PUBLIC CONSULTATION

Improving offshore safety in Europe

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1. *Which changes, if any, would you recommend to the authorisation conditions for offshore prospection or exploration or production activities? Please specify which authorisations your recommendations concern (all authorisations, those in a specific country, those authorising only a certain stage(s) such as prospection, exploration or production etc).*

Independent environmental regulators

The regulator(s) responsible for approving compliance with environmental and safety standards must be separate from the government authority responsible for allocating authorisations to exploit hydrocarbon resources, where that authority is responsible for energy development and security of supply.

Compliance with and integration of environmental requirements

Authorisation granted by a Member State for any intervention in the seabed including both exploration/prospecting for and production of hydrocarbons must, as a matter of EU law, be conditional on operators demonstrating full and on-going compliance with environmental and safety standards.

Although Article 194(2) TFEU as reflected in Directive 94/22/EC, preserves Member States' right to determine the conditions for exploiting their energy resources, EU environmental policy goals and legal requirements must still be complied with. Offshore drilling must be conditional on compliance with high standards of environmental protection. The Treaties enshrine the objective of a high level of protection for the environment, and the integration of environmental protection requirements into other areas of Union law and policy (Article 3(3) TEU, and Articles 11 and 191 TFEU). Union policy on energy must have regard to the functioning of the internal market, to environmental protection and to solidarity between Member States (Article 194(1) TFEU). Member States have an obligation to facilitate the achievement of the Union's tasks in a spirit of sincere cooperation (Article 4(3) TEU).

2. *European law foresees that the competent national authorities shall ensure that authorisations are granted on the basis of selection criteria which*

consider, among other things, the financial and technical capability of the companies wishing to carry out offshore oil or gas operations.

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

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

Authorisation for offshore drilling must be dependent on compliance with very stringent environmental and technical standards, because of the potentially catastrophic nature of consequences if an offshore oil spill does occur. Due to the fact that drilling is moving into ever more risky locations, the likelihood of accidents will increase, and the consequences become more difficult to deal with. Therefore the precautionary principle and the principle of prevention as stated in Article 191(2) must apply.

Technical capability should include demonstration of application of best available techniques and that a thorough risk assessment process as discussed at response 5 below has been followed.

Financial capability should include the ability to meet losses caused in case of an accident up to an appropriate level underpinned by financial security instruments as discussed at response 10 below.

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

EU legislation should set out procedures for ensuring high environmental and safety standards are met, and linked to authorisation to drill. Development and coordination at EU level of best available techniques, risk assessment procedures and emergency response planning, as further detailed under response 5 and 7 below, should apply.

Neighbouring Member States should already be consulted on proposed offshore drilling plans as a result of EU and international law requirements for transboundary environmental impact assessments. However, this could be strengthened by introducing an express requirement in the authorisation procedure for the relevant regulator in the neighbouring Member State to be provided with information and specific consultation opportunities on the technical detail of the proposals, including an obligation for comments to be effectively taken into account by the authorising Member State.

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

See response 5 below.

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

EU legislation on safety and environmental standards for offshore drilling

The current regulatory framework for the offshore oil industry is inconsistent and incomplete across the territory of the EU (for further information on the gaps in the regulatory picture, see http://www.clientearth.org/international-and-eu-regulation-of-offshore-drilling-analysis-and-proposals-for-reform). To remedy this, new legislation should be introduced at EU level requiring:

- examination and approval by independent regulators of the design, construction, and planned operation of offshore drilling installations;
- application of best available techniques for pollution prevention and accident avoidance;
- robust procedures for emergency response planning;
- high standards of practice for on-going compliance monitoring and inspections;
- systematic information exchange and consultation between regulators coordinated by the EU;
- EU monitoring of Member State implementation of standards;
- publication of key information to the general public;
- strict liability of offshore operators for damage caused by a spill, and financial security requirements.

The new legislation should expressly require Member States to ensure that offshore installations in their jurisdiction are operated with all appropriate preventive measures taken, and should require a precautionary approach to be applied by national regulators in discharging all their functions (in compliance with Article 191(2) TFEU).

Although legislation on certain of the aspects listed in the previous paragraph currently exists, to varying degrees, at either national or international level, it is necessary to supplement it with EU legislation for the following reasons:

(a) so that consistency can be achieved across the Union, levelling up standards, filling gaps and making compliance easier to monitor and pursue. It is crucial to ensure high level practice across the territory, not only at national or even regional level. It is also crucial to ensure that regulators in different jurisdictions have similar powers and a consistent framework in which to act. The EU is best placed to ensure these objectives are achieved.

(b) so that additional enforcement possibilities exist if Member States fail adequately to secure the compliance of operators on their territory with high standards (not possible for the elements of the framework currently covered primarily under international law).

The best examples of existing national regulation in these areas can be drawn on in the design of EU minimum standards. In addition, EU frameworks such as the Seveso Directives (Directive 96/82/EC and proposals for its revision) and the Industrial Emissions Directive (**IED**, Directive 2010/75/EU) contain elements which are not currently, but should be, applied in parallel to the offshore drilling industry.

There will be overlaps and interaction between assessment of risks in installation design, the development of best available techniques, and best practice in planning emergency response measures. As such, it makes sense to focus relevant procedures for all these aspects into one piece of legislation which can be tailored to the specific needs of the industry, and for the same regulatory process which approves well design and operational safety parameters to identify best practice and approve accident response measures.

A "goal setting" regulatory regime relying on individual analysis and risk assessment of every installation both before drilling begins and throughout the installation's life, depends heavily on the existence of robust, expert, independent regulators. Regulators must have adequate powers and resources. To ensure that Member States allocate adequate resources to recruiting, training and equipping regulators a binding EU level framework will assist.

Examination and approval of technical design

EU legislation should contain requirements for national regulators to be provided with, review, question and ultimately approve information on the technical design, construction and operational parameters of an installation before an authorisation to drill is given (or becomes valid). It should contain procedural standards for ensuring identification and mitigation of environmental risks – for example, specifying minimum categories of technical information to be provided to regulators, and minimum time periods for review and response.

The well design examination and "safety case" risk assessment and mitigation system in the UK is well developed, and could form the basis for an EU law. However it contains some weaknesses - for instance, too little emphasis on identification of environmental (as opposed to human safety) risks. Stricter rules on the independence of experts responsible for approving well design are also required – ideally this function would be provided by an independent regulator. The Commission is best placed to isolate the strongest practices from existing Member State regimes and incorporate these into a set of minimum EU wide procedural standards.

Best available techniques

EU law should expressly require that best available techniques (**BAT**) are applied in the technical design and operation of offshore installations. BAT should be understood (as in the IED) as referring to the most effective and advanced stage of technological development, but with reference to both minimisation of pollution, and minimisation of accident risk. The process of examining and approving installation design and operational plans should require identification of BAT and demonstration by the operator that it will be implemented.

Emergency response planning

The Seveso II Directive (and current proposals for Seveso III) offer a useful model for emergency response planning.[1] Relevant aspects from Seveso which should be incorporated into the new legislation include: requirements for emergency plans, designed with public participation, and post accident reporting requirements both to national regulators and to an EU agency (either the Commission or the European Maritime Safety Agency (see responses 7 and 16 below).

On-going compliance monitoring

There must be minimum requirements for national regulators to audit and inspect procedures and equipment at appropriate intervals to ensure that compliance is maintained. Member States must require operators to supply regular safety reports, covering all relevant aspects of their operations including BAT application, risk monitoring, review of emergency response plans, reports on accidents or breaches which have occurred, and steps taken in response to each.

The potential role of the EU in reviewing the compliance monitoring practices of national regulators and providing support to Member States should be exploited (see response to question 7 below).

Information exchange and consultation

EU law must contain rules requiring systematic dissemination of information across the EU. What sort of information should be exchanged, and how this should be done including the question of a role for the EU is considered further at responses 7, 11, and 13 below.

Transparency

New rules on proactive provision of information to the public are required (discussed at response 11 below).

Liability

New rules ensuring liability is clear and compensation is guaranteed are required (discussed at question 10 below).

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

Consistency of standards should in itself assist with a better level of compliance because operators will no longer apply different standards and be required to follow

[1] As a second option, it would be possible to extend the Seveso and IED frameworks to offshore drilling. However in our view the preferable option is for the Commission to "cherry-pick" the helpful aspects from these and combine with Member State best practice in requiring state of the art technical standards, and risk assessment procedures, specific to the offshore industry. One regulatory process should help identify trends as well as streamlining administrative burden.

different methodologies in different jurisdictions. In addition, the key measures to ensure better compliance will be -

- strong national regulators
- increased role for EU oversight and coordination
- improved transparency rules
- clear liability and compensation rules.

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

Role for the EU in monitoring and supporting national regulators

National regulators have expert knowledge of operating conditions in their regions and are available to take primary responsibility for supervision of the industry and verification of compliance. As noted at response 5 above, EU law should set out clear requirements for the procedures which must be followed by the regulators, so Member States can ensure they have the necessary powers and resources to do this job. However, the force of regulation should also be improved by requiring oversight and support, by the EU, of the regulatory procedures employed at Member State level.

The involvement of the EU should include -

(1) creation of comprehensive systems of **information exchange** between the EU and Member States. This should include information on BAT - development of reference documents and standards should be coordinated by the EU with the involvement of stakeholders in a similar method to that employed under Article 13 IED. It should also include sharing of emergency plans, reports on accidents and steps taken in response. It should also cover reports on compliance/breaches by operators – as regulators across the EU, who may be dealing with the same company operating in different jurisdictions, need to be aware of compliance issues elsewhere.

(2) a periodic **audit** of Member State regulators by the EU, in order to verify that the procedures contained in EU environmental and safety legislation are being properly applied. The existence of EU legislation setting out consistent procedural standards would provide the frame of reference. This would introduce a "safety net" level of cross-checking and allow any deficiencies in the approach of Member State regulators, such as a lack of independence, or lack of resources, to come to light. Crucially the existence of EU legislation would allow enforcement action by the EU if Member State regulatory regimes were failing.

(3) an EU level **transparency** platform for provision of key information to the public should be further explored, though this could alternatively be dealt with at national level (see response 11 below).

The European Maritime Safety Agency performs similar audit functions to those described at 2) above with respect to the application by Member States of shipping

safety rules. It also has a clear role to play in emergency response (see response 16 below). Therefore, its mandate could be extended, with appropriate resources, to performance of similar functions in respect of offshore installations. Alternatively, the Commission could provide the above roles, in coordination with EMSA. The Commission should consider the best division of functions.

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

Yes, the Environmental Liability Directive should be extended to cover all marine waters under Member State jurisdiction. Currently, the ELD is not capable of dealing adequately with the consequences of a marine pollution incident, and this is a fundamental gap in its coverage which should be rectified urgently.

However, extension of the ELD to marine waters would not present a complete solution to all of the liability and compensation issues which may be raised by an offshore oil spill. Certain gaps in coverage would remain:

Additional gaps in coverage under the ELD

- The Environmental Liability Directive only applies where damage is severe enough to count as "significant" under the definitions in the Directive. So far, practical experience of determining when damage is significant such as to trigger ELD liability has been limited, so some doubt remains as to whether the Directive would be responsive in all necessary circumstances (please see http://www.clientearth.org/international-and-eu-regulation-of-offshore-drilling-analysis-and-proposals-for-reform for further details).
- The ELD does not currently contain any financial security mechanisms.
- The ELD sets up a strict liability mechanism for environmental damage, but "traditional" property, personal injury and economic losses would usually be dealt with under Member State laws on a negligence basis. A comprehensive system for offshore oil spill liability should deal with this type of loss on a strict liability basis also.

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

See responses to 8 above and 10 below.

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

While the gap in coverage for marine waters under Member State jurisdiction under the ELD should be remedied, further measures in respect of offshore oil liability are needed in addition.

New EU legislation is required for the offshore oil industry requiring as follows:

Liability

- unlimited strict liability for all environmental damage flowing from an oil pollution incident from an offshore installation. The law must be drafted so the definition of environmental damage is broad, and capable of capturing both immediate damage caused by spilled oil, plus the severe environmental damage which may flow from actions consequential upon the spill of oil such as use of dispersants, boom deployment or controlled burns during clean up operations.

- payment or reimbursement by operators of remedial measures, as required under the ELD.

Financial security

- Member States to ensure that financial security is provided by operators as a condition of receiving an authorisation to drill.

- financial security would, practically, have to be provided up to a ceiling. Member States should be required to set and keep under review the financial security ceiling on the basis of modelling by independent experts, in a transparent process.

- discretion may be left to Member States in selecting how the financial security is provided. They can therefore choose to operate an insurance requirement, a levy creating a compensation fund, or, membership of an industry mutual coverage system like the North Sea Offshore Pollution Liability Association Ltd (**OPOL**) (whereby, operators agree to cover each others' liabilities in the event of a default).

- If the latter option (i.e. an OPOL type scheme) is chosen, it must be the case that the terms of the industry agreement are such that the full liability under the legislation, up to the financial security ceiling, is met. There must be no restrictive terms such that only "direct" damage and "reasonable" remediation measures are to be covered.

- Consideration should be given to the establishment of a state backed, EU wide compensation fund to be readily deployable in the event that financial security ceilings are breached and the responsible company is unable to meet its liabilities.

Offshore oil drilling, in particular as it moves into "frontier" territories, is an extreme example of a high risk, high reward industry and therefore a very robust liability is appropriate.

Such a liability and compensation framework tailored specifically to the offshore drilling industry would necessitate that the operators and activities which it covered were exempted from coverage under the ELD.

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

Transparency and access to information

Improved transparency has a key role to play in promoting improved industry compliance. Citizens and NGOs must be able to monitor the environmental performance of companies, allowing them to assist in identifying instances of non-compliance and apply public pressure.

EU law should set minimum requirements for information which must be published. Although some of this information may currently be available on request, under freedom of information rules, basic data on who is drilling and where, and key information on companies' safety and environmental performance, should be made routinely and proactively available. Ideally this would be in the form of an EU centralised transparency platform, where data collected from operators and/or regulators in different jurisdictions could be collated and presented in a comparable manner. Alternatively, a requirement on Member States to have their own registers with national information, ensuring that operators and/or regulators publish a consistent list of information in a consistent format so as to enable observation and comparison would also assist.

A non-exhaustive list of the kind of information which should be covered by this requirement is as follows:

- Where drilling has been authorised to take place, geographical and physical features (e.g. depth); environmental conditions and impact and risk assessments
- The identity of the licensee and any other companies involved and their roles in the operation
- Techniques/technology used - BAT
- The location of abandoned installations
- The location of pipelines
- Operators' emergency response plans as approved by the regulator
- Accident records, including all accidents, leaks, equipment failures and near accidents, plus causes of the failures and steps taken to remedy the problem such as better training or technical solutions
- Records of any breaches of operating conditions identified by the regulator and action to remedy them.

These requirements must be without prejudice to the information that must be made available as part of public participation arrangements required under the Environmental Impact Assessment Directive.

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

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

All of the above (see response 11), and in addition, results of research and development which indicate possible improvements to technical or procedural standards; results from risk assessment procedures which indicate best available means of reducing a risk, results from assessment of safety cases which indicate that a certain procedure or piece of equipment entails a risk which cannot in the circumstances be reduced to an acceptable level.

The Commission should of course consider views from regulators and companies as to what information needs to be shared in the interests of achieving the highest possible standards. The crucial point is that this must be legally required to be done on a systematic basis and EU-wide.

This information sharing should be coordinated via the EU as noted at response 7 above.

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

Through binding legislation and information exchange as set out in answers to questions 5, 7 and 13 above.

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

See response 14 above.

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

The European Maritime Safety Agency already has capabilities for responding to oil spills regardless of their source. It can and does already play a role in responding to spills from offshore drilling platforms, but its mandate should be expressly extended to this effect by amendment to its founding legislation. It must be clear that EMSA may respond to a spill immediately and of its own initiative, without requiring pre-authorisation from Member States, which could result in damaging delays.

Regular provision of information by Member States on their emergency plans, reporting of any accidents or breaches of safety rules; either to the Commission or directly to EMSA itself (as described in response 7) will allow EMSA to develop and coordinate its own emergency response plans for an oil platform incident.

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

Consistent EU standards, enforced by the EU (on top of national regulators) will provide a platform for dissemination of best practice to overseas jurisdictions. It is crucial to leverage the capacity of the EU to provide a centralised point of liaison, influence and exchange of information between relevant EU and non-EU regulators.

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

The practices of EU companies operating overseas are a matter of clear concern. In this context it is particularly important to guard against the possibility of an EU company, either directly or via its subsidiaries, being responsible for a spill in non-EU waters which could have severe impacts on EU territory (the Mediterranean for example).

Extraterritorial application of EU environmental standards

It should be a requirement of EU law that EU companies apply EU offshore safety and environmental practices in all their operations, both inside and outside of EU territory. The EU can regulate EU companies' actions outside of the jurisdiction in areas within its competence - see for example the Common Fisheries Policy (Regulation 2371/2002/EC), the provisions of which govern activities practised by Community vessels or Member State nationals even if they are outside of EU territorial waters. The preamble to the CFP Regulation notes the requirements of Article 117 of the UN Convention on the Law of the Sea, imposing a duty on its signatories, including the EU, to take measures in respect of their nationals as necessary for the conservation of living resources in the high seas. This same duty is applicable in the case of controlling damage to marine life through offshore oil pollution.

The issue of how to monitor compliance with such a requirement in respect of EU companies' global operations is clearly linked to the broader question of strengthening EU law requirements for corporate reporting. In order to monitor and enforce the application of EU offshore environmental standards, there must be a specific obligation for operators to procure regular, independently audited reports for provision to national regulators and the Commission, demonstrating that the best available techniques for pollution and accident prevention as developed at EU level (see responses 5 and 7 above) are also being applied in their overseas operations. If it is the case that local laws apply a higher standard, operators may explain what that standard is and how it has been complied with in the alternative. The reports should also cover details of any accidents which have occurred, and what steps were taken in response.

Parent company duty of care

Frequently EU companies will operate in other jurisdictions via subsidiaries or contractual partners. Rules on separate legal personality and limited liability will

prevent parent companies from being held liable for the impacts of operations of their subsidiaries or subcontractors. Direct extraterritorial regulation of subsidiaries and subcontractors incorporated outside of the EU, requiring them to use certain standards and practices, will face problems as intrusive to the sovereignty of the other jurisdiction. However, it may be possible to impose requirements on parent companies to exercise control over their subsidiaries in third countries with the aim of preventing breaches of environmental procedures.[2] One current example of imposition of duties on parent companies is criminal law responsibility for corruption of foreign officials.[3]

Compliance of the offshore drilling industry overseas with applicable EU legislation and its precautionary approach could be significantly improved by such a requirement on parent companies to exercise oversight and control of their subsidiaries and business partners in this respect. This duty of care should apply to all situations where an EU company is able to exercise significant influence over the operations of another entity. Where the duty was breached, parent companies could be responsible for covering compensation costs. Parent companies could be also held responsible for ensuring that the operating company under their control has sufficient financial capacity to cover payment for damage up to appropriate ceilings as described in response 10 above.

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[2] This view is noted in Edinburgh University's recent study prepared for, and at the request of, the European Commission. For further details please see: http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm; paragraphs 188-191.

[3] The UK offence of failing to prevent bribery by foreign subsidiaries and sub-contractors (Bribery Act 2010, Chapter 23) is a prominent example. Other examples include US 1990 Americans with Disabilities Act (42 U.S.C. § 12101), or 1964 Civil Rights Act, that imposes on all American employers covered by the Acts an obligation to monitor the compliance of all the corporations they control in foreign countries with the prohibitions stipulated in those Acts. For further details and full discussion please see Ibid, paragraph 229.