Directive 2013/30/EU on the safety of offshore oil and gas operations

ERA
ANNUAL CONFERENCE ON EUROPEAN ENVIRONMENTAL LAW
6 March 2014
Topics for discussion

1. How did we get here?
2. What is an ‘offshore’ operation?
3. Timelines & Derogations
4. Place in EU Framework
5. The Directive’s Seven Pillars
6. Summary Assessment
How did we get here?
### How did we get here?

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<tr>
<th>Recent serious incidents outside Europe</th>
<th>Historic serious incidents within Europe</th>
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<tr>
<td><strong>Deepwater Horizon</strong> (2010) Gulf of Mexico</td>
<td><strong>Piper Alpha</strong> (1988) - North Sea (UK)</td>
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- **In Europe** most oil and gas is produced offshore. Perceived fragmentation and disparities:
  - **North Sea** Member States (UK, Netherlands, Denmark and Norway) recognised as individual leaders but Commission seeks a ‘composite’ benchmark.
  - **Mediterranean, Black and Baltic Seas** operations less experienced.

- **Commission Communication**, ‘Facing the challenge of the safety of offshore oil and gas activities’, COM (2010) 560 final (October 2010)

- **Proposal for a Regulation** on safety of offshore oil and gas **prospection, exploration and production activities**, COM(2011) 688 final (October 2011)
### How did we get here?

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Document Ref</th>
<th>Summary</th>
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<tr>
<td>27/10/2011</td>
<td>Legislative proposal published</td>
<td>COM(2011)0688</td>
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<tr>
<td>17/11/2011</td>
<td>Committee referral announced in Parliament, 1st reading/single reading</td>
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<td>24/11/2011</td>
<td>Debate in Council</td>
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<td>24/05/2012</td>
<td>Referral to associated committees announced in Parliament</td>
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<tr>
<td>03/12/2012</td>
<td>Debate in Council</td>
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<td>19/03/2013</td>
<td>Vote in committee, 1st reading/single reading</td>
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<tr>
<td>25/03/2013</td>
<td>Committee report tabled for plenary, 1st reading/single reading</td>
<td>A7-0121/2013</td>
<td>Summary</td>
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<td>20/05/2013</td>
<td>Debate in Parliament</td>
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<tr>
<td>21/05/2013</td>
<td>Decision by Parliament, 1st reading/single reading</td>
<td>T7-0200/2013</td>
<td>Summary</td>
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<td>21/05/2013</td>
<td>Results of vote in Parliament</td>
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<tr>
<td>06/06/2013</td>
<td>Act adopted by Council after Parliament’s 1st reading</td>
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<td>12/06/2013</td>
<td>Final act signed</td>
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<tr>
<td>12/06/2013</td>
<td>End of procedure in Parliament</td>
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<tr>
<td>28/06/2013</td>
<td>Final act published in Official Journal</td>
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Shift from the proposed Regulation to a Directive raised by EP: Concern about significant revocation and amendments of existing equivalent national legislation, diverting resources from safety assessments and inspections. (Commission had favoured a Directive ‘due to its clarity, consistency and speed of implementation through direct application’.)

Consider: Art.5 TEU, principles of subsidiarity and proportionality.
What is an offshore operation?
What is ‘offshore’?

‘offshore’ means situated in the territorial sea, the Exclusive Economic Zone or the continental shelf of a Member State within the meaning of the United Nations Convention on the Law of the Sea.

![Diagram of maritime zones](image-url)
What is offshore? The EEZ

An area beyond and adjacent to the territorial sea not exceeding 200 nautical miles (from the baselines from which the breath of the territorial sea is measured) where a coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and

(b) jurisdiction as provided for in the Convention with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment. [Art. 56, UNCLOS]
What is offshore? The Continental shelf

‘the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or a distance of 200 nautical miles from the baselines where the outer edge of the continental margin does not extend up to that distance’. [Art. 76, UNCLOS]

www.steptoe.com
What is an offshore operation?

Directive covers:

- ‘**offshore oil and gas operations**...all activities associated with an installation or connected infrastructure, including design, planning, construction, operation and decommissioning thereof, relating to exploration and production of oil or gas, but excluding conveyance of oil and gas from one coast to another’ [Art. 2(3)]

- ‘**installation**’...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 operation’ ’ [Art. 2(19)]

- ‘**exploration**’...drilling into a prospect and all related offshore oil and gas operations necessary prior to production-related operations’ ’ [Art. 2(15)]
Timelines & Derogations
**Timelines & Derogations**

  - **Transposition** deadline **19 July 2015.** ’ [Art. 41(1)]
  - **Planned operations** subject from **19 July 2016.** ’ [Art. 42(1)]
  - **Existing operations** phased in from date of scheduled regulatory reviews of risk assessment documentation but **no later than 19 July 2018.** ’ [Art. 42(2)]

<table>
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<tr>
<th>Member States with offshore waters that do not have offshore oil and gas operations under their jurisdiction, and which do not plan to license such operations only need comply with* rules on</th>
<th>Landlocked Member States (Austria, Czech Republic, Hungary, Luxembourg and Slovakia) only need comply with rules on**</th>
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<tbody>
<tr>
<td>• reporting of major accidents outside EU [Art. 20]**</td>
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<td>• contact points for information exchange for transboundary preparedness and response [Art. 32]</td>
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<td>• effective proportionate and dissuasive penalties [Art. 34].</td>
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* Can only licence new operations once other provisions have been transposed and notified to Commission.

** If on 18 July 2013, no company registered in territory was conducting operations outside EU, Art. 20 transposition only required by MS 12 months after such registration or by 19 July 2015 (whichever is later).
Place in EU legal framework
**Place in EU legal framework**

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<tr>
<th>Without prejudice to</th>
<th>&amp; Amends</th>
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<tr>
<td>EU law on <strong>health and safety of workers</strong></td>
<td>Directive <a href="https://eur-lex.europa.eu/">2004/35/EC</a> on environmental liability with regard to the prevention and remedying of environmental damage (‘ELD’)</td>
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<tr>
<td>Directive <a href="https://eur-lex.europa.eu/">2001/42/EC</a> on the assessment of the <strong>effects of certain plans and programmes</strong> on the environment (‘SEA’)</td>
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<tr>
<td>Directive <a href="https://eur-lex.europa.eu/">2003/4/EC</a> on public <strong>access to environmental information</strong></td>
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<tr>
<td>Directive <a href="https://eur-lex.europa.eu/">2003/35/EC</a> on public <strong>participation in respect of the drawing up of certain plans and programmes</strong> relating to the environment</td>
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<tr>
<td>Directive <a href="https://eur-lex.europa.eu/">2010/75/EU</a> on industrial emissions (‘IPPC’)</td>
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<tr>
<td>Directive <a href="https://eur-lex.europa.eu/">2011/92/EU</a> on the <strong>assessment of the effects of certain public and private projects</strong> on the environment (‘EIA’)</td>
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Seven Pillars

Directive establishes measure on:

1. Prevention of Major Accidents
2. Preparing and Carrying out Operations
3. Prevention Policy
4. Transparency and Sharing of Information
5. Cooperation between Member States
6. Emergency Preparedness & Response
7. Transboundary effects
1. Prevention of Major Accidents

‘major accident’ means, in relation to an installation or connected infrastructure:

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<tr>
<th>(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;</th>
<th>Incident per se + PI/potential</th>
</tr>
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<tbody>
<tr>
<td>(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;</td>
<td>Seriously damaging the installation + PI/potential</td>
</tr>
<tr>
<td>(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</td>
<td>All other incidents causing PI to people on the installation</td>
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<tr>
<td>(d) any major environmental incident resulting from incidents referred to in points (a), (b) and (c).</td>
<td>Resulting env. incidents</td>
</tr>
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For the purposes of determining whether an incident constitutes a major accident under points (a), (b) or (d), an installation that is normally unattended shall be treated as if it were attended;’ [Art. 2(1)]
1. Prevention of Major Accidents

‘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’. ’ [Art. 2(37)]

Art. 1(a) of ELD defines ‘environmental damage’ as:

‘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. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing… [Habitats or Wild Birds Directives] or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.’
1. Prevention of Major Accidents

Operators must ensure that ‘all suitable measures’ are taken to:

- prevent ‘major accidents’
- When occurs ‘limit...consequences for human health and the environment’

‘Operator’ is ‘the entity appointed by the licensee or licensing authority [LA] to conduct offshore oil and gas operations, including planning and executing a well operation or managing and controlling the functions of a production installation’. Acts/omissions by ‘contractors’ do not relive Operators of duties under the Directive. [Art. 3(2)]

‘Systematic risk management’ [undefined] must form the basis for Operator activities ‘so that the residual risks of major accidents to persons, the environment and offshore installations are acceptable’.

‘Acceptable...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;
1. Prevention of Major Accidents

Consider: ‘…principle of proportionality is one of the general principles of European Union law and requires that measures implemented through European Union law provisions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not go beyond what is necessary to achieve them…

With regard to judicial review of those conditions, however, the European Union legislature must be allowed a broad discretion when it is asked to intervene in an area which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. In its judicial review of the exercise of such powers, the Court cannot substitute its own assessment for that of the European Union legislature. It could, at most, find fault with its legislative choice only if it appeared manifestly incorrect or if the resultant disadvantages for certain economic operators were wholly disproportionate to the advantages otherwise offered…

…the proportionality of a European Union measure cannot depend on retrospective assessment of its efficacy… its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it at the time of the adoption of the legislation in question’.

Case C-203/12, Billerud Karlsborg and Billerud Skärblacka Billerud Karlsborg AB, paras. 34-37.
1. Prevention of Major Accidents

**LA may not grant licence unless** [Art. 4]:

- ‘satisfied with evidence ...that the applicant has made or will make adequate provision, on the basis of arrangements to be decided by Member States, to cover liabilities potentially deriving from the...operations’. Must be in place ‘from the start...’ and ‘maintain sufficient capacity’.

- Financial sufficiency must include ‘resources for the immediate launch and uninterrupted continuation of all measures necessary for effective emergency response and subsequent remediation’.

**MS to** [Art. 4(3)]:

- ‘facilitate’ financial instruments/arrangements to allow demonstration of sufficiency. (Echoes Art 14(1) ELD – 2010, Commission decided not to propose mandatory financial security. 2013, [final implementation report](https://www.steptoe.com) identified only 8 MS having decided to do so – none are N. Sea MS.)

- establish - as minimum - procedures for ‘ensuring prompt and adequate handling of compensation claims including in respect of compensation payments for trans-boundary incidents’. 
1. Prevention of Major Accidents

- Effective **public participation** required (including through SEA and EIA Directives) before exploratory wells are drilled. [Art. 5]

- Operations **not to start** until a report on major hazards (situations with the potential to result in a major accident) has been ‘accepted’ by a CA and ‘notification’ submitted. [Art. 6] CA will ‘prohibit’ operations where ‘considered insufficient’. [Art. 18]

- Licensee is financially liable for prevention and remediation under ELD for operations carried out by it or an Operator. [Art. 7]

- Separation of CA’s role as authority developing offshore economy/revenues and enforcement/inspections/compliance – unless less than 6 installations, but **independence obligation** in any event and must be demonstrated to public [Arts. 8 and 9]. [World Wide Fund for Nature](https://wwf.org) criticism already about independence under Italian transposition arrangements.

- European Maritime Safety Agency (EMSA) will assist MS and Commission on technical and scientific support: detecting spills, MS emergency response plans etc. [Art. 10]
2. Preparing and Carrying Out Operations

Extensive Operator/Owner documentation requirements [Art. 11], including:

- ‘report on major hazards’ required (includes ‘corporate major accident prevention policy’ [Art. 19], safety and environmental management system’, ‘scheme of independent verification’ [see Annex V] and ‘emergency response plan’) and must be reviewed at least every 5 years
  - see Annex I, includes:
    - ‘demonstration that all the major hazards have been identified, their likelihood and consequences assessed, including any environmental, meteorological and seabed limitations on safe operations, and that 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 oil spill response effectiveness’;
    - ‘an assessment of the identified potential environmental effects resulting from the loss of containment of pollutants arising from a major accident, and a description of the technical and non-technical measures envisaged to prevent, reduce or offset them, including monitoring’.

- internal emergency response plan [Art. 14]

- design notification (comments by CA to be addressed in the later report on major hazards) as well as material change and relocation notifications

- any other relevant documents requested by CA
2. Preparing and Carrying Out Operations

Notable features include:

- ‘scheme of independent verification’ [see Annex V and Art. 17(3)] – all advice and records of action taken made available to CA and must be retained for 6 months after completion of the operation to which they relate.

- CA is empowered to ‘require improvements’ (aside from banning power) where Directive is ‘not being fulfilled’ or ‘reasonable concerns about safety’. [Art. 18]
3. Prevention Policy

Notable features include:

- **Passive reporting obligation of major accidents outside the Union.** ‘MS shall require companies registered in their territory and conducting, themselves or through subsidiaries, offshore oil and gas operations outside the Union as licence holders or operators to report to them, on request, the circumstances of any major accident in which they have been involved’. [Art. 20]

- **MS national mechanism for confidential reporting of safety concerns.** Whistleblowers’ protection of anonymity. Mechanisms and its confidential nature must be made known to employees and contractors. [Art. 22]
4. Transparency and Sharing of Information

Notable features include:

- Operators and owners [Art. 23] must provide CA with at least information described in Annex IX, which is then made publicly available by MS (common formats due, so for major hazard indicators it will be possible to compare information from CAs and individual operators and owners):

  The information to be shared by the CA and operators and owners shall include:
  - ‘unintended release of oil, gas or other hazardous substances, whether or not ignited’
  - ‘loss of well control requiring actuation of well control equipment, or failure of a well barrier requiring its replacement or repair’
  - ‘failure of a safety and environmental critical element’
  - ‘a major environmental incident’

  Annual reports submitted by MS to Commission [Art. 25] shall include:
  - ‘the number and type of inspections and investigations carried out, any enforcement actions or convictions’
  - ‘incident data pursuant to the common reporting system required in Article 23’
  - ‘the performance...in relation to prevention of major accidents and the limiting of consequences of major accidents that do occur’
5. Cooperation between Member States

Notable features include [Art 27]:

- **CAs to regularly exchange ‘knowledge**,** information and experience with other competent authorities, inter alia, through the European Union Offshore Oil and Gas Authorities Group (EUOAG), and that it engages in consultations on the application of relevant national and Union law with the industry, other stakeholders and the Commission. (EUOAG established by Commission Decision of 19 January 2012.)**

- **By 19 July 2014, Commission will present a report on the adequacy of national expert resources for complying with the regulatory functions pursuant to this Directive which, if necessary, shall include proposals for ensuring all Member States have access to adequate expert resources.**
6. Emergency Preparedness & Response

- Two parts (which MS must ensure are ‘consistent’):
  - Operator/Owner Internal Emergency Response Plan [Art. 28]
  - MS External Emergency Response Plan – ‘a local, national or regional strategy to prevent escalation or limit the consequences of a major accident relating to offshore oil and gas operations using all resources available to the operator as described in the relevant internal emergency response plan, and any supplementary resources made available by the Member States’ [Art. 29 and Annex VII]

- **MS must ensure that equipment and expertise relevant to the internal emergency response plan** is maintained ‘in order for that equipment and expertise to be available at all times’ and to the authorities.

- **Active reporting obligation of major accident or ‘immediate risk’ thereof.** Obligation on Operator to take ‘all suitable measures’ to prevent escalation and to limit consequences.
7. Transboundary Effects

- MSs must notify each other of operations considered likely to have significant effect on the environment of another MS and ‘endeavour’ to jointly adopt measures to prevent damage. [Art. 31]

- When not notified, a MS who think it will be potentially affected can request all information and may jointly assess effectiveness of measures together.

- Same information sharing for non-EU states where a ‘risk of foreseeable transboundary effects’ (on a ‘reciprocal basis’).

- In the event of an accident or imminent threat – notification to Commission, MS and non-EU states on same basis.
Summary Assessment
Summary Assessment

– True impact will only be felt after the transitional periods are over and at this point the conflicts between regulation and practical management chain limitations will become apparent.

– Complex operations/supply and management chains generally create far greater difficulties in the application of EU legislation than is imagined – and the oil and gas industry is certainly complex.

– The financial instruments measure on prevention risk confronting the same ELD difficulties. Extension of ELD liability to licensees is a logical addition to scope but timing is questionable given the imminent review of the ELD (Commission will submit a report to Parliament and Council before 30 April 2014).
Summary Assessment

Notable features:

• Risk acceptability of major accidents (including environmental incidents) requires all measures short of what is “grossly disproportionate”.

• Public participation before exploratory wells drilled. Cannot start operations until report on major hazards has been accepted (far from a “box ticking” exercise).

• Poacher-Gamekeeper challenge met by separation of functions within public authorities and public accountability provisions to ensure independence. Does this risk undermining knowledge based decision-making in both fields?

• Pre-operation protocols involve a back and forth with authorities and there is a need to address the comments made (not just procedural).

• Independent verifier of Pre-Operation activities aimed at avoiding mere “self-comforting” by industry.

• Reporting of even non-EU incidents - which may go to issues of character and practice - no compartmentalising of activities on EU/non-EU.

• Whistle-blowers charter.

• Forcing regulators and regulators to talk systematically (an antidote to the arms length approach resulting from “independence” attacks on EU regulators).
Mr. Abrahams is an English Barrister and a partner in Steptoe’s Brussels office. His practice is focused on EU regulatory requirements and related commercial issues in the chemical regulatory and life sciences area. His clients are leading companies and associations in sectors including chemicals (REACH, biocides, cosmetics and pesticides), agricultural biotechnology, electronics, food and feed, metals, mining and extractive industries. An important part of his practice is helping clients to shape their legislative and policy environments, representing them before EU institutions, EU Member States and in the European Court of Justice.

Who’s Who Legal Environment identifies him as one of the leading individuals in EU environmental regulation, as does Chambers & Partners Europe.
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