

LEGISLATION

Safety first – Consultation on the EU Offshore Safety Directive

Jan Burgess, Head of the CMS Health and Safety Group, and associate Jacqueline Cursiter, examine the implications of recent consultation on the EU Offshore Safety Directive.

As a result of concern about major E&P incidents such as Deepwater Horizon, there have been moves to strengthen the regulation of such operations under the EU Offshore Safety Directive. UK consultation on the EU Offshore Safety Directive began on 28 July 2014 and closed on 21 September 2014. Throughout this period, representatives of oil and gas companies, the industry body Oil & Gas UK, the Health and Safety Executive (HSE) and the Department of Environment and Climate Change (DECC), have been working together to ensure responses to the consultation are submitted on time. Similar discussions have been underway in the other EU member states.

A degree of flexibility

On 28 June 2013, the Official Journal of the EU published the *Directive 2013/30/EU of the European Parliament (EP) and of the Council on the safety of offshore oil and gas operations and amending Directive 2004/35/EC on environmental liability*. Subsequently, the Directive on the safety of offshore oil and gas operations came into force on 18 July 2013.

A range of discussions ensued, focused on examining the extent to which these changes will reform the current safety and environmental regime in the UK. The legislation takes the form of a

'Directive' rather than a 'Regulation', as had been proposed initially. As a result, the means of implementing changes proposed under the Directive is left to EU member states, to leave room for some degree of flexibility. Indeed, where there is considered to be adequate legislation in place, there will be no need for existing legislation to be replaced.

The Directive aims to ensure that best practices are implemented across all active offshore regions in Europe. In addition, the recital (ie preamble) to the Directive sets out requirements on licensees, operators and owners in relation to activity both in the EU and outside the EU. The European Commission's view is that the Directive is relevant to the European Economic Area and, therefore, also applies to Norway. However, following suggestions by the Norwegian authorities that the EU Offshore Safety Directive did not affect them, further discussions are likely to be held in due course.

Rigid timetable

The need for an integrated approach to safety and environmental issues offshore was recognised at the outset, and a rigid timetable for change was set out. Following completion of the consultation period, a final draft is to be produced by the end of November 2014.

Member state laws, regulations and administrative provisions must be implemented by 19 July 2015.

The majority of the Directive will be transposed into UK legislation by amending the *Offshore Installation (Safety Case) Regulations*, with some

amendment to other HSE and DECC legislation and the introduction of new regulations. The authorities have made it clear throughout meetings this year that the approach to be taken would not involve 'gold plating' (ie going beyond the Directive to achieve a 'wish list'). Furthermore, there will be a strict approach to amending only 'necessary' existing legislation in order to implement the Directive. Doing this should keep intact the extant high standards under the UK's current offshore safety regulatory framework.

Defining well operations

Despite completion of the consultation phase, there are still some key issues to be addressed in order for industry to understand what impact the legislation will have on the UK's existing safety and environmental regime.

One issue, which appears to have been resolved is the definition of 'well operations'. The importance of this interpretation stems from Article 42, where timescales for the application of the Directive are outlined under Transitional Provisions. The provisions state: *'In relation to owners, operators of planned production installations and operators planning or executing well operations, member states shall apply the laws, regulations and administrative provisions adopted pursuant to Article 41 by 19 July 2016.'* For existing installations, there is allowance for provisions to come into force at a later date – either on the date of scheduled regulatory review or no later than 19 July 2018.

During the consultation, it was recognised that all UK offshore installations (over 300) potentially could be caught by the earlier July 2016 transitional period, by virtue of a lack of clarity over the definition of 'well operations'. The lack of guidance to assist operators makes such issues all the more challenging. However, the HSE paper on the implementation of the Directive, dated 21 May 2014, states: *'The HSE proposes to clarify the position in the new regulations so that the early transition dates only apply to specific well-operation requirements (eg submitting a well notification) and not to existing production installations where these well activities take place. Consequently, most of the production installations will not need to submit safety cases reflecting the new provisions before April 2018.'*

The EU Offshore Safety Directive aims to ensure that best practices are implemented across all active offshore regions in Europe

The operatorship question

One key issue came to light almost by chance during one of the many meetings between industry, DECC and HSE, with potential for huge repercussions for the structure of the oil and gas sector. Unfortunately this matter was not resolved by the start of the consultation process.

The Directive states: *"The 'operator' means 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 existing position for safety is that the 'operator' is defined in much the same way throughout all the relevant regulations, ie *'the person appointed by the licensee to manage and control directly or by any other person the execution of the main functions of a production installation'*. In other words, this only concerns the running of the installation (platform or FPSO) and only relates to safety. The definition allows for licensees to appoint 'another person' other than the licence/field operator to be the operator.

DECC and HSE adopted a joint position which is stated in the consultation document – that the 'operator' of the installation is to be interpreted in a way which is more in line with the concept of the 'licence operator', rather than the one under safety legislation; that it will have to be approved by the licensing authority and will have to be the same company as the licence operator. If the official position as stated in the consultation document by DECC and HSE is realised, license operators will no longer be able to 'contract out' duty holder or safety case obligations, eg to a 'contracted out' operator.

There has been a flurry of activity on the question of operatorship, which continues as this has the potential to seriously impact the business model for many smaller operators and also contractors providing a 'duty-holdership' service. However, the matter recently became further confused at the start of September, when DECC indicated that its position on the definition of operatorship had changed from a single operator approach and suggested that the *status quo* could not be retained.

The means of implementing changes proposed under the Directive is left to EU member states, to leave room for some degree of flexibility... DECC and HSE have made it clear that the approach to be taken in the UK will not involve 'gold plating'

Outstanding issues

There are still outstanding issues arising from the Directive which remain to be resolved. In particular, how will the regulators function under the new regime? With attention being diverted by issues such as the operatorship discussions, some parties maintain that focus on a key feature of the Directive has been lost.

Article 8 sets out the requirement to ensure *at all times*, the independence and objectivity of the competent authority, and prevent conflicts of interest between the competent authority and regulatory functions relating to the economic development of the offshore natural resources and licensing of offshore oil and gas operations, as well as the collection of management revenues from those operations. The final approach to be taken to this requirement is eagerly awaited.

We anticipate that the legislative activity will be monitored very closely by the oil and gas industry as the impact of the EU Offshore Safety Directive is finally revealed. ●

Petroleum Review will publish updates on the situation in future issues.

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