



# Conserving the Marine Environment of the European Union: A Critical Appraisal of the European Parliament's Resolution 2015/2352 ss it concerns the establishment of a new legislative compensation mechanism for offshore accidents

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# **CHAPTER 23**

## **CONSERVING THE MARINE ENVIRONMENT OF THE EU: A CRITICAL APPRAISAL OF THE EUROPEAN PARLIAMENT'S RESOLUTION 2015/2352 AS IT CONCERNS THE ESTABLISHMENT OF A NEW LEGISLATIVE COMPENSATION MECHANISM FOR OFFSHORE ACCIDENTS**

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**RÉSUMÉ:** *Le 1<sup>er</sup> décembre 2016, le Parlement européen a adopté la résolution 2015/2352 invitant la Commission européenne à envisager la création d'un mécanisme de compensation législative pour les accidents en mer. Le Parlement européen a proposé que celui-ci couvre les compensations versées aux pêcheurs, à l'industrie du tourisme côtier et à d'autres secteurs de l'économie bleue pour les dommages traditionnels et les pertes économiques pures. Ce document évalue de manière critique la résolution et son potentiel pour la protection de l'environnement marin de l'UE. Il examine également s'il est nécessaire ou souhaitable de disposer d'un mécanisme de compensation à l'échelle européenne pour les accidents en mer. En abordant ces questions, le présent document examinera la proposition de l'UE par rapport aux principes reconnus du droit et de la politique de l'environnement. Il analysera également la loi norvégienne à cet égard, le Parlement européen ayant noté qu'il s'agissait d'un modèle de meilleure pratique pour le futur système d'indemnisation législative. Ce document examinera également les difficultés que pourrait poser la mise en place d'un système*

*de compensation tel que proposé dans la résolution. L'argument avancé dans ce document est que la compensation des pertes résultant des opérations pétrolières et gazières en mer est un élément nécessaire de tout régime cherchant à garantir l'extraction durable des ressources en mer, ce qui rend la proposition du Parlement européen souhaitable.*

**Mots-clés:** *système de compensation législative; droit de l'UE; protection de l'environnement; principe pollueur-payeur.*

**ABSTRACT:** *On the 1<sup>st</sup> of December, 2016, the European Parliament passed Resolution 2015/2352 calling on the European Commission to consider establishing a legislative compensation mechanism for offshore accidents. The European Parliament proposed that this should cover compensation to fishermen, the coastal tourism industry and other sectors of the blue economy for traditional damage and pure economic losses. This paper critically assesses the resolution and its potential for securing protection of the EU marine environment. It also considers whether it is necessary or desirable to have a Europe-wide compensation mechanism for offshore accidents. In addressing these issues, this paper will examine the EU proposal against recognised principles of environmental law and policy. It will also analyse the Norwegian Law in this regard as the European Parliament noted this as a model of best practice for the prospective legislative compensation scheme. This paper will also consider what challenges might arise from establishing a compensation scheme as proposed in the resolution. The argument made in this paper is that compensation for losses arising from offshore oil and gas operations is a necessary part of any regime looking to ensure sustainable offshore resource extraction, making the EU Parliament's proposal desirable.*

**Keywords:** *legislative compensation scheme; EU law; environmental protection; polluter pays principle.*

## 1. INTRODUCTION

On the 1<sup>st</sup> of December 2016, the European Parliament passed Resolution 2015/2352 calling on the European Commission to consider establishing a legislative compensation mechanism for offshore accidents. The European Parliament proposed that this should cover compensation to fishermen, the coastal tourism industry and other sectors of the blue economy for traditional damage and pure economic losses. This resolution is one of the many efforts aimed at protecting the EU marine environment from the harmful effects that might be caused by offshore oil and gas activities. It stems from the understanding that one aspect of securing this environmental protection is the existence of a regime that adequately provides remedies for losses arising from offshore oil and gas operations. The EU Parliament also hinges the resolution on the polluter pays principle, one of the fundamental principles of environmental law and policy. On the face of it, the European Parliament's resolution is commendable. However, it is important to critically assess the resolution and its potential for securing protection of the EU marine environment.

It is also important to find out whether it is necessary or desirable to have a Europe-wide compensation mechanism for offshore accidents. Is it rather preferable to have individual States determine what compensation mechanism is suitable for their jurisdictions? What therefore are the advantages of having a Europe-wide compensation scheme as opposed to individual schemes? In addressing these questions, this paper will examine the EU proposal against recognised principles of environmental law and policy. It will also analyse the Norwegian Law in this regard as the European Parliament noted this as a model of best practice for the prospective legislative compensation scheme. This paper will also consider what challenges might arise from establishing a compensation scheme as proposed in the resolution. The argument made in this paper is that compensation for losses arising from offshore oil and gas operations is a necessary part of any regime looking to ensure sustainable offshore resource extraction, making the EU Parliament's proposal desirable.

## 2. THE EU PROPOSAL

The EU Parliament expressed concern that although a major offshore accident has not occurred in EU waters since 1988, with increasing offshore oil and gas activities in EU waters particularly in the Mediterranean and the Black Sea, it was necessary to take action for the purpose of implementing legislation aimed at protecting the marine environment. It further stated that offshore accidents could lead to losses that were not being adequately compensated for. In this regard, it noted that as a result of offshore accidents/oil spills, the environment could suffer adversely and third parties could suffer losses as well. The Parliament expressly acknowledged the fishing industry, the coastal tourism industry and other sectors of the blue economy as persons who could suffer such losses<sup>1</sup>.

However, the law, as provided for in the Offshore Safety Directive (OSD) and the Environmental Liability Directive (ELD), covers prevention and remediation costs for oil spills/environmental damage but does not cover costs of compensation for losses to the persons in the industries just mentioned. This, the Parliament noted, does not adequately capture the polluter pays principle, which it recognised is the principal base on which liability regimes are established<sup>2</sup>. In view of this, the Parliament called on the European Commission to consider establishing a legislative mechanism to compensate third parties for losses incurred as a result of oil spills<sup>3</sup>. Such losses should include traditional damage (that is, bodily injury and damage to property), economic loss (that is, loss of profits results from bodily injury and damage to property) and pure economic loss (that is, loss of profits that is not connected with bodily injury or damage to property). The Parliament noted that the proposed law should be modelled after the Norwegian law which recog-

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<sup>1</sup> European Parliament Resolution of 1 December, 2016 on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations (2015/2352).

<sup>2</sup> *Ibid.*, recital J.

<sup>3</sup> *Ibid.*, para 3.

nises the right to compensation for fishermen who have suffered financial losses as a result of pollution/waste from petroleum activities<sup>4</sup>.

In addition to the above, the EU Parliament expressed the desirability of having a uniform compensation scheme throughout Europe as the way civil liability is handled varies from one Member State to the other and very importantly, because in many Member States with an offshore oil and gas industry, there is no liability for most third-party claims for compensation for traditional damage caused by an accident. Furthermore, a vast majority of Member States had no regime for compensation payments, and could offer no assurance that in the event of an accident leading to claims, persons liable would have adequate financial assets to meet claims<sup>5</sup>.

Having set out the EU Parliament's proposal, the next section considers the reason for this proposal in order to set the background for the discussion.

### 3. THE DRIVER FOR THE PROPOSAL

The EU proposal stems from the realities thrown up by the Deepwater Horizon disaster of 20 April 2010. In addition to the death of eleven workers and bodily injury to seventeen others, the Macondo well blowout resulted in the spilling of about four million barrels of oil into the Gulf of Mexico over an eighty-seven day period<sup>6</sup>, a spill that has been regarded as the worst ever in the history of marine oil drilling operations<sup>7</sup>. In view of this disaster, the EU reviewed the regulation of safety in EU waters insofar as it concerns oil and gas operations. The EU was and still is concerned about the ability of oil companies working in the EU to contain a similar disaster if same occurred in EU waters. The costs to BP, operator of the Deepwater Horizon rig, as a result of the spill is reported to stand at 65 billion dollars<sup>8</sup>. This figure represents compensation for claimants affected by the spill as well as fines from the authorities and clean-up costs. Are funds available to EU oil companies to deal with a major accident as the Deepwater Horizon disaster?

The concern of the EU led to the introduction of the Offshore Safety Directive (OSD) which aims to

«reduce as far as possible the occurrence of major accidents relating to offshore oil and gas operations and to limit their consequences, thus increasing the protection of the marine environment and coastal economies against pollution, establishing minimum conditions for safe offshore exploration and exploitation of oil and gas

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, para 5.

<sup>6</sup> United States Environmental Protection Agency, «Deepwater Horizon - BP Gulf of Mexico Oil Spill», <https://www.epa.gov>.

<sup>7</sup> *Ibid.*

<sup>8</sup> VAGHAN, A. (2018), «BP's Deepwater Horizon Bill Tops \$65bn», *The Guardian*, 16 January, <https://www.theguardian.com/business/2018/jan/16/bps-deepwater-horizon-bill-tops-65bn>.

and limiting possible disruptions to Union indigenous energy production, and to improve the response mechanisms in case of an accident»<sup>9</sup>.

This Directive recognises that major accidents from oil and gas operations can adversely and irreversibly affect not just the marine and coastal environment but also coastal economies, hence the need to prevent them<sup>10</sup>. Notwithstanding this recognition, Article 3(3) indicates that EU Member States are only under a duty to ensure that operators of oil and gas installations take all suitable measures to limit the consequences of a major accident «for human health and for the environment». Consequences to coastal economies are not factored in. In consonance with this, Article 7 only concerns itself with liability for environmental damage. It requires Member States to ensure that licensees are financially responsible for preventing and remedying environmental damage resulting from oil and gas operations. No part of the Directive speaks about liability for injury to coastal economies.

Also providing for the protection of the EU marine environment is the Environmental Liability Directive (ELD). Although this Directive was in force before the Deepwater Horizon disaster, it was amended by Article 38 of the Offshore Safety Directive to cover damage to the waters of the continental shelf of EU Member States. The ELD promotes the polluter pays principle, thus making the polluter responsible for the cost of environmental damage to water, land and biodiversity, including prevention, control and remediation costs. Pursuant to Article 18(2) of the ELD which requires the Commission to review and report to the Council and the European Parliament on the application of the Directive as well as indicate areas of amendment, the Commission's report noted that, «[t]he implementation of the ELD has improved the prevention and remediation of environmental damage to a limited extent in comparison to the situation before the transposition of the ELD»<sup>11</sup>. The limited success of the ELD was noted to have arisen from different EU Member States applying the Directive differently.

Nevertheless, despite the lofty aims of the OSD and limited success of the ELD, the EU proposal under consideration recognises that the OSD and ELD do not capture the full implications of the polluter pays principle. At the moment, both the OSD and ELD are limited to providing that the polluter pays the costs of preventing and remedying environmental damage. They do not cater for third party claims arising from the environmental damage caused, whether these are traditional damage claims or claims for pure economic loss<sup>12</sup>.

The conclusion from the review of the ELD's application across the EU is useful when one is analysing the EU's proposal of 1 December 2016. This is because

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<sup>9</sup> Offshore Safety Directive, Recital 2.

<sup>10</sup> *Ibid.*, Recital 4.

<sup>11</sup> *Report from the Commission to the Council and the European Parliament under Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage COM/2016/0204 final*, para 5, <https://eur-lex.europa.eu>.

<sup>12</sup> EU Resolution 2015/2352, recitals 3 and 4.

it highlights the problem noted by the EU regarding different regimes for compensation for third party claims arising from environmental damage. It is necessary to assess whether it is desirable for compensation to be extended beyond what is provided for currently under the OSD and ELD to include the proposal made by the EU.

#### 4. POSSIBLE LOSSES FROM A MAJOR POLLUTION INCIDENT

In reality, the EU Parliament is right to note that the losses incurred from oil pollution go beyond losses merely to the physical environment. They affect persons and industries that depend on the marine environment for their livelihood or economic sustenance. This includes the fisheries industries, allied industries such as the fish processing industry and fish supply industry. Coastal tourism will also suffer if the coast/waters are polluted due to petroleum activities.

Goldberg, in analysing liability in connection with the Deepwater Horizon accident under the United States' Oil Pollution Act, provides an analysis of seventeen hypothetical situations where persons can be shown to have suffered losses as a result of pollution from an oil spill<sup>13</sup>. These hypothetical situations include a commercial fisherman who has lost the opportunity to fish due to the spill and the owner of a beachfront hotel who, although no oil has washed up on the beachfront reserved for use by the hotel's guests, nevertheless sees his patronage reduced because patrons have decided to take their vacation elsewhere because of the spill. Another example is that of an employee of the hotel who has had his working hours cut and consequently, his wages reduced by 25% as part of measures taken by the hotel as the employer to cut its own losses caused by the oil spill. Goldberg also speaks of a restaurant that recorded loss of profits since its usual customers, namely fishermen, dockworkers and others involved in the marine industry, no longer frequent the restaurant due to being out of work as a result of the spill.

While some examples seem directly related to the spill such as fishermen losing profits, others such as the seller of fireworks whose main customers are beach goers do not. One gets the sense from reading through the hypothetical situations provided by Goldberg that a single incident of offshore oil pollution could affect an almost unlimited number and class of persons who may seem only remotely connected with the oil spill. Indeed, it was reported that some claims against BP came from such unlikely victims as strip club owners, cab drivers, electricians and plumbers amongst others<sup>14</sup>.

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<sup>13</sup> GOLDBERG, J. (2011), «Liability for Economic Loss in Connection with the Deepwater Horizon Spill», *Mississippi College Law Review*, 30(2), 346-348.

<sup>14</sup> WEBB, T. (2010), «Deepwater Oil Spill Victims, from Waitresses to Cabbies and Strippers, Plead for BP Payouts», 20 June, *The Guardian*, <https://www.theguardian.com/environment/2010/jun/20/deepwater-oil-spill-victims-compensation-bp>.



There are certainly problems associated with this kind of claims recognition. The EU has at yet not clarified what categories of people should be compensated for losses associated with oil spills. While fishermen are clearly within the purview of the EU, what the EU calls other «sectors of the blue economy» remains ambiguous. In a subsequent section, this paper will consider the challenges associated with the EU proposal. This will come after a consideration of the desirability or otherwise of the proposal.

## 5. PROPOSAL: DESIRABLE OR NOT?

The EU Parliament noted in its resolution that the proposed legislative compensation mechanism should be modelled after the Norwegian Petroleum Activities Act. In view of this recognition of the Norwegian law as best practice, this paper will now analyse the details of that law.

### 5.1. Norwegian Petroleum Activities Act, 1996

The Norwegian Petroleum Activities Act<sup>15</sup> is the primary legislation governing petroleum activities in Norway. In addition to rules governing general liability for environmental damage, it provides special rules for the compensation of fishermen in the event of oil pollution. No other State apart from Norway has promulgated legislation to recognise the fisherman's right of compensation in Europe<sup>16</sup>. The Norwegian Petroleum Activities Act, in setting out the rules governing liability for pollution damage, defines «pollution damage» as «damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from a facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures»<sup>17</sup>. Section 7-1 goes on to state clearly that «damage or loss incurred by fishermen as a consequence of reduced possibilities for fishing is also included in pollution damage.» In Chapter 8, the Act expressly provides that the party responsible for pollution or waste from petroleum activities must compensate fishermen for financial losses incurred as a result of such pollution or waste, including the costs of reasonable measures taken to contain the damage or loss and any loss or damage stemming from such measures<sup>18</sup>. Liability for the aforementioned losses is not based on fault. In the event that the person who caused the pollution damage cannot be identified, all licensees shall be jointly and severally liable where it is clear that the damage is associated with the petroleum activities under a particular licence<sup>19</sup>.

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<sup>15</sup> Act 29 November 1996 No. 72 relating to petroleum activities.

<sup>16</sup> SALES, K.; MUDGAL, S., and FOGGLEMANN, V. (2014), *Civil Liability, Financial Security and compensation claims for offshore oil and gas activities in the European Economic Area, Final Report to the European Commission*, 11, <https://ec.europa.eu>.

<sup>17</sup> Petroleum Activities Act, 1996, Section 7-1.

<sup>18</sup> *Ibid.*, Section 8-3.

<sup>19</sup> *Ibid.*, Section 8-4.



Although the proposed EU legislation is to look to the Norwegian law for some guidance, it must be noted that the Norwegian law provides for compensation only for fishermen. The EU proposal on the other hand intends to cover fishermen as well as others who may be affected by oil pollution, namely, persons involved in the coastal tourism industry and other users of the blue economy. In view of this then, it may be worth considering the United States' Oil Pollution Act of 1990 (OPA) as that law goes farther than the Norwegian law. Amongst other criteria, the OPA in Section 1002(b)(2)(E), allows any person to claim «[d] amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources». Section 1002(b)-(2)-(C) makes recoverable by any claimant, damages for loss of subsistence use of natural resources. This is so if such claimant uses those natural resources which have been injured, destroyed, or lost, and no question arises as to the ownership or management of the resources. These provisions were the basis of many claims against BP. Unlike the Norwegian law, any claimant who has suffered losses is entitled to damages. It must be mentioned though that under the OPA, liability is capped at certain amounts, specifically, 75 million dollars for an offshore facility<sup>20</sup>.

## **5.2. EU proposal vis-as-vis principles of environmental law and policy**

This section will argue that the EU proposal is desirable. It will consider the following principles of environmental law and policy in order to establish the argument: the polluter pays principle, sustainable development, intragenerational equity, environmental justice and social impact assessment.

### *5.2.1. The polluter pays principle*

The EU Parliament's proposal may be justified on the polluter pays principle. The Parliament itself recognises this when it notes that «the effective application of the “polluter pays” principle to offshore oil and gas operations should extend not only to the costs of preventing and remedying environmental damage —as currently achieved to a certain extent via the OSD and ELD— but also to the costs of remedying traditional damage claims»<sup>21</sup>. It is interesting that Parliament should consider that the polluter pays principle be extended beyond just prevention and remediation efforts on the environment. Indeed, popular definitions of the principle focus on the costs of pollution to the physical environment rather than other costs associated with the pollution such as costs to persons who rely on the environment for their subsistence or who have a right to commercially exploit the natural resources of the environment. For example, the French Environmental

<sup>20</sup> OPA, 1990, Section 1004(a)(3). This does not include clean-up costs.

<sup>21</sup> EU Resolution 2015/2352, para 3.

Code refers to the principle as the polluter bearing the costs of measures for the prevention, reduction and control of pollution<sup>22</sup>. The same idea is reflected in the OSPAR's view of the principle. The OECD, credited as the originator of the principle<sup>23</sup>, had in 1972 stated that the principle was aimed at encouraging the rational use of scarce environmental resources and preventing distortion in international trade and investment. It went on to describe the principle as the polluter bearing the costs of measures «decided by public authorities to ensure that the environment is in an acceptable state». Focus here again is on the physical environment. This way of viewing the polluter pays principle thus stems from the historical development of the principle. However, there is no reason why it should not be extended to cover liability to compensate persons who have incurred losses as a result of environmental pollution. Cardato argues that expanding the definition of pollution and placing emphasis on who really incurs costs in the event of environmental pollution is instructive for a more useful interpretation of the polluter pays principle. For him, the following questions need to be answered: «What constitutes pollution? Who are the polluters? How much must the polluters pay? To whom they must make the payment?». In answering these questions, he argues thus:

«A correct interpretation of the polluter pays principle would define pollution as any by-product of a production or consumption process that harms or otherwise violates the property rights of others. The polluter would be the person, company, or other organization whose activities are generating that by-product. And finally, payment should equal the damage and be made to the person or persons being harmed. Inanimate objects and the environment do not incur costs, people do. It is not merely the physical property that is being damaged, but the interests of the owner»<sup>24</sup>.

This argument resonates with the EU proposal which recognises that beyond the physical environment, people who depend on the environment suffer losses that need to be compensated for and this should be viewed within the lens of the polluter pays principle.

### 5.2.2. *Intra-generational equity*

Inter-generational equity rather than intra-generational equity is the more widely known environmental principle. Inter-generational equity refers to the ability of the present generation to meet its needs without jeopardising the ability of future generations to meet their own needs. This is a very important aspect of the principle of sustainable development. However, intra-generational equity is just as important. It refers to equity between the same generations. Some persons depend

<sup>22</sup> Article L 110-1 para 2, French Environmental Code.

<sup>23</sup> DE LARRAGÁN, J. (2011), *Distributional Choices in EU Climate Change Law and Policy: Towards a Principled Approach*, 142.

<sup>24</sup> CORDATO, R. (2001), «The Polluter Pays Principle: A Proper Guide for Environmental Policy», *Studies in Social Cost, Regulation, and the Environment*, Institute for Research on the Economics of Taxation, No. 6, i, <http://iret.org/pub/SCRE-6.PDF>.

on the environment for their subsistence and this should not be taken away from them. If persons involved in oil and gas activities have access to ocean resources, it seems fair to expect other users of the same ocean space to have access to the resources they need. Viewing it from this perspective, therefore, the EU Parliament's proposal is desirable.

### 5.2.3. *Environmental justice*

The EU Parliament's proposal may also be justified on the basis of environmental justice. As Cordato notes, requiring that persons who have suffered losses as a result of pollution caused by another be compensated appeals to society's sense of fairness and justice<sup>25</sup>. While the concept of environmental justice has been used in different ways, Walker and Bulkeley note that the concept is «a response to perceived injustice, as judged through observations of unreasonable inequality in outcome and lack of “fair treatment” for, in particular, people and social groups that are already marginalised and disadvantaged». An oft-quoted definition of environmental justice is the one provided by the United States' Environmental Protection Agency (EPA). That definition emphasises fair treatment of all in the enforcement of environmental laws, regulations, and policies<sup>26</sup>. Equality and fair treatment are therefore key to ensuring justice. The EPA rightly notes that this means that «no single group of people should bear a disproportionate share of the negative environmental consequences arising from industrial, governmental, or commercial operations or policies»<sup>27</sup>. Thus, fishermen, persons involved in industries allied to fishing, coastal tourism and other users of the ocean should be treated equally with oil and gas companies. It would amount to unfair and unequal treatment for oil companies to be allowed to bear responsibility only for remediation of the marine environment without been required to compensate other users of the ocean for losses they have incurred as a result of the oil company's operations. This would mean that the injured parties are bearing a disproportionate share of the negative environmental consequences of the oil company's commercial operations.

### 5.2.4. *Social impact assessment*

The last principle upon which the desirability of the EU Parliament's proposal is based is social impact assessment. Social impact assessment (SIA) has always been a part of environmental impact assessment (EIA), although it has gained ground in recent times due to increased concerns about the cumulative impact of development on human livelihood and wellbeing<sup>28</sup>. SIA, which can now be

<sup>25</sup> *Ibid.*, 1.

<sup>26</sup> US EPA, «Learn About Environmental Justice», <https://www.epa.gov>.

<sup>27</sup> *Ibid.*

<sup>28</sup> ZHANG, R.; SHI, G.; YUANNI, W. *et al.* (2018), «Social Impact Assessment of Investment Activities in the China-Pakistan Economic Corridor», *Impact Assessment and Project Appraisal*, 331-347.

regarded as a standalone concept, refers to a process whereby the social effects of a development project are identified, analysed and managed with the goal of bringing about a socially sustainable development environment<sup>29</sup>. Social values and priorities are an integral part of impact assessment, and SIA is a veritable tool for ensuring social justice and equity are integrated into project approval and implementation<sup>30</sup>. There has been increased debate on the need for better outcomes for communities involved in resource extraction through effective SIA implementation including in oil and gas operations<sup>31</sup>. This underscores the need for the existence of a scheme adequate to compensate persons who have suffered losses as a result of oil pollution. The environment exists not only for its own sake but also for the benefit of humans. Therefore, it is necessary to consider how the use of the environment for offshore petroleum operations might impact on the ability of other groups of people to earn a living and how this affects wellbeing. If the activity of one impacts on the wellbeing of others, it is only fair that this impact is adequately mitigated, and an adequate compensation scheme is one way of mitigating such adverse impact. This social aspect of pollution is vital as the inability of, for example, a fishing community to carry on its means of livelihood can have serious social consequences.

## 6. RELATIONSHIP BETWEEN COMPENSATION FOR LOSSES AND ENVIRONMENTAL PROTECTION

It is established that some people depend on the environment for their livelihood. The fishing industry, tourism and allied industries are examples in this regard. As the EU Parliament put it, these industries «rely on the good condition of the shared marine environment for doing business»<sup>32</sup>. By requiring that these persons be compensated for traditional damage and economic losses, an incentive is introduced to encourage or compel companies engaged in offshore oil and gas operations to take steps to ensure that their operations are safe environmental-wise. Thus, there is a correlation between compensating persons who have suffered losses as a result of oil pollution and the protection of the marine environment. One can take the scenario where a company is only responsible for the costs of cleaning up the marine environment and the costs of compensation to employees injured as a result of a major accident. Such company may well consider that it can take certain risks because its burden is light. However, where it must bear responsibilities for other consequences of its polluting actions, including compensating all the victims of the pollution incident, then it is likely to carry out more safe op-

<sup>29</sup> *Ibid.*

<sup>30</sup> CASHMORE, M. (2004), «The Role of Science in Environmental Impact Assessment: Process and Procedure Versus Purpose in the Development of Theory», *Environmental Impact Assessment Review*, 24(4), 403-426.

<sup>31</sup> SMITS, C., *et al.* (2017), «Oil and Gas Development in Greenland: A Social License to Operate, Trust and Legitimacy in Environmental Governance», *Resources Policy*, 53, 109-116.

<sup>32</sup> European Parliament Resolution of 1 December, 2016, on Liability, Compensation and Financial Security for Offshore Oil and Gas Operations (2015/2352).

erations. The case of BP in the Deepwater Horizon incident is an example in this regard. BP's liability for the spill amounted to 65 billion dollars. The realisation that a company may incur such liability in future thus encourages compliance with safety measures, which in turn, positively impacts on the marine environment.

## **7. BENEFITS OF AN EU-WIDE SYSTEM**

### **7.1. Uniform standard of environmental protection**

The EU Parliament proposed a Europe-wide compensation scheme. Is this desirable or should individual Member States determine their liability regimes? It may be argued that the proposal is desirable. This is because the EU Parliament identified problems with the liability regimes in Member States. In addition to non-existent liability regimes, the EU Parliament also highlighted the issue of considerable variety in the way civil liability is handled across Member States. In a report prepared by Sales, Mudgal and Foggelman, the authors noted that while there are effective liability regimes to cover traditional damage to persons working on offshore installations, the same cannot be said of liability regimes to cover traditional damage to third parties, that is, persons who are not employees of the oil company. They further stated that what is covered is uncertain and there are differences in the coverage across EU Member States<sup>33</sup>. Non recognition of pure economic loss, a requirement that losses be direct, the requirement to prove negligence in order to succeed in a claim and uncertainty regarding the extension of tort laws to the exclusive economic zones and continental shelf are some of the limitations of liability regimes identified across EU Member States.

The identification of this problem presupposes that if a Europe-wide compensation scheme is established, then a general standard in force throughout the EU leading to a uniform protection of the marine environment of the EU could be achieved.

If there are differences in the civil liability regime across EU Member States, then the potential for forum shopping exists. Why should a victim of environmental pollution be able to get a favourable judgment in one State and not in another State? Having a Europe-wide compensation scheme will therefore help to deal with this problem as there will be just one standard across Member States.

## **8. CHALLENGES OF IMPLEMENTING THE PROPOSAL**

From the above, it is apparent that the EU Parliament's proposal has merits. Nevertheless, some challenges with implementing the proposal have been identified.

First, there is no clarity on the categories of persons to be compensated in the event of an oil spill. The Parliament's proposal mentions fishermen, those involved

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<sup>33</sup> SALES, K.; MUDGAL, S., and FOGGELMAN, V. (2014), *op. cit.*, 12 (note 16).

in coastal tourism and other sectors of the blue economy. The reality is that this could cover an unlimited and unpredictable class of claimants. The seventeen hypothetical situations provided by Goldberg and referred to above is instructive in this regard. The surprising class of claimants that BP had to compensate because of the Deepwater Horizon accident is also instructive. The EU must thus make clear who can claim compensation when there has been an oil spill. How would the EU determine what can be compensated for and what cannot? For example, if the new law allows fishermen to be compensated for loss of profits as a result of oil spills, is there a reason why workers who have had their hours cut due to poor holiday bookings should not be compensated? This issue is further related to the oft-stated challenge of recognising pure economic losses, namely the floodgate of claims problem. The EU proposal is set to open up this problem as it seeks to cover persons involved in coastal tourism and other sectors of the blue economy.

The second challenge identified is that oil companies may find it difficult to access the insurance and other financial instruments to cover such unlimited liability. It may be useful to borrow a leaf from the regime under the US Oil Pollution Act which sets a cap on liability at 75 million dollars.

Lastly, there is the issue involving small companies and unlimited liability. Small companies play a major role in maximising oil recovery, particularly in mature oil and gas provinces. These companies will be especially hit by any such unlimited liability or liability capped at quite a high figure. In the event of a Deepwater Horizon style accident in EU waters involving small companies, who would bear responsibility if the small company cannot pay? Does this mean that small companies would be excluded from acquiring licenses to produce oil and gas?

These challenges need to be considered by the EU before putting the proposal into effect.

## 9. CONCLUSION

This paper considered the EU Parliament's proposal in Resolution 2015/2352 of 1 December 2016 where it called on the EU Commission to establish a legislative compensation mechanism in respect of offshore accidents from oil and gas operations. This paper argued that the proposal is desirable. It is in accord with the relevant principles of environmental law and policy, namely the polluter pays principle, the principle of intra-generational equity, environmental justice and social impact assessment. An EU-wide scheme would also help ensure a uniform standard of environmental protection in EU waters. Notwithstanding this, the following problems were identified, namely, unlimited category of claimants, the floodgates problem associated with pure economic loss and difficulty accessing insurance and financial instruments, particularly for small companies. While the EU Parliament's proposal certainly has merits, there is a need to consider how the problems identified above may be addressed in order to achieve an effective regime for environmental protection.

