



BRIEFING

European Commission proposes new legislation on the safety of offshore oil and gas

Summary

The European Commission's proposed offshore oil and gas safety legislation aims to tackle the lack of a harmonised safety regime for the EU-wide industry. It also aims to cut the chances of a major accident or to limit its consequences. If enacted, it will put more responsibility on owners, operators, member states and the Commission. Both industry and regulators in the UK have expressed serious concerns about the potential for the legislation weakening the effectiveness of existing offshore safety regimes in the North Sea.

Here we look at the Regulation's scope and potential implications for the offshore industry.

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Introduction

If it becomes law, the European Commission's proposed EU Regulation on Safety of Offshore Oil and Gas Exploration and Production Activities (the Regulation) is likely to have important implications for EU-based offshore oil and gas companies. The Regulation aims to address the lack of 'a suitable, comprehensive and EU-wide coherent regulatory environment prioritizing continuous reduction of risks of major accidents'¹. It also aims to cut the likelihood of a major accident in EU waters or to limit the consequences of an accident.

To address this, the Regulation proposes a pervasive, three-tier regulatory system that places integrated safety, incident prevention and reporting requirements on owners and operators, member states and the European Commission. Independent 'competent authorities' appointed by each member state will regulate compliance with the Regulation and co-ordinate with the Commission. The Regulation also requires effective, proportionate and dissuasive sanctions to ensure the efficacy of the new regime.

According to the memorandum with the proposal, the safety regime under the Seveso Directive² (that applies to onshore installations in Europe where quantities of dangerous or hazardous substances are stored or used above certain thresholds) served as a 'good practice example' for the new regime under the Regulation. This is seen, for example, in the requirements that operators draw up major accident prevention plans and formal safety reports. The approach taken under the Regulation is based on the North Sea offshore safety regimes (particularly those of the UK and Norway), which include requirements for thorough risk assessment and reliable management systems.

¹ Commission staff working paper-Executive Summary of the Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council.

² Directive 98/82/EC.

The Regulation is intended to augment other EU legislation that applies offshore, such as the EU Environmental Liability Directive³, the Environmental Impact Assessment Directive⁴, the Waste Framework Directive⁵ and EU Directives on the health and safety of workers at work⁶.

Scope of the Regulation

The Regulation will apply to all activities that relate to exploring for, producing or processing oil and gas offshore, including transport of oil and gas through offshore infrastructure connected to an installation or subsea installation. Existing installations, as well future installations and operations, will be caught. It will apply to the entire lifecycle of exploration and production activities, from design to decommissioning and permanent abandonment.

The Regulation is limited to EU waters but states that EU-based licensees, operators and major contractors should: 'endeavour to conduct their offshore oil and gas operations when outside the Union in accordance with the principles set out in this Regulation'. It also states that 'the Commission shall promote high safety standards for offshore oil and gas operations at international level at appropriate global and regional fora, including those related to Arctic waters'. This suggests the authors of the regime proposed by the Regulation intend it to translate into industry best practice worldwide.

³ Directive 2004/35/EC.

⁴ Directive 85/337/EEC, as amended by Directives 97/11/EC, 2003/35/EC and 2009/31/EC.

⁵ Directive 2008/98/EC.

⁶ Directive 92/91/EEC.

Timing of implementation

Formally proposed on 27 October 2011, the Regulation will now go to the European Parliament and Council for examination in line with the ordinary legislative procedure.⁷ EU ‘regulations’ have direct effect, which means that, once the Regulation comes into force, it would automatically apply in each member state. In the UK there would still be a need for a statutory instrument to support the main directly applicable provisions of the Regulation (for example, to prescribe offences and penalties for breach).

Installations’ operators will be required to comply with the Regulation within two years of its coming into effect, except the operators of non-production installations under contract but not yet established on location, and operators of planned installations, will be required to comply within one year. Well operators would be required to comply within three months. On the timetable the Commission anticipates, obligations under the Regulation could apply for certain installations as soon as 2013.

Financial evaluation

According to the Commission, the Regulation would increase the cumulative safety-related operating costs on industry by an estimated €122m a year, compared with the current figure of €52m. In comparison, it estimates the value of the Regulation in terms of overall risk reductions would amount to €103-455m a year. The basis for the Commission’s estimates are not clear from its proposal.

⁷ The European Parliament and the Council will review the Commission’s proposals and may propose amendments. If the Council and the Parliament cannot agree upon amendments, a second reading takes place. In the second reading, the Parliament and Council can again propose amendments. Parliament has the power to block the proposed legislation if it cannot agree with the Council. If the two institutions agree on amendments, the proposed legislation can be adopted. If they cannot agree, a conciliation committee tries to find a solution. Both the Council and the Parliament can block the legislative proposal at this final reading.

Implications of the Regulation

Licensing

The Regulation will require licensing authorities in member states to take into account operators’ technical and financial capacities to control the safety of offshore activities and environmental protection. Operators will therefore have to show they can satisfy such criteria before being allowed to explore for and produce oil and gas in EU waters.

The competent authorities will be entitled to inspect the safety, environmental protection and emergency preparedness of rigs and platforms and the operations conducted on them. If an operator does not respect the minimum standards, the competent authority will be able to take enforcement action and/or impose penalties. Ultimately, if the operator refuses to comply, it would have to stop exploration or production operations.

Extension of Environmental Liability Directive

The Regulation would expand the current territorial application of the EU Environmental Liability Directive (ELD) for ‘water damage’ (as a category of environmental damage), currently limited to the coastal strip and territorial sea (about 22km offshore), to all marine waters under the jurisdiction of the member states, including the exclusive economic zone (up to about 370km from the coast in some areas), thus expanding the potential costs of ELD compliance for operators.

In addition, the Regulation ‘clarifies’ that the holders of authorisations for offshore activities (such as licensees) are also potential ‘operators’ under the ELD, ‘and may not be entitled to delegate their responsibilities in this regard to third parties contracted by them.’

Requirement to produce a Major Hazard Report

There will be a new EU-wide requirement for owners and/or operators of installations, including mobile drilling rigs, to set out in a Major Hazard Report (MHR) their compliance with EU best operating practices for any

significant aspect of the lifecycle of an installation. They must submit the report to the competent authority, and operations may not proceed unless the competent authority has accepted the MHR during the consenting procedure. The MHR should show that the owners and/or operators have:

- established effective corporate policy and suitable arrangements for major accident prevention;
- comprehensively and systematically identified all major hazard scenarios for all hazardous activities that may be carried out on each installation;
- assessed the likelihood and consequences and the necessary controls of major hazard scenarios within a comprehensive safety management system; and
- taken into account risk to the environment, including impacts of climactic conditions and climate change on the long-term resilience of installations.

Operators would be required to submit a design notification to the competent authority and integrate into the MHR an internal emergency response plan, both of which are site-specific and take account of the risks and hazard scenarios identified in the MHR. Likewise, the MHR must incorporate an overview of the operator's major accident prevention policy, which should take into account the most up-to-date risk assessment and Mapping Guidelines for Disaster Management.⁸ The administrative burden of doing this will depend on the status of operators' existing emergency response plans, but any existing plans will nevertheless need to be integrated into the MHR before being submitted.

The recitals to the Regulation state that the MHR should be comparable and complementary to the safety and health document referred to in

⁸ Commission Staff Working Paper SEC(2010) 1626 final of 21 December 2010.

Directive 92/91/EC⁹ (ie, to show that the risks incurred by workers at the workplace have been determined and assessed, that adequate measures will be taken to attain the aims of that Directive and that the design, use and maintenance of the workplace and the equipment are safe).

Member states will be required to take full account of companies' emergency response plans under the MHR when compiling national emergency plans, and the plans will be periodically tested by the industry and national authorities. National emergency response plans are to be made available to the Commission and to the public as appropriate. This is to provide a more transparent and cohesive EU-wide and national framework for emergency responses across the industry.

Requirement to follow best available practices

Under the Regulation, industry will be required to follow the best available practices on safety in design and continuous safe operations. Operators and competent authorities will be required to collaborate to create and update new or improved standards and guidance. Because there is already a significant degree of interaction and self-regulation regarding safety within the industry, this should aid fulfilment of this requirement. Increased industry-wide transparency in this area is intended to cut the risk of an adverse event. If a major accident were to overwhelm national response capacities, the affected member states would be able to request help from other member states and the European Maritime safety Agency.¹⁰

⁹ Directive concerning the minimum requirements for improving the safety and health protection of workers in the mineral-extracting industries through drilling

¹⁰ Through the EU Civil Protection Mechanism established by the Council Decision 2007/779/EC.

Increased data reporting requirements

The Regulation highlights the need for a common data-reporting format for operators to report to the member state and proposes that the Commission be given powers to implement this. It proposes that member states be required to provide reports of operators' activity and incidents and to tell the Commission of major accidents and that the Commission publishes reports on levels of EU activity and trends in safety and environment performance of the offshore sector.

In addition, competent authorities would be required to establish procedures to allow anonymous reporting of safety and/or environmental concerns on offshore oil and gas operations. Common data reporting would enable operators to share EU-wide the lessons learned from major accidents and 'near misses' but may expose them to greater scrutiny by both the public and competitors. According to the Commission's proposals, public participation would be organised so that it does not pose risks to the safety and security of offshore oil and gas installations and their operation.

Mandatory third-party verification schemes

A scheme is proposed under the Regulation that would require independent, third-party verification of the suitability of the systems and safety-critical elements identified in the risk assessments, the safety management system for the installation and the well design and control plans. This appears similar to the obligation for UK operators under the Offshore Installations (Safety Case) Regulations 2005, which requires an effective verification scheme involving an 'independent and competent person' to be in place in respect of safety-critical elements, to assure both the duty holder and regulatory authorities that the duty holder can prevent, control or mitigate against major accident hazards.

Analysis of financial security arrangements and product safety standards

The Regulation provides that the Commission should further analyse and study measures to ensure an adequately

robust liability regime for damages related to offshore oil and gas operations. This should include consideration of financial capacity, including availability of appropriated financial security instruments or other arrangements. It also indicates that the Commission should proceed with analysis of the product safety standards that apply to offshore oil and gas operations to ensure that EU-level technical standards are complemented by product safety legislation that applies to all offshore installations in EU waters.

Industry response

The Regulation has not met with a positive response from the industry. The chief executive of Oil & Gas UK, the offshore industry association, has said 'Oil & Gas UK is opposed to blanket EU regulation of this country's offshore oil and gas industry, which operates under a fully fit for purpose and robust regulatory regime. Relinquishing regulatory control to the EU, which has no established competence in this matter and where only three out of the twenty-seven member states have an offshore oil and gas industry of real scale, risks undermining safety and environmental performance here in the UK'.

Oil & Gas UK proposes that instead of proceeding by way of a 'regulation' there should be a 'directive', which would leave it for each member state to put in place their own legislation to achieve the objectives of the directive, taking into account the varying need for regulation among member states and the high standards already achieved in the UK.

A joint response by Lloyd's, the Association of British Insurers and the International Underwriting Association states that liability should not be extended to cover environmental damage to all marine waters under the jurisdiction of member states, as it would be difficult to quantify operators' financial exposure and, therefore, difficult to provide insurance for the costs of remedying such damage. The authors suggest instead that the priority should be prevention in the form of 'strict standards designed to prevent accidents likely to cause environmental damage'. They argue that

offshore activity in UK waters is already subject to a regulatory regime that imposes sufficiently stringent standards on operators, so it is important that EU intervention does not weaken this.

These criticisms are to be seen against the backdrop that an ‘update on offshore matters’ produced by the UK Health and Safety Executive’s Offshore Division in September 2011 (before release of the Commission’s proposals) stated that areas ‘which give us cause for concern’ include EU ‘measures to increase oversight of regulators’, and that HSE and DECC would be ‘continuing positive engagement with the Commission to influence its thinking and to minimise the impact – direct or collateral – on the UK regime.’

More recently, on 22 November 2011, Charles Hendry MP, Minister of Energy, indicated that although many of the requirements in the proposed Regulation appear to mirror key elements of the UK’s existing offshore safety regime, the UK Government has ‘serious concerns’ over the practical effect of an EU ‘regulation’ on the administration of the UK’s current regime.

Conclusion

In summary, the Regulation will impose on the industry additional safety, verification and information-sharing requirements at a national level, within a framework that is designed to enable information sharing and cohesive regulation across the EU. This is likely to increase the administrative burden on owners and operators who must comply with the Regulation’s requirements. Some industry insiders have expressed concern that it could introduce unnecessary administrative complications that may potentially weaken the effectiveness of the UK’s existing offshore safety regime.

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