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CHAPTER 10

Exploration and Exploitation of Offshore Oil and Gas

What Future for Civil Liability in the EU?

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Résumé : *Pour les entreprises pétrolières, l'exploration et l'exploitation gazières et pétrolières en mer continuent à être une affaire importante. L'offshore en tant que source de production est même susceptible d'augmenter à l'avenir. Malgré plusieurs accidents ayant causé une pollution de l'environnement marin et des dommages aux gens, aucun régime étendu concernant la responsabilité civile pour dommages causés au cours de l'exploration et l'exploitation gazières et pétrolières en mer n'est en vigueur au niveau de l'Union européenne. En se fondant sur l'idée que les règles de responsabilité civile peuvent aider à augmenter le niveau de la protection de l'environnement, cette contribution présente et compare les cadres juridiques sur la pollution et la responsabilité civile, entre autres des conventions internationales, des directives de l'Union européenne et des lois nationales. Le résultat de l'analyse sert de base pour des réflexions quant à un possible cadre juridique harmonisé sur la responsabilité civile pour des dommages causés à l'occasion de l'exploration et de l'exploitation gazières et pétrolières en mer. Compte tenu des multiples impacts qui affectent le fragile environnement marin, il faut réglementer profondément ces activités afin de préserver les océans pour les futures générations.*

1) Human Sea Programme of the University of Nantes: The development of human activities at sea? "For a new Maritime Law", ERC (European Research Council) 2013 Advanced Grant, SP2-Ideas, FP7 (Seventh Framework Programme) of the European Union (2007-2013) Agreement No. 340770.



BÉATRICE SCHÜTTE

Abstract: For petroleum companies, the exploration and exploitation of offshore oil and gas remains an important business. Offshore source production is even likely to increase in the future. Despite a number of accidents causing both environmental pollution and harm to people, no overarching civil liability framework is yet in force for the EU. Based on the idea that liability rules can help to increase the level of environmental protection, this paper presents and compares regulatory frameworks on pollution and liability, among them International Conventions, EU Frameworks and selected national laws of EU Member States. The result of the analysis is taken as a starting point for reflections as to what a harmonised civil liability framework could look like. Given the manifold forms of impact on the delicate marine environment, these activities must be thoroughly regulated in order to preserve the oceans for future generations.

Introduction

With oil and gas being natural resources of limited reserves, companies are eager to exploit as much as possible. Demand is growing and possible alternatives are either not yet suitable for mass use, or they still lack acceptance among the public.

Thus, offshore exploitation of oil and gas is still an important business for the respective companies. According to data from 2012, almost 9% of the EU's gross petroleum products consumption and almost 14% of the gross natural gas consumption were produced in the EU.² More than 90% of this originates from offshore installations, most of which are located in the North Sea.³ So far, there is one installation in the Baltic Sea, in the EEZ of Poland. Further offshore installations are to be found in the Mediterranean Sea and in the Black Sea.

Oil spills can have disastrous consequences. For instance, the damage caused by the 1989 Exxon Valdez spill was still visible 20 years later, and nowadays the entire coastline where the spill occurred is still being monitored in order to observe long-term consequences.⁴ Back then, the Alaskan economy lost billions of dollars and fishermen lost their income in the long term. In the offshore sector, more than 40 blowouts have been reported since 1955.⁵

Serious accidents on offshore platforms also happened in Europe, such as the capsizing of the Alexander Kjelland platform in Norwegian waters where 123 people lost their lives, or the explosion of the Piper Alpha platform in UK waters with 167 victims.⁶

Even though technologies have advanced and stricter safety measures have been taken, there is no guarantee that catastrophic oil spills like the Deepwater Horizon disaster will not be repeated. For the advanced technology also facilitates operations further off shore and in deeper waters than before.⁷ When the preparations for the Offshore Safety Directive started, there were already almost 1000 offshore oil and

2) Offshore oil and gas production in Europe, via EU Offshore Authorities Group Web Portal, euoag.jrc.ec.europa.eu/node/63 (accessed 6 October 2017).

3) Lindøe, Preben; Engen, Ole, *Offshore Safety Regimes – A Contested Terrain* in: *The Regulation of the Continental Shelf Development*, p. 196.

4) The Complete Story of the Exxon Valdez Oil Spill, via <https://www.marineinsight.com/maritime-history/the-complete-story-of-the-exxon-valdez-oil-spill/> (accessed 6 October 2017).

5) Palmer, Vernon Valentine, *The Great Spill in the Gulf . . . and a Sea of Pure Economic Loss: Reflections on the Boundaries of Civil Liability* Penn State Law Review Vol. 116 (2012), p. 108

6) Christou, Michalis; Konstantinidou, Myrto, *Safety of offshore oil and gas operations: Lessons from past accident analysis*, pp. 16/17.

7) European Parliament Report on liability, compensation and financial security for offshore oil and gas operations (2016), p. 10/19.

gas installations in the EU.⁸ Other than in the case of the Deepwater Horizon, most drillings in EU waters happen in relatively shallow waters at a depth of often less than 100 metres. Yet, experts state that the risks are not automatically lower.⁹ For the years to come, the production of oil and gas from offshore sources is expected to increase.¹⁰

In general, environmental protection is one of the objectives of the European Union, as determined in both the TEU and the TFEU, which state that the EU aims at a high level of protection and improvement of the environment.¹¹

Two types of damage may occur in this context: on the one hand, there is the damage to the marine environment and, on the other hand, individuals and legal entities can also suffer damage in different ways, for instance death, bodily harm, damage to things or economic loss. So far, the international community fails in agreeing on a binding framework. The International Maritime Organization (IMO) rejected the need for a framework for oil pollution emerging from offshore installations, despite having a very elaborate one on vessel source oil pollution. It was argued that bilateral and regional arrangements were more appropriate.¹² By contrast, the European Parliament, in a resolution published in December 2016, regrets that the Offshore Safety Directive does not establish a comprehensive framework on civil liability including damage sustained by individuals and legal entities.¹³

As regards offshore activities, damage may not only be caused through oil spills, but also through other substances being released during the process, such as sewage water, produced water or displacement water which may be contaminated.¹⁴

8) EU Commission Press Release 27 October 2011: Commission proposes new rules on the safety of offshore oil and gas activities, via http://europa.eu/rapid/press-release_MEMO-11-740_en.htm?locale=en (accessed 03 October 2017).

9) Faure, Michael et al., *A Multilayered Approach to cover Damage caused by Offshore Facilities* Virginia Environmental Law Journal 2015, p. 368.

10) Rochette, Julien; Wemaere, Matthieu; Chabason, Lucien; Callet, Sarah, *Seeing beyond the Horizon for Deepwater Oil and Gas: strengthening the International Regulation of Offshore Exploration and Exploitation*, p. 5.

11) Walter, Antonia *Environmental Protection in the EU and the WTO: Is Article XX GATT in its Present Interpretation Consistent with the Current Standard of Environmental Protection of the EU?* European Energy and Environmental Law Review 2014, p. 2.

12) Faure, Michael et al. *A Multilayered Approach to cover Damage caused by Offshore Facilities* Virginia Environmental Law Journal 2015, p. 372.

13) European Parliament resolution of 1 December 2016 on liability, compensation and financial security for offshore oil and gas operations, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0478+0+DOC+XML+V0//EN> (accessed 06 October 2017)

14) Rochette, Julien; Wemaere, Matthieu; Chabason, Lucien; Callet, Sarah, *Seeing beyond the Horizon for Deepwater Oil and Gas: strengthening the International Regulation of Offshore Exploration and Exploitation*, p. 7/8.

The purpose of this paper is to give a comparative overview of existing regulation concerning oil pollution, at an EU level, an international level and in selected national laws. Based on the outcome of the analysis, it will examine what regulation in the EU could look like in the future. In this context, the focus will be on the liability rules as such and not on compensation mechanisms.

1. Current Regulation

A number of regulatory frameworks concerning oil spills exist both on an EU level as well as on an international level. In addition to that, the national laws of the EU member states contain legal provisions on this matter.

1.1. International Principles

Important international principles include the 'polluter pays' principle, the preventive principle and the precautionary principle.

1.1.1. The Polluter-Pays Principle

The polluter pays principle (PPP) has been developed based on the simple fact that the polluters are the ones responsible for the pollution they have caused. Nowadays, it is a basis of European environmental policy.¹⁵ Originally, it was based on economic considerations like the Coase theorem, and it was officially formulated for the first time in an OECD recommendation on economic aspects of environmental policies.¹⁶ In 1986, it was implemented in the EU Treaties by the Single European Act.¹⁷ The more precise meaning of the principle, as well as its application to actual cases, are open to interpretation.¹⁸

The PPP further evolved through the practice of the European Court of Justice, for instance regarding the requirement of causation, the question of who is a polluter, or concerning the differentiation of contributions from categories of polluters.¹⁹ The causal

15) Lindhout, Petra; Van den Broek, Berthy, *The Polluter Pays Principle: Guidelines for Cost Recovery and Burden Sharing in the Case Law of the European Court of Justice* Utrecht Law Review Volume 10, Issue 2 (May) 2014, p. 46.

16) Stoczkiewicz, Marcin, *The polluter pays principle and State aid for environmental protection* Journal for European Environmental and Planning Law 2009, p. 172.

17) Bergkamp, Lucas; Goldsmith, Barbara, *The EU Environmental Liability Directive – A Commentary* p. 26.

18) Sands, Philippe; Peel, Jacqueline (eds.) *Principles of International Environmental Law*, 3rd ed. 2012, p. 228.

19) Lindhout, Petra; Van den Broek, Berthy, *The Polluter Pays Principle: Guidelines for Cost Recovery*

link must be established between either the environmental damage or the imminent danger of environmental damage on the one hand, and the act or omission of the operator on the other hand. The polluter pays principle must be interpreted in the light of other principles of European Environmental Law, particularly regarding the principle of an increased level of environmental protection and the precautionary principle.²⁰ The PPP is binding not only for the institutions of the EU but also for the national authorities when transposing European law. The PPP applies only to the damage caused to the environment, not to consequential damage caused to people's health or belongings or economic loss.

1.1.2. The Preventive Principle

The preventive principle is an essential part of the EU's environmental policy. It was adopted in the EU's first environmental action programme in 1972.²¹ The preventive principle deals with known risks and is based on the conviction that it is better to prevent than to cure.²² It means that the creation of nuisance and pollution must be prevented at source. It is implemented in article 191 (2) TFEU. The preventive principle furthermore served as a basis for the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal from 1989.²³

1.1.3. The Precautionary Principle

On the EU level, the precautionary principle is implemented in article 191 TFEU. It is not further defined in the treaty itself and its actual meaning has been disputed among academics. The precautionary principle is meant to be used by decision-makers in the assessment of risk.²⁴ Its actual scope of application goes beyond the environmental field.

Internationally, the precautionary principle was acknowledged for the first time in the UN World Charter for Nature in 1982. It was furthermore implemented into the Rio Declaration in 1992. In contrast to the Prevention Principle, the Precautionary Principle

and Burden Sharing in the Case Law of the European Court of Justice Utrecht Law Review Volume 10, Issue 2 (May) 2014, p. 49.

20) Moussoux, Youri, *L'application du principe du pollueur-payeur à la gestion du risque environnemental et à la mutualisation des coûts de la pollution* Lex Electronica, vol. 17 .1 (Été/Summer 2012), p. 2.

21) <https://www.eea.europa.eu/environmental-time-line/1970s> (accessed 05 October 2017).

22) http://glossary.eea.europa.eu/terminology/concept_html?term=prevention%20principle (accessed 05 October 2017).

23) <https://www.britannica.com/topic/environmental-law/Principles-of-environmental-law> (accessed 02 October 2017).

24) Communication from the Commission on the precautionary principle, p. 2; eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN (accessed 30 September 2017).

refers to uncertain or unknown risks.²⁵ The fact that a risk is not proven shall not keep an operator from taking incentives to minimise possible risks.

1.2. International Conventions

International conventions dealing with oil spills in a broad sense are the CLC Convention together with the Convention on the IOPC Fund, MARPOL and the OSPAR Convention.

The CLC Convention and MARPOL only apply to vessel source pollution, so they will not provide for liability provisions in the case of a spill emerging from a platform. These frameworks are only applicable to incidents with so-called mobile offshore drilling units (MODUs) when they are in transit, as in that case they qualify as ships under the scope of the conventions.²⁶

1.2.1. UNCLOS

The United Nations Convention on the Law of the Sea is one of the broadest international treaties on environmental matters.²⁷ The convention aims to be the overarching framework regulating almost all possible activities at sea.²⁸ It has influenced both the development of regional frameworks concerning the protection of the marine environment and broader international environmental law.²⁹ The purpose is to establish a legal order for the seas and oceans and contracting parties must prevent, reduce and control pollution of the marine environment and provide appropriate legal remedies for damage caused through pollution.

In general, the contracting states are the addressees of UNCLOS, and the latter does not determine any compensation mechanism itself.³⁰ Rather, UNCLOS provides guidelines and names the most important matters to be taken into account by the states party to the convention.³¹ UNCLOS is of particular relevance since other

25) Bergkamp, Lucas; Goldsmith, Barbara, *The EU Environmental Liability Directive – A Commentary* p. 28.

26) Faure, Michael et al., *A Multilayered Approach to cover Damage caused by Offshore Facilities* Virginia Environmental Law Journal 2015, p. 372.

27) Sands, Philippe; Peel, Jacqueline (eds.), *Principles of International Environmental Law*, 3rd ed. 2012, p. 349.

28) Churchill, Robin R., *The 1982 United Nations Convention on the Law of the Sea* in: *The Oxford Handbook of the Law of the Sea*, p. 25

29) Sands, Philippe; Peel, Jacqueline (eds.), *Principles of International Environmental Law*, 3rd ed. 2012, p. 350.

30) *Ibid.* p. 730.

31) Vinogradov, Sergej, *The Impact of the Deepwater Horizon: The Evolving International Legal Regime for Offshore Accidental Pollution Prevention, Preparedness, and Response* Ocean Development &

frameworks, conventions and EU directives refer to it with regard to certain definitions.³² Environmental pollution, or more exactly its prevention, is addressed in part XII of the Convention. States party to UNCLOS must develop international standards and norms regarding the control, prevention and reduction of marine pollution from different sources.³³ Thus, UNCLOS basically provides for the establishment of international rules on liability.³⁴

1.2.2. The CLC Convention

The CLC Convention, adopted by the IMO, was the first international treaty dealing with civil liability for oil pollution damage. The CLC convention covers civil liability for marine oil pollution. Strict liability is imposed on the ship owners in article 3. The servants or agents of the ship owner and members of the crew, the pilot, any charterer, as well as any person performing salvage or any preventive actions, are exempt from damages claims. The related convention on the IOPC fund establishes an international fund for the compensation for oil pollution damage in order to recover damage caused through pollution in cases where the CLC convention 1992 does not offer sufficient protection and in order to give effect to the purposes of the convention on the IOPC fund.³⁵ Under the scope of the CLC Convention, injured parties may have a damages claim for pure economic loss if a sufficient causal link can be established.³⁶ But, as mentioned above, the framework only applies to pollution from ships and under this scope to mobile drilling units in transit, but not to offshore platforms as such.

1.2.3. MARPOL

MARPOL is the main international treaty concerning the prevention of marine pollution emerging from ships.³⁷ It contains discharge standards, technical specifications and navigation standards but also punitive aspects. The ship owner and the master, as well as other persons causing environmental damage, can be liable.³⁸ According to

International Law 2013, p. 340.

32) See for instance article 2 II OSD concerning the definition of territorial waters.

33) Churchill, Robin R., *The 1982 United Nations Convention on the Law of the Sea* in: The Oxford Handbook of the Law of the Sea, p. 29.

34) Rochette, Julien; Wemaere, Matthieu; Chabason, Lucien; Callet, Sarah, *Seeing beyond the Horizon for Deepwater Oil and Gas: strengthening the International Regulation of Offshore Exploration and Exploitation*, p. 9.

35) Sands, Philippe; Peel, Jacqueline (eds.), *Principles of International Environmental Law*, 3rd ed. 2012; pp. 748, 749.

36) Noussia, Kyriaki, *Environmental Pollution Liability and Insurance Law Ramifications in Light of the Deepwater Horizon Oil Spill*, The Hamburg Lectures on Maritime Affairs 2009 & 2010, p. 8/9.

37) International Convention for the Prevention of Pollution from Ships <http://www.imo.org/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-%28MARPOL%29.aspx> (accessed 19 September 2017).

38) Alam, Shawkat et al. (eds.), *Routledge Handbook of International Environmental Law*, p. 284.

article 4 of the convention, violations shall be prohibited and sanctions established under the law applicable to the ship concerned, or when a violation occurs under the jurisdiction of a party to the convention, the applicable law shall be that of the respective party. MARPOL covers pollution through oil, noxious liquid substances, harmful substances in packaged form, sewage and garbage.³⁹

The MARPOL convention does not provide a liability framework either but instead refers to national laws. And just as the CLC Convention it applies only to MODUs in transit and not to platforms as such.

1.2.4. The 1993 Lugano Convention

The 1993 Lugano Convention was adopted by the Council of Europe and deals with Civil Liability for Damage resulting from Activities Dangerous to the Environment. It refers to the desirability of strict liability and the implementation of the PPP. Under the scope of the convention, damage not only means damage caused to the environment, but also loss of life and personal injury as well as damage to property.⁴⁰ However, it only refers to a limited number of noxious activities. It leaves out activities like fisheries and exploitation of resources as well as tourism.

1.2.5. The OSPAR Convention

The OSPAR Convention applies to the North Sea and the Northeast Atlantic and aims at covering all kinds of pollution. In the relevant area, it is even applicable to the high seas. It entered into force in 1992 and replaced the Oslo and Paris Conventions.⁴¹ The OSPAR Convention applies to platforms and offshore installations, monitors their development and keeps an inventory.⁴² The addressees of the convention are the contracting parties and they are obliged to protect the marine environment from the detrimental consequences of human activities.⁴³

1.2.6. The Helsinki Convention

The 1992 Helsinki Convention applies to the Baltic Sea, probably the most polluted sea in Europe. Parties to the Convention are obliged to prevent and eliminate pollution and to foster the ecological restoration of the marine environment of the Baltic Sea.

39) Ibid, p. 284 *et seq.*

40) Sands, Philippe; Peel, Jacqueline (eds.), *Principles of International Environmental Law*, p. 652.

41) <https://www.ospar.org/convention>.

42) <https://www.ospar.org/work-areas/oic/installations> (accessed 01 October 2017); Basse, Ellen Margrethe *Miljøretten* (Vol. 6), p. 193.

43) Basse, Ellen Margrethe *Miljøretten* (Vol. 6), p. 193.

To achieve these goals, they must apply both the precautionary principle and the polluter pays principle.⁴⁴

1.2.7. The Barcelona Convention

The Barcelona Convention, or Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, was adopted in 1976 as part of the UNEP. It has 22 contracting parties, which are all of the countries adjacent to the Mediterranean Sea.⁴⁵ The Convention contains an offshore protocol, which was adopted in 1994. The EU accessed the Protocol in 2012, just before implementing the offshore safety directive.

The Barcelona Convention as such aims at assessing and controlling marine pollution, ensuring sustainable management of natural resources, integrating the environment in both social and economic development, protecting marine environment, coastal zones and natural heritage from pollution through prevention measures, as well as at fostering the cooperation between the Mediterranean states and improving the quality of life in the area.⁴⁶

The Offshore Protocol has a broad scope as regards exploration and exploitation activities. It regulates licensing procedures as well as the handling of waste and other hazardous and noxious substances. The protocol does not contain any liability rules; however, in article 27 it obliges the parties to cooperate regarding the establishment of an appropriate framework on civil liability and compensation concerning the activities regulated in the protocol. In more detail, they shall adopt rules that channel liability to the operator, grant prompt and adequate payment of compensation and include compulsory insurance or another financial guarantee.⁴⁷

1.2.8. Summary

The CLC Convention is the only framework that contains actual liability rules. But, as mentioned above, it does not apply to offshore oil and gas platforms. Criticism brought forward against the CLC Convention and the Convention on the IOPC Fund states that in the end these frameworks are more favourable to the oil companies than to the victims, as the liability is mostly channelled to the ship owner and, even when there is

44) Sands, Philippe; Peel, Jacqueline (eds.), *Principles of International Environmental Law*, 3rd ed. 2012, p. 363.

45) http://ec.europa.eu/environment/marine/international-cooperation/regional-sea-conventions/barcelona-convention/index_en.htm (accessed 04 October 2017).

46) http://ec.europa.eu/environment/marine/international-cooperation/regional-sea-conventions/barcelona-convention/index_en.htm (accessed 04 October 2017).

47) Scovazzi, Tullio *Maritime Accidents with Particular Emphasis on Liability and Compensation for Damage from the Exploitation of Mineral Resources of the Seabed*, p. 299.

a compensation fund, intervention remains limited.⁴⁸ The other conventions do not include any explicit liability rules but pass the duty to establish such rules and to apply the polluter pays principle to the states party to the conventions. This does not open for harmonisation as the states have a margin of discretion regarding the implementation of these principles. And even though several conventions oblige the respective contracting parties to cooperate concerning the establishment of frameworks on civil liability for pollution damage, none is in force yet.

1.3. EU Law

With the protection of the environment being one of the objectives of the European Union, a number of directives and other instruments have been adopted throughout the years.

1.3.1. EU Offshore Safety Directive

The Offshore Safety Directive (OSD) is the most relevant instrument with regard to exploration and exploitation of offshore oil and gas and it was enacted in 2013. The EU wanted to make reference to the increased awareness on security issues related to offshore oil and gas operations in the wake of the Deepwater Horizon blowout.⁴⁹

It establishes minimum requirements, which means that the member states are free to enact stricter rules than those foreseen in the Directive. The framework is, furthermore, of relevance for the European Economic Area.

Article 7 OSD deals with the liability for environmental damage. The member states shall ensure that the licensee is financially responsible for both prevention and remediation of environmental damage. For the definition of environmental damage, the provision refers to the Environmental Liability Directive, which in general remains applicable alongside the offshore safety directive. The directive does not contain any explicit liability provisions. The term, 'environmental liability', is approached in a public administrative liability manner, referring to the society as a whole being affected by the pollution.⁵⁰ Stating that the member states shall ensure the financial liability of the licensee rather means that it is up to them to enact specific rules. It is exactly for the lack of liability rules that the directive has been criticised. Furthermore, the OSD only applies to pollution arising from an accident. Operational pollution or even voluntary discharges are not covered.

⁴⁸) De Sadeleer, Nicolas, *The Polluter-pays Principle in EU Law – Bold Case Law and Poor Harmonisation*, p. 415.

⁴⁹) See (5) Considerations regarding the Directive.

⁵⁰) COMMISSION STAFF WORKING DOCUMENT Liability, Compensation and Financial Security for Offshore Accidents in the European Economic Area (2015), p. 8.

In 2015, the Commission released both a report on liability, compensation and financial security for offshore oil and gas operations and a staff working document concerning the Liability, Compensation and Financial Security for Offshore Accidents in the European Economic Area.⁵¹

Operators must ensure coverage of damage including economic loss where the national laws provide for it. But reference to existing national laws does not foster harmonisation. By contrast, particularly with regard to transboundary pollution, people exposed to the same risk are not equally protected as the national laws do not necessarily grant compensation to the same extent. Just like the Environmental Liability Directive, the Offshore Safety Directive provides the member states with a broad margin of discretion and does not introduce any explicit liability regime.

1.3.2. Environmental Liability Directive

The Environmental Liability Directive was enacted in 2004 and deals with the prevention and remediation of environmental damage.⁵² The framework does not apply to cases falling under the scope of international conventions on oil pollution, carriage of goods, the EURATOM Treaty or conventions on nuclear damage. That means the directive would not be applicable in case of oil pollution from a MODU in transit.

Legal academics have criticised it for actually lacking efficiency. In its original scope, the ELD applied only to coastal waters as it protected only those waters listed in the Water Framework Directive. With the implementation of the Offshore Safety Directive, its scope was extended and it now applies to all marine waters – except for the high seas.⁵³ Yet, the ELD does not set up a real liability regime either. In particular, it fails to provide injured parties with a damages claim. In number 14 of the preamble, applicability to cases of personal injury, property damage or any economic loss is explicitly excluded. The directive applies only to environmental damage per se which is defined in its article 2. It is more of an administrative regime empowering the competent authorities to enforce it, even though it uses characteristic civil liability terms.⁵⁴

51) <https://ec.europa.eu/energy/en/topics/oil-gas-and-coal/offshore-oil-and-gas-safety>

52) <http://ec.europa.eu/environment/legal/liability/> (accessed 29 September 2017).

53) See art. 2 no. 5 Environmental Liability Directive and art. 2 no. 7 Water Framework Directive; <http://ec.europa.eu/environment/legal/liability/> (accessed 29 September 2017).

54) De Smedt, Kristel, *Is Harmonisation Always Effective? The Implementation of the Environmental Liability Directive* European Energy and Environmental Law Review 2009, p. 2; Bergkamp, Lucas *The EU Environmental Liability Directive: A Commentary*, p. 38.

1.3.3. EU Marine Strategy Framework Directive

The aim of the Marine Strategy Framework Directive from 2008 is to achieve a so-called good environmental status for the EU marine waters by 2020. It applies to marine waters under the jurisdiction of EU member states.

Member states shall apply an ecosystem-based approach to the management of human activities impacting the marine environment.⁵⁵ The adoption of the directive marked the starting point of holistic ocean governance.⁵⁶ The postulation of an integrated maritime policy for the EU was already made in 2006 in a corresponding Commission Green Paper. The directive addresses issues like excessive exploitation of living resources, the introduction of alien species, marine pollution and the need to protect biodiversity.⁵⁷

1.3.4. Summary

None of the above mentioned frameworks, neither the international conventions nor the EU directives, establish an actual comprehensive framework for civil liability for damage resulting from exploration and exploitation of offshore oil and gas. They either apply only to a small part of the offshore operations which is the use of MODUs in transit, or they impose obligations on the member state to establish liability rules. The new Offshore Safety Directive redirects to the ELD regarding civil liability. However, the latter is not a genuine civil liability framework either, as it can only be enforced by public authorities. Claims filed by individuals for consecutive damage like bodily harm, property damage and pure economic loss are explicitly excluded.

1.4. National Laws

In this part, selected national laws concerning liability for damage caused by offshore oil and gas operations will be examined, namely those of Denmark, Germany and the UK. The national legislation of the UK is particularly interesting as the country is still the EU's major producing country⁵⁸ but will soon cease to be a member state.⁵⁹ Germany and Denmark are both EU member states having offshore installations in

55) http://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/marine-strategy-framework-directive/index_en.htm (accessed 05 October 2017).

56) Koivurova, Timo, *A Note on the European Union's Integrated Maritime Policy* Ocean Development & International Law, Vol. 40 (2009), p. 175.

57) Juda, Lawrence, *The European Union and the Marine Strategy Framework Directive: Continuing the Development of European Ocean Use Management* Ocean Development & International Law, 41:1, p. 35.

58) Offshore oil and gas production in Europe, via EU Offshore Authorities Group Web Portal, <https://euoag.jrc.ec.europa.eu/node/63> (accessed 06 October 2017).

59) See below, section 3.1.

the North Sea. And as regards oil and gas, Denmark is self-sufficient which means it does not need to import anything from abroad.⁶⁰

Furthermore, from a comparative legal point of view, the countries represent different legal families, with German law representing the Germanic legal family, Danish law as part of the Nordic legal family and English law from the Anglo-American legal family.⁶¹

National laws are particularly relevant when it comes to damages claims filed by individuals and legal entities since due to a lack of a comprehensive framework these claims will be solved according to the law applicable under private international law. The country of jurisdiction is to be determined in accordance with the Brussels I Regulation which gives the injured party the choice between the country in which the damage occurred and the country in which the event causing the damage took place.⁶² As regards the law applicable, the Rome II Regulation provides for the same choice in its article 7.⁶³

1.4.1. German Law

Relevant German laws concerning marine pollution are the Water Resources Act (*Wasserhaushaltsgesetz*), the Environmental Damage Act (*Umweltschadensgesetz*) and the general Tort Law.

1.4.1.1. The Water Resources Act

The Water Resources Act aims at ensuring the protection of all waters as part of natural resources, as livelihood for humans, the natural habitat of flora and fauna and useable goods by means of sustainable governance. It also applies to marine waters including the continental shelf, among others.⁶⁴ Liability for changing the water quality is regulated in § 89 of the Water Resources Act. The provision imposes strict liability on anyone who discharges substances into a body of water or influences its quality by other means. If the activities mentioned in the provision are committed by several people, they will be jointly liable. According to § 89 II Water Resources Act, the owner of an installation which is meant to produce, to process, to store, to dispose of, to

60) Basse, Ellen Margrethe, *Miljøret* (Vol. 4), p. 189.

61) Zweigert, Konrad; Kötz, Hein, *Einführung in die Rechtsvergleichung*, pp. 130, 177 et seq., 272.

62) See article 5 (3) Brussels-I Regulation.

63) See article 7 Rome II Regulation; The provision applies to both damage to the environment per se and damage suffered by persons as well as property damage. See also Hinteregger, Monika *Transboundary Environmental Damage and the Law of the European Union* Proceedings of the Annual Meeting (American Society of International Law), Vol.105, Harmony and Dissonance in International Law (2011), pp. 434, 435.

64) See § 3 Nr. 2a WHG.

transport or to deduct substances, and from which these substances escape without being discharged into the water, is strictly liable if the water quality is deteriorated. As opposed to § 89 I, the escape of the substances happens without any active interference by the owner.⁶⁵ In this context, the owner is the person running the installation in their name and on their account.⁶⁶ The term 'installation' is to be understood in the widest possible sense.⁶⁷ § 89 II refers to a danger inherent to an activity which results in the deterioration of the water quality. It differs from most other general liability provisions as it does not require the violation of a protected interest. Even pure economic loss is recoverable as long as it is a consequence of the degradation of the water quality.⁶⁸

Environmental damage is addressed in § 90 of the Water Resources Act. The provision defines water damage referring to the Environmental Damage Act. The duties of the person responsible for the water damage are regulated in § 90 II Water Resources Act stating that they must, in accordance with the ELD, take the necessary measures to restore the damaged environment.

1.4.1.2. The Environmental Damage Act

Regarding environmental damage per se, Germany enacted in 2007 the Environmental Damage Act in order to transpose the ELD into national law. The responsible person must take appropriate measures to prevent environmental damage and, if damage has already occurred, mitigate it and take the necessary actions to restore the damaged environment. It is an administrative law framework, just like the ELD, which leaves the enforcement to the public authorities.⁶⁹ The Environmental Damage Act is subsidiary to laws containing stricter and further-reaching rules.

1.4.1.3. General Tort Law

The general tort law regulated in § 823 et seq. of the German Civil Code (BGB) is applicable in addition to the special environmental legislation. The most relevant provisions are § 823 I, § 823 II and § 826. General tort liability is fault-based and governed by § 823 I. § 823 II refers to the violation of a statutory rule and § 826 regulates the intentional infliction of damage *contra bonos mores*. Under the scope of

65) Sieder/Zeitler WHG, § 89, p. 59.

66) Sieder/Zeitler WHG, § 89, p. 68.

67) Sieder/Zeitler WHG, § 89, p. 56; In this context, the Water Resources Act has a wider scope than the Environmental Liability Act. The latter only applies to installations enumerated in its Annex I (Ibid. p. 9).

68) Fuchs, p. 262. So for instance, a municipality could claim the costs for the examination of water samples from the polluter, BGHZ 103, 129.

69) Marty, Michael Umweltschutz durch Umwelthaftung - Das Umweltschadensgesetz, via <http://docplayer.org/11089790-Umweltschutz-durch-umwelthaftung-das-umweltschadensgesetz.html> (accessed 05 October 2017).

§ 823 I, there has been a tendency in court practice to establish specific duties of care related to environmental protection.⁷⁰ This is based on the assumption that everyone keeping or creating a source of danger is obliged to take all reasonable safety measures required to minimise the risk of damage.⁷¹ A successful damages claim based on § 823 I requires the violation of a protected interest, namely life, health, bodily integrity, freedom, property or another right. 'Another right' is a grey legal concept which has been further developed by court practice. Related to damage caused through exploration and exploitation of offshore oil and gas, fishery rights will be particularly relevant.⁷² The intentional infliction of damage *contra bonos mores* according to § 826 will be of little, if any, relevance.

1.4.2. Danish Law

Relevant legal frameworks in Danish law are the Subsoil Act (*Undergrundsloven*), the Environmental Damage Act (*Miljøskadeloven*), the Environmental Liability Act (*Miljøskadeerstatningsloven*), the Marine Environment Act (*Havmiljøloven*) and the Continental Shelf Act (*Kontinentalsokkeloven*). The Environmental Damage Act is mainly explanatory and defines the scope of application and the types of environmental damage. One must take into account that the Danish legislation does not apply to Greenland.

1.4.2.1. The Environmental Liability Act

The Environmental Liability Act applies to damage caused in the course of commercial or administrative activity.⁷³ Under its scope, the injured party can claim compensation for bodily harm, loss of caregiver, damage to things, economic loss. The tortfeasor must also bear the reasonable costs of prevention and the restoration of the environment.⁷⁴

Liability under the scope of this act is strict.⁷⁵ The activities to which the framework applies are listed in its appendix 1. Exploitation of oil and gas is listed under lit. c, but it only includes those parts of the territorial sea that are close to the shore (*kystnære dele af søterritoriet*). This term is not further defined in the law, it just makes clear that not the entire 12 nautical mile zone is covered.

70) Staudinger, Umwelthaftungsrecht Einleitung zum Umwelthaftungsrecht, marginal no. 58.

71) Staudinger, Umwelthaftungsrecht Einleitung zum Umwelthaftungsrecht, marginal no. 59.

72) Staudinger, Umwelthaftungsrecht Einleitung zum Umwelthaftungsrecht, marginal no. 65.

73) See § 3 Danish Environmental Liability Act.

74) See § 2 Danish Environmental Liability Act.

75) Basse, Ellen Margrethe *Miljøretten* (Vol. 3), p. 341.

1.4.2.2. The Marine Environment Act

The Marine Environment Act covers most of the environmental aspects regarding exploration and exploitation of offshore oil and gas.⁷⁶ The act explicitly applies to the Exclusive Economic Zone and the continental shelf of Denmark. According to its § 1, the law aims at protecting nature and the environment in order to provide a sustainable basis for the development of society. Pollution and other influences on nature and the environment, particularly the marine environment, shall be limited and prevented, especially with regard to activities that can endanger human health, damage natural and cultural goods on and in the sea and on the seabed or present obstacles to lawful exploitation of the sea. It refers to limiting and preventing pollution from both ships and platforms and also contains provisions regarding the response to pollution incidents.⁷⁷ The act contains further provisions on forbidden activities as well as provisions on criminal liability⁷⁸ but it does not establish any civil liability rules concerning marine pollution. Violation of certain rules of the Marine Environment Act may give rise to a damages claim under the scope of the general Danish tort law.⁷⁹

1.4.2.3. The Subsoil Act

The Danish subsoil act regulates the exploitation of Danish underground resources and it applies to the country's EEZ and the continental shelf.⁸⁰ The law aims at a reasonable exploitation of underground resources and requires special permission and approval concerning all stages of exploration and exploitation of resources originating from underground.⁸¹ According to § 35 of the Danish Subsoil Act, the licensee is strictly liable to compensate damage caused under the performance of the licensed activity even if the damage results from an accident.⁸² The provision refers to damage caused in relation to preliminary inquiries, exploration, exploitation, storage and scientific examinations.⁸³ In addition to that, the general Danish law of torts, i.e. the tort liability act (*Erstatningsansvarsloven*) and the culpa-rule, remain applicable.⁸⁴

76) Basse, Ellen Margrethe *Miljøretten* (Vol. 6), p. 250.

77) Skou, Anders *Havmiljøloven* in Den Store Danske, Gyldendal. <http://denstoredanske.dk/index.php?sideId=89569> Accessed 02 oktober 2017

78) In August 2017, the Danish Environmental Protection Agency reported Mærsk Oil to the police for violation of the Marine Environment Act by illegal dumping of chemicals <http://mst.dk/service/nyheder/nyhedsarkiv/2017/ug/miljoestyrelsen-politianmelder-maersk-oil/> (accessed 02 October 2017).

79) v. Eyben, Bo; Isager, Helle, *Lærebog i Erstatningsret*, p. 92 et seq.

80) <http://www.fao.org/faolex/results/details/en/?details=LEX-FAOC105433>; Anita Rønne: *Undergrundsloven* in Den Store Danske, Gyldendal. <http://denstoredanske.dk/index.php?sideId=176858> (accessed 02 October 2017).

81) Basse, Ellen Margrethe *Miljøretten* (vol. 6), p. 213.

82) Sandroos, Bo *Undergrundsloven med kommentarer*, p. 263.

83) Basse, Ellen Margrethe *Miljøretten* (vol. 6), p. 231.

84) COMMISSION STAFF WORKING DOCUMENT Liability, Compensation and Financial Security for

1.4.2.4. The Continental Shelf Act

The Continental Shelf Act states in its § 1 that natural resources in the Danish continental shelf belong to the Danish state and may only be exploited with permission granted by the state. Danish law applies to all installations used for the exploration and exploitation in the area of the continental shelf. The act contains a liability provision in § 4 IV. The owner is strictly liable for damage caused by the installation.⁸⁵

1.4.2.5. The Offshore Safety Act

The Offshore Safety Act originally dates from 2005, but has been amended in order to implement the EU Offshore Safety Directive into Danish law.⁸⁶ It mainly regulates aspects concerning health and safety at work and the constructional safety of the platform.⁸⁷ In its § 10, for instance, it places upon the employer the duty to identify and to minimise health and safety risks as far as possible with reasonable effort. The employer must also inform the employees about all the risks that may be inherent to their work.⁸⁸

1.4.2.6. General Tort Law

In Danish tort law, damages claims are based on the so-called culpa rule and the Tort Liability Act. As the name 'culpa rule' indicates, liability in general is fault-based, i.e. the tortfeasor must act either intentionally or negligently. However, the courts in Denmark have in some environmental liability cases either applied strict liability or a reversed burden of proof, particularly when damage was a consequence of technical or material problems. When fault-based liability applies, the courts usually set a low threshold for negligence.⁸⁹

1.4.3. UK Law

The UK does not have any legal regime in force that specifically deals with liability for pollution damage resulting from offshore activities.⁹⁰

Offshore Accidents in the European Economic Area (205), p. 15.

85) Basse, Ellen Margrethe *Miljøretten* (vol. 6), p. 235.

86) Basse, Ellen Margrethe *Ny Lovgivning skaber forvirring* <http://www.altinget.dk/energi/artikel/ny-lovgivning-skaber-forvirring> (accessed 02 October 2017).

87) Basse, Ellen Margrethe *Miljøretten* (Vol. 6), p. 235.

88) Basse, Ellen Margrethe *Miljøretten* (Vol. 6), p. 240.

89) Basse, Ellen Margrethe *Miljøretten* (Vol. 3), p. 334; see also Basse, Ellen Margrethe *Miljøretten* (Vol. 4), p. 528.

90) Faure, Michel, *Civil Liability and Financial Security for Offshore Oil and Gas Activities*, p. 100.

According to the Environmental Damage (Prevention and Remediation) Regulations from 2009 which are model rules, licensees are required to respect the method customarily used in good oilfield practice.⁹¹

1.4.3.1. General UK Law

For each part of the country, i.e. for England, Wales and Scotland, there are Environmental Damage Prevention and Remediation Regulations. Relevant in this context is the Environmental Protection Act 1990 and the Environmental Damage (Prevention and Remediation) (England) Regulations 2015. The former includes some provisions concerning pollution at sea. The latter deals with damage to the environment per se and defines different kinds of environmental damage as well as water damage. The person responsible for the damage is liable to remediate it.

Concerning third party damage, the general tort law rules apply. One can consider the tort of negligence, nuisance, breach of statutory duty or the rule in *Rylands vs Fletcher*.⁹²

The rule in *Rylands vs Fletcher* used to be a strict liability rule in English tort law. Throughout the years, it was turned into a negligence rule with a reversed burden of proof.⁹³ It has been applied to a large number of things, among them fire, gas, electricity but also oil and petrol.⁹⁴ However, the applicability of the rule in *Rylands vs Fletcher* can be questioned as in its original context it would require that the continental shelf where the exploration and exploitation take place can be seen as land owned by someone.⁹⁵ But the courts also applied the rule also to parties possessing a licence to occupy land, for instance in order to lay gas pipes or electricity cables.⁹⁶ The applicability is furthermore not limited to adjacent land. Then again, it is being argued that the continental shelf cannot be seen as land in the traditional sense even though one might consider amplifying the notion due to policy considerations. This would though be contrary to the tendencies in court practice regarding the development of the application of the rule in *Rylands vs Fletcher*.⁹⁷ Additionally, the rule only provides for

91) Faure, Michel, *Civil Liability and Financial Security for Offshore Oil and Gas Activities*, p. 101.

92) Environmental law and practice in the UK (England and Wales): overview [https://uk.practicallaw.thomsonreuters.com/6-503-1654?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-503-1654?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (accessed 25 September 2017); Gordon, Greg, *Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations in the UK (Part I)* Environmental Law and Management Volume 25 (2013), p. 5.

93) Van Dam, Cees, *European Tort Law*, p. 446.

94) Winfield and Jolowicz on Tort, p. 770/771. Blackburn J held that it could be 'anything likely to do mischief'. Street on Torts, p. 467.

95) Gordon, Greg *Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations in the UK (Part I)* in Environmental Law and Management Volume 25 (2013), p. 5.

96) Winfield and Jolowicz on Tort, p. 773.

97) Gordon, Greg *Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations*

property damage in a very restrictive sense so that not even a consequential economic loss may be recovered.⁹⁸

The tort of nuisance is part of the law of neighbourhood and focuses on the enjoyment of one's own land. It requires a major interference with the injured party's property, of a tangible or intangible nature.⁹⁹ The noxious event must originate from the tortfeasor's land, which means that the defendant will be either the owner or the occupier.¹⁰⁰ Nuisance has previously been applied in case of contamination of a river by a land owner living upstream who was liable to pay compensation to land owners downstream. Thus, one could also apply it to cases where an oil spill causes damage at a place far from where it originated. The recoverable damages under the scope of nuisance include damage to land as such, consequential economic loss and loss of amenities. Neither personal injury nor pure economic loss can be recovered.¹⁰¹

In order to claim damages under the scope of the tort of negligence, the injured party must prove that the tortfeasor violated a duty of care owed to him and that he suffered damage as a consequence.¹⁰² If the claim is successful, the injured party can recover damages for both property damage and consequential economic loss as well as for bodily harm. The burden of proof rests upon the claimant.¹⁰³

Pure economic loss will not be recoverable in this area of law. The courts do not impose a duty of care concerning this kind of loss in order to avoid 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.¹⁰⁴ The claimant would have to prove that the defendant owed him the duty to protect him against exactly the kind of loss he suffered.¹⁰⁵

in the UK (Part I) in *Environmental Law and Management* Volume 25 (2013), p. 6/7.

98) Gordon, *Greg Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations in the UK (Part I)* in *Environmental Law and Management* Volume 25 (2013), p. 7.

99) Street on Torts, p. 425.

100) Markesinis & Deakin's *Tort Law*, p. 535.

101) Gordon, *Greg Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations in the UK (Part I)* in *Environmental Law and Management* Volume 25 (2013), p. 7/8.

102) Winfield and Jolowicz on Tort, p. 150.

103) Winfield and Jolowicz on Tort, p. 297

104) Gordon, *Greg Oil, Water and Law don't mix: environmental liability for offshore oil and gas operations in the UK (Part I)* in *Environmental Law and Management* Volume 25 (2013), p. 5; A duty of care concerning pure economic loss has only been assumed in a limited number of cases, for instance regarding negligent misstatements and negligence in the performance of a service. Markesinis & Deakin's *Tort Law*, p. 198/199.

105) Street on Torts, p. 81.

1.4.3.2. OPOL

In addition to the national legislation, another interesting instrument originates from the UK: the Offshore Pollution Liability Agreement (OPOL Agreement) which was adopted in September 1974. Behind this Agreement is the Offshore Pollution Liability Association.

It is a private agreement between operators in the offshore sector, not a treaty. Within the UK, operators are obliged to be OPOL members in order to obtain a license.¹⁰⁶ OPOL was meant to be an interim solution until the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and the Exploitation of Seabed Mineral Resources (CLEE) entered into force. However, the framework never received enough ratifications and thus never entered into force.

The financial responsibility rests upon the operator who must ensure the ability to cover costs of incidents up to 250 million dollars. OPOL applies to escapes or discharges of oil from offshore facilities within the jurisdiction of states associated with OPOL. In the beginning, it applied to installations within the jurisdiction of the United Kingdom. Throughout the years, it has been extended to offshore facilities within the jurisdictions of Denmark, the Federal Republic of Germany, France, the Republic of Ireland, the Netherlands, Norway, the Isle of Man, the Faroe Islands and Greenland. It does not apply to facilities in the Baltic and Mediterranean Seas. The regime is open to be extended so as to apply to offshore facilities within the jurisdiction of any other state. The decisive factor to determine the applicability of OPOL in a liability case is the location of the offshore installation.¹⁰⁷ OPOL has a broad scope regarding the forms of installations. It applies to any kind of installation, fixed or mobile, well or pipeline according to article 8 of the agreement.

Throughout the years, OPOL got accepted by the British government as the best means of addressing these liability issues.¹⁰⁸

1.4.4. Comparative Summary

The national laws have in common that the general rules on tort law remain applicable alongside the specific rules.

As the examination of national laws shows, some states are reluctant when it comes to compensation of pure economic loss. But with regard to oil spills as well as other

106) Faure, Michel; Wang, Hui, *Compensating victims of a European Deepwater Horizon accident: OPOL revisited* in: *Marine Policy* 62 (2015), p. 26.

107) <http://www.opol.org.uk/about-1.htm> (accessed 06 October 2017).

108) Cameron, Peter *Liability for Catastrophic Risk in the Oil and Gas Industry* *International Energy Law Review* 2012, p. 211.

types of environmental pollution, economic loss frequently affects residents in the polluted areas. They might not suffer damage to their health or to their belongings, but polluted beaches in a region that is usually very popular with tourists can mean the loss of earnings for all those who depend on the tourism in the long term. Both German and Danish law have strict liability regimes in force. Unlike German and Danish law, in practice, the UK relies primarily on a private agreement which is not a treaty or an act and only damage not covered by OPOL is being claimed under application of the general tort law.

So far, there are no harmonised rules based on which individuals and legal entities can recover damage suffered as a consequence of a spill or a blowout arising from offshore operations. Throughout the EU, in order to file a damages claim, one must rely on the Brussels I and Rome II Regulations to determine the country of jurisdiction and the applicable – national – law. As seen above, the national laws differ with regard to the recoverable damages. That means, people in different countries are exposed to the same risks, but they are not protected to the same extent.

2. Future Regulation in the EU

Based on the outcome of the analysis above, the question is if, and to what extent, civil liability concerning exploration and exploitation of offshore oil and gas could be harmonised on a European level. This question is particularly relevant with regard to third party damage.

Regulatory options include, furthermore, hard law and soft law means. Throughout the years, the EU institutions have adopted an increasing number of soft law instruments. Although they are not legally binding they have legal impact.¹⁰⁹ This is a result of the development of a new regulatory policy promoting the use of both alternative and complementary regulatory instruments.¹¹⁰ There are both formal and informal soft law instruments. Formal ones are the above-mentioned recommendations and opinions, but there are also informal instruments used by EU institutions in daily practice.¹¹¹ One will have to consider carefully if an implementation by means of soft law is feasible. International organisations that work to a large extent with soft law instruments have in the past experienced that they have little impact in the field of environmental measures.¹¹² Criticism brought forward against soft law means includes

109) Egelund Olsen, Birgitte, Engsig Sørensen, Karsten (eds.), *Regulation in the EU*, p. 171.

110) Senden, Linda, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where do they meet?* EJCL 2005, p. 1.

111) Senden, Linda, *Soft Law and its Implication for Institutional Balance in the EC* Utrecht Law Review 2005, p. 79 (82).

112) Krämer, Ludwig, *EU Environmental Law*, 7th ed. 2007, p. 53.

that they often do not receive sufficient attention by decision makers. Hard law means, on the other hand, also enable the establishment of enforcement measures.¹¹³

Given the fact that the lack of a comprehensive framework was regretted in an EU Parliament resolution, the EU institutions appear to be open to the adoption of such rules.¹¹⁴

2.1. Brexit

A major challenge in this context will be the Brexit, the UK's resignation from the European Union. According to the current status quo,¹¹⁵ the UK's EU membership will end in March 2019. It is a challenge, as the UK is the EU's major oil and gas producer: roughly half of the European offshore installations are in waters under the jurisdiction of the UK and 75% of the offshore oil and 54% of the gas produced in the EU comes from there.¹¹⁶

Enacting a European directive after 2019 would thus only cover a quarter of the offshore oil and less than half of the offshore gas produced in what is still EU28. One might try to aim at a treaty between EU27 and the UK. However, it could be difficult to achieve since the country no longer wants to be subject to rules drafted in Brussels. With regard to environmental protection in general, Brexit might even be a challenge for the UK itself as it has been said that roughly 1100 EU environmental laws will need to be transposed into national UK law.¹¹⁷

2.2. Regulation for the entire EU or Regional Frameworks?

Another question to deal with is whether it is favourable to enact a framework covering the entire EU or whether one should establish rules according to the regions. The advantage of the latter is that it would allow the framework to take into account the natural and geographical circumstances of the respective regions, as for instance for the Mediterranean Sea there will be different factors to consider than there are for the Baltic Sea or the EU territorial waters in the Atlantic Ocean. Also, in a directive, one could implement provisions concerning particular regions only. Furthermore, regional

113) Rochette, Julien; Wemaere, Matthieu; Chabason, Lucien; Callet, Sarah, *Seeing beyond the Horizon for Deepwater Oil and Gas: Strengthening the International Regulation of Offshore Exploration and Exploitation*, p. 28.

114) See above, section 1.

115) As of March 2018.

116) Offshore oil and gas production in Europe, via EU Offshore Authorities Group Web Portal, euoag.jrc.ec.europa.eu/node/63.

117) Newspaper Article in 'The Guardian', 13 February 2017 <https://www.theguardian.com/environment/2017/feb/13/uk-unprepared-for-exiting-europes-green-legislation-says-mp> (accessed 06 October 2017).

agreements seem most appropriate for bodies of water that are almost closed and have only a little exchange of water with other marine areas.

An argument brought forward in favour of regional agreements is that the further conventions reach with regard to their territorial scope, the weaker they are concerning compliance and effectiveness.¹¹⁸ Frameworks covering smaller regions may be used as basis for a corresponding more global one if they prove successful, thus one might take a bottom-up approach. A global approach has the advantage that it increases legal certainty on international level, which can be particularly relevant for multinational companies.¹¹⁹ Another option could be to take the OPOL agreement as a starting point. The downside of this agreement is that liability is capped to 250 million dollars.

2.3. Liability according to the Draft Common Frame of Reference

The Draft Common Frame of Reference (DCFR) is an academic model framework elaborated by the Study Group on a European Civil Code and that aims to be an example of what a unified European Civil Code could look like.

Article VI-3:206 DCFR deals with environmental liability, i.e. the accountability for damage caused by dangerous substances or emissions to third parties.

The provision imposes strict liability on the keeper of a substance or the operator of an installation if the substance or emissions from the installation have caused damage to another. Additional requirements are the danger inherent in such a substance or emission to cause tangible damage, and the damage occurred being the realisation of that danger. The danger must be related to the properties of the substance or emission.

The rule contains an exoneration clause for cases where the operator of an installation or the keeper of a substance proves that they complied with statutory standards. This refers to the management of the installation or the control of the substance. For instance, liability will not be imposed when statutorily prescribed emission levels were not exceeded. Transferring this to offshore oil and gas installations, it means that the operator will be strictly liable in case of a major accident, but not for damage caused by operational discharge if it is within the limits set by the law.¹²⁰ The recoverable

118) Balsiger, Jörg; Vandevveer, Stacy D., *Navigating Regional Environmental Governance* in: Global Environmental Politics 2012, p. 3.

119) Rochette, Julien; Wemaere, Matthieu; Chabason, Lucien; Callet, Sarah *Seeing beyond the Horizon for Deepwater Oil and Gas: Strengthening the International Regulation of Offshore Exploration and Exploitation*, p. 30.

120) Study Group on a European Civil Code PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW Draft Common Frame of Reference (DCFR) Articles and Comments (Interim Edition), p. 1410.

damage under the scope of article VI-3:206 DCFR includes bodily harm, loss of breadwinner and loss consequential to property damage. Other forms of damage can only be recovered in case of intentional or negligent behaviour.¹²¹ This rule does not give a claim for pure economic loss.

Article VI-3:206 DCFR summarises the common core of liability for damage caused through environmental pollution of the majority of the EU member states.¹²² Damage to the environment per se is regulated in article VI-2:209 stating that "burdens incurred by the State or designated competent authorities in restoring substantially impaired natural elements constituting the environment, such as air, water, soil, flora and fauna, are legally relevant damage to the state or the authorities concerned". That means, only public authorities are able to claim damages under the scope of this provision.¹²³

For the term of impairment of the environment, the DCFR refers to the ELD being the prevailing European framework on this matter. The part of the DCFR dealing with non-contractual liability did not remain uncriticised among academics. It was particularly held that the proposed solutions concerning pure economic loss or non-pecuniary loss opened all of the floodgates since they exceed the prevailing standards in most EU member states.¹²⁴

2.4. Liability according to the Principles of European Tort Law

The Principles of European Tort Law (PETL) are another academic model framework. They were published in 2005 by the European Group on Tort Law.

The PETL contain a provision on strict liability for abnormally dangerous activities. The question to ask in this context is whether exploration and exploitation of offshore oil and gas can count as an abnormally dangerous activity.

According to the PETL, an activity is abnormally dangerous if it creates a foreseeable and highly significant risk of damage even if all due care is exercised and it is not a matter of common usage.¹²⁵ Accidents with oil platforms have shown how disastrous

¹²¹) Study Group on a European Civil Code PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW Draft Common Frame of Reference (DCFR) Articles and Comments (Interim Edition), p. 1406.

¹²²) Study Group on a European Civil Code PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW Draft Common Frame of Reference (DCFR) Articles and Comments (Interim Edition), p. 1406.

¹²³) Principles, Definitions and Model Rules of European Private Law - Draft Common Frame of Reference (DCFR), Interim Edition, via http://www.ccbe.org/NTCdocument/DCFRpdf1_1262861061.pdf, p. 1355 (accessed 03 October 2017).

¹²⁴) Zimmermann, Reinhard, *The Present State of European Private Law* The American Journal of Comparative Law Vol. 57 (2009), p. 496.

¹²⁵) See article 5:101 (2) PETL.

the consequences can be. So the main question is whether or not offshore exploration and exploitation is common usage. The approach taken is thus very narrow. The wording of this provision in the principles is the same as in the Restatement (Third) of Torts § 20 b in US law. According to that, an activity is common usage if a significant part of the community engages in it. Concerning exploration and exploration of offshore oil and gas, despite a relatively high number of installations, one cannot say that a significant part of the community engages in it. The principles state furthermore that this strict liability rule shall not apply when an activity is "specifically subjected to strict liability by any other provision of these Principles or any other national law or international convention."

Both of the analysed model frameworks agree upon the point that liability for damage caused through offshore activities should be strict. The concept is favourable compared to fault liability, because the potential consequences of spills and blowouts can be detrimental and affect both the environment and the people for a very long time. It provides stronger incentives for the operator to take necessary safety measures and to employ a comprehensive risk management scheme.

3. Concluding Remarks

In order to provide potential victims of pollution resulting from exploration and exploitation of offshore oil and gas with adequate protection, the rules on civil liability should be harmonised at the European level. Considering the problem of transboundary pollution, it is not fair to have people in the same maritime region exposed to the same risks but who may not be able to recover the same amount of damages, depending on the applicable law according to private international law. In addition to that, a duty to establish such a framework is enacted in several international conventions.

Such a framework should be based on strict liability. Liability should not be channelled, i.e. operator and licensee should be jointly and severally liable. The rules set out in the model frameworks DCFR and PETL presented above would provide a good basis of liability.

In addition to that, pure economic loss should be recoverable if it is not too remote. The burden of proof concerning economic loss should rest upon the claimant in order to not open the floodgates. For instance, a fisherman claiming the loss of his earnings as fish stocks died from pollution must prove that his fishing area is affected, and he must demonstrate his regular earnings from fisheries. One may also consider limiting the indemnification for pure economic loss to a certain period of time, for instance maximum six months or one year.

When drafting a framework for the EU, one should still envisage a collaboration with the UK after Brexit, as it is – and most likely will be in the future as well – Europe's major producer of offshore oil and gas.

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