

Key messages on the EU Environmental Liability Directive



As providers of cover for environmental liability, insurers consider the EU's Environmental Liability Directive (ELD) instrumental for preventing and remediating environmental damage. Insurance Europe therefore welcomes efforts to ensure the Directive is fit for purpose and, in particular, adequately implemented. At the same time, it is important to ensure that any future changes to the framework would not have an adverse effect on the availability of insurance and the development of the environmental liability insurance market.

Therefore, in addition to the more specific issues raised below, Insurance Europe recommends that the focus should primarily be placed on ensuring that effective measures are being taken throughout the EU to prevent and mitigate any potential environmental accidents. In particular, the whole body of European environmental law must be fully implemented at national level and provisions should be introduced for competent authorities to oversee and, if necessary, ensure compliance with.

Mandatory financial security could hamper market development

- Mandatory financial security requirements would interfere with the development of a market for ELD insurance in the few markets where it has not yet fully matured. It would not serve as a solution to the low uptake of insurance cover because it would not solve the lack of reported incidents, sub-optimal enforcement and slower developments in emerging markets. Furthermore, sufficient insurance is available in most markets, even though most member states do not have mandatory financial security in place.
- Solutions based on market demand allow member states to assess their individual circumstances and take the approach best suited to them. This approach particularly enables member states to consider aspects such as the available cover, risk awareness, the insurance needs of the targeted industries, as well as government's ability to assess and experience with assessing an ELD claim.
- A "one size fits all" approach would generally not work due to the differences in the risk profiles of players in the market (such as SMEs and large companies). The "one size fits all" approach restricts contractual freedom, which may increase costs and decrease insurance capacity. For mandatory insurance to work well, several market conditions need to be met, including the availability of sufficient claims data, similarity in the risks being covered, and sufficient insurance and reinsurance capacity.
- Introducing compulsory insurance where market preconditions are not met may have negative consequences for both insurers and consumers. In instances where there is insufficient or no insurance, insurers could be unwilling to offer cover under the restrictions imposed by a compulsory scheme, leaving individuals and businesses unprotected, as they would not be able to obtain the cover required by law. There could also be increased moral hazard, as policyholders who have been obliged to purchase insurance can implement less protection, as they feel the burden is on the insurance provider. Higher premiums could also be imposed due to the uncertainty created by the lack of data needed for underwriting; the lack of a competitive market; and the additional administrative costs for insurers.

Introduction of an EU-wide fund would lead to diminishment of safety (moral hazard)

- Insurance Europe is concerned about the impact an EU fund would have on the risk management practices/exposures of industrial operators, as well as on the insurance market.
- Introducing an EU-wide fund would disincentivise operators from buying adequate levels of insurance and thereby poses a moral hazard:
 - Operators who do buy adequate insurance would be penalised with higher costs (they pay insurance premiums and make additional contributions to the fund), whereas those who do not would be rewarded by the fund taking over part or all of their liability despite saving on costs.
 - Operators would be discouraged from implementing adequate prevention mechanisms, because the fund would pay out regardless of whether they invest in risk prevention and risk management, which are key to minimising industrial disasters. Consequently, introducing a fund might actually increase the risk of industrial disasters occurring.
 - Funds are difficult to set up and costly to run. Determining who contributes how much and how to organise and administer a fund invariably creates a number of highly contentious issues that are difficult to solve in practice.

No extension of the scope of the ELD

- The current strict division between public law liability for damage to the environment under the ELD and civil liability for personal injury and damage to property in connection with harmful environmental effects should be maintained. For personal injury and property damage, the national civil law regimes provide adequate compensation mechanisms.
- Certain issues are better suited to be tackled through distinct legislation and not through the ELD. An example of this is damage to air quality, which should remain excluded from the ELD as it is impossible to remediate air outside confined spaces. Pollutants spread through the air that cause personal injury or damage to property should still result in the polluter being liable under civil law.
- Criminal responsibility for environmental damage should be dealt with in distinct legislation not in the ELD, which is exclusively concerned with preventing and remediating environmental damage.

ELD should not become a regulation

- Turning the Directive into a regulation would not be the right way to address the gaps in the implementation of the ELD. The ELD should be applied consistently and uniformly across all member states. There should be a focus on adequate ELD enforcement and a common understanding of the ELD to promote the availability of, and demand for, financial security for ELD liabilities across the EU. The whole body of European environmental law must be fully implemented at national level and have competent authorities enabled to oversee and, if necessary, enforce compliance with environmental provisions. This is an essential prerequisite to adequate insurance cover being offered at competitive conditions, thereby stimulating operator take-up throughout the EU. Furthermore, implementation of ELD rules could be enhanced by facilitating the use of user-friendly tools and providing administrative support measures.

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