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Topics

Types of financial security mechanisms in the United States
Activities subject to financial security requirements in the United States
Historical background
Financial security provisions in the ELD
Financial security provisions in other EU environmental legislation
Types of financial security mechanisms in the United States

Corporate financial tests and guarantees
• Financial net worth
• Guarantees (generally by parent company)

Money or equivalent of money
• Escrow accounts
• Irrevocable letters of credit
• Trust funds
• Certificates of deposit
Types of financial security mechanisms in the United States (cont’d)

Insurance
- Commercial insurers
- Captives
- Risk retention groups (mutuals)
- Purchasing groups

Bonds
- Surety bonds
- Collateral bonds
- Self bonds
Types of financial security mechanisms in the United States (cont’d)

Governmental schemes
- State bond pools (generally created by members paying to join pool)
- State insurance schemes

Mechanisms for governmental entities
- Generally based on financial strength
- Generally less stringent than for private persons
Activities subject to financial security requirements in the United States

- Underground storage tanks
- Underground injection wells
- Hazardous waste treatment, storage and disposal facilities
- Municipal solid waste landfills
- Used oil recycling operations
- Public drinking water supply systems
- Facilities for waste polychlorinated biphenyls
- Facilities handling radioactive substances

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Activities subject to financial security requirements in the United States (cont’d)

- Offshore oil and gas exploration and drilling
- Surface and hard rock mining
- Dry-cleaning establishments
- Nuclear installations
- Vessels carrying oil and hazardous substances
- Offshore facilities for handling oil
Historical background

1976 Proposed Directive on toxic and dangerous waste – provision for strict liability for personal injury from such waste deleted

Historical background

1984 Directive on transfrontier shipment of hazardous waste – statement that Council will determine conditions for civil liability of producer for damage caused by hazardous waste and “system of insurance”
Historical background

1986 Sandoz – pollution of Rhine
Council Resolution requesting Commission to propose Regulation imposing civil liability for environmental damage to Rhine and other main transportation routes in EU
Parliament issues similar Resolution
Historical background

1987- Commission study shows few MSs have legislation imposing civil liability for environmental damage

• begins preparation of green paper on civil liability for remedying environmental damage

• continues work on proposed Directive on civil liability for waste
Historical background


Historical background

1991 Draft Green Paper on remedying environmental damage leaked
  • discusses possibility of integrating civil liability with joint compensation schemes
Historical background

1993 Commission issues Green Paper on remedying environmental damage which includes discussion of

- various concepts of liability for environmental damage including past pollution incidents
- adequacy of remedies including financial security by persons likely to damage environment
Historical background

- liability system for remedying environmental damage in US
- proposed Convention on civil liability for damage from activities dangerous to the environment

Appears to favour strict liability system for environmental damage with joint compensation schemes (possibly reflecting Superfund programme due to US author)
Historical background

1993 - Comments on Green Paper and 1996 various meetings, hearings, draft papers and studies, including 1994 Resolution by Parliament requesting Commission to submit proposed Directive on civil liability for future environmental damage
Commission focus on whether to accede to Lugano Convention or base Directive on it
Historical background

1997 Communication from DG Environment to College of European Commissioners requesting decision on potential initiative on environmental liability – leaked
Commission decides to issue White Paper amidst opposition to Directive
Historical background

1999 *Erica* oil spill off coast of Brittany

2000 Commission issues White Paper on civil liability for environmental damage
Historical background

White Paper suggests most appropriate option is Directive providing “for strict liability for damage caused by EC regulated activities, with defences, covering both traditional [bodily injury and property damage] and environmental [remediation] damage, and fault-based liability for damage to biodiversity caused by non-dangerous activities”

No requirement for financial security; recommends discussions with insurers and bankers to stimulate financial guarantee instruments
Historical background

2001 Working Paper on prevention and restoration of significant environmental damage

- approach switches from civil liability regime and Lugano Convention approach to public law regime
- MSs to have option of requiring insurance for potential liabilities
Historical background

2002 - Legislative process with Council taking lead
2004  lead
Proposed Directive, article 16

“Member States shall encourage the use by operators of any appropriate insurance or other forms of financial security. Member States shall also encourage the development of appropriate insurance or other financial security instruments and markets by the appropriate economic and financial operators, including the financial services industry”
Parliamentary Committee on Industry, External Trade, Research and Energy (2 May 2003)

“There should be mandatory liability but not compulsory insurance. … A mandatory financial security regime would destabilise [polluter pays approach]: operators would know that their financial liabilities are covered by an insurance policy/fund/levy …and, as a consequence, the incentive to prevent damage (and avoid the cost of paying for pollution) is removed. A mandatory system of financial security might well be described as the ‘insurer pays principle’ – the risk of liability has been transferred from operator to financial security provider”

“Financial security, in the form of insurance and/or dedicated funds, must be made mandatory ... to ensure that the financial means to carry out environmental remediation are available. ... Within 5 years from the date of entry into force of the Directive, Member States must ensure that operators shall use appropriate insurance or other forms of financial security (probably with an upper cap) to cover their responsibilities. In any case, it would make sense to have different levels of insurance cover reflecting the risks of the relevant activity of the operator. ...”
Parliament first reading

“1. Member States shall ensure that operators use appropriate insurance or other forms of financial security to cover their responsibilities under this Directive in relation to the activities listed in Annex I. In relation to activities covered by [IPPC Directive], this provision shall apply within three years from the date of entry into force of this Directive. In relation to all other activities listed in Annex I, this provision shall apply within six years from the date of entry into force of this Directive.
2. Member States may decide not to apply this provision to low-risk activities and may consider establishing thresholds in relation to any insurance requirements under these provisions.

3. The Commission shall review the operation of this provision and, if appropriate, within six years from the date of entry into force of this Directive, shall make proposals in relation to thresholds to be set for the minimum financial security required according to the different activities listed in Annex I.
Parliament first reading (cont’d)

4. Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators in relation to all occupational activities and all types of environmental damage.”
Council Common Position

Opposition to mandatory financial security by Denmark, France, Ireland, Italy and UK
"Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under this Directive."
Council Common Position (cont’d)

The Commission, before [8 years after entry into force of ELD] shall present a report on the effectiveness of the Directive in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III. In the light of that report, the Commission may submit proposals for mandatory financial security.”
Amendments by Parliament (Second Reading)

“1. Five years after the entry into force of this Directive, the Commission shall report to the European Parliament and the Council … If no appropriate instruments or markets for insurance or other forms of financial security have been established, the Commission shall in the light of that report, submit proposals on a harmonised compulsory financial guarantee for water and soil damage based on a gradual approach. After a two year assessment period, this provision shall apply to the reparation of damages caused to species and natural habitats.
Amendments by Parliament (Second Reading) (cont’d)

2a. A ceiling may be established for the financial guarantee by case and by location, to be determined in accordance with a sliding scale drawn up by Member States, taking into account in particular the risks of the activities carried out and the annual turnover.

2b. Member States may decide not to apply this provision to low risk activities and may consider establishing thresholds in relation to any insurance requirements under these provisions.”
Commission’s Opinion

“Commission cannot accept [amendments] as it affects its right of initiative. Moreover, it would be particularly difficult to adopt rules mandating financial security when the economic operators most knowledgeable and economically interested in developing such products have been unable to do so.
Commission’s Opinion (cont’d)

With respect to paragraphs 2a and 2b of the amendment, the Commission does not see any current need for such additional provisions, which, at this stage and pending new Community legislation on financial security, have only the effect of enabling Member States to adopt measures in the field of financial security. It must be remembered, however, that the Member States may adopt such rules anyway, on the basis of their general power to legislate on their territory, since no provision of the Directive prevents them of doing so.”
Final version of ELD

MSs to “encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under [ELD]”
Final version of ELD (cont’d)

European Commission to submit report by 30 April 2010 to include “the availability at reasonable costs and on conditions of insurance and other types of financial security for [Annex III] activities [and] shall also consider … a gradual approach, a ceiling for the financial guarantee and the exclusion of low-risk activities. In the light of that report, and of an extended impact assessment, including a cost-benefit analysis, the Commission shall, if appropriate, submit proposals for a system of harmonised mandatory financial security.”
Financial security provisions in other EU environmental legislation

- Council Regulation 259/93/EEC on the supervision and control of shipments of waste within, into and out of the European Community
- Directive 2002/96/EC on waste electrical and electronic equipment
- Directive 2006/21/EC on the management of waste from extractive industries
Financial security provisions in other EU environmental legislation

- Regulation (EC) No 183/2005 laying down requirements for feed hygiene
- Proposed Directive on the geological storage of carbon dioxide