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"*Future Risk / Future Requirements*": Directive 2013/30/EU – An Efficient European Reaction to the Montara and Macondo Incidents?

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Introduction

More than a thousand offshore oil and gas platforms are operating in European waters.[1] Most of those installations are located in the North Sea. But there is also a potential for more offshore drilling in the Mediterranean Sea and in other European sea areas in the future.[2] In a press release of 2011, the European Commission indicated that the likelihood of a major offshore accident in European waters still remained **"*unacceptably high*"** referring to 14 past major accidents in global

[1] As of 2011, there are located within the EU: 486 offshore installations in the UK, 181 in the Netherlands, 61 in Denmark, 2 in Germany, 2 in Ireland, 123 in Italy, 4 in Spain, 2 in Greece, 7 in Romania, 1 in Bulgaria and 3 in Poland. Additionally, drilling operations have recently started in Cyprus. In Malta, offshore licences have already been awarded, see European Commission: MEMO/11/740 of 27 October 2011 ("*Commission proposes new rules on the safety of offshore oil and gas activities*"), p. 6.

[2] Apart from the traditional exploration countries UK and Norway, interest in offshore oil and gas is developing throughout the EU as, all in all, 13 EU Member States (UK, the Netherlands, Denmark, Germany, Ireland, Italy, Spain, Greece, Romania, Bulgaria, Poland, Malta and Cyprus) have awarded offshore oil and gas licences, see European Commission Press Release IP/11/1260 of 27 October 2011, p. 2.

offshore oil and gas operations since the 1980s (e.g., well blow-outs and total loss of production platforms).[3] Two of the most prominent European offshore disasters of the past have been the accidents of the "***Alexander Kielland***" of 1980 and the "***Piper Alpha***" of 1988.[4] Nevertheless and rather surprisingly, the safety of offshore oil and gas operations was not subject to any specific EU legal act and left to the national legislator until 2013.

In response to the "wake up call" of the 2010 Deepwater Horizon disaster and – less prominently, also as a reaction to the Montara spill of 2009 – the European Commission had prepared legislative action in this policy area since 2011. One of the reasons for this initiative is also the fact that – since "Deepwater Horizon" – the tolerance of the general public for environmental damage has reached an all-time low.[5] Initially, the Commission had intended to institute a directly binding EU Regulation, however, the efforts finally resulted in **Directive 2013/30/EU on safety of offshore oil and gas operations**.[6]

This rather new EU Directive mandates those EU Member States which are active regulators of offshore oil and gas operations to transpose all of its provisions into national legislation by 19 July 2015 (Article 41(1) and (2) of the Directive). Other EU Members only have limited transposition obligations (Article 41(3) and (4) of the Directive.[7] The act has no bearing on the offshore oil and gas industry located in EU countries until it is transposed into the national law by the EU Member States. However, in relation to owners/operators of planned production installations and owners/operators planning or executing well operations, EU Member States shall apply the laws, regulations and administrative provisions adopted on the national level in implementation of the Directive by **19 July 2016** (see **Article 42(1) of the Directive**). Existing offshore installations controlled by EU entities will have until **19 July 2018** (at the latest) to comply with the legal requirements of the Directive (see **Article 42(2) of the Directive**).

The EU Offshore Directive is a complex legal act of 44 Articles and nine Annexes. Article 2 of the Directive lists 37 (partly new) legal definitions for the purposes under

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[3] Ibid, p. 1.
[4] See Lloyd's List of 9 July 2013, p. 8 ("*Piper Alpha remembered 25 years on*").
[5] See: Interview with Eero Ailio, Deputy Head of Unit Retail Markets, Coal and Oil at the European Commission, available at: http://www.dnv.com/industry/oil_gas/publications/updates/Oil_and_Gas_Update/2013/02_2013/Preventing_major_offshore_accidents_in_Europe.asp [last access: March 2015].
[6] Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178/66 of 28 June 2013.
[7] EU Members with offshore waters that do currently not have offshore oil and gas operations under their jurisdiction, and which do not plan to license such operations, shall inform the Commission thereof and shall be obliged to bring into force, by 19 July 2015, only those measures which are necessary to ensure compliance with Articles 20, 32 and 34 of the Directive. Such EU Members may not license such operations until they have transposed and implemented the remaining provisions of this Directive and have informed the Commission thereof. The five landlocked EU Members shall be obliged to bring into force, by 19 July 2015, only those measures which are necessary to ensure compliance with Article 20 of the Directive (on the reporting of major accidents relating to offshore oil and gas operations conducted *outside* the EU).

EU Law. The sum of the Directive's overall policy objectives piles up to 65 Recitals. Highlighting one, according to Recital (17), "*within the [EU], there are already examples of good standards in national regulatory practices relating to offshore oil and gas operations. However, these are inconsistently applied throughout the [EU] and* ***no Member State has yet incorporated all of the best regulatory practices in its legislation for preventing major accidents or limiting the consequences for human life and health, and for the environment*****.**"

Consequently, the Directive seeks to introduce those best regulatory practices, necessary to deliver effective regulation which secures the highest safety standards and protects the environment. All in all, the Directive introduces a licensing scheme, documentary rules, some updated and extended provisions on the liability for environmental damage (as defined and regulated under the **Environmental Liability Directive 2004/35/EC**),[8] rules for a competent authority within EU Member States, rules on transparency and information sharing as well as cooperation between EU Members and provisions on offshore oil and gas operations *outside* of the EU.

This contribution to the Amsterdam INTERSPILL 2015 conference will highlight two key elements of the new EU Offshore Directive: First, the accumulation of administrative requirements established by the act will be summarized. The objective of this section is in particular to identify interrelated legal provisions of the Directive and its overall "system" which is not easy to grasp. Second, the truly complicated issue of liability for damages caused by offshore oil and gas operations will be touched upon. However, the second point refers to a still largely uncoordinated area of law which is currently undergoing an intensive and time-consuming review, not only within Europe. As a result, only an outlook emphasizing the existing problems and the way forward in liability for offshore oil and gas operations under EU Law can be presented.

I. Key Administrative Requirements of the EU's Offshore Directive

In sum, Directive 2013/30/EU mandates the EU Member States to introduce or update legal rules on different levels such as:

- independence and objectivity of the competent authority within EU Member States ensuring its adequate human and financial resources;
- efficient and early public participation in decisions with potential effects of planned offshore oil and gas exploration operations on the environment;
- participation of the employees in matters affecting safety and human health at work;

[8] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143/56 of 30 April 2004.

- warranties and continued verifications of comprehensive concepts on environmental management and of preventing major accidents by **operators/owners**;[9]
- updated documentary obligations of the owners/operators to be verified by the competent authority;
- the formulation and continuous improvement of norms and strategies to prevent major accidents, in particular, analysis of causes of accidents;
- the introduction of coordinated internal and external emergency response plans and transboundary cooperation;
- international exchange of information and public transparency.

1. The Competent Authority within EU Member States

One major objective of the EU Offshore Directive is to ensure an independent and objective administration of offshore oil and gas operations by one competent authority. Pursuant to **Article 8(1) of the Directive** the EU Members appoint their competent authority which is responsible for a variety of regulatory functions. Among those are the assessment and acceptance of reports on major hazards as well as design notifications and overseeing compliance by operators and owners with the Directive, including inspections, investigations and enforcement actions (**Articles 8(1)(a) and (b)**).

The EU Members are required by the Directive to enable the competent authority to be able to carry out its functions and duties in an independent and objective way and with adequate human and financial resources (see **Articles 8(2) to (5) of the Directive**). In particular, objectivity and independence shall be ensured by preventing any kind of conflicting interests between the regulatory functions of the competent authority and the regulatory functions relating to the economic development of the offshore natural resources and licensing of offshore oil and gas operations within the Member State (including the collection and management of revenues from those operations).

In particular, in accordance with **Article 18 of the Directive** the competent authority is empowered to require improvements and, if necessary, prohibit the continued operation of any installation (or any part thereof or any connected infrastructure) where it is shown

- by the outcome of an inspection,[10]

[9] The term "*operator*" is legally defined in Article 2(5) of the Directive as "*the entity appointed by the licensee or licensing authority to conduct offshore oil and gas operations, including planning and executing a well operation or managing and controlling the functions of a production installation*". The term "*owner*" is legally defined in Article 2(27) of the Directive as meaning "*an entity legally entitled to control the operation of a non-production installation.*"

[10] See Article 8(1)(b) of the Directive.

- by a determination that the operator no longer has the capacity to meet the requirements under the Directive (resulting in the licensee[11] assuming responsibility for the discharge of the duties concerned and factually "forcing" the licensee to propose a replacement operator to the licensing authority),[12]
- by a periodic review of the report on major hazards,[13] or
- by changes to notifications (to be submitted by the operator/owner),[14]

that the requirements of the Directive are not being fulfilled or that there are reasonable concerns about the safety of offshore oil and gas operations or installations.

Finally, in accordance with **Article 22(1)(a) and (b) of the Directive**, the EU Member States shall ensure that the competent authority establishes mechanisms for confidential reporting of safety and environmental concerns relating to offshore oil and gas operations from *any* source and for investigation of such reports while maintaining the anonymity of the individuals concerned. Operators and owners are required to communicate details of the national arrangements for those mechanisms to their employees (including also contractors connected with the operation and their employees) and to ensure that reference to confidential reporting is included in relevant training and notices (**Article 22(2) of the Directive**).

2. Early and Efficient Public Participation

A second major policy objective of the Directive is the establishment of early and efficient public participation in decision-making with a potential negative effect on the environment. **Recitals (15) and (16) of the Directive** summarize these objectives referring to other international instruments such as the **"*Aarhus Convention*"**[15] and to existing EU legal instruments.[16] The **final part of Recital (16)** stresses, however, that "*not all exploratory offshore oil and gas operations are covered by existing [EU Law]*". This would apply in particular to the decision-making that aims or could lead to

[11] See the legal definition for "licensee" in Article 2(11) of the Directive: "*Licensee means the holder or joint holders of a licence*". "*Licence" means an authorisation for offshore oil and gas operations pursuant to Directive 94/22/EC*", see Article 2(9) of the Directive.
[12] See Article 6(4) of the Directive.
[13] See Articles 11(1)(e), 12 and 13 of the Directive.
[14] See Article 11(1)(a) to (k) of the Directive.
[15] UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, (1999) 38 ILM, p. 517.
[16] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197/30 of 21 July 2001; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, OJ L 156/17 of 25 June 2003; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26/1 of 28 January 2012; and Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, OJ L 348/9 of 28 November 2012.

exploration operations being commenced from a non-production installation although such exploration operations may in some circumstances potentially have significant effects on the environment. Thus, one policy objective of the Directive is that this kind of decision-making has to be the subject of public participation as required under the Aarhus Convention as well.

As a result, **Article 5(1) of the Directive** mandates that "*the drilling of an exploration well from a non-production installation shall not be commenced unless the relevant authorities of the Member State have previously ensured that early and effective public participation on the possible effects of planned offshore oil and gas operations on the environment pursuant to other EU legal acts has been undertaken*". Where public participation has not been undertaken and where it is planned to allow exploration operations, the EU Member States shall ensure that other arrangements are made, such as information of the public by public notices or other appropriate means such as electronic media (**Article 5(2)(a) to (f) of the Directive**). This legal requirement does, however, not apply in respect of areas licensed before the entry into force of the Directive (i.e., 18 July 2013, **see Article 5(3) of the Directive**).

The public participation requirements of the EU Offshore Directive will probably result in some changes in the national legal orders of the EU Member States. For the future, the drilling of new offshore exploration wells will be subjected to the duty of undertaking prior environmental impact assessments as well as to generally assess the effects of certain plans and programmes on the environment. Some EU Members might decide to extend this legal requirement also to the drilling of onshore exploration wells.

3. "*Major Hazards*" / "*Major Accidents*" / "*Major Environmental Incidents*"

Recital (22) of the Directive summarizes the policy objectives in relation to identifying "*major hazards*"[17] and the prevention of "*major accidents*"[18] which are key legal terms of the Directive. "*Specific legislation is needed to address the major hazards relating to the offshore oil and gas industry, specifically in process safety, safe containment of hydrocarbons, structural integrity, prevention of fire and*

[17] A "*major hazard*" is legally defined in **Article 2(23) of the Directive** as: "[…] *a situation with the potential to result in a major accident*."

[18] A "*major accident*" is legally defined "[*…] in relation to an installation or connected infrastructure*" with four sub-elements **in Article 2(1) of the Directive** as: *(a) an incident involving an explosion, fire, loss of well control, or release of oil, gas or dangerous substances involving, or with a significant potential to cause, fatalities or serious personal injury; (b) an incident leading to serious damage to the installation or connected infrastructure involving, or with a significant* potential to cause, fatalities or serious personal injury; (c) any other incident leading to fatalities or serious injury to five or more persons who are on the offshore installation where the source of danger occurs or who are engaged in an offshore oil and gas operation in connection with the installation or connected infrastructure; or (d) any major environmental incident resulting from incidents referred to in points (a), (b) and (c).

explosion, evacuation, escape and rescue, and limiting environmental impact following a major accident."

The legal definition of "*major accident*" in **Article 2(1) of the Directive** relates to the term "*installation or connected infrastructure*", widely defined in **Article 2(19) and (21) of the Directive**.[19] Additionally, the Directive also introduces the legal category of a "*major environmental incident*" (see **Article 2(37) of the Directive**)[20] to the regulation of offshore oil and gas operations. This now opens an array of other legal instruments of EU environmental legislation to the offshore oil and gas sector because the legal definition of "*major environmental incident*" refers to the EU's Environmental Liability Directive.[21] This Directive legally defines "*environmental damage*" in its Article 2(1) as:

(a) **damage to protected species and natural habitats**, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species;
(b) **water damage**, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential […];[22]
(c) **land damage**, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

Thus, incidents may be qualified as "*major environmental incidents*" under the EU Offshore Directive if the above-named subjects of protection are affected *"with significant adverse effects*" (either actually or potentially). As a result, some EU Member States will probably have to update their national legal understanding of the legal terms "*major hazard*", "*major accident*" and "*major environmental incident*".

4. Systematic Risk Management ("*suitable*" / "*acceptable*")

[19] See Article 2(19) of the Directive: "*Installation" means a stationary, fixed or mobile facility, or a combination of facilities permanently inter-connected by bridges or other structures, used for offshore oil and gas operations or in connection with such operations. Installations include mobile offshore drilling units only when they are stationed in offshore waters for drilling, production or other activities associated with offshore oil and gas operations*." Article 2(21) of the Directive: "*Connected infrastructure" means, within the safety zone or within a nearby zone of a greater distance from the installation at the discretion of the Member State: (a) any well and associated structures, supplementary units and devices connected to the installation; (b) any apparatus or works on or fixed to the main structure of the installation; (c) any attached pipeline apparatus or works*."

[20] "*Major environmental incident" means an incident which results, or is likely to result, in significant adverse effects on the environment in accordance with Directive 2004/35/EC*".

[21] Op. cit., footnote 7.

[22] However, the EU Offshore Directive extends the legal understanding of "*water damage*" to ensure that the liability of licensees under the Environmental Liability Directive applies to marine waters of the EU Member States (as defined in Directive 2008/56/EC).

The Directive's rules on risk management reflect in particular the character of the legal act as a direct reaction to the Macondo (and also Montara) disasters. **Recital (14) of the Directive** outlines the most important policy objectives in this area: "*Operators should reduce the risk of a major accident as low as reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits of such reduction. The reasonable practicability of risk reduction measures should be kept under review in the light of new knowledge and technology developments. In assessing whether the time, cost and effort would be grossly disproportionate to the benefits of further reducing the risk, regard should be had to best practice risk levels compatible with the operations being conducted.*"

In implementation of this objective, **Article 3(1) of the Directive** mandates the EU Member States to require operators to ensure that "*all suitable measures*"[23] are taken to prevent major accidents in offshore oil and gas operations. Specifically, **Article 3(4) of the Directive** postulates that the EU Member States shall require operators to ensure that offshore oil and gas operations are carried out on the basis of "*systematic risk management*" so that the residual risks of major accidents to persons, the environment and offshore installations are "*acceptable*". Remarkably, just like the general term "*suitable*", the threshold of a risk being "*acceptable*" is legally defined in **Articles 2(8) of the Directive** in the spirit of the above-mentioned Recital (20) of the Directive.[24]

The EU legislator is, of course, aware of the fact that various measures of risk management are already implemented in the offshore oil and gas industry. However, the Directive seeks to push those industry measures further to the limit, up to the point when "*time, cost or effort would be grossly disproportionate to the benefits of further reducing the risk*". It will definitely be a point of possibly differing opinions between competent authorities and operators/owners whether the implementation of certain risk management measures are actually "*grossly disproportionate*" in relation to their risk reduction potential.

In any case, from 19 July 2015 onwards, operators/owners of new or relocated offshore oil and gas projects will have to include in their documents to be submitted to the competent authority pursuant to **Article 11 of the Directive** (in conjunction with its **Annex I**) also a demonstration that, inter alia,[25]

- all the major hazards have been identified,

[23] See Article 2(6) of the Directive: "*Suitable" means right or fully appropriate, including consideration of proportionate effort and cost, for a given requirement or situation, based on objective evidence and demonstrated by an analysis, comparison with appropriate standards or other solutions used in comparable situations by other authorities or industry.*"

[24] "*Acceptable", in relation to a risk, means a level of risk for which the time, cost or effort of further reducing it would be grossly disproportionate to the benefits of such reduction. In assessing whether the time, cost or effort would be grossly disproportionate to the benefits of further reducing the risk, regard shall be had to best practice risk levels compatible with the undertaking.*"

[25] See Annex I, Part 2 point 5 and Part 3 point 5 of the Directive, both relating to information to be submitted in a report on major hazards for a production/non-production installation.

- their likelihood and consequences have been assessed, including any environmental, meteorological and seabed limitations on safe operations,
- their control measures including associated safety and environmental critical elements are suitable so as to reduce the risk of a major accident to an acceptable level;

This demonstration shall include an assessment of any oil spill response effectiveness (see below I. 6. on "*Emergency Preparedness and Response*").

5. Major Accident Prevention by Operators/Owners

Article 19 of the Directive is the key provision for major accident prevention to be implemented by operators/owners and to be supervised by EU Members. Operators and owners will be required to prepare a document setting out their **corporate major accident prevention policy**[26] and to ensure that this policy is implemented throughout their offshore oil and gas operations, including by setting up appropriate monitoring arrangements to assure effectiveness of the policy (see **Article 19(1) of the Directive**).[27] The corporate major accident prevention policy shall take account of the **operators' primary responsibility for the control of risks of a major accident** that are a result of its operations and for continuously improving control of those risks so as to ensure a high level of protection at all times (see **Article 19(2) of the Directive**).

A remarkable issue is the fact that, in accordance with **Article 19(8) of the Directive**, the **corporate major accident prevention policy** to be implemented by operators and owners also covers their production and non-production installations outside of the EU. As a result, in this area, the EU Offshore Directive has some extra-territorial effect.

Moreover, operators and owners have to prepare a document setting out their **corporate safety and environmental management system** (see **Article 19(3) of the Directive**).[28] That document shall include, inter alia, a description of the organisational arrangements for control of major hazards as well as arrangements for preparing and submitting reports on major hazards.[29]

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[26] The corporate major accident prevention policy is to be submitted to the competent authority pursuant to Article 11(1)(a) of the Directive.

[27] The document shall contain the information specified in Annex I, Part 8, i.e., a list of (at least) nine specific points, among them (1) "*the responsibility at corporate board level for ensuring, on a continuous basis, that the corporate major accident prevention policy is suitable, implemented, and operating as intended"; (2) "measures for building and maintaining a strong safety culture with a high likelihood of continuous safe operation; […]*".

[28] The corporate safety and environmental management system is to be submitted to the competent authority pursuant to Article 11(1)(b) of the Directive.

[29] Annex I, Part 9 of the Directive governs the minimum standards for the corporate safety and environmental management system.

Finally, pursuant to **Articles 23 and 24 of the Directive**, the EU Member States shall ensure industry cooperation with the 28 competent authorities within the EU "*to establish and implement a priority plan for the development of standards, guidance and rules which will give effect to best practice in major accident prevention, and limitation of consequences of major accidents should they nonetheless occur*."[30] In October 2014, the Commission issued an implementing act in accordance with Article 24(2) of the Directive – **Commission Regulation (EU) No 1112/2014** – determining a common data reporting format and the details of information to be shared.[31]

6. Emergency Preparedness and Response

Based on their corporate major accident prevention policy operators/owners shall also prepare an **internal emergency response plan** (see **Article 14(1) of the Directive** in conjunction with its Annex 1, Part 10).[32] Those plans shall be prepared (and continuously updated)[33] in accordance with **Articles 28 and 29 of the Directive** taking into account the major accident risk assessment undertaken during preparation of the most recent report on major hazards. The internal emergency plan shall include an analysis of the oil spill response effectiveness.

Internal emergency response plans have to be put into action without delay to respond to any major accident or a situation where there is an immediate risk of a major accident. The internal emergency response plans of operators/owners have to be consistent with the **external emergency response plan** prepared by EU Member States in cooperation with licensees (see **Article 29 of the Directive**).[34] Pursuant to **Article 28(2) of the Directive**, the EU Member States shall ensure "*that the operator and the owner maintain equipment and expertise relevant to the internal emergency response plan in order for that equipment and expertise to be available at all times and to be made available as necessary to the authorities responsible for the execution of the external emergency response plan of the Member State where the internal emergency response plan applies*".

[30] Annex IV of the Directive summarizes the information to be submitted by operators and owners for prevention of major accidents.

[31] Commission Implementing Regulation (EU) No 1112/2014 of 13 October 2014 determining a common format for sharing of information on major hazard indicators by the operators and owners of offshore oil and gas installations and a common format for the publication of the information on major hazard indicators by the Member States, OJ L 302/1 of 22 October 2014.

[32] The corporate internal emergency response plan is to be submitted to the competent authority pursuant to Article 11(1)(g) of the Directive.

[33] As a consequence of any material change to the report on major hazards or notifications, see Article 28(3) of the Directive.

[34] According to Article 29(2) of the Directive "*external emergency response plans shall be prepared by the Member State in cooperation with relevant operators and owners and, as appropriate, licensees and the competent authority, and shall take into account the most up to date version of the internal emergency response plans of the existing or planned installations or connected infrastructure in the area covered by the external emergency response plan.*"

It is important to note in this context that **Article 19(6) of the Directive** mandates the EU Members to make sure that operators and owners have to prepare and maintain a complete inventory of emergency response equipment pertinent to their offshore oil and gas operation.

7. Independent Verification, Compliance and Oversight by EU Members

Article 17(1) of the EU Offshore Directive introduces another new feature, mandating EU Member States to ensure that operators and owners establish **schemes for independent verification**, including a preparation of a **description** of such schemes.[35] The results of the independent verification shall be without prejudice to the responsibility of the operator or the owner for the correct and safe functioning of the equipment and systems under verification (**see Article 17(2) of the Directive**).

"*Independent verification*" is legally defined in **Article 2(29) of the Directive** as "*an assessment and confirmation of the validity of particular written statements by an entity or an organisational part of the operator or the owner that is not under the control of or influenced by, the entity or the organisational part using those statements*". In respect of offshore installations, the schemes for independent verification shall be established, in accordance with **Article 17(4)(a) of the Directive**, to assure

- that the elements identified as "*critical*" for safety and the protection of the environment[36] in the operator's/owner's risk assessment are "*suitable*"[37] as described in the report on major hazards (see **Article 11(2) of the Directive**), and
- that the schedule of examination and testing of the safety and environmental critical elements is "*suitable*", up-to-date and operating as intended;

Operators and owners will be required to make available to the competent authority advice received from the independent verifier (relating to the two issues mentioned

[35] The independent verification scheme and its description is a document to be submitted to the competent Authority pursuant to Article 11(1)(d) of the Directive, to be included within the safety and environmental management system to be submitted to the competent authority pursuant to Article 11(1)(b) of the Directive. The description of the independent verification scheme shall contain the information specified in Annex I, Part 5 of the Directive. Pursuant to Article 17(3) of the Directive, the selection of the independent verifier and the design of schemes for independent verification shall meet the criteria of Annex V of the Directive.

[36] See the legal definition of "*safety and environmental critical elements*" in Article 2(33) of the Directive meaning "*parts of an installation, including computer programmes, the purpose of which is to prevent or limit the consequences of a major accident, or the failure of which could cause or contribute substantially to a major accident.*"

[37] See the legal definition in Article 2(6) of the Directive, op. cit. footnote 19.

above), also relating to records of action taken on the basis of the independent advice. These records must be retained by the operator/owner for a period of six months after completion of the offshore oil and gas operations to which they relate (see **Article 17(6) of the Directive**). Generally, the EU Members shall ensure that operators/owners respond to and take appropriate action based on the advice of the independent verifier (see **Article 17(5) of the Directive**).

In respect of notifications of well operations, the schemes for independent verification shall give assurance that the well design and well control measures are "*suitable*" for the anticipated well conditions at all times (see **Article 17(4)(b) of the Directive**).

Finally, pursuant to **Articles 8 and 21 of the Directive**, the EU Members (via their competent authorities) shall ensure the compliance of operators/owners with the measures established in the report on major hazards (see below) and in the variety of the other plans as established by the Directive. In particular, the EU Member States shall ensure "*that operators/owners provide the competent authority […] with transport to or from an installation or vessel associated with oil and gas operations, including the conveyance of their equipment, at any reasonable time, and with accommodation, meals and other subsistence in connection with the visits to the installations,* ***for the purpose of facilitating competent authority oversight, including inspections, investigations and enforcement of compliance***" (see **Articles 8(1)(b) and 21(2) of the Directive**). In this context, the competent authorities of the EU Member States will have to develop, review and continuously improve annual plans for effective oversight (see **Article 21(3) of the Directive**).

8. Documents to be Submitted, especially the "*Report on Major Hazards*"

It has already been stressed that **Article 11 of the Directive** is the key provision for all documents to be submitted by operators/owners. Some of those documents where already introduced in this paper (i.e. the corporate major accident prevention policy, the corporate safety and environmental management system, the corporate internal emergency response plan or the independent verification scheme and its description). There are also other documents to be submitted to the competent authority, specifically relating to the design of a production installation or to the possible relocation of a production installation (see **Annex 1, Part 1 of the Directive**), to well operations (see **Article 15 of the Directive**) or to combined operations (see **Article 16 of the Directive**).

However, the relevance of the so-called **"*report on major hazards*"**, a final key and very complex document to be submitted in accordance with **Articles 11(1)(e) and 11(7) of the Directive**, shall be finally emphasized at this point. **Recitals (26) and (27) of the Directive** outline the future practical relevance of this report extensively: "*[…] The risk assessments and arrangements for major accident prevention should be clearly described and compiled in the report on major hazards […] [this report]*

should be prepared and, as necessary, amended in respect of any significant aspect of the lifecycle of a production installation, including design, operation, operations when combined with other installations, relocation of such installation within the offshore waters of the Member State in question, major modifications, and final abandonment. Similarly, the report on major hazards should also be prepared in respect of non-production installations and amended as necessary to take into account significant changes to the installation. No installation should be operated in offshore waters of Member States unless the competent authority has accepted the report on major hazards submitted by the operator or owner […]."

This report on major hazards shall be submitted to the competent authority by a deadline ending before the planned commencement of the operations. Assessing and **accepting**[38] reports on major hazards, assessing design notifications, and assessing notifications of well operations or combined operations, and other similar documents that are submitted to it constitute the primary regulatory functions and duties of the competent authority (see **Article 8(1)(a) of the Directive**).

Materially, **Article 12 (for production installations)**[39] and **Article 13 (for non-production installations)**[40] **of the Directive** set out the legal requirements for adhering to the complexity of the report on major hazards which is to be updated whenever appropriate or when so required by the competent authority.[41] The report may be prepared in relation to a group of production installations, subject to the agreement of the competent authority (see **Article 12(3) of the Directive**, this rule does, however, not apply to non-production installations). In sum, the Directive mandates EU Members to ensure that

- workers' representatives are consulted at the relevant stages in the preparation of the report on major hazards for a production installation, and that evidence is provided to this effect;[42]
- that the operator provides, if deemed necessary by the competent authority, further information and makes any necessary changes to the submitted report on major hazards;[43]

[38] The term „*acceptance*" "*in relation to the report on major hazards*" is legally defined in Article 2(22) of the Directive as meaning "*the communication in writing by the competent authority to the operator or the owner that the report, if implemented as set out therein, meets the requirements of this Directive. Acceptance does not imply any transfer of responsibility for control of major hazards to the competent authority.*"

[39] In conjunction with Annex I, Parts 2 and 5 of the Directive.

[40] In conjunction with Annex I, Parts 3 and 5 of the Directive.

[41] The report on major hazards for both production and non-production installation shall be subject to a thorough periodic review by the owner at least every five years or earlier when so required by the competent authority. The results of the review shall be notified to the competent authority, see Articles 12(7) and 13(7) of the Directive.

[42] See Article 12(2) of the Directive in conjunction with Annex I, Part 2, point 3 of the Directive and Article 13(2) of the Directive in conjunction with Annex I, Part 3, point 2 of the Directive.

[43] See Articles 12(4) and 13(3) of the Directive and Article 13(3) of the Directive.

- that the operator prepares an amended report on major hazards[44] where modifications are to be made to the production installation entailing a material change, or where it is intended to dismantle a fixed production installation;[45]
- that the planned modifications are not brought into use nor any dismantlement commenced until the competent authority has accepted the amended report on major hazards for the production installation.[46]

Additionally, Annex I of the Directive, Part 2 (for production installations) and Part 3 (for non-production installations) list the **minimum formal requirements for the report on major hazards**, summing up a list of **16 individual points** to be addressed and adhered to. Practically, as regards content, almost all other legal requirements of the Directive form elements of the report on major hazards. As such, it will be a very complex (and probably time-consuming) document to be produced by operators/owners.

II. The Key Issue under Private Law: Liability for Damages

Already by its name, Directive 2013/30EU is a legal instrument primarily relating to safety and not to liability for damages caused by offshore oil and gas operations. However, within the legal order of the EU, the Directive at least introduces a "way forward concept" on the liability of licensees and operators of offshore installations and their access to sufficient physical, human and financial resources.

Recitals (9), (11), (58) and (63) of the Directive address the general policy objectives of the EU relating to questions of liability. Highlighting some of the most important statements, **Recital (9) of the Directive** refers to the problem that "*[…] under existing liability regimes, the party responsible may not always be clearly identifiable and may not be able, or liable, to pay all the costs to remedy the damage it has caused*." As a result, "*the party responsible should always be clearly identifiable before offshore oil and gas operations are commenced.*"

Recital (11) of the Directive stresses the need "*to clarify that holders of authorisations for offshore oil and gas operations*[47] *are also the liable 'operators' within the meaning of [the Environmental Liability Directive], and should not delegate their responsibilities in this regard to third parties contracted by them.*"

Finally, **Recital (63) of the Directive** postulates that "*operators should ensure they have access to sufficient physical, human and financial resources to prevent major accidents and limit the consequences of such accidents. However, as no existing*

[44] To be submitted pursuant to Article 11(1)(f) of the Directive by a deadline specified by the competent authority, in accordance with Annex I, Part 6 of the Directive.
[45] See Articles 12(5) and 13(4) of the Directive.
[46] See Articles 12(6) and 13(5) and (6) of the Directive.
[47] 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, OJ L164/3 of 30 June 1994.

financial security instruments, including risk pooling arrangements, can accommodate all possible consequences of major accidents, the Commission should undertake further analysis and studies of the appropriate measures to ensure an adequately robust liability regime for damages relating to offshore oil and gas operations, requirements on financial capacity including availability of appropriated financial security instruments or other arrangements. This may include an examination of the feasibility of a mutual compensation scheme. […]".

1. Formal Issues Relating to Liability under the EU Offshore Directive

The first strategic steps of undertaking analysis and studies are substantiated further by **Article 39(1) of the Directive**, requesting the Commission to submit, by 31 December 2014, to the European Parliament and to the Council a **report on the availability of financial security instruments, and on the handling of compensation claims, where appropriate, accompanied by proposals**. The underlying issues are, however, so complex that this report could not be published within the timeframe envisioned by Article 39(1) of the Directive. So far, the Commission has been assisted by an extensive external report on the topic which was completed in August 2014 and which has identified a deeply fragmented legal picture within the EU (the EEA States Norway and Iceland have been included in the study).[48] In its summary, the report states that there is currently:

- no liability in many EU States for most third-party claims for compensation for "traditional" damage caused by an [offshore] accident;
- no regime in the vast majority of EU States to handle compensation payments; and
- no assurance in many EU States that operators, or other liable persons, would adequate financial assets to meet such claims.[49]

Given the complexity of varying and fragmented approaches in the national legal order of most EU Member States, it may well be that the Commission report on the availability of financial security instruments, and on the handling of compensation claims will be further postponed. Maybe it will even be combined (at a later stage) with another report that the Commission has to prepare as well: In accordance with **Article 39(2) of the Directive**, the Commission shall, by 19 July 2015, submit to the European Parliament and to the Council a **report on its assessment of the effectiveness of the liability regimes in the [EU] in respect of the damage caused by offshore oil and gas operations**. That report shall include an

[48] BIO by Deloitte (2014), Civil Liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area, Final Report prepared for the European Commission – DG Energy.
[49] Ibid., p. 12.

assessment of the appropriateness of broadening liability provisions. The report shall be accompanied, where appropriate, by proposals.

2. Material Issues Relating to Liability under the EU Offshore Directive

According to **Article 4(2)(c) of the Directive**, when assessing the technical and financial capability of the applicant for a licence, due account shall be taken in particular of "*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*". The above-mentioned external report prepared to assist the Commission in adhering to **Article 39(1) of the Directive** has, however, identified that most EU Member States currently do not recognize a liability for potential economic damages (with notable exceptions, such as France).[50]

The extensive provision of **Article 4(3) of the Directive** mandates the EU Member States to "*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 […] 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. […].*" Licensees will also be required to maintain sufficient capacity to meet their financial obligations resulting from liabilities for offshore oil and gas operations. It can be expected that the majority of EU Member States will implement Article 4(3) of the Directive by requiring a **proof of insurance** from licensees (with certain minimum standards for coverage, as some national legal orders within the EU do already prescribe).

Finally, **Article 7 of the** Directive, in fact, governs liability for environmental damage by stating: "*Without prejudice to the existing scope of liability relating to the prevention and remediation of environmental damage pursuant to [the EU Directive on Environmental Liability], Member States shall ensure that the licensee is financially liable for the prevention and remediation of environmental damage as defined in [the Environmental Liability Directive], caused by offshore oil and gas operations carried out by, or on behalf of, the licensee or the operator.*"

Thus, the holder of a license (i.e. the licensee) will be directly financially liable for the prevention and remediation of environmental damage caused by offshore oil and gas activities carried out by, or on behalf of, the licensee or the operator. Nevertheless, the operator is the entity with the primary responsibility for the safety of offshore operations, obliged under EU Law to reduce the risk of major accidents as low as

[50] BIO by Deloitte (2014), Civil Liability, financial security and compensation claims for offshore oil and gas activities in the European Economic Area, Final Report prepared for the European Commission – DG Energy, p. 10.

"*proportionately acceptable*". Depending on commercial arrangements or national administrative requirements, the operator can be a third party or the licensee itself or only one of several licensees.[51] It is remarkable that even if a licensee is not identical with the operator, the licensee is strictly liable under the (now) **combined legal regimes of the Offshore Directive and the Environmental Liability Directive**. Consequently, in transposition of the EU Offshore Directive to the national legal orders of the EU Member States, financial liability for damages caused by offshore oil and gas operations will be strictly channelled to the licensees in the future.

III. Conclusions and Outlook

The EU Offshore Directive establishes a stringent and very complex safety regime to bring the risk of EU-related offshore accidents in oil and gas operations down to an absolute minimum. It sets out clear – but nevertheless lengthy – rules covering the whole lifecycle of all exploration and production activities from initial design to the final abandonment or decommissioning of platforms and rigs. It will also be a "diplomatic tool" for the EU to further promote the highest standards of offshore safety globally, sharing best practices and improving standards in cooperation with third countries, with a particular emphasis on sensitive sea areas, such as the Arctic[52].

The Directive is, in fact, an efficient reaction of the EU legislator to the Macondo and Montara disasters. The instrument has (*inter alia*) at least two short term effects: First, there will be no room at all for any kind of state liability if EU Members correctly apply and continuously update the regime of Directive 2013/30/EU within their national legal order from 19 July 2015 onwards. This is important to note for one particular reason and lesson from the past: In the proceedings relating to the Montara spill, the Indonesian government had sought compensation both from the well operator and from the Australian government, alleging that the responsible Northern Territory Department of Resources had not been a "*diligent regulator*".[53] Reversing the argument, there might be room for state liability if an injured party can prove that the competent authority within a given EU State had, in fact, serious shortcomings in its procedures in applying the specifications of the EU Offshore Directive, thus contributing to a major offshore accident.[54]

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[51] See Recital (13) of the Directive.
[52] See Recital (52) and Article 33(3) of the EU Offshore Directive.
[53] *Tromans* (2014), Pollution from Offshore Rigs and Installations, Chapter 11 in: *Soyer/Tettenborn* (eds.), Offshore Contracts and Liabilities (Informa Law), pp. 253 (at 257).
[54] Although it did not happen offshore, there exists a good and recent case study (the proceedings are, however, not finalized yet) for a possible contributory negligence from a German regulatory agency: In November 2013, there was a major oil accident in an onshore oil storage facility (a cavern site) situated close to the North Sea coastline which caused a spill of 40.000 litres of crude oil into the surrounding coastal waters. Criminal investigations for water pollution charges also included members of the competent regulatory agency; for more information on the accident see: http://www.kavernen-

Second, as an imminent practical result, the EU Offshore Directive has widened the scope of application of the Environmental Liability Directive. For water damage, the former EU legal framework for environmental liability was restricted to the territorial sea (i.e., (only) twelve nautical miles measured from the baselines). This would, however, materially exclude most offshore oil and gas projects to be covered by Directive 2013/30/EU. Thus, **Recital (58) of the EU Offshore Directive** postulates that "*the definition of water damage in [the Environmental Liability Directive] should be amended to ensure that the liability of licensees under [the Environmental Liability Directive also] applies to marine waters*[55] *of Member States […]".* The amendment is effected specifically by **Article 38 of the EU Offshore Directive**. For water damage, by 19 July 2015, the updated EU legal framework for environmental liability will be extended to the exclusive economic zone and to the relevant continental shelf of the EU Members (i.e., 200 nautical miles measured from the baselines). Consequently, the geographical scope for liability under the two Directives has been extended significantly.

For the remaining issues relating to civil liability in general, it will be most interesting to see what the year 2015 (or much further on) will hold ready for further European integration in the area of liability for damages caused by offshore oil and gas operations. However, as it has already been pointed out quite succinctly in academic literature, experience in the field of environmental liability generally suggests that progress in harmonising a civil liability regime is likely to be "*tortuous*".[56] Thus, progress and early agreement cannot be expected in this new area under EU Law. Civil liability of licensees for loss or damage suffered by third parties is not addressed by the EU Offshore Directive. This problem might as well be a potential (but truly sensitive) legislative issue for the EU Commission to navigate through the EU's internal process of legal harmonisation and integration in the years to come.

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informationszentrum-etzel.de/detail-aktuelles/schadensereignis-am-standort-etzel.html (in German, last access: March 2015).

[55] The marine waters of the EU Members are legally defined in Article 3(1) of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164/19 of 25 June 2008. See Article 3(1)(a) defining "*marine waters*" as "*waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the [the United Nations Convention on the Law of the Sea]* […]".

[56] See *Tromans* (2014), Pollution from Offshore Rigs and Installations, Chapter 11 in: *Soyer/Tettenborn* (eds.), Offshore Contracts and Liabilities (Informa Law), pp. 253 (at 273).