

To: Environmental Liability TF
From: Carmen Bell
cc: General Liability SG
Date: 16 November 2012
Reference: NLI-ENV-12-044

Subject: EC feasibility study on industrial disaster fund - Insurance Europe comments

Action requested

- Member input on draft Insurance Europe comments to BioIS feasibility study on an EU industrial disaster fund.
- Member availability for December Environmental Liability Taskforce meeting.

Background

As part of its on-going study on the Environmental Liability Directive (ELD) and financial security options, the EC has commenced a study on the feasibility of creating a fund to cover environmental liability and losses from major industrial accidents. The study is being conducted by Bio Intelligence Services (BioIS). Members may recall that BioIS conducted the study on ELD implementation and effectiveness a few years ago, which was aimed at collecting stakeholder feedback for the EC's October 2010 report on the same topic.

The aim of the EC's current disaster fund study is to examine whether such a fund – or resource pooling scheme – would be possible and effective for addressing traditional and environmental damage that results from industrial pollution. The EC states that the development of this fund would depend on the potential involvement of the industrial operators as well as key players in the financial sector.

BioIS created a [questionnaire](#) to examine the above issue and has requested for participation by Insurance Europe (see memo NLI-ENV-12-035). BioIS has set a deadline of **21 November 2012** for responses to this questionnaire. The EC also held a related [workshop](#) on **7 November 2012**, where Insurance Europe presented on environment liability issues and on concerns about the fund from the perspective of the insurance industry.

Recent Developments – Taskforce conference call and draft comments to BioIS

Insurance Europe's Environmental Liability Taskforce held a conference call on 13 November to discuss the results of the 7 November EC workshop for the BioIS study as well as the taskforce's concerns about the study overall. Members represented on the call included: CH, DE, ES, FR, GR, NL, UK.

Member comments:

- Must be mindful of what happened in the US with the Superfund¹, which resulted in extensive litigation between those entities contributing to the fund through their insurers.

¹ Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), a United States federal law designed to clean up sites contaminated with hazardous substances

- Insurers could face direct conflict with Solvency II requirements if they are eventually given the burden of contributing to the fund.
- The introduction of this fund could kill off environmental liability insurance, thus **it is crucial to think of how this fund will impact the environmental insurance market development.**
- The fund could also impact the general liability insurance market by re-introducing risks deemed uninsurable in some countries (eg asbestos, which experience heavy litigation in the UK).
- The necessity of this fund is not clear and is not sufficiently discussed in the BioIS background document.
- Need to highlight that there is **no failure of the insurance market** and give a **clear understanding of what insurance is about.**
- Insurance is more experienced in this area and can cover risks for each industrial sector separately (unlike a fund, which offers no distinction between sectors).
- The fund proposal could be in conflict with Article 14 of the ELD, which requires Member States to promote the development of financial security products to cover environmental liability.

Questionnaire

Members also discussed the BioIS questionnaire and debated whether to answer it from both Insurance Europe and national levels. Members were generally in agreement that Insurance Europe itself could not answer the questionnaire, as the questionnaire did not seem well-designed for response by a trade federation. It was decided that Insurance Europe would submit written comments in lieu of a questionnaire response, which the EC had invited stakeholders to do at the 7 November workshop.

Members differed on their opinions about whether the national associations and their companies should answer the questionnaire. Some members felt the insurance industry should answer in order to show a willingness to contribute to the study, whereas others felt it necessary to highlight to BioIS their concerns about the questionnaire/study through written comments instead. It was also discussed, however, that there could be conflicting answers presented by member associations, which might lead proponents of the fund to say that the insurance industry is in confusion.

It was summarised that each national association will determine on its own basis whether to provide a response to the questionnaire or not.

Proposal for written comments

Members discussed the approach for Insurance Europe's written comments to the BioIS study/questionnaire. It was noted that the comments should not be defensive, but make reasonable and clear statements to explain the insurance industry's concerns and provide solid reasons as to why a fund will not work. It was also discussed that it is important to show why the insurance industry debates the introduction of a fund (eg the impact on the insurance market). Additionally, members stressed the importance of disputing BioIS's suggestion that there is a "failure of the insurance industry".

Members also discussed the comments should state that a fund may result in keeping "uninsurable operators" in the market. In Hungary, for example, the operator that caused the red toxic mud spill (MAL) had trouble finding insurance due to its lack of quality of risk and could only afford to be insured at low sums. It was also alleged that MAL did not do maintenance checks and may have operated without a local permit.

Members further noted that the riskier operators will become the responsibility of the larger, insurable ones, thus, many operators may not be happy to have to pay for their riskier competitors. Moreover, the EU may find that industrial operators will have different safety standards if they are not faced with the risk of liability.

Finally, the comments should summarise that industrial disasters, such as that in Hungary, are country-specific and not necessarily occurring all over Europe. These incidents can be better resolved through the introduction of measures for individual responsibility and safety standards as well as more involvement by local authorities. In other words, **different markets require different solutions.**

Draft comments to BioIS

The Insurance Europe Secretariat has prepared a first set of draft comments in line with the concerns raised at the 7 November workshop and the 13 November taskforce conference call (NLI-ENV-12-045). These comments generally outline Insurance Europe's position as follows:

- Lack of justification for introducing an industrial disaster fund (for both environmental and traditional damages).
- The timeline for the study needs to be extended for sufficient input by stakeholders.
- The study questionnaire is not appropriately designed for feedback from either the industrial or insurance sectors.
- On-going development of the insurance industry (especially environmental liability market) can be severely impeded by the introduction of a fund.
- Member States have different methods of resolving the damage caused by industrial accidents, as demonstrated by the case studies provided in the BioIS background document
 - It is also discussed that the objective in having these case studies in the background document is unclear, as they do not establish the need for an EU-wide fund.
- The private insurance sector is well experienced in risk assessment and transfer, thus, it is questionable to what extent a fund can cover industrial risks more efficiently and effectively than insurers.

Once finalised, these written comments will be submitted to BioIS and the EC by the questionnaire's proposed deadline of 21 November 2012. The first draft BioIS report is expected by 24 November, after which Insurance Europe should have a chance to issue comments about the initial findings in the report.

Environmental Taskforce Meeting

As the BioIS draft report on this issue is expected for the end of November 2012, a taskforce meeting will be scheduled around mid-December to discuss the contents of the report. **This meeting should take place sometime between 6 – 18 December 2012.**

Next Steps

- **21 November 2012:** Deadline for BioIS environmental disaster fund workshop questionnaire
- **24 November 2012:** Projected deadline for *draft* BioIS report.

Input Requested

Members are requested to provide the Insurance Europe Secretariat (bell@insuranceeurope.eu):

- their input on the draft comments (NLI-ENV-12-045) for the BioIS study on feasibility of an industrial disaster fund **no later than 10am on Wednesday, 21 November 2012**; and
- their availability for an Environmental Liability Taskforce meeting **no later than cob Monday, 19 November 2012.**