in, on, or under any other waters, other than a vessel or a public vessel”.<sup>115</sup>

A responsible party has a defence for:

- an act of God;
- an act of war;
- the act of an unrelated third party provided that the responsible party exercised due care in respect of the oil and took precautions against foreseeable acts or omissions of any third parties and the foreseeable consequences of such acts or omissions; or

<sup>110</sup> 33 United States Code s 2702(a). The United States Code is available from: [www.law.cornell.edu/uscode/text](http://www.law.cornell.edu/uscode/text)

<sup>111</sup> See 42 Code of Federal Regulations s 300.600 (“Natural resources means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled (hereinafter referred to as ‘managed or controlled’) by the United States (including the resources of the exclusive economic zone)”).

<sup>112</sup> See 42 United States Code s 9601(14).

<sup>113</sup> See 33 United States Code ss 2718(a), 2751(e).

<sup>114</sup> *Ibid*, s 2701(32).

<sup>115</sup> *Ibid*, s 2701(22).

- any combination of the above.<sup>116</sup>

The defences, which are narrow, do not apply if the responsible party knowingly fails or refuses to report an incident as required by law, or fails or refuses to co-operate with the responsible official or to comply, without sufficient cause, with relevant governmental orders.<sup>117</sup>

Section 2702(a) of the OPA provides that:

“Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident”.

Section 2702(b) lists the categories of damages. They are as follows:

1. “[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources”;
2. damages equal to net losses of taxes, royalties, rents, fees or net profit shares by a political subdivision, a State or the federal Government due to the injury, destruction or loss of real or personal property or natural resources;
3. the net costs of a State or a political division of a State in providing increased or additional public services as the result of an oil pollution incident;
4. the cost of restoring, rehabilitating, replacing or acquiring the equivalent of the damaged natural resources;
5. compensation for the loss of the natural resources between the time of their injury and their restoration;
6. the reasonable cost of assessing those damages; and
7. damages for loss of the subsistence use of a natural resource.<sup>118</sup>

The OPA does not impose liability for bodily injury.

This report discusses only the first category of damages in any depth. We note, however, that claims from Deepwater Horizon were brought under all the above categories (see section 3.4.4).<sup>119</sup>

The first category includes pure economic loss provided that a claimant’s damage (1) results from a discharge<sup>120</sup> or a “substantial threat of a discharge” of oil, and (2) is caused by the loss of property or

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<sup>116</sup> Ibid, s 2703(a).

<sup>117</sup> Ibid, s 2703(c).

<sup>118</sup> Ibid, s 2702(b). The order of damages has been changed from the OPA to emphasise the first category.

<sup>119</sup> See *In re: Deepwater Horizon* (No. 13-30315, consolidated with Nos. 13-30329, 13-31220 and 13-31316) (Fifth Circuit Court of Appeals, 3 March 2014); available at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31220-CV0.pdf>

<sup>120</sup> 33 United States Code s 2702(a). Section 2702(a) reads: “Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or

natural resources. The OPA thus specifically created liability for a “loss of profits” not resulting from bodily injury or property damage, which is pure economic loss.<sup>121</sup>

The first category of damages is unclear. No court has construed the provision. In the claims arising from Deepwater Horizon, for example, BP entered into a settlement agreement with persons claiming under the provision<sup>122</sup> (see section 3.4.2 below).

The lack of clarity is illustrated by a clash between two eminent and distinguished law professors concerning the scope of pure economic loss provided by the provision. The clash, which was published in the *Mississippi College Law Review*, includes an analysis of 17 hypothetical claims concerning an oil spill by a US corporation in the Gulf of Mexico. The hypotheticals are based very closely on the Deepwater Horizon spill.

Professor Goldberg, who prepared a report for the GCCF, concluded that the first category of damages authorises “recovery for any person who suffers economic loss because an oil spill has interfered with his or her ability to use property or resources that he or she has a particular right to put to commercial use”.<sup>123</sup> Professor Robertson considers that this interpretation is too narrow and bars a large number of claims that should be covered.<sup>124</sup> According to Professor Robertson, Professor Goldberg’s interpretation of the provision would exclude claims 9 to 17 below, and could also exclude claims 6 through 8, thus potentially including only claims 1, 3 and 4. In contrast, Professor Robertson considered that his interpretation would include claims 1 through 5 and probably, claims 6 through 10.

The hypothetical claims are as follows:

1. A commercial fisherman, who relies for his business on fisheries in the Gulf of Mexico, claims lost profits because he is unable to fish for a period of time due to an oil spill polluting the waters in which he fishes.
2. A ship’s chandler (that is, a man whose business consists of supplying bait, tackle and other necessary supplies to, and maintaining and repairing vessels of, commercial fishermen claims lost profits because the oil spill prevented fishing by commercial fishermen.
3. The owner of a beachfront hotel in the Gulf area claims loss of business because tourists have decided to take their holidays at other locations. The oil has not reached the beachfront owned

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adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident”.

<sup>121</sup> See Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, *Penn State Law Review*, vol. 116, 105, 128 (2011); available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>

<sup>122</sup> See *In re: Deepwater Horizon* (No. 13-30315, consolidated with Nos. 13-30329, 13-31220 and 13-31316) (Fifth Circuit Court of Appeals, 3 March 2014); available at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31220-CV0.pdf>

<sup>123</sup> John C.P. Goldberg, *OPA and Economic Loss: A Reply to Professor Robertson*, (2011) *Mississippi College Law Review*, vol. 30, 203, 204 (citing John C.P. Goldberg, *Liability for Economic Loss in Connection with the Deepwater Horizon Spill*, (22 November 2010), available from <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4595438> reprinted in (2011) *Mississippi College Law Review*, vol. 30, 355 app.).

<sup>124</sup> David W. Goldberg, *Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990*, (2011) *Texas Journal of Oil, Gas, and Energy Law*, vol. 7, 241, 242; see also David W. Goldberg, *OPA and Economic Loss: A Response to Professor Goldberg*, (2011) *Mississippi College Law Review*, vol. 30, 217.

by the hotel and reserved for its guests but has been found in the immediate vicinity, including waters frequently used by the hotel's guests, and beaches routinely visited by them.

4. An employee of the beachfront hotel has had his hours reduced by 25 per cent, with a consequent loss of 25 per cent of his wages for a certain period because the managers of the hotel have reduced staff hours by 25 per cent.
5. The owner of a barge that hauls equipment and supplies up and down a small river that flows to the Gulf cannot operate the barge for a three-week period, and thus loses profits, because oil from the spill has entered the river and threatened migratory birds, leading the authorities to close the river to boat traffic for that period to allow the oil to be cleaned up.
6. The operator of a dockside restaurant in a seaport on the Gulf claims that it has lost profits because many of its regular customers (who are dockworkers, fishermen and other people with jobs connected to maritime commerce) have stopped frequenting the restaurant.
7. A real estate agent whose listings mainly consist of beachfront properties in an area of the Gulf contaminated by the oil spill claims a loss of commissions because the spill has led the market for property sales and rentals to collapse.
8. A woodworker who owns a small furniture store in a town that relies on beach tourism for a major source of revenue claims loss of profits due to a decline in orders for furniture because some of the beaches are polluted by the oil spill. The shop is located three miles inland.
9. The owner of a beachfront inn located on the Gulf claims loss of profits due to cancelled reservations. No oil from the spill has reached within 100 miles of the waters or stretch of coastline on which the inn is located and there are no discernible adverse physical effects such as noxious odours. Government officials and scientists, however, have concluded that oil from the spill may reach the waters and beaches within a month.
10. The owner and operator of a fireworks store claims loss of profits due to reduced tourist traffic. The store is located 150 miles from Gulf beaches on a main interstate highway leading to them. He claims that he relies on tourists travelling to and from the beaches for much of his business.
11. The operator of a tour boat that carries passengers along a scenic Gulf shoreline claims lost profits. No oil from the spill has threatened to, or has, come within 400 miles of the area in which the tours take place. The owner claims, however, that popular misimpressions about the scope of the spill have depressed tourism in the entire Gulf area, causing him to lose business.
12. The owner of an amusement park in a land-locked area of central Florida claims loss of profits. Many visits to the amusement park combine a trip to it with a beach holiday on Florida's Atlantic Coast. The Atlantic Coast is not threatened by the spill but the owner of the amusement park claims that consumer unease about travelling to Florida have led to the lost profits.
13. The owner and operator of a resort in Nevada claims lost profits due to cancellation of a convention by an association of Gulf-area fishermen, who have held its annual meeting at the resort for the past 10 years. The resort owner claims that the cancellation is due to the economic effects of the oil spill.

14. A company, incorporated and operated in Hartford, Connecticut, that imports snorkelling equipment from China claims loss of profits due to the spill because sales of the equipment have declined.
15. The operator of a seafood restaurant in Phoenix, Arizona, claims loss of profits due to general consumer fears about contaminated seafood caused by the oil spill. The seafood served by the restaurant is not from the Gulf.
16. The owner and independent franchisee of a petrol station in Boise, Idaho, which sells petrol produced by the oil company that caused the spill, claims lost income due to a boycott of the petrol station. The boycott was called by a local environmental group that demanded greater corporate accountability.
17. The operator of a catering company based in New York City, where the oil company that caused the oil spill is located, claims lost revenues. Prior to the spill, a substantial portion of the profits of the company were generated by catering at the oil company's headquarters. The catering was substantially reduced after the spill.<sup>125</sup>

### **3.3.3.2. Limits of liability**

The OPA establishes various limits of liability for damages in respect of offshore facilities and vessels. The limit of liability for damages for an offshore facility, except a deepwater port, is US\$ 75 million (EUR 54.77 million). This limit does not include clean-up costs; it includes only the categories of damages specified above.<sup>126</sup> The limits do not apply if an incident is caused by gross negligence or wilful misconduct, or the breach of applicable federal safety, construction or operating regulations.<sup>127</sup>

The limit will soon increase. In February 2014, the Bureau of Ocean Energy Management of the US Department of the Interior proposed regulations to increase the limit of liability for damages from US\$ 75 million (EUR 54.77 million) to US\$ 133.65 million (EUR 97.6 million) in view of a 78.2 per cent increase in the Consumer Price Index from 1990 through 2013. The proposed increase is the first for offshore facilities since the OPA was enacted. The proposed increase, when finalised, will apply to all offshore facilities except deepwater ports. The proposed rule will also establish the methodology to be used by the Bureau to make periodic adjustments to the limit of liability.<sup>128</sup> On 19 March 2014, the Bureau extended the comment period to the proposed rule by 30 days until 25 April 2014 due to having received “numerous” comments that “it did not anticipate receiving”.<sup>129</sup> The final rule had not been promulgated as of 1 October 2014.

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<sup>125</sup> David W. Goldberg, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) Texas Journal of Oil, Gas, and Energy Law, vol. 7, 241, 247-49. The 17 items were originally set out in articles by Professors Robertson and Goldberg; see John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill 7 (22 November 2010), (2011) Mississippi College Law Review, vol. 30, 355, 346-48; David W. Robertson, The Oil Pollution Act's Provisions on Damages for Economic Loss, (2011) Mississippi College Law Review, vol. 30, 157, 169-73.

<sup>126</sup> Ibid, s 2704(a)(3). BP waived this limit of liability in the Deepwater Horizon incident.

<sup>127</sup> Ibid, s 2704(c).

<sup>128</sup> US Department of the Interior, Bureau of Ocean Energy Management, Consumer Price Index Adjustments of the Oil Pollution Act of 1990 Limit of Liability for Offshore Facilities, Proposed Rule, 79 Federal Register 10,056 (24 February 2014); available at <http://www.gpo.gov/fdsys/pkg/FR-2014-03-19/html/2014-06047.htm>

<sup>129</sup> See US Department of the Interior, Bureau of Ocean Energy Management, Consumer Price Index Adjustments of the Oil Pollution Act of 1990 Limit of Liability for Offshore Facilities, Proposed Rule – extension of

On a related topic, on 19 August 2014, the Bureau of Ocean Energy Management published an Advanced Notice of Proposed Rulemaking concerning risk management, financial assurance and loss prevention in respect of oil and gas operations on the outer continental shelf. The Advanced Notice sought comments to about 50 questions on the current financial assurance and bonding programme for such operations.<sup>130</sup>

### 3.3.3.3. *Financial security*

The OPA requires owners and operators of offshore oil and gas facilities, including MODUs (and vessels) in US waters to have a certificate of financial responsibility (COFR) to cover liability for removal costs and damages under the OPA.<sup>131</sup> The financial security evidenced by the COFR may be in the form of “insurance, surety bond, guarantee, letter of credit, qualification as a self-insurer, or other evidence of financial responsibility”.<sup>132</sup>

Financial responsibility for offshore facilities may be evidenced by self-insurance, insurance, an indemnity, a surety bond or another financial security instrument approved by the competent authority.<sup>133</sup> The Code of Federal Regulations sets out detailed criteria for each financial security instrument.<sup>134</sup>

The proposed increase in the limit of liability does not affect the level of financial security required for offshore facilities which, the Bureau stated, it may propose revising in a separate rulemaking.<sup>135</sup>

The current financial security requirement for liability under the OPA for an offshore facility located in waters seaward of the boundary of a State is US\$ 35 million (EUR 25.56 million); it is US\$ 10 million (EUR 7.3 million) for an offshore facility located in waters landward of such a boundary.<sup>136</sup> The President may set an amount of up to US\$ 150 million (EUR 109.54 million) if he determines that such an amount “is justified based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party”.<sup>137</sup>

Claims for the costs of cleaning up oil and for damages may be asserted directly against the guarantor who provides evidence of financial responsibility.<sup>138</sup>

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public comment period, 79 Federal Register 15,275 (19 March 2014); available at <http://www.gpo.gov/fdsys/pkg/FR-2014-03-19/html/2014-06047.htm>

<sup>130</sup> See Bureau of Ocean Energy Management, Advanced Notice of Proposed Rulemaking, Risk Management, Financial Assurance and Loss Prevention, 79 Federal Register 49,027 (19 August 2014); available at <http://www.boem.gov/79-FR-49027/>

<sup>131</sup> 33 United States Code s 2716.

<sup>132</sup> *ibid*, s 2716(e).

<sup>133</sup> 33 Code of Federal Regulations s 553.20.

<sup>134</sup> *Ibid*, ss 553.21-.32.

<sup>135</sup> US Department of the Interior, Bureau of Ocean Energy Management, Consumer Price Index Adjustments of the Oil Pollution Act of 1990 Limit of Liability for Offshore Facilities, Proposed Rule, 79 Federal Register 10,056 (24 February 2014); available at available at <http://www.gpo.gov/fdsys/pkg/FR-2014-03-19/html/2014-06047.htm>

<sup>136</sup> 33 United States Code s 2716(c)(1)(B).

<sup>137</sup> *Ibid*, s 2716(c)(1)(C).

<sup>138</sup> *Ibid*, s 2716(f).

### 3.3.3.4. Claims procedure

A claimant must first claim against the responsible party for the oil spill. If the responsible party denies liability, or the claim is not settled within 90 days after it has been submitted, the claimant may commence a judicial action against the responsible party or submit the claim to the Oil Spill Liability Trust Fund (OSLTF).<sup>139</sup> An exception is States, which may first claim against the OSLTF.

The limit that the OSLTF may pay for any one incident is US\$ 1 billion (EUR 730.27 million).<sup>140</sup> If the OSLTF pays a claim, it is subrogated to the claimant's rights under any law other than the OPA. If the OSLTF does not pay a claim, the claimant may seek judicial review of its denial. If a claimant accepts full payment for their claim from the OSLTF, the claimant is barred from bringing another action to recover the costs or damages that are the subject of the claim.<sup>141</sup>

There is a limitations period of three years for claims for damages from the date "on which the injury and its connection with the incident in question were reasonably discoverable with the exercise of due care".<sup>142</sup>

The claims procedure, which was established in 1992 as an interim rule, is set out in the Code of Federal Regulations.<sup>143</sup> The National Pollution Center of the US Coast Guard has also published a "Claimant's Guide", which it updated in April 2012.<sup>144</sup> In November 2011, the Coast Guard proposed amendments to its interim rule. It stated that the procedures had been shown to be adequate, with 136,066 claims having been adjudicated and US\$ 414,212,615 (EUR 30,248,698,506) having been paid. It considered, however, that revisions were needed to address regulatory gaps and to clarify some provisions.<sup>145</sup>

### 3.3.4. State oil pollution legislation

Many coastal States have enacted legislation to establish liability for claims from offshore oil and gas operations. An example is the Florida Pollution Discharge Prevention and Control Act, which imposes strict liability.<sup>146</sup> The OPA specifically provides that it does not bar persons bringing claims under State legislation.<sup>147</sup>

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<sup>139</sup> 26 United States Code s 9509(c)(1)(A).

<sup>140</sup> Ibid, s 9509(c)(2)(A)(i).

<sup>141</sup> 33 Code of Federal Regulations s 136.115(a).

<sup>142</sup> Ibid, s 136.101(a)(1)(i).

<sup>143</sup> Ibid, part 136; <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=33:2.0.1.2.7>

<sup>144</sup> National Pollution Funds Center, U.S. Coast Guard, Claimant's Guide, A Compliance Guide for Submitting Claims Under the Oil Pollution Act of 1990 (April 2003, updated April 2012); available from: <http://www.uscg.mil/npsc/claims/> (Claimant Guide; English)

<sup>145</sup> 76 Federal Register 67,385, 67,389 (1 November 2011); available at [www.gpo.gov/fdsys/pkg/FR-2011-11-01/pdf/2011-28189.pdf](http://www.gpo.gov/fdsys/pkg/FR-2011-11-01/pdf/2011-28189.pdf)

<sup>146</sup> See Thomas J. Schoenbaum, Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon (2012) *Journal of Environmental Law*, vol. 24(3), 395, 401.

<sup>147</sup> 33 United States Code s 2718(a).

### 3.4. Claims arising from Deepwater Horizon

The Deepwater Horizon oil spill began on 20 April 2010 when there was an explosion on the Deepwater Horizon drilling rig. Drilling was not taking place at the time due to it having been temporarily stopped for safety reasons.<sup>148</sup>

The incident resulted in approximately 53,000 barrels of oil per day leaking into the Gulf of Mexico for 87 days, for a total of approximately 4.5 million barrels of oil (an amount which is being challenged; see below). The oil affected the coastal areas of five States: Alabama, Florida, Louisiana, Mississippi and Texas.

The following is a brief overview of compensation claims and liabilities concerning the Deepwater Horizon incident. The purpose is to show the wide-ranging and diverse nature of compensation claims that can arise from an offshore oil and gas incident so that they can be considered against the claims that would (or would not) be covered under the liability systems in the Target States. A secondary purpose is to show how the compensation scheme in the US worked in practice.<sup>149</sup>

As indicated in section 3.3 above, the US has a specific federal liability system under the OPA that imposes liability for loss of income and impairment of earning capacity (that is, pure economic loss claims) from oil pollution from an offshore facility whereas no such liability system exists in the EEA.

#### 3.4.1. Claims for compensation

Following the Deepwater Horizon incident, over 100,000 claims were filed in State and Federal courts against BP and its contractors under general maritime law and State tort law in the five States affected by the spill.<sup>150</sup> Claims were also made for damages under the OPA (see section 3.3.3.1).

The claims by private individuals, non-profit organisations, businesses, and governmental entities included claims for bodily injury and death, business loss, property damage, economic loss, lost revenues, and the cost of increased public services.<sup>151</sup> Claims under general maritime law included negligence, gross negligence, and maritime products liability claims from exposure to oil and dispersants. Similar claims were brought under State tort law. Claims under State tort law for bodily injury included claims for negligence, negligence per se, strict products liability, nuisance, battery and medical monitoring from exposure to oil and dispersants. Claims for wrongful death were brought on behalf of the 11 men killed in the incident.

Claims were not brought against the OSLTF due to BP agreeing to pay them.

Under the OPA, Transocean, as the owner or operator of the MODU, Deepwater Horizon, was liable for clean-up costs and damages up to a cap of approximately US\$ 65 million (EUR 47,704,700) based on the MODU's tonnage.<sup>152</sup> BP, as operator of the offshore facility, was liable for damages in excess

<sup>148</sup> See Drilling in Extreme Environments, 12.

<sup>149</sup> The discussion does not include other aspects of the Deepwater Horizon incident, which are outside the remit of this study.

<sup>150</sup> State law claims may be brought in federal courts under diversity jurisdiction rules. Admiralty law claims are brought in federal courts.

<sup>151</sup> See Thomas J. Schoenbaum, Liability for Damages in Oil Spill Accidents: Evaluating the USA and International Law Regimes in the Light of Deepwater Horizon, (2012) *Journal of Environmental Law*, vol. 24(3), 395, 407-08.

<sup>152</sup> See 33 United States Code s 2704(b). Section 2704(b)(1) provides that a MODU "which is being used as an offshore facility is deemed to be a tank vessel with respect to the discharge ... of oil on or above the surface of



of Transocean's liability up to a limit of US\$ 75 million (EUR 54.77 million) plus unlimited clean-up costs.<sup>153</sup> BP waived the US\$ 75 million cap.

Most claims for compensation under the OPA fell in the first category of damages, that is, "the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources". This category is, by far, the main category for claims for compensation.

The relevance of pure economic loss to claims for compensation for harm from an offshore oil and gas is illustrated by the Deepwater Horizon accident. As stated by Professor Robertson,

"it seems apparent that in sheer magnitudes of dollars, economic-loss damages far exceed all of the other losses combined. In the aftermath of the disaster, BP Exploration & Production, Inc. created the Gulf Coast Claims Facility (GCCF) as a mechanism for settling damages and other claims against BP. In its April 13, 2012 status report, the GCCF reported that it had paid out a total of \$6,316,458,256, and that about 96% of that amount – \$6,053,660,113.42 – had gone to economic-loss claimants".<sup>154</sup>

In June 2010, BP initiated procedures to handle the claims for compensation. In response to allegations that payment of them was being delayed and that BP was denying claims alleged to be covered, President Obama met with BP at the White House to institute a claims facility, the GCCF, to be administered by an independent claims administrator, with a three-judge panel to hear appeals against his decisions.

The GCCF was established on 23 August 2010. All claims adjudicated under the claims facility were to have access to a US\$ 20 billion (EUR 14.6 billion) escrow account, to be established by BP over a four-year period at US\$ 5 billion (EUR 3.65 billion) each year, including US\$ 5 billion in 2010. BP agreed to set aside US\$ 20 billion in US assets to back up its commitment to establish the fund. The establishment of the GCCF did not extinguish the rights of claimants to pursue their claims in court or with the OSLTF. Further, the GCCF did not include direct claims from local, state, tribal, and the federal governments.<sup>155</sup>

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the water". Section 2704(b)(2) provides that if removal costs or damages exceed that limit the MODU is deemed to be an "offshore facility".

<sup>153</sup> See Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, (2011) *Washington Law Review*, vol. 86, 1, 54.

<sup>154</sup> See David W. Goldberg, *Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990*, (2011) *Texas Journal of Oil, Gas, and Energy Law*, vol. 7, 241, 242. In July 2011, the percentage of claims for pure economic loss filed with the GCCF was 99 per cent. See Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, (2011) *Penn State Law Review*, vol. 116, 105, 109, 116 n.49; available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf> The GCCF did not account for all of the costs and expenses paid by BP. As discussed in the final report, other costs include those for remediating the oil spill, natural resource damages, sanctions for pollution from the well blowout, etc.. See Tom Borden, *BP's legal bill for the Gulf oil spill disaster soars to \$1bn*, *The Independent* (5 February 2014); available at <http://www.independent.co.uk/news/business/news/bps-legal-bill-for-the-gulf-oil-spill-disaster-soars-to-1bn-9107849.html>

<sup>155</sup> The White House, Office of the Press Secretary, *Fact Sheet: Claims and Escrow* (16 June 2010); available at <http://www.whitehouse.gov/the-press-office/fact-sheet-claims-and-escrow>

The GCCF was a quasi-public claims fund to pay claims under the OPA as well as State tort law for bodily injury and death.<sup>156</sup> In effect, the GCCF replaced the initial claims procedure under the OPA, with an expanded claims handling facility to cover common law claims.

Despite the White House and BP selecting Kenneth Feinberg, who had administered the September 11th Victim Compensation Fund, as the independent claims administrator, challenges were made by some claimants that the claims process was resulting in inadequate payments to them. The criticism led, among other things, to committees of the US Senate and US House of Representatives holding four hearings on issues arising from the compensation and claims process in 2010 alone, followed by further hearings. Issues included whether the GCCF was processing claims in accordance with the procedures established pursuant to the OPA.<sup>157</sup>

As indicated above, claimants were not obliged to bring claims to the GCCF. Instead, they could bring a judicial action, as many claimants did.

In August 2010, the Judicial Panel on Multidistrict Litigation consolidated the class actions and other claims under Judge Carl Barbier in the US District Court for the Eastern District of Louisiana (District Court).<sup>158</sup> The purpose of the multi-district litigation process, which was established long before Deepwater Horizon, is to create an expeditious process to handle claims following a mass tort in which hundreds of thousands of cases may be filed.<sup>159</sup> Judge Barbier also heard, and continues to hear, the action by the United States against BP, Anadarko, MOEX and Transocean (see below).

#### **3.4.2. Settlement agreements for compensation claims**

The GCCF closed in March 2012. It was replaced with a settlement programme supervised by Judge Barbier.<sup>160</sup>

There had been two settlement agreements as of October 2014; the economic and property loss settlement, and the medical benefits settlement. Due to the existence of class actions, both had to be, and were, approved by the District Court.

##### **➤ Economic and property loss settlement agreement**

The economic loss and property damage settlement agreement is 1,032 pages long. In June 2012, pursuant to the settlement, the Deepwater Horizon Claims Center replaced the GCCF and a transitional settlement programme. BP set aside US\$ 7.8 billion (EUR 5,696,106,000) to fund the settlement; there is no cap on it.

On 21 December 2012, the District Court approved the terms of the economic and property loss settlement, concluding that they were “fair, reasonable and adequate” to members of the class. On 10

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<sup>156</sup> See Byron G. Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, (2011) *Mississippi College Law Review*, vol. 30, 255, 261-62.

<sup>157</sup> See Jonathan L. Ramseur, *Liability and Compensation Issues Raised by the 2010 Gulf Oil Spill 14-18* (Congressional Research Service, 7-5700, R41679, 11 March 2011).

<sup>158</sup> *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010* (MDL No. 2179).

<sup>159</sup> See Thomas J. Schoenbaum, *The Deepwater Horizon Oil Spill in the Context of the Public International Law Regimes for the Protection of the Marine Environment: A Comparative Study*, (2012-2013) *University of San Francisco Maritime Law Journal*, vol. 25, 1, 23-24.

<sup>160</sup> See Gulf Coast Claims Facility; available at <http://www.gulfcoastclaimsfacility.com/>

January 2014, the Fifth Circuit Court of Appeals affirmed the District Court's approval of the settlement.<sup>161</sup>

The settlement covers 11 categories of economic and property loss claims by businesses, non-profit organisations and individuals. The categories are as follows:

- Individual Economic Loss
- Individual Periodic Vendor or Festival Vendor Economic Loss
- Business Economic Loss
- Start-up Business Economic Loss
- Failed Business Economic Loss
- Coastal Real Property Damage
- Wetlands Real Property Damage
- Real Property Sales Loss
- Subsistence Loss
- Vessel of Opportunity (VoO) Charter Payment<sup>162</sup>
- Vessel Physical Damage

Class members in the settlement are:

- Businesses that owned, operated or leased a physical facility in the Gulf Coast Areas<sup>163</sup> or Specified Gulf Waters at any time between 20 April 2010 and 16 April 2012 and sold products in those areas directly to consumers or end users, or to another entity that sold such products directly to consumers or end users; and
- Service businesses that had one or more full-time employees (including owner-operators) who carried out their full-time services whilst they were physically present in the Gulf Coast Areas or Specified Gulf Waters at any time between 20 April 2010 and 16 April 2012.

Claimants may recover under more than one category. Businesses must have operated for at least 18 months prior to 20 April 2010 to claim, with an exception for start-up, failed, and failed start-up

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<sup>161</sup> *In re: Deepwater Horizon – Appeals of the Economic and Property Damage Class Action Settlement* (5<sup>th</sup> Circuit, Case No. 13-30095 (10 January 2014); available from <http://www.deepwaterhorizoneconomicsettlement.com/> Many of the facts of the economic and property damage settlement are taken from this publication.

<sup>162</sup> The Vessel of Opportunity programme involved commercial and charter fishing owners and operators who agreed to use their vessels to help BP clean up the oil spill on the understanding that BP would compensate them.

<sup>163</sup> The Gulf Coast Areas are: all parishes in Louisiana, all counties in Alabama, all counties in Mississippi, four Gulf Coast counties in Texas; and 30 Gulf Coast counties in Florida. See *Understanding the New BP Settlement; A guide for Gulf Coast Business Owners About the \$7.8 Billion BP Settlement*; available at [http://webcache.googleusercontent.com/search?q=cache:0X2ZOp6a\\_K4J:cdn2.hubspot.net/hub/218458/file-24566139-pdf/docs/e-book\\_bp\\_settlement\\_for\\_business\\_owners.pdf%253Ft%253D1363794569000+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:0X2ZOp6a_K4J:cdn2.hubspot.net/hub/218458/file-24566139-pdf/docs/e-book_bp_settlement_for_business_owners.pdf%253Ft%253D1363794569000+&cd=1&hl=en&ct=clnk&gl=uk) It was not necessary for a claimant to be located on the Gulf Coast itself; businesses that were located away from the coast but that suffered an indirect economic impact due to a decline or fluctuation in revenue due to decreased business were also included in the settlement.

businesses. Real estate developers were entitled to bring claims for coastal real property damage, wetlands real property damage, and real property sales loss.

Proof of causation, the amount of a decline in business, the methodology to calculate losses, required documentation, and other factors are subject to criteria set out in the settlement agreement.

A wide scope of businesses is eligible for the settlement. They include hospitality, tourism, food service, fishing-related industries, retail, development, business services, and non-profit organisations including churches, crisis centres and food banks.

There was an additional category for seafood compensation, that is, persons who owned, operated or leased a physical facility in the Gulf Coast Areas or Specified Gulf Waters and regularly purchased seafood harvested from Specified Gulf Waters in order to produce goods for resale. The amount of that settlement, which is included in the US\$ 7.8 billion (EUR 5,696,106,000), was approximately US\$ 2.3 billion (EUR 1,679,621,000).

#### ➤ **Medical benefits settlement agreement**

On 11 January 2013, the District Court approved the medical benefits settlement. On 11 February 2014, the Fifth Circuit Court of Appeals dismissed the remaining appeals to the District Court's approval of the settlement.<sup>164</sup> The settlement covers claims from the following persons who suffered bodily injuries:

- “Clean-up workers” between 20 April 2010 and 16 April 2012 (who are eligible for up to US\$ 60,700 (EUR 44,327.39) each;
- Persons who resided in specified beachfront areas within at least half a mile of the water in specified coastal areas of Louisiana, Mississippi, Alabama or the Florida panhandle (known as Zone A) for some time on each of at least 60 days between 20 April 2010 and 30 September 2010 and who had a “specified physical condition” before 30 September 2010; and
- Persons who resided in specific wetlands within at least one mile of the water in coastal areas of Louisiana, Mississippi, Alabama or the Florida panhandle (known as Zone B) for some time on each of at least 60 days between 20 April 2010 and 31 December 2010.

A “specified physical condition” is a condition that results from exposure to oil, dispersants, and/or other substances used to clean up the oil spill or a heat-related physical condition due to “sunstroke (heat stroke), loss of consciousness (fainting) due to heat, heat fatigue (exhaustion) and/or disorders of sweat glands, including heat rash”.<sup>165</sup> Payments for the latter two categories are between US\$ 900 (EUR 657) and US\$ 36,950 (EUR 26,983.48) each plus specified hospital payments.<sup>166</sup>

In addition to compensation payments, members of the class action are entitled to periodical medical examinations and tests for 21 years. In addition, BP agreed to fund a US\$ 105 million (EUR 76,678,350) grant programme to improve medical care in 17 coastal parishes and counties in Louisiana to Florida.

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<sup>164</sup> See MDL-2179 Oil Spill by the Rig Deepwater Horizon; available at <http://www.laed.uscourts.gov/OilSpill/OilSpill.htm>

<sup>165</sup> See Deepwater Horizon Medical Benefits Claims Administrators, available at <https://deepwaterhorizonmedicalsettlement.com/>

<sup>166</sup> See Jennifer Larino, BP oil spill medical settlement moves forward after appeals dismissed, The Times-Picayune (13 February 2014).

### 3.4.3. Appeal of economic and property loss settlement agreement

BP subsequently appealed the terms of the economic and property loss settlement agreement, on the basis that it had resulted in BP paying claims for loss of income to some claimants whose loss was unrelated to the Deepwater Horizon incident. On 3 March 2014, the Fifth Circuit Court of Appeals affirmed the lower court's ruling that the settlement agreement did not require claimants "to submit evidence that the claim arose as a result of the oil spill" but, rather, simply to attest, under penalty of perjury, that the claim was due to the Deepwater Horizon incident. In ruling for the majority (2:1), Circuit Judge Southwick stated that the above

"requirements are not as protective of BP's present concerns as might have been achievable, but they are the protections that were accepted by the parties and approved by the district court. It was a contractual cession by BP to limit the issue of factual causation in the processing of claims ... There is nothing fundamentally unreasonable about what BP accepted but now wishes it had not".<sup>167</sup>

On 19 May 2014, the Fifth Circuit Court of Appeals ruled en banc by an 8-5 vote not to reconsider the 3 March 2014 decision upholding Judge Barbier's ruling on the settlement agreement.<sup>168</sup>

BP had also requested a stay from paying claims under the settlement until the US Supreme Court rules on its appeal, contending that "unless the mandate is recalled and stayed, countless awards totalling potentially hundreds of millions of dollars will be irretrievably scattered to claimants that suffered no injury traceable to BP's conduct".<sup>169</sup>

On 9 June 2014, the US Supreme Court denied BP's request for a stay pending its decision on whether to grant review of the settlement agreement.<sup>170</sup>

On 24 September 2014, Judge Barbier denied BP's request for reimbursement of 793 claims it alleged that it had overpaid, ruling that the settlement agreements between the claimants and BP were final. BP announced that it would appeal the ruling.<sup>171</sup>

### 3.4.4. Other claims and proceedings

The settlement does not include claims for economic damage by entities in the banking, financial, insurance, oil and gas, or real estate development sectors, defence contractor industries, or entities selling BP-branded fuel. These entities are entitled to bring actions outside the settlement.

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<sup>167</sup> *In re Deepwater Horizon* (No. 13-30315; 5<sup>th</sup> Cir. 3 March 2014); available at <http://www.ca5.uscourts.gov/opinions%5Cpub%5C13/13-31220-CV0.pdf>

<sup>168</sup> *In re: Deepwater Horizon – Appeals of the Economic and Property Damage Class Action Settlement* (No. 13-30095, 5<sup>th</sup> Cir. 19 May 2014); available at <http://neworleans.legalexaminer.com/wp-content/uploads/sites/95/2014/05/Certification-Panel-En-Banc-13-30095.pdf>

<sup>169</sup> See Carolyn Davis, Supreme Court's Scalia to Review New BP Appeal on Macondo Payouts, Daily GPI Drilling (29 May 2014); available at <http://www.naturalgasintel.com/articles/98527-supreme-courts-scalia-to-review-new-bp-appeal-on-macondo-payouts>

<sup>170</sup> See Richard Thompson, Supreme Court: BP must pay claims during appeal, New Orleans Advocate (9 June 2014); available at <http://www.theneworleansadvocate.com/news/9410758-171/supreme-court-bp-must-pay>

<sup>171</sup> See Margaret Cronin Fisk and Laurel Calkins, BP Told It Can't Claw Back Oil-Spill Damage Overpayments, Bloomberg News (24 September 2014); available at <http://www.bloomberg.com/news/2014-09-24/bp-told-it-can-t-claw-back-oil-spill-damage-overpayments.html>

In addition, BP still faces claims by shareholders, and claims related to the drilling moratorium that followed the incident.<sup>172</sup> For example, in April 2014, six new actions were brought against BP in Texas by US pension funds, bringing the number of actions by institutional investors to 20. The plaintiffs allege that BP committed fraud by informing stockholders that it had pledged to become a safer company following a critical report of its safety record in 2007, and that BP then failed to do so.<sup>173</sup>

On 21 April 2014, a hearing on a motion for class certification in securities-related litigation against BP was held. As of October 2014, the court had not issued a decision.

The individual securities claims against BP and current and former directors and officers by pension or investment funds or advisers as of October 2014 were one case in the multi-district litigation, 11 in Federal court in Texas, three in State courts in Texas and one in Federal court in New York State.<sup>174</sup>

#### ➤ Proceedings for natural resource damages

Proceedings have also been brought against BP for natural resource damages under the fourth, fifth and sixth categories of damages under the OPA (see section 3.4.1.). The proceedings for natural resource damages are particularly complicated due to the spill affecting so many Federal and State natural resources.<sup>175</sup>

In April 2011, BP announced that it was providing US\$ 1 billion (EUR 730.27 million) to the relevant governmental authorities (known as natural resource trustees). The National Oceanic and Atmospheric Administration (NOAA) described the money as representing:

“a first step toward fulfilling BP’s obligation to fund the complete restoration of injured public resources, including the loss of use of those resources by the people living, working and visiting the area. The Trustees will use the money to fund projects such as the rebuilding of coastal marshes, replenishment of damaged beaches, conservation of sensitive areas for ocean habitat for injured wildlife, and restoration of barrier islands and wetlands that provide natural protection from storms”.<sup>176</sup>

The US\$ 1 billion payment is not the limit of BP’s liability for natural resource damages. The assessment and restoration process is ongoing.

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<sup>172</sup> See Jonathan L. Ramseur & Curry L. Hagerty, Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments 3 (Congressional Research Service, 31 January 2013); available at [www.fas.org/sqp/crs/misc/R42942.pdf](http://www.fas.org/sqp/crs/misc/R42942.pdf)

<sup>173</sup> See Mark Schleifstein, Louisiana, Texas, Maryland, private pension funds file Deepwater Horizon oil spill fraud suits against BP, The Times-Picayune (1 May 2014); available at <http://connect.nola.com/user/mschleif/posts.html>

<sup>174</sup> See BP, US Legal Proceedings; available at <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings/US-legal-proceedings.html>

<sup>175</sup> See Adam Vann and Robert Meltz, The 2010 Deepwater Horizon Oil Spill: Natural Resource Damage Assessment Under the Oil Pollution Act 14-15 (Congressional Research Service, 24 July 2013); available at <http://fas.org/sqp/crs/misc/R41972.pdf>

<sup>176</sup> See *ibid* (quoting NOAA, NRDA Trustees Announce \$1 Billion Agreement to Fund Early Gulf Coast Restoration Projects (21 April 2011)); available at [http://www.noaa.gov/stories/2011/20110421\\_nrdarestitution.html](http://www.noaa.gov/stories/2011/20110421_nrdarestitution.html)

A fact sheet with details of the natural resource damage assessment process is available from BP's website.<sup>177</sup>

➤ **Proceedings for clean-up costs**

BP and the other parties involved in the Deepwater Horizon incident (Transocean, MOEX, and Andarko) are liable for "removal costs", that is, the costs of cleaning up the oil spill. Liability for such costs is unlimited.

On 11 July 2011, the Obama Administration sent a twelfth invoice for US\$ 4.9 million (EUR 359,620,000) to BP and the other parties for clean-up costs.<sup>178</sup> The invoices had been approved by the federal on-scene coordinator (FOSC). Payments for the invoices are deposited in the OSLTF. BP had paid the first eleven invoices, totaling US\$ 711,757,835.56 (EUR 522,372,000), in full.

The invoices include three main categories of costs:

- US Coast Guard direct costs, including "the purchase and rental of response and personal protective equipment, the cost of contract services, telecommunications costs, and travel orders";
- US Coast Guard indirect costs, including the costs of Coast Guard "assets operating in support of the response, including aircraft, cutters, boats, vehicles and people"; and
- Costs incurred by other Federal Agencies and States, including the "operation of ships, aircraft and boats; scientific determination of clean-up needs; deployed personnel; and other expenses ... National Guard Bureau support for deployed personnel, activation and deployment of National Guard from [Louisiana, Mississippi, Alabama and Florida] and State support for removal operations, scientific determination of clean-up needs, and other expenses".

Examples of costs incurred by Federal agencies include the following:

- "Cost of work, services, and materials procured under contract for purposes related to the Oil Spill;
- Costs that reflect agency activities to mitigate the impacts of the Oil Spill. For example, these costs may include mobilization of resources to coordinate benefit issuance and the dissemination of public information;
- Costs associated with temporary Federal agency personnel assigned to work on the Oil Spill;
- Costs associated with condition monitoring and assessment (for example, hiring additional personnel to do public health monitoring);
- Transportation equipment (including but not limited to boats/cutters, aircrafts, and vehicles);
- Travel expenses and per diem, including a wide range of costs incurred while on travel.
- Office supplies, equipment, and capital and/or maintenance costs for new or expanded field sites;

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<sup>177</sup> Fact Sheets, Natural Resource Damage Assessment of the Gulf of Mexico Deepwater Horizon accident; available from <https://www.thestateofthegulf.com/fact-sheets/?page=2>

<sup>178</sup> See Restorethegulf.gov, Fact Sheets; available at <http://www.restorethegulf.gov/task-force/education-resources/fact-sheets>

- Cost of materials, equipment, and supplies related to clean-up;
- Shipping costs and materials;
- Salaries and overtime for full-time personnel assigned to work on the Oil Spill (including administrative personnel, and D.C.- and field-based program officers)<sup>179</sup>.

The above clean-up costs do not include those incurred directly by BP.

In April 2014, BP announced that it had completed the final stage of clean up after having spent over US\$ 14 billion (EUR 10,274,900,000) and having cleaned 780 miles of coastline, with over 70 million personnel hours on clean-up measures. BP stated that it would continue to “keep resources in place to respond quickly at the Coast Guard’s direction if potential Macondo oil is identified and requires removal”<sup>180</sup>.

The US Coast Guard disagreed, however. Whilst acknowledging that the clean-up stage had changed to cleaning up re-oiling events on previously cleaned up coastline (known as Middle Response), Captain Thomas Sparks, the FOSC for the Deepwater Horizon clean up, stated “let me be absolutely clear: This response is not over---not by a long shot”<sup>181</sup>.

Monitoring and planning is being carried out, not only by the US Coastguard, but also by the affected States.<sup>182</sup>

States have brought claims against BP for reimbursement for their clean-up costs. As of 31 March 2014, BP had reimbursed States US\$ 738 million (EUR 541,631,000) for clean-up costs and other claims.<sup>183</sup>

#### ➤ **Claims by municipalities**

Municipalities filed claims against BP under the OPA for loss of taxes. For example, in February 2013, four municipalities in Florida filed claims for loss of income even though oil did not reach their beaches. The municipalities claim that they lost millions of dollars in lost tax revenue and costs.<sup>184</sup>

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<sup>179</sup> RestoreTheGulf.gov, Oil Spill Cost and Reimbursement Fact Sheet (12 July 2011); available at <http://www.restorethegulf.gov/release/2011/07/12/oil-spill-cost-and-reimbursement-fact-sheet>

<sup>180</sup> See Iain Hepburn, Coast Guard hits back as BP claims Deepwater Horizon clear-up finally finished four years on, Energy Voice (16 April 2014); available at <http://www.energyvoice.com/2014/04/coast-guard-hits-back-bp-claims-deepwater-horizon-clear-finally-finished-four-years/>

<sup>181</sup> RestoreThe Gulf.gov, Different tactics, Deepwater Horizon Response is far from complete (15 April 2014); available at <http://www.restorethegulf.gov/release/2014/04/15/different-tactics-deepwater-horizon-response-far-complete>

<sup>182</sup> See, eg, Florida Department of Environmental Protection, Daily Monitoring Reports; available at <http://www.dep.state.fl.us/deepwaterhorizon/response.htm>; Coastal Recovery Commission of Alabama; available at <http://crcalabama.org/>

<sup>183</sup> See Jonathan L. Ramseur & Curry L. Hagerty, Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments 7 (Congressional Research Service, 31 January 2013); available at [www.fas.org/sqp/crs/misc/R42942.pdf](http://www.fas.org/sqp/crs/misc/R42942.pdf)

<sup>184</sup> See Sheila Mullane Estrada, Four Pinellas beach cities sue BP for gulf oil spill, Tampa Bay Times (5 February 2013); available at <http://www.tampabay.com/news/environment/four-pinellas-county-beach-cities-sue-bp-for-gulf-oil-spill/1273840>



### 3.4.5. Summary of claims for compensation

In summary, the claims for traditional damage from Deepwater Horizon, as of 31 March 2014, are as follows:

- Initial BP claims programme (5 May 2010 to 22 August 2010): US\$ 399 million (EUR 292,833,000)
- Claims paid by the GCCF (23 August 2010 to 4 June 2012): US\$ 6,667 million (EUR 4,893,030)
- Claims under the economic and property loss settlement agreement: ongoing
- Claims under the medical benefits settlement agreement: ongoing

The above claims do not include the US\$ 54 million (EUR 39,631,600) settlement for claims by real estate agents.<sup>185</sup> In addition, as indicated in section 3.4.4, BP faces securities-related claims.

As of October 2014, BP had paid approximately US\$ 11 billion (EUR 8,073,100,000) to individuals and businesses by means of the above claims processes, US\$ 2.9 billion (EUR 2,128,360,000) of which was paid in 2013.

In addition, BP had paid nearly US\$ 1.5 billion for claims, advances and settlements with Federal and State government entities.<sup>186</sup> These amounts include clean-up costs as well as claims for compensation.

### 3.5. Civil and criminal offences for water pollution in the USA

The federal Clean Water Act (and other federal environmental statutes) establishes administrative, civil and criminal offences and sanctions for water pollution. If the US Environmental Protection Agency (EPA) decides to bring an administrative offence, it files an administrative complaint. Any hearing is held before an administrative law judge, with any appeal of the judge's decision to the EPA's Environmental Appeals Board. A further appeal is to the relevant federal Court of Appeals. The maximum level of fines for civil administrative penalties are established by the Clean Water Act (and other Acts), as is the procedure to be followed by the EPA in bringing proceedings.

An environmental civil judicial action is an enforcement action brought in federal court by the US DOJ on behalf of the EPA. The DOJ may bring such an action in lieu of the EPA bringing a civil administrative action. As with a civil administrative action, the maximum level of fines for civil judicial penalties is established by the Clean Water Act (or other federal environmental statute).

An environmental criminal action is necessarily judicial. It is, therefore, brought by the DOJ on behalf of the EPA. The DOJ brings also judicial actions on behalf of other federal departments and agencies.

The Clean Water Act (and other federal environmental statutes) sets out factors to be taken into account in determining the amount of a civil administrative or civil judicial penalty. In respect of the Clean Water Act, they include the seriousness of the breach or breaches, the economic benefit, if any, to the defendant as a result of the breach, the defendant's degree of culpability, any other penalty for

<sup>185</sup> See Jonathan L. Ramseur & Curry L. Hagerty, Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments 7 (Congressional Research Service, 31 January 2013); available at [www.fas.org/sqp/crs/misc/R42942.pdf](http://www.fas.org/sqp/crs/misc/R42942.pdf)

<sup>186</sup> BP, Investigations and Legal Proceedings; available at <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings.html>

the same incident, any history of prior breaches, the economic effect of the penalty on the defendant, and “any other matters as justice may require”.<sup>187</sup> The EPA and the courts use these factors to adjust a penalty.

Equivalent offences also exist at State level.

### 3.5.1. Offences and sanctions

As indicated above, in addition to liability for clean-up costs and damages, a responsible party who causes a discharge of oil or hazardous substances in the waters of the US may also be liable for one or more offences under the federal Clean Water Act.

In respect of an unlawful discharge of oil (or unit of a reportable quantity of a hazardous substance)<sup>188</sup>, the Clean Water Act imposed a civil penalty of up to US\$ 1,000 (EUR 730) per barrel of oil or unit of a reportable quantity of hazardous substance. If the unlawful discharge resulted from gross negligence, the maximum was increased to US\$ 3,000 (EUR 2,190) per barrel.<sup>189</sup> In 2004, the EPA increased these maximum amounts to US\$ 1,110 (EUR 811) and US\$ 4,300 (EUR 3,140), respectively, to take account of inflation. From 6 December 2013, they were increased to US\$ 2,100 (EUR 1,533) and US\$ 5,300 (EUR 3,870), respectively.<sup>190</sup>

Other civil penalties under the Clean Water Act include a fine of up to US\$ 25,000 (EUR 18,257) per day for the failure, without sufficient cause, to comply with an order to clean up a spill of oil or hazardous substances, or up to three times the costs incurred by the OSLTF as a result of the failure.<sup>191</sup> The failure or refusal to comply with specified regulations issued under the Clean Water Act was also subject to a civil fine of up to US\$ 25,000 per day.<sup>192</sup> The maximum amounts were increased to US\$ 37,500 (EUR 27,385) per day in 2004. The EPA has issued guidance on criteria for assessing civil penalties, as well as guidance on enforcement and settlement policies.

Criminal penalties established by the Clean Water Act include a fine of not less than US\$ 5,000 (EUR 3,651) or more than US\$ 50,000 (EUR 36,513) per day of a breach of the Act, imprisonment up to three years, or both, for knowingly discharging a pollutant into the waters of the United States without a permit.<sup>193</sup>

### 3.5.2. Proceedings arising from Deepwater Horizon

In December 2010, the DOJ<sup>194</sup> brought an action against BP, Anadarko Petroleum Corporation (which owned a 25 per cent interest in the Macondo well), MOEX Offshore 2007 LLC (MOEX) (which owned

<sup>187</sup> 33 United States Code s 1321(b)(8).

<sup>188</sup> A reportable quantity of a hazardous substance is the quantity that must be notified to the EPA under the Comprehensive Environmental Response, Compensation, and Liability Act if it is released into the environment. See 42 Code of Federal Regulations s 302.3. The Code of Federal Regulations sets out the “hazardous substances”, which are numerous.

<sup>189</sup> 33 United States Code s 1321(b)(7).

<sup>190</sup> The amounts, like other fines, are adjusted for inflation at least every four years pursuant to the Debt Collection Improvement Act of 1996.

<sup>191</sup> 33 United States Code s 1321(b)(7)(B).

<sup>192</sup> *Ibid*, s 1321(b)(7)(C).

<sup>193</sup> 33 United States Code s 1319(c)(2)(A).

<sup>194</sup> The DOJ brings prosecutions on behalf of other federal governmental authorities.

part of the lease for the exploration operations) and Transocean Deepwater, Inc. (Transocean) (the drilling contractor that leased the Deepwater Horizon MODU to BP) for civil penalties under the Clean Water Act and a declaration of liability under the OPA. The case has three phases. The first phase, which was heard for nine weeks between February and April 2013, was part of the action for compensation and involved liability and fault. The second phase, which was heard for three weeks in September and October 2013, concerned the amount of oil that was discharged from the Macondo well into the Gulf of Mexico. The amount of oil is significant due to fines for the discharge being based on the number of barrels of oil under the Clean Water Act (see section 3.5.1 above). The US Government estimated the amount of the discharge at 176 million gallons; BP estimated it at just under 103 million gallons.<sup>195</sup> The third phase, which will begin on 20 January 2015, concerns the assessment of civil penalties.<sup>196</sup> The third phase is expected to last three weeks.<sup>197</sup>

On 4 September 2014, Judge Barbier ruled that the spill had been caused 67 per cent from BP's gross negligence, 30 per cent from Transocean's negligence, and three per cent from Halliburton's negligence. BP has stated that it will appeal the ruling.<sup>198</sup>

Meanwhile, BP and Anadarko challenged the prosecution against them for civil offences under the Clean Water Act. The challenge was on the basis that liability is imposed on the owner of a "facility" "from which oil or a hazardous substance is discharged" "into or upon the navigable waters of the United States".<sup>199</sup> They contended that the well (from which the oil was discharged) was not a "facility" and, thus, they had not committed the civil offence under the Clean Water Act. On 4 June 2014, the Fifth Circuit Court of Appeals agreed with the lower court that the well was a "facility".<sup>200</sup>

On 8 June 2012, the US District Court for the Eastern District of Louisiana approved a settlement between the DOJ and MOEX, in which MOEX agreed to pay US\$ 70 million (EUR 51.119 million) in civil penalties for breaching the Clean Water Act (see section 3.5.1 for a description of offences under the Clean Water Act). Of that amount, US\$ 45 million (EUR 32.862 million) was paid to the OSLTF and US\$ 25 million (EUR 18.257 million) was distributed to the five States affected by the spill, that is, Alabama, Florida, Louisiana, Mississippi and Texas.<sup>201</sup>

The DOJ has also brought criminal proceedings against BP and some of its contractors.

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<sup>195</sup> See Deadlines, meetings set ahead of Jan. BP trial, *Acadiana Business* (30 April 2014); available at <http://www.miamiherald.com/2014/04/22/4073174/deadlines-meetings-set-ahead-of.html>

<sup>196</sup> See US Department of Justice, Environment and Natural Resources Division Releases FY 2013 Accomplishments Report (22 April 2014); available at <http://www.justice.gov/opa/pr/2014/April/14-enrd-414.html>

<sup>197</sup> See BP, US Legal Proceedings; available at <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings/US-legal-proceedings.html>

<sup>198</sup> *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, Findings of Fact and Conclusions of Law; Phase One Trial (MDL 2179 , Section J, District of the Eastern District of Louisiana, 4 September 2014)*; available from <http://www.laed.uscourts.gov/oilspill/oilspill.htm>; see generally Margaret Cronin Fisk, Laurel Brubaker Calkins and Jef Feeley, 'Worst Case' BP Ruling on Gulf Spill Means Billions More in Penalties, *Bloomberg* (5 September 2014); available at <http://www.bloomberg.com/news/2014-09-04/bp-found-grossly-negligent-in-2010-gulf-of-mexico-spill.html>

<sup>199</sup> 33 United States Code ss 1321(a)(2), (b)(3), (b)(7)(A).

<sup>200</sup> *In re Deepwater Horizon; United States v B.P. Exploration & Production, Inc.* (No. 12-30883, 4 June 2014); available from <https://www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-30883-CV0.pdf>

<sup>201</sup> See Jonathan L. Ramseur & Curry L. Hagerty, *Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments 6* (Congressional Research Service, 31 January 2013); available at [www.fas.org/sqp/crs/misc/R42942.pdf](http://www.fas.org/sqp/crs/misc/R42942.pdf)

On 25 July 2013, Halliburton Energy Services, Inc. (the cementing contractor on the Macondo well) agreed to plead guilty to destroying evidence in connection with the Deepwater Horizon incident, to pay the maximum statutory fine available for the offence, to be subject to three years' probation, and to continue to co-operate with the DOJ in its ongoing criminal investigation.<sup>202</sup>

On 29 January 2013, BP pleaded guilty to criminal charges and agreed to pay US\$ 4.25 billion (EUR 3,103,647,500) in penalties. BP had been charged with 14 counts: 11 counts of felony manslaughter, one count of felony obstruction of Congress, one count of criminal breach of the Clean Water Act, and one count of criminal breach of the Migratory Bird Treaty Act. The fine for the Clean Water Act was US\$ 1.495 billion (EUR 1,091,753,650), which was payable to the OSLTF.

On 14 February 2014, Transocean pleaded guilty to a criminal breach of the Clean Water Act. The company admitted that crew members on board the drilling rig, whilst acting at the direction of BP's well site leaders, had been negligent in failing fully to investigate clear evidence that the well was insecure and that oil and gas were flowing into it. Transocean (Transocean Ocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., Transocean Deepwater Inc. and Triton Asset Leasing GMBH) was ordered to pay US\$ 400 million (EUR 292.1 million) and was sentenced to five years' probation.<sup>203</sup> In addition, under a proposed consent decree for civil penalties for breaching the Clean Water Act, Transocean agreed to pay US\$ 1 billion (EUR 730.27 million) over a three-year period, to improve its performance, and to implement specified measures to prevent a recurrence of a release of oil.<sup>204</sup>

The District Court has ruled that Anadarko Petroleum Corporation, which owned 25 per cent of the lease for the Macondo well, was not negligent in connection with its operations at the well.<sup>205</sup>

Further, on 10 December 2012, the District Court approved a settlement between BP and the US Securities and Exchange Commission (SEC) concerning civil securities fraud charges, including statements about the estimated flow rate of the Macondo well. BP agreed to pay US\$ 525 million (EUR 383,391,750), to be used by the SEC to create a fund to provide compensation to investors that were harmed by the fraud.<sup>206</sup>

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<sup>202</sup> See US Department of Justice, Halliburton Agrees to Plead Guilty to Destruction of Evidence in Connection with Deepwater Horizon Tragedy (25 July 2013); available at <http://www.justice.gov/opa/pr/2013/July/13-crm-850.html>

<sup>203</sup> See US Department of Justice, Transocean Pleads Guilty, Is Sentenced to Pay \$400 Million in Criminal Penalties for Criminal Conduct Leading to Deepwater Horizon Disaster (14 February 2013); available at <http://www.justice.gov/opa/pr/2013/February/13-ag-199.html>

<sup>204</sup> See *ibid*; Transocean, Agreement Reached with U.S. Department of Justice on Deepwater Horizon Claims (3 January 2013); available at [http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle\\_pf&ID=1770985](http://phx.corporate-ir.net/phoenix.zhtml?c=113031&p=irol-newsArticle_pf&ID=1770985) The US Department of Justice identifies the company that settled as Transocean Deepwater Horizon, Inc. The Transocean press release identifies the company as Transocean Ltd.

<sup>205</sup> See Jef Feeley and Laurel Brubaker Calkins, BP Partner Anadarko E-Mails Seen Showing Role in Well (22 March 2014); available at <http://www.bloomberg.com/news/2014-03-21/bp-partner-anadarko-e-mails-seen-showing-role-in-well.html>

<sup>206</sup> See Jonathan L. Ramseur & Curry L. Hagerty, Deepwater Horizon Oil Spill: Recent Activities and Ongoing Developments 5 (Congressional Research Service, 31 January 2013); available at [www.fas.org/sqp/crs/misc/R42942.pdf](http://www.fas.org/sqp/crs/misc/R42942.pdf)

Proceedings were also brought against two BP supervisors on the Deepwater Horizon drilling rig for manslaughter. Arguments on an appeal of the lower court's decision were heard by the Federal Fifth Circuit Court of Appeals in July 2014.<sup>207</sup>

### 3.5.3. RESTORE Act

On 6 July 2012, the Resources and Ecosystems Sustainability Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act) entered into force.

The details of the RESTORE Act, which are reflected by the name of the Act itself, are beyond the scope of this report. It is relevant, however, that the Act provides that 80 per cent of any civil and administrative penalties paid under the Clean Water Act by responsible parties in the Deepwater Horizon incident are payable into the Gulf Coast Restoration Trust Fund for the environmental and economic benefit of the region affected by the oil spill.

On 3 January 2013, Transocean Deepwater Inc. agreed with the EPA to plead guilty to breaches of the Clean Water Act. Under the settlement, Transocean Ocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., Transocean Deepwater Inc. and Triton Asset Leasing GMBH agreed to pay US\$ 1 billion (EUR 730.27 million) in civil penalties and US\$ 400 million (EUR 292.108 million) in criminal fines. Eighty per cent of the US\$ 1 billion is payable into the Trust Fund.

### 3.6. Effect of international and regional Conventions on claims for traditional damage from an offshore oil and gas incident

Various international and regional Conventions and agreements have an impact on offshore oil and gas operations in the EU. The following key Conventions and agreements could affect claims for compensation for traditional damage from an offshore oil and gas incident:

- Various marine Conventions could apply in particular circumstances, in particular:
  - the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage (Civil Liability Convention);
  - the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention); and
  - the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage (Bunker Oil Convention);
- The Nordic Environmental Protection Convention between Denmark, Finland, Norway and Sweden; and
- The Offshore Protocol to the Barcelona Convention for the protection of the marine environment and coastal regional of the Mediterranean (Offshore Protocol).

Many other Conventions and agreements concern the pollution of EEA waters. These include the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), and the other Protocols of the Barcelona Convention. These Conventions and agreements are not discussed due to this study being limited to compensation for traditional damage from an offshore oil and gas incident.

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<sup>207</sup> See Associated Press, BP employees should have manslaughter charges reinstated, prosecutors argue (8 July 2014); available at [http://www.nola.com/crime/index.ssf/2014/07/bp\\_employees\\_should\\_have\\_mansl.html](http://www.nola.com/crime/index.ssf/2014/07/bp_employees_should_have_mansl.html)

### 3.6.1. Mobile facilities as “ships” under international marine Conventions

Some offshore oil and gas facilities<sup>208</sup> may be considered to be “ships” under international marine Conventions, depending on the definition of a “ship” in those Conventions. In such a case, the compensation scheme under the Conventions may apply to a pollution incident concerning them. That is, the national law implementing the Conventions could apply instead of other national law that imposes liability for traditional damage, such as the Civil Code.

There are, thus, two significant issues; cover for pure economic loss under the Conventions, which may not be recognised under the tort law of a Target State; and the limitation of liability under the Conventions in Target States that recognise pure economic loss.

A wide range of floating units are deployed for offshore oil and gas activities from which accidents resulting in pollution can occur.<sup>209</sup> Such crafts can be first “ships”, which may be defined as “ship-shaped, self-propelled” and that can “navigate regularly between two locations, without any permanent or semi-permanent attachment to surface or subsea facilities of the seabed”.<sup>210</sup> There are also floating offshore units which differ from “ships”, in terms of construction or function: these crafts are “neither ship-shaped nor self-propelled, and as such do not navigate the seas on unassisted voyages in the same manner as trading ships.”<sup>211</sup> Further, there is a category of floating offshore craft which falls between the two previous categories, and which includes ship-shaped exploration, production, storage and/or offloading craft, such as drill ships, FPSOs and Floating Storage and Offloading Units (FSO).<sup>212</sup>

Still further, there are MODUs, which are covered by the OSD “when they are stationed in offshore waters for drilling, production or other activities associated with offshore oil and gas operations” (see recital 32 and article 2(19)).

The international nature of the issue as to whether a MODU and other offshore oil and gas facilities is a “ship” is evidenced by the decision as to whether, under US law, Deepwater Horizon was a “vessel”. Judge Barbier, the judge for the cases arising out of the Deepwater Horizon incident, concluded that “longstanding case law ... establishes conclusively that the Deepwater Horizon, a mobile offshore drilling unit, was a vessel” and thus subject to US general maritime law.

Judge Barbier noted that:

“At all material times, the vessel was afloat upon the navigable waters of the Gulf of Mexico. ... the DEEPWATER HORIZON had no legs or anchors connecting it to the seabed. Its only physical ‘attachment’ to the wellhead was the 5,000 foot string of drill

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<sup>208</sup> The OSD covers mobile offshore drilling

<sup>209</sup> There are also, of course, fixed oil production platforms. The International Association of Drilling Contractors commented that “the volumetric pollution risk from a fixed oil production platform which is stationed for a lifetime is more significant than from a mobile drilling installation which is stationed for several months at any given location”. Comment by Taf Powell, International Association of Drilling Contractors (30 September 2014).

<sup>210</sup> Paul Dean and Simon Shaddick (Holman Fenwick Willan). The legal and regulatory treatment of FPSOs, with a focus on limitation of liability, July 2012, p.2; available at [http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20\[A4%206pp\]%20July%202012.pdf](http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20[A4%206pp]%20July%202012.pdf)

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

pipe. ... The DEEPWATER HORIZON was practically capable of maritime transportation, and thus is properly classified as a vessel”.<sup>213</sup>

In respect of whether offshore oil and gas facilities are “ships”, Sea Alarm Foundation, an NGO, stressed that expanding offshore activities will also increase the intensity of maritime activities to supply and maintain offshore installations. In turn, these activities, e.g. the activities of supply vessels, moving from an installation to another and also to the shores of some States or the activities of supplying helicopters, add to the overall risk profile of offshore installations.<sup>214</sup>

Claims for pollution damage from FPSOs used for offshore oil and gas operations may be covered by the Civil Liability Convention and the Fund Convention. Further, the Bunker Oil Convention, which has a particularly broad definition of a “ship”, may in certain circumstances cover MODUs in addition to FPSOs.

In this regard, the International Association of Drilling Contractors (IADC) pointed out that drilling contractors are liable for damage caused by the rig itself (e.g. if the rig causes damage to the environment through loss of diesel fuel), but everything coming out of the well would be the liability of the licensee. Thus, drilling contractors generally do not face liability for environmental damage and third-party damage. In addition, when drilling rigs are moved from one location to another, they are considered vessels and the international shipping conventions will apply during this transit of the drilling material. Consequently, drilling contractors are more concerned with insuring the asset itself (i.e. the rig – which can cost billions of US dollars to build – and all drilling materials).<sup>215</sup>

#### **3.6.1.1. 1992 Civil Liability and 1992 Fund Conventions**

The Civil Liability Convention provides that the “owner” (that is, the registered owner) of a “ship” is strictly liable for “pollution damage”. The term “pollution damage” is defined, in pertinent part, as “loss or damage caused ... by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur” (article I(6)(a)).

The word “oil” is defined as “persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship” (that is, not including non-persistent oil such as gasoline, light diesel oil, or kerosene) (article I(6)).

The word “ship” is defined as:

“any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard” (article I(1)).

The Fund Convention, which provides a second tier of compensation above the limit of compensation for which the owner of a ship is liable under the Civil Liability Convention, has the same definitions for “owner”, “pollution damage”, “oil”, and “ship” as the Civil Liability Convention (article 1(2)).

<sup>213</sup> *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico*, 808 Federal Supplement 2d 943, (Eastern District Louisiana, 2011); available at <https://www.courtlistener.com/laed/bQip/in-re-oil-spill-by-the-oil-rig-deepwater-horizon/>; see John Costonis, *And Not a Drop to Drink: Admiralty Law and the BP Well Blowout*, Louisiana Law Review, vol. 73(1), 1 (2012).

<sup>214</sup> Telephone interview with Hugo Nijkamp, Sea Alarm Foundation, 28 April 2014.

<sup>215</sup> Telephone interview with the International Association of Drilling Contractors (IADC), 28 March 2014.

The owner of a ship is not liable under the Civil Liability Convention if he proves that the pollution damage:

- “(a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function” (article III(2)).

The Fund Convention is not liable to pay compensation if it proves that:

“the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship or other ship owned or operated by a State and used, at the time of the incident, only on Government non-commercial service” (article 4(2)).

Resolution of the issue in a Target State whose law does not impose liability for pure economic loss could be crucial because claimants, such as persons in the fisheries and tourism industries, would be able to recover compensation only if the offshore oil and gas facility was concluded to be a ship. As discussed below, however, all such claims would not be covered.

Claims for compensation that have been covered by the Conventions following oil spills from ships include claims by fishermen and the tourism industry. This does not mean, however, that the Conventions specifically provide compensation for pure economic loss. Professor Palmer has concluded that they do not do so. Instead, he states, courts have allowed claims for pure economic loss in the form of lost revenues because the damage to the claimants was deemed to be “caused by contamination”, the core purpose of the Conventions. Professor Palmer further commented that it was, therefore, “somewhat illogical” that the Fund awarded compensation to “salmon farmers, fish processors, repairers of fishing boats, divers maintaining salmon cages, collectors of offal from fish processors, ice producers supplying salmon farmers, and manufacturers of boxes for processed fish” whilst denying compensation for “the claims of employees in fish processing plants whose working hours were reduced ... on the basis that their lost wages were not due to the ‘contamination’”.<sup>216</sup>

The issue as to whether various offshore oil and gas facilities are “ships” under the marine Conventions dates back to the 1990s, when vessels, including FPSOs, were increasingly used for offshore storage and transfer operations.

In 1999, a Working Group established by the Assembly of the International Oil Pollution Compensation Funds (IOPCF) concluded that the above vessels fell within the meaning of a “ship” under the Conventions only when they were being used to carry oil as cargo to or from a port or oil terminal outside the oil field in which they generally operated. If they left an offshore oil field for operational reasons or the avoidance of bad weather, the Working Group considered that they were not a “ship” within the meaning of the Conventions. The Assembly subsequently endorsed the Working Group’s

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<sup>216</sup> Vernon Valentine Palmer, *The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability*, Penn State Law Review, vol. 116, 140 and n.154 (2011); available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf>



recommendations with the proviso that the application of the Conventions would depend on the circumstances of individual cases.<sup>217</sup>

The Assembly's position does not, however, bind national courts.<sup>218</sup> For example, in June 2006, the Greek Supreme Court concluded that a vessel that was anchored in Piraeus harbour and that stored and processed oily waste from ships for resale was a "ship" under the Conventions. The vessel did not have an engine or other means of propulsion and had been anchored in the harbour for over five years. Oil from the vessel had been released into the harbour following an explosion and fire on board. The court concluded that a tanker or seaborne craft that had the capability of movement by self-propulsion or towage, as well as the ability to carry oil in bulk as cargo, is a "ship" regardless of whether the incident occurred whilst the vessel was being used to carry the oil.<sup>219</sup> In October 2006, the Assembly of the IOPCF announced that its definition of a "ship" is the correct definition.<sup>220</sup>

The uncertainty created by the conflicting conclusions of the Greek Supreme Court and the Assembly of the IOPCF concerning the definition of a "ship" under the Conventions remains unsettled. For example, in April 2013, the Netherlands issued a note to the Assembly in which it stated that it did "not want to reopen the discussion of the Executive Committee decision or the judgement of the Greek Supreme Court". It stated, however, that it was "of the opinion that victims of these kinds of incidents should be compensated. Therefore the Netherlands would support an interpretation of the definition of 'ship' in line with the Greek judgment".<sup>221</sup>

The Netherlands' position concerning the broad definition of a "ship" is in line with the definition of a "ship" under Dutch law as "all objects, not being aircraft, which as appears from their construction are destined to float, and which float or have floated".<sup>222</sup>

### 3.6.1.2. Bunker Oil Convention

The definition of a "ship" under the Bunker Oil Convention is broader than the definition under the Civil Liability and the Fund Conventions. Under the Bunker Oil Convention, a "ship" is defined as "any sea-going vessel and seaborne craft of any type whatsoever" (article 1(1)). The Bunker Oil Convention may, thus, apply not only to FPSOs but also, in some cases, to MODUs.<sup>223</sup>

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<sup>217</sup> See James Harrison, Conflicting Interpretations – The *Slops* Incident and the Application of the International Oil Pollution Liability and Compensation Regime to Offshore Storage and Transfer Operations, (2008) *Journal of Environmental Law*, vol. 20(3), 455, 461-62 (referring to Record of Decision of the Forty-First Session of the Executive Committee, IOPCF Document 92FUND/EXC.34/7, para 3.2.6 (27 June 2008)).

<sup>218</sup> See Peter Wetterstein, Environmental liability in the offshore sector with special focus on conflict of laws (part I), *Journal of International Maritime Law*, vol. 20, 30, 38 (2014).

<sup>219</sup> See *ibid.*

<sup>220</sup> See *ibid.*, 463 (2008).

<sup>221</sup> International Oil Pollution Compensation Funds, Definition of "Ship" under the 1992 Civil Liability and 1992 Fund Conventions, para 5.2.3 (IOPC/APR13/7/1/Rev.1, 15 April 2013).

<sup>222</sup> See Response by the Nederlandse Vereniging voor Zee- en Vervoersrecht (NVZV) (Dutch Maritime and Transport Association) to the CMI Questionnaire dated 19 July 2013 with regard to offshore activities – pollution liability and related issues; available at <http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Offshore%20Activities/14.NETHERLANDS%20Answer%201st.%20Questionnaire.pdf>

<sup>223</sup> See Response to the Offshore Activities questionnaire from the Norwegian Maritime Law Association (25 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:YJGh21q4w7YJ:www.sjorettforeningen.no/site/wp->

The Bunker Oil Convention, which entered into force on 21 November 2008, applies to a discharge of “bunker oil” that causes “pollution damage” from a spill of fuel oil from a “ship”.

The term “bunker oil” is defined by the Convention as “any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil” (article 1(5)).

The term “pollution damage” is defined as:

- “(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of bunker oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
- (b) the costs of preventive measures and further loss or damage caused by preventive measures” (article 1(9)).

The person who may be liable under the Bunker Oil Convention is the “shipowner”, which term is defined as “the owner, including the registered owner, bareboat charterer, manager and operator of the ship” (article 1(3)).

The shipowner is not liable for pollution damage if he proves that:

- “the damage resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character; or
- The damage was wholly caused by an act or omission done with the intent to cause damage by a third party; or
- The damage was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function” (article 3(3)).

The limits of liability for the Bunker Oil Convention are the limits of liability in the Convention on Limitation of Liability for Maritime Claims, 1976, as amended by the LLMC 1996 Protocol (LLMC). The LLMC limits the liability of a “shipowner” (defined as “the owner, charterer, manager and operator of a seagoing ship”) for claims for bodily injury, property damage and economic loss. New limits are expected to come into force on 19 January 2015 unless there are any objections.<sup>224</sup>

There is, however, no definition of “ship” in the LLMC. Article 15(4) nonetheless provides:

“The Courts of a State Party shall not apply this Convention to ships constructed for, or adapted to, and engaged in, **drilling**:

- (a) When a State has established under its national legislation a higher limit of liability than that otherwise provided for in Article 6; or

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[content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk](http://content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk); see also Steven Rares, An international convention on offshore hydrocarbon leaks paras 32-38 [2012] Federal Judicial Scholarship 14; available at <http://www.fedcourt.gov.au/publications/judges-speeches/justice-ares/ares-j-20121019/Rares-J-20121019.rtf>

<sup>224</sup> See Increase in LLMC Limits; available at <http://www.ipta.org.uk/llmc%20limits.htm>

- (b) When that State has become a party to an international convention regulating the system of liability in respect of such ships.” (emphasis added)

Article 15(5) further provides that:

“This Convention shall not apply to:

- (a) Air-cushion vehicles;
- (b) **Floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof.**” (emphasis added)

It is unlikely that most FPSOs will be considered as “floating platforms”, as they are ship-shaped in their construction. Arguments can nonetheless be developed for the two different interpretations. In fact, the word “ship” under the LLMC can be interpreted as applying to the physical attributes of a FPSO and therefore the characteristics of its construction. Another interpretation can focus more on the functions of a FPSO, which are intended to be moored at a single location in order to produce or store hydrocarbons. A FPSO under this interpretation does not operate as a “ship” and liability cannot be limited.<sup>225</sup>

Nonetheless, it has been highlighted that without further guidance in the text of the Convention or from a court interpreting the text, it would be impossible to assess whether or not a FPSO or another “vessel” can be considered as a “ship” under the LLMC. Moreover, a great variety of FPSOs are deployed for offshore oil and gas activities. An approach *in concreto* would therefore probably be needed in order to assess whether, in each case, a FPSO can be considered to be a “ship” according to the LLMC.<sup>226</sup>

The limits of liability under the LLMC are determined by the tonnage of a ship subject to the LLMC.<sup>227</sup> Thus:

“Taking as an example a typical VLCC-sized tanker of 160,000GT, the limit of liability currently available in the United Kingdom for physical damage claims is about US\$63 million under the LLMC, and US\$135 million under the CLC. The scale of recent incidents in the offshore energy sector demonstrates that these sums are substantially lower than the third-party liabilities that may be faced in the event of a significant incident. The tragic events at the Macondo field in 2010 are a case in point.”<sup>228</sup>

Most Target States are parties to the LLMC. Consequently, the LLMC will apply in those States where it is in force. Whether MODUs fall within the definition of a ship under the LLMC is debatable and may vary from State to State depending upon the way they enacted the LLMC. Some States have clearly

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<sup>225</sup> Paul Dean and Simon Shaddick (Holman Fenwick Willan). The legal and regulatory treatment of FPSOs, with a focus on limitation of liability, with a focus on limitation of liability, July 2012, p.4; available at [http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20\[A4%206pp\]%20July%202012.pdf](http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20[A4%206pp]%20July%202012.pdf)

<sup>226</sup> Ibid.

<sup>227</sup> See Increase in LLMC Limits; available at <http://www.ipta.org.uk/llmc%20limits.htm>

<sup>228</sup> Paul Dean and Simon Shaddick (Holman Fenwick Willan). The legal and regulatory treatment of FPSOs, with a focus on limitation of liability, with a focus on limitation of liability, July 2012, p.3; available at [http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20\[A4%206pp\]%20July%202012.pdf](http://www.hfw.com/downloads/Client%20Brief%20-%20FPSOs%20[A4%206pp]%20July%202012.pdf)

decided that the Convention applies. Drilling ships however are subject to the LLMC unless the State expressly opted out.<sup>229</sup>

In Norway, the Maritime Code (Chapter 21, section 507) provides that if the relevant floating unit is a drilling platform or a similar mobile construction and is not regarded as a ship and intended for use in exploitation of subsea natural resources, Chapter 9 (Limitation of liability) of the Maritime Code will then apply. Nonetheless, the limit for personal injury for claims will be 36 million Special Drawing Rights (SDRs),<sup>230</sup> and 60 million SDRs for other claims and clean-up costs.<sup>231</sup>

The issue of limitation of liability under the international shipping conventions is an important one as, as pointed out by one interviewed stakeholder, floating structures will be used much more in the future (it is already the case in the North Sea), especially in Europe where it is not necessary to drill as deep into the seabed in order to extract hydrocarbons. In fact, the risk involved with these types of floating structures is as high as the one presented by drilling rigs.<sup>232</sup>

Insurance for FPSOs, drilling rigs, drill ships and other such units can be covered by the International Group of P&I Clubs under poolable P&I cover (that is, covered by the pooling arrangement of the P&I Clubs) until they begin operations. Thus, whilst they are being towed to an oil or gas field or are navigating to that field, poolable P&I cover applies. Once they begin carrying out drilling and production operations, a P&I Club may offer insurance but this insurance is not poolable. In effect, the operator of the unit would be buying back cover that is excluded under the poolable cover.<sup>233</sup>

### 3.6.2. Nordic Environmental Protection Convention

On 19 February 1974, Denmark, Finland, Norway and Sweden enacted the Nordic Environmental Protection Convention, which entered into force on 5 October 1976.

The purpose of the Convention is to provide the right to a person in a Contracting State who is, or may be, affected by a nuisance caused by environmentally harmful activities in a neighbouring Contracting State to bring an action in a court or administrative authority of that Contracting State against the person who is carrying out “environmentally harmful activities”.

The term “environmentally harmful activities” means a

“discharge from the soil or from the buildings or installations of solid or liquid waste, gas or any other substance into water courses, lakes or the sea and the use of land,

<sup>229</sup> Telephone interview with Fabien Lerede, Syndicate Claims Director, Charles Taylor & Co. Limited, as agents for the managers of The Standard Club Europe Ltd, 18 March 2014.

<sup>230</sup> The currency value of SDRs is calculated from the market exchange rates of a basket of major currencies, that is, the US dollar, the Euro, the Japanese yen, and pounds sterling. The currency value is calculated daily when the International Monetary Fund is open for business. The basket of currencies is reviewed and adjusted every five years. See International Monetary Fund, SDR Valuation; available at <http://www.imf.org/external/np/tre/sdr/basket.htm>

<sup>231</sup> Gaute Gjelsten (Wikborg Rein, Lawyers). Limitation of liability for pollution damage for offshore vessels and units in the North Sea (Norwegian sector), in Standard Bulletin (The Standard), Offshore special edition (October 2010), pp. 12-13; available at <http://www.standard-club.com/media/54049/StandardBulletinOffshoreSpecialedition14October2010.pdf>

<sup>232</sup> Telephone interview with Fabien Lerede, Syndicate Claims Director, Charles Taylor & Co. Limited, as agents for the managers of The Standard Club Europe Ltd, 18 March 2014.

<sup>233</sup> See Barbara Jennings, Offshore Contracting, Standard Bulletin (November 2008); available at [http://www.standard-club.com/media/23525/14292\\_SB\\_report\\_NOV\\_08\\_disclaimer.pdf](http://www.standard-club.com/media/23525/14292_SB_report_NOV_08_disclaimer.pdf)

the seabed, buildings or installations in any other way which entails or may entail environmental nuisance by water, pollution or any other effect on water conditions, sand drift, air pollution noise, vibration, changes in temperature, ionizing radiation, light, etc.” (article 1).

The Convention specifically applies to the continental shelf (article 13). It, therefore, applies to environmentally harmful activities from offshore oil and gas operations.

In addition to providing the right to bring an action to question the permissibility of the activities, including measures to prevent them, the Convention provides the right to bring proceedings for damage caused by the activities. In such a case, the issue of compensation is not to be judged by rules that are less favourable to the injured party than the compensation rules in the State in which the activities are being carried out (article 3).

A Protocol to the Convention, signed on the same date as the Convention, provides as follows:

“The right ... for anyone who suffers injury as a result of environmentally harmful activities in a neighbouring State to institute proceedings for compensation before a court or administrative authority of that State shall, in principle, be regarded as including the right to demand the purchase of his real property”.

The Convention does not seek to harmonise the liability systems of Denmark, Finland, Norway and Sweden. Nor does it introduce a specific liability system in those States. Instead, the Convention authorises actions in any of the Contracting States by a person who may be, or is, harmed by environmentally harmful activities carried out in them. The Contracting Parties were able to agree to the grant of this right because their relevant liability systems were, and still are, based on similar principles of liability. That is, the Convention would not have been entered into if the applicable legislation between the Contracting States had not been largely homogeneous.<sup>234</sup>

Following the entry into force of the Convention, Norway included provisions in its Petroleum Licensing Act explicitly to provide persons in Denmark, Finland and Sweden with the right to claim compensation for pollution damage that originates on the Norwegian continental shelf and harms such persons in those States.<sup>235</sup>

For whatever reason, the Convention has been largely dormant. The only case in which the Convention appears to have been applied is a 2002 case that involved a Norwegian and a Swedish environmental NGO. The NGOs applied jointly to the District Courts in Halden and Sarpsborg, located in Norway near the Swedish border, to claim damages from two major industrial companies on the basis that the companies had polluted the coastal area in Southeastern Norway and Western Sweden for many years. There was no dispute that the Swedish NGO had standing to bring the action under

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<sup>234</sup> See Peter Wetterstein, Recent Trends in the Development of International Civil Liability, *Nordic Journal of International Law*, vol. 60, 49, 61 (1991); Economic Commission for Europe, International Working Group on Civil Liability, The Relationship Between Article 9(3) of the Convention on Industrial Accidents and the Forthcoming Protocol on Liability, Working Paper submitted by the delegation of Norway section III (MP.WAT/AC.3/2002/WP.1; CP.TEIA/AC.1/2002/WP.1, 14 January 2002).

<sup>235</sup> Act of 29 November 1996 No. 72 relating to petroleum activities, as amended, section 7-2 (Norway); available at: <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/>

the Convention in Norway or that the Norwegian courts had the power to rule on damage that occurred in Sweden.<sup>236</sup>

One commentator has stated that forum shopping may have been involved because the rights of environmental groups in Norway were stronger than those in Sweden.<sup>237</sup>

### 3.6.3. Offshore Protocol

The Offshore Protocol is one of seven Protocols to the Barcelona Convention for the protection of the marine environment and coastal region of the Mediterranean. The Convention, which entered into force on 12 February 1978, was subsequently revised, with the revised version entering into force on 9 July 2004. A key purpose of the Barcelona Convention is, as its name implies, protection of the marine and coastal environment of the Mediterranean and sustainable development in the Mediterranean region.

Article 7 of the Barcelona Convention provides that “[t]he Contracting Parties shall take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil”. Article 12 of the original Convention (Article 16 of the revised Convention) provides that “The Contracting Parties undertake to cooperate as soon as possible in the formulation and adoption of appropriate procedures for the determination of liability and compensation for damage resulting from the pollution of the marine environment deriving from violations of the provisions of this Convention and applicable Protocols”.

The EU is a party to the Barcelona Convention, as are Croatia, Cyprus, France, Greece, Italy, Malta, and Spain (that is, all the Target States that border on the Mediterranean Sea) and Slovenia, plus 14 non-EU States that also border on the Mediterranean Sea.

The purpose of the Offshore Protocol is to protect the marine and coastal environment of the Mediterranean and sustainable development in the Mediterranean region. Cyprus is the only Target State that has ratified the Offshore Protocol (see Cyprus summary, section 1.5).

The Offshore Protocol entered into force on 24 March 2011. On 17 December 2012, the Council issued a Decision to approve the EU’s accession to the Offshore Protocol.<sup>238</sup> The Council Decision noted that competent authorities in Member States that ratified the Offshore Protocol should be responsible “for certain detailed measures laid down in [it]”. The liability and compensation provisions in Article 27 of the Offshore Protocol are some of these measures. Article 27, like Article 16 of the Barcelona Convention, is drafted in broad terms; it does not directly require a party to the Convention or Protocol to enact legislation that is drafted pursuant to those articles.

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<sup>236</sup> See Economic Commission for Europe, International Working Group on Civil Liability, The Relationship Between Article 9(3) of the Convention on Industrial Accidents and the Forthcoming Protocol on Liability, Working Paper submitted by the delegation of Norway section II (MP.WAT/AC.3/2002/WP.1; CP.TEIA/AC.1/2002/WP.1, 14 January 2002).

<sup>237</sup> See CMS Cameron McKenna (Paul F. Sheridan), Study of Civil Liability Systems for Remedying Environmental Damage, Final Report (DG ENV Contract B4/3040/94/000665/MAR/H1, 31 December 1995) (unnumbered pages).

<sup>238</sup> Council Decision of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil. OJ L 4/13 (9 January 2013); available from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2013:004:TOC>

Article 27 of the Offshore Protocol provides that:

- “1. The Parties undertake to cooperate as soon as possible in formulating and adopting appropriate rules and procedures for the determination of liability and compensation for damage resulting from the activities dealt with in this Protocol, in conformity with Article 12 of the Convention.
2. Pending development of such procedures, each Party:
  - (a) Shall take all measures necessary to ensure that liability for damage caused by activities is imposed on operators, and they shall be required to pay prompt and adequate compensation;
  - (b) Shall take all measures necessary to ensure that operators shall have and maintain insurance cover or other financial security of such type and under such terms as the Contracting Party shall specify in order to ensure compensation for damages caused by the activities covered by this Protocol”.

In 1978, the Mediterranean Action Programme (MAP), which was established by the United Nations Environment Programme and which assists Mediterranean countries, among other things, in assessing and controlling marine pollution and formulating national environmental policies, began drafting guidelines on liability and compensation under Article 16 of the Barcelona Convention. The Contracting Parties to the Barcelona Convention adopted the guidelines, which are non-binding, at the 15<sup>th</sup> Ordinary Meeting on 18 January 2008.<sup>239</sup> The guidelines “apply to the activities to which the Barcelona Convention or any of its Protocols applies” and are subject to “existing global and regional environmental liability and compensation regimes ... bearing in mind the need of ensuring their effective implementation in the Mediterranean Sea Area”.<sup>240</sup> The guidelines thus apply to the Offshore Protocol as well as the Convention.

The guidelines cover traditional damage and environmental damage. Further Guideline 28:

“opens up the possibility, once 5 years have elapsed since the date of the adoption of the Guidelines, of instituting a mandatory insurance policy, as well as Guideline 29, on the possibility of creating [and] establishing a Mediterranean Compensation Fund to ensure compensation in cases where the Operator cannot be identified, or when the state has not taken preventive measures in emergency situations and is not reimbursed for the cost of these measures”.<sup>241</sup>

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<sup>239</sup> Decision IG 17/4: Guidelines for the Determination of Liability and Compensation for Damage resulting from Pollution of the Marine Environment in the Mediterranean Sea Area, Annex, p. 133; available at [http://195.97.36.231/acrobatfiles/08IG17\\_10\\_Ann5\\_Decisions\\_Liability\\_Eng.pdf](http://195.97.36.231/acrobatfiles/08IG17_10_Ann5_Decisions_Liability_Eng.pdf); see Tullio Scovazzi, *The Mediterranean Guidelines for the Determination of Environmental Liability and Compensation: The Negotiations for the Instrument and the Questions of Damage that Can Be Compensated*, (2009) *Max Planck Yearbook of United Nations Law*, vol. 13, pp. 183, 184.

<sup>240</sup> United Nations Environment Programme, *Mediterranean Action Plan, Draft Guidelines on liability and compensation for damage resulting from pollution of the marine environment in the Mediterranean Sea area*, pp. 3-4 (UNEP(DEPI)MED WG.319.3 (8 June 2007)).

<sup>241</sup> United National Environment Programme, *Summary of the responses of the Contracting Parties to the Report Survey on the implementation of the MAP guidelines concerning liability and damage reparation*, p. 5 (UNEP(DEPI)MED WG 364/3, 28 November 2011).

### 3.7. Conflict of laws issues

As a general rule, a person who suffers damage from an accident originating in another Target State has the right to bring an action to recover damages. In such an event, conflict of laws issues arise.

There are three such issues:

- Jurisdiction – that is, will a court in the Target State of the accident or the Target State of the injury hear the case;
- Choice of laws – that is, which law will apply to the issue; the law of the Target State of the accident or the Target State of the injury; and
- If the case is heard in the Target State of the injury, but the assets of the tortfeasor are in another Target State (or, perhaps, a non-Target State), will the law of that Target State recognise and enforce the foreign judgment?

The issues are critical due to the wide variety of national liability systems that may apply to claims for traditional damage due to pollution from an offshore oil and gas incident. Some national liability systems recognise pure economic loss to varying degrees; others do not recognise it. No two national liability systems in the 20 Target States are the same.

Further, as indicated by the 17 hypotheticals in section 3.8.2 below, claims for loss of income would not necessarily be limited to persons in the Target State in whose maritime territory the oil spill occurred. Further, the oil spill may affect more than one Target State, as well as Member States of the EU that are not Target States.

This section briefly reviews the first two issues.

#### 3.7.1. Jurisdiction

A claim for compensation from offshore oil and gas operations may not necessarily be brought in the Target State in whose territorial waters or on whose continental shelf a spill occurs. For example, the operator of the *Piper Alpha* platform, which was located in the North Sea off Scotland, was Occidental Petroleum (Caledonia) Limited, whose parent company was based in Texas. Following the tragic explosion and fire in 1988 in which 167 men died and 62 were injured, claims were brought in Texas and Scotland. The reason for the Texas claims was the much higher level of damages under Texas law than under Scots law.

Within the EU, except for Denmark, Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended (Brussels I),<sup>242</sup> applies to determine the jurisdiction for a transboundary claim.

Article 5 of Brussels I provides, in pertinent part, that:

“A person domiciled in a Member State may, in another Member State, be sued ...

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur”;

<sup>242</sup> OJ L 12/1 (16 January 2001). A consolidated version, dated 14 May 2010, is available from Europa, Summaries of EU Legislation, Jurisdiction, recognition and enforcement of judgments in civil and commercial matters (“Brussels I”); available from [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/judicial\\_cooperation\\_in\\_civil\\_matters/l33054\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33054_en.htm)



4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings". ...

Persons who suffer traditional damage from an offshore oil and gas incident may also bring claims in jurisdictions outside the EEA. The issue as to whether Texas courts would accept jurisdiction was not reached due to a compromise, called the “mid-Atlantic formula” (or “mid-Atlantic compromise”) between the claimants and Occidental. Following payment of the claims, Occidental brought contribution actions against 24 contractors for a total of 146 separate law suits in Scottish courts, of which seven claims were litigated as test cases. The contribution actions were resolved in 2002, when the House of Lords issued a ruling; some of the parties having settled by that time.<sup>243</sup>

In comments to the European Commission’s public consultation on Improving Offshore Safety in Europe, London-based re/insurers commented that the litigation in the *Piper Alpha* case was the consequence of decisions made by operators and their contractors and their re/insurers. They further commented that the Commission could not restrict such persons’ ability to bring legal actions because it would be contrary to the Commission’s duty to facilitate access to justice in breach of article 67(4) of the Treaty on the Functioning of the European Union.<sup>244</sup> Article 67(4) provides that “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters”.

Contribution actions as a result of a spill from offshore oil and gas operations should not affect the payment of compensation to persons who suffer harm as a result of the spill. The potential remains, however, that such persons may bring claims in the courts of the US or other jurisdictions rather than the State in which the harm was suffered, whether or not such claims are successful. This potential may arise, in particular, in a Target State in which claims for pure economic loss are not recognised.

### 3.7.2. Choice of laws

Article 7 of Council Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II)<sup>245</sup> provides a person who claims compensation for damage that results from environmental damage from a transboundary incident in the EU with a choice of basing the “claim on the law of the country in which the event giving rise to the damage occurred” or the law of the country in which the damage is suffered”. Article 7 is an exception to the general provision, article 4, which provides in pertinent part that “Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur” (Rome II, article 4(1)).

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<sup>243</sup> *Caledonia North Sea Ltd v British Telecommunications Plc* (2002) SC 117 (House of Lords) (UK); available from <http://www.bailii.org/uk/cases/UKHL/>; see Public Consultation: Improving Offshore Safety in Europe, Joint response by Lloyd’s, the Association of British Insurers and the International Underwriting Association; available at <http://webcache.googleusercontent.com/search?q=cache:gIX2vJPEPYIJ:https://www.abi.org.uk/~media/Files/Documents/Consultation%2520papers/2011/05/EC%2520offshore%2520liability%2520consultation%2520-%2520May%25202011.ashx+&cd=1&hl=en&ct=clnk&gl=uk>

<sup>244</sup> Public Consultation: Improving Offshore Safety in Europe, Joint response by Lloyd’s, the Association of British Insurers and the International Underwriting Association.

<sup>245</sup> OJ L 199/40 (31 July 2007).

Rome II applies to all Member States in the EU, except Denmark which has opted out of it.<sup>246</sup>

A major purpose of Rome II is “to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought” in order to ensure the proper functioning of the internal market of the EU.

As indicated above, however, Rome II departs from this general rule in cases of environmental damage by providing the person who suffers damage with a choice of law. In this respect, Recital 25 states that “Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised”.

As the EU Economic and Social Committee remarked, “[t]he Commission is pursuing objectives which actually have nothing to do with conflict of laws, but which are rather intended to encourage potential environmental polluters to take environmental protection very seriously by threatening them with the application of a more stringent system of substantive law”.<sup>247</sup>

Not only does the application of Rome II mean that a law that recognises claims for pure economic loss may be applied in a Target State that does not recognise such loss, it also means that a broader scope of pure economic loss claims may be covered. Further, it means that “the law applicable under the Regulation and not the law of the forum must be applied to determine the basis of assessment of a monetary award”. That is, the amount of recoverable damages may also differ depending on the applicable law.<sup>248</sup>

### 3.8. Differences in liability systems between Target States for claims for traditional damage

The law that would apply to claims for compensation for traditional damage from pollution caused by an offshore oil and gas incident in EEA waters is predominantly tort law. As discussed in this report, it is rare for a Target State to have enacted specific legislation for such compensation. Even Norway, the only Target State that has enacted legislation specifically to provide compensation to businesses in the fisheries industry in the event of an offshore oil and gas incident, has not enacted similar legislation for claims by businesses in the tourism industry or other coastal industries.

This section discusses differences in tort law in the Target States. It then discusses the recognition (or not) of pure economic loss in the Target States, including a discussion of significant differences in the scope of pure economic loss recognised by those Target States that recognise it. The section then

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<sup>246</sup> Rome II, article 1(4), article 7.

<sup>247</sup> Willibald Posch, Some observations on the law applicable to transfrontier environmental damage, 33, 50, in *Environmental Liability and Ecological Damage in European Law* (Monika Hinteregger, editor, Cambridge University Press, 2008) (quoting Opinion of the European Economic and Social Committee, OJ 2004 C 241/4, para 5.4).

<sup>248</sup> See *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, paragraph 17 (Court of Appeal) (England) (quoting Andrew Dickinson, *The Rome II Regulation; A Commentary*, paragraph 14.19 (Oxford University Press, 2009)); available from <http://www.bailii.org/ew/cases/EWCA/Civ/2014/>

applies this discussion to 17 hypotheticals to indicate differences in liability regimes across the EEA for claims for pure economic loss from pollution from an offshore oil and gas incident.

Neither this section, nor any other section of the final report, discusses in any detail the liability regimes for compensation concerning fatalities or serious personal injury to people who are on an offshore installation when an accident occurs. Such accidents include the Alexander Kielland platform, which capsized in Norway's Ekofisk oil field during a storm in March 1980 with the loss of 123 lives, and the Piper Alpha platform, on which explosions and fire in July 1988 caused the loss of 167 lives. The Deepwater Horizon incident also resulted in the deaths of 11 employees of M-I Swaco, a division of Schlumberger, an oil field services company, and Transocean.<sup>249</sup> Some of the other employees on the rig also suffered injuries from the blowout and explosion on the Deepwater Horizon drilling rig.

All Target States have effective liability regimes for claims for compensation arising from fatalities or serious personal injury suffered by employees. Further, most Target States require employers, including operators of offshore oil and gas installations and their contractors, to have financial security to cover such claims. Disputes arising out of such accidents may involve the law applicable to such claims (due to its potential effect on the amount of compensation) (see section 3.7.2 above), but not the operator's or contractor's liability for, or its ability to pay, compensation for them.

#### **3.8.1. Tort law**

The tort law of the Target States has evolved over hundreds of years and is part of the jurisprudence of each Target State. It is not possible simply to compare the words or provisions in the Civil Code of one Target State with the same words in the Civil Code of another Target State and conclude that they have the same meaning; they do not necessarily do so. Indeed, in most, if not virtually all, cases, they do not do so.

Courts construe the meaning of words and provisions in Civil Codes, Laws on Obligations, Laws on Wrongs, and similar legislation in the context of the tort law of that Target State. The tort law of some Target States may well have similarities to the tort law of other Target States, but it will not be identical.

There are also differences in the way in which legislation is enacted. Iceland, for example, follows the tradition of Nordic States by having relatively short legislation accompanied by explanatory memoranda. Other Target States have lengthier legislation and no explanatory memoranda. The common law in Target States such as Cyprus, Malta, Ireland and the UK differs again. Indeed, tort law in the UK is based on judge-made law; there is no Civil Code or other general tort legislation to which to refer.

Another reason for differing interpretations is the difference in legal procedures in the Target States, that is, in the way in which the courts handle claims.<sup>250</sup> For example, in some Target States, such as France and Italy, civil proceedings may be joined to criminal proceedings. In other Target States, the two proceedings are always separate.

The result is that the tort law of each Target State differs, often substantially, from the tort law of other Target States.

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<sup>249</sup> See Associated Press, Gulf Oil Spill Deaths: The 11 Rig Workers Who Died During The BP Deepwater Horizon Explosion (15 November 2012); available at [http://www.huffingtonpost.com/2012/11/15/gulf-oil-spill-deaths\\_n\\_2139669.html](http://www.huffingtonpost.com/2012/11/15/gulf-oil-spill-deaths_n_2139669.html)

<sup>250</sup> See Jan Darpö and Annika Nilsson, On the Comparison of Environmental Law (14 January 2011); available at [http://law.pace.edu/sites/default/files/IJIEA/jciDarpö\\_IJIECT\\_final%20feb%2010%203-10\\_cropped.pdf](http://law.pace.edu/sites/default/files/IJIEA/jciDarpö_IJIECT_final%20feb%2010%203-10_cropped.pdf)

### 3.8.2. Recognition of pure economic loss

The recognition of pure economic loss by a Target State does not mean that claims for lost income or other losses from an offshore oil and gas incident will necessarily be covered. As with general tort law, the applicable law differs widely between the Target States.

France is undisputably the Target State that recognises pure economic loss more widely than any other Target State. Even in France, however, which does not differentiate between claims for pure economic loss and claims for bodily injury or property damage, claims are not compensable if there is an absence of causation or the loss is uncertain or indirect. These restrictions apply to all tort claims; they are not limited to claims for pure economic loss.<sup>251</sup>

Italian law recognises pure economic loss but it is more difficult to claim damages for such loss than under French law. Pollution-related cases in which claims for pure economic loss have succeeded under French law include the following:

The owner of a café who lost some of his customers due to pollution of a nearby river was awarded lost income.<sup>252</sup>

Fishermen, local authorities and businesses were awarded economic loss following an oil spill near Corsica.<sup>253</sup>

There must be certainty, however. For example, a claim by the French State for loss of taxes due to unsold fishing licences did not succeed due to the uncertainty of the loss (see also the summary for France).<sup>254</sup>

An Italian court has awarded damages under the Civil Code to a hotel that lost profits from a reduction in the number of visitors due to the presence of waste on a nearby beach.<sup>255</sup> This case, however, is not typical under Italian civil law.<sup>256</sup> By analogy, the potential exists that Italian law may recognise claims for pure economic loss from an offshore oil and gas incident, not only for claims by commercial fisheries but also for claims by the tourism industry. This is not certain, however, especially because Italian law is considerably less liberal than French law in the recognition of pure economic loss. It cannot, therefore, be concluded with any certainty that Italian law will necessarily cover claims arising from the tourism industry for lost profits from an oil spill from an offshore oil and gas facility.

The following table, authored by Professors Parisi, Palmer and Bussani, generally classifies the following Target States (including England and Scotland in the UK) into the categories of (1) recovery

<sup>251</sup> See Ronen Perry, *The Economic Bias in Tort Law*, (2008) *University of Illinois Law Review*, 1573, 1619.

<sup>252</sup> *Environmental Liability and Ecological Damage in European Law 487* (Monika Hinteregger, editor, Cambridge University Press, 2008)(citing *Corr. Turnhout*, 18 February 1992, unpublished, No. 498).

<sup>253</sup> Ronen Perry, *The Economic Bias in Tort Law*, (2008) *University of Illinois Law Review*, 1573, 1619-20 (citing *Tribunal de grande instance (T.G.I. Bastia*, 8 December 1976, D.S. 1977, Jur. 427).

<sup>254</sup> *Environmental Liability and Ecological Damage in European Law 487* (Monika Hinteregger, editor, Cambridge University Press, 2008)(citing *Pol. Chimay*, 14 August 1931, JJP, 1932, 378).

<sup>255</sup> *Cassazione Penale*, Sez. III, 2 maggio 2007 (u.p. 6 marzo 2007), n. 16575 – Pres. Lupo – Rel. Fiale – P.M. Meloni – Ministero dell' ambiente c. A.R., G. G. P., V. L., F. L.; see Ugo Salanitro, *Danni Temporanei All'Ambiente e Tutela Degli Interessi Privati: Un Problema di Ingiustizia del Danno*, *Giurisprudenza, Danno e Responsabilità*, N. 4/2008, 416.

<sup>256</sup> Comment by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

of compensation, (2) unsettled, and (3) no recovery, in respect of claims for pure economic loss from physical damage to “unowned resources” in the public domain.<sup>257</sup> This category would include pollution from an offshore oil and gas incident. In comparing this category to other categories of pure economic loss, the authors note that:

“this category raises the greatest concern about liability to an indeterminate class of individuals, with relevant concerns for open-ended liability and litigation. Not surprisingly, with the possible exception of France and a few unsettled jurisdictions, European courts have been reluctant to grant compensation for pure economic loss in these situations”.<sup>258</sup>

**Table 2: Classification of specified Target States for recovery of compensation for pure economic loss from physical damage to unowned resources<sup>259</sup>**

| Compensation is recoverable | Unsettled as to whether compensation is recoverable | Compensation is not recoverable |
|-----------------------------|---|---------------------------------|
| <b>France</b>               | Italy   | England                         |
|                             | Greece  | Germany                         |
|                             | Netherlands   | Portugal                        |
|                             |   | Scotland                        |
|                             |   | Spain                           |

As indicated above, the fact that a Target State recognises claims for pure economic loss does not necessarily mean that all pure economic loss claims will necessarily succeed. In another analysis, Professors Palmer and Bussani classify Croatia, France, Greece and Spain as having liberal regimes, and Germany, Poland, Portugal and Romania as having conservative regimes. For example, whilst Romanian law recognises pure economic loss, compensation for such claims is “an exception” rather than the general rule.<sup>260</sup>

Much also depends on the type of pure economic loss. To make this issue even more complex, the recognition of claims for pure economic loss is not limited to compensation for loss of income due to physical damage to unowned resources.<sup>261</sup> There are many other types of pure economic loss claims,

<sup>257</sup> Francesco Parisi, Vernon V. Palmer and Mauro Bussani, *The Comparative Law and Economics of Pure Economic Loss*, *International Review of Law and Economics* 16, 22 (George Mason University School of Law, Law and Economics Research Paper No. 05-12 and University of Minnesota Law School, Legal Studies Research Paper No. 07-18, 2006); available at [https://www.lider-lab.sssup.it/lider/it/home/documenti/doc\\_download/42-the-comparative-law-and-economics-of-pure-economic-loss-francesco-parisi-vernon-v-palmer-mauro-bussani.html](https://www.lider-lab.sssup.it/lider/it/home/documenti/doc_download/42-the-comparative-law-and-economics-of-pure-economic-loss-francesco-parisi-vernon-v-palmer-mauro-bussani.html) and from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=742104](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=742104)

<sup>258</sup> *Ibid*, 22.

<sup>259</sup> *Ibid*, 16

<sup>260</sup> *Ibid*, 66.

<sup>261</sup> Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, *Netherlands Comparative Law Association, Electronic Journal of Comparative Law*, vol. 11(3), 70 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

including claims for negligence by professionals, contract claims, damage to a third party's property that affects the ability of another person to carry out services, etc, etc.

In addition, claims for pure economic loss do not exist in a vacuum; their recognition or success depends on other aspects of a Target State's law. For example, "in Croatia, as in any other liberal regime, [limitations arise] from subtle manipulations of the technical elements of the cause of action", such as whether there is adequate causation to establish the defendant's liability.<sup>262</sup>

In commenting on the oft-stated fear that the floodgates will be opened if claims for pure economic loss are recognised (see section 3.1.3.2 above), Professor Willem van Boom has stated:

"in all European jurisdictions, the concept of causation renders it possible to exclude unwanted floods of claims on the basis of remoteness, unforeseeability, or indirectness of the damage incurred. Whenever a legal system in principle allows claims for pure economic loss, the emphasis is inevitably placed upon causation principles in order to channel claims and to ensure that the right balance between admission and restriction is kept".<sup>263</sup>

### 3.8.3. Hypothetical claims for compensation for loss of income

Section 3.3.3.1 set out 17 hypothetical claims in the context of claims arising from the Deepwater Horizon incident. The hypotheticals were compiled by two eminent US law professors to consider the scope of pure economic loss damages for which a responsible person could be liable under the OPA. Those damages are "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources" provided that the damages result from a discharge or substantial threat of a discharge of oil.

As noted in section 3.3.3.1, the scope of damages for pure economic loss under the OPA has never been litigated. In respect of Deepwater Horizon, BP entered into settlements rather than litigating the meaning of the relevant language.

This section examines the hypotheticals in the context of claims that may or would succeed – or would not succeed – if the law of the Target States was applied to them. As noted above, the hypotheticals were drafted specifically to illustrate claims under the OPA.

As noted by Professor Robertson, in acknowledging most of the drafting by Professor Goldberg:

"None of the claimants is difficult to imagine, and none would be making a ridiculous or far-fetched argument in seeking OPA economic-loss coverage. Note, also, that, roughly speaking, the list moves outward from clearly covered – core – claimants in the direction of increasingly more remote cases".<sup>264</sup>

The hypotheticals, as adapted for Target States and an oil spill from offshore oil and gas operations in EEA waters, are set out below:

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<sup>262</sup> Ibid, 46.

<sup>263</sup> Willem H. van Boom, Pure Economic Loss; a Comparative Perspective, 17-18 (emphasis added).

<sup>264</sup> David W. Robertson, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) Texas Journal of Oil, Gas and Energy, vol. 7, 241, 250.

1. A commercial fisherman, who relies for his business on fisheries in the area of the Target State affected by the oil spill, claims lost profits because he is unable to fish for a period of time due to an oil spill polluting the waters in which he fishes.
2. A ship's chandler (that is, a man whose business consists of supplying bait, tackle and other necessary supplies to, and maintaining and repairing vessels of, commercial fishermen) claims lost profits because the oil spill prevented fishing by commercial fishermen.
3. The owner of a beachfront hotel in the area of the Target State affected by the oil spill claims loss of business because tourists have decided to take their holidays at other locations. The oil has not reached the beachfront owned by the hotel and reserved for its guests but has been found in the immediate vicinity, including waters frequently used by the hotel's guests, and beaches routinely visited by them.
4. An employee of the beachfront hotel has had his hours reduced by 25 per cent, with a consequent loss of 25 per cent of his wages for a certain period because the managers of the hotel have reduced staff hours by 25 per cent.
5. The owner of a barge that hauls equipment and supplies up and down a small river that flows to the sea in the area in the Target State affected by the spill cannot operate the barge for a three-week period, and thus loses profits, because oil from the spill has entered the river and threatened migratory birds, leading the authorities to close the river to boat traffic for that period to allow the oil to be cleaned up.
6. The operator of a dockside restaurant in a seaport in the Target State in the area affected by the spill claims that it has lost profits because many of its regular customers (who are dockworkers, fishermen and other people with jobs connected to maritime commerce) have stopped frequenting the restaurant.
7. A real estate agent whose listings mainly consist of beachfront properties in a coastal area of the Target State, and adjacent Target States, contaminated by the oil spill claims a loss of commissions because the spill has led the market for property sales and rentals to collapse.
8. A woodworker who owns a small furniture store in a town that relies on beach tourism for a major source of revenue claims loss of profits due to a decline in orders for furniture because some of the beaches are polluted by the oil spill. The shop is located three miles (five kilometres) inland.
9. The owner of a beachfront inn located on the coast in a Target State near the affected area claims loss of profits due to cancelled reservations. No oil from the spill has reached within 100 miles (161 kilometres) of the waters or stretch of coastline on which the inn is located and there are no discernible adverse physical effects such as noxious odours. Government officials and scientists, however, have concluded that oil from the spill may reach the waters and beaches within a month.
10. The owner and operator of a fireworks store claims loss of profits due to reduced tourist traffic. The store is located 150 miles (241 kilometres) from the beaches of the Target State contaminated by the spill on a main motorway leading to them. He claims that he relies on tourists travelling to and from the beaches for much of his business.
11. The operator of a tour boat that carries passengers along a scenic coastal shoreline in the general area of Target State (or another Target State) affected by the spill claims lost profits. No oil from the spill has threatened to, or has, come within 400 miles (644 kilometres) of the area in which the tours take place. The owner claims, however, that popular misimpressions

about the scope of the spill have depressed tourism in the entire coastal area, causing him to lose business.

12. The owner of an amusement park in an inland area of a Target State (or another Member State of the EU) claims loss of profits. Many visits to the amusement park combine a trip to it with a beach holiday on the Target State's coast. The Target State's (Member State's) coast is not threatened by the spill but the owner of the amusement park claims that consumer unease about travelling to the Target State (Member State) have led to the lost profits.
13. The owner and operator of a resort in an inland Member State of the EU claims lost profits due to cancellation of a convention by an association of fishermen who live in the area of the Target State affected by the oil spill. The fishermen have held their annual meeting at the resort for the past 10 years. The resort owner claims that the cancellation is due to the economic effects of the oil spill.
14. A company incorporated and operated in a Target State many kilometres from the Target State(s) affected by the oil spill, that imports snorkelling equipment from China claims loss of profits due to the spill because sales of the equipment have declined.
15. The operator of a seafood restaurant in a land-locked Member State of the EU claims loss of profits due to general consumer fears about contaminated seafood caused by the oil spill. The seafood served by the restaurant is not from the area in the Target State affected by the oil spill.
16. The owner and independent franchisee of a petrol station in a land-locked Member State of the EU, which sells petrol produced by the oil company that caused the spill, claims lost income due to a boycott of the petrol station. The boycott was called by a local environmental group that demanded greater corporate accountability.
17. The operator of a catering company based in a Member State that borders on the Baltic Sea, where the oil company that caused the oil spill is located, claims lost revenues. Prior to the spill, which occurred in the Mediterranean, a substantial portion of the profits of the company were generated by catering at the oil company's headquarters. The catering was substantially reduced after the spill.<sup>265</sup>

A substantial difference from claims under the OPA is that nearly all the tort systems in the Target States that recognise pure economic loss have a fault or negligence requirement. Assuming that claimants meet this burden, the legal systems in France, Italy, Greece and the Netherlands should recognise claims for the first hypothetical of the fisherman who lost income. The second hypothetical of a support industry is more tenuous, however, as are the third and fourth hypotheticals of a beachfront hotel and its employee who lost income. As described above and in the Target States summaries, many of the Target States that recognise pure economic loss would not recognise claims by support industries or the tourism industry because, in large part, the claims would be considered to be indirect or too remote.

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<sup>265</sup> Adapted from the 17 hypotheticals created by Professors Goldberg and Robertson. See David W. Goldberg, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) Texas Journal of Oil, Gas, and Energy Law, vol. 7, 241, 247-49. The 17 items were originally set out in articles by Professors Robertson and Goldberg; see John C.P. Goldberg, Liability for Economic Loss in Connection with the Deepwater Horizon Spill 7 (22 November 2010), (2011) Mississippi College Law Review, vol. 30, 355, 346-48; David W. Robertson, The Oil Pollution Act's Provisions on Damages for Economic Loss, (2011) Mississippi College Law Review, vol. 30, 157, 169-73.



Some Target States that recognise pure economic loss may also allow the fifth hypothetical of the owner of the barge because the inability to use the barge is due to the oil spill having entered the river on which the barge operates.

It seems unlikely, however, that any Target State except, perhaps France, would allow claims by any of the other hypothetical claimants. The reason for denying the claims would not be the non-recognition of pure economic loss; it would be because the claim failed to satisfy the prerequisites of causation, directness and foreseeability.

### 3.9. Application of tort law to the continental shelf and exclusive economic zone

Our research indicated that it is not certain that the Civil Codes and other laws that impose liability for traditional damage in the Target States would actually apply to claims for compensation from an offshore oil and gas accident. The legislation of some Target States specifically applies jurisdiction for tort law, and other civil laws, to the continental shelf and, if applicable, the EEZ.<sup>266</sup> Our research did not, however, locate laws, or legislative provisions, that extend jurisdiction for the relevant civil legislation in all Target States.

A study of the comparative law applicable to the continental shelf and the EEZ in 11 countries, which included some Target States, concluded in respect of public law as follows:

“One point that also appears common is that the EEZ and the continental shelf, irrespective of the continental shelf doctrine, is not regarded as ‘territory’ and an express extension to apply national public law and court jurisdiction in areas beyond the territorial sea is probably necessary, if only for certainty”.<sup>267</sup>

The national reporter for Germany in the study commented, again in respect of public law, that “the legislature must (directly or implicitly) state in each law it passes in the realm of public law, whether this law (or parts of it) shall cover activities on the German continental shelf or in the EEZ claimed by Germany”.<sup>268</sup>

Similarly, the national reporter for the Netherlands commented, in referring to whether the Waterworks Management Act applied to the EEZ, that the application of legislation to the continental shelf and the EEZ must be expressly stated in the relevant legislation.<sup>269</sup> He stated that:

“Although the intention is clearly to make the Waterworks Management Act applicable to the EEZ, one might conclude the method to achieve this result is not effective. ... the definition of waterworks has been extended to the EEZ as well. This deserves critical consideration; I propose that applicability beyond the boundaries of the territorial waters can only exist by means of an explicit article in the Act stating its

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<sup>266</sup> As indicated in the Target State summaries, not all Target States have recognised an exclusive economic zone.

<sup>267</sup> Moira L. McConnell, Observations on the Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: A Comparative View, *Ocean Yearbook*, vol. 25, 221, 242 (2011). The 11 countries are Belgium, Canada, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Norway, the USA, and Venezuela.

<sup>268</sup> Wolfgang Wurmnest, The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone, *Ocean Yearbook*, vol. 25, 311, 319 (2011).

<sup>269</sup> Christiaan P. Verwer, The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The Netherlands Perspective, *Ocean Yearbook*, vol. 25, 379, 382 (2011).

applicability. Here the only mention is of extension of a definition to cover the EEZ as well, which is quite different from the explicit statement of applicability outside of the territorial waters. The Act's explicit statement that it is not applicable to extractive activities in the EEZ, leading to the contrary rationale that the Act is applicable to the EEZ regarding all other aspects is not convincing. This exemption of applicability to the EEZ is caused by the fact that the Extraction Act has its own system for licensing and supervision by authorities".

In reaching his conclusion that there must be a specific statement that the legislative provisions in question apply to the continental shelf and the EEZ, the national reporter for the Netherlands also referred to other Dutch legislation that specifically states that it applies to either the EEZ or the Dutch continental shelf.<sup>270</sup>

National reports for other countries in the study also referred to legislation that specifically applies to the continental shelf or the EEZ.<sup>271</sup> In addition, as noted in the summaries in this report, including the UK (UK summary, section 1.12), specific legislation has been enacted to apply civil law to such areas in what appears to be a minority of Target States.

The comparative study concluded that although the continental shelf and the EEZ are not "law free zones:

"the question of the applicable law and the basis for that law, particularly in connection with what are usually regarded as 'private law' matters (e.g., contracts, property rights, and torts) still remains uncertain, and even undeveloped, for varying reasons".<sup>272</sup>

It thus strongly appears that most Target States have not enacted legislation to apply the relevant provisions of Civil Codes, Laws on Wrongs, Laws on Obligations and other relevant legislation to the continental shelf and the EEZ. It further appears that jurisdiction for at least some of the environmental laws that impose liability for traditional damage from pollution does not apply beyond the territorial sea.

### 3.10. Applicable liability systems in the Target States for claims for traditional damage from an offshore oil and gas incident

This section describes the liability systems in each of the 20 Target States that would apply to claims for traditional damage from an offshore oil and gas incident. It also describes the imposition of liability for traditional damage under contractual agreements, such as production sharing agreements, which are entered into by a licensee and the State in respect of offshore oil and gas operations. The purpose of the discussion is to evaluate the effectiveness of the liability systems and contractual liability in the Target States in the event of an offshore oil and gas incident.

The discussion distinguishes between liability for bodily injury and property damage, and liability for pure economic loss. As indicated above, liability for pure economic loss is essential for claims for compensation for traditional damage from an offshore oil and gas incident because most claimants will not have suffered bodily injury or property damage.

<sup>270</sup> See, e.g., *ibid*, 385 (Working Conditions Act), 386 (Commodities Act), 386 (Working Hours Act), 387 (Water Supply Act), 388 (Act to Prevent Sea Pollution), 389 (Order Containing General Rules for Environment Extractive Activities), 391 (Soil Removal Act), 393 (Patent Act).

<sup>271</sup> See Moira L. McConnell, *Observations on the Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: A Comparative View*, *Ocean Yearbook*, vol. 25, 221, 243 (2011).

<sup>272</sup> *Ibid*, 240-41.

Virtually all, if not all, Target States impose liability on employers (including operators and contractors on offshore oil and gas facilities) for bodily injury suffered by an employee from an accident. Employers' liability is not discussed below because it is not a problematic issue. That is, it is highly unlikely that there would be any dispute that the employer is liable for, and would pay, compensation for such claims. Instead, the discussion focuses on third party claims.

This section also comments on provisions in the legal, or other, regimes of Target States to ensure the prompt and adequate handling of compensation claims for traditional damage. Due to the vast majority of Target States not having a claims handling regime, this section only indicates Target States that have such a regime.

Detailed accounts of the liability systems and the claims handling regimes (when they exist) for the Target States are in the summaries for each Target State.

The table below summarises the legislative and contractual liability for bodily injury, property damage and economic loss in the Target States.

**Table 3: Legislative and contractual liability for bodily injury, property damage and economic loss in the Target States<sup>273</sup>**

| Target State    | Legislative liability for bodily injury, property damage and economic loss                                  | Contractual liability for bodily injury, property damage and economic loss   |
|-----------------|---|--|
| <b>Bulgaria</b> | Law on Obligations and Contracts<br>Environmental Protection Act (probably not)<br>Water Act (probably not) | No   |
| <b>Croatia</b>  | Civil Obligations Act   | No, but the Production Sharing Agreement includes an indemnity and hold harmless agreement for compensation and other losses to the State  |
| <b>Cyprus</b>   | Law of Civil Wrongs   | Yes, the Production Sharing Contract imposes liability for bodily injury, property damage and, perhaps, pure economic loss<br>The Production Sharing Contract also includes an indemnity for compensation to the State |
| <b>Denmark</b>  | Subsoil Act (section 35)<br>Liability for Damages Act   | No   |
| <b>France</b>   | Civil Code<br>Mining Code (liability for damages caused by mining operations)                               | No   |
| <b>Germany</b>  | Civil Code  | No   |

<sup>273</sup> Contractual liability arises out of production sharing agreements and other agreements between the Target State and operators, and other licensees for offshore oil and gas operations. That is, the liability is not imposed by legislation; instead it is imposed by the contract into which the licensee must enter.

| Target State       | Legislative liability for bodily injury, property damage and economic loss  | Contractual liability for bodily injury, property damage and economic loss  |
|--------------------|---|---|
|                    | Water Resources Act (perhaps)<br>Environmental Liability Act (perhaps)  |   |
| <b>Greece</b>      | Civil Code<br>Law 1650/86   | Yes, the Draft Model Lease obliges a lessee to ensure adequate compensation for bodily injury and property damage |
| <b>Iceland</b>     | Hydrocarbons Law<br>Tort Damages Act  | No, but the Model Licence includes an indemnity and hold harmless agreement for compensation to the State         |
| <b>Ireland</b>     | Civil Liability Act<br>Common law   | No  |
| <b>Italy</b>       | Civil Code  | No  |
| <b>Latvia</b>      | Civil Code  | No  |
| <b>Lithuania</b>   | Civil Code<br>Law on Environmental Protection   | No  |
| <b>Malta</b>       | Civil Code  | Yes <sup>274</sup>  |
| <b>Netherlands</b> | Civil Code  | No  |
| <b>Norway</b>      | Petroleum Act<br>Pollution and Waste Act (if Petroleum Act does not apply to a claim and if applicable)<br>Act Relating to Compensation in Certain Circumstances (if Petroleum Act does not apply to a claim and if applicable) | No  |
| <b>Poland</b>      | Civil Code  | No  |
| <b>Portugal</b>    | Civil Code<br>Decree-Law No. 147/2008 (if applicable)<br>Law 11/87 (if applicable)  | No  |
| <b>Romania</b>     | New Civil Code  | No  |
| <b>Spain</b>       | Civil Code  | No  |
| <b>UK</b>          | Common law  | No, but the Model Clauses for a licence include an indemnity for third-party claims to the State                  |

<sup>274</sup> Comment by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014). Dr Galea provided the following information: "The Model Production Sharing Contract (PSC) imposes liability for any loss or damage suffered by or done to the Government, to the environment or to third parties. The PSC also indemnifies Government against all actions and demands that may be brought against it as a result of any act or omission by or on behalf of the contractor or of any of its-subcontractors undertaking petroleum operations".

### 3.10.1. Bulgaria

Liability for claims for compensation for bodily injury and property damage is imposed by the Law on Obligations and Contracts.

Article 3(1) of the Maritime Space Act provides, in pertinent part, that “[d]amages, caused by an act of quasi delicti occurring in the ... territorial sea, on the continental shelf and in the exclusive economic zone, shall be subject to Bulgarian legislation”. The term “delicti” is derived from the Latin word “delictum” meaning “fault”. The application of tort law to offshore oil and gas operations may mean that only tort law based on fault applies. Or it may have a broader meaning to include tort law based on strict liability. This issue is, of course, only relevant if a provision of the Law on Obligations and Contracts that imposes strict liability applies to a claim for compensation from pollution from an offshore oil and gas incident.

Even if only liability based on negligence applies, the burden is on the tortfeasor (wrongdoer) not the claimant. That is, the burden concerning proof of fault under the Law on Obligations and Contracts is reversed; the claimant is not required to prove fault; the tortfeasor has the burden of showing that it did not act with fault.

It is unclear whether the Law on Obligations and Contracts imposes liability for pure economic loss. Article 45 provides, in pertinent part, that “[e]very person is obligated to redress the damage he has faultily caused to another person”. Article 51 provides, in pertinent part, that “[c]ompensation shall be due for all damages that are a direct and immediate consequence of the tort”.

If the Law on Obligations and Contracts imposes liability for pure economic loss, liability thus applies only to damage that is “a direct and immediate consequence of the tort”. It may, therefore, be difficult for a claimant for compensation for harm caused by pollution from an offshore oil and gas incident to prove that the loss is a direct and immediate consequence of the incident.

Article 170 of the Environmental Protection Act provides that “any person, who causes damage at fault to a person because of polluting or damaging the environment shall compensate them”. It is unclear, however, whether the Environmental Protection Act imposes liability for pure economic loss, albeit fault-based if it does. Further, it appears that the Act does not apply to actions carried out on the continental shelf and EEZ. In respect of State property, article 170 refers to the Minister of Environment and Water as the governmental authority with power to bring an action when harm extends over the territory of multiple administrative regimes. Article 170 further refers to the competent Regional Governor as the governmental authority with power to bring an action if the harm extends over multiple municipalities.

Article 202 of the Water Act provides that a person who causes water pollution is liable for compensation for harm to other persons if the polluter is at fault. Article 3 of the Water Act, however, refers to surface water, groundwater, internal marine waters and the territorial sea; it does not refer to the continental shelf and the EEZ.

In summary, Bulgarian law may impose liability for pure economic loss but, if it does so, a claimant would have to show that its loss is a direct and immediate consequence of the incident. Further, if fault-based tort law applies, the tortfeasor bears the burden of showing that it did not act with fault.

### 3.10.2. Croatia

The Production Sharing Agreement for the first international offshore licensing round, launched on 2 April 2014, provides an indemnity and a hold harmless agreement from the Contractor to Croatia for “any damage or loss which the Contractor, its employees or Sub-contractors and their employees may cause to the person, the property or the rights of other persons” from hydrocarbon operations. Further,

the agreement requires a Contractor, among other things, to “take all necessary and adequate steps to ... ensure payment of adequate compensation for injury to persons or damage to property caused consequent to Petroleum Operations”, and to control and clean up any pollution, and, if necessary, to reimburse the State for such costs.

The agreement does not impose liability for damage or loss on the Contractor itself; it is limited to liability as between the parties to the agreement, that is, the Contractor and the State.

The law that imposes liability for compensation for bodily injury and property damage, as well as pure economic loss, is the Civil Obligations Act which imposes fault-based liability. If offshore oil and gas operations were to be considered to fall within the categories in the Act for a “dangerous thing” or a “dangerous activity”, strict liability would apply. It is unclear, however, whether they would fall within this category.

In respect of lost profits, a claimant would have to show “that in the due course of events, or according to special circumstances, there was a probability of making the profit and that he/she had the intention to acquire that profit”.<sup>275</sup> Further, the claimant would have to show that the pollution caused by an offshore oil and gas incident is, in general, likely to cause the damage that occurred.<sup>276</sup>

There has been no major pollution case in Croatia so far concerning offshore oil and gas activities. Nonetheless, a RO-RO (Roll on/Roll off) vessel burned once between Italy and Croatia.<sup>277</sup> There are no Protocols or special provisions under Croatian law for transboundary liability.<sup>278</sup>

There is however, a Decree on the main technical requirements on safety and security of offshore exploration and production of hydrocarbons in the Republic of Croatia. According to this Decree, a platform is considered as a vessel (technical maritime vessel).<sup>279</sup> Therefore, the Civil Liability Convention or Bunker Oil Convention could apply to it. In addition, some limitations within the Civil Liability Convention are linked to the tonnage for vessels, which is a difficult limitation to set in place for such activities.<sup>280</sup> A legal expert stated that there was no knowledge as to whether or not this Decree had been applied, but that it could be assumed that the Decree was applicable to several production platforms that produce gas in the north Adriatic (which are operated by the joint venture company of INA d.d., Agip SpA and alternatively Edison SpA).<sup>281</sup>

In summary, liability exists under Croatian law for lost profits if a claimant shows the probability of making the profits and that he/she had the intention to acquire the profits. Further, the claimant would have to show that the pollution caused by an offshore oil and gas incident is, in general, likely to cause the loss of profits, or other damage that occurred. The claimant would probably also have to show that

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<sup>275</sup> See Marko Baretić and Dr. Saša Nikšić, Croatia, 88, 97 in Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in Comparative Law* (Routledge-Cavendish, 2009).

<sup>276</sup> See Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 46 (December 2007).

<sup>277</sup> See Maritime Information Centre, *Vessel on fire at sea* (4 February 2008); available at [http://www.micportal.net/index.php?option=com\\_content&view=article&id=126%3Avessel-on-fire-at-sea&Itemid=66](http://www.micportal.net/index.php?option=com_content&view=article&id=126%3Avessel-on-fire-at-sea&Itemid=66)

<sup>278</sup> Telephone interview with Miran Maćešić, Maćešić & Partners LLC, 10 April 2014.

<sup>279</sup> Article 3 of the Decree, available in Croatian at: <http://www.azu.hr/wp-content/uploads/2014/03/Pravilnik.pdf>

<sup>280</sup> See IMO raises compensation limits for oil pollution disasters (Legal Committee - 82nd session 16-20 October 2000); available at [http://www.imo.org/blast/mainframe.asp?topic\\_id=68&doc\\_id=514](http://www.imo.org/blast/mainframe.asp?topic_id=68&doc_id=514)

<sup>281</sup> Telephone interview with Miran Maćešić, Maćešić & Partners LLC, 10 April 2014.

the person who caused the lost profits was at fault. Further, the Civil Liability Convention or the Bunker Oil Convention may apply to some incidents, depending on the nature of the offshore facility.

### **3.10.3. Cyprus**

Claims for bodily injury and property damage may be brought under the common law, as set out in the Law of Civil Wrongs, as amended (Cap. 148). The Civil Wrongs Law establishes civil liability for negligence. It also imposes strict liability for some activities, none of which appears to be relevant to a claim for bodily injury and property damage from an offshore oil and gas incident.

Cypriot law does not impose liability for pure economic loss.

In addition to statutory liability, the Production Sharing Contract, which is entered into by licensees for a production licence, provides for contractual liability as follows:

“The Contractor shall indemnify and compensate any person, including the Republic [of Cyprus], for any damage or loss which the Contractor, its employees or subcontractors and their employees may cause to the person, the property or the rights of other persons, caused by or resulting from Hydrocarbons Operations, including any environmental damage”.

It is unclear from the above provision whether the Production Sharing Contract imposes contractual liability for pure economic loss as well as bodily injury and property damage. The provision imposes strict liability; no defences or exceptions are set out.

The Production Sharing Contract also requires the Contractor to indemnify and hold harmless the State. Unlike the indemnity provision set out above, this provision is limited to liability between the parties to the agreement, that is, the Contractor and the State.

In summary, liability exists under Cypriot law for fault-based liability for bodily injury and property damage, but not for pure economic loss. Strict liability exists under the Production Sharing Contract for compensation to “any person” including the State, but it is unclear whether liability under the contract covers pure economic loss.

### **3.10.4. Denmark**

Section 35 of the Subsoil Act is the main provision that imposes liability for bodily injury and property damage (and economic loss) caused by the exploration for, and production of, hydrocarbons. Section 35(1) provides that “A licensee shall be liable to pay damages for any loss, damage or injury caused by the activities carried on under the licence, even though such loss, damage or injury was caused accidentally”. Persons who may claim compensation include the licensee’s employees and contracting parties, as well as third parties.

The Environmental Damage Compensation Act imposes strict liability for compensation for bodily injury, property damage and economic loss from pollution from activities and facilities listed in an Annex to the Act. The activities and facilities in the Annex include, among other things, energy facilities, and other facilities considered to have a high risk of causing pollution. Liability is subject to an exception for force majeure. The operator of an offshore oil and gas facility could be liable for compensation under the Act provided, of course, that the facility is concluded to be included in the Annex.

Under Danish civil law, pure economic loss is defined by the same rules as loss that results from physical damage to property or bodily injury. That is, liability for pure economic loss is not treated differently than liability for bodily injury or property damage. The main general source of law for pure

economic loss is case law. Three elements constitute such a loss: first the claimant must prove he suffered a loss, second the claimant must prove that the loss is caused by an act or omission of the defendant and third, there must be a causal link between the two. Such a link can be negligence by the tortfeasor or strict liability.<sup>282</sup> In this respect, pure economic loss must not be too remotely connected to the tortfeasor's negligent conduct. Further, the claimant must have been directly affected by the tortfeasor's negligence.<sup>283</sup>

Major obstacles to claims for pure economic loss could thus be encountered if a defendant asserts that the claim is too remote to be entitled to damages under Danish law (see section 3.1.1.3 direct and remote claims). In practice, pure economic loss is more difficult to prove than bodily injury or property damage.<sup>284</sup> The recovery of pure economic loss in the form of lost income due to pollution from an offshore oil and gas incident would appear to be unlikely.<sup>285</sup>

In summary, the Subsoil Act imposes strict liability for bodily injury, property damage and economic loss caused by an offshore oil and gas incident. The Liability for Damages Act imposes fault-based liability for personal injury and loss of dependency from an offshore oil and gas incident. The Environmental Damage Compensation Act, if it applies, imposes strict liability for claims for bodily injury, property damage and economic loss. In order to recover pure economic loss, a claimant must show that its loss is direct and that the defendant's act was likely to cause the loss.

### 3.10.5. France

Liability for bodily injury, property damage and pure economic loss in France is governed by the Civil Code which, as a general rule, imposes fault-based liability. Although the Civil Code has some provisions that provide an exception from this general rule by imposing strict liability, none of them appear to apply to a claim from an offshore oil and gas incident.

Article 1382 of the French Civil Code states that “[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. Article 1383 states that “[e]veryone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence”. Neither of these articles would “screen out recovery for pure economic loss”.<sup>286</sup> French law may, thus, potentially allow claims by, among others, “marinas, boat suppliers, hotel operators, and commercial fisherman in the area [who] suffer severe economic loss” due to an

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<sup>282</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss, *New Horizons in Comparative Law* 283 (University of Texas at Austin, Studies in Foreign and Transnational Law) (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009).

<sup>283</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: *New Horizons in Comparative Law*, University of Texas at Austin, Studies in Foreign and Transnational Law (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009).

<sup>284</sup> Bernhard Gomard, *Recent Developments in the Danish Law of Tort*, Stockholm Institute for Scandinavian Law 1957-2009.

<sup>285</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: *New Horizons in Comparative Law* 65-66 (University of Texas at Austin, Studies in Foreign and Transnational Law) (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009) (considering that Danish courts would deny hypothetical claims for lost income suffered by cattle raisers and butchers from the closure of cattle and meat markets for 10 days due to a person having negligently allowed infected cattle to escape).

<sup>286</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: *The Ways to Recovery*, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 34 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>



offshore oil and gas incident.<sup>287</sup> For example, in one case, the owner of a café who lost income because he lost some of his customers due to the pollution of a nearby river was awarded compensation.<sup>288</sup> In another case, however, a claim by the State for loss of taxes due to unsold fishing licences did not succeed due to the uncertainty of the loss.<sup>289</sup>

Article L.155-3 of the Mining Code also imposes liability on the explorer or operator or, if not, the holder of the mining licence, for damage caused by its activities. Such liability is not limited to the area for which the mining licence is granted or the time during which the licence is in effect. In case of a default by the holder, the State guarantees compensation for the damage (which is then subrogated to the rights of the victim against the responsible person).

Compensation for pollution in France is not limited to persons who suffer lost income. In respect of pollution from the *Erika* oil spill, the *Paris Tribunal de grande instance* awarded compensation for environmental damage to “the local authorities to whom the law grants a specific competence in matter of environment, conferring upon them a special responsibility in the protection, management, and preservation of a territory”.<sup>290</sup> The court also awarded compensation to the *Ligue de protection des oiseaux*, an environmental NGO that had taken care of birds affected by the oil spill. One commentator remarked that compensation for such harm had been recognised before “but never with such high scale compensation”.<sup>291</sup>

Although there is no established compensation scheme in France, in case of a “national disaster”, *ad hoc* compensation procedures may be created. AZF is an example of such a procedure.

The explosion in a warehouse that stored granular ammonium nitrate at the AZF chemical plant in Toulouse, France, on 21 September 2001, caused the deaths of 30 people (including 21 employees), injuries to over 4,500 people, and the destruction of 27,000 homes and other buildings. On 3 October 2001, the French Government established the National Disaster Victim Compensation Committee (*Comité National de Suivi pour la prise en charge des Victimes*), led by the French Ministry of Justice. The Committee included the Grand Paroisse Group (owner of the chemical plant), governmental authorities, elected officials and disaster-victim associations. On 31 October 2001, an agreement, called the National Disaster Compensation Convention, was signed. The agreement established special procedures to provide compensation to victims. The claims were managed by a team of 220 experts (including medical experts), 25 claims managers, and 10 lawyers. Over EUR 2 billion was eventually paid out in compensation for claims for bodily injury and property damage; 16,000 people were compensated for bodily injuries, and 71,000 cases (33,000 of which were for residences, including private and local authority houses and flats) involved compensation for property damage. Other settled claims involved public, commercial buildings and vehicles.

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<sup>287</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 38 (December 2007)(see page 13; analogising chemical spill to a hypothetical concerning a person who negligently allows infected cattle to escape, resulting in the Government ordering the closure of cattle and meat markets).

<sup>288</sup> *Environmental Liability and Ecological Damage in European Law* 487 (Monika Hinteregger, editor, Cambridge University Press, 2008)(citing *Corr. Turnhout*, 18 February 1992, unpublished, No. 498).

<sup>289</sup> *Ibid* (citing *Pol. Chimay*, 14 August 1931, JJP, 1932, 378).

<sup>290</sup> See Olivier Moréteau, France: French Tort Law in the Light of European Harmonization, *Journal of Civil Law Studies*, vol. 6(2), 759, 788-89 (quoting *TGI Paris*, 16 January 2008, paragraph 3.1.2.2.3).

<sup>291</sup> See Olivier Moréteau, France: French Tort Law in the Light of European Harmonization, *Journal of Civil Law Studies*, vol. 6(2), 759, 789.

Notably, however, there were delays in a substantial part of the compensation payments as a result of their coverage by insurance.<sup>292</sup>

### 3.10.6. Germany

Liability for compensation for bodily injury and property damage is imposed by the German Civil Code. The standard of liability is fault-based. The Civil Code does not specifically impose liability for pure economic loss. One commentator has stated that a person in the fisheries industry would not succeed in a claim unless, according to an exception, its business was an “established and practised commercial operation” and the pollution was directly intended to interfere with it. The same commentator considered that a person in the tourism industry would not be entitled to compensation because the damage would be indirect.<sup>293</sup> This requirement, thus, means that many claims for pure economic loss from an offshore oil and gas incident would not succeed.

Strict liability for bodily injury and property damage is imposed by the Environmental Liability Act and the Water Resources Act. One commentator considers that persons in the fisheries industry should be able to claim lost profits under the Water Resources Act but that persons in the tourism industry would probably be unable to claim because their losses would be regarded as indirect damage.<sup>294</sup>

### 3.10.7. Greece

The environmental protection law (Law 1650/86) in Greece imposes liability for bodily injury and property damage from water pollution (and other environmental damage). Article 29 provides that:

“Whoever, whether a physical person or legal entity, causes pollution or other degradation to the environment, is liable for damage, unless he proves that the damage is due to an act of God or was the result of a third party’s culpable act”.<sup>295</sup>

One commentator considered that a hypothetical claim by the owner of an outdoor recreation business that had organised rafting and canoeing tours on a river for 10 years for a total loss of profits for three years during which time the river could not be used for white water canoeing and rafting due to pollution of a nearby river would succeed under Law 1650/86.<sup>296</sup> By analogy, it appears that at least some claims for lost profits from pollution from an offshore oil and gas incident should also succeed.

Liability for claims for bodily injury and property damage is also imposed by the Civil Code. The Civil Code may also impose liability for pure economic loss but, if so, stringent causation requirements would limit the number of successful claims. The claimant must show that the defendant was, in general, likely to cause the harm that occurred and also that the defendant’s act affected an interest

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<sup>292</sup> See BIO Intelligence Service, Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents (2013), pp. 24-26 (Final Report prepared for European Commission DG Environment).

<sup>293</sup> See Environmental Liability and Ecological Damage in European Law 525 (Cambridge University Press, Monika Hinteregger, editor, 2008).

<sup>294</sup> See *ibid.*

<sup>295</sup> Translation by Monika Hinteregger. Environmental Liability and Ecological Damage in European Law 284 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>296</sup> Environmental Liability and Ecological Damage in European Law 494 (Monika Hinteregger, editor, Cambridge University Press, 2008).

considered to be protected by the purpose of the law.<sup>297</sup> It is, thus, unclear whether a claim for harm for pure economic loss from an offshore oil and gas incident would succeed; much would depend on the nature and circumstances of each claim. In this respect, the commentator who considered that a hypothetical claim under article 29 of Law 1650/86 for lost profits by an outdoor recreational company, as described directly above, would succeed, also concluded that the claim for lost profits would succeed under the Civil Code.<sup>298</sup>

The strict liability provisions of the Civil Code do not appear to be relevant to a claim from pollution from an offshore oil and gas incident.

The Draft Model Lease Agreement for the 2012 open round requires a lessee who causes harm to ensure adequate compensation for claims for bodily injury and property damage. Article 12.2(b) of the Agreement provides as follows “[t]he Lessee undertakes for the purposes of this Agreement to take all necessary and adequate steps ... to ensure adequate compensation for injury to persons or damage to property caused by the effect of the Petroleum Operations”.

The obligation appears to be subject to strict liability, with no defences or exceptions. The agreement does not, however, specifically state that the lessee must pay compensation; instead, it states that the lessee must take all necessary steps to ensure adequate compensation. Liability under the agreement is, thus, not entirely clear.

In summary, Greek law imposes strict liability for compensation from pollution, subject to the defences of an act of God or a third party’s culpable act. Greek law recognises claims for pure economic loss subject to the claim meeting the other requisites of Greek tort law. The Draft Model Lease Agreement may impose liability for bodily injury and property damage but this is not entirely clear.

#### **3.10.8. Iceland**

Article 28 of the Hydrocarbons Act states that “[t]he holders of prospecting licenses or exploration and production licenses will be liable for damages under this Act for any loss or damage caused by hydrocarbon activity, including environmental damage, regardless of whether the loss or damage was caused by culpable conduct or not”. The Hydrocarbons Act also states that liability under other Icelandic laws also applies referring, in particular, to the Tort Damages Act.

Further, Section 18 of the Model Licence for the Second Licensing Round (Model Licence)<sup>299</sup> also provides that the provisions imposing liability for loss or damage caused by a hydrocarbon activity under article 28 of the Hydrocarbons Act “does not limit the right to damages by an injured party derived from general rules”. The Model Licence includes an indemnity and hold harmless agreement from the lessee to the State.

Still further, article 7 of Act No. 33/2004 on marine and coastal antipollution measures provides that “[e]ach and every one causing pollution in Iceland’s pollution jurisdiction [which includes the continental shelf and the exclusive economic zone] is liable under the general rules of damages for damage attributable to the pollution”.

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<sup>297</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 45 (December 2007).

<sup>298</sup> Environmental Liability and Ecological Damage in European Law 494 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>299</sup> National Energy Authority, Model Licence for Exploration and Production of Hydrocarbons, Second Licensing Round on the Icelandic Continental Shelf (Model Licence). An English translation of the Model Licence is available from <http://www.nea.is/2nd-licensing-round/legal-documents/>

The Tort Damages Act imposes fault-based for bodily injury and property damage and, perhaps pure economic loss.

In summary, liability for compensation for traditional damage from an offshore oil and gas incident under Icelandic law is as follows:

- The Hydrocarbons Act imposes strict liability for “any loss or damage caused by hydrocarbon activity, including environmental damage” but it is not clear that the term “loss or damage” includes compensation for pure economic loss; and
- The Tort Claims Act imposes fault-based liability for bodily injury and property damage but it is unclear whether it also imposes liability for pure economic loss.

#### **3.10.9. Ireland**

The legislation for the exploration and production of offshore oil and gas in Ireland does not specifically impose liability for compensation to third parties who suffer bodily injury or property damage from offshore oil and gas operations. Instead the Civil Liability Act, 1961, and common law apply, both of which are mainly fault-based for claims for compensation of the type that would be claimed for harm from pollution from an offshore oil and gas incident.

As a general rule, liability for pure economic loss does not exist under Irish law. A court may award pure economic loss but only if the loss was foreseeable and significant.<sup>300</sup>

One commentator considered that a hypothetical claim concerning the owner of an outdoor recreation business that had organised rafting and canoeing tours on a river for 10 years for a total loss of profits for three years during which the river could not be used for white water canoeing and rafting due to pollution of a nearby river would face a “heavy burden in establishing liability”. The commentator noted that the court could rule favourably if it considered that the polluter should reasonably have foreseen that all the users of the river would be deprived of its use if it was polluted.<sup>301</sup> By analogy, claims for lost profits from pollution from an offshore oil and gas incident are also likely to be difficult to establish.

Ireland does not have a procedure for handling claims for compensation although if it accepts membership of OPOL as financial security (as it has done at least once since April 2010), the compensation scheme under the Offshore Pollution Liability Association (OPOL) would apply (see section 4.1.2).

In summary, liability for pure financial loss for compensation for harm from pollution from an offshore oil and gas incident does not, as a general rule, exist under Irish law. Even if it does exist, pure economic loss is not generally recoverable. Fault would apply to claims for harm from pollution from an offshore oil and gas incident.

#### **3.10.10. Italy**

Liability for bodily injury and property damage is imposed by the Italian Civil Code.

The Civil Code does not include a general definition of “damages”. Article 2056, however, specifically includes “damage arising from loss of earnings”, stating that it “shall be equitably estimated by the

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<sup>300</sup> See Environmental Liability and Ecological Damage in European Law 525 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>301</sup> Ibid, 494.

court according to the circumstances of the case”. A claimant would need to be granted legal standing to bring the claim pursuant to article 2043 of the Civil Code.<sup>302</sup>

As an exception to fault-based liability, the Civil Code imposes “Liability arising from the exercise of dangerous activities”. This provision could potentially impose strict liability for harm from pollution from offshore oil and gas operations, although it is unclear whether such operations would be considered to be “dangerous activities”. If not, fault-based liability would apply.

Italian law recognises pure economic loss subject to a claim meeting the other requisites of Italian tort law. An Italian court has awarded damages under article 2043 to a hotel that lost profits from a reduction in the number of visitors due to the presence of waste on a nearby beach. By analogy, the potential exists that Italian law may recognise claims for pure economic loss from an offshore oil and gas incident, not only for claims by commercial fisheries but also for claims by the tourism industry. This is not certain, however.

#### **3.10.11. Latvia**

The Latvian Civil Code imposes liability for bodily injury, property damage and economic loss. It is unlikely, however, that liability for pure economic loss would apply to harm from an offshore oil and gas incident due the requirement for the loss to be direct.

It is unclear whether harm from pollution from an offshore oil and gas incident would be subject to strict liability under the Civil Code. If the strict liability provisions did not apply, the standard of liability would be fault-based.

In summary, if Latvian law imposes liability for pure economic loss, such liability probably would not apply to claims for compensation for harm from pollution from an offshore oil and gas incident unless the loss was concluded to be direct. Liability may be fault-based.

#### **3.10.12. Lithuania**

The Lithuanian Civil Code imposes liability for bodily injury and property damage. The Civil Code may impose liability for pure economic loss provided that the loss is direct, but it is not clear whether the relevant provision refers to consequential economic loss rather than pure economic loss.

In addition, the Law on Environmental Protection, Lithuania’s framework environmental law imposes liability for bodily injury, property damage, and potentially pure economic loss. The Law applies to the continental shelf and EEZ as well as the territorial sea and inland areas.

In summary, Lithuanian law may impose liability for pure economic loss if the loss is direct but this is uncertain. Lithuania’s framework environmental law may impose liability for pure economic loss but, again, this is uncertain.

#### **3.10.13. Malta**

The Civil Code of Malta imposes liability for bodily injury and property damage.

The Civil Code imposes liability for economic loss (material damages); article 1045(1) provides that the damage for which a person is liable is “the actual loss which the [defendant’s] act shall have directly caused to the injured party”. This provision covers both damages actually incurred as well as future earnings.

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<sup>302</sup> See *ibid*, 524.

Liability is fault-based. Malta does not have relevant specific legislation that imposes liability for dangerous activities.

In summary, Maltese law imposes liability for pure economic loss, which loss must be direct. Liability is fault based.<sup>303</sup>

#### **3.10.14. The Netherlands**

The Civil Code, which imposes liability for bodily injury, property damage and economic loss, is fault-based. The Code includes provisions imposing strict liability for dangerous activities, at least one of which applies to harm from pollution from an offshore oil and gas incident that causes damage in the territory of the Netherlands.

The Dutch law of torts does not specifically state that pure economic loss is recoverable but neither does it state that it is not recoverable. Dutch courts decide whether to award pure economic loss on a case by case basis depending on the facts of each case.

Lost income from pollution from an offshore oil and gas incident appears to be recoverable. One commentator noted that “fishermen whose earning capacity had been adversely affected by an oil spill in a coastal area [had] been awarded damages as compensation for individual economic losses (i.e. loss of earning capacity)”.<sup>304</sup> Another commentator also considered that damages could be awarded in the hypothetical case of a loss in revenue by a hotel located next to a lake that was not owned by the hotel when tourists stayed away from the hotel due to a tortfeasor having polluted the lake. The commentator stated that the Explanatory Memorandum on the rules regarding liability for dangerous substances suggested that damages could be recoverable in such a case.<sup>305</sup>

In summary, Dutch law imposes liability for pure economic loss. A claim by fishermen for lost income from an oil spill has succeeded in the past. Claims by the tourism industry for lost income may also succeed.

#### **3.10.15. Norway**

Norway has a well-developed and sophisticated regime for compensating persons who suffer bodily injury, property damage and economic loss from offshore oil and gas operations. The Petroleum Act, which channels liability to the licensee, specifically includes pure economic loss.

Further, there are specific provisions for claims by fishermen. Section 8-3 of the Petroleum Act provides that a licensee is strictly liable for financial loss suffered by Norwegian fishermen resulting from pollution and waste from petroleum activities. The financial loss includes:

- the reasonable cost of measures taken by the fishermen to avert or limit the damage or loss;
- any financial loss from such measures;

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<sup>303</sup> Comments (and information) by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>304</sup> See Environmental Liability and Ecological Damage in European Law 504 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>305</sup> J.M. Barendrecht, Pure Economic Loss in the Netherlands 115, 128, in Netherlands Reports to the Fifteenth International Congress of Comparative Law (E.H. Hondius, editor, Intersentia Rechtswetenschappen, 1998) (referring to pages 18-19 of the Explanatory Memorandum on the rules regarding liability for dangerous substances).

- damage and inconvenience as a result of supply vessels and support vessel traffic; and
- relocation of the facility to or from the relevant fishing field.

The licensee has a right of recourse against the person who actually caused the loss or the owner of a ship providing that the relevant conditions of liability have been satisfied.

Claims for pollution damage from offshore oil and gas operations must be brought under the Petroleum Act. If the Petroleum Act does not apply to a claim, the claim may be brought under the Pollution and Waste Act or the Act Relating to Compensation in Certain Circumstances, as applicable.

The Petroleum Act does not apply in Svalbard. Instead, the Svalbard Act applies. That Act imposes strict liability “to pay compensation ... for economic loss resulting from the environmental damage” caused by that person due to breaching provisions of the Act.

In summary, Norway has a highly developed liability system established by the Petroleum Act for claims for compensation from offshore oil and gas incidents. Liability under the Act includes liability for pure economic loss. Further, liability is strict, it is channelled to licensees, and claims from offshore oil and gas incidents must be brought under the Act if it applies. Legislation that applies to Svalbard also imposes liability for economic loss arising from an offshore oil and gas incident.

### **3.10.16. Poland**

The Polish Mining Law, which applies to the exploration and production of hydrocarbons as well as other minerals, imposes liability for property damage; it does not impose liability for bodily injury and does not appear to impose liability for pure economic loss.

The Polish Civil Code imposes liability for bodily injury and property damage. Liability is also imposed for pure economic loss but only for compensation for lost profits when there is a high probability of their loss. As a practical matter, therefore, a claimant will face difficulty in proving entitlement to lost profits.

Although the Civil Code appears to be liberal in respect of a cause of action for pure economic loss, Polish courts and scholars have concluded that limitations apply. That is, article 361(1) of the Civil Code states that liability applies only to compensation for the “normal consequences” of an act or omission. Further, article 446 states that specified persons, usually relatives of a deceased, may claim compensation for their losses resulting from the death of the deceased. In this respect, Polish courts and scholars consider that article 446 proves that there is an opposite rule under the Civil Code to which article 446 is an exception. That is, only the person *directly* injured by the act of a tortfeasor is entitled to claim compensation. Commentators considered that the application of either or both of these limitations would result in a person who suffered damage for lost profits from a hypothetical closure of cattle and meat markets due to the tortfeasor’s negligence in allowing infected cattle to escape being unable to recover its loss.<sup>306</sup> This hypothetical can be analogised to persons suffering lost income due to water pollution.<sup>307</sup>

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<sup>306</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 66-67 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>307</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 66-67 (December 2007)(see page 13; analogising chemical spill to a hypothetical concerning a person who negligently allows infected cattle to escape, resulting in the Government ordering the closure of cattle and meat markets).

The strict liability provisions for dangerous activities in the Civil Code may apply to a claim for harm from offshore oil and gas operations but this is unclear.

In summary, Polish law may impose liability for pure economic loss but only if there is a high probability of the loss from the tort. Only persons who have suffered direct damage would be able to claim. Liability is probably fault-based but this is not clear.

### 3.10.17. Portugal

The Portuguese Civil Code imposes liability for bodily injury and property damage. Liability is fault-based because the strict liability provisions do not appear to apply to claims for pollution from offshore oil and gas operations.

Article 564(2) of the Civil Code imposes liability for consequential losses that are “predictable”. Such losses could include lost profits from fisheries and tourism due to water pollution from an offshore oil and gas incident provided the economic losses are a direct consequence of the water pollution and are consequential,<sup>308</sup> that is, consequential, not pure economic, loss.

More crucially, one commentator considered that article 483 of the Civil Code could impose liability for pure economic loss in the form of lost profits by fishermen and owners of tourism facilities<sup>309</sup> but not for the lost profits of the local distributor of drinks to tourism facilities.<sup>310</sup>

In Decree-Law No. 147/2008, which transposed the Environmental Liability Directive (2004/35/CE) (ELD), Portugal introduced civil liability for compensation for environmental damage (the only Member State to do so). Strict liability under the transposing legislation applies to operators who produce oil, in particular, the holders of a licence to produce offshore oil. The legislation appears to impose liability for compensation for bodily injury and property damage but not pure economic loss.

A further Portuguese law, Law 11/87, may impose strict liability for bodily injury and property damage from pollution from offshore oil and gas operations if such operations are considered to be a “particularly dangerous activity”.

Further, the same commentator who commented on the Civil Code (above) considered that articles 22 or 23 of Law No. 83/95 of 31 August 1995 impose liability on a hypothetical person who polluted a river in respect of a claim by the owner of an outdoor recreation business that had organised rafting and canoeing tours on a nearby river for 10 years for a total loss of profits for three years during which time the river could not be used for white water canoeing and rafting.<sup>311</sup> By analogy, at least some claims for lost profits from pollution from an offshore oil and gas incident should also succeed.

In summary, Portuguese law may impose liability for pure economic loss but only if the loss is direct. Law 11/87 and Law 83/95 may impose strict liability for bodily injury and property damage but this is unclear.

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<sup>308</sup> See Environmental Liability and Ecological Damage in European Law 525 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>309</sup> See *ibid.*

<sup>310</sup> See *ibid.*, 552.

<sup>311</sup> *Ibid.*, 506.



**3.10.18. Romania**

The Romanian Petroleum Law states that the applicable law for “damages caused ... to third parties arising from the conduct of petroleum operations” is “delictual fault civil responsibility”. That is, only fault-based liability applies; strict liability does not apply.

The relevant law for torts for harm from an offshore oil and gas incident is the New Civil Code, which entered into force on 1 October 2011. The New Civil Code imposes liability for bodily injury and property damage. Claims for pure economic loss are recognised, but cover for them is limited due to the requirement to meet other requisites of Romanian tort law.

**3.10.19. Spain**

The Spanish Civil Code imposes liability for bodily injury and property damage. The strict liability sections of the Civil Code would not apply to a claim for compensation from harm from an offshore oil and gas incident.

A judgment by the Spanish Supreme Tribunal indicates difficulties that may be encountered in claims for property damage for shellfish from an oil spill. Following a spill of oil by the tanker *Compostilla*, in the port of La Coruña in January 1972, owners of a mussel farm claimed damages due to their inability to sell mussels due to them tasting of oil from oil residues on the seabed. The court ruled against the claimants, stating that they should have destroyed the mussels on orders of the local authorities instead of trying to place them on the market.<sup>312</sup>

Spanish law does not specifically recognise pure economic loss. Under Spanish law, the damage suffered by a claimant must be certain and adequately proven or the causal link between the tortfeasor’s conduct and damage to the claimant must be established. As a result of this requirement, courts tend not to state that compensation for pure economic loss is not recoverable. Rather, they state that the claimant has not established damage or causation.

If, therefore, a person in, say, the fisheries industry or the tourism industry, could show that economic losses suffered by him from pollution caused by an offshore oil and gas incident were “foreseeable” and could also meet strict requirements of Spanish law, that person could recover. Although such recovery is possible in principle, it is not necessarily probable.<sup>313</sup>

Claims by businesses in the fisheries and tourism industries following the oil spill by the *Aegean Sea* off the coast of Galicia in 1992 indicate that such claims would not necessarily succeed. In those claims, which would have been brought under Spanish law transposing marine Conventions (and, thus, legislation that imposes liability for pure economic loss), the Court of Appeals held against the fishermen and other maritime workers, concluding that they had relied on speculation and had not sufficiently specified the negative effects of the spill and its economic consequences for them.<sup>314</sup>

In summary, liability for pure economic loss appears to be imposed by Spanish law but stringent criteria apply including a requirement for a claimant to show that its loss is foreseeable, certain and adequately proven.

<sup>312</sup> See *ibid*, 558 (referring to STS 19.6.1980 [RJ 1980/2410]).

<sup>313</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 41 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>314</sup> See *Environmental Liability and Ecological Damage in European Law 516* (Monika Hinteregger, editor, Cambridge University Press, 2008).

### 3.10.20. United Kingdom

Claims for bodily injury and property damage in the UK are mostly brought in negligence rather than under law that imposes strict liability.

The applicable law for a claim for compensation for traditional damage does not provide for pure economic loss. Claims by fishermen, persons in the tourism industry, and other persons who suffered economic loss would not, therefore, be covered unless such persons had suffered damage to property in which they had a legal interest, or bodily injury.

Even if a person suffered property damage or bodily injury from pollution from offshore oil and gas operations, consequential economic loss does not appear to be covered or, at the least, is limited. For example, if a fish farmer suffered property damage due to oil pollution to some, but not all, of the farmed fish, the loss of income from the inability to sell unharmed fish seems highly unlikely to be covered because it is not consequential damage.

There is thus a substantial gap in the common law for claims that are likely to arise from pollution from offshore oil and gas operations.

The gap may be covered in part by OPOL, which provides for compensation for “pollution damage” and “remedial measures”, with costs of the latter being limited to public authorities. Compensation for “pollution damage” is limited to damage from “oil”; it does not include damage from other chemicals or dispersants.

OPOL may provide compensation for pure economic loss, although this is disputed by OPOL.<sup>315</sup> Membership of OPOL is mandatory for licensees of offshore oil and gas operations in the UK (see UK summary, section 1.1.2).

In summary, the law in the UK does not cover pure economic loss. Claims from offshore oil and gas incidents may, however, succeed in respect of direct loss if the claims are covered by OPOL depending on whether OPOL provides compensation for pure economic loss.

### 3.11. Offences and sanctions related to pollution from offshore oil and gas incidents

Many Target States have established offences for polluting marine waters. The typical sanction is a fine, the amount of which varies widely between the different Target States. Imprisonment may also be imposed. For example, the sanctions for unlawfully polluting water under the German Criminal Code are a fine or imprisonment up to five years, with a fine or imprisonment up to three years for negligent pollution.

Some Target States such as Greece, Malta and the UK, authorise the imposition of liability on directors and officers if the company commits an offence. The criteria for the liability of directors and officers vary between these Target States.

A few Target States mention the threat to fisheries or tourism in the provisions establishing offences. For example, the Bulgarian Maritime Spatial Act imposes liability, among other things, for “a direct or indirect introduction by man of substances or energies into the marine environment ... which hinders legitimate use of the sea, including quality impairment of the sea water and deterioration of the conditions for tourism and leisure activities”.

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<sup>315</sup> See comment by OPOL in section 4.1.2 below.

The Greek Hydrocarbons Law specifically recognises that fishing may be damaged by prospecting, exploration and exploitation of hydrocarbons in the context of unlawful operations. In this respect, it is an offence under the Law to carry out the prospecting, exploration and exploitation of hydrocarbons in breach of regulations, including a breach which results “in the pollution or contamination of the sea, in damage to the sea flora and fauna or to the fishing”.

None of the offences or the sanctions in any Target State is of the scale of the sanctions imposed by the Clean Water Act in the US (see section 3.5.1). Companies carrying out oil and gas operations in EEA waters would, thus, not face the prospect of the huge civil liability under the US Clean Water Act faced by BP and other persons involved in the Deepwater Horizon incident (see section 3.5).

### 3.12. Systems for handling claims for compensation

If pollution from an offshore oil and gas incident occurs in EEA waters, it will be essential to handle claims promptly. This section examines regimes that exist in the Target States for handling claims for compensation from pollution from an offshore oil and gas incident.

#### 3.12.1. Legislative claims regime

As indicated in the summaries, Norway is the only Target State that has established a legislative system for handling claims for compensation for harm from an offshore oil and gas incident (see Norway summary, section 1.6). In brief, that system, which is established by the Petroleum Act, provides that, unless it is obviously unnecessary, the operator who caused the pollution damage shall make weekly public announcements in the “Norwegian Gazette (*Norsk Lysingsblad*) and in newspapers and other publications which are generally read in those places where damage is caused, or is presumed to occur”. The announcements will include the identity of the person to whom the claims should be submitted and the deadline for their submission. The Ministry may provide for a shorter limitations period than the prescribed period.

Claims for pollution damage are brought in the court in the district in which petroleum was discharged or in which the damage was caused. The Ministry is authorised, however, to aggregate all the claims in a single court.

If pollution from the offshore oil and gas incident has harmed persons in Denmark, Finland or Sweden, they have a right, under the Nordic Environmental Protection Convention, to bring an action for compensation for pollution damage in a Norwegian court as well as in national courts (see section 3.6.2).

#### 3.12.2. Non-legislative claims regimes

OPOL established a non-statutory compensation scheme for companies that are parties to it. Claims are not made directly against OPOL; instead, they may be made only against the operator whose act or omission caused the pollution that resulted in the claim. Disputes between a claimant and the operator appear to be subject to arbitration (see section 4.1.2 below for a description of OPOL).

No claims have been made under OPOL. The regime is, therefore, untested. OPOL’s Guidelines for Claimants state that:

“OPOL is intended to encourage prompt remedial action by operators of offshore facilities in the event of a spill.

OPOL intends that all admissible claims associated with a spill should be settled in an orderly and expeditious manner without recourse to the Courts and avoiding complicated and lengthy jurisdictional problems.”<sup>316</sup>

OPOL does not bar a claimant bringing an action against the operator (or other persons) in a court. If the claimant does so, however, national law – not the liability agreement under OPOL – would apply. If the claim was for pure economic loss and the damage occurred in the UK, it would not succeed because the law in the UK does not recognise pure economic loss. There is, thus, a strong incentive for claimants to comply with the procedures set out by OPOL, provided that the OPOL liability agreement provides cover for pure economic loss,<sup>317</sup> even though the decision-maker is not independent. Conversely, if an oil company, especially a large oil company, was the operator responsible for paying the claims, it would be under substantial pressure to safeguard its reputation by paying them.

### **3.12.3. Regimes organised by insurers**

Insurers have vast expertise and experience in handling claims from accidents, including claims for man-made and natural catastrophes. If an offshore oil and gas incident was to occur in the waters of any of the Target States that require insurance as the financial security mechanism for compensation for traditional damage (see Table 5 in section 4.2) or, indeed, for which the operator had the relevant insurance, insurers would be involved and would be likely to lead the regime.

As discussed in section 3.8, however, some Target States do not recognise liability for pure economic loss. Insurance policies taken out by operators and others, therefore, would not cover such claims in those jurisdictions. In the majority of Target States in which it is unclear whether claims by businesses in the fisheries, tourism and coastal industries are covered, it is virtually inevitable that claims handling would be delayed by judicial actions as to whether the wording of insurance policies provided cover for claims that may – or may not – be covered by the underlying law.

### **3.12.4. Ad hoc claims regimes**

Man-made disasters have occurred in the past and compensation schemes for traditional damage have been established to handle claims for traditional damage. An example is the scheme that was established by the French Government following the AZF industrial accident. The incident occurred on 21 September 2001 when an explosion in a warehouse that stored granular ammonium nitrate at the AZF chemical plant in Toulouse caused the deaths of 30 people (including 21 employees), injuries to over 4,500 people, and the destruction of 27,000 homes and other buildings. On 3 October 2001, the French Government established the National Disaster Victim Compensation Committee (*Comité National de Suivi pour la prise en charge des Victimes*), led by the Ministry of Justice. The Committee included the Grand Paroisse Group (owner of the chemical plant), governmental authorities, elected officials and disaster-victim associations. On 31 October 2001, an agreement called the National Disaster Compensation Convention was signed. The agreement established special procedures to provide compensation to victims. The claims were managed by a team of 220 experts (including medical experts), 25 claims managers, and 10 lawyers. Over EUR 2 billion was eventually paid out in compensation for claims for bodily injury and property damage; 16,000 people were compensated for bodily injuries, and 71,000 cases (33,000 of which were for residences, including private and local authority houses and flats) involved compensation for property damage. Other settled claims involved public and commercial buildings and vehicles.

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<sup>316</sup> OPOL, Guidelines for Claimants; available at <http://www.opol.org.uk/guidelines.htm>

<sup>317</sup> See comment by OPOL in section 4.1.2 below.

Notably, however, there were delays in a substantial part of the compensation payments as a result of their coverage by insurance.<sup>318</sup>

### 3.12.5. Judicial regimes

In the absence of a regime for handling claims for compensation from an offshore oil and gas incident, or even when a regime exists but the claim fails to settle, claims could be heard by national courts and tribunals in all the Target States. In addition, some cases could be heard by mediation or arbitration, depending on the Target State. The likelihood of numerous claims for an offshore oil and gas incident means that it would be difficult for judicial systems to handle the claims unless there were procedures for multi-party actions in the Target State.

Some Target States have procedural mechanisms for group actions, test cases, class actions, and other actions involving numerous claims. These Target States include Denmark, Germany, Italy, Portugal, the Netherlands, Norway, Spain, and the UK.<sup>319</sup> None of these procedural mechanisms was introduced to handle claims for compensation from an offshore oil and gas incident. Further, many, if not most, of the mechanisms are designed to handle claims by consumers.<sup>320</sup> They are, thus, not discussed in any detail in this report because they are not relevant to claims for compensation from pollution from an offshore oil and gas incident.

The claims from Deepwater Horizon that were not settled by the GCCF show the types of procedures that have been used to resolve the large numbers of claims that can arise from an offshore oil and gas incident. Many of the US claims were brought as class actions under the relevant civil rules of procedure. In addition, the claims have been heard by procedures established by the Judicial Panel on Multidistrict Litigation, the US mechanism for multi-party and multi-district litigation (see section 3.4.1). This system was not introduced for the Deepwater Horizon claims; it existed long before the incident occurred.<sup>321</sup>

One interviewed stakeholder pointed out that in case of an offshore accident, criminal and civil proceedings will be brought in many Target States. However, civil proceedings may not begin for years (i.e. until the criminal proceedings are closed). An additional issue is the hierarchy of claims: clean-up costs would probably be met by all operators in Europe, but this may not leave any money for traditional damage (in light of civil proceedings taking a long time).

A major delaying issue would be the imposition of fault-based liability for most claims for traditional damage. A liability system based on negligence or fault is inherently subject to delay compared to a strict liability regime. Claims under the former system would inevitably lead to disputes as to whether the act or omission causing the damage was negligent or otherwise at fault.

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<sup>318</sup> See BIO Intelligence Service, Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents (2013), 24-26 (Final Report prepared for European Commission DG Environment); available from <http://ec.europa.eu/environment/legal/liability/>

<sup>319</sup> See Gabrielle Nater-Bass, Class Action Arbitration: A New Challenge? (2009); available at [www.homburger.ch/fileadmin/publications/CLASSACT\\_01.pdf](http://www.homburger.ch/fileadmin/publications/CLASSACT_01.pdf); Duncan Fairgrieve and Geraint Howells, Collective Redress Procedures – European Debates, International and Comparative Law Quarterly, vol. 58, 379-409 (2009).

<sup>320</sup> See Duncan Fairgrieve and Geraint Howells, Collective Redress Procedures – European Debates, International and Comparative Law Quarterly, vol. 58, 379, 380 (2009).

<sup>321</sup> See Daniel A. Richards, An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge, Fordham Law Review, vol. 78(1), 311 (2009).

Experience in the EU has shown that problems may arise from the judicial process for claims, especially due to delay. An example is the *Prestige* oil spill, which occurred on 19 November 2002. Criminal proceedings were commenced in Spain on 15 November 2002. Prosecutions were subsequently brought against the captain, the chief engineer and the first officer of the *Prestige*, followed by a prosecution against the Director General of the Spanish Merchant Navy. Following lengthy proceedings, the Criminal Provincial Court of La Coruña acquitted all defendants on 13 November 2013. An appeal was still pending before the Spanish Supreme Court in October 2014. Under articles 109 and 116 of the Spanish Criminal Code, a person who is convicted of a criminal offence has direct civil liability for the damages caused by the offence.<sup>322</sup>

### 3.13. Analysis of liability systems and compensation regimes in the Target States

The discussion of the liability systems of the Target States, and the absence of regimes to handle claims for compensation for traditional damage from pollution from an offshore oil and gas incident indicates that many, if not most, Target States do not have a liability system that would cover many claims for traditional damage or a compensation handling regime in place if an offshore oil and gas incident was to occur.

#### 3.13.1. Effectiveness of liability systems

Our review of the liability systems of the Target States indicates that there is a major issue as to whether the majority of civil claims from accidents resulting in widespread pollution damage will be met by the current legal and other regimes in place in those States. Claimants appear to be much more likely to succeed in a minority of Target States (such as France, the Netherlands, Denmark and Norway) than in the other Target States. In particular, claimants that seem unlikely to obtain redress in many Target States include businesses that suffer claims that are not “direct”, that is, that do not arise directly from a spill. Examples include ferries, plus businesses that process fish and shellfish and that suffer a decline in profits due, among other things, to a ban on fishing.<sup>323</sup>

Norway is the only Target State that has legislation that specifically imposes liability for compensation to businesses, in respect of fisheries. Section 8-3 of the Petroleum Act provides that a licensee is strictly liable for financial loss suffered by Norwegian fishermen resulting from pollution and waste from petroleum activities. The financial loss includes:

- the reasonable cost of measures taken by fishermen to avert or limit the damage or loss;
- any financial loss from such measures;
- damage and inconvenience as a result of supply vessels and support vessel traffic; and
- relocation of the facility to or from the relevant fishing field.

<sup>322</sup> See Adriana De Buerba and Ángela Uria, *Prestige case: EUR2.2 billion in environmental damages at stake* (Lexology, 9 June 2014).

<sup>323</sup> See OPOL and Oil & Gas UK, *Oil Spill Cost Study – OPOL Financial Limits 37* (February 2012) (stating that ferries would not be compensated under OPOL because losses are not direct); available at [www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182](http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182). A claim by a fish processing business following the *Sea Empress* spill was also concluded not to be direct. See *Alegrete Shipping Company, Inc v International Oil Pollution Compensation Fund (The Sea Empress)* [2003] 2 All ER (Comm) 1, [2003] 1 Lloyd’s Rep 327 (Court of Appeal) (England); available from <http://www.bailii.org/databases.html#uk>

Claims for pollution damage from offshore oil and gas operations must be brought under the Norwegian Petroleum Act. If the Petroleum Act does not apply to a claim, the claim may be brought under the Pollution and Waste Act or the Act Relating to Compensation in Certain Circumstances, as applicable. The Petroleum Act thus establishes a liability regime specifically for claims by businesses in the fisheries industry from an oil and gas incident. Norway thus recognises the interests of the fisheries industry and the offshore oil and gas sector and has established a liability system to handle potential conflicts. Norwegian law does not, however, specifically recognise claims by persons in the tourism or other coastal industries. Such claims are subject to more generalised law. The imposition of strict liability, however, differentiates Norway from other Target States that do not have such a system by removing an obstacle for claimants who suffer loss from an offshore oil and gas incident.

Danish law imposes strict liability for traditional damage, including pure economic loss, caused by the exploration for, and production of, hydrocarbons. Dutch law also imposes strict liability for traditional damage caused by the exploration for, and production of, hydrocarbons, provided that the damage from such operations occurs in the Netherlands. If the damage from such operations occurs in another country, the law of that country applies. The removal of the need to show the operator's negligence facilitates claims by persons harmed by pollution from an offshore oil and gas incident.

Portuguese law balances the right to prospect, explore, develop and produce petroleum with rights, or uses, in connection with other natural resources in the same area by stating that they should not be carried out in a manner that is incompatible with such rights and uses. Unlike Norway, however, Portugal has not established a specific liability system for claims arising from an offshore oil and gas accident. Difficulties, perhaps insurmountable difficulties in some cases, thus remain in claims for loss of income from pollution from an offshore oil and gas incident.

Icelandic law imposes strict liability for bodily injury and property damage from hydrocarbon activities. It is not clear from the Hydrocarbons Act, however, whether claims for pure economic loss would succeed. The explanatory notes to the Hydrocarbons Act may clarify this issue but an English translation was not available.

Claims by businesses in the fisheries and tourism industries for harm from marine pollution have been brought in the EU. Most of these claims have been brought due to an oil spill from a vessel and, thus, have been handled under national legislation implementing the Civil Liability Convention or the Fund Convention, both of which impose strict liability for pollution damage, which includes lost income, provided the loss is direct. No such Convention exists for compensation from harm from offshore oil and gas operations.

Other claims for harm from marine pollution have also been brought in Target States. For example, a claim by fishermen who had suffered lost income due to an oil spill in a coastal area succeeded in the Netherlands.<sup>324</sup>

In France, a claim by the owner of a café who lost income because he lost some of his customers due to the pollution of a nearby river was awarded compensation.<sup>325</sup> In another French case, however, a claim by the State for loss of taxes due to unsold fishing licences did not succeed due to the uncertainty of the loss.<sup>326</sup>

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<sup>324</sup> See Environmental Liability and Ecological Damage in European Law 504 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>325</sup> Ibid, 487 (citing Corr. Turnhout, 18 February 1992, unpublished, No. 498).

<sup>326</sup> Ibid, 487 (citing Pol. Chimay, 14 August 1931, JJP, 1932, 378).

Most Target States rely to a large extent for a liability system for claims for compensation from pollution from an offshore oil and gas incident on their Civil Codes, Law on Wrongs, Law on Obligations and/or common law. This liability system is supplemented in some Target States by laws that specifically impose civil liability for pollution although some of these laws do not appear to apply seaward beyond the territorial sea.

The most crucial issue concerning the liability system for traditional damage discovered by the research in this study is the legal uncertainty as to whether claims for pure economic loss from an offshore oil and gas incident would be recoverable under the legal systems of most Target States and, if so, the extent of claims that would be recoverable under that law. That is, it is unclear whether the national law of a substantial number of Target States impose liability for pure economic loss other than liability for intentionally inflicted pure economic loss, which is imposed by all European legal systems,<sup>327</sup> but which does not apply to claims for compensation from an offshore oil and gas incident. If liability for pure economic loss does not exist in a Target State, many claims by third parties for traditional damage from pollution from an offshore oil and gas incident would fail. Further, even when the law of a Target State recognises pure economic loss, the scope of claims recognised by them, and their legal approach to such claims, differs broadly. The approach ranges from liberal to unsettled to conservative.

A total of 96 per cent of the claims for traditional damage from Deepwater Horizon were for pure economic loss.<sup>328</sup> Due to the lack of clear liability for pure economic loss in most Target States, and the lack of a liberal approach to such claims by the vast majority of Target States that recognise such claims, many claims for lost income from pollution from an offshore oil and gas incident in the waters of the Target States seem likely to fail. The requirement for a claim to be direct further means that even if claims for lost income are recognised by the law of a Target State, it is unlikely that claims by businesses in sectors other than the fisheries sector and, perhaps the tourism sector, would succeed. Further, the likelihood of a claim by a business in the tourism sector succeeding is significantly less than the likelihood that a claim by a business in the fisheries sector would succeed.

One commentator has questioned the rationale why a claim by a business in the fisheries sector should be more likely to succeed than a claim by another coastal business, such as the tourism sector. Professor Perry considered that “no rational distinction can be made between the interests of fishermen and the interests of other victims (such as fish restaurants, bait shops, tourist guides, hotel, and other businesses in the area)”.<sup>329</sup>

Even claims by fishermen may not succeed. Following the oil spill by the *Aegean Sea* off the coast of Galicia in 1992, claims were brought by businesses in the fisheries and tourism industries for lost income under the Spanish legislation implementing the marine Conventions (and, thus, legislation that specifically imposes liability for pollution damage, which includes lost income). The Court of Appeals held against the fishermen and other maritime workers, concluding that they had relied on speculation

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<sup>327</sup> See Francesco Parisi, Vernon V. Palmer and Mauro Bussani, The Comparative Law and Economics of Pure Economic Loss, *International Review of Law and Economics*, vol. 27, 29, 45 (2007); available at <http://www.egov.ufsc.br/portal/sites/default/files/anexos/32972-41246-1-PB.pdf>

<sup>328</sup> See David W. Goldberg, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) *Texas Journal of Oil, Gas, and Energy Law*, vol. 7, 241, 242.

<sup>329</sup> See Ronen Perry, Relationship Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, (2004) *Rutgers Law Review*, vol. 56, 711, 786.



and had not sufficiently specified the negative effects of the spill and its economic consequences for them.<sup>330</sup>

Further, claims by other coastal industries may not succeed. One commentator considered that article 483 of the Portuguese Civil Code could impose liability for pure economic loss in the form of lost profits by fishermen and owners of tourism facilities<sup>331</sup> but not for the lost profits of the local distributor of drinks to tourism facilities.<sup>332</sup> Article 483 provides that “[w]hosoever with intent or due to negligence unlawfully infringes the right of a third party or any legal provision established to protect the third party’s right must undertake to indemnify the damaged party for the damages resulting from the infringement”.

OPOL may have filled the gap caused by the absence of liability for pure economic loss in the UK, where such liability in the context of claims for compensation from pollution from an offshore oil and gas incident does not exist.<sup>333</sup> This is due to the UK Government requiring licensees for offshore oil and gas operations to be members of OPOL and also, of course, the voluntary agreement by oil companies to establish OPOL in the first place. OPOL is not, however, a legislative system. The liability system established by it also has limitations including the absence of an independent decision-maker and the limitation of claims to direct losses only (see section 4.1.2). Crucially, OPOL considers that “Pollution Damage”, for which compensation is provided under the Liability Agreement, does not include pure economic loss (see section 4.1.2).

It is unclear in many Target States whether claims for pure economic loss are recoverable at all; except in Target States such as the UK and Cyprus where they are not recoverable under the law of those States, and in France where they are widely recognised as being recoverable. Target States that recognise pure economic loss and that fall between these extremes include Greece, Italy and the Netherlands. They also include Poland and Romania, with these Target States having a more conservative approach than the former three Target States. As discussed above, however, even in Target States that recognise claims for pure economic loss, it is unclear whether claims for lost income from pollution from an offshore oil and gas incident would be covered. Further, stringent criteria tend to apply. It is much less likely that a claim for pure economic loss would succeed than a claim for bodily injury or property damage.

It is, thus, not possible simply to conclude that if a Target State imposes liability for pure economic loss, claims by persons in the fisheries, tourism and other sectors harmed by pollution from an offshore oil and gas incident would necessarily be covered; much depends on the law in the each jurisdiction. The law in the Target States for this area of law varies broadly.

In Croatia, for example, a claimant would have to show the probability of making the profits that are claimed and that he/she had the intention to acquire the profits in order to succeed in a claim.

Another significant obstacle to claims for pure economic loss in the Target States that recognise liability for it is the need for a claimant to prove fault, a requirement that also exists for a claim for other traditional damage. This requirement exists in Target States such as Bulgaria, Croatia, Cyprus, France, Greece, Ireland, Italy, Latvia, Malta and Romania.

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<sup>330</sup> See Environmental Liability and Ecological Damage in European Law 516 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>331</sup> See *ibid*, 525.

<sup>332</sup> See *ibid*, 552.

<sup>333</sup> See section 4.1.2 below for comment by OPOL.

Even when a claim is for property damage, difficulties may be encountered. Following a spill of oil by the tanker *Compostilla*, in the port of La Coruña in January 1972, owners of a mussel farm claimed damages due to their inability to sell mussels due to them tasting of oil from the residue of oil on the seabed. The Spanish Supreme Tribunal ruled against the claimants, stating that they should have destroyed the mussels on orders of the local authorities instead of trying to place them on the market.<sup>334</sup>

Further, some Target States have an exclusion, or a defence, for *force majeure*. If, therefore, pollution from an offshore oil and gas incident resulted from, say, a hurricane affecting an oil rig, the operator would not be liable (see sections 5.1 and 5.2, for a discussion of Fukushima, in which an earthquake followed by a tsunami struck the power plant).

Our research also indicated that two Target States may have partially filled the gap in liability in their legislative systems for claims from an offshore oil and gas incident by imposing liability for compensation for third-party claims from such an incident through contractual agreements.

The Production Sharing Contract for Cyprus appears to impose strict liability for bodily injury and property damage. The Contract provides that “[t]he Contractor shall indemnify and compensate any person, including the Republic [of Cyprus], for any damage or loss which the Contractor, its employees or subcontractors and their employees may cause to the person, the property or the rights of other persons, caused by or resulting from Hydrocarbons Operations, including any environmental damage”. The meaning of the word “rights” is not entirely clear. It may mean, for example, the right to occupy or to use property. Further, the agreement does not appear, however, to fill the gap in Cypriot law for liability for pure economic loss; the agreement appears to be limited to claims for bodily injury and property damage.

The Draft Model Lease Agreement for Greece provides that the lessee agrees “to take all necessary and adequate steps ... to ensure adequate compensation for injury to persons or damage to property caused by the effect of the Petroleum Operations”. Even if the agreement imposes liability on a lessee, which is unclear, liability does not appear to extend to pure economic loss.

If the Cypriot and Greek contractual agreements do, in fact, impose liability for pure economic loss on licensees / lessees (which seems to be more likely under Cypriot law than under Maltese law), they are likely to prove difficult to implement. That is, only the State has the right to require the licensee / lessee to carry out its obligations under the contract. Claimants do not have any rights under the contracts so would need to persuade the State to act on their behalf. Further, the contractual provisions do not include any details of the type of claims that would be covered.

The systems in place in the Target States for compensation from an offshore oil and gas incident are in sharp contrast to the USA. As indicated above, the common law of US States does not impose liability for pure economic loss. Further, general maritime law does not recognise liability for pure economic loss except for claims by commercial fishermen. This gap was, however, filled in 1990 by the OPA, which specifically imposes liability, among other things, for the “loss of profits or earning capacity caused by the injury, destruction, or loss of real or personal property or natural resources” (see section 3.3.3.1). The OPA also imposes liability for property damage. Liability for such claims is strict. US law thus differentiates between claims for bodily injury (which are not covered by the OPA) for which fault-based liability applies, and liability for property damage and pure economic loss, for which strict liability applies.

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<sup>334</sup> See *ibid*, 558 (referring to STS 19.6.1980 [RJ 1980/2410]).

The OPA provision that imposes liability for loss of profits or earning capacity is not altogether clear (as discussed in section 3.3.3.1).

What is clear, however, is the broad extent of claims for which BP was concluded to be liable following the Deepwater Horizon incident. As indicated in section 3.4.2 above, the settlement agreement entered into by BP and claimants for economic and property loss, and approved by the courts, includes many coastal businesses other than businesses in the fisheries and tourism sectors. Such coastal businesses include hospitality, food service, fishing-related industries, retail, development, business services and non-profit organisations including churches, crisis centres, food banks and businesses that regularly purchased seafood. Our review of the liability systems of the Target States indicates that claims by the vast majority of these businesses would not succeed if an offshore oil and gas incident was to occur in their waters.

Finally, our research indicated that it is not certain that the Civil Codes and other laws that impose liability for traditional damage in the Target States would actually apply to claims for compensation from an offshore oil and gas incident. As indicated above, a comparative study of the law that applies to the continental shelf and the EEZ of 11 States, including some of the Target States, has described the application of national law to the continental shelf and EEZ as “uncertain, fragmented and in general undeveloped or certainly misunderstood, particularly with respect to application of private law [including tort law]”.<sup>335</sup>

Our research located some laws that specifically apply jurisdiction for tort law, and other civil laws, to the continental shelf and EEZ, as described in the Target State summaries. Our research did not, however, locate laws that extended jurisdiction for the relevant civil legislation in all Target States. It thus appears that at least some Target States have not enacted such legislation. Further, jurisdiction for at least some of the environmental laws that impose liability for traditional damage from pollution does not apply beyond the territorial sea.

#### **3.13.2. Effectiveness of compensation handling regimes**

Only Norway has a legislative regime for handling claims for compensation for traditional damage from an offshore oil and gas incident; the other Target States do not have specific compensation regimes. It is not clear whether the Norwegian regime would apply in other Target States where, for example, potentially affected communities depend more on tourism than fishing. The Norwegian regime, however, illustrates an effective system that could be adapted for use in other Target States.

The OPOL system illustrates a voluntary system to handle claims from an offshore oil and gas incident. However, the effectiveness of the OPOL system is drawn into question, in particular, by the appointment of the liable operator as the decision-maker on whether claims are covered. This system, which has never been tested, could have some practical shortcomings – as suggested by the challenges to the US system established after Deepwater Horizon (see section 3.4.1). OPOL would also cover fewer claims than those covered under the OPA in the USA. For example, claims in the US included claims for harm from dispersants, liability for which is not imposed by OPOL.

Further, liability under OPOL is subject to a cap. The payment of claims following the *Sea Empress* oil spill, in which the marine Conventions applied, illustrates the delay that can result when the monetary amount of claims exceeds the limit of liability.

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<sup>335</sup> See Moira L. McConnell, Observations on the Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: A Comparative View, *Ocean Yearbook*, vol. 25, 221, 246 (2011).

An ad hoc system, such as that established by the French Government following the AZF incident does not really establish a compensation handling regime. Instead, however successful, this was a system that was established after – not before – an incident occurred.

Finally, the judicial systems of Target States that provide for class actions, group actions, test cases and other multi-party litigation may well be able to handle claims for compensation for traditional damage from an offshore oil and gas incident that do not settle. The effectiveness of such a system for transboundary claims could, however, be an issue, particularly if claims were heard under the legal systems of more than one Target State.

# 4. Available financial security instruments and financial liability requirements under hydrocarbons licensing regimes in Target States

BP, the operator in the Macondo exploration well, estimated that its costs of that accident will exceed US\$ 42.7billion (EUR 31,338,300,000),<sup>336</sup> an estimate that was made before Judge Barbier's ruling that BP was grossly negligent under the Clean Water Act, with the potential for the substantially increased costs that ruling (which BP is appealing) entails (see section 3.5.2). Very few companies and no existing risk-pooling scheme could accommodate such a sum, which would leave the host country exposed to public financial risk and the potential that many claims for compensation would be unpaid or paid only in part.

In the EU, there is no consistent approach that would ensure that the “polluter pays” principle would be fully upheld to cover damages of a transboundary character and/or of the level seen in the Gulf of Mexico. The re/insurance market does not – and cannot – furnish instruments that guarantee unlimited financial indemnity. The financial assets of any company, however large, are necessarily finite as well as being subject to other obligations and commitments. Apart from OPOL, no guarantees amongst Target States or international solutions are currently in place. The absence of an international liability and financial security regime governing offshore oil and gas accidents is in contrast to the maritime transport sector where liability conventions and associated funds and mandatory financial security provisions exist to help facilitate the speedy compensation of victims. It is nonetheless important to note that the international agreements in the maritime transport sector usually include liability caps, which limit the amount of compensation that is available to injured parties.

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<sup>336</sup> See Tom Borden, BP's legal bill for the Gulf oil spill disaster soars to \$1bn, The Independent (5 February 2014); available at <http://www.independent.co.uk/news/business/news/bps-legal-bill-for-the-gulf-oil-spill-disaster-soars-to-1bn-9107849.html>

Liability limits may delay the payment of claims, as occurred following the *Sea Empress* oil spill off the Welsh coast, when the claims exceeded the available funds. Further, the limits in the Conventions may be exceeded due to EU law, as occurred in the claims following the *Erika* oil spill.<sup>337</sup>

The hazards from offshore oil and gas activities may be summarised as follows:

“The offshore oil and gas exploration and production industry faces many operating hazards, such as blowouts, explosions, oil spills, and fires, as well as hazards associated with marine operation, such as collision, grounding, and damage or loss from severe weather [e.g., hurricanes in America or winterstorms in Europe]. These hazards can cause personal injury and loss of life, damage to and destruction of property and equipment, pollution or environmental damage, and suspension of operation.”<sup>338</sup>

It was pointed out that should any disaster of the magnitude of Macondo occur in Europe (e.g. in the North Sea), companies other than majors would not be able to pay to deal with its consequences,<sup>339</sup> although some stakeholders in the offshore oil and gas and insurance industries consider that such a disaster happening in Europe would lead to less damage (in monetary terms) requiring compensation. This comment, however, must be weighed against various factors such as the availability of airports, ports, and large cities with facilities to support speedy clean-up measures in the case of Macondo,<sup>340</sup> which is not necessarily the case if an oil spill should occur in some Target States, particularly in northern regions. Further, the comment may reflect the availability of liability for pure economic loss in the USA, which is not the case in most States in the EEA. As discussed in section 3.4.1, approximately 96 per cent of the claims for compensation from Macondo were for pure economic loss;<sup>341</sup> these claims would not be covered by the legislation in most Target States (see section 3.10).

In addition there is, in EEA waters, an increasing number of smaller operators focussing on certain niches (such as taking over depleted wells) which may not have sufficient financial capacity in case of an offshore accident.<sup>342</sup> It is worth noting that the material that is extracted from the seabed is crude oil, which is quite a different substance from already transformed oil. Crude oil is high in gas and therefore entails a risk of explosion. There are very few response boats that could operate in such accidents: for instance, the European Maritime Safety Agency (EMSA) has no vessel that can assist in the recovery of crude oil migration, as their equipment would need to be explosion-proof (which it currently is not). These incidents are therefore particularly expensive and there are no existing facilities in the world to remediate them efficiently.<sup>343</sup> However, the EMSA is not the only provider of clean-up vessels. Other such companies include Oil Spill Response Limited. Initiatives by the industry

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<sup>337</sup> See *Commune de Mesquer v Total France SA* (CJEU, Case No. C-188/07, 2008); available from <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-188/07>

<sup>338</sup> See Rawle O. King, *Deepwater Horizon Oil Spill Disaster: Risk, Recovery, and Insurance Implications*, Congressional Research Service Report for Congress, p. 12 (12 July 2010); available at <http://www.fas.org/sqp/crs/misc/R41320.pdf>

<sup>339</sup> Telephone interview with Karl Kristensen, from Bellona, 29 April 2014.

<sup>340</sup> See Kiley Kroh, Michael Conathan and Emma Huvos, *Putting a Freeze on Arctic Ocean Drilling 6-7* (Center for American Progress, February 2012); available at <http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/arcticreport.pdf>

<sup>341</sup> See David W. Goldberg, *Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990*, (2011) *Texas Journal of Oil, Gas, and Energy Law*, vol. 7, 241, 242.

<sup>342</sup> Telephone interview with Nicolas Fournier, from Oceana, 21 March 2014.

<sup>343</sup> Telephone interview with the International Association of Drilling Contractors (IADC), 28 March 2014.

also exist: the oil and gas industry has for instance “commissioned four well capping stacks to be stored at strategic locations around the world, one of which is already located in Stavanger, Norway, with a further capping stack already available in the UK”, although they may be transported to other locations.<sup>344</sup>

This chapter is structured as follows. First, it provides information on the availability of financial security instruments on the global market. Second, it examines the mandatory financial security regimes of all Target States to describe the financial security instruments that are acceptable to competent authorities for liability for compensation for traditional damage. Third, it compares and analyses financial security requirements for traditional damage and available instruments. In doing so, the report examines, among other things, the availability of existing cover under insurance and other financial security instruments for such liability regimes.

#### **4.1. Financial security instruments and mechanisms available, or under development, for offshore oil and gas incidents in EEA waters**

An important distinction needs to be made between (i) financial security instruments and/or mechanisms that are currently available on the financial markets to licensees in EEA waters for third-party damage resulting from offshore oil and gas activities, and (ii) those that are acceptable and accepted by competent authorities in the 20 Target States for compensation for such damage.

This section details the types of financial security instruments and/or mechanisms currently available on the financial market (4.1.1), before analysing more specifically the OPOL scheme (4.1.2) and the financial product developed by Munich Re (4.1.3).

It is noted that Target States are reconsidering or revising financial security requirements for offshore oil and gas activities in their transposition of the OSD. In particular, the revisions by the OSD to the ELD, that is the inclusion of licensees of offshore facilities as operators under the ELD, and the extension of liability under the ELD to waters in the EEZ,<sup>345</sup> have resulted in reconsideration by Target States of financial security for environmental damage. The financial security requirements described below may thus change as a result of the transposition process, not only for environmental damage (which is outside the scope of this study), but also for traditional damage as well as obligations under the hydrocarbons licensing regime.

##### **4.1.1. Types of available financial security instruments and/or mechanisms**

This section provides a detailed description of the financial security instruments and/or mechanisms that are currently available to licensees on the financial market.

The Metro Report broadly covers instruments available to licensees. Where relevant, this section therefore refers to that study.

A distinction must be made between first-party (e.g. self-insurance and corporate guarantor) and third-party (e.g. insurance, mutualisation) financial instruments and mechanisms. The types of financial security instruments / mechanisms that are currently available to cover claims for traditional damage are:

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<sup>344</sup> Written feedback of OGP provided in the framework of this study, 16 April 2014; and meeting with OGP representatives, 6 May 2014.

<sup>345</sup> OSD, articles 7 and 38.

#### 4. Available financial security instruments and financial liability requirements under licensing regimes

- First-party financial security instruments:
  - Self-insurance (corporate net worth or other financial criteria);
  - Captives; and
  - Guarantee by a parent or other company that meets corporate net worth or another financial test.
- Third-party financial security instruments:
  - Pools: re/insurance pools; mutuals for industry sectors; government-sponsored pools;
  - Insurance;
  - Bonds: catastrophe (cat) bonds or other types of bonds by banks or sureties; and
  - Guarantees: letters of credit; trust funds; other types of bank guarantees.

It is also often possible to use different combinations of the above-mentioned instruments and mechanisms if the requisite governmental requirements permit such a combination. Most businesses use a combination of traditional instruments and self-insurance (purchasing primary and excess liability insurance in the international marine insurance market).<sup>346</sup> There are many interactions between, for instance, pools, commercial insurers and reinsurers. These interactions and combinations have the benefit of spreading the risk among various players, and increasing the available capacity. Indeed, because the limits of insurance for claims from offshore oil and gas operations are usually in excess of US\$ 1 billion, there is no single insurer willing to cover the entire risk exposure.<sup>347</sup> Insurance is virtually always underwritten on a subscription basis, that is, with numerous insurers subscribing to a single contract. Specialist brokers (such as Willis and Marsh) play an important role. As with other types of insurance, a company seeking offshore energy insurance typically instructs a broker, who presents the client's needs to the insurance market and negotiates with underwriters in the energy field<sup>348</sup> to develop an insurance package.<sup>349</sup>

In addition, alternative risk transfer (ART) mechanisms, such as catastrophe bonds (see sections below), constitute alternative sources of capacity for spreading oil spill and other financial risks, and may thus provide added capital to cover higher liability limits for oil spills. ART mechanisms “turn an insurance policy or reinsurance contract into a financial security that is then transferred to investors in the capital markets”.<sup>350</sup> The benefits of ARTs may be summarised as follows:

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<sup>346</sup> Robert P. Hartwig, Claire Wilkinson. An Overview of the Alternative Risk Transfer Market. Handbook of International Insurance, Huebner International Series on Risk, Insurance and Economic Security, vol. 26, 2007, p. 926; available at <http://mail.melat.ir/reinsurance-market/20.pdf>; Rawle O. King (2010), p. 8.

<sup>347</sup> Rawle O. King (2010), p. 9.

<sup>348</sup> The London insurance market is one of the largest insurance markets in the world. Lloyd's of London (Lloyd's), as well as the London company market, serves as a meeting place for insurers and brokers. “Underwriters are employees of an insurance company who negotiate and write policies and define the terms of insurance contracts that assign risk to various parties in return for financial payment (profit) and assurances. An underwriter's seal must be affixed to each commercial policy. At Lloyd's, underwriters work in what are called “syndicates” that represent a group of underwriters serving as gate keepers for participating companies signing new policies. (...). Lloyd's brokers work with the syndicates employed by direct and reinsurance companies to find a solution for offshore oil and gas companies.” David E. Dismukes, Christopher P. Peters (Coastal Marine Institute). Diversifying Energy Industry Risk in the Gulf of Mexico: Post-2004 Changes in Offshore Oil and Gas Insurance Markets. OCS Study, BOEM 2011-054 (November 2011), p. 17; available at <http://www.data.boem.gov/PI/PDFImages/ESPIS/5/5164.pdf>

<sup>349</sup> David E. Dismukes (2011), p. 17.

<sup>350</sup> Rawle O. King (2010), p. 2.



“Alternative risk transfer solutions help to expand the set of possible insurable risks. They can also pick up where traditional insurance and reinsurance leave off or provide coverage where no traditional coverage is available. By tapping the vast resources of the capital markets, many times greater than those of insurers, ART solutions can also greatly increase capacity.”<sup>351</sup>

(Reinsurance companies are “insurance companies for insurance companies.” That is, an insurer (called a reinsured) cedes part of a risk insured by it to a reinsurer, who may then cede part of that risk to another insurer.)

#### **4.1.1.1. Self-insurance**

Most major oil and gas companies rely on self-insurance or a captive as their balance sheets and asset bases are generally larger than those of the insurance companies from which they would obtain coverage. Small cap companies are usually required by lenders to maintain insurance.<sup>352</sup>

“Pure” self-insurance (in contrast to a captive, see below) is usually created by setting up a “reserve fund”, or “affiliate reserve fund”, for unanticipated events (including accidental damage). A reserve fund is “generally described as a relatively large savings account into which the self-insuring company deposits an amount of money (capital) to serve as a financial base to call upon if an adverse event occurs.”<sup>353</sup> An affiliate reserve fund is “simply a reserve fund that has been created, and booked for financial reporting purposes, to an affiliate, or subsidiary company of a larger energy company”.<sup>354</sup> Self-insurance is usually chosen over traditional insurance if it allows the company to insure itself more cheaply than obtaining cover on the commercial insurance market.

Small or medium-size operators may have a high self-insured retention (SIR) in an insurance policy. The SIR may itself be insured if this is permitted by the insurer offering the policy. SIRs are not, however, self-insurance.

Oceana commented that self-insurance does not seem to be an efficient type of financial security in connection with the “polluter pays” principle. The reason for this is that the cost of self-insurance is low and leads to a lesser sense of responsibility from the company that self-insures. This type of insurance therefore reduces the deterring dimension of insurance costs.<sup>355</sup> However, the opposite view could also be considered as valid, namely that buying insurance from an independent insurance company can lead to moral hazard.

#### **4.1.1.2. Captives**

If a company is sufficiently large, it may establish, and thus obtain insurance from, a captive insurance company that, in turn, may (or may not) purchase reinsurance from commercial reinsurers.<sup>356</sup> Some majors, such as BP, do not reinsure risks out of their captive.

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<sup>351</sup> Robert P. Hartwig (2007), p. 927.

<sup>352</sup> David E. Dismukes (2011), pp. 15, 73.

<sup>353</sup> Ibid, p. 15.

<sup>354</sup> Ibid, p. 15.

<sup>355</sup> Telephone interview with Nicolas Fournier, Oceana, 21 March 2014.

<sup>356</sup> BIO Intelligence Service (2009). Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues. Report for the European Commission (DG Environment). In

#### 4. Available financial security instruments and financial liability requirements under licensing regimes

Captives are an alternative to traditional commercial insurance, set up by a parent company to insure the risks of its owner.<sup>357</sup> Their sole function is to insure (or finance risk) for the parent company, other operating affiliates, and sometimes partners, joint ventures or special purpose vehicles, and in some instances other project contractors.<sup>358</sup> A reason for an oil and gas company to create a captive may be that regulation in a specific country requires that it take out insurance coverage.<sup>359</sup> A, perhaps, more important reason is the favourable tax treatment that may be obtained by establishing a captive.

Offshore captives (captives are often domiciled offshore, e.g. in Bermuda, the Cayman Islands, the Isle of Man) may use a “fronting” insurer to provide the basic insurance policy. In the words of Robert P. Hartwig: “Fronting typically means that underwriting, claims, and administrative functions are handled in the [target country] by an experienced commercial insurance company, since a captive generally will not want to get involved directly in running the insurance operation. Also, fronting allows a company to show it has an insurance policy with a [target country]-licensed insurance company, which may be required for legal and business reasons.”<sup>360</sup> Specialist teams of brokers, sometimes from the major brokers, may also run a captive for a company.

The reported advantages of captives (and self-insurance) are:

- The general financial insulation from market cycle swings in the insurance business;
- The reduction of overall transactional costs of insurance;
- Greater flexibilities for coverage;
- Tax advantages (depending on the country); and
- Internationalisation of the knowledge associated with brokering insurance.<sup>361</sup>

However, a number of criticisms have been raised regarding the use of captive insurance companies. These criticisms include:

- The independence of the captive from the regulated company (the insured exercises direct control over the insurer), and reserves, and the location of captives outside the jurisdiction in which regulated facilities are located;
- Use of fronting (by which a commercial insurer issues a policy that is reinsured to the captive) where, in some cases, the captive agrees to reimburse the insurer for the full amount of claims paid by it; and
- Specialised expertise needed by governmental personnel to oversee captives.<sup>362</sup>

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collaboration with Stevens & Bolton LLP; available at

[http://ec.europa.eu/environment/enveco/others/pdf/implementation\\_efficiency.pdf](http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf)

<sup>357</sup> Robert P. Hartwig (2007), p. 926.

<sup>358</sup> David E. Dismukes (2011), p. 15.

<sup>359</sup> Metro Report, p. 228; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>360</sup> Robert P. Hartwig, Claire Wilkinson. An Overview of the Alternative Risk Transfer Market. Handbook of International Insurance, Huebner International Series on Risk, Insurance and Economic Security, Vol. 26, 2007, p. 952; available at <http://mail.melat.ir/reinsurance-market/20.pdf>

<sup>361</sup> David E. Dismukes (2011), pp. 15-16.

<sup>362</sup> BIO Intelligence Service (2009). Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues. Report for the European Commission (DG Environment). In

The level of insurance which can be provided by a captive is driven by the level of the captive's capital/assets and any reinsurance arrangements. Jupiter,<sup>363</sup> BP's captive, holds assets in excess of US\$ 5 billion. It can provide insurance coverage of up to US\$ 1.5 billion on a per risk basis.<sup>364</sup> Most multinational oil companies have set up a captive (e.g. Total, Shell, ConocoPhillips). Those captives tend to be rated by external rating agencies, to establish their financial security. In many cases captive insurance companies are as highly rated by those credit agencies, as non-captive insurance companies.<sup>365</sup> OGP is of the view that the use of captive insurance companies must be permitted, provided the captive meets the same credit requirements as applicable to other providers of financial security, such as non-captive insurance companies.<sup>366</sup>

The above section describes pure captives, that is, captives set up by a single company. Joint captives also exist to cover more than one company. They are generally established to cover risks for which it is difficult to obtain cover on the commercial insurance market.

#### **4.1.1.3. Financial test and corporate guarantees**

The financial test and corporate guarantee were addressed in BIO Intelligence Service's study on the Implementation effectiveness of the ELD and related financial security issues (BIO, 2009).<sup>367</sup>

The financial test and corporate guarantee are available only to larger regulated companies or regulated companies with a large parent company or other affiliate.

The financial test generally includes criteria to determine a minimum level of the regulated company's net working capital or net worth, a minimum level of its current assets to its current liabilities, a minimum ratio of net income or tangible net worth to the estimated costs of complying with required works, a minimum rating for the company's bonds by a recognised rating company, and the location of a substantial proportion of the company's assets in the relevant jurisdiction. The net worth of a company is its total assets minus its total liabilities, that is, the equity of shareholders in the company. The working capital is the company's current assets minus its current liabilities. A company that has an investment grade bond rating may, depending on the legislation involved, satisfy one criterion of the financial test by using tangible net worth. Depending again on the legislation involved, a company that does not have investment grade bond rating may satisfy the criterion by evidence of its net working capital. In such a case, it is likely that the data provided by the regulated company must be supported by a report from an independent auditor.

A corporate guarantee enables a company with a large parent or other affiliated company to provide the above evidence regarding its parent or other affiliate on behalf of the regulated company.

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collaboration with Stevens & Bolton LLP; available at [http://ec.europa.eu/environment/enveco/others/pdf/implementation\\_efficiency.pdf](http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf)

<sup>363</sup> Meeting with OGP representatives, 6 May 2014.

<sup>364</sup> Metro Report, p. 229; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>365</sup> Meeting with OGP representatives, 6 May 2014.

<sup>366</sup> Meeting with OGP representatives, 6 May 2014.

<sup>367</sup> BIO Intelligence Service (2009). Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues. Report for the European Commission (DG Environment). In collaboration with Stevens & Bolton LLP; available at [http://ec.europa.eu/environment/enveco/others/pdf/implementation\\_efficiency.pdf](http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf)

A governmental authority's acceptance of the above mechanisms is based on its satisfaction that the regulated company's, or its affiliate's, financial strength sufficiently minimises the likelihood that public funds will be required to pay to remedy environmental damage or other harm caused by the regulated company. Another reason in respect of very large regulated companies is that the third party from which the company would obtain financial security could be less financially viable than the regulated company itself.

Companies that satisfy the financial test or corporate guarantee can do so at low cost because they do not have to purchase a financial security mechanism from a third party. The competent authority, however, must regularly monitor the company's financial position to ensure its continued financial viability and its potential failure.

#### **4.1.1.4. Pools**

##### **Re/insurance pools**

Re/insurance pools tend to be set up for risks with a high value for which expert underwriting skills are required, especially when only a limited number of underwriters have the requisite expertise.

Munich Re and Swiss Re are the largest reinsurance companies ("first tier"), but there are many other insurance or reinsurance companies ("second tier"), such as Hannover Re. These reinsurance companies are engaged in insurance as well, to a certain extent. For instance, Hannover Re has two main products for oil and gas activities: treaty reinsurance (it supports insurance companies by giving them increased capacity) and facultative reinsurance or direct insurance (D&F) through a subsidiary with an insurance licence. In the framework of the treaty reinsurance, the reinsurer covers a book of business, that is it reinsures an insurance company's portfolios in a specified sector. The D&F business considers each insured risk separately. Traditionally the capacity for D&F business is much larger than for treaty business. Hannover Re's civil liability product (written on a stand-alone basis) was created in 2010 after the Macondo incident.<sup>368</sup> The Swiss Re Group of companies also acts as both an insurer and a reinsurer in Europe providing both direct casualty insurance and facultative and treaty reinsurance. It is possible that with respect to any particular loss, Swiss Re could be involved as both an insurer and a reinsurer of other cedents. Such claims are handled by the respective business units.<sup>369</sup>

In most reinsurance companies, the reinsurance cover operates under a one-year contract (as is also the case for insurance). Renegotiating contracts every year is a common practice in the insurance and reinsurance industry.<sup>370</sup> It has happened in the past that the contract or policy is not renewed, but it virtually never happens that the client does not find another company to provide cover for its activities up to a certain limit and for a certain price.<sup>371</sup>

Lloyd's is the leading market for re/insurance to the offshore energy sector; the offshore energy insurance market being a global, not nationally specific, market. Thus, clients of such products have operations on a global level, even though some national companies may operate only in one

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<sup>368</sup> Interview with Michael Wennin, Hannover Re, 25 March 2014.

<sup>369</sup> Interview with Christopher Baumgartner, Swiss Re, 10 June 2014.

<sup>370</sup> Interview with Michael Wennin, Hannover Re, 25 March 2014. It was reported that Hannover Re could provide capacity for more than one year (typically 2-3 years), but this has not been asked for.

<sup>371</sup> Ibid.

country.<sup>372</sup> Lloyd's sets general terms and conditions. It is dependent on reinsurance and only provides policies on an annual basis.<sup>373</sup>

In terms of financial capping, for instance Hannover Re has a capacity of US\$ 150 million per occurrence, both for insurance and reinsurance. This amount is set by the Board every year and may therefore change annually (over the last several years, this limitation varied from US \$ 100 to US\$ 150 million). There is however no annual aggregate limit.<sup>374</sup>

If the pool is a mutual pool (see directly below), criteria on the acceptance of members of the pool tend to be stringent because all businesses in the pool underwrite the risks of other members according to their proportionate capacity in the pool. Thus, companies that do not meet the requisite standards of members of the pool are almost certain to be refused entry due to their higher potential for incurring losses payable by the pool.

### **Mutuals for industry sectors**

Mutual insurance companies may be established to provide insurance to operators in certain regulated sectors. They are comprised of similarly-situated companies that “mutually” insure one another.<sup>375</sup> Members pay an initial premium followed by annual premiums. The mutual may, in some cases, make a call on members for additional premiums if losses exceed the total funding held by the mutual.<sup>376</sup> Mutualisation is considered to “enhance insurance availability, expand the terms under which insurance is offered, diversify risk, and reduce the overall cost of insurance” as policyholders of the company are also their owners/shareholders.<sup>377</sup> Perhaps the best known example of a mutual is the International Group of P&I Clubs for marine shipping risks.

According to the Metro Report, pools are reportedly attractive only for middle size companies in the offshore oil and gas industry because (i) smaller companies are deterred by the high deductibles (of US\$ 10 million), and (ii) at least for BP, “the current pools mutualize (based on solidarity) but premiums do not sufficiently reflect risk and hence do not award the good risks”.<sup>378</sup> This statement must nonetheless be balanced as some of the majors are members of a mutual insurance company, namely OIL Insurance Ltd. (OIL) (see below).

Nonetheless, OGP has reaffirmed that it does not support “mutual funding arrangements” as it considers that such arrangements would be contrary to the “polluter pays” principle. OGP is of the view that clear accountability must be maintained and that “regulations must not spread the financial responsibility for an individual licence holder’s safety and environmental performance beyond the licence holder and its co-venturers, to the entire industry e.g. by way of industry wide mutual funding arrangements.” OGP considers that “any such departure from the ‘polluter pays’ principle would dilute

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<sup>372</sup> Telephone interview with Lloyd's of London, 15 April 2014.

<sup>373</sup> Interview with Michael Wennin, Hannover Re, 25 March 2014.

<sup>374</sup> Ibid..

<sup>375</sup> David E. Dismukes (2011), p. 23.

<sup>376</sup> BIO Intelligence Service (2009). Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues. Report for the European Commission (DG Environment). In collaboration with Stevens & Bolton LLP; available at [http://ec.europa.eu/environment/enveco/others/pdf/implementation\\_efficiency.pdf](http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf)

<sup>377</sup> David E. Dismukes (2011), p. 23.

<sup>378</sup> Metro Report, p. 247; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

accountability and weaken the incentive on any operator to pursue diligent continuous improvement of the safety measures in his operation, and thereby could potentially have a negative impact on the safety performance.”<sup>379</sup>

Mutual insurance companies that can be discussed in this context but that go beyond the EEA are therefore OIL, which was formed in 1972, and the Oil Casualty Insurance Ltd. (OCIL, which has sometimes been described as a mutual), founded in 1986. Both OIL and OCIL have experienced considerable growth in the last few decades. OIL’s total assets have grown from US\$ 160,000 (EUR 115,327) in 1972 to over US\$ 7bn (EUR 5.045bn) in 2013. From 2002 to 2012, OCIL registered an increase in its number of worldwide shareholders from 75 to 113, of which 12 are currently situated in Europe.

In addition, and although the Houston-based energy company Noble Energy is no longer advocating it,<sup>380</sup> it is noteworthy that it had suggested an alternative approach, designed for the USA, which relies on risk pooling by industry (mutual monitoring), through notably the creation of a Mutual Response Fund, of potentially US\$ 5-10bn, to be run by the US Treasury. Noble Energy recognised that “[the] model could only work if it is mandated via a statute.”<sup>381</sup> This proposal was extensively presented in the Metro Report.<sup>382</sup>

However, Noble Energy’s proposal did not receive much support from the industry. The industry, through OGP, indicated that it was not in favour of such a proposal, arguing that “legislation which would require all companies to participate in risk sharing in a single risk pool regardless of its safety record or safety standards is not equitable and drives the wrong behaviour (e.g., can lead to complacency which can have a detrimental impact on overall EU safety standards.”<sup>383</sup>

### ***Oil Insurance Ltd (OIL)***

The history and functioning of OIL was largely described in the Metro Report. OIL was formed in 1972 by 16 energy companies in response to the Lake Charles refinery explosion (1967, Louisiana) and the Santa Barbara oil spill which resulted from the blowout of an offshore well (1969, Southern California). The purpose of OIL was “to develop an alternative to the high premium and limited coverage options that were emerging at that time in the private commercial insurance industry. Through mutualisation, OIL’s members hoped to form a collective, lower-cost insurance pool for similar-situated energy companies.”<sup>384</sup> OIL members currently include the following energy operators which are active in one or more of the Target States as well as, for some members, Australia, Canada, the USA, Latin America and the Caribbean: BASF, Dong Energy, Galp, Repsol, Total, Apache Corporation, Chevron, ConocoPhillips, and Noble Energy.<sup>385</sup> OIL’s globally insured assets have grown from US\$ 48bn (EUR 34,598bn) in 1972 to over US\$ 2 trillion (EUR 1.44 trillion) in 2014, and it is rated A- by Standard & Poor’s and A2 by Moodys.<sup>386</sup>

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<sup>379</sup> Written feedback of OGP provided in the framework of this study, 16 April 2014.

<sup>380</sup> Telephone interview with Noble Energy, 6 June 2014.

<sup>381</sup> Metro Report, p. 279; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>382</sup> See *ibid*, pp. 276-81.

<sup>383</sup> Written feedback provided by OGP in the framework of this study, 16 April 2014; and meeting of 6 May 2014.

<sup>384</sup> David E. Dismukes (2011), p. 24.

<sup>385</sup> See OIL’s website: <https://www.oil.bm/membership/current-members>

<sup>386</sup> See OIL History; available at <https://www.oil.bm/about-oil/at-a-glance>

Unlike traditional private insurance companies, which operate on a profit basis, OIL operates on a fee/cost basis for its services.

OIL has three main insurance products: (i) all risks physical damage, (ii) well control, and (iii) third party pollution liability. This latter coverage, which is the one relevant for accidental damage, covers liability resulting from pollution (including oil spills), that is personal injury, loss of or damage to property arising from a leakage, and a pollution or contamination incident. According to information provided by OIL on its website, the block capacity is US\$ 300 million (EUR 216,238 million).<sup>387</sup> These three insurance agreements are proposed as a package and constitute the basic insurance policy for each OIL member. However, there may be exclusions associated with each coverage, and extra coverage may also be added subject to payment of supplemental premiums.

How OIL's insurance policy operates was well described by the US Coastal Marine Institute:

"OIL's coverage options are also broken into mandatory and optional components. Mandatory coverage is capped at the lesser of 10 percent of a company's 'unmodified gross assets' or \$250 million per incident/claim with no annual aggregate limit. If a company selects only the basic mandatory coverage level, its losses will only be paid at 60 percent of the claimed amount up to the \$250 million incident/claimed limitation. The insured will retain the remaining 40 percent of the loss. The 60 percent of the loss covered by OIL will be repaid by OIL members per a formula for the standard premium rate. Commonly, the 40 percent of exposure retained by an insured will be covered by the commercial market. OIL does not prohibit companies from 'filling the gaps' of its mandatory coverage with other supplemental policies that may be provided by other parties.

OIL's voluntary coverage structure is based upon one of two different options from which an insuring company self-selects. The first option is referred to as an 'individual retro' (IR) option and insures a policyholder (energy company) for an additional amount up to \$250 million per occurrence. The same occurrence limit is in place for both the first and second tier. The IR electing member pays only the standard premium until it incurs and claims a loss. Once a claim occurs, the member is responsible for a sliding percentage of the IR claim.

The sliding percentage associated with IR claims range from between 33.3 to 62.5 percent. The larger the loss, the smaller the percentage of risk retention: the smaller the loss, the larger the percentage of risk retention. Losses that result in a payback of less than 40 percent provides clear advantages over the simple standard premium option but an outcome of this nature is rare since the average formula retrospective premium percent tends to gravitate towards the 40 percent level. Generally, the percentage calculated by the formula determines the amount an insured company is liable for in terms of its whole claim. ...

The second voluntary premium structure is referred to as a 'flat premium' option. If selected, this option insures an OIL policyholder for 100 percent of its losses in excess of the base \$150 million coverage level up to a cap of \$250 million per claim. The

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<sup>387</sup> See OIL Insurance Limited, 3<sup>rd</sup> Party Pollution Liability; available at <https://www.oil.bm/products/3rd-party-pollution-liability>

higher coverage level comes at a cost since companies that choose this second voluntary option pay considerably higher premiums than the first voluntary option.<sup>388</sup>

### ***Oil Casualty Insurance Ltd (OCIL)***

OCIL is covered in the Metro Report. The following is therefore a summary.

OCIL and OIL are sister entities which compose the OIL Group.<sup>389</sup>

OCIL was set up in 1986, by members of OIL, as an excess liability insurance company, owned by companies in the energy industry. However, OCIL is not strictly a mutual (although it has sometimes been described as one). Energy companies purchasing insurance from OCIL have the option of either being a shareholder or a policyholder, but they have no financial obligation beyond the premium charged for their individual risk.<sup>390</sup>

OCIL is an excess liability insurance company, i.e. it provides insurance on an excess of loss basis. It offers the following products:

- Excess liability: with a maximum limit of US\$ 100,000,000 and a minimum attachment of US\$ 50,000,000 (that is, a maximum of US\$ 100 million excess a minimum of US\$ 50 million);
- Excess direct and facultative property: with a maximum limit of US\$ 25,000,000 and a minimum attachment of US\$ 50,000,000; and
- Reinsurance: OCIL provides both facultative and treaty reinsurance coverage to ceding companies.<sup>391</sup>

The figure that follows compares coverage under OIL and OCIL.

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<sup>388</sup> David E. Dismukes (2011), p. 29. The limit increased from US\$ 250mn to a maximum of US\$ 300mn per member from 1 January 2012, excess of a minimum US\$ 10mn SIR. Also on 1 January 2012, the overall aggregation limit for all OIL members combined for non-windstorm losses increased from US\$ 750mn to US\$900mn. See David Bull, *Pouring OIL on Troubled Waters*; available at <http://www.insiderquarterly.com/pouring-oil-on-troubled-waters>

<sup>389</sup> David Bull, *Pouring OIL on troubled waters*, Insider Quarterly, Winter 2011, available at <http://www.insiderquarterly.com/pouring-oil-on-troubled-waters>

<sup>390</sup> See OIL Casualty Insurance, Ltd, *Products*; available at <http://www.ocil.bm/faqs/fact-sheet>

<sup>391</sup> See *ibid.*



## OIL – key facts

### OIL Insurance Ltd

**Founded:** 1972

**Shareholders' equity:** \$3.42bn (30.6)

**Insured member assets:** \$2tn

**Cover offered:** Package of coverages

### Oil Casualty Insurance Ltd

**Founded:** 1986

**Shareholders' equity:** \$467mn (30.6)

**Cover offered:** Excess liability

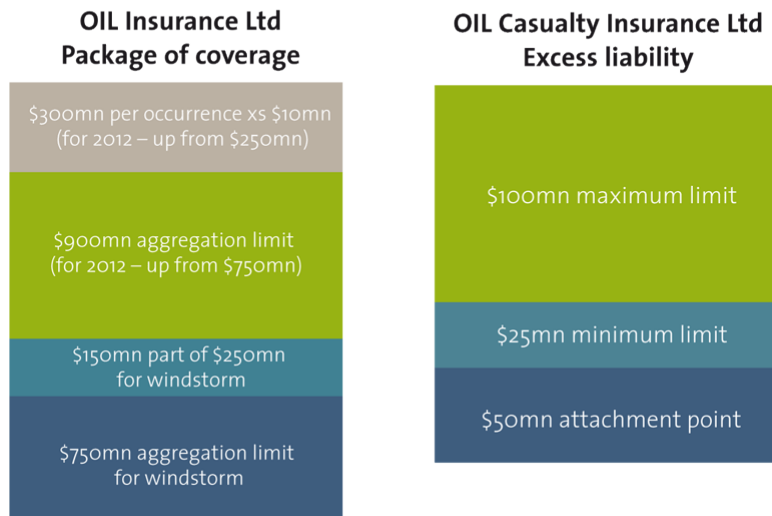


Figure 2: Comparison of OIL and OCIL coverage (Insider Quarterly, 2011)<sup>392</sup>

OIL includes cover for punitive damages,<sup>393</sup> which is not really relevant for risks from the Target States due to the law of most of them not recognising punitive damages, and those that do recognise such damages, recognising only a limited form of them (see each of the Target State summaries, section 1.5.9).

According to Oceana, regional mutual funds could be a solution for reliable financial security for offshore oil and gas activities. OPOL is such a fund, although it has its limitations. Oceana is therefore in favour of the creation of regional funds that would be administrated and managed at the regional sea level (and preferably by a public authority); such regional funds should be set up under the existing UN Regional Seas Conventions,<sup>394</sup> in order to ensure transparency and public supervision. Such regional conventions already exist. For example, in the Mediterranean Sea, the Offshore Protocol to the Barcelona Convention applies and is managed by REMPEC (Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea) (see section 3.6.3). There is therefore already a proper institutional capacity to organise such funds. Using already existing instruments instead of creating new ones for such a purpose seems to be more reasonable and feasible. Other existing regional conventions include the OSPAR Convention (Convention for the Protection of the marine Environment of the North-East Atlantic) for the Atlantic Sea, and HELCOM (Baltic Marine Environment Protection Commission-Helsinki Commission) for the Baltic Sea. Such a mechanism would be seen as more democratic for such operations.

<sup>392</sup> David Bull, Pouring OIL on troubled waters, Insider Quarterly, Winter 2011, available at <http://www.insiderquarterly.com/pouring-oil-on-troubled-waters>

<sup>393</sup> See Frank Streidl, Pollution Liability – Just an Insurance Issue? (8 March 2013); available at [http://www.energyclaims.net/assets/Pollution-Liability-\(Just%20an%20Insurance%20Issue\).pdf](http://www.energyclaims.net/assets/Pollution-Liability-(Just%20an%20Insurance%20Issue).pdf)

<sup>394</sup> See United Nations Environment Programme, Regional Seas Programme; available at <http://www.unep.org/regionalseas/>

#### 4.1.1.5. Insurance

A wide range of commercial insurance policies is available to companies carrying out offshore exploration and production. The policies are as follows:

- Offshore physical damage, which provides first-party cover to an insured in respect of its offshore facilities, equipment, pipelines, and offshore loading;
- Hull, machinery, which provides cover to MODUs;
- Operator's Extra Expense (OEE) or Energy Exploration and Development (EED), which is described below;
- Land rigs and miscellaneous property, which includes contractor's equipment, scientific and sampling instruments, diving equipment and remotely operated vehicles;
- Business interruption / loss of production income;
- Public / general liability policies, which cover third party risks with (in many jurisdictions) qualified or absolute exclusions for specified environmental liabilities;
- Environmental insurance policies, which provide cover for bodily injury, property damage and clean-up costs from a pollution incident; and
- Employers' liability policies (and, where appropriate, workers' compensation policies), which provide cover for accidents and diseases suffered by employees resulting from their employment.<sup>395</sup>

As indicated in section 2.4 above, the knock-for-knock principle applies to the vast majority of joint ventures for offshore oil and gas operations by displacing the tort system with agreements not to bring actions against other co-venturers. A corollary of the adoption of the knock-for-knock principle is that parties to JOAs retain the risks and, thus, cover them with first-party insurance policies rather than the third-party policies that would apply under the tort system.<sup>396</sup>

The insurance policy that applies to most claims for compensation for pollution from an offshore oil and gas incident is the Offshore Energy Package Policy, which includes the following covers,<sup>397</sup> or an insurance programme that includes them:

- OEE or EED;
- Physical damage (to the operator's property);
- Pollution;
- Business interruption;
- Third party liability;

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<sup>395</sup> See Booz Allen Hamilton, The Offshore Oil and Gas Industry Report in Insurance – Part One 14-15 (5 October 2010); available at [http://www.eoearth.org/files/172301\\_172400/172375/insurance-report-part-two-oct-12-2010-r1.pdf](http://www.eoearth.org/files/172301_172400/172375/insurance-report-part-two-oct-12-2010-r1.pdf). The report is written for risks in US waters and also includes cover for oil spill financial responsibility under the OPA.

<sup>396</sup> See Gideon Parchomovsky and Endre Stavang, Contracting around Tort Defaults: The Knock-for-Knock Principle and Accident Costs 9; available at [http://lawf.biu.ac.il/library/mb/13Parchomovsky\\_Stavang.pdf](http://lawf.biu.ac.il/library/mb/13Parchomovsky_Stavang.pdf)

<sup>397</sup> A package policy is an insurance programme that consists of various policies that each provides a different type of cover.

#### 4. Available financial security instruments and financial liability requirements under licensing regimes

- Construction risk;
- Charterers' liability;
- Windstorm;
- Crude oil storage;
- Political risk;
- War and related risks; and
- Contingent OEE/EED.<sup>398</sup>

The discussion in this report focusses on OEE and EED, which provide cover, among other things, for compensation for traditional damage. Contingent OEE/EED covers a licensee for the liability of drilling contractors.<sup>399</sup> The knock-for-knock principle often applies to JOAs between operators and drilling contractors (and sub-contractors). Under this principle, the operator and the drilling contractor would each have a first-party insurance policy to cover their risks. Because the operator could not bring a tort action against the drilling contractor – and vice versa – the insurers could not bring subrogation actions.<sup>400</sup>

An OEE or EED policy provides coverage for “control of well”. This coverage part has three sections as follows:

- Control of well;
- Redrilling/extra expenses; and
- Seepage and pollution, clean-up and contamination.

Coverage for other risks, which may be added to an OEE or EED policy by endorsements include: an OPA endorsement; an OPOL endorsement; underground control of well; extended redrill and restoration; making well safe; care custody and control; resultant plugging and abandonment endorsement; evacuation expenses; deliberate well firing; contingent joint ventures; turnkey wells endorsement; farmout wells endorsement; developmental drilling wells endorsement; wild well contractor endorsement; no claims return of premium endorsement; priority of payments endorsement; various excess cover endorsements; and windstorm endorsement.<sup>401</sup>

Thus, the standard OEE or EED policy does not provide cover for pure economic loss. If cover is needed to comply with the OPA or OPOL (if OPOL provides for pure economic loss; see section 4.1.2), the insured must purchase these endorsements. The OPA endorsement would be required for

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<sup>398</sup> See Claude L. Stuart III, Downhole, Offshore and Blowouts; A Primer on Oil and Gas Coverage: The Offshore Energy Package Policy (paper for presentation at the 18<sup>th</sup> Annual Insurance Law Institute, Houston, 7-8 November 2013); available at [https://utcle.org/index.php/ecourses/OC4729/get-asset-file/asset\\_id/31153](https://utcle.org/index.php/ecourses/OC4729/get-asset-file/asset_id/31153) (first four pages only)

<sup>399</sup> See Willis, EMR Newsletter 1 (August 2011); available at [http://www.willis.com/Documents/Publications/Industries/Energy/EMR\\_Newsletter\\_August\\_2011.pdf](http://www.willis.com/Documents/Publications/Industries/Energy/EMR_Newsletter_August_2011.pdf)

<sup>400</sup> See Gideon Parchomovsky and Endre Stavang, Contracting around Tort Defaults: The Knock-for-Knock Principle and Accident Costs 9-10; available at [http://lawf.biu.ac.il/library/mb/13Parchomovsky\\_Stavang.pdf](http://lawf.biu.ac.il/library/mb/13Parchomovsky_Stavang.pdf)

<sup>401</sup> See Claude L. Stuart III, Downhole, Offshore and Blowouts; A Primer on Oil and Gas Coverage: The Offshore Energy Package Policy (paper for presentation at the 18<sup>th</sup> Annual Insurance Law Institute, Houston, 7-8 November 2013); available at [https://utcle.org/index.php/ecourses/OC4729/get-asset-file/asset\\_id/31153](https://utcle.org/index.php/ecourses/OC4729/get-asset-file/asset_id/31153) (first four pages only).

drilling in US waters to comply with the oil spill financial responsibility requirements under that Act (see section 3.3.3).

The OPOL endorsement would be required for drilling in UK waters and by members of OPOL who are carrying out offshore operations in other jurisdictions. The endorsement provides cover for strict liability for compensation to third parties (and remediation costs), as set out in the OPOL Liability Agreement (see section 4.1.2).<sup>402</sup>

The Joint Rig Committee of the Lloyd's Market Association (LMA) drafted a new OPOL endorsement following the Deepwater Horizon incident to clarify that the endorsement does not respond to the OPOL guarantee to provide payment of claims if the responsible operator failed to pay.<sup>403</sup> The OPOL endorsement, effective 1 January 2014, is available from the LMA's website.<sup>404</sup>

The predominant OEE / EED policy is the OEE Policy, Energy Exploration and Development (EED 8/86), which was developed by the Joint Rig Committee of the LMA. Most OEE and EED policies are variations of EED 8/86.<sup>405</sup> The coverage clauses of EED 8/86 provide cover for:

“Oil and/or gas and/or thermal energy wells:

- while being drilled, deepened, serviced, worked over, completed and/or reconditioned until completion or abandonment,
- while producing;
- while shut-in;
- while plugged and abandoned”.

EED 8/86 thus provides cover for compensation for bodily injury and property damage from an oil or gas well from the time the well is being drilled to the time at which the well has been plugged and abandoned.

Lloyd's has noted that oil companies that purchase EED 8/86 generally also obtain additional coverage options including: underground blowout, which covers the costs of containing blowouts within the well bore; “making wells safe”, which covers costs to prevent wells becoming out of control when surface infrastructure is damaged by specified named perils such as hurricanes; and extended re-drilling, which covers costs to re-drill or restore wells that have been lost due to damage to production infrastructure caused by specified named perils.<sup>406</sup>

The EED 8/86 Policy is intended to be a stand-alone policy, not part of a package policy. Indeed, Tom Bolt, Director of Performance Management at Lloyd's, sent a letter to Lloyd's syndicates, dated 29 July 2011, stating that all energy liability business underwritten by Lloyd's must be underwritten on a stand-alone basis to receive approval for the syndicates' business plans in 2012.<sup>407</sup>

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<sup>402</sup> See *Drilling in extreme environments*, 31.

<sup>403</sup> See *ibid*, 36.

<sup>404</sup> See Lloyd's Market Association, Joint Rig Committee; available at [http://www.lmalloyds.com/Web/market\\_places/marine/JRC/Joint\\_Rig.aspx](http://www.lmalloyds.com/Web/market_places/marine/JRC/Joint_Rig.aspx)

<sup>405</sup> See J. Clifton Hall III, *Offshore Energy Insurance*, (2009) *Tulane Law Review* vol. 83, 1303, 1308.

<sup>406</sup> *Drilling in extreme environments*, 32.

<sup>407</sup> See Willis, *EMR Newsletter 1* (August 2011); available at [http://www.willis.com/Documents/Publications/Industries/Energy/EMR\\_Newsletter\\_August\\_2011.pdf](http://www.willis.com/Documents/Publications/Industries/Energy/EMR_Newsletter_August_2011.pdf)

EED 8/86 includes various warranties and conditions, including requiring the insured to install a standard make of blowout preventer on the wellhead according to industry practice, and endeavouring to comply with regulations on technical requirements to minimise damage or pollution from a blowout.<sup>408</sup>

As with other OEE and EED policies, EED 8/86 provides cover for (A) control of well, (B) redrilling/extra expenses, and (C) seepage and pollution, clean-up and contamination. The first section, Section A, control of well, is for the costs of bringing the well at which there is a blowout under control and in extinguishing or attempting to extinguish fires. The second section, Section B, is for the costs of restoring the well at which there is a blowout or drilling a relief well. Only the third section (C) is relevant to claims for compensation for traditional damage. This section covers the costs of compensation for bodily injury and property damage, and remediating pollution from the well that suffered the blowout, plus legal expenses.

Section C of EED 8/86 provides, in pertinent part, as follows:

“Underwriters, subject to the Combined Single Limit of Liability, terms and conditions of this Policy, agree to indemnify the Assured against:

- a. all sums which the Assured shall by law or under the terms of any oil and/or gas and/or thermal energy lease and/or licence be liable to pay for the cost of remedial measures and/or as damages for bodily injury (fatal or non-fatal) and/or loss of, damage to or loss of use of property caused directly by seepage, pollution or contamination arising from wells insured herein;
- b. the cost of or of any attempt at removing, nullifying or cleaning up seeping, polluting or contaminating substances emanating from wells insured herein, including the cost of containing and/or diverting the substances and/or preventing the substances reaching the shore;
- c. costs and expenses incurred in the defence of any claim or claims resulting from actual or alleged seepage, pollution or contamination arising from wells insured herein, including Defence Costs and costs and expenses of litigation awarded to any claimant against the Assured, provided however that the inclusion of the above costs and expenses shall in no way extend the Combined Single Limit of Liability of Underwriters over all Sections of this Policy;

provided always that such seepage, pollution or contamination results from both (1) an accident or occurrence taking place during the period of this insurance (including any continuation thereof provided for by Clause 16 of the General Conditions) and of which notice has been given in accordance with Clause 10 of the General Conditions hereto and (2) an occurrence giving rise to a claim which would be recoverable under Section A of this Policy if the Assured’s retention applicable to Section A were nil.”<sup>409</sup>

Cover under EED 8/86, and other OEE and EED policies, is limited to risks arising from a blowout. The term “blowout” is defined in EED 8/86 as “an unintended flow from the well(s) of drilling fluid, oil, gas or

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<sup>408</sup> See Lloyd’s, *Drilling in extreme environments*, 32.

<sup>409</sup> The wording of EED 8/86 is taken from a presentation by Frank Streidl, entitled *Pollution Liability – Just an Insurance Issue?* (8 March 2013); available at [http://www.energyclaims.net/assets/Pollution-Liability-\(Just%20an%20Insurance%20Issue\).pdf](http://www.energyclaims.net/assets/Pollution-Liability-(Just%20an%20Insurance%20Issue).pdf)

water above the surface of the ground or water bottom”<sup>410</sup> Risks associated with pollution that does not arise from a well, such as leaks, ruptures and explosions (other than an explosion from a blowout) is covered by a corporate liability policy (see below).<sup>411</sup>

Crucially, the three coverage sections in EED 8/86 (and, thus, many if not most other OEE and EED wordings) are subject to a single aggregate limit for each accident or occurrence. Willis, a major broker, has commented that the combined single aggregate limit of liability per event means, in practice, that if there is a major blowout, such as Deepwater Horizon, the costs of controlling the well and redrilling would tend to absorb most, if not all, of the coverage provided by the policy.<sup>412</sup>

Oil companies typically purchase cover under an OEE or EED policy of between US\$ 100 million (EUR 73,850,696.14) and US\$ 300 million (EUR 221,543,204.49) for offshore wells.<sup>413</sup> Thus, if the policy is purchased to comply with OPOL, insureds must agree with their insurers that requirements under OPOL have priority in allocating the limit. As noted in section 4.1.2, financial security under OPOL does not include the costs of drilling a relief well.

Further, as can be seen from the EED 8/86 wording, coverage (a) includes claims for compensation for bodily injury and property damage from an offshore oil and gas incident provided the damage is “direct”; it does not include a claim for pure economic loss. There is, thus, a big gap in the OEE / EED policy for claims from pollution from an offshore oil and gas incident in a Target State in which claims for pure economic loss are recognised.

Other insurance policies in addition to OEE or EED policies are typically purchased by large oil companies that carry out offshore exploration and development drilling. They may include a corporate liability policy, or a series of such policies in layers, to cover all their activities.<sup>414</sup> Corporate policies are not necessarily related to a specific platform. A major could use its captive for certain liabilities, and the insurance market for other liabilities.<sup>415</sup> (A layered insurance programme is made up of a primary policy, and various excess layers. For example, the primary layer may have a limit of liability of, say, EUR 50 million; the first excess layer may have cover in excess of EUR 50 million for EUR 100 million (EUR 100 million XS EUR 50 million); the third excess layer may have cover of EUR 200 million (EUR 200 million XS EUR 150 million); and so on.)

Lloyd’s has described a corporate liability policy, and its use, as follows:

“Most oil companies engaged in exploration and development drilling will have a corporate liability policy or series of policies arranged in layers covering the entire range of their activities. Smaller oil companies may rely upon a specific section of their ‘package’ policies covering third party liabilities. This is a layer of coverage which sits in excess of dedicated primary liability policies, such as employer’s liability and vehicle liability. However, for offshore well pollution risk there is no dedicated underlying policy unless the form has been specifically structured to sit in excess of the OEE policy.

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<sup>410</sup> The definition from the EED 8/86 wording is taken from a presentation by Francis Lobo, entitled The State of the Art in Drilling (September 2010); available from <http://asiaoec.com/downloads2010.html>

<sup>411</sup> See Drilling in Extreme Environments, 30.

<sup>412</sup> Willis Energy Market Review 22 (2011); available at [http://www.willis.com/Documents/Publications/Industries/Energy/EMR\\_April\\_2011.pdf](http://www.willis.com/Documents/Publications/Industries/Energy/EMR_April_2011.pdf)

<sup>413</sup> Drilling in extreme environments, 32.

<sup>414</sup> Ibid.

<sup>415</sup> Telephone interview with Lloyd’s of London, 15 April 2014.

#### 4. Available financial security instruments and financial liability requirements under licensing regimes

Larger oil companies will have layers of liability cover with specific markets and the scope of coverage will generally be unique to the market concerned.

The policy forms most common in the London market are the LSW 244 and JL 2003/06 wordings and are generic liability forms used for energy business with customised exclusions. Both forms exclude pollution from wells and this exclusion must be deleted, if this policy is to sit in excess of the OEE policy cover. However, the cover available is not the wider cover available through the EED 8/86 policy form, but rather the policy has its own insuring conditions and exclusions. Problems have therefore occasionally arisen in the interpretation of the coverage scope for pollution liability and clean-up cost, whether resulting from wells or production facilities. Specifically, the retaining of policy exclusions far more appropriate to land based activities has caused problems”.<sup>416</sup>

The exclusion in JL 2003/06 (now JL 2012/006),<sup>417</sup> indicated above, both of which are excess liability policies, bars cover for “any seepage, pollution or contamination which is directly caused by or arises out of the drilling of, production from, servicing of, operation of or participation in wells or holes”.<sup>418</sup> London Standard Wording (LSW) 244 is similar.<sup>419</sup> The problem to which Lloyd’s thus referred is the exclusion of cover for clean-up costs,<sup>420</sup> which is not discussed in this report because it is outside its remit. New wordings are being developed to respond to the gap in LSW 244 and JL 2003/06.<sup>421</sup>

Further, the cover provided by JL 2012/06 is cover “for damages in respect of: ‘Bodily Injury’, ‘Personal Injury’, ‘Property Damage’ ... caused by or arising out of an Occurrence during the Policy Period ...”.<sup>422</sup> LSW 244 is similar. That is, LSW 244 and JL 2012/06 do not provide cover for pure economic loss. An endorsement must, therefore, be added to provide this coverage in jurisdictions in which such liability is recognised.

Insurance Europe indicated that offshore risks are rare yet severe, highly complex and extremely difficult to quantify, adding that few insurers are able to offer this cover and global insurance capacity is highly limited, in contrast with other insurance markets such as those for motor or natural catastrophes.

Insurance in the offshore oil and gas industry is generally provided by the subscription market due, in particular, to the size of the risk insured. As indicated above, a single insurer does not underwrite a policy. Instead, a broker will broke the policy to many subscribers who each underwrite a specified

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<sup>416</sup> Drilling in extreme environments, 32.

<sup>417</sup> See Joint Liability Committee, Umbrella Wording (JL2012/006), London Claims Made Wording (JL2012/007) (23 March 2012); available at <http://www.iaa.co.uk/CMDownload.aspx?ContentKey=76f4c01c-5ddb-4adc-9708-ee4d336043f6&ContentItemKey=e09ccdbb-dca5-4e7f-bb76-7ea366470f45>

<sup>418</sup> The wording is taken from a presentation by Paul King, entitled Offshore Pollution Insurance; The Inconsistent approach in the Insurance Market; available at <http://www.oilandgasuk.co.uk/downloadabledocs/995/paul>

<sup>419</sup> See *ibid.*

<sup>420</sup> See Drilling in extreme environments, 36.

<sup>421</sup> See Indecs Insight – 1; available at [http://www.indecs.co.uk/section.php/43/1/indecs\\_insight\\_1](http://www.indecs.co.uk/section.php/43/1/indecs_insight_1); presentation by Paul King, entitled Offshore Pollution Insurance; The Inconsistent approach in the Insurance Market; available at <http://www.oilandgasuk.co.uk/downloadabledocs/995/paul>

<sup>422</sup> See Joint Liability Committee, Umbrella Wording (JL2012/006), London Claims Made Wording (JL2012/007) (23 March 2012); available at <http://www.iaa.co.uk/CMDownload.aspx?ContentKey=76f4c01c-5ddb-4adc-9708-ee4d336043f6&ContentItemKey=e09ccdbb-dca5-4e7f-bb76-7ea366470f45>

portion of the risk. Liability between the underwriters to a subscription policy is not joint and several; each underwriter is liable only for its proportion of the risk, as specified in the schedule to the policy.

The nature of the insurance market for energy risks was further expressed by the International Union of Marine Insurance (IUMI), which stated: “The insurance market for energy risks is complex, matching the complex needs of the sector. Most energy contracts are shared by a panel of underwriters as the liabilities need to be spread to be insurable. What coverage there is comes at a price.”<sup>423</sup>

Traditional insurance and reinsurance usually have a large capacity, which is based on the capital of the insurer for the year. Insurance and reinsurance companies have all increased their capital basis over the last several years. This capacity covers combined damage, such as third-party liability, well drilling, etc. Altogether insurers and reinsurers currently have a maximum capacity of US\$ 5 billion; the capacity for liability coverage only is US\$ 1-1.5 billion.<sup>424</sup> Regarding the fact that the capacity has recently increased, it was pointed out that an increase in capacity is a typical cycle (i.e. as long as the profit is good, the pressure on prices lowers and insurance becomes cheaper); the last reduction of capacity took place in 2001 after the World Trade Center disaster and to a lesser degree in 2005 following the Hurricane damages of Katrina, Wilma and Rita. Thus, the increase in capacity was made possible because the profit situation was very good, but also because capital came in through the capital market: investments were made in bonds which served to increase insurance and reinsurance capacities.<sup>425</sup>

Liability insurance in the offshore oil and gas industry reportedly tends to be a very customised product. Commercial liability insurance will generally switch from a platform construction policy to an operating policy once construction is complete (and other contractual parameters are met). Policy duration may vary,<sup>426</sup> but is usually annual. According to IUMI, the fact that insurance contracts are renewed on an annual basis provides certain flexibility in the cover that is needed by both operators and insurers and which it is important to maintain.<sup>427</sup>

This study does not discuss in any detail insurance policies for constructing offshore oil and gas facilities because the focus of this study is on claims for compensation for pollution from an offshore oil and gas incident, which tend to be brought against licensees for offshore oil and gas operations, not a company that constructs a drilling rig. We simply note, in respect of the references to construction policies below, that these changed dramatically in the early 2000's. Before that time, jacket structures for drilling rigs were constructed onshore and then towed to the seabed where they would be located by barge. With the advent of drilling in deep water, sometimes at depths of 2,000 metres and sometimes far from the coast, semi-submersible units were constructed onshore and then towed to the seabed where they would be located for the final construction phase. In addition, new arrangements were made to transport oil and gas onshore. These included tankers, pipelines, and FPSOs.<sup>428</sup>

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<sup>423</sup> IUMI Position Paper, IUMI comments to proposed EC Regulation with respect to Offshore Energy Liability, 24 September 2012.

<sup>424</sup> Telephone interview with Michael Wennin, Hannover Re, 25 March 2014.

<sup>425</sup> Ibid.

<sup>426</sup> David E. Dismukes (2011), p. 20.

<sup>427</sup> Telephone interview with Lars Lange and Neil Roberts, IUMI, 7 May 2014.

<sup>428</sup> See Tim Taylor, *Offshore Energy Construction Insurance: Allocation of Risk Issues*, (2013) *Tulane Law Review*, vol. 87, 1165, 1167-68. A jacket structure is a fixed platform for drilling oil and gas from the seabed. The substructure (jacket) is constructed of steel welded pipes, attached to the sea floor by steel piles. The piles, which are made of steel pipes between one and two metres in diameter, can penetrate 100 metres or so into the sea bed.



It is interesting to note that mutuals can be seen as competitors of insurance companies within the same market when companies are buying insurance, but can be complementary to reinsurers if they need to buy reinsurance themselves.<sup>429</sup>

As indicated in the Metro Report, there is also involvement of a few protection and indemnity (P&I) clubs in the cover of offshore-related risks. However, they provide cover for offshore-related risks more as commercial insurers than as P&I Clubs, hence the absence of mutualisation.<sup>430</sup> According to one interviewed P&I Club, P&I Clubs involved in the offshore sector still strive to provide insurance at the lowest cost for shipowners and to ensure rapid compensation for the victims.<sup>431</sup> The Standard, a P&I Club, insures two types of activities: drilling rigs (jack-up drilling rigs, semi-submersible drilling rigs and drilling ships) and FPSOs, which are usually tankers that have been reconverted into producing hydrocarbons.<sup>432</sup> A P&I Club will really insure the navigation part of the activity (collision, pollution, transported substances, etc.), i.e. the pollution that results from bunker oil (under the Bunker Oil Convention). However, if the ship is not moving and is drilling, P&I clubs will only be able to provide for a limited cover for the traditional marine risks. (Currently, the Standard for instance can provide insurance cover for third-party damage up to US\$ 1 billion (through reinsurance, etc.), the main issue being how to insure beyond that amount).<sup>433</sup> However, P&I Clubs cannot cover pollution from well which is traditionally covered by the Market through specific covers (OEE/EED).<sup>434</sup> Following Macondo, reinsurance companies such as Hannover Re developed specific civil liability products (written on a stand-alone basis) for offshore oil and gas activities.<sup>435</sup>

One limitation of traditional insurance coverage regarding third-party liability for accidental damage is summarised in the Metro Report:

“In practice often one single policy is used with one single limit. That means that if there would for example be a major blow-out with e.g. pollution, the primary attention will be focused on re-instating the oil rig. That may de facto take a large part of insurance proceeds away. In some cases all cover is hence used by the first party cover as a result of which little may be left to cover pollution or losses of other third parties. Of course that depends upon the specific type of coverage.”<sup>436</sup>

Furthermore, there are different types of risks and therefore different types of coverage for offshore oil and gas activities (exploration, production, decommissioning, etc.). Products being rated differently, no single product covers the whole lifecycle of the offshore installation: when taken out, third-party liability cover will be included in the policy specific to a particular stage of the lifecycle. Coverage depends on

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<sup>429</sup> Telephone interview with Lloyd's of London, 15 April 2014.

<sup>430</sup> Metro Report, p. 236; available at [http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>431</sup> Telephone interview with Fabien Lerede, Syndicate Claims Director, Charles Taylor & Co. Limited, as agents for the managers of The Standard Club Europe Ltd, 18 March 2014.

<sup>432</sup> Ibid. FPSOs separate water from gas or other elements drilled into the subsoil and remain in the same location; such systems can drill up to 2,000 metres deep, and are a solution for marginal oil fields.

<sup>433</sup> Telephone interview with Fabien Lerede, Syndicate Claims Director, Charles Taylor & Co. Limited, as agents for the managers of The Standard Club Europe Ltd, 18 March 2014.

<sup>434</sup> Ibid.

<sup>435</sup> Telephone interview with Michael Wennin, Hannover Re, 25 March 2014.

<sup>436</sup> Metro Report, p. 237; available at [http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

what companies want covered, the different activities undertaken and various risks involved (premiums being risk-based).<sup>437</sup>

In addition, and as indicated in the Metro Report, “[a] distinction should [however] be made between the insurance that is provided to the operator on the one hand and insurance coverage that may be provided to subcontractors, such as the drilling company. The drilling company will often work with a MODU”. The Metro report stated that in many jurisdictions, the MODU is often considered as a ship when in transit and as an offshore facility when stationed. The liability for MODUs may not be clear under various national laws, and when considered as a ship, the Bunker Oil Convention may apply in which relatively low limits of liability are provided. The Metro Report further stated that “[r]epresentatives of the drilling contractors hold that some of the larger drillers will self-insure, but that most drillers will take out insurance coverage. They experience no problems in obtaining cover on the commercial market”<sup>438</sup> (see section 3.6.1.2 above).

Insurance and reinsurance are widely accepted. However, companies defer on the market depending on their rating (Standard & Poor’s, etc.). In some States, there are certain caps (i.e. some ratings are not acceptable): if e.g. an insurance company is rated B, it may not be accepted. When a reinsurance company reinsures an insurance company, it looks at the rating: the better the rating, the less capital they need.<sup>439</sup>

Insurance is accepted as evidence of financial security in virtually all Target States. Even when it is not a financial security mechanism required by a Target State, virtually all, if not all, operators have insurance – although, of course, the types of insurance purchased by them, and the wordings of that insurance, vary.

#### **4.1.1.6. Alternative Risk Transfers**

Alternative risk transfers have been developed in part to respond to limitations in reinsurance risk-bearing capacity during hard markets.<sup>440</sup> Hard markets occur due to the cyclical nature of the insurance market. During a hard market, premiums increase and less cover is available. During a soft market, premium rates are stable or decrease and insurance cover is readily available. The hardening or softening of the cycle depends on various factors including the number of natural disasters (and thus large numbers of claims),

#### **Reinsurance sidecar**

Alternative risk transfers that aim at extending capacity through the spreading of financial risks associated with oil spills include “reinsurance sidecars”. The figure below illustrates an alternative risk transfer mechanism using a reinsurance sidecar transaction.

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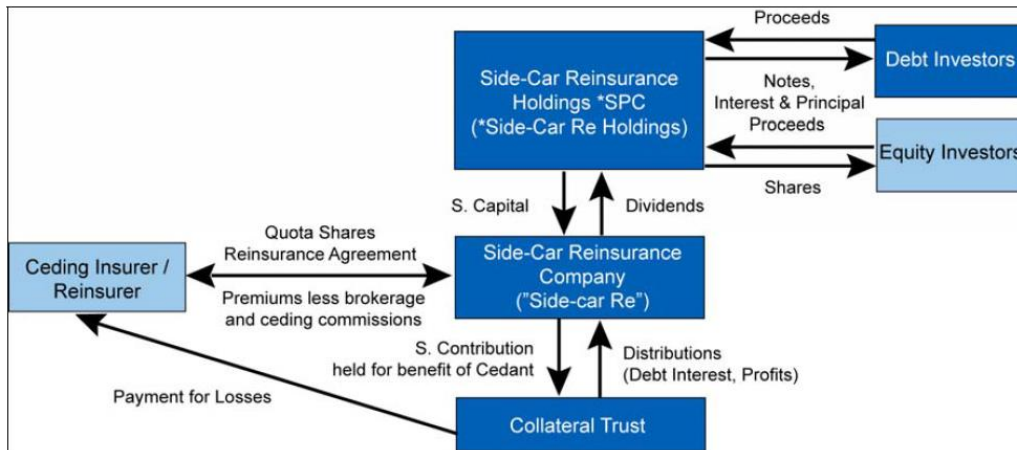
<sup>437</sup> Telephone interview with Lloyd’s of London, 15 April 2014.

<sup>438</sup> Metro Report, p. 238; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf). Indeed, Judge Barbier, the judge hearing the cases arising from the Deepwater Horizon incident concluded that the Deepwater Horizon, a MODU, is a vessel (see section 3.6.1 above).

<sup>439</sup> Telephone interview with Michael Wennin, Hannover Re, 25 March 2014.

<sup>440</sup> J. David Cummins and Mary A. Weiss, Convergence of Insurance and Financial Markets: Hybrid and Securitized Risk-Transfer Solutions, *Journal of Risk and Insurance* (2009), vol. 76(3), pp. 501-02; available at <http://homepage.univie.ac.at/franz.diboky/RI2/Convergence.pdf>

4. Available financial security instruments and financial liability requirements under licensing regimes



Source: Congressional Research Service.

Figure 3: Illustration of a Reinsurance Sidecar Transaction (King, 2010)<sup>441</sup>

Sidecars are special purpose vehicles sponsored by reinsurers to provide additional capacity; they access capital markets directly through private debt and equity investment.

The structure of a reinsurance sidecar may be described in the following terms:

“The sidecar is formed by a ceding reinsurer, and its risk-bearing activities are typically confined to this specific reinsurer. The capital raised by the sidecar is held in a collateral trust for the benefit of the ceding reinsurer. The cedent then enters into a reinsurance contract with the sidecar, usually a quota share agreement. The sidecar receives premiums for the reinsurance underwritten and is liable to pay claims under the terms of the reinsurance contracts. ...

The ceding reinsurer can earn profits on transactions with the sidecar through ceding commissions and sometimes also profit commissions. Thus, it can replace risk-based underwriting profit income with fee income, transferring the risk to the sidecar.

...

Thus sidecars may reduce regulatory costs and enhance the issuer’s financial rating. ... Sidecars and Cat bonds can work together as complementary instruments in much the same way as quota share and excess of loss complement each other in a traditional reinsurance program.

The sidecar is usually owned by a holding company, which raises capital for the sidecar by issuing equity and/or debt. If debt securities are issued, a tiered structure can be used, similar to an asset-backed security, to appeal to lenders with differing appetites for risk. Private equity, hedge funds, insurers, and reinsurers provide the capital for the typical sidecar. In fact, the growth of the sidecar market has been significantly driven by hedge funds seeking attractive non-traditional sources of investment yield.”<sup>442</sup>

It would however appear that reinsurance sidecars are currently not used in the offshore oil and gas sector. This was reported by various stakeholders interviewed for this study.

<sup>441</sup> Rawle O. King (2010), p. 17.

<sup>442</sup> J. David Cummins (2009), pp.512-13.

**4.1.1.7. Bonds and contingent capital**

Insurance-linked financial instruments include e.g. cat bonds and contingent capital. These instruments provide oil and gas companies with an additional risk management option that leverages capital markets for insurance purposes.<sup>443</sup>

**Catastrophe (cat) bonds**

Cat bonds tend to be multi-year. This type of bonds can be used as a mechanism to fund mega-catastrophes (they tend to be used for higher layers of coverage).<sup>444</sup>

The figure below illustrates the typical structure of a cat bond mechanism.

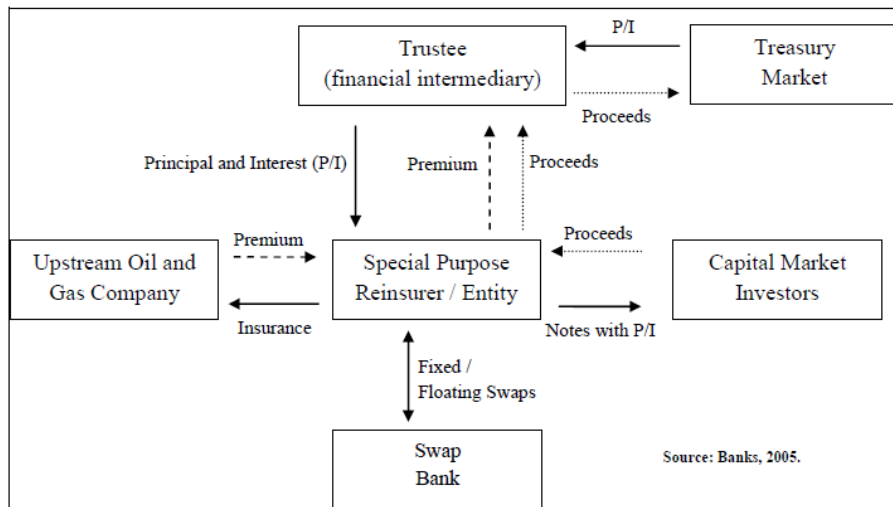


Figure 4: Structure of a typical catastrophe bond mechanism (Dismukes, 2011)<sup>445</sup>

Funds raised from investors are used to establish a special purpose entity (SPE) or a special purpose reinsurer (SPR).<sup>446</sup> The SPR/SPE acts as the administrator and general contractor of the security issuance. The SPE/SPR then issues a reinsurance policy to the insurer or corporation transferring (ceding) the risk, which pays a premium to the SPE/SPR.<sup>447</sup> Bond proceeds are usually passed from investors to the SPR/SPE, and then passed to the trustee for reinvestment. In return for their involvement, the SPR/SPE and trustee will receive a portion of the premium income as a fee from the insured company.<sup>448</sup> Investors receive notes (bonds) from the SPE/SPR with an agreed-on coupon (interest payment).<sup>449</sup>

<sup>443</sup> David E. Dismukes (2011), p. 29.

<sup>444</sup> J. David Cummins (2009), p. 521.

<sup>445</sup> David E. Dismukes (2011), p. 34.

<sup>446</sup> Ibid.

<sup>447</sup> Robert P. Hartwig (2007), p. 940.

<sup>448</sup> David E. Dismukes (2011), p. 34.

<sup>449</sup> Robert P. Hartwig (2007), p. 940.

Cat bonds, which may come in many different forms, each have a specific form of trigger. The three main types of triggers are as follows.

- “Indemnity triggers create a hold harmless provision that insulates the insured against any contractually agreed-upon catastrophe risk per a definition. If a catastrophe occurs according to the definition, then the principal and interest due to the bond holder are forfeited up to the level of insured losses or otherwise stated amount.
- Parametric triggers are developed from models, or other formulas, that use storm inputs, such as a hurricane’s maximum wind speed or minimum barometric pressure, to determine payouts (can include withheld interest and/or principle depending upon conditions). Geographical considerations are also used in parametric triggers. Parametric triggers are becoming more commonplace in the market because they do not require investors to be experts in the company’s asset exposure to calculate potential risk. The Willis Hurricane Index is one such parametric trigger.
- Index triggers tie payouts to industry-wide losses or other metrics not associated with the specific storm such as a parametric model would use (Klein et al., 2000)”.<sup>450</sup>

In addition to specific bond triggers, bonds can be differentiated by outcomes, and various different tranches, relative to a catastrophic occurrence such as a hurricane.<sup>451</sup> On the occurrence of an event, proceeds are released from the SPR/SPE to help the insurer pay claims; the release of funds is usually proportional to event size.<sup>452</sup>

The pricing of cat bonds follows insurance and reinsurance costs since these are competitive and alternative forms of insurance.<sup>453</sup>

Bonds with European windstorm exposure have been established. Some bonds may cover multiple perils, i.e. a blend of uncorrelated risks such as US and European windstorm risk.<sup>454</sup> From 1997 to 2007, 15.2 per cent of the total volume of cat bonds covered European windstorm.<sup>455</sup> However, it was reported in the Metro Report that capital markets and more particularly bonds are not often used. In addition, operators reportedly do not themselves use bonds; only insurers may do so. Cat bonds are also seemingly only suited for sudden events and less for long tail risks.<sup>456</sup>

Depending on how the deal is structured, investors face the prospect of losing some or all of the investment income produced by the bond – and even some of the principal – in the event of a

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<sup>450</sup> David E. Dismukes (2011), p. 35, citing Klein, R.W., M.F. Grace, and R.W. Phillips. 2000. Onshore special purpose reinsurance vehicles: A public policy evaluation. Internet website: [http://rmictr.gsu.edu/Papers/SPRV\\_Paper\\_6-9.PDF](http://rmictr.gsu.edu/Papers/SPRV_Paper_6-9.PDF)

<sup>451</sup> David E. Dismukes (2011), p. 35.

<sup>452</sup> J. David Cummins (2009), p. 523.

<sup>453</sup> David E. Dismukes (2011), p. 35.

<sup>454</sup> Robert P. Hartwig (2007), p. 941.

<sup>455</sup> J. David Cummins (2009), pp. 524-525.

<sup>456</sup> Metro Report, p. 232; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

catastrophic loss.<sup>457</sup> If no contingent event occurs, the principal is returned to the investors upon the expiration of the bonds.<sup>458</sup>

### Contingent capital

Like cat bonds, contingent capital is based upon the use of financial markets to protect an insuring company against perils while providing a profit opportunity for market-based counterparties. However, unlike cat bonds, contingent capital is financed directly by the insuring company without an intermediary.<sup>459</sup>

Contingent capital is a way of financing a loss after the event has occurred. It is considered useful in financing low-frequency/high-severity exposures. However, risk is spread over time rather than being transferred (as with “traditional” financial security instruments), and the financial impact may still be severe although contingent capital has its advantages and may notably spare a company from insolvency. The functioning of contingent capital is as follows:

“Contingent capital is similar to a line of credit except that access to the capital is conditional (contingent) upon the occurrence of (i) an insured event and (ii) an impact of a predetermined size on some measure of company financial performance (such as certain financial statement items) (Culp 2005). If both (i) and (ii) occur, then the company is assured of a cash infusion in the form of a loan at its time of greatest need. Put options (which give the owner the right to sell at a predetermined price) on a company's own stock also can be used in the case where item (ii), the financial trigger, is the company's stock price”.<sup>460</sup>

Thus, contingent capital allows an insurer to issue capital (e.g. common stock, hybrid capital, or debt) at a predetermined strike price following the occurrence of a defined catastrophic event (for instance if the insurer's stock price falls below the strike price following a windstorm of specified strength). Contingent capital agreements are usually in the form of options.<sup>461</sup> J. David Cummins describes the benefits and disadvantages of contingent capital as follows:

“The benefits of contingent capital include a low up-front option fee, balance sheet protection when it is most needed—after a major catastrophic event—and access to financing with neither a corresponding increase in leverage nor a dilution of shareholders' equity. A disadvantage of contingent capital is that issuing shares has a dilution effect not present with Cat bonds or options, and issuing contingent debt adversely affects the insurer's capital structure.”<sup>462</sup>

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<sup>457</sup> Robert P. Hartwig (2007), p. 940.

<sup>458</sup> J. David Cummins (2009), p. 523.

<sup>459</sup> David E. Dismukes (2009), p. 36.

<sup>460</sup> Robert P. Hartwig (2007), p. 946, citing notably Culp, L. Christopher, 2005, *Structured Finance and Insurance: The Art of Managing Capital and Risk* (New York: John Wiley).

<sup>461</sup> J. David Cummins (2009), p. 516.

<sup>462</sup> Ibid.

#### 4.1.1.8. Guarantees

##### Trust funds

A trust fund is administered by a trustee on behalf of a beneficiary, to which the trustee owes a fiduciary duty. The beneficiary of a trust fund for third-party liabilities (including traditional damage), into which the regulated company has placed assets, is the competent authority. The assets may include a letter of credit. Legislative provisions permitting the use of trust funds as financial security mechanisms in the USA may specify the express or minimum format of the deed of trust. They typically require the trust fund to be irrevocable in order to prevent the regulated company terminating it without the agreement of the governmental entity.<sup>463</sup>

##### Letters of credit

A letter of credit which may be used as a financial security mechanism for traditional (and other) liabilities is an agreement by the financial institution that issues it to pay money from it to the competent authority when requested to do so by the entity. The financial institution bases a decision to issue a letter of credit on the creditworthiness of the company to which it is issued. The institution may require the company to provide collateral in the form of securities, bonds or other monetary instruments for the entire face value of the letter of credit. In the USA, letters of credit used as mechanisms for financial security provisions in environmental legislation must generally be irrevocable.<sup>464</sup>

The Metro Report states that letters of credit are *de facto* not used in the EU to obtain and evidence financial responsibility, except for so called fronting arrangements in other parts of the world<sup>465</sup> (i.e. to provide security to insurance companies which provide fronting arrangements). This position was confirmed by stakeholders who were interviewed for this study.<sup>466</sup>

##### Bank guarantees

A bank guarantee differs from a letter of credit in that the amount of the guarantee is only paid if the regulated company does not fulfil stipulated obligations.<sup>467</sup>

Bank guarantees are reportedly more expensive than insurance. In addition, bank guarantees may be attractive only if the financial institution has a good and higher credit rating than the person who wishes to take it out.<sup>468</sup>

Guarantees are an alternative to insurance. However, a stakeholder reported that they are not a big alternative as guarantees will always be smaller than insurance coverage.<sup>469</sup>

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<sup>463</sup> BIO Intelligence Service (2009).

<sup>464</sup> Ibid.

<sup>465</sup> Metro Report, p.233; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>466</sup> Notably: meeting with OGP representatives, 6 May 2014.

<sup>467</sup> BIO Intelligence Service (2009).

<sup>468</sup> Metro Report, p.233; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>469</sup> Telephone interview with Michael Wennin, Hannover Re, 25 March 2014.

OGP also indicated that letters of credit or bank guarantees are not really chosen by companies to finance pollution exposures “because of the wide variety of claimants, which banks/guarantors will not usually be set up to manage”.<sup>470</sup>

#### **4.1.1.9. Funds established by Governments**

As highlighted in the 2009 study on the implementation of the ELD and related financial security issues,<sup>471</sup> the legislation requiring financial security for traditional and environmental liabilities may, in some cases, establish or enable a scheme by which regulated companies may meet the requirements if commercial financial security mechanisms are generally unavailable. The legislation may, for example, establish a fund into which taxes levied on the regulated companies themselves or other persons are paid. An example in the USA was the establishment of state funds during the 1990s to enable owners and operators of underground storage tanks to provide evidence of financial security in respect of damage from their underground storage tanks.

However, the establishment of such funds may lead to specific problems, namely:

- Funds may become insolvent due to the large number of claims (such has been the case in the USA);
- Funds may impact policies offered by insurers as they may lead to a lack of interest in such policies whilst the funds exist;
- Funds do not encourage regulated companies to reduce health, safety and environmental risks from their operations; and
- Funds do not accord with the polluter pays principle.

#### **4.1.2. The OPOL voluntary compensation scheme**

OPOL establishes a voluntary compensation system for pollution damage from offshore oil and gas operations. When it was established in 1975, OPOL was intended to be an interim measure until a Convention of Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources (CLEE) came into effect. CLEE is a regional Convention for States that border on the North Sea, the Baltic Sea, or the Atlantic Ocean north of latitude 36° North. CLEE was signed by Germany, Ireland, the Netherlands, Norway, Sweden and the UK. It has not, however, entered into force and is highly unlikely to do so due to disagreement concerning its provisions between the States that would have been a party to it.<sup>472</sup> As a result, OPOL continued in existence.

OPOL initially applied to offshore oil and gas facilities on the UK continental shelf. It was then extended to cover such facilities on the continental shelves of Denmark, France, Germany, Ireland, the

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<sup>470</sup> Written feedback of OGP provided in the framework of this study, 16 April 2014.

<sup>471</sup> BIO Intelligence Service (2009), Study on the Implementation Effectiveness of the Environmental Liability Directive (ELD) and related Financial Security Issues, Report for the European Commission (DG Environment). In collaboration with Stevens & Bolton LLP; available at [http://ec.europa.eu/environment/enveco/others/pdf/implementation\\_efficiency.pdf](http://ec.europa.eu/environment/enveco/others/pdf/implementation_efficiency.pdf)

<sup>472</sup> See United Nations Environment Programme, A legal discussion on civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent Deepwater Horizon Incident, Mediterranean Action Plan 49-50 (1st Offshore Protocol Working Group Meeting, Valletta, Malta, 13-14 June 2013); available at [http://www.rempec.org/admin/store/wyswiglmg/file/News/Forthcoming%20Meetings/Offshore%20Protocol%20WG%20\(Malta,%202013-14%20June%202013/WG%20384-%20INF.6%20-%20IMLI%20Doc%20-%20Dr%20Sciculna%20%20&%20%20Dr\\_%20Gutierrez%20-%20E.pdf](http://www.rempec.org/admin/store/wyswiglmg/file/News/Forthcoming%20Meetings/Offshore%20Protocol%20WG%20(Malta,%202013-14%20June%202013/WG%20384-%20INF.6%20-%20IMLI%20Doc%20-%20Dr%20Sciculna%20%20&%20%20Dr_%20Gutierrez%20-%20E.pdf)



Netherlands, the Isle of Man, the Faroe Islands and Greenland.<sup>473</sup> Despite this extension, OPOL's membership for facilities beyond the UK continental shelf is limited. For example, OPOL covers a single pipeline on the Norwegian continental shelf. The reason that the pipeline is covered is due to it traversing the UK, as well as the Norwegian, continental shelf. Because membership of OPOL is mandatory for the licensee of an offshore facility in the UK (see below), it was agreed that OPOL should cover the entire pipeline.

Membership of OPOL is not mandatory for the licensee of an offshore facility in any jurisdiction covered by it other than the UK. Further, a member of OPOL does not need to include all its offshore facilities within OPOL.<sup>474</sup>

OPOL is not a fund. Rather, as indicated above, it is a voluntary compensation system entered into by companies that operate, or intend to operate, offshore facilities used in connection with the exploration and production of offshore oil and gas. In the case of the UK continental shelf, all such companies must be members of OPOL to operate. In the case of the other Designated States of Denmark, Germany, France, Greenland, Ireland, the Netherlands, Norway, the Isle of Man and the Faroe Islands, only a few such companies are members.

A key OPOL agreement is the Offshore Pollution Liability Agreement, as amended 28 October 2013, which took effect on 1 January 2014 (OPOL Agreement).<sup>475</sup> The OPOL Agreement sets out the terms and conditions under which the members will pay compensation for "pollution damage" and "remedial measures" in the event of a spill of oil from a member's offshore facility.

The OPOL Agreement provides for strict liability for a claim for pollution damage and remedial measures as follows:

"If a Discharge of Oil occurs from one or more Offshore Facilities to which this Contract is applicable, and if, as a result, the Party who was the Operator of said Offshore Facility or Facilities at the time of the Discharge of Oil takes Remedial Measures and/or any Public Authority or Public Authorities take Remedial Measures and/or any Person sustains Pollution Damage, then the Party who was the Operator of said Offshore Facility or Facilities at the time of the Discharge of Oil shall be responsible for the cost of said Remedial Measures which it takes and shall reimburse the Public Authority or Public Authorities the cost of said Remedial Measures taken by that Public Authority or those Public Authorities and shall pay compensation for said Pollution Damage up to an overall maximum of U.S. \$250,000,000 per Incident, to the extent and subject to [specified] provisions ...".<sup>476</sup>

The term "discharge of oil" is defined, in pertinent part, as "any escape or discharge of oil into the sea from one or more Offshore Facilities".<sup>477</sup> The word "oil" is defined as "crude oil and condensate (being those products of natural gas processing which assume liquid form at normal temperature and pressure), whether or not such materials are mixed with or present in other substances".<sup>478</sup> OPOL

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<sup>473</sup> See OPOL, The Offshore Pollution Liability Association Ltd (amended 28 October 2013). Comment by Niall Scott, OPOL (8 September 2014).

<sup>474</sup> See OPOL Agreement, clause III(1).

<sup>475</sup> The OPOL Agreement is available at <http://www.opol.org.uk/agreement.htm>

<sup>476</sup> Ibid, clause IV(A). Strict liability is liability without negligence or fault.

<sup>477</sup> Ibid, clause I(5).

<sup>478</sup> Ibid, clause I(9).

does not, therefore, apply to claims for compensation from damage from gas, dispersants, or any other substances.

An “offshore facility” is defined, in respect of such facilities in the jurisdiction of its members, as:

- “A any well and any installation or pipeline or portion thereof of any kind, fixed or mobile, being used for the purpose of exploring for, producing, treating, storing or transporting Oil from the seabed or its subsoil;
- B any well used for the purpose of exploring for or recovering gas or natural gas liquids from the seabed or its subsoil during the period that any such well is being drilled (including completion), re-completed or worked upon (except for normal work-over operations); or
- C any installation of any kind, fixed or mobile, intended for the purpose of exploring for, producing, treating or storing Oil from the seabed or its subsoil where such installation has been temporarily removed from its operational site for whatever reason.<sup>479</sup>

The term “offshore facility” does not include abandoned wells, installations or pipelines, or “any ship, barge or other craft not being used for the storage of Oil, commencing at the loading manifold thereof”.<sup>480</sup> Due to OPOL’s application to oil, the term does not include installations, pipelines or facilities for the production, treatment or transport of natural gas or natural gas liquids.<sup>481</sup> OPOL applies to wells used to explore for, or recover gas or natural gas liquids, but only in respect of any oil that may be discharged from such wells.<sup>482</sup> Further, the definition of an “offshore facility” does not include the decommissioning phase of a well.

OPOL channels liability to the “operator” of an offshore facility.<sup>483</sup> OPOL is not, however, an exclusive compensation system. Claims may be brought against licensees, including operators, contractors and other persons, under legislative systems. As indicated above, OPOL is purely voluntary.

There are exclusions in OPOL for an incident caused by an act of war, the intentional act of a third party, compliance with a governmental regulation, the negligence or wrongful act of a governmental authority, or negligence or an act or omission by a claimant with the intent to cause damage.<sup>484</sup>

The term “remedial measures” is defined as “reasonable measures taken by ... the Operator, and by any Public Authority<sup>485</sup> to prevent, mitigate or eliminate Pollution Damage following such Discharge of

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<sup>479</sup> Ibid, clause I(8).

<sup>480</sup> Ibid.

<sup>481</sup> See Stephen Shergold, Danielle Beggs & Sam Boileau, United Kingdom: Incidents on offshore facilities – who is responsible for environmental damage? (2010) *International Energy Law Review* 178, 179-80.

<sup>482</sup> OPOL Agreement, clause I(8)(B).

<sup>483</sup> The word “operator” is defined as “a Person which by agreement with other Persons has been authorized to manage, conduct, and control the operation of an Offshore Facility, subject to the terms and conditions of said agreement, or which manages, conducts and controls the operation of an Offshore Facility in which only it has an interest”. Ibid, clause I(10).

<sup>484</sup> Ibid, clause IV(B).

<sup>485</sup> The term “public authority” is defined as “the Government of any State recognised as such under international law or custom and any public body or authority (municipal, local or otherwise) within such State competent under the municipal law of such State to carry out Remedial Measures”. Ibid, clause I(14).

Oil or to remove or neutralize the Oil involved in such discharge”.<sup>486</sup> The OPOL Guidelines for Claimants state that there are three categories of compensable remedial measures; “clean-up operations on shore or at sea”, “Property damage”, and “Disposal costs of collected material”. Any “[o]ther losses ... must be quantifiable and ... must result directly from the contamination itself”.<sup>487</sup> The power to bring claims for remedial measures is limited to public authorities.<sup>488</sup> If, therefore, say a fish farmer carries out measures to prevent oil harming the fish or the fish farm, OPOL does not cover the cost of the preventive measures.

The term “pollution damage” is defined as “direct loss or damage (other than loss of or damage to any Offshore Facility involved) by contamination which results from a Discharge of Oil”.<sup>489</sup> The meaning of the phrase “direct loss or damage” is not defined. There has never been a claim under OPOL so it is not possible to gauge the meaning of the phrase from experience. It is clear, however, that the term “direct loss or damage” does not include remedial measures due to their separate definition and because they are recoverable only by a public authority.

It could be argued that the term “direct loss or damage” does not cover pure economic loss. For example, in *Landcatch Ltd v International Oil Pollution Compensation Fund*, the court concluded that a fish farmer in the Shetland Islands who could not sell farmed salmon due to the lack of customers following the oil spill from the *Braer* in 1993, was not entitled to compensation because the loss was indirect, rather than direct.<sup>490</sup> If this is the case, OPOL may not cover the loss of revenues from the mariculture or the tourism industries due to an oil spill.

A strong argument that elements of pure economic loss are included in the term “pollution damage” can be drawn, however, from a joint study entitled “Oil Spill Cost Study – OPOL Financial Limits”, commissioned by OPOL and Oil & Gas UK (the trade body for the UK offshore oil and gas industry). The study considered the financial impact of a well blowout in UK waters on the following industries in determining whether the US\$ 250 million limit under OPOL is adequate for claims for “pollution damage” and “remedial measures”: shellfish farms, fish farms (primarily salmon), commercial (wild) fisheries, and tourism.<sup>491</sup> In particular, the report discussed the financial impact on tourism and commercial fishing.<sup>492</sup> Both types of claims are pure economic loss.

The study stated that “the costs of oil spill response and of third party loss or damage that might result [from well blow out scenarios in UK waters] are discussed in relation to the financial provision that exists in the UK via the OPOL Agreement, whereby there is an agreement amongst members of OPOL to meet claims relating to pollution damage and the cost of remedial measures up to a maximum of US\$250million per incident”.<sup>493</sup>

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<sup>486</sup> Ibid, clause I(15).

<sup>487</sup> OPOL, The Offshore Pollution Liability Association Limited, Guidelines for Claimants; available at <http://www.opol.org.uk/guidelines.htm>

<sup>488</sup> OPOL Agreement, clause IV(A).

<sup>489</sup> Ibid, clause I(13).

<sup>490</sup> *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] SLT 1208, 1221 (Inner House) (Scotland); available from <http://www.bailii.org/databases.html#uk>

<sup>491</sup> OPOL and Oil & Gas UK, Oil Spill Cost Study – OPOL Financial Limits 33 (February 2012); available at [www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182](http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182)

<sup>492</sup> Ibid, 36.

<sup>493</sup> Ibid, 6.

In respect of fishing, the study stated, among other things, that:

“Claims for the cost of the impact on fishing were calculated primarily on the basis of the value of the fishing ground likely to be affected together with the type of catch. Compensation to fisherman was based on a closure of the fishing grounds for 3 months based on discussions with Marine Scotland and reflecting the restrictions that were put in place following the Braer incident in Shetland”.<sup>494</sup>

In respect of tourism west of Shetland, the study stated, among other things, that:

“The tourism areas that may be affected are the whole of Shetland, Orkney and parts of Caithness and Sutherland. The total expenditure by tourists has been used to estimate the possible economic impact due to the loss of tourism due to the oil spill”.<sup>495</sup>

The study does not, of course, bind OPOL or its members. It would, however, be difficult – perhaps extremely difficult – for an operator to deny claims for “pollution damage” on the basis that they are pure economic loss and are not covered by OPOL when OPOL and Oil and Gas UK had concluded that the liability cap of OPOL is adequate to cover them.

If OPOL covers pure economic loss, this would be highly significant for claims for compensation in the UK because the law in that jurisdiction does not cover them (see UK summary). As discussed below, however, this is uncertain.

It appears from the joint study that OPOL intended the definition of “pollution damage” to be synonymous with part of the definition of “pollution damage” in the Civil Liability Convention, which applies to vessels. As indicated above, OPOL defines the term, in pertinent part, as “direct loss or damage ... by contamination which results from a Discharge of Oil”. The Civil Liability Convention defines the term “pollution damage”, in pertinent part, as “loss or damage caused ... by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur”.<sup>496</sup> Other marine conventions, including the Fund Convention, have an identical or similar definition.<sup>497</sup> The Fund set up by the Fund Convention compensates claims for pure economic loss “if the damage is a result of the oil pollution and is suffered by those who are dependent for the earnings on coastal or sea-related activities” provided that “[p]ure economic loss ... is quantifiable in economic terms”.<sup>498</sup>

The joint study discussed whether a claim would be considered to be “direct” by referring to *P&O Scottish Ferries Ltd v Braer Corporation*,<sup>499</sup> a case concerning the definition of “pollution damage” under the Fund Convention. The court concluded that a claim for lost fares for ferries and holiday

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<sup>494</sup> Ibid, 36.

<sup>495</sup> Ibid, 37.

<sup>496</sup> Civil Liability Convention, art I(6)(a).

<sup>497</sup> Fund Convention, art 1(2). The definition of “pollution damage” under the Merchant Shipping Act 1995 is equivalent. Merchant Shipping Act 1995, s 153(1)(a) (“damage caused outside the ship in the territory of the United Kingdom by contamination resulting from the discharge or escape”).

<sup>498</sup> Edward H.P. Brans, *Liability for Damage to Public Natural Resources; Standing, Damage and Damage Assessment* 322 (Kluwer Law International, 2001).

<sup>499</sup> [1999] 2 Lloyd’s Rep 535 (Outer House) (Scotland); available from <http://www.bailii.org/databases.html#uk>

cruises was not covered because it was an indirect consequence of adverse publicity affecting the image of Shetland. The study referred to the case as follows:

“Ferries have been considered during assessment of tourism costs. During the *Braer* oil spill, a claim of approximately £1m was submitted by ferry operators for loss of income but was not upheld. This was because it could not be proved that losses were as a direct consequence of the spill and because of lack of proximity of the ferry route to the spill extents (IOPCF, 2000). For this reason, such costs have not been included in this report”.<sup>500</sup>

Other claims that were considered to be indirect under the Fund Convention include a claim by a fish processing company. The company had lost business when a fishing ban, imposed following the *Sea Empress* oil spill off the Welsh coast in 1996, resulted in it being unable to process whelks that it had contracted to supply to Korea. The Court of Appeal agreed with the lower court that the IOPCF was not liable because the loss suffered by the company was indirect in comparison to whelk fishermen which, although they had no property interest in the whelks, had suffered a loss as a direct result of the contamination. In describing the criteria for a claim to be “direct” under the Fund Convention, Mance, LJ stated that “there can be claims under the statute for loss suffered by fishermen, which apart from the statute would not be recoverable at common law, even assuming negligence. Making that assumption, such claims arise from the very close relationship between the contaminated waters and the fishermen's activities and loss”.<sup>501</sup>

In respect of the above references to the joint study and the definition of “pollution damage” appearing to be intended to equate with the definition in the Civil Liability Convention, OPOL commented, on 8 September 2014, that a conclusion that OPOL covers pure economic loss “cannot properly be drawn by reference to the joint study ... or by reference to any alleged intention regarding the definition of ‘pollution damage’ in the OPOL Agreement”. OPOL stated that “the scope of losses covered by OPOL would be determined in accordance with the laws of England should there be a dispute [which] [a]s the Report acknowledges, English law does not provide compensation for pure economic loss nor, on an unlimited basis for consequential economic loss”.<sup>502</sup>

It is, thus, unclear as to whether an arbitrator would conclude that the OPOL Agreement provides cover for pure economic loss (see the discussion concerning arbitration below).

Claims for pollution damage and remedial measures are not made directly against OPOL; instead, they are made against the “operator who has caused the pollution that damage has been suffered and/or costs incurred”, who is “solely responsible for the acceptance and payment of such claim”.<sup>503</sup> The Guidelines for Claimants state that “Claims [for pollution damage and remedial measures] must be reasonable, quantifiable and justifiable”. The operator thus appears to be the decision-maker as to whether a claim is “pollution damage” and whether it is “reasonable, quantifiable and justifiable”.

The appointment of the operator who must pay claims as the decision-maker for determining whether they are covered by OPOL is a major drawback of the regime. For example, BP was heavily criticised

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<sup>500</sup> OPOL and Oil & Gas UK, Oil Spill Cost Study – OPOL Financial Limits 37 (February 2012); available at [www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182](http://www.oilandgasuk.co.uk/templates/asset-relay.cfm?frmAssetFileID=2182)

<sup>501</sup> *Alegrete Shipping Company, Inc v International Oil Pollution Compensation Fund (The Sea Empress)* [2003] 2 All ER (Comm) 1, [2003] 1 Lloyd's Rep 327 (Court of Appeal) (England); available from <http://www.bailii.org/databases.html#uk>

<sup>502</sup> Comment by Niall Scott, OPOL (8 September 2014).

<sup>503</sup> See OPOL, Guidelines for Claimants.

for its handling of claims from Deepwater Horizon, leading to the establishment of the GCCF. Even then, the GCCF was, again, heavily criticised concerning its independence and fair handling of claims despite the appointment of Kenneth Feinberg, who is perhaps, the most experienced independent administrator of a claims facility in the US (see discussion of claims for compensation from Deepwater Horizon, section 3.4.1). The requirement for claims to be paid promptly is set out in the OSD. Article 4 of the OSD provides, in pertinent part, that “Member States shall, as a minimum, establish procedures for ensuring prompt and adequate handling of compensation claims including in respect of compensation payments for trans- boundary incidents”.

The limit for claims from an “incident”<sup>504</sup> under OPOL is US\$ 250 million (EUR 182.57 million), which is split into a maximum of US\$ 125 million (EUR 91,739,800) per incident for remedial measures, and a maximum of US\$ 125 million (EUR 91,739,800) per incident for compensation for pollution damage.<sup>505</sup> If the limit in one category is reached, any surplus from the other category may be used. The OPOL risk pooling mechanism is for insolvency risk only; that is, the compensation limits are for the amount that other companies would contribute on top of all available compensation from the liable party in the first instance after the liable party becomes insolvent.

The OPOL Agreement, which is subject to English law,<sup>506</sup> contains an arbitration clause.<sup>507</sup> According to the Guidelines for Claimants, the clause applies to a “Dispute between the “operator & claimant””. This does not appear to be the case, however, because under the doctrine of privity of contract, a clause in a contract applies only to a party to the contract.<sup>508</sup> The OPOL Agreement specifies that the “Parties to this Contract are Operators of or intend to be the Operators of Offshore Facilities”; claimants are not parties.<sup>509</sup> It is unclear whether a claimant would be required to agree to arbitration prior to the operator agreeing to consider the claim. OPOL leaves this issue unclear although it would seem that this is the intent.

Further, the OPOL Agreement states that no person has any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce a term under it.<sup>510</sup> Due to a claimant not being a party to the agreement, the claimant thus has no redress against OPOL if the operator denies its claim. Redress is solely against the operator against whom the claim is made.

The time limit for bringing a claim is one year from the “incident” that resulted in the “pollution damage” or the carrying out of the “remedial measures” at issue.<sup>511</sup> As indicated above, an “incident” is defined as an “occurrence or series of occurrences arising out of one event which results in a Discharge of Oil”.<sup>512</sup> The one-year limitations period for claims thus begins to run before the oil that causes the

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<sup>504</sup> The word “incident” is defined as “any occurrence or series of occurrences arising out of one event which results in a Discharge of Oil”. OPOL Agreement, clause I(6).

<sup>505</sup> Ibid, clauses IV(A)(1)-(2).

<sup>506</sup> Ibid, clause XII.

<sup>507</sup> Ibid, clause IX.

<sup>508</sup> See Greg Gordon, Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 2: Regulatory law, the Environmental Liability Directive and OPOL (2013) Environmental Law and Management, vol. 25, 121, 127 (referring to *New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co* [1975] AC 154 (Privy Council); available from available from <http://www.bailii.org/uk/cases/UKPC/>)

<sup>509</sup> OPOL Agreement, preamble.

<sup>510</sup> Ibid, clause XIII.

<sup>511</sup> Ibid, clause VI.

<sup>512</sup> Ibid, clause I(6).

pollution damage is released into the sea. This period is substantially shorter than the three-year limit from the time of the damage for claims under the Civil Liability<sup>513</sup> and Fund<sup>514</sup> Conventions. The long-stop limit for claims from the time of an incident in those Conventions is six years. There is also a marked difference between a claim for compensation for harm from an oil spill from a ship and one from geological strata containing oil. For example, it took 87 days before the well that was leaking oil from the Deepwater Horizon incident was capped (see section 3.4). It took 74 days to stop the Montara oil spill into the Timor Sea.<sup>515</sup>

It is unclear whether claims under OPOL are limited to damage that occurred before expiration of the one-year limitations period or whether they may include claims for ongoing damage beyond that time period. The Guidelines for Claimants states that “any claim may be amended at any time prior to final settlement”. In this respect, the Deepwater Horizon economic loss and property damage settlement agreement covers claims during a period of just under two years (see section 3.4.2).

A party may show financial responsibility under OPOL by one of the following mechanisms or a combination of them:

- insurance of at least US\$ 250 million (EUR 182.57 million) for any one incident and US\$ 500 million (EUR 365.135 million) in the annual aggregate, with a maximum deductible of US\$ 10 million (EUR 7.3 million) per occurrence;
- qualification as a self-insured by means of a credit or financial strength rating from internationally recognised credit rating agency acceptable to OPOL; or
- a guarantee from a guarantor that has a credit rating that satisfies the second criterion.<sup>516</sup>

This limit is in line with similar limits for compensation claims from offshore oil and gas operations in the UK. The limit does not include the cost of a relief well; this is outside the remit of OPOL. In respect of insurance as evidence of financial responsibility, the Joint Rig Committee of the LMA has issued an OPOL endorsement for use in offshore energy policies.<sup>517</sup>

The reference to credit rating requires a member of OPOL who qualifies as a self-insurer to have:

“one or more of the following credit or financial strength ratings: “A-” or higher from Standard & Poor’s; “A-” or higher from A. M. Best; “A3” or higher from Moody’s; “A” or

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<sup>513</sup> Civil Liability Convention, art VIII. Article VIII provides “Rights of compensation under this Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage. Where this incident consists of a series of occurrences, the six years’ period shall run from the date of the first such occurrence”).

<sup>514</sup> Fund Convention, art 6 (“Rights to compensation ... shall be extinguished unless an action is brought thereunder or a notification has been made ... within three years from the date when the damage occurred. However, in no case shall an action be brought after six years from the date of the incident which caused the damage”).

<sup>515</sup> See George Roberts, Montara oil spill: Indonesia requests Australia's cooperation on resolving dispute over impact on coastal communities, ABC News (29 September 2014); available at <http://www.abc.net.au/news/2014-09-29/indonesia-pleads-for-australias-cooperation-on-montara-oil-spill/5777840>

<sup>516</sup> See Information for prospective members; available at [www.opol.org.uk/downloads/opol-memberinfo-jan14.pdf](http://www.opol.org.uk/downloads/opol-memberinfo-jan14.pdf)

<sup>517</sup> The OPOL endorsement is available at the website of Lloyd’s Market Association, Joint Rig Committee at [http://www.lmalloyds.com/Web/market\\_places/marine/JRC/Joint\\_Rig.aspx](http://www.lmalloyds.com/Web/market_places/marine/JRC/Joint_Rig.aspx)

higher from Fitch; and/or the equivalent from another internationally recognised credit rating agency acceptable to the Association”.<sup>518</sup>

The requirement for a specified credit rating does not include a requirement to show a minimum net worth of the company, a positive net income, or a minimum ratio of assets to liabilities or liabilities to net worth. The requirement also does not require the company to show a minimum amount or percentage of its assets in the Designated State.<sup>519</sup> In this respect, OPOL does not require a guarantor to be registered in a Designated State.<sup>520</sup>

As of 2014, 32 per cent of the members of OPOL provided evidence of financial responsibility by means of a captive.<sup>521</sup>

In summary, OPOL provides a compensation system for claims for bodily injury, property damage and (perhaps) economic loss and ensures that a specified amount of funds is available to pay those claims.

OPOL suffers, however, from potential and actual severe limitations on coverage that include:

- the designation of the operator who caused the pollution damage as the decision-maker as to whether a claim is covered, particularly in view of terms such as “direct”, “indirect” and a decision as to whether a claim is “reasonable, quantifiable and justifiable”;
- the lack of cover for claims for compensation as a result of a discharge or release of gas, dispersants or any substance other than oil;
- the inability of a person, other than a governmental entity, to claim compensation for remedial measures;
- the one-year limitations period to file a claim;
- the (perceived at least) requirement to enter into an arbitration agreement with the operator in order to file a claim under OPOL;
- the lack of a requirement to show a minimum net worth, a positive net income, or similar indications that a member of OPOL is sufficiently financially secure to pay claims if they arise;
- the ability of a guarantor to hold assets outside, rather than inside, a Designated State; and
- the uncertainty as to whether OPOL provides compensation for pure economic loss.

#### **4.1.3. Munich Re’s SOSCover proposal**

According to an interviewed stakeholder,<sup>522</sup> current financial security instruments are the same as before the Macondo incident. Only Munich Re and Noble Energy made new proposals on the market,

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<sup>518</sup> OPOL, Rules of the Offshore Pollution Liability Association Limited (as at 4 September 2014), Form FR-4; available at <http://www.opol.org.uk/rules.htm>

<sup>519</sup> See discussion of financial security requirements under US law for mine reclamation at Gregory E. Conrad, Mine Reclamation Bonding – from Dilemma to Crisis to Reinvention: What’s a State Regulator to Do? (Energy and Mineral Law Foundation, Winter Workshop on Energy Law (11 February 2014); available at [www.imcc.isa.us/EMLF%20Bonding%20Presentation%20Final.pdf](http://www.imcc.isa.us/EMLF%20Bonding%20Presentation%20Final.pdf)

<sup>520</sup> See Rules of the Offshore Pollution Liability Association Limited, FR-3, Verification of Guarantee, clause 7.

<sup>521</sup> Correspondence with Niall Scott, Managing Director, OPOL (15 May 2014).

<sup>522</sup> Telephone interview with Michael Wennin, Hannover Re, 25 March 2014.



although these proposals have not led to anything concrete thus far. These two proposals were presented and analysed in the Metro Report. However, Noble Energy is no longer advocating its proposal.<sup>523</sup> Consequently, only Munich Re's proposal is addressed in this section.

Following Deepwater Horizon, Munich Re, the world's biggest reinsurance company, developed a specific product – a risk distribution mechanism – for the Gulf of Mexico: the Sudden Oil Spill coverage (SOSCover), a facility that would be able to generate substantial capacity for offshore-related risks, that is aggregate limits of US \$10 billion to US\$ 20 billion for companies in offshore oil activities.<sup>524</sup> Offshore gas activities are therefore not included in SOSCover.

The Sudden Oil Spill Consortium, a joint venture, was thus created between Aon Benfield, Guy Carpenter, Munich Re and Willis Re, to “provide larger liability limit insurance coverage for deepwater drilling operations in US waters.”<sup>525</sup> According to Munich Re, its proposal resulted from the need, made evident by the Macondo incident, to provide a solution for an easy and speedy access to compensation for victims.<sup>526</sup>

As indicated in the Metro Report, SOSCover could work under three different models: “1/ a consortium of insurers and reinsurers, each providing uniform prices and conditions and fixed capacity; 2/ traditional insurance or reinsurance on a subscription basis, with flexible pricing, conditions and limits; 3/ a pool for oil drilling companies with contributions reflecting market share.”<sup>527</sup>

SOSCover would work like a balance sheet protection, and not like traditional insurance coverage. This product is based on parametric triggers, and may be seen as a pay-as-you-go product.<sup>528</sup> It involves a scenario-based approach.<sup>529</sup> As indicated in the Metro Report, “these scenarios are ex ante calculable and predictable. A scenario analysis would for example limit the coverage to all BP installations on the North Sea, rather than all liability risks of BP worldwide.”<sup>530</sup>

The nature of the product is quite different than typical insurance product. Munich Re's product is, as stated above, a balance sheet protection product. It is in fact triggered by something rather unusual in the insurance world and could therefore be defined as an “unconventional or an innovative insurance product”. This means that in the context of this product, insurers form an insurance consortium and not banks or hedge funds. Munich Re further indicated that the product strictly follows liability rules and therefore is very close to a liability cover.<sup>531</sup> The table below summarises the main features of SOSCover.

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<sup>523</sup> Telephone interview with Noble Energy, 6 June 2014.

<sup>524</sup> Metro Report, p. 266; available at [http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>525</sup> Bermuda Re Insurance Magazine, Deepwater Horizon: one year on, 1 September 2011, available at <http://www.bermudareinsurancemagazine.com/article/deepwater-horizon-one-year-on>

<sup>526</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>527</sup> Metro Report, pp. 266-267; available at [http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>528</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>529</sup> Ibid.

<sup>530</sup> Metro Report, p.268; available at [http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dqs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>531</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

Table 4: Main features of SOSCover developed by Munich Re (source: Munich Re)<sup>532</sup>

| <b>US Sudden Oil Spill Cover</b> |  |
|----------------------------------|--|
| <b>Scope of coverage</b>         |  |
| <b>Insured</b>                   | <ul style="list-style-type: none"> <li>▪ Lessees and operators of federal oil and gas leases (“joint venture”), represented by operator, 100% scaling</li> </ul>   |
| <b>Insured activity</b>          | <ul style="list-style-type: none"> <li>▪ All highly exposed wells on US sea territory to be insured (Gulf of Mexico, California, Alaska)               <ul style="list-style-type: none"> <li>• Wild Cat</li> <li>• Exploration</li> <li>• Appraisal</li> <li>• Development</li> <li>• Production</li> <li>• Work-over</li> </ul> </li> </ul>  |
| <b>Perils insured</b>            | <ul style="list-style-type: none"> <li>▪ Coverage limited to oil spills / releases of wells (no coverage provided for vessels and pipelines).</li> </ul>   |
| <b>Excluded events</b>           | <ul style="list-style-type: none"> <li>▪ Terrorism (potential inclusion of sub-limit of 10-20% for additional premium), war.</li> <li>▪ All kinds of Nat-Cat events (windstorm, meteorite impact, earthquake, seaquake, etc.) and consequential events (sub sea landslide, mudslide, flood wave, tsunami etc.)</li> <li>▪ Gradual pollution and leakage</li> <li>▪ Computer attacks</li> <li>▪ Loss of GPS signal</li> </ul>   |
| <b>Cornerstones of coverage</b>  |  |
| <b>Losses covered</b>            | <ul style="list-style-type: none"> <li>▪ Liability arising out of oil spills of insured activity (defined drilling) :               <ul style="list-style-type: none"> <li>• Clean-up and removal costs</li> <li>• Natural resource damage</li> <li>• 3rd Party Property damage</li> <li>• Bodily injury</li> <li>• Loss of profits and earning capacity of related industries</li> <li>• Revenues and Public Services</li> </ul> </li> <li>▪ Waiver of subrogation against the joint venture’s contractors</li> </ul> |
| <b>Defence costs</b>             | <ul style="list-style-type: none"> <li>▪ Defence costs are covered and part of the limit</li> <li>▪ No duty to defend</li> </ul>   |
| <b>Limit</b>                     | <ul style="list-style-type: none"> <li>▪ \$10bn+ capacity, provided by an insurance consortium.</li> <li>▪ Limit is in place per well and per any event, but only once per year per well and with a double aggregate per insured.</li> </ul>   |
| <b>Capacity requests</b>         | <ul style="list-style-type: none"> <li>▪ Capacity providers need to commit their capacity for a period of 24 months (but with an annual right to cancel and a cancellation</li> </ul>  |

<sup>532</sup> Philipp Wassenberg, Munich Re. EU Oil Spill Project. PPT presentation of 14 December 2012, provided by e-mail of 17 April 2014.

| <b>US Sudden Oil Spill Cover</b>          |   |
|---|---|
|   | <p>period of 15 months).</p> <ul style="list-style-type: none"> <li>▪ Renewal subject to annual review of risk adequate terms and conditions.</li> </ul>  |
| <b>Retention</b>                          | <ul style="list-style-type: none"> <li>▪ Attachment point of US\$1.5 billion</li> <li>▪ Cover will be pure excess cover, no follow form / no drop down etc.</li> </ul>  |
| <b>Trigger and indemnification period</b> | <ul style="list-style-type: none"> <li>▪ Trigger: Occurrence</li> <li>▪ Date of loss: Date of event</li> <li>▪ Reporting: As soon as likely to involve the coverage</li> <li>▪ Sunset clause: New claims after 36 months are cut off</li> <li>▪ Risks attaching</li> </ul>  |
| <b>Claims payment process</b>             | <ul style="list-style-type: none"> <li>▪ First part of the limit is US\$ 1.5 billion and will be paid into an escrow fund after the entire retention of US\$ 1.5 billion is funded by the insured (“Benefit Program”)</li> <li>▪ Pay-out of the limit’s other tranches (“Liability Program”) after <ul style="list-style-type: none"> <li>• A) parametric trigger (defined no of claimants) and</li> <li>• B) exhaustion of the limit’s previous tranche</li> </ul> </li> </ul> |
| <b>Co-insurance</b>                       | <ul style="list-style-type: none"> <li>▪ Minimum of 10% co-insurance (of US\$ 10 billion), depending on the limit required</li> <li>▪ Possible role of the oil companies’ Captives both of retention and co-insurance</li> </ul>  |
| <b>Claims Service</b>                     | <ul style="list-style-type: none"> <li>▪ A fully integrated claims facility with a clear claims management strategy is available (on a fee basis) as part of the product</li> </ul>   |

Although it has been reported that Munich Re has finally shelved its SOSCover project,<sup>533</sup> the latter assured that the product was not abandoned: its current lack of implementation is due to the unwillingness of oil companies to buy it.<sup>534</sup>

Munich Re indicated that it could develop a similar product for Europe. However, Europe is much more complex than the Gulf of Mexico. Challenges include the different territorial waters and the multitude of bordering States, but also the heterogeneous safety standards and liability regimes.<sup>535</sup> In addition, a lot of data is currently lacking.<sup>536</sup> Once all these data are provided (from commercial and official EU sources), Munich Re would be in a position to further analyse the exposures,<sup>537</sup> and a specific product

<sup>533</sup> See *Munich Re finally shelves \$20bn Gulf of Mexico liability project*, Insurance Day, Issue 3, 967, 22 October 2013, p.3; available at <http://badendirectory.com/wp-content/uploads/2014/03/ID-TUESDAY-OCTOBER-22.pdf>

<sup>534</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>535</sup> Philipp Wassenberg, Munich Re. EU Oil Spill Project. PPT presentation of 14 December 2012, provided by e-mail of 17 April 2014.

<sup>536</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>537</sup> Philipp Wassenberg, Munich Re. EU Oil Spill Project. PPT presentation of 14 December 2012, provided by e-mail of 17 April 2014.

for Europe could be developed within 3-6 months.<sup>538</sup> For Europe, Munich Re estimates that a minimum cover of US\$ 5 billion would be necessary.<sup>539</sup>

However, the Metro Report indicates that the Munich Re proposal has not met widespread interest.<sup>540</sup> Criticism included the following:

- IUMI observed that energy market practitioners considered the proposal unrealistic because of the limited insurance capacity actually available in the global market;<sup>541</sup>
- Premium payable by each operator and its co-venturers for such insurance cover would be extremely high and would not be considered economic, and would likely render many investments unattractive, which would have a detrimental impact on offshore oil and gas production in EU Member States.<sup>542</sup> Munich Re considered this criticism was speculative “since the premiums have not been made public and would, moreover, be low for smaller operators”;<sup>543</sup>
- Only short-tail losses would be covered (claims must indeed be brought within 36 months – see the “sunset clause” in the table above), although damage from an offshore installation will usually lead to long-term losses (long-tail risk),<sup>544</sup> and
- Some majors currently have better protection than what SOSCover would offer, as well as a better rating than insurers that would be willing to join the facility, and would hence not be an attractive scheme for them.<sup>545</sup>

For Munich Re, the oil industry tends to systematically underestimate risks and damages, including in European waters where high risk wells also exist (e.g. Northwest Shetland and East of Cyprus in the Mediterranean).<sup>546</sup>

Munich Re contends that a compulsory system would be needed to ensure that oil companies join the SOSCover-type facility which could be designed for Europe,<sup>547</sup> as incentives for the industry may otherwise be lacking.<sup>548</sup> Other stakeholders concurred in that a product such as the one developed by Munich Re could only work if it was made mandatory.

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<sup>538</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>539</sup> Ibid.

<sup>540</sup> See Metro Report, p. 269; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>541</sup> See notably Telephone interview with Lars Lange and Neil Roberts, IUMI, 7 May 2014.

<sup>542</sup> Written feedback provided by OGP in the framework of this study, 16 April 2014; and meeting of 6 May 2014.

<sup>543</sup> Metro Report, footnote 1302, p.269 (referring to an interview with Philipp Wassenberg, from Munich Re); available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>544</sup> Metro Report, p. 269; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>545</sup> Ibid.

<sup>546</sup> Ibid, p. 270.

<sup>547</sup> Telephone interview with Philipp Wassenberg, Munich Re, 17 April 2014.

<sup>548</sup> Metro Report, p. 270; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

## 4.2. Financial security requirements under Target State oil and gas licensing regimes

The focus of this section is on the effectiveness of financial security mechanisms that are in place in the Target States for offshore oil and gas licensing. It analyses the measures taken to assure adequate financial security when awarding an offshore oil and gas licence in each of the 20 Target States. As a general rule, financial caps and other limitations on financial liability in the Target States do not exist except for the voluntary system established by OPOL.

Before discussing the financial security requirements for offshore oil and gas operations in each Target State, the report briefly notes that the OSD has emphasised requirements for financial capability and financial security for offshore oil and gas operations.

Recital 10 of the OSD refers to existing requirements for a competent authority to ensure that an applicant for a licence for offshore oil and gas operations has financial capability, with emphasis on financial capability for liabilities from a major accident, by stating that:

“Pursuant to Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons offshore oil and gas operations in the Union may be carried out subject to obtaining an authorisation. In this context the licensing authority is required to consider the technical and financial risks, and where appropriate, the previous record of responsibility, of applicants seeking exclusive exploration and production licences. There is the need to ensure that when examining the technical and financial capability of the licensee the licensing authority thoroughly examine also its capability for ensuring continued safe and effective operations under all foreseeable conditions. When assessing the financial capability of entities applying for authorisation pursuant to Directive 94/22/EC, Member States should verify that such entities have provided appropriate evidence that adequate provisions have been or are to be made to cover liabilities deriving from major accidents”.

The summaries for the Target States indicate requirements for financial and technical capability.

Article 4(3) of the OSD provides that:

“Member States shall ensure that the licensing authority does not grant a licence unless it is satisfied with evidence from the applicant that the applicant has made or will make adequate provision, on the basis of arrangements to be decided by Member States, to cover liabilities potentially deriving from the applicant’s offshore oil and gas operations. Such provision shall be valid and effective from the start of offshore oil and gas operations. Member State shall require applicants to provide, in an appropriate manner, evidence of technical and financial capacity and any other relevant information relating to the area covered by the licence and the particular stage of offshore oil and gas operations”.

A competent authority must, in particular, take account of “the applicant’s financial capabilities, including any financial security, to cover liabilities potentially deriving from the offshore oil and gas operations in question including liability for potential economic damages where such liability is provided for by national law” (OSD, article 4(2)(c)).

As a result of the OSD, Member States are revising requirements for financial security in their licensing regimes. The following discussion indicates the requirements that are in place in October 2014, with the caveat that at least some of these are likely to be revised in the near future.

Norway has contended that its legislation is more stringent than the OSD. Further, Norway considers that the OSD is not EEA relevant because the Directive is outside the material scope of the EEA Agreement and, also, the Agreement does not apply beyond Norway's territorial sea.<sup>549</sup>

The following section describes the financial security required by each of the Target State for offshore oil and gas operations. Details of the financial security requirements can be found in the summaries for the Target States (see Annex). In order to place the analysis of financial security mechanisms for compensation for traditional damage in context, this section also discusses financial security mechanisms that are required for other aspects of a licence for offshore oil and gas operations, in particular, obligations under the licence for carrying out the works programme specified by it.

The table below summarises the legislative financial security requirements for compensation for traditional damage in the Target States, which are analysed in the next sections.

**Table 5: Legislative financial security requirements for compensation for traditional damage in the Target States**

| Target State       | Legislative financial security requirement  |
|--------------------|---|
| <b>Bulgaria</b>    | Not specified but permit or concession agreement may require insurance  |
| <b>Croatia</b>     | Insurance   |
| <b>Cyprus</b>      | Insurance   |
| <b>Denmark</b>     | Insurance   |
| <b>France</b>      | Not specified   |
| <b>Germany</b>     | Insurance   |
| <b>Greece</b>      | Insurance   |
| <b>Iceland</b>     | Insurance, performance bond or other type of financial security acceptable to the competent authority                                     |
| <b>Ireland</b>     | Insurance, with competent authority having discretion not to require financial security, or to require another type of financial security |
| <b>Italy</b>       | Not specified   |
| <b>Latvia</b>      | Not specified but licences may require financial security   |
| <b>Lithuania</b>   | Not specified but production sharing agreement may require financial security   |
| <b>Malta</b>       | Model production sharing contract specifies insurance as a financial security instrument <sup>550</sup>                                   |
| <b>Netherlands</b> | Not specified; financial security is rarely imposed   |
| <b>Norway</b>      | Insurance   |
| <b>Poland</b>      | Type of financial security, and whether it is required, is decided on a case-by-case basis  |

<sup>549</sup> See Memo from Bjørnar Alterskjær and Arne Torsten Andersen, ALT Law firm, to Paal Frisvold, Bellona Europa, Offshore Safety Directive – EEA Relevance and Geographical Applicability (13 March 2013), advising on relevance of the OSD to Norway; available at [http://bellona.no/filearchive/fil\\_Offshore\\_EEA\\_relevance.pdf](http://bellona.no/filearchive/fil_Offshore_EEA_relevance.pdf)

<sup>550</sup> Comment (information provided) by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

| Target State    | Legislative financial security requirement  |
|-----------------|---|
| <b>Portugal</b> | The concession contract specifies insurance for civil liabilities to the State and third parties <sup>551</sup> |
| <b>Romania</b>  | Not specified but permits may require financial security  |
| <b>Spain</b>    | Insurance   |
| <b>UK</b>       | Specified credit ratings, parent company guarantee, insurance, or a combination of them                         |

#### 4.2.1. Bulgaria

Neither the Bulgarian Concessions Act nor the Underground Resources Act sets out the financial security required for a prospection and exploration permit. Any financial security that is required is specified by the permit itself.

Two types of financial security are required for a concession agreement. They are: financial security for a candidate for a concession to cover its bid, and financial security for the successful candidate to cover its obligations under the agreement itself.

It is unclear whether the holder of a prospection and exploration permit, or a concession agreement, must have financial security for compensation for claims for bodily injury and property damage and, perhaps, pure financial loss. If there is such a requirement, which is not specified in legislation, the financial security instrument to cover it appears to be insurance.

#### 4.2.2. Croatia

Three types of financial security apply to offshore oil and gas operations in Croatia: a bank guarantee to accompany a bid under the first offshore licensing round; an irrevocable and unconditional bank guarantee / performance bond for carrying out the works programme under the agreement; and insurance for, among other things, bodily injury, property damage and other losses.

Offshore oil and gas activities are highly reliant on the political context. Such activities bring in money for the State and increase employment as well. Croatia is currently in the same situation that Greece or Spain were economically speaking and unemployment is quite high. It is therefore easier at the moment (October 2014) for foreign companies to get an exploration or production licence due to the need for foreign investment in Croatia. Rules are therefore more lenient than in some other States. In this respect, it is up to the Government and the applicant to negotiate entirely the contract for offshore oil and gas activities.<sup>552</sup>

#### 4.2.3. Cyprus

There are two requirements in Cyprus for financial security for offshore oil and gas operations under the Hydrocarbon (Prospection, Exploration and Exploitation) Law of 2007 (No. 4(I)/2007): an irrevocable bank guarantee in respect of carrying out the works programme, and insurance for compensation to third parties and damage to the environment.

<sup>551</sup> Comment (information provided) by Jose Miguel Martins, Entidade Nacional do Mercado dos Combustíveis (15 September 2014).

<sup>552</sup> Telephone interview with Miran Maćešić, Maćešić & Partners LLC, 10 April 2014.

The 2012 Model Contract specifies that the Minister will review and, if satisfactory, approve the insurance policies for exclusions and will verify the financial capacity of insurers.

#### **4.2.4. Denmark**

The Model Licence requires a licensee to submit “security, possibly in the form of a parent company guaranty, in an amount and of a nature that is acceptable to the [Danish Energy Agency]”. This type of financial security is to ensure the licensee’s performance of its obligations under the licence.

The licensee’s liability for damages for “any loss, damage or injury caused by the activities carried on under the licence”, as imposed by the Subsoil Act, must be covered by insurance, which must “provide reasonable coverage, in light of the risks involved in the operation of the business and the premiums to be paid”.

Insurance for companies is currently subject to consideration whether or not to change the amounts of insurance for financial capacity. Such changes could have impacts in licensee groups, as companies might have to pay higher amounts for insurance. One commentator stated that the OSD seems to make it more difficult to operate offshore oil and gas activities for smaller companies.<sup>553</sup>

#### **4.2.5. France**

The legislative provisions concerning financial security for mining activities in France, including offshore oil and gas operations, are being revised to be more stringent as part of the reform of the Mining Code. The financial security requirements in the Code that was effective in October 2014 appear to apply only to works programmes and not compensation for bodily injury, property damage or economic loss.

#### **4.2.6. Germany**

Germany requires applicants for offshore oil and gas operations to have evidence of financial security. The main financial security requirements are for the work programme, with the competent authority reviewing financial capability in closer detail when it reviews the operating plan for works to be carried out under the mining permit. The financial security instrument for compensation for bodily injury, property damage and economic loss in the event of a pollution incident, if required, is insurance.

#### **4.2.7. Greece**

The Greek Hydrocarbons Law and the Model Agreement set out detailed provisions for financial security. The mandatory requirements mainly concern financial security for the works programme and obligations under the lease and exploration and exploitation licences.

A deposit guarantee or insurance is also required, although the requirements appear to relate to environmental, rather than traditional, damage.

In addition, insurance in accordance with “Good Oilfield Practices” is required. This requirement appears to include insurance for compensation for harm from an offshore oil and gas incident.

Further, social security insurance, which would apply to employees of persons responsible for harm to employees, is specifically required.

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<sup>553</sup> Telephone interview with Jens Skov-Spilling, Director, Energy Resources, Danish Energy Agency, on 10 April 2014.



**4.2.8. Iceland**

Holders of offshore exploration and production licences in Iceland are required to have financial security in the form of a bank guarantee. If the licensee has a parent company, a parent company guarantee, to cover obligations under the licence is required.

In addition, the licensee must have insurance, performance bonds or other financial security acceptable to the competent authority for liability for any damage that may be caused by exploration, exploitation and production activities, or their non-performance, including environmental damage. The insurance, or other financial security, must specifically cover, among other things, pollution damage and other liability to third parties as well as liability concerning employees.

**4.2.9. Ireland**

The Irish Petroleum and Other Minerals Development Act requires an applicant to post a performance bond or guarantee to carry out the work programme itself. As a practical matter, guarantees have been accepted but not a bond.

The financial security requirements for compensation for claims by third parties for bodily injury and property damage are minimal. The financial security specified for such claims is insurance, with the Minister having the discretion not to require financial security or to accept other types of financial security such as self-insurance. Since 2010, the Minister has accepted membership of OPOL as financial security in respect of a shallow and a deep-water well by a smaller operator.

**4.2.10. Italy**

Italy requires applicants for exploration and production licences to be financially capable of carrying out the works programme. The focus is on financial security for the works programme, not compensation for claims from bodily injury, property damage and economic loss. Italy is, however, reviewing financial security requirements as part of the transposition of the OSD with a view to imposing more stringent requirements.

**4.2.11. Latvia**

The Latvian Law on Subterranean Depths does not include provisions that mandate financial security for offshore oil and gas operations, although such provisions may well be included in prospecting and/or exploration and production licences.

**4.2.12. Lithuania**

The Lithuanian Law on Subsoil does not include any requirements for financial security for offshore oil and gas operations. The production sharing agreement, which accompanies an exploration and production permit, is likely to include such provisions.

**4.2.13. Malta**

The Maltese Petroleum (Production) Act does not set out requirements for mandatory financial security for offshore oil and gas operations in legislation. Instead, the requirements are set out in the Model Production Sharing Contract (2001). The model clauses are available on request to the

Continental Shelf Department at the Ministry for Transport and Infrastructure by oil companies that have shown an interest in entering into a licence.<sup>554</sup>

#### **4.2.14. Netherlands**

Neither the Dutch Mining Act nor any other legislation imposes mandatory financial security requirement for compensation for bodily injury, property damage and economic loss involving offshore oil and gas operations. The financial security provisions in the Mining Act relate only to financial security for the discharge of payments and obligations under a licence. Such financial security is rarely imposed.

#### **4.2.15. Norway**

The JOA into which a licensee for offshore oil and gas operations in Norway must enter sets out the financial arrangements between the parties to it, the work programmes, and insurance requirements.

The Norwegian Petroleum Act requires the person to whom a licence is granted to “provide such security as approved by the Ministry for fulfilment of the obligations, which the licensee has undertaken, as well as for possible liability in connection with the petroleum activities”.

Financial security for third-party claims for compensation for bodily injury, property damage and economic loss is in the form of insurance.

In practice, most companies (that is, subsidiaries of foreign companies) provide parent company guarantees for financial security for their obligations under the licence; very few companies provide other types of guarantees.<sup>555</sup> However, such a guarantee is not required officially in the Norwegian texts; it is only very common in practice.<sup>556</sup>

#### **4.2.16. Poland**

Mining concessions in Poland do not include a requirement for financial security. Instead, the system is flexible. The Polish Ministry of Environment considers applications on a case-by-case approach and may require a bank guarantee or collateral or other type of guarantee.

Further, there are no other obligations that provide for financial security in respect of licences for hydrocarbons except for a liquidation fund for mining to ensure the decommissioning of mines. The Ministry of Environment considers the financial standing of an applicant for a licence and its ability to finance the work programme during the licensing process, including any parent guarantees.

#### **4.2.17. Portugal**

Decree-Law 109/94 requires applicants who bid for the right to carry out prospecting, exploration, development and production activities in Portugal to submit a programme for the proposed work that

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<sup>554</sup> Comment (and information provided) by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>555</sup> Telephone interview with Mette K. Gravdahl Agerup, Ministry of Petroleum and Energy (Norway), on 23 April 2014; Telephone interview with Professor Ivar Alvik, Scandinavian Institute of Maritime Law, University of Oslo, on 1 April 2014; and Telephone Interview with Professor Erik Røsæg, Scandinavian Institute of Maritime Law, University of Oslo, on 24 March 2014.

<sup>556</sup> Telephone interview with Professor Ivar Alvik, Scandinavian Institute of Maritime Law, University of Oslo, on 1 April 2014.

includes “an estimate of the respective costs and information on the sources of financing”. Entities that apply for a concession must post a provisional bond and, if a concession or licence is granted, must post a bond to cover obligations under the concession or licence.

The Decree-Law does not require a bond or other financial security to be posted for compensation for bodily injury, property damage or economic loss caused by a pollution incident from offshore oil and gas operations.

#### **4.2.18. Romania**

Neither the Romanian Petroleum Law nor the Methodological Rules include any requirements for financial security. The competent authority’s website states that a bank guarantee is required for a petroleum agreement, to cover the “timely performance of the minimum exploration program”. There is no indication of a requirement for financial security for a prospecting permit although this may be specified in the permit itself. Further, there is no legislative requirement for financial security to cover compensation for claims for bodily injury, property damage or economic loss under a petroleum agreement.

#### **4.2.19. Spain**

The Spanish Ministry of Industry, Energy and Tourism requires financial security in the form of a guarantee for the works programme, to include investment, taxation, social security and restoration obligations, as well as obligations arising from the research programme. The Ministry also requires civil liability insurance to cover possible damage or loss caused to people or property as a result of the oil and gas activities.

#### **4.2.20. United Kingdom**

Financial security is required in the UK “to discharge any liability for damage attributable to the release or escape of Petroleum in the course of activities connected with the exercise of rights granted by the licence”.

Prior to Deepwater Horizon, a person who carried out offshore oil and gas activities was required to have financial security only as specified under OPOL. Following Deepwater Horizon, the UK Government considered that the limit of liability of US\$ 250 million (EUR 182.57 million) under OPOL, even though it had been increased from US\$ 120 million (EUR 88.070 million), may not be sufficient to pay all claims arising from an offshore oil spill, in particular because financial security under OPOL does not cover the cost of drilling a relief well. The Department of Energy & Climate Change (DECC), therefore, issued a short guidance note (DECC Guidance) concerning the financial security that must be demonstrated prior to consent being granted for exploration and appraisal wells on the UK continental shelf. The financial security requirements do not apply only to harm caused by pollution. Other requirements include financial security for plugging and abandoning a well.

The DECC Guidance provides, among other things, that “[t]he level of financial responsibility that companies need to demonstrate for any particular well should be calculated by establishing the combined cost of well control and cost of financial remediation and compensation from pollution”.

The DECC Guidance further states that evidence of financial responsibility may be provided by: “reliance on credit/financial strength rating of the operator or co-venturer; insurance; parent company guarantee/affiliate undertaking; and any combination of the above”. The Guidance does not specify the type of financial security that is specifically required for compensation for traditional damage.

The mechanisms for financial security under OPOL are specified credit ratings by specified credit rating agencies, a parent company (or other company) guarantee, insurance of a minimum of US\$ 250 million (EUR 182.57 million), or a combination of the mechanisms.

### **4.3. Comparison and analysis of financial security requirements for traditional damage and available instruments**

The primary focus of financial security for offshore oil and gas operations in all Target States is the ability to carry out the obligations under a licence or agreement, including the works programme. Financial security to cover the costs of compensation for claims for traditional damage if an accident was to occur is not only secondary; it is very far behind the primary focus.

Some Target States specify financial security requirements for compensation for traditional damage in their legislation; others also – or alternatively – specify it in production sharing and other agreements. The licensing legislation in some Target States does not mention it (see Table 5 above). It is likely that financial security requirements in these Target States are specified in contractual agreements, but it cannot be guaranteed that this is the case because the model contractual agreements of some Target States were not all available for review or information concerning them was not provided.

The competent authorities in some Target States have discretion whether to require any financial security for compensation for traditional damage. In some, such as the Netherlands, interviewed stakeholders indicated that financial security is rarely imposed.

None of the Target States sets out a broad range of financial security instruments that applicants for licences may select to meet the requirement for financial security for compensation for claims for traditional damage, although the competent authorities in some, if not many, Target States will consider the adequacy of instruments submitted to them.

Instead of a wide range of financial security instruments from which to choose, the majority of Target States have only one preferred mechanism for compensation for claims for traditional damage – insurance. Twelve Target States specify insurance, of which nine do not specify any other type of financial security mechanism. This high proportion of Target States that require insurance may be even higher because the model contractual agreements for six Target States were unavailable for review and information concerning them was not provided. These six States did not specify any type of financial security mechanism in their licensing legislation so it may well be the case that they specify insurance in their model contractual agreements.

Of the Target States that specify financial security mechanisms other than insurance for compensation for claims for traditional damage, only the UK specifies credit ratings or a parent company guarantee; and in this case, the mechanisms are an alternative to insurance or may be used in combination with it. Only Iceland specifies a performance bond. The performance bond is indicated together with insurance, or another type of financial security at the discretion of the competent authority. In this respect, it would seem that a performance bond could only be taken out post ante, that is, after an accident has occurred in order to guarantee that the costs of performing the obligation to pay compensation is covered.

The focus on insurance for financial security for compensation for claims for traditional damage from an offshore oil and gas incident contrasts with the mechanisms that may be selected to meet the obligations of a licence or contractual agreement. The most common financial security instruments required for such obligations are bank guarantees, performance bonds, insurance and, if appropriate, parent company guarantees. Further, applicants for licences usually have more than one instrument from which to choose.

#### 4. Available financial security instruments and financial liability requirements under licensing regimes

Due to the substantial – almost overwhelming – reliance on insurance by the Target States as financial security for the costs of claims for compensation for traditional damage in the event of an offshore oil and gas incident, it is critical to examine whether the insurance policies that are available are adequate to cover third party claims for compensation for traditional damage. There appears to be no question that the policies provide cover for claims for bodily injury and property damage; they do not, however, appear to provide cover for pure financial loss, which will form the vast majority of claims, at least in Target States whose law recognises pure economic loss. As indicated above, however, competent authorities are expanding the requirements for financial security for offshore oil and gas operations in their transposition of the OSD.

As discussed above, the main policies for offshore oil and gas operations are OEE and EED policies, both of which are patterned on EED 8/86, and corporate liability policies.

As also indicated above, section C(a) of EED 8/86 (the relevant coverage clause for claims for compensation for traditional damage) provides, in pertinent part, as follows:

“Underwriters, subject to the Combined Single Limit of Liability, terms and conditions of this Policy, agree to indemnify the Assured against: ... all sums which the Assured shall by law or under the terms of any oil and/or gas ... lease and/or licence be liable to pay for the cost of remedial measures and/or as damages for bodily injury (fatal or non-fatal) and/or loss of, damage to or loss of use of property caused directly by seepage, pollution or contamination arising from wells insured herein ...”.

EED 8/86 policy thus provides cover for claims for compensation for bodily injury and property damage from an offshore oil and gas incident; it does not provide cover for a claim for pure economic loss. There is, thus, a large gap in OEE / EED policies for claims for financial loss from pollution from an offshore oil and gas incident unless the main body of the wording has been adapted to provide such cover, or the cover is provided by an endorsement.

Further, cover under EED 8/86, and other OEE and EED policies, is limited to risks arising from a blowout. Still further, the three coverage sections in EED 8/86 (and thus many if not most other OEE and EED wordings) are subject to a single aggregate limit for each accident or occurrence. If, therefore, a major blowout occurs, the costs of controlling the well and redrilling would tend to absorb most, if not all, of the indemnity provided by the policy. The limit of indemnity would have been exhausted before most claims for compensation for traditional damage had been made.

If damage occurs from an offshore oil and gas incident other than a blowout, the corporate liability policy, which is taken out by most companies involved in offshore oil and gas operations, would respond. As a Lloyd's publication states, the most common policy forms in the London market are the LSW 244 and JL 2012/06 wordings. These wordings provide cover for bodily injury, personal injury, and property damage; they do not provide cover for pure economic loss unless they have been adapted to do so, or an endorsement to that effect has been added to the policy.

Other types of insurance policies from the London market and other insurance markets provide cover to the offshore energy industry. These policies may well provide cover for compensation for pure economic loss for harm from an offshore oil and gas incident. Endorsements to this effect, which may be added to OEE and EED policies as well, are offered by the London market (and other insurance markets) for companies subject to the OPA in the US, and to OPOL.

As with any insurance policy, the amounts of the aggregate, and each and every, limits of liability are crucial, especially when – as with EED 8/86 – the limit of indemnity for the three coverage grants in that policy is aggregated.

Competent authorities may also be accepting other forms of financial security for compensation for traditional damage. In this respect, it is important to note that not all of the instruments and mechanisms mentioned in this chapter are available to operators and other licensees. Indeed, for instance, some ART mechanisms are only available to insurers, such as sidecar reinsurance, cat bonds, etc.

NGOs such as Oceana contend that there must be safety nets with a strong financial obligation imposed on companies carrying out offshore activities, without any liability cap. The mechanism to be put in place should be (i) independent and transparent, (ii) mandatory, and (iii) applicable to all licensees. Thus, for Oceana, there are no specific financial security instruments and/or mechanisms that are preferable to others, provided the conditions of use of the funds are optimal and that transparency is ensured.<sup>557</sup>

For IUMI, an operator needs to be able to choose the financial securities to best protect itself, which may or may not include traditional insurance. In addition, it considers that “the offshore liability insurance market is global and may be reluctant to commit capital to support a mandatory territory specific security measure within the EU.”<sup>558</sup> This view is shared by OGP, which considers the flexibility for each company to choose how best to demonstrate to be a key issue: “a one-size-fits-all approach for meeting financial responsibility does not work for such a diverse industry as the oil and gas sector. Such an approach is likely [to] drive up costs and could create barriers to entry for new participants, for no discernible safety benefit, thereby potentially damaging the [oil and gas] industry in the EU Member States.”<sup>559</sup>

One element that has been emphasised, especially by (re)insurance companies, regarding the need for increased capacity for offshore activities is that if such increased capacity is mandated, “the question will be how it will be delivered, because there is only a finite amount of risk capacity.”<sup>560</sup> The answer to this question depends on the amount of increased financial security (not merely insurance) that would be required. There is obviously insufficient capacity for an amount that is commensurate with the losses paid by BP following the Deepwater Horizon incident. Further, requirements for mandatory financial security for equivalent amounts would drive most oil companies out of the offshore oil and gas industry. Equally, however, a minimum amount of mandatory financial security that is set too low does not apply the polluter pays principle. Instead, it externalises the implications of an oil company’s potential accident onto the public purse. The appropriate amount is thus between these two figures, with mandatory financial security not being limited to insurance.

Opinions vary as to how financial requirements should be established. Some stakeholders, such as Oceana, consider that the evaluation carried out by competent authorities to award a licence and the level of financial security required should be based on the worst-case scenario (the Macondo accident can be used as a reference, as it is a major accident in the history of offshore oil and gas activities). The concept of the “worst-case scenario” would enable a range of risks that would not be too low to be taken into account.<sup>561</sup>

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<sup>557</sup> Telephone interview with Nicolas Fournier, from Oceana, on 21 March 2014.

<sup>558</sup> IUMI Position Paper, IUMI comments to proposed EC Regulation with respect to Offshore Energy Liability, 24 September 2012.

<sup>559</sup> Written feedback provided by OGP in the framework of this study, 16 April 2014.

<sup>560</sup> Bermuda Re Insurance Magazine, Deepwater Horizon : one year on, 1 September 2011; available at <http://www.bermudareinsurancemagazine.com/article/deepwater-horizon-one-year-on>

<sup>561</sup> Telephone interview with Nicolas Fournier, from Oceana, on 21 March 2014.

Others, such as OGP, consider that financial security requirements should be exposure-based, that is “the requirements should be based on the exposure levels associated with particular activities considering the credible worst case scenario i.e. with due regard to the likelihood of particular consequences” (taking into account the activity undertaken, the environment in which operations are conducted, the type of well, the water depth, reservoir pressure, etc.).<sup>562</sup> For the Standard, it would be more relevant to establish a differentiation mechanism based on the well’s technical characteristics, which would ensure the development of adapted financial securities.<sup>563</sup>

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<sup>562</sup> Written feedback provided by OGP in the framework of this study, 16 April 2014, and meeting on 6 May 2014.

<sup>563</sup> Telephone interview with Fabien Lerede, Syndicate Claims Director, Charles Taylor & Co. Limited, as agents for the managers of The Standard Club Europe Ltd, 18 March 2014.

According to Mr Lerede, one of the particularities of Deepwater Horizon was that the drilling was very deep and involved a very high-pressured well. However, risks in Europe are different from the ones that affected Deepwater Horizon as there are no deepwater, high pressure wells. For instance, the North Sea is not very deep (except maybe in Ireland on the Atlantic coast) and the pressure is not high. Indeed, nowadays we see companies acquiring existing rigs (and not building new ones): in such a case where the field has already been exploited, the pressure is very low and the risks involved small.

4. Available financial security instruments and financial liability requirements under licensing regimes

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# 5. Findings and conclusions

The effectiveness of the liability systems in the Target States for traditional damage caused by pollution from offshore oil and gas operations, regimes to handle compensation claims for the damage, the availability of financial security instruments, and requirements for financial security are closely linked. All four criteria depend on the nature of the liability system. The vast majority of claims for traditional damage from pollution from an offshore oil and gas incident are, indisputably, for pure economic loss.

Thus, if the liability system of a Target State does not recognise pure economic loss, it is irrelevant whether there is an effective regime to handle compensation claims, or whether such claims are covered by financial security instruments. Further, if the liability system of a Target State that recognises pure economic loss has adopted a conservative approach to claims for it, again the vast majority of claims for loss from pollution from an offshore oil and gas incident will fail. In such a case, it is mostly irrelevant whether there is an effective claims-handling regime or financial security for claims for traditional damage.

The vast majority of Target States are in the above two categories; they either do not recognise pure economic loss, have not adopted a liberal approach to claims for it, or do not have a specific liability system for claims from pollution from an offshore oil and gas incident. Thus, under the current legal systems of the Target States, many claims for traditional damage from pollution caused by an offshore oil and gas incident would fail. The existence, or not, of compensation regimes, financial security instruments and requirements for them is largely irrelevant.

The relatively short history of drilling for oil and gas in deep waters and harsh maritime environments has fortunately not resulted in many accidents in which pollution from offshore deposits has affected coastal communities, in particular communities where livelihoods depend on fishing and tourism. The Deepwater Horizon incident has shown, however, that an accident that occurs 50 miles (80 kilometres) from shore can have a devastating effect on the economy of such communities.

The harm caused by oil pollution from the Deepwater Horizon incident occurred despite the incident occurring in practically the most favourable conditions for remediating an oil spill from an offshore oil and gas installation. The conditions included:

“the well-developed infrastructure in place at the time of the spill. The abundance of ports, docks, airfields, Coast Guard facilities, and road and rail lines enabled a coordinated mobilization of people and equipment that streamed through the entire Gulf Coast during the response effort. Within a 500-mile radius of the blowout site, responders benefitted from access to 95 airports with runways 8,000 feet or longer (and 442 with runways 5,000 feet or longer), and 3,217 total ports. That area also includes multiple large cities replete with hotels, restaurants, gas stations, hospitals, and other facilities and equipment to support and sustain the largest environmental disaster response effort in U.S. history”

Even with the above infrastructure and other favourable conditions, “it still took three months, billions of dollars, and tens of thousands of responders to cap the well. At peak response, there were 9,700

vessels, 127 aircraft, and 47,829 people responding to the disaster”.<sup>564</sup> Further, the US “Coast Guard boasts a strong network of resources and personnel along the Gulf coast, including 30 facilities within a 500-mile radius of the spill site. In addition to providing crucial logistical support, the Coast Guard contributed 7,000 active and reserve personnel, 60 vessels, and 22 aircraft to the response effort”.<sup>565</sup>

A similar infrastructure does not exist in all the Target States that are currently carrying out offshore oil and gas prospecting, exploration and production. Further, whilst weather conditions in maritime areas such as the Aegean Sea, Adriatic Sea and the Mediterranean are – like those in the Gulf of Mexico – favourable at most times of the year, the situation is very different in the offshore areas of some other Target States.

Further, the drilling conditions of high temperature and high pressure in the Deepwater Horizon incident do not mean that a major offshore oil and gas incident will not occur if such conditions are not present. As a Lloyd’s publication states:

“Increasingly, oil and gas companies are prospecting and producing in areas that relatively recently would have been considered uneconomic or even impossible to explore. This includes operating in ever deeper waters and moving into more remote and hostile environments. Over the past 30 years, offshore drilling has progressively been pushing back the frontiers of technology. Water and drilling depths have increased dramatically as the search for hydrocarbons has moved towards the outer edge of the world’s continental shelves.”<sup>566</sup>

As the Lloyd’s publication further states, in some locations, “[b]oth onshore and offshore drilling operations face the problem of extreme weather and its effect upon personnel, equipment and operating practices”.<sup>567</sup> This observation extends, not only to oil and gas prospecting, exploration and production itself; it also extends to measures to respond to a blowout or spill from such operations. Further, oil behaves differently in colder, than in warmer, climatic conditions.

The infrastructure to respond to a spill in some Target States is less developed than the infrastructure that responded to the Deepwater Horizon incident in the Gulf of Mexico. It may, therefore, take longer to respond to a spill than the 87 days that it took to cap the well in the Deepwater Horizon incident.

Still further, the more favourable climatic conditions in the Mediterranean do not mean that a spill from offshore oil and gas operations would be any less devastating in that area. Target States, and other States, that border on the Mediterranean depend heavily on tourism and fishing for their economies.

As stated by Frédéric Pierret, Executive Director of the World Tourism Organisation, the “Mediterranean Sea is the world’s leading tourism destination in terms of both international and

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<sup>564</sup> Kiley Kroh, Michael Conathan and Emma Huvos, Putting a Freeze on Arctic Ocean Drilling 3 (Center for American Progress, February 2012); available at <http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/arcticreport.pdf>

<sup>565</sup> Kiley Kroh, Michael Conathan and Emma Huvos, Putting a Freeze on Arctic Ocean Drilling 6 (Center for American Progress, February 2012); available at <http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/arcticreport.pdf>

<sup>566</sup> Lloyd’s, Drilling in extreme environments: Challenges and implications for the energy insurance industry 7 (2011) (Drilling in extreme environments); available at <http://www.lloyds.com/~media/lloyds/reports/emerging%20risk%20reports/lloyds%20drilling%20in%20extreme%20environments%20final.pdf>

<sup>567</sup> Ibid, 22.

domestic tourism”.<sup>568</sup> Three hundred and six million (31 per cent) of all international tourist arrivals in the world between 1995 and 2011 were in the Mediterranean, with most tourists visiting Southern Europe. In 2011, 88 per cent of tourist arrivals in the Mediterranean were to Southern Europe. The tourism industry generates EUR 215 billion in export earnings from such tourism, including international passenger transport, and accounts for 12 per cent of total exports for the 29 countries that border on the Mediterranean.<sup>569</sup> In short, oil pollution from an offshore oil and gas incident in the Mediterranean would likely have a devastating effect on the economy of the Target States, and other States, affected by it regardless of whether the spill is of the magnitude of the Deepwater Horizon spill.

The OSD established minimum requirements for preventing major accidents in offshore oil and gas operations in the EU and for limiting the consequences of such accidents. The risk of an incident has therefore decreased. The risk can never, however, be eliminated entirely, particularly accidents caused by human error. Without an effective liability system, together with an effective claims handling system and financial security to pay claims for compensation for pure economic loss from an offshore oil and gas incident, the incident would result in claims against the Target State in which the incident occurred.

### 5.1. Liability systems for traditional damage

Liability for traditional damage in the Target States is imposed, as a general rule, by civil codes, laws on obligations, laws on wrongs, and the common law. None of these tort laws is designed to impose liability for harm from pollution from offshore oil and gas accidents. The law, which has evolved over hundreds of years, is based almost entirely, if not entirely in most Target States, on land-based incidents. The result is that the law in most Target States is ill-equipped to handle claims for compensation for damage caused by pollution from offshore oil and gas accidents. In some Target States, it appears that the relevant law does not even extend to the continental shelf and the EEZ where most offshore oil and gas operations take place.

Some Target States have enacted legislation that imposes strict liability for claims for traditional damage from pollution. As with general tort law, however, the vast majority of this legislation is focused on, and designed for, land-based incidents. Further, not only is it unclear in some Target States whether the legislation applies to incidents that occur in the continental shelf and the EEZ, in some Target States, it is clear that the legislation does not do so. For example, some legislation refers specifically to its application to water pollution only in inland waters and the territorial sea.

The focus of legislation for compensation for traditional damage on incidents that occur on land rather than the continental shelf or the EEZ would not matter if the type of damage suffered is the same, or mostly the same. This is not, however, the case due, in substantial part, to the vast majority of people living and working on land. Whilst claims for pure economic loss are not uncommon in the inland territories of Target States, and other States, the proportion of such claims versus claims for bodily injury and property damage differs substantially from the proportion of claims for pure economic loss that arise from marine oil spills.

As Professor Palmer succinctly explained, in discussing pure economic loss claims in the context of marine oil spills:

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<sup>568</sup> See Frédéric Pierret, Executive Director, World Tourism Organization, *The Mediterranean – a tourism stronghold: Facts and Figures* (presentation, Djerba, 16 -17 April 2012); available at [http://dtxtg4w60xqpw.cloudfront.net/sites/all/files/pdf/01\\_frederic\\_pierret\\_0.pdf](http://dtxtg4w60xqpw.cloudfront.net/sites/all/files/pdf/01_frederic_pierret_0.pdf)

<sup>569</sup> Ibid.

“Oil spills afford a critical vantage point from which to observe the evolution of liability rules .... Spills are excellent engines of pure economic loss. They cause relatively little damage to private property or to human life. Instead, they devastate something un-owned – natural resources, wildlife, the shores, the environment – and that devastation causes severe disruption to the surrounding co-dependent economy. The resulting loss to individuals and businesses is a massive economic ricochet. Consequently, it is no surprise to learn, for example, that 99% of the claims filed with the Trust Administrator in the BP spill thus far are for lost earnings and profits while only 1% are for property damage”.

That is, whilst inland industrial accidents tend predominantly to cause bodily injury and property damage, the reverse is true for damage from marine-based pollution incidents. In the latter type of incidents, claims for pure economic loss predominate. This is not, of course, to say, that bodily injury and property damage do not occur in offshore oil and gas accidents. The *Alexander Kielland* platform, which capsized in Norway’s Ekofisk oil field during a storm in March 1980 with the loss of 123 lives, and the *Piper Alpha* platform, on which explosions and fire in July 1988 caused the loss of 167 lives show vividly the potential for the loss of lives from offshore oil and gas operations.

As Deepwater Horizon illustrates, however, whereas most damage suffered by persons from land-based industrial accidents is in the form of bodily injury and property damage, the reverse is true for most damage that results from marine-based incidents involving pollution. The difference was graphically illustrated by the Deepwater Horizon incident. As stated by Professor Robertson,

“it seems apparent that in sheer magnitudes of dollars, economic-loss damages far exceed all of the other losses combined. In the aftermath of the disaster, BP Exploration & Production, Inc. created the Gulf Coast Claims Facility (GCCF) as a mechanism for settling damages and other claims against BP. In its April 13, 2012 status report, the GCCF reported that it had paid out a total of \$6,316,458,256, and that about 96% of that amount – \$6,053,660,113.42 – had gone to economic-loss claimants”.<sup>570</sup>

The reason is, as indicated above, that the pollution damage is caused directly to the environment itself whereas the losses suffered are based on that damage and can be direct, remote or indirect. As remarked by Lord McCluskey in a case involving compensation for oil pollution from a vessel under the IMO Conventions:

“The most obvious case [of ‘pollution damage’ under the IMO Conventions] is the fisherman whose livelihood is earned fishing in particular waters, in respect of which he may indeed have a licence to fish or some form of permission or quota allowance; he then loses that livelihood because those waters are polluted by oil escaping from a ship and he can no longer take fish there. He does not own the waters; he does not

<sup>570</sup> See David W. Goldberg, Criteria for Recovery of Economic Loss Under the Oil Pollution Act of 1990, (2011) Texas Journal of Oil, Gas, and Energy Law, vol. 7, 241, 242. In July 2011, the percentage of claims for pure economic loss filed with the GCCF was 99 per cent. See Vernon Valentine Palmer, The Great Spill in the Gulf ... and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability, (2011) Penn State Law Review, vol. 116, 105, 109, 116 n.49; available at <http://www.pennstatelawreview.org/116/1/116%20Penn%20St.%20L.%20Rev.%20105.pdf> The GCCF did not account for all of the costs and expenses paid by BP. Other costs include those for remediating the oil spill, natural resource damages, sanctions for pollution from the well blowout, etc. See Tom Borden, BP’s legal bill for the Gulf oil spill disaster soars to \$1bn, The Independent (5 February 2014); available at <http://www.independent.co.uk/news/business/news/bps-legal-bill-for-the-gulf-oil-spill-disaster-soars-to-1bn-9107849.html>

own the fish in the sea; his vessel may be based and berthed far distant from the scene of the oil spill, and his business may be registered elsewhere .... For the fisherman ... the pollution of the waters in which he regularly fishes does no physical harm to his person or his property; the oil does not touch him or anything belonging to him; there is no contamination of him or of his vessel or equipment. Nevertheless ... the loss of his livelihood is properly described as damage that is caused directly and immediately by contamination resulting from the discharge or escape of oil from the ship. The contamination does not set in train a chain of events that eventually results in his suffering loss or damage. On the contrary, the contamination is both the immediate, direct and, in such a case, the only cause of his loss. The contamination occurs at the very point at which he carries on his economic activity, fishing. But, because he does not own the waters in which he fishes or the fish which swim there, that loss is properly described as pure loss; because what he loses is not the fish or the waters but the intangible prospect of making a net profit by selling any fish that he might otherwise have caught in the waters had they not been contaminated. That loss of prospective profit is pure economic loss. In a figurative sense what he has in the waters is a direct economic interest. That interest is directly affected by the contamination".<sup>571</sup>

Whereas fishermen and other persons who are affected by a spill of oil from a vessel can claim under specific legislation in a very few Target States such as Norway, Denmark, and perhaps Iceland, no such legislation exists in the vast majority of Target States for compensation for pure economic loss from a spill of oil from offshore oil and gas operations.

That is, the only Target State that has legislation that specifically imposes liability for compensation in the event of pollution from an offshore oil and gas incident is Norway in respect of the fisheries industry. Danish law imposes strict liability for bodily injury, property damage and economic loss caused by the exploration for, and production of, hydrocarbons. Icelandic law imposes strict liability for bodily injury and property damage from hydrocarbon operations, but it is not clear that liability for compensation for pure economic loss is included.

Virtually all other Target States rely solely, or to a large extent, on their Civil Codes, Laws on Obligations, Laws on Wrongs, and common law for a liability system for claims for compensation from pollution from an offshore oil and gas incident. In some Target States this liability system is supplemented by laws that specifically impose civil liability for pollution, although some of these laws do not appear to apply beyond the territorial sea. Indeed, it is even unclear whether some Target States have exercised jurisdiction in respect of tort law to actions that take place on the continental shelf or on the EEZ.

Cyprus and, to a lesser extent, Greece, appear to impose liability for pure economic loss on licensees / lessees under their Model Production Sharing Contract and Draft Model Lease Agreement, respectively, in addition to their general tort law. Due to the inclusion of obligations for compensating persons harmed by offshore oil and gas operations in contractual agreements, however, they are likely to be difficult to implement. That is, only the State (the other party to the agreements) has the right to require the licensee / lessee to carry out its obligations under the contract. Claimants do not have any rights under the contracts so would need to persuade the State to act on their behalf. Further, the contractual provisions do not include any details of the type of claims that would be covered.

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<sup>571</sup> *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] SLT 1208, 1221 (Inner House) (Scotland); available from <http://www.bailii.org/databases.html#uk>

The UK requires licensees for offshore oil and gas operations to be members of OPOL. OPOL is a contractual agreement between OPOL and its members; it is not legislation. It is unclear whether OPOL provides cover for pure economic loss as an element of “pollution damage” (see section 4.1.2). Whilst the claims handling regime is standard in that claimants must bring claims for loss directly against the operator that caused it, OPOL is not involved in the claims handling regime. Further, OPOL appears to require claimants to go to arbitration for disputed claims. A benefit of OPOL is that it requires members to have financial security up to a cap for traditional damage claims, although most claims would not be covered if pure economic loss is not covered.

The non-recognition of pure economic loss in some of the Target States as well as other States tends to arise from the exclusionary rule, which excludes liability for economic loss in the absence of bodily injury or property damage. The major argument against the recognition of pure economic loss is the “floodgates” argument, that is, if liability for pure economic loss is recognised, the floodgates to claims would open. As Professors Palmer and Bussani have commented, this argument:

“is not only pervasive but has proved persuasive in many quarters. It usually links up with and reinforces the other arguments. Common law countries, mixed jurisdictions and a number of civil law countries all share similar concerns about the danger of excessive liability entailed by pure economic loss claims. In this context, another frequently invoked explanation for the exclusionary rule concerns the problems of open-ended liability and derivative litigation, i.e., the extension of liability for the remote consequences of a wrongful act. The common premise of this argument is that in a complex economy, pure economic losses are likely to be serially linked to one another. The foregone production of a good, for example, often generates losses that affect several downstream individuals and firms who would have utilized the good as an input in their production process, and so on. In such a world of economic networking, it becomes necessary to set reasonable limits to the extent to which remote economic effects of a tort should be made compensable”.<sup>572</sup>

As Justice Cardozo also commented, the recognition of claims for pure economic loss may expose a wrongdoer to “an indeterminate amount for an indeterminate time to an indeterminate class”.<sup>573</sup>

Arguments for the exclusionary rule include the following:

- “in some cases [it] would unleash an infinity of actions that would burden if not overwhelm the courts”;
- “the fear that widespread liability would place an excessive burden upon the defendant who, for purposes of the argument, is treated as the living proxy of human initiative and enterprise. The potentially staggering liability would be out of all proportion to the degree to which the defendant was negligent”;
- “pure economic loss is simply part of a broad modern trend toward greater and greater tort liability, a trend that must be kept under control. Allowing exceptions to the exclusionary rule is

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<sup>572</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 18-19 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>573</sup> *Ultramares Corp v Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (US); available at <http://www.uniset.ca/other/cs3/174NE441.html>

a slippery slope that may lead to reversal of the rule and may also encourage the development of other types of tort liability”,<sup>574</sup>

- economic interests are inferior to people’s lives, health, bodily integrity and property;<sup>575</sup>
- the exclusionary rule provides a bright line, that is, “a certain and easily applicable limitation on tort liability”.<sup>576</sup>

Arguments against the exclusionary rule include the following:

- justice is more important than certainty; “[i]liability should be limited in a just and principled manner, not through arbitrary bright lines”,<sup>577</sup> and
- in order “to maintain efficient precaution incentives, parties should under most circumstances face the full range of economic consequences of their activities [n]o matter how severe the harm”.

Professor van Boom concluded that,

“there should be no fundamental or dogmatic obstacle to claims for pure economic loss. The tortfeasor should not be allowed to walk free merely because of the nature of the damage he caused. The exclusionary rule does not provide any incentives for damage avoidance. Denying a claim in tort to victims of pure economic loss would not only leave them without any compensation, but would also lead to a lack of incentives for careful behaviour”.<sup>578</sup>

There has also been scepticism of the floodgates argument, as follows:

- “given the experience of the Liberal [pure economic loss] regimes, where the floodgates argument has not been a restraint and yet no dire consequences have resulted, it is not clear that the [floodgates] argument rests upon an empirical foundation”,<sup>579</sup> and
- the recognition of pure economic loss by French law does not seem to have affected claims in France.<sup>580</sup>

As Professor van Boom stated “If we look at continental jurisdictions that allow claims for pure economic loss, it must be admitted that the ‘admissive’ continental courts are in fact *not at all* flooded with pure economic loss claims”.<sup>581</sup>

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<sup>574</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 18-20 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>575</sup> Ronen Perry, The Economic Bias in Tort Law, (2008) University of Illinois Law Review, 1573, 1587-88.

<sup>576</sup> Ibid, 1595-96.

<sup>577</sup> Ibid.

<sup>578</sup> Willem H. van Boom, Pure Economic Loss; a Comparative Perspective, 48-49.

<sup>579</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 23 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>580</sup> See *ibid*, 22.

<sup>581</sup> Willem H. van Boom, Pure Economic Loss; a Comparative Perspective, 44 (emphasis original).

Deepwater Horizon shows the stark consequences for BP that resulted from the introduction of pure economic loss in the OPA. Equally stark, however, are the consequences for claimants if pure economic loss is not recognised. That is, if some liability for pure economic loss is not recognised, the vast majority of third-party claims for compensation for traditional damage from a major offshore oil and gas accident will fail. If the communities affected by the oil spill are dependent upon tourism or fishing for their livelihoods, the consequences would be disastrous, not only for people in the communities but also for the Target State. For example, a Target State that has promoted offshore oil and gas operations to repair its debt deficit from the economic recession could find itself having to pay huge amounts of compensation to people affected by the accident as well as having to subsidise the communities in the affected area until they could become self-sufficient again.

In Target States in which pure economic loss is recognised, the extent to which claims for loss of income, and other pure economic loss claims, are covered differs widely. Some Target States have adopted a liberal approach; others have adopted a conservative approach; yet others have adopted an intermediate approach, with variations in it. It is not possible simply to conclude that if a Target State recognises liability for pure economic loss, claims by businesses in the fisheries, tourism and other sectors harmed by pollution from an offshore oil and gas incident would necessarily be covered; much depends on the law in each jurisdiction. The law in the Target States for this area of law is not uniform.

Further, other aspects of the tort laws of Target States affect the way in which claims for pure economic loss are treated by the courts.

In many Target States, only “direct” claims are covered. This requirement tends to mean that even if claims for loss of income are recognised by the law of a Target State, it is unlikely that claims by businesses in sectors other than the fisheries sector and, perhaps, the tourism sector, would succeed. Further, the likelihood of a claim by a business in the tourism sector succeeding is significantly less than that of a claim by a business in the fisheries sector. Although a claim for loss of income by the inability to fish from polluted waters is obviously more “direct” than a claim for loss of income by, say, a hotel or a restaurant on the coast that goes out of business due to financial difficulties caused by polluted beaches a short distance from it, the rationale for the former claims to succeed and the latter claims to fail is suspect.<sup>582</sup> The 17 hypotheticals (see section 3.8.3) show that most claims for pure economic loss would not succeed because the claims would be considered to be remote, lacking causation, or the loss would be concluded not to be foreseeable.

Another significant obstacle to claims for pure economic loss – and other types of traditional damage – in the Target States that recognise liability for it is the need for a claimant to prove that the defendant was at fault. This requirement exists in Target States such as Bulgaria, Croatia, Cyprus, France, Greece, Ireland, Italy, Latvia, Malta and Romania. The need to prove fault means that it would be more difficult for claims for compensation for traditional damage to succeed.

Further, the law of many Target States includes an exception or a defence for *force majeure*. Whilst there are good arguments why a licensee of an offshore oil and gas facility should not have to pay compensation for losses from an accident that it could not have prevented, problems can arise, as evidenced by the Fukushima disaster, which occurred on 11 March 2011 when an earthquake measuring 9.0 on the Richter scale was followed by a 14 to 15-metre tsunami. The tsunami struck the Fukushima Daiichi Nuclear Power operated by Tokyo Electric Power Company (TEPCO). Japanese

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<sup>582</sup> See Ronen Perry, Relationship Economic Loss: An Integrated Economic Justification for the Exclusionary Rule, (2004) Rutgers Law Review, vol. 56, 711, 786 (“no rational distinction can be made between the interests of fishermen and the interests of other victims (such as fish restaurants, bait shops, tourist guides, hotel, and other businesses in the area”).



law imposes strict liability for compensation on the operator of a nuclear power plant, with an exemption for “a grave natural disaster of an exceptional character”. The Japanese Civil Code, which imposes fault-based liability, applies to gaps in the specific legislation. A further issue that had to be addressed was the decision by TEPCO’s insurers not to renew insurance coverage for the plant, at which four of the six reactors were damaged.<sup>583</sup>

A nuclear disaster following an earthquake and tsunami is obviously very different from pollution from an offshore oil and gas incident although it is not unforeseeable that such an incident could occur as a result of a natural catastrophe such as a hurricane. The relationship between special legislation and a Civil Code indicates difficult issues that could arise.

## 5.2. Compensation regimes for claims for traditional damage

A corollary issue to ensuring compensation for persons who suffer traditional damage from pollution from an offshore oil and gas incident – provided there is a liability system for claims by them – is the structure of the compensation regime to handle the claims. As indicated above, only Norway has a regime to handle compensation for claims for traditional damage from pollution from an offshore oil and gas incident.

Regimes exist for handling claims for compensation from industrial accidents, including marine claims. They include the following:

- the EU Solidarity Fund, established by Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund, albeit for natural disasters;<sup>584</sup>
- the regimes established by the marine Civil Liability Convention and the Fund Convention;
- the claims systems established pursuant to the Deepwater Horizon spill;
- the OSLTF, established by the OPA; and
- the claims regime established by Japan following the Fukushima disaster.<sup>585</sup>

Following the Fukushima disaster, a Dispute Reconciliation Committee for Compensation of Nuclear Damage was established to resolve the dispute between TEPCO and persons seeking compensation.

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<sup>583</sup> See Toyohiro Nomura, The Japanese Experience on Claims Management after the Fukushima Daiichi Accident (paper for presentation at European Commission conference on Taking nuclear third party liability to the future (20-21 January 2014)); available from

[http://ec.europa.eu/energy/nuclear/events/20140120\\_nuclear\\_third\\_party\\_liability\\_and\\_insurance\\_en.htm](http://ec.europa.eu/energy/nuclear/events/20140120_nuclear_third_party_liability_and_insurance_en.htm)

Professor Nomura is a member of the Dispute Reconciliation Committee. See also Nuclear Energy Agency and Organisation for Economic Co-operation and Development, Fukushima Daiichi nuclear accident; available at <http://www.oecd-nea.org/fukushima/>

<sup>584</sup> OJ L 311/3 (14 November 2002). The Solidarity Fund is being revised. See European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund (COM(2013)0522 – C7-0231/2013 – 2013/0248(COD)) (Ordinary legislative procedure: first reading); available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0436&format=XML&language=EN>; see also European Parliamentary Research Service, Reforming the European Union Solidarity Fund (16 April 2014); available at <http://epthinktank.eu/2014/04/16/reforming-the-european-union-solidarity-fund/>

<sup>585</sup> See Organisation for Economic Co-operation and Development and the Nuclear Energy Agency, Japan’s Compensation System for Nuclear Damage; As related to the TEPCO Fukushima Daiichi Nuclear Accident (2012); available at <http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf>

In September 2011, the Nuclear Damage Compensation Resolution Center was established under the Committee to handle claims. In addition, the Japanese Government established the Nuclear Damage Compensation Facilitation Corporation for payments that exceeded the amount of the financial security, and TEPCO's ability to pay the claims.<sup>586</sup>

Without an effective liability system for claims for pure economic loss from pollution from an offshore oil and gas incident exists, any compensation scheme that is established would most likely founder and fail.

### 5.3. Financial security requirements for traditional damage

None of the Target States sets out a broad range of financial security instruments that applicants for licences for offshore oil and gas operations may select to meet the requirement for financial security for compensation for claims for traditional damage, although the competent authorities in some, if not many, Target States will consider the adequacy of instruments submitted to them.

Instead of a wide range of financial security instruments from which to choose, the majority of Target States have only one preferred mechanism for compensation for claims for traditional damage – insurance. Twelve Target States specify insurance, of which nine do not specify any other type of financial security mechanism. This high proportion of Target States that require insurance may be even higher because the model contractual agreements for six Target States were not available for review or information was not provided in respect of them. These six States did not specify any type of financial security mechanism in their licensing legislation so it may well be the case that they specify insurance in their model contractual agreements.

It is not clear, however, whether the insurance policies accepted by competent authorities in the Target States includes cover for pure financial loss. It would obviously make little sense for a licensee of offshore oil and gas operations to have financial security for a liability that does not exist in the jurisdiction in which the licensee is carrying out operations. It would also make little sense for providers of financial security instruments to develop products to offer financial security for such a liability.

The focus on insurance for financial security for compensation for claims for traditional damage from an offshore oil and gas incident contrasts with the mechanisms that may be selected to meet the obligations of a licence or contractual agreement. The most common financial security instruments required for such obligations are bank guarantees, performance bonds, insurance and, if appropriate, parent company guarantees. Further, applicants for licences usually have more than one instrument from which to choose.

Stakeholders also mentioned the New Zealand Oil Pollution Fund, the Protection of the Sea Levy system in Australia,<sup>587</sup> and the COPE Fund that had been proposed in the EU following the *Erika* oil spill.<sup>588</sup>

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<sup>586</sup> Organisation for Economic Co-operation and Development and the Nuclear Energy Agency, Japan's Compensation System for Nuclear Damage; As related to the TEPCO Fukushima Daiichi Nuclear Accident (2012); available at <http://www.oecd-nea.org/law/fukushima/7089-fukushima-compensation-system-pp.pdf>; Toyohiro Nomura, The Japanese Experience on Claims Management after the Fukushima Daiichi Accident (paper for presentation at European Commission conference on Taking nuclear third party liability to the future (20-21 January 2014)); available from [http://ec.europa.eu/energy/nuclear/events/20140120\\_nuclear\\_third\\_party\\_liability\\_and\\_insurance\\_en.htm](http://ec.europa.eu/energy/nuclear/events/20140120_nuclear_third_party_liability_and_insurance_en.htm)

<sup>587</sup> Comment by Nicolas Fournier, OCEANA (30 September 2014); comment by Maria Deligianni, European Community Shipowners' Associations (30 September 2014).

#### 5.4. Findings' conclusions

If a pollution incident from offshore oil and gas operations was to occur in the waters of the vast majority of Target States, neither the operator who caused the incident nor the other licensees would be liable for many claims for compensation for traditional damage. This is because the law of most Target States either does not recognise liability for pure economic loss, the Target State has adopted a conservative approach to pure economic loss claims, or there are criteria in the general tort law that would not be satisfied by such claims. Further, it is unclear whether the tort law of many Target States applies to incidents on the continental shelf and the EEZ where most offshore oil and gas operations are carried out. The result is, basically, that application of the polluter pays principle to offshore oil and gas operations is severely limited. The OSD and the ELD apply the principle to the costs of preventing and remedying environmental damage, but no EU or national legislation exists in most Target States to apply the principle to the costs of most traditional damage claims.

The potential liabilities of operators for accidental pollution caused by them have thus been externalised rather than internalised. Or to state the reverse, a quasi-subsidy exists for offshore oil and gas operators because the public purse would bear the costs of compensation for traditional damage from pollution caused by the operators rather than the operators themselves.

It is undisputable that the current liability system in Target States would not compensate most persons who suffer loss, especially lost income, from pollution from an offshore oil and gas incident. The lacuna in the law if an incident was to occur in the waters of the Target States would not only adversely affect persons who suffered harm from the incident; it would adversely affect the future of offshore oil and gas operations in those States and, even, the entire EU. This would particularly be the case if the incident was to occur in an area that was largely dependent on tourism for revenue.

Further, a major reason why some Target States are promoting offshore oil and gas operations is to repair their debt deficits resulting from the economic recession. In the absence of an effective liability system and an effective financial security system to cover claims, those States are likely to be held responsible for at least some compensation. The absence of an effective system, therefore, poses a major risk to such States as, indeed, to any Target State.

Until the adequacy of compensation for pure economic loss caused by an offshore oil and gas incident is resolved, at least in the Target States that do not recognise pure financial, those Target States that recognise pure economic loss but have adopted a conservative approach, and Target States that have adopted a less conservative regime but whose tort law would result in denial of many claims (that is, virtually all Target States), adequate regimes to handle payments for compensation cannot be established.

This does not mean that the adequacy of regimes for handling compensation should not be considered at this time. The application of Rome II to most Target States means that claimants may select the law of the Target State in which the offshore oil and gas incident occurred or the law of the Target State (or other State) in which the injury is suffered. The wide variance in applicable tort law means that claims would be made in more than one Target State, perhaps in many Target States due to the proximity of some of them and their maritime areas. It is likely that courts in those Target States would be called on to apply the law of other Target States. In short, the litigation that is likely to ensue would be complex, difficult to handle, and expensive, especially if large numbers of actions were commenced.

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<sup>588</sup> Comment by Nicolas Fournier, OCEANA (30 September 2014).

In addition, until liability systems for claims for pure economic loss from pollution from an offshore oil and gas incident are established – either specifically or generally – it is impossible to ensure that operators and other licensees of offshore oil and gas operations have adequate financial security for potential claims. It would make little sense to require a licensee to have financial security for losses that are not covered by the liability system applicable to its operations.

In summary, if an accident such as Deepwater Horizon – or even much less severe than Deepwater Horizon – was to occur in EEA waters, there is currently:

- no liability in most Target States for many third-party claims for compensation for traditional damage caused by the accident;
- no regime in the vast majority of Target States to handle compensation payments; and
- no assurance in most Target States that operators, or other liable persons, would have adequate financial assets to meet such claims.

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# Annex: Target States summaries

## Bulgaria

### 1.1 Introduction

The first offshore concession agreement for natural gas in Bulgaria was signed in 2001, for the Galata block in the Bulgarian exclusive economic zone (EEZ) in the Black Sea. By 2010, most of the gas in the block had been produced.<sup>590</sup> In 2012, there was a significant increase in the production of natural gas as a result of production from two new offshore fields in Kaliakra and Kavarna, also in the Black Sea. Two concession agreements were signed in 2012, and a third in 2013. The fields have a combined total of 74 billion cubic feet of gas.<sup>591</sup>

Also in 2012, Bulgaria granted a prospecting and exploration permit to Total SA, OMV AG and Repsol for the Khan Asparah block in the Black Sea. The block, which is 14,220 square kilometres and is located 80 kilometres from the coast in water depths between 100 and 2,000 metres, is considered to contain oil and gas.<sup>592</sup>

Estimates in 2013 were for a five-fold increase in the production of gas in the following 10 years.<sup>593</sup> A final estimate on the amount of offshore gas has not yet been made due to the continuing exploration. As of October 2014, Bulgaria did not export natural gas.<sup>594</sup>

Oil production in Bulgaria is insignificant. In 2012, the only production was 23.5 thousand tonnes at an onshore field at Dolni Dubnik, northern Bulgaria, by Oil and Gas Exploration and Production plc, which

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<sup>590</sup> See Kostadin Sirlshtov and Pavlin Stoyanoff, Bulgaria Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/bulgaria>

<sup>591</sup> See Ministry of Economy, Energy and Tourism, Bulletin on the State and Development on the Energy Sector in the Republic of Bulgaria 6 (2013); available at [http://www.mi.government.bg/files/useruploads/files/buletin\\_energy\\_2013\\_en.pdf](http://www.mi.government.bg/files/useruploads/files/buletin_energy_2013_en.pdf); Melrose produces first gas from Kavarna, Kaliakra fields offshore Bulgaria (4 November 2010); available at <http://www.pennenergy.com/articles/pennenergy/2010/11/melrose-produces-first.html>

<sup>592</sup> See Total enters exploration in Bulgaria with award of the Khan Asparuh offshore license (29 August 2012); available at <http://total.com/en/media/news/press-releases/20120829-total-enters-exploration-bulgaria-with-award-khan-asparuh-offshore-license>

<sup>593</sup> See Bulgaria to Achieve Nearly 5-Fold Increase in Local Gas Production in 10 Years (13 August 2013); available at <http://www.novinite.com/articles/152812/Bulgaria+to+Achieve+Nearly+5-Fold+Increase+in+Local+Gas+Production+in+10+Years>

<sup>594</sup> See Kostadin Sirlshtov and Pavlin Stoyanoff, Bulgaria Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/bulgaria>

was privatised in 2004.<sup>595</sup> The company operates 12 concession agreements for oil and/or gas production and three permits for oil and gas prospecting and exploration.<sup>596</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore (and onshore) oil and gas (and other minerals) in Bulgaria is governed by a mining law and a concessions law.

Bulgaria does not have a Civil Code. Instead, various Acts impose liability for bodily injury and property damage.

## 1.3 Rights to, and ownership of, offshore oil and gas

Bulgaria owns oil and gas in its territory, territorial sea, continental shelf and EEZ.

Article 18 of the Bulgarian Constitution<sup>597</sup> provides that:

- “(1) The State shall enjoy exclusive ownership rights over the underground resources ...
- (2) The State shall exercise sovereign rights in prospecting, developing, utilizing, protecting and managing the continental shelf and the exclusive off-shore economic zone, and the biological, mineral and energy resources therein”.

The Underground Resources Act, also called the Subsurface Act expands upon the Constitution by stating that underground natural resources, which include oil and gas, are exclusive state property (article 3(1); see article 2(3)).<sup>598</sup> The term “oil and gas” is defined as “all natural liquid fuel and gaseous carbon nitrogen in the earth womb, as well as other useful components associated with them” (Underground Resources Act, Additional provisions, section 1(15)). The term “earth womb” is defined as “the part of the earth crust accessible by the human activity” (Underground Resources Act, Additional Provisions, section 1(6)).

Article 5(2) of the Maritime Space, Inland Waterways and Ports Act of January 2000,<sup>599</sup> as amended (Maritime Space Act), also expands upon the Constitution. It provides that “[t]he internal sea waters and the territorial sea, as well as the air space over them, the seabed and the subsoil are part of the territory of the Republic of Bulgaria, over which it shall exercise its sovereignty”.

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<sup>595</sup> See Ministry of Economy, Energy and Tourism, Bulletin on the State and Development on the Energy Sector in the Republic of Bulgaria 12 (2013); available at [http://www.mi.government.bg/files/useruploads/files/buletin\\_energy\\_2013\\_en.pdf](http://www.mi.government.bg/files/useruploads/files/buletin_energy_2013_en.pdf)

<sup>596</sup> See <http://www.ogep-bg.com/en/aboutus.html>

<sup>597</sup> An unofficial English translation of the Constitution of the Republic of Bulgaria, with revisions to 6 February 2007, is available at: <http://www.parliament.bg/en/const>

<sup>598</sup> An unofficial English translation of the Underground Natural Resources Law, with revisions to 1 April 2005, is available at [http://www.geology.bas.bg/admin/LUNR\\_en.pdf](http://www.geology.bas.bg/admin/LUNR_en.pdf)

<sup>599</sup> An unofficial English translation of the Act, as of 26 July 2013, is available at: [http://www.conces.government.bg/save?fileId=3019&type=doc&fileName=Maritime\\_Space.pdf](http://www.conces.government.bg/save?fileId=3019&type=doc&fileName=Maritime_Space.pdf) The translation states that an update of the English text is being prepared



Article 5(3) of the Maritime Space Act provides that “[t]he Republic of Bulgaria shall exercise sovereign rights, jurisdiction and control as defined herewith over the contiguous zone, the continental shelf and the exclusive economic zone”.

The territorial sea extends out 12 nautical miles from the coast and internal sea waters (Maritime Space Act, article 16). “The contiguous zone ... is the belt of sea adjacent to the territorial sea and extending to a distance of 24 nautical miles from the baselines from which the breadth of the territorial sea is measured” (Maritime Space Act, article 37).

The continental shelf consists of “the seabed and subsoil of the submarine area that constitute a natural prolongation of the land territory and extend beyond the territorial sea to the limits established by the continental shelf of the other adjacent and opposite-lying states” (Maritime Space Act, article 40).

The EEZ extends “beyond the limits of the territorial sea to a distance of up to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured” (Maritime Space Act, article 45).

Bulgaria has been involved in disputes concerning the extent of its continental shelf and EEZ.<sup>600</sup> On 4 December 1997, Bulgaria and Turkey reached a boundary agreement and delimitation of maritime areas in the Black Sea.<sup>601</sup> A dispute between Bulgaria and Romania over the extent of their continental shelves in the Black Sea had not been resolved as of October 2014.<sup>602</sup>

The provisions authorising Bulgaria to exercise jurisdiction for oil and gas activities in the continental shelf and EEZ are as follows.

Article 42 of the Maritime Space Act provides that:

- “(1) The Republic of Bulgaria shall exercise over the continental shelf sovereign rights for prospecting, exploration, development, exploitation, protection and management of its natural resources, including the energy, mineral and other non biological resources of the seabed and the subsoil, as well as the living organisms belonging to sedentary species.
- (2) The Republic of Bulgaria shall exercise exclusive rights over the continental shelf in respect of:
  - 1. Execution, authorisation and regulation of drilling works irrespective of their purpose;

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<sup>600</sup> The Maritime Space Act recognises the potential for such disputes. See Maritime Space Act, article 41 (“[t]he outer limits of the continental shelf shall be established by agreement with the neighbouring adjacent and opposite-lying Black Sea littoral states in accordance with international law with a view to achieving an equitable solution”); *ibid* article 46 (“[t]he external limits of the exclusive economic zone shall be established by an agreement with the neighbouring adjacent and opposite-lying states in accordance with international law in order to achieve an equitable solution”).

<sup>601</sup> See Bulgaria, Summary of Claims (DoD 2005. 1-M); available at [http://www.dtic.mil/whs/directives/corres/20051m\\_062305/bulgaria.doc](http://www.dtic.mil/whs/directives/corres/20051m_062305/bulgaria.doc)

<sup>602</sup> See Vladimir Socor, Romanian-Bulgarian Maritime Dispute Can Affect Exxon’s, South Stream, Nabucco Projects, *Eurasia Daily Monitor*, vol. 9(61) (27 March 2012); available at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=39185](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=39185)

2. Construction, authorisation of the construction and regulation of the construction and use of artificial islands, installations and facilities which are under its jurisdiction”.

Article 47 of the Maritime Space Act provides that:

“In the exclusive economic zone the Republic of Bulgaria shall exercise:

1. its sovereign rights of exploring, developing, exploiting, protecting and managing the living, mineral and energy resources of the seabed, its subsoil and the waters superjacent to the seabed, as well as of performing other activities relating to the exploration and exploitation of the zone;
2. its exclusive rights and its jurisdiction with regard to:
  - a) the construction and use of artificial islands, installations and facilities;
  - ...
  - c) protection of the marine environment; ...”.

## 1.4 Specific legislation for offshore oil and gas operations

The grant of rights for exploring, developing, exploiting, protecting and managing the living, mineral and energy resources in the continental shelf and the EEZ are carried out pursuant to procedures established by the Concessions Act and the Underground Resources Act (Maritime Space Act, article 52).

The Concessions Act<sup>603</sup> applies “to the implementation and termination of a mining concession for mineral deposits unless otherwise provided for in the [Underground] Resources Act” (Concessions Act, article 5(3)).

The Underground Resources Act governs conditions and procedures for “prospecting, exploration and extraction of the underground natural resources on the territory of the Republic of Bulgaria, in the continental shelf and in the exclusive economic zone in the Black Sea” (Underground Resources Act, article 1(1)(1)).

There are two types of authorisation for offshore (and onshore) oil and gas (and other mineral) operations; a prospection and exploration permit, and a concession agreement.

The Council of Ministers grants prospection and exploration permits following a proposal from the Minister of Economy, Energy and Tourism (Underground Resources Act, articles 4(1), 44(1)). The maximum length of a prospection and exploration permit is five years, with the potential for two extensions, each for a period of two years.

If commercial quantities of oil or gas are discovered, the Council of Ministers grants a concession agreement for the extraction of oil and gas or other underground natural resources, again following a proposal from the Minister of Economy, Energy and Tourism (Underground Resources Act, article 4(2)).<sup>604</sup> The maximum length of a concession agreement is 30 years, with the potential for a 15-year extension. The concession agreement grants the holder the right to produce oil or gas in return for its

<sup>603</sup> An unofficial English translation of the Concessions Act, effective 11 August 2006, is available from <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwebul.htm>

<sup>604</sup> Three types of concessions may be granted under the Concessions Act; a mining concession (which includes a concession for oil and gas), a public works cession, and a service concession. Concessions Act, article 2(3).

agreement to develop and maintain the facilities to do so in accordance with the agreement (Underground Resources Act, article 33).<sup>605</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Bulgarian legislation on civil liabilities is contained in various Acts and other legislation. The main law is the Law on Obligations and Contracts (SG No. 275/1950), as amended,<sup>606</sup> which is discussed below.

In addition, article 170 of the Environmental Protection Act (SG No. 91/2002), as amended,<sup>607</sup> provides that “any person, who shall culpably inflict environmental pollution or damage on another, will be obliged to indemnify the aggrieved party”. Article 171 provides that aggrieved persons “may bring action against the offender for cessation of the violation and for elimination of the consequences of [the] pollution”. The claimant must, thus, prove that the defendant’s act was unlawful.<sup>608</sup>

It is unclear whether the Environmental Protection Act imposes liability for pure economic loss, albeit fault-based if it does. Further, it appears that the Act does not apply to actions carried out on the continental shelf and EEZ. In respect of State property the Act refers to inland territory. Article 170 refers to the Minister of Environment and Water as the governmental authority with power to bring an action when harm extends over the territory of multiple administrative regimes. Article 170 further refers to the competent Regional Governor as the governmental authority with power to bring an action if the harm extends over multiple municipalities.

Further, article 202 of the Water Act (SG No. 67/1999), as amended,<sup>609</sup> provides that a person who causes water pollution is liable for compensation for harm to other persons if the polluter is at fault. It is unclear whether harm includes pure economic loss.

Article 3 of the Water Act, however, refers to surface water, groundwater, internal marine waters and the territorial sea; it does not refer to the continental shelf and the EEZ. Whilst pollution from offshore oil and gas operations in the EEZ would almost inevitably result in pollution in the territorial sea and, perhaps, also the onshore territory of Bulgaria (see section 1.12 below), the incident causing the pollution would probably take place in the EEZ.

### 1.5.1 Bodily injury and property damage

The Law on Obligations and Contracts imposes liability for bodily injury and property damage.

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<sup>605</sup> See also Kostadin Sirlishtov and Pavlin Stoyanoff, Bulgaria Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/bulgaria>

<sup>606</sup> An unofficial English translation of the Law on Obligations and Contracts, dated 20 May 2005, is available at [http://www.maxconsult.bg/images/useful/useful\\_15\\_en.pdf](http://www.maxconsult.bg/images/useful/useful_15_en.pdf)

<sup>607</sup> An unofficial English translation of the Environmental Protection Act, with amendments to June 2011, is available at [http://www3.moew.government.bg/files/file/PNOOP/Acts\\_in\\_English/Environmental\\_Protection\\_Act.pdf](http://www3.moew.government.bg/files/file/PNOOP/Acts_in_English/Environmental_Protection_Act.pdf)

<sup>608</sup> See Milena Stoyanova, Personal Injuries under the Bulgarian Law and Jurisprudence 11; available at [https://www.lider-lab.sssup.it/docs/sistemi\\_paese/Bulgaria\\_Personal\\_Injuries.pdf](https://www.lider-lab.sssup.it/docs/sistemi_paese/Bulgaria_Personal_Injuries.pdf)

<sup>609</sup> An unofficial English translation of the Water Act, with amendments to 14 October 2011, is available at [http://www3.moew.government.bg/files/file/PNOOP/Acts\\_in\\_English/Water\\_Act.pdf](http://www3.moew.government.bg/files/file/PNOOP/Acts_in_English/Water_Act.pdf)

The Labour Act imposes strict liability on an employer for harm by an accident or disease to an employee.<sup>610</sup>

### 1.5.2 Economic loss

The Law on Obligations and Contracts does not appear to impose liability for pure economic loss but this is not entirely clear. Article 45 provides, in pertinent part, that “[e]very person is obligated to redress the damage he has faultily caused to another person”. Article 51 provides, in pertinent part, that “[c]ompensation shall be due for all damages that are a direct and immediate consequence of the tort”.

A claimant may claim compensation for the lost salary of a third person who ceases work in order to take care of the injured person; compensation equates to the salary of a medical attendant.<sup>611</sup> Although the compensation is for lost salary, liability for such compensation, however, is not pure economic loss because it is compensation to the claimant who has suffered bodily injury, not to the person who has lost the salary.

If the Law on Obligations and Contracts imposes liability for pure economic loss, liability applies only to damage that is “a direct and immediate consequence of the tort”. It may, therefore, be difficult for many claimants for compensation for harm caused by pollution from an offshore oil and gas incident to prove that the loss is direct and immediate.

As indicated in section 1.5.1, even if the Environmental Protection Act and the Water Act impose liability for pure economic loss, they do not appear to apply to incidents that occur on the continental shelf and EEZ.

### 1.5.3 Liability for dangerous activities

Article 50 of the Law on Obligations and Contracts imposes strict liability for damage caused by chattels.<sup>612</sup> The Plenary of the Supreme Court, in Ordinance 7/30.12.1959, ruled that an owner or supervisor may avoid strict liability by proving that the damage was caused by *force majeure*, solely by the fault of the injured person, or the fault of a third person.<sup>613</sup>

It is unclear whether strict liability would apply to claims for compensation for harm from an offshore oil and gas incident. Article 31(1) of the Maritime Space Act provides that:

“Damages, caused by an act of quasi delicti occurring in the internal sea waters and the territorial sea, as well as damages resulting from violation of the rights and jurisdiction of the Republic of Bulgaria in the contiguous zone, on the continental shelf and in the exclusive economic zone, shall be subject to Bulgarian legislation ...”.

The word “delicti” or “delict” is derived from the Latin word “delictum”, meaning “fault”. The term “quasi delicti” is sometimes used to mean an unintentional tort, as opposed to “delict”, an intentional fault. It is unclear, therefore, whether the use of the term “quasi delicti” is intended to be limited to torts caused by fault, or whether it also includes torts to which strict liability applies. This issue would, of course,

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<sup>610</sup> See *ibid* at 10.

<sup>611</sup> See *ibid*.

<sup>612</sup> Article 50 also imposes strict liability for damage caused by animals that have run away or got lost.

<sup>613</sup> See Milena Stoyanova, Personal Injuries under the Bulgarian Law and Jurisprudence 9-10; available at [https://www.lider-lab.sssup.it/docs/sistemi\\_paese/Bulgaria\\_Personal\\_Injuries.pdf](https://www.lider-lab.sssup.it/docs/sistemi_paese/Bulgaria_Personal_Injuries.pdf)

only be relevant if a provision of the Law on Obligations and Contracts that imposes strict liability applies to a claim for compensation from pollution from an offshore oil and gas incident.

#### 1.5.4 Standard of liability (strict / fault-based)

Article 45 of the Law on Obligations and Contracts provides that “[e]very person is obligated to redress the damage he has faultily caused to another person. In all cases of tort fault is presumed until otherwise proved”.

The reversal of the burden of proving that a tortfeasor’s / wrongdoer’s act is negligent (see section 1.5.6 below) would make it easier for claimants to claim compensation for harm from an offshore oil and gas incident. As indicated in section 1.5.2 above, however, the potential lack of liability for pure economic loss would substantially reduce the number of actionable claims.

#### 1.5.5 Scope of liability (joint and several / several)

Article 53 of the Law on Obligations and Contracts provides that “Where the damage is caused by several persons, they shall be liable jointly and severally”.

Article 49 provides that “One who has assigned a job to another shall be liable for the damage caused by the latter in, or in connection with, the performance thereof”. This provision has been construed to be limited mostly to employers assigning jobs to employees.<sup>614</sup> It thus provides for vicarious liability but seems unlikely to apply to independent contractors involved in offshore oil and gas operations.

Article 50 provides that “The owner of a chattel and the person under whose supervision the said chattel is shall be liable jointly and severally for the damage ensuing from the chattel”. This provision may potentially result in a contractor being held liable for harm from offshore oil and gas operations as well as the holder of the concession agreement.

#### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Article 45 of the Law on Obligations and Contracts presumes that a person who causes damage to a third party is liable unless proven otherwise by the tortfeasor / wrongdoer. The burden thus shifts to the tortfeasor to show that it did not breach its duty of care to the claimant and that its acts were not unlawful,<sup>615</sup> substantially aiding claimants who have suffered harm in pursuing their claims.

#### 1.5.7 Exceptions

A person is not liable under the Law on Obligations and Contracts for an inevitable and unavoidable event or *force majeure*.<sup>616</sup>

#### 1.5.8 Defences

There are no relevant defences to claims for compensation from offshore oil and gas activities.

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<sup>614</sup> See Diana Dimitrova, Indemnity Law in Bulgaria (14 May 2007); available at [http://intra.intereuropeag.com/download/konferenz4\\_regional/07\\_vortrag\\_dimitrova\\_athen.pdf](http://intra.intereuropeag.com/download/konferenz4_regional/07_vortrag_dimitrova_athen.pdf)

<sup>615</sup> See Milena Stoyanova, Personal Injuries under the Bulgarian Law and Jurisprudence 3; available at [https://www.lider-lab.sssup.it/docs/sistemi\\_paese/Bulgaria\\_Personal\\_Injuries.pdf](https://www.lider-lab.sssup.it/docs/sistemi_paese/Bulgaria_Personal_Injuries.pdf)

<sup>616</sup> See *ibid* 3.

Article 51 of the Law on Obligations and Contracts provides for a reduction of damages if the claimant is contributorily negligent. It does not seem likely, however, that this provision would apply to claims for compensation for harm from an offshore oil and gas incident.

A person is not liable under the Law on Obligations and Contracts if there is an “extreme necessity” for the event that caused the damage (article 46(2)). In such a case, the person who caused the extreme necessity is liable.<sup>617</sup> Such a defence could potentially apply depending on the circumstances of a case, as well as judicial construction of the term “extreme necessity”.

### 1.5.9 Remedies

Article 51 of the Law on Obligations and Contracts provides that “[c]ompensation shall be due for all damages that are a direct and immediate consequence of the tort”. That is, the remedy for bodily injury and property damage from offshore oil and gas incidents is compensatory damages.

Punitive damages are not available for torts under Bulgarian law.

### 1.5.10 Limitations period(s)

The limitation period for torts is five years (Law on Obligations and Contracts, article 110).

The accrual date for the limitation period for “claims arising from tort ... shall begin to run upon discovering the offender” (Law of Obligations and Contracts, article 114).

### 1.5.11 Right to claim contribution from other responsible persons

Article 54 of the Law on Obligations and Contracts provides that “The person liable for damages faultily caused by another shall have a claim against the latter for what has been paid”. That is, a tortfeasor has a claim for contribution against other tortfeasors if it has paid more than its share for damage caused by the tortfeasors.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Bulgaria for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Bulgaria for claims for harm from transboundary offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for oil and gas licensing in Bulgaria is the Ministry of Economy, Energy and Tourism.

The Council of Ministers awards licences and concessions for offshore (and onshore) oil and gas activities in Bulgaria following a proposal by the Minister of Economy, Energy and Tourism.

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<sup>617</sup> See *ibid* 4.

Further, the Ministry of Transport, Information Technology and Communications, in collaboration with the interested authorities and organisations, is authorised to “take the necessary measures to prevent, reduce and eliminate the risk” in the event of the “failure, breakdown or other maritime incident in the maritime space of the country posing a risk of pollution of the marine environment or the coastline or of harm of related interests” (Maritime Space Act, article 56).

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The need for an environmental impact assessment must be considered before a prospection and exploration licence, and a concession agreement, is granted.

Bulgarian law also provides for protection of marine flora and fauna and underwater cultural heritage.<sup>618</sup>

## 1.10 Offences and sanctions

The Maritime Spatial Act and the Underground Resources Act establish various offences for harm from offshore oil and gas activities.

Article 53(1) of the Maritime Spatial Act prohibits, among other things, the discharge of waste and harmful substances in internal waters and the territorial sea. Article 53(2) prohibits “[a]ny pollution of the marine environment in the exclusive economic zone which may infringe the interests of the country ...”.

The term “pollution of the marine ... environment” is defined as:

“a direct or indirect introduction by man of substances or energies into the marine environment, including estuaries, which causes or is likely to cause harm to living marine or river resources and is hazardous to human health and which hinders legitimate use of the sea, including quality impairment of the sea water and deterioration of the conditions for tourism and leisure activities according to the effective norms and standards for admissible pollution” (Maritime Space Act, Supplementary Provisions, section 11).

The penalty for committing or permitting a breach of articles 53(1) and 53(2) is a fine between BGN 150,000 (EUR 76,694.88) and BGN 500,000 (EUR 255,626.43) unless a more severe penalty applies (Maritime Spatial Act, article 119).

The reference to tourism and leisure activities in the definition of “pollution of the marine ... environment” shows that Bulgaria has specifically recognised the potential for harm to them from marine pollution, albeit in respect of an offence and not compensation for claims for compensation (see section 1.5 above).

Article 119(4) of the Maritime Space Act provides that “[a] pecuniary sanction in the amount of BGN 300,000 (EUR 153,375.86) to BGN 600,000 (EUR 306,765.81) shall be imposed on any legal entity which has materially benefited or would have materially benefited as a result of a violating, or enabling a violation of, the bans under article 53, paragraph 1, where such violations are committed by:

<sup>618</sup> See Kostadin Sirleshtov and Jenia Rusanova, Bulgaria – Mining Law 2014 (International Comparative Legal Guides); available at <http://www.iclg.co.uk/practice-areas/mining-law/mining-law-2014/bulgaria>

1. a natural person empowered to formulate and express the will of such legal entity;
2. a natural person appointed to represent said legal entity, or
3. a person who is a member of a control or supervisory body of said legal entity”.

If such persons “have acted with premeditation, and as a result have caused substantial damage to the marine environment, the pecuniary sanction that may be imposed upon them shall be between BGN 1.5 (EUR 766,938.83) and BGN 3 million (EUR 1,533,877.66)” (Maritime Spatial Act, article 119(5)). These sanctions, however, appear to be focused on intentional discharges rather than accidental discharges and, thus, do not appear likely to apply to pollution from an offshore oil and gas incident because the tortfeasor would not materially benefit from it.

The sanctions under articles 119(4) and 119(5) are “imposed irrespective of the administrative-penal or administrative liability of the perpetrator of such violation”.

The Underground Resources Act also establishes various offences, including prospecting, exploring or extracting underground natural resources without a permit or concession. The sanctions are fines unless more severe penalties are appropriate (Underground Resources Act, article 93(1)).

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

Applicants for prospection and exploration permits, and concession agreements, must show that they have the financial (as well as the technical and managerial) capability to carry out activities under the permits / agreements (Underground Resources Act, article 23(1)). “Economic and financial standing” for a concessions agreement is evidenced by:

- “1. registered fixed capital of the candidate;
2. residual and/or market value of the candidate's assets, which shall be certified by the annual financial report or by the respective market value, prepared by registered assessor; [and]
3. candidate's annual financial reports for the 3 preceding years” (Concessions Act, article 26(3)).

The legislation does not specify any financial security that is required for a prospection and exploration permit. Such a requirement is set out in individual permits.

Two types of financial security are required for a concession agreement. They apply to:

- a candidate for a concession agreement to cover its bid; and
- the successful candidate to cover its obligations under the concession agreement.

In respect of the first type, the Concessions Act states that, as part of the application for a concession, a candidate must submit a guarantee “in the form of a cash deposit or a bank guarantee”, with “[t]he form of the security ... selected by the candidates themselves” to secure their participation in the concession procedure (Concession Act, articles 55(1)-(2)). The Concession Act also sets out details for the competent authority to ensure the validity of a bank guarantee (Concession Act, article 55). The financial security of candidates is released if they are unsuccessful.

The financial security of the candidate who is selected as the concessionaire is retained and may be drawn upon if the holder fails to execute the concession agreement within the deadlines set out in it.



The security is released within seven days from the date on which the concession agreement is completed (Concessions Act, article 55(6)).

In respect of the second type, the holder of the concession must “provide guarantees and or other performance bonds for the due fulfilment of its obligations under the concession agreement” (Concession Act, article 56). Such “guarantees and security [are] determined by the decision to launch a concession procedure” (Concession Act, article 57).

The amount of the financial security also includes interest and penalties from the delay in, or failure to, carry out obligations under the concession agreement, as well as decommissioning costs.

The financial security instruments that could be required have been described as one or more of the following:

- bank guarantee;
- escrow account payment;
- insurance; and
- other financial security instruments permitted by law.<sup>619</sup>

The process has been described as follows:

“Usually, the developer provides a bank guarantee ensuring the payment of the royalties or the exploration fee and the fulfilment of its other financial obligations. The developer is also obliged to maintain the insurance policies that are common for the oil and natural gas exploration/production.

A separate guarantee, of any of the above-mentioned types, should be provided in relation to covering the expenses for environmental protection, including liquidation, conservation and recovery of the exploited terrains”.<sup>620</sup>

#### **1.11.1 Persons required to have evidence of financial security**

The person who is required to have evidence of financial security for a prospection and exploration permit is the holder of the permit.

The person who is required to have evidence of financial security for a concession agreement is the holder of the agreement and, as indicated above, a person who is bidding for one.

#### **1.11.2 Time at which evidence of financial security is required**

Evidence of financial security is required when an application for a prospection and exploration permit or a concession agreement is made in order to ensure that the candidate can fulfil the obligations under the permit or agreement if it is awarded.

The holder of a prospection and exploration permit and a concession agreement must obtain financial security for obligations under the permit or agreement within a specified period of entering into it.

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<sup>619</sup> See Kostadin Sirleshtov and Pavlin Stoyanoff Bulgaria Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/bulgaria>

<sup>620</sup> See *ibid.*

Financial security must be maintained during the pendency of a prospection and exploration permit or concession agreement in order to ensure that the holder fulfils its obligations under it.

### **1.11.3 Scope (traditional damage / environmental damage / etc)**

Financial security for a bidder for a concession agreement is to ensure that it can carry out obligations under a concession agreement if it succeeds in the bid.

Financial security for the holder of a prospection and exploration permit or a concession agreement is to cover the obligations under the permit or agreement. In respect of a concession agreement, it is also to cover interest and penalties from a delay in, or failure to, carry out such obligations, and decommissioning costs. The form, amount, and time of submission of evidence of financial security are specified in the prospection and exploration permit or the concession agreement.

It is unclear whether insurance must be taken out for claims for compensation for bodily injury and property damage from an offshore oil and gas incident. Such a requirement may be in the permit or agreement; it is not specified in the Concessions Act or the Underground Resources Act.

### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The following financial security instruments may be considered to be satisfactory: a bank guarantee (which should be unconditional and irrevocable), an escrow account, a trust account, and insurance. Other types of financial security may be considered. In practice, the holder of a concession obtains a bank guarantee, as well as having insurance for liabilities from its activities (see section 1.11.3 above).<sup>621</sup>

### **1.11.5 Monetary limit(s)**

Neither the Underground Resources Act nor the Concessions Act specifies the monetary limit of financial security that must be provided. The amount is specified in the prospection and exploration permit, or the concession agreement.

### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

Neither the Underground Resources Act nor the Concessions Act specifies the time at which financial security under a prospection and exploration permit or a concession agreement is reviewed. The permit and agreement may contain information concerning the time of review, including adjustments and additional payments, if required, following the review.

## **1.12 Jurisdictional issues (if any)**

Civil liability under Bulgarian law applies to oil and gas pollution incidents in the EEZ and on the continental shelf as well as onshore, in internal sea waters, and the territorial sea.

Article 31(1) of the Maritime Space Act provides that:

“Damages, caused by an act of quasi delicti occurring in the internal sea waters and the territorial sea, as well as damages resulting from violation of the rights and jurisdiction of the Republic of Bulgaria in the contiguous zone, on the continental shelf

<sup>621</sup> See *ibid.*

and in the exclusive economic zone, shall be subject to Bulgarian legislation and the Bulgarian courts shall be competent in matters of litigation”.

Bulgarian health and safety law and criminal law applies in the territorial sea.

Article 38 of the Maritime Space Act provides as follows:

“In the contiguous zone the Republic of Bulgaria shall exercise the necessary control to prevent infringement of its customs, financial, immigration and health requirements within its borders, including in the territorial sea, and shall also exercise its criminal jurisdiction with a view to prosecuting offenders of such regulations”.

The Maritime Space Act does not include equivalent provisions in respect of the continental shelf or the EEZ.

As indicated in section 1.5 above, neither the Environmental Protection Act nor the Water Act appears to apply on the continental shelf and the EEZ.

### 1.13 Key points

Bulgaria has produced natural gas from its continental shelf in the Black Sea since 2001; oil production is onshore only and is insignificant. Exploration for oil and gas, and production of gas, in the Black Sea has increased since 2012, including exploration in water depths between 100 and 2,000 metres. Estimates in 2013 were for a five-fold increase in the production of natural gas by 2023.

Liability for claims for compensation for bodily injury and property damage is imposed by the Law on Obligations and Contracts. The application of tort law to offshore oil and gas operations appears to infer that a claimant must prove negligence in order to succeed in a claim. It is unclear whether this Law also imposes liability for pure financial loss.

The Environmental Protection Act and the Water Act may impose liability for compensation from pollution but they do not appear to apply to pollution that originates on the continental shelf and the EEZ, where most offshore oil and gas operations are carried out.

There are two types of authorisations for offshore oil and gas operations; a prospection and exploration permit, and a concession agreement.

Neither the Concessions Act nor the Underground Resources Act sets out the financial security required for a prospection and exploration permit. Any financial security that is required is specified by the permit itself.

Two types of financial security are required for a concession agreement. They are: financial security for a candidate for a concession to cover its bid, and financial security for the successful candidate to cover its obligations under the agreement itself.

It is unclear whether the holder of a prospection and exploration permit, or a concession agreement, must have financial security for compensation for claims for bodily injury and property damage and, perhaps, pure financial loss. If there is such a requirement, which is not specified in legislation, the financial security instrument to cover it appears to be insurance.

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# Croatia

## 1.1 Introduction

Croatia currently produces offshore gas, and plans to expand exploration and production activities substantially.<sup>622</sup> In accordance with these plans, Croatia established a dedicated hydrocarbons agency in February 2014, enacted a law in July 2013 that specifically focuses on the exploration and production of hydrocarbons, and launched the first international offshore licensing round for exploration on 2 April 2014.

There are currently three exploitation fields in the North Adriatic representing 36 exploitation wells, together with 82 exploration wells.<sup>623</sup> The exploration wells are all operated by INA, a medium-sized oil company,<sup>624</sup> in cooperation with EDISON GAS through a joint operating company EDINA for the Izabela Contract Area and ENI through the INAgip joint operating company for the North Adriatic and Aiza-Laura Contract Areas.<sup>625</sup> Croatia owns approximately 45 per cent of the shares of INA.<sup>626</sup>

The first international offshore licensing round is for the exploration of 29 blocks in the Adriatic Sea, totalling 36,822 square kilometres.<sup>627</sup> Eight of the blocks are in the north and 21 are in central and southern Adriatic. According to the competent authority, the Croatian Hydrocarbons Agency, preliminary data indicates that gas reserves are more likely to be located in the north, and oil deposits are more likely to be located in the south, where the seabed is deeper.<sup>628</sup> The preliminary data was acquired by Spectrum, an Oslo-based service company, based on approximately 15,000 kilometres of long offset seismic data.<sup>629</sup>

As in some other Target States, environmental groups have opposed offshore oil and gas exploration.<sup>630</sup>

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<sup>622</sup> Comment by Barbara Doric, Croatian Hydrocarbons Agency (11 September 2014).

<sup>623</sup> Ibid.

<sup>624</sup> INA is present in Croatia, Egypt and Angola.

<sup>625</sup> See INA's website <http://www.ina.hr/default.aspx?id=5533>

<sup>626</sup> See INA, History; available at <http://www.ina.hr/default.aspx?id=267>

<sup>627</sup> See Deloitte Petroleum Services, First International Offshore Croatian Licensing Round 2014 launched; available at [http://www.psg.deloitte.com/NewsLicensingRounds\\_HR\\_140414.asp](http://www.psg.deloitte.com/NewsLicensingRounds_HR_140414.asp)

<sup>628</sup> See Reuters, Croatia opens tender for Adriatic oil and gas exploration (2 April 2014); available at <http://uk.reuters.com/article/2014/04/02/croatia-exploration-idUKL5N0MT2R520140402>

<sup>629</sup> See Drilling Contractor, 2D seismic survey offshore Croatia to lead into 2014 licensing round, 13 August 2013. Available at <http://www.drillingcontractor.org/2d-seismic-survey-offshore-croatia-to-lead-into-2014-licensing-round-25334>; Croatia's upcoming offshore and onshore licence rounds, presented by George Kovacic (Spectrum), Calgary Global Exploration Forum, October 2013. Available at <http://www.cgef.org/clients/b/b9/b998539fe09babf4dcb5a5ab948469ef/File/Spectrum%20Croatia%20.pdf>

<sup>630</sup> See Paul Bradbury, Clean Adriatic Sea Alliance: Opposition to Oil Drilling in Croatia (22 March 2014); available at <http://www.croatia-split.com/blog/what-s-happening/clean-adriatic-sea-alliance-opposition-to-oil-drilling-in-croatia.html>; Stop Oil & Gas Drilling in the Croatian Adriatic Sea; available at <https://www.indiegogo.com/projects/stop-oil-gas-drilling-in-the-croatian-adriatic-sea>

## 1.2 Form of legislation (Civil Code, statute, other)

The prospecting, exploration and production of offshore oil and gas in Croatia is governed by an Act and secondary legislation (regulations).

The Civil Obligations Act imposes liability for bodily injury, property damage and economic loss. In this respect, the Tender Guidance for the First Offshore Licensing Round for Licences for the Exploration and Production of Hydrocarbons (Tender Guidance) includes a Draft Production Sharing Agreement (Production Sharing Agreement) that allocates responsibility and liability for compensation for bodily injury, property damage and economic loss, and other specific losses, to the Contractor.<sup>631</sup>

## 1.3 Rights to, and ownership of, offshore oil and gas

Pursuant to article 1(1) of the Act on the Exploration and Exploitation of Hydrocarbons (Hydrocarbons Act),<sup>632</sup> Croatia exercises jurisdiction and sovereign rights over:

“[the] exploration and exploitation of the hydrocarbons located in the ground or under the bed of internal waters or the territorial sea of the Republic of Croatia or under the ground of the continental shelf of the Adriatic Sea coast all the way to the demarcation line with neighbouring countries, to which, pursuant to international law, the Republic of Croatia exercises jurisdiction and sovereign rights”.

Article 5(1) provides that:

“[t]he hydrocarbon reserves in the reservoirs located on land, at sea and/or in the ground over which the Republic of Croatia exercises sovereignty, jurisdiction and/or sovereign right, are in exclusive possession of the Republic of Croatia”.

Article 5(3) provides that:

“[t]he Republic of Croatia has the exclusive right to explore and exploit hydrocarbons and this right can be transferred to a third legal entity under the conditions prescribed by this Act”.

Croatia has entered into agreements with Italy, Bosnia and Herzegovina and Montenegro concerning the limits of its maritime boundary. The delimitation of the maritime boundary between Croatia and Slovenia was in arbitration in 2014 (Tender Guidance, s 2.4.2, p. 6).

## 1.4 Specific legislation for offshore oil and gas operations

The main Act that governs the prospecting, exploration and production of hydrocarbons in Croatia is the Hydrocarbons Act.

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<sup>631</sup> The Tender Guidance is available at [http://www.mingo.hr/userdocsimages/rudarstvo/Tender\\_Guidance\\_Documentation.pdf](http://www.mingo.hr/userdocsimages/rudarstvo/Tender_Guidance_Documentation.pdf).

<sup>632</sup> An unofficial English translation of the Hydrocarbons Act, dated 18 July 2013, is available at <http://www.mingo.hr/userdocsimages/rudarstvo/ACT%20ON%20THE%20EXPLORATION%20AND%20EXPLOITATION%20HYDROCARBONS%20-%20PROVISIONAL%20TRANSLATION.pdf> The translation is marked “Provisional Translation”.

The Mining Act<sup>633</sup> and regulations adopted under it apply to the following issues if those issues are not regulated by the Hydrocarbons Act and regulations adopted pursuant to it:

“specification of hydrocarbon reserves, specification of exploitation fields, the registry of exploration areas and/or exploitation fields, preparation and verification of mining projects, construction and utilization of mining facilities and plants, preparation of mining plans and performance of mining surveys, site rehabilitation, *damage compensation*, safety and protection measures, qualifications and skills needed for conducting particular mining works and other issues” (Hydrocarbons Act, article 2(2) (emphasis added)).

Prior to enactment of the Hydrocarbons Act, the Mining Act 2009<sup>634</sup> covered hydrocarbons as well as other forms of mining. Although a main purpose of the Mining Act 2009 was to transpose the Hydrocarbons Licensing Directive (Directive 1994/22/EC) (see section 2.2 of the final report), problems were encountered in its implementation. As a result, the Act was amended in 2011. When those amendments failed to resolve the uncertainties, the Hydrocarbons Act was enacted. The current mining law is the Mining Act 2013.

Article 66(3) of the Hydrocarbons Act is a transitional provision that requires “holders of exploration approval, holders of approval for exploitation field, [and] holders of the authorisation for the mining works” when the Hydrocarbons Act was enacted to harmonise their licences and concession agreements within two years of the date on which the Hydrocarbons Act entered into effect.

A list of regulations related to oil and gas operations is set out in the Tender Guidance for the first international offshore licensing round<sup>635</sup> and also in a brochure for the licensing round.<sup>636</sup>

There are two types of offshore oil and gas licences in Croatia. They are:

- An exploration licence for five years with two optional extensions of six months, if justified; and
- A production concession for up to 30 years.

The agreements entered into by an “investor” and the Croatian Government are:

- An exploration and production sharing agreement (production sharing agreement);
- An exploration and production agreement with fees and taxes payments obligation (royalty payment agreement); and
- A mixed agreement that is a hybrid of a production sharing agreement and a royalty payment agreement.<sup>637</sup>

<sup>633</sup> An unofficial English translation of the Mining Act 2013, dated 2 May 2013, is available at <http://www.mingo.hr/userdocsimages/rudarstvo/MINING%20ACT%20-%20PROVISIONAL%20TRANSLATION.pdf> The translation is marked “Provisional Translation”.

<sup>634</sup> An unofficial English translation of the Mining Act 2009, dated 23 June 2009, is available at <http://www.mvep.hr/zakoni/pdf/650.pdf>

<sup>635</sup> Tender Guidance, Annex I, pp. 14-15.

<sup>636</sup> Croatian Hydrocarbons Agency, 1<sup>st</sup> Offshore Licensing Round 2014; Hydrocarbons Exploration and Production Croatia; available at <http://www.azu.hr/>

<sup>637</sup> See Bernd Rajal and Petra Šantić, Croatia Chapter, Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/croatia>

## 1.5 Liability for bodily injury, property damage and economic loss

Article 32 of the Hydrocarbons Act provides, among other things, that during the execution of mining works, the “investor” has the following obligations:

“Comply with all the requirements relating to nature and environment protection, safety of navigation if the mining works are carried out at sea, protection of the reservoirs, to provide measures for the safety and health of people, all in accordance with the conditions of the issued licence, the provisions of the Agreement, the provisions of this Act and other special regulations;

- In the event of environmental pollution during the execution of the mining works, treat it in an environmentally acceptable manner, ...
- Return the land or other natural area that was damaged during the mining works to its original condition, at its own expense,
- In accordance with the provisions of the agreement allocate to a special account the agreed amount for rehabilitation of the exploration area and/or exploitation field ....”

An “investor” is defined, in pertinent part, as “one or more legal entities that have been issued a licence pursuant to this Act and that have concluded an agreement in compliance with this Act, under the conditions explicitly prescribed by this Act” (Hydrocarbons Act, article 4(8)).

Article 36 of the Hydrocarbons Act further provides that:

- “(1) During the execution of the mining works the Investor shall take all measures to protect nature and the environment, health and safety of people and assets regulated by special regulations, and in accordance with the terms of the issued licence, the provisions of the agreement and this Act.
- (2) In addition to obligations referred to in paragraph 1 of this Article, the Investor is obliged to conduct a rehabilitation of the exploration area and/or exploitation field after the completion of the mining works”.

### 1.5.1 Bodily injury and property damage

The Civil Obligations Act, which came into force on 1 January 2006,<sup>638</sup> establishes liability for property damage and bodily injury. The following discussion of the Civil Obligations Act is based, in part, on the interpretation of provisions of the former Obligations Act of 1978.

This is because, as stated by two Croatian law professors, the changes to the Obligations Act:

“regarding the liability for material damage have not undergone any substantial changes. The changes have only been of a terminological nature; instead of the term ‘material damage’ the [2006 Act] uses the term ‘patrimonial damage’”.<sup>639</sup>

<sup>638</sup> An unofficial English translation of the Obligations Act of 1978, together with unofficial English translations of much other Croatian legislation, is available from <http://www.lexadin.nl/wlg/legis/nofr/eur/lxwecro.htm>. The English translation of the Civil Obligations Act states that it is “a purified text version published in the Official Gazette no. 35/2005”. It is not, therefore, the version in force in October 2014.

<sup>639</sup> See Marko Baretić and Dr. Saša Nikšić, Croatia, 88, in Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in Comparative Law* (Routledge-Cavendish, 2009); see also Marko Baretić and Dr. Saša Nikšić, Croatia, 88, in Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in*



The main tort provisions of the Civil Obligations Act 2006 are articles 1045 and 1046.

Article 1045 provides that:

- “(1) One who causes damage to the other is obliged to compensate for it unless he proves that damage has originated without his fault.
- (2) Simple negligence shall be presumed.
- (3) For damage caused by a thing or activity which generates an enhanced danger; the liability shall be strict.
- (4) Liability shall be strict in other cases provided by law”.

Article 1046 provides that:

“Damage is the decrease of someone’s patrimony (regular damage), hindering of its increase (loss of profit) and infringement of a personal right (non-patrimonial damage)”.<sup>640</sup>

Liability under the Civil Obligations Act is discussed below in this section 1.5.

The Production Sharing Agreement states that the Contractor is “entirely and solely responsible in law towards third parties and shall compensate for any damage or loss which the Contractor, its employees or Sub-contractors and their employees may cause to the person, the property or the rights of other persons, caused by or resulting from Petroleum Operations, including any Environmental Damage”. The Production Sharing Agreement also includes an indemnity and a hold harmless agreement from the Contractor to Croatia for such claims (Production Sharing Agreement, s 33.1.1).

The Contractor is the person who enters into the agreement with the Croatian Government pursuant to the First Offshore Licensing Round (Production Sharing Agreement, p. 4).

Further, the Production Sharing Agreement requires a Contractor:

“[to] take all necessary and adequate steps to: ...

- i. prevent Environmental Damage and, where some adverse impact on the environment is unavoidable, to minimise such impact and the consequential effects thereof on property and people; [and]
- ii. ensure payment of adequate compensation for injury to persons or damage to property caused consequent to Petroleum Operations, and the amount so paid as compensation shall not be deemed to be a recoverable cost under this Agreement” (section 10.1(c)).

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Comparative Law, University of Texas at Austin, Studies in Foreign and Transnational Law (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009); Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 46 (December 2007) (provisions “have not been changed substantially”); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>640</sup> The English translation of articles 1045 and 1046 of the Civil Obligations Act is from Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss, New Horizons in Comparative Law 48 (Routledge-Cavendish 2009), which updates their prior article of this name, especially in regard to the Civil Obligations Act.

Although it is not entirely clear, the Production Sharing Agreement appears to state that the Contractor is liable for compensation for bodily injury and property damage (and economic loss) as between the Contractor and Croatia. That is, the Production Sharing Agreement does not appear to establish contractual liability on the Contractor for such compensation in addition to the liability established by Croatian law; it simply allocates liability under Croatian law between the Contractor and Croatia.

The Production Sharing Agreement also requires a Contractor to control and clean up any pollution (Production Sharing Agreement, sections 10.1(c)(i), (iii)), and, if necessary, to reimburse the State for the reasonable costs and expenses of such measures (Production Sharing Agreement, section 10.1(c)(iii)). This report does not discuss such provisions further because liability for preventing and remedying environmental damage is outside its remit.

### 1.5.2 Economic loss

Article 1046 of the Civil Obligations Act (see section 1.5 above) specifically provides for loss of profit.

Commentators have stated that Croatian tort law “does not treat pure economic loss any differently from any other loss ... even if inflicted by simple negligence of the tortfeasor”.<sup>641</sup> In order to succeed in a claim for loss of profit, a claimant would have to show “that in the due course of events, or according to special circumstances, there was a probability of making the profit and that he/she had the intention to acquire that profit”.<sup>642</sup>

Further, a person claiming lost income from pollution caused by an offshore oil and gas incident would have to show that, in general, the pollution was likely to cause the damage that occurred.<sup>643</sup>

### 1.5.3 Liability for dangerous activities

Article 1063 of the Civil Obligations Act imposes strict liability for damage caused by a dangerous thing or activity. Article 1063 provides that:

“Damage caused in relation with a dangerous thing or dangerous activity shall be considered as resulting from that thing or activity, unless it has been proved that they have not caused the damage”.

The person who is liable for such damage is the owner of the dangerous thing or “the person engaged in the respective activity” (section 1064).

The Civil Obligations Act does not specify that offshore oil and gas operations are a “dangerous thing” or a “dangerous activity”. This issue is unresolved.

### 1.5.4 Standard of liability (strict / fault-based)

As a general rule, liability under the Civil Obligations Act is fault-based. Article 1049 provides that “[f]ault shall exist where a defendant has caused damage intentionally or by acting carelessly”. Thus, as a general rule, a claimant for bodily injury, property damage or economic loss from offshore oil and

<sup>641</sup> Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 46-47 (December 2007).

<sup>642</sup> Marko Baretić and Dr. Saša Nikšić, Croatia, 88, 97 in Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in Comparative Law* (Routledge-Cavendish, 2009).

<sup>643</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, *Electronic Journal of Comparative Law*, vol. 11(3), 46 (December 2007).

gas operations would need to show that the person who caused the damage was negligent, which may be difficult.

### 1.5.5 Scope of liability (joint and several / several)

The scope of liability for damage under the Civil Obligations Act is joint and several. Article 1107 provides as follows:

- “(1) All participants shall be solidarily liable for damage caused by several persons together.
- (2) The abettor and aider, as well as the person who helped that the responsible persons are not identified shall be liable solidarily.
- (3) The persons who have caused the damage acting independently from one another shall be solidarily liable for the damage caused, if their respective shares in the damage caused cannot be determined.
- (4) Where the damage has undoubtedly been caused by one of two or more specific persons that are mutually related in a certain way, and it may not be determined which one of them has caused the damage, these persons shall be solidarily liable”.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

As indicated in section 1.5.1 above, article 1045 of the Civil Obligations Act provides a presumption of liability as follows:

- “(1) One who causes damage to the other is obliged to compensate for it unless he proves that damage has originated without his fault.
- (2) Simple negligence shall be presumed”.

The defences to strict liability for damage from a dangerous thing or dangerous activity also reverse the burden of proof in respect of fault (see section 1.5.3 above). As indicated in section 1.5.3, however, it is an open issue as to whether offshore oil and gas operations are a “dangerous thing” or a “dangerous activity”.

### 1.5.7 Exceptions

The Production Sharing Agreement includes an exemption from performance of the agreement for *force majeure*, that is, “all events which are unforeseeable, irresistible and beyond the control of the Party which invokes it, such as earthquake, typhoon, fire, riot, insurrection, civil disturbances, acts of war or acts attributable to war, invasions, blockades, riots, strikes, but ... not include the unavailability of funds” (article 34.1).

The exemption does not appear to apply to liability for compensation for claims for traditional damage from pollution. First, the exemption applies to the State as well as the Contractor. Second, it applies to pollution that is caused by operations under the agreement. Third, the Production Sharing Agreement does not appear to impose contractual liability on a Contractor.

### 1.5.8 Defences

The Civil Obligations Act provides a defence to strict liability for damage caused by a dangerous thing or activity if the owner “proves that the damage results from another unforeseeable cause not incident

to the thing, which could not be prevented, avoided or eliminated” (Civil Obligations Act, article 1067(1)), “the damage has occurred exclusively due to an action of the injured party or a third party, which the former could not foresee and the consequences of which could not be avoided or eliminated” (article 1067(2)), “the injured party has partly contributed to the occurrence of damage” (article 1067(3)), or “a third party partly contributed to the occurrence of damage ...” (article 1067(4)).

### 1.5.9 Remedies

The remedy for damage under the Civil Obligations Act is compensation, including a right to compensation for pure economic loss and loss of profit (articles 1085, 1089). In deciding the issue, the court shall take into account “the circumstances that have occurred following the occurrence of damage, [in order to] determine the amount required in order to reverse the injured party’s financial position to the state in which it would have been had the wrongful act or failure to act not occurred” (article 1090).

Croatian law does not recognise punitive damages.<sup>644</sup>

### 1.5.10 Limitations period(s)

Article 230 of the Civil Obligations Act specifies a three year limitation period for a claim for compensation for traditional damage from the time the injured party became aware of the damage or the person who caused it. There is a long stop limitations period of five years for a claim.

If, however, damage has been caused by a criminal offence and the offence has a longer prescription period, the limitation period for a claim for compensation is the same as that period (article 231).

### 1.5.11 Right to claim contribution from other responsible persons

Article 1109 of the Civil Obligations Act authorises a tortfeasor (wrongdoer) to claim contribution from other tortfeasors for damage caused by them. Article 1109 provides as follows:

- “(1) A solidary debtor who has made payment in excess of his share in the damage may request from all other debtors to compensate for the amount he has paid instead of them.
- (2) The amount of share of each individual debtor shall be determined by the court in view of degree of the respective fault and seriousness of the consequences arising from their acts or omissions.
- (3) If the shares cannot be determined, each debtor shall account for an equal share, unless it is just to decide otherwise in a specific case”.

## 1.6 Compensation system (claims within Target Country)

Croatia has not established a compensation system for claims for traditional damage from pollution from offshore oil and gas operations.

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<sup>644</sup> See Fox Williams, Agency law in Croatia; available at <http://www.agentlaw.co.uk/site/global/Croatia.html>

## 1.7 Compensation system (claims concerning transboundary incidents)

Croatia has not established a compensation system for claims for traditional damage from pollution from transboundary offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for hydrocarbons licensing is the Croatian Hydrocarbons Agency, which was established in February 2014.<sup>645</sup>

The Agency makes proposals to the Ministry of Economy in rendering a decision on implementation of the public tendering process for issuing licences (Hydrocarbons Act, article 6(2)(b)).

The Ministry of Economy enters into agreements with investors to carry out offshore oil and gas operations (Production Sharing Agreement, p. 4).

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The Production Sharing Agreement states that the licensee must prepare the following as part of the Development and Production Plan:

“a full Environmental Impact Assessment prior to the initiation of any exploitation work, which will comply with the provisions of the Strategic Environmental Assessment (SEA) of the offshore area of the Republic of Croatia and with the relevant opinion of the Environmental Authority, as well as with the relevant provisions of the Directive 85/337/EEC [now Directive 2011/92/EU, as amended by Directive 2014/42/EU]. an environment management plan, including a socio-economic management plan, prepared in accordance with the requirements of the Regulations and of the Applicable Environmental Legislation, including the measures planned for the protection of the environment, the elimination or the reduction of pollution and the protection and compensation of affected populations and industries if applicable, and the verification of the effectiveness of said measures” (section 7.2.1)

Article 20(2) of the Hydrocarbons Act provides that

“[t]he Government of the Republic of Croatia shall revoke the licence in the following cases ...3. if the licence holder conducts mining works contrary to the measures for occupational safety, people`s and property safety and contrary to the measures and liabilities with respect to nature and environmental protection, or if they in any way violate any positive regulation of the Republic of Croatia, which has been disclosed by the State Inspector`s Office, 4. illiquidity and/or bankruptcy of the investor as the licence holder”.

Further, article 24(6) of the Hydrocarbons Act provides:

“In the event of termination of the agreement, the investor will independently and at its own expense, return the area of mining works to its original state, all in accordance with the special regulations on environmental and nature protection, safety of people

<sup>645</sup> The website of the Croatian Hydrocarbons Agency is <http://www.azu.hr/>

and property, protection of human health and other applicable special regulations and international standards on the exploration and exploitation of hydrocarbons”.

### 1.10 Offences and sanctions

The Hydrocarbons Act includes various provisions regarding (i) administrative supervision and inspection, and (ii) offences and sanctions.

Article 57 of the Act provides:

- “(1) In implementing inspection, a Mine Inspector of the State Inspectorate shall:
1. ban the mining works if irregularities and disadvantages can cause immediate danger to life and health of workers and other citizens or significant property damage;
  2. ban the mining works on hydrocarbon exploration if these works are conducted without licence, contrary to the licence and the approved work programme;
  3. ban the mining works on hydrocarbon exploitation, if it is conducted without agreement or contrary to the agreement and verified mining documents;
  4. suspend the construction of mining facilities and plants if they are constructed without building permit or not constructed according to it.
- (2) Complaint against the decision of State Inspectorate referred to in paragraph 1 of this Article shall not delay execution.”

In addition, the investor and the “liable person of the investor” may be fined if there is a breach of the licence and/or agreement.

Article 59 of the Hydrocarbons Act provides that:

- “(1) The Investor will be fined in the amount of 100,000.00 to 500,000.00 HRK [EUR 13,048.00 to 65,240.00] for the violation:
- ...
2. if conducting the mining works on hydrocarbon exploration without licence, i. e. contrary to the licence and approved work plan,
  3. if performing hydrocarbon exploitation without agreement, i.e. contrary to the agreement and verified mining documents,

...

  5. if not implementing necessary safety measures and/or implement rehabilitation of the exploration area and/or exploitation field, after the mining works are finished or permanently suspended....
- (2) For violations referred to in paragraph 1 of this Article the liable person of the Investor will be fined in the amount of 10,000.00 to 50,000.00 HRK [EUR 1,340.80 to 6,524.00]”.

Article 60 further provides:

- “(1) The Investor will be fined in the amount of 50,000.00 to 250,000.00 HRK [EUR 6,524.00 to 32,620.00] for the following violations:
- ...

3. if the contractual sum of money is not detached to a special account, for the rehabilitation of the exploration area and/or exploitation field,
- ...
- (2) For violations referred to in paragraph 1 of this Article the liable person of the Investor will be fined in the amount of 5,000.00 to 25,000.00 HRK [EUR 652.40 to 3,262.00].”

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Production Sharing Agreement sets out specific provisions on financial security.

Two types of financial security are required for offshore oil and gas operations: an irrevocable and unconditional bank guarantee / performance bond for carrying out the works programme under the agreement, and insurance for, among other things, bodily injury, property damage and other losses, as discussed below.

#### ➤ Bank guarantee for the bid bond

In addition, applicants in the first international offshore licensing round must “provide a guarantee of serious intent/bid bond in Croatian Kuna of an amount equivalent to ... EUR 500,000.00”.

Annex 7 to the Tender Guidance sets out a template for the form of the bank guarantee, which must be unconditional and valid until at least the last day of the validity period for the application.<sup>646</sup> The guarantee is then returned to unsuccessful applicants. It is returned to the successful applicant when that applicant delivers the performance guarantee under its agreement with the Minister (Tender Guidance, s 3.5, pp. 11-12).

#### ➤ Bank guarantee / performance bond for the works programme

Article 15 of the Production Sharing Agreement provides as follows in respect of financial security for the works programme:

- “15.1 As a condition precedent to the effectiveness of this Agreement, upon the Effective Date, the Contractor shall provide an irrevocable, unconditional, on demand bank guarantee in favour of the Government, for the amount specified in this Article. The bank guarantee shall be issued by a bank licensed to operate in any of the following countries: the Republic of Croatia, any member state of the European Union, any country of the EEA, any country that had signed the Government Procurement Agreement (GPA) and any country that had signed and ratified Association Agreements or Bilateral Agreements with the European Union or the Republic of Croatia and has the right to do so, according to the legislation of those countries.
- 15.2 The amount of the bank guarantee shall be an amount equal to One Hundred percent (100%) of the total minimum expenditure obligation in respect of the Phase I of the Exploration Period to be undertaken by the Contractor in the Agreement Area.

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<sup>646</sup> Comment by Barbara Doric, Croatian Hydrocarbons Agency (11 September 2014).

- 15.3 Before the commencement of the Phase II of the Exploration Period the Contractor shall deliver to the Government a similar bank guarantee for an amount equal to One Hundred percent (100 %) of the total minimum expenditure obligation in respect of the Phase II of the Exploration Period to be undertaken by the Contractor in the Agreement Area.
- 15.4 The bank guarantee referred to above shall provide that after the completion and due performance of the Minimum Work and Expenditure Obligations of a particular Exploration Phase, the guarantee will be released in favour of the Company on presentation to the bank of a Certificate from the Ministry, that the obligation of the Contractor has been fulfilled and the relevant guarantee may be released. Such Certificate shall be provided within thirty (30) days from the completion of the Minimum Work Programme and fulfilment of obligations under this Agreement to the satisfaction of the Government.
- 15.5 The bank guarantee, shall further provide that at the end of each Quarter and upon the completion and due performance of relevant activity in the Minimum Work Programme of a particular Exploration Phase, the applicable value of the Guarantee will be reduced in favour of the Company on presentation to the bank of a Certificate from the Government to the effect that the relevant Guarantee may be reduced.
- 15.6 If, upon expiry of the Phase I of the Exploration Period or any further Phase or extension thereof, or in the event of whole relinquishment or termination of the Agreement, the exploration work has not reached the applicable Exploration Work Obligations, the Ministry shall have the right to call for the guarantee as compensation for the non-performance of the Exploration Work Obligations entered into by the Contractor.
- 15.7 After the payment has been made, the Contractor shall be deemed to have fulfilled its Exploration Work Obligations for the relevant Exploration Phase under this Agreement.
- 15.8 If any of the documents referred to above are not delivered by the Contractor within the period specified herein, this Agreement may be terminated by the Government upon tendering ninety (90) days written notice of its intention to do so.
- 15.9 Notwithstanding any change in the composition or shareholding of the parent company furnishing a Performance Guarantee as provided herein and the provisions set out below, it shall not, under any circumstances, be absolved of its obligations contained in the guarantees so provided.
- 15.10 The Government shall release the guarantee given by the Assignor to the extent of the amount of the guarantee provided by the Assignee, and where relevant the guarantee under Article 15.2 of this Article, if:
- a) a Party (Assignor) assigns all or a part of its Participating Interest to another (Assignee) in accordance with Article 31;
  - b) the Assignee provides an irrevocable, unconditional bank guarantee from a reputed bank of good standing, acceptable to the Government, in favour of the Government, for an amount equal to the assignee's



- Participating Interest share of the estimated expenditure of the Minimum Work Programme at the Effective Date of the assignment;
- c) the Assignee provides a Performance Guarantee; and
  - d) the addendum to the Agreement giving effect to the assignment of Participating Interest is executed by all Parties”.

Annex C to the Production Sharing Agreement sets out the format for the performance guarantee.

➤ **Insurance for bodily injury, property damage and other losses**

Pursuant to article 43(1) of the Hydrocarbons Act,

“The Investor, during the validity of the issued licence and the signed contract, shall have and maintain in force the appropriate insurance policy which covers the investor’s and third parties’ property, health and security of the investor’s employees and third parties, ecological damage and any other possible risks in the process of carrying out the mining work, in which the Investor shall respect the effective special provisions in the insurance area”.

Article 33.1.3 of the Production Sharing Agreement states that:

“The Contractor shall effect and, during the term of this Agreement, maintain and obtain insurance coverage for and in relation to Petroleum Operations for such amounts and against such risks as are customarily or prudently insured in the international Petroleum industry, and shall furnish to the Agency, certificates evidencing that such coverage is in effect. Such insurance policies shall include the Government as additional insured and shall waive subrogation against the Government. The said insurance shall, without prejudice to the generality of the foregoing, cover:

- a) loss or damage to all installations, equipment and other assets for so long as they are used in or in connection with Petroleum Operations; provided, however, that if for any reason the Contractor fails to insure any such installation, equipment or assets, it shall replace any loss thereof or repair any damage caused thereto;
- b) loss, damage or injury caused by pollution in the course of or as a result of Petroleum Operations;
- c) loss of property or damage or bodily injury suffered by any third party in the course of or as a result of Petroleum Operations for which the Contractor may be liable;
- d) any claim for which the Government may be liable relating to the loss of property or damage or bodily injury suffered by any third party in the course of or as a result of Petroleum Operations for which the Contractor is liable to indemnify the Government;
- e) with respect to Petroleum Operations offshore, the cost of removing wrecks and cleaning up operations following any accident in the course of or as a result of Petroleum Operations;
- f) the Contractor’s and/or the Operator’s liability to its employees engaged in Petroleum Operations as required by applicable laws; and

- g) other insurance policies in compliance with the Law and other applicable laws of the Republic of Croatia.

The Contractor shall require its Sub-contractors to obtain and maintain insurance against the risks referred to in this Article relating mutatis mutandis to such Sub-contractors”.

Section 33.1.4 states that:

“The Contractor has the freedom to select its insurance provider. The Contractor shall provide the Agency with the certificates proving the subscription and maintenance of the above-mentioned insurances. The Agency shall approve the said insurance policies for exclusions and verify the financial capacity of Insurers. All insurance policies taken out pursuant to this Article shall be made available to Agency for review and approval prior to operations commencing. The Agency shall have the right to require amendments to the said insurance policies in order to secure the compliance with the requirements pursuant to this Article”.

Section 33.1.5 states that:

“[the] Contractor is liable for any loss or damage resulting from the Gross Negligence or Willful Misconduct of Contractor, of Contractor's Sub-contractors or their employees, acting in the scope of their employment in the performance of Petroleum Operations, or any other persons for whom Contractor is responsible with regard to Petroleum Operations”.

Section 33.1.6 states, in pertinent part, that:

“Where the Contractor consists of several entities, the obligations and responsibilities of those entities under this Agreement shall be joint and several”.

#### **1.11.1 Persons required to have evidence of financial security**

The investor is required to have evidence of financial security.

The rights and liabilities referred to in the licence and the agreement between the investor and Croatia may be transferred. Such transfer requires the prior written consent of the Ministry responsible for mining, except if the rights and liabilities regulated in the licence and the agreement are made to an associated company (Hydrocarbons Act, article 9(2)). However, in such a case, the investor (original licence holder) remains jointly and severally liable with the associated company (article 9(3)). Transfer to a non-associated company, which requires prior consent, is subject to the new company meeting all the requirements for the licence (Hydrocarbons Act, article 9(4)), which entails meeting requirements pertaining to financial security.

#### **1.11.2 Time at which evidence of financial security is required**

The Hydrocarbons Act establishes a single licence which gives the investor: (i) the right to explore, (ii) the right to the concession if a commercial discovery is made, and (iii) the right to conclude an agreement. Hence, insurance must be maintained by the operator from the exploration phase (which includes drilling works) throughout the exploitation phase.

Pursuant to the Hydrocarbons Act, the obligations for the investor to have financial security are two-fold, and must be spelled out in the agreement concluded between the investor and Croatia (article 22(5)):

- “The obligations of insurance of the works, equipment and people pursuant to the provisions of this Act, special regulations of the Republic of Croatia and international standards in exploration and exploitation of hydrocarbons;
- The obligation of allocation of an amount of money to a special account or an obligation of submitting a bank guarantee for the rehabilitation of exploration and/or exploitation field; and
- The force majeure provisions and procedures thereunder”.

### 1.11.3 Scope (traditional damage / environmental damage / etc)

As indicated above, the bank guarantee / performance bond is financial security for the works programme. Insurance is the financial security for compensation for traditional damage and other losses.

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

Article 43 of the Hydrocarbons Act specifically refers to the licensee’s insurance obligations, which are applicable during the time the licence and the signed contract remain valid. Article 43 provides that:

- “(1) The Investor, during the validity of the issued licence and the signed contract, shall have and maintain in force the appropriate insurance policy which covers the investor’s and third parties’ property, health and security of the investor’s employees and third parties, ecological damage and any other possible risks in the process of carrying out the mining work, in which the Investor shall respect the effective special provisions in the insurance area.
- (2) Pursuant to paragraph 1 of this Article the Investor shall undertake to conclude insurance policies that:
- insure wells, plants, equipment, buildings and other movable and immovable property of the Investor
  - insure the potential damage occurred in nature and environment, especially related to the pollution of air, water, ground and underground areas, within and outside the exploration area and/or exploitation field,
  - insure the potential damage under the land surface (eruption, loss of geological layer, loss of tank, land surface pollution caused by eruption, pollution of underwater and so on),
  - generally insure the Investor’s responsibility, for the Investor’s employees and for any other personnel engaged by the Investor to carry out the mining work for the third parties,
  - generally insure the responsibility for the Investor’s employees and any other person engaged by the Investor to carry out the mining work for the third parties.
- (3) The Investor shall make and/or reinstate the issued insurance policies during the whole validity of the issued licence and the signed contract.
- (4) The Investor shall, apart from the insurance policies referred to in paragraph 2 of this Article, make insurance policies in compliance with the specific

regulations if these policies are not included in the content of the above regulation.”

In addition, the licensed operator has an obligation to allocate an amount of money to a special account or to submit a bank guarantee for the rehabilitation of the explored and/or exploited hydrocarbons field (Hydrocarbons Act, article 22(5)).

#### **1.11.5 Monetary limit(s)**

The Production Sharing Agreement requires a performance bank guarantee which needs to be in the same amount as the exploration investment programme of the selected bidder which is part of the bid. Also, the Tender Guidance defines the bank guarantee for the bid to be in the amount of EUR 500,000.00.<sup>647</sup>

Section 1.11.1 above, sets out the amounts of the bank guarantee / performance bond for the works programme.

The amount of insurance for bodily injury, property damage and other losses is not specified.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

Insurance policies must be taken out and/or reinstated during the entire validity of the licence and the signed contract (Hydrocarbons Act, Article 43(3)).

Article 6(4) of the Hydrocarbons Act provides that:

“[the Hydrocarbons] Agency shall be entitled to, at any time as long the licence and agreement are effective and valid, [to] request any data and/or information from the investor with respect to the fulfilment of their commitments in accordance with the conditions stated in the issued licence and provisions of the concluded agreement, provisions of this Act and other special regulations, and the investor shall submit these data to the Ministry”.

This provision includes the provision of information on financial security.

The concession grantor must regularly check the validity of the security instruments (Concessions Act, Article 31(5)), although there is no indication as to the frequency meant by the use of the term “regularly”. If a financial security instrument has become invalid, the concession grantor must “without delay” require the concessionaire to deliver an appropriate new instrument. If the concessionaire fails to do so, the concession contract may be unilaterally terminated (Concessions Act, Article 47). The concession contract may also be terminated “if the concessionaire fails to take the measures and actions necessary for the protection of a common or public good and the protection of nature and cultural goods.”

## **1.12 Jurisdictional issues (if any)**

The Hydrocarbons Act specifically applies to the territorial sea, EEZ and the continental shelf.

It is not clear whether the Civil Obligations Act applies to the EEZ and the continental shelf.

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<sup>647</sup> Comments by Barbara Doric, Croatian Hydrocarbons Agency (11 September 2014).

### 1.13 Key points

Croatia has strongly promoted offshore oil and gas operations in recent years. It established the Croatian Hydrocarbons Agency in February 2014, enacted the Hydrocarbons Act in July 2013, and launched the first international offshore licensing round for exploration on 2 April 2014.

The Civil Obligations Act imposes compensation for bodily injury, property damage and pure economic loss. Stringent criteria apply, however, to claims for pure economic loss.

Unless offshore oil and gas operations fall within the category of a “dangerous thing” or a “dangerous activity”, liability is fault based. The Production Sharing Agreement for the first international offshore licensing round provides an indemnity and a hold harmless agreement from the Contractor to Croatia for compensation for bodily injury, property damage, pure economic loss and other losses during hydrocarbon operations. The Agreement does not appear to impose liability for compensation for traditional damage but this is not entirely clear.

Croatia has not established a compensation system for claims for bodily injury, property damage or economic loss from pollution from offshore oil and gas operations.

Three types of financial security apply to offshore oil and gas operations: a bank guarantee to accompany a bid under the first international offshore licensing round; an irrevocable and unconditional bank guarantee / performance bond for carrying out the works programme under the agreement; and insurance for, among other things, bodily injury, property damage and other losses.

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# Cyprus

## 1.1 Introduction

In August 2007, Cyprus completed a first licensing round for exploration rights in which it awarded a licence for the 13 exploration blocks designated by it in its EEZ. In February 2012, it launched a second licensing round in which it awarded licences for the exploration of oil and gas in a further five blocks.

Further exploration for gas is scheduled to begin in late 2014.<sup>648</sup> This further exploration was aided on 12 December 2013, when Cyprus and Egypt signed a unitisation agreement on the joint exploitation of hydrocarbon reserves on the median line between their EEZs. Egypt ratified the agreement in September 2014. The agreement is pursuant to the Framework Agreement Concerning the Development of Cross-Median Line Hydrocarbon Reserves, which was signed by Cyprus and Egypt in May 2006 (see section 1.3 below).<sup>649</sup>

As of October 2014, Cyprus was still in the exploration phase, with no production having begun.

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas activities in Cyprus are subject to primary legislation in the form of statutes, and secondary legislation in the form of regulations.

The Civil Wrongs Law imposes liability for bodily injury and property damage; it does not impose liability for pure economic loss.

In addition, the Model Exploration and Production Sharing Contract, dated February 2012, which was issued for the second licensing round (2012 Model Contract),<sup>650</sup> imposes contractual liability for bodily injury, property damage, environmental damage and, perhaps, pure economic loss, on the person who signs the contract.

## 1.3 Rights to, and ownership of, offshore oil and gas

Article 4(1) of Law No. 64(I)/2004 to provide for the Proclamation of the Exclusive Economic Zone by the Republic of Cyprus provides that Cyprus has sovereign rights within its EEZ “for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other

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<sup>648</sup> See John Defterios, Cypriot president: Underwater gas fields can help unite island (24 April 2014); available at <http://edition.cnn.com/2014/04/23/business/cyprus-president-energy-gas-oil/>; Reuters, Update 2-Cyprus opens second hydrocarbons licensing round (13 February 2012); available at <http://uk.reuters.com/article/2012/02/13/cyprus-hydrocarbons-idUSL5E8DD2W420120213>

<sup>649</sup> See Stefanos Evripidou, Cyprus and Egypt sign unitisation deal on the joint exploitation, Cyprus Mail (13 December 2013); available at <http://cyprus-mail.com/2013/12/13/cyprus-and-egypt-sign-unitisation-deal-on-the-joint-exploitation/>

<sup>650</sup> The 2012 Production Sharing Contract is available at [http://www.mcit.gov.cy/mcit/mcit.nsf/all/2300DDB36D859732C22579AA002BDE09/\\$file/Model%20PSC.pdf?open&element](http://www.mcit.gov.cy/mcit/mcit.nsf/all/2300DDB36D859732C22579AA002BDE09/$file/Model%20PSC.pdf?open&element)

activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds”.<sup>651</sup>

Article 3(1) of the Hydrocarbon (Prospection, Exploration and Exploitation) Law of 2007 (No. 4(I)/2007) (Hydrocarbons Law) provides that the ownership of hydrocarbons, including those in Cyprus’ territorial waters, continental shelf and EEZ, are vested in the State.<sup>652</sup> Article 4(1) of the Hydrocarbons Law provides that the Council of Ministers has the right to determine areas to be made available for prospecting, exploring for, and exploiting, hydrocarbons within areas in which Cyprus has sovereign rights and jurisdiction.

Cyprus has signed agreements on the delimitation of the EEZ with Egypt, Lebanon, and Israel. The agreements with Egypt and Israel have been ratified and are in force. Agreements on the joint development and exploitation of cross-median hydrocarbon reservoirs are being negotiated. An agreement with Syria had not been signed as of October 2014. Turkey has disputed some of Cyprus’ rights to offshore hydrocarbon deposits.

## 1.4 Specific legislation for offshore oil and gas operations

Offshore oil and gas operations in Cyprus are governed by the Hydrocarbons Law and the Hydrocarbons (Prospection, Exploration and Exploitation) Regulations of 2007 and 2009 (No. 51/2007 and No. 113/2009) (Hydrocarbons Regulations).<sup>653</sup>

There are three types of licences for offshore oil and gas operations. They are:

- A prospecting licence, which is granted for up to one year;
- An exploration licence, which is granted for up to three years, with two optional extensions up to two years each; and
- An exploitation licence, which is granted for up to 25 years, with one optional extension up to 10 years.

## 1.5 Liability for bodily injury, property damage and economic loss

Claims for bodily injury and property damage may be brought under the common law, as set out in the Law of Civil Wrongs, as amended (Cap. 148) (Civil Wrongs Law). Cypriot law does not impose liability for pure economic loss.

### 1.5.1 Bodily injury and property damage

Article 51 of the Civil Wrongs Law establishes civil liability for negligence. It provides that a person who causes harm to another person to whom that person owes a duty is liable for compensating that person for the harm. Article 51 specifies situations for which “a duty not to be negligent shall exist”. The situations do not specifically mention harm from offshore oil and gas operations.

<sup>651</sup> An unofficial English translation of Law No. 64(1)/2004, dated January 2010, is available from <http://www.olc.gov.cy/olc/olc.nsf/All/A0231939301952D1422576C1003014FF?OpenDocument>

<sup>652</sup> An unofficial English translation of the Hydrocarbons Law, dated May 2010, is available from [http://www.mcit.gov.cy/mcit/mcit.nsf/dmllegislationTitle\\_en?OpenForm&ExpandView](http://www.mcit.gov.cy/mcit/mcit.nsf/dmllegislationTitle_en?OpenForm&ExpandView)

<sup>653</sup> An unofficial English translation and consolidation of the Hydrocarbons Regulations, dated May 2010, is available from [http://www.mcit.gov.cy/mcit/mcit.nsf/dmllegislationTitle\\_en?OpenForm&ExpandView](http://www.mcit.gov.cy/mcit/mcit.nsf/dmllegislationTitle_en?OpenForm&ExpandView)



Article 51 further provides that “the occupier of any immovable property shall owe such a duty to all persons who are, and to whom the owner of any property which is lawfully in or upon or so near to such immovable property as in the usual course of things to be affected by the negligence”. It would seem, however, that offshore oil and gas operations on the EEZ are too distant for this provision to apply.

Article 45 of the Civil Wrongs Law establishes liability for a public nuisance, which is described as “some unlawful act, or omission to discharge a legal duty where such act or omission endangers the life, safety, health, property or comfort of the public or obstructs the public in the exercise of some common right”. In order to bring an action for public nuisance, a person must have “suffered special damage”, that is, damage that has not been suffered by society in general. This provision could potentially apply to harm from offshore oil and gas operations.

Article 46 of the Civil Wrongs Law provides an action in private nuisance. Again, this provision could potentially apply. The absence of compensation for pure economic loss, however, means that claims by businesses in the fisheries and tourism sectors would not succeed.

Article 43 of the Civil Wrongs Law provides an action in trespass to immovable property. As a practical matter, however, such an action is unlikely to apply to harm from offshore oil and gas activities because a direct entry onto the claimant’s land, which is unlikely to result from an oil spill, is required.

Article 32 of the 2012 Model Contract provides for contractual liability as follows:

“The Contractor shall indemnify and compensate any person, including the Republic, for any damage or loss which the Contractor, its employees or subcontractors and their employees may cause to the person, the property or the rights of other persons, caused by or resulting from Hydrocarbons Operations, including any environmental damage.

The Contractor shall indemnify, defend and hold harmless the Republic against all claims, losses or damage whatsoever caused by or resulting from Hydrocarbons Operations. ...

Where the Contractor consists of several entities, the obligations and responsibilities of those entities under this Contract shall be joint and several”.

The term “Hydrocarbon Operations” is defined as “Exploration Operations, Development and Production Operations and all other related activities carried out under this Contract, including the lifting of Hydrocarbons from the Contract Area but excluding any storage, transportation or processing beyond the Delivery Point” (section 1.1).

The “Contractor” is the person who signs the Production Sharing Contract / Model Contract.

The 2012 Model Contract thus requires the Contractor and other licensees, not only to indemnify the State for “damage or loss ... to the person, the property or the rights of other persons ... including any environmental damage”, but also to compensate third parties who suffer such damage. The scope of damage is unclear as to whether it extends beyond property damage and bodily injury to include pure economic loss. Further, the 2012 Model Contract does not specify how claims for compensation shall be made against the Contractor and the licensees or who shall decide whether the claims fall within the scope of damage covered by the Contract.

### 1.5.2 Economic loss

The law of Cyprus does not provide for pure economic loss that results from a negligent act. “Actual physical harm would have to be proved in order for a claim to exist, pure financial loss would not suffice”.<sup>654</sup>

As indicated in section 1.5.1 above, it is unclear whether the 2012 Model Contract requires licensees and other persons indicated in it to compensate third persons for pure economic loss.

### 1.5.3 Liability for dangerous activities

Article 52 of the Civil Wrongs Law provides for liability for damage “caused by any dangerous thing other than fire or an animal, or by the escape of anything which if it escapes is liable to cause damage”. Article 52 establishes a presumption that, in such a case, “the onus shall be upon the defendant to show that there was no negligence for which he is liable in connection with such dangerous thing or the escape of such thing”. That is, in order to rebut the presumption, the defendant must show that it was not negligent. Although the burden on a person who brings a claim for dangerous activities is alleviated by the shift of the burden to the defendant, the requirement for negligence limits this provision. A plaintiff would also have to prove that offshore oil and gas operations were “dangerous”.

### 1.5.4 Standard of liability (strict / fault-based)

The Civil Wrongs Act provides for liability in negligence (see section 1.5.1 above). Liability in nuisance is subject to reasonableness.

Liability under the 2012 Model Contract appears to be strict liability.

### 1.5.5 Scope of liability (joint and several / several)

Section 11 of the Civil Wrongs Law provides for joint and several liability.

As a matter of court practice, rather than statute or legislation, when there is more than one tortfeasor / wrongdoer, a court first seeks to apportion liability on the basis of each party’s fault. If allocation is not possible, the court allocates liability evenly between the wrongdoers.

Liability under the 2012 Model Contract is joint and several as between licensees.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

As indicated in section 1.5.3 above, article 52 of the Civil Wrongs Law establishes a rebuttable presumption of negligence for dangerous activities.

In a further shift of the burden of proof, article 55 of the Civil Wrongs Law provides that:

“In any action brought in respect of any damage in which it is proved –

- (a) that the plaintiff had no knowledge or means of knowledge of the actual circumstances which caused the occurrence which led to the damage, and

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<sup>654</sup> See Louise Zambartas, Cyprus, in Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I, Country Reports, p. 53, 74 (April 2007).

- (b) that the damage was caused by some property of which the defendant had full control,

And it appears to the Court that the happening of the occurrence causing the damage is more consistent with the defendant having failed to exercise reasonable care, the onus shall be upon the defendant to show that there was no negligence for which he is liable in connection with the occurrence which led to the damage”.

It would seem difficult, however, for article 55 to apply to harm from offshore oil and gas operations because a plaintiff would inevitably know the circumstances that caused the damage.

### 1.5.7 Exceptions

There are no relevant exceptions to the Civil Wrongs Law or liability under the 2012 Model Contract.

### 1.5.8 Defences

Article 56 of the Civil Wrongs Law provides defences to an action in negligence if a third person was negligent and that person’s negligence “was the decisive cause of the damage”, or the damage “was due to the happening of some extraordinary natural occurrence which a reasonable person would not have anticipated and the consequences of which could not have been avoided by the exercise of reasonable care”.

The latter defence would not, however, be applicable to harm from offshore oil and gas operations in the absence of an “extraordinary natural occurrence”.

### 1.5.9 Remedies

The remedy for a civil wrong is compensatory damages.

Exemplary damages are available under the law of Cyprus if the defendant’s conduct is particularly arrogant and rude.<sup>655</sup>

The remedy under the 2012 Model Contract is compensation.

### 1.5.10 Limitations period(s)

Article 6 of the Limitations Law No. 66(I)/2012 provides for a six year limitation period for civil wrongs. Section 6(2) provides for a three year limitation period for claims for nuisance, negligence or breach of a statutory duty. Article 3 provides that the limitation period begins to run when all events that give rise to an actionable right concerning a claim have been completed, with an exception for bodily injury claims, in which case limitation runs from the date on which the claimant becomes aware of the injury.

Article 6(3) specifies an exception from the above limits in the discretion of the court if a civil wrong results in bodily injury or death. In such a case, a court can dis-apply the time limit provided that the claim is brought within two years after expiration of the limitation period. In deciding whether to exercise its discretion, a court must consider various specified factors including the length of the delay in commencing an action and the reasons for the delay.

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<sup>655</sup> See Louise Zambartas, Cyprus, in *Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops*, Annex I, Country Reports, p. 53, 69 (April 2007) (referring to *Papakokkinou v Kanther* (1982) 1 CLR 65).

Article 4 establishes a long stop of 10 years for proceedings to be issued unless the law specifically provides otherwise.

#### **1.5.11 Right to claim contribution from other responsible persons**

Article 64 of the Civil Wrongs Law provides that a joint wrongdoer has a right to recover contribution from any other wrongdoer who is liable for the same damage, whether or not that other person was sued. A court determines the amount of contribution as is “just and equitable having regard to the extension of such person’s responsibility for the damage”, including the discretion to exempt any person from liability.

Article 11 of the Civil Wrongs Law provides that a judgment against a civil wrongdoer is not a bar to an action against another wrongdoer.

### **1.6 Compensation system (claims within Target Country)**

There is no compensation system in Cyprus for claims for harm from offshore oil and gas operations.

It is unclear how the indemnity from the Contractor to Cyprus to “indemnify and compensate any person ... for any damage or loss which the Contractor ... may cause to the person, the property or the rights of other persons” in the Production Sharing Contract would work in practice. The Production Sharing Contract is between Cyprus and the Contractor. Persons who claim compensation for damage or loss under it, therefore, do not have a contractual right of action against the Contractor. They would need to request Cyprus to enforce the contract against the Contractor on their behalf. Implementation of such a system could delay payments or, at the least, lead to a complex claims handling regime.

### **1.7 Compensation system (claims concerning transboundary incidents)**

There is no compensation system in Cyprus for claims for harm from offshore oil and gas operations in respect of transboundary incidents.

### **1.8 Competent authority**

The competent authority for granting exploration and exploitation licences in Cyprus is the Council of Ministers.

The competent authority for implementing the Hydrocarbons Law and the Hydrocarbons Regulations is the Ministry of Energy, Commerce, Industry and Tourism.

### **1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)**

Article 11(1) of the Hydrocarbons Law provides that applicants for an authorisation to explore for hydrocarbons must include, in their application, “a brief note stating the activities of exploring hydrocarbons and the effects which those activities are likely to have on the environment and ways of their effective handling”. Article 11(2) provides that the Assessment of the Effects of Certain Projects on the Environment Law applies to applications for authorisations to exploit hydrocarbons.

Article 13 of the Hydrocarbons Law provides that conditions and requirements for granting authorisations include, among other things, conditions for protection of the environment, and “protection of biological and mineral resources and of national treasures possessing artistic, historic or archaeological value”.

Regulation 6(6) of the Hydrocarbons Regulations provides that an authorisation for exploration must include, among other things, “a brief note concerning the exploration activities and the effects which [they] are likely to have on the environment, and the measures that the exploration work programme intends to take for dealing with [them]”.

Further, Regulation 15(6) of the Hydrocarbons Regulations provides that “[p]rior to the commencement of any drilling operations, the holder of an authorization shall prepare and submit to the Minister for evaluation and approval, a contingency plan for hydrocarbon leakage and fire”. ...

The 2012 Model Contract requires the contractor for exploration activities to carry out a preliminary environmental impact assessment before initiating exploration work and a full environmental impact assessment before initiating any exploitation work. Both assessments must comply with the Strategic Environmental Assessment concerning hydrocarbon activities within the EEZ of the Republic of Cyprus.<sup>656</sup> In this respect, the Ministry of Commerce, Industry and Tourism has carried out a Strategic Environmental Assessment to identify, describe and evaluate the likely significant environmental effects of implementing hydrocarbon exploration and production activities. Licensees are obliged to follow and comply with the results and recommendations of the assessment.

### 1.10 Offences and sanctions

The holder of an authorisation for prospection, exploration or exploitation (licensee) has a duty, among other things, to:

“prevent damage to producing formations and ensure that hydrocarbons discovered, mud or any other fluids or substances do not escape or be wasted [and to] prevent damage to hydrocarbon and water bearing strata that are adjacent to a producing formation or formations and prevent water from entering any strata bearing hydrocarbons, except where water injunction methods are used for secondary recovery operations or are intended otherwise in accordance with generally accepted international petroleum industry practice (Hydrocarbons Regulations, regulation 13(2)).”

The Minister may direct the licensee to take measures to comply with the above duty (Regulation 14(2)). Alternatively, the Minister may carry out the measures and seek reimbursement (Regulation 14(3)).

If the licensee fails to comply with the duty to take the above measures, it is guilty of an offence, with a sanction of imprisonment not exceeding two years, a fine not exceeding EUR 1,708,601, or both. The licensee has a defence if he proves “that he promptly took all necessary measures in accordance with good oilfield practices in order to comply with the Minister’s directions”.

The Hydrocarbons Law also sets out various offences including criminal offences for obstructing an authorised officer in implementing the Law (article 21(1)). Sanctions include imprisonment, a fine, or both (article 21(2)). A court may also confiscate or seize hydrocarbons, machines, equipment,

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<sup>656</sup> Model Contract, articles 5.2, 5.6; see Ministry of Commerce, Industry and Tourism in 2012, Guidance Note for the 2<sup>nd</sup> Licensing Round, Offshore Cyprus, para 2.2.3. The guidance is available at [http://www.mcit.gov.cy/mcit/mcit.nsf/all/53E619E1FB9CFE26C22579AA002C0F4C/\\$file/Guidance%20Note.pdf?openement](http://www.mcit.gov.cy/mcit/mcit.nsf/all/53E619E1FB9CFE26C22579AA002C0F4C/$file/Guidance%20Note.pdf?openement) The Strategic Environmental Assessment is available on the website of the Ministry of Energy, Commerce, Industry and Tourism; see <http://www.mcit.gov.cy/mcit/mcit.nsf/All/C0FEAAF63F3DB362C22574D600456349?OpenDocument>

vehicles, ships, aircraft and constructions that have been obtained as the result of the commission of an offence (article 26).

Further, Regulation 15(4) of the Hydrocarbons Regulations provides that:

“If the Minister deems that any works or installations erected by the holders of an authorization or any operations conducted by the holders of an authorization endanger or may endanger persons or property of a third-party or cause pollution or harm to the environment, wildlife or marine organisms to a degree which the Minister deems unacceptable, the Minister may require the holder of an authorization to take corrective measures within a reasonable time period specified by the Minister, and to repair any damage to the environment. [T]he Council of Ministers...may suspend the authorization until the holder of an authorization has taken such corrective measures or has repaired any environmental damage”.

Directors and officers and senior employees are subject to criminal liability if their company is convicted and the offence was carried out with their consent, tolerance or negligence (article 25).

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The exploration and/or exploitation of offshore oil and gas in Cyprus may not be carried out unless the Minister of Commerce, Industry and Tourism has issued a contract. The Hydrocarbons Regulations provide that the Minister may issue a production sharing contract, a concession agreement “or such other form as customarily used in the international petroleum industry” (regulation 5(3)). As indicated above, the Minister issued a Model Production Sharing Contract, dated February 2012.

The 2012 Model Contract is the second Model Contract to be issued by Cyprus. The first Model Contract was issued in February 2007 in the context of the first Licensing Round when Noble Energy International was granted an exploration license to explore and exploit Block Number 12. Whilst both Model Contracts provide that the licensee is obliged to take out and maintain in force all the relevant insurances, only the 2012 Model Contract enables the Minister to approve “the said insurance policies for exclusions and verify the financial capacity of Insurers” (compare 2007 Model Contract, article 17(2) and 2012 Model Contract, article 32(3)).

Financial security is required for a prospecting licence, an exploration licence and an exploitation licence as follows.

As with other Member States, Cyprus is transposing the Offshore Safety Directive (2013/30/EU), which will result in revisions to financial security requirements to include those under the OSD.

#### ➤ **Prospecting licence**

Article 7 of Annex D of the 2012 Model Contract requires a bank guarantee in respect of carrying out the initial work programme (i.e. minimum amount of seismic surveys and exploratory wells). Further, article 32 of the 2012 Model Contract requires insurance to be taken out for compensation to third parties and damage to the environment.

There are thus two requirements for financial security for a prospecting licence; an irrevocable bank guarantee in respect of carrying out the works programme, and insurance for damage to third parties and the environment.

## ➤ Exploration and Production Licences

As with the prospecting licence, there are two requirements for financial security for an exploration licence and an exploitation licence; an irrevocable bank guarantee in respect of carrying out the works programme, and insurance for damage to third parties and the environment.

The 2012 Model Contract provides that the Development and Production Plan to be prepared by the Contractor and submitted to the Minister for approval must include, among other things:

“a risk management plan prepared in accordance with the requirements of the [Hydrocarbons] Law and the Applicable Environmental Legislation, including the measures and directions established by the Minister to prevent any damage and remove any hazards that the Hydrocarbons Operations may cause to affected communities, Contractor’s personnel and the environment ...

an environmental management plan, including a socio-economic management plan, prepared in accordance with the requirements of the [Hydrocarbon] Regulations and of the Applicable Environmental Legislation, including the measures planned for the protection of the environment, the elimination of the reduction of pollution and *the protection and compensation of affected populations and industries if applicable*, and the verification of the effectiveness of said measures ...

an emergency response plan prepared in accordance with the requirements of the [Hydrocarbon] Regulations and of the Applicable Environmental Legislation, including measures to respond to any accident that may occur at the site of the Hydrocarbon Operations, medical treatment and evacuation of employees and surrounding populations and the protection of the environment ...

the Contractor’s proposals for financing, hereunder full information as to the Contractor’s current financial status, technical competence and experience” (article 7.2.1 (emphasis added)).

It is unclear how an environmental management plan would provide for the “compensation of affected populations and industries”.

### ○ Financial security for carrying out the works programme

The Guidance Note for the 2<sup>nd</sup> Licensing Round, Offshore Cyprus, published by the Ministry of Commerce, Industry and Tourism in 2012 (Guidance) provides that the applicant shall submit financial capacity documentation:

“[to] demonstrate the Applicant’s financial ability to finance oil and gas exploration and exploitation activities, and also the manner in which exploration and development activities shall be financed, if the application is successful, and how performance of the applicants’ obligations shall be guaranteed.

It shall include the financial structure of the Applicant and its parent company, if any, including annual reports, audited balance sheets and profit and loss statements for the past three (3) years, and any reports which the applicant or its parent company may have filled to competent authorities responsible for securities regulation during that period.

Where the Applicant is a Consortium, all relevant information shall be provided for each Consortium Member” (paragraph 3.5.5.1(2)(A)).

The Hydrocarbons Regulations provide similar requirements for an application for an authorisation for prospection (sections 6(2)(d)-(e)).

If the applicant has a parent company, it shall “submit to the Minister for approval an undertaking where its ultimate parent company is guaranteeing the proper performance of the obligations arising from this Contract” (Production Sharing Contract, article 32).

The 2012 Model Contract provides, among other things, that when the contractor consists of several entities, they shall enter into a joint operating agreement that binds them and shall nominate an operator, with the joint operating agreement and the operator to be approved by the Council of Ministers (articles 4.1-.2).

The Clarification questions and answers for the 2<sup>nd</sup> Licensing Round<sup>657</sup> provide further details of the financial documentation that an applicant must submit. The clarification also states that “the applicant, and its parent company, if any, needs to include annual reports, audited balance sheets and P&L statements for the past three years”.

The Minister may terminate the 2012 Model Contract and the Council of Ministers may revoke the licence for the contract area in the event, among other things, of the “bankruptcy, composition with creditors or liquidation of assets of the Contractor of its parent-company or any entity constituting the Contract, as the case may be” (article 34.1).

An application to transfer or assign an authorisation must be made to the Minister and must include, among other things, “evidence of the proposed transferee’s or assignee’s technical and financial ability to assume and undertake the work obligations and other commitments of the holder of an authorisation [and] an unconditional written undertaking by the transferee or assignee to assume all the obligations transferred and assigned by the transferor or assignor” (Hydrocarbons Regulations, regulation 12((2)).

Article 38 of the 2012 Model Contract provides, as a condition precedent to its effectiveness, that:

“upon the Effective Date, the Contractor shall provide an irrevocable bank guarantee, payable to The Permanent Secretary, Ministry of Commerce, Industry and Tourism, guaranteeing its Exploration Work Obligations for the Initial Licensing Period. The bank guarantee shall be issued by a bank licensed to operate in any of the following countries: the Republic of Cyprus, any member state of the European Union, any country of the EEA, any country that had signed the Government Procurement Agreement (GPA) and any country that had signed and ratified Association Agreements or Bilateral Agreements with the European Union or the Republic of Cyprus and has the right to do so, according to the legislation of those countries.

- a) The amount of the guarantee shall be calculated by using the unit costs per km of seismic survey and per exploratory well set forth as follows:
  - i. Euros \_\_\_\_ (\_\_\_\_) per km of seismic survey to be performed;
  - ii. Euros \_\_\_\_ (\_\_\_\_) million per exploratory well to be drilled.
- b) Three (3) months after completion of a seismic survey or an exploratory well drilled to the minimum contractual depth, the above mentioned guarantee shall be adjusted in such a manner as to guarantee the outstanding balance

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<sup>657</sup> The Clarification questions and answers is available at <http://www.mcit.gov.cy/mcit/mcit.nsf/All/696168A6A79E534FC22579B4003E6F10?OpenDocument>



of the Exploration Work Obligations for the current Exploration Phase, as valued in accordance with the provisions of the foregoing paragraph.

In the event of a renewal of an authorization to explore, the Contractor shall also provide a similar guarantee guaranteeing the Exploration Work Obligations for that renewal. The amount of the said guarantee shall be calculated in accordance with the provisions of Article [38.2(a)]. If, upon expiry of the Initial Licensing Period or any renewal or extension thereof, or in the event of whole relinquishment or termination of the Contract, the exploration work has not reached the applicable Exploration Work Obligations, the Minister shall have the right to call for the guarantee as compensation for the non-performance of the Exploration Work Obligations entered into by the Contractor”.

The 2012 Model Contract also includes a pro forma Letter of Guarantee (performance guarantee) to be issued by a bank on behalf of the applicant for the second licensing round (Annex E).

The above requirements relate to the applicant’s financial ability to carry out the works programme; they do not relate to its ability to pay compensation in the event of pollution from an incident involving offshore oil and gas operations.

- **Financial security for compensation to third parties**

The 2012 Model Contract states that:

“The Contractor shall take out and maintain in force, and cause to be taken out and maintained in force by its subcontractors, all insurances with respect to Hydrocarbons Operations, of the type and for such amounts customarily used in the international Hydrocarbons industry, including, inter alia, *third party liability insurances and insurances to cover damage to property and environment*, without prejudice to such insurances as may be required under the legislation of the Republic.

The Contractor shall provide the Minister with the certificates proving the subscription and maintenance of the above-mentioned insurances. The Minister shall approve the said insurance policies for exclusions and verify the financial capacity of Insurers. The Minister shall have the right to require amendments to the said insurance policies in order to secure the compliance with the requirements pursuant to this Article” (articles 32.3-4) (emphasis added)).

That is, the 2012 Model Contract requires a licensee and its subcontractors to purchase insurance from approved insurers for liability for compensation to third parties.

Further, Cyprus has ratified the Offshore Protocol to the Barcelona Convention for the protection of the marine environment and coastal region of the Mediterranean (Offshore Protocol) (see Final Report, section 3.6.3).<sup>658</sup> The Offshore Protocol, which entered into force on 24 March 2011, was subsequently ratified by the EU.<sup>659</sup>

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<sup>658</sup> See Law 20 (III) of 2001, published in the Official Cyprus Government Gazette No. 3537 of 15 October 2001.

<sup>659</sup> Council Decision of 17 December 2012 on the accession of the European Union to the Protocol for the Protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil. OJ L 4/13 (9 January 2013).

Cyprus is preparing legislation pursuant to article 27 of the Protocol, which states, among other things, that Parties “(a) Shall take all measures necessary to ensure that liability for damage caused by activities is imposed on operators, and they shall be required to pay prompt and adequate compensation; [and] (b) Shall take all measures necessary to ensure that operators shall have and maintain insurance cover or other financial security of such type and under such terms as the Contracting Party shall specify in order to ensure compensation for damages caused by the activities covered by this Protocol”.

Until such legislation is enacted, Cyprus is following UK guidelines dealing with financial security for damage caused by offshore activities (see UK summary, section 1.11.4).<sup>660</sup>

#### **1.11.1 Persons required to have evidence of financial security**

The person who is required to have evidence of financial security is the Contractor, that is, the person who enters into the 2012 Model Contract with the Minister.

#### **1.11.2 Time at which evidence of financial security is required**

The Guidance states that the performance guarantee by a bank for the obligations of the work programme must be submitted when a licence is awarded and subsequent to signing the 2012 Model Contract.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

As indicated in section 11.1 above, there are two requirements for financial security for a prospecting licence, an exploration licence and an exploitation licence; one for carrying out the works programme, and one for damage to third parties and the environment.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The financial security mechanism for liability for “damage to property and environment” is insurance (see section 1.11.3 above).

#### **1.11.5 Monetary limit(s)**

The Guidance states that the amount of the performance guarantee is decided when a licence is awarded and subsequent to signing the 2012 Model Contract.

The amount of the insurance to be taken out for third-party liabilities is not specified.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

Insurance for liability for third-party claims for compensation must be taken out when a licensee enters into the 2012 Model Contract.

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<sup>660</sup> See Mediterranean Action Plan (MAP), Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), Report of the Workshop on the Regional Response Capacity and Coordination to Major Oil Spill in the Mediterranean Sea 8 (REMPEC/WG.34/21, 24 January 2014); available at [http://www.rempec.org/admin/store/news/E-REMPEC\\_WG.34.21\\_MEDEXPOL\\_2013\\_Final\\_Report.pdf](http://www.rempec.org/admin/store/news/E-REMPEC_WG.34.21_MEDEXPOL_2013_Final_Report.pdf)

## 1.12 Jurisdictional issues (if any)

Article 3 of the Civil Wrongs Law provides that “a person who shall suffer any injury or damage by reason of any civil wrong committed in the Republic or within three miles of the coast thereof, measured from low watermark, shall be entitled to recover from the person committing or liable for such civil wrong the remedies which the court has power to grant”. It appears, therefore, that the Civil Wrongs Law does not apply to the continental shelf and the EEZ.

## 1.13 Key points

Cyprus is in the exploration phase for offshore oil and gas. Perhaps as a result, its legislation for liability for compensation to third parties who suffer bodily injury or property damage from a pollution incident from offshore oil and gas operations is not well developed. There is no specific legislation covering claims for compensation for pollution damage from offshore oil and gas operations. Instead, the Civil Wrongs Law, which establishes liability for bodily injury and property damage but not pure economic loss, applies.

Licensees also have contractual liability under the 2012 Model Contract for “damage or loss which they, the Contractor’s employees or subcontractors and their employees may cause to the person, the property or the rights of other persons, caused by or resulting from Hydrocarbons Operations, including any environmental damage”. There are no details, however, to indicate whether this provision includes liability for compensation only for bodily injury and property damage, or whether it also includes liability for economic loss, in the event of a pollution incident from offshore oil and gas operations. There are also no details on the methodology for claims by third parties, or who decides whether a claim is covered by the above language.

No procedure for handling claims for compensation has been established.

There are two requirements for financial security for offshore oil and gas operations for a prospecting licence, an exploration licence, and an exploitation licence; an irrevocable bank guarantee in respect of carrying out the works programme, and insurance for compensation to third parties and damage to the environment. The 2012 Model Contract specifies that the Minister will approve the insurance policies for exclusions and will verify the financial capacity of insurers.

Cyprus will almost certainly fill at least some of the regulatory gaps indicated above. A major reason why they have not already been filled is probably the speed with which Cyprus has introduced mechanisms for the exploration and production of hydrocarbon reserves in its EEZ which coincided with a period of steep economic recession and its debt deficit.

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# Denmark

## 1.1 Introduction

The first exploration well in the Danish continental shelf area of the North Sea was drilled in 1966. The first field to produce oil, the Dan field, continues to produce oil and gas, accounting for nearly 28 per cent of total oil production for Denmark since 1972.<sup>661</sup>

Most of the oil from known offshore fields has been produced, with production declining for the past 10 years. By 2013, 132 exploration wells had been drilled in the western part of the North Sea, of which over half have led to the commercial production of oil or gas.<sup>662</sup> The sixth licensing round was held in 2006. A seventh licensing round covering areas to the west of 6°15' east longitude is being held in 2014. The Danish Energy Agency (DEA) considers that large quantities of oil and gas are still to be discovered on the Danish continental shelf.<sup>663</sup>

According to the Metro Report “there are in total 19 producing fields of various size and three operators are responsible for production from these fields: DONG E&P A/S, Hess Denmark ApS and Maersk Olie og Gas A/S”.<sup>664</sup> The Metro Report also indicated that according to the official statistics of the DEA, in 2011, there were 278 active production wells (199 oil wells and 79 gas wells).<sup>665</sup> In 2012, oil production on the Danish continental shelf totalled 11.7 million cubic metres, a decline of 8.6 per cent from 2011. Also in 2012, natural gas production totalled 5.6 billion Nm<sup>3</sup> (Normal cubic metres), a decline of 13.7 per cent from 2011.<sup>666</sup>

In 1997, an open door procedure was introduced for unlicensed areas east of 6° 15' east longitude that is, the entire onshore and offshore area of Denmark except for the western most part of the North Sea. Under the open door procedure, companies can apply for licences annually between 2 January and 30 September. Licences are granted on a first-come, first-served basis. There had been no discoveries of oil and gas in the open door areas as of October 2014.<sup>667</sup>

On 9 July 2012, the Danish North Sea Fund (*Nordsøfonden*) acquired a 20 per cent interest in the Danish Underground Consortium (*Dansk Undergrunds Consortium*) (DUC). The DUC is a joint venture between A.P. Møller, Shell and Chevron, created in 1962 to explore and – at that time – possibly to develop and produce oil and gas in Denmark. Following the participation of the Danish North Sea Fund, A.P. Møller has a 31.2 per cent interest, Shell has a 36.8 per cent interest, and Chevron has a

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<sup>661</sup> See Energi, Denmark’s Producing Fields 2011 (2012); available at <http://www.ens.dk/sites/ens.dk/files/oil-gas/fields-production/Denmarks%20producing%20fields%202011%20ENG.pdf>

<sup>662</sup> See Energi Styrelsen, Oil and Gas Production in Denmark and Subsoil Use 2012 6 (June 2013); available from <http://www.ens.dk/en/oil-gas/reports-oil-gas-activities>

<sup>663</sup> See Danish Energy Agency, Oil and gas companies invited to new North Sea licensing round (24 April 2014); available at <http://www.ens.dk/en/info/news-danish-energy-agency/oil-gas-companies-invited-new-north-sea-licensing-round>

<sup>664</sup> Metro Report, p. 111; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>665</sup> Ibid, p. 112.

<sup>666</sup> See Energi Styrelsen, Oil and Gas Production in Denmark and Subsoil Use 2012, 18 (June 2013); available from <http://www.ens.dk/en/oil-gas/reports-oil-gas-activities>

<sup>667</sup> See *ibid*, 8.

12 per cent interest in the DUC. Maersk Oil is the operator of all licences held by A.P. Møller – Mærsk A/S on behalf of the DUC.<sup>668</sup>

There have not been any major incidents in Denmark so far, but there have been two incidents that could have led to a major accident. Besides that there have been a few severe occupational accidents.<sup>669</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The legislation governing offshore oil and gas operations in Denmark consists of Acts and Orders, together with guidelines and other documentation.

A mining Act imposes liability for bodily injury, property damage and economic loss caused by the exploration for, and production of hydrocarbons.

In addition, the Liability for Damages Act (Act No. 885 of 20 September 2005, as amended,<sup>670</sup> imposes liability for personal injury and loss of dependency.

## 1.3 Rights to, and ownership of, offshore oil and gas

Act No. 293 of 10 June 1981, as revised by Consolidated Act No. 960 of 13 September 2011 on the Use of the Danish Subsoil, as amended (Subsoil Act)<sup>671</sup> provides that all raw materials in the subsoil, including those in the Danish EEZ and the Danish continental shelf area belong to the State. Exploration for, and exploitation of, the raw materials may be carried out only pursuant to a licence granted by the Minister for Climate and Energy (Subsoil Act, section 2).

The Subsoil Act does not apply to the Faroe Islands, which are an autonomous province of Denmark. This report does not discuss offshore hydrocarbon activities in the Faroe Islands because they are not

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<sup>668</sup> See *ibid*, 7-8; Danish Energy Agency, Oil and gas companies invited to new North Sea licensing round (24 April 2014); available at <http://www.ens.dk/en/info/news-danish-energy-agency/oil-gas-companies-invited-new-north-sea-licensing-round>; DUC; available at <http://www.duc.dk/> A.P. Møller ja A.P. Møller – Mærsk A/S A.P. Møller – Mærsk A/S had been granted a 50-year sole concession for exploring and producing all oil and gas in Denmark in 1962. The licences are now held by A.P. Møller – Mærsk A/S, which have slowly relinquished areas under the concession. See Nicolaj Kleist & Morten Brage, Bruun & Hjejle, Denmark Chapter – Oil and Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/denmark>

<sup>669</sup> Telephone interview with Hans Erik Christensen, Senior Adviser, Offshore Safety Unit, Danish Energy Agency, 5 May 2014.

<sup>670</sup> An unofficial translation of the Liability for Damages Act is available at: <http://patienterstatningen.dk/en/Love-og-Regler/Lov-om-klage-og-erstatningsadgang/Behandlingsskader.aspx> The translation was last updated on 23 February 2010.

<sup>671</sup> The Subsoil Act implements Directive 94/22/EC on the conditions of granting and using authorisations for the prospection, exploration and production of hydrocarbons, and parts of the Environmental Impact Assessment Directive (2011/92/EU), the Birds Directive (92/43/EEC), the Habitats Directive (92/43/EEC; consolidated version 1 January 2007), and the Geological Storage Directive (2009/31/EC). See Guide to Hydrocarbons Licences 10. An unofficial English translation of the Subsoil Act is set out in the Danish Energy Agency, A Guide to Hydrocarbon Licences in Denmark, Exploration and Drilling Activities 10 (September 2011) (Guide to Hydrocarbon Licences); available from <http://webcache.googleusercontent.com/search?q=cache:KiWTFXRSaPkJ:www.ens.dk/node/1896+&cd=2&hl=en&ct=clnk&gl=uk>

part of the EU,<sup>672</sup> other than to note that the Government of the Faroe Islands has enacted the Hydrocarbon Activities Act<sup>673</sup> and supporting legislation to control offshore oil and gas activities, three licensing rounds have been held, plus open door licensing,<sup>674</sup> and offshore exploration is being carried out.<sup>675</sup>

Neither does this report discuss hydrocarbon activities in Greenland, which is an autonomous dependent Danish territory.<sup>676</sup> Greenland withdrew from the EU on 1 February 1985 and became an OCT.<sup>677</sup> Greenland's Bureau of Minerals and Petroleum launched the latest licensing round for the exploration of offshore oil and gas in April 2011.<sup>678</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The Subsoil Act is the main Act that controls exploitation and recovery activities for raw materials and hydrocarbons in the Danish subsoil and on the Danish continental shelf, including prospecting for, exploring and recovering them. The Act also includes provisions that cover the Government's right to purchase liquid hydrocarbons, as well as provisions concerning other uses of the subsoil.<sup>679</sup>

The main Act that governs safety on the Danish continental shelf is Act No. 1424 of 21 December 2005 on Offshore Installations for Exploration, Extraction and Transport of Hydrocarbons, as amended (Offshore Safety Act).<sup>680</sup> Section 45 requires the operator of an offshore installation to prepare emergency response plans for accidents and dangerous situations. The plans must be submitted to the DEA and the Danish Environmental Protection Agency at least three to four weeks before operations commence. The operator must keep the plans up to date and forward them, on request, to the DEA. Details concerning preparation of the plans are set out in section 4 of Executive Order No. 1501 of 15 December 2010.<sup>681</sup> Operators have the duty, under the Offshore Safety Act, to ensure that "the necessary health and safety instructions are given to contractors working for the operators,

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<sup>672</sup> See The Mission of the Faroes to the EU, The Faroes and the European Union; available at <http://www.faroes.be/>

<sup>673</sup> An unofficial English translation of the Hydrocarbon Activities Act, with amendments to 26 May 2010, and related legislation is available from <http://www.jardfeingi.fo/Default.aspx?pageid=11947>

<sup>674</sup> Details of the first and second licensing rounds and open door licensing are available from <http://www.jardfeingi.fo/Default.aspx?pageid=11947>

<sup>675</sup> See Deloitte, Third Faroese Licensing Round; available at [http://www.psg.deloitte.com/NewsLicensingRounds\\_FO\\_0807.asp](http://www.psg.deloitte.com/NewsLicensingRounds_FO_0807.asp); DONG Energy awarded six new oil and gas blocks offshore the Faroe; available at [http://www.dongenergy.com/EN/Media/Newsroom/News/Pages/DONG\\_Energy\\_awarded\\_six\\_new\\_oil\\_and\\_gas\\_blocks\\_offshore\\_the\\_Faroe\\_Islands.aspx](http://www.dongenergy.com/EN/Media/Newsroom/News/Pages/DONG_Energy_awarded_six_new_oil_and_gas_blocks_offshore_the_Faroe_Islands.aspx); DONG Energy secures oil and gas blocks, offshore Faroe Islands (26 June 2013); available at <http://www.offshore-technology.com/news/newsdong-energy-oil-gas-blocks-faroe-islands>

<sup>676</sup> See Denmark, Greenland and the Faroes; available at <http://denmark.dk/en/society/greenland-and-the-faroes/>

<sup>677</sup> See Folketinget, What is Greenland's relationship with the EU?; available at [http://www.eu-oplysningen.dk/euo\\_en/spsv/all/17/](http://www.eu-oplysningen.dk/euo_en/spsv/all/17/)

<sup>678</sup> See Kevin Casey, Greenland's New Frontier: Oil and Gas Licenses Issued, Though Development Likely Years Off (The Arctic Institute, 20 January 2014); available at <http://www.thearcticinstitute.org/2014/01/greenlands-new-frontier-oil-and-gas.html> Information about offshore oil and gas licensing in Greenland is available from the Government of Greenland's website at <http://www.govmin.gl/index.php/petroleum>

<sup>679</sup> Guide to Hydrocarbon Licences, 10.

<sup>680</sup> The Guide to Hydrocarbon Licences includes an unofficial English translation of the Offshore Safety Act.

<sup>681</sup> See Guide to Hydrocarbon Licences, 19.

especially to the operating company in cases where this company is not the operator” and that health and safety risks are identified, assessed and reduce as much as reasonably practicable.

The Acts are accompanied by regulations and guidance as well as other Acts on specific aspects of offshore oil and gas operations.<sup>682</sup>

The Continental Shelf Act<sup>683</sup> and the Marine Environment Protection Act<sup>684</sup> also establish rules relating to offshore oil and gas activities.

Various Executive Orders set out rules concerning offshore oil and gas activities. They are:

- Executive Order No. 1032 of 23 August 2007, which provides rules on reimbursement of expenses related to the authorities’ administration in connection with hydrocarbon activities;
- Executive Order No. 56 of 4 February 2002, which provides rules for the submission of samples and other information about the Danish subsoil;
- Executive Order No. 419 of 2 June 2005, which regulates the payment of fees connected with certain licences issued pursuant to the Act on the Use of the Danish Subsoil;
- Executive Order No. 684 of 23 June 2011, which provides for environmental impact assessment rules. The Order also provides for consequence assessments concerning international nature conservation areas and protection of certain species in connection with projects about offshore exploration for and production of hydrocarbons, storage in the subsoil, pipelines etc.; and
- Executive Order No. 657 of 30 December 1985, which provides rules on safety zones and zones for the observance of order and the prevention of danger.<sup>685</sup>

General regulations and guidelines for oil and gas activities also cover offshore oil and gas activities. The main general regulations and guidelines are:

- Model Licence – 6<sup>th</sup> Licensing Round;
- Model Licence – Open Door Procedure;
- Model Joint Operating Agreement and Accounting Procedure (JOA);
- Conditions regarding Pre-investigations Offshore;
- National Environmental Research Institute – Best Practice for pre-investigations offshore; and
- Guidelines for Drilling, Exploration.<sup>686</sup>

The following types of licences for offshore oil and gas operations are issued in Denmark:

- A licence for preliminary investigations for up to three years;

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<sup>682</sup> Pages 10-12 of the Guide to Hydrocarbon Licences lists the main Acts, Orders, guidelines, and other documentation. These pages include links to the legislation, guidelines and documentation in Danish and, if available, also to an informal English translation.

<sup>683</sup> Consolidated Act No. 1101 of 18 November 2005 on the Continental Shelf.

<sup>684</sup> Consolidated Act No. 925 of 28 September 2005 on the Protection of the Marine Environment.

<sup>685</sup> See Guide to Hydrocarbon Licences, 11.

<sup>686</sup> See *ibid*, 11-12.



- An exploration licence;
- A production licence; and
- An exploration and production licence.

## 1.5 Liability for bodily injury, property damage and economic loss

Danish law imposes liability for bodily injury, property damage and economic loss.

### 1.5.1 Bodily injury and property damage

Liability for bodily injury and property damage is imposed by the Subsoil Act, the Liability for Damages Act, and the Environmental Damage Compensation Act.

#### ➤ Subsoil Act

Section 35 of the Subsoil Act is the main provision that imposes liability for bodily injury and property damage (and economic loss) caused by the exploration for, and production of, hydrocarbons. Section 35(1) provides that “A licensee shall be liable to pay damages for any loss, damage or injury caused by the activities carried on under the licence, even though such loss, damage or injury was caused accidentally”.

Persons who may claim compensation include the licensee’s employees and contracting parties, as well as third parties.<sup>687</sup>

#### ➤ Liability for Damages Act

The Liability for Damages Act imposes liability for personal injury and loss of dependency. The purpose of the Act is to simplify and expedite claims for personal injury and to allow insurers to settle such claims, with the Board of Industrial Injuries handling complex claims.<sup>688</sup> The amount of loss is calculated according to the Act.<sup>689</sup>

If a loss is covered by property insurance or consequential loss insurance, liability in damages does not apply unless, among other things, the person whose fault caused the damage is not liable unless the person caused the loss wilfully or through gross negligence (Liability for Damages Act, section 19).

#### ➤ Environmental Damage Compensation Act

The Environmental Damage Compensation Act imposes strict liability for compensation for bodily injury, property damage and economic loss from pollution from activities and facilities listed in an Annex to the Act. The activities and facilities in the Annex include, among other things, energy facilities, and other facilities considered to have a high risk of causing pollution. Liability is subject to

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<sup>687</sup> See *ibid*, 12.

<sup>688</sup> See Danish Motor Insurers Bureau, *Strict Liability and Compensation; The Danish Model* (presentation) (21 March 2011); available at [http://www.rzu.gov.pl/files/3106\\_5145\\_Nowoczesne\\_rozwiazania\\_w\\_zakresie\\_kompensacji\\_szkod\\_komunikacyjnych\\_Warszawa\\_21\\_marca\\_2011\\_r\\_.pdf](http://www.rzu.gov.pl/files/3106_5145_Nowoczesne_rozwiazania_w_zakresie_kompensacji_szkod_komunikacyjnych_Warszawa_21_marca_2011_r_.pdf)

<sup>689</sup> See The Danish Insurers and Pensions Information Service, *Insurance and pensions for everyday needs*; available at [http://www.forsikringogpension.dk/documents/webpjecer/insurance\\_for\\_everyday\\_needs.pdf](http://www.forsikringogpension.dk/documents/webpjecer/insurance_for_everyday_needs.pdf)

an exception for *force majeure*.<sup>690</sup> The operator of an offshore oil and gas facility could be liable for compensation under the Act provided, of course, that the facility is concluded to be included in the Annex and the Act applies to the Danish continental shelf and the EEZ.

### 1.5.2 Economic loss

As indicated in section 1.5.1 above, section 35 of the Subsoil Act imposes liability for economic loss caused by the exploration for, and production of, hydrocarbons. As also indicated in section 1.5.1, the Liability for Damages Act also applies to claims for compensation for third parties, as does the Environmental Damage Compensation Act.

Under Danish civil law, pure economic loss is defined by the same rules as loss for bodily injury and property damage; it is not treated differently.

The main general source of law for pure economic loss is case law. Three elements are required; the claimant must prove he suffered a loss, the claimant must also prove that the loss is caused by an act or omission of the defendant, and there must be a causal link between the two. Such a link can be negligence by the tortfeasor or strict liability.<sup>691</sup> In this respect, pure economic loss must not be too remotely connected to the tortfeasor's conduct. The claimant must have been directly affected by the tortfeasor's conduct.<sup>692</sup>

In practice, pure economic loss is more difficult to prove than bodily injury or property damage.<sup>693</sup> It is unclear whether, for example, a claim by a person in the tourism sector for lost income due to pollution from an offshore oil and gas incident would succeed.<sup>694</sup> It may also be relevant for claims for pure economic loss that the financial security requirement for third-party damages refers only to bodily injury and property damage (see section 1.11.3 below).

### 1.5.3 Liability for dangerous activities

Courts have restricted strict liability under Danish law to two categories; large excavations, and leakages from supply lines.<sup>695</sup>

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<sup>690</sup> Moalem Weitemeyer Bendtsen, Denmark; Environmental Law (17 April 2012), Mondaq; available at <http://www.mondaq.com/x/169684/EU+Regulatory+Law/Environmental+Law>; see Marie-Louise Larsson, The Law of Environmental Damage; Liability and Reparation 326-28 (Kluwer 1999).

<sup>691</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: New Horizons in Comparative Law, 283 (University of Texas at Austin, Studies in Foreign and Transnational Law) (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009).

<sup>692</sup> See *ibid.*

<sup>693</sup> Bernhard Gomard, Recent Developments in the Danish Law of Tort, Stockholm Institute for Scandinavian Law 1957-2009.

<sup>694</sup> Cf Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: New Horizons in Comparative Law 65-66 (University of Texas at Austin, Studies in Foreign and Transnational Law) (Basil Markesinis and Jörg Fedtke, general editors, Routledge-Cavendish, 2009) (considering that Danish courts would deny hypothetical claims for lost income suffered by cattle raisers and butchers from the closure of cattle and meat markets for 10 days due to a person having negligently allowed infected cattle to escape).

<sup>695</sup> See Vibe Ulfbeck, Denmark, in Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports 101, 110-111 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

#### 1.5.4 Standard of liability (strict / fault-based)

Section 35 of the Subsoil Act imposes strict liability on a hydrocarbons licensee for damage caused to a third party.<sup>696</sup>

#### 1.5.5 Scope of liability (joint and several / several)

The Model Licence for Exploration for and Production of Hydrocarbons (Model Licence) provides that if an exploration or production licence is granted to more than one person, each licensee is jointly and severally liable for any damages under section 35 of the Subsoil Act as well as for obligations under the licence.<sup>697</sup>

Liability under the Liability for Damages Act is subject to apportionment "on the basis of what may be considered reasonable taking account of the nature of the liability and circumstances in general" and also subject to tortfeasors being covered by liability insurance (section 25).

#### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

There is no rebuttable presumption in respect of section 35 of the Subsoil Act.

#### 1.5.7 Exceptions

Section 35 of the Subsoil Act does not include exceptions to liability.

#### 1.5.8 Defences

Section 35(2) of the Subsoil Act provides a defence, as follows: "In the event that the injured party contributed to the loss, damage or injury, either intentionally or through gross negligence, the damages payable may be reduced or lapse".

It does not appear that this defence would be relevant to a claim for harm from pollution from an offshore oil and gas incident.

#### 1.5.9 Remedies

The remedy for bodily injury and property damage is compensatory damages.

Liability under the Liability for Damages Act is subject to a general mitigation rule, under which damages may be reduced or waived if "the liability would be unreasonably onerous for the party liable in damages or if very special circumstances otherwise make it reasonable to do so (section 24). The Act further provides that "[t]he decision to do so shall take account of the magnitude of the loss, the nature of the liability, the liability of the party causing the loss, the injured party's interest, any insurance policies that exist and circumstances in general" (section 24).

Danish law does not recognise punitive damages.<sup>698</sup>

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<sup>696</sup> See Guide to Hydrocarbon Licences, 12.

<sup>697</sup> Licence No. X/YY for Exploration for and Production of Hydrocarbons, s 21(1)(a). An unofficial English translation of the Model Licence is set out in the Guide to Hydrocarbon Licences.

<sup>698</sup> See Swiss Re, Punitive damages in Europe; concern, threat or non-issue? 7 (2012); available at [http://www.biztositasizemle.hu/files/201206/punitive\\_damage\\_in\\_europe.pdf](http://www.biztositasizemle.hu/files/201206/punitive_damage_in_europe.pdf)

### 1.5.10 Limitations period(s)

The general limitation period in Denmark is three years. There is a longstop (statute of repose) of 30 years for claims for compensation for bodily injury, environmental damage or damage caused by noise and vibrations.<sup>699</sup>

### 1.5.11 Right to claim contribution from other responsible persons

The JOA sets out the rights and obligations between the operator and other licensees.<sup>700</sup>

## 1.6 Compensation system (claims within Target Country)

Denmark does not have a compensation system for claims for bodily injury, property damage and economic loss from offshore oil and gas operations. If claims are not settled out-of-court (that is, directly with the operator and/or its insurer), they may be brought before the courts through regular court procedures.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Denmark for claims for bodily injury, property damage or economic loss concerning transboundary incidents from offshore oil and gas operations.

## 1.8 Competent authority

The DEA, which was established in 1976 and which assists the Ministry of Climate, Energy and Building in energy matters, is the competent authority for administering legislation for hydrocarbon activities on the Danish continental shelf. The DEA's main purpose is to follow and evaluate Danish as well as international progress in energy production, supply and research. More specifically, the Energy Resources Division is in charge of all matters relating to the exploration and production of oil and gas. Decisions by the DEA can be referred to the Minister for Climate, Energy and Building.<sup>701</sup>

The DEA also administers the Subsoil Act, the Offshore Safety Act, the Pipelines Act and the Act on the Continental Shelf and supervises compliance with such Acts and statutory orders. The DEA organises licensing rounds and issues licences, as well as supervising implementation of regulations and licence conditions.<sup>702</sup>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

Section 28 of the Subsoil Act requires preparation of an environmental impact assessment for offshore projects that are assumed to have a significant environmental impact. The assessments, which include surveys, must be carried out to obtain a hydrocarbons licence. Applications for approval of offshore

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<sup>699</sup> See Lex Universal, The new Danish Limitations Act (31 March 2008); available at <http://lexuniversal.com/en/news/4906>

<sup>700</sup> Danish Energy Agency, Licence xx/XX, Xxxx Group, Draft Model Joint Operating Agreement, sections 3.12, 12.2.2 (February 2009). The draft model JOA is set out in the Guide to Hydrocarbon Licences.

<sup>701</sup> Guide to Hydrocarbon Licences, 4.

<sup>702</sup> Ibid.

pre-investigation programmes must include necessary information about the proposed project, including in particular, its “impact on international nature protection areas for the DEA’s decision about necessity of a consequence assessment and the necessary information about the project in relation to the projects disturbance of certain species”. If mitigation measures are proposed, they should be described in the application.<sup>703</sup>

The DEA assesses whether a consequence assessment must be submitted with the application. If a consequence assessment is required, it should show that the project will not damage the targeted area. If an offshore project is assumed to have a significant impact on an international nature conservation area, it may only be approved if the consequence assessment shows that it will not damage the area.

Executive Order No. 684 of 23 June 2011 sets out detailed provisions on environmental impact assessments, including offshore projects for which they are (and are not) required, their contents, information to be included, and procedures concerning them. The Executive Order also includes other criteria, such as the protection of nature, the environment and the cultural heritage, which may also need to be taken into account.

A strategic environmental impact assessment has been carried out for the seventh licensing round, with its findings having been taken into account in the terms and conditions for the licensing round.<sup>704</sup>

## 1.10 Offences and sanctions

The Subsoil Act sets out specific offences and sanctions in respect of offshore oil and gas operations. The Danish Criminal Code may also apply.

Part 17 of the Act on the Protection of the Marine Environment of 1980<sup>705</sup> establishes, among other things, offences and sanctions for pollution from offshore oil and gas operations (and shipping).

### Specific provisions

The Subsoil Act imposes fines or imprisonment for up to four months for various offences, including the failure to have an applicable licence, and the failure to comply with an enforcement notice (article 38(1)). The Act provides that regulations issued under it may include fines and imprisonment up to four months for their breach (article 38(2)). It further provides that companies and other legal persons may be criminally liable under Part 5 of the Danish Criminal Code (article 38(3)).

The Offshore Safety Act provides, in its part IX, for various offences and sanctions related to the management of offshore installations. Persons who may be liable include the licensee, the owner of the installation, the operator, contractors, employers and company managers. Such persons may be liable for failing to identify and assess risks, failing adequately to supervise operations at an installation, and failing to comply with orders. Penalties include fines and imprisonment, with longer prison terms for intentional or grossly negligent breaches. For example, a supervisor or employee who fails to identify and assess health and safety risks may be fined or imprisoned for up to one year

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<sup>703</sup> See *ibid*, 21

<sup>704</sup> See Danish Energy Agency, The 7<sup>th</sup> Danish Licensing Round; available at <http://www.ens.dk/en/oil-gas/licences/licensing/rounds/7th-danish-licensing-round>

<sup>705</sup> An unofficial English translation of the Act, without any amendments, is available from <http://www.lexadin.nl/wlg/legis/nofr/eur/arch/den/marineprot.doc>

(section 70(2)). If the failure is intentional or grossly negligent, the maximum term of imprisonment increases to two years (section 70(4)).

Section 73 of the Subsoil Act provides that criminal liability may be imposed on limited liability companies according to rules set out in Part V of the Danish Criminal Code.

### General provisions

Criminal law in Denmark is mostly based on the Danish Criminal Code. A company can be prosecuted in a similar way to an individual offender. Sanctions include fines (Criminal Code, section 25) and confiscation (Criminal Code, section 75).<sup>706</sup>

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Model Licence requires a licensee to submit financial statements for activities covered by the licence. If the licensee is a subsidiary, it may also be required to submit financial statements for its parent company and consolidated financial statements.<sup>707</sup> Further, the Model Licence requires a licensee to submit “security, possibly in the form of a parent company guaranty, in an amount and of a nature that is acceptable to the [DEA]”. The DEA may require the security to be changed or supplemented upon 30 days’ notice.<sup>708</sup> This type of financial security is to ensure the licensee’s performance of its obligations under the licence.

The Model Licence states that a licensee’s liability for damages under the Subsoil Act (see section 1.5.1 above) must be covered by insurance. The insurance must “provide reasonable coverage, in light of the risks involved in the operation of the business and the premiums to be paid”. The licensee must notify the DEA of the insurance and its principal terms at the end of each calendar year. The DEA may require the licensee to take out additional insurance.<sup>709</sup> In 2014, Denmark was carrying out a review of the insurance declarations in order to evaluate whether the amount of insurance is sufficient and if more stringent requirements should be used.<sup>710</sup>

Denmark has a workers’ compensation regime for injuries to employees during the course of their employment.<sup>711</sup> Chapter 10 of the Consolidated Workers’ Compensation Act No. 278 of March 14, 2013 requires employers to take out insurance to cover liability under the Act.

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<sup>706</sup> Kromann Reumert, Criminal Liability of Companies Denmark, Lex Mundi Publication 2008, available at : [file:///C:/Users/FAngevin/Downloads/GPG\\_CLC\\_BCC\\_Denmark.pdf](file:///C:/Users/FAngevin/Downloads/GPG_CLC_BCC_Denmark.pdf)

<sup>707</sup> Model Licence, s 21(1)(a).

<sup>708</sup> Ibid, s 32.

<sup>709</sup> Ibid, s 30.

<sup>710</sup> Feedback from Danish Energy Agency (Jens Skov-Spilling, Director, Energy Resources (10 April 2014)).

<sup>711</sup> See Danish Business Authority, Business in Denmark; available at <http://businessindenmark.danishbusinessauthority.dk/national-board-industrial-injuries> The relevant legislation is the Consolidated Workers’ Compensation Act No. 278 of March 14, 2013, and the Act on Protection Against the Consequences of Industrial Injuries, as amended. An English translation of both Acts is available from <http://www.ask.dk/en/English/Industrial-injuries/Legislation.aspx>

### 1.11.1 Persons required to have evidence of financial security

The persons required to have evidence of financial security for the work programme are the operator of a hydrocarbons licence and its co-licensees.<sup>712</sup>

The licensee must also have insurance for damages under the Subsoil Act, that is, liability for damage to third parties.<sup>713</sup>

### 1.11.2 Time at which evidence of financial security is required

The licensee must provide evidence of financial security for its obligations under the licence within 30 days of the grant of the licence.<sup>714</sup>

The applicant for a licence must show evidence of insurance coverage for liabilities under section 35 of the Subsoil Act at the time of the application.<sup>715</sup> At the end of each calendar year, the DEA must be informed of the insurance then in force and its principal terms.

### 1.11.3 Scope (traditional damage / environmental damage / etc)

A licensee is required to have insurance for the following:

- injury to its employees;
- bodily injury and property damage to a third party; and
- pollution damage for its activities.

The licensee must also have other insurance required to be taken out under Danish law, including employers' liability, motor vehicles, aircraft and oil pollution liability for ships, as applicable.<sup>716</sup>

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

The DEA introduced an Operators Insurance Declaration form pursuant to section 30 of the Model Licence. The form requires the operator to declare, in respect of offshore activities, that it has “received insurance certificates or declarations of self-insurance from all co-licensees (including the operator's own certificate or declaration) for the [specified] year”.

The operator must also declare that the insurance programmes for all co-licensees satisfy the following conditions for additional expenses:

“Control of Well (COW) - including seepage and pollution

Coverage: normal coverage in the Danish sector is a minimum of DKK 1,000,000,000 [EUR 134,010,478.31] (100% interest) per occurrence - including underground blow out. If three times all cost relating to drilling and testing any well in the covered year exceeds DKK 1,000,000,000 [EUR 134,010,478.31] the coverage should as a

<sup>712</sup> Model Licence, s 32.

<sup>713</sup> Ibid, s 30.

<sup>714</sup> Ibid, s 32.

<sup>715</sup> Ibid, s 30.

<sup>716</sup> See Guide to Hydrocarbon Licences, 12-13.

minimum be increased to this amount for that well. Cost relating to drilling and testing this well shall be as stated in the budget for the licence, approved in accordance with the JOA”.

In respect of third-party liability regarding exploration, development and production of offshore (as well as onshore) operations, the operator must declare that the insurance programmes for itself and all co-licensees have the following coverage:

“when drilling: DKK 1,000,000,000 [EUR 134,010,478.31] (100% interest) per occurrence [and] when not drilling: DKK 100,000,000 [EUR 13,401,047.83] (100% interest) per occurrence”.

The insurance coverage must be “normal for the specific activity performed under the Knock-for-Knock principle” (see section 2.4 of the final report for a description of the Knock-for-Knock principle).<sup>717</sup>

The JOA, including its Appendix A, Accounting Procedure, sets out the arrangements for insurance between licensees and contractors. The JOA provides, among other things, that the operator may charge to the joint account any amounts that it has paid in settlement of claims from third parties resulting from the joint operations including costs, expenses and damages.<sup>718</sup>

#### 1.11.5 Monetary limit(s)

See section 1.11.4 above.

#### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

The operator must submit the completed insurance declaration to the DEA no later than 1 March each year during the pendency of the licence. If it is not possible to submit the form by this date, the DEA must be informed in due time, and a new arrangement must be made.<sup>719</sup>

### 1.12 Jurisdictional issues (if any)

The Subsoil Act specifically applies to operations on the Danish continental shelf.

It is not clear whether the Environmental Damage Compensation Act would apply to the Danish continental shelf and the EEZ.

### 1.13 Key points

The production of oil and gas from Denmark’s continental shelf is mature as is its legislation imposing liability for compensation for claims from offshore pollution incidents.

<sup>717</sup> Operator’s Declaration of Insurance. The form is set out in the Guide to Hydrocarbon Licences. Knock for knock indemnities are frequently used in the offshore oil and gas industry. An example of the basic form is an operator indemnifying a drilling contractor against claims concerning bodily injury and property damage to the operator’s employees and property, respectively, and pollution released for property owned by the operator. The indemnities are effective in the absence of the drilling contractor’s negligence or breach of contract or statutory duty. In return, the drilling contractor provides a reciprocal indemnity to the operator. See Chidi Egbochue, Reviewing ‘knock for knock’ indemnities following the Macondo Well blowout, 7(4) Construction Law International 7, 8-9 (4 January 2013).

<sup>718</sup> Danish Energy Agency, Licence xx/XX, Xxxx Group, Draft Model Joint Operating Agreement (February 2009).

<sup>719</sup> Guide to Hydrocarbon Licences, Operators Declaration of Insurance.



The specific legislation that applies to compensation for bodily injury, property damage and economic loss from pollution from offshore oil and gas operations is section 35 of the Subsoil Act, which imposes strict liability on a licensee(s) for “damages for any loss, damage or injury caused by activities carried on under the licence”.

There is no established compensation system for internal or cross-boundary incidents.

A licensee must have insurance to cover its liability for damages for bodily injury and property damage under section 35 of the Subsoil Act.

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# France

## 1.1 Introduction

France is in the early stages of exploration for offshore oil and gas. It has the potential for substantial production due to having an EEZ of 11 million square kilometres, the second largest in the world after the USA.<sup>720</sup> In addition, France has sedimentary basins with the potential for further oil and gas deposits. Offshore areas near New Caledonia may also contain oil and gas.

Some areas in which exploration is being carried out are not in the continental shelf off the French mainland but, rather, in France's overseas territories. The main areas in which exploration was focused in October 2014 were French Guiana and the Mozambique Canal. Exploration has also been carried out off the French coast in the English Channel, the Iroise Sea, the Gulf of Gascogne, the Gulf of Lion and the Corsican Canal.<sup>721</sup>

The first exploration licence in France was awarded in 1954. In 2008, about 130 square kilometres of licences were awarded. In January 2011, deep water exploratory well drilling permits were awarded for French Guiana. In addition, exclusive exploration licences have been awarded for areas off the West Indies and Indian Ocean Islands. Other licences are being considered off French Finistère, Saint-Pierre-et-Miquelon,<sup>722</sup> and Guadeloupe.<sup>723</sup> Potential offshore deposits have been found off French Guiana<sup>724</sup> and in the Mediterranean Sea (Rhône Maritime Licence).

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas activities in France and its continental shelf are subject to primary legislation in the form of statutes and codes, and secondary legislation in the form of decrees / regulations.

Liability for bodily injury, property damage and pure economic loss is governed by the French Civil Code.<sup>725</sup> Article L.155-3 of the Mining Code also imposes liability for damages caused by mining activities.

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<sup>720</sup> Jacques Beall, Alain Feretti, De la gestion préventive des risques environnementaux : la sécurité des plateformes pétrolières en mer, CESE (March 2012).

<sup>721</sup> The project team is indebted to Carole Mercier, Ministry of Ecology, Sustainable Development and Energy (MEDDE), Directorate-General for Energy and Climate, for kindly providing information for the summary for France ([Comments provided on 30 September 2014](#)).

<sup>722</sup> Saint-Pierre-et-Miquelon is an OCT of the EU.

<sup>723</sup> Sébastien Mabile, Recherche et exploitation d'hydrocarbures en mer: vers un tournant normatif, Droit de l'environnement, No. 212, May 2013.

<sup>724</sup> French Guiana and Guadeloupe are Outermost Regions of the EU.

<sup>725</sup> An unofficial English translation of the Civil Code by Georges Rouhette, with the assistance of Anne Berton, with amendments to 4 April 2006, is available from Legifrance at <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>. The website includes a link to an inventory and short analysis of amendments, in French only, to the Civil Code since 4 April 2006.

### 1.3 Rights to, and ownership of, offshore oil and gas

Law No. 68-1181 of 30 December 1968 relating to the exploration of the continental shelf and to the exploitation of its natural resources, as amended (Law No. 68-1181) provides that France has the right to explore the continental shelf off the French mainland and its overseas territories and to exploit natural resources on it (article 1).

Through the Extraplac programme, France is examining the potential extension of the continental shelf off the French mainland and its overseas territories (mainly French Southern and Antarctic territories – Crozet, Saint Paul and Amsterdam – and potentially French Polynesia). However, this programme is in large part to extend its potential exploration and production areas for metallic raw materials rather than hydrocarbons.<sup>726</sup>

### 1.4 Specific legislation for offshore oil and gas operations

The main laws controlling offshore oil and gas operations in France and its overseas territories are:

- The Mining Code;
- Law No. 68-1181;
- Decree No. 71-360 of 6 May 1971 for the application of Law No. 68-1181, which covers mining works and police power beyond 12 nautical miles;
- Decree No. 71-361 of 6 May 1971 introducing penal provisions for the application of Law No. 68-1181 and Decree No. 71-360;
- Decree No. 71-362 of 6 May 1971 on preliminary exploration licences (*autorisations de prospections préalables*) for mineral and fossil substances in the subsoil of the continental shelf;
- Decree No. 2006-648 of 2 June 2006 concerning mining titles and underground storage licences, as modified by Decree No. 2006-798 of 6 July 2006 concerning prospection, research and exploitation of mineral substances or fossil fuels contained in publicly owned deep ocean and metropolitan continental shelf; and
- Decree No. 2006-649 of 2 June 2006 on mining works, underground storage works and police power, as modified by Decree No. 2006-798 (which is applicable offshore within the 12 nautical miles limit).

The Environment Code (in particular articles L.218-32 and L.161-1). In some overseas territories, specific legislation applies instead of, or to supplement, the Mining Code and its accompanying legislation. For example, the legislation concerning mining exploration and exploitation in French Guiana is basically the same as the legislation that applies to the French mainland with some exceptions due to differences in the nature of the territories.

Two main approvals are required for the prospecting, exploration and exploitation of offshore oil and gas. They are:

- An exploration or research licence (*permis exclusif de recherches* or PER), which is granted for a maximum period of five years, with two optional renewals for up to five years each without going through the bidding process (with an automatic renewal for at least three years

<sup>726</sup> Jacques Beall, Alain Feretti, De la gestion préventive des risques environnementaux : la sécurité des plateformes pétrolières en mer, CESE, March 2012 ; see also France lays claim to more seafloor, The Connexion (11 October 2011) ; available at <http://www.connexionfrance.com/France-seafloor-continental-shelf-overseas-territoires-minerals-oil-gas-15118-view-article.html>

or the same length as the previous licensing period if the holder has complied with the obligations of the licence); and

- A mining concession agreement with optional renewals for up to 25 years.<sup>727</sup>

In addition, the holder of a licence or concession is under an obligation to request specific authorisation for all the works it must carry out. Authorisation is also required if there is a change in the licence/agreement (e.g. an extension of time for the licence/agreement).

### ➤ Mining Code

The Mining Code applies to the exploration and exploitation of minerals and fossil fuels located in the seabed or subsoil in inland territories, territorial waters (12 nautical miles from the coast), the exclusive economic zone, and the continental shelf.

In July 2012, the French Prime Minister announced that the Mining Code was to be reformed. The purpose of the reforms is to bring the Mining Code into compliance with environmental principles in the Charter for the Environment, to ensure that all mining activities are as safe as possible, and to modernise mining law. Areas of the Code that are being reformed include: modernisation of the mining model that would rely mostly on a procedure of granting licences by the State, taking into account protection of the environment, and workers and public safety.

The current system of exploration licence and concession agreement would be replaced by an exploration permit (*permis d'exploration*) and an exploitation permit (*permis d'exploitation*). More detailed account of environmental issues are being made to the procedures for granting the licence; classified installations for environmental protection (ICPE) regulations would be applied to onshore, but not offshore, mining operations. The Bill to reform the Mining Code includes a chapter on offshore oil and gas operations.

### ➤ Decree No. 2006-649

Article 29 of Decree No. 2006-649, which applies offshore within 12 nautical miles off the coast, allows an applicant to make a simultaneous application for all three necessary authorisations, that is: “*titre minier, autorisation d'ouverture de travaux de recherches ou d'exploitation, autorisation domaniale*”.

Decree No. 71-360 applies to mining operations beyond 12 nautical miles.

Article 29 of Decree No. 2006-649 requires every incident or accident that breaches article 79 (now articles L.161-1 and L.173-2) of the Mining Code to be reported to the *Préfet* and the Regional Directorate for the Environment, Development and Housing (*Direction régionale de l'environnement, de l'aménagement et du logement*). Article 79 also provides that every individual or collective accident that causes death or bodily injury should be reported to the above two competent authorities.

In addition, Article 32 of the above Decree provides that, in the event of such accidents, the Regional Director for the Environment should visit the site as soon as possible to investigate the causes. The Regional Director then submits a report to the *Préfet* and the public prosecutor. Article 30 of the Decree provides that a list of occupational accidents that result in a cessation of work of more than three days should be reported annually to the *Préfet*.

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<sup>727</sup> See Ruxandra Lazar and Raphaële Bouniol, Mining, oil and gas exploration and exploitation activities in France: applicable law and planned reform (2 April 2014); available at <http://www.naturalgaseurope.com/pdfs/Mining%20Oil%20and%20Gas%20Update%20version%20KS.PDF>

➤ **Law No. 68-1181**

Law No. 68-1181 specifies, among other things, that the exploration and exploitation of natural resources on the continental shelf of mainland France and its overseas territories may be carried out only pursuant to prior authorisation (article 2). The Law also sets out safety measures, customs and tax provisions, provisions concerning fees, and penal provisions.

➤ **General legislation**

General legislation that applies to offshore oil and gas operations includes:

- Decree No. 2006-648 of 2 June 2006 concerning mining rights and underground storage (*autorisation titre minier*) (Decree No. 2006-648);
- Decree No. 2006-649 of 2 June 2006 concerning mining works, underground storage and the regulations governing mining and underground storage (*autorisation d'ouverture de travaux*) (applicable within 12 nautical miles off the coast);
- Decree No. 80-470 of 18 June 1980 concerning temporary occupation of maritime public domain (*l'occupation temporaire du domaine public maritime*) (*autorisation domaniale*);
- Decree No. 2000-278 of 22 March 2000 completing general regulation concerning extractive industries established by Decree No. 80-331 of 7 May 1980;
- Decree No. 80-331 of 7 May 1980 establishing general regulations for extractive industries; and
- Decree No. 2011-2019 of 29 December 2011 reforming impact assessment studies of work projects.

## 1.5 Liability for bodily injury, property damage and economic loss

The Civil Code imposes liability for bodily injury, property damage and pure economic loss.

The Mining Code also provides (article L.155-3) that the explorer or operator or, if not, the holder of the mining licence is liable for damage caused by its activities. Such liability is not limited to the area for which the mining licence is granted or the time during which the licence is in effect. Furthermore, in case of a default by the holder, the State guarantees compensation for the damage (which is then subrogated to the rights of the victim against the responsible person). In addition, pursuant to article L.161-1 of the Mining Code, exploration and exploitation works must comply with specified constraints and obligations, aimed, among other things, at protecting the environment.

In addition, French law imposes liability for compensation for environmental damage to governmental authorities and non-governmental organisations (NGOs). In respect of pollution from the *Erika* oil spill, the *Paris Tribunal de grande instance* awarded compensation for environmental damage to “the local authorities to whom the law grants a specific competence in matter of environment, conferring upon them a special responsibility in the protection, management, and preservation of a territory”.<sup>728</sup> The court also awarded compensation to the *Ligue de protection des oiseaux*, an environmental NGO that

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<sup>728</sup> See Olivier Moréteau, France: French Tort Law in the Light of European Harmonization, *Journal of Civil Law Studies*, vol. 6(2), 759, 788-89 (quoting TGI Paris, 16 January 2008, paragraph 3.1.2.2.2.3).

had taken care of birds affected by the oil spill. One commentator remarked that compensation for such harm had been recognised before “but never with such high scale compensation”.<sup>729</sup>

### 1.5.1 Bodily injury and property damage

The main tort provisions in the Civil Code are articles 1382 and 1383. Article 1382 provides that “[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it”. Article 1383 provides that “[e]veryone is liable for the damage he causes not only by his intentional act, but also by his negligent conduct or by his imprudence”.

Damage, under French law, may be defined as an “injury suffered by a person in his body, in his pecuniary rights, or extra-pecuniary right, which opens to the victim a right to compensation if it appears to be for breach of contract or tort or quasi-delictual or an act which the law or the courts require a person to compensate”.<sup>730</sup>

### 1.5.2 Economic loss

Although the term “pure economic loss” is almost unknown in France, it is indisputable that French law provides liability for pure economic loss.<sup>731</sup> The following are examples of successful claims for pure economic loss, including non-pollution related cases.

- The owner of a café who lost some of his customers due to pollution of a nearby river was awarded lost income.<sup>732</sup>
- Fishermen, local authorities and businesses were awarded economic loss following an oil spill near Corsica.<sup>733</sup>
- A bus company was awarded lost profits due to negligent obstruction of roads in Marseilles.<sup>734</sup>
- A football club was awarded compensation following the death of a player.<sup>735</sup>

<sup>729</sup> See Olivier Moréteau, France: French Tort Law in the Light of European Harmonization, *Journal of Civil Law Studies*, vol. 6(2), 759, 789.

<sup>730</sup> Cornu G., *Vocabulaire juridique*, 8<sup>e</sup> édition mise à jour. Quadriga, 2007, p. 328.

<sup>731</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, *Netherlands Comparative Law Association, Electronic Journal of Comparative Law*, vol. 11(3), 38 (December 2007) (“France’s accent on reparation ... presents an appearance of maximum permissiveness toward pure economic loss as well as an appearance of maximum indifference to the strong policy arguments usually made elsewhere against its recovery [that is, that allowing claims for pure economic loss will open the floodgates]”); available at <http://www.ejcl.org/113/article113-9.pdf>; Walter van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law 236* (Hart Publishing, The Common Law of Europe Casebook Project, 2000) (“Under French tort law, the right to life, physical and moral integrity, specific and general rights of personality and privacy, as well as property rights are all fully protected against interference and damage of any kind, including pure economic loss and *perte d’une chance* (loss of a chance) irrespective of whether the damage is suffered by the primary victim or by secondary victims or dependants”).

<sup>732</sup> *Environmental Liability and Ecological Damage in European Law 487* (Monika Hinteregger, editor, Cambridge University Press, 2008)(citing *Corr. Turnhout*, 18 February 1992, unpublished, No. 498).

<sup>733</sup> Ronen Perry, *The Economic Bias in Tort Law*, (2008) *University of Illinois Law Review*, vol. 2008, 1619-20 (citing *Tribunal de grande instance (T.G.I. Bastia*, 8 December 1976, D.S. 1977, Jur. 427).

<sup>734</sup> *Ibid* (citing *Cour de cassation, Deuxième chambre civile [Cass. 2e civ.]* 28 April 1965, D.S. 1965, 777, Esmein).

<sup>735</sup> *Ibid* (citing *Cour d’appel [CA] Colmar*, 20 April 1955, JCP 1955 II 8741).

- Ship owners were awarded loss of income due to the negligent obstruction of access to seaports.<sup>736</sup>

In order to succeed in a claim for losses from pollution, a claimant must show that the pollution caused the loss. For example, a claim by the State for loss of taxes due to unsold fishing licences did not succeed due to the uncertainty of the loss.<sup>737</sup>

In summary, although there is no definition of “economic loss” under French law, French law provides that any damage may be compensated if it is direct and certain. Consequently, economic loss, including pure economic loss, may be compensated if the claimant proves that it is direct and certain.<sup>738</sup>

### 1.5.3 Liability for dangerous activities

There are no provisions in French law for liability from dangerous activities that are relevant to harm from offshore oil and gas activities.<sup>739</sup>

A 2009 parliamentary report discussed establishing a general regime for liability for dangerous activities, in particular, industrial catastrophes. Abnormally dangerous activities to be covered by the regime were to be defined as activities that create a risk of grave damage that can simultaneously affect a large amount of people. The burden of proof of this new regime could only be rebutted if the victim is at fault and not, as is usual, for *force majeure* or other exonerations.<sup>740</sup>

The regime had not been introduced by October 2014.

### 1.5.4 Standard of liability (strict / fault-based)

Liability under French tort law is fault-based (Civil Code, article 1382) or strict (Civil Code, article 1384).

In order for article 1382 to apply, the claimant must prove: (i) the fault of the person who is allegedly liable, (ii) damage suffered by the claimant, and (iii) a causal link between the two.

Article 1384 provides, in pertinent part, that ““One shall be liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody”. The *Cour de cassation* has concluded that liability under article 1384 is strict.<sup>741</sup> The injured party need only prove that the “thing” caused him/her an injury; there is no need to prove fault.

<sup>736</sup> Ibid (citing Cour d’appel [CA] Rouen, 17 December 1987, D.M.F. 1988, 488).

<sup>737</sup> Environmental Liability and Ecological Damage in European Law 487 (Monika Hinteregger, editor, Cambridge University Press, 2008) (citing Pol. Chimay, 14 August 1931, JJP, 1932, 378).

<sup>738</sup> Laurent Aynès. Quelques données juridiques. Conférence Cour de Cassation 2007 "Risques, assurances, responsabilités". La réparation du préjudice économique. 26 April 2007; available at [http://www.courdecassation.fr/IMG/File/pdf\\_2007/26-04-2007/26-04-2006\\_aynes.pdf](http://www.courdecassation.fr/IMG/File/pdf_2007/26-04-2007/26-04-2006_aynes.pdf)

<sup>739</sup> Provisions in the Civil Code that impose liability for dangerous activities are article 1385 (damage by animals); and article 1386 (damage by buildings).

<sup>740</sup> Sénat, Responsabilité civile : des évolutions nécessaires; available at <http://www.senat.fr/rap/r08-558/r08-55814.html>

<sup>741</sup> See Robert R. Taylor, No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability, (1987) *Loyola of Los Angeles International and Comparative Law Review*, vol. 9, 545.



### 1.5.5 Scope of liability (joint and several / several)

The identification of tortfeasors (wrongdoers) follows the “equivalence of conditions” of causation.<sup>742</sup> This means that French courts take account of every event without which the damage would not have occurred. In such cases, all members of a group that caused the damage may be liable.

The *Cour de cassation*, however, makes a distinction between “*responsabilité solidaire*” and “*responsabilité in solidum*”. The “*responsabilité solidaire*” applies to all cases where the liability results from the law or a Convention. The “*responsabilité in solidum*” refers to liability for all other cases.

In a 1971 ruling, the *Cour de cassation* held that when judges make a terminological mistake concerning the type of joint liability but the mistake does not have a prejudicial impact on the applicant, the decision may not be appealed to the *Cour de cassation*.<sup>743</sup>

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

French law does not establish a rebuttable presumption of liability in respect of bodily injury, property damage or economic loss.

The exceptions from liability under article 1382 of the Civil Code (see section 1.5.8 below) are, however, sometimes referred to as rebuttals of the notion of fault.<sup>744</sup>

### 1.5.7 Exceptions

There are no exceptions in the Civil Code to liability for bodily injury, property damage or economic loss.

### 1.5.8 Defences

There are several “defences” to liability under the Civil Code. The defendant must show at least one of them to be exonerated from liability.

One exception is *force majeure*, that is, an event that is unforeseeable, unavoidable and extraneous to the defendant. A second exception is the fault of the victim, or contributory negligence, which can result in shared liability or complete exoneration. The third cause is an act of a third party that breaks the chain of causation. Such an intervening act may result in complete exoneration of the defendant.<sup>745</sup>

The second and third causes would not seem to be applicable to a claim for harm from pollution from an offshore oil and gas incident; the first cause could, however, apply if, say, a hurricane resulted in pollution from an offshore installation.

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<sup>742</sup> Cristina Corgas-Bernard, La pluralité de responsables en droit français et dans d’autres ordres juridiques Nationaux; available at [http://grerca.univ-rennes1.fr/digitalAssets/267/267956\\_ccorgas.pdf](http://grerca.univ-rennes1.fr/digitalAssets/267/267956_ccorgas.pdf)

<sup>743</sup> Cass. Ch. Mixte, 26 March 1971; available at [http://grerca.univ-rennes1.fr/digitalAssets/267/267956\\_ccorgas.pdf](http://grerca.univ-rennes1.fr/digitalAssets/267/267956_ccorgas.pdf)

<sup>744</sup> See Robert R. Taylor, No Fault Takes a French Twist: A French Re-Examination of the Nature of Liability, (1987) *Loyola of Los Angeles International and Comparative Law Review*, vol. 9, 545, 551-52.

<sup>745</sup> [http://www.biicl.org/files/730\\_introduction\\_to\\_french\\_tort\\_law.pdf](http://www.biicl.org/files/730_introduction_to_french_tort_law.pdf)

### 1.5.9 Remedies

The remedy for a claim for bodily injury, property damage, or economic loss is compensatory damages. French law does not provide for punitive damages. Instead, tort law has the principle of full compensation (*réparation intégrale*), that is, to compensate a plaintiff for the harm suffered but not to award damages in excess of this amount (*tout le damage, mais rien que le dommage*).<sup>746</sup>

Claims for bodily injury, property damage and economic loss may be brought before civil courts or criminal courts if penal proceedings have also been brought against the liable party.

### 1.5.10 Limitations period(s)

Law No. 2008-561 of 17 June 2008 provides that the limitations period for bodily injury is 10 years from the date on which the initial damage was constituted or aggravated (Civil Code, article 2226).

The limitation period for property damage as well as for economic loss is five years from the date on which the holder of a right knew or should have known of the existence of the damage (Civil Code, article 2224).

### 1.5.11 Right to claim contribution from other responsible persons

French law provides that a defendant who has paid more compensatory damages than those for which it is liable has a right of contribution against other tortfeasors (*action récursoire*).<sup>747</sup>

## 1.6 Compensation system (claims within Target Country)

There is no compensation scheme for claims for bodily injury, property damage or economic loss under French law. If claims are not settled out-of-court (that is, directly with the operator and/or its insurer), they may be brought before the courts through regular court procedures. However, in case of a national disaster, *ad hoc* compensation procedures may be created. Such was the case following the AZF industrial accident.

The incident occurred on 21 September 2001 when an explosion in a warehouse that stored granular ammonium nitrate at the AZF chemical plant in Toulouse caused the deaths of 30 people (including 21 employees), injuries to over 4,500 people, and the destruction of 27,000 homes and other buildings. On 3 October 2001, the French Government established the National Disaster Victim Compensation Committee (*Comité National de Suivi pour la prise en charge des Victimes*), led by the Ministry of Justice. The Committee included the Grand Paroisse Group (owner of the chemical plant), governmental authorities, elected officials and disaster-victim associations. On 31 October 2001, an agreement, called the National Disaster Compensation Convention, was signed. The agreement established special procedures to provide compensation to victims. The claims were managed by a team of 220 experts (including medical experts), 25 claims managers, and 10 lawyers. Over EUR 2 billion was eventually paid out in compensation for claims for bodily injury and property damage; 16,000 people were compensated for bodily injuries, and 71,000 cases (33,000 of which were for residences, including private and local authority houses and flats) involved compensation for property damage. Other settled claims involved public, commercial buildings and vehicles.

<sup>746</sup> See Swiss Re, Punitive damages in Europe; concern, threat or non-issue? 3 (2012); available at [http://www.biztositasizsemlle.hu/files/201206/punitive\\_damage\\_in\\_europe.pdf](http://www.biztositasizsemlle.hu/files/201206/punitive_damage_in_europe.pdf)

<sup>747</sup> [http://grerca.univ-rennes1.fr/digitalAssets/267/267956\\_ccorgas.pdf](http://grerca.univ-rennes1.fr/digitalAssets/267/267956_ccorgas.pdf)

Notably, however, there were delays in a substantial part of the compensation payments as a result of their coverage by insurance.<sup>748</sup>

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in France for claims for bodily injury, property damage or economic loss concerning transboundary incidents from offshore oil and gas operations.

## 1.8 Competent authority

Prior to the modification of the Mining Code in 2011, the competent authority to award a hydrocarbons licence was the Minister responsible for mines (*Ministre en charge des mines*). The Mining Code now refers to the “competent authority”.

As of October 2014, competences were shared between the Minister responsible for mines and the Minister in charge of energy.

Other involved authorities also include, notably:<sup>749</sup>

- The Regional Authority (*Préfet*); and
- The Regional Directorate for the Environment, Development and Housing (*Direction régionale de l’environnement, de l’aménagement et du logement* - DREAL).

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

Article 79 of the Mining Code provides that research and exploitation operations of a mine must comply with safety and health of workers, safety and public health, and the essential characteristics of the surrounding environment (land and sea).

Article 3 of Decree No. 2006-648 (and Order – *Arrêté* – of 28 July 1995 setting the modalities for the establishment of mining titles applications) lists the documents that must be provided for a licence to be granted for the prospective area. They include the following:

- A technical dossier;
- The contemplated work programme;
- Cartographic documents;
- An impact notice (*notice d’impact*) indicating potential impacts of the proposed work on the environment and the conditions under which the proposed operation takes into account environmental concerns;
- An impact assessment study (required by article R. 122-3 of the French Environmental Code); and

<sup>748</sup> See BIO Intelligence Service, Study to explore the feasibility of creating a fund to cover environmental liability and losses occurring from industrial accidents (2013), 24-26 (Final Report prepared for European Commission DG Environment).

<sup>749</sup> See e.g. articles 18 and 21 of Decree No. 2006-648.

- A further impact assessment report if the perimeter is located in, or close to, a Natura 2000 area (article R. 414-23 of the French Environmental Code);
- A document showing compatibility of the project with public security;
- A security and health document with the copy of navigation licence for all ships that will be used;
- Measures for follow-up activities; and
- The financial capability (financial commitment) of the applicant.

In addition, once the mining title is granted, the title holder will nevertheless be required to obtain certain authorisations before mining works (e.g. drilling works) can start, pursuant to Decree No. 2006-649 (applicable within 12 nautical miles off the coast) and Decree No. 71-360 (applicable beyond 12 nautical miles).

France's highest administrative court (*Conseil d'Etat*) ruled, however, on 17 July 2013<sup>750</sup> that article 4(1) of Decree No. 2006-649 should be modified as it only required the opening of drilling works and research for hydrocarbons to be “declared” under French law, which meant the procedure was not subject to strict controls.

The *Conseil d'Etat* subsequently ruled that this last provision should be amended in order to make licensing for drilling operations and research for hydrocarbons subject to the “authorisation” procedure, which is much more restrictive. The revision was subsequently made by the adoption of Decree No. 2014-118 of 11 February 2014, which modified Decree No. 2006-649.<sup>751</sup> This change of procedure is part of the overall reform of the Mining Code.

## 1.10 Offences and sanctions

Law No. 68-1181 establishes specific offences for pollution from offshore installations and devices. It provides that a person who, during exploration or exploitation activities, discharges or releases any materials listed in article 3(1) of the International Convention for the Prevention of the Pollution of the Sea by Oil is liable for a fine or, in the event of a second or subsequent offence, imprisonment.

If an offence is committed on the express instructions of the owner or operator of the installation or device or “the person responsible on board such installations and devices for the conduct of the exploration or exploitation work”, that person is subject to imprisonment and a fine (article 28). If such a person has not given express instructions, he may be considered to be an accomplice (article 28). A discharge will, however, be considered not to have occurred if it “takes place in order to ensure the safety of the installation or device”, “to avoid serious damage to them or to save human life at sea”, or if a release “is the result of unforeseeable and unavoidable damage or leakage, if all necessary measures have been taken, after the damage occurred or the leak was discovered, to prevent or reduce the release” (article 28).

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<sup>750</sup> Legifrance, No. 353589 (17 July 2013); available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000027724404&astReql=1354799046&fastPos=1>

<sup>751</sup> See Les forages destinés à la recherche d'hydrocarbures désormais soumis à autorisation (13 February 2014); available at <http://www.actu-environnement.com/ae/news/forages-hydrocarbures-offshore-soumis-autorisation-20782.php4>

The products listed in the Convention for the Prevention of the Pollution of the Sea by Oil are “oil [and] any oily mixture the oil in which fouls the surface of the sea”. The word “oil” is defined as “crude oil, fuel oil, heavy diesel oil and lubricating oil, and ‘oily’ shall be construed accordingly” (Convention for the Prevention of the Pollution of the Sea by Oil, article 1(1)).

## **1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)**

As part of an application for a mining title (either an exploration or exploitation licence), the applicant is required to provide evidence of financial security (Decree No. 2006-648). Evidence of financial security must also be provided when an application for an extension of the scope of the licence is submitted (Decree No. 2006-648, article 51).

### **1.11.1 Persons required to have evidence of financial security**

The applicant for a hydrocarbons licence is the person required to have evidence of financial security.

### **1.11.2 Time at which evidence of financial security is required**

Evidence of financial security must be provided when an application for a hydrocarbons licence is made.

### **1.11.3 Scope (traditional damage / environmental damage / etc)**

Financial security appears to be required only for the works programme and not for compensation for bodily injury, property damage or economic loss.

### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

Article 5 of Decree No. 2006-648 requires applicants for hydrocarbons licences to have evidence of financial security by the following mechanisms:

- Balance sheets and accounts of the company;
- Off-balance sheet commitments, guarantees and sureties that the company awarded, presentation of pending litigation and financial risks that might result from it for the company; and
- Guarantees and securities to the benefit of the company.

If the applicant is unable to provide the above evidence, it may prove its financial capability with another appropriate document or the competent authority may require complementary information or documents.

### **1.11.5 Monetary limit(s)**

The monetary limits of financial security are not specified.

### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

Financial security is reviewed during the entire period of the licence.<sup>752</sup>

### 1.12 Jurisdictional issues (if any)

Act No. 68-1181 provides that:

“Subject to the provisions of the present Act and the texts adopted for its implementation, French laws and regulations shall, during the period when the activities [that is, exploration and exploitation of natural resources] are being conducted apply on board the installations and devices ... as if they were located in the territory of metropolitan France. They shall also apply, under the same conditions, to the installations and devices themselves” (article 5).

French law also applies to the safety zones of up to 500 metres from such installations and devices (article 5). The installations and devices are also subject to legislation concerning the safety of life at sea (article 10).

It is unclear whether the Civil Code applies to the French continental shelf and EEZ.

### 1.13 Key points

The exploitation of oil and gas from the French continental shelf and EEZ is still in its exploratory phase. Decree No. 71-360 (which applies to mining works beyond 12 nautical miles off the coast) is being updated as part of the transposition of the OSD. In addition, the Mining Code is being reformed to include, among other things, a separate chapter for offshore oil and gas operations.

As offshore operations enter their production stage, French law will have wide application due to France having the second largest EEZ in the world due to its overseas territories.

The Civil Code imposes liability for bodily injury, property damage and pure economic loss. It is not certain, however, that claims by fishermen, businesses in the tourist industry or other businesses that may be affected by pollution damage from offshore operations would be entitled to recover damages for their loss. Much will depend on whether the damage suffered by a claimant is considered to be direct. It is also unclear whether article 1382, as well as article 1384, of the Civil Code would apply. If only article 1382 applies, a claimant would need to establish that the person who caused the damage was at fault, which may be difficult.

Article L. 155-3 of the Mining Code also imposes liability for damage caused by oil and gas (and other mining) operations. If there is a default by the holder, the State guarantees compensation for the damage (which is then subrogated to the rights of the victim against the responsible person).

No procedure for handling claims for compensation has been established although the French Government showed its ability to set one up quickly following the explosion and fire at AZF, Toulouse.

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<sup>752</sup> Interview with Youssoupha Diop (*Direction Générale de Prévention des Risques – France*) (28 April 2014).

# Germany

## 1.1 Introduction

There are 44 oil fields with commercial production in Germany, most of which are located in Schleswig-Holstein and Lower Saxony. The largest oil field – and the only offshore field with commercial production – is the Mittelplate oil field, located in the tidal flats of the Wadden Sea (*Wattenmeer*).

Production from the Mittelplate oil field began in 1987; in 2007, it produced over 60 per cent of the 3.4 million tonnes of oil produced by Germany in that year.<sup>753</sup> In 2012, 1.4 million tonnes of oil were produced from the field, for a total of 25 million tonnes since production began. Wintershall and RWE Dea (operator) each hold a 50 per cent share in the field.<sup>754</sup>

Oil is produced from the Mittelplate field by means of an artificial drilling and production island, constructed seven kilometres off Friedrichskoog. The island is constructed of a rain and water proof concrete and steel basin protected by high sheet pile walls. It includes a closed waste disposal system to prevent contamination of the Wadden Sea mudflats and the North Sea during drilling operations.<sup>755</sup> The protection is essential because the Wadden Sea, which includes the National Parks of Lower Saxony and Schleswig-Holstein, and the Dutch Wadden Sea Conservation Area, is a World Heritage Site.<sup>756</sup> Eighteen wells, including some horizontal wells, extend from the island into the western, larger, part of the oil field to depths of 3,000 metres.<sup>757</sup>

Beginning in mid-2000, RWE Dea and Wintershall also began producing oil from the eastern parts of the Mittelplate oil field by means of a deep drilling rig on the island. Seven highly deviated extended-reach production wells, some of which are over nine kilometres in length, extend horizontally from onshore based facilities.

By 2007, 283 million tonnes, that is, 32 per cent of the recoverable oil in Germany had been produced. In January 2008, there were an estimated 37 million tonnes of proven and probable oil reserves, of which 63 per cent were in Schleswig-Holstein and 34 per cent were in Lower Saxony. This figure was

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<sup>753</sup> See Energy Resources 2009, chapter 8 Energy Resources in Germany 189-191; available at [http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe\\_2009\\_Teil3\\_en.pdf?blob=publicationFile&v=2](http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe_2009_Teil3_en.pdf?blob=publicationFile&v=2)

<sup>754</sup> See E&P in Brief, A Wintershall Fact Sheet; Oil Production in Germany (July 2012); available at [http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact\\_Sheet\\_F%C3%B6rderung\\_Deutschland\\_en.pdf](http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact_Sheet_F%C3%B6rderung_Deutschland_en.pdf); E&P in Brief, A Wintershall Fact Sheet; Wintershall in the North Sea (March 2014); available at [http://www.wintershall.com/uploads/user\\_pxbxconnector/pxbxrawdata/182/factsheet-nordsee-en.pdf](http://www.wintershall.com/uploads/user_pxbxconnector/pxbxrawdata/182/factsheet-nordsee-en.pdf)

<sup>755</sup> See E&P in Brief, A Wintershall Fact Sheet; Oil Production in Germany (July 2012); available at [http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact\\_Sheet\\_F%C3%B6rderung\\_Deutschland\\_en.pdf](http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact_Sheet_F%C3%B6rderung_Deutschland_en.pdf)

<sup>756</sup> See UNESCO, The Wadden Sea; available at <http://whc.unesco.org/en/list/1314>

<sup>757</sup> See E&P in Brief, A Wintershall Fact Sheet; Oil Production in Germany (July 2012); available at [http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact\\_Sheet\\_F%C3%B6rderung\\_Deutschland\\_en.pdf](http://www.wintershall.com/fileadmin/gfx/specials/schizophyllan/Fact_Sheet_F%C3%B6rderung_Deutschland_en.pdf); E&P in Brief, A Wintershall Fact Sheet; Wintershall and RWE Dea continue investment in the

Mittelplate offshore field (March 2014); available at [http://www.wintershall.com/uploads/user\\_pxbxconnector/pxbxrawdata/188/factsheet---lf--rderung-mittelplate-en.pdf](http://www.wintershall.com/uploads/user_pxbxconnector/pxbxrawdata/188/factsheet---lf--rderung-mittelplate-en.pdf)

a 10 per cent reduction from the previous year and reflected the continued decline of the previous six years.<sup>758</sup> In 2014, between 20 and 25 million tonnes of economically recoverable oil remains in the Mittelplate field.<sup>759</sup>

Additional offshore deposits of approximately 20 million tonnes of oil near the Mittelplate field are considered to exist plus further deposits off the coast of Cuxhaven in Lower Saxony. A consortium of RWE Dea (operator), Wintershall, and Gas de France Suez plans to drill four exploratory wells in the Schleswig-Holstein and Lower Saxony Wadden Sea tidal flats. As of October 2014, the consortium was preparing applications for exploratory wells.

Approximately 93 per cent of the natural gas produced in Germany is from onshore Lower Saxony.<sup>760</sup> The only offshore gas production platform in Germany is platform A6-A in the far northwest of the German North Sea, in the *Entenschnabel* (Duck's Bill) area. In 2012, the platform produced approximately 160 million cubic meters of natural gas.<sup>761</sup> The Federal Institute for Geosciences and Natural Resources has estimated that Germany has recoverable reserves of shale gas of between 0.7 and 2.3 trillion cubic metres.<sup>762</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore (and onshore) oil and gas in Germany is governed by a mining law, which also applies to minerals other than oil and gas. The law is accompanied by various ordinances.

The Civil Code, which was revised in 2002,<sup>763</sup> imposes liability for bodily injury, property damage and economic loss. Other legislation also imposes strict liability for bodily injury, property damage and economic loss.

## 1.3 Rights to, and ownership of, offshore oil and gas

The territorial sea of Germany in the North Sea and the Baltic Sea extends 12 nautical miles from the coastline; it is subject to the jurisdiction of the Länder that border it.

<sup>758758</sup> See Energy Resources 2009, chapter 8 Energy Resources in Germany 189-191; available at [http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe\\_2009\\_Teil3\\_en.pdf?\\_\\_blob=publicationFile&v=2](http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe_2009_Teil3_en.pdf?__blob=publicationFile&v=2)

<sup>759</sup> See E&P in Brief, A Wintershall Fact Sheet; Wintershall and RWE Dea continue investment in the Mittelplate offshore field (March 2014); available at [http://www.wintershall.com/uploads/user\\_pxbxconnector/pxbxrawdata/188/factsheet---lf--rderung-mittelplate-en.pdf](http://www.wintershall.com/uploads/user_pxbxconnector/pxbxrawdata/188/factsheet---lf--rderung-mittelplate-en.pdf)

<sup>760</sup> See Energy Resources 2009, chapter 8 Energy Resources in Germany 195; available at [http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe\\_2009\\_Teil3\\_en.pdf?\\_\\_blob=publicationFile&v=2](http://www.bgr.bund.de/EN/Themen/Energie/Downloads/Energierohstoffe_2009_Teil3_en.pdf?__blob=publicationFile&v=2)

<sup>761</sup> See E&P in Brief, A Wintershall Fact Sheet; Wintershall in the North Sea (March 2014); available at [http://www.wintershall.com/uploads/user\\_pxbxconnector/pxbxrawdata/182/factsheet-nordsee-en.pdf](http://www.wintershall.com/uploads/user_pxbxconnector/pxbxrawdata/182/factsheet-nordsee-en.pdf)

<sup>762</sup> See E&P in Brief, A Wintershall Fact Sheet; Natural gas reserves in Germany (March 2014); available at [http://www.wintershall.com/uploads/user\\_pxbxconnector/pxbxrawdata/116/factsheet-heimische-erdgasf--rderungen.pdf](http://www.wintershall.com/uploads/user_pxbxconnector/pxbxrawdata/116/factsheet-heimische-erdgasf--rderungen.pdf)

<sup>763</sup> An unofficial English translation of the German Civil Code, dated 2014, with amendments to 1 October 2013, by Neil Mussett of Langenscheidt Translation Service issued by the Federal Ministry of Justice in corporation with juris GmbH is available at [http://www.gesetze-im-internet.de/englisch\\_bgb/](http://www.gesetze-im-internet.de/englisch_bgb/)



The EEZ in the North Sea and the Baltic Sea is mainly identical with Germany's continental shelf. The extent of the EEZ in the Baltic Sea is smaller than that in the North Sea due to the maritime limits of neighbouring States. Thus, Germany's EEZ in the Baltic Sea extends less than 200 nautical miles from its coastline.<sup>764</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The main German legislation for offshore (and onshore) oil and gas operations (and operations concerning other minerals) is the Federal Mining Act of 1980, as amended (Mining Act).

The Mining Act is accompanied by various ordinances, including:

- the Ordinance on the Environmental Impact Assessment of Mining Projects of 1990, as amended; the Health and Safety Mining Ordinance of 1991;
- the Federal General Mining Ordinance of 1995, as amended; and
- the Continental Shelf Mining Ordinance of 21 March 1989, as consolidated in 29 July 2009.

Germany implements the open door licensing system; it does not hold formal licensing rounds.

The following are the categories of mining authorisations for oil and gas (and other minerals):

- an exploration licence (sometimes called an exploration concession) (*Aufsuchungserlaubnis*); and
- a production licence (*Gewinnungsbewilligung*) (Mining Act, section 8) or a mining proprietorship (*Bergwerkseigentum*) (Mining Act, section 9).

A mining proprietorship is similar to a production licence, with the inclusion of additional rights.<sup>765</sup>

A mining permit (*Betriebsplanzulassung*), which authorises the actual exploration and production operations, may also be required.<sup>766</sup>

The exploration licence is granted for a period of up to five years with optional extensions for a further three years. The licence grants the operator the right, if the operator meets technical and financial capability requirements, exclusively to carry out exploration activities in the area covered by the licence. Actual exploration activities may be carried out only on the basis of authorised operation plans (Mining Act, sections 51 *et seq.*)<sup>767</sup>

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<sup>764</sup> See Bundesamt für Seeschifffahrt und Hydrographie, Exclusive Economic Zone; available at [http://www.bsh.de/en/Marine\\_uses/Industry/Wind\\_farms/EEZ.jsp](http://www.bsh.de/en/Marine_uses/Industry/Wind_farms/EEZ.jsp)

<sup>765</sup> See Legislation, Licensing and Fiscal regime for oil and gas exploration and production in Germany, Geozentrum Hannover; available from LBEG's website at [http://www.lbeg.niedersachsen.de/download/1235/Legislation\\_Licensing\\_and\\_Fiscal\\_regime\\_for\\_oil\\_and\\_gas\\_exploration\\_and\\_production\\_in\\_Germany.pdf](http://www.lbeg.niedersachsen.de/download/1235/Legislation_Licensing_and_Fiscal_regime_for_oil_and_gas_exploration_and_production_in_Germany.pdf)

<sup>766</sup> See Kai Pritzsche and Sebastian Pooschke, Germany Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/germany>

<sup>767</sup> See LBEG, Exploration licence; available at [http://www.lbeg.niedersachsen.de/bergbau/mining\\_authorizations/exploration\\_licence/exploration-licence-922.html](http://www.lbeg.niedersachsen.de/bergbau/mining_authorizations/exploration_licence/exploration-licence-922.html)

The production licence grants the exclusive right to explore and produce oil and gas (and other minerals) within a specified area for a maximum period of 50 years, and to acquire the ownership of the minerals, including the right to construct and operate any necessary facilities. The length of the licence is determined by factors such as the amount of oil or gas reserves in the field, technical conditions, and economic calculations.<sup>768</sup> A simplified procedure applies if the applicant has an exploration concession.

The mining proprietorship confers the same rights as a production licence, also for a maximum period of 50 years; it may only be granted to the current holder of a production licence, which then terminates (Mining Act, section 13(1)).

The grant of a production licence or mining proprietorship does not entitle the holder to carry out exploration and production operations. As with the exploration licence, the operator must meet technical and financial capability requirements in order exclusively to carry out exploration and production operations in the licenced area. Such operations may be carried out only on the basis of authorised operations plans (Mining Act, sections 51 *et seq*).

The mining permit authorises the operator (who may, or may not, be the holder of the mining authorisation) to carry out the exploration and production of oil and gas (or other minerals). The permit sets out the main operation plan(s) and, in some cases, other operating plans.<sup>769</sup>

There are four types of operation plans. They are:

- the skeleton operations plan (*Rahmenbetriebsplan*);
- the main operations plan, valid for two-year terms (*Hauptbetriebsplan*);
- the special operations plan (*Sonderbetriebsplan*); and
- the mine closure operations plan (*Abschlussbetriebsplan*).<sup>770</sup>

If operations are carried out offshore, the Federal Maritime and Hydrographic Agency (*Bundesamt für Seeschifffahrt und Hydrographie*) (BSH) reviews the operations for approval after a licence has been granted.

The Mining Act also includes provisions that establish liability for damage that results from carrying out mining operations.<sup>771</sup>

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<sup>768</sup> See Legislation, Licensing and Fiscal regime for oil and gas exploration and production in Germany, Geozentrum Hannover; available from LBEG's website at [http://www.lbeg.niedersachsen.de/download/1235/Legislation\\_Licensing\\_and\\_Fiscal\\_regime\\_for\\_oil\\_and\\_gas\\_exploration\\_and\\_production\\_in\\_Germany.pdf](http://www.lbeg.niedersachsen.de/download/1235/Legislation_Licensing_and_Fiscal_regime_for_oil_and_gas_exploration_and_production_in_Germany.pdf)

<sup>769</sup> See Kai Pritzsche and Sebastian Pooschke, Germany Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/germany>

<sup>770</sup> See Mining, Report for Germany; available at [http://www.un.org/esa/dsd/dsd\\_aofw\\_ni/ni\\_pdfs/NationalReports/germany/mining.pdf](http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/germany/mining.pdf)

<sup>771</sup> Comment by Jacob Stübiger, Bundesministerium für Wirtschaft und Energie (30 September 2014).

## 1.5 Liability for bodily injury, property damage and economic loss

German law imposes liability for bodily injury, property damage and economic loss. The Environmental Liability Act and the Water Resources Act are discussed below followed by a discussion of the Civil Code provisions.

Unlike many European jurisdictions with a Civil Code, Germany established strict liability, as an exception to fault-based liability in specific statutes, some of which have maximum limits of liability. The 2002 amendments to the Civil Code harmonised the maximum limits for harm to a single person, with the limits in the statutes continuing to apply in cases of harm to more than one person.<sup>772</sup> In addition, the 2002 amendments incorporated some of the statutes into the Civil Code.

The person who is liable for compensation for bodily injury, property damage and economic loss is the licensee, who is usually also the operator. Sub-contractors are not liable under a licence for offshore oil and gas operations. JOAs and other contractual documents may transfer liability between a licensee and its contractors.

Article 58(1) of the Mining Act provides that the following persons are responsible for compliance with it:

- “1 – the operator, in the case of corporate bodies and commercial partnerships the persons authorized to represent such bodies and partnerships under the law, the company articles or the partnership agreement, and
- 2 – the persons appointed for managing or supervising the operations of the enterprise or part of the enterprise within the scope or their duties and authority”.

### ➤ Environmental Liability Act

Germany enacted the Environmental Liability Act 1991 to facilitate claims by persons who suffered environmental damage and to fill gaps in the then-existing liability system.<sup>773</sup> The Act imposes strict, joint and several liability for bodily injury and property damage on operators of specified commercial and industrial installations. The Act includes a rebuttable presumption which provides that the operator of a specified installation is liable unless the operator proves that only normal operations at the installation were carried out at the time of the damage. There is a defence of *force majeure*. There is also a limit of liability of just over EUR 81 million per incident. Section 18(1) of the Act specifically states that the Act does not bar claims under existing legislation.

The Environmental Liability Act 1991 provides for mandatory financial security for operators of installations considered to be particularly hazardous. This provision has not, however, been brought into force due to insurers’ unwillingness to provide the level of financial security required by the Act.

Annex I of the Act lists over 100 installations, to which liability under the Act applies. The list includes, among other things, installations permitted under the Federal Emission Control Act, including installations in the mining and energy industries, oil industries, and facilities that store dangerous

<sup>772</sup> See Ulrich Magnus, The Reform of German Tort Law, InDret 2/2003 6 (Working Paper No. 127, April 2003); available at <http://www.raco.cat/index.php/InDret/article/download/82541/107387>

<sup>773</sup> See Jochen Taupitz, The German Environmental Liability Law of 1990: Continuing problems and the impact of European Regulation, (1993) Syracuse Journal of International Law & Commerce, vol. 19, 13, 15.

substances. Offshore oil and gas installations may thus be subject to strict liability for bodily injury and property damage under the Act in the event of an offshore oil and gas incident.<sup>774</sup>

### ➤ **Water Resources Act**

Article 22 of the Water Resources Act imposes strict liability on a person who causes “damage to another” by the introduction into water of material that alters the physical, chemical or biological quality of the water. In order to bring a claim, the claimant must be directly affected by the damage.

A commentator considers that persons in the fisheries industry should be able to claim lost profits under the Water Resources Act but that persons in the tourism industry would probably not succeed in a claim because their losses would be regarded as indirect damage.<sup>775</sup>

#### **1.5.1 Bodily injury and property damage**

The basic tort law provision in the Civil Code is section 823, which provides that:

- “(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.
- (2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault”.

The rights set out in subsection 1 are known as “absolute rights”, that is, rights that are protected against harm by any person. A person who damages an absolute right is liable for compensation to the injured person. In order to have legal standing under section 823(1) of the Civil Code, a claimant would have to show that it has suffered damage to an absolute right.

#### **1.5.2 Economic loss**

The absolute rights set out in section 823(1) of the Civil Code do not include pure economic loss. One commentator has stated that pure economic loss is, therefore, recoverable only under sections 823(2) and 826 of the Civil Code.<sup>776</sup>

Section 823(2) is set out in section 1.5.1 above. A breach of the Mining Act could, potentially, satisfy the requirement for compensation for lost income from an offshore oil and gas incident provided, of course, that the operator or some other person breached the Mining Act. The success of a claim would also depend on a court concluding that the Mining Act is “intended to protect another person”.

Section 826 of the Civil Code provides that “A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for

<sup>774</sup> See Country profile, Germany 7; available at <http://www.asse.org/practicespecialties/international/docs/Germany.pdf>

<sup>775</sup> See Environmental Liability and Ecological Damage in European Law 525 (Cambridge University Press, Monika Hinteregger, editor, 2008).

<sup>776</sup> Christian von Bar, Principles of European Law; Study Group on a European Civil Code; Non-contractual liability arising out of damage caused to another 233 (Sellier, 2009). Professor von Bar also referred to article 824, which imposes liability for slander and, thus, is not relevant to a claim for harm from an offshore oil and gas incident.

the damage”. Section 826 has been interpreted by German courts to include the situation where a tortfeasor “was conscious of the possibility that harm might occur and acquiesced in its doing so”.<sup>777</sup> A claim for harm from pollution from an offshore oil and gas incident would satisfy these criteria only if the act was grossly negligent.

### 1.5.3 Liability for dangerous activities

The Civil Code imposes strict liability for certain acts, none of which would apply to a claim for compensation for harm caused by an offshore oil and gas incident.<sup>778</sup>

One commentator has stated that a person in the fisheries industry would not be able to claim unless, according to an exception, its business was an “established and practised commercial operation” and the pollution was directly intended to interfere with it. The same commentator considers that a person in the tourism industry would not be entitled to compensation because the damage would be indirect.<sup>779</sup> These requirements, thus, mean that many claims for pure economic loss would not succeed.

### 1.5.4 Standard of liability (strict / fault-based)

The standard of liability under the Civil Code is negligence or fault. Strict liability may be imposed by other specific laws (see section 1.5.3 above).

### 1.5.5 Scope of liability (joint and several / several)

Joint and several liability applies to claims for compensation for bodily injury and property damage.

Section 830 of the Civil Code provides that:

- “(1) If more than one person has caused damage by a jointly committed tort, then each of them is responsible for the damage. The same applies if it cannot be established which of several persons involved caused the damage by his act.
- (2) Instigators and accessories are equivalent to joint tortfeasors”.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

A rebuttable presumption shifts the burden to the tortfeasor in product liability claims. In such a case, the tortfeasor must show that it did not breach its duty of care.<sup>780</sup> This provision does not seem likely to apply to harm from an offshore oil and gas incident.

As indicated in section 1.5 above, the Environmental Liability Act includes a rebuttable presumption.

<sup>777</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 60-61 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>778</sup> Section 833 of the Civil Code imposes strict liability for harm caused by an animal in specific circumstances. Section 836 imposes strict liability for bodily injury from the collapse of a building.

<sup>779</sup> See Environmental Liability and Ecological Damage in European Law 525 (Cambridge University Press, Monika Hinteregger, editor, 2008).

<sup>780</sup> See Richard Best, Liability for Asbestos Related Disease in England and Germany, German Law Journal, vol. 4(7), 662, 677 (2003); available at [http://www.germanlawjournal.com/pdfs/Vol04No07/PDF\\_Vol\\_04\\_No\\_07\\_661-683\\_Private\\_Best.pdf](http://www.germanlawjournal.com/pdfs/Vol04No07/PDF_Vol_04_No_07_661-683_Private_Best.pdf)

### 1.5.7 Exceptions

There are no relevant exceptions in the Civil Code to tort liability for harm from an offshore oil and gas incident.

### 1.5.8 Defences

Section 254 of the Civil Code reduces the compensation due to an injured person if the person was contributorily negligent. This provision seems unlikely to apply to harm from an offshore oil and gas incident.

### 1.5.9 Remedies

The general remedy for torts is compensatory damages. Section 842 of the Civil Code provides that “Liability to compensate for damage resulting from a tort directed against the person extends to the disadvantages the tort produces for the livelihood or advancement of the injured person”.

Specific provisions apply in the case of death. These include compensation to a third party who pays for the victim’s funeral or if the deceased person maintained another person (Civil Code, section 844).

Although German law does not recognise punitive damages, an award of compensatory damages may include, depending on the facts of the case, additional damages in the form of a punitive element designed to punish the wrongdoer and to prevent a recurrence of the damage. The German Supreme Court has emphasised, however, that this uplift does not equate to the type of punitive damages that are awarded in the US.<sup>781</sup>

### 1.5.10 Limitations period(s)

The limitations period for claims for torts under the Civil Code is three years (Civil Code, section 195). There is a long stop of 30 years from the date on which the act, breach of duty or other event that caused the loss occurred for claims for bodily injury (Civil Code, section 199(2)). The long stop for other claims is 10 years (Civil Code, section 199(3)(1)).

### 1.5.11 Right to claim contribution from other responsible persons

A tortfeasor who has paid a claim for compensation may claim against other tortfeasors for their share of the compensation.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Germany for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Germany for claims for harm from transboundary offshore oil and gas operations.

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<sup>781</sup> See Swiss Re, Punitive Damages in Europe: concern, threat or non-issue? 4 (2012) (referring to BGH NJW 1992, 3069); available at [http://www.biztositasizemle.hu/files/201206/punitive\\_damage\\_in\\_europe.pdf](http://www.biztositasizemle.hu/files/201206/punitive_damage_in_europe.pdf)

## 1.8 Competent authority

Implementation and enforcement of the licensing regime for oil and gas (and other minerals) is decentralised to the Länder in Germany. The competent authority for offshore oil and gas licensing is the State Authority for Mining, Energy and Geology in the Land or Länder in which the oil or gas field is located.

The competent authority for Lower Saxony and Schleswig-Holstein, including the German continental shelf in the North Sea and part of the German continental shelf in the Baltic Sea (plus Niedersachsen and Bremen), is the State Authority for Mining, Energy and Geology (*Landesamt für Bergbau, Energie und Geologie*) (LBEG) in Hanover.<sup>782</sup> The LBEG is also the Geological Survey of Niedersachsen.<sup>783</sup>

In addition, the national park authorities for Lower Saxony and Schleswig-Holstein are involved in decisions concerning the Mittelplate oil field due to its location in the Wadden Sea National Parks of those Länder.<sup>784</sup>

The BHS must approve offshore facilities in respect of maritime spatial planning.<sup>785</sup>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The Ordinance on the Environmental Impact Assessment for Mining Projects of 1990 lists mining projects for which an environmental impact statement must be prepared.<sup>786</sup>

Article 55(3) of the Mining Act states that approval of an operation schedule may be granted only if “the necessary precaution is taken against hazards for lives and health of the personnel employed and third parties present on the enterprise’s premises and for protecting physical assets, in particular by applying measures in keeping with the generally acknowledged rules of safety technology ...”. Article 55(8) further requires that: “the necessary precaution has been taken to assure the elimination of any risk to the safety of operations legitimately underway under article 50 and 51”.

Still further, article 55 provides, in respect of operations to be carried out on the continental shelf or coastal waters, that:

“(10) – neither the operation nor the visual or acoustic perception of shipping installations and navigation guides is impaired;

<sup>782</sup> See Legislation, Licensing and Fiscal regime for oil and gas exploration and production in Germany, Geozentrum Hannover; available from LBEG’s website at [http://www.lbeg.niedersachsen.de/download/1235/Legislation\\_Licensing\\_and\\_Fiscal\\_regime\\_for\\_oil\\_and\\_gas\\_exploration\\_and\\_production\\_in\\_Germany.pdf](http://www.lbeg.niedersachsen.de/download/1235/Legislation_Licensing_and_Fiscal_regime_for_oil_and_gas_exploration_and_production_in_Germany.pdf)

<sup>783</sup> See LBEG, State Authority for Mining, Energy and Geology; available at [http://www.lbeg.niedersachsen.de/download/1070/The\\_LBEG\\_presents\\_itself.pdf](http://www.lbeg.niedersachsen.de/download/1070/The_LBEG_presents_itself.pdf)

<sup>784</sup> See RWE, Additional crude oil reserves assumed to exist in northern Germany (2 November 2011); available at <http://www.rwe.com/web/cms/en/113648/rwe/press-news/press-release/?pmid=4007050>

<sup>785</sup> See presentation by Bettina Käppeler, Maritime Spatial Planning in the German EEZ; available at <http://www.imp-med.eu/En/image.php?id=241>

<sup>786</sup> Mining, Report for Germany s A.1.3; available at [http://www.un.org/esa/dsd/dsd\\_aofw\\_ni/ni\\_pdfs/NationalReports/germany/mining.pdf](http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/germany/mining.pdf)

- (11) – there is no unreasonable impairment in the use of shipping lanes and air transport, of shipping, fishing and the conservation of living sea flora and fauna,
- (12) – laying, maintaining and operating underwater cables and pipelines as well as oceanographic or other scientific research is not impeded to a larger extent than seen unavoidable under the existing circumstances, and
- (13) – it is ensured that the detrimental effects on the sea are restricted to the lowest possible degree”.

## 1.10 Offences and sanctions

Section 324 of the German Criminal Code<sup>787</sup> provides as follows:

- “(1) Whosoever unlawfully pollutes a body of water or otherwise alters its qualities in a negative manner shall be liable to imprisonment not exceeding five years or a fine.
- (2) The attempt shall be punishable.
- (3) If the offender acts negligently the penalty shall be imprisonment not exceeding three years or a fine”.

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

An applicant for a licence to explore or exploit oil and gas must provide information concerning its financial and technical capability.<sup>788</sup>

Appendix 1 to Decree of the Ministry of Economics, Technology and Transport of Lower Saxony from 29th January 1993 (Nds. MBl. S. 192 or Ministerial Gazette for Lower Saxony p. 192)<sup>789</sup> sets out the following financial competence requirements for an exploration licence and a production licence:

“Financial competence can generally be proven by providing details on the extent to which expenditure is financed by equity capital, loans or public authority grants with the explanation that the resources are also available for the restoration of the surface. The details must be credible. Likewise, financial statements, bank statements, loan approvals and similar statements can be included (§ 11 No. 7)”.

The criteria for financial capability for the exploration licence and the production licence are identical.

The Mining Act and the Federal General Mining Ordinance provide for potential financial security to cover the work programme.<sup>790</sup> The competent authority may thus include a requirement for financial

<sup>787</sup> An unofficial English translation of the Criminal Code by Michael Bohlander, dated 2013, with amendments to 2 October 2009, is available at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html)

<sup>788</sup> See Legislation, Licensing and Fiscal regime for oil and gas exploration and production in Germany, Geozentrum Hannover; available from LBEG’s website at [http://www.lbeg.niedersachsen.de/download/1235/Legislation\\_Licensing\\_and\\_Fiscal\\_regime\\_for\\_oil\\_and\\_gas\\_exploration\\_and\\_production\\_in\\_Germany.pdf](http://www.lbeg.niedersachsen.de/download/1235/Legislation_Licensing_and_Fiscal_regime_for_oil_and_gas_exploration_and_production_in_Germany.pdf)

<sup>789</sup> An unofficial English translation of Appendix 1 is available from LBEG’s website at [http://www.lbeg.niedersachsen.de/bergbau/mining\\_authorizations/exploration\\_licence/exploration-licence-922.html](http://www.lbeg.niedersachsen.de/bergbau/mining_authorizations/exploration_licence/exploration-licence-922.html)



security in the operating plan, which is set out in the mining permit. The requirement for financial security may include one or more aspects of the works programme.<sup>791</sup>

Many more details of the financial and technical capabilities of the company that is proposing to carry out activities concerning oil and gas (or other minerals) are required when the operating plan is submitted than when the application for a licence is made. Any deviations from an approved operations schedule must be notified to the LBEG.

#### **1.11.1 Persons required to have evidence of financial security**

The operator is required to have evidence of financial security.

#### **1.11.2 Time at which evidence of financial security is required**

Financial security is required when an operations schedule is approved. Section 56(2) of the Mining Act states that:

“the competent agency may impose the deposit of a surety as a condition for pronouncing the approval where such condition is deemed required for assuring compliance with the conditions specified in .... The competent agency may refuse to accept as a security deposit the evidence submitted by the operator of having signed an insurance with insurance company admitted in the domain covered by this law only in the event that the insured sum is not sufficient cover. The release of a security deposit shall be decided upon by the competent agency”.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

The main financial security requirement is for obligations under an operating plan / work programme. Insurance may be required for claims for compensation for bodily injury, property damage and economic loss.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The financial security required for a mining permit may include a bank guarantee, an assignment, a pledge, a savings account, or insurance.<sup>792</sup> As a practical matter, most companies provide guarantees. The LBEG would also consider corporate net worth, captives and combinations of different types of securities but applicants, which are mainly large companies, had not, as of October 2014, submitted these types of financial security mechanisms to it. Insurance may be required.

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<sup>790</sup> See Mining, Report for Germany s A.1.3; available at [http://www.un.org/esa/dsd/dsd\\_aofw\\_ni/ni\\_pdfs/NationalReports/germany/mining.pdf](http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/germany/mining.pdf)

<sup>791</sup> See Kai Pritzsche and Sebastian Pooschke, Germany Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/germany>

<sup>792</sup> See Kai Pritzsche and Sebastian Pooschke, Germany Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/germany>

### 1.11.5 Monetary limit(s)

The Mining Act does not set out monetary limits for financial security. The amount of financial security for the work programme (operations plan) and obligations under a licence is commensurate with the programme and obligations.

### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

The LBEG carries out reviews of financial security on a case-by-case basis which is, as a general rule, linked to licensing periods. If the LBEG considers that a project involves an increased risk, it reviews the financial capabilities of the companies involved in it on a regular basis.

## 1.12 Jurisdictional issues (if any)

The Order on the jurisdiction regarding the prosecution and punishment of offences concerning the continental shelf of 14 January 1982, as amended, extends jurisdiction for offences to the continental shelf.

The Civil Code would also need to apply to the continental shelf and the EEZ.

## 1.13 Key points

Germany has produced offshore oil and gas for many years, with its largest oil field being the offshore Mittelplate field, located in the tidal flats of the Wadden Sea. Exploration for offshore oil is continuing. Natural gas is produced from an offshore platform in the German North Sea.

The legislation for oil and gas licensing (onshore and offshore) is a mining law that also applies to other minerals.

Liability for compensation for bodily injury and property damage is imposed by the Civil Code and also by the Environmental Liability Act and the Water Resources Act. Liability under the Civil Code is fault-based; liability under the Environmental Liability Act and the Water Resources Act is strict.

The Civil Code does not specifically impose liability for pure economic loss. One commentator has stated that a person in the fisheries industry would not succeed in a claim unless, according to an exception, its business was an “established and practised commercial operation” and the pollution was directly intended to interfere with it. The same commentator considered that a person in the tourism industry would not be entitled to compensation because the damage would be considered to be indirect. This requirement, thus, means that many claims for pure economic loss would not succeed.

Germany requires applicants for offshore oil and gas operations to have evidence of financial security. The main financial security requirements are for the work programme, with the competent authority reviewing financial capability in closer detail when it reviews the operating plan for works to be carried out under the mining permit. The financial security instrument for compensation for bodily injury, property damage and economic loss in the event of a pollution incident, if required, is insurance.

# Greece

## 1.1 Introduction

The first commercial offshore oil deposits in Greece were discovered in the 1970s, following exploration in the Prinos area of the Aegean Sea near Thassos Island, south of mainland Greece. The discoveries led to the creation of the Public Petroleum Corporation, which subsequently became Hellenic Petroleum SA. Commercial production was short lived. Production at the offshore Prinos oil field in the Gulf of Kavala began in 1981 and ceased in 1998, for a total of 110 million barrels. Production at the offshore south Kavala gas field began in 1981 and ceased in 1993, for a total of approximately 615 million cubic metres.

In 1996, Greece launched the first international licensing round, leading to the grant of two exploration licences for offshore areas in Katakolo in north-western Peloponnese in northern Greece, and the western Patraikos Gulf (as well as onshore areas). By 2000, however, exploration had virtually ceased.

By 2010, a total of three areas were producing oil and gas; the Prinos and north Prinos fields, the Epanomi gas field, which had been discovered in 1988, and the Katakolon oil field, which had been discovered in 1988. Total reserves of oil were less than two million tonnes.<sup>793</sup>

A major deterrent to the exploration of offshore oil and gas in Greece is the long-standing dispute between Greece and Turkey over the limits of their maritime borders in the Aegean Sea, a dispute that has nearly resulted in war between the two countries on several occasions.<sup>794</sup>

As a result of the continuing dispute concerning the Aegean Sea,<sup>795</sup> Greece launched an open bid round in March 2012 for onshore and offshore areas in western Greece,<sup>796</sup> the Gulf of Patraikos (west) offshore area, the Katakolon onshore and offshore area, and the Ioannina onshore area.<sup>797</sup>

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<sup>793</sup> See, e.g. A. Mavromatidis, V. C. Kelessidis and D. G. Monopolis, A review of recent hydrocarbon exploration in Greece and its potential (Paper presented at the 1st International Conference on Advances in Mineral Resources Management and Environmental Geotechnology, 7-9 June 2004, Chania - Crete – Greece); available at <http://www.mred.tuc.gr/home/kelessidis/publications/16.pdf>; S. Xenopoulos, N. Roussos, Status of existing and possible new production in Greece (presentation); available at [http://www.elliny.gr/includes/event/Xenopoulos\\_Roussos\\_AAPG\\_presentation.pdf](http://www.elliny.gr/includes/event/Xenopoulos_Roussos_AAPG_presentation.pdf)

<sup>794</sup> See Hellenic Republic, Ministry of Foreign Affairs Greek-Turkish dispute over the delimitation of the continental shelf (last update 17 April 2013); available at <http://www.mfa.gr/en/issues-of-greek-turkish-relations/relevant-documents/delimitation-of-the-continental-shelf.html>

<sup>795</sup> See Didier Ortolland, The Greco-Turkish dispute over the Aegean Sea: a possible solution?, La revue géopolitique; available at <http://www.diploweb.com/The-Greco-Turkish-dispute-over-the.html>; see also U.S> Energy Information Administration, Turkey (17 April 2014); available at <http://www.eia.gov/countries/cab.cfm?fips=tu>

<sup>796</sup> See Deloitte, Greece launches open-door invitations for exploration and exploitation of hydrocarbons, 2012; available at [http://www.psg.deloitte.com/NewsLicensingRounds\\_GR\\_120414.asp](http://www.psg.deloitte.com/NewsLicensingRounds_GR_120414.asp)

<sup>797</sup> See Ministry of Environment, Energy and Climate Change, Directorate of Petroleum Policy, Further Information and Guidance on the Open Door Invitation (Government Gazette No 76, Part B, 27.01.2012) for granting and using authorizations for the exploration and exploitation of hydrocarbons (Further Information and Guidance on the Open Door Invitation); available at <http://www.ypeka.gr/LinkClick.aspx?fileticket=65LqDXMex/A%3D>

In 2013, a consortium of Petroceltic International plc, Hellenic Petroleum SA (operator), and Edison International SpA was awarded an exploration licence for a three-year period, with two optional extensions for a maximum of eight years for the oil-prospective block in the Gulf of Patraikos. The area is 1,892 square kilometres, with water depths between 100 and 300 metres.<sup>798</sup>

On 14 May 2014, the Minister of Environment, Energy and Climate Change signed a 30-year exploration licence, subject to ratification by the Greek Parliament, with Energean (operator) and Trajan Oil for the 545 square kilometre Katakolon block, which is considered to hold reserves of five million barrels of oil. If production ensues, it would include “extended reach drilling”, that is, drilling from an onshore location.<sup>799</sup>

The Ministry of Environment, Energy and Climate Change announced that a second offshore licensing round, that includes 20 blocks in the Ionian Sea off western Greece, would be launched following publication of the Notice of the Call for Tenders in the Official Journal. The launch, which occurred in October 2014, covers approximately 200,000 square kilometres.<sup>800</sup>

Current offshore production of oil and gas is small. As of October 2014, Greece's sole offshore oil operation is off the northern island of Thassos, where Energean produces about 2,000 barrels of crude oil a day.<sup>801</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The prospecting, exploration and production of offshore (and onshore) oil and gas in Greece is governed by a hydrocarbons law.

The Civil Code imposes liability for bodily injury, property damage and economic loss. Environmental legislation also imposes liability for bodily injury and property damage.

## 1.3 Rights to, and ownership of, offshore oil and gas

Article 2(1) of Law No. 2289/95 (Prospecting, Exploration and Exploitation of Hydrocarbons), published in the Government Gazette No. 27; Part One, 8 February 1995,<sup>802</sup> as amended by Law No. 4001/2011 for the operation of Electricity and Gas Energy Markets, for Exploration, Production and transmission networks of Hydrocarbons and other provisions, published in the Government Gazette No. 179; Part One, 22 August 2011 (Hydrocarbons Law) provides that the Greek Government has the

<sup>798</sup> See Petroceltic International Plc, Award of New Licence in Greece (12 July 2013); available at <http://www.petroceltic.ie/investor-centre/press-releases/pr-2013/2013-07-12.aspx>

<sup>799</sup> See Bloomberg, Greece Plans Offshore Oil, Gas Bidding Round (13 February 2014); available at [http://www.epmag.com/Technology-Regulations/Greece-Plans-Offshore-Oil-Gas-Bidding\\_129266](http://www.epmag.com/Technology-Regulations/Greece-Plans-Offshore-Oil-Gas-Bidding_129266)

<sup>800</sup> See Adam Dann and David Cook, Greek Oil & Gas – Second offshore licencing round – key dates and considerations, Expert Legal Insights, Berwin Leighton Paisner (6 October 2014); available at <http://www.blplaw.com/expert-legal-insights/articles/greek-oil-gas-second-offshore-licensing-round-key-dates-considerations/>

<sup>801</sup> See Harry Papachristou, Greece to sign three oil, gas concession deals May 14, Reuters (8 May 2014); available at <http://af.reuters.com/article/commoditiesNews/idAFL6N0NU51H20140508>

<sup>802</sup> An unofficial English translation of the Hydrocarbons Law, which consolidates the Hydrocarbons Law and Law No. 4001/2011, with amendments to 22 August 2011, is available from the website of the Ministry of Environment, Energy and Climate Change, Prospecting, Exploration and Exploitation of Hydrocarbons, Brief history of events, at <http://www.ypeka.gr/Default.aspx?tabid=765&locale=en-US&language=el-GR#>. The website also includes unconsolidated English translations of the Hydrocarbons Law and Law No. 4001/2011.

exclusive right to prospect, explore and exploit hydrocarbons “in onshore areas, sub lake and submarine areas”. Greece has appointed the Hellenic Hydrocarbon Resources Management SA (HHRM) to manage such rights on its behalf (Hydrocarbons Law, article 2(1)).

The term “submarine areas” is defined as “the seabed and the subsoil of the internal waters, the territorial sea, the continental shelf and the exclusive economic zone (once declared), to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured” (Hydrocarbons Law, article 2(1)).

As indicated in section 1.1 above, Greece has been involved in a long-standing dispute with Turkey over the delimitation of borders in the Aegean Sea. In August 1976, Greece submitted the dispute to the International Court of Justice. On 19 December 1978, however, the court declared that it was not competent to hear the case due to Turkey, which is also not a signatory of UNCLOS, not recognising the court’s jurisdiction.

The Hydrocarbons Law recognises the continuing dispute as follows:

“In the absence of a delimitation agreement with neighboring States, whose coasts are opposite or adjacent to the coasts of the Hellenic Republic, the outer limit of the continental shelf and of the exclusive economic zone (once declared) is the median line, every point of which is equidistant from the nearest points on the baselines (both continental and insular) from which the breadth of the territorial sea is measured” (Hydrocarbons Law, article 2(1)).

## 1.4 Specific legislation for offshore oil and gas operations

The main law in Greece for offshore (and onshore) oil and gas operations is the Hydrocarbons Law.

Three types of licences are granted for offshore oil and gas operations in Greece:

- a prospecting licence for up to 18 months;
- an exploration licence for seven years with the potential for extension; and
- an exploitation licence for 25 years with the potential for extension for gas and in deep waters.<sup>803</sup>

The exploration licence may result in either a lease agreement or a production sharing agreement.<sup>804</sup> The relevant agreement as of October 2014 is a lease agreement.

## 1.5 Liability for bodily injury, property damage and economic loss

Greek law imposes liability for compensation for bodily injury, property damage and economic loss. The Draft Model Lease Agreement (Model Agreement)<sup>805</sup> includes an indemnity and hold harmless agreement from the lessee to HHRM. The provision provides that the lessee shall:

<sup>803</sup> See information provided by Iosif Athanasiadis and Spyros Mavrakos, Directorate of Petroleum Policy, Greece (5 May 2014); see also presentation by S. Stamataki and S. Bellas, Greece; New horizons to hydrocarbons exploration (4-7 February 2014); available at <http://www.athensenergyforum.com/presentations/BELLAS.pdf>

<sup>804</sup> See presentation by S. Stamataki and S. Bellas, Greece; New horizons to hydrocarbons exploration (4-7 February 2014); available at <http://www.athensenergyforum.com/presentations/BELLAS.pdf>; Hydrocarbons Law, article 2(10).

“indemnify, defend and hold the Lessor harmless against claims, losses and damages of any nature whatsoever, including, without limitation, claims for loss or damage to property or injury or death to persons caused by or resulting from any Petroleum Operations conducted by or on behalf of the Lessee, provided that the Lessee shall not be held responsible to the Lessor under this provision for any loss, claim, damage or injury caused by or resulting from any negligent action of personnel employed by the Lessor or from action done at the direction of the Lessor” (Model Agreement, article 9.2(i)).

As between HHRM and the lessee, therefore, the lessee is liable for claims for compensation.

### 1.5.1 Bodily injury and property damage

Two laws apply to compensation for bodily injury and property damage from pollution; Law 1650 on the protection of the environment, and the Civil Code.

#### ➤ Law 1650/86 on the protection of the environment

Article 29 of Law 1650/86 on the protection of the environment imposes strict liability for bodily injury and property damage from pollution provides that:

“Whoever, whether a physical person or legal entity, causes pollution or other degradation to the environment, is liable for damage, unless he proves that the damage is due to an act of God or was the result of a third party’s culpable act”.<sup>806</sup>

A claimant may be able to bring a claim under article 29 if the injury or damage was caused by pollution of water from an offshore oil and gas incident.<sup>807</sup> As indicated in article 29, the Law is subject to defences, including *force majeure*.<sup>808</sup>

#### ➤ Civil Code

Article 914 is the basic tort provision in the Civil Code. It provides that “[a]nyone is liable for injury which he has unlawfully inflicted by his fault”. Article 919 provides that “A person who has intentionally caused prejudice to another in a manner contrary to morality shall be liable in damages”.<sup>809</sup>

Under article 57 of the Civil Code, “[a] person who has suffered an unlawful infringement on his personality has the right to claim the cessation of such infringement and also the non-recurrence

<sup>805</sup> The Model Agreement is available from the website of the Ministry of Environment, Energy and Climate Change, Open Door, Procedure for granting exploration and exploitation licenses of areas, on permanent basis; see <http://ypeka.gr/Default.aspx?tabid=766&locale=en-US&language=el-GR>

<sup>806</sup> Translation by Monika Hinteregger. *Environmental Liability and Ecological Damage in European Law 284* (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>807</sup> See *Environmental Liability and Ecological Damage in European Law 525* (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>808</sup> See Christina Vlachtsis, Greece, 283, 299, in *Cross-Border Transactions and Environmental Law* (Mark Brumwell, editor, Butterworths, 1999).

<sup>809</sup> The translation of articles 914 and 919 of the Civil Code are from Vernon Valentine Palmer and Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, *Netherlands Comparative Law Association, Electronic Journal of Comparative Law*, vol. 11(3), 44 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

thereof in the future. A claim for compensation, according to the provisions about tort, is not excluded”.<sup>810</sup>

The Model Agreement specifically requires a lessee who causes harm adequately to compensate claims for bodily injury and property damage. Article 12.2(b) of the Model Agreement states that:

“The Lessee undertakes for the purposes of this Agreement to take all necessary and adequate steps ... to ensure adequate compensation for injury to persons or damage to property caused by the effect of the Petroleum Operations” (Model Agreement, article 12.2(b)).

The Model Agreement thus imposes contractual liability on a lessee “to ensure adequate compensation” for bodily injury and property damage; the Agreement does not refer to the Civil Code in doing so. It is unclear whether the Model Agreement creates separate liability from the Civil Code or whether it simply refers to the amount of compensation payable for claims under the Civil Code.

The Model Agreement authorises HHRM to carry out works and to seek reimbursement for the costs of such works from the lessee as follows:

“If the Lessor has on reasonable grounds reason to believe that any works or installations erected by the Lessee or any operations carried out by the Lessee are endangering or may endanger persons or any property of any other person or are causing pollution or are harming wildlife or the environment to a degree which the Lessor deems unacceptable, the Lessor may take remedial measures within such period as may be determined by the Lessor and may repair any damage to the environment, the costs of such remedial action to be borne by the Lessee. If the Lessor deems it necessary, it may require the Lessee to discontinue Petroleum Operations (without any liability on the part of the Lessor) in whole or in part until the Lessee or the Lessor has taken such remedial measures or has repaired any damage” (Model Agreement, article 12.3).

Further, the Model Agreement contemplates a potential accident and provides for a response to it, stating that:

“In the event of any emergency or accident arising from Hydrocarbon Operations affecting the environment, the Lessee shall notify the Lessor at its earliest opportunity, giving details of the same and in the case of fire or an oil spill, the Lessee shall immediately implement the relevant contingency plan. In dealing with any emergency or accident affecting the environment, the Lessee shall at all times take such action as is prudent and necessary in accordance with the Environmental Laws and Good Oilfield Practices in the circumstances” (Model Agreement, article 12.8).

### 1.5.2 Economic loss

As with liability for bodily injury and property damage, Law 1650/86 on the protection of the environment and the Civil Code apply to compensation for economic loss from pollution.

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<sup>810</sup> See Marina Androulakakis and Milka Chasioti, Greece 99, 118, in European Lawyer Reference Series; available at [http://www.bernitsaslaw.com/static/publication\\_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890https://www.google.fr/search?q=article+57+greek+civil+code+reparation&q=article+57+greek+civil+code+reparation&qs=chrome..69i57.8935j0j7&sourceid=chrome&es\\_sm=93&ie=UTF-8](http://www.bernitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890https://www.google.fr/search?q=article+57+greek+civil+code+reparation&q=article+57+greek+civil+code+reparation&qs=chrome..69i57.8935j0j7&sourceid=chrome&es_sm=93&ie=UTF-8)

➤ **Law 1650/86 on the protection of the environment**

Law 1650/86 imposes liability for pure economic loss.

One commentator considered that a hypothetical claim by the owner of an outdoor recreation business that had organised rafting and canoeing tours on a river for 10 years for a total loss of profits for three years during which time the river could not be used for white water canoeing and rafting due to pollution of a nearby river would succeed under Law 1650/86.<sup>811</sup> By analogy, it appears that at least some claims for lost profits from pollution from an offshore oil and gas incident should also succeed provided that Law 1650/86 applies to the continental shelf and the EEZ.

➤ **Civil Code**

Neither of the main tort provisions in the Civil Code, that is, articles 914 and 919 (see section 1.5.1 above) excludes liability for pure economic loss.<sup>812</sup> Further, the Civil Code imposes liability for lost profits. The amount awarded is the loss of profit “which can be expected as probable profit in the usual course of events or by reference to the special circumstances and particularly to the preparatory measures taken”. That is, there must be sufficient proof to show that the plaintiff would have suffered the loss (Civil Code, article 298(2)), with a direct causal link between the wrong and the damage.<sup>813</sup> The cost of reducing the damage is also recoverable.<sup>814</sup>

In order, therefore, successfully to claim pure economic loss under the Civil Code, a claimant must meet stringent causation requirements. The claimant must show that the defendant was, in general, likely to cause the harm that occurred and also that the defendant’s act affected an interest considered to be protected by the purpose of the law.<sup>815</sup> It is, thus, unclear whether a claim for harm for pure economic loss from an offshore oil and gas incident would succeed; much would depend on the nature and circumstances of each claim.

In this respect, the commentator who considered that a hypothetical claim under article 29 of Law 1650/86 for lost profits by an outdoor recreational company, as described directly above, would succeed, also concluded that the claim for lost profits would succeed under the Civil Code.<sup>816</sup>

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<sup>811</sup> Environmental Liability and Ecological Damage in European Law 494 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>812</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 44 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>813</sup> See Marina Androulakakis and Milka Chasioti, Greece 99, 118, in European Lawyer Reference Series; available at [http://www.bernitsaslaw.com/static/publication\\_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890](http://www.bernitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890); see also Aida Economou, Greece report 1, 13; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/greece\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf)

<sup>814</sup> See Eugenia Dacornia, Greece 192, 204, 212-213, in Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports 101, 110-111 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>815</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 45 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>816</sup> Environmental Liability and Ecological Damage in European Law 494 (Monika Hinteregger, editor, Cambridge University Press, 2008).



### 1.5.3 Liability for dangerous activities

Specific legislation, including products liability legislation, imposes strict liability for traditional damage.<sup>817</sup> This legislation does not, however, appear to be relevant to claims for compensation for traditional damage from an offshore oil and gas incident.

### 1.5.4 Standard of liability (strict / fault-based)

The basic standard of liability under the Civil Code is fault-based.

### 1.5.5 Scope of liability (joint and several / several)

Article 926 of the Civil Code imposes joint or several liability in the following situations, which could potentially apply to harm from an offshore oil and gas incident.

Joint and several liability applies if more than one tortfeasor (wrongdoer) causes damage to the claimant by:

- acting jointly to cause the damage;
- acting in parallel and, together, causing the same damage; and
- acting simultaneously or consecutively and, together causing the same damage when the damage caused by each tortfeasor cannot be determined.<sup>818</sup>

Joint and several liability also applies if a tortfeasor maintains or worsens the damage that has been caused.<sup>819</sup>

If more than one person is the lessee under a lease agreement in the open bid round of 2012, “every person constituting the Lessee shall be jointly and severally liable in respect of the obligations arising under [the] Agreement” (Model Agreement, article 1.4). This provision, however, seems to focus more on carrying out the work programme than liability for compensation in the event of pollution from an offshore oil and gas incident.

The Model Agreement provides that if a lessee is dissolved or liquidated or if its affairs are wound up due to its insolvency or inability to meet its obligations, or if the lessee makes an assignment for the benefit of its creditors of any substantial part of its assets, or if a receiver or manager is appointed under a debenture of similar security, HHRM may declare that the lessee’s rights under the Model Agreement are terminated (Model Agreement, article 23.1). In such an event, HHRM may “promptly and without consideration assign its undivided participating share in the Agreement to the remaining participants, pro rata to their participating shares and the remaining participants shall enjoy the benefit of the share so assigned and be liable jointly and severally for the corresponding obligations” (Model Agreement, article 23.2).

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<sup>817</sup> See Ioannis M. Pavlakis, Tort, Personal Injury & Compensation, Greek Law Digest (9 January 2012); available at <http://greeklawdigest.gr/en/topics/basic-aspects-of-civil-law/item/26-tort-personal-injury-compensation>

<sup>818</sup> See Aida Economou, Greece report 1, 4; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/greece\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf)

<sup>819</sup> See Eugenia Dacornia, Greece 192, 208-209, in Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports 101, 110-111 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007).

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

The burden of proving fault may switch from the claimant to the defendant if the relevant facts are within the defendant's sphere of influence. In such a case, the defendant must show that it is not negligent. Courts have, however, applied the rebuttable presumption only to products liability cases.<sup>820</sup> It does not, therefore, appear to be applicable to a claim for harm from an offshore oil and gas incident.

### 1.5.7 Exceptions

The Civil Code does not include any exceptions that are relevant to claims for compensation for bodily injury, property damage or economic loss from an offshore oil and gas incident.

### 1.5.8 Defences

Article 300 of the Civil Code reduces the compensation claimed by a claimant if the claimant is contributorily negligent. This provision seems unlikely to apply to harm from pollution from an offshore oil and gas incident.

### 1.5.9 Remedies

The general remedy for a claim for compensation for a tort is compensatory damages (Civil Code, article 297(1)).

Punitive damages are not available under Greek law.<sup>821</sup>

### 1.5.10 Limitations period(s)

Article 937 of the Civil Code provides for a limitations period of five years from the time at which a claimant is aware of the damage caused to them and the identity of the person who caused it. There is a long stop limitation period of 20 years from the date that the damage was caused. If the damage results from a criminal act and the limitation period for the crime is longer than the limit in the Civil Code, that limit applies to the claim for damages (Civil Code, article 937).<sup>822</sup>

### 1.5.11 Right to claim contribution from other responsible persons

Article 927 of the Civil Code authorises a tortfeasor who has paid the entire compensation due under article 926 with a right of recourse against the other tortfeasors. In such a case, the court determines each tortfeasor's respective share of damage. If it is not possible to allocate damage, the shares are allocated equally between them.<sup>823</sup>

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<sup>820</sup> See Aida Economou, Greece report 1, 10; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/greece\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf)

<sup>821</sup> See Marina Androulakakis and Milka Chasioti, Greece 99, 118, in European Lawyer Reference Series; available at [http://www.bermitsaslaw.com/static/publication\\_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890](http://www.bermitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890); see also Aida Economou, Greece report 1, 13; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/greece\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf)

<sup>822</sup> See Marina Androulakakis and Milka Chasioti, Greece 99, 103, in European Lawyer Reference Series; available at [http://www.bermitsaslaw.com/static/publication\\_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890](http://www.bermitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890)

<sup>823</sup> See Pan. J. Zepos, Graduation of Fault in Damages Under Greek Civil Code Articles 926 and 927, *Tulane Law Review*, vol. 49, 366 (1975).

## 1.6 Compensation system (claims within Target Country)

Article 74 of the Code of Civil Procedure authorises a joint action if each claimant has a common right to damages and their rights arise from the same factual and legal basis, or the subject matter of the dispute consists of similar claims with a similar factual and legal basis.<sup>824</sup> Normal court procedures would apply if article 72 is not applicable to claims.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Greece for claims for transboundary harm from offshore oil and gas operations.

## 1.8 Competent authority

The Ministry of the Environment, Energy and Climate Change (Ministry) is the competent authority for granting and implementing authorisations for the exploration and exploitation of hydrocarbons in Greece. Licences are approved by the Minister for the Environment, Energy and Climate Change, subject to ratification by the Greek Parliament. The Directorate of Petroleum Policy in the General Directorate of Energy in the General Secretariat for Energy & Climate Change is the relevant directorate in the Ministry.

HHRM administers and exercises Greece's rights to explore and exploit hydrocarbons and enters into lease agreements with oil and gas companies on behalf of the State.

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The Ministry carried out strategic environmental assessments on hydrocarbon exploration and exploitation; licensees must comply with the assessments. Strategic environmental assessments and related documents for the areas in the 2012 Open Bid Round are available from the website of the Ministry of Environment, Energy and Climate Change for the round; see <http://ypeka.gr/Default.aspx?tabid=766&locale=en-US&language=el-GR> (in Greek)

Environmental impact assessments pursuant to Law 4014/2011 must be prepared for the different stages of a licence.<sup>825</sup> The Model Agreement sets out requirements for preparing the assessments (Model Agreement, articles 7.7, 12).

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<sup>824</sup> See Aida Economou, Greece report 1, 4-5; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/greece\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/greece_en.pdf); Marina Androulakakis and Milka Chasioti, Greece 99, 103, in European Lawyer Reference Series; available at [http://www.bernitsaslaw.com/static/publication\\_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890](http://www.bernitsaslaw.com/static/publication_files/19/private-antitrust-litigation-greek-chapter-2013.pdf?1369132890)

<sup>825</sup> See information provided by Iosif Athanasiadis and Spyros Mavrakos, Directorate of Petroleum Policy, Greece (5 May 2014); see also presentation by Sofia Stamataki, Greece opens the upstream sector (IENE International Workshop, April 2012).

## 1.10 Offences and sanctions

It is an offence to carry out the prospecting, exploration and exploitation of hydrocarbons without a licence. The sanctions for the offence are imprisonment for up to two months and/or a fine between EUR 100,000 and EUR 1.5 million (Hydrocarbons Law, article 12A(8)).

It is also an offence to carry out the prospecting, exploration and exploitation of hydrocarbons in breach of regulations. Conviction for a breach that results “in the pollution or contamination of the sea, in damage to the sea flora and fauna or to the fishing” is imposed by a decision of the competent port authority, “in accordance with the relevant legislation on the protection of the marine environment”. The Hydrocarbons Law thus, specifically recognises that fishing may be damaged by prospecting, exploration and exploitation of hydrocarbons in the context of unlawful operations.

The sanction for a breach of the Hydrocarbons Law is the applicable administrative, civil or criminal penalty “issued after call and hearing of the person concerned” (Hydrocarbons Law, article 12A(8)). The Minister of Environment, Energy and Climate Change may, by a decision issued after the call and hearing, “order the cessation of the operations of prospecting, exploration and exploitation of hydrocarbons carried out in breach of the provisions of this law and of the regulations issued pursuant to [it]” (Hydrocarbons Law, article 12A(10)).

Further, Law 1650/86 on the protection of the environment establishes offences for causing water pollution (and other environmental damage). Directors and officers of the company that caused the damage may also be prosecuted (Law 1650/86, article 28).

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

Several types of financial security apply to various aspects of the licensing regime for offshore oil and gas operations.

Only two types of financial security appear likely to apply to compensation for bodily injury, property damage or economic loss by pollution from an offshore oil and gas incident; financial security for environmental requirements, and insurance in accordance with Good Oilfield Practices (described further below). Insurance required by social security legislation would also apply to employees of the companies responsible for harm caused to them.

### ➤ Environmental requirements

Financial security is required for the risk of harm to the environment, including the risk of endangering “persons or property of another person”.

The Hydrocarbons Law sets out various requirements concerning protection of the environment. In particular, article 12A(3) provides that:

“The Contractor shall also take all necessary measures to minimize any environmental pollution or damage to waters, to soil or to the atmosphere that may occur in connection with the activities of hydrocarbons. Where the Lessor or Contractor considers that any works or installations erected or any activities carried out may endanger persons or property of another person or pollute or cause harm to the environment, fauna, flora or the marine organisms, he shall require from the Contractor to take corrective measures within a reasonable period and to repair any damage to the environment. The Lessor or Contractor may also suspend its

contractual rights of the Contractor, until it has taken all the corrective measures and restore environmental damage”.

Article 12A(5) of the Hydrocarbons Law states that:

“To comply with the provisions hereof, the Minister of Environment, Energy and Climate Change may require from the Lessor or Contractor a deposit guarantee, the amount of which is to be determined by the Minister, upon the recommendation of [HHRM] or, alternatively, an insurance contract with an international firm against all risks”.

Assuming that article 12A(5) applies to article 12A(3), which strongly appears to be the case, the deposit guarantee or insurance required by the former appears likely to be focused more towards environmental, than traditional, damage. It is unclear whether the deposit guarantee and insurance is *ex ante* or *post ante*. Whereas insurance covers only fortuities, insurance could apply *post ante*, with the fortuity being the risk of costs exceeding a specified amount.

➤ **Applications for licensing under the open door bid round**

In respect of the 2012 open round, the Further Information and Guidance document issued by the Ministry of Environment, Energy and Climate Change specifies that the three exploration areas included in the bid round “are located in environmentally sensitive regions where tourism is an important earner” (section 3.4, 6). The document states that the Ministry may require applicants for lease agreements to have the following types of financial security:

- “[a] special reserve” to cover the costs of withdrawal, abandonment or decommissioning, including plugging wells, removing installations and restoring the environment; and
- “a deposit guarantee, the amount of which is to be determined by the Ministry or alternatively, an insurance contract with an international firm against all risks” to comply with the provisions of safety regulations and environmental protection (section 3.4, 6-7).

➤ **Financial capacity of an applicant for a lease agreement under the open door bid round**

An applicant for a lease agreement under the 2012 open bid round was required to have the following documentation to show its appropriate financial capacity:

“Audited financial statements of the last three (3) years, including:

- i) Balance Sheet
- ii) Income Statement
- iii) Cash Flow Statement
- iv) Annual Report”.

In addition, the Further Information and Guidance document specifies that “[a]ny additional information supporting the financial capacity of the person, including a Bank Letter of Guarantee which should cover the [following] Euro commitment” (section 5.2(III)(A), 11). That is, “[e]ach Exploration Phase must include an agreed contractual Euro commitment, corresponding to the estimation of the work programme. This amount will be used as financial guarantee in the event part or the entire minimum exploration work programme is not fulfilled” (section 5.2(IV)(B), 11).

The Ministry evaluates bids on the basis of financial and technical criteria.<sup>826</sup> If more than one person applies for a lease agreement, each of them must satisfy the financial capacity requirements.<sup>827</sup>

➤ **Insurance for exploration and exploitation operations**

The lessee must take out insurance for its Petroleum Operations, that is, its Exploration Operations and its Exploitation Operations. These terms are defined, respectively, as:

- “operations conducted for the purpose of Hydrocarbon Exploration and includes operations conducted for the purpose of carrying out an Appraisal Programme”; and
- “operations pursuant to a Development and Production Programme to develop a Discovery and to carry on Hydrocarbon Exploitation” (Model Agreement, Definitions, p. 5)

The Model Agreement describes the insurance that the lessee must “effect and maintain for Petroleum Operations” as:

“insurance coverage of the type, and in such amount as is customary in the international petroleum industry in accordance with Good Oilfield Practices, and, on request, furnish to the Lessor certificates evidencing that such coverage is in effect when such future surrender takes place. The said insurance shall, without prejudice to the generality of the foregoing cover those matters described in Annex E” (Model Agreement, article 9.2(g)).<sup>828</sup>

The term “Good Oilfield Practices” is defined as “all those things that are generally accepted and the international petroleum industry as good, safe, economical and efficient in exploring for and producing Hydrocarbons” (Model Agreement, Definitions, p. 4).

The form of the “Insurances” is set out in Annex E of the Model Agreement, although this Annex is not included in the version available from the Ministry’s website.

Article 12A(5) of the Hydrocarbons Law (see this section above) appears to apply to exploration and exploitation operations because it is included in a section of the Hydrocarbons Law entitled “Safety Regulations - Protection of the Environment - Criminal and Administrative Penalties - Social Insurance”. The type of insurance required for good oilfield practices thus appears to be cover for all risks, which would appear to include cover for third-party claims for compensation.

- **Exploration stage**

The Model Agreement further requires an applicant to have a bank guarantee for the exploration phase. This phase is divided into three phases, each for a specified number of years. The lessee must provide a bank guarantee for each phase as follows:

“The Lessee shall on the Effective Date [that is, the date on which the Ministry approves the lease agreement], ... on the first day of the Second Phase, or the first

<sup>826</sup> Ministry of Environment, Energy & Climate Change, General Directorate of Energy, Directorate of Petroleum Policy, Open Door Invitation for granting and using authorizations for the exploration and exploitation of hydrocarbons (Open Door Invitation). An English translation of the Open Door Invitation is available on the Ministry’s website at <http://ypeka.gr/Default.aspx?tabid=766&locale=en-US&language=el-GR>

<sup>827</sup> Open Door Invitation, article 7.

<sup>828</sup> The text of Annex E is not available in the Model Agreement on the Ministry’s website.

day of the Third Phase, provide, a Bank Guarantee in respect of the Minimum Expenditure Obligation for each of the Phases into which the Basic Exploration Stage is divided” (Model Agreement, article 3.6).

The term “Bank Guarantee” is defined as “a payment guarantee by a first class bank lawfully operating in Greece with a branch in Athens, Greece acceptable to the Lessor, substantially in the form set out in Annex G” (Model Agreement, Definitions p. 2). The text of Annex G is not included in the Model Agreement available on the Ministry’s website.

- **Parent company guarantee**

A lessee must also provide, on the date that the Ministry approves the lease agreement, a parent company guarantee (Model Agreement, article 18). The Model Agreement states that the form of the parent company guarantee will be set out in Annex F, although this annex is not included in the Model Agreement available from the Ministry’s website.

- **Extension of the exploration stage**

If an exploration stage extension is granted, the lessee must provide:

“a Bank Guarantee on the first day of the Exploration Stage Extension for the full amount, if any, of any shortfall, being the difference between the Minimum Expenditure Obligation at the end of the Basic Exploration Stage and the actual amount expended by the Lessee during that stage in respect of the Minimum Work Obligations. Such bank guarantee will replace the then current bank guarantee in existence” (Model Agreement, article 2.2(c)).

- **Suspension of the lessee’s obligations to remove installations**

If the Ministry suspends the lessee’s obligations to remove installations “for whatever period of time the existence of such installations is considered necessary for the performance of the Lessee’s operations in the same or in another Contract Area”, the lessee must provide financial security by opening:

“a special account in a bank or banks legally operating in Greece in accordance with the provisions of Article 8.2 of the Presidential Decree. Into such account it shall periodically deposit amounts so as this fund, plus interest, is developed to be the Lessee’s special reserve for the fulfillment of its obligations to remove the installations. The procedure and all relevant details for these periodic deposits shall be mutually agreed upon the commencement of the production. If no agreement is reached, the matters in issue shall be referred to the Sole Expert for final determination.

- (a) The time when the special reserve shall be used as well as the necessary amounts and the time when the Lessee shall deposit them, shall be determined by decision of the Committee for the Removal and Disposal of the Installations.
- (b) The accumulated reserve, without the relevant interest, shall be debited to the Lessee’s Income and Expenditure Account” (Model Agreement, article 8.6; see article 8.7).

## ➤ Social security legislation

Article 12A(11) provides that:

“The work rendered in exploitation installations of hydrocarbons by personnel employed there shall be deemed, for the purposes of applying the relevant social insurance legislation work rendered within the nearest insurance area of the respective social insurance organization where such exploitation installations are located outside the local insurance competence of the Institute or any other social insurance organization”.

Various provisions of Greek law concerning employer's contributions to the Institute of Social Insurance and other social insurance organisations are dis-applied (Hydrocarbons Law, article 12A(12)).

Article 12A(6) also imposes a levy for a Green Fund, as follows:

“An amount equal to twenty percent (20%) per annum from the royalty of production sharing which H.H.R.M earns by virtue of the agreements hereunder shall be deposited in the special account of the 'Green Fund', with the Bank of Greece. The return on such account shall be disposed to finance programs concerning the prevention of marine pollution caused by exploration and exploitation of hydrocarbons and the protection of the environment from activities related to any kind of exploitation or use of energy sources or resources”.

### 1.11.1 Persons required to have evidence of financial security

The lessee is required to have evidence of financial security.

In respect of insurance for “Good Oilfield Practices”, the lessee must “require its contractors and sub-contractors to carry insurance of the type and in such amount as is customary in the international Petroleum industry in accordance with Good Oilfield Practice” (Model Agreement, article 9.2(h)).

### 1.11.2 Time at which evidence of financial security is required

Evidence of financial security is required when a lease agreement is entered into and when a person applies for an exploration licence or an exploitation licence.

### 1.11.3 Scope (traditional damage / environmental damage / etc)

Most of the financial security requirements appear to focus only on obligations under a lease agreement or an exploration or exploitation licence. They do not appear to apply to financial security for compensation for bodily injury, property damage or economic loss from an offshore oil and gas incident except, perhaps the environmental requirements.

The references to insurance coverage for “Good Oilfield Practices” appear to include compensation for traditional damage from an offshore oil and gas incident but this is unclear.

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

The financial security requirements are as follows:

- Environmental requirements: deposit guarantee or insurance;



- Applications for licensing under the 2012 open door bid round:
  - “[a] special reserve” to cover the costs of withdrawal, abandonment or decommissioning, including plugging wells, removing installations and restoring the environment; and
  - “a deposit guarantee, the amount of which is to be determined by the Ministry or alternatively, an insurance contract with an international firm against all risks” to comply with the provisions of safety regulations and environmental protection.
- Financial capability of an applicant for a lease agreement in the 2012 open door bid round: potentially a bank letter of guarantee to cover each exploration phase.
- Exploration operations:
  - “insurance coverage of the type, and in such amount as is customary in the international petroleum industry in accordance with Good Oilfield Practices”;
  - a bank guarantee to cover the minimum expenditure obligation for each phase of the operations;
  - a parent company guarantee; and
  - a bank guarantee to replace the existing bank guarantee if the exploration phase is extended.
- Exploitation operations:
  - “insurance coverage of the type, and in such amount as is customary in the international petroleum industry in accordance with Good Oilfield Practices”;
  - a bank guarantee to cover the minimum expenditure obligation for each phase of the operations;
  - a parent company guarantee; and
  - a special account in a Greek bank if the Ministry suspends the lessee’s obligations to remove installations.
- Social security legislation: insurance.

#### 1.11.5 Monetary limit(s)

The monetary limit for the insurance requirements is not specified. Calculation of the monetary limit of the bank guarantees for the works programme is set out in the Model Agreement (see section 1.11.4 above and section 1.11.6 below).

#### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

The financial security for the exploration phase is reviewed at the end of each of the three phases in the exploration phase. Article 3.6 of the Model Agreement states that:

“The amount of the Bank Guarantee given pursuant to this Article shall be reduced at the end of every Calendar Quarter by an amount equal to the Adjusted Expenditure incurred by the Lessee during that quarter in discharge of its obligations hereunder. ...

If at the end of any phase, the Lessor determines that the Adjusted Expenditure incurred by the Lessee during that phase (taking account of any amount carried forward pursuant to Article 3.4) does not equal or exceed the minimum expenditure obligation for that phase, the Bank Guarantee shall provide for the payment

thereunder to the Lessor of the full amount of the shortfall” (Model Agreement, article 3.6).

The Model Agreement sets out details for calculating the Adjustable Expenditure” (Model Agreement, article 3.7).

### 1.12 Jurisdictional issues (if any)

Jurisdiction for criminal offences applies to offshore oil and gas installations, floating constructions and the safety zone around them, with jurisdiction deemed to be in the district of the Piraeus Magistrates Court (Hydrocarbons Law, article 11(12), subsection 14).

The jurisdiction of the civil courts also applies to the above areas, with jurisdiction deemed to be in the district of the Piraeus Magistrates Court (Hydrocarbons Law, article 11(12), subsection 15).

It is unclear whether the Civil Code applies to the Greek continental shelf and the EEZ.

### 1.13 Key points

Greece has a long history of offshore oil and gas exploration and production. By October 2014, however, some of these sources had declined or finished; resulting in Greece producing oil (no gas) from a single area off the northern island of Thassos, for a total of about 2,000 barrels of crude oil per day. The exploration licences, as of October 2014, include a 30-year licence for an offshore block that would involve extended-reach drilling from onshore if production ensues.

The Ministry of Environment, Energy and Climate Change launched a second offshore licensing round, that includes 20 blocks in the Ionian Sea off western Greece, in October 2014.

A lengthy dispute concerning the limits of the maritime borders with Turkey has deterred the exploration of oil and gas in the Aegean Sea.

The legislation for offshore (and onshore) oil and gas licensing is a Hydrocarbons Law.

Liability for claims for bodily injury and property damage is imposed by the Civil Code. The Civil Code may also impose liability for pure economic loss, but stringent causation requirements would limit the number of successful claims. The environmental protection law (Law 1650/86) also imposes liability for bodily injury and property damage from water pollution (and other environmental damage).

The Draft Model Lease Agreement for the 2012 open round specifically requires a lessee who causes harm to compensate claims for bodily injury and property damage. The Model Agreement thus appears to impose contractual liability on a lessee “to ensure adequate compensation” for bodily injury and property damage; the Agreement does not refer to the Civil Code in doing so. If it does so, however, it is unclear how liability would be imposed because claimants have no rights against the lessee under the Model Agreement. Only the State could enforce its terms.

The Hydrocarbons Law and the Model Agreement set out detailed provisions for financial security. The mandatory requirements mainly concern financial security for the works programme and obligations under the lease and exploration and exploitation licences.

A deposit guarantee or insurance is also required for environmental requirements, although the requirements appear to relate to environmental, rather than traditional, damage.

In addition, insurance in accordance with Good Oilfield Practices, which appears to include insurance for compensation for harm from an offshore oil and gas incident, is required. Further, social security insurance, which would apply to employees of persons responsible for harm to employees, is required.

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# Iceland

## 1.1 Introduction

Offshore oil and gas operations in Iceland are in the exploratory phase, with no commercial production having begun as of October 2014.

Iceland commissioned research on its continental shelf during the 1970s. In 1979, it enacted legislation on territorial waters, the continental shelf and the EEZ. This was followed by an agreement with Norway in 1981 on sovereignty over the continental shelf on the Jan Mayen Ridge to the northeast of Iceland. The agreement, followed by another agreement in 2008, subsequently led to Norway having the right to participate in licences granted by Iceland up to 25 per cent in the Dreki Area, which includes part of the Jan Mayen Ridge, and Iceland having the same right to participate in licences granted by Norway in its part of the Jan Mayen Ridge when Norway begins prospecting in it.

Research on the oil and gas potential of the Icelandic continental shelf continued during the 1980s and 1990s. In 2001 and 2002, non-exclusive prospecting for oil by seismic surveys was initiated on the Jan Mayen Ridge. In 2004, preparations began for exclusive exploration and production licensing. In December 2007, Iceland decided that it would offer exclusive licences for the exploration and production of hydrocarbons in the northern part of the Dreki Area, with a tentative date for the first licensing round of January 2009.<sup>829</sup>

On 22 January 2009, Iceland launched the first licensing round for hydrocarbon exploration and production licences on its continental shelf in the Dreki Area.

On 3 October 2011, Iceland launched the second licensing round for hydrocarbon exploration and production licences on its continental shelf in the Dreki Area.

Iceland also accepts applications for prospecting licences, and considers applications for other licences, under the open door system.

As in some other States that are exploring the potential for offshore oil and gas production, concerns about its environmental effects have resulted in opposition from environmental groups.<sup>830</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas operations in Iceland are subject to primary legislation in the form of statutes, and secondary legislation in the form of regulations and rules.

Specific legislation applies to compensation for harm from pollution from oil and gas operations as well as general legislation in the form of the Tort Damages Act.

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<sup>829</sup> See presentation by Kristinn Einarsson, Hydrocarbon Licensing Coordinator, NEA, The Regulatory Setup for Oil and Gas Exploration in Iceland & Preparations for the First License Round (September 2008); available at [http://www.orkustofnun.is/media/radstefnur/Kristinn\\_Einarsson\\_IEC\\_2008.pdf](http://www.orkustofnun.is/media/radstefnur/Kristinn_Einarsson_IEC_2008.pdf)

<sup>830</sup> See Icelandic environmentalists against Jan Mayen oil (6 March 2014); available at <https://jichanlulu.wordpress.com/tag/eykon/>, with a link to <http://ruv.is/frett/sidustu-leyfin-til-oliuleitar-veitt>

### 1.3 Rights to, and ownership of, offshore oil and gas

Iceland owns hydrocarbons in its territory, including its continental shelf. Act No. 13/2001 on Prospecting, Exploration and Production of Hydrocarbons, as amended (Hydrocarbons Act),<sup>831</sup> states that such ownership is pursuant to article 1 of the Act. Article 1 states that the Act:

“applies to the prospecting, exploration and production of hydrocarbons and transport of hydrocarbons through piping systems outside 115 metres from the shore and within Icelandic territorial waters and economic zone and on the Icelandic continental shelf. The Act also applies to offshore installations unless otherwise determined in legislation or rules based on this Act “.

The term “hydrocarbons” is defined as “mineral oil, natural gas or other types of hydrocarbons found naturally in strata under the seabed and which can be exploited in a gaseous or liquid form” (Hydrocarbons Act, article 2).

The ownership of hydrocarbons may be transferred to the holder of a production licence who produces such hydrocarbons (Hydrocarbons Act, article 2).

Further, the Act on the Entitlement of the Icelandic State to Sea Bed Resources, No. 73/1990 states that natural resources on, in or under the sea bed outside of the “net-laying area” (60 fathoms from the low water mark) are the property of Iceland.<sup>832</sup>

As indicated in section 1.1 above, Iceland has entered into agreements with Norway concerning hydrocarbon deposits on the Jan Mayen Ridge. The agreements are:

- Agreement of 22 October 1981 between Iceland and Norway on the Continental Shelf in the area between Iceland and Jan Mayer;
- Agreement of 3 November 2008 between Iceland and Norway concerning transboundary deposits; and
- Agreed Minutes of 3 November 2008 concerning the Right of Participation pursuant to Articles 5 and 6 of the Agreement from 1981.<sup>833</sup>

Iceland has issued three exploration and production licences under the agreements. Norway participated in them through its State-owned oil company, Petoro Iceland AS.

On 4 January 2013, the Icelandic Ministry of Industries and Innovation issued two exploration and production licences pursuant to the agreements in the Dreki area. One licence was issued to the Icelandic branch of Faroe Petroleum Norge AS (67.5%), Iceland Petroleum (*Íslenskt Kolvetni ehf.*) (7.5%), and Petoro Iceland AS (25%), with Faroe Petroleum Norge AS as the operator. The other licence was issued to Ithaca Petroleum ehf. (formerly Valiant Petroleum ehf.) (56.25%), Kolvetni ehf. (18.75%), and Petoro Iceland AS (25%), with Valiant Petroleum ehf. as the operator.

<sup>831</sup> An unofficial English translation of the Hydrocarbons Act, dated 21 March 2012, is available at <http://www.nea.is/media/olia/Act-No-13-2001-03102011.pdf>

<sup>832</sup> See Ministry for Foreign Affairs, The Ocean: Iceland’s Policy 27; available at [http://www.mfa.is/media/Efstabaugi/The\\_Ocean\\_Icelands\\_Policy.pdf](http://www.mfa.is/media/Efstabaugi/The_Ocean_Icelands_Policy.pdf)

<sup>833</sup> Unofficial English translations of the Agreements and Agreed Minutes are available from National Energy Agency, Legal and Regulatory Framework; available at <http://www.nea.is/oil-and-gas-exploration/legal-and-regulatory-framework/>

In 2014, the Ministry of Industries and Innovation issued an exploration and production licence to Eykon Energy ehf. (15 per cent), CNOOC Iceland ehf. (60%), and Petoro Iceland AS (25%), with Eykon Energy ehf. as the operator.

## 1.4 Specific legislation for offshore oil and gas operations

The main Act for offshore oil and gas licensing is the Hydrocarbons Act, which transposed Directive 94/22/EC into Icelandic law.<sup>834</sup>

The Hydrocarbons Act is accompanied by:

- Regulation 884/2011 on Prospecting, Exploration and Production of Hydrocarbons (Hydrocarbons Regulation);<sup>835</sup>
- Regulation No. 39/2009 on the Hydrocarbon Research Fund, as amended (Hydrocarbon Research Fund Regulation);<sup>836</sup> and
- Draft Rules on Prospecting, Exploration and Production of Hydrocarbons.<sup>837</sup>

There are two types of licences for offshore oil and gas. They are:

- A prospecting licence for a maximum period of three years; and
- An exploration and production licence for a maximum period of 12 years, with optional extensions up to two years each for a maximum total length of 16 years.

If the holder of an exploration licence satisfies the conditions specified in it, the holder has priority for an extension of the licence for production for up to 30 years.

## 1.5 Liability for bodily injury, property damage and economic loss

Article 28 of the Hydrocarbons Act imposes strict liability for “any loss or damage caused by hydrocarbon activity, including environmental damage”, as follows:

“The holders of prospecting licenses or exploration and production licenses will be liable for damages under this Act for any loss or damage caused by hydrocarbon activity, including environmental damage, regardless of whether the loss or damage was caused by culpable conduct or not”.

<sup>834</sup> See Iceland Offshore Exploration (March 2014); available at <http://www.os.is/gogn/os-onnur-rit/OS-Iceland-Offshore-Exploration-v022013.pdf>

<sup>835</sup> An unofficial English translation of the Hydrocarbons Regulation, dated 3 October 2011, is available at <http://www.nea.is/media/olia/Regulation-884-2011-03102011.pdf>

<sup>836</sup> An unofficial English translation of the Hydrocarbon Research Fund Regulation, dated 7 February 2014, is available at <http://www.nea.is/media/olia/Regulation-39-2009-07022014.pdf> Alternatively, the unofficial translations of the Hydrocarbons Act, the Hydrocarbons Regulation, and the Hydrocarbon Research Fund Regulation are available from <http://www.nea.is/oil-and-gas-exploration/legal-and-regulatory-framework/> In addition, the Hydrocarbons Act, the Hydrocarbons Regulation, the Hydrocarbon Research Fund Regulation, together with the Agreements with Norway, Act No. 170/2008 on the Taxation of Hydrocarbon Extraction, Rules on Prospecting, Exploration and Production of Hydrocarbons, and the Model Licence for Exploration and Production of Hydrocarbons are available from: <http://www.nea.is/licensinground2009/legal-documents/>

<sup>837</sup> An unofficial English translation of the Draft Rules on Prospecting, Exploration and Production of Hydrocarbons, dated 21 January 2009, is available from <http://www.nea.is/licensinground2009/legal-documents/>

Article 22 of the Hydrocarbons Act further requires:

“The licensee and others involved in hydrocarbon activities [to] take the necessary measures to prevent damage or reduce the consequences of damage which has occurred, including measures aimed to bring the environment back to its former state”.

Article 29 of the Hydrocarbons Act, which is headed “General Rules of Law of Tort”, states that the above provisions “by no means limit the right to damages derived from general rules”. Section 18 of the Model Licence for the Second Licensing Round (Model Licence)<sup>838</sup> also provides that the provisions imposing liability for loss or damage caused by a hydrocarbon activity under article 28 of the Hydrocarbons Act do “not limit the right to damages by an injured party derived from general rules”.

Further, article 7 of Act No. 33/2004 on marine and coastal antipollution measures provides that “[e]ach and every one causing pollution in Iceland's pollution jurisdiction is liable under the general rules of damages for damage attributable to the pollution”. The term “Iceland’s pollution jurisdiction” is defined as “[t]he area of ocean covering coastal waters, including beaches to the high-tide boundary during spring tide, territorial waters and the exclusive economic zone, Iceland's continental shelf and the uppermost layers of soil ...” (article 3(10)).

Article 7 of Act No. 33/2004 further provides that “If there is a risk of marine and coastal pollution, the one bearing responsibility for the pollution shall do all in his power to prevent or reduce it. He is also liable for the damage that his actions or lack of action causes others”. The Act specifically mentions “platforms and other structures within Iceland's pollution jurisdiction beyond three nautical miles from the baseline of the territorial waters” (article 6(a)) and the “prohibition or limitation of pollution from ships, platforms and other structures at sea or from land stations in accordance with the annexes of the MARPOL 73/78 protocol and other international agreements of which Iceland is a member” (article 6(v)).<sup>839</sup>

The Tort Damages Act 1993<sup>840</sup> thus imposes liability for harm from offshore oil and gas operations.

### 1.5.1 Bodily injury and property damage

As indicated above, section 28 of the Hydrocarbons Act imposes liability on an operator and a licensee for bodily injury and property damage from offshore hydrocarbon activities. Section 28 is reinforced by section 18 of the Model Licence, which states that:

“Pursuant to Article 28 of the Hydrocarbons Act the Licensee is liable for any damage caused by its exploration, exploitation and production activities or the non-performance thereof, including environmental damage, regardless of whether the damage can be proved to be culpable ...”.

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<sup>838</sup> National Energy Authority, Model Licence for Exploration and Production of Hydrocarbons, Second Licensing Round on the Icelandic Continental Shelf (Model Licence). An English translation of the Model Licence is available from <http://www.nea.is/2nd-licensing-round/legal-documents/>

<sup>839</sup> An unofficial English translation of the Act, with no amendments, is available from the website of the Icelandic Coast Guard at <http://www.lhg.is/english/Legislation/>

<sup>840</sup> All the references in this summary to the Tort Damages Act and the Iceland Supreme Court cases are taken from Arnjótur Björnsson, A Survey of Icelandic Tort Law; available at <http://www.scandinavianlaw.se/pdf/38-14.pdf>



Further, the Model Licence includes an indemnity and hold harmless agreement from a licensee to the State as follows:

“The Licensee shall indemnify and hold harmless the Icelandic State, NEA and all related and collateral parties from any and all disputes, actions, claims or causes of actions (including attorneys' fees and costs) whatsoever which may be brought by any third party arising out of or in connection with the activities of the Licensee undertaken pursuant to this Licence”.

The Model Licence also includes a notification provision as follows:

“NEA shall notify the Licensee of any claim falling within the scope of Paragraph 2 above [the indemnity and hold harmless clause]. In the event that NEA considers any such claim unjustified, NEA shall reject the claim, if necessary by bringing the matter before the courts. The Licensee may join any action brought in respect of such claim in accordance with the applicable provisions of the Code of Civil Procedure No. 91 of 31 December 1991”.

### **1.5.2 Economic loss**

Article 28 of the Hydrocarbons Act specifies that liability is imposed for “any loss or damage caused by hydrocarbon activity, including environmental damage”. Further the defences to liability refer to “physical injury”, “bodily harm”, “loss of provider”, and “material loss or damage” (see section 1.5.8 below).

The Hydrocarbons Act thus appears to include compensation for claims for pure economic loss. The Explanatory Memorandum to the Act may clarify the issue but an English translation was not available.

### **1.5.3 Liability for dangerous activities**

The Tort Damages Act does not include provisions that impose liability for dangerous activities. Icelandic law does not have a general rule of strict liability for extra-hazardous or abnormally dangerous activities.

### **1.5.4 Standard of liability (strict / fault-based)**

Article 28 of the Hydrocarbons Act imposes strict liability for “any loss or damage caused by hydrocarbon activity, including environmental damage”.

The standard of liability under the Tort Damages Act is negligence / fault-based. The Icelandic Supreme Court has ruled that strict liability applies in a few cases but strict liability is rare in the absence of a statute that specifically imposes it.

### **1.5.5 Scope of liability (joint and several / several)**

Section 19 of the Model Licence states that modified joint and several liability is imposed on licensees for “any loss or damage caused by hydrocarbon activity, including environmental damage” under article 28(2) of the Hydrocarbons Act. Article 28 further provides that the NEA “is permitted, when deciding on an operator, to provide that liability for damages ... should extend also to an operator who is not a licensee”.

The modified joint and several liability system operates as follows:

“In cases where the holders of a licence for exploration and production of hydrocarbons are more than one, claims for damages should be addressed to the operator of the licence. If an operator has not paid a claim for damages in full on its due date, licensees are required to pay the balance of the payment in direct proportion to their respective shares in the licence in question. If a single licensee does not make his payment, his share in the payment of damages shall be paid by other licensees in direct proportion to their shares in the licence in question” (Hydrocarbons Act, article 28).

The Tort Damages Act imposes joint and several liability, with liability being allocated between the tortfeasors (wrongdoers) on the basis of reasonableness.

### **1.5.6 Rebuttable presumption (reversing burden of proof to defendant)**

Neither the Hydrocarbons Act nor the Tort Damages Act establishes a rebuttable presumption of liability that applies to harm from pollution from offshore oil and gas operations.

### **1.5.7 Exceptions**

The Hydrocarbons Act appears to include defences rather than exceptions, as described in section 1.5.8 below.

### **1.5.8 Defences**

The Hydrocarbons Act sets out two “defences” to liability for loss or damage from hydrocarbon activities.

Article 28 of the Hydrocarbons Act provides that:

“Compensation for physical injury or for loss of provider may be reduced or cancelled if the party who suffered loss or damage, or who died, caused loss or damage intentionally or through gross negligence. Compensation for material loss or damage may be reduced or cancelled if the party who suffered loss or damage caused the loss or damage intentionally or through gross negligence.

Compensation for environmental damage may be reduced or cancelled when there is proof that the damage was caused by natural catastrophe or by other uncontrollable events for which the licensee cannot be held liable”.

Further, Section 18 of the Model Licence expands on these provisions as follows:

“The compensation liability for bodily harm or loss of provider may be lowered or cancelled if it is proven that the party suffering harm has inflicted the harm intentionally or due to major carelessness. The compensation liability for material damages may be lowered or cancelled if it is proven that the party suffering damages has inflicted the damage intentionally or due to carelessness.

Compensation for environmental damage may be reduced or cancelled due to the occurrence of a force majeure event”.

The term “if it is proven” indicates that the above provisions are defences and not exceptions to liability because they infer that the licensee must prove that liability under the Hydrocarbons Act does not apply.

The defence for a “natural catastrophe or ... other uncontrollable event” / *force majeure* applies only to liability for environmental damage; it does not apply to compensation for loss or damage suffered by a person.

Damages under the Tort Damages Act may be reduced partially or entirely if the claimant is contributorily negligent. This defence is unlikely to apply to a claim for harm from pollution from an offshore oil and gas incident.

### 1.5.9 Remedies

Article 28 of the Hydrocarbons Act uses the term “compensation”. The use of the term indicates that monetary compensation is payable to a person who suffers loss or damage. It is unclear from the Act itself, however, whether monetary compensation is payable in the event of “environmental damage”. In this respect, Iceland has transposed the Environmental Liability Directive which imposes liability for preventing and remediating environmental damage to land, waters and protected species and natural habitats.<sup>841</sup> The Hydrocarbon Act may be intended to apply to the remediation of environmental damage below the level of the thresholds in the transposing Act.

The remedy under the Tort Damages Act is compensatory damages.

Icelandic law does not recognise punitive damages.<sup>842</sup>

### 1.5.10 Limitations period(s)

Article 9 of Act No. 150/2007 on the limitation periods for claims applies the general limitations period of four years to claims for traditional damage.<sup>843</sup>

Article 9 provides that:

“Claims for damages shall be subject to a limitation period of four years from the date on which the injured party obtained, or should have obtained, necessary knowledge of the damage and the person liable for the damage. However, the limitation period in respect of claims for damages for physical injury, including non-pecuniary damage, shall run for ten years.

However, the claim shall become barred [subject to specified exceptions] no later than 20 years after the event of damage or other basis for liability ended”.

### 1.5.11 Right to claim contribution from other responsible persons

The operator has a right to contribution for compensation paid for loss or damage under the Hydrocarbons Act from other licensees. Article 7(1) of the Joint Operating Agreement provides as follows:

“Unless otherwise specified in this Agreement, the Parties shall be primarily liable to each other on a pro rata basis, secondarily jointly and severally liable for all

<sup>841</sup> See Act on Environmental Liability, No. 55/2012.

<sup>842</sup> See Gunnar Örn Hardarson and Asdis Magnúsdóttir, Iceland, World Trademark Review; available at

<sup>843</sup> An unofficial English translation of the original version of the Act is available from the Ministry of Industries and Innovations website at <http://eng.atvinnuvegaraduneyti.is/laws-and-regulations/nr/nr/7422>

obligations arising by virtue of the joint venture's activities. This applies irrespective of a liability towards third parties".<sup>844</sup>

The Tort Damages Act provides that if more than one person is liable for damage, contribution between them is based on reasonableness in light of the nature of their liability and other circumstances.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Iceland for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Iceland for claims for transboundary harm from offshore oil and gas operations.

## 1.8 Competent authority

The NEA (*Orkustofnun*) of the Ministry of Industries and Innovation is the competent authority for granting licences for prospecting for hydrocarbons on the Icelandic continental shelf (Hydrocarbons Act, article 4). The NEA is also the competent authority for granting licences for the exploration and production of hydrocarbons on the Icelandic continental shelf (Hydrocarbons Act, article 7).

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

In 2007, the Ministry of Industry, Energy and Tourism published a strategic environmental assessment for the northern part of the Dreki Area.<sup>845</sup> Environmental impact statements are prepared before granting a licence.<sup>846</sup>

In addition, the NEA consults the Ministries responsible for nature conservation, and research, preservation and utilisation of the sea before it grants an exploration and production licence (Hydrocarbons Act, article 7).

## 1.10 Offences and sanctions

Article 24b of the Hydrocarbons Act provides that:

“If the holder of a prospecting licence or an exploration and production license does not comply with the requirements of this Act, with regulations based on this Act, with the exploration and production licence or other sources, the [NEA] shall give written

<sup>844</sup> The Joint Operating Agreement is Enclosure A to the Agreement concerning Exploration and Production of Hydrocarbons for the Second Licensing Round. The Agreement is available from <http://www.nea.is/2nd-licensing-round/legal-documents/>

<sup>845</sup> See NEA, Dreki - Strategic Environmental Assessment; available at <http://www.nea.is/oil-and-gas-exploration/the-exploration-area/dreki---sea/>

<sup>846</sup> Telephone interview with Thorarinn Sveinn Arnarson and Skúli Thoroddsen, NEA (24 March 2014).

notice of warning to the licensee with an ample time limit for remedies but daily penalties pending. If the prospecting licensee or licensee takes no heed of the notice by the [NEA] within the set time limits, the [NEA] may withdraw or change the licence. In the case of a serious infraction or negligence, or if it is clear that the prospecting licensee or licensee cannot fulfil obligations given by the licence, the [NEA] may withdraw the licence without warning.

Penalties can be ISK 50,000–500,000 (EUR 323- 3,231.21) per day. When deciding on the order of daily penalties, the nature of negligence or infraction against given interests may be of influence. A decision on daily penalties shall be announced by a letter to the payer delivered in a certifiable manner. Daily penalties constitute an enforceable claim, as well as the costs associated with collecting them. Collected penalties less costs associated with collecting them go to the State Treasury. Non-compliance by the prospecting licensee or licensee with the requests of the [NEA] shall be reported to the Minister”.

Article 32 of the Hydrocarbons Regulation states that:

“Offences against this Act are punishable by fines, unless a more severe punishment is indicated pursuant to other legislation. Both legal entities and individuals may be subjected to fines for offences against this Act. A legal entity may be fined for violation of this Act regardless of culpability of the legal person’s representative or employee”.

Article 59 of the Hydrocarbons Regulation similarly states that:

“Violations of this Regulation are punishable by fines, unless a more severe punishment is indicated pursuant to other legislation. Fines may be imposed for violations of this Regulation upon both legal persons and natural persons. A legal person may be fined for violations of this Regulation without regard to culpability on the part of a representative or employee of the legal person”.

Further, Act No. 33/2004 on marine and coastal antipollution measures establishes offences and sanctions for breaching the Act and regulations under it. The penalty is a fine or imprisonment of up to two years unless a more severe penalty under other legislation applies. If the breach involves “large-scale or repeated, intentional violations[, the sanction is] imprisonment for up to four years” (article 25). A legal entity may be fined but not “if an accident is involved” (article 26).

### **1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)**

An applicant for an exploration and production licence must show that it has the financial capability to carry out the obligations of the licence (Hydrocarbons Act, article 7). The applicant must provide “Detailed information on the intended activity of the applicant, including information on the financial capacity of the applicant for conducting such activity” (Draft Hydrocarbon Rules, article 11(4)).

Two types of financial security are required: a guarantee for obligations under an exploration and production licence; and insurance, or another form of acceptable financial security, for various types of damage including “pollution damage and other liability towards third parties”.

A holder of an exploration and production licence must provide:

“[a] guarantee in amount and of a kind, in the form of a parent company guarantee ... to NEA. If the Licensee does not have a parent company, extra insurance or bank

guarantee are required that is acceptable to NEA. The parent guarantee, extra insurance or bank guarantee shall cover the fulfilment of all obligations towards the Icelandic State as well as any liability in damages [that is, liability for “any damage caused by its exploration, exploitation and production activities” or their non-performance, including environmental damage”]” (Model Licence, section 20).

The form of the parent company guarantee is set out in Appendix 4 of the Model Licence.

An exploration and production licence must include a provision that states that:

“The licensee’s purchase of insurance from a recognised insurance company, banker’s indemnity or other collateral that the [NEA] considers equal [is required] to cover possible liability for damages caused by activity of the licensee” (Hydrocarbons Act, article 11(6)).

Article 19(10) of the Hydrocarbons Regulation provides more details of the financial security required by a licensee as follows:

“The licensee’s purchase of a liability insurance from a recognised insurance company, banker’s indemnity insurance, performance bonds or other insurance policies that the [NEA] considers equivalent [is required] to cover possible loss or damage caused by the activities of the licensee”.

Section 20 of the Model Licence requires:

“petroleum activities [to] be insured at all times, with the insurance covering at least the following:

- a) Damage to facilities.
- b) Pollution damage and other liability towards third parties.
- c) Wreck removal and clean-up as a result of accidents
- d) Drilling of [exploratory/appraisal/production] wells.
- e) Insurance of the Licensee’s own employees who are engaged in the activities”.

The insurance for items (a) to (d) must be “reasonable ... taking into consideration risk exposure and premium costs” (section 20).

The NEA may withdraw a licence if the licensee files for bankruptcy or a plan of reorganisation under a bankruptcy code (Hydrocarbons Act, article 10). Article 20 of the Hydrocarbons Regulation has an equivalent provision.

### **1.11.1 Persons required to have evidence of financial security**

The licensee of an exploration and production licence must have evidence of financial security, as indicated in section 1.11 above.

The licensee must also ensure that contractors and sub-contractors engaged in hydrocarbon activities take out insurance for their employees equivalent to that taken out by the licensee (Model Licence, section 20). Article 14 of the JOA specifies the operator’s duty to take out and maintain insurance on behalf of the joint venture. It also states that another licensee is entitled to take out its own insurance provided the other licensee waives recourse against other licensees.

### 1.11.2 Time at which evidence of financial security is required

Evidence of financial security must be provided for the licensee's obligations under the licence within 30 days from the date on which the licence is granted (Model Licence, section 20). The NEA may subsequently, upon 30 days' notice, require the guarantee to be changed or supplemented (Model Licence, section 20).

### 1.11.3 Scope (traditional damage / environmental damage / etc)

The guarantee covers the licensee's obligations under the exploration and production licence. The insurance (or other form of financial security acceptable to the NEA) covers damage to facilities; pollution damage and other liability towards third parties; wreck removal and clean up as a result of accidents, drilling of exploratory, appraisal and production wells; and employee liability insurance.

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

The NEA "may consent to the Licensee using other security arrangements [than insurance]" (Model Licence, section 20). Article 19(1) of the Hydrocarbon Regulation refers to "a liability insurance from a recognised insurance company, banker's indemnity insurance, performance bonds or other insurance policies"

### 1.11.5 Monetary limit(s)

Neither the Hydrocarbons Act, the Hydrocarbons Regulation nor the Model Licence specifies the monetary limits of the financial security. The NEA specifies the level required, with the power to require the guarantee for the obligations under the licence to be supplemented (Model Licence, section 20). Further, the NEA may require a licensee to take out further insurance (see section 1.11.6 below).

### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

Section 20 of the Model Licence states that "at the end of each calendar year, the Licensee shall inform NEA about existing insurance agreements, with an indication of the main terms. NEA may require further insurance".

In respect of decommissioning an offshore installation, article 16 of the Hydrocarbons Act states that:

"If there is reason to assume that a licensee does not have the financial ability to pay for the cost of decommissioning an offshore installation, the [NEA] can at any time demand that the licensee prove his ability to pay or provide necessary guarantees".

## 1.12 Jurisdictional issues (if any)

Liability for compensation for loss or damage by hydrocarbon activities imposed by the Hydrocarbons Act specifically applies to operations on the Icelandic continental shelf.

## 1.13 Key points

Iceland is in the exploratory phase of offshore oil and gas operations; commercial production had not begun as of October 2014.

Strict liability for compensation for loss or damage from pollution from offshore oil and gas operations is imposed by the Hydrocarbons Act. That Act specifies that liability under other Icelandic laws also applies referring, in particular, to the Tort Damages Act, which imposes fault-based for bodily injury and property damage and, perhaps pure economic loss.

Holders of exploration and production licences are required to have financial security in the form of a bank guarantee, if the licensee has a parent company, a parent company guarantee, to cover obligations under the licence. In addition, the licensee must have insurance, performance bonds or other financial security acceptable to the NEA for liability for any damage that may be caused by exploration, exploitation and production activities, or their non-performance, including environmental damage. The insurance, or other financial security, must specifically cover, among other things, pollution damage, liability towards third parties, and employees' liability insurance.



# Ireland

## 1.1 Introduction

The first exploration licence for offshore oil and gas in Ireland was awarded in 1969 for an area off County Cork in southern Ireland. A lease was granted but it was not until 1978 that production of gas began. In November 2002, a second petroleum lease was granted, also for an area off County Cork. As of October 2014, production had not begun, due in large part to opposition to the development of land-based facilities.

Ireland held the first licensing round for offshore oil and gas in 2005, followed by further rounds in 2007 and 2009. The licensing rounds resulted in the granting of three leases and the issuance of 21 exploration licences.<sup>847</sup>

The fourth licensing round was held in 2011. This round differed from previous rounds in that, whereas the previous rounds had covered specific basins or blocks, the 2011 round covered the whole of Ireland's Atlantic seabed, except for previously licensed areas, for a total of 996 full and 58 partial blocks in an area of over a quarter of a million square kilometres.<sup>848</sup> The round resulted in 13 licensing options for two year periods being granted to 12 companies, with the option to convert them to 15 year frontier exploration licences.<sup>849</sup>

The Department of Communications, Energy and Natural Resources has estimated that there is approximately 6.5 billion barrels of oil and 20 trillion cubic feet of gas off the west coast of Ireland, for a total of 10 billion barrels of oil equivalent (boe).<sup>850</sup>

In 2012, the Joint Committee on Communications, Natural Resources and Agriculture of the *Oireachtas* (Parliament) issued a report on recommendations for Ireland's offshore oil and gas industry in light of its limited success.<sup>851</sup> The recommendations included a review of the Petroleum and Other Minerals Act, 1960, as well as reviews of fiscal and licensing terms before each licensing round.<sup>852</sup>

No offshore oil or gas blowout has ever been reported in Ireland.<sup>853</sup>

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<sup>847</sup> See SIPTU, *Optimising Ireland's Oil and Gas Resources 5* (June 2011); available at [http://www.siptu.ie/media/publications/file\\_14692\\_en.pdf](http://www.siptu.ie/media/publications/file_14692_en.pdf)

<sup>848</sup> Joint Committee on Communications, Natural Resources and Agriculture of the *Oireachtas*, *Report Offshore Oil and Gas Exploration 38* (CNRA 010, May 2012) (Offshore Oil and Gas Exploration Report); available at <http://www.oireachtas.ie/parliament/media/committees/archivedcommittees/cnranda/Launched-JCNRA-Report-on-Offshore-Oil-and-Gas-Exploration.pdf> In June 2012, the Committee divided into two, becoming the Joint Committee on Agriculture, Food and the Marine, and the Joint Committee on Transport and Communications.

<sup>849</sup> See Deloitte, *Irish 2011 Atlantic Margin Licensing Round offers released*; available at [http://www.psg.deloitte.com/NewsLicensingRounds\\_IE\\_111102.asp](http://www.psg.deloitte.com/NewsLicensingRounds_IE_111102.asp)

<sup>850</sup> See SIPTU, *Optimising Ireland's Oil and Gas Resources 5* (June 2011); available at [http://www.siptu.ie/media/publications/file\\_14692\\_en.pdf](http://www.siptu.ie/media/publications/file_14692_en.pdf)

<sup>851</sup> *Offshore Oil and Gas Exploration Report*, 3

<sup>852</sup> *Ibid*, 10-12.

<sup>853</sup> Telephone interview with Patrick Shannon, Chairman of the Irish Offshore Operator's Association (IOOA), 14 April 2014; and telephone interview with the Petroleum Affairs Division at the Department of Communications, Energy and Natural Resources, 9 May 2014.

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas operations in Ireland are subject to primary legislation in the form of statutes, and secondary legislation in the form of regulations.

The Petroleum and Other Minerals Development Act, 1960,<sup>854</sup> the Civil Liability Act, 1961, and the common law impose liability for bodily injury and property damage. As a general rule, Irish law does not impose liability for pure economic loss.

## 1.3 Rights to, and ownership of, offshore oil and gas

All petroleum in Ireland, its territorial sea and its continental shelf is vested in the State.<sup>855</sup> Under the Petroleum and Other Minerals Development Act, 1960, the State vests petroleum in the Minister for Communications, Energy and Natural Resources and his successors.<sup>856</sup> Exploration and production is carried out only if the Minister grants the requisite licence.<sup>857</sup>

Section 2(1) of the Continental Shelf Act, 1968, further provides that “Any rights of the State outside territorial waters over the sea bed and subsoil for the purpose of exploring such sea bed and subsoil and exploiting their natural resources are ... vested in the Minister and shall be exercisable by the Minister”. The territorial sea extends 12 nautical miles from the coast.<sup>858</sup>

Ireland is carrying out a project, known as the Irish Continental Shelf Delineation Project, to maximise the area of the Irish continental shelf and to establish and delineate its outer limits beyond 200 nautical miles.<sup>859</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The main legislation for offshore oil and gas licensing is the Petroleum and Other Minerals Development Act, 1960.

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<sup>854</sup> A list of the main Acts and Statutory Instruments Relevant to Offshore Oil and Gas Exploration and Development, with links to the legislation, is available at <http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Statutory+Basis/>. The legislation available through the links does not include amendments from amending Acts, which are listed separately. Irish legislation and case law is also available from the British and Irish Legal Information Institute; see <http://www.bailii.org/databases.html#ie>

<sup>855</sup> Petroleum and Other Minerals Development Act, 1960, section 2(1) (definition of “State petroleum”).

<sup>856</sup> The name of the Minister has changed several times. When the Continental Shelf Act was enacted, the Minister was known as the Minister for Industry and Commerce. Section 4(2) of the Continental Shelf Act provides that the term “petroleum” is defined by reference to the Petroleum and Other Minerals Development Act, 1960. That Act defines the term “petroleum” as “any mineral oil or relative hydrocarbon and natural gas and other liquid or gaseous hydrocarbons and their derivatives or constituent substances existing in its natural condition in strata (including, without limitation, distillate, condensate, casinghead gasoline and such other substances as are ordinarily produced from oil and gas wells) and includes any other mineral substance contained in oil and natural gas brought to the surface with them in the normal process of extraction, but does not include coal and bituminous shales and other stratified deposits from which oil can be extracted by distillation” (section 2(1)).

<sup>857</sup> Petroleum and Other Minerals Development Act, 1960, ss 6(1), 9(1).

<sup>858</sup> Maritime Jurisdiction (Amendment) Act, 1988), s 2 and Table.

<sup>859</sup> See Irish Continental Shelf Delineation Project; available at <http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Irish+Continental+Shelf+Delineation+Project/>

The Act provides for three types of licences: an exploration licence, a prospecting licence, and a reserved area licence (section 21(1)). A reserved area licence is a licence adjacent to or surrounding the leased area that is not subject to an authorisation other than a prospecting licence (section 19)).

There are three categories of exploration licence:

- A standard exploration licence for water depths to 200 metres, which may be granted for a maximum period of six years, divided into two phases of three years each;
- A deepwater exploration licence for water depths over 200 metres, which may be granted for a maximum period of nine years, divided into three phases of three years each; and
- A frontier exploration licence, which may be granted for a maximum period of 12 years, divided into four phases of three years each.

In addition, there is a licensing option, which is granted for a maximum period of three years, and which grants the holder the option to an exploration licence(s) over part or all of the area covered by the option.

The provisions in the Petroleum and Other Minerals Development Act, 1960, relating to compensation and offences are discussed below.

The Safety, Health and Welfare (Offshore Installations) Act, 1987, applies health and safety law specifically to offshore installations, that is, “any installation which is or has been maintained, or is intended to be established, for the exploration for or exploitation of minerals and includes any installation providing accommodation for persons who work on or from any such offshore installation so engaged in exploration or exploitation of minerals” (section 2(1)).

## 1.5 Liability for bodily injury, property damage and economic loss

Liability exists under Irish law for bodily injury and property damage. As a general rule, liability does not exist for pure economic loss.

If there is a threat of, or actual, pollution caused by operations carried out by, or on behalf of, the holder of an “authorisation”, the holder “in accordance with law and established procedures, shall at its expense immediately control and remove the pollutant and deal effectively with any threat of pollution”.<sup>860</sup>

An “authorisation” is defined by section 1(2) of the Licensing Terms for Offshore Oil and Gas Exploration, Development & Production 2007, issued by the Department of Communications, Energy and Natural Resources (Licensing Terms) as any one of the following:

- a Petroleum Prospecting Licence;
- an Undertaking to grant an Exploration Licence (Licensing Operation);
- an Exploration Licence;
- a Petroleum Lease; and
- a Reserved Area Licence.

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<sup>860</sup> Licensing Terms, s 60(2).

### 1.5.1 Bodily injury and property damage

Claims for bodily injury and property damage may be brought under the common law, the Petroleum and Other Minerals Development Act, 1960, the Civil Liability Act, 1961, and the Workers Compensation Act, 1934, as appropriate. The application of the common law and the above statutes is limited, however, because many claims from pollution damage from offshore oil and gas operations could be for pure economic loss.

#### ➤ Common law claims

Common law causes of action are discussed further below. The four applicable causes of action are negligence, public nuisance, private nuisance, and the rule in *Rylands v Fletcher*.

#### ➤ Petroleum and Other Minerals Development Act, 1960

Sections 12 and 16 of the Petroleum and Other Minerals Development Act, 1960, provide for compensation for, among other things, nuisance. Those sections are set out below with the caveat that their focus is not claims for pollution damage from offshore oil and gas operations but, rather, compensation for damage to land from the operations themselves. They may, thus, not apply to claims for compensation for bodily injury and property damage from offshore oil and gas operations.

Section 12 of the Petroleum and Other Minerals Development Act, 1960, provides that:

“Whenever damage to the surface of land or to mineral deposits or to water supplies or a nuisance is caused whether directly or indirectly, either—

- (a) by the exercise by the licensee under a petroleum prospecting licence of his rights under the licence, or
- (b) by exercise by the Minister of the powers conferred on him by paragraph ( b ) of subsection (1) of section 11 of this Act,

the licensee or the Minister (as the case may be) shall be liable to pay compensation for such damage or nuisance, and the provisions of Chapter VII of this Part shall apply in respect of such compensation”.

Section 16 of the 1960 Act provides that:

“Where damage to the surface of land or to mineral deposits or to water supplies or a nuisance is caused directly or indirectly, either—

- (a) by working or doing anything incidental to the working of petroleum, or
- (b) by exercising the right of entry on and user of land [“reasonably necessary for the working of petroleum or for any purpose incidental thereto],

the person causing such damage or nuisance, whether he is the lessee under a petroleum lease or the Minister, shall be liable to pay compensation for such damage or nuisance, and the provisions of Chapter VII of this Part shall apply in respect of such compensation”.

Chapter VII provides that the Board shall decide the amount of compensation if the parties do not agree (section 41(1)). If compensation is payable by the Minister, the Minister of Finance must consent to the payment (section 41(2)).

### ➤ **Civil Liability Act, 1961**

The Civil Liability Act, 1961, imposes liability for bodily injury and property damage, as discussed further below.

Claims under the Civil Liability Act, 1961, are provable in bankruptcy provided the wrong that resulted in the wrongdoer's liability for damages occurred before the bankruptcy (section 61). Notwithstanding any other enactment or any rule of law, a claim for damages or contribution in respect of a wrong shall be provable in bankruptcy where the wrong out of which the liability to damages or the right to contribution arose was committed before the time of the bankruptcy.

### ➤ **Workers Compensation Act, 1934**

Section 15 of the Workers Compensation Act, 1934, imposes liability on employers to pay compensation for personal injury or death to employees by accidents that arise out of and in the course of employment<sup>861</sup> as well as specified diseases (Part X). The Act sets out details of the compensation and related matters.

## **1.5.2 Economic loss**

As a general rule, there is no liability for pure economic loss under Irish law.<sup>862</sup> Many claims by businesses in the fisheries and tourism sectors from pollution damage from offshore oil and gas operations would, thus, not be actionable. A court may award pure financial loss if the court concludes that it was foreseeable that the loss would occur and the loss had a certain degree of significance,<sup>863</sup> both issues that would seem to be applicable after the Deepwater Horizon incident.

One commentator considered that the hypothetical of an owner of an outdoor recreation business that had organised rafting and canoeing tours on a river for 10 years suffering a total loss of profits for three years during which the river could not be used for white water canoeing and rafting due to pollution of a nearby river. The commentator stated that the owner would face a “heavy burden in establishing liability”. The commentator noted that the court could rule favourably if it considered that the polluter should reasonably have foreseen that all the users of the river would be deprived of its use if it was polluted.<sup>864</sup> By analogy, claims for lost profits from pollution from an offshore oil and gas incident may also be difficult to establish; much would depend on the circumstances.

## **1.5.3 Liability for dangerous activities**

The rule in *Rylands v Fletcher*, which is a sub-set of nuisance, imposes strict liability on a person who controls land for the natural consequences of the escape of a substance that it brought onto, or that accumulated on, the land, provided that the use of the land is “non-natural”.

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<sup>861</sup> The Workers Compensation Act, 1934, is available at [http://www.bailii.org/ie/legis/num\\_act/1934/0009.html#zza9y1934s67](http://www.bailii.org/ie/legis/num_act/1934/0009.html#zza9y1934s67)

<sup>862</sup> See Raymond Friel, Ireland, 240, 256, in European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>863</sup> See Environmental Liability and Ecological Damage in European Law 525 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>864</sup> Environmental Liability and Ecological Damage in European Law 494 (Monika Hinteregger, editor, Cambridge University Press, 2008).

The rule is probably not relevant to claims for property damage from offshore oil and gas activities in Ireland because it is unlikely to apply to oil leaks from a wellhead because the operator would not have brought the oil onto, or kept the oil on, “land” controlled by it.<sup>865</sup>

#### 1.5.4 Standard of liability (strict / fault-based)

The standard of liability for an action in negligence is (obviously) fault-based.

The standard of liability for public nuisance is neither strict liability nor negligence; it is fault. That is, the defendant must have carried out an unlawful act or have failed to discharge a legal duty. The level of fault varies depending on the circumstances of the case.

Some form of fault is required for private nuisance because the defendant must have unlawfully interfered with a person’s use or enjoyment of land; negligence is not necessarily required.<sup>866</sup>

The standard of liability for the rule in *Rylands v Fletcher* is strict liability.

The standard of liability under the Civil Liability Act, 1961, is negligence.

#### 1.5.5 Scope of liability (joint and several / several)

The Civil Liability Act, 1961, imposes joint and several liability for bodily injury and property damage on wrongdoers (called “concurrent wrongdoers,” for the “same damage” (section 11). If items of damage caused by wrongdoers to a third person are independent, the court may apportion liability between them “as may be justified by the probabilities of the case, or where the plaintiff is at fault may similarly reduce his damages”. If it is not possible to determine the proper apportionment, “the damages may be apportioned or divided equally”. This method of apportionment also applies to acts which, taken together, are a nuisance even though an act taken by a wrongdoer would not, taken alone, be a nuisance (section 12).

#### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Applicable Irish law does not establish a rebuttable presumption. The burden of proof in a claim for bodily injury and property damage is on the plaintiff.

#### 1.5.7 Exceptions

There are no exceptions to the applicable Irish law for a claim for bodily injury or property damage.

#### 1.5.8 Defences

There are no defences to a common law tort for bodily injury in Ireland, although a defendant may allege that the claimant cannot recover in part or in whole due to contributory negligence. In addition, a person cannot rely upon their own illegal act to bring an action in tort. Neither of these situations is likely to arise in a claim for compensation for harm from pollution from an offshore oil and gas incident.

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<sup>865</sup> See Greg Gordon, Oil, water and law don’t mix: environmental liability for offshore oil and gas operations in the UK; Part 1: Liability in the law of tort/delict and under the petroleum licence (2013) Environmental Law and Management, vol. 25, 3, 6-7 (discussing tort law in the UK).

<sup>866</sup> See *ibid*, 3, 7 (discussing tort law in the UK).

There are defences to a private nuisance action for the existence of an easement by prescription and statutory authority for the nuisance, neither of which would apply to claims concerning offshore oil and gas activities.

### 1.5.9 Remedies

The remedy for a claim for bodily injury and property damage is ordinary compensatory damages.

Aggravated damages may be awarded at the discretion of the court depending on the existence of the following factors:

- “(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or
- (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or
- (c) conduct of the wrongdoer and / or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action”.<sup>867</sup>

Punitive damages, which are synonymous with exemplary damages, may be awarded at the discretion of the court. Punitive damages arise “from the nature of the wrong which has been committed and/or the manner of its commission which are intended to mark the court’s particular disapproval of the defendant’s conduct in all the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct by awarding such damages, quite apart from its obligation, where it may exist in the same case, to compensate the plaintiff for the damage which he or she has suffered”. The amount of punitive damages that are awarded, if any, depends on the circumstances of the case.<sup>868</sup>

### 1.5.10 Limitations period(s)

There is a general limitations period of six years for torts.<sup>869</sup> The limitations period for actions for “negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision)” is two years.<sup>870</sup>

The Statute of Limitations Act, 1991, as amended by section 7 of the Civil Liability and Courts Act, 2004, provides that a claim for damages for bodily injury is two years from the “relevant date”, which is defined as “the date of accrual of the cause of action or the date of knowledge of the person concerned as respects that cause of action whichever occurs later”.<sup>871</sup>

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<sup>867</sup> *Shortt v The Commissioner of an Garda Síochána* [2007] IESC 9 (Irish Supreme Court) (quoting *Conway v Irish National Teachers Organisation* [1991] 2 I.R. 305); available at <http://www.bailii.org/ie/cases/IESC/2007/S9.html>

<sup>868</sup> *Shortt v The Commissioner of an Garda Síochána* [2007] IESC 9 (Irish Supreme Court).

<sup>869</sup> Statute of Limitations Act, 1959, s 11(1).

<sup>870</sup> *Ibid*, s 11(2), as amended by Civil Liability and Courts Act, 2004, s 7.

<sup>871</sup> The Civil Liability and Courts Act, 2004, is available at [http://www.bailii.org/ie/legis/num\\_act/2004/0031.html](http://www.bailii.org/ie/legis/num_act/2004/0031.html). See also Kieran Cowhey and Lea Devitt, Ireland: Civil Liability And Courts Act 2004 (1 February 2008); available at <http://www.mondaq.com/x/51626/Personal+Injury/Civil+Liability+And+Courts+Act+2004>

### 1.5.11 Right to claim contribution from other responsible persons

The Civil Liability Act, 1961, provides a right to a concurrent wrongdoer who has paid compensation to an injured person to bring an action for contribution from other tortfeasors (wrongdoers). The court determines the amount of the contribution as the amount that is “just and equitable having regard to the degree of that contributor’s fault”. The court also has the “power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any contributor shall amount to a complete indemnity” (section 21). Similar rules apply to settlements by a concurrent wrongdoer provided that the amount of contribution is “just and equitable” (section 22).

The Tortfeasors Act, 1951, provides a right of contribution against other tortfeasors by a tortfeasor who has paid compensation.<sup>872</sup>

## 1.6 Compensation system (claims within Target Country)

Ireland does not have a compensation system specifically for pollution damage from offshore oil and gas operations. Court procedures apply if claims are not settled.

The Licensing Terms require an authorisation holder to notify the Minister, “forthwith” and in writing, of:

“the making of any claim or the commencement of any action, suit, proceedings or arbitration arising out of the exercise or purported exercise of the rights and privileges granted by the authorisation, or arising from or attributed to any act or omission of the authorisation holder or its officers, servants, employees or workmen or contractors or persons in privity with the authorisation holder [. The authorisation holder] shall furnish to the Minister all the information which the Minister may from time to time require as to any such claim, action, suit, proceedings or arbitration” (Licensing Terms, section 1(2)).

The Licensing Terms do not provide procedures for handling such claims. Further, it appears that the provision is not intended to apply to claims for traditional damage from pollution from an offshore oil and gas incident. If such claims are made, there would appear to be no need for the licensee to notify the Minister because the Minister would already be aware of them due to the publicity concerning the incident.

If the Minister determines that the authorisation holder must have a performance bond or guarantee, or insurance, the procedures would appear to entail calling on the bond, or the insurers to handle claims in the event they arise. If the Minister, as recently occurred, determines that membership of OPOL satisfies as evidence of financial security, the procedures under OPOL would apply (see section 4.1.2 of the report).

## 1.7 Compensation system (claims concerning transboundary incidents)

Ireland does not have a compensation system specifically for claims concerning transboundary incidents for pollution damage from offshore oil and gas operations.

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<sup>872</sup> The Tortfeasors Act, 1951, is available at [http://www.bailii.org/ie/legis/num\\_act/1951/0001.html#zza1y1951](http://www.bailii.org/ie/legis/num_act/1951/0001.html#zza1y1951)



## 1.8 Competent authority

The Petroleum Affairs Division of the Department of Communications, Energy and Natural Resources is the competent authority for petroleum licensing. Its role is to “to maximise the benefits to the State from exploration for and production of indigenous oil and gas resources, while ensuring that activities are conducted safely and with due regard to their impact on the environment and other land/sea users”.<sup>873</sup>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The Department of Communications, Energy and Natural Resources carries out strategic environmental impact assessments for licensing rounds.<sup>874</sup>

## 1.10 Offences and sanctions

The Continental Shelf Act, 1961, states that it is an offence to cause the discharge or escape of any oil:

“to which section 10 of the Oil Pollution of the Sea Act, 1956, applies or any mixture containing not less than one hundred parts of such oil in a million parts of the mixture ... into any part of the sea ... from a pipe-line, or ... otherwise than from a ship, as the result of any operation for the exploration of the sea bed and subsoil or the exploitation of their natural resources in a designated area” (section 7(1)).

The owner of the pipeline or the person carrying out the operations has a defence if it proves that the discharge “was due to the act of a person who was there without his permission (express or implied) or, in the case of an escape, that he took all reasonable care to prevent it and that as soon as practicable after it was discovered all reasonable steps were taken for stopping or reducing it” (section 7(1)).

The penalty on summary conviction or indictment is a fine; with a maximum fine on summary conviction and a fine on indictment “of such amount as the court may consider appropriate” (section 7(2)).

The Oil Pollution of the Sea Act, 1956, is, however, not directed at discharges of oil and oily mixtures from offshore oil and gas facilities but, instead, on discharges of oil and oily mixtures from a vessel, place on land, and apparatus for transferring oil to and from a vessel (section 11(1)). It is, thus, questionable whether it applies to pollution from an offshore oil and gas facility.

Section 12 of the Petroleum and Other Minerals Development Act, 1960, provides that:

“Whenever damage to the surface of land or to mineral deposits or to water supplies or a nuisance is caused whether directly or indirectly, either—

<sup>873</sup> See Role of PAD; available at <http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Role+of+PAD/>

<sup>874</sup> The assessments are available at Irish Offshore Strategic Environmental Assessment (IOSEA); [http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Irish+Offshore+Strategic+Environmental+Assessment+\(IOSEA+4\)/](http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Irish+Offshore+Strategic+Environmental+Assessment+(IOSEA+4)/)

- (a) by the exercise by the licensee under a petroleum prospecting licence of his rights under the licence, or
- (b) by exercise by the Minister of the powers [to act as the holder of a licence when the Minister has not issued one],

the licensee or the Minister (as the case may be) shall be liable to pay compensation for such damage or nuisance, and the provisions of Chapter VII of this Part shall apply in respect of such compensation”.

The Petroleum and Other Minerals Development Act, 1960, also sets out other offences, including the failure or refusal by a licensee to provide information when requested by the Minister (section 17(3)).

The Safety, Health and Welfare (Offshore Installations) Act, 1987, sets out offences for the failure to comply with health and safety regulations applicable to offshore installations (section 34), and penalties for such offences (section 39).

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Licensing Terms provide that the Minister shall take the following matters into account in applications for authorisations for licences:

- “(a) the work programme proposed by the applicant;
- (b) the technical competence and offshore experience of the applicant;
- (c) the financial resources available to the applicant;
- (d) the applicant’s policy to health, safety and the environment; and
- (e) where relevant, previous performance by the applicant under any authorisations to which the applicant has been a party” (section 3).

The Minister:

“may, upon granting an authorisation or at a later date, direct the authorisation holder to post a performance bond or guarantee to ensure fulfilment of the obligations to be undertaken as well as to cover any liability which may be incurred relating to the activity of the authorisation holder” (Licensing Terms, section 42).

The above financial security instruments, which may be – rather than are necessarily – required, are designed to ensure that the licensee carries out the work programme.

In addition, the authorisation holder must take out an insurance policy to indemnify “the authorisation holder against all claims by employees of the authorisation holder for workmen’s compensation, damages at common law or otherwise”. The policy’s terms and insurers are subject to approval by the Minister (Licensing Terms, section 44(1)).

As a practical matter, evidence of financial security may take the form of corporate net worth or some other form of self-insurance rather than insurance. For example, the Minister accepted membership of OPOL in respect of a small operator who was granted a licence, after the Macondo spill, to drill two exploration wells. One well was in shallow water; the other was in deep water. The approach taken by

Ireland is to determine the “reasonable” requirement to be imposed on licensees. “Reasonable” is defined by UK experience.<sup>875</sup>

Further, the Licensing Terms state that the authorisation holder must:

“at all times keep the Minister effectually indemnified against any claim, demand or damage whatsoever in respect of its operations under the authorisation or for injury or damage to any person or property (including the person or property of any other person in receipt of an authorisation from the Minister) or for nuisance or in any way arising out of or attributed to the exercise or purported exercise of any of the rights and privileges conferred by the authorisation or attributed to any act or omission of the authorisation holder or its officers, servants, employees, or workmen or contractors or persons in privity with the authorisation holder whether such claims shall be made against the Minister or the authorisation holder and the Minister jointly or with others” (Licensing Terms, section 44(2)).

If the authorisation holder fails to carry out the obligations under the authorisation, the Minister is entitled, after reasonable notice in writing, to carry them out, including the provision and installation of any necessary equipment. The Minister may recover its costs and expenses from the authorisation holder (Licensing Terms, section 65).

Any disputes between the authorisation holder and the Minister are to be settled by arbitration proceedings (Licensing Terms, section 51).

If a licensee who is an individual becomes bankrupt, or if a licensee that is a body corporate dissolves, the licence terminates (section 22(4)). The appointment of a receiver or liquidator (whether compulsory or voluntary) is grounds for revoking a licence (referred to as an “authorisation”).<sup>876</sup>

Section 62 of the Workmen’s Compensation Act, 1934, provides that an employer may establish a scheme of compensation, benefit or insurance for its workmen provided the scheme is not less favourable to the workmen and their dependants than the Act itself.

#### **1.11.1 Persons required to have evidence of financial security**

If an authorisation is held by more than one company, all obligations under it are joint and several obligations (Licensing Terms, section 43).

Further, if an authorisation is held by more than one company, the joint operating agreement between the companies, and any amendments to it, must be submitted to the Minister for information. Any proposed change of operator is subject to the Minister’s prior approval (Licensing Terms, section 57).

#### **1.11.2 Time at which evidence of financial security is required**

A performance bond may be required when an authorisation is granted, or at a later date if the Minister so states (Licensing Terms, section 42).

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<sup>875</sup> Telephone interview with the Petroleum Affairs Division at the Department of Communications, Energy and Natural Resources, 9 May 2014.

<sup>876</sup> Department of Communications, Energy and Natural Resources, Licensing Terms for Offshore Oil and Gas Exploration, Development & Production 2007, s 1(2); available from <http://www.dcenr.gov.ie/Natural/Petroleum+Affairs+Division/Licensing+Applications/>

Insurance is required as part of the authorisation. The authorisation holder must maintain and keep up the policy and pay all premiums “so long as the operations of the authorisation continue” (section 44). The authorisation holder must produce the policy and receipts for the premium to the Minister or any person authorised by the Minister on demand (Licensing Terms, section 44(1)). As indicated above, however, the Minister may decide to accept a financial security mechanism other than insurance.

### **1.11.3 Scope (traditional damage / environmental damage / etc)**

The bond or guarantee must cover all the obligations under an authorisation “as well as ... any liability which may be incurred relating to the activity of the authorisation holder” (Licensing Terms, section 42). The bond or guarantee is thus designed to cover obligations under the authorisation itself, that is, the work programme; it is not designed to cover claims for compensation for pollution from offshore oil and gas operations.

The scope of cover provided by insurance (or some other type of financial security mechanism accepted by the Minister) specifically includes claims for compensation for bodily injury and property damage from pollution from offshore oil and gas operations because it includes “damages at common law or otherwise”.

### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

As indicated above, the financial security mechanism for obligations under an authorisation and “any liability which may be incurred relating to the activity of the authorisation holder” is a “performance bond or guarantee” (Licensing Terms, section 42). As a practical matter, guarantees have been used; performance bonds have never been used.<sup>877</sup>

Also as indicated above, the financial security mechanism for workers’ compensation, damages at common law or otherwise, and liability for any damage, including pollution damage or in respect of any liability which may arise as a result of [the holder’s] operations under the authorisation” is insurance (Licensing Terms, sections 44(1), 44(4)).

### **1.11.5 Monetary limit(s)**

Neither the legislation, nor the Licensing Terms, specifies the monetary limits of the performance bond or guarantee, or the insurance cover. The amount of each is to be approved by the Minister (see Licensing Terms, sections 42 and 44(1), (4)). The Minister determines the amount on a case-by-case basis.<sup>878</sup>

The Licensing Terms provide the Minister with “the right, from time to time, to increase all money amounts mentioned herein having regard to relevant economic factors and shall notify the authorisation holder accordingly. The increases shall have effect from the date of such notice”. (Licensing Terms, section 45).

### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

Neither the legislation nor the Licensing Terms specify the timing of reviews of the adequacy of the financial security to be held by the holder of an authorisation. The Minister has the right, however, to

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<sup>877</sup> Telephone interview with the Petroleum Affairs Division at the Department of Communications, Energy and Natural Resources, 9 May 2014.

<sup>878</sup> Ibid.

direct the holder to post a performance bond or guarantee (Licensing Terms, section 42). Further, the Minister may require the holder to produce the insurance policy and receipts (Licensing Terms, section 44(1)).

### 1.12 Jurisdictional issues (if any)

The Continental Shelf Act, 1968, provides that an act or omission that takes place on an installation in a designated area or any waters within 500 metres of such an installation and which is an offence under Irish law is an offence (section 3(1)(a)). The Act specifically applies to acts or omissions “in connection with the exploration of the sea bed or subsoil or the exploitation of their natural resources” within the above areas (section 3(1)(b)).

Section 10 of the Maritime Jurisdiction Act, 1959, extends jurisdiction for offences to internal waters and the territorial sea. Further, the Act applies the Civil Liability Act, 1961, to such areas (section 3(2)).

### 1.13 Key points

Ireland is still mainly in the exploration phase for offshore oil and gas, a process which it is expanding and expediting.

The legislation for the exploration and production of offshore oil and gas does not specifically impose liability for compensation to third parties who suffer bodily injury or property damage from a pollution incident from offshore oil and gas operations. Instead the Civil Liability Act, 1961, and common law apply.

As a general rule, liability for pure economic loss does not exist under Irish law. The majority of claims for compensation from pollution from an offshore oil and gas incident, particularly from the fisheries and tourism sectors, would thus not be actionable. Further, Ireland does not have a procedure for handling claims for compensation although if it accepts membership of OPOL as financial security (as it has done at least once since April 2010), the compensation scheme under OPOL would apply.

A performance bond or guarantee is specified as financial security for carrying out the work programme itself. As a practical matter, guarantees have been accepted but not a bond. These financial security mechanisms are not, however, designed to apply to claims for compensation from a pollution incident from offshore oil and gas operations.

The financial security requirements for compensation for claims by third parties for bodily injury and property damage are minimal. The financial security specified for such claims is insurance, with the Minister having the discretion not to require financial security or to accept other types of financial security such as self-insurance. As indicated above, the Minister accepted membership of OPOL in respect of a shallow and a deep water well by a small operator.

The legislation does not specify a minimum level of financial security to be shown by an authorisation holder. Instead, the amount is at the discretion of the Minister and is decided on a case-by-case basis.

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# Italy

## 1.1 Introduction

Italy has a long history of onshore oil and gas production.

In 1950, Italy began researching the potential for oil and gas in its offshore area. The first offshore well was drilled in Italian territory (and also the first in European territory) in 1959. In the late 1960s and early 1970s, gas was discovered in the offshore area, followed by further discoveries. In the 2000s, gas was discovered in the Northern Adriatic Sea and the Tyrrhenian Sea, west of Sicily.<sup>879</sup>

Some of the wells that have been drilled since the early 1990s are in deep waters of over 800 metres and, in the Ionian Sea and the Sicily Channel, over 1,000 metres.<sup>880</sup>

As of 31 December 2013, there were 21 offshore exploration permits and 94 onshore exploration permits, for a total of 115 permits.<sup>881</sup> In addition, there were 66 offshore production permits and 134 onshore production permits for a total of 200 permits.<sup>882</sup>

The number of offshore exploration permits has decreased substantially since the 1990s when there were over 80 of them. The number of production permits has remained constant.<sup>883</sup>

In 2012, 5.37 million tons of oil was produced in Italy, of which approximately nine per cent was produced offshore. Also in 2012, 8,530 million standard cubic metres (SM<sup>3</sup>) of gas was produced, of which approximately 70 per cent was produced offshore. Further in 2012, there were 59 onshore and offshore operators in total, of which two (ENI and Edison) operated offshore.<sup>884</sup>

There was a decrease in the production of oil and gas in Italy after 2002, with the lowest level of production occurring in 2009. In 2010, the production of oil began to increase, followed by an increase in the production of gas in 2011. The increase is mainly due to a revamping of onshore fields more

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<sup>879</sup> See International Energy Agency, Energy Policies of IEA Countries; Italy 101 (2009 Review); available from <http://www.iea.org/publications/freepublications/publication/name,3873,en.html>

<sup>880</sup> See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 34 (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

<sup>881</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>882</sup> See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 34 (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

<sup>883</sup> See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 35 (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

<sup>884</sup> See presentation by Luca Di Donatantonio and Maria Giovanna Montalbano, Directorate General for Mining and Energy Resources, REMPEC – 1<sup>st</sup> Offshore Protocol Working Group Meeting; Offshore Regulation and Practice in Italy (13 June 2013).

than offsetting the depletion of offshore reserves. Production of both oil and gas in 2012 increased by two per cent compared to 2011.<sup>885</sup>

As in some other Target States, some environmental groups in Italy have opposed offshore oil and gas operations.<sup>886</sup>

Following the Macondo incident the Parliament enacted new legislation (art. 35 of Law Decree 22/06/2012, n. 83, converted into Law 07/08/2012 n. 134), which imposes a ban on hydrocarbons prospection, exploration and exploitation activities within the boundaries of the marine and coastal protected areas set by national, European or international laws in Italian waters. The ban also applies to hydrocarbon activities within 12 miles from the Italian coastline and from the boundaries of protected areas. There is an exception for existing licences and licences for which an application had been made when the legislation was adopted.<sup>887</sup>

The ban has resulted in a reduction in the area for offshore oil and gas exploration from 255,000 square kilometres to 139,000 square kilometres,<sup>888</sup> including a prohibition on exploration in the Tyrrhenian Sea east of Sardinia. Partially to compensate, the Ministry for Economic Development opened up a new area west of Sardinia including deep water areas about 2,500 metres deep.<sup>889</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore oil and gas activities is governed by the mining law and several other laws, decrees and regulations, the main one of which is the Ministerial Decree dated 4 March 2011, and implementing regulations, in particular, Decree of 22 March 2011 of the Director General for Energy and Mineral Resources of the Ministry of Economic Development.<sup>890</sup>

<sup>885</sup> See Executive Summary of DGRME Annual Report 2013Year 2012; available at <http://unmig.sviluppoeconomico.gov.it/unmig/stat/ra2013eng.pdf>

<sup>886</sup> See Christopher Coats, Is Italy Making Peace with Offshore Oil and Gas? (29 April 2014); available at <http://www.forbes.com/sites/christophercoats/2013/04/29/is-italy-making-peace-with-offshore-oil-and-gas/>; Ladka Bauerova and Chiara Vasarri, Italy Seeks \$18 Billion Investment Ditching Offshore Ban: Energy (19 July 2012); available at <http://www.bloomberg.com/news/2012-07-18/italy-seeks-18-billion-investment-ditching-offshore-ban-energy.html>; Oil spill in Sicily Channel would ruin almost entire Maltese coast, Malta Independent (3 December 2013); available at <http://www.independent.com.mt/articles/2013-12-03/news/oil-spill-in-sicily-channel-would-ruin-almost-entire-maltese-coast-3347349505/>

<sup>887</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014); see Law Decree 22/06/2012, n. 83, converted into Law 07/08/2012 n. 134, art 35; available at [http://www.gazzettaufficiale.it/atto/serie\\_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-08-11&atto.codiceRedazionale=12A08941](http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2012-08-11&atto.codiceRedazionale=12A08941)

<sup>888</sup> See Associazione Italiana di Diritto Marittimo, MARITTIMO Response of the Italian MLA to the Questionnaire on Offshore activities, pollution liability and related issues (11 September 2013); available at <http://www.aidim.org/pdf/Documenti%202013/Offshore%20Activities-Responses%20of%20the%20Italian%20MLA.pdf>

<sup>889</sup> See Italy's shrinking offshore oil and gas industry (4 December 2014); available <http://www.offshore-technology.com/features/featureitalys-shrinking-offshore-oil-and-gas-industry-4140696/>; see also Italy's new offshore drilling rules risk sidelining independents (24 September 2013); available at <http://www.reuters.com/article/2013/09/24/italy-drilling-idUSL5N0HJ3CL20130924>

<sup>890</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).



The Civil Code imposes liability for bodily injury, property damage and economic loss.

### 1.3 Rights to, and ownership of, offshore oil and gas

Article 2 of Law 21 July 1967, n. 613 (or Law n. 613/1967) on the Exploration and Production of Oil and Gas in the Territorial Sea and the Continental Shelf, and Amendments to Act No. 6 of 11 January 1957 on the Surveying and Production of Oil and Gas (Continental Shelf Act) provides that “[t]he right to explore the continental shelf and exploit its natural resources shall be vested in the State”.<sup>891</sup> Italy has not established an EEZ.

Article 2 further provides that:

“Operations undertaken with a view to prospecting for, surveying and producing oil and gas in the subsoil of the submarine areas adjacent to the territory of the Italian peninsula and islands, from the coast at low tide to the outer boundary of the Italian continental shelf, shall be subject to the provisions of this Act and to those provisions of the laws in force which are not in conflict therewith”.

Still further, article 2 provides that “[m]inerals extracted from the continental shelf shall, for all purposes, including taxation not provided for in this Act, be deemed to be equivalent to those extracted in Italian territory”.

Italy has entered into agreements with Albania, Croatia, France, Greece, Libya, Malta, Montenegro, Slovenia, Spain and Tunisia concerning the extent of its continental shelf.<sup>892</sup>

### 1.4 Specific legislation for offshore oil and gas operations

The main laws and regulations that govern the exploration and production of oil and gas in Italy are:

- Royal Decree 1443/1927 laying down the legislative framework on mining activities;
- Law n. 6/1957 on research and exploration of liquid and gas hydrocarbons;
- Law n. 613/1967;
- Law n. 9/1991;
- Legislative Decree n. 625/1996;
- Legislative Decree n. 164/2000 (Letta Decree);
- Law n. 239/2004 (Marzano Law); and

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<sup>891</sup> An unofficial English translation of the Act, as enacted, is available at: [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA\\_1967\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ITA_1967_Act.pdf) The definition of the continental shelf in the Act was subsequently superseded by the definition in article 76 of the United National Convention on the Law of the Sea of 10 December 1982. See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 10 (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

<sup>892</sup> See Directorate General for Mineral and Energy Resources, Ministry of Economic Development, The Sea Supplement to Hydrocarbons and Geothermal Resources Official Bulletin 7 (Year LVII, No. 2, 28 February 2013); available at <http://unmig.sviluppoeconomico.gov.it/unmig/buig/supplemento57-2/supplemento57-2eng.pdf>

- Decree of 22 March 2011 of the Director General for Energy and Mineral Resources of the Ministry of Economic Development.<sup>893</sup>

In addition, the Continental Shelf Act sets out detailed criteria and procedures for offshore oil and gas operations. Article 3 of the Continental Shelf Act provides as follows:

“The activities referred to in the second paragraph of the preceding article [that is, prospecting for, surveying and producing minerals] shall be carried out in the following stages:

- (1) Prospecting, which shall consist of reconnaissance of the surface of the entire subsoil of the sea-bed of the territorial sea and continental shelf with a view to ascertaining its geo-mineral characteristics;
- (2) Prospecting, similar to the foregoing but in a delimited zone, which shall be permitted on a non-exclusive basis;
- (3) Surveying on an exclusive basis in a zone of predetermined topography and size, which shall consist of all operations, including mechanical drilling, undertaken with a view to discovering deposits;
- (4) Production on an exclusive basis in the area covered by the survey licence with a view to exploiting the deposits discovered.

...

Stage (2) shall not be mandatory and may be authorized either before, or at the same time as stages (3) and (4);

Stage (3) shall be mandatory before proceeding to the production stage (4)”.

The legislation that governs health and safety for mining activities, including offshore activities, is:

- Legislative Decree No. 624/1996;
- Legislative Decree No. 81/2008; and
- Directorial Decree of 22 March 2011.

As indicated in section 1.1 above, following the Macondo incident, Italy enacted new legislation (art. 35 of Law Decree 22/06/2012, n. 83, converted into Law 07/08/2012 n. 134), which imposes a ban on hydrocarbons prospection, exploration and exploitation operations within the boundaries of the marine and coastal protected areas established by national, European or international laws in Italian waters. The ban also applies to hydrocarbon operations within 12 miles from the Italian coastline and from the boundaries of the protected areas. There is an exception for existing licences and concessions and licences and concessions for which an application had been made when the legislation was adopted.<sup>894</sup>

There are three types of permits for offshore oil and gas operations under Italian law. They are:

- A prospecting permit, which may be granted for one year;

<sup>893</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>894</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

- An exploration licence, which may be granted for a maximum of six years with two optional extensions of three years; and
- A production licence for a maximum of 20 years, with an optional extension for 10 years.

## 1.5 Liability for bodily injury, property damage and economic loss

Liability for bodily injury, property damage and economic loss is imposed by the Civil Code,<sup>895</sup> which applies to such liability under the legislation specific to offshore oil and gas licensing.<sup>896</sup>

In general, the legislation and jurisprudence on civil liability and compensation for damages in Italy is stratified and complex. It is not easy to reach an unequivocal interpretation and conclusions. For example, economic loss is contemplated under the Civil Code but the recognition of the pure economic loss is much harder to obtain. Since pure economic loss is not directly but indirectly linked to the event causing damage, the cause-effect relationship, that in any case must be proved under Italian law, is difficult to show and the burden of the proof is on the claimant.<sup>897</sup>

### 1.5.1 Bodily injury and property damage

The main provision of the Civil Code that imposes liability for torts is article 2043, entitled Compensation for Unlawful Acts. Article 2043 provides that “[a]ny intentional or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages”. The key word that determines the scope of the act or omission that satisfies the criteria for a tort is the word “unjustified”.

### 1.5.2 Economic loss

The Civil Code does not include a general definition of “damages”. Article 2056, however, specifically includes “damage arising from loss of earnings”, stating that it “shall be equitably estimated by the court according to the circumstances of the case”. A claimant would need to be granted legal standing to bring the claim, pursuant to article 2043 of the Civil Code.<sup>898</sup>

An Italian court has awarded damages under article 2043 to a hotel that lost profits from a reduction in the number of visitors due to the presence of waste on a nearby beach.<sup>899</sup> This case is not typical under the Italian civil liability regime.<sup>900</sup> By analogy to the case, the potential, however, exists that Italian law may recognise claims for pure economic loss from an offshore oil and gas incident, not only

<sup>895</sup> See Italian Civil Code, Italian Tort Law (undated) (setting out English translations of some provisions of the Italian Civil Code); available at <http://italiantortlaw.altervista.org/civilcode.html>

<sup>896</sup> See telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014).

<sup>897</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>898</sup> See Environmental Liability and Ecological Damage in European Law 524 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>899</sup> Cassazione Penale, Sez. III, 2 maggio 2007 (u.p. 6 marzo 2007), n. 16575 – Pres. Lupo – Rel. Fiale – P.M. Meloni – Ministero dell’ ambiente c. A.R., G. G. P., V. L., F. L.; see Ugo Salanitro, Danni Temporanei All’Ambiente e Tutela Degli Interessi Privati: Un Problema di Ingiustizia del Danno, *Giurisprudenza, Danno e Responsabilità*, N. 4/2008, 416.

<sup>900</sup> Comment by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

for claims by commercial fisheries but also for claims by the tourism industry. This is, however, not certain.

### 1.5.3 Liability for dangerous activities

Article 2050 of the Civil Code imposes “Liability arising from the exercise of dangerous activities”; it provides that:

“Whoever causes injury to another in the performance of an activity dangerous by its nature or by reason of the instrumentalities employed, is liable for damages, unless he proves that he has taken all suitable measures to avoid the injury”.

This provision could possibly apply to harm from pollution from offshore oil and gas operations due to the nature of such operations.

Article 2051 of the Civil Code, entitled “Damage caused by things in custody”, provides that “[e]veryone is liable for injuries caused by things in his custody, unless he proves that the injuries were the result of a fortuitous event”. This provision could also possibly apply to harm from pollution from offshore oil and gas operations if the pollutant is in the custody of the operator.

Various other provisions of the Civil Code impose strict liability, none of which would apply to harm from pollution from offshore oil and gas operations.<sup>901</sup>

### 1.5.4 Standard of liability (strict / fault-based)

The general standard of liability under the Civil Code is negligence / fault-based. Liability for dangerous activities is strict (see section 1.5.3 above).

### 1.5.5 Scope of liability (joint and several / several)

Article 2055 of the Civil Code provides for joint and several liability as follows:

“If the act causing damage can be attributed to more than one person, all are jointly and severally liable for the damages. ...

In case of doubt, the degree of fault attributable to each is presumed to be equal”.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

The Civil Code does not establish a relevant rebuttable presumption for harm from pollution from offshore oil and gas operations.

### 1.5.7 Exceptions

There is a general exception to liability under civil law for *force majeure*.<sup>902</sup> There are also exceptions for fortuitous events.<sup>903</sup>

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<sup>901</sup> The other provisions are: article 2052, damage caused by animals; article 2053, collapse of buildings; and article 2054, circulation of vehicles.

<sup>902</sup> See telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014).

### 1.5.8 Defences

As indicated in section 1.5.3 above, a tortfeasor / wrongdoer has a defence to liability for dangerous activities if the tortfeasor shows that he took all suitable measures to avoid injury.

### 1.5.9 Remedies

The remedy for claims for traditional damage is compensatory damages

Punitive damages are not available under Italian law.<sup>904</sup>

### 1.5.10 Limitations period(s)

The limitation period for damage under the Civil Code is five years from the date on which the injury occurred. Article 2947(1) provides that “[t]he right to compensation for damage deriving from unlawful acts has a statute of limitations of five years from the day in which the fact occurred ...”.

### 1.5.11 Right to claim contribution from other responsible persons

Article 2055 of the Civil Code establishes a right to contribution by a tortfeasor who has paid more than his share from other tortfeasors.

Article 2055 provides, in pertinent part, that “[t]he person who has compensated for the damage has recourse against each of the others in proportion to the degree of fault of each and to the consequences arising therefrom”.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Italy for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Italy for claims for transboundary harm from offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for offshore oil and gas licensing is the Directorate General for Mineral and Energy Resources of the Ministry for Economic Development (Directorate General).

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<sup>903</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>904</sup> See Claudio Perrella, Italian Supreme Court Confirms Stance On Punitive Damages (describing Cassazione 8 February 2012, n. 1781/2012 Soc. Ruffinatti v Oyola-Rosado); available at <http://www.mondaq.com/x/212846/Arbitration+Dispute+Resolution/Italian+Supreme+Court+Confirms+Stance+On+Punitive+Damages>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

A strategic environmental assessment is prepared for offshore (and onshore) hydrocarbon activities for new locations. In addition, an applicant must prepare an environmental impact assessment for its proposed activity in all the phases of the oil and gas activities, from prospecting, to exploration, to development.<sup>905</sup> If the licence includes protected areas under nature conservation legislation, the assessment is more detailed.<sup>906</sup>

## 1.10 Offences and sanctions

Various offences and penalties apply to mining operations, including activities involving hydrocarbons. The penalty is payment of a sum equal to 10 per cent of the estimated cost of the work that was not performed, and in any event not lower than EUR 15,493.70 and not greater than EUR 92,962.24..<sup>907</sup>

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country's hydrocarbons licensing regime)

The Directorate General evaluates the financial capability of applicants for offshore oil and gas operations, including the applicant's balance sheet, net worth, share capital, etc.; it does not grant an application unless it is satisfied that the applicant is financially capable. The legislation for oil and gas licensing establishes that licensees have technical and financial capacity to perform the operations envisaged by the licence.<sup>908</sup>

There are three types of authorisations; a prospecting permit, an exploration licence and a production licence, as indicated above. An applicant for an exploration permit and a production permit must have a paid-in share capital of at least EUR 120,000. If a company has a total injected capital of less than EUR 10 million, it must have a guarantee from a parent or affiliated company showing a total share capital of at least EUR 10 million.<sup>909</sup>

The Directorate General usually requires an applicant to have a guarantee and insurance for its activities adequate to the works to be performed. The financial security requirements are not, however, rigidly set out and are being reviewed by the Directorate General as part of the transposition of the Offshore Safety Directive (2013/30/EU). The mining law establishes in general the

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<sup>905</sup> Telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014).

<sup>906</sup> See An Overview of the Regulatory Framework, Fiscal System, and Marketing of Oil and Gas in Italy; available at [http://orion4energy.com/wp-content/uploads/2011/06/aipn\\_italy2.pdf](http://orion4energy.com/wp-content/uploads/2011/06/aipn_italy2.pdf)

<sup>907</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>908</sup> Telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014).

<sup>909</sup> See Monica Colombera and Alfredo Fabbricatore, Italy Chapter – Oil & Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014/italy>

guarantee/insurance measures. The technical regulation provides the level of guarantee/insurance to be established.<sup>910</sup>

The above financial security is focused on the works programme to be carried out, not compensation for claims for bodily injury, property damage and economic loss.

#### **1.11.1 Persons required to have evidence of financial security**

The applicant for an exploration licence or a production licence must show evidence of financial security.

#### **1.11.2 Time at which evidence of financial security is required**

The evidence of financial security shall be shown to Directorate General at the time of an application for a prospection activity (geological and geophysical surveys phase) as well as for exploration and production activities.<sup>911</sup> The Directorate General then keeps the financial security under review.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

Financial security must be shown for the works programme. It is not specifically required for compensation for claims for bodily injury, property damage and economic loss from pollution from oil and gas operations.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The financial security instrument is at the discretion of the Directorate General, which examines an applicant's financial capability. The Directorate General may require evidence of securities or insurance.

#### **1.11.5 Monetary limit(s)**

Monetary limits are not specified for financial security for compensation for harm from an offshore oil and gas incident.

Monetary limits of the guarantees for the work programme and for carrying out obligations under the respective licence relate to the costs necessary to carry them out.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

There are no special requirements for a review of financial security instruments. As a practical matter, the Directorate General reviews securities and guarantees at each stage of the life cycle of an offshore installation, when authorisations for new works are requested.<sup>912</sup>

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<sup>910</sup> Telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014).

<sup>911</sup> Comment (information provided) by Carla Giannitelli, Ministry of Economic Development, Directorate-General for Mineral and Energy Resources (1 October 2014).

<sup>912</sup> Telephone interview with Carla Gianitelli, Franco Telizzese and Antonio Caliri, Ministry of Economic Development (12 May 2014)..

## 1.12 Jurisdictional issues (if any)

Article 49 of the Continental Shelf Act provides that:

“Surveying and production installations on the Italian continental shelf shall be subject to the laws of the State. The powers conferred on State organs in their respective purviews shall be exercised by the organs which have jurisdiction over the coast nearest to the installation”.

It is not, however, entirely clear whether the Civil Code applies to the Italian continental shelf and EEZ.

## 1.13 Key points

Italy has a long history of exploring for, and producing oil and gas, with the first offshore well in Europe having been drilled in Italy in 1959. Most oil and gas operations are carried out onshore, with a relatively small percentage being carried out offshore. The offshore production is mostly gas, with a much smaller percentage of oil being produced.

Since the Macondo incident, Italy has imposed a ban on drilling within 12 miles of its coastline and protected marine areas.

The legislation for oil and gas licensing is mining legislation that also applies to licensing for prospecting for, exploration and production of other minerals.

Compensation for bodily injury, property damage and economic loss is imposed by the Civil Code. Claims for compensation for pure economic loss as well as bodily injury and property damage, may be recognised under Italian law, as indicated by the case involving the award of lost profits to a hotel due to waste on a nearby beach resulting in a loss in the number of visitors to the hotel. As with claims for bodily injury and property damage, all the criteria for a tort claim, including proof that the harm was unjustified, would have to be established. Thus, it is not certain that claims for pure economic loss would succeed.

Italy requires applicants for exploration and production licences to be financially capable of carrying out the works programme. The focus is on financial security for the works programme, not compensation for claims from bodily injury, property damage and economic loss. Italy is, however, reviewing financial security requirements as part of the transposition of the Offshore Safety Directive (2013/30/EU) with a view to imposing more stringent requirements.



# Latvia

## 1.1 Introduction

Latvia began prospecting for oil in its offshore areas in the Baltic Sea in 1976. Prospecting, exploration and production did not progress, however, until 1991, following the restoration of independence. The Latvian Department of Geology then carried out seismic testing in the western offshore area, resulting in the discovery of prospective hydrocarbon areas. In 1996, Latvia issued an exploration and production licence for the southwest offshore area. A longstanding dispute between Latvia and Lithuania concerning the delimitation of maritime boundaries, however, has resulted in a delay to operations pursuant to the licence (see this section, and section 1.3, below).<sup>913</sup>

In April 2001, Latvia launched the first offshore licensing round for prospecting, exploration and production of hydrocarbons. In April 2002, Latvia announced a repeat licensing round for offshore exploration and production, and a second round for offshore prospecting.

In 2002, Latvia issued two prospecting licences to TGS-NOPEC for the entire Latvian continental shelf, consisting of approximately 200,000 square kilometres. Both licences have since expired.<sup>914</sup>

In April 2003, the Council of Ministers amended the hydrocarbon licensing regulations to facilitate oil and gas operations.

In July 2004, Latvia issued two exploration and production licences to Odin Energi A/S for areas in the southern part of its offshore area. The licences were subsequently superseded by new licences due to the licensees changing to Baltin Energy Ltd (in December 2008), and Odin Energi Latvija Ltd (in January 2010).<sup>915</sup>

In September 2008, Latvia issued a prospecting licence to Oljeprospektering AB for 1,011.2 square kilometres in the south-western part of its offshore area.<sup>916</sup>

On 27 March 2009, Latvia announced a further licensing round for exploration and production in the offshore area.

In September 2009, Latvia issued an exploration and production licence to Balin Energi Ltd.

It has been estimated that the E-24 basin in the Baltic Sea has 100 million tonnes of oil. Sovereignty over the area is disputed between Latvia and Lithuania (see section 1.3 below).<sup>917</sup>

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<sup>913</sup> See State Geological Survey, Latvian Sector of the Baltic Sea, Petroleum potential; overview of exploration history; available at <http://mapx.map.vgd.gov.lv/g3activen/naftas/nf00.htm>; Hydrocarbon Licensing; available at [http://mapx.map.vgd.gov.lv/geo3/VGD\\_OIL\\_PAGE/new\\_page\\_2.htm](http://mapx.map.vgd.gov.lv/geo3/VGD_OIL_PAGE/new_page_2.htm)

<sup>914</sup> See Offshore; available at [http://mapx.map.vgd.gov.lv/geo3/VGD\\_OIL\\_PAGE/new\\_page\\_9.htm](http://mapx.map.vgd.gov.lv/geo3/VGD_OIL_PAGE/new_page_9.htm); State Geological Survey, Latvian Sector of the Baltic Sea, Petroleum potential; overview of exploration history; available at <http://mapx.map.vgd.gov.lv/g3activen/naftas/nf00.htm>

<sup>915</sup> See Offshore; available at [http://mapx.map.vgd.gov.lv/geo3/VGD\\_OIL\\_PAGE/new\\_page\\_9.htm](http://mapx.map.vgd.gov.lv/geo3/VGD_OIL_PAGE/new_page_9.htm)

<sup>916</sup> See *ibid*; Ministry of Economics, Prospecting, Exploration and Production of Hydrocarbons ; available at <http://www.em.gov.lv/em/2nd/?lng=en&cat=30178>

<sup>917</sup> See New sea conflicts may arise with Lithuania (10 January 2012); available at <http://www.jura24.lt/en/news/port/new-sea-conflicts-may-arise-with-latvia-401074>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore (and onshore) oil and gas (and other minerals) in Latvia is governed by a mining law and secondary legislation (regulations).

The Civil Code applies to liability for compensation for harm from pollution from oil and gas operations.

## 1.3 Rights to, and ownership of, offshore oil and gas

Latvia has declared sovereignty over its continental shelf and EEZ. The Marine Environment Protection and Management Law (Marine Law)<sup>918</sup> describes the Latvian continental shelf as follows:

“the seabed and the subsoil in submarine areas which are natural prolongation of the land territory of Latvia, are located immediately beyond the boundaries of the territorial sea and extend to the boundaries [of Estonia, Lithuania and Sweden in conformance with agreements entered into with them]” (Marine Law, sections 1, 3(3)).

Latvia has also declared that it has:

“sovereign rights to explore the continental shelf and use the natural resources thereof in compliance with the requirements of this Law and other regulatory enactments. The natural resources of the continental shelf are the property of Latvia” (Marine Law, section 3(4)).

The Latvian EEZ is described as:

“the territory of the Baltic Sea which is located immediately beyond the territorial sea boundaries and which extends to the boundaries [of Estonia, Lithuania and Sweden in conformance with agreements entered into with them]” (Marine Law, sections 3(2)-(3)).

Further, Latvia has declared that, in its EEZ, it has:

- “1) sovereign rights to explore, protect, use and manage the natural resources of the exclusive economic zone located in the seabed, in the subsoil and waters thereof, and manage the use of such resources, as well as to perform other actions necessary for exploration and use of the exclusive economic zone ...;
- 2) exclusive rights to construct and establish artificial islands, structures and installations necessary for exploration, extraction of natural resources and for other actions, as well as to supervise construction, establishment and use of such artificial islands, structures and installations;
- 3) exclusive jurisdiction in respect of protection and preservation of the marine environment, ... construction, establishment and use of artificial islands, as well as structures and installations; and
- 4) other rights provided for in this Law and the United Nations Convention on the Law of the Sea of 1982” (Marine Law, section 3(5)).

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<sup>918</sup> An unofficial English translation of the Law, dated 2011, by the State Language Centre, is available at [http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Marine\\_Environment\\_Protection\\_and\\_Management\\_Law.doc](http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Marine_Environment_Protection_and_Management_Law.doc)

In 1999, Latvia and Lithuania signed the Latvia-Lithuania Sea Border Treaty. The Lithuanian Seimas (Parliament) ratified the Treaty in 1999. The Latvian Saeima (Parliament) began considering ratification but did not ratify the Treaty.<sup>919</sup> The delay in ratification was due to some Latvian members of Parliament considering that an agreement on bilateral economic cooperation in their EEZs and continental shelves in the Baltic Sea zone should be resolved first.<sup>920</sup> Article 4 of the Treaty states that if extractable resources are discovered in the sea bed on both sides of the border between Latvia and Lithuania, the resources can be extracted from both sides, with Latvia and Lithuania having reached agreement on the terms and conditions for their extraction before extraction begins.<sup>921</sup>

In January 2013, Latvia and Lithuania agreed to begin development of the Economic Cooperation Agreement in the Baltic Sea EEZ and continental shelf under article 4 of the Treaty.<sup>922</sup> On 27 May 2014, intergovernmental working groups of both countries met to discuss such cooperation, including the first meeting to discuss drafting the agreement. The next meeting is planned for December 2014.<sup>923</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The main Law for offshore (and onshore) hydrocarbons licensing in Latvia is the Law on Subterranean Depths,<sup>924</sup> that is, a mining law that also applies to minerals other than oil and gas.

The Regulations regarding the Protection of the Environment during the Works of Exploration and Extraction of Hydrocarbons in the Sea, Regulation No. 595 of 18 July 2006 (Hydrocarbons Regulations) also apply.<sup>925</sup>

Latvia has two types of hydrocarbon licence; a prospecting licence, and an exploration and production licence.

A prospecting licence may be issued for a maximum of five years. An exploration and production licence may be issued for a maximum of 30 years, including an exploration phase up to 10 years.<sup>926</sup>

A prospecting licence is a non-exclusive licence for which an oil company applies to the Ministry of Economics; the licence is not subject to a bidding procedure. The applicant first proposes the prospecting licence area. If the Cabinet of Ministers approves the area, the applicant submits an application for the licence itself.

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<sup>919</sup> See New sea conflicts may arise with Lithuania (10 January 2012); available at <http://www.jura24.lt/en/news/port/new-sea-conflicts-may-arise-with-latvia-401074>

<sup>920</sup> See *ibid.*

<sup>921</sup> See *ibid.*

<sup>922</sup> See Latvia and Lithuania could resume talks on sea border treaty, The Baltic Course (25 January 2013); available at <http://www.baltic-course.com/eng/legislation/?doc=69260>

<sup>923</sup> See Ministry of Foreign Affairs of the Republic of Latvia, Latvia and Lithuania discussed possibilities of economic cooperation in the Baltic Sea (27 May 2014); available at <http://www.mfa.gov.lv/en/news/press-releases/2014/may/27-2/>

<sup>924</sup> An unofficial English translation of the Law, dated 2011, with amendments to 21 October 2010, is available from the Ministry of Economy's website at <http://www.em.gov.lv/em/2nd/?lng=en&cat=30178>

<sup>925</sup> An unofficial English translation of the Hydrocarbons Regulations, dated 18 July 2006, is available from <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwelat.htm>

<sup>926</sup> Comment (information provided) by Raimonds Vite, Department of Energy Market and Infrastructure, Ministry of Economics of the Republic of Latvia (1 October 2014).

An exploration and production licence is an exclusive licence that is issued based on a bidding procedure initiated by the Ministry of Economics or the applicant. As with the prospecting licence, the applicant first proposes a licence area. If the Cabinet of Ministers approves the area, the Ministry announces a competition for exploration and production licences for that area. The Ministry subsequently issues the licence to the winner of the bid, following evaluation of the applicants by the Competition Commission.<sup>927</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

The Civil Code imposes liability for bodily injury, property damage and economic loss.

Article 14(9) of the Law on Subterranean Depths states that a person who uses subterranean depths, which includes a person carrying out offshore oil and gas operations, has a duty “to compensate all losses caused to owners of subterranean depths, users, environment, cultural monuments as a result of use of subterranean depths thereof”. It is unclear whether this provision includes a duty to compensate persons who have been harmed by pollution from an offshore oil and gas incident.

### 1.5.1 Bodily injury and property damage

The basic tort provision of the Civil Code<sup>928</sup> is section 1635, which provides, in pertinent part, as follows:

“Every delict, that is, every wrongful act per se, as a result of which harm has been caused (also moral injury), shall give the person who suffered the harm therefrom the right to claim satisfaction from the infringer, insofar as he or she may be held at fault for such act.

By moral injury is understood physical or mental suffering, which are caused as a result of unlawful acts committed to the non-financial rights or non-financial benefit delicts of the person who suffered the harm. The amount of compensation for moral injury shall be determined by a court at its own discretion, taking into account the seriousness and the consequences of the moral injury”.

Further, sections 1770 to 1775 of the Civil Code provide as follows:

“Compensation shall be payable for any loss which is not accidental” (section 1775).

“A loss shall be understood to mean any deprivation which can be assessed financially” (section 1770).

“Losses may be either such losses as have already arisen, or such losses as are anticipated; in the former case, they give rise to a right to compensation, but in the latter case, to a right to security” (section 1771).

“A loss which has already arisen may be a diminution of the victim's present property or a decrease in his or her anticipated profits” (section 1772).

“A loss shall be considered: direct where it is the natural and inevitable result of an illegal act or failure to act; indirect where it is caused by an occurrence of particular

<sup>927</sup> See Licensing Procedures; available at [http://mapx.map.vgd.gov.lv/geo3/VGD\\_OIL\\_PAGE/licensing\\_procedures.htm](http://mapx.map.vgd.gov.lv/geo3/VGD_OIL_PAGE/licensing_procedures.htm)

<sup>928</sup> An unofficial English translation of the Civil Code by the Translation and Terminology Centre, dated 2007, with amendments to 22 June 2006, is available at [www.ur.gov.lv/faili/ENGLISH%20Normative%20akti/civillikums.doc](http://www.ur.gov.lv/faili/ENGLISH%20Normative%20akti/civillikums.doc)

circumstances or relationships; and accidental where caused by a chance event or force majeure” (section 1773).

### 1.5.2 Economic loss

As indicated in section 1.5.1 above, liability under the Civil Code also includes “a decrease in [the injured person’s] anticipated profits”.

Latvian law thus appears to impose liability for pure economic loss. If it does so, all other criteria for a tort claim would need to be satisfied.

### 1.5.3 Liability for dangerous activities

Section 2347 of the Civil Code imposes strict liability for activities “associated with increased risk for other persons (transport, undertakings, construction, dangerous substances, etc.)”. In such a case, the person who carried out the activity is liable to the person injured by it “for losses caused by the source of increased risk, unless he or she proves that the damages have occurred due to force majeure, or through the victim's own intentional act or gross negligence”.

It is unclear whether harm from pollution from an offshore oil and gas incident would be subject to strict liability. Section 2347 could potentially apply due to inclusion of the words “undertakings,” “construction”, and “dangerous substances”, plus the term “etc”.

As well as imposing strict liability for dangerous activities, the Civil Code imposes strict liability for bodily injury from unlawful activities. Article 2347 of the Civil Code also imposes strict liability on a person who “inflicts a bodily injury upon another person through an action for which he or she is at fault and which is illegal”. The compensation that is due is “medical treatment expenses and, apart therefrom and pursuant to the discretion of a court, also for potential lost income”.

If a deceased person had a duty to maintain another person, the tortfeasor assumes that duty. In such a case, “[t]he amount of such compensation shall be determined pursuant to the discretion of a court; the age of the deceased, his or her ability to earn a living at the time of death, and, finally, the needs of the person for whom compensation is to be determined. If the latter has adequate means of livelihood, the duty to provide compensation shall cease” (Civil Code, section 2351). If the tortfeasor was negligent in causing the deceased’s death, “he or she shall compensate the heirs of the deceased for medical treatment and burial expenses” (Civil Code, section 2350).

### 1.5.4 Standard of liability (strict / fault-based)

Section 1640 of the Civil Code states that there are varying degrees of fault “depending on whether the act was committed with wrongful intent, or only due to negligence”. The term “wrongful intent” means “every intentional harm” (Civil Code, section 1641).

Section 1644 of the Civil Code states that “[i]f a person inflicts harm upon another without wrongful intent, if such person is at fault for the wrong, then he or she acted negligently. Negligence can be gross or ordinary”. Section 1645 states that:

“A person acts with gross negligence if his or her conduct is reckless and careless in the highest degree; or if he or she acts with less care towards the property of another entrusted to him or her than he or she would apply to his or her own property; or if he or she initiates a course of action, the harmfulness and dangerousness of which could not and should not have been unknown to him or her. In terms of compensation for losses and other legal consequences, gross negligence shall be wholly equivalent to wrongful intent”.

Section 1646 defines “ordinary negligence” as “that lack of care and due diligence as must be observed by any reasonably prudent and careful manager”.

#### 1.5.5 Scope of liability (joint and several / several)

The Civil Code imposes joint and several liability for indivisible harm from a tort. Section 1674 provides, in pertinent part, that “[p]ursuant to law, a solidary obligation is established when the subject-matter of performance is indivisible, namely, when it is either a certain action, or inaction ...”.

If the harm results from a criminal offence committed by more than one person, each person is jointly and severally liable for losses that result from it (Civil Code, section 1675).

Section 1650 of the Civil Code provides that “If two persons are mutually at fault for negligence, the claims arising therefrom shall be mutually adjusted to the extent to which they cover each other”.

#### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

If section 2647 (see section 1.5.3 above) applies, the burden of showing that a tortfeasor is not liable switches to the tortfeasor. That is, the tortfeasor can avoid liability if it shows that the damage was caused by *force majeure*, or that the injured person committed an intentional act or acted with gross negligence.

#### 1.5.7 Exceptions

Section 1774 of the Civil Code creates an exception for non-compensable damage as follows:

“An accidental loss is not required to be compensated by anyone. Therefore, if a fortuitous impediment prevents a person from performing an obligation that has been undertaken, it shall be considered that circumstances are as if the person had performed the obligation, unless the person had accepted the risk of casualty loss in a contract” (section 1774).

Article 1775 of the Civil Code further provides that “[c]ompensation shall be payable for any loss which is not accidental”. Section 1773 states that damage is “accidental where caused by a chance event or *force majeure*”.

Thus, if damage is caused by a fortuitous impediment that prevents a person carrying out a duty or *force majeure*, compensation is not recoverable.<sup>929</sup>

#### 1.5.8 Defences

Section 1776 of the Civil Code provides that “[a] victim may not claim compensation if he or she could have, through the exercise of due care, prevented the loss (Section 1646). An exception to this provision shall be allowed only in a case of malicious infringement of rights”.

This defence would not seem to apply to a claim for bodily injury, property damage or economic loss from an offshore oil and gas incident.

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<sup>929</sup> See Agris Bitāns, Latvia, in *Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops*, Annex I: Country Reports 271, 274 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

### 1.5.9 Remedies

The remedy for harm for bodily injury, property damage and economic loss is compensatory damages.

Latvian law does not recognise punitive damages.<sup>930</sup>

### 1.5.10 Limitations period(s)

The standard prescription period for a tort is 10 years from the date on which the claim arose (Civil Code, sections 1900, 1896).

### 1.5.11 Right to claim contribution from other responsible persons

The Civil Code authorises a contribution claim against other tortfeasors by a tortfeasor who has compensated the injured person.

Section 1642 of the Civil Code states that:

“If both parties acted with wrongful intent, with one and the same purpose, and in relation to the same subject-matter, then one party may not bring an action against the other on this basis. However, if only one party acted with wrongful intent, then the party who thereby suffered harm shall have the right to request satisfaction from the other, even if he or she is at fault for negligence”.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Latvia for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Latvia for claims for harm from transboundary offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for organising hydrocarbon licensing, issuing licences, and carrying out administrative supervision of prospecting, exploration and production of hydrocarbons in Latvia is the Ministry of Economics.

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The Hydrocarbons Regulations impose detailed requirements for the protection of the sea from offshore oil and gas operations in Latvia’s EEZ, including the following provisions.

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<sup>930</sup> See Raimonds Slaidins and Liga Hartmane, Latvia 12; available at [http://ec.europa.eu/competition/antitrust/actionsdamages/national\\_reports/latvia\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/latvia_en.pdf)

Article 1(3) of the Hydrocarbons Regulations requires a person who has a licence for the exploration and extraction of hydrocarbons in the EEZ of Latvia to carry out an environmental impact assessment following receipt of the licence.

The Hydrocarbons Regulations further require action plans for emergency situations to be prepared (articles 14 and 15). Still further, if dispersants are used to eliminate hydrocarbon pollution, their use is to be restricted as far as possible and, if used, the plan to use them must be co-ordinated in advance with the State Environmental Service. The use of hydrocarbon-sinking substances for the elimination of pollution is prohibited (article 16).

## 1.10 Offences and sanctions

The Hydrocarbons Regulations sets out prohibitions against the discharge of waste, including chemicals and drilling mud into the marine environment of the EEZ (section II). Article 19 of the Law on Subterranean Depths provides that:

“Persons who, in using subterranean depths, have violated the requirements specified in this Law and in other regulatory enactments, as well as officials, which in contrary to the requirements of this Law and other regulatory enactments have issued authorisations for the extraction of mineral resources or licences for the use of subterranean depths shall be held liable in accordance with the laws”.

Article 19, therefore, applies to a breach of the Hydrocarbons Regulations as well as the Law on Subterranean Depths.

Article 20(1) of the Marine Law provides, among other things, that a “user of the sea” has the following obligations:

- “1) not to allow pollution of the sea and activities which may negatively affect the marine environmental status; [and]
- 4) to perform measures in order to prevent threats of damage or damage to the marine environment in compliance with the Environmental Protection Law”.

The Environmental Protection Law<sup>931</sup> specifically applies to the Latvian continental shelf and EEZ (section 2(2)). The Law, however, applies to the prevention and remediation of environmental damage; it does not impose liability for compensation for bodily injury, property damage or economic loss.<sup>932</sup>

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Law on Subterranean Depths does not include any provisions that mandate financial security for offshore oil and gas operations, although these requirements may well be in the licences themselves.

Article 4 of Directive 94/22/EC on the conditions for using authorisations for the prospection, exploration and production of hydrocarbon, which directs Member States to take necessary measures

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<sup>931</sup> An unofficial English translation of the Environmental Protection Law, with amendments to 21 June 2007, dated 2007, by the Translation and Terminology Centre, is available from <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwelat.htm>

<sup>932</sup> Among other things, the Law transposes the Environmental Liability Directive (2004/35/EC).



to ensure the consideration of the financial (and technical) capability of applicants for hydrocarbon operations, applies.

#### **1.11.1 Persons required to have evidence of financial security**

See section 1.11 above.

#### **1.11.2 Time at which evidence of financial security is required**

See section 1.11 above.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

See section 1.11 above.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

See section 1.11 above.

#### **1.11.5 Monetary limit(s)**

See section 1.11 above.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

See section 1.11 above.

### **1.12 Jurisdictional issues (if any)**

Section 3(6) of the Marine Law provides that

“The constructed and established artificial islands, structures and installations, the installed cables, pipelines and the operation of such, as well as customs, fiscal, health protection, external and internal security and immigration provisions on the continental shelf and in the exclusive economic zone shall be under the jurisdiction of Latvia”.

It is not clear whether the Civil Code applies to the Latvian continental shelf and EEZ.

### **1.13 Key points**

In 1996, Latvia issued an exploration and production licence for its southwest offshore area. There has, however, been a delay in operations pursuant to the licence due to the longstanding dispute between Latvia and Lithuania over maritime boundaries in the Baltic Sea. Measures are underway between Latvia and Lithuania to resolve that dispute. It has been estimated that the offshore area contains 100 million tonnes of oil.

In 2001, Latvia launched the first offshore licensing round for prospecting, exploring and production. Since that time, Latvia has issued prospecting licences and exploration and production licences for its offshore area. Production of offshore oil and gas had not commenced as of October 2014.

The Civil Code imposes liability for bodily injury, property damage and economic loss. Liability for pure economic loss may not, however apply to harm from an offshore oil and gas incident, at least for claims by persons in the tourism and other coastal industries other than commercial fishing.

The main law for offshore (and onshore) oil and gas (and other minerals) licensing in Latvia is the Law on Subterranean Depths, a mining law. The Law does not include provisions that mandate financial security, although such provisions may well be included in prospecting and/or exploration and production licences.

# Lithuania

## 1.1 Introduction

In 1991, following the restoration of independence, onshore production of oil in Lithuania began slowly. The pace subsequently increased, resulting in the production of approximately 470,900 tonnes of oil onshore in 2001.<sup>933</sup> Production has decreased annually from 216,100 tonnes in 2005.<sup>934</sup> In 2011, production was 113,800 tonnes.<sup>935</sup>

In 1996, it was estimated that there was about 80 million tonnes of prognostic oil offshore, with 20 to 30 million tonnes of recoverable offshore reserves.<sup>936</sup> Lithuania has exercised jurisdiction to enable it to carry out oil and gas operations on its continental shelf and in its EEZ but was not producing offshore oil as of October 2014.

On 2 June 2014, the Director of the Geological Survey referred to Lithuania's intention to begin oil and gas exploration in the Baltic Sea when the longstanding dispute with Latvia over maritime borders has been resolved (see section 1.3 below). The Director stated that Lithuania could grant a licence to a Swedish company that has been granted a licence by Latvia in the disputed area if the company wins the bidding round for exploring the area when the dispute has been resolved. The Latvian licence includes a clause stating that the limits of the licenced area may be revised when the dispute has been resolved.<sup>937</sup>

Lithuania does not have any natural gas production but has potential shale gas reserves on its continental shelf in the Baltic Sea.<sup>938</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore (and onshore) oil and gas (and other minerals) in Lithuania is governed by a mining law.

The Civil Code imposes liability for bodily injury, property damage and economic loss. In addition, Lithuania's framework environmental law could potentially apply to damage from pollution from an offshore oil and gas incident due to that law imposing liability for damage to "health, property, or interests".

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<sup>933</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014); see also Petroleum (last modified 21 March 2010); available at [http://mapx.map.vgd.gov.lv/geo3/VGD\\_OIL\\_PAGE/](http://mapx.map.vgd.gov.lv/geo3/VGD_OIL_PAGE/)

<sup>934</sup> See presentation by K&L Gates, 3rd Panel, Shale gas – Prospects in Europe (EU, Poland, Ukraine, Lithuania, Latvia) (8 November 2012) <http://www.klgates.com/files/Upload/Shale-Gas-Conf-Materials-3rd-Panel.pdf>

<sup>935</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014).

<sup>936</sup> Ibid.

<sup>937</sup> See Lithuania won't lose oil exploration at sea border with Latvia, The Lithuania Tribune (2 June 2014); available at <http://www.lithuaniatribune.com/68687/lithuania-wont-lose-oil-exploration-area-at-sea-border-with-latvia-201468687/>

<sup>938</sup> See Lithuania; European Region, Global Shift; available at <http://www.globalshift.co.uk/lith.html>

### 1.3 Rights to, and ownership of, offshore oil and gas

Lithuania owns the subsoil in its territory, continental shelf and economic zone. Article 2 of the Law on Subsoil of the Republic of Lithuania, 5 July 1995, No. I-1034, as amended,<sup>939</sup> provides that:

“The subsoil of land and inland waters is the exclusive property of the State, and the State holds exclusive rights to the subsoil on the continental shelf and in the economic zone in the Baltic Sea. Subsoil shall be exploited on the basis of the right of exploitation, which may be granted by the Government of the Republic of Lithuania or its authorised body in accordance with the procedure laid down by the present Law and other laws to legal and natural persons and groups of such persons acting under joint venture agreements”.

The term “subsoil” is defined as:

“the part of the earth’s crust (lithosphere) starting with the surface of subsoil rocks on land and on the surface of the bottom sediments of inland waters, in the continental shelf and the economic zone in the Baltic Sea” (Law on Subsoil, article 3(5)).

Article 12 of the Law on Subsoil provides that:

“Hydrocarbons may be used by legal and natural persons and by groups of such persons acting under joint venture agreements having obtained a permit issued by the Government or by its authorised body and having concluded an agreement on the exploitation of resources ... with the body authorised by the Government”.

The hydrocarbon utilisation permit may be issued solely by the Government.<sup>940</sup>

In 1999, Lithuania and Latvia signed the Latvia-Lithuania Sea Border Treaty. The Lithuanian Seimas (Parliament) ratified the Treaty in 1999. The Latvian Saeima (Parliament) began considering ratification but did not ratify the Treaty. Article 4 of the Treaty states that if extractable resources are discovered in the sea bed on both sides of the border between Lithuania and Latvia, the resources can be extracted from both sides, with Lithuania and Latvia having reached agreement on the terms and conditions for their extraction before extraction begins.<sup>941</sup>

In January 2013, Lithuania and Latvia agreed to begin development of the Economic Cooperation Agreement in the Baltic Sea EEZ and continental shelf under article 4.<sup>942</sup> On 27 May 2014,

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<sup>939</sup> An unofficial English translation of the Law on Subsoil is available from the presentation by K&L Gates, 3<sup>rd</sup> Panel, Shale gas – Prospects in Europe (EU, Poland, Ukraine, Lithuania, Latvia) (8 November 2012) <http://www.klgates.com/files/Upload/Shale-Gas-Conf-Materials-3rd-Panel.pdf>

<sup>940</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014).

<sup>941</sup> See New sea conflicts may arise with Lithuania (10 January 2012); available at <http://www.jura24.lt/en/news/port/new-sea-conflicts-may-arise-with-latvia-401074>

<sup>942</sup> See Latvia and Lithuania could resume talks on sea border treaty, The Baltic Course (25 January 2013); available at <http://www.baltic-course.com/eng/legislation/?doc=69260>

intergovernmental working groups met to discuss cooperation in the Baltic Sea, including the first meeting to discuss drafting the agreement. The next meeting is planned for December 2014.<sup>943</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The main law that governs the exploration and production of oil and gas (and other minerals) in offshore (and onshore) Lithuania is the Law on Subsoil. In 2013, the law was amended to facilitate the licensing of shale gas operations.

Lithuania has one type of permit for mining operations; a hydrocarbon utilization (production) permit. The permit includes the right to carry out the prospecting and exploration of conventional and unconventional hydrocarbons.<sup>944</sup> The permit is accompanied by a production sharing agreement.<sup>945</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Article 33(1) of the Law on Environmental Protection, Law No. I-2223, 21.01.1992, as amended,<sup>946</sup> which is the framework environmental legislation in Lithuania, provides that persons whose “health, property, or interests have been damaged” may bring a claim for such damage if the damage was caused by unlawful activities. This Law could potentially apply to compensation for damage from pollution from an offshore oil and gas incident. Article 2 provides that it covers, among other things, the “rational utilisation of natural resources in the Republic of Lithuania, the territorial waters, continental shelf and economic zone thereof”.

Article 27 of the Law on Subsoil provides that “legal and natural persons as well as by groups of such persons acting under joint venture agreements” shall indemnify the State “for the damage sustained as a result of the exploitation of subsoil ... where such exploitation results in the reduction of subsoil resources or in the deterioration of the conditions of their exploitation, in the change in valuable properties or other elements of the environment”. This provision appears to be focused on remediating damage caused by mining operations, not compensation to persons harmed by an incident concerning such operations.

The Civil Code also applies to claims for bodily injury, property damage and, potentially, economic loss, as described below.

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<sup>943</sup> See Ministry of Foreign Affairs of the Republic of Lithuania, Lithuania and Latvia discussed possibilities of economic cooperation in the Baltic Sea (30 May 2014); available at <http://www.urm.lt/default/en/news/lithuania-and-latvia-discussed-possibilities-of-economic-cooperation-in-the-baltic-sea>

<sup>944</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014).

<sup>945</sup> See presentation by K&L Gates, 3rd Panel, Shale gas – Prospects in Europe (EU, Poland, Ukraine, Lithuania, Latvia) (8 November 2012) <http://www.klgates.com/files/Upload/Shale-Gas-Conf-Materials-3rd-Panel.pdf>

<sup>946</sup> An unofficial English translation of the Law on Environmental Protection, with amendments to 28 May 2010, is available from <http://www.eui.eu/Projects/InternationalArtHeritageLaw/Documents/NationalLegislation/Lithuania/lawenvlprotectio n.doc>

### 1.5.1 Bodily injury and property damage

The basic provision for tort liability under Lithuanian law is article 6.246 of the Civil Code,<sup>947</sup> which provides that:

- “1. Civil liability shall arise from non-performance of a duty established by laws ... or from performance of actions that are prohibited by laws ... or from violation of the general duty to behave with care.
2. It may be established by laws that a person shall be bound to compensate damage he has not caused himself but is responsible for the actions of another person who inflicted the damage (indirect civil liability).
3. Damage caused by lawful actions must be compensated only in cases expressly specified by laws”.

Article 6.263 provides that:

- “1. Every person shall have the duty to abide by the rules of conduct so as not to cause damage to another by his actions (active actions or refrainment from acting).
2. Any bodily or property damage caused to another person and, in the cases established by the law, non-pecuniary damage must be fully compensated by the liable person.
3. In cases established by laws, a person shall also be liable to compensation for damage caused by the actions of another person or by the action of things in his custody”.

The Civil Code could thus potentially apply to a claim for compensation for bodily injury and property damage from an offshore oil and gas incident.

### 1.5.2 Economic loss

Lithuanian law may impose liability for pure economic loss. Article 6.249(1) of the Civil Code specifically provides for compensation for income that the plaintiff “would have received if unlawful actions had not been committed”.

That is, article 6.249(1) of the Civil Code provides, in pertinent part, that:

- “1. Damage shall include the amount of the loss or damage of property sustained by a person and the expenses incurred (direct damages) as well as the incomes of which he has been deprived, i.e. the incomes he would have received if unlawful actions had not been committed. Damage expressed in monetary terms shall constitute damages. Where the amount of damages cannot be proved by the party with precision, it shall be assessed by a court ...
4. In addition to the direct damages and the incomes of which a creditor has been deprived, damages shall comprise:

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<sup>947</sup> An unofficial English translation of the Lithuanian Civil Code of 18 July 2000, Law No. VIII-1864, as amended on 12 April 2011 (No XI-1312) is available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=202088](http://www.wipo.int/wipolex/en/text.jsp?file_id=202088)

- 1) reasonable costs to prevent or mitigate damage;
- 2) reasonable costs incurred in assessing civil liability and damage;
- 3) reasonable costs incurred in the process of recovering damages within extrajudicial procedure”.

In order to be entitled to economic loss, the plaintiff must show: the commission of a wrongful act, a causal link, and fault (if strict liability does not apply).<sup>948</sup> Article 6.249 also provides that the loss, property damage, and expenses must be “direct”.

An alternative interpretation of article 6.249, however, is that it imposes liability for consequential economic loss, not pure economic loss.

### 1.5.3 Liability for dangerous activities

Article 6.270 of the Civil Code imposes strict liability for harm from the exercise of hazardous activities<sup>949</sup> as follows:

- “1. A person whose activities are connected with potential hazards for surrounding persons (operation of motor vehicles, machinery, electric or atomic energy, use of explosive or poisonous materials, activities in the sphere of construction, etc.) shall be liable to compensation for damage caused by the operation of potentially hazardous objects which constitute a special danger for surrounding persons, unless he proves that the damage was caused by superior force or it occurred due to the aggrieved person's actions exercised either intentionally or by his own gross negligence.
2. A defendant in the cases established in the preceding Paragraph of this Article shall be the possessor of a potentially hazardous object by the right of ownership or trust or on any other legitimate grounds (loan for use, lease, or any other contract, by the power of attorney, etc.).
3. The possessor of a potentially hazardous object shall not be liable to compensation for damage it has caused if he proves to have lost the operation thereof due to unlawful actions of other persons. In such event, liability arises to the person or persons who gained the operation of a potentially hazardous object by unlawful actions. Where the loss of operation of a potentially hazardous object results also from the fault of the possessor, the latter and the person who seized the potentially hazardous object unlawfully shall be solidarily liable for the damage.... Upon having compensated for the damage, the possessor shall acquire a right of recourse for the recovery of sums paid against the person who unlawfully seized the potentially hazardous object.

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<sup>948</sup> See Gediminas Pranevicius, Lithuania, in *Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops*, Annex I: Country Reports 277, 809 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>949</sup> The Civil Code also establishes strict liability for harm from the “collapse of buildings, construction works, installations or other structures, including roads” \*article 6.266), domestic or wild animals in someone's custody (article 6.267).

4. In the event where damage was inflicted to a third person in the result of reciprocity of several potentially hazardous objects, all the possessors of the objects concerned shall be solidarily liable for the damage caused.
5. The damage incurred by the possessors of potentially hazardous objects in the result of the reciprocity thereof shall be compensated in accordance with the general provisions”.

Article 6.270 does not specify that it imposes liability for harm from offshore oil and gas activities but they could, for example, fall within the activities of “machinery” or “activities in the sphere of construction”. Further, the list of hazardous activities is not intended to be definitive. Courts consider whether an activity is hazardous by evaluating the hazardous characteristics of the activity, and the possibility (or impossibility) of a person having the ability entirely to control the activity.<sup>950</sup>

#### **1.5.4 Standard of liability (strict / fault-based)**

The general standard of liability under the Civil Code is fault. Article 6.248 provides that:

- “1. Civil liability shall arise only upon the existence of the fault of the obligated person, except in the cases established by laws or a contract when civil liability arises without fault....
2. Fault may be expressed by intention or negligence.
3. A person shall be deemed to have committed fault where taking into account the essence of the obligation and other circumstances he failed to behave with the care and caution necessary in the corresponding conditions ...”.

#### **1.5.5 Scope of liability (joint and several / several)**

The Civil Code imposes joint and several liability for a tort.

Article 6.269 of the Civil Code provides that:

- “1. Where several persons jointly take part in causing damage, they shall be solidarily liable for compensation thereof.
2. In order to determine the reciprocal claims of solidarily liable persons, the different degree of gravity of their respective fault shall be taken into consideration, except in cases when it is otherwise provided for by laws.
3. The aggrieved person may not claim more from all the liable persons than he could claim if only one person were liable.
4. Where damage may have resulted from different actions performed by several persons and they are liable to compensation, even though it is determined that the damage actually resulted from actions of only one of those persons, the obligation to compensate the damage shall rest upon all these persons jointly unless the other persons prove that the damage could not have resulted from the event (actions) for which they are liable”.

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<sup>950</sup> See Gediminas Pranevicius, Lithuania, in *Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops*, Annex I: Country Reports 277, 279 (Bernhard A. Koch, editor, European Centre of Tort and Insurance Law, April 2007).



### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Lithuanian law establishes the principle of an unlawful act or fault if damage occurs. In order to avoid liability, the defendant has the burden of showing that it did not act unlawfully or with fault.<sup>951</sup>

### 1.5.7 Exceptions

The Civil Code does not include any relevant exceptions to liability for harm from an offshore oil and gas incident.

### 1.5.8 Defences

As indicated in section 1.5.3 above, article 6.270 provides a defence to a strict liability action if the tortfeasor (wrongdoer) “proves that the damage was caused by superior force or it occurred due to the aggrieved person’s actions exercised either intentionally or by his own gross negligence”.

The Civil Code provides for contributory negligence. Article 6.282 provides that:

- “1. If the aggrieved person’s gross negligence contributed to causing or increasing damage, depending on the degree of the aggrieved person’s fault (and on the degree of the fault of the person by whom the damage was caused, in the event of the existence of such fault), the extent of the compensation can be reduced or the claim for the compensation dismissed unless the laws provide for otherwise.
2. The fault of the aggrieved person shall not be taken into consideration in recovering compensation for the damage caused by the death of the breadwinner and in compensating the costs of funeral expenses”.
3. The court may, taking in consideration difficult property situation of the person who caused the damage, reduce the amount of the reparable damage, except in cases when the damage was caused intentionally”.

This provision would not, however, appear to apply to harm from an offshore oil and gas incident.

### 1.5.9 Remedies

The general remedy for a tort is compensatory damages.

Lithuanian law does not recognise punitive damages.<sup>952</sup>

### 1.5.10 Limitations period(s)

The standard limitations period for a tort under the Civil Code is 10 years from the date on which the injured person becomes, or should have become, aware of the right to bring an action (Civil Code, article 1.125(1)).

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<sup>951</sup> See *ibid*, 278.

<sup>952</sup> See Mantas Juozaitis and Ramunas Audzevicius, Lithuania: A question of procedure (1 May 2011); available at <http://www.iflr.com/Article/2836721/Lithuania-A-question-of-procedure.html>

Unless an exception applies, the limitations period begins to run “from the day on which a person becomes aware or should have become aware of the violation of his right” (Civil Code, article 1.127(1)).

#### **1.5.11 Right to claim contribution from other responsible persons**

The Civil Code authorises a contribution action by a tortfeasor against other tortfeasors.

Article 6.280 of the Civil Code provides, in pertinent part, that:

- “1. A person who has compensated the damage caused by another person shall have the right of recourse (the right of counterclaim) against the person by whom the damage was caused in the amount equal to the paid compensation unless a different amount is established by the law.
2. The person who has compensated for the damage caused by several persons jointly shall have the right of recourse against every of them in proportion to the degree of gravity of the fault of each of them. Where it is impossible to determine the degree of gravity of the fault of each of them, the portions of damage under compensation attributable to each of them shall be considered to be equal”.

### **1.6 Compensation system (claims within Target Country)**

There is no compensation system in Lithuania for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

### **1.7 Compensation system (claims concerning transboundary incidents)**

There is no compensation system in Lithuania for claims for harm from transboundary offshore oil and gas operations.

### **1.8 Competent authority**

The competent authority for licensing oil and gas operations in Lithuania is the Lithuanian Geological Survey of the Ministry of Environment and the Ministry of the Environment.<sup>953</sup>

### **1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)**

The Law on Environmental Impact Assessment of the Proposed Economic Activity of 15 August 1996, as amended, applies, among other things, to the extraction of subsoil resources.<sup>954</sup>

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<sup>953</sup> Comment (information provided) by Jurga Lazauskienė, Head, Department of Bedrock and Oil Geology (29 September 2014).

<sup>954</sup> An unofficial English translation of the Law, with amendments to 30 June 2008, is available from the Ministry of the Environment’s website at <http://www.am.lt/VI/en/VI/index.php#a/155>

## 1.10 Offences and sanctions

Article 25 of the Law on Subsoil states that:

“Legal and natural persons as well as groups of such persons acting under joint venture agreements shall bear liability for the violation of the Law on Subsoil in accordance with the procedure laid down by laws”.

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Law on Subsoil does not specify the type of financial capability, or financial security, to be shown by an applicant for an exploration and production permit.

Article 4 of Directive 94/22/EC on the conditions for using authorisations for the prospection, exploration and production of hydrocarbon, which directs Member States to take necessary measures to ensure the consideration of the financial (and technical) capability of applicants for hydrocarbon operations applies.

Further, the production sharing agreement, which accompanies an exploration and production permit, should include financial security requirements.

### 1.11.1 Persons required to have evidence of financial security

See section 1.11 above.

### 1.11.2 Time at which evidence of financial security is required

See section 1.11 above.

### 1.11.3 Scope (traditional damage / environmental damage / etc)

See section 1.11 above.

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

See section 1.11 above.

### 1.11.5 Monetary limit(s)

See section 1.11 above.

### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

See section 1.11 above.

## 1.12 Jurisdictional issues (if any)

It is not clear whether there are jurisdictional issues concerning the application of civil and criminal law to Lithuania’s offshore areas. In particular, it is not clear whether the Civil Code applies to the Lithuanian continental shelf and EEZ.

### 1.13 Key points

Lithuania has produced onshore oil since 1991. As of October 2014, however, Lithuania was not producing offshore oil, although the Geological Survey has estimated that there are between 36 and 72 million cubic metres of oil in its offshore area in the Baltic Sea. Further, the Director of the Geological Services referred to Lithuania's intent to begin the exploration of its Baltic Sea area when the longstanding dispute with Latvia over maritime borders has been resolved.

As of October 2014, Lithuania did not have any natural gas production but it has potential shale gas reserves on its continental shelf in the Baltic Sea.

The exploration and production of offshore (and onshore) oil and gas (and other minerals) in Lithuania is governed by a mining law.

The Civil Code imposes liability for bodily injury, property damage and economic loss provided that the loss is direct. In addition, Lithuania's framework environmental law imposes liability for bodily injury, property damage, and potentially pure economic loss provided that the law applies to the continental shelf and the EEZ.

The Law on Subsoil does not include any requirements for financial security for offshore oil and gas operations. The production sharing agreement, which accompanies an exploration and production permit, is likely to include such provisions.

# Malta

## 1.1 Introduction

The offshore oil and gas industry in Malta is in its infancy. As of October 2014, there was no commercial production of either oil or gas on Malta's continental shelf.<sup>955</sup>

Exploration for oil began in 1958. The first well, however, was dry and subsequent exploratory wells were either dry or lacked the potential for commercial production. Problems were also encountered due, among other things, to a dispute in the 1970s between Malta and Libya concerning territorial limits in the continental shelf.

Since 2010, the Maltese Government has entered into one agreement to explore for oil and gas on Malta's continental shelf.<sup>956</sup> The agreements are with oil majors and small to medium sized companies. A major incentive for the agreements is the presence of proven offshore oil and gas reserves in geological strata in which Italy and Libya have oil and gas fields in their continental shelves.<sup>957</sup> Estimates of the amount of oil and gas in Malta's continental shelf vary. Estimates include between 9.8 and 62.8 million stock tank barrels of oil, 12.8 billion cubic feet of gas,<sup>958</sup> and up to 260 million barrels of oil.<sup>959</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Malta has specific legislation for licensing exploration and production activities on the continental shelf. The legislation consists of primary statutes and secondary legislation (regulations).

The Civil Code imposes liability for bodily injury, property damage and economic loss.

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<sup>955</sup> See Ministry for Resources and Rural Affairs, The National Energy Policy for the Maltese Islands 158 (2012); Genel, MOG Achieve Agreement on Maltese Extension (9 January 2014); available at [http://www.rigzone.com/news/oil\\_gas/a/131014/Genel\\_MOG\\_Achieve\\_Agreement\\_on\\_Maltese\\_Extension](http://www.rigzone.com/news/oil_gas/a/131014/Genel_MOG_Achieve_Agreement_on_Maltese_Extension); Oil well is likely next year, Times of Malta (6 September 2012); available at <http://www.timesofmalta.com/articles/view/20120906/local/Oil-well-is-likely-next-year.435757>; Mediterranean Oil & Gas to spud Malta oil well in December 2013, Malta Today; available at <http://www.maltatoday.com.mt/news/national/21080/mediterranean-oil-gas-to-spud-malta-oil-well-in-december-2013-20120917>

<sup>956</sup> See Maltese History & Heritage, Oil Exploration in Malta; available at <http://vassallohistory.wordpress.com/oil-exploration-in-malta/>. Information concerning the agreement provided by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>957</sup> See Malta Ministry for Resources and Rural Affairs, A Proposal for an Energy Policy for Malta 21 (April 2009); available at <https://secure2.gov.mt/SEA/file.aspx?f=3654>

<sup>958</sup> See PermEnergy, Malta and Italy strive for offshore oil exploration agreement (12 November 2013); available at [http://webcache.googleusercontent.com/search?q=cache:Y\\_LOQilyWV8J:www.pennenergy.com/articles/pennenergy/2013/11/malta-and-italy-strive-for-offshore-oil-exploration-agreement.html+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:Y_LOQilyWV8J:www.pennenergy.com/articles/pennenergy/2013/11/malta-and-italy-strive-for-offshore-oil-exploration-agreement.html+&cd=1&hl=en&ct=clnk&gl=uk) A stock tank barrel is measured at surface conditions.

<sup>959</sup> See Matthew Xuereb, Potential 260 million barrels of oil off Malta, Malta Times (15 October 2012); available at <http://www.timesofmalta.com/articles/view/20121015/local/Potential-260-million-barrels-of-oil-off-Malta.441106>

There is no specific legislation concerning compensation for claims for bodily injury, property damage or economic loss from offshore oil and gas activities. Instead, the Civil Code (Cap. 16) applies.<sup>960</sup>

### 1.3 Rights to, and ownership of, offshore oil and gas

The Continental Shelf Act (Cap. 535) provides that

- “(1) The Government of Malta exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
- (2) The Government of Malta shall have the exclusive right to exploit the subsoil of the continental shelf, as well as to authorise and regulate any activity, including but not limited to drilling and tunnelling, on the continental shelf for all purposes, irrespective of the depth of water above the said subsoil.
- (3) The rights referred to in sub-article (1) are exclusive in the sense that if the Government of Malta does not explore the continental shelf or exploit its natural resources, no one may undertake the activities referred to in the preceding sub-article without the express written consent of the Prime Minister” (article 3).<sup>961</sup>

The Petroleum (Production) Act (Cap. 156) provides that property in “petroleum” in its natural condition “wheresoever existing in Malta” is vested in the Government of Malta (article 3(1)).<sup>962</sup> The term “petroleum” is defined as “all natural hydrocarbon liquid or gaseous including crude oil, natural gas, asphalt, ozokerite and cognate substances and natural gasoline” (article 2).

### 1.4 Specific legislation for offshore oil and gas operations

Offshore oil and gas operations in Malta are regulated by the Petroleum (Production) Act and the Petroleum (Production) Regulations 2001 (S.L. 156.01).<sup>963</sup> The Maltese Government has designated the offshore area into areas / blocks covering over 70,000 square kilometres.<sup>964</sup>

Exploration and exploitation activities (referred to as “searching and boring for and getting ... petroleum”) may be carried out only pursuant to a licence granted under the Petroleum (Production) Act.

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<sup>960</sup> The English version of the Civil Code is available from the website of the Ministry of Justice, Culture and Local Government: <http://www.justiceservices.gov.mt/LOM.aspx?pageid=27&mode=chrono> The English version of the Civil Code and all other statutes and secondary legislation referred to in this summary for Malta are taken from the website of the Ministry of Justice, Culture and Local Government. The website indicates that all the legislation is regularly updated to include amendments.

<sup>961</sup> The English version of the Continental Shelf Act is available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12216&l=1> The new Continental Shelf Act came into force on 8 August 2014. Comment by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>962</sup> The English version of the Petroleum (Production) Act is available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8679>

<sup>963</sup> The English version of the Petroleum (Production) Regulations 2001 is available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9436>

<sup>964</sup> See Ministry for Resources and Rural Affairs, The National Energy Policy for the Maltese Islands 158 (2012).

There are two types of licences; an exploration licence, and an exploration and production licence.<sup>965</sup> An exploration licence is granted pursuant to an exploration study agreement; an exploration and production licence is granted pursuant to a production sharing agreement. The maximum period for an exploration and production licence is 30 years. The Regulations set out matters to be included in applications for exploration licences and exploration and production licences.

An example of an exploration study agreement is that entered into in late 2012 between the Maltese Government and Capricorn Malta Limited involving three blocks, totalling 6,400 square kilometres, off the north coast of Malta. Capricorn is a subsidiary of Cairn Energy plc.<sup>966</sup>

Among other things, the two-year agreement obliged Capricorn:

- to pay US\$ 100,000 to the Maltese Government as a signature bonus;
- expend at least US\$ 2.5 million on exploration measures;
- pay annual rentals of US\$ 192,000 to the Maltese Government;
- pay an annual administrative fee of US\$ 100,000; and
- make annual contributions of US\$ 75,000 for education and equipment.

The agreement also requires Capricorn, among other things, to reprocess existing 2D seismic data, acquire and process at least 1,500 kilometres of new 2D seismic data, and carry out technical studies to integrate and interpret existing and reprocessed data with the new data.<sup>967</sup> Capricorn has the option to notify the Maltese Government if it wishes to enter into negotiations for an exploration and production sharing agreement for any part of the acreage covered by the exploration study agreement.<sup>968</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Maltese law imposes liability for bodily injury and property damage. Maltese law also appears to impose liability for pure economic loss.

### 1.5.1 Bodily injury and property damage

Claims for compensation for bodily injury and property damage are authorised by the Civil Code.

Article 1031 of the Civil Code, which is the main civil liability provision, provides that “Every person ... shall be liable for the damage which occurs through fault”. The fault-based standard is a “reasonable person” standard,<sup>969</sup> described in article 1032(1) of the Civil Code as follows: “A person shall be

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<sup>965</sup> See *ibid.*

<sup>966</sup> See George M. Mangion, *Betting on oil and gas*, Malta Independent (20 March 2014); available at <http://www.independent.com.mt/articles/2013-07-28/opinions/betting-on-oil-exploration-2182905866/?c=c>

<sup>967</sup> Comment by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>968</sup> See *Government awards oil company offshore exploration study agreement*, Malta Today; available at <http://www.maltatoday.com.mt/news/national/23253/government-awards-oil-company-offshore-exploration-study-agreement-20121209>

<sup>969</sup> See Eugene Buttigeig, Malta 298, 300, in *European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports* (Bernhard A.

deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a *bonus paterfamilias*". Article 1033 further provides that a person is liable if they act or fail to act in breach of a duty imposed by law.

### 1.5.2 Economic loss

Article 1045(1) provides that the damage for which a person is liable is "the actual loss which the [defendant's] act shall have directly caused to the injured party". This provision may impose liability for pure economic loss provided that the loss is direct.

### 1.5.3 Liability for dangerous activities

Malta does not have specific legislation that imposes liability for dangerous activities.

### 1.5.4 Standard of liability (strict / fault-based)

Liability for claims for bodily injury and property damage is based on fault.

### 1.5.5 Scope of liability (joint and several / several)

Article 1049 of the Civil Code provides for joint and several liability if the damage is caused by two or more defendants who act with malice. If some defendants act with malice and others do not do so, joint and several liability applies only to the defendants who act with malice. Proportionate liability applies to the other defendants.

Article 1049 does not, however, prevent an injured person from bringing a claim against any person who caused the damage. Article 1050 provides that if the injured party cannot ascertain each defendant's proportion of the damage, the injured person may bring a claim against all alleged tortfeasors (wrongdoers) regardless of whether some of them acted with malice and others did not do so.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Maltese law does not establish a rebuttable presumption that a person committed a tort. Article 1033 of the Civil Code provides that "Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom". That is, the burden of proving that the defendant's tortious act caused harm remains with the plaintiff.<sup>970</sup>

### 1.5.7 Exceptions

There are no exceptions to claims for bodily injury and property damage under Maltese law.

### 1.5.8 Defences

*Force majeure* is a defence to an action for compensation for bodily injury or property damage. Article 1029 of the Civil Code provides that "Any damage which is produced by a fortuitous event, or in

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Koch, editor, Contract 30-CE-0063869/00-28, April 2007) (Eugene Buttigeig, Malta); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>970</sup> See Eugene Buttigeig, Malta, 299.



consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs”.

Further, article 1051 provides for a reduction in damages payable to an injured party if the injured party “has by his imprudence, negligence or want of attention contributed or given occasion to the damage”. This provision is unlikely to apply to a claim for compensation for harm from pollution from an offshore oil and gas incident.

### 1.5.9 Remedies

The remedy for a claim for bodily injury or property damage is compensatory damages. Moral (non-pecuniary) damage for pain and suffering is not expressly mentioned in the Civil Code, although the award of moral damage is not expressly excluded.<sup>971</sup>

Punitive damages are not available under Maltese law.<sup>972</sup>

### 1.5.10 Limitations period(s)

Article 2153 of the Civil Code provides that the limitations period for a tortious action that does not arise from a criminal offence is two years. Article 2154(1) provides that the limitations period for a civil action for damages arising from a criminal offence is the period that relates to the criminal action.

### 1.5.11 Right to claim contribution from other responsible persons

Article 1050 of the Civil Code provides that a defendant has a right of contribution against other tortfeasors when it is not possible to ascertain the proportion of the damage caused by each tortfeasor. Further, a defendant has a right to demand that all tortfeasors are joined in the proceedings. In such a case, the court may apportion damages between the defendants in equal or unequal shares, according to the relevant circumstances.

## 1.6 Compensation system (claims within Target Country)

Malta does not have a specific compensation system for claims from industrial accidents.

Compensation claims are heard by the First Hall of the Civil Court, with a right of appeal.

## 1.7 Compensation system (claims concerning transboundary incidents)

Malta does not have a specific compensation system for claims for bodily injury or property damage from transboundary incidents.

## 1.8 Competent authority

The competent authority for offshore oil and gas operations is the Continental Shelf Department at the Ministry for Transport and Infrastructure through the Maritime Governance Unit and the Oil Exploration Unit.<sup>973</sup>

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<sup>971</sup> Comment by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>972</sup> See Executive summary and overview of the national report for Malta, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/executive\\_summaries/malta\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/executive_summaries/malta_en.pdf)

The Maritime Governance Unit is responsible for the co-ordination of planning and permitting activities in Malta's continental shelf. The Unit's main functions are:

- “Co-ordinating the planning and permitting of activities within Malta's continental shelf, such as the construction, placing or use of artificial islands, installations, structures or devices in, on or above the Continental Shelf and the laying and maintenance of submarine cables and pipelines;
- Management of a Geographical Information System for maritime data to enable the planning of future maritime activities thereby facilitating Maritime Spatial Planning which is one of the most important pillars for Integrated Maritime Policy;
- To provide technical support on various issues related to Integrated Maritime Policy;
- To issue permits and co-ordinate any requests made for marine scientific research within Malta's continental shelf and to integrate any results acquired in the Geographical Information System for maritime data;
- To provide support to the National Sovereignty and Jurisdiction Commission in connection with Malta's sovereign rights, maritime boundaries and discussions with neighbouring countries;
- To act as co-ordinator on health, safety and environmental issues relating to offshore oil and gas prospecting, exploration and production activities”.<sup>974</sup>

The Oil Exploration Unit is responsible for licensing and regulating oil and gas operations on Malta's continental shelf. The main responsibilities of the Oil Exploration Unit are as follows:

- “Promotion of exploration opportunities offshore Malta with the aim of attracting reputable oil companies to invest in oil exploration activities offshore Malta;
- Granting of licenses for oil exploration and production activities under Exploration Study Agreements and Production Sharing Contracts including prior negotiations with oil companies;
- Monitoring of contractual obligations of oil companies licensed under Exploration Study Agreements and Production Sharing Contracts;
- Surveillance of exploration activity on Malta's continental shelf and in neighbouring countries;
- Provision of technical advice in relation to oil exploration, particularly the identification, evaluation and assessment of oil and gas prospects as well as any other geological and geophysical support that may be required;
- Administration of a geological and geophysical database of oil exploration data”.<sup>975</sup>

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<sup>973</sup> Comment by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

<sup>974</sup> See Maritime Governance Unit; available at <https://mticms.gov.mt/en/Pages/Continental%20Shelf/Maritime-Governance-Unit.aspx>

<sup>975</sup> See Oil Exploration Unit; available at <http://mti.gov.mt/en/Pages/Continental%20Shelf/Oil-Exploration-Unit.aspx>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

An environmental risk / impact assessment is required prior to the commencement of exploratory drilling operations. Acceptance of the assessment is subject to review by, and determination of, the Maltese Government.

A full environmental impact assessment is required prior to the commencement of production operations. The environmental assessment includes new information from the exploration phase of the production sharing contract.

In January 2014, for the first time, the Department for Transport and Infrastructure required a company, Mediterranean Oil and Gas, which proposed drilling an exploratory well in deep waters 130 kilometres south of Malta, to carry out an environmental risk assessment, to submit an oil spill contingency plan, and to report on major hazards. The requirement is in addition to obligations in the production sharing contract between the Maltese Government and Mediterranean Oil and Gas.<sup>976</sup>

In December 2013, Transport Malta signed a 31-month contract for a study on oil and hazardous and noxious substance spill response training and revision of its National Marine Pollution Contingency Plan, in order to incorporate a section on offshore drilling. The contract was awarded by EEA Grants, with Norwegian Coastal Administration (*Kystverket*) as Donor Project Partner.<sup>977</sup>

## 1.10 Offences and sanctions

Various statutory provisions establish offences and sanctions for pollution from offshore oil and gas activities.

It is a criminal offence to carry out offshore exploration or exploitation activities without a licence. The penalty on conviction is a fine of not less than EUR 465.87 and not more than EUR 1,164.69 for each day during which the offence occurs. In addition, all petroleum from the activities is forfeited to the Maltese Government (Petroleum (Production) Act, article 3).

The Continental Shelf Act provides that the Prime Minister may make regulations for, among other things, “protecting the marine environment” (article 4(1)(n)). The Prime Minister may also make regulations:

“prescribing the minimum and maximum punishments, whether by way of fine (*multa*) or of imprisonment, to be applied in respect of any contravention or nonobservance of any regulation made under [article 4]: Provided that any punishment prescribed in the regulations made under this sub-article shall not exceed a fine (*multa*) of two million euro (€2,000,000), and shall not exceed a term of five years imprisonment, or both, in

<sup>976</sup> See Matthew Vella, Oil drillers obliged to conduct environment risk assessment, Malta today (22 January 2014); available at <http://www.maltatoday.com.mt/news/national/33370/oil-drillers-obliged-to-conduct-environment-risk-assessment-20140122>; James Debono, Oil exploration: risk assessment will not be published, Malta Today (28 January 2014); available at <http://www.maltatoday.com.mt/news/national/36025/oil-exploration-risk-assessment-will-not-be-published-20140127>

<sup>977</sup> See Transport Malta, Oil/HNS Spill Response Capacity Building; available at <http://www.transport.gov.mt/ports-marinas/maritime-pollution-prevention-and-control/oilhns-spill-response-capacity-building>

respect of any contravention or non-observance of any such regulation” (article 4(1)(q)).

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

Malta does not set out requirements for mandatory financial security for offshore oil and gas operations in legislation. Instead, the requirements are set out in the Model Production Sharing Contract (2001) and the Model Exploration Study Agreement (2001), into which every applicant for an exploration study licence and an exploration and production licence, respectively, must enter. The model agreements are available on request to the Department of Transport and Infrastructure by oil companies that have shown an interest in entering into a licence.

The production sharing contract (also known as a production sharing agreement) is an agreement between the Maltese Government and an oil company. The oil company retains the risks of carrying out exploration activities in accordance with the terms and conditions of the contract, which sets out the time limits for exploration with possible extensions, subject to agreement by the Government.

If commercial quantities of oil are discovered, the oil company recovers its expenditures from the produced oil subject to an agreed limit (known as cost oil). Produced oil that exceeds that limit is then shared between the oil company and the Maltese Government based on the allocation set out in the agreement. The oil company pays income taxes on its revenue based on its share of the profit oil, together with any other applicable taxes..<sup>978</sup>

An example of a production sharing contract is that entered into by the Maltese Government with Malta Oil Pty Limited in July 2008, following an exploration study agreement entered into in March 2005. The contract had a time period of 30 years, of which the first six years was for exploration activities, following by development and production activities if petroleum was discovered in commercial quantities. Malta Oil’s principal financial obligations, which were set out in the exploration study agreement, are as follows:

- A signature bonus of US\$ 0.5 million (EUR 367,107);
- Expenditure of at least US\$ 5 million in the first three years of the contract;
- Annual rentals on a rising scale, beginning at US\$ 120,000 (EUR 88,106) annually;
- An annual administration fee of US\$ 100,000 (EUR 7,421); and
- Annual scholarship and training contributions of US\$ 50,000 (EUR 36,711) for the first two years, followed by annual contributions of US\$ 100,000 (EUR 73,421) for the remainder of the contract.

The contract also obliged Malta Oil to produce any petroleum discovered as efficiently as possible according to good oilfield practice. Malta Oil would retain part of the proceeds to recover its costs and share the remainder with the Maltese Government, as set out in the contract. If oil in commercial quantities was discovered, Malta Oil would prepare a development plan for approval by the Government. The plan would include, among other things, technical and engineering plans for

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<sup>978</sup> Comment (information provided) by Charles Galea, Continental Shelf Department, Office of the Director General, Malta (15 September 2014).

development, a detailed economic, social and environmental impact study, and development and production programmes. Income tax of 35 per cent on the profit oil is payable to the Government.<sup>979</sup>

#### **1.11.1 Persons required to have evidence of financial security**

The contractor / licensee that enters into a production sharing contract is required to have evidence of financial security. If the licensee consists of more than one entity, each entity is jointly and severally liable.

#### **1.11.2 Time at which evidence of financial security is required**

The financial security is required at the time that the production sharing contract is entered into. The competent authority carries out due diligence and checks the applicant's financial and technical capabilities, including the capacity of the applicant for accidental damage.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

The production sharing contract obliges the contractor to “make good any loss or damage to the Government and to third parties”, including environmental damage.<sup>980</sup>

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The production sharing contract requires the contractor to have insurance for the duration of exploration / exploitation operations. The certificate of insurance is vetted by specialised legal / insurance firms to ensure that it is in accordance with the contractual obligations in the production sharing contract and industry standards.

#### **1.11.5 Monetary limit(s)**

The specialised legal / insurance firms recommend the industry standard for capping the limits of the required insurance to the competent authority. The competent authority checks that the firms are independent and that no conflict of interest exists.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

The frequency of the review of the insurance certificate depends on the stage and scale of exploration / production operations.

The review for exploratory drilling is carried out prior to commencement of drilling operations. The competent authority grants consent to drill only if the review is satisfactory.

Malta did not have any production operations at the time this summary was prepared in October 2014.

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<sup>979</sup> See Award of a new Production Sharing Contract in Offshore Malta, Gozo News (19 July 2008); available at <http://gozonews.com/3275/award-of-a-new-production-sharing-contract-in-offshore-malta/print/>

<sup>980</sup> Ministry for Resources and Rural Affairs, The National Energy Policy for the Maltese Islands 159 (2012).

## 1.12 Jurisdictional issues (if any)

Article 6(2) of the Continental Shelf Act (Cap. 535) provides that: “For the purposes of civil jurisdiction exercisable by the courts of Malta, any artificial island, installation, structure or device and any waters within five hundred metres thereof shall be treated as if they were situated in Malta”.

The Territorial Waters and Contiguous Zone Act (Cap. 226) provides jurisdiction and power to prevent breaches of law, including pollution and to punish offences in the territorial sea and contiguous zone (section 4).<sup>981</sup> The Act defines the territorial waters of Malta as “all parts of the open sea within twelve nautical miles off the coast of Malta measured from low-water mark” (article 3). The contiguous zone is defined as the zone of the open sea contiguous to the territorial waters out to 24 nautical miles from baselines from which the breadth of the territorial waters are measured (article 4(2)).

It is unclear whether the Civil Code applies to the Maltese continental shelf.

## 1.13 Key points

Offshore oil and gas operations in Malta are in the exploration phase; no commercial production had begun as of October 2014.

The Civil Code imposes liability for compensation for bodily injury, property damage and economic loss. The standard is fault-based, which could be difficult for claimants to meet in the event of harm from an offshore oil and gas incident. Further, a claimant must show that the loss is direct.

Malta does not set out requirements for mandatory financial security for offshore oil and gas operations in legislation. Instead, they are set out in the Model Production Sharing Contract (2001) and the Model Exploration Study Agreement (2001).

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<sup>981</sup> The English version of the Territorial Waters and Contiguous Zone Act is available at: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8728>

# Netherlands

## 1.1 Introduction

In 1959, the onshore Groningen natural gas field was discovered, resulting in the Netherlands subsequently becoming the largest producer and exporter of gas in the EU. The Groningen field is one of the 10 largest gas fields in the world.

In 1963, the State issued a production licence for the Groningen field to *Nederlandse Aardolie Maatschappij BV* (NAM), a joint venture between Shell and ExxonMobil, which each own 50 per cent of the shares in NAM.

Until 1970, the focus on exploration for oil and gas was onshore, with only 52 of the 636 wells that were drilled before that time being drilled offshore.<sup>982</sup> In 1973, gas was discovered in the Dutch continental shelf, with production beginning in 1977.<sup>983</sup> The Dutch continental shelf covers an area of nearly 57,000 square kilometres.<sup>984</sup>

By the end of 2010, the Netherlands had produced nearly 3.2 trillion cubic metres (tcm) of natural gas; remaining gas reserves were estimated at 1.3 tcm, of which 980 bcm are in the Groningen field, 160 bcm in small onshore fields, and 164 bcm in small offshore fields.<sup>985</sup> The term “small fields” is used to describe fields other than the Groningen field.

In 2012, the Netherlands produced 78.2 billion cubic metres (bcm) of natural gas, of which 52.2 bcm came from the Groningen field, 7.0 bcm from the small onshore fields and 18.9 bcm from small offshore fields.<sup>986</sup>

Most gas has been produced from onshore, with relatively small exploration in the Dutch North Sea. In 2012, *Energie Beheer Nederland BV* (EBN), which is owned by the State and which has a 40 per cent stake in oil and gas projects in which it invests, began a large study to identify the potential for oil and gas in the Northern part of the Dutch North Sea.<sup>987</sup>

The production of gas in the Netherlands is in decline; the Netherlands is anticipated to become a net importer of gas between 2020 and 2025.<sup>988</sup> In January 2013, 265 gas fields were producing gas, of which 152 were on the Dutch continental shelf.<sup>989</sup> Offshore exploration was continuing.

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<sup>982</sup> See EBN, Focus on Dutch Oil & Gas 2013 34; available at [http://www.ebn.nl/en/Actueel/Documents/EBN\\_Focus\\_On\\_Dutch\\_oil\\_gas\\_2013.pdf](http://www.ebn.nl/en/Actueel/Documents/EBN_Focus_On_Dutch_oil_gas_2013.pdf).

<sup>983</sup> See Total E&P; available at <http://www.nl.total.com/en/site/total-netherlands/corporate-history>

<sup>984</sup> See Elisabetta Aarts, Netherlands, in *Oil and Gas Review* 147, 148 (Christopher Strong, editor, 2013).

<sup>985</sup> See International Energy Agency, *Oil and Gas Security 2012; Emergency Response of IEA Countries*, The Netherlands 17; available at <http://www.iea.org/publications/freepublications/publication/Oil&GasSecurityNL2012.pdf>.

<sup>986</sup> See TNO, Production; available at <http://www.nlog.nl/en/production/production.html>

<sup>987</sup> See Focus on opportunities for oil and gas production in the Netherlands; available at <http://www.ebn.nl/en/Actueel/Pages/Focus-on-opportunities-for-oil-and-gas-production-in-the-Netherlands.aspx>

<sup>988</sup> See TNO, Production; available at <http://www.nlog.nl/en/production/production.html>

<sup>989</sup> See International Energy Agency, *Oil and Gas Security 2012; Emergency Response of IEA Countries*, The Netherlands; available at <http://www.iea.org/publications/freepublications/publication/Oil&GasSecurityNL2012.pdf>

The production of oil in the Netherlands is much lower than the production of gas. In 2012, 1.3 million standard cubic metres were produced, of which 880,000 were from the Dutch continental shelf.<sup>990</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The legislation that applies to licensing exploration and production activities on the continental shelf is a primary statute and secondary legislation in the form of a Decree and Regulations.

The Civil Code imposes liability for bodily injury, property damage and economic loss.

## 1.3 Rights to, and ownership of, offshore oil and gas

Section 3(1) of the Mining Act 2003, as amended (Mining Act), states that the State owns minerals in the Netherlands. The term “minerals” is defined as “minerals or substances of organic origin, present in the subsoil, in a concentration or deposit which is there by natural origin, in solid, liquid or gaseous form, with the exception of marsh gas, limestone, gravel, sand, clay, shells and mixtures thereof” (Mining Act, article 1(c)). The Mining Act applies to minerals “insofar as the minerals are located at a depth of more than 100 metres beneath the earth’s surface”.

Ownership of minerals that are produced pursuant to a production licence is transferred to the holder of the licence (Mining Act, article 3(2)).

The exploration and production of minerals is prohibited unless the Minister of Economic Affairs has issued the requisite licence (Mining Act, article 6(1)).

The State participates directly in the exploration and production of hydrocarbons through EBN, with a 40 per cent share under the Mining Act and a 50 per cent share in some licences granted between 1976 and 1995. Unless the Minister of Economic Affairs grants an exemption, a licensee must enter into a co-operation agreement with EBN within one year after a production licence is granted. When EBN acquires a participating interest, it reimburses licensees a percentage equal to its interest in the production licence for expenditures incurred by them in the costs of exploration and appraisal plus any further capital investments made by them in production facilities.<sup>991</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The main legislation for the exploration and production of minerals, including hydrocarbons, in the onshore and offshore of the Netherlands is the Mining Act, which specifically applies to the continental shelf (article 2(1)).<sup>992</sup>

The main secondary legislation for the exploration and production of minerals, including hydrocarbons, is the Mining Decree<sup>993</sup> and the Mining Regulation.<sup>994</sup>

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<sup>990</sup> See Elisabetta Aarts, Netherlands, in *Oil and Gas Review* 147, 148 (Christopher Strong, editor, 2013).

<sup>991</sup> See *ibid*, 152-153.

<sup>992</sup> An unofficial English translation of the Mining Act prepared for Dorhout Advocaten at Groningen by J.L. den Dulk, updated to 1 January 2012, is available at <http://www.nlog.nl/resources/Legislation/Mining%20Act%20English%20Translation%20%20jan%202012.pdf>.

<sup>993</sup> An unofficial English translation of the Mining Decree prepared for Dorhout Advocaten at Groningen by J.L. den Dulk, updated to 13 October 2011, is available at



There are two types of offshore oil and gas licences. They are:

- An exploration licence; and
- A production licence.

Prospection may be carried out pursuant to prior notification and submission of specified information to the MEA unless the MEA requires a licence, for example, due to the safety of shipping.<sup>995</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Dutch tort law imposes liability for bodily injury, property damage and economic loss.<sup>996</sup>

### 1.5.1 Bodily injury and property damage

The Dutch Civil Code is the applicable legislation for compensation for bodily injury and property damage for pollution from offshore oil and gas operations. The Code includes a specific provision for harm from mining.

The main provision in the Civil Code<sup>997</sup> for a tort is article 6:162, which describes a “tortious act” as follows:

- “1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
2. As a tortious act is regarded a violation of someone else’s right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.
3. A tortious act can be attributed to the tortfeasor [the person committing the tortious act] if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles (common opinion)”.

Article 6:95 of the Civil Code provides that:

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<http://www.nlog.nl/resources/Legislation/Mining%20Decree%20English%20Translation%2023%20okt%202011.pdf>.

<sup>994</sup> An unofficial English translation of the Mining Regulation prepared for NAM by J.L. den Dulk, updated to August 2009, is available at <http://www.nlog.nl/resources/Legislation/MBREnglishAug%2009.pdf>

<sup>995</sup> See Elisabetta Aarts, Netherlands, in *Oil and Gas Review* 147, 158 (Christopher Strong, editor, 2013).

<sup>996</sup> See Melissa Moncada Castillo & Willem H. van Boom, Netherlands 306, 311, in *European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports* (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm); *Environmental Liability and Ecological Damage in European Law* 524 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>997</sup> An unofficial English translation of the Civil Code is available, under the item “Legislation” at <http://www.dutchcivillaw.com/>. The website notes that some provisions are still being translated. <http://www.dutchcivillaw.com/civilcodegeneral.htm>

“The damage that has to be compensated by virtue of a statutory obligation to repair damages (due by virtue of law), consists of material loss and other disadvantages, the latter as far as the law implies that there is an additional entitlement to a compensation for such damage”.

Article 6:96(1) provides that: “A material loss includes losses suffered as well as missed profits”.

### 1.5.2 Economic loss

The Dutch law of torts does not specifically state that pure economic loss is recoverable but neither does it state that it is not recoverable. Dutch courts decide whether to award pure economic loss on a case by case basis depending on the facts of each case.

Lost income from pollution from an offshore oil and gas incident appears to be recoverable. One commentator noted that “fishermen whose earning capacity had been adversely affected by an oil spill in a coastal area [had] been awarded damages as compensation for individual economic losses (i.e. loss of earning capacity)”.<sup>998</sup>

Another commentator considered that damages could be awarded in the hypothetical of a loss in revenue by a hotel located next to a lake that was not owned by the hotel when tourists stayed away from the hotel due to a tortfeasor having polluted the lake. The commentator stated that the Explanatory Memorandum on the rules regarding liability for dangerous substances suggested that damages could be recoverable in such a case.<sup>999</sup>

### 1.5.3 Liability for dangerous activities

Two provisions in the Civil Code potentially and actually impose liability for compensation for harm from offshore oil and gas operations; article 6:175 and article 6:177, respectively.<sup>1000</sup>

Article 6:175 imposes strict liability for harm from dangerous substances. Article 6:175 provides, in pertinent part, as follows:

- “1. The person who in the course of his professional practice or business uses a substance or keeps it under his control, while it is known that this substance has such characteristics that it causes a special danger of a serious nature for persons or property, is liable when this potential danger is realized. With a person who conducts a business is equated a legal person who uses the substance or keeps it under his control in the fulfilment of his task or duty. When a substance is explosive, oxidising, inflammable, light inflammable, heavily inflammable, poisonous or very poisonous according to the criteria and methods as set under ... the Environmental Management Act, then it will

<sup>998</sup> Environmental Liability and Ecological Damage in European Law 504 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>999</sup> J.M. Barendrecht, Pure Economic Loss in the Netherlands 115, 128, in Netherlands Reports to the Fifteenth International Congress of Comparative Law (E.H. Hondius, editor, Intersentia Rechtswetenschappen, 1998) (referring to pages 18-19 of the Explanatory Memorandum on the rules regarding liability for dangerous substances).

<sup>1000</sup> Article 6.173 of the Civil Code imposes strict liability for harm from defective chattels (personal property). Article 6.174 of the Civil Code imposes strict liability for harm from defective premises. Article 6.179 imposes strict liability for harm from animals. None of these provisions would apply to harm from an offshore oil and gas incident.

in any event be regarded as a substance which causes a special danger of a serious nature.

2. If the substance is under control of a keeper who makes it his business to store such substances, then the liability from the first paragraph rests on him.  
...
3. Where the substance is to be found in a pipeline, the liability from the first paragraph rests on the management in charge of maintenance ....
4. Where the damage is a consequence of pollution of air, water or soil with the substance, the liability from the first paragraph rests on the person who, at the start of the activity which caused the pollution, is liable by virtue of the present Article. ...”.

Although the operator of an offshore oil and gas installation would not, say, use or keep hydrocarbons under his control, the potential exists that article 6:175 could potentially apply to harm caused by offshore oil and gas operations.

Article 6:177 of the Civil Code imposes strict liability for mining operations as follows:

- “1. The operator of a mining work as meant in Article 1, component (n), of the Mining Act [see below] is liable for the damage which has been caused by:
  - a. effusions of minerals [defined, in pertinent part, as “minerals or substances of organic origin, present in the subsoil, in a concentration or deposit which is there by natural origin, in solid, liquid or gaseous form”] as a consequence of uncontrollable forces of nature in the earth’s underground which are set in motion because of the construction or the exploitation of the work ....<sup>1001</sup>
2. For the purpose of this Article an ‘operator of a mining work’ is understood as:
  - a. the holder of [an exploration or production] license ... who constructs a mining work or under whose authority such a work is constructed or who has a mining work in use;
  - b. everyone who, other than as a subordinate, constructs a mine work or under whose authority such a mine work is constructed or who has such a mine work in use without the need of having a license ....
3. Liable for damage caused by the effusion of minerals is the person who, at the time of the event which has set off the effusion, is the operator of the involved mining work ...”.

Article 1(n) of the Mining Act defines “mining works” in pertinent part, as:

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<sup>1001</sup> An alternative translation of this clause by the Dutch Maritime and Transport Law Association reads: “The operator of works referred to in Article 1(n) of the *Mijnbouwwet* (Mining Act) shall be liable for a loss arising from ... the outflow of minerals referred to in Article (a) of the *Mijnbouwwet* due to failure to control the underground natural forces activated by the installation or operation of the works; [or] soil movement caused by the installation or operation of the works”. Response by the Nederlandse Vereniging voor Zee- en Vervoersrecht (NVZV) (Dutch Maritime and Transport Association) to the CMI Questionnaire dated 19 July 2013 with regard to offshore activities – pollution liability and related issues; available at <http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Offshore%20Activities/14.NETHERLANDS%20Answer%201st.%20Questionnaire.pdf>

“a work that according to an order in council forms part of a designated category of works:

- 1°. for the purpose of the exploration for or the production of minerals ...
- 3°. that relate to the works mentioned in 1°... here above”.

Article 6:177 applies to an incident from oil and gas operations. In this respect, the Dutch Maritime and Transport Law Association considers that article 6:177 applies to loss from the blow out of a well.<sup>1002</sup>

Article 6:177 applies to pollution from offshore oil and gas operations including such operations on the Dutch continental shelf and EEZ provided the damage from the operations occurs in the territory of the Netherlands (see section 1.12 below).

#### **1.5.4 Standard of liability (strict / fault-based)**

The general basis of liability under the Civil Code is fault-based. Liability under articles 6:175 and 6:177 is strict.

#### **1.5.5 Scope of liability (joint and several / several)**

If more than one person causes damage to a claimant, each tortfeasor is liable for an equal share unless the law, common practice or a statutory provision provides otherwise.

Article 6:6(1) of the Civil Code provides that:

- “1. If a performance is indebted by two or more debtors jointly, then each of them is liable for an equal part, unless from law, common practice or a juridical act results that they are liable for unequal parts or that they are joint and several liable.
2. If the performance is undividable or if from law, common practice or a juridical act results that the debtors each are liable for the whole debt, then they are joint and several liable [it then is a so called ‘joint debt’ or ‘joint obligation’ of ‘solidary debtors’].
3. From an agreement between the debtor and creditor may result that, when the obligation passes (moves) to two or more legal successors of the debtor, these successors are liable for unequal parts or that they are joint and several liable”.

If there are concurrent tortious acts that cause the same damage, joint and several liability applies. In this respect, article 6:102 of the Civil Code provides as follows:

- “1. When two or more persons are individually liable for the same damage, then they are joint and several liable for it. In order to assess what each of them has to contribute ... on account of their internal relationship with each other, the damage is imputed to them in accordance with Article 6:101, unless a different imputation results from law or a juridical act.
2. When the damage is caused as well by circumstances which are attributable to the injured person himself, then Article 6:101 [which provides for contributory negligence] is applicable to the obligation of each of the liable

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<sup>1002</sup> Ibid.

persons meant in the previous paragraph to compensate the damage to the injured person, on the understanding that the injured person may, overall, not claim more of each of the liable persons than he could if only one of them would have been liable as a result of the circumstances on which their liability is based. When it is not possible to recover a contribution in full from one of the persons with an internal obligation to contribute in the damages, then the court may order, upon the request of one of these persons, that in the application of Article 6:13 [which concerns the insolvency of a debtor who is jointly and severally liable] the unrecovered contribution shall be imputed also over the injured person”.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Article 6:99 of the Civil Code reverses the burden of proof when damage is caused to a claimant from more than one event. That is, article 6:99 provides that:

“Where the damage is caused by two or more events, for each of which another person is liable, and it is ascertained that the damage originates from at least one of these events, then each of these liable persons is joint and several liable for that damage, unless a liable person proves that this specific damage is not caused by the event for which he himself is liable”.

### 1.5.7 Exceptions

Article 6:178 of the Civil Code provides exceptions to liability under articles 6:175 and 6:177 (see section 1.5.3 above) if:

- “a. the damage is caused as a result of an armed conflict, civil war, insurrection, internal riot, rebellion or mutiny;
- b. the damage is caused by a force of nature of exceptional, inevitable and compelling characteristics, except in the situation meant in Article 6:177, paragraph 1, with regard to uncontrollable forces of nature in the earth’s underground which are set in motion because of the construction or the exploitation of a mining work;
- c. the damage is caused exclusively due to the observance of a command or mandatory regulation of the government;
- d. the damage is caused due to an operation or activity with a substance as meant in Article 6:175 in the interest of the injured person himself, where it was reasonable to expose him to the danger of damage;
- e. the damage is caused exclusively by an operation, activity or omission of a third person, performed with the intention to cause damage ...;
- f. it concerns nuisance, pollution or another impact as far as the persons who are held liable for these effects would not have been liable under the previous Section, even if they would have deliberately caused this nuisance, pollution or other impact”.

### 1.5.8 Defences

Article 6.101 of the Civil Code authorises the amount of damages to be reduced if the injured person is contributorily negligent. It is unlikely that this situation will arise in claims for bodily injury, property damage or economic loss from pollution from offshore oil and gas operations.

### 1.5.9 Remedies

The remedy for a tort under the Civil Code is compensatory damages.

In determining the amount of damages for pure economic loss, courts tend “to calculate the *real* costs incurred and the *plausible* drop in profits”.<sup>1003</sup> In a ruling on this issue, the Dutch Supreme Court required a claimant “to prove the extent of his damage by proving the actual and irreversible drop in turnover. The claimant could not claim the profit he usually made on the production over the five hours he was cut off from energy supplies, but had to show that the interruption was not redressed afterwards (e.g., by working overtime)”.<sup>1004</sup>

The above methodology appears to be especially relevant to claims by businesses that suffer pure economic loss due to pollution from an offshore oil and gas incident. If, say, a fisherman loses income due to a ban on fishing, but mitigates that loss by receiving income due to working for the operator in carrying out clean-up works, the fisherman would not be entitled to the total amount of lost income from the fishing ban.

Dutch law does not recognise punitive damages.<sup>1005</sup>

### 1.5.10 Limitations period(s)

Article 3:310 of the Civil Code establishes a five year limitation period for torts. The period begins to run on the day after the day on which the injured party becomes aware of the damage. There is a long stop of 20 years. Article 3:310(2) of the Civil Code states, however, that if the “damage is caused by air, water or soil pollution, by the realisation of a danger as meant in Article 6:175 of the Civil Code ... then ... the right of action to claim damages becomes prescribed on the expiry of thirty years from the day on which the event occurred that caused the damage”.

If damage is caused by a criminal offence to which the Dutch Penal Code applies, article 3:310 provides that “the right of action to claim damages against the person who committed the criminal offence shall not become prescribed as long as the penal action has not ceased to exist due to its prescription or the death of the liable person”.

### 1.5.11 Right to claim contribution from other responsible persons

Article 6:10 of the Civil Code authorises a tortfeasor who has paid more than its share of compensation to claim contribution from other tortfeasors.

Article 6:12 provides a right of subrogation against other tortfeasors by a tortfeasor who is jointly and severally liable and has paid in excess of its share.

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<sup>1003</sup> Melissa Moncada Castillo & Willem H. van Boom, Netherlands 306, 316, in European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>1004</sup> Ibid (describing the Cable case, HR 18-4-1986, Nederlandse Jurisprudentie 1986, no. 567).

<sup>1005</sup> See Swiss Re, Punitive damages in Europe; concern, threat or non-issue? 6 (2012); available at [http://www.biztositasizemle.hu/files/201206/punitive\\_damage\\_in\\_europe.pdf](http://www.biztositasizemle.hu/files/201206/punitive_damage_in_europe.pdf)

## 1.6 Compensation system (claims within Target Country)

The Netherlands does not have a compensation system for claims for bodily injury, property damage and economic loss from pollution from offshore oil and gas operations. If claims are not settled, normal court procedures apply.

## 1.7 Compensation system (claims concerning transboundary incidents)

The Netherlands does not have a compensation system for claims for bodily injury, property damage and economic loss from transboundary pollution from offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for oil and gas licensing in the Netherlands is the Ministry of Economic Affairs.

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

An environmental mining licence is required for the installation and operation of mining facilities on the Dutch continental shelf (as well as onshore) (Mining Regulations, section 1.4). An environmental impact assessment may be required as part of the permitting process.<sup>1006</sup>

The Mining Regulations set out criteria for the use and discharge of oil containing mixtures and chemicals (chapter 9).

## 1.10 Offences and sanctions

Article 132 of the Mining Act authorises the Minister of Economic Affairs to enforce obligations in and by virtue of the Act. Article 133 states that it is an offence to breach the prohibition to enter or to “have any matter of any kind” in a safety zone around a mining installation other than pursuant to an exploration or production licence (see article 43.1).

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The provisions on financial security in the Mining Act refer, in substantial part to financial security for “soil movement resulting from the production of minerals” (article 46(1)) and the production of terrestrial heat and the storage of substances (article 46(4)). These provisions do not apply to oil and gas exploration and production operations on the Dutch continental shelf.

Financial security may be required to cover administrative measures to enforce the requirement for a licensee to carry out its obligations to remove installations. The Mining Regulations do not specify when the Ministry of Economic Affairs may demand such financial security.<sup>1007</sup>

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<sup>1006</sup> See Elisabetta Aarts, Netherlands, in Oil and Gas Review 147, 165 (Christopher Strong, editor, 2013).

<sup>1007</sup> See *ibid*, 166.

Financial security may be required under exploration and production licences for discharging payments and obligations under the licence.<sup>1008</sup> As a practical matter, however, such financial security is rarely imposed.<sup>1009</sup> The Ministry of Economic Affairs may, however, refuse to grant an application for an exploration or production licence if it is not satisfied that the applicant will be able to provide financial security if the Ministry was to request it in the future.<sup>1010</sup>

The financial security requirements in the mining legislation do not include financial security for compensation for bodily injury, property damage or economic loss.

#### **1.11.1 Persons required to have evidence of financial security**

The licensee(s) of an exploration or production licence may be required, as indicated in section 1.11 above, to have evidence of financial security for discharging payments and obligations under the licence. Each entity that holds an interest in a licence is considered to be a holder of the licence regardless of the percentage of their interest in it. The licence does not indicate the percentage interests.<sup>1011</sup>

#### **1.11.2 Time at which evidence of financial security is required**

Evidence of financial security, if required by the Ministry of Economic Affairs, is required when an exploration or production licence is granted.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

As indicated above, the financial security requirements do not include financial security for compensation for bodily injury, property damage or economic loss.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The Mining Act does not specify the form of financial security that is required.

#### **1.11.5 Monetary limit(s)**

The Mining Act does not specify a monetary amount of financial security. Article 46(3) states that “[t]he amount of and the period during which, the moment in time and the manner in which the provision of security will be provided, must be to the satisfaction of [the Minister of Economic Affairs]”.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

The Mining Act does not specify the time at which the adequacy of financial security is reviewed. As indicated in section 1.11.5 above, article 46(3) provides that “[t]he amount of and the period during which, the moment in time and the manner in which the provision of security will be provided, must be to the satisfaction of [the Minister of Economic Affairs]”.

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<sup>1008</sup> See Max Oosterhuis & Roland de Vlam, Netherlands Chapter – Oil and Gas Regulation 2014, International Comparative Legal Guides; available at <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2014>

<sup>1009</sup> See Elisabetta Aarts, Netherlands, in Oil and Gas Review 147, 159 (Christopher Strong, editor, 2013).

<sup>1010</sup> See *ibid*, 166.

<sup>1011</sup> See *ibid*, 161.



## 1.12 Jurisdictional issues (if any)

The Mining Act specifically applies to the Dutch continental shelf. The Mining Act does not, however, impose liability on the operator of an offshore oil and gas facility for traditional damage from a pollution incident from the facility.

The Civil Code imposes liability for loss arising from specified mining operations including, among other things, a blow out of a well. There is nothing in the Civil Code, however that applies the relevant provision (article 6:177), or indeed, any other provision, of the Civil Code to the Dutch continental shelf or the EEZ. Further, article 6:177 refers to a loss from a “soil movement caused by the installation or operation of the works” (see section 1.5.3 above), a situation that could occur only on land.

In a comparative study of the law that applies to the continental shelf and EEZ in 11 countries, the national reporter for the Netherlands commented, in referring to whether the Waterworks Management Act applies to the EEZ, that the application of legislation to the continental shelf and the EEZ must be expressly stated in the relevant legislation in order to be applicable to such areas.<sup>1012</sup>

He stated that:

“Although the intention is clearly to make the Waterworks Management Act applicable to the EEZ, one might conclude the method to achieve this result is not effective. ... the definition of waterworks has been extended to the EEZ as well. This deserves critical consideration; *I propose that applicability beyond the boundaries of the territorial waters can only exist by means of an explicit article in the Act stating its applicability.* Here the only mention is of extension of a definition to cover the EEZ as well, which is quite different from the explicit statement of applicability outside of the territorial waters. The Act’s explicit statement that it is not applicable to extractive activities in the EEZ, leading to the contrary rationale that the Act is applicable to the EEZ regarding all other aspects is not convincing. This exemption of applicability to the EEZ is caused by the fact that the Extraction Act has its own system for licensing and supervision by authorities” (emphasis added).

The national reporter’s conclusion concerning the applicability of legislative provisions to the EEZ or the Dutch continental shelf was not based solely on the Waterworks Management Act. In reaching his conclusion that there must be a specific legislative provision that applies the legislation to the Dutch continental shelf and the EEZ, he referred to other Dutch legislation that specifically states that it applies to either the EEZ or the Dutch continental shelf.<sup>1013</sup>

It thus appears that article 6:177 and other relevant provisions of the Civil Code do not apply to offshore oil and gas operations on the Dutch continental shelf and EEZ because the Civil Code does not specify that they apply to those areas.

Accordingly, the Dutch Civil Code would not apply to a claim from a person who suffers traditional damage outside the Netherlands from pollution from an oil and gas incident on the Dutch continental shelf or EEZ. This is because the application of Rome II (see final report, section 3.7.2) would not apply because there is no applicable Dutch law and, thus, no conflicts of law issue.

<sup>1012</sup> Christiaan P. Verwer, The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The Netherlands Perspective, *Ocean Yearbook*, vol. 25, 379, 382 (2011).

<sup>1013</sup> See, e.g., *ibid*, 385 (Working Conditions Act), 386 (Commodities Act), 386 (Working Hours Act), 387 (Water Supply Act), 388 (Act to Prevent Sea Pollution), 389 (Order Containing General Rules for Environment Extractive Activities), 391 (Soil Removal Act), 393 (Patent Act).

The Civil Code does, however, apply to a claim from a person in the Netherlands from an oil and gas incident on the Dutch continental shelf or EEZ. As stated by a Dutch lawyer:

“Formally [the Civil] Code does not apply beyond twelve sea miles from the Dutch coast but, as mining installations for the exploration and production of oil and gas from underneath the Dutch part of the continental shelf are regarded as Dutch territory, the Dutch Civil Code will apply to matters of third party liability arising from activities carried-out on such mining installations. The exception to this rule being third party damage resulting from said activities that is suffered on another State’s territory. In such case the legislation of that other State will be applied”.<sup>1014</sup>

### 1.13 Key points

The exploration and production of gas and, to a more limited extent oil, in the Netherlands is governed by the Mining Act and secondary legislation. The production of oil and gas is mature as is the legislation. The State has a 40 per cent interest in the production.

Dutch law imposes liability for bodily injury and property damage under the Civil Code, which includes specific provisions for mining operations as well as general provisions.

Dutch law does not specifically state that pure economic loss is recoverable but neither does it state that it is not recoverable. Dutch courts decide whether to award pure economic loss on a case by case basis depending on the facts of each case.

There is no mandatory financial security requirement for compensation for bodily injury, property damage and economic loss involving offshore oil and gas operations. The financial security provisions in the Mining Act do not relate to the exploration and production of offshore oil and gas other than requiring financial security for the discharge of payments and obligations under a licence. Such financial security is rarely imposed.

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<sup>1014</sup> See Karin Weisenborn, The Netherlands; Liability For Third Party Damage Resulting From Exploration and Production Activities, Upstream Legal Topics, June 2013 – The Netherlands; available at [http://www.wl-associates.com/wp-content/uploads/pdfs/Upstream-Legal-Topics\(1\)-Third-Party-Liability-under-Dutch-Law.pdf](http://www.wl-associates.com/wp-content/uploads/pdfs/Upstream-Legal-Topics(1)-Third-Party-Liability-under-Dutch-Law.pdf); see also Decarbonise, Solutions to Climate Change, 7.1 Liabilities for Storage; available at <http://decarboni.se/publications/71-liabilities-storage>

# Norway

## 1.1 Introduction

In 2011, Norway was the world's seventh largest oil exporter and fourteenth largest oil producer, and the world's third largest gas exporter and sixth largest gas producer.<sup>1015</sup>

Oil production on Norway's continental shelf began in 1971; the highest annual production was in 2000 at 181million Sm<sup>3</sup> o.e. (standard cubic metre of oil equivalent). In 2013, there were 72 oil fields in production, four of which had begun production that same year. The Ekofisk oil field, which had been discovered in 1969, had the highest production at about 8.4 per cent of the total. Production in 2013 was 85 million Sm<sup>3</sup> o.e., a decrease of 4.8 per cent from 2012.

Gas production on Norway's continental shelf began in 1977. It increased nearly every year until 2012, with a decrease of 5.2 per cent in 2013, when the total was nearly 109 million Sm<sup>3</sup> o.e. In 2013, 64 gas fields were in production. The Troll field, which began gas production in 1996, had the highest production at slightly over 27 per cent of the total.

In 2010, gas production exceeded oil production for the first time. In 2013, oil accounted for 39.4 per cent of the total production, with gas accounting for 50.5 per cent. The remaining 10.1 per cent of production was natural gas liquids and condensate.<sup>1016</sup>

Exploration activity on the Norwegian continental shelf has increased since about 2000. The Ministry of Petroleum and Energy (MPE) considers that there are substantial undiscovered resources near the developed fields in the North Sea, Norwegian Sea and Barents Sea as well as in less explored areas. In late 2010, the total recoverable resources were estimated at between 10 and 16 billion Sm<sup>3</sup> o.e., with an expected total of 13 billion Sm<sup>3</sup> o.e.<sup>1017</sup> The MPE considered that about 47 per cent of this amount had not yet been produced.<sup>1018</sup>

As of October 2014, there had been 22 licensing rounds on the Norwegian continental shelf.<sup>1019</sup> In addition, applications had been received from 47 companies for the 23<sup>rd</sup> licensing round.<sup>1020</sup>

Bellona indicated that no major accident occurred in Norway so far. The last accidents date back to 1977 and 1980 and rules have been changed quite a lot since the incident occurred. However, the

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<sup>1015</sup> Norwegian Ministry of Petroleum and Energy, Facts 2013; The Norwegian Petroleum Sector 20 (March 2013).

<sup>1016</sup> Statistics Norway, Oil and gas activities: Q4 2013 (3 March 2014); available at <https://www.ssb.no/en/ogprodre/>

<sup>1017</sup> See Norwegian Ministry of Petroleum and Energy, An Industry for the Future – Norway's petroleum activities 16-18 (Meld.St.28 (2010-2011 Report to the Storting (white paper)) (translation from the Norwegian. For information only); available from <http://www.regjeringen.no/en/dep/oed/documents-and-publications/propositions-and-reports/reports-to-the-storting/2010-2011/meld-st-28-2010---2011.html?id=660966> The Storting is the Norwegian Parliament.

<sup>1018</sup> Norwegian Ministry of Petroleum and Energy, Facts 2013; The Norwegian Petroleum Sector 20 (March 2013).

<sup>1019</sup> See Norwegian Petroleum Directorate, Nominations for the 23rd licensing round (22 January 2014); available at <http://www.npd.no/en/news/News/2014/Nominations-for-the-23rd-licensing-round/>

<sup>1020</sup> See Norway wins interest from 47 oil firms in licensing round, Soil and Companies News (12 September 2014); available at <http://www.hellenicshippingnews.com/norway-wins-interest-from-47-oil-firms-in-licensing-round/>

Macondo accident showed that in case of a major blowout, there would be no available capacity to compensate losses.<sup>1021</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Norway has specific legislation for licensing exploration and production activities on its continental shelf. The legislation consists of primary statutes and secondary legislation (regulations)

Liability for bodily injury and property damage is imposed by:

- Act of 29 November 1996 No. 72 relating to petroleum activities, as amended (Petroleum Act);
- Act of 13 March 1981 No. 6 Concerning Protection Against Pollution and Concerning Waste (Pollution and Waste Act); and
- Act of 13 June 1969 No. 26 Relating to Compensation in Certain Circumstances (Act Relating to Compensation in Certain Circumstances).

Liability for pure economic loss is imposed by:

- The Petroleum Act; and
- Act of 15 June 2001 No.79 Relating to the Protection of the Environment in Svalbard, as amended (Svalbard Act).

## 1.3 Rights to, and ownership of, offshore oil and gas

The Petroleum Act provides that the right to petroleum deposits on the Norwegian continental shelf is vested in the State (section 1-1).<sup>1022</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The Petroleum Act establishes the legal basis for licensing the exploration, production and transport of petroleum from offshore oil and gas operations. The Act specifically imposes liability for pollution damage from offshore oil and gas operations (discussed below).

The production licence grants the right to explore for, and produce, oil and gas. The licence may be granted for up to 10 years, with an extension of the period specified in the licence (typically 30 years) if the licensees comply with the obligations in the licence. Production licences are generally granted for an initial exploration period of six years.<sup>1023</sup>

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<sup>1021</sup> Telephone interview with Karl Kristensen, from Bellona, on 29 April 2014.

<sup>1022</sup> The “information use only” English translation of the Petroleum Act is available at: <http://www.npd.no/en/Regulations/Acts/Petroleum-activities-act/> The translation is dated 23 November 2012. English translations of related Acts are available from the Norwegian Petroleum Directorate’s website at: <http://www.npd.no/en/Regulations/Acts/>

<sup>1023</sup> See Statoil, The Norwegian licensing system; available at <http://www.statoil.com/annualreport2012/en/ouroperations/applicablelawsandregulations/pages/thenorwegianlicensingssystem.aspx>

When the MPE grants a production licence, the licensees enter into a standard JOA that regulates the relationship between them and the State of Norway (section 3-3).<sup>1024</sup> The JOA also sets out the financial arrangements between the parties to it, the work programmes, and insurance requirements. The JOA enables the Norwegian Government to maintain control over the operations to ensure that the exploitation of oil and gas is for the benefit of Norwegian society.<sup>1025</sup> The operator of the production licence is appointed by the MPE.<sup>1026</sup>

The Regulations to Act relating to petroleum activities, laid down by Royal Decree of 27 June 1997, No. 653, as amended (Petroleum Regulations) establish detailed provisions for exploration and production licences, impact assessments, the production of petroleum, cession of production and related matters.<sup>1027</sup>

The Regulations relating to Health, Safety and the Environment in the Petroleum Activities and at Certain Offshore Facilities (Framework Regulations)<sup>1028</sup> apply to health and safety issues concerning offshore oil and gas operations. The Framework Regulations are supplemented by guidelines.<sup>1029</sup>

Other health and safety regulations specific to offshore oil and gas operations are as follows.

- Regulations relating to management and the duty to provide information in the petroleum activities and at certain onshore facilities (Management Regulations);<sup>1030</sup>
- Regulations relating to conducting petroleum activities (Activities Regulations);<sup>1031</sup>
- Regulations relating to technical and operational matters at onshore facilities in the petroleum activities, etc. (Technical and Operational Regulations);<sup>1032</sup> and

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<sup>1024</sup> An unofficial English translation of the Agreement concerning petroleum activities (the standard JOA) is available at: <http://www.regjeringen.no/upload/OED/Vedlegg/Konsesjonsverk/k-verk-vedlegg-1-2-eng.pdf>

<sup>1025</sup> See Tina Hunter, Comparative Law as an Instrument in Transnational Law: The Example of Petroleum Regulation, (2009) Bond Law Review, vol. 21, 42, 65-66; see also Petroleum Act, s 1-2 (“Resource management of petroleum resources shall be carried out in a long-term perspective for the benefit of the Norwegian society as a whole”).

<sup>1026</sup> See Statoil, The Norwegian licensing system; available at <http://www.statoil.com/annualreport2012/en/ouroperations/applicablelawsandregulations/pages/thenorwegianlicensingssystem.aspx>

<sup>1027</sup> The “information use only” English translation of the Petroleum Regulations is available at: <http://www.npd.no/en/Regulations/Regulations/Petroleum-activities/> The translation states that it is not necessarily updated to reflect recent changes. Related Regulations are available from the Norwegian Petroleum Directorate’s website at: <http://www.npd.no/en/Regulations/Regulations/>

<sup>1028</sup> The Regulations relating to Health, Safety and the Environment in the Petroleum Activities and at Certain Offshore Facilities are available from the website of the Petroleum Safety Authority at <http://www.psa.no/framework-hse/category403.html>

<sup>1029</sup> The Guidelines regarding the Framework Regulations; available from the Petroleum Safety Authority’s website at <http://www.ptil.no/framework/category408.html>

<sup>1030</sup> The Regulations relating to management and the duty to provide information in the petroleum activities and at certain onshore facilities are available from the Petroleum Safety Authority’s website at <http://www.ptil.no/management/category401.html>

<sup>1031</sup> The Regulations relating to conducting petroleum activities are available from the Petroleum Safety Authority’s website at <http://www.ptil.no/activities/category399.html>

- Regulations relating to design and outfitting of facilities, etc. in the petroleum activities (the facilities regulations).<sup>1033</sup>

The Regulations in the first three bullet points are supplemented by guidelines.<sup>1034</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Norwegian law imposes liability for bodily injury, property damage and economic loss.

### 1.5.1 Bodily injury and property damage

Several Acts impose liability for bodily injury and property damage.

#### ➤ Pollution and Waste Act

The general rules on claims for damage from pollution and waste are set out in the Pollution and Waste Act.<sup>1035</sup> The term “pollution damage” is defined as “damage, nuisance or loss caused by pollution”. The Pollution and Waste Act imposes strict liability (section 55) and specifically includes “compensation for financial losses resulting from pollution damage” (section 57). The Act applies to activities on the continental shelf (section 4).

Section 53 provides, in pertinent part, that chapter 8 of the Act (which applies to compensation for pollution damage) applies “insofar as the question of liability is not separately regulated by other legislation or a contract”. If, therefore, the Petroleum Act or any other specific legislation, such as the Svalbard Act (discussed below), relates to compensation for pollution damage from activities on the continental shelf, the specific legislation applies instead of the Pollution and Waste Act.

#### ➤ Act Relating to Compensation in Certain Circumstances

The general Norwegian tort law is the Act Relating to Compensation in Certain Circumstances. The Act provides for strict liability for compensation for pollution damage. As with the Pollution and Waste Act, the Act does not apply if more specific legislation applies (section 5-5). Section 5-2 of the Act is similar to section 7-3 of the Petroleum Act in that the liability of a tortfeasor (wrongdoer) may be reduced depending on the circumstances of a pollution incident (see section 1.5.5 below).<sup>1036</sup>

<sup>1032</sup> The Regulations relating to technical and operational matters at onshore facilities in the petroleum activities, etc. are available from the Petroleum Safety Authority’s website at <http://www.ptil.no/technical-and-operational-regulations/category635.html>

<sup>1033</sup> The Regulations relating to design and outfitting of facilities, etc. in the petroleum activities are available from the Petroleum Safety Authority’s website at <http://www.ptil.no/facilities/category400.html>

<sup>1034</sup> Pdf’s of the Regulations and Guidelines are available from: <http://www.ptil.no/pdf-of-regulations/category934.html>

<sup>1035</sup> The “information use only” English translation of the Act is available at <http://www.regjeringen.no/en/doc/laws/acts/pollution-control-act.html?id=171893> The translation reflects amendments up to 20 June 2003.

<sup>1036</sup> See Response to the Offshore Activities questionnaire from the Norwegian Maritime Law Association (25 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:yJGh21q4w7YJ:www.sjoretsforeningen.no/site/wp-content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

## ➤ Chapter 7 of the Petroleum Act

Chapter 7 of the Petroleum Act imposes strict and unlimited liability for pollution damage (including bodily injury and property damage) from petroleum activities. Liability under chapter 7 mainly protects Norwegian interests.<sup>1037</sup> In addition, damage that originates in Norway or on the Norwegian continental shelf which causes damage in Denmark, Finland and Sweden is also compensable under chapter 7 (section 7-2). The protection of Danish, Finnish and Swedish interests is by virtue of the 1974 Nordic Environmental Convention (see a brief description of the Convention in section 1.7 below, and a more detailed description in section 3.6.2 of the main report).

Section 7-1 of the Petroleum Act defines “pollution damage” as:

“damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from a facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures. Damage or loss incurred by fishermen as a consequence of reduced possibilities for fishing is also included in pollution damage”.

The Petroleum Act does not define the terms “damage” and “loss” or specify the persons who may claim them, with the exception of Norwegian fishermen (see section 1.5.2 below).<sup>1038</sup>

Section 7-1 provides that the term “facility” includes “ships used for stationary drilling”. In addition, ships used “for the storage of petroleum in conjunction with production facilities” are considered to be part of a facility as are “ships for transport of petroleum during the time when loading from the facility takes place”.<sup>1039</sup>

Liability for claims for compensation is channelled to the licensee (section 7-4; see section 7-3). If, however, the person who causes the pollution damage does not have a licence to carry out petroleum activities, that person is strictly liable for the damage, as is any other person “who knew, or should have known, that the activity was conducted without a licence” (section 7-6).

The term, “licensee”, includes, in addition to the actual licensee:

- an operator who is deemed to be a licensee by the Ministry when it approves the status of the operator; and
- a person who has approval from the competent authority to carry out activities in connection with a facility that is located outside the Norwegian continental shelf when the pollution damage is from that facility.

Liability under the second bullet point thus focuses on the place of the damage, not the location of the facility that caused it.<sup>1040</sup>

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<sup>1037</sup> See Response to the Offshore Activities questionnaire from the Norwegian Maritime Law Association (25 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:yJGh21q4w7YJ:www.sjorettforeningen.no/site/wp-content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

<sup>1038</sup> See Patricia Park, *International Law for Energy and the Environment* 282 (CRC Press, 2d edition, 2013).

<sup>1039</sup> See also Petroleum Act, section 1-6(d), which provides the following definition: “facility, installation, plant and other equipment for petroleum activities, however not supply and support vessels or ships that transport petroleum in bulk. Facility also comprises pipeline and cable unless otherwise provided”.

<sup>1040</sup> See Patricia Park, *International Law for Energy and the Environment* 282 (CRC Press, 2d edition, 2013).

If there is more than one licensee, the operator is primarily liable for claims for compensation. Any other licensees are secondarily liable if the operator fails to pay the claims by the specified deadline for payment.

Section 7-4 provides that the liability of a licensee for pollution damage is limited to the provisions of the Petroleum Act.

Section 7-4 further provides that the following persons have immunity from such claims:

- anyone who carries out tasks or work in connection with petroleum activities pursuant to an agreement with the licensee or his contractors;
- “anyone who has manufactured or delivered equipment to be used in the petroleum activities”;
- anyone who carries out “measures to avert or limit pollution damage, or to save life or rescue values which have been endangered in connection with the petroleum activities, unless the measures are performed in conflict with prohibitions imposed by public authorities or are performed by someone other than public authorities in spite of express prohibition by the operator or the owner of the values threatened”; and
- anyone employed by a licensee or by someone mentioned in the above bullet points.

The licensee has a right to bring a contribution (recourse) action against the person who caused the damage, but only if that person or someone in his service acted wilfully or with gross negligence (sections 7-4, 7-5).

Further, if the licensee fails to comply with a judgment to pay compensation for pollution damage by the deadline specified in it, the person who sustained the damage may bring an action against the person who caused the damage to the same extent that the licensee may bring a recourse action against them (section 7-4).

The right to bring a recourse action is limited in that recourse liability may be mitigated to the extent “considered reasonable in view of manifested conduct, economic ability and the circumstances in general” (section 7-5).

#### ➤ **Other legislation imposing liability for compensation**

Section 10-9 of the Petroleum Act provides that if liability to a third party is incurred by “anyone undertaking tasks for a licensee, the licensee shall be liable for damages to the same extent as, and jointly and severally with, the perpetrator and, if applicable, his employer”. Liability under section 10-9 is not, however, liability for pollution damage.

### **1.5.2 Economic loss**

The following legislation imposes liability for pure economic loss for compensation for damage from offshore oil and gas operations:

- Chapter 8 of the Petroleum Act; and
- The Svalbard Act.<sup>1041</sup>

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<sup>1041</sup> The “information use only” English translation of the Svalbard Act is available at <http://www.regjeringen.no/en/doc/laws/acts/svalbard-environmental-protection-act.html?id=173945>



The Petroleum Act does not apply in Svalbard.

As indicated in section 1.5.1 above, the Pollution and Waste Act specifically imposes liability for “compensation for financial losses resulting from pollution damage” (section 57) in the event that the Petroleum Act or the Svalbard Act does not cover the liabilities.

#### ➤ **Chapter 8 of the Petroleum Act**

Chapter 8 of the Petroleum Act specifically provides for claims for compensation by “Norwegian fishermen”.

The term “Norwegian fishermen” is defined as “persons registered in the registration list of fishermen and owners of vessels listed in the registry of Norwegian fishing vessels subject to registration licence” (section 8-1).

Section 8-3 provides that a licensee is strictly liable for financial loss suffered by Norwegian fishermen resulting from pollution and waste from petroleum activities. The financial loss includes:

- the reasonable cost of measures taken by the fishermen to avert or limit the damage or loss;
- any financial loss from such measures;
- damage and inconvenience as a result of supply vessels and support vessel traffic; and
- relocation of the facility to or from the relevant fishing field.

The licensee has a right of recourse against the person who actually caused the loss or the owner of a ship providing that the relevant conditions of liability have been satisfied.

If it is not possible to identify the person who caused the damage, the licensees are jointly and severally liable “insofar as the damage may be believed to have been caused by petroleum activities in connection with the licence in question” (section 8-4).

Section 8-3 sets out specific conditions for claimants, including bringing ashore relevant objects, or as a minimum, reporting their location to the police or port authority if it is reasonable to require it. Claims may also be made in respect of other vessels that assist a fishing vessel in bringing such objects ashore.

In addition, section 8-2 provides that if petroleum activities are carried out partly or entirely in a fishing field, and fishing becomes impossible or is substantially impeded, the Norwegian Government is obliged “to award compensation in respect of any resulting financial loss” to the extent of the loss. The compensation may be awarded as a lump sum or fixed annual payments. Claims must normally be made within seven years of the activities having occupied the fishing field. If the licensee should have averted the loss, the Government may claim recovery of the costs paid by it (section 8-2).

Section 8.5 specifically provides that if a facility or an action in connection with the placing of such a facility causes damage, and the injured party does not have a right to compensation pursuant to the provisions of section 8-2, “the licensee shall, regardless of fault, be liable for damages in respect of the financial losses suffered by fishermen as a result of the damage”.

#### ➤ **Svalbard Act**

The purpose of the Svalbard Act is “to preserve a virtually untouched environment in Svalbard with respect to continuous areas of wilderness, landscape, flora, fauna and cultural heritage” (section 1).

In addition to the provisions concerning protection of the environment, section 95 provides for claims for compensation including economic loss.

Section 95 imposes strict liability “to pay compensation ... for economic loss resulting from the environmental damage” caused by that person due to breaching provisions of the Svalbard Act. Section 95 also imposes liability on “[p]ersons that have indirectly contributed to the environmental damage (by delivering goods or services, carrying out inspection or control measures or in any other way)” but only “to the extent that intent or negligence can be shown”.

The liability for which the above persons are liable also applies to:

- “a. financial losses incurred because the environmental damage prevents or impedes the exercise of the public right of access and passage in connection with commercial activities;
- b. the costs of or losses relating to reasonable measures to reduce or mitigate environmental damage or to restore the state of the environment;
- c. the costs borne by any person for clearing up waste left [outside specified land use areas]”.

The above persons may also be required “to pay environmental compensation to the Svalbard Environmental Protection Fund”, with the amount to be determined by “the value of what has been damaged, the extent and duration of the environmental damage, the fault of the offender, other sanctions imposed on the offender and the general circumstances”.

### **1.5.3 Liability for dangerous activities**

The Act Relating to Compensation in Certain Circumstances Liability imposes liability for dangerous (known as high risk) activities. As noted above, that Act does not apply to claims for compensation for pollution damage from offshore oil and gas operations if specific provisions, such as the Petroleum Act or the Svalbard Act, apply (see section 1.5.2 above).

### **1.5.4 Standard of liability (strict / fault-based)**

A licensee is strictly liable for pollution damage under sections 7 and 8 of the Petroleum Act and the Svalbard Act. If specific provisions in these Acts do not apply, the Pollution and Waste Act and the Act Relating to Compensation in Certain Circumstances impose strict liability for pollution damage.

### **1.5.5 Scope of liability (joint and several / several)**

Section 7-3 of the Petroleum Act provides that if the operator does not pay claims for compensation by the specified deadline, any other licensees are liable to the extent of non-payment. Liability is apportioned in accordance with the licensees’ participating interest in the licence provided that, if any licensees do not pay their share, their liability is allocated proportionately between the other licensees.

### **1.5.6 Rebuttable presumption (reversing burden of proof to defendant)**

Norwegian law does not establish a rebuttable presumption in respect of compensation for pollution damage from offshore oil and gas operations.

### **1.5.7 Exceptions**

Section 7-3 of the Petroleum Act provides that if a licensee demonstrates that:

“an inevitable event of nature, act of war, exercise of public authority or a similar force majeure event has contributed to a considerable degree to the damage or its extent under circumstances which are beyond the control of the liable party, the liability may be reduced to the extent it is reasonable, with particular consideration to the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides”.

Section 7-3 does not establish true exceptions. Instead, they are mitigating factors according to which a court may use its discretion partially or entirely to reduce the amount of compensation.<sup>1042</sup> An advantageous aspect of the factors is that it focuses a licensee’s attention on ways to reduce its liability and, thus, the risk of harm.<sup>1043</sup>

### 1.5.8 Defences

The Petroleum Act does not include defences to liability for claims for compensation. It does, however, provide persons other than the licensee with limited immunity to claims (see section 1.5.1 above).

### 1.5.9 Remedies

The remedy for pollution damage from offshore oil and gas operations is compensatory damages. Norwegian law does not provide for punitive damages.

### 1.5.10 Limitations period(s)

The Time Bar Act 1979 provides a general limitation period of three years.

The Petroleum Act provides that claims by fishermen under section 8 of the Act are dealt with by a Commission. There is a right to an administrative appeal, the decisions of which may be directly brought to the district court within two months of the defendant having been notified of the decisions by a summons (section 8-6).

See also section 1.6 below for a licensee’s right under the Petroleum Act to shorten the compensation period for claims with the Ministry’s consent.

### 1.5.11 Right to claim contribution from other responsible persons

As indicated in section 1.5.1 above, a licensee has a right to bring a contribution (recourse) action under the Petroleum Act against the person who caused the damage, but only if that person or someone in his service acted wilfully or with gross negligence (Petroleum Act, sections 7-4, 7-5).

As also indicated in section 1.5.1 above, the right to bring a recourse action under section 7 of the Petroleum Act is limited in that recourse liability may be mitigated to the extent “considered reasonable in view of manifested conduct, economic ability and the circumstances in general” (section 7-5).

## 1.6 Compensation system (claims within Target Country)

Section 7 of the Petroleum Act establishes special procedures for expediting and aggregating claims for compensation.

<sup>1042</sup> See Patricia Park, *International Law for Energy and the Environment* 282 (CRC Press, 2d edition, 2013).

<sup>1043</sup> See Joshua Fershee, *Choosing a Better Path: The Misguided Appeal of Increased Criminal Liability After Deepwater Horizon*, *William & Mary Environmental Law and Policy Review*, vol. 36, 1, 25 (2011).

Section 7-7 provides that unless the Ministry considers that it is obviously unnecessary, the operator shall, by public announcement and without undue delay, provide information regarding the person to whom claims for compensation for pollution damage shall be directed. The public announcement is to be made at least weekly in the “Norwegian Gazette (*Norsk Lysingsblad*) and in newspapers and other publications which are generally read in those places where damage is caused, or is presumed to occur” (section 7-7). The Ministry is authorised to grant the persons who are liable under the Petroleum Act the right to announce a limitations period shorter than the prescribed period. If this right is granted, the limitations period must be published in the above public announcement (section 7-7).

Claims for pollution damage are brought in the court in the district in which petroleum was discharged or in which the damage was caused. The Ministry is authorised, however, to aggregate all the claims in a single court (section 7-8).

Norway is a Designated State under the Offshore Pollution Liability Association Ltd (OPOL).<sup>1044</sup> The voluntary compensation system for claims for “pollution damage” established by OPOL thus applies to operators of offshore facilities who are members of OPOL (see section 4.1.2 of the main report).

The scope of OPOL is, however, limited in Norway. Only two operators on the Norwegian continental shelf (ConocoPhillips Skandinavia AS and Lundin Norway AS) are members of OPOL.<sup>1045</sup> Further, only one pipeline is covered by OPOL. The coverage of the pipeline by OPOL was due to it crossing the Norwegian continental shelf as well as the UK continental shelf (in which jurisdiction an operator must be a member of OPOL to have a petroleum licence).

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensatory system in Norway for claims concerning transboundary incidents from offshore oil and gas operations.

The Nordic Environmental Protection Convention, however, provides that persons in Denmark, Finland and Sweden who are, or may be, harmed by environmentally harmful activities from offshore oil and gas operations on the Norwegian continental shelf (as well as other operations in Norway) have the right to claim compensation for pollution damage (see section 3.6.2 of the main report).

Under the Convention, the rules for the compensation must not be less favourable to the injured party than the compensation rules in the State in which the environmentally harmful activities have been carried out.

## 1.8 Competent authority

The Storting is the ultimate authority because it establishes the framework for petroleum activities in Norway.

The MPE is the competent authority with overall responsible for managing petroleum resources on the Norwegian continental shelf.

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<sup>1044</sup> See Offshore Pollution Liability Agreement (“OPOL”) (amended 28 October 2013), clause I(4); available at <http://www.opol.org.uk/agreement.htm>

<sup>1045</sup> See Response to the Offshore Activities questionnaire from the Norwegian Maritime Law Association (25 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:yJGh21q4w7YJ:www.sjoretsforeningen.no/site/wp-content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

The Norwegian Petroleum Directorate (NPD) is the competent authority for licensing operations. The NPD, which reports to the MPE, has administrative authority for exploration and production activities.

The Petroleum Safety Authority is the competent authority for health and safety, including emergency preparedness, for offshore oil and gas operations, as well as specified onshore operations.<sup>1046</sup> The Authority reports to the Ministry of Labour.

Other competent authorities are as follows.

- The Ministry of Labour has overall responsibility for safety and the working environment, including emergency preparedness.
- The Ministry of Finance is responsible for the taxation of petroleum.
- The Ministry of Fisheries and Coastal Affairs is responsible for oil spill preparedness in Norwegian waters.
- The Ministry of Health and Care Services is responsible for health issues.
- The Ministry of the Environment is responsible for environmental protection and the external environment.<sup>1047</sup>

➤ **Role of State entities**

The MPE also has ownership responsibility for the State-owned companies Petoro AS, Gassco AS (which is responsible for the transport of gas from the Norwegian continental shelf), and Statoil ASA.

Statoil was created in 1972 on the principle that the State should have 50 per cent participation in each production licence. The 50 per cent rule was subsequently changed; the Storting now decides the level of State participation in individual production licences.

In January 1985, 50 per cent of the State's participation became linked to Statoil and 50 per cent became part of the State's Direct Financial Interest (SDFI) in petroleum operations by its interests in oil and gas fields, pipelines, and onshore facilities. Under the arrangement, the State pays a share of investments and costs and receives the corresponding share under the production licence.

In 2001, 21.5 per cent of the assets of the SDFI were sold; 15 per cent to Statoil and 6.5 per cent to other licensees. Statoil then became an international oil company with 67 per cent of its shares owned by the State. Statoil, which currently has operations in 35 countries, operates on the Norwegian continental shelf on the same terms as other companies.

In May 2001, Petoro AS was created as a state-owned limited company to manage the SDFI on behalf of the State.<sup>1048</sup>

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<sup>1046</sup> See Petroleum Safety Authority, Role and area of responsibility; available at <http://www.ptil.no/role-and-area-of-responsibility/category916.html>

<sup>1047</sup> See Norwegian Petroleum Directorate, Framework and Organization (26 April 2013); available at <http://npd.no/en/Publications/Facts/Facts-2013/Chapter-2/>

<sup>1048</sup> See Ministry of Petroleum and Energy, Norway's oil history in 5 minutes; available at <http://www.regjeringen.no/en/dep/oed/Subject/oil-and-gas/norways-oil-history-in-5-minutes.html?id=440538>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

A licensee must submit a proposed programme for environmental impact assessment for a new area which is to be opened for petroleum activities. The impact assessment assesses “the consequences [that] opening an area for petroleum activities may have on commercial activities and environmental aspects, including the possibility of pollution and expected economical and social effects” (Petroleum Regulations, section 6a).

Before the licensee submits the plan for development and operation of an oil or gas field, the licensee must submit the environmental impact assessment.

Section 6c of the Petroleum Regulations sets out a detailed list of criteria to be considered in the impact assessment including provisions for public consultation.

## 1.10 Offences and sanctions

The Petroleum Act provides that:

“Wilful or negligent violation of provisions or decisions issued in or pursuant to this Act shall be punishable by fines or imprisonment for up to 3 months. In particularly aggravating circumstances, imprisonment for up to 2 years may be imposed. Complicity is punishable in the same way. These provisions shall not apply if the violation is subject to a more severe penalty under any other statutory provision” (section 10-17).

If the competent authority issues an Order under the Petroleum Act, it can levy a fine for each day after the deadline for noncompliance.

The Regulations relating to safe practice in exploration and exploration drilling for petroleum deposits on Svalbard, stipulated by Royal Decree of 25 March 1988 by virtue of Section 4 of Act of 17 July 1925 no. 11, relating to Svalbard (Spitzbergen) (Svalbard Regulations) set out offences.<sup>1049</sup>

Section 4 provides that the Norwegian Petroleum Safety Authority may impose coercive fines on a licensee who fails to comply with an Order by the deadline set out in it. The fine must be stipulated in the Order or in connection with a new time limit to comply with it. The authority may waive a fine if it considers it reasonable to do so.

Section 5 provides that wilful or negligent breaches of the regulations, “or of regulations imposed by virtue of these regulations, is punishable by fines, cf. Section 339 subsection 2 of the Penal Code, except when more severe penal provisions applies to the case. Attempt and complicity is subject to the same penalty”.

Article 339(2) of the Penal Code provides for fines for failing to provide a report or information required by law to a public authority, or for breaching a regulation issued by a public authority.<sup>1050</sup>

<sup>1049</sup> An unofficial English translation of the Svalbard Regulations is available at [www.ub.uio.no/ujur/ulovdata/lov-19880325-0250-eng.pdf](http://www.ub.uio.no/ujur/ulovdata/lov-19880325-0250-eng.pdf)

<sup>1050</sup> General Civil Penal Code (unofficial translation); available at [www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf](http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf) See also Law Library of Congress, Oil Spill Liability and Regulatory Regime: Norway; available from <http://www.loc.gov/law/help/oil-spill-liability/index.php>

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

A licensee must provide the Ministry with evidence of insurance for its liabilities in an amount determined by the Ministry for each licensee.

Section 10-7 of the Petroleum Act provides that:

“Upon granting a licence and subsequently, the Ministry may decide that the licensee shall provide such security as approved by the Ministry for fulfilment of the obligations, which the licensee has undertaken, as well as for possible liability in connection with the petroleum activities”.

Section 10-7 also applies after petroleum activities have ceased.

Article 14 of the standard JOA sets out the provisions for insurance. Article 14 places the duty to take out and maintain insurance, as required by laws, regulations and other resolutions of the authority and as decided by the management committee, on the operator. The operator must submit copies of the policies to the other parties. Further, the operator is responsible for claims handling.

Other parties may also take out their “own insurance or in other equivalent ways ensure coverage”. If they do so, they must provide the operator with advance notice before the operator takes out insurance on behalf of the joint venture, provide information of the insurance to the other parties, and ensure that any recourse against the other parties has been waived. The operator must also establish that that recourse against the other parties under the insurance taken out by one of the joint venture parties has been waived.<sup>1051</sup>

Article 15 of the Regulations relating to safe practice in exploration and exploration drilling for petroleum deposits on Svalbard provides that the Petroleum Safety Authority may require a licensee to “provide financial security for fulfilment of the obligations he has undertaken, as well as for possible liability in connection with the activities” prior to the commencement of petroleum activities.

As noted in the Metro Report,<sup>1052</sup> Statoil has insurance for its activities on the Norwegian continental shelf and other locations in which it operates. The well control policy for the Norwegian continental shelf has limits of NOK 2,500 million (EUR 297,087,000) per incident for exploration wells and NOK 2,000 million (EUR 237,669,000) per incident for production wells. The cover is for well control incidents, including pollution and clean-up costs.

In addition, Statoil has a third party liability insurance programme with a gross limit of NOK 4,800 million (EUR 570,407,000) per incident, and a self-insured retention of a maximum of NOK 6 million (EUR 713,008).<sup>1053</sup>

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<sup>1051</sup> See Agreement concerning petroleum activities (unofficial English translation); available at <http://www.regjeringen.no/upload/OED/Vedlegg/Konsesjonsverk/k-verk-vedlegg-1-2-eng.pdf>

<sup>1052</sup> See Metro Report, 110; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf)

<sup>1053</sup> See Statoil, Insurance; available at <http://www.statoil.com/annualreport2010/en/ouroperations/pages/insurance.aspx>

### 1.11.1 Persons required to have evidence of financial security

If there is more than one licensee, each licensee is jointly and severally responsible to the Norwegian Government for the financial obligations that arise from petroleum activities carried out pursuant to the licence (Petroleum Act, section 10-8).

### 1.11.2 Time at which evidence of financial security is required

Insurance must be taken out prior to drilling. The licensee has a duty to inform the Ministry about the insurance arrangements, with an indication of the main terms at the end of each calendar year. The Ministry may require additional insurance to be taken out (Petroleum Regulations, article 73).

### 1.11.3 Scope (traditional damage / environmental damage / etc)

Section 73 of the Petroleum Regulations provides that the insurance to be taken out by a licensee must cover at least the following:

- “a) damage to facilities,
- b) pollution damage and other liability towards third parties,
- c) wreck removal and cleanup as a result of accidents,
- d) insurance of the licensee’s own employees who are engaged in the activities”.

Section 73 further provides that licensees “shall ensure that contractors and subcontractors engaged in the activities take out insurance for their employees to the same extent as the operator insures his own employees”.

### 1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)

Section 73 of the Petroleum Regulations provides that activities carried out by the licensee under chapters 3 and 4 of the Petroleum Act (that is, the production licence and the production of petroleum) “shall be insured at all times”.

In respect of the insurance to be taken out for damage to facilities, pollution damage and other liability towards third parties, and wreck removal and clean up as a result of accidents, the licensee shall “provide reasonable insurance cover, taking into consideration risk exposure and premium costs”.

Insurance cover for the licensee’s own employees is to be agreed by the licensee with the relevant employee organisations.

Section 73 further provides that “The Ministry may consent to the licensee using another form of security arrangement”.

### 1.11.5 Monetary limit(s)

There is no set amount of insurance. Instead, the Ministry determines the limit of insurance required in individual cases.

### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

As indicated in section 1.11.2 above, section 73 of the Petroleum Regulations provides that “the licensee shall inform the Ministry about existing insurance agreements, with an indication of the main terms [at the end of each calendar year]. The Ministry may require further insurance to be taken out”.



## 1.12 Jurisdictional issues (if any)

Section 7-2 of the Petroleum Act specifically provides, in pertinent part, that the provisions of chapter 7 (which concerns liability) apply:

“to liability for pollution damage from a facility when such damage occurs in Norway or inside the outer limits of the Norwegian continental shelf or affects a Norwegian vessel, Norwegian hunting or catching equipment or Norwegian facility in adjacent sea areas. With regard to measures to avert or limit pollution damage it is sufficient that damage may occur in such area”.

Section 7-2 further provides that chapter 7 also applies:

“to pollution damage from facilities used in petroleum activities according to this Act, when the damage occurs in onshore or offshore territory belonging to a state which has acceded to the Nordic Convention on Environment Protection of 19 February 1974” (see section 1.5.1 above).

Further, section 1-5 of the Petroleum Act provides that:

“Norwegian law other than this Act, including provisions relating to licences, consents or approvals required according to the legislation, shall also be applicable to petroleum activities. This applies unless otherwise warranted by an Act, a decision by the King, international law or agreement with a foreign state”.

Section 1-5 further provides that Norwegian law does not apply to mobile facilities under foreign flag except for permanent facilities unless an Act or a decision by the King in Council stipulates otherwise.

The Norwegian law that is applicable under section 1-5 includes tort law.<sup>1054</sup>

Section 54 of the Pollution and Waste Act specifies that it applies to pollution damage that occurs in Norway or Norway’s economic zone, as well as activities outside such areas that cause damage within them.

## 1.13 Key points

Oil and gas have been produced from Norway’s continental shelf since 1971 and 1977, respectively.

Norway has a well-developed and sophisticated regime for compensating persons who suffer bodily injury, property damage and economic loss from offshore oil and gas operations. The liability system specifically includes pure economic loss. Further, there are specific provisions for claims by fishermen. The liability system is designed to protect the interests of the offshore oil and gas industry, which the Norwegian Government operates for the benefit of Norwegian society.

Liability for compensation for pollution damage is channelled to all licensees, not only the operator, who is selected by the MPE under the JOA for production operations.

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<sup>1054</sup> See Response to the Offshore Activities questionnaire from the Norwegian Maritime Law Association (25 September 2013); available at <http://webcache.googleusercontent.com/search?q=cache:yJGh21q4w7YJ:www.sjoretsforeningen.no/site/wp-content/uploads/2013/09/Offshore.pdf+&cd=2&hl=en&ct=clnk&gl=uk>

The operator is primarily liable for compensation claims. Other licensees are liable if the operator fails to pay. Claims for pollution damage from offshore oil and gas operations must be brought under the Petroleum Act. If the Petroleum Act does not apply to a claim, the claim may be brought under the Pollution and Waste Act or the Act Relating to Compensation in Certain Circumstances, as applicable.

Norway has a mechanism to aggregate claims for compensation in a single court and has established procedures to handle claims in the event of pollution damage from offshore oil and gas operations.

Financial security for third-party claims for compensation for bodily injury, property damage and economic loss is in the form of insurance. No statutory minimum indemnity level of insurance is required. Instead, the MPE determines the amount for individual operations.

The Norwegian Government has a 67 per cent interest in Statoil (which operates on the Norwegian continental shelf as well as in 35 countries). Further, the State owns the shares of Petoro (which manages the SDFI on behalf of the State) and Gassco (which is responsible for the transport of gas from the Norwegian continental shelf).

# Poland

## 1.1 Introduction

Commercial production of oil in Poland began in 1854 in the Carpathians, in southeast Poland. After the Second World War, new discoveries of oil were made in this area, leading to a substantial increase in production. In 1955 two gas fields were discovered in the Carpathian Foredeep basin, followed by a further 50 gas fields and 10 oil fields in that area.<sup>1055</sup> Known oil deposits in the Carpathians and the Carpathian Foredeep are now mostly exhausted.

In 2011, Poland produced approximately 5.8 billion cubic metres of gas and 4.6 million barrels of oil, of which approximately 16.1 million cubic metres of gas and 1.1 million barrels of oil were produced from the Baltic Sea Shelf.<sup>1056</sup> The Polish exclusive economic area in the Baltic Sea is approximately 29,000 square kilometres.

By 2013, 237 exploration concessions and 237 production concessions for hydrocarbons had been granted for onshore and offshore areas.<sup>1057</sup> Four production licences are currently in effect for the Baltic Sea Shelf.<sup>1058</sup>

Known recoverable reserves of oil in onshore Poland is estimated at up to 25.6 million tonnes; known recoverable reserves of oil on the Baltic Sea Shelf is estimated at five million tonnes.<sup>1059</sup>

Although the exploration and production of conventional oil and gas continue in Poland, the main focus in 2014 is on unconventional gas (shale gas) deposits in onshore Poland.<sup>1060</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore oil and gas in Poland is governed by a mining law and secondary legislation (regulations).

General legislation in the form of the Civil Code applies to compensation for harm from pollution from oil and gas operations.

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<sup>1055</sup> See Piotr Karnkowski, Exploration and exploitation of oil and gas fields in Poland: a historical outline, *Przegląd Geologiczny*, vol. 55, No. 12(1), 1049-1059 (2007).

<sup>1056</sup> See Mark Brininstool, The Mineral Industry of Poland, US Geological Survey Minerals Yearbook 2011, Advance Release, Poland (December 2012; revised April 2013); available at <http://minerals.usgs.gov/minerals/pubs/country/2011/myb3-2011-pl.pdf>

<sup>1057</sup> See Presentation by Marta Wagrodzka, Department of Geology and Geological Concessions, Update on Hydrocarbon Law and Projections of Shale Gas Resources (24 April 2013); available at [http://www.usea.org/sites/default/files/event-/Shale\\_Gas\\_2\\_Ministry\\_of\\_Environment\\_Marta\\_Wagrodzka.pdf](http://www.usea.org/sites/default/files/event-/Shale_Gas_2_Ministry_of_Environment_Marta_Wagrodzka.pdf)

<sup>1058</sup> Telephone interview with Krzysztof Kowalik, Bureau of Hydrocarbons, Ministry of Environment (29 April 2014).

<sup>1059</sup> See Krzysztof Cichoński and Tomasz Młodawski, Poland: Getting the Deal Through – Oil Regulation 2013; available at <http://www.mondaq.com/x/255786/Oil+Gas+Electricity/Oil+Regulation+Poland+2013>

<sup>1060</sup> See Polish Natural Gas; Opportunities, Expectation, Reality (6 November 2013); available at [http://www.opppw.com/files/373193481/file/20131106\\_conference\\_pgz\\_summary\\_en.pdf](http://www.opppw.com/files/373193481/file/20131106_conference_pgz_summary_en.pdf)

### 1.3 Rights to, and ownership of, offshore oil and gas

The Act concerning the maritime area of the Polish Republic and the marine administration of 21 March 1991<sup>1061</sup> designated the territorial sea, EEZ and continental shelf of Poland.

Article 2(2) provides that “[t]he internal waters and the territorial sea are part of the territory of the Polish Republic”. Article 2(3) provides that “[t]he territorial sovereignty of the Polish Republic over the internal waters and the territorial sea shall extend to the waters, to the airspace over such waters and to the seabed and the subsoil of the internal waters and of the territorial sea”. Article 15 provides that “[t]he exclusive economic zone ... includes the waters, the seabed and its subsoil”.

Article 22 provides that “[i]n the exclusive economic zone, the Polish Republic shall have the exclusive right to construct, or to authorize and regulate the construction and utilization of, artificial islands, installations and structures of any kind intended for the conduct of scientific research, exploration or exploitation of resources”.

Article 33 provides that:

- “1. The right to the exploration, extraction and utilization of mineral resources in Polish maritime areas shall be held by the State.
2. The exploration, extraction and utilization of mineral resources referred to in paragraph 1 shall require a licence from the Minister of Environmental Protection, Natural Resources and Forestry, issued in agreement with the Minister of Transport and Marine Economy.
3. Foreign natural or juridical persons may participate in the exploration, extraction and utilization of mineral resources which are referred to in paragraph 2 if provision therefor is made by international treaties binding on the Polish Republic or if they are acting on the basis of the licences referred to in paragraph 2”.

The Geological and Mining Law of 9 June 2011 (Mining Law) provides that the State Treasury owns the right to mine deposits of hydrocarbons (Mining Law, article 10).<sup>1062</sup> The State Treasury may benefit from mining hydrocarbons or may dispose of its property right in them only by establishing a “mining usufruct”, that is, the right to prospect, explore for and exploit hydrocarbons (and other minerals). The State Treasury grants this right by means of a concession (Mining Law, articles 12, 21). The Mining Law specifically refers to concessions for “exploiting minerals from deposits located within the boundaries of the maritime areas of the Republic of Poland” (article 22(1)(3)).

In addition to a concession, a licence to prospect, explore and produce the minerals is also required.

The relationship between a concession and a licence has been succinctly described as follows:

“The process of granting a concession for the prospecting, exploration or production of hydrocarbons requires two types of legal documents: a mining usufruct agreement and a concession. A mining usufruct agreement is signed between the State Treasury

<sup>1061</sup> An unofficial English translation of the original version of the Act is available at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL\\_1991\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/POL_1991_Act.pdf)

<sup>1062</sup> An unofficial English translation of the original version of the Mining Law is available from [http://www.wug.gov.pl/index.php?english/polish\\_law](http://www.wug.gov.pl/index.php?english/polish_law) and [http://www.mos.gov.pl/g2/big/2012\\_06/e1fd8f256cbc5cefb421364232bf09dc.pdf](http://www.mos.gov.pl/g2/big/2012_06/e1fd8f256cbc5cefb421364232bf09dc.pdf)

(represented by the Minister of the Environment) and a company. This agreement defines rights and obligations with regard to activities within a strictly defined area of the subsurface. It also stipulates the amount and the method of payment of the mining usufruct fee, which constitutes the State Treasury income. A second indispensable title document is a concession itself — an administrative decision, which establishes and defines the type and method of the activity, the area within which it shall be conducted, the time limit for which it was granted, the date it comes into effect, the aim, scope, type and time schedule for geological works, as well as other requirements, especially in regards to environmental protection”.<sup>1063</sup>

## 1.4 Specific legislation for offshore oil and gas operations

The Mining Law applies to concessions for, and the licensing of offshore oil and gas operations, as well as concessions for, and the onshore and offshore licensing of operations concerning other minerals.

On 11 March 2014, the Polish Government adopted a draft Bill to amend the Mining Law, with the purpose of regulating and facilitating hydraulic fracturing. The Bill was forwarded to the Sejm (Polish Parliament).<sup>1064</sup> The Hydrocarbons Act was adopted in July 2014; it will come into force on 1 January 2015.<sup>1065</sup>

The Mining Law is accompanied by Regulations Pursuant to the Mining Law of 9 June 2011.<sup>1066</sup>

The Mining Law specifies that the Civil Code applies in addition to compensation under the Mining Law (Mining Law, articles 144, 145).

There are two types of approvals. They are:

- a prospection, exploration and production licence which may be granted for a fixed period between three and 50 years, or a shorter period if requested by the applicant; and
- a concession agreement.

Prospection and exploration licences are usually granted for three to eight years; production licences are usually granted for 25 to 40 years.<sup>1067</sup>

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<sup>1063</sup> Ewa Zalewska, The concession granting policy for prospecting, exploration and production of hydrocarbons in Poland, *Przełd Geologiczny*, vol. 55, No. 12(1) (2007); available from the Ministry of Environment website at: [http://www.mos.gov.pl/kategoria/2347\\_presentations/](http://www.mos.gov.pl/kategoria/2347_presentations/)

<sup>1064</sup> See Poland: Shale gas – recent developments, Schoenherr (March 2014).

<sup>1065</sup> See Adam Kozłowski, Polish shale gas (r)evolution to be reinvigorated, Norton Rose Fulbright Piotr Strawa i Wspólnicy Spk (27 October 2014); available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?q=1fac5d43-afb9-4edc-8aec-b3fc7c0c550d>

<sup>1066</sup> The website for the Ministry of Environment states that an English translation of the Regulations is in progress but that, currently, the Regulations are only available in Polish; see [http://www.mos.gov.pl/kategoria/4888\\_regulations\\_pursuant\\_to\\_the\\_geological\\_and\\_mining\\_law\\_of\\_9\\_june\\_2011/](http://www.mos.gov.pl/kategoria/4888_regulations_pursuant_to_the_geological_and_mining_law_of_9_june_2011/)

<sup>1067</sup> See Krzysztof Cichocki and Tomasz Młodawski, Poland: Getting the Deal Through – Oil Regulation 2013; available at <http://www.skslegal.pl/download.php?id=168>

When the Hydrocarbons Act enters into force on 1 January 2015, the above system will be replaced by a unified prospecting, exploration and exploitation licence system. Licences will be issued for a specified period of between 10 and 30 years. Prospecting and exploration operations will have a maximum period of five years, with a possible extension of the prospecting period of up to one year if necessary to complete this phase. Transitional provisions apply to existing prospecting, exploration and exploitation licences.<sup>1068</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Polish law imposes liability for bodily injury, property damage and economic loss.

### 1.5.1 Bodily injury and property damage

The Mining Law imposes liability for property damage. The Civil Code imposes liability for bodily injury and property damage.

#### ➤ Mining Law

Article 146(1) of the Mining Law provides that the “entrepreneur”<sup>1069</sup> who carries out a mining plant activity is liable for damage caused by its activities.

The focus of article 146 appears to be mining activities onshore, particularly because the first article in the Division VIII, entitled Responsibility for Damages, in the Mining Law states that:

“The owner cannot oppose the threats caused by the activity of a mining plant which is run in accordance with the Act. However, under the terms of the Act, he may demand compensation for damage caused by this activity” (Mining Law, article 144(1)).

The Mining Law further provides that, unless the Mining Law provides otherwise, reparation of such damage is pursuant to the Civil Code (Mining Law, article 145). That is, the Mining Law provides for compensation for damages suffered by a landowner from a mining activity that the landowner cannot seek to prevent occurring or continuing.

It is thus unclear whether the Mining Law imposes liability for harm from pollution from offshore oil and gas operations. Conversely, there is nothing in Division VIII of the Mining Law to state that it does not apply to offshore oil and gas operations. This summary, therefore, describes the provisions of Division VIII with the caveat that it is unclear whether they impose liability for harm from pollution from offshore oil and gas operations.

#### ➤ Civil Code

The main article imposing liability for bodily injury and property damage under Polish law is article 415 of the Civil Code. Article 415 provides that “Whoever by his fault caused damage to another person is obliged to redress it”.

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<sup>1068</sup> See Adam Kozłowski, Polish shale gas (r)evolution to be reinvigorated, Norton Rose Fulbright Piotr Strawa i Wspólnicy Spk (27 October 2014); available at <http://www.internationallawoffice.com/newsletters/Detail.aspx?q=1fac5d43-afb9-4edc-8aec-b3fc7c0c550d>

<sup>1069</sup> The term “entrepreneur” is often used in Polish legislation to describe the holder of a mining concession or licence, as well as being frequently used in other legislation.

### 1.5.2 Economic loss

The Mining Law does not appear to impose liability for pure economic loss.

Polish law authorises the recovery of pure economic loss for lost profits which may be awarded if there is a high probability of their loss.<sup>1070</sup>

As a practical matter, a claimant will face difficulty in proving entitlement to lost profits. Although the Civil Code appears to be liberal in respect of a cause of action for pure economic loss, Polish courts and scholars have concluded that limitations apply. That is, article 361(1) of the Civil Code states that liability applies only to compensation for the “normal consequences” of an act or omission. Further, article 446 states that specified persons, usually relatives of a deceased, may claim compensation for their losses resulting from the death of the deceased. In this respect, Polish courts and scholars consider that article 446 proves that there is an opposite rule under the Civil Code to which article 446 is an exception. That is, only the person *directly* injured by the act of a tortfeasor is entitled to claim compensation.

Commentators considered that the application of either or both of these limitations would result in a person who suffered damage for lost profits from a hypothetical case involving the closure of cattle and meat markets due to the tortfeasor’s negligence in allowing infected cattle to escape would not recover.<sup>1071</sup> This hypothetical can be analogised to persons suffering lost income due to the operator of offshore oil and gas operations negligently causing water pollution leading to claims for pure economic loss.<sup>1072</sup>

### 1.5.3 Liability for dangerous activities

Article 435 of the Civil Code provides that:

“An operator who runs, on his own account, an enterprise or a plant that is operated by forces of nature (steam, gas, electricity, liquid fuels, etc.) is responsible for damage to a person or property that has been caused to anyone by the operation of the enterprise or plant, unless the damage was caused by force majeure, or exclusively through the fault of the injured party or a third party, for whom the operator does not take responsibility”.<sup>1073</sup>

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<sup>1070</sup> See Ewa Bagińska, Poland 334, 339, in European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>1071</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 66-67 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>1072</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 66-67 (December 2007)(see page 13; analogising chemical spill to a hypothetical concerning a person who negligently allows infected cattle to escape, resulting in the Government ordering the closure of cattle and meat markets).

<sup>1073</sup> The translation of article 435 is taken from Barbara Iwanska, Access to national court by citizens in environmental matters – Poland, p. 11; available at <http://www-user.uni-bremen.de/~avosetta/iwanskaaccess02.pdf>

Article 435, which imposes strict liability, is generally used for claims for compensation for environmental damage.<sup>1074</sup> Courts have interpreted article 435 broadly to apply to mining works and transport and gas companies.<sup>1075</sup> It is unclear, however, whether it would apply to environmental damage from offshore oil and gas operations. If it would apply, it provides for bodily injury, property damage, pure economic loss, and environmental damage.<sup>1076</sup>

Article 324 of the Environmental Protection Law, Act of 27 April 2001, provides that “If a loss is incurred by a lower-tier or upper-tier plant [under the Seveso Directive (now Directive 2012/18/EU)] Article 435 (1) of the Civil Code applies regardless whether the given plant is driven by the forces of nature or not”.<sup>1077</sup> Article 324 would not, however, apply to harm from pollution from an offshore oil and gas facility because the Seveso Directive does not apply to such facilities.<sup>1078</sup>

Article 206 of the Civil Code imposes strict liability on a person who keeps a substance or who operates an installation that results in an emission that causes bodily injury, property damage or economic loss. Substances covered by article 206 include solid, liquid or gaseous chemicals. An emission includes the release or escape of substances.<sup>1079</sup> The potential thus exists that article 206 could apply to compensation for harm from pollution from offshore oil and gas operations.

#### 1.5.4 Standard of liability (strict / fault-based)

The standard of liability for compensation under the Mining Law is strict (Mining Law, article 146).

#### 1.5.5 Scope of liability (joint and several / several)

The Mining Law provides that liability for damage caused by an entrepreneur and others for reasons other than a mining plant activity is joint (article 146(5)). Further, liability of the entrepreneur and “entities engaged professionally in the activities with which they were entrusted by the entrepreneur is [also] joint” (article 146(6)).

Article 146(2) further provides that “other entities that are involved in an activity regulated by the [Mining] Act [are also liable] even if the provisions referring to the mining plant activities do not apply”. If it is not possible to determine the person who is responsible for the damage, the entrepreneur who had the right to carry out the mining plant activities on the day of the damage is liable (Mining Law, article 146(3)).

The Civil Code imposes joint and several liability if more than one tortfeasor has caused the damage for which the claimant makes a claim.

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<sup>1074</sup> See Jerzy Jendrośka, Citizens access to court and enforcement in Poland p. 3; available at <http://www-user.uni-bremen.de/~avosetta/jendraccess02.pdf>

<sup>1075</sup> See *ibid.*

<sup>1076</sup> Telephone interview with Krzysztof Kowalik, Bureau of Hydrocarbons, Ministry of Environment (29 April 2014).

<sup>1077</sup> An unofficial English translation of the Environmental Protection Law is available from [http://www.mos.gov.pl/kategoria/1977\\_law/](http://www.mos.gov.pl/kategoria/1977_law/)

<sup>1078</sup> See European Parliament resolution of 13 September 2011 on facing the challenges of the safety of offshore oil and gas activities (20112072(INI)), para 10; available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0366>

<sup>1079</sup> See Civil Law Codification Commission, Acting under the Minister of Justice, Green Paper; An Optimal Vision of the Civil Code of the Republic of Poland 110 (Zbigniew Radwański, editor, 2006); available at <http://www.ejcl.org/112/greenbookfinal-2.pdf>



### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

The Mining Law does not establish a rebuttable presumption to reverse the burden of proof from a claimant to a tortfeasor / wrongdoer.

There are no rebuttable presumptions in the Civil Code relevant to harm from pollution from offshore oil and gas operations.

### 1.5.7 Exceptions

Article 146 of the Mining Law does not include any exceptions to liability. There are no relevant exceptions in the Civil Code.

### 1.5.8 Defences

Article 146 of the Mining Law does not include any defences to liability.

Liability under article 435 of the Civil Code is subject to defences for “*vis major*” (*force majeure*), or the damage being caused entirely due to the fault of the injured party or a third person not connected with the tortfeasor / wrongdoer.<sup>1080</sup> The first defence could potentially apply to a claim for compensation for harm from pollution from an offshore oil and gas incident but the second defence is highly unlikely to apply.

### 1.5.9 Remedies

The Mining Law provides for liability for restoration when mining activities have caused damage. Article 147 provides that “[t]he restoration to the previous condition may, especially, occur through delivering land, buildings, equipment, premises, water or other goods of the same sort”. Further, the person who suffers the damage may “with the consent of the entity responsible for the damage ... perform the obligation in return for a suitable amount of money” (Mining Law, article 147(3)). Compensation for the injured person’s expenses “for redressing the damage ... shall be determined with the inclusion of the value of the legitimate expenses (Mining Law, article 148).

A claimant may select restitution or monetary compensation for an action under article 435 of the Civil Code.<sup>1081</sup>

Polish law does not recognise punitive damages.<sup>1082</sup>

### 1.5.10 Limitations period(s)

The limitation period for compensation for damage under the Mining Law is five years from the date of the discovery of the damage (Mining Law, article 149).

The limitation period for damages under the Civil Code and the Civil Procedures Code is three years from the date on which the claimant is aware of the damage and the identity of the person who is

<sup>1080</sup> See Jerzy Jendrośka, Citizens access to court and enforcement in Poland p. 3; available at <http://www-user.uni-bremen.de/~avosetta/jendraccess02.pdf>

<sup>1081</sup> See *ibid.*

<sup>1082</sup> See Swiss Re, Punitive damages in Europe; concern, threat or non-issue? 7 (2012); available at [http://www.biztositasizemle.hu/files/201206/punitive\\_damage\\_in\\_europe.pdf](http://www.biztositasizemle.hu/files/201206/punitive_damage_in_europe.pdf)

responsible or liable for it. There is a long stop of 10 years from the date on which the damage occurred.

#### 1.5.11 Right to claim contribution from other responsible persons

As indicated in section 1.5.5 above, the Mining Law provides for liability between an entrepreneur and other entities that are engaged professionally in activities entrusted to them by the entrepreneur.

A tortfeasor who has paid more than its share under the Civil Code may seek contribution from other tortfeasors.

### 1.6 Compensation system (claims within Target Country)

The Mining Law authorises the judicial enforcement of claims following exhaustion of amicable settlement proceedings, that is, if an entrepreneur “refuses to conclude a settlement or when 30 days have passed since submitting the claim by the aggrieved, unless the aggrieved, reporting the amicable settlement require, had determined a longer period” (Mining Law, articles 151(1)-(2)).

It is unclear, however, whether the above compensation system would apply to claims for harm from offshore oil and gas operations, particularly because the relevant provisions refer to the potential for an indemnity covered by article 28 of the Mining Law; article 28 concerns the concession for the underground storage of waste.

Further, the above provision is not a compensation scheme for claims for harm from offshore oil and gas incidents.

### 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Poland for claims for transboundary harm from offshore oil and gas operations.

### 1.8 Competent authority

The competent authority for oil and gas licensing in Poland is the Bureau of Hydrocarbons of the Ministry of Environment. Decisions under the Mining Law that involve internal marine waters, the territorial sea and the coastal belt are agreed with the Director of the competent Maritime Authority. Decisions under the Mining Law that involve the EEZ, are made in consultation with the Minister responsible for maritime economy (Mining Law, article 8).

The mission of the Polish Mining Authority is “to provide public service with the aim to improve miners’ health and safety, ensure sustainable management of deposits and reduce negative impact of the extractive industry on the environment” including the supervision of “mining plant operations, especially in respect of: health and safety at work, and fire protection, mine rescue, management of mineral deposits during the process of extraction, environment protection and deposit management, mining damage prevention, [and] mining plant construction and closure, including land reclamation and development of post mining areas”.<sup>1083</sup>

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<sup>1083</sup> See State Mining Authority; available at <http://www.wug.gov.pl/index.php?english/mission>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

Applications for a mining concession include requirements set out in environmental protection regulations as well as requirements under the Mining Law and other legislation (Mining Law, article 24(1)).

The Polish Mining Authority has published “Information regarding measures taken for implementation of sustainable development policy with the Mining Area”.<sup>1084</sup> The paper sets out environmental and other requirements for hydrocarbon and other mining operations, including preparation for catastrophes and hazardous incidents.

## 1.10 Offences and sanctions

The Mining Law establishes offences and sanctions. The offences include carrying out mining activities without a licence (Mining Law, article 173).

In addition, the President of the State Mining Authority may issue a decision and impose a penalty for various offences including the failure by an entrepreneur in:

- a) “identifying the risks associated with mining plant operations and taking measures to prevent and remove these threats,
- b) having adequate means and facilities, and operations services to ensure the safety of plant workers and the mining plant,
- c) evaluation and documentation of occupational risk and the use of necessary solutions to reduce this risk, including the preparation of the document of safety and health protection,
- d) having own rescue services or entrusting part or all of this obligation to other entities” (Mining Law, article 175(1)).

Fines range from set amounts to a percentage of the revenue of an entity during the previous year (Mining Law, articles 175(2)-(3)).

The head of a mining plant may be fined up to 300 per cent of his monthly salary (Mining Law, article 175(3)).

Criminal penalties, including fines and imprisonment, may also apply. They include carrying out mining works without a licence or an approved plan. The penalties may be increased if the offence is committed intentionally (Mining Law, Division XI, Penal Provisions).

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

Mining concessions do not include a requirement for financial security. Instead, the system is flexible. The Ministry of Environment considers applications on a case-by-case approach and may require a

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<sup>1084</sup> The document is available at [http://www.un.org/esa/dsd/dsd\\_aofw\\_ni/ni\\_pdfs/NationalReports/poland/mining.pdf](http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/poland/mining.pdf)

bank guarantee or collateral or other type of guarantee. An operator may appeal a requirement to provide collateral.<sup>1085</sup>

Further, there are no other obligations that provide for financial security in respect of licences for hydrocarbons except for the liquidation fund for mining (see directly below). Instead, the Ministry of Environment considers the financial standing of an applicant for a licence and its ability to finance the work programme during the licensing process, including any parent company guarantees.<sup>1086</sup>

In 2002, a liquidation fund for mining plants was established to cover the costs of decommissioning them if an entrepreneur winds up his mining activities. Entrepreneurs must pay into the fund. Chapter 5 of the Mining Law sets out details for the fund including requirements to contribute to it. The focus of the fund is on onshore mining plants, although it applies to some extent to offshore oil and gas activities.<sup>1087</sup>

#### **1.11.1 Persons required to have evidence of financial security**

See section 1.11 above concerning the absence of financial security requirements for compensation for harm from pollution from offshore oil and gas operations.

#### **1.11.2 Time at which evidence of financial security is required**

See section 1.11 above concerning the absence of financial security requirements for compensation for harm from pollution from offshore oil and gas operations.

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

See section 1.11 above concerning the absence of financial security requirements for compensation for harm from pollution from offshore oil and gas operations.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

See section 1.11 above concerning the absence of financial security requirements for compensation for harm from pollution from offshore oil and gas operations.

#### **1.11.5 Monetary limit(s)**

See section 1.11 above concerning the absence of financial security requirements for compensation for harm from pollution from offshore oil and gas operations.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

If the Ministry of Environment requires the holder of a concession to have financial security, the entrepreneur must show evidence of it annually in January.<sup>1088</sup>

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<sup>1085</sup> Telephone interview with Krzysztof Kowalik, Bureau of Hydrocarbons, Ministry of Environment (29 April 2014).

<sup>1086</sup> See Krzysztof Cichoński and Tomasz Młodawski, Poland: Getting the Deal Through – Oil Regulation 2013; available at <http://www.skslegal.pl/download.php?id=168>

<sup>1087</sup> Telephone interview with Krzysztof Kowalik, Bureau of Hydrocarbons, Ministry of Environment (29 April 2014); see Mining Law, article 28.

<sup>1088</sup> Telephone interview with Krzysztof Kowalik, Bureau of Hydrocarbons, Ministry of Environment (29 April 2014).

## 1.12 Jurisdictional issues (if any)

The Mining Law specifically applies to Poland's continental shelf. In addition, it specifies that the Civil Code may apply.

## 1.13 Key points

Poland has been producing oil and gas from its onshore territory since 1854 and also has a long history of producing oil and gas from its continental shelf.

The Mining Law may apply to claims for compensation for property damage from pollution from offshore oil and gas operations but this is not absolutely clear. On 1 January 2015, the Hydrocarbons Act, which amends the Mining Law and other laws, will enter into effect. The Civil Code applies to claims for bodily injury, property damage and economic loss from pollution from offshore oil and gas operations. Claims for pure economic loss may succeed depending on the relevant facts. Stringent criteria, including the need to prove fault, apply however.

Polish legislation does not necessarily require financial security for offshore oil and gas operations. Instead, the Ministry of Environment considers the financial standing of an applicant for a licence. During this process, the Ministry may require the applicant to provide a parent company guarantee or some other form of financial security.

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# Portugal

## 1.1 Introduction

Portugal began substantial prospecting for offshore oil and gas in the 1970s following the introduction of legislation to facilitate its exploration and production.<sup>1089</sup> In the licensing round of 1973 and 1974, 30 contracts were signed, resulting in 22 offshore wells being drilled; five in the Porto basin, 14 in the Lusitanian basin, and three in the Algarve basin. Although two wells produced small amounts of oil, the contracts were terminated by 1979 due to the failure to discover commercial quantities of oil or gas. Exploration subsequently declined during the 1980s.

In 2002, Portugal launched a licensing round for 14 blocks in the deep offshore, resulting in two blocks being granted in 2005. In 2007, the pace of licensing increased, with concessions being signed for the deep offshore of the Alentejo and Peniche basins, as well as the Lusitanian basin. The Peniche and Alentejo basins are considered to be new frontier areas.<sup>1090</sup>

Between 1978 and 2004, 15 offshore concessions were granted; 11 in the Porto basin, three in the Algarve basin, and one in the Lusitanian basin. In addition, a preliminary evaluation licence was granted in the deep-offshore Algarve basin. Five offshore wells were drilled; three in the Porto basin and two in the Algarve basin. Production was not, however, commercial.<sup>1091</sup>

Exploration on the Portuguese continental shelf is continuing but, as of October 2014, it has not resulted in commercial discoveries of oil or gas.

As in some other States, environmental groups have opposed offshore oil and gas exploration in Portugal.<sup>1092</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas activities in Portugal are subject to primary legislation in the form of statutes, and secondary legislation in the form of a Ministerial Order.

The Civil Code imposes liability for bodily injury and property damage. In addition, civil liability for environmental damage may be imposed by Law No. 11/87 of 7 April 1987, as well as Decree-Law No. 147/2008 of 29 July 2008.

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<sup>1089</sup> See A.M.Pereira, Saragga Leal, Oliveira Martins, Judice e Associado, Oil and Gas (Exploration and Production) in Portugal (30 June 2011); available at <http://www.worldservicesgroup.com/publications.asp?action=article&artid=3997>.

<sup>1090</sup> See Galp Energia, Exploration & Production; available at <http://www.galpenergia.com/EN/Investidor/ConhecerGalpEnergia/Os-nossos-negocios/Presenca-no-mundo/Portugal/Paginas/Exploracao-Desenvolvimento-Portugal.aspx>

<sup>1091</sup> See Directorate-General for Energy and Geology, Petroleum Exploration in Portugal; available at [www.dgeg.pt/dpep/en/history.htm](http://www.dgeg.pt/dpep/en/history.htm)

<sup>1092</sup> See Thousands sign petition against oil prospecting in Algarve, The Portugal News Online (20 March 2014); available at <http://www.theportugalnews.com/news/thousands-sign-petition-against-oil-prospecting-in-algarve/31007>

### 1.3 Rights to, and ownership of, offshore oil and gas

Article 4 of Decree-Law No. 109/94 of 26 April 1994 (Decree-Law 109/94) provides that “accumulations of petroleum” that exist in available offshore (as well as onshore) areas are “part of the public domain of the State”.

Section 1(2) defines the “offshore” as:

“the sea bed and subsoil of the submerged areas next to the National territory as far out as the depth of the water allows the [above] activities be carried out, without prejudice to current international agreements”.

The term “petroleum” is defined as:

“all natural concentrations or mixtures of hydrocarbons in the liquid or gaseous state, including all substances of any other nature that are found in combination, suspension or mixture with the hydrocarbons, with the exclusion of natural, solid hydrocarbons the exploitation of which can only be made by extraction of the reservoir rocks themselves” (article 3(a)).

Section 1(1) of Decree-Law No. 109/94:

“regulates the access to and the exercise of activities of prospecting, exploration, development and production of petroleum in the available areas of the National territory onshore and offshore, as well as activities of preliminary evaluation of areas of potential interest for [such] activities”.

Decree-Law 109/94 further provides that “[t]he activities of prospecting, exploration, development and production of petroleum can only be exercised under a concession resulting from a public bidding or from direct negotiation” (article 5(1)).

### 1.4 Specific legislation for offshore oil and gas operations

The main legislation for offshore oil and gas licensing is Decree-Law 109/94, a petroleum law.<sup>1093</sup>

Decree-Law 109/94 is accompanied by Administrative Rule No. 79/94, D.R. (Official Gazette), I-B No. 205, 5 September 1994, which sets out Concession Contract Specifications to which Article 83 of the Decree-Law refers.<sup>1094</sup>

There are two types of offshore oil and gas licences. They are:

- A preliminary evaluation licence for a maximum period of six months, with no optional extensions; and

<sup>1093</sup> An unofficial translation of the original version of the Decree-Law No. 109/94 is available at [www.dgeg.pt/dpep/en/law/oillaw\\_en.pdf](http://www.dgeg.pt/dpep/en/law/oillaw_en.pdf) English translations of Decree-Law No. 109/94 and five pieces of supplementary documentation are available from <http://www.dgeg.pt/dpep/en/law.htm>

<sup>1094</sup> The Concession Contract Specifications is appended to Decree-Law No. 109/94; see the unofficial translation at [www.dgeg.pt/dpep/en/law/oillaw\\_en.pdf](http://www.dgeg.pt/dpep/en/law/oillaw_en.pdf) Documents concerning topics, such as charges and the identity of areas for exploration, development and production are not set out, due to such topics not being covered by this study.



- A concession agreement, with periods specified in it for:
  - An exploration phase up to eight years, with two optional extensions up to one year each; and
  - A production phase (if commercial amounts of oil and gas are discovered) for a period of up to 25 years, with optional extensions of a minimum of three years up to a total extension period of 15 years.<sup>1095</sup>

## 1.5 Liability for bodily injury, property damage and economic loss

Decree-Law 109/94 does not contain any provisions concerning liability for bodily injury, property damage or economic loss. It does require a concessionaire, when applicable, to “present plans to the [Department for Oil Exploration and Production] specifying the preventive measures to be used against pollution of surface water and contamination of aquifers as well as plans for treating (and disposing of) the drilling effluents” (article 71(2)). This provision, however, relates more to land-based than marine-based activities. In addition, it does not impose liability in the event of such contamination.

Article 69(1) provides that “The holders of the rights set out in this law ... assume full responsibility for any loss or damage caused to the State or to third parties by their activity”.<sup>1096</sup>

### 1.5.1 Bodily injury and property damage

Civil liability for bodily injury and property damage is imposed by the Civil Code. Civil liability for environmental damage may be imposed by Law No. 11/87 of 7 April 1987, as well as Decree-Law No. 147/2008 of 29 July 2008, which transposed the administrative law regime of the Environmental Liability Directive (2004/35/CE) (ELD).

#### ➤ Civil Code

Article 483 of the Civil Code is the main article that imposes liability for torts in Portuguese law. Article 483 provides that:

“Whosoever with intent or due to negligence unlawfully infringes the right of a third party or any legal provision established to protect the third party’s right must undertake to indemnify the damaged party for the damages resulting from the infringement”.<sup>1097</sup>

Liability under article 483 is fault-based. Further, Portuguese courts and scholars have read the word “unlawfully” as an intent by the legislature to protect only “absolute rights”, that is, “life, body, health,

<sup>1095</sup> See Rui Mayer, Diogo Ortigão Ramos, Ana Isabel Marques and Bruno Neves de Sousa, Portugal, *The Oil and Gas Law Review* 189, 190 (editor Christopher B. Strong, Law Business Research Ltd, 2013); available at [http://www.cuatrecasas.com/media\\_repository/gabinete/publicaciones/docs/1390586868en.pdf](http://www.cuatrecasas.com/media_repository/gabinete/publicaciones/docs/1390586868en.pdf)

<sup>1096</sup> Comment by Jose Miguel Martins, Entidade Nacional do Mercado dose Combustíveis (15 September 2014).

<sup>1097</sup> The discussion of the Portuguese Civil Code is taken from the following documents: Henrique dos Santos Pereira, Portugal, Mark Brumwell (editor), *Cross-Border Transactions and Environmental Law*, p. 269, 278 (Butterworths, 1999); André G. Dias Pereira, *Portuguese Tort Law: A Comparison with the Principles of European Tort Law*; and Maria Manuel Veloso Gomes, Portugal 353, in *European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports* (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

freedom, property or other right” as set out in article 823(1) of the German Civil Code (see summary for Germany, section 1.5). These “absolute rights” do not include pure economic loss.<sup>1098</sup> It is, thus, likely to be difficult for claimants to succeed in claims for compensation for lost income from pollution from an incident by offshore oil and gas operations unless they can show unlawful conduct by the operator or other tortfeasor.

➤ **Law No. 11/87 of 7 April 1987**

Article 41(1) of Law No. 11/87 of 7 April 1987 provides that:

“there is an obligation to indemnify, irrespective of any fault, whenever someone has caused significant damage to the environment as a result of a particularly dangerous activity, even though he has complied with the law and all technical rules that are applicable”.

The words “significant damage” and “particularly dangerous activity” are not defined but are decided on the basis of the facts and circumstances of each case.<sup>1099</sup>

There is a defence to such liability if the person carrying out the “particularly dangerous activity” proves that it took all reasonable means to prevent such damage.<sup>1100</sup>

Article 41(2) of Law 11/87 provides that the amount of the indemnity for such environmental damage will be established by a regulation (that is, a Decree-Law). That regulation had not been issued as of October 2014.

It is not certain that article 41 would apply to harm from offshore oil and gas operations. A relevant issue is whether such operations would be considered to be a “particularly dangerous activity”.

➤ **Decree-Law No. 147/2008**

Chapter II of Decree-Law No. 147/2008 of 29 October 2008 (Decree-Law 147/2008) established a system of civil liability for environmental damage. Chapter II has four articles, numbered 7 to 10.

Article 7 provides that:

“Anyone who, by virtue of carrying on an economic activity listed in Annex III to this decree-law, which forms an integral part of the latter, violates the rights or interests of others by means of harm to any environmental component shall be obliged to remedy the damage resulting from such violation, irrespective of the existence of negligence or fraud”.

Holders of authorisations to produce offshore oil carry out an economic activity listed in Annex III, and are, thus, subject to strict liability under the legislation. That is:

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<sup>1098</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 63-64 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>1099</sup> See Henrique dos Santos Pereira, Portugal, Mark Brumwell (editor), Cross-Border Transactions and Environmental Law, p. 269, 278 (Butterworths, 1999).

<sup>1100</sup> See Avosetta Questionnaire Portugal, Enforcement of EC Environmental Law in Portugal; available at <http://www-user.uni-bremen.de/~avosetta/portugalresp2009.pdf>

- Annex III(7) of Decree-Law No. 147/2008 includes “Manufacture ... of ... Dangerous substances as defined in Article 3 of Order no. 732 –A/98 of 11 September 1998, which transposes Article 2(2) of Council Directive 67/548/EEC” (now Directive 1272/200/EC);
- Article 2(2) refers to Annex 1, which includes hydrocarbons and crude oil; and
- “Manufacture” is defined to include the “production or extraction of substances in the natural state”.

Further, the Offshore Safety Directive (2013/30/EU) amended the ELD by specifying that the holder of an authorisation for offshore oil and gas operations, including but not limited to the operator, is liable for environmental damage caused by operations carried out by, or on behalf of the operator under the Directive (ELD, article 7, recital 11).

Article 8 provides that: “Anyone who fraudulently or negligently violates the rights or interests of others by means of harm to an environmental component shall be obliged to remedy the damage resulting from such violation”. Article 8 thus applies a negligence-based standard for liability by non-Annex III operators.

Article 9 provides a defence as follows: “The remediation to be made pursuant to [strict liability for Annex III activities and negligence or fault for non-Annex III activities] may be reduced or excluded, taking into account the specific circumstances, where the negligent conduct of the injured party has contributed to the cause or exacerbation of the damage”.

Article 10 provides that:

“1 - The injured parties referred to in the articles above cannot demand reparation or compensation for the damage claimed to the extent that such damage is remedied under the terms of the following chapter.

2 - Claims by injured parties in any trials or proceedings shall not exonerate the operator responsible from the full and effective adoption of the preventive and remedial measures that result from the implementation of this decree-law nor shall impede the actions of the administrative authorities to this end”.

In summary, Decree-Law 147/2008 authorises a cause of action for compensation for environmental damage against an operator, including the operator of an offshore facility that produces oil, whose activities cause environmental damage, including damage to land, water and protected species and natural habitats. An Annex III operator is subject to strict liability; a non-Annex III operator is subject to fault-based liability (fraud or negligence). Article 9 sets out a contributory negligence defence which limits the damages payable to an injured person if that person’s negligence has contributed to the environmental damage or its exacerbation.

Article 10(1) provides that a person who is injured by environmental damage does not have a claim for compensation against the operator if the damage has been prevented or remediated under the administrative liability regime set out in Decree-Law 147/2008. Finally, article 10(2) provides, in effect, that any claim for compensation is secondary to the administrative liability regime in that the claim does not exonerate the liability of the operator for carrying out preventive and remedial actions and that it cannot impede actions of the competent authorities in implementing the administrative liability regime.

It is, thus, not entirely clear whether Decree-Law 147/2008 authorises compensation for pure economic loss although it appears to authorise compensation for bodily injury and property damage caused by environmental damage.

## ➤ Law 83/95

Law 83/95 of 31 August authorises so-called “popular actions” and the right of participation in proceedings by non-governmental organisations and other persons who do not have a direct interest in the proceedings but who are protecting interests protected by law, including public health, the environment, the cultural heritage, and consumer protection. In addition, the Law authorises class actions, with an opt out provision.

### 1.5.2 Economic loss

Article 564(2) of the Civil Code imposes liability for consequential losses that are “predictable”. Such losses could include lost profits from fisheries and tourism due to water pollution from an offshore oil and gas incident provided the economic losses are a direct consequence of the water pollution and are consequential,<sup>1101</sup> that is, consequential, not pure, economic loss.

More crucially, however, one commentator considered that article 483 of the Civil Code could impose liability for pure economic loss in the form of lost profits by fishermen and owners of tourism facilities<sup>1102</sup> but not for the lost profits of the local distributor of drinks to tourism facilities.<sup>1103</sup>

Further, the same commentator considered that articles 22 or 23 of Law No. 83/95 of 31 August 1995 impose liability on the hypothetical of a person who polluted a river in respect of a claim by the owner of an outdoor recreation business that had organised rafting and canoeing tours on a nearby river for 10 years for a total loss of profits for three years during which time the river could not be used for white water canoeing and rafting.<sup>1104</sup> By analogy, at least some claims for lost profits from pollution from an offshore oil and gas incident should also succeed.

### 1.5.3 Liability for dangerous activities

Article 493(2) of the Civil Code imposes strict liability for dangerous activities. None of the categories of dangerous activities appear, however, to apply to harm from pollution from offshore oil and gas operations.<sup>1105</sup>

### 1.5.4 Standard of liability (strict / fault-based)

The general standard of liability under the Civil Code is negligence and fault. Article 483(2) provides that “an obligation to pay compensation when there is no fault shall arise only in cases specified by law”. As indicated in section 1.5.3 above, strict liability does not appear to apply to liability for compensation for traditional damage caused by pollution from offshore oil and gas operations.

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<sup>1101</sup> See Environmental Liability and Ecological Damage in European Law 525 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>1102</sup> See *ibid.*

<sup>1103</sup> See *ibid.*, 552.

<sup>1104</sup> *Ibid.*, 506.

<sup>1105</sup> The categories of strict liability in the Civil Code are: various liability (article 500), animals (article 502), the keeper of a car (article 503), the keeper of gas or electric energy structures (article 509), and damages caused by nuisance or excavations to neighbouring structures (articles 1346-1352). See André G. Dias Pereira, Portuguese Tort Law: A Comparison with the Principles of European Tort Law, p. 638.

### 1.5.5 Scope of liability (joint and several / several)

Article 497 of the Civil Code imposes joint and several liability for a tort.

Article 490 of the Civil Code specifically provides that “If there are multiple actors, instigators or collaborators of the wrongful act, all of them are liable for the damage caused by them”.

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Article 493 of the Civil Code establishes a rebuttable presumption in that the defendant can show that even though it carried out a dangerous activity, it took measures to avoid the damage. As indicated in section 1.5.3 above, however, the categories of dangerous activities do not appear to apply to harm from pollution from offshore oil and gas operations.

### 1.5.7 Exceptions

The Civil Code does not specify any relevant exceptions to compensation for harm from pollution from offshore oil and gas operations.

### 1.5.8 Defences

The Civil Code states that an Act of God and the conduct of a third party are defences to a strict liability cause of action for a tort which, as indicated above, does not appear to apply to harm from pollution from offshore oil and gas operations.

Portuguese law also authorises a reduction or elimination of damages for contributory negligence. It is highly unlikely that this provision would apply to a claim for compensation for harm from pollution from an offshore oil and gas incident.

### 1.5.9 Remedies

The remedy for a tort is compensatory damages (Civil Code, article 564).

Punitive damages are not available under Portuguese law.

### 1.5.10 Limitations period(s)

Article 498 of the Civil Code provides a prescription period for actions for liability in tort of three years, beginning on the date on which the plaintiff is aware that it may make a claim.

### 1.5.11 Right to claim contribution from other responsible persons

A person who is jointly and severally liable for a tort has a right of contribution against other tortfeasors.

## 1.6 Compensation system (claims within Target Country)

Portugal has not established a compensation system for claims for bodily injury and property damage from pollution from offshore oil and gas operations. Normal court procedures apply if a claim is not settled.

## 1.7 Compensation system (claims concerning transboundary incidents)

Portugal has not established a compensation system for claims for bodily injury and property damage from pollution from transboundary offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for offshore oil and gas licensing is the Directorate-General for Energy and Geology (DGEG) (*Direcção- Geral de Energia e Geologia*) through the Department for Oil Exploration and Production (DPEP) (*Gabinete para a Pesquisa e Exploração de Petróleo*).

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

Decree-Law 109/94 provides that rights to prospect, explore, develop and produce petroleum “shall always respect the national interests as regards defence, navigation and research and conservation of marine resources” (article 7(3)).

The exercise of the above rights must not be incompatible with rights granted to carry out “activities in connection with other natural resources, or for other uses, in the same area” (article 7(1)). If the exercise of such rights is incompatible, the Minister(s) responsible for the conflicting activities decide which right shall prevail “in accordance with the national interest and in conformity with the applicable international law” (article 7(2)).

Such a conflict arose in at least one instance off the southern coast of Portugal in which concerns about the effect of offshore oil and gas operations on tourism resulted in a delay in signing a concession agreement.<sup>1106</sup>

Decree-Law No. 69/2000 of 3 May 2000, as amended, which transposed the Environmental Impact Assessment Directive (Directive 2011/92/EU, as now amended by Directive 2014/52/EU) requires the preparation of an environmental impact assessment if a project is likely to result in a significant impact on the environment. The production of hydrocarbons, but not prospecting for them, is listed in Annex I of the Decree-Law and thus requires preparation of an environmental impact assessment.

## 1.10 Offences and sanctions

Decree-Law 109/94 establishes various offences including carrying out prospecting, exploration, development or production activities in the absence of approval to do so; failure to post a required bond within the time limit for doing so; and commencing commercial production from a petroleum field before approval to do so has been granted (article 68).

The offences also include the “failure to adopt preventive measures concerning the safety of personnel and installations and also the measures related to the restoration of the landscape” (article 68(h)). The measures in respect of the latter are the adoption of:

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<sup>1106</sup> See Rui Mayer, Diogo Ortigão Ramos, Ana Isabel Marques and Bruno Neves de Sousa, Portugal, The Oil and Gas Law Review 189, 190 (editor Christopher B. Strong, Law Business Research Ltd, 2013); available at [http://www.cuatrecasas.com/media\\_repository/gabinete/publicaciones/docs/1390586868en.pdf](http://www.cuatrecasas.com/media_repository/gabinete/publicaciones/docs/1390586868en.pdf); see also Petition by ASMAA - Algarve Surf and Marine Activities Association, Say No to Oil and Gas Exploration in the Algarve; available at <http://www.change.org/petitions/say-no-to-oil-rigs-in-the-algarve-diz-n%C3%A3o-%C3%A0s-plataformas-de-petr%C3%B3leo-no-algarve>

“adequate measures to minimise the environmental impact caused by [the concessionaire’s] activities, ensuring the maintenance of the surrounding ecosystem and protecting the cultural heritage, strictly adhering to the applicable laws” (article 71(1)).

The sanctions for the above offences are fines, with the amount depending on the individual offence (article 68). The Decree-Law notes, in particular, that “[n]egligence will always be penalised” (article 68(3)), and that “[t]he payment of fines does not release the perpetrator from the need to fulfil the duties and obligations which resulted in the fine” (article 68(4)).

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

Article 11 of Decree-Law 109/94 provides that entities that bid for the right to carry out prospecting, exploration, development and production activities must show that they have financial (as well as technical) capacity. Financial capacity is demonstrated, among other things, by the submission of “appropriate bank declarations [and] accounts for the last three years of activity” (article 11(3)). Applicants must also submit “[a] programme of the proposed work including an estimate of the respective costs and information on the sources of financing” (article 11(4)(b)).

The Concession Contract Specifications provide that “[t]he concession contract must specify the ... value and conditions of the bond to be posted” (specification IX).

Entities that apply for a concession must post a provisional bond and, if a concession or licence is granted, must post a bond, as set out in the Decree-Law and as described below.

Article 74 of the Decree-Law provides as follows:

- “4. The licensees and concessionaires will post a bond to guarantee the fulfillment of the obligations assumed with the issuing of the licence or with the signing of the concession contract, including the payment of fines and damages to the State or to third parties.
6. The bonds for concession contracts during the initial period (exploration period) will be posted annually and the respective value will be the equivalent of 50% of the value of the work budgeted for in the annual work plans ...”.

The Concession Contract provides that:

“The Concessionaire must contract and maintain insurance covering the risks inherent to its activity with any renowned international insurance company. These insurance contracts must cover namely the damages relative to the civil liability of the Concessionaire.

Under the terms of the general law the Concessionaire is responsible for any damages caused to the State or to third parties as a consequence of its activity.

The Concessionaire shall also be responsible for any damages caused by its subcontractors to the extent that these might be responsible.

The Concessionaire assumes full responsibility for loss, damages and all the risks associated with its activity indemnifying and holding harmless the State for any facts occurred in consequence or related to the exercise of same activity”.<sup>1107</sup>

### 1.11.1 Persons required to have evidence of financial security

A bidder for a concession agreement must post a provisional bond (Decree-Law 109/94, articles 74(1)-(3)).

A licensee or concessionaire must post a bond to meet the terms and conditions of the licence or concession agreement (Decree-Law 109/94, article 74).

The concessionaire must have insurance for civil liabilities and is responsible for any damage caused by its contractors.

### 1.11.2 Time at which evidence of financial security is required

The provisional bond must be posted with the bid for a concession and must be maintained for 60 days after the Minister issues the order granting the concession to the winning bid (Decree-Law 109/94, article 15(3)).

The bond that guarantees that the applicant will carry out the obligations of a licence or concession agreement must be posted when the licence is issued or the concession is signed (Decree-Law 109/94, article 74(4)).

### 1.11.3 Scope (traditional damage / environmental damage / etc)

The purpose of the provisional bond is to support the application for a concession (Decree-Law 109/94, article 74(1)). The provisional bond cannot, therefore, be intended to cover compensation for claims for bodily injury, property damage or economic loss from an offshore oil and gas incident.

The purpose of the bond to be posted by a licensee or concessionaire is to guarantee that it will carry out the obligations of the licence or concession contract, “including the payment of fines and damages to the State or to third parties” (Decree-Law 109/94, article 74(4)).

It appears from the phrase “including the payment of ... damages to the State or to third parties” that the bond is intended to cover, not only a licensee’s or concessionaire’s obligations under the licence or concession contract, but also compensation for bodily injury, property damage and, perhaps economic loss, from pollution from an offshore oil and gas incident.<sup>1108</sup> This amount is necessarily incapable of precise calculation because the amount of compensation that is payable cannot be known for some considerable time after such an incident has occurred. In addition, any fine that may be imposed as a result of the activities of a licensee or concessionaire is also incapable of precise calculation before an offence occurs.

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<sup>1107</sup> Comment (information provided) by Jose Miguel Martins, Entidade Nacional do Mercado dos Combustíveis (15 September 2014).

<sup>1108</sup> See Rui Mayer, Diogo Ortigão Ramos, Ana Isabel Marques and Bruno Neves de Sousa, Portugal, The Oil and Gas Law Review 189, 195 (editor Christopher B. Strong, Law Business Research Ltd, 2013).



#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

As indicated above, the Concession Contract provides that the concessionaire must maintain insurance for damages relative to its civil liability to the State and third parties.

Provisional bonds as well as bonds for concession contracts and licensing are to be posted in favour of the DPEP in the form of a “cash deposit, bank guarantee or guaranteed security” (Decree-Law 109/94, article 74(8)). “Bonds posted by bank guarantee or guaranteed security must include a declaration by the issuing entity, assuring immediate and unconditional payment, up to the limit of the value of the guarantee or security, of any amounts requested by the [DPEP]” (Decree-Law 109/94, article 74(9)).

#### **1.11.5 Monetary limit(s)**

The provisional bond is to be in an amount established by the DPEP and published in the bidding announcement (Decree-Law 109/94, article 15(3)). The maximum period for a provisional bond is one year (Decree-Law 109/94, articles 74(3)).

The amounts of the other bonds that must be posted vary depending on the licence or concession agreement. The amount of a bond for a preliminary evaluation licence is “the equivalent of 50% of the value of the work budgeted for”. Its duration is the length of the licence plus an additional 60 days (Decree-Law 109/94, article 74(5)). The amount of a bond for a concession contract is also “the equivalent of 50% of the value of the work budgeted for in the annual work plans”. It must be posted annually (Decree-Law 109/94, article 74(6)) at the same time that the annual work plans for prospecting and exploration are submitted (Decree-Law 109/94, article 74(7)).

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

See section 1.11.5 above for a discussion of the timing of reviews by the DPEP of the adequacy of financial security.

A bond for a licence or concession contract is terminated at the end of the respective period of validity for the licence or contract unless it must be renewed or replaced. If it is to be renewed or replaced, the existing bond must remain in force until the renewal or replacement by a new bond (Decree-Law 109/94, article 74(10)).

Further, if a bond is “totally or partially used, it must be replaced by a new bond of identical amount and type within a period of 30 days after its use” (Decree-Law 109/94, article 74(11)).

### **1.12 Jurisdictional issues (if any)**

Decree-Law No. 147/2008 applies to Portugal’s EEZ.

Law 11/87 and the Civil Code would also need to apply to the continental shelf and EEZ in order to apply to claims for traditional damage from offshore oil and gas operations.

### **1.13 Key points**

Although exploration for offshore oil and gas in Portugal began in the 1970s, it has not as of October 2014 resulted in the discovery of commercial amounts of oil or gas. Exploration is continuing although, on at least one occasion, it was delayed by concerns over the impact of offshore oil and gas operations on tourism.

The Civil Code imposes liability for bodily injury and property damage. Liability is fault-based because the strict liability provisions do not appear to apply to claims for pollution from offshore oil and gas operations. One commentator considers that the Civil Code may also impose liability for pure economic loss in the form of lost profits by fishermen and owners of tourism facilities, but not for the lost profits of the local distributor of drinks to tourism facilities. The Civil Code would need to apply to the continental shelf and the EEZ to apply to such claims.

In its transposition of the ELD, Portugal introduced civil liability for compensation for environmental damage (the only Member State to do so). Strict liability applies to operators who produce oil, in particular, licensees who have a licence to produce offshore oil. The legislation appears to include compensation for bodily injury and property damage but not pure economic loss.

Article 41(2) of Law 11/87, if applicable to the continental shelf and the EEZ, may impose liability for bodily injury and property damage from pollution from offshore oil and gas operations if such operations are considered to be a “particularly dangerous activity”.

Portuguese law requires a bond in the form of a “cash deposit, bank guarantee or guaranteed security” to be posted by a licensee or concessionaire. The purpose of the bond is to guarantee that the licensee or concessionaire will carry out the obligations of the licence or concession contract, “including the payment of fines and damages to the State or to third parties”. The financial security, thus, includes compensation for bodily injury, property damage and (if applicable) economic loss from pollution from offshore oil and gas operations.

# Romania

## 1.1 Introduction

Romania has a long history of oil and gas production. Commercial oil production began in 1857. By 1900, Romania was producing 1.9 million barrels annually, making it the third largest oil producer in the world. In 1935, Romania was the sixth largest oil producer in the world. In 1976, oil production peaked at 14.7 million tonnes.<sup>1109</sup>

Commercial gas production began in Romania in 1909. In 1986, gas production peaked at 39.4 billion cubic metres.<sup>1110</sup>

After the First World War, the Romanian oil and gas industry was nationalised. Exploration and production sharing agreements were required to be entered into between the State-owned company and oil and gas companies. In 1993, the National Agency for Mineral Resources (NAMR) was established. In 1995, the first petroleum law was enacted, and in 2004, Petrom SA (the then State-owned company) was privatised.<sup>1111</sup>

Exploratory drilling in offshore Romania began in 1976, with commercial amounts of gas being discovered offshore in 1981, and offshore oil production beginning in 1987.

Romania estimates that it has gas reserves ranging from 40 billion to 80 billion cubic metres in its Black Sea shelf near the Khan Asparouh block.<sup>1112</sup>

Romania held the tenth licensing round, which included offshore as well as onshore areas, in 2009. The eleventh licensing round is planned to take place in 2015.

## 1.2 Form of legislation (Civil Code, statute, other)

The exploration and production of offshore (and onshore) oil and gas in Romania is governed by a petroleum law which applies to onshore as well as offshore operations. The law is accompanied by Methodological Rules, approved by a Government Decision.

The Civil Code imposes liability for bodily injury, property damage and economic loss.

## 1.3 Rights to, and ownership of, offshore oil and gas

Romania owns the oil and gas in its onshore territory, territorial sea, continental shelf, and EEZ.

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<sup>1109</sup> Presentation by Mihai Silkviu German and Florina Sora, Petroleum E&P in Romania; Achievements and Expectations (1st Oil Forum of the Energy Community, 24-25 September 2009, Belgrade; available at <http://www.energy-community.org/pls/portal/docs/414189.PDF>

<sup>1110</sup> Ibid.

<sup>1111</sup> See Sean Rush, Andreea Lisievici and Cornel Popa, The regime governing upstream oil and gas development in Romania, (2011) *Journal of World Energy Law and Business* 1; available at <http://www.memerycrystal.com/uploaded/Articles/other%20files/Romanian%20Petroleum%20Regime.pdf>

<sup>1112</sup> See Bulgarian Cabinet approves renewable energy plan, offshore drilling tender (9 January 2013); available at <http://sofiaglobe.com/2013/01/09/bulgarian-cabinet-approves-renewable-energy-plan-offshore-drilling-tender/>

Article 136(3) of the Constitution of Romania<sup>1113</sup> states, in pertinent part, that:

“The mineral resources of public interest ... the beaches, the territorial sea, the natural resources of the economic zone and the continental shelf, as well as other possessions established by the organic law, shall be public property exclusively”.

Article 136(2) of the Constitution provides that “Public property is guaranteed and protected by the law, and belongs to the State or to territorial-administrative units”.

Article 1(1) of the Petroleum Law No. 238 of 7 June 2004, published in the Official Gazette of Romania No. 535 of 15 June 2004, as amended (Petroleum Law),<sup>1114</sup> expands on the Constitution by providing that “[t]he petroleum resources located in the subsoil of this country and on the Romanian continental shelf of the Black Sea ... make the exclusive object of public ownership and belong to the Romanian State”.

The term “petroleum” is defined as “the combustible mineral substances consisting of mixtures of naturally accumulated hydrocarbons in the earth’s crust and which, at surface conditions, appear in a gaseous state, in the form of natural gas, or in a liquid state, in the form of crude oil and condensate” (Petroleum Law, article 1(1)).

The Petroleum Law defines “natural gas” to include “the free gas from methane gas reservoirs, the gas dissolved in crude oil, those from the gas cap associated with the crude oil reservoirs as well as the gas arising out of the production of the gas condensate mixtures” (Petroleum Law, article 1(2)).

The width of the territorial sea is 12 nautical miles (Territorial Sea Act, article 1). “The internal waters, the territorial sea and the soil and subsoil thereof, together with the airspace above them, shall be part of the territory of Romania”, over which Romania exercises sovereignty (Territorial Sea Act, article 5). The width of the contiguous zone is 24 nautical miles measured from the same baselines as the territorial sea (Territorial Sea Act, article 6).

Article 1 of Decree No. 142 of 25 April 1986 of the Council of State concerning the establishment of the Exclusive Economic Zone of ... Romania in the Black Sea (Decree 142/1986),<sup>1115</sup> as well as establishing the EEZ, provides that Romania “shall exercise sovereign rights and jurisdiction over the natural resources of the seabed, its subsoil and the superjacent water column and with regard to the different activities related to their exploration, exploitation, conservation and management”.

Article 2 of Decree 142/1986 establishes the limits of the EEZ, particularly in view of the proximity of the continental shelves of neighbouring countries, by providing that:

“The outer part of the exclusive economic zone shall extend to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; owing to the narrow dimensions of the Black Sea, the effective extent of the exclusive economic zone of ... Romania shall be determined by delimiting it within the framework of negotiations with the neighbouring States with coasts opposite or adjacent to the Romanian Black Sea coast. The delimitation shall be carried out with

<sup>1113</sup> An unofficial English translation of the Constitution of Romania, with revisions to 29 October 2003, is available at: <http://www.cdep.ro/pls/dic/site.page?id=371>

<sup>1114</sup> An unofficial English translation of the Petroleum Law, without amendments, is available from NAMR’s website at <http://www.namr.ro/legislation/romanian-legislation/petroleum-domain/>

<sup>1115</sup> An unofficial English translation of the original version of Decree No. 142 is available from <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ROM.htm>

due regard for the legislation of ... Romania, by means of agreements with those States, through the application, according to the specific circumstances of each area to be delimited, of the delimitation principles and criteria generally recognized in international law and in the practice of States, in order to arrive at equitable solutions”.

Article 3 of Decree 142/1986 provides that:

“In its exclusive economic zone ... Romania shall exercise:

- (a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources and other resources on the seabed, in its subsoil and in the superjacent water column”.
- (b) Sovereign rights with regard to other activities related to the economic exploitation and exploration of the zone ...”.

In 2009, the International Court of Justice issued a ruling that ended a dispute between Romania and Ukraine over the limitations of the continental shelf and EEZ in the Black Sea.<sup>1116</sup>

#### 1.4 Specific legislation for offshore oil and gas operations

The main legislation for offshore (and onshore) oil and gas activities in Romania is the Petroleum Law. It is accompanied by Methodological Rules for the application of Petroleum Law No. 238 of 2004, approved by Government Decision no. 2075 of 24 November 2004 (Methodological Rules).<sup>1117</sup> The Methodological Rules set out the procedures for bidding for petroleum agreements and the petroleum agreements themselves.

The permitting system in Romania is a hybrid of a concessionary system with aspects of a licensing system.<sup>1118</sup>

Exploratory works are carried out under a “prospecting permit”, which is defined as “the legal instrument issued by the competent authority whereby the non-exclusive right is granted (in the sense that such right can be simultaneously granted to several applicants) to conduct exploration operations in a petroleum block” (Petroleum Law, article 2(27)).<sup>1119</sup>

A prospecting permit:

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<sup>1116</sup> See Vladimir Socor, Romanian-Bulgarian Maritime Dispute Can Affect Exxon's, South Stream, Nabucco Projects, Eurasia Daily Monitor, vol. 9(61) (27 March 2012); available at [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=39185](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=39185); Petros Siousiouras and Georgios Chrysochou, The Aegean Dispute in the Context of Contemporary Judicial Decisions on Maritime Delimitation, Laws 2014(3), 12, 21-24 (14 January 2014); available from <http://www.mdpi.com/2075-471X/3/1/12>

<sup>1117</sup> An unofficial English translation of the original version of the Methodological Rules is available from NAMR's website at <http://www.namr.ro/legislation/romanian-legislation/petroleum-domain/>

<sup>1118</sup> See Eugenia Guşilov, Romania's Oil and Gas Framework, Policy Brief #2 (March 2013) (published in Petroleum Industry Review (March 2013)).

<sup>1119</sup> A “petroleum block” is defined as “the area corresponding to the projection at the surface of the contour of the portion of the Earth's crust within which, along a determined depth interval, exploration, development, production or storage operations are being conducted, and also the surfaces needed for the conduct of petroleum exploration, development, production, storage and transportation operations, which are located outside the aforementioned area”. Petroleum Law, article 2(25).

- is non-exclusive;
- is granted for a maximum term of three years; there is no right to extend it (Petroleum Law, article 28);
- does not provide any rights to develop or produce oil or gas; and
- any discovery of oil or gas pursuant to it, is subject to competitive bidding and a concession agreement.<sup>1120</sup>

A “petroleum agreement”, also called a concession agreement or a petroleum concession agreement, is granted for the exploration, development and production of oil and gas. The term “petroleum agreement” is defined as:

“a legal instrument concluded in accordance with the provisions of this law between the competent authority and one or several Romanian or foreign legal entities for the purpose of conducting petroleum operations and obtaining the concession of the assets which are necessary for the performance of such operations” (Petroleum Law, article 2(2)).

The “petroleum concession” is carried out according to the petroleum agreement. That is, the “petroleum concession” is:

“the legal operation whereby the Romanian state, as represented by the competent authority, in its capacity of concession grantor, transfers for a determined period of time to a Romanian or foreign legal person the right and obligation to conduct, at such person’s own risk and expense, petroleum operations which fall under the provisions of this law, and the right to use publicly-owned assets which are necessary for the conduct of petroleum operations, in exchange for a royalty” (Petroleum Law, article 2(7)).

Petroleum agreements are granted, following competitive bidding, for up to 30 years, with the potential for extension for a further 15 years (Petroleum Law, article 27(2)).

A petroleum agreement is the only authorisation granted in Romania for oil and gas exploration, development and production. The agreement may be granted for the following activities:

- exploration-development-production;
- development-production;
- production; and
- amendments to a petroleum agreement (Methodological Rules, article 22(2)).

## 1.5 Liability for bodily injury, property damage and economic loss

Article 46(1) of the Petroleum Law states that the holder of a petroleum agreement is liable,

“in accordance with rules of the delictual fault civil responsibility, to remedy the damages caused by its fault to third parties arising from the conduct of petroleum

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<sup>1120</sup> See Sean Rush, Andreea Lisievici and Cornel Popa, The regime governing upstream oil and gas development in Romania, (2011) *Journal of World Energy Law and Business* 1; available at <http://www.memerycrystal.com/uploaded/Articles/other%20files/Romanian%20Petroleum%20Regime.pdf>

operations up to the date of relinquishment, even if such damages are ascertained after the termination of the petroleum concession”.

The Petroleum Law thus, specifically, states that the liability of a petroleum agreement for damage to third parties from its operations is subject to civil liability law and that such liability is fault-based.

The applicable civil law is the New Civil Code, which entered into force on 1 October 2011, replacing the Civil Code that had been adopted in 1864 and had largely been unchanged since that time. The New Civil Code imposes liability for bodily injury and property damage. It is unclear whether it imposes liability for pure economic loss.

### 1.5.1 Bodily injury and property damage

Article 1349 is the main tort provision in the New Civil Code. It provides that:

- “(1) Everyone shall respect the code of conduct which the law or local custom imposes and shall not breach, by action or inaction, the rights or legitimate interests of others.
- (2) Anyone who knowingly breaches this duty shall be liable for all damage and shall make amends for it in full.
- (3) In cases expressly provided by law, a person may also be liable for damage caused by the actions of another ...”<sup>1121</sup>

Article 1349(2) thus requires the tortfeasor / wrongdoer to have realised the harmful consequences that could occur from the wrongful act and to be able to prevent or avoid them.<sup>1122</sup> That is, the harmful consequences must be reasonably foreseeable.

### 1.5.2 Economic loss

The New Civil Code does not directly recognise liability for pure economic loss, but neither does it exclude it. Article 1385 appears to impose liability for lost income resulting from a tort, due to it specifically imposing liability for damages due to the loss of a chance to obtain an advantage. The amount of compensation for the loss of a chance received by the claimant is proportionate to the probability of obtaining the advantage, taking account of the circumstances of an individual case and the “situation of the victim”.<sup>1123</sup> It seems likely, however, that there would have to be a direct causal link, which may be difficult to prove.<sup>1124</sup>

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<sup>1121</sup> Translation from Case of *Vlad v Romania*, European Court of Human Rights, Applications nos. 40756/06, 41508/07 and 50806/07 (26 February 2014); available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138558>

<sup>1122</sup> See Lacrima Rodica Boilă, A new perspective on the institution of tort liability in the current civil code, (2011) *Juridical Current*, vol. 14(4), 203, 205.

<sup>1123</sup> See Mónika Józson, Non-contractual liability arising out of damage caused to another 207, 233 in *A Factual Assessment of the Draft Common Frame of Reference* (Sellier European Law Publishers, Luisa Antonioli and Francesca Fiorentini, editors, 2010).

<sup>1124</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, *Netherlands Comparative Law Association, Electronic Journal of Comparative Law*, vol. 11(3), 65-66 (December 2007) (discussing articles 998 and 999 of the former Civil Code); available at <http://www.ejcl.org/113/article113-9.pdf>

### 1.5.3 Liability for dangerous activities

The New Civil Code imposes strict liability for harm from defective products (article 1376; see article 1349(4)).<sup>1125</sup> This provision does not, however, appear to be applicable to claims for harm from pollution from an offshore oil and gas incident.

Other provisions of the New Civil Code which impose strict liability for dangerous activities also do not appear to apply to claims for compensation for harm from an offshore oil and gas incident.<sup>1126</sup>

Further, article 46(1) of the Petroleum Act refers only to “delictual fault civil liability”; it does not refer to strict liability (see section 1.5 above). Strict liability, therefore, does not apply to claims for compensation for bodily injury, property damage or economic loss from an offshore oil and gas incident.

### 1.5.4 Standard of liability (strict / fault-based)

Liability under the New Civil Code, like the Civil Code it replaced, is mostly fault-based.

### 1.5.5 Scope of liability (joint and several / several)

Article 1382 of the New Civil Code imposes joint and several liability. It provides that “Those who are responsible for a harmful act are held solidarily liable to compensate the prejudiced”.<sup>1127</sup>

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

The New Civil Code does not appear to provide for a rebuttable presumption of liability in respect of tort claims.

### 1.5.7 Exceptions

There do not appear to be any exceptions to fault-based liability in the New Civil Code that could apply to a claim for compensation for bodily injury, property damage or economic loss from an offshore oil and gas incident.

### 1.5.8 Defences

Limitations of liability include *force majeure*, contributory negligence, a fortuitous event and the act of a third party (New Civil Code, article 1371).

### 1.5.9 Remedies

The remedy for a tort is compensatory damages.

<sup>1125</sup> Other legislation also imposes liability for defective products including Law No. 240/2004 regarding liability for defective products; see Remus Ene and Adelina Somoiaş, Romania Product Liability 2014 (International Comparative Legal Guides); available at <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2014/romania>

<sup>1126</sup> See Lacrima Rodica Boilă, A new perspective on the institution of tort liability in the current civil code, (2011) Juridical Current, vol. 14(4), 203, 206 (referring to articles 1375 and 1378 concerning harm caused by animals and the destruction of a building).

<sup>1127</sup> Translation from Florin Luduşan, Contractual liability and tort liability in the new civil code. Similarities and differences, *Academica Science Journal* No. 1(2), 36,39-40 (2013); available at <http://academica.udcantemir.ro/wp-content/uploads/article/juridica/j2/J2A8.pdf>



Romanian law does not recognise punitive damages.<sup>1128</sup>

#### 1.5.10 Limitations period(s)

The limitations period for a tort is three years from the date on which the claimant knew that the damage had occurred and was, or should have been, aware of the person who caused the damage.<sup>1129</sup>

#### 1.5.11 Right to claim contribution from other responsible persons

A tortfeasor who pays more than its share of compensation may claim contribution from other tortfeasors.

### 1.6 Compensation system (claims within Target Country)

There is no compensation system in Romania for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

Class actions are not recognised by Romanian law. It does, however, include provisions under which cases involving multiple parties may be required to appoint one or more representatives. In addition, the court may make such an appointment.<sup>1130</sup>

### 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Romania for claims for harm from transboundary offshore oil and gas operations.

### 1.8 Competent authority

The competent authority for oil and gas licensing in Romania is the National Agency for Mineral Resources (NAMR). NAMR:

- a) manages the petroleum resources of the state;
- b) negotiates the clauses and terms of the petroleum agreements and enters into such agreements on behalf of the state;
- c) regulates the petroleum operations conducted under the petroleum agreements and the technical norms and instructions issued for the application of the law;
- d) receives, checks and registers the data and information concerning the petroleum resources and reserves and ensures their storage, systematization and us ...

<sup>1128</sup> See Remus Ene and Adelina Somoiaş, Romania Product Liability 2014 (International Comparative Legal Guides); available at <http://www.iclg.co.uk/practice-areas/product-liability/product-liability-2014/romania>

<sup>1129</sup> See Gheorghe Buta and Nicolae Viorel Dinu, Dispute Resolution Handbook; Romania (Practical Law Company 2011/12); available at [http://www.musat.ro/pdf/PLC%20Dispute%20Resolution%20Handbook%202012\\_2011.pdf](http://www.musat.ro/pdf/PLC%20Dispute%20Resolution%20Handbook%202012_2011.pdf)

<sup>1130</sup> See *ibid.*

- g) monitors the application of the measures established for the protection of the surface and subsoil during the performance of the petroleum operations;
- h) checks the compliance by the title holder with the provisions of the petroleum agreement and the relevant norms and instructions and orders measures meant to ensure such compliance;
- i) orders the cessation of the exploration or production works carried out outside the boundaries of the block granted, of those which do not have approved technical documentation and of those which, given the manner in which they are conducted, may be conducive to an irrational exploitation and the damaging of the reservoirs, such cessation to last until the causes which generated said actions are removed; ...
- j) issues mandatory technical norms and instructions for the fulfillment of the provisions of this law; [and]
- m) endorses the abandonment plan and approves the termination of the concession on the basis of the fulfillment of the provisions of the environment restoration plan approved by the responsible authorities pursuant to the environment protection legislation” (Petroleum Law, article 54).

The Head of NAMR approves prospecting permits, and agreements between title holders and other legal entities to carry out petroleum operations not including petroleum agreements (Methodological Rules, articles 22(3)(a), (b)).

The Romanian Government approves petroleum agreements by a Governmental Decision (Petroleum Law, article 31(1); Methodological Rules, article 22(2)).<sup>1131</sup>

### 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

Government Decision No. 445 of 2009 on environmental impact assessment pertaining to certain public and private projects applies to prospecting permits and petroleum agreements. An environmental impact assessment is required before a petroleum agreement is granted.<sup>1132</sup>

### 1.10 Offences and sanctions

The Petroleum Law establishes various offences including the following:

“The breach of the obligation of a foreign entity to establish a subsidiary or branch with its headquarters in Romania within 90 days of the petroleum agreement coming into effect, or the failure to prepare technical and economic documentation for carrying out petroleum operations under the petroleum agreement are offences punishable by a fine of between 300 million (EUR 68,254,852.18) and 700 million lei” (EUR 159,261,321.76) (Petroleum Law, article 56(a); see section 1.11 below).

<sup>1131</sup> See Eugenia Guşilov, Romania’s Oil and Gas Framework, Policy Brief #2 (March 2013) (published in Petroleum Industry Review (March 2013)).

<sup>1132</sup> See <http://www.aneir-cpce.ro/chapter5/rp1.htm> (“A full environmental study shall be undertaken prior to commencement of the minimum work program” for a petroleum agreement).

If the offence is committed a second time, the maximum amount of the fine is doubled up to a maximum of 1,000 million lei (EUR 227,517,899.43) (Petroleum Law, article 58).

Carrying out petroleum operations without a permit or petroleum agreement is a crime punishable by imprisonment from six months to two years (Petroleum Law, article 57).

Article 31 of the Act concerning the Legal Regime of the Internal Waters, the Territorial Sea and the Contiguous Zone of Romania, 7 August 1990 (Territorial Sea Act)<sup>1133</sup> states that:

“it shall be prohibited to pollute the internal waters and the territorial sea, or the atmosphere above them, by the disposal, dumping or discharge from a ship or other floating or fixed installation ... of any toxic substances or residues of toxic substances, radioactive substances, hydrocarbons or other substances which are harmful or dangerous to human health or to marine life, or other residues or materials capable of causing damage to the Romanian coastline or of creating obstacles to the legitimate uses of the sea”.

The penalty for breaching the prohibition is a fine plus confiscation in “particularly serious situations” (Territorial Sea Act, articles 35-36).

Fines levied for such breaches “shall not exempt the violator from the obligation to furnish compensation for the damage caused on land, in the internal waters and in the territorial sea of Romania, in accordance with Romanian law” (Territorial Sea Act, article 39).

The above provisions of the Territorial Sea Act do not appear to apply to pollution from oil and gas operations in the EEZ because they refer specifically to internal waters and the territorial sea, and not to the continental shelf or EEZ. It is also not clear whether the word “discharge” includes an accidental as well as an intentional discharge, or whether the Territorial Sea Act applies to a discharge of oil or gas from the seabed itself and not only from a “floating or fixed installation” itself.

Article 13 of Decree 142/1986 provides that the following actions are offences punishable by fines:

- “(a) The unlawful exploration and exploitation of the natural resources of the exclusive economic zone of ... Romania;
- (b) Pollution and the act of unlawfully introducing, for purposes of disposal within the exclusive economic zone of ... Romania, by ... installations or structures constructed in the sea, substances which are harmful to human health or to the living resources of the sea or other waste and materials which could cause damage or create obstacles to the lawful use of the sea”.

### **1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)**

Neither the Petroleum Law nor the Methodological Rules specify any requirement for an applicant for a prospecting permit or a petroleum agreement to submit evidence of financial security for obligations under a permit or agreement, or for compensation for claims for harm from offshore oil and gas operations. The emphasis in the legislation is on the financial and technical capabilities of the bidders for a permit or agreement.

<sup>1133</sup> An unofficial English translation of the original version of the Territorial Sea Act is available from <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ROM.htm>

NAMR's website does, however, state that "A bank guarantee shall be required to cover timely performance of the minimum exploration program" in a petroleum agreement.<sup>1134</sup>

The bidder for a petroleum agreement must, among other things, provide NAMR with:

"[a] letter of good standing issued by the bidder's bank or other institutions or organizations which the bidder is registered or is working with, including its auditors or chartered independent accountants, comprising the description of the global liquidity, asset solvency, gross profit rate and rate of return; in case the bidder is a newly established legal entity, the same data shall be provided in respect of the bidder's shareholder or main shareholders" (Methodological Rules, article 34(2)9g).

The above provision focuses, exclusively, on the financial strength of the bidder.

In addition, the bidder for a petroleum agreement must provide NAMR:

"attesting certificates issued by the public authorities/institutions which manage the State's Budget, the budget of the State's Social Security, the budget of the Sole National Fund of Public Health Insurance, the budget of Unemployment Insurance, the budget of Work Accidents and Professional Disease Insurance and the local budgets, which should reflect the bidder's financial and fiscal discipline in respect of the fulfillment by the bidder of its obligations towards such budgets. In case of the foreign companies with no previous activity in Romania, the last annual audited report of the bidder or, as the case may be, of its shareholder/main shareholders will be submitted" (Methodological Rules, article 34(2)(h)).

The above provision requires evidence of insurance and other financial evidence concerning employees. It does not include financial security for claims for compensation for harm from an offshore oil and gas incident.

The evaluation criteria for the selection of the winning bid sets out weighted points to score a bidder's financial capacity, technical capability, and other criteria (Methodological Rules, article 49). NAMR selects the winning bid by comparing the financial and technical capabilities of the bidders.<sup>1135</sup>

If a foreign entity is granted a petroleum agreement, it must, within 90 days from the date of the agreement, establish a subsidiary or branch with its headquarters in Romania (Petroleum Law, article 33(1)). The company appointed to represent the interests or more than one entity that obtains petroleum rights in the same block has this obligation (Petroleum Law, article 33(2)).

The holder of a petroleum agreement must, among other things "prepare, based on the petroleum agreement, technical and economic documentation for the conduct of the petroleum operations and submit the same for approval to the competent authority" (Petroleum Law, article 48(1)(b)). The documentation includes technical and economic documentation for decommissioning.

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<sup>1134</sup> See <http://www.aneir-cpce.ro/chapter5/rp1.htm> The website refers to a "Concession Agreement Model". It does not include an English translation of a model agreement.

<sup>1135</sup> See Sean Rush, Andreea Lisievici and Cornel Popa, The regime governing upstream oil and gas development in Romania, (2011) *Journal of World Energy Law and Business* 1; available at <http://www.memerycrystal.com/uploaded/Articles/other%20files/Romanian%20Petroleum%20Regime.pdf>

**1.11.1 Persons required to have evidence of financial security**

The holder of a petroleum agreement must have a bank guarantee to cover timely performance of the minimum exploration programme under the agreement.

**1.11.2 Time at which evidence of financial security is required**

The time at which the evidence of financial security is required is not specified.

**1.11.3 Scope (traditional damage / environmental damage / etc)**

The scope of the bank guarantee for the petroleum agreement is the “timely performance of the minimum exploration program”. NAMR’s website does not indicate whether a bank guarantee is required for development and/or production.

Neither does the website – or relevant legislation – indicate whether financial security is required for a prospecting permit, although a requirement for financial security may be set out in the permit itself.

**1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

A bank guarantee is required under a petroleum agreement for the timely performance of the minimum exploration programme.

**1.11.5 Monetary limit(s)**

Neither the Petroleum Law nor the Methodological Rules specifies any monetary limits for financial security.

**1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

Neither the Petroleum Law nor the Methodological Rules specifies the timing of reviews of the bank guarantee that is required.

**1.12 Jurisdictional issues (if any)**

Article 46(1) of the Petroleum Law specifically states that “the rules of delictual fault civil responsibility” apply to harm to third parties arising from fault in carrying out petroleum operations.

Article 3 of Decree 142/1986 provides that Romania has jurisdiction in its EEZ for, among other things, “[t]he establishment and use of ... installations and structures; ... The protection and conservation of the marine environment”. Article 3 further provides that “The sovereign rights and the jurisdiction provided for in this article shall be exercised in accordance with the legislation of ... Romania”. Article 7 states that Romania shall exercise control in its contiguous zone “to prevent and punish infractions of its customs, fiscal and sanitary laws and regulations and infractions relating to the crossing of the State frontier”.

The New Civil Code would also need to apply in the Romanian continental shelf and the EEZ.

**1.13 Key points**

Romania has a long history of oil and gas production. Onshore production of oil and conventional gas has been in decline since 1976 and 1986, respectively. Since 2009, when the dispute with Ukraine

over the limitations of the continental shelf and EEZ in the Black Sea ended, Romania has extended its offshore exploratory activities. Romania estimates that gas reserves in the Khan Asparouh block in the Black Sea are between 40 billion and 80 billion cubic metres.

The main legislation for offshore oil and gas operations in Romania is the Petroleum Law, which is accompanied by Methodological Rules, which set out procedures for bidding for petroleum agreements and related matters.

The permitting system is a hybrid of a concessionary system with aspects of a licensing regime. Two types of permit may be granted: a prospecting permit; and a petroleum agreement, which may be issued for exploration-development-production, development-production, or production activities.

The Petroleum Law states that the applicable law for “damages caused ... to third parties arising from the conduct of petroleum operations” is “delictual fault civil responsibility”. That is, only fault-based liability applies; strict liability does not apply.

The relevant law for torts for harm from an offshore oil and gas incident is the New Civil Code, which entered into force on 1 October 2011. The New Civil Code imposes liability for bodily injury and property damage. It is unclear whether it also imposes liability for pure economic loss. It would also need to apply to incidents in the continental shelf and the EEZ.

Neither the Petroleum Law nor the Methodological Rules include any requirements for financial security. The competent authority’s, NAMR’s, website states that a bank guarantee is required for a petroleum agreement, to cover the “timely performance of the minimum exploration program”. There is no indication of a requirement for financial security for a prospecting permit although this may be specified in the permit itself. Further, there is no requirement for financial security to cover compensation for claims for bodily injury, property damage or economic loss under a petroleum agreement.

# Spain

## 1.1 Introduction

Spain has a long history in the commercial production of oil and gas. Exploration began in the 1940's, with discoveries of oil in the 1950s in onshore Spain.

Most of the offshore fields were discovered in the 1970s. During the 1980s, offshore extensions of onshore gas fields were discovered together with discoveries of minor fields in the Mediterranean Sea. This was followed in the 1990s by the discovery of small fields near already discovered fields in the Cantabrian Sea and the Mediterranean Sea. Since then, less than 10 exploration wells have been drilled, none of which has been successful.<sup>1136</sup>

Currently, less than one per cent of the oil used by Spain is produced in Spain.<sup>1137</sup> Small amounts of oil are still produced from the onshore Ayoluengo field in northern Spain. Small amounts of oil also continue to be produced from offshore fields, in particular the Ebro Delta region in the Mediterranean. There does not appear to be the potential for further discoveries.

Gas production is also very limited or has ceased from onshore and offshore regions, including from the Guadalquivir basin in southwest Spain and the Bay of Biscay.<sup>1138</sup>

Large offshore deposits of oil are considered to exist between Lanzarote, in the Canary Islands, and Morocco. The Canary Islands are an Autonomous Community of Spain and an Outermost Region of the EU. In May 2014, the Spanish Government approved an environmental impact statement prepared by Repsol SA, which has been granted an exploration permit.<sup>1139</sup> The State's approval is accompanied by a 41-page regulation setting out measures to avoid environmental damage. Repsol has stated it would spend EUR 7.5 billion to develop the field if exploration is successful.<sup>1140</sup>

Judicial challenges to the exploration licence granted to Repsol have been ongoing for 12 years. On 24 June 2014, the Spanish Supreme Court rejected seven challenges to the permit.<sup>1141</sup> The challenges were brought by, among others, environmental NGOs, including Greenpeace, Oceana, and

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<sup>1136</sup> See Elvira Álvarez de Buergo and Anunciación Pérez García, Repsol-YP, Exploration Country Focus – Spain (June 2007); available at <https://www2.aapg.org/europe/newsletters/2007/06jun/spain.cfm>

<sup>1137</sup> See Organisation for Economic Co-operation and Development, Spain – Inventory of Estimated Budgetary Support and Tax Expenditures for Fossil-Fuels; available at <http://www.oecd.org/site/tadffss/ESP.pdf>

<sup>1138</sup> See Energy Files, Spain; available at <http://www.energyfiles.com/eurfsu/spain.html>

<sup>1139</sup> See We have the Power; available at <http://beyen.net/wehavethepower/?p=1>

<sup>1140</sup> See Todd White, Repsol Given Rules for Oil Drilling Off Canary Islands (9 June 2014); available at <http://www.bloomberg.com/news/2014-06-10/spain-sets-repsol-guidelines-to-drill-off-canary-islands.html>; Todd White, Repsol Wins Approval for \$10 Billion Project Off Spain (30 May 2014); available at <http://www.bloomberg.com/news/print/2014-05-29/repsol-wins-key-approval-for-canaries-exploration-after-12-years.html>; Stephen Burgen, Spain's oil deposits and fracking sites trigger energy gold rush, The Guardian (26 March 2014); available at <http://www.theguardian.com/world/2014/mar/26/spain-oil-deposit-fracking-sites-energy-offshore-gas/print>

<sup>1141</sup> See Todd White, Repsol Cleared by High Court to Drill off Spain's Canary (24 June 2014); available at <http://www.bloomberg.com/news/2014-06-24/repsol-cleared-by-high-court-to-drill-off-spain-s-canary.html>

the World Wildlife Fund, as well as the Government of the Canary Islands, which had initially been in favour of exploration.<sup>1142</sup>

On 11 August 2014, the Spanish Government issued a resolution providing the final authorisation to Repsol to begin exploration.<sup>1143</sup> A vote in the Canary Islands on the question “Do you think the Canaries should change its environmental and tourism model for the sake of oil and gas exploration?” is scheduled for 23 November 2014.<sup>1144</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas activities in Spain are subject to primary legislation in the form of statutes, and secondary legislation.

The Civil Code imposes liability for bodily injury and property damage from harm from offshore oil and gas operations.

## 1.3 Rights to, and ownership of, offshore oil and gas

Article 132(2) of the Spanish Constitution states that “[t]he goods of the State's public property shall be that established by law and shall, in any case, include the foreshore beaches, territorial waters and the natural resources of the exclusive economic zone and the continental shelf”.<sup>1145</sup>

Spain claimed jurisdiction over its territorial sea on 15 January 1977.<sup>1146</sup>

In 1978, Spain claimed sovereign rights over its EEZ for the purposes of “exploring and exploiting the natural resources of the seabed, subsoil thereof and its superjacent waters”.<sup>1147</sup> The EEZ extends 200 nautical miles from the outer limits of the territorial sea.

Article 2 of the 1978 Act provides that the Spanish State has:

- “(a) the exclusive right to the natural resources of the [exclusive economic] Zone;
- (b) The authority to enact regulations concerning the preservation of, exploration for and exploitation of such resources with a view to the protection of the protection of the marine environment;

<sup>1142</sup> See Andrés González, UPDATE 2-Spain's Repsol given go-ahead to drill for oil off Canary Islands (24 June 2014); available at <http://uk.reuters.com/article/2014/06/24/spain-canaryislands-drilling-idUKL6N0P534Y20140624>

<sup>1143</sup> See Todd White, Repsol Wins Final Permit to Drill for Oil Off Canary Islands, Bloomberg (13 August 2014); available at <http://www.bloomberg.com/news/2014-08-13/repsol-wins-final-permit-to-drill-for-oil-off-canary-islands-1-.html>

<sup>1144</sup> See Canary Islands to vote on oil exploration The Guardian (2 October 2014); available at <http://www.theguardian.com/world/2014/oct/02/canary-islands-vote-oil-exploration-repsol>

<sup>1145</sup> An unofficial English translation of the Spanish Constitution, as modified on 27 August 1992, is available at: [https://www.essex.ac.uk/armcon/world/europe/western\\_europe/spain/SpainConstitution.pdf](https://www.essex.ac.uk/armcon/world/europe/western_europe/spain/SpainConstitution.pdf)

<sup>1146</sup> See Law No. 10/1977 of 4 January 1977 on the Territorial Sea. An unofficial English translation of the original Act is available at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP\\_1977\\_Act.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1977_Act.pdf)

<sup>1147</sup> Act No. 15/1978 on the Economic Zone of 20 February 1978, article 1. An unofficial English translation of the original Act is available at [http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP\\_1978\\_Act.pdf](http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1978_Act.pdf)



- (c) Exclusive jurisdiction to enforce all relevant measures;
- (d) Such other rights as may be determined by the Government in accordance with international law”.

## 1.4 Specific legislation for offshore oil and gas operations

The main legislation in Spain for hydrocarbons licensing is Act 34/1998 of 7 October 1998 on the Hydrocarbons Sector (Hydrocarbons Act).<sup>1148</sup>

The Hydrocarbons Act is accompanied by Royal Decree 2362 of 30 July 1976.

There are three types of licences for offshore (and onshore) oil and gas operations in Spain. They are as follows:

- An investigation permit of up to six years with an option for a three year extension;
- An exploration authorisation of up to six years with an option for a three year extension; and
- An exploitation concession of up to 30 years with two optional renewals of 20 years each.

## 1.5 Liability for bodily injury, property damage and economic loss

Liability for bodily injury and property damage is imposed by the Civil Code. It is difficult to succeed in a claim for pure economic loss under Spanish law.

### 1.5.1 Bodily injury and property damage

The main provision for tort liability in the Civil Code is article 1902, which provides that “[t]he person who, as a result of an action or omission, causes damage to another by his fault or negligence shall be obliged to repair the damage caused”.

A judgment by the Supreme Tribunal indicates difficulties that may be encountered in claims for property damage for shellfish from an oil spill. Following a spill of oil by the tanker *Compostilla*, in the port of La Coruña in January 1972, owners of a mussel farm claimed damages due to their inability to sell mussels due to them tasting of oil from oil residues on the seabed. The court ruled against the claimants, stating that they should have destroyed the mussels on orders from the local authorities instead of trying to place the mussels on the market.<sup>1149</sup>

### 1.5.2 Economic loss

Spanish law does not specifically recognise pure economic loss. Under Spanish law, the damage suffered by a claimant must be certain and adequately proven or the causal link between the tortfeasor’s / wrongdoer’s conduct and damage to the claimant must be established. As a result of this

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<sup>1148</sup> An unofficial English translation of the Hydrocarbons Act (4<sup>th</sup> edition 2008) is available at: [www.cne.es/cne/doc/publicaciones/NE008\\_08.pdf](http://www.cne.es/cne/doc/publicaciones/NE008_08.pdf)

<sup>1149</sup> See Environmental Liability and Ecological Damage in European Law 558 (Monika Hinteregger, editor, Cambridge University Press, 2008) (referring to STS 19.6.1980 [RJ 1980/2410]).

requirement, courts tend not to state that compensation for pure economic loss is not recoverable. Rather, they state that the claimant has not established damage or causation.<sup>1150</sup>

If, therefore, a person in, say, the fisheries or tourism industry, could show that economic losses suffered by him from pollution caused by an offshore oil and gas incident were “foreseeable” and could also meet strict requirements of Spanish law, that person could recover. Although such recovery is possible in principle, it is not necessarily probable.<sup>1151</sup>

Claims by businesses in the fisheries and tourism industries following the oil spill by the *Aegean Sea* off the coast of Galicia in 1992 indicate that such claims would not necessarily succeed. In those claims, which would have been brought under Spanish law implementing marine Conventions (and, thus, legislation that imposes liability for losses from pollution damage), the Court of Appeals held against the fishermen and other maritime workers, concluding that they had relied on speculation and had not sufficiently specified the negative effects of the spill and its economic consequences for them.<sup>1152</sup>

### 1.5.3 Liability for dangerous activities

The Civil Code imposes strict liability for specified dangerous activities, none of which apply to harm from pollution from offshore oil and gas operations.<sup>1153</sup>

### 1.5.4 Standard of liability (strict / fault-based)

Liability under the Civil Code is negligence / fault-based with an exception of strict liability for specified activities (see section 1.5.3 above).

### 1.5.5 Scope of liability (joint and several / several)

As a general rule, the Civil Code imposes several liability unless joint and several liability is expressly established.<sup>1154</sup>

Articles 1137 and 1138 of the Civil Code provide for joint and several liability as follows:

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<sup>1150</sup> See Miquel Martin-Casals and Albert Ruda, Spain 407, 417, in European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>1151</sup> See Vernon Valentine Palmer and Mauro Bussani, Pure Economic Loss: The Ways to Recovery, Netherlands Comparative Law Association, Electronic Journal of Comparative Law, vol. 11(3), 41 (December 2007); available at <http://www.ejcl.org/113/article113-9.pdf>

<sup>1152</sup> See Environmental Liability and Ecological Damage in European Law 516 (Monika Hinteregger, editor, Cambridge University Press, 2008).

<sup>1153</sup> The provisions are: article 1905 (dangerous animals); article 1906 (hunting); article 1907 (the collapse of a building); article 1908 (explosion of machine that have not been taken care of with due diligence, explosions of dangerous substances that have not been stored in a safe and suitable place; excessive fumes that are harmful to persons or properties, fallen trees on transit spaces except for falls resulting from *force majeure*, and emanations of drains or deposits of infectious materials which have been built without due precautions), article 1909 (construction defects); and article 1910 (things thrown or fallen from a house).

<sup>1154</sup> See Environmental Liability and Ecological Damage in European Law 410 (Monika Hinteregger, editor, Cambridge University Press, 2008).

“The coincidence of two or more creditors or two or more debtors in a single obligation shall not imply that each of them is entitled to request or that each of them must perform in full the things constituting the subject matter thereof. This shall only take place where the obligation expressly determines it, being created as a joint and several obligation.

Unless it should result otherwise from the text of the obligations mentioned in the preceding article, the credit or debit shall be presumed divided in as many equal shares as there are creditors or debtors, and they shall be deemed to be different credits or debits”.

In practice, case law in Spain imposes joint and several liability when more than one person has acted together and caused damage and the acts of each tortfeasor / wrongdoer cannot be separated.<sup>1155</sup> That is, Spanish courts may consider that there is insufficient evidence to permit them to identify each tortfeasor’s share of liability and, thus, hold that they are jointly and severally liable. This is particularly the case when there are concurrent causes of the same damage.<sup>1156</sup>

### 1.5.6 Rebuttable presumption (reversing burden of proof to defendant)

Spanish law does not establish a rebuttable presumption of liability that is relevant to compensation for traditional damage from pollution from offshore oil and gas operations.

### 1.5.7 Exceptions

Articles 1905 and 1908 of the Civil Code provide exceptions from liability for *force majeure*.

### 1.5.8 Defences

Article 1905 of the Civil Code provides for contributory negligence.

### 1.5.9 Remedies

The remedy for bodily injury and property damage under the Civil Code is compensatory damages.

As a general rule, Spanish law does not recognise punitive damages. In 2001, however, the Spanish Supreme Court recognised an American judgment on intellectual property law that included treble damages.<sup>1157</sup> The recognition of a foreign judgment that imposed punitive damages is obviously different from the imposition of punitive damages under Spanish law, however.

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<sup>1155</sup> See Alfonso Gutiérrez, Spain, 1, 12; available at <http://www.uria.com/documentos/publicaciones/3143/colaboraciones/948/documento/Spain-Enforcement.pdf?id=3271>

<sup>1156</sup> See Martin-Casals and Albert Ruda, Spain 407, 425, in in European Centre of Tort and Insurance Law, Research Unit for European Tort Law, Austrian Academy of Sciences, Liability and Compensation Schemes for Damage Resulting from the Presence of Genetically Modified Organisms in Non-GM Crops, Annex I: Country Reports (Bernhard A. Koch, editor, Contract 30-CE-0063869/00-28, April 2007); available from [http://ec.europa.eu/agriculture/analysis/external/liability\\_gmo/index\\_en.htm](http://ec.europa.eu/agriculture/analysis/external/liability_gmo/index_en.htm)

<sup>1157</sup> See John Y. Gotanda, Charting Developments Concerning Punitive Damages: Is the Tide Changing?, (2007) Columbia Journal of Transnational Law, vol. 45, 507, 521-22 (describing *Miller Import Corp. v. Alabastres Alfredo, S.L.*, STS, Nov. 13, 2001 (Exequátur No. 2039/1999)).

### 1.5.10 Limitations period(s)

Article 1968(2) of the Civil Code provides for a limitation period of one year for “obligations resulting from fault or negligence as provided in article 1,902, from the date on which the injured party became aware of them” (see section 1.5 above).

### 1.5.11 Right to claim contribution from other responsible persons

Spanish courts recognise a right of contribution against other tortfeasors by a tortfeasor who has paid more than its share of compensation.

## 1.6 Compensation system (claims within Target Country)

There is no compensation system in Spain for claims for harm from offshore oil and gas operations. Normal court procedures apply if a claim is not settled out of court.

## 1.7 Compensation system (claims concerning transboundary incidents)

There is no compensation system in Spain for claims for transboundary harm from offshore oil and gas operations.

## 1.8 Competent authority

The competent authority for licensing the exploration and production of oil and gas in Spain is the Ministry of Industry, Energy and Tourism.

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

An application for a mining concession must include an environmental impact study (Hydrocarbons Act, article 25(1)(b)).

## 1.10 Offences and sanctions

Title VI of the Hydrocarbons Act establishes offences and penalties. They include administrative, civil and criminal offences for breaching provisions of the Act. For example, the performance of activities regulated by the Hydrocarbons Act without an authorisation is considered to be a very serious breach (Hydrocarbons Act, article 109)).

Article 114(1) of the Hydrocarbons Act provides that:

- “(a) For very serious breaches: a fine of up to 30,000,000 euros.
- b) For serious breaches: a fine of up to 6,000,000 euros.
- c) For minor breaches: a fine of up to 600,000 euros”.

Article 113(2) provides that “[w]hen a quantifiable profit is obtained as a consequence of the breach, the fine may be up to double the profit obtained”. Article 113(3) provides that “[t]he penalty amount shall vary taking into account criteria of proportionality and the circumstances specified in the article above”.

Further, article 113(4) provides that “[t]he commission of a very serious breach may entail the cancellation or suspension of the administrative authorisation or the consequent temporary incapacitation for the performance of the activity for a maximum period of one year. The revoking or suspension of the authorisations shall always be decided by the authority responsible for granting them”.

Article 325 of the Criminal Code provides that:

“Whoever, breaking the laws or other provisions of a general nature that protect the environment, directly or indirectly causes or makes emissions, spillages, radiation, extractions or excavations, filling with earth, noises, vibrations, injections or deposits, in the atmosphere, the ground, the subsoil or the surface water, ground water or sea water, including the high seas, even those affecting cross border spaces, as well as the water catchment basins, that may seriously damage the balance of the natural systems shall be punished with a sentence of imprisonment from two to five years, a fine from eight to twenty-four months and with special barring from his profession or trade for a period from one to three years. Should there be risk of serious damage to the health of persons, the sentence of imprisonment shall be imposed in its upper half”.

### 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

The Hydrocarbons Act requires an applicant for a licence to carry out offshore activities to provide evidence of financial security for the works programme, including restoration obligations and other obligations arising from the research permits in addition to reflecting compliance with investment, taxation, and Social Security requirements (Hydrocarbons Act, article 21).

Article 9 of the Hydrocarbons Act states that:

“Prior to commencement of the hydrocarbon exploration, research and mining or storage work, a civil liability insurance policy must be procured in order to secure any possible damage or loss caused to people or property as a result of the activities to be performed, in accordance with applicable regulations, depending on the nature of such activities”.

Further, article 25(1)(d) of the Hydrocarbons Act states that, as part of an application for a mining concession, the applicant shall submit to the Ministry of Industry, Tourism and Trade a “[d]eposit slip accrediting the guarantee duly set up by the applicant with the Government Depository (*Caja General de Depósitos*)”.

Article 25 (2) states that:

“Following a report from the affected Autonomous Region, the Government shall authorise the granting of the hydrocarbon deposit or underground storage mining concession by means of Royal Decree. This Royal Decree shall set out the basic conditions for the proposed mining development, the civil liability insurance that must be taken out as a compulsory requirement by the holder of the concession and the economic provision for the decommissioning.

Whenever advisable on the grounds of general interest, the mining development plan may be modified by Royal Decree following a report from the Autonomous Region affected”.

In addition, in order to cover the remediation of potential damage to the environment, the constitution of a financial guarantee is mandatory, and may take three forms: a fund of the Technical Reserve (*Fondo de Reserva Técnica*), a financial statement or an environmental liability insurance policy.

#### **1.11.1 Persons required to have evidence of financial security**

The holder or operator of a research permit or mining concession is required to have evidence of financial security for the works programme (Hydrocarbons Act, article 21(4)). The applicant for a mining concession is required to have civil liability insurance to cover

#### **1.11.2 Time at which evidence of financial security is required**

The applicant for a research permit must provide evidence of a guarantee (Hydrocarbons Act, article 16(2)(d)).

#### **1.11.3 Scope (traditional damage / environmental damage / etc)**

The scope of the guarantee for the works programme includes financial security for the investment plan and restoration plan. Article 21(1) provides that:

“The guarantee required under article 16 shall be stipulated in line with the investment plan and the restoration plan submitted by the applicant and shall reflect compliance with investment, taxation, Social Security and restoration obligations, as well as any other obligations arising from the research permits”.

The scope of the civil liability insurance is “to secure any possible damage or loss caused to people or property as a result of the activities to be performed” (Hydrocarbons Act, article 9).

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The form of the financial security for the works programme is a guarantee.

The form of the financial security for possible traditional damage is civil liability insurance.

#### **1.11.5 Monetary limit(s)**

The Hydrocarbons Act does not specify the monetary limits for financial security.

#### **1.11.6 Timing of review(s) of adequacy of financial security by competent authority**

The Hydrocarbons Act requires the guarantee for the work programme to be regularly adjusted for new permits and concessions (Hydrocarbons Act, article 21(3)). If the guarantee is wholly or partially executed due to non-performance of investment, taxation, Social Security and restoration obligations, as well as obligations arising from the research programme, the Ministry may require the holder of the research permit or mining concession to replace it (Hydrocarbons Act, article 21(6)).

The Hydrocarbons Act does not specify the timing of review of the adequacy of the civil liability insurance.

## **1.12 Jurisdictional issues (if any)**

Article 30 of the Hydrocarbons Act provides that:

“The holders of exploration authorisations, research permits or mining concessions shall be subject to the jurisdiction of Spanish law and the Spanish courts of law for any questions that may arise in relation to them”.

The Civil Code would also need to apply to the continental shelf and the EEZ.

### 1.13 Key points

Spain has a long history of onshore and offshore oil and gas production. Some commercial reserves have been exhausted and prospects for the discovery of further reserves is considered unlikely. Current production of oil and gas is minimal compared to the use of oil and gas in Spain.

The Civil Code applies to claims for bodily injury and property damage from pollution from offshore oil and gas operations provided it applies to the continental shelf and the EEZ.

Spanish law does not specifically recognise pure economic loss. Under Spanish law, the damage suffered by a claimant must be certain and adequately proven and the causal link between the tortfeasor's / wrongdoer's conduct and damage to the claimant must be established. As a result of the requirements, courts tend not to state that compensation for pure economic loss is not recoverable. Rather, they state that the claimant has not established damage or causation. If, therefore, a person in, say, the fisheries or tourism industry, could show that economic losses suffered by him from pollution caused by an offshore oil and gas incident were “foreseeable” and could also meet other requirements of Spanish tort law, that person could recover. Although such recovery is possible in principle, it is not necessarily probable.

The Ministry of Industry, Energy and Tourism requires financial security in the form of a guarantee for the works programme, to include investment, taxation, Social Security and restoration obligations, as well as obligations arising from the research programme. The Ministry also requires civil liability insurance to cover possible damage or loss caused to people or property as a result of the hydrocarbon activities.

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# United Kingdom

## 1.1 Introduction

Offshore oil and gas operations in the UK are mature. They began in 1964, when the UK Government issued the first licences to extract oil and gas from the UK continental shelf. Since that time, over £500 billion (EUR 614.1 billion) has been invested in exploration drilling and field development on the UK continental shelf.<sup>1158</sup> By 2012, over 42 billion barrels of oil equivalent (boe) had been recovered from it. Although production peaked in 1999, an estimated 12 to 24 boe is still available for recovery.

Approximately 450,000 people are directly or indirectly involved in the UK offshore oil and gas industry, including 36,000 people employed by operators, of which 12,000 work offshore. Of the 200,000 people employed in the supply chain, 45,000 work offshore. During 2011 and 2012, the Department of Energy and Climate Change (DECC) approved 45 projects with a capital expenditure of £22 billion (EUR 27.02 billion).<sup>1159</sup>

In 2012, offshore oil produced 67 per cent of the UK's demand for oil and 53 per cent of its demand for gas. It has been estimated that by 2030, 70 per cent of the UK's primary energy supplies will continue to be provided by offshore oil and gas.<sup>1160</sup> In 2014, DECC announced the 28<sup>th</sup> Offshore Oil and Gas Licensing Round, in which it invited applications for seaward production licenses for designated acreage on the UK continental shelf.<sup>1161</sup>

## 1.2 Form of legislation (Civil Code, statute, other)

Offshore oil and gas activities in the UK are subject to primary legislation in the form of statutes, secondary legislation in the form of regulations, and guidance. Claims for bodily injury, property damage and economic loss may be brought under the common law as well as a voluntary pollution compensation scheme established by OPOL.<sup>1162</sup>

## 1.3 Rights to, and ownership of, offshore oil and gas

Ownership of oil and gas in the territorial sea around the UK (as well as inland areas of the UK) is vested in the Crown,<sup>1163</sup> which also owns over half of the foreshore of the UK and the seabed in the

<sup>1158</sup> Sir Ian Wood, UKCS Maximising Recovery Review: Final Report 5 (24 February 2014); available from <http://www.woodreview.co.uk/>

<sup>1159</sup> UK Oil & Gas, Economic Report 2013, 8-9; available at <http://www.oilandgasuk.co.uk/2013-economic-report.cfm>

<sup>1160</sup> Sir Ian Wood, UKCS Maximising Recovery Review: Final Report 5 (24 February 2014); available from <http://www.woodreview.co.uk/>

<sup>1161</sup> See United Kingdom Government notice concerning Directive 94/22/EC of the European Parliament and of the Council on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons; Announcement of the United Kingdom 28<sup>th</sup> Offshore Oil and Gas Licensing Round. OJ C 6/4 (10 January 2014).

<sup>1162</sup> This summary refers to OPOL as it applies in the UK. For a more detailed summary, see section 4.1.2 in the main report.

<sup>1163</sup> Petroleum Act 1934, s 1(1). The Petroleum Act 1934 and other statutes and secondary UK legislation, as well as many cases, are set out in the British and Irish Legal Information Institute (BAILII) Databases; available at <http://www.bailii.org/databases.html#uk> Amendments to the original legislation are set out separately.

territorial sea.<sup>1164</sup> The UK continental shelf, where most offshore oil and gas operations are carried out, is not owned by the UK Government but is under its control for the exploration and exploitation of oil and gas.

Oil and gas exploration is also taking place in the Falkland Islands, which is an overseas territory of the UK<sup>1165</sup> and an OCT of the EU.<sup>1166</sup> This study does not discuss oil and gas operations in the Falkland Islands other than to note that the Falkland Islands Department of Mineral Resources has issued exploration licences and production licences for offshore areas,<sup>1167</sup> and that a longstanding dispute exists between the UK and Argentina concerning sovereignty over the continental shelf and EEZ off the Falkland Islands.<sup>1168</sup>

#### 1.4 Specific legislation for offshore oil and gas operations

The exploration and/or exploitation of offshore oil and gas in the UK may not be carried out unless the Secretary of State has issued the requisite licence.

There is a substantial amount of UK legislation governing offshore oil and gas operations, measures to avoid harm from them, and financial responsibility requirements in respect of them.<sup>1169</sup> As a risk spreading device, it is common for exploration for and development of petroleum deposits to be undertaken by several oil companies working together in a joint venture. The vertical relationship between these companies and the state is governed by the petroleum licence. The horizontal relationship between the companies is governed by the JOA. The JOA will appoint one of the parties as the operator, an appointment which the State has the power to approve or veto. Licence obligations are generally imposed jointly and severally upon all licensees, while the principal obligations under regulatory law are imposed upon the operator, who also carries the primary responsibility for responding to pollution by offshore oil and gas operations. If the operator does not respond appropriately, the Secretary of State is empowered to intervene.<sup>1170</sup>

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<sup>1164</sup> See *Shetland Salmon Farmers Association v Crown Estate Commissioners*, 1991 S.L.T. 166 (Inner House) (Scotland); available from <http://www.bailii.org/databases.html#uk>; see generally Greg Gordon, Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 1: Liability in the law of tort/delict and under the petroleum licence (2013) *Environmental Law and Management*, vol. 25, 3, 4.

<sup>1165</sup> See Falkland Islands Government, Self Governance; available at <http://www.falklands.gov.fk/self-governance/>

<sup>1166</sup> See Council Decision 2013/755/EU on the association of the overseas countries and territories with the European Union ( 'Overseas Association Decision' ), Annex I, OJ L 344/1, L 344/31 (19 December 2013).

<sup>1167</sup> See Falkland Islands Department of Mineral Resources; available at <http://www.fig.gov.fk/minerals/> Legislation and other details of the licensing regime for exploration licences is available from Falkland Islands Department of Mineral Resources, Exploration Licences; available from <http://www.fig.gov.fk/minerals/index.php/licencing/exploration-licences> Legislation and other details of the licensing regime for production licences is available from Falkland Islands Department of Mineral Resources, Production Licences; available from <http://www.fig.gov.fk/minerals/index.php/licencing/production-licences>

<sup>1168</sup> See Durham University International Boundaries Research Unit, Argentina and UK claims to maritime jurisdiction in the South Atlantic and Southern Oceans; available at [https://www.dur.ac.uk/ibru/resources/south\\_atlantic/](https://www.dur.ac.uk/ibru/resources/south_atlantic/)

<sup>1169</sup> See, e.g., Department of Energy & Climate Change, Oil and gas licensing; available from <https://www.gov.uk/browse/business/licences/oil-and-gas-licensing> UK legislation and case law is available from BAILII Databases (British and Irish Legal Information Institute); available at <http://www.bailii.org/databases.html#ie>

<sup>1170</sup> The representative of the Secretary of State (known as SOSREP) has the power to issue directions to the operator, among other things, "to take, or refrain from taking, any action of any kind whatsoever". Offshore Installations (Emergency Pollution Control) Regulations 2002/1861, regulation 3. The SOSREP's role is to monitor

Various types of offshore production licences may be granted, each for a specific area and a fixed term. Three types of licences may be granted; traditional, frontier and promote licences. A traditional licence grants the right to “search and bore for and get” petroleum in a specified area on the UK continental shelf. A frontier licence grants the right to carry out an initial screening phase at a substantial discount from the normal lease fee at specified difficult / unexplored areas of the UK continental shelf, and then relinquish three quarters of the acreage. A promote licence grants the right to assess and promote the prospectivity of the licenced acreage for an initial two year period at a cost of 10 per cent of a traditional licence, subject to meeting specified criteria before being allowed to drill any wells and also subject to agreeing to complete a specified work programme.<sup>1171</sup>

All venture parties to a petroleum licence are jointly and severally liable for obligations arising under it. Contractual liability between the co-venture parties varies depending on the agreements between them. For example, liability may be apportioned by a party’s interests and may be several (that is, not joint or collective). There may also be indemnity provisions.<sup>1172</sup> The most common current standard model form JOA for the UK continental shelf is the Oil & Gas UK Standard Form Joint Operating Agreement, dated January 2009.<sup>1173</sup> This agreement is new; many JOAs have been ongoing for years or decades, with older JOAs following either the British National Oil Corporation (BNOC) JOA or the styles developed by the major companies.

The contractual allocation of liability is, of course, without prejudice to the provisions in the licence; it is a background re-allocation of liability that does not preclude the State from seeking to enforce the licence obligations jointly and severally against the licensees.

Contractors, including the drilling contractor, are also involved; they provide a range of services to operators. The services typically have a duration between five and 100 days, with a range of values between US\$ 500,000 (EUR 367,107) and US\$ 10 million (EUR 7,342,140).<sup>1174</sup> Service agreements are usually based on model form agreements including the suite of standards developed by UK LOGIC.<sup>1175</sup>

UK legislation includes a duty to have evidence of financial security for, among other things, compensation for harm caused by accidental pollution. The form of financial security that is recommended, and likely to be approved by the competent authority, DECC, is described in guidance. Further, the UK Government requires persons who carry out offshore oil and gas activities in the UK to be members of OPOL, membership of which requires the provision of evidence of financial security for oil pollution damage.

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response measures taken by the Maritime and Coastguard Agency and the operator and to take any necessary high level decisions concerning them if the public interest of the UK is at issue. See National contingency plan for marine pollution from shipping and offshore installations s 5.4, 11 (2014); see also Congress 4. The plan was subject to public consultation from 27 January 2014 to 23 April 2014.

<sup>1171</sup> See Department for Energy & Climate Change, Licensing Terms and Conditions; available at <https://www.og.decc.gov.uk/UKpromote/regulatory/LicensingTermsAndConditions.pdf>

<sup>1172</sup> See Peter Cameron, Liability for Catastrophic Risk in the Oil and Gas Industry (2012), *International Energy Law Review* 215; Stephen Shergold, Danielle Beggs & Sam Boileau, United Kingdom: Incidents on offshore facilities – who is responsible for environmental damage? (2010) *International Energy Law Review* 178, 178-79.

<sup>1173</sup> See Shane Bosna, The Regulation of Marine Pollution Arising from Offshore Oil and Gas Facilities – An Evaluation of the Adequacy of Current Regulatory Regimes and the Responsibility of States to Implement a New Liability Regime, (2012) *Australian & New Zealand Maritime Law Journal*, vol. 26, 89, 102.

<sup>1174</sup> See Peter Cameron, Liability for Catastrophic Risk in the Oil and Gas Industry (2012) *International Energy Law Review* 207, 207.

<sup>1175</sup> *Ibid*, 208. The contracts are available at LOGIC’s website: <http://www.logic-oil.com/standard-contracts>

In June 2014, the UK Government announced that DECC would be replaced, in respect of oil and gas licensing, by a new competent authority to be called the Oil and Gas Authority. It is expected that the new Authority will be fully operational as an independent body by early 2016.<sup>1176</sup>

There is also a separate body of law governing health and safety, which applies to offshore oil and gas operations as well as some of that law applying to onshore operations. The new competent authority responsible for implementing the safety requirements of the OSD is the Offshore Safety Directive Regulator.<sup>1177</sup>

There is no UK legislation that establishes a fund to compensate persons who suffer bodily injury, property damage or economic loss from pollution from offshore oil and gas operations. As noted above, there is a compensation scheme under OPOL that covers some, but not all, claims that may be made in the event of an oil spill.

## 1.5 Liability for bodily injury, property damage and economic loss

Liability for bodily injury and property damage exists under the law of the various jurisdictions of the UK; liability for pure economic loss does not exist. OPOL may provide compensation for some pure economic loss claims but this is not clear.<sup>1178</sup>

Each licence must contain an indemnity to the State for any actions, costs, demands, etc. from third-party claims.<sup>1179</sup>

### 1.5.1 Bodily injury and property damage

Four causes of action are applicable to claims for bodily injury and property damage from offshore oil and gas activities. They are negligence, public nuisance, private nuisance, and the rule in *Rylands v Fletcher*.<sup>1180</sup> All four causes of action, known as tort actions, may apply in England, Wales and Northern Ireland. In Scotland, where the term delict, rather than tort, is used, the causes of action are limited to negligence and private nuisance; public nuisance and the rule in *Rylands v Fletcher* do not exist under Scots law.

A cause of action in trespass may, but is unlikely to, apply. Trespass to land under the law in the UK is an unjustifiable direct and immediate interference with the possession of land. Claims for property damage from marine pollution, however, tend to arise from the indirect, rather than the direct, entry of pollutants onto land. For example, the House of Lords (now UK Supreme Court) held that trespass may not have occurred when oil from a tanker had been discharged into the sea because it was not

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<sup>1176</sup> See Adam Brown, A strategy for the UK North Sea oil and gas industry: work in progress, *The Lawyer* (16 October 2014); available at <http://www.thelawyer.com/briefings/a-strategy-for-the-uk-north-sea-oil-and-gas-industry-work-in-progress/3027264.article>; Funding announced for new oil and gas industry regulator, *BBC News* (16 July 2014); available at <http://www.bbc.co.uk/news/uk-scotland-scotland-business-28329472>

<sup>1177</sup> Health and Safety Executive, OSD – The Competent Authority; available at <http://www.hse.gov.uk/osdr/authority.htm>

<sup>1178</sup> See comment by OPOL, section 4.1.2.

<sup>1179</sup> Petroleum Licensing (Production) (Seaward Areas) Regulations 2008/225, regulation 38.

<sup>1180</sup> The rule in *Rylands v Fletcher* is discussed below under section 1.5.3 Liability for dangerous activities.

certain whether the oil would be washed ashore or, if so, when or under what conditions it would do so.<sup>1181</sup>

### ➤ Negligence

Under the law of negligence, a person who owes another person a legal duty to exercise care is negligent if that person breaches the duty and the breach causes the other person damage that is a foreseeable consequence of the breach. Negligence actions may be brought for both bodily injury and property damage.

### ➤ Nuisance

A public nuisance is an unlawful act or the failure to discharge a legal duty to act when the effect of the act or failure materially affects the reasonable convenience and comfort of a class of people or their health, lives or property. A person who brings a claim in public nuisance must show that he has suffered harm that has not been suffered by the general public.

A private nuisance is an unlawful interference with a person's use or enjoyment of land or some right over or in connection with the land. A nuisance may take one of three forms: (1) encroachment on a neighbour's land; (2) direct physical injury to a neighbour's land; and (3) interference with a neighbour's use and enjoyment of his land. An example of the second category, which is the only category likely to be applicable to claims concerning pollution from offshore oil and gas operations, is the liability of a dredging company for the deposit of large quantities of silt from its dredging activities on land located next to an estuary.<sup>1182</sup>

A claimant must have the exclusive right to possession of the land at issue in order to bring an action in private nuisance. Claims are thus available in nuisance only for property damage, not bodily injury.

Liability for nuisance is subject to reasonableness. For example, the owner and operator of a tanker was not liable in nuisance to the owner of land damaged by oil when the oil was discharged to save the lives of seamen on board the tanker.<sup>1183</sup>

## 1.5.2 Economic loss

There is in general no liability under the law of negligence in the UK for pure economic loss.<sup>1184</sup> In order for economic loss to be recoverable, there must be physical damage (either bodily injury<sup>1185</sup> or

<sup>1181</sup> See *Esso Petroleum Company v Southport Corporation* [1965] AC 218, [1956] 2 WLR 81 (House of Lords); available from <http://www.bailii.org/databases.html#uk>

<sup>1182</sup> *Jan de Nul (UK) Ltd. v Axa Royale Belge S.A.* [2002] 1 All ER (Comm) 767 (Court of Appeal); available from <http://www.bailii.org/databases.html#uk>

<sup>1183</sup> *Esso Petroleum Company Ltd v Southport Corporation* [1956] AC 218, [1956] 2 WLR 81 (House of Lords) ; available from <http://www.bailii.org/databases.html#uk>

<sup>1184</sup> *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557 (Court of Appeal) ; available from <http://www.bailii.org/databases.html#uk> For pure economic loss to be actionable in negligence, there must be a relationship of extremely close proximity between the claimant and defendant. See, e.g. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 3 WLR 101 (House of Lords); available from <http://www.bailii.org/databases.html#uk>; *Merritt v Henderson Syndicates Ltd* [1995] 2 AC 145, [1994] 3 WLR 761 (House of Lords); available from <http://www.bailii.org/databases.html#uk> The factual circumstances of an oil spill will not satisfy this criterion.

<sup>1185</sup> See *Grieves v FT Everard & Sons Ltd* [2007] UKHL 39, [2008] 1 AC 281 (House of Lords) (claim for pleural plaques is not claim for actionable injury); available from <http://www.bailii.org/databases.html#uk>

property damage<sup>1186</sup>) or a special relationship between the claimant and defendant such as a fiduciary relationship.

Thus, unless pollution from offshore oil and gas operations causes damage to a claimant's property or the claimant suffers a personal injury which prevents him from working for a period of time (which may occur as a result of e.g. ingesting oil), the claimant cannot recover economic loss. A fisherman who could not catch fish due to the negligence of a person causing the suspension of a fishery for a period of time would, thus, not have a cause of action under the law of the UK because the fisherman does not own the fish before he has caught them and brought them into his possession.<sup>1187</sup>

Economic loss is potentially recoverable if pollution damages fish or equipment in a fish farm. A court may, however, consider that loss from, say, the inability to sell undamaged fish was not consequential damage related to the property damage (see below this section concerning denial of a claim for economic loss under the Marine Shipping Act 1995).

There is liability for pure economic loss in nuisance in that, for example, a nuisance may arise from odour or noise (which is not property damage). There does not, however, appear to be liability for pure economic loss in nuisance in the context of claims from offshore oil and gas operations. For example, a fisherman would not have a claim in nuisance for damage to fish killed by an oil spill, or due to a ban on fishing due to an oil spill, because he does not own the fish. Similarly, a person in the tourism industry would not have a claim in nuisance for loss of profits due to coastal pollution from offshore oil and gas operations.

The Merchant Shipping Act 1995, which implements the Civil Liability Convention and various other marine conventions, authorises a claim for pure economic loss. That is, the 1995 Act authorises a claim for "pollution damage", which is defined in pertinent part as "damage caused ... by contamination resulting from a discharge or escape of oil from the ship".<sup>1188</sup> The 1995 Act does not, however, apply to pollution from offshore oil and gas activities; it is limited to oil spills from a ship, as specified in the Act.

A case concerning the oil spill from the *Braer* off the Shetland Islands in 1993 illustrates the scope of a claim for pure economic loss under the 1995 Act. Lord McCluskey discussed the meaning of "pollution damage" and the need for loss to be direct as follows:

"The most obvious case [of 'pollution damage'] is the fisherman whose livelihood is earned fishing in particular waters, in respect of which he may indeed have a licence to fish or some form of permission or quota allowance; he then loses that livelihood because those waters are polluted by oil escaping from a ship and he can no longer take fish there. He does not own the waters; he does not own the fish in the sea; his vessel may be based and berthed far distant from the scene of the oil spill, and his business may be registered elsewhere .... For the fisherman ... the pollution of the

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<sup>1186</sup> See *Candlewood Navigation Corp v Mitsui Osk Lines (The Mineral Transporter and The Ibaraki Maru)* [1986] AC 1, [1985] 3 WLR 381 (Privy Council); available from <http://www.bailii.org/databases.html#uk>

<sup>1187</sup> *Leigh & Silavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785, 809, [1986] 2 WLR 902 (House of Lords) (England) ("there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred"); available from <http://www.bailii.org/databases.html#uk>

<sup>1188</sup> Merchant Shipping Act 1995, s 181(1); see *Alegrete Shipping Company, Inc v International Oil Pollution Compensation Fund (The Sea Empress)* [2003] EWCA Civ 65 (Court of Appeal); available from <http://www.bailii.org/databases.html#uk>

waters in which he regularly fishes does no physical harm to his person or his property; the oil does not touch him or anything belonging to him; there is no contamination of him or of his vessel or equipment. Nevertheless ... the loss of his livelihood is properly described as damage that is caused directly and immediately by contamination resulting from the discharge or escape of oil from the ship. The contamination does not set in train a chain of events that eventually results in his suffering loss or damage. On the contrary, the contamination is both the immediate, direct and, in such a case, the only cause of his loss. The contamination occurs at the very point at which he carries on his economic activity, fishing. But, because he does not own the waters in which he fishes or the fish which swim there, that loss is properly described as pure loss; because what he loses is not the fish or the waters but the intangible prospect of making a net profit by selling any fish that he might otherwise have caught in the waters had they not been contaminated. That loss of prospective profit is pure economic loss. In a figurative sense what he has in the waters is a direct economic interest. That interest is directly affected by the contamination".<sup>1189</sup>

The court concluded that a fish farmer in the Shetland Islands who could not sell farmed salmon due to the lack of customers following the oil spill was not entitled to compensation because the loss was indirect, rather than direct.<sup>1190</sup>

### 1.5.3 Liability for dangerous activities

The rule in *Rylands v Fletcher*, which is a sub-set of nuisance, imposes strict liability on a person who controls land for the natural consequences of the escape of a substance that it brought onto, or that accumulated on, the land, provided that the use of the land is "non-natural".

The rule is probably not relevant to claims for property damage from offshore oil and gas activities in the UK because, among other things, the rule does not exist under the law of Scotland<sup>1191</sup> off which most of the UK offshore oil and gas is located. In addition, it is unlikely to apply to oil leaks from a wellhead because the operator would not have brought the oil onto, or kept the oil on, "land" controlled by it.<sup>1192</sup>

### 1.5.4 Standard of liability (strict / fault-based)

The standard of liability for negligence is (obviously) fault-based.

The standard of liability for public nuisance is not strict liability because the defendant must have carried out an unlawful act or have failed to discharge a legal duty. The level of fault, however, varies and is not necessarily negligence.

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<sup>1189</sup> *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] SLT 1208, 1221 (Inner House) (Scotland); available from <http://www.bailii.org/databases.html#uk>

<sup>1190</sup> *Landcatch Ltd v International Oil Pollution Compensation Fund* [1999] SLT 1208 (Inner House) (Scotland); available from <http://www.bailii.org/databases.html#uk>

<sup>1191</sup> See *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council* (1985) SC (HL) 17 (House of Lords); available from <http://www.bailii.org/databases.html#uk>

<sup>1192</sup> See Greg Gordon, *Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 1: Liability in the law of tort/delict and under the petroleum licence* (2013) *Environmental Law and Management*, vol. 25, 3, 6-7.

Some form of fault is required for private nuisance because the defendant must have unlawfully interfered with a person's use or enjoyment of land; negligence is not necessarily required.<sup>1193</sup>

The standard of liability for the rule in *Rylands v Fletcher* is strict liability.

#### **1.5.5 Scope of liability (joint and several / several)**

Joint and several liability is the applicable scope of liability for a tort / delict if there is indivisible harm and the same evidence would support an action against each person causing, or materially contributing to, the harm. If, however, each person commits an independent tort and the torts combine to cause the same harm, several rather than joint and several liability applies. For example, two ships that negligently collided with a third ship were not jointly and severally liable when each ship independently committed a separate tort.<sup>1194</sup>

#### **1.5.6 Rebuttable presumption (reversing burden of proof to defendant)**

There is no rebuttable presumption in the common law in the UK for a claim for bodily injury or property damage.

#### **1.5.7 Exceptions**

There are no exceptions to the common law in the UK for a claim for bodily injury or property damage.

#### **1.5.8 Defences**

There are no defences to a common law tort for bodily injury in the UK, although a defendant may allege that the claimant cannot recover in part or in whole due to contributory negligence. In addition, a person cannot rely upon their own illegal act to bring an action in tort.

There are defences to a private nuisance action for the existence of an easement by prescription and statutory authority for the nuisance, neither of which would apply to claims concerning offshore oil and gas activities.

It is not a defence to a nuisance action that the defendant has a permit to carry out the activity causing the nuisance.<sup>1195</sup> Thus, a permit to explore for, or exploit, offshore oil and gas is not a defence to a nuisance action. A permit defence would not apply to a negligence action because the defendant would necessarily have to have been negligent and, thus, out of compliance with the permit.

#### **1.5.9 Remedies**

The remedy for a claim in negligence for bodily injury or property damage from pollution from offshore oil and gas activities (like any other activity) is compensatory damages.

The remedy for a claim in nuisance, in addition to compensatory damages for a past nuisance, is an injunction (in Scots terminology, this is known as an interdict) or, in some cases, compensatory

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<sup>1193</sup> See *ibid*, 3, 7.

<sup>1194</sup> *The Kursk* [1924] P. 140, (1924)18 LI. L. Rep. 228 (Court of Appeal); available from <http://www.bailii.org/databases.html#uk>

<sup>1195</sup> *Barr v Biffa Waste Services* [2012] EWCA Civ 312 (Court of Appeal); available from <http://www.bailii.org/databases.html#uk>



damages.<sup>1196</sup> A claim in nuisance concerning pollution from offshore oil and gas activities would almost inevitably be for a past nuisance; thus the appropriate remedy would be compensatory damages.

Punitive (exemplary) damages are not available in Scots law. In English law, they are not available for claims in negligence or public nuisance. They are available for claims in private nuisance under English law but it is extremely unlikely that a court would award them.

Aggravated damages are available under English law if a defendant compounds or aggravates the harm caused by it to a claimant by high-handed, insulting or oppressive conduct. Aggravated damages are, however, rarely awarded. They are not available in Scots law.

#### 1.5.10 Limitations period(s)

The following limitations periods apply to torts / delicts.

The Limitation Act 1980,<sup>1197</sup> which applies in England and Wales, establishes a six-year limitation period for a tort claim. The limitation period begins to run from the date of the act or omission that caused the damage. If, however, the damage is physical damage, the limitation period runs from the date of the damage, not the date of the act or omission that caused the damage.

If the damage is latent and is not discovered until after the six-year period, the Latent Damage Act 1986<sup>1198</sup> provides that a claimant has three years from the date of their knowledge of the damage or the date at which they ought reasonably to have known of the damage to bring a claim. There is a long-stop of 15 years from the date of the defendant's act or omission.

The Prescription and Limitation (Scotland) Act 1973, as amended,<sup>1199</sup> provides a prescription period of five years for reparation claims not involving personal injury. The period begins to run from the date of the loss or damage. A separate limitation period exists for personal injury actions. This provides that the claimant has three years from the date of their knowledge of the damage or the date at which "it would have been reasonably practicable for him in all the circumstances to become, aware of [specified] facts". The court has discretion to extend the three year limitation period (but not the five year prescription period) where the interests of justice require it.

The Limitation (Northern Ireland) Order 1989<sup>1200</sup> provides a limitation period of six years for a tort action. Section 11 provides for three years for a claim from latent damage from the time the cause of action accrued or the claimant "had both the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action". Section 12 provides a long-stop of 15 years for a tort action.

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<sup>1196</sup> *Coventry v Lawrence* [2014] UKSC 13 (UK Supreme Court); available from <http://www.bailii.org/databases.html#uk>

<sup>1197</sup> See Limitation Act 1980, s 2.

<sup>1198</sup> See Latent Damage Act 1986.

<sup>1199</sup> For an up to date text of the Act, together with a very full commentary, see D Johnston, *Prescription and Limitation* (2<sup>nd</sup> Ed, W Green, Edinburgh, 2012).

<sup>1200</sup> See Limitation (Northern Ireland) Order 1989/1339, s 6(1).

### 1.5.11 Right to claim contribution from other responsible persons

The Civil Liability (Contribution) Act 1978,<sup>1201</sup> which applies to England, Wales and Northern Ireland, provides that a person who is “liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)”. The term “in respect of the same damage” refers to harm and not compensatory damages. Liability includes liability in tort.<sup>1202</sup> The amount of contribution recoverable is that which the court considers to be “just and equitable having regard to the extent of that person’s responsibility for the damage in question”.<sup>1203</sup>

There is also a right to contribution under Scots law. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 provides that: “Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just”.<sup>1204</sup>

## 1.6 Compensation system (claims within Target Country)

There is no UK statutory compensation system for claims for bodily injury, property damage or economic loss from a spill of oil or any other substance from offshore oil and gas operations.<sup>1205</sup> There is, however, the non-statutory OPOL scheme. The following briefly describes OPOL as it relates to claims for compensation for bodily injury, property damage and economic loss in the UK.<sup>1206</sup> Section 1.9 describes financial responsibility requirements related to OPOL. For a further description of OPOL, see section 4.1.2 of the final report.

OPOL does not supersede the common law in the UK; it provides an alternative means of obtaining compensation following an oil spill from offshore oil and gas operations. As the Liability Agreement under OPOL specifically states, it “does not restrict a claimant’s right to seek redress in the courts for reimbursement of a particular claim or claims”.<sup>1207</sup> OPOL guarantees compensation and other payments covered by it up to US\$ 250 million (EUR 182.57 million ) in case the operator cannot pay or otherwise defaults; it does not limit the liability of its members. Importantly, however, members of OPOL agree to contribute proportionately up to a maximum of US\$ 250 million towards any deficit

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<sup>1201</sup> See Civil Liability (Contribution) Act 1978, s 1(1).

<sup>1202</sup> Ibid, s 6(1).

<sup>1203</sup> Ibid, s 2(1).

<sup>1204</sup> The Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s 3.

<sup>1205</sup> The UK is a party to the IMO Conventions. There is, thus, a compensation system for spills of oil and other hazardous substances from vessels. Due to oil spills, including the *Braer* and the *Sea Empress*, the UK also has a history of implementing the compensation systems.

<sup>1206</sup> See Metro Report, 176-182, s 4.2 for a more detailed description of OPOL; available at [http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028\\_b3-978-1\\_final\\_report.pdf](http://ec.europa.eu/dgs/energy/tenders/doc/2013/20131028_b3-978-1_final_report.pdf) See ibid, 88-89, s 3.5.2.2.2 for a description of the relationship between offshore oil and gas activities in the UK and OPOL.

<sup>1207</sup> OPOL, The Offshore Pollution Liability Association Limited, Guidelines for Claimants; available at <http://www.opol.org.uk/guidelines.htm> A document entitled Guidelines for Claimants specifically states that “OPOL does not take away a claimant’s right to seek redress through the Courts for losses which exceed the maximum recoverable under the [OPOL] Agreement, or those beyond the scope of the Agreement”. Ibid.

caused by a party to OPOL being unable to pay claims.<sup>1208</sup> The OPOL risk pooling mechanism is for insolvency risk only; that is, the compensation limits are for the amount that other companies would contribute on top of all available compensation from the liable party in the first instance after the liable party becomes insolvent.

An important potential difference between the common law and OPOL is that, whereas the common law does not authorise a claim for pure economic loss relevant to claims from offshore oil and gas operations, OPOL provides a strict liability compensation scheme that may include claims for at least some pure economic loss.<sup>1209</sup> OPOL does not, in any event, include all claims against an operator or other person responsible for pollution from offshore oil and gas operations. Among other things, OPOL is limited to oil spills; it does not include pollution from other chemicals, including dispersants.

## 1.7 Compensation system (claims concerning transboundary incidents)

As indicated above, there is no statutory compensation system for claims for bodily injury, property damage or economic loss either within the UK or concerning transboundary incidents. The OPOL compensation scheme could, however, apply to transboundary incidents. That scheme is described in section 1.5.2 above and section 4.1.2 of the final report.

## 1.8 Competent authority

The competent authority for licensing UK offshore oil and gas operations, including financial security requirements, is DECC.

The Energy Division of the Health & Safety Executive is the competent authority for health and safety issues concerning offshore oil and gas operations.<sup>1210</sup> Oil and Gas UK has published “Guidance on the Conduct and Management of Operational Risk Assessment for UKCS Offshore Oil and Gas Operations”,<sup>1211</sup> which sets out health and safety measures, in particular, the use of operational risk assessment procedures.

If pollution from offshore oil and gas operations occurs, the lead competent authority is the Maritime and Coastguard Agency, in particular, its Counter Pollution and Response Branch, which responds pursuant to the National Contingency Plan. DECC’s Offshore Inspectorate Unit also has investigatory powers.

Also in the event of a spill, the representative of the Secretary of State (known as SOSREP) has the power to issue directions to the operator, among other things, “to take, or refrain from taking, any action of any kind whatsoever”.<sup>1212</sup> The SOSREP’s role is to monitor response measures taken by the

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<sup>1208</sup> Articles of Association of the Offshore Pollution Liability Association Limited, article 7; available at <http://www.opol.org.uk/articles.htm> The proportion to be paid by each member is calculated by the specified number of units in respect of offshore facilities; see Information for Prospective Members; available at: [www.opol.org.uk/downloads/opol-memberinfo-jan14.pdf](http://www.opol.org.uk/downloads/opol-memberinfo-jan14.pdf)

<sup>1209</sup> See comment by OPOL, section 4.1.2.

<sup>1210</sup> See Stephen Tromans and Josephine Norris, What if Deepwater Horizon occurred west of Shetland [2010] *International Energy Law Review*, vol. 7, 8, 9.

<sup>1211</sup> Oil and Gas UK, *Guidance on the Conduct and Management of Operational Risk Assessment for UKCS Offshore Oil and Gas Operations* (Issue 1, January 2012).

<sup>1212</sup> *Offshore Installations (Emergency Pollution Control) Regulations 2002/1861*, regulation 3; see Hugh Shaw, *Dealing with maritime emergencies in the United Kingdom: the role of the SOSREP* 176-182, in *Shipping, Law*

Maritime and Coastguard Agency and the operator and to take any necessary high level decisions concerning them if the public interest of the UK is at issue.<sup>1213</sup>

The Marine Management Organisation has a support role for measures to respond to oil pollution incidents in English and Welsh waters, including approval of the use of dispersants.<sup>1214</sup> Marine Scotland and the Northern Ireland Environment Agency have equivalent roles for those jurisdictions.

Local authorities do not have specific duties to issue plans for, or to clean up, coastal areas from marine pollution. They do, however, have a general duty to assess, plan and advise the public on the risk of a potential emergency,<sup>1215</sup> as well as a general power to incur expenses in response to emergencies or disasters.<sup>1216</sup>

In February 2014, a report by Sir Ian Wood into the future of the UK offshore oil and gas industry, recommended the creation of “a new independent Regulator, responsible for operational regulation of the UKCS, focusing on supervising the licensing process and maximising economic recovery of the UK’s oil and gas reserves in the short, medium and long terms”.<sup>1217</sup>

## 1.9 Information taken into account relating to the licensed area concerning (risk, hazards, costs of degradation of the marine environment, etc)

The UK has prepared strategic environmental assessments (SEAs) under the SEA Directive<sup>1218</sup> for the entire UK continental shelf. There are eight SEAs in total,<sup>1219</sup> which include, among other things, discussions of measures to prevent, reduce or offset significant adverse effects on the environment.

The Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010, which transposed the Marine Strategy Framework Directive,<sup>1220</sup> include provisions to ensure that the marine environment is not degraded.

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and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea - Legal Implications and Liabilities (Lawtext Publishing, editors, Richard Caddell and Rhidian Thomas, 2013).

<sup>1213</sup> See National contingency plan for marine pollution from shipping and offshore installations s 5.4, 11 (2014); see also Congress 4. The plan was subject to public consultation from 27 January 2014 to 23 April 2014. See also Peter Cameron, Liability for Catastrophic Risk in the Oil and Gas Industry (2012), International Energy Law Review 215; Stephen Shergold, Danielle Beggs & Sam Boileau, United Kingdom: Incidents on offshore facilities – who is responsible for environmental damage? (2010) International Energy Law Review 178, 178-79.

<sup>1214</sup> See Marine Management Organisation, Marine Pollution Contingency Plan (27 February 2014); available at [http://webcache.googleusercontent.com/search?q=cache:YUYJyFDInIMJ:marinemangement.org.uk/protecting/pollution/documents/contingency\\_plan\\_external.pdf+&cd=4&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:YUYJyFDInIMJ:marinemangement.org.uk/protecting/pollution/documents/contingency_plan_external.pdf+&cd=4&hl=en&ct=clnk&gl=uk)

<sup>1215</sup> Civil Contingencies Act 2004, s 2; see also Civil Contingencies Act 2004 (Contingency Planning) (Scotland) Regulations 2005/494 (Scottish Statutory Instrument).

<sup>1216</sup> Local Government Act 1972, s 138 (England and Wales); Local Government (Scotland) Act 1973, sn 84; see National contingency plan for marine pollution from shipping and offshore installations s 2.10-.12, 6 (2014).

<sup>1217</sup> Sir Ian Wood, UKCS Maximising Recovery Review: Final Report 6, Recommendation 2 (24 February 2014); available from <http://www.woodreview.co.uk/>

<sup>1218</sup> Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment. OJ L 197/30 (21 July 2001).

<sup>1219</sup> See British Geological Survey, About Strategic Environmental Assessment (SEA) data; available at <http://webcache.googleusercontent.com/search?q=cache:ENyYlo2Zjd4J:www.bgs.ac.uk/data/sea/+&cd=1&hl=en&ct=clnk&gl=uk>

## 1.10 Offences and sanctions

Various statutory provisions establish offences and sanctions for pollution from offshore oil and gas activities. Some are specific to offshore oil and gas activities; others are general.

### 1.10.1 Specific provisions

It is a criminal offence to “release any oil; or ... allow such a release to continue”.<sup>1221</sup> The word “release” is defined “in relation to oil” as “the emission ... of the oil from an offshore installation into the relevant area”. The “relevant area” is defined as

“that area (together with places above and below it) comprising— (a) those parts of the sea adjacent to England from the low water mark to the landward baseline of the United Kingdom territorial sea; (b) the United Kingdom territorial sea apart from those areas comprised in Scottish controlled waters and Welsh controlled waters; and (c) those areas of sea in any area for the time being designated under ... the Continental Shelf Act 1964”.<sup>1222</sup>

The offence thus applies to the UK continental shelf as well as the territorial sea adjacent to England. The sanction for the offence at Crown Court is an unlimited fine.<sup>1223</sup>

It is a defence to show that the release could not reasonably have been prevented or that it was due to an act carried out as an emergency to secure a person’s safety.<sup>1224</sup> For example, the operator of an offshore installation was found not guilty of discharging oil in breach of its permit when the operator had checked the relevant equipment and had the requisite maintenance procedures to deal with the small quantity of oil that was released. The Aberdeen Sheriff Court concluded that the discharge or release of the oil could not reasonably have been prevented.<sup>1225</sup>

It is a criminal offence to fail to comply with the terms and conditions of a permit for offshore petroleum activities.<sup>1226</sup> Other offences concerning permitting include the failure to comply with an enforcement or prohibition notice.<sup>1227</sup>

In addition, it is a criminal offence for an operator of an offshore installation or an oil handling facility (or a harbour authority), without reasonable cause, to fail to submit, or to fail to re-submit, an oil pollution emergency plan (OPEP) in compliance with the Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998, to fail to maintain an oil

<sup>1220</sup> Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy.

<sup>1221</sup> Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005/2055, regulation 3A (unofficial consolidated version available at [http://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62694/oppo-consolidated.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62694/oppo-consolidated.pdf) )

<sup>1222</sup> Ibid, regulation 2.

<sup>1223</sup> Ibid, regulation 16(5).

<sup>1224</sup> Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005/2055, regulation 16(2).

<sup>1225</sup> See Greg Gordon, Oil, water and law don’t mix: environmental liability for offshore oil and gas operations in the UK; Part 2: Regulatory law, the Environmental Liability Directive and OPOL (2013) Environmental Law and Management , vol. 25, 121, 124 (describing the unreported case).

<sup>1226</sup> Offshore Petroleum Activities (Oil Pollution Prevention and Control) Regulations 2005/2055, regulation 3(1).

<sup>1227</sup> Ibid, regulation 16(1)(b).

pollution plan, or to fail to implement an OPEP.<sup>1228</sup> The fine on indictment in Crown Court is unlimited. (See section 1.11 below for a discussion of OPEPs and their relationship to mandatory financial security.)

### 1.10.2 General provisions

Various offences for water pollution apply to the territorial sea but not the UK continental shelf. Due to the location of most offshore oil and gas facilities in the UK continental shelf, these offences are not discussed other than to note that relevant legislation includes the Environmental Permitting (England and Wales) Regulations 2010/675, the Water Resources Act 1991, the Marine (Scotland) Act 2010, and the Marine and Coastal Access Act 2009.

Public nuisance is a crime (as well as a civil cause of action) in England, Wales and Northern Ireland but not Scotland. It does not apply when a specific offence applies.<sup>1229</sup>

Various health and safety laws apply to offshore oil and gas operations, as they apply to any other occupational operation. For example, it is a criminal offence for an employer to fail to carry out operations “in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety”.<sup>1230</sup> It is also a criminal offence for an operator (employer) to fail “to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees”.<sup>1231</sup> Sanctions include unlimited fines and imprisonment.

It is also a criminal offence for a company to cause a person’s death.<sup>1232</sup> Individuals involved in the death, including directors, officers and employees in their personal capacity, may be prosecuted for common law manslaughter.

Directors and officers and senior employees are subject to criminal liability under many UK environmental and health and safety laws if the company is convicted and an offence was carried out with their consent, connivance or neglect.

## 1.11 Mandatory financial security for offshore oil and gas operations (in the framework of the Target Country’s hydrocarbons licensing regime)

There is a statutory regime for mandatory financial security for offshore oil and gas activities in the UK and a “voluntary” regime under OPOL.

Licences to explore and exploit offshore oil and gas in the UK incorporate model clauses that establish the terms and conditions for activities carried out pursuant to them. The model clauses are set out in regulations.<sup>1233</sup>

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<sup>1228</sup> Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998/1056, as amended, regulation 7.

<sup>1229</sup> *R v Rimmington* [2005] UKHL 63, [2006] 1 AC 459 (House of Lords); available from <http://www.bailii.org/databases.html#uk>

<sup>1230</sup> Health and Safety at Work etc. Act 1974, s 3(1).

<sup>1231</sup> *Ibid*, s 2(1).

<sup>1232</sup> Corporate Manslaughter and Corporate Homicide Act 2007, s 1.

<sup>1233</sup> Petroleum Licensing (Production) (Seaward Areas) Regulations 2008/225, regulation 2(1), Schedule.

Model clause 23(9) relates to financial security. It provides that:

“The Licensee shall comply with any reasonable instructions from time to time given by the Minister with a view to ensuring that funds are available to discharge any liability for damage attributable to the release or escape of Petroleum in the course of activities connected with the exercise of rights granted by this licence”.<sup>1234</sup>

The term “petroleum” is defined as “any mineral oil or related hydrocarbon and natural gas existing in its natural condition in strata but does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation”.<sup>1235</sup>

Prior to Deepwater Horizon, a person who carried out offshore oil and gas activities was required to have financial security only as specified under OPOL. Following Deepwater Horizon, the UK Government considered that the limit of liability of US\$ 250 million (EUR 182.57 million) under OPOL, even though it had been increased from US\$120 million (EUR 88.070 million), may not be sufficient to pay all claims arising from an offshore oil spill, in particular because financial security under OPOL does not cover the cost of drilling a relief well.<sup>1236</sup> DECC, therefore, issued a short guidance note (DECC Guidance) concerning the financial security that must be demonstrated prior to consent being granted for exploration and appraisal wells on the UK continental shelf.<sup>1237</sup> The financial security requirements do not apply only to harm caused by pollution. Other requirements include financial security for plugging and abandoning a well.<sup>1238</sup> The relevant provisions of the DECC Guidance, which has been effective since 1 January 2013,<sup>1239</sup> are described below.

An additional financial security requirement that applies to an employer anywhere in the UK, including offshore installations and associated structures, is employers’ liability insurance from an authorised insurer to cover claims by employees for injury or disease arising out of employment in the amount of at least £5 million (EUR 5.988 million). In practice, most employers purchase employers’ liability

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<sup>1234</sup> Ibid, Schedule 1, para 23(9).

<sup>1235</sup> Ibid, regulation 1(1).

<sup>1236</sup> See Greg Gordon, Oil, water and law don’t mix: environmental liability for offshore oil and gas operations in the UK; Part 1: Liability in the law of tort/delict and under the petroleum licence (2013) Environmental Law and Management, vol. 25, 3, 11.

<sup>1237</sup> Department of Energy and Climate Change (DECC), Guidance Note to UK Offshore Oil and Gas Operators on the Demonstration of Financial Responsibility before Consent may be Granted for Exploration & Appraisal Wells on the UKCS; available at [http://webcache.googleusercontent.com/search?q=cache:A01N4drQ468J:https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/68885/7265--financial-responsibility-guidelines.doc+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:A01N4drQ468J:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/68885/7265--financial-responsibility-guidelines.doc+&cd=1&hl=en&ct=clnk&gl=uk) The DECC Guidance is four pages in length, one of which contains only address details.

<sup>1238</sup> Petroleum Act 1998, s 38, as amended by Energy Act 2008, s 73.

<sup>1239</sup> See letter from Wendy J Kennedy, Head, Offshore Environment and Decommissioning DECC, dated 12 December 2012 (“Guidance Note takes effect from the 1 January 2013 and as such, from this date all Exploration and Appraisal Well Oil Pollution Emergency Plans submitted to the department for approval must be accompanied by evidence of the relevant financial responsibility”); available from <https://www.gov.uk/oil-and-gas-legislation-on-emissions-and-releases>

insurance in the amount of £10 million (EUR 12,575,300). The failure to have employers' liability insurance is a criminal offence subject to a fine of up to £2,500 (EUR 3,143.82) per day.<sup>1240</sup>

### 1.11.1 Persons required to have evidence of financial security

The persons required to have evidence of financial security are the “operator” of an “oil handling facility” and an “offshore installation” (as well as the harbour authority of a specified harbour).<sup>1241</sup> In addition, each company in a group (co-venture) that is granted a petroleum licence must provide evidence of access to sufficient funds to meet field development plan costs.<sup>1242</sup>

An “oil handling facility” is defined in pertinent part, as “a facility which presents a risk of an oil pollution incident and includes, inter alia, an oil terminal, pipeline and any other facility handling oil”.<sup>1243</sup> An “offshore installation” is defined as “any fixed or floating offshore installation or structure engaged in gas or oil exploration or production activities, or loading or unloading of oil”.<sup>1244</sup> The word “oil” is defined as “petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products”.<sup>1245</sup>

The “operator” in respect of “an oil handling facility [is] a person having, for the time being, the management of such facility in the United Kingdom, and in relation to an offshore installation, includes any person having the management of the installation”.<sup>1246</sup>

### 1.11.2 Time at which evidence of financial security is required

Evidence of financial security must be shown when the operator or co-venturer of an oil handling facility or an offshore installation submits an OPEP to DECC for approval<sup>1247</sup> unless another time has been agreed with DECC.

The DECC Guidance states that:

“For an OPEP to be credible and for DECC to have sufficient assurance that the OPEP will be implemented when required, DECC requires operators to provide sufficient evidence that the risks of the operation have been appropriately estimated

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<sup>1240</sup> Employers' Liability (Compulsory Insurance) Act 1969 (England, Wales and Scotland); Employer's Liability (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972. There are certain exemptions to the requirement to have employers' liability insurance, none of which apply to offshore oil and gas operations.

<sup>1241</sup> Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998/1056, as amended, regulation 4(1).

<sup>1242</sup> See DECC, UK Petroleum Licensing: Financial Guidance, s 39; available at [http://webcache.googleusercontent.com/search?q=cache:QCy3r\\_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/15172/4229-guidance-financial.pdf+&cd=2&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:QCy3r_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15172/4229-guidance-financial.pdf+&cd=2&hl=en&ct=clnk&gl=uk)

<sup>1243</sup> Merchant Shipping (Oil Pollution Preparedness, Response and Co-operation Convention) Regulations 1998/1056, as amended, regulation 4(1).

<sup>1244</sup> Ibid.

<sup>1245</sup> Ibid, regulation 2.

<sup>1246</sup> Ibid, regulation 4(1).

<sup>1247</sup> Ibid, regulation 4. An operator must review the OPEP within five years of its submission and re-submit it. The operator must also re-submit the plan if “any major change occurs which affects or could affect the validity or effectiveness of [the] plan to a material extent”. Ibid, regulation 4(5).



and that the financial mechanisms are in place to meet those risks, should they materialise”.

### 1.11.3 Scope (traditional damage / environmental damage / etc)

The DECC Guidance provides “general guidance to operators on what they need to demonstrate and how they do so in order to comply with [requirements] to provide and implement an OPEP”. It further states that:

“[t]he level of financial responsibility that companies need to demonstrate for any particular well should be calculated by establishing the combined cost of well control and cost of financial remediation and compensation from pollution”.

Although the DECC Guidance thus refers specifically to claims for “compensation”, the regulations concerning OPEPs do not specify any measures that should be carried out to compensate persons who suffer harm from pollution. There is, thus, no link between the amount of financial responsibility that is required for compensation and measures to pay it.<sup>1248</sup>

The DECC Guidance Notes on Oil Pollution Emergency Plan Requirements focus, instead, on procedures that must be included in an OPEP to enable an effective and efficient response to an oil spill, and the preparation and submission of an OPEP.<sup>1249</sup> The guidance notes refer to socio-economic impacts as follows:

“Any significant potential socio-economic impacts that could have a bearing on the response strategy should be summarised in the OPEP. For example, in certain areas, it may [be] important to ensure that fishermen and/or fish farmers are regularly advised of the location and direction of movement of a spill; or it may be important to avoid using dispersants in areas where there would be a possibility of dispersed oil contaminating harvested or farmed shellfish stocks; or it may be necessary to take specific measures to prevent oil coming ashore in areas with a high amenity value. It is not necessary to try to quantify the economic impact, but any significant potential impacts should be identified and clearly linked to the response strategy”.<sup>1250</sup>

As discussed above, any measures carried out by fishermen and fish farmers are not covered by OPOL because only public authorities are entitled to compensation for “remedial measures”. Further OPOL does not provide compensation for harm from dispersants or any substances other than oil. Still further the common law does not provide compensatory damages for pure economic loss, which may potentially be covered by OPOL. There is, thus, a mismatch between the guidance notes and compensation payable for harm from offshore oil and gas operations.

The DECC Guidance further states that the provision of financial security:

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<sup>1248</sup> See Greg Gordon, Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 2: Regulatory law, the Environmental Liability Directive and OPOL (2013) Environmental Law and Management, vol. 25, 121, 122.

<sup>1249</sup> DECC, Guidance Notes to Operators of UK Offshore Oil and Gas Installations (including pipelines) on Oil Pollution Emergency Plan Requirements (July 2012); available at [http://webcache.googleusercontent.com/search?q=cache:YMJwJUq1VeAJ:https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/68974/opecp-guidance.docx+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:YMJwJUq1VeAJ:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/68974/opecp-guidance.docx+&cd=1&hl=en&ct=clnk&gl=uk)

<sup>1250</sup> Ibid, 18, s 5.7.

“does not limit in any way the extent of a licensee’s obligations under a petroleum licence nor an operator’s obligations in relation to an OPEP, including ensuring sufficient funds are available to discharge any liability for damage attributable to an escape of petroleum in the course of activities they undertake. Ultimately, persons liable for pollution damage may have to pay costs and damages to others who are affected. There is no upper limit on such payments”.

There, thus, does not have to be any calculation of the amount of financial security necessary to pay compensation claims or any details concerning their payment in an OPEP. More crucially, as discussed above, a substantial number of claims from pollution would not be compensated.

#### **1.11.4 Financial security mechanisms (insurance / bonds / bank guarantees / corporate net worth / etc)**

The DECC Guidance states that evidence of financial responsibility may be provided by:

- “reliance on credit/financial strength rating of the operator or co-venturer;
- insurance;
- parent company guarantee/affiliate undertaking; and
- any combination of the above”.

The DECC Guidance provides further details of the financial responsibility mechanisms, noting that any documentation that does not meet the specified criteria will subject the process of approving financial responsibility to examination and scrutiny and may delay approval in the consenting process.

DECC has published financial guidance on financial viability (a company’s ability to remain solvent) and financial capacity (a company’s ability to meet specific costs). DECC may apply both criteria or only one of them.<sup>1251</sup> DECC has also published notes on the financial check that it carries out on applications for a licence.<sup>1252</sup>

The DECC Guidance refers to the “Guidelines to Assist Licensees in Demonstrating Financial Responsibility to DECC for the Consent of Exploration and Appraisal Wells” prepared by Oil & Gas UK (OGUK Guidelines). In doing so, it states that although “[t]he OGUK Guidelines are not DECC guidance ... DECC intends to give considerable weight in each case to an operator who can show that the guidelines have been met”. The OGUK Guidelines set out the methodology to estimate costs for well control and clean-up and compensation.

The UK Government has stated that it “expects all offshore operators to be members of [OPOL] and to register each of its separate operatorships”.<sup>1253</sup> The requirement is thus limited to operators; it does

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<sup>1251</sup> Department of Energy & Climate Change – UK Petroleum Licensing: Financial Guidance; available at [http://webcache.googleusercontent.com/search?q=cache:QCy3r\\_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/15172/4229-guidance-financial.pdf+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:QCy3r_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15172/4229-guidance-financial.pdf+&cd=1&hl=en&ct=clnk&gl=uk)

<sup>1252</sup> Financial Assessment; available at [http://webcache.googleusercontent.com/search?q=cache:4iqHBVw2fa8J:https://www.og.decc.gov.uk/upstream/licensing/103\\_1/guidance\\_finance.doc+&cd=1&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:4iqHBVw2fa8J:https://www.og.decc.gov.uk/upstream/licensing/103_1/guidance_finance.doc+&cd=1&hl=en&ct=clnk&gl=uk)

<sup>1253</sup> See <https://www.gov.uk/oil-and-gas-petroleum-licensing-guidance>

not extend to other licensees. Such persons would, however, be contractually liable for a portion of the costs of an oil spill by virtue of JOAs.<sup>1254</sup>

OPOL's financial security mechanisms are broadly equivalent to DECC's requirements (see main report, section 4.1.2).

#### 1.11.5 Monetary limit(s)

There is no specified statutory monetary limit for the amount of financial security for which an operator of an offshore oil and gas activity must have evidence. As indicated above, an applicant for a petroleum licence must be a member of OPOL, which requires insurance up to US\$ 250 million (EUR 182.57 million) or the operator's, or its guarantor's, rating at a specified level by a specified credit rating agency.

#### 1.11.6 Timing of review(s) of adequacy of financial security by competent authority

DECC checks financial security at each licence stage. The criteria may differ depending on the licence and licence stage. For example, the financial security criteria at the licence award or licence assignment stage are less onerous than those at the well consent stage.<sup>1255</sup>

### 1.12 Jurisdictional issues (if any)

UK civil law, including the law of tort / delict,<sup>1256</sup> applies to oil and gas operations in the territorial sea and the UK continental shelf.<sup>1257</sup> More specifically, the law of England and Wales applies to the determination of issues that arise from acts that take place in the English (and Welsh) area of the UK continental shelf, the law of Scotland applies to those that take place in the Scottish area, and the law of Northern Ireland applies to those that take place in the Northern Irish area.<sup>1258</sup>

UK criminal law applies to oil and gas operations in the territorial sea and the UK continental shelf<sup>1259</sup> provided that the act or omission occurs on an installation or in any waters within 500 metres of an installation.<sup>1260</sup>

### 1.13 Key points

The UK has a well-developed licensing system for offshore oil and gas operations. UK law does not, however, establish procedures for handling claims for compensation for bodily injury or property

<sup>1254</sup> See Greg Gordon, Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 2: Regulatory law, the Environmental Liability Directive and OPOL (2013) Environmental Law and Management, vol. 25, 121, 126.

<sup>1255</sup> DECC, UK Petroleum Licensing: Financial Guidance, s 32; available at [http://webcache.googleusercontent.com/search?q=cache:QCy3r\\_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/15172/4229-guidance-financial.pdf+&cd=2&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:QCy3r_yLtaEJ:https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15172/4229-guidance-financial.pdf+&cd=2&hl=en&ct=clnk&gl=uk)

<sup>1256</sup> See Greg Gordon, Oil, water and law don't mix: environmental liability for offshore oil and gas operations in the UK; Part 1: Liability in the law of tort/delict and under the petroleum licence (2013) Environmental Law and Management, vol. 25, 3, 4-5.

<sup>1257</sup> Petroleum Act 1998, s 11.

<sup>1258</sup> Civil Jurisdiction (Offshore Activities) Order 1987/2197, s 2.

<sup>1259</sup> Petroleum Act 1998, s 10.

<sup>1260</sup> Criminal Jurisdiction (Offshore Activities) Order 1987/2198.

damage for such operations. If a spill of oil or chemicals from offshore oil and gas operations was to occur, the common law of negligence and nuisance would apply. The applicable law does not, however, provide for pure economic loss. Claims by fishermen, persons in the tourism industry, and other persons who suffered economic loss would not, therefore, be covered unless such persons had suffered damage to property in which they had a legal interest, or bodily injury.

Even if a person suffered property damage or bodily injury from pollution from offshore oil and gas operations, economic (consequential) loss does not appear to be covered. For example, if a fish farmer suffered property damage due to oil pollution to some, but not all, of the farmed fish, the loss of income from the inability to sell unharmed fish seems highly unlikely to be covered because it is not consequential damage. There is thus a substantial gap in the common law for claims that are likely to arise from pollution from offshore oil and gas operations.

The gap may be covered in part by OPOL, which provides for compensation for “pollution damage” and “remedial measures”, with claims for costs of the latter being limited to public authorities. Compensation for “pollution damage” is, however, limited to damage from “oil”; it does not include damage from other chemicals or dispersants. Further, it is unclear whether OPOL provides cover for pure economic loss (see section 4.1.2).

Still further, only “direct” damage is covered. OPOL does not cover “indirect” damage. Thus, whilst claims for direct loss by the tourism industry and fishermen may potentially be covered; claims by, say, ferries and holiday cruises, industries supporting commercial fisheries, and other businesses whose income declines as a result of pollution from offshore oil and gas operations do not appear to be covered. Further, claims must be brought within one year of the incident causing the damage, which may limit them further (see section 4.1.2 of the final report).

OPOL does not establish a procedure for handling claims; the responsible operator determines whether to pay a claim. OPOL may intend a dispute concerning payment to be subject to arbitration but this is unclear. In particular, the OPOL agreement concerning arbitration does not bind a claimant. A claimant may, therefore, be required to agree to arbitrate in the event of a dispute as a condition of submitting a claim, but this is unclear.

Following the Deepwater Horizon incident, DECC requires evidence of financial security, apparently in addition to that which OPOL requires of its members. There is thus a minimum of US\$ 250 million (EUR 182.57 million) for pollution damage and remedial measures in addition to financial security for a relief well and other measures. The mechanisms for financial security under OPOL are specified credit ratings by specified credit rating agencies, a parent company (or other company) guarantee, insurance of a minimum of US\$ 250 million, or a combination of the mechanisms. Financial security mechanisms that may be approved by DECC include such mechanisms.

In respect of offences and penalties, the law in the UK establishes various offences concerning offshore oil and gas operations; some are specific whilst others are general. Virtually all, if not all, are criminal offences.



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