



Workshop “Financial Security in ELD”
- Minutes -
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Title	Financial Security in Environmental Liability Directive
Location	Brussels, CHARLEMAGNE building, Room Lord Jenkins
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The workshop support material (e.g. presentations, list of participants, etc.) is available on the following address: http://www.biohost.org/eld/	

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1. OPENING AND WELCOME REMARKS

Ms. Vakrou (EC) welcomed the attendees to the workshop on Financial Security in Environmental Liability Directive (ELD). She gave an overview of the key issues and explained the context of the ongoing study with respect to the preparatory work for the Commission's reports in 2010 and 2014 and explained that the main objective of the current study is to present the state of the art of financial security of environmental liability under the ELD with an analysis of their gaps and limitations.

2. INTRODUCTION TO THE STUDY

Mr. Mudgal (BIO) presented a more detailed introduction to the study and explained the main objectives of the workshop. In particular, he explained that this study aims at:

- presenting the state of the art of insurance and financial security of environmental liability under the ELD with an analysis of their gaps and limitations
- analysing the Member States (MS)' response to financial security ELD requirements
- identifying market-based instruments (MBI) that could serve as alternatives to insurance cover in the context of the ELD

He further explained the methodology used for data gathering (stakeholder consultation through questionnaires or telephonic interviews and literature review) and also the key questions to be addressed during the workshop. He invited the attendees to participate in the discussion and contact BIO, during or after the workshop, if there were any questions or issues to be discussed or to provide any additional information.

3. HISTORICAL BACKGROUND

Ms. Fogleman (Stevens & Bolton LLP) gave a comprehensive presentation on the financial security provisions in the ELD, addressing in particular the historical background, the various changing approaches along the way with regard to financial security, financial security provisions in other EU environmental legislation, and similar issues in the US context.

She started by referring to the situation in the US and the types of financial security mechanisms in use. In particular she explained that while insurance is the most prominent mechanism, there is a wide variety of mechanisms including corporate financial guarantees, bonds and governmental schemes such as state bond pools. She referred to the wide range of environmental legislation that contains a requirement for financial security, including the ownership and operation of underground storage tanks (USTs), hazardous waste disposal sites and dry cleaners. She highlighted that in the Superfund programme, which is usually compared to the ELD, there is a requirement for owners and operators of unspecified facilities to have financial security. This requirement, however, has never been brought in. She pointed out the importance of clearly linking the financial security requirement to specific activities.

She continued explaining the historical background of environmental liability and financial security in the ELD and the evolution in the approaches. In the beginning (more than 30 years ago), the discussion on financial security issues was very much related to waste issues. In addition, different provisions for civil liability for environmental damage caused by waste problems were proposed but



never adopted. Discussion on environmental liability was also driven by ecological disasters such as the pollution of the Rhine River in 1986. The approaches to environmental liability and financial security have changed over time. For example, the approach changed from a civil liability regime to a public law regime (as currently adopted in the ELD). Another important aspect that was widely discussed was the proposed introduction of a mandatory financial security scheme. The Parliament and the Council had contradictory opinions when this issue was discussed in light of the proposed Directive submitted by the Commission (the Parliament was in favour of requiring insurance or other forms of financial security for operators; the Council was against). This discussion between the Parliament and the Council contributed to the introduction of the requirement for the European Commission to submit a report by 2010 analysing the availability at reasonable costs and on conditions of insurance and other types of financial security and the possibility of a gradual approach. According to Ms. Fogleman, the approach adopted for financial security in the ELD of allowing operators to choose the mechanism that best suits their needs and to phase in the requirement is the best approach and, if introduced, the approach that is most likely to succeed. Finally she mentioned that financial security provisions are contained in other EU environmental legislation such as the Directive 2006/21/EC on the management of waste from extractive industries.

4. CURRENT STATUS OF ELD TRANSPOSITION IN MS

Mr. Lopatta (EC) presented the current status of the ELD transposition in MS. He explained the current state of transposition, infringement procedures for non-transposition, and future developments and work planned in this context. He explained that, as of 27 of June 2008, sixteen MS have transposed the Directive (France adopted it just the day before¹), three MS (Denmark, Poland, Portugal) were about to publish and/or notify the transposed legislation, and eight MS are still failing to do so. Infringement procedures for non-communication of transposition had been issued for 9 MS (Court application) as for 26 June 2008.

He highlighted that, if appropriate and on the basis of the 2010 report and an extended impact assessment including a cost-benefit analysis, the Commission shall submit proposals for a system of harmonised mandatory financial security. More likely, legislation proposals were to be made after the 2014 report on general application of ELD, and will be based on MS reports which are due by 2013. The presentation was followed by a discussion and following are the main points.

Regarding the **reporting process by the Commission** (i.e. reports in 2010 and 2014), **Mr. Lockhart-Mummery (UK)** proposed that the starting point should be to develop precise definitions of the issues and problems to be addressed through the different studies and potential legislative proposals. He indicated that the current approach seems to be looking at the solutions (e.g. insurance) without properly understanding the underlying problems to be addressed by financial security. Different issues such as ELD remediation damage, insurance markets development, situations where there is not an operator fund will require different solutions. Other participants did also agree with this statement (e.g. Ms. Goldsmith, Ad-Hoc Industry Natural Resource Damage Group). Mr. Lockhart-Mummery also highlighted that the assessment of the effectiveness of ELD in terms of damage remediation will still not be possible until track records of past cases are available. Also, he pointed out that it will be difficult to gather all the necessary data and information for the 2010 report and requested to know what would be the approach to achieve this in the limited time available.

¹ This information had to be corrected immediately after the workshop when it turned out that a French Decree is still missing for a complete transposition. But as Poland completed already the transposition in the meantime, the total number of 16 MS having transposed, is to date (17 July 2008) correct.



Ms. Vakrou (EC) replied that the Commission was planning to organise the work needed in form of a mix with studied and consultation with the MS, insurance and operators as wide as possible. Two meetings are planned with experts in MS for next year (2009). But the collection of information will rely upon strengthening the collaboration with MS and other stakeholders. The idea is to create a permanent information exchange platform with MS, operators, insurers, and other relevant stakeholders. The aim is not to examine only the insurance response to financial security under ELD, but also alternative instruments and to develop best practices on how to reduce the risks of the industry. She also stressed on the fact that due to the subsidiarity principle, MS can make their choices. This is the reason why one of the aspects to be analysed in the 2010 report will be the rationale behind the decisions of the different MS for proposing a mandatory insurance scheme or a more flexible solutions. Such analysis will be developed with the help of MS and will look at, for example, how some of these choices could be impeding factors when trying to implement a system for all the twenty seven MS.

Regarding the **system of harmonised mandatory financial security**, **Mr. Lane (ExxonMobil)** requested more detail on the possible way of defining “harmonised system of mandatory financial security” mentioned by Mr. Lopatta. He also expressed his opinion of not being in favour of such mandatory insurance schemes and would rather prefer to have a much broader definition of financial assurance.

Mr. Lopatta (EC) answered that the Directive requires the Commission to look at the necessity or possibility of a system of harmonised mandatory financial security, which can indeed be quite broad, in the 2010 report, and eventually in the 1014 report. The assessment would be based on the experiences reported by the MS that have already included provisions for a mandatory financial security, not confined to insurance alone. As many MS have opted for a gradual implementation and postponed the introduction of a mandatory scheme (at least until 2010), information on their current implementation may not be available until 2010.

Ms. Vakrou (EC) commented that an important issue regarding the introduction of mandatory schemes is also the time framework for transposition. It is observed that in those MS that have introduced provisions for a mandatory system, a time period is defined for a progressive implementation of the system and analysis of how the system can be established in an appropriate manner. Furthermore, in general, the transposition and implementation of ELD have been difficult within the given timeline and some MS still experience problems in the transposition of the Directive.

Another issue regarding the ELD transposition was raised by **Ms. Goldsmith (Ad-Hoc Industry Natural Resource Damage Group)** during the discussions following Mr. Lopatta’s presentation. She highlighted that an important problem is that many people still have a lot of questions and uncertainty about how the ELD is going to be implemented in practice. Other participants also agreed with this statement (e.g. **Mr. De Heras Herraiz, Pool espanol de riesgos medioambientales**). In this regard, they have developed a wide set of documents, including a draft paper on financial security, insurance and the ELD², for the purpose of making people discuss about this issue.

Some other issues were highlighted by the participants that would need attention in the future such as the case where companies do not have the money required to cover the full costs of remediation and public funds might have to be used (**Ms. Foglemen, Stevens & Bolton LLP**) or what the authorities could do to enhance “insurability” of the risks (**Mr. De Heras Herraiz, Pool espanol de riesgos medioambientales**).

² October 2007



5. INSURANCE INDUSTRY'S VIEW

Four presentations were made in this session:

- **Mr. Tettamanti (Swiss Re)** addressed the issue of what currently remains uninsurable and why.

Mr. Tettamanti explained that, currently, the insurance industry does not offer insurance products against all of the liabilities. He argued that for the insurance market to further develop, it needs a clear legal framework allowing insurers to know exactly in what circumstances they are required to pay claims and for what amounts. Furthermore, he highlighted that the level of risk management in a company is a significant factor in influencing underwriters to decide on whether or not cover its risks. Also, it is very important that the underwriter is able to assess the risk presented to be able to calculate the appropriate level of premiums. However, for new liabilities this is not the case as only little information is available on the probability of loss and on the amount of losses to be expected. He also argued that the ELD does introduce remedial measures for which the industry has very little experience and therefore new claims management skills will be needed.

- **Mr. Busenhart (Swiss Re)** gave a presentation on the example of the US environmental insurance market.

Mr. Busenhart described the main insurance markets in the USA, the General Liability Insurance Market (CGL policies) and the Environmental Impairment Liability Insurance Market (EIL policies), and the coverage they offered. In this regard, he indicated, for example that the current pollution exclusion eliminates most kinds of pollution, whether gradual or sudden and accidental. He highlighted the case of News Jersey, in the USA, which has begun actively prosecuting claims for natural resource damages (NRDs) in an unprecedented way. In particular he mentioned the event in the Lower Passaic River, where the authorities are seeking \$950m in NRD from 66 companies.

- **Mr. de Heras (Pool Español de Riesgos Medioambientales)** gave a presentation on the market development expectations and opportunities, illustrated with examples from Germany, France and Spain.

He introduced the main insurance solutions currently available in Europe, this being the General Third Party Liability (GTPL) insurance and the EIL policies. He also briefly explained the particularities of the ELD transposition in Germany, France, Italy and Spain and the specific insurance models available in these countries, with focus on the costs covered and the exclusions in each case. He concluded highlighting that the insurance industry can still be considered as a niche market. In order to enhance insurability, achieve a more comprehensive coverage and ensure a stable market in the long term, it will be necessary to have a better and common understanding of liabilities, and to develop and share risk and damage evaluation techniques and other relevant information.

- **Ms. Klein (GDV)** presented first experiences with the German non-binding model (USV-Mode).

She explained that the acceptance of this non-binding model is very positive to date (up to 75%) and is expected to improve by 2010. She highlighted that the current success of this model shows that there is no need for compulsory solutions and that a compulsory scheme could hinder the development of the market in Germany.



A summary of discussions in light of these presentations is presented below:

After the presentation by Mr. Busenhart (Swiss Re) on the example of the US environmental insurance market, **Ms. Goldsmith (Ad-Hoc Industry Natural Resource Damage Group)** highlighted that the case in New Jersey presented in Mr. Busenhart's presentation is a very relevant example that helps us to understand how implementation works in practice as it illustrates the difficulties in defining the limits of the liability. It also helps in understanding the reality of implementation, which in turn can be useful in defining the direction to be chosen for the future.

Some participants discussed the **main differences between the US and EU situation regarding financial security in environmental liability**. For example, **Mr. Lopatta (EC)** highlighted that the ELD does not require restoration of past damage, while the US legislation does. Also, the types of liability regimes applicable to operators and the damages that are covered are more precisely defined in the case of the ELD. Another difference underlined by **Ms. Fogleman (Stevens & Bolton LLP)** was the availability of different financial security instruments in the US for quite some time now, thus the market is more mature. **Mr. Busenhart (Swiss Re)** responded that in 20 years we might also have historical cases covered by ELD. Furthermore, he indicated that, regarding the availability of products and market development, one particularity in Europe is that different approaches will be used for the ELD transposition across the 27 MS, which causes some important uncertainties for insurers.

6. OPERATORS' PERSPECTIVE

Ms. Jaskulké (Suez and MEDEF) and **Ms. Heck (Suez)** made a presentation on operators' perspective on financial security in the ELD. The issues discussed included the driving forces for covering risks by a financial security instrument (e.g. insurance), the type of financial security products that can be used in practice, the activities that can be covered, and whether financial security decisions can be taken at the corporate level and implemented globally or to be decided at the national level.

After the presentation, some other operators and associations described their **approaches to financial security, preferred financial instruments, and main concerns** regarding the implementation of ELD.

Mr. Sonigo (FERMA) expressed concern about the compulsory insurance as this approach is in contradiction to risk management. He also indicated not being in favour of pools as they provide insurance capacity but not competition and the experience of FERMA with pools has not been very fruitful. FERMA would like an open insurance market with competition to cover the risks. Banks are not very keen to cover long terms risks thus FERMA does not perceive bank guarantees as a very viable option. Using internal resources and ad-hoc means are less preferred as companies have to pay up-front and block money in a reserve and therefore not being able to use it. Consequently, **Mr. Sonigo** argued that insurance seems to be the most appropriate option among the existing solutions. Finally, **Mr. Sonigo** indicated his disagreement with the statement that insured operators are going to be less active in their risk management and expressed his opinion that operators covered by ELD are more and more concerned about risk management.

Mr. Lane (ExxonMobil) highlighted that **ExxonMobil** always try to avoid the risk in the first place and agrees with the polluters pay principle. Mr. Lane accepted that prevention is better than cure and the ELD provides additional incentive to avoid pollution. ExxonMobil has opted for self-insurance as it has sufficient economic resources available to do so and this further reinforces and incentivises risk



management. His major concern about the introduction of mandatory insurance schemes is the coverage that will be required in different MS. He opined that it is not necessary to introduce such mandatory schemes when wider financial security opportunities are already available and possible. In general, ELD is a good piece of legislation, even if it would be better to harmonise the ELD implementation requirements and promote the development of a wider range of financial security instruments.

Mr. de Heras (Pool Español de Riesgos Medioambientales) argued that pools exist in those MS where, for the moment, the insurance market is not fully developed and independent or does not yet propose a sufficient range of products to cover all ELD responsibilities. Therefore, pools help to create a market that would exist otherwise with difficulties as self-insurance is a feasible solution for large companies but not for SMEs. The Spanish pool has approximately 30 members.

Mr. Tettamanti (Swiss Re) added that CEA would like to see developments in the insurance market and products are starting to become available but it might still not be sufficient to cover current needs. The industry would like to see products that are sustainable and that still in use in the future. Another key issue is the handling the risk claims.

Another important issue addressed during the discussion was **how large operators that are present all over Europe deal with different financial security requirements in different MS** and the case of **transboundary damage**. The available **insurance capacity in the market** was also discussed in this context. In this regard, **Ms. Vakrou (EC DG ENV)** asked if it would be possible to create a “generic/large” insurance product that could be applied to all type of operations in different parts of Europe. This could cover companies that operate in many EU countries and would like one product to cover all their liabilities. It could also be offered as a pool product to more than one company.

Ms. Heck (Suez) replied that Suez, which operates in many MS and in different sectors, has two types of products. First, they have the so-called horizontal programmes, which provide worldwide coverage. In such case, they define internally the amount of insurance needed to cover the exposures to be externalised. The capacity available in the market is taken into consideration as insurers are not always capable to face all their exposures. Secondly, sector-specific coverages are used in different MS, having lower costs than the horizontal programmes. In general, Suez works with global brokers.

Mr. Hellebuyck (AIG) explained that AIG started environmental liability policies in the US and now developing them in Europe (present in 14 MS) and has a specialised group. Regarding the transboundary issue, AIG has about half a dozen projects in development mainly for large companies in the chemical sector and offer centralised pan-European programmes covering 99% of the scope of ELD in conjunction with other liabilities. These large companies usually have the assistance of a professional risk manager and they also use the services of a broker. Together with the insurer, these large companies can put together a tailor-made solution and this pan-European “master” policy can correspond to existing standards. Regarding the capacity issue raised previously by **Ms. Heck (Suez)**, Mr. Hellebuyck informed that it would be possible to provide the required capacity with cooperation between different insurers. He estimated that approximately up to 200 million Euros of capacity could be achieved with a structured programme in cooperation with different insurers. AIG alone could supply with 50 million Euros liability coverage. Therefore, he didn’t believe that capacity is the most crucial problem.

Mr. Lane (ExxonMobil) replied that due to the Valdez event, Exxon had to face a liability for 5 billion Euros, which is far from being covered by the 200 million Euros coverage capacity mentioned earlier.

Several participants mentioned that an important barrier encountered by operators for covering risks with financial security instruments is the **lack of awareness about the existing products in the market**.



In this regard, **Mr. Hellebuyck (AIG)** argued that the dissemination of information about new available products is a more pressing problem for operators than the actual insurance capacity in the market, particularly in the case of SMEs. Insurers depend greatly on brokers for the distribution of new products and in some cases there is a lack of awareness on the availability of solutions available in the market.

Ms. Goldsmith (Ad-Hoc Industry Natural Resource Damage Group) suggested that information on specific insurance products should be disseminated and an effort should be made to further share the information among different stakeholders (e.g. operators, brokers, insurers, etc.). **Mr. Hellebuyck (AIG)** replied that many of these products are still under development and some information is already available at the CEA.

Several participants highlighted that it would be interesting **to analyse recent events under ELD (case studies)** in order to be able to determine the performance of the insurance instruments in place, the losses, the management capacity, etc.

Mr. Hellebuyck (AIG) explained the case of a recent claim for biodiversity damage in France near Marseille. Fire started in a tyre recycling factory and affected the nearby marshland and flora and fauna in the vicinity were claimed to be affected by the toxic fumes of the fire once extinct. He proposed to provide more information on this case.

Mr. de Heras (Pool Español de Riesgos Medioambientales) informed the recent event of a big fire in Spain which was generated by forest maintenance operations in a protected area where 1000 hectares were burnt. He described another case in the Bay of Algeciras where a boat transporting metal waste ran aground, resulting in a spill incident with damages for the marine environment (case covered by the Spanish transposition of the ELD).

Mr. Lockhart-Mummery (UK) agreed that it was important to have a look at existing cases and added that another important aspect is to be taken into consideration would be the capacity of MS to enforce the legislation. In the UK, there have been studies on such cases, but most of them occurred before ELD. It has been estimated that there are approximately 5 water related cases and 20 biodiversity related cases per year. He also pointed out that it was necessary to look at who was more involved in pollution cases (e.g. waste sector, transport companies, farmers, etc.).

Ms. Otonicar (Austrian Environmental Ministry) indicated that in most of the cases in Austria, financial security instruments (e.g. insurance) are not in place to cover the operator's liabilities (as it can be seen in the case of the water policy). In Austria, the attention is mainly focused in a draft paper that reviews the general conditions for financial security and focuses on issues such as risk management which are believed to be essential in the context of environmental liability.

7. PANEL OF MS REPRESENTATIVES

Various MS representatives presented the current situation regarding transposition of the ELD and the measures that are being implemented or under consideration for encouraging the development of financial security instruments and markets according to Article 14 of the ELD.

Mr. Lockhart-Mummery (UK) explained that UK is engaged with the insurers and brokers in order to identify the potential barriers and solutions. It is observed that not many companies in the UK have insurance policies. One of the main barriers encountered for the promotion of financial security instruments in the context of environmental liability is the lack of knowledge about existing legislation and associated risks. Therefore, it is crucial to provide information to operators, and in particular to reach SMEs, by means of guidelines, for example. He argued that if brokers knew more about legislation, it would be easier to disseminate information. Also, it was considered important to make information available about risk assessments and to introduce strong sanctions to enhance



enforcement. Operators seem to believe that financial security is too expensive, complicated and in any case, cannot cover all the risks.

Mr. Eorteu (ES) explained that Spain has introduced provisions for a compulsory financial security scheme. The mandatory scheme approach was very controversial in the beginning and it was necessary to establish an open dialogue with the insurance industry and also with other ministries. Finally, it has been decided that this scheme will not come into force until 2010. Depending on the results of the 2010 report by the Commission, the Spanish government will decide on how to carry out the implementation of this mandatory scheme. Currently, different meetings are being organised with the insurance industry so they can express their concerns and needs. The coverage of this mandatory system is limited in terms of scope, money, time, and the required level of restoration. Mr. Eorteu also highlighted risk management assessment and management as key issues. Indeed, Spain would like to require mandatory risk assessments and management to companies following under the scope of the ELD, and now efforts are put on this aspect also in order to promote prevention. He also highlighted that some types of restorations might be difficult to enforce in practice (i.e. complementary and compensatory restoration).

Mr. Pontvianne (FR) wanted to know how Spain had estimated the 20 million Euro maximum ceiling for the mandatory financial guarantee in the Spanish law transposing the ELD. He also asked if market capacity, maximum risk, and other aspects were taken into consideration.

Mr. Eorteu (ES) replied that an economic impact assessment was undertaken taking into account the number of companies and the price of the policies, though he admitted that this figure could be far from reality.

Mr. Descamps (BE) explained that in Belgium, the Flemish and the Walloon regions has already transposed the ELD, and the region of Brussels is in the process of a second reading by the Government and the draft law should be transposed by the end of 2008. Belgium approach is somehow in between the Spanish and the British approach and there is no obligation for financial security (indeed, the article 14.2 of the ELD is used without any modification). The Flemish and the Walloon laws allow the government to charge the costs of restoration on the company assets, as in the UK. BE has carried out different expert group meetings and some of the main findings of these meetings are:

- accidental pollution is covered by most insurers but gradual pollution by only few
- it is important to keep in mind third party insurance and other market instruments for financial security in the case of insolvency
- bank guarantees are not the most suitable solution
- prevention is better than the cure and in most cases it is better to invest in preventive measures than in insurance policies
- there is a lack of statistical information and awareness on the side of operators and brokers on financial security products.

He also mentioned the case of transboundary water pollution problem between the Flemish and the Walloon regions where 80 kg of cyanides were released into a river in the beginning of August 2007. Another case involved the destruction of a very rare plant species at a construction site.

Ms. Goldsmith (Ad-Hoc Industry Natural Resource Damage Group) asked if the Belgian authorities had been able to document the mentioned cases.

Mr. Descamps (BE) responded that the main problem to collect information for the cyanide case was that the legislation was not yet in place and also that the incident only lasted for a few weeks. There were approximately 800 tonnes of dead fish, but none of the affected species were protected.



Regarding the economic damage, each operator had to pay a compensation of approximately 300,000 Euro.

Ms. Letrémy (FR) added some information about the French transposition. She highlighted that there is not permit exemption and no compulsory insurance or financial guarantee. She also provided additional information about certain products available already at the French market, such as the AXA's Eco-Sphere. Now that ELD is transposed through a clear legal framework, France is confident about the development of the French market in the near future.

Ms. Bouman (NL) informed that there has been an evaluation of the existing Decree on financial security. The government proposed to maintain the Decree; the Parliament however has adopted a resolution to abolish the Decree. Other existing legislations include provisions on financial security.

8. THE WAY FORWARD

Mr. Lockhart-Mummery (UK) asked how the Commission was planning to gather information for the 2010 report.

Ms. Vakrou and Mr. Lopatta (EC) explained that expert meetings for discussion were planned and focus will be placed on the analysis of existing case studies (number of cases, cases resolved by the competent authority, scope of the cases, etc.). In this regard they requested and welcomed participants to send information on available cases in their MS. They also highlighted that a constructive approach will be adopted for enhanced reporting. They also highlighted that all stakeholders should engage in and contribute to a constructive dialogue and to this end all available tools such as, for example, Internet consultation will be adopted for enhanced reporting

Participants mentioned different issues that, in their opinion, should be addressed in the 2010 report by the Commission including the transboundary issues, pools, compulsory schemes, measures for success or failure, cases when the operator can not cover the costs, etc. In general, it was agreed that there should be quantitative elements in the report and that an on-line consultation should be carried out. Also, good data should be used on the different approaches and resulting restoration in different MS.