

Improving financial security in the context of the Environmental Liability Directive (ELD) Work area 3 MAWP 2018; Background Document

This note is a brief summary of ‘Improving financial security in the context of the Environmental Liability Directive (ELD)’, the third project in the Multi-Annual Work Programme (MAWP) 2017 – 2020, ‘Making the Environmental Liability Directive more fit for purpose’.

1. Purpose

The purpose of the project is to fill the gap in knowledge for the European Commission on voluntary and mandatory financial security for ELD liabilities, and to suggest ways in which such financial security could be improved both at an EU level and a Member State level.

Studies into financial security under the ELD were carried out for the European Commission in 2008 and 2009, following which various reports have also been published by Insurance Europe, brokers, and others in the insurance industry. No detailed study or report exists, however, on the current baseline on the availability of, and demand for, financial security for ELD liabilities at an EU level or for each of the Member States. The purpose of this project is to fill that gap.

In addition to describing the baseline, the *Report* will provide an overview of the evolution of financial security for environmental, especially ELD, liabilities since 2008. To provide a benchmark against which to compare the overview, the *Report* will examine the evolution of financial security for environmental liabilities in the USA for the same time period. The focus of the *Report* will be on voluntary and mandatory financial security for accidental environmental damage; financial security for environmental responsibilities, such as closing a landfill, will be discussed only as necessary.

Voluntary and mandatory financial security mechanisms for environmental damage necessarily include a specified monetary limit; it is not feasible for them to provide cover for a large-scale incident. The *Report* will, therefore, examine various funds, as well as mutual risk-sharing facilities for operators, to assess their feasibility, again on an EU and Member State level.

Ensuring that the public purse does not pay to remediate environmental damage has led to innovative approaches by some States, including Australia and Canada. The *Report* will examine these approaches to determine their feasibility for remediating environmental damage under the ELD.

Some Member States, such as the Czech Republic, Portugal, Spain and Slovakia, have adopted mandatory financial security – and accompanying assessment tools – for ELD

liabilities. Other Member States, such as Ireland, include ELD liabilities in their mandatory financial security systems for environmental damage. Still others require financial security for environmental liabilities under other EU legislation that does not include mandatory financial security provisions, such as the Industrial Emissions Directive. The *Report* will examine these systems but will not provide detailed information on well-known assessment tools. Rather, its focus will be on Member States for which current information on financial security for environmental, especially ELD, liabilities is less well known, or in some cases, unknown.

Problems occasionally arise when an operator causes environmental damage but is not financially able to pay to remediate it, or becomes insolvent. A corollary problem is the failure of some mandatory financial security systems to ensure that the financial security is secure, sufficient and available when required. The *Report* will, therefore, examine the effectiveness of existing financial security systems for environmental liabilities and suggest measures to avoid or mitigate such problems. The discussion will highlight best practices.

In examining whether improvements to existing financial security systems for environmental, especially ELD, liabilities could be made, the *Report* will analyse the means, methods and instruments for providing evidence of financial security to identify problems, gaps, and shortcomings in such systems, and whether a harmonised EU-wide solution is needed or whether it is preferable to address these issues at individual Member State level. Related issues to be examined include methods of phasing in mandatory financial security.

Finally, the *Report* will describe three concrete evidence-based conceptual formulations of financial security instruments or schemes at EU level, identify Member States that could benefit from such instruments and schemes, and recommend at least one of them for each identified Member State.

2. Methodologies

The project uses several methodologies to gather and analyse information including empirical research, legal research and analysis, and comments from ELD stakeholders throughout the project and at a workshop.

The 28 Member State reports on financial security, which will form an annex to the *Report*, are being compiled using empirical research, and legal research and analysis. Each report follows the same format in order to facilitate comparisons and to analyse the data in them.

A key methodology is the use of questionnaires to gather information about the current state of financial security in each Member State and at EU level. In order to encourage responses, four questionnaires are being prepared for the following groups in order to keep the questionnaires as short and focused as possible:

1. re/insurers, brokers and related parties;
2. other providers of financial security including banks and sureties;

3. governmental and competent authorities; and
4. operators, environmental NGOs and academics.

3. Time line

The following is the time line for key components of the project. In respect of the *Report*, the date indicates the month during which the specified section of it should be completed subject to comments by ELD stakeholders and any revisions.

- 5 March: presentation of the project at the 6th ELD Stakeholders Workshop;
- March: *Report*: draft section on the main developments and trends in financial security in the EU for environmental, especially ELD, liabilities since 2008 including summaries of the ELD studies for 2008 and 2009; preliminary drafts of reports for 28 Member States;
- April: *Report*: draft section on the examination of the design and use of mandatory financial security requirements outside the EU; submission of the *Interim Report* to the European Commission;
- May: Electronically circulate translated versions of the four questionnaires; *Report*: draft section on examination of Member State mandatory financial security requirements for ELD liabilities and any issues involving their introduction in Member States that have considered their adoption, or have adopted them;
- June: *Report*: draft sections on review of trends in financial security for environmental liabilities in the USA, and approaches in other States, and integrate information from the questionnaires into the annexes to the *Report*;
- August: *Report*: draft section on development of three concepts for concrete measures that could be adopted at EU level or in individual Member States;
- September / October: follow up to the Workshop including incorporation of comments into the *Report*;
- October: ELD Stakeholders Workshop in Brussels on the project;
- 14 November: presentation of the project results at the 22nd ELD Government Experts Group meeting; and
- November: submit the *Report* to the European Commission; end of project.

4. Collaboration

The project team considers that an integral component of this project is collaboration with, and feedback from, the ELD Government Experts Group, and other ELD stakeholders. The issue of mandatory financial security for ELD liabilities has been highly controversial. Unless key ELD stakeholders are consulted and their comments fully considered, the project will not reach its full potential.

Accordingly, the project team requests the ELD Government Experts Group to provide information to them, both when requested and spontaneously whenever members of the Group wish.

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Ecologic Institute
Institute for European Environmental Policy
Maastricht University Faculty of Law (METRO)
Stevens & Bolton LLP
University of Catania