



Mr. Klaus-Dieter Borchardt
Director
Internal Energy Market
Directorate General for Energy

European Commission
1040 Brussels

Brussels, 8 May 2017

Subject: European Parliament resolution of 1 December 2016 on liability, compensation and financial security for offshore oil and gas operations

Dear Mr. Borchardt,

As **European Community Shipowners' Associations (ECSA), International Association of Drilling Contractors (IADC) and International Marine Contractors' Association (IMCA)**, we represent the interests of a large community of oil and gas industry stakeholders, including mobile offshore drilling contractors.

The offshore oil and gas sector has followed closely and with great interest the **Commission's work on liability, compensation and financial security for offshore oil and gas operations and shares the Commission's conclusions on the report COM (2015) 422** pursuant to Article 39 of Directive 2013/30/EU (OSD), which provides an overview on how liability for damage from offshore accidents in oil and gas prospecting, exploration and production is addressed in the EU/EEA.

The offshore oil and gas sector is particularly concerned about the European Parliament resolution adopted on 1 December 2016 (2015/2352(INI)), which comes as a response to the abovementioned Commission report. As the European Commission is preparing to submit by 19 July 2019 a report assessing the experience of implementing the OSD, as per Article 40 of the OSD, we would like to draw your attention to the following matters of concern of the European Parliament resolution:

- ***Calling the Commission to consider the establishment of a legislative compensation mechanism for offshore accidents (proposal 3);***

The potential establishment of a legislative compensation mechanism for offshore accidents may lead to unjustified cross-subsidisation of risks between countries/ regions/ economic agreements and potentially more hazard in case of one uniform solution that overlooks the differences amongst Member States.

It is more prudent to invite Member States to draw inspiration from existing schemes and best practices, for example the Norwegian Petroleum Act, already in place in major oil and gas countries rather than imposing one solution 'fits for all', without taking into consideration the nature of offshore activities, different geophysical characteristics, health and safety requirements of each Member State. If an overarching compensation mechanism is established it may overlap with existing national arrangements and eventually penalise the already compliant companies.

The diversity of economic activities in EU Member states means that the national legislative bodies are best placed to decide on how to balance economic interests as the need for financial robustness should reflect the risk at hand which differs from location to location and from operation to operation. In addition, offshore operations mostly take place on the continental shelf and therefore fall under the national jurisdiction of the coastal States and under the maritime zones regime of the United Nations Convention on the Law of the Sea. National laws therefore regulate such operations.

- ***Stressing that there is no civil liability in many of the Member States with offshore oil and gas activities and calling for a European framework (proposal 5);***

As correctly pointed out in the Commission Staff Working Document 167 final of 14.09.2017, almost all EU Member States impose strict liability for bodily injury, property damage and economic loss, including pure economic loss. Therefore, contrary to the EP conclusion, civil liability systems already exist in EU-states at national law level– mostly under the tort law of Focal States - and we see no need to set up an EU-system since it has not been shown or documented to be necessary.

The European Parliament resolution **makes a reference, inter alia, to "uncertainty as to how Member States' legal systems would deal with the diversity of civil claims that could result from offshore oil and gas incidents". At European law level,** as correctly pointed out at Commission report 422 of 14.09.2015, there are already two EU regulations (Brussels I Regulation and Rome II Regulation) addressing which court/s should hear a case, what law/s should that court apply and if a judgment will be recognized or enforced in another country. We believe that the existing EU legislation provides a comprehensive jurisdictional regime to avoid conflict of laws in civil (and commercial) matters. Thus, an adequate system to pursue transboundary damage claims in civil matters emanating from offshore accidents in the EU does exist. It would be prudent to investigate further if the aforementioned EU regulations function as intended before concluding that there is a legal gap concerning civil liability of offshore oil and gas incidents.

- ***(...) believes that financial liability caps should be avoided (proposal 8) and; (...) considers that in that context, the establishment of a fund based on fees paid by the offshore industry could also be assessed (proposal 19).***

Through Article 4 OSD, Member States are required to ensure that licensee applicants are able to cover any liability they may incur from offshore operations by having adequate financial resources and possessing financial security if needed. Member States are also required to establish procedures for ensuring prompt and adequate handling of compensation claims including compensation payments for transboundary incidents.

Recital 9 of the OSD mentions the need for the responsible party to be clearly identifiable. **The licensee is the one held responsible, therefore liability arising from any “major accident” is channeled** to the licensee. Channeling responsibility makes it much easier to identify that party, i.e. the licensee, as responsible. In addition, it is important to emphasize that any pollution that is derived from the well/sea bed (i.e. under the sea) currently is the responsibility of the licensee and should remain so. Also, we strongly advocate that in no way should any liability for such pollution from the seabed be attributed to vessels/mobile offshore units performing services for the licensee/oil company. The licensee/ oil company is the only party which received the most reward **directly** from the extraction of hydrocarbon reserves - not its sub-contractors –and should therefore remain fully liable.

The advantage of keeping the potential injurer, more particularly the licensee, fully liable for the remaining risk, is that this may provide additional incentives for prevention. Nevertheless, an unlimited liability of the licensee would be uninsurable (e.g. the US Oil Pollution Act includes a \$75 million liability cap for civil claims).

Taking the UK as an example, the Offshore Petroleum Licensing (Offshore Safety Directive) Regulations 2015, UK regulator guidance, and Financial Responsibility Guidelines (created by licensees), obliges licensees and operators to:

- provide evidence and make adequate provision to cover liabilities which potentially derive from those operations, and
- maintain sufficient capacity to meet all the financial obligations which may result from any liability for offshore operations carried out by operators appointed by or in respect of it.

There are several Financial Responsibility Guidelines for licensees covering various aspects of offshore operation, which set out methods to calculate the level of costs that are likely to be needed to cover such liabilities, and how licensees and operators can demonstrate that these are met (partly by being a member of the Offshore Pollution Liability Association - OPOL scheme). The OPOL scheme covers offshore facilities within the jurisdiction of the United Kingdom, Denmark, Germany, France, Ireland, the Netherlands, Norway, the Isle of Man, the Faroe Islands and Greenland. Although at the moment it excludes those offshore facilities located in the Baltic and Mediterranean Seas, the OPOL scheme can be extended so as to apply to offshore facilities within the jurisdiction of any other State.

In addition, countries which have implemented the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) 1990 can extend national implementing regulations to operators of offshore units, so that they are required to have an oil pollution emergency plan (OPEP) in place, which requires coordination with that **jurisdiction’s National Contingency Plan. Operators are required to demonstrate** they have the financial means to meet the commitments set out in the OPEP, if the worst-case scenario were to materialize. This is achieved by demonstrating that the risks of the operation have been appropriately assessed and that the financial mechanisms are in place to meet those risks. **A country’s National Contingency Plan will also refer to where** liability and compensation matters for marine pollution incidents should be directed. For transboundary incidents, the OPRC has a fall back provision contained in its Annex on reimbursement of costs of assistance.

In summary, since the licensee is the one held liable, the identification of the liable party is easier and there is a clear incentive for them to choose high-quality, environmentally and safety-conscious contractors that will minimize the operational risks entailed.

Provided that there are financial liability caps for offshore accidents, the parties in the contract may decide on individualised insurance coverage, depending on the preferences of the parties and their attitudes towards risks. On the contrary, a generalized unlimited liability will lead to a general increase of the contract price, also for those who do not wish the additional protection.

Economists have traditionally warned against unlimited liability in cases where increased liability can be passed on via the price mechanism. In that situation, increased liability may lead to higher prices for all consumers, whereas only some (more particularly the high-risk individuals) may benefit from this increased liability. Therefore, the public at large should be aware of the fact that increased compensation always come at a price: the higher the financial cap, the higher the oil prices which the public at large must be willing to pay.

Recommendations

Our sector of the oil and gas industry is strongly against any prospect of liability for pollution from wells by or through any means shifting from licensees/operators towards drilling contractors. The established status quo in this regard must prevail or drilling activity conducted by third-party contractors becomes non-viable, as the risks and **associated costs to cover those risks would be beyond drilling contractors' ability to pay.** Financial security provisions to meet liabilities and obligations should be sufficiently flexible to enable small-to-medium sized licensees to comply on a proportionate basis. If, for example, an obligation to purchase a certain level of insurance was imposed, and that level of insurance was not available in the market due to the lack of appetite to take on this insurance risk, this would effectively restrict offshore activity to the largest players.

As concluded in the 2015 Commission report, broadening liability provisions through EU legislation is not appropriate at this juncture. Among the many reasons for this conclusion was that several Member States may be reappraising their existing liability regimes for offshore accidents in tandem with other changes introduced by the OSD. The obligation under Article 4(3) of OSD should lead to a broadening of liability provisions in EU Member States, especially if Member State regulators impose obligations to prove the ability of licensees and operators to meet liabilities and financial obligations. Therefore, our sector shares the Commission views that in order to develop broader liability and compensation provisions through EU legislation, the EU must first gain some experience with the OSD's effectiveness before evaluating and considering changing the status quo.

Additionally, based on the aforementioned 2015 report, the Commission can use EU Offshore Authorities Group (EUOAG) meetings for systematic data gathering covering all liability-related aspects of newly transposed laws. Although we appreciate the effort made through EUOAG, and whereas the offshore oil and gas industry actively participates in all its meetings, we consider that insufficient data on the matter have been collected at this time. We will continue to engage and collaborate with the Group aiming at a more robust data collection in the near future.

Finally, the EU should be aware of the discussions held in this matter at international level. Under the aegis of the International Maritime Organisation (IMO) Legal Committee, there are current discussions analysing the liability and compensation issues connected with transboundary pollution damage resulting from offshore oil exploration and exploitation activities, with the aim of developing guidance to assist States interested in pursuing bilateral or regional arrangements. The IMO secretariat is collecting examples of existing bilateral and regional agreements to develop elements and legal principles for incorporation into the guidance on bilateral and regional arrangements or agreements. Any further EU action should take into account any guidance developed under the auspices of IMO, which is the latest international effort to address this issue.

As the European parliament resolution is expected to be further examined by the European Commission services, we would appreciate your attention to our concerns and remain engaged in providing any additional input.

Yours sincerely,



Patrick Verhoeven

ECSA
Secretary General



Derek Hart

IADC
Regional Director
North Sea



John Bradshaw

IMCA
Policy & Regulatory Affairs
Manager

In CC:

Mr. Stefan Moser
Mr. Joerg Koehli

CONTACT PERSONS

European Community Shipowners' Associations (ECSA)

Maria Deligianni – ECSA secretariat (maria.deligianni@ecsa.eu)

International Association of Drilling Contractors (IADC)

Derek Hart – IADC secretariat (Derek.Hart@iadc.org)

International Marine Contractors Association (IMCA)

John Bradshaw – IMCA secretariat (John.bradshaw@imca-int.com)

Eleni Antoniadou – IMCA secretariat (Eleni.antoniadou@imca-int.com)