

To: **Environmental Liability Taskforce**

From: Carmen Bell

Date: 17 July 2009

Reference: NLI-ENV-09-051

Subject: ELD - Commission Workshop, "Implementation Efficiency of the ELD", on 10 July 2009

## | Objective

Summarise 10 July 2009 EC ELD Workshop

## | Background

- The European Commission (EC) has to report by April 2010 on the effectiveness of the Environmental Liability Directive ([2004/35/EC](#)) in terms of actual remediation of environmental damages and on the availability, at reasonable costs, and conditions of insurance and other types of financial security.
- A "Study on the Implementation Efficiency of the Environmental Liability Directive (ELD) and Related Financial Security Issues" is currently underway.
- On 10 July, the EC held a workshop titled "Implementation Efficiency of the ELD". Phil Bell did a presentation on related insurance issues on behalf of the CEA and participated in the workshop's panel discussion regarding mandatory financial security.

## | Recent Developments – CEA Presentation at Workshop

Upon the CEA's request that it have a chance to present on insurance-related issues and views at the workshop, BioIS invited the CEA (Phil Bell) to participate in the panel related to mandatory financial security and specified that there was no need for a formal presentation.

However, a few days before the workshop, BioIS provided the CEA with the agenda in which it was revealed that there would be an *individual presentation* made on the insurer stakeholder view (by a Chubb insurance representative, not the CEA). The CEA Secretariat immediately contacted the Commission in order to get the opportunity to do a presentation on the views from the European insurance industry, and the Commission requested BioIS to amend the workshop agenda accordingly (see final agenda at NLI-ENV-09-052).

Mr. Bell's presentation centered on the key issues surrounding ELD-related insurance products, including the prevention of overlap problems, potential options for policy covers and ELD risk assessment and claims management. (see Mr. Bell's presentation at NLI-ENV-09-053).

## | Introduction by the Commission

- The Commission reported on the status of the transposition:
  - 23 Member States have completed and notified transposition.
  - The following areas have not yet complete transposition: Austria (for nature and land), Finland (for land), Greece, Slovenia (Annex I and Annex II)
  - The specificities of the Member State transpositions will be available on the Commission's environmental website<sup>1</sup> shortly (not yet the case).
- It then recalled that the 2nd Commission Report on the implementation of the ELD, due in April 2010, will cover the following issues:
  - Does the liability aspect of the ELD "do its job"?

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<sup>1</sup> [www.ec.europa.eu/environment/liability](http://www.ec.europa.eu/environment/liability)  
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- Can the remedial/preventive measures be achieved within reasonable costs?
- Is insurance and/or other financial security available with respect to the ELD market?
- Barriers to ELD implementation include:
  - Lack of data
  - Lack of claims experience
  - Costs of insurance
  - Overlap within insurance products
  - Variations in Member State transposition
  - Poor communication on the ELD and related financial products
- The most popular means of financial security for environmental liability is insurance and/or reinsurance. Other forms of financial security include bank and financial guarantees, market based instruments and alternative risk transfers.

### | BioIS Study

Biois presented on its ongoing ELD implementation study for the Commission, which is due by end of October 2009.

- Objectives are to evaluate:
  - Transposition progress and Member State development
  - Insurance and financial security availability
  - ELD cases
  - Understanding of operators
- BioIS further discussed its "Background Paper" which was distributed to invitees prior to the workshop (see NLI-ENV-09-049):
  - Interviews for the study have included 15 Member States, 13 insurers, 1 reinsurer and 2 brokers.
  - ELD cases in Hungary, Poland, Spain and the UK will be reviewed for the study.
  - BioIS is still looking for information from the Member States about:
    - Main differences in their ELD implementation from the original directive;
    - Acknowledged barriers to financial security;
    - Alternatives to insurance;
    - Other ELD cases.
- It also referred to an article on "Alternative Financial Guarantees for Environmental Liabilities under the ELD", written by Prof. Bocken, which was tabled at the workshop (see NLI-ENV-09-054). This article included the following points:
  - Limitations of liability insurance:
    - "Making insurance mandatory shifts focus from protection of the policyholder to that of the insured" and departs from normal commercial insurance practices. (p. 148).
    - "An economic analysis leads to a rejection of mandatory insurance, *especially if the market is not well developed*" (p. 149).
    - "Mandatory liability insurance *does not, in the short term, constitute a realistic option* for the effective protection of public interests against environmental impairment" (p. 149).
  - Financial guarantee requirements under the ELD, including the proportionality principle and the preventive effect of the mechanism:
    - Limiting both the total and individual cost of the security mechanisms is an important policy consideration for selecting ELD implementation mechanisms (p. 158).
    - A diversified system should be put in place, which takes into account the nature of the operation, the foreseeability and scope of the damage and which enables the operator to pursue financial and fiscal optimisation.
    - "Economic incentives are a relevant instrument to achieve prevention and result also from allocating the cost of environmental damage to the responsible operator" – "the economic incentive for compliance is obvious if enforcement of the security brings about an immediate loss to the operator," but "the situation is different if risk spreading mechanisms are used, which are financed by contributions from a more or less large group" (p. 158).
  - The alternatives to mandatory insurance:

- Alternatives are available in a variety of security mechanisms, and “when faced with compulsory guarantee requirements, the financial markets and trade associations have in the past been able to devise smart dual operators” (p. 168).
- The article goes into further discussion about the following topics:
  - Security mechanisms based on the assets of the liable party himself or a third party guarantor:
    - Declaration of insurance (self-insured operators) (p.160).
    - Traditional security interests in immovable or movable property (eg mortgages, charges on land, liens and privileges) (p. 160).
    - Deposits, trust funds, escrow agreements (p. 161).
    - Guarantees by parent companies; bank guarantees and surety bonds (p.162).
  - Financial mechanisms in case of insolvency.
  - Loss spreading mechanisms that satisfy financial security requirements and cover the operator against environmental liabilities.

### | Stakeholders' presentations

- The workshop included presentations from stakeholders, including insurers (Chubb and CEA), operators (Ad-Hoc Industry Natural Resource Damage Group), lawyers (case studies by Steven & Bolton LLP), Member State authorities (Spanish Ministry of the Environment, DEFRA) and providers of financial security instruments (UniCredit Bank Hungary Zrt).
- The UK authority (DEFRA) mentioned that the 2002 study, which concluded that mandatory insurance was not a proportionate solution, was currently being updated. The Commission invited other Member states to proceed similarly in order to feed the 2010 ELD report. Related to the cost of insurance, insurers in the room pointed out that insurance was not expensive but that underwriting of ELD involves high costs (visit of the site, etc)
  - The Spanish Ministry of the Environment presented the system in Spain, wherein a compulsory insurance scheme will enter into force in 30 April 2010. This presentation was the only one in favour of compulsory insurance. However, the Spanish Ministry did not specify whether it was in favour of compulsory insurance only at the national level *or* if it were also in favour of it at the EU level.
  - Moreover, in his presentation on behalf of the CEA, Phil Bell noted that the Spanish government was permitted to legislate this area in the manner that best suited its own market, because it had the freedom to do so without any requirements/limitations from the directive.
- After the insurer presentations, it was discussed that from an insurer's point of view species and habitats are likely to be the most difficult environmental damages to insure.
- Barbara Goldsmith of the Ad-Hoc Industry Natural Resource Damage Group noted that the annexes in the CEA's 2009 ELD publication, *Navigating the ELD*, which was provided at the CEA's ELD workshop on 24 April, was quite helpful and that she would like to see it updated.
- The case studies provided by Steven & Bolton LLP focused on Poland, Hungary and the UK, who concluded that it was a complex issue and that there was no level playing field across Europe.
- It was noted by one of the attendees that ELD insurance cover alone is often not enough, and that more than one insurance policy may be necessary to cover liability for environmental damage.

### | Panel debate

- All panellists agreed that a mandate of EU-wide insurance would not be appropriate for the ELD market (it has to be noted that the delegate from the Spanish government was not present for the panel).
- The French Ministry of Environment
  - expressed the opinion that compulsory insurance might lead to an increase of the premium (obligation to also cover the bad risks), which the operators can even less offer at the present time of economic crisis.
  - reported that the demand for insurance cover had increased since the transposition.
  - concluded that the main drivers for market development were legal certainty and guidelines for risk assessment

### | Workshop Conclusions

The Commission representatives shared their sentiment that compulsory insurance did not appear to be a viable solution for financial security with respect to the ELD. They invite shareholders to provide the Commission with any further data and look forward to the report which BioIS will provide in November. The Commission will update its environmental website with final Member State transposition information.

The Commission provided that all the workshop presentations would be made available on its environmental website as well.

### | Next steps

#### ... at CEA level

- Continue to support BioIS with the remaining work for the study.

#### .. at EC level

- 10-11 Nov. 09: expert meeting and 2nd BioIS report due.
- April 2010: deadline for EC report.

Members are invited to send any questions or comments on the above to Carmen Bell ([bell@cea.eu](mailto:bell@cea.eu)).