Brussels, 28 February 2019

# Evaluating the EU Offshore Safety Directive

The Directive on Safety of Offshore Oil and Gas Operations (2013/30/EU) provided an important enhancement of the safety of offshore oil and gas production in the EU. Union-wide requirements on major hazard reporting, oil spill response, liability for environmental damages and financial security all constituted important first steps in the area of offshore oil and gas safety. But the current framework still allows for inconsistencies between safety regimes in EU Member States in fields of crucial importance to offshore safety. As Member States had until July 2015 to transpose the directive, with the transitional period for the industry lasting up until July 2018, focusing on the scope of the legislation rather than assessing its implementation seems most relevant in this evaluation round. The following proposals from The Bellona Foundation, Surfrider Foundation Europe, WWF Greece, Nature and Youth and Friends of the Earth Europe therefore address current shortcomings that could jeopardise achieving the aim of the directive.

***Underlying risk drivers should be re-mapped***

The Offshore Safety Directive (OSD) was designed to target specific underlying risk drivers as mapped in the Commission's 2011 Impact Assessment.[1] Eight years later, the risk outlook may well have shifted. Amongst other factors, the marine ecosystems are becoming more vulnerable, with increased pollution and acidification; there is more extreme weather caused by climate change; installations and infrastructure is continuously aging, with more temporary and final abandonment of wells; digitalisation has skyrocketed for the offshore sector, as for other industries, with the vulnerability this entails; and in the North Sea, small players are increasingly replacing larger companies, without necessarily having the same technical and financial capacity for emergency response and damage compensation. A new

[1] Commission staff working paper impact assessment accompanying the document proposal for the Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities (SEC/2011/1293)

analysis of current risk drivers should therefore be compiled in a report for the ongoing evaluation to navigate by.

***Reporting compliance must be assured***

A strong reporting regime is crucial to maintaining safe offshore operations. While the directive sets up a framework to this end, there is little assurance that Member States are in fact receiving all reportable incident notices from operators, and that Member States themselves are being fully transparent.

The need for assurances that operators do not withhold information from the competent authority of the Member State, and that the authority in its turn both verifies and acts on information (or the lack thereof), was illustrated in the EEA state Norway this January. Norway has not implemented the OSD, but prides itself in being amongst the best performing offshore safety regimes globally. In a recent report however, the Auditor General of Norway slammed the Norwegian Petroleum Safety Authority for, amongst other things, blindly trusting and seldom verifying information from operators.[2] The Auditor General noted that basing the system on trust alone is obviously not working. [3]

When it comes to data resources and transparency, assurances that reporting rules are actually being followed are in high demand. Judging from the case of Norway, this can be assumed to be particularly pressing for smaller states, where a limited pool of qualified personnel entails high changeover between industry and regulators, with the impartiality issues this can easily entail. Smaller states are heavily represented amongst EU oil and gas producers, and will be even more so after Brexit.

In light of this, the undersigned organisations hold that providing The European Maritime and Safety Agency stronger supervision and control functions could contribute to remedying the lack of reporting assurance. Furthermore and in any event, the Commission must be particularly diligent in requiring full reports annually from Member States, including on how often Member States require full environmental impact assessments for exploration drilling projects. Assurances are needed that regulators do in fact publish their plans and procedures yearly and accessibly. It is crucial that the Commission in its turns produces and publishes EU-wide reports and evaluations.

***Risk preparedness must account for worst case scenarios***

The basic core of the directive is to effectively manage the risks involved with offshore petroleum activity. The key tool to assessing

[2] Report in Norwegian here.
[3] Quoted in Norwegian here.

acceptable risk is scenario analysis that explicitly includes sketching up plausible worst case scenarios that may or may not have very low probability of occurring. Risk assessment that excludes worst case scenarios undermines the very objective of the directive. The directive was drafted in the wake of the Deepwater Horizon blowout, a disaster that is proof that dramatic incidents can occur even during operations that are not considered to be of particularly high risk. Dimensioning risk management after the most probable scenario rather than the worst case scenario entails that operators, stakeholders and third parties are over-exposed to and under-protected against severe consequence events and outcomes from otherwise manageable or avoidable accidents, operator errors and equipment failures. It is therefore imperative to strictly define in the legislation that risk management strategies must account for worst case scenarios.

***Activities should be restricted in specific areas***

The directive does not adequately address the sensitiveness of specific areas and/or the importance of certain zones for marine ecosystems and the ocean's resilience. Offshore exploration and exploitation should be prohibited in areas that score high on factors such as vulnerability, productivity and public value, like the Mediterranean area. Offshore exploration and exploitation should also be prohibited in icy Arctic waters, and in a buffer zone stretching 100 nautical miles from the ice edge. The Arctic is an example for an area where the probability of an incident occuring is higher (harsh weather, darkness), the potential damage is worse (vulnerable ecosystem with spawning areas for few, but keystone species) and the ability to clean up is lower (remoteness, slow old degradation due to the climate). The European Parliament called for a ban on oil drilling in icy Arctic waters of the EU and the EEA in the resolution on an integrated European Union policy for the Arctic in March 2017.[4]

More generally, OSD should be amended to prohibit any offshore activities in marine protected areas, and in a buffer zone around those. A buffer zone is necessary due to response time, and should be large enough to enable implementing emergency response suitable to the sensitiveness of the area. The European Parliament stressed "that no oil or gas exploration or drilling should be permitted in or near Marine Protected Areas (MPAs) or vulnerable areas of high conservation value" in its resolution on International ocean governance adopted in January 2018.[5] 77 % of the respondents to a public

[4] P8_TA(2017)0093, para. 14

[5] P8_TA(2018)0004, para. 69

consultation organised in 2018 are favorable to a moratorium on offshore activities in MPAs.[6]

***Real public participation must be ensured***

Approaches to public consultation must be harmonised across Member States, so as to ascertain that such participation serves the intended cause. For instance, the directive should, on specified terms, require public consultations also for re-licensing areas that have been fallow for a considerable amount of time, where new knowledge on factors such as the vulnerability of the specific marine area or the efficiency of emergency response may require increased caution. Member States should also report on how many licensing decisions are made in clear contradiction with advice received from scientific agencies in the public participation rounds, and strive to close any gap here. A recent analysis conducted by The Norwegian Society for the Conservation of Nature in EEA state Norway,[7] which has extensive public participation requirements, showed that all recommendations given by governmental environmental agencies on block announcement rounds the last five years have been ignored. The Member States must be diligent in ensuring that concrete, weighty and relevant environmental concerns voiced in the public participation rounds are properly emphasised in the risk considerations relating to licenses.

***Liability rules must reflect the real risk of offshore oil and gas activities***

As painfully demonstrated with the Deepwater Horizon accident, the potential consequences and costs of an offshore accident can never be predicted. It is against the backdrop of this disaster that the OSD was drafted, with the objective of preventing major accidents in offshore oil and gas operations. This target of prevention speaks for striving towards preventive effects also in the design of civil liability schemes, which are currently limited in different ways throughout Member States. For those conducting activities with particularly massive potential consequences to also carry the burden of those consequences, is in line with the polluter pays principle and these considerations from the Commission's 2015 report[8]:

*It can be argued that holding firms accountable for all damage and loss caused by offshore accidents facilitates access to justice for victims. It incentivizes firms to take adequate precautions and develop safer ways of operating. It also helps ensure that offshore activities only take place if their benefits outweigh their risks.*

[6] Voice for the Ocean consultation organised by Surfrider Foundation Europe between June 2018 and January 2019. The full results will be public in April 2019

[7] Article in Norwegian daily Klassekampen

[8] Report from the Commission to the European Parliament and the Council on liability, compensation and financial security for offshore oil and gas operations pursuant to Article 39 of Directive 2013/30/EU (COM/2015/0422)

In this report, it was stressed that the Commission should conclude on the need for further steps in terms of possibly broadening liability legislation in the currently ongoing evaluation. The need for a decision at this juncture was also underlined by the European Parliament in a 2016 resolution,[9] stressing

*"(…) that there is no liability in many of the Member States with offshore and gas activities for most third-party claims for compensation for traditional damage caused by an accident, no regime in the vast majority of Member States for compensation payments, and no assurance in many Member States that operators or liable persons would have adequate financial assets to meet claims; stresses, moreover, that there is often 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; believes, therefore, that an European framework is needed, which should be based on the legislation of the most advanced Member States, should cover not only bodily injury and property damage but also pure economic loss, and should ensure effective compensation mechanisms for victims and for sectors that may be severely affected (e.g. fisheries and coastal tourism);*

We would like to underline the importance of a clear conclusion at this point, and request that civil liability schemes now be uplifted in all Member States to global best practice levels. This must also include some recognition of pure economic loss.

We recognize the practical necessity of limiting this to sufficiently direct claims. But this can be done, and the challenges connected hereto should not be used by the industry as a *carte blanche* to avoid an entire category of very real losses that could be suffered by third parties as a result of an especially risky and profitable activity. We deem it unacceptable that particularly the vast economic losses that could easily hit the fishing sector and local coastal economies in the case of a major accident, currently risk going largely uncompensated. This must be remedied.

***Comprehensive financial security should be a prerequisite***

As a prerequisite for commencing or continuing offshore oil and gas operations, the OSD should include an obligation for comprehensive financial security, including financial mechanisms in case of insolvency, that covers all operator and licensee liabilities under the OSD. This should also require the parties to to demonstrate adequate financial assets to meet these civil claims stemming for worst case scenario

[9] European Parliament resolution of 1 December 2016 on liability, compensation and financial security for offshore oil and gas operations (2015/2352(INI))

accidents. Currently, financial security is merely one of the factors that is taken into account during the assessment of the applicant's technical and financial capability [cf. art. 4(2)(c)], while further studies are under way [cf. art. 39(1)].

***Negligent conduct should be criminalised***

In the 2015 Commission report on liability, it was stressed that it is important that the Commission returns to the subject of criminalisation in the OSD evaluation. The undersigned organisations hold that spills caused by serious negligence should be criminalised by adding major offshore accidents to the Environmental Crime Directive.[10] As held in the abovementioned 2015 Commission report, criminalisation could add

*(…) a separate layer of deterrence beyond civil and environmental liability, which could improve the protection of the environment and compliance with offshore safety legislation.* [11]

We would like to highlight that impunity for environmental crimes seriously undermines environmental protection. With the financial muscles of some of the major oil companies, financial liability is not always enough of a deterrent. A separate layer is needed, and we ask that this is ensured at this juncture.

***Due enforcement on decommissioning hazards must be admitted***

Increasing in extent and relevance, it is important that the field of decommissioning does not go unregulated in any aspect. The ongoing evaluation should aim to examine whether the broad acquis of EU regulation allows for all necessary enforcement in this field, for instance where old abandoned wells leak to surface.

***More obligations should apply outside the EU***

Companies registered in the EU should be bound worldwide by all OSD obligations that can be applied directly to operators. Allowing companies to skip OSD standards in developing countries does not sit well with the initial intention of avoiding a second Deepwater Horizon. With the UK set to leave the EU and Norway refusing to implement the OSD, applying more OSD standards also outside of EU waters could also to some extent remedy unintentional limiting of the scope of the directive. In addition, the obligations already applicable for extraterritorial activities should be enforced in a consistent and transparent manner. At this point it is not very clear whether Member

[10] Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law

[11] Report from the Commission to the European Parliament and the Council on liability, compensation and financial security for offshore oil and gas operations pursuant to Article 39 of Directive 2013/30/EU (COM/2015/0422)

States do in fact ask for accident prevention plans covering extraterritorial activities, and even more so if and how they verify that that the plans are applied.

There is a clear need to further enhance efforts to effectively manage the risks connected to offshore oil and gas activities. In this continuous pursuit, contentment equals vulnerability. By taking due account of the above recommendations, we believe that the important first step that the OSD constituted can be built on in the way that best ensures the achievement of the aim of the directive.

Contacts:

Anne Fougner Helseth, The Bellona Foundation: anne@bellona.no

Antidia Citores, Surfrider Foundation Europe: acitores@surfrider.eu

Antoine Simon, Friends of the Earth Europe, antoine.simon@foeeurope.org

Gaute Eiterjord, Nature and Youth: gautee@nu.no

George Chasiotis, WWF Greece: g.chasiotis@wwf.gr