FINANCIAL SECURITY FOR ENVIRONMENTAL RESPONSIBILITIES AND LIABILITIES, ESPECIALLY THE ENVIRONMENTAL LIABILITY DIRECTIVE

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TOPICS

• Voluntary financial security
• Environmental insurance in the EU
• Awareness of environmental liabilities and insurance
• Mandatory financial security
  o Environmental responsibilities
  o Environmental liabilities
  o EU legislative requirements
  o EU legislation with national requirements
  o Environmental Liability Directive
  o National legislative requirements
Voluntary financial security

- Insurance is the only applicable financial security instrument
  - Operators do not set money aside in dedicated bank accounts, trust funds, etc., or obtain bank guarantees or bonds if they not required to do so
  - No benefit; would suffer only a financial detriment

- Insurance and reinsurance providers
  - Difference between insurance and reinsurance
  - Commercial companies
  - Re/insurance environmental pools
    - France, Italy, Spain
  - Captives
• Developments in environmental insurance in the EU
  o ELD led more insurers to enter the environmental insurance market in the EU
    – Note: small market compared to market for general/public liability and many other types of insurance
  o Insurance for environmental liabilities
    – Stand-alone environmental insurance policies
    – Environmental extensions to general liability policies
    – Environmental extensions to property policies
• Stand-alone environmental insurance policies
  o Types
    – General menu-style policies
    – Sections of combined policies offering many types of insurance
    – Bespoke policies or sections of bespoke policies
  o Never limited to ELD liabilities
  o Provide cover for third-party bodily injury and property damage claims, measures to remediate environmental damage (especially pollution under other environmental laws), business interruption, disaster representation, non-owned disposal sites, etc. depending on the insurer
  o May provide cover for remediating pre-existing environmental damage as well as operational risks
  o May be adapted for mandatory financial security requirements
• Stand-alone environmental insurance policies (continued)
  o Widely available for ELD liabilities for large operators with sites and/or operations in more than one Member State
  o Large variation in availability for operators with sites and/or operations in a single Member State
    – Widely available in some Member States
    – Not available in other Member States
    – Even when available, cover is sometimes limited to sudden and accidental pollution
• Cover for environmental risks in general liability policies
  o General liability policies provide cover for third-party claims for bodily injury, property damage and related economic loss (pure economic loss in some Member States, and sometimes other harm) caused by an insured’s acts and omissions
  o Do not provide cover for remediating on-site environmental damage
  o Do not provide cover for any ELD liabilities
  o Almost always have a pollution exclusion that bars cover for third-party claims from pollution with the exception of sudden and accidental pollution (qualified pollution exclusion)
• Environmental extensions (except Austria and Germany)
  o Nearly always provide cover only for remediating pollution that has migrated off-site from a sudden and accidental incident on an insured’s site and only if legislation other than the ELD requires its remediation
  o Nearly never provide cover for ELD liabilities except as above
  o Generally have low – or very low – sub-limits of liability
  o May have time element clauses
ENVIRONMENTAL INSURANCE IN THE EU

• Property policies
  o Provide cover for loss of or damage to on-site property (e.g., buildings, other structures) covered by the policy (generally called ‘insured property’; does not include land)
  o Do not provide cover for off-site pollution or other environmental damage
  o Often have an absolute or qualified pollution exclusion

• Environmental extensions
  o Not available in many Member States
  o Even if available, nearly never provide cover for ELD liabilities
AWARENESS OF ENVIRONMENTAL LIABILITIES AND INSURANCE

- Environmental teams in large (and some medium-sized) brokers
- Widespread lack of knowledge by operators, other brokers and many other ELD stakeholders about
  - ELD and/or other environmental liabilities and how they interact with each other
  - How the ELD or other environmental liabilities can apply to a business’ operations
  - Scope of cover provided by environmental insurance, especially general liability and property policies and extensions to them
    - Tendency to consider that their scope is much broader than it actually is
    - Availability may depress demand for stand-alone environmental insurance policies even if a business recognises that its operations may cause environmental damage
MANDATORY FINANCIAL SECURITY

• Mandatory financial security for environmental responsibilities
  o May be required for specified obligations under an environmental permit
  o Generally not controversial because measures required by permit conditions will inevitably occur
  o Many types of acceptable financial security instruments
    – Bank guarantees, dedicated bank accounts, and bonds are the most popular
    – Insurance is generally not applicable
      ▪ Covers fortuities, not certainties
      ▪ Limited exceptions include the following costs associated with the closure of a landfill
        • Amount: costs exceeding estimated costs
        • Timing: closure occurring before sufficient funds have been accumulated
MANDATORY FINANCIAL SECURITY

• Mandatory financial security for environmental liabilities (continued)
  o Liabilities include accidental pollution resulting in third-party claims and remedial measures
  o Often controversial because an accident may not occur
  o Many types of financial security instruments and combinations of them
    – Insurance and bank guarantees are the most popular
    – Other instruments and mechanisms
      ▪ Charges over property (may be limited due to time needed to sell property)
      ▪ Dedicated bank accounts
      ▪ Pools, e.g., Protection & Indemnity (P&I) Clubs
        • International Group of P&I Clubs: 13 members provide liability cover to approximately 90% of the world’s ocean-going tonnage
      ▪ Self insurance and parent company guarantees (tend to be controversial)
MANDATORY FINANCIAL SECURITY

• EU legislative requirements include
  o Landfill Directive (1999/31/EC)
    – Closure and post closure measures
  o Extractive Waste Directive (2006/21/EC)
    – Closure, post closure and rehabilitation/restoration measures
  o Directive on the geological storage of carbon dioxide (2009/31/EC)
    – Closure and post closure measures, EU Emissions Trading System obligations
  o Many types of acceptable financial security instruments
    – Bank guarantees are the most popular followed by dedicated bank accounts
    – Other financial security instruments and mechanisms are also acceptable depending on the Member State
MANDATORY FINANCIAL SECURITY

• EU mandatory financial security requirements are not a driver for environmental insurance
  o Require financial security only for environmental responsibilities, not environmental liabilities
MANDATORY FINANCIAL SECURITY

• EU legislation with national financial security requirements
  o Integrated pollution and prevention permits including permits under the Industrial Emissions Directive (2010/75/EU)
    – May include mandatory financial security for third-party claims for bodily injury and property damage as well as remediation measures during the pendency of a permit and remediating a site to a ‘satisfactory state’
    – Cyprus, Finland (compensation), France, Ireland, Italy, Malta, the Netherlands (being introduced), Poland (some permits), Sweden
  o Seveso III Directive (2012/18/EU)
    – May include mandatory financial security for third-party claims for bodily injury and property damage as well as remediation measures
    – Finland (compensation), France, Ireland, Italy, the Netherlands (being introduced), Slovakia, Sweden
MANDATORY FINANCIAL SECURITY

• Mandatory financial security systems for ELD liabilities
  o Czechia
  o Portugal
  o Slovakia
  o Spain

• Differences in systems
  o Phase-in period based on risk from polluting operations or all at the same time
  o Scope: all operators or only higher risk operators
  o Amount of financial security is based on risk assessments
  o Exceptions
  o Covered ELD liabilities: primary, complementary and compensatory remediation – or only primary remediation
MANDATORY FINANCIAL SECURITY

• Mandatory financial security systems for ELD liabilities (continued)
  o Hybrid system of ELD liabilities and environmental responsibilities
    – Ireland
  o Provisions in national legislation requiring mandatory financial security for ELD liabilities
    – Italy
    – Poland

• Mandatory financial security for ELD liabilities in Member States that have introduced it is a driver for environmental insurance
• National mandatory financial security requirements for environmental liabilities and responsibilities
  o Waste activities
    – Belgium (soil pollution), Croatia, Cyprus, Czechia, Denmark (pollution from oil tanks), Estonia, Finland (compensation), France, Germany, Greece (hazardous waste), Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Poland, Spain
• Increasing trend towards mandatory financial security for environmental liabilities and responsibilities
Questions