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NOTE

from: General Secretariat of the Council

to: COREPER/Council

No. Cion prop.: 16175/11 ENER 344 ENV 832 MARE 1 COMAR 1 PROCIV 144 CODEC 1871

Subject: Proposal for a Regulation of the European Parliament and of the Council on safety of offshore oil and gas prospection, exploration and production activities
- Progress report

I. INTRODUCTION

1. The Commission adopted, on 27 October 2011, the above proposal based on Article 192(1) of the Treaty on the Functioning of the European Union. The general objectives of the proposal are to reduce the risks of a major accident in Union waters and, secondly, to limit the consequences should such an accident nonetheless occur. These objectives can be broken down to the following specific objectives:

- ensure a consistent use of best practices for major hazards control by oil and gas industry offshore operations potentially affecting Union waters or shores;
- implement best regulatory practices in all European jurisdictions with offshore oil and gas activities;

- strengthen Union's preparedness and response capacity to deal with emergencies potentially affecting Union citizens, economy or environment; and
 - improve and clarify existing Union liability and compensation provisions.
2. The opinion of the Economic and Social Committee was adopted on 22 February 2012 whereas the opinion of the Committee of the Regions is not yet available.
 3. The examination of the above proposal by the European Parliament will be shared between the Committee on Industry, Research and Energy (*Mr Ivo Belet, rapporteur*), the Committee on Environment, Public Health and Food Safety and the Committee on Legal Affairs. The EP is expected to vote on a draft report in early October 2012.
 4. The Permanent Representatives Committee/Council (TTE - Energy) is invited to take note of this progress report drawn up under the responsibility of the Presidency. This report outlines the main issues discussed and concerns raised by delegations.

II. STATE OF PLAY

The Working Party on Energy (hereinafter referred to as the EWP) started its examination of the above draft Regulation (and the impact assessment) during November 2011, under the Polish Presidency. The examination was pursued under the Danish Presidency in January 2012 and, following a general discussion of the main principles and provisions and a further discussion on all articles and annexes, the Presidency presented a first revised text of the draft Regulation (5277/12) on 16 January 2012. A second comprehensive revised text was presented on 16 April (5277/1/12 REV 1).

Delegations hold general reservations/scrutiny reservations and continue to analyse the provisions contained in the draft Regulation in more depth.

Main issues:

It is the Presidency's understanding that the objectives to improve European offshore safety and environmental protection as presented in the Commission proposal are, in principle, highly welcomed by delegations. However, the following main issues have emerged from the discussions at the EWP and will require further in-depth consideration, without prejudice to particular points of interest of individual delegations or other provisions included in the proposal which have not yet been fully addressed.

Legal instrument - Regulation or Directive:

During the discussion at the EWP, a majority of delegations expressed a strong concern with a Regulation as being the legal instrument chosen and would instead prefer a Directive. According to these delegations, given the fact that the adoption of a Regulation may require the replacement of all or part of national rules and the procedures which stem from them, a Regulation would undermine and dismantle their already well-functioning regulatory offshore safety regime and would restrict Member States' flexibility to a large extent. In this context, it has to be noted that the proposed Regulation provides for minimum requirements, which would allow Member States to adopt or introduce more stringent protective national measures. Furthermore, it would create a duplication of work with increased costs, unnecessary bureaucracy and longer timelines as a result. Instead, according to these delegations, a properly drafted Directive would effectively establish common high standards throughout Europe without imposing a major revision of the existing regulatory framework.

In response, the Commission argued that a Regulation would simplify offshore oil and gas operations in different European regions through uniform application of binding rules and practices applying directly to all operators (industry) wherever in the EU they are working. It would also mean that those Member States that did not have an offshore industry in their exclusive economic zones would avoid administrative burden that a Directive would imply. Moreover, the adoption of a Regulation would more adequately create a level playing field throughout the EU by establishing a coherent legislative regime which would be directly applicable in the Member States, thus, avoiding long delay for implementation. Finally, the Commission pointed out the minimum requirement nature of the proposal and previous cases of national implementing provisions as potential ways to limit the impact on pre-existing national legislation.

Competent authority:

The current text of the draft Regulation (doc.5277/1/12 REV 1) deals with the competent authority in Articles 8 (appointment of the competent authority) and 8(a) (functioning of the competent authority) in Chapter II. Article 8 prescribes that Member States with offshore oil and gas activities under their jurisdiction shall appoint a competent authority responsible for the duties assigned to it under the Regulation. Member States shall ensure that the regulatory functions of the competent authority are independent from any conflict of interest with regulatory functions relating to economic development of the Member State, in particular licensing of offshore oil and gas activities, and policy for and collection of related revenues. Furthermore, the competent authority can be comprised of one or more bodies, however, duplication of regulatory functions of these bodies shall be avoided.

In Article 8(a) it is ruled that the competent authority shall, in its regulatory decisions, act independently of policies, regulatory decisions or other considerations unrelated to its functions pursuant to the Regulation and shall not adopt any political stance regarding the oil and gas sector.

The Commission initially proposed that the competent authority would have to make suitable arrangements to ensure its independence from conflict of interest between regulation and environmental protection, on the one hand, and functions relating to economic development of the Member State, on the other hand. The competent authority should be clearly independent of any government organisation for industry, sponsorship or for licensing or revenue collection.

Although the current revised text of the draft Regulation modifies the independent criteria proposed by the Commission by more focussing on the independence of the functions of the competent authority and not the organisation as such, a number of delegations still have a concern on the role and competence of the competent authority. According to these delegations, the separation criteria could imply increased costs and unnecessary bureaucracy as a consequence. Instead, proper arrangements for avoiding conflict of interests should be left to the Member States to decide. If this would not be considered feasible, one proposal was that a clearer text should be developed in order to allow the separation within a single organisation by using "Chinese walls". The level of activity of offshore operations in the individual Member State should also be considered in this regard. Moreover, the provision in Article 20(5) concerning Member States obligation to monitor the effectiveness of the competent authority and take necessary measures to improve the effectiveness has been perceived by some delegations as challenging the independence of the competent authority. Finally, given that the competent authority can be comprised of one or more bodies, it would be appropriate to establish a "lead body" to whom other bodies would be required to co-operate and report to.

According to the Commission, these articles are crucial elements of the draft Regulation. Considering the experience from the Deepwater Horizon accident in the Gulf of Mexico in April 2010, it would be of the highest importance to implement, through a Regulation, clear and harmonised rules to be applicable in all European jurisdictions to avoid a conflict of interest situation between safety regulation and policy making. Nevertheless, given the fact that the competent authority can be comprised of one or more bodies (Article 2 of the draft Regulation), there would be no strict obligation on Member States to establish a new single authority for the above purpose. This even applies to the larger bodies present in the Member States with extensive offshore activity, and where structural independence is easily achievable.

Liability regime:

According to Article 7 of the current text of the draft Regulation, the licensee is liable for the prevention and remediation of environmental damage caused by offshore oil and gas activities carried out by the licensee or any operator appointed on the basis of a contract with the licensee.

According to some delegations, it is not clear from the current text how financial liabilities (civil environmental liability) and technical liabilities (implementation of preventive and remedial action) are shared between licensees and operators and what the interaction is between these two actors. According to these delegations, the text should define more clearly whether it is the operator or the licensee who would be responsible for putting in place remedial measures and if need be paying to restore the quality of the environment. Should the operator take on financial liabilities directly, the proposal should specify that its financial capacity must be evaluated.

Furthermore, a few delegations are dubious about the fact that liability for damage other than environmental damage (tourism, fishing, etc.) is not covered in the text and that it would be appropriate to indicate whether it is the licensee or the operator who is liable in this field. An additional concern raised in this context is that, in some Member States, the operator is always the license holder and should have the overall responsibility.

The Commission holds that liability for remediation of environmental damages remains always with the licensee and where the operator is not the licensee, the licensee still retains at all times the power to appoint and to replace an operator. Therefore there appears to be no disagreement on the point of principle.

The Regulation does not address the matter of compensation mechanisms and liability for traditional damages due to inconclusive nature of the analysis as explained in the Impact Assessment accompanying the proposal. The Commission is currently undertaking further research on this matter.

Delegated powers of the Commission:

According to the current text of the draft Regulation, the Commission shall be empowered to adopt delegated acts concerning the adaptation of the requirements to the latest development of relevant technologies and procedures in the annexes to the Regulation.

Several delegations remain reluctant to empower the Commission to amend the annexes through delegated acts and argue that most of the elements included in the annexes are essential. Accordingly, the scope to use delegated acts will have to be restricted and clearly specified. Furthermore, some delegations believe, since the proper knowledge and experience regarding the technical procedures included in the annexes lay with the Member States, these must be adequately involved in the process of amending the annexes. It would also be of importance to clarify and ensure the responsibility of the competent authority in this context.

The Commission believes that, given the technical nature of the annexes and the need to being able to urgently amend the technical procedures in line with ongoing developments in the offshore safety field, the use of delegated acts should remain in the Regulation. Nevertheless, the scope of this instrument could be examined and clarified.
