Financial Provision - Protecting the Environment and the Public Purse

Introduction
In 2014, the European Network of the Heads of Environment Protection Agencies (EPA Network) recognised that the cost of dealing with environmental liabilities arising from industrial operations too often fell to the public purse as a result of the failure of financial provisions. An IMPEL project was set up to look at the extent of this problem across Europe, and to identify what forms of financial provision are most likely to deliver secure and sufficient cover which is available to the regulator when needed.

The project aim is defined as the generation of a better understanding of the availability and suitability of financial tools. This should result in improved protection of the environment and the public purse, whilst ensuring compliance with the Polluter Pays Principle, and encouraging operator investment in pollution prevention.

The project report presents the results of the first year of the project, and provides recommendations for the second year of the work. A core drafting team including experienced practitioners and academics covering the relevant law, insurance and technical fields, as well as practicing regulators led the evidence gathering and reporting.

The evidence gathering comprised three main components:
- A questionnaire-based survey, which generated 150 responses;
- A workshop of technical experts in the field, which was attended by about 40 delegates; and
- Follow-up interviews and interaction with a range of specialists with knowledge of the subject.
The report provides information on what forms of financial provision exist, and how effective they are in different circumstances, including their application to foreseen and unforeseen liabilities. Further sections of the report cover approaches to financial provision across Europe, including countries where it is mandatory, and situations where it has been both effective and ineffective.

**Findings and recommendations**

The findings of the report summarise the evidence and include a detailed review against the criteria of good provision needing to be "secure, sufficient and available"; see example for parent company guarantee (as one possible financial instrument) in the table below. Case studies are provided where financial provision worked and which show that it is a potential protection against the problem of abandoned liabilities. There are also cases where financial provision failed to cover the costs of restoration or pollution remediation because it was not secure, sufficient or available when required showing the importance of adhering to these principles when implementing financial provision.

Preliminary conclusions are provided, addressing the scope of the problem, the acceptability and availability of suitable financial provision mechanisms, common approaches across Europe, and the role of regulators in ensuring financial provisions work in practice.

Recommendations for a work programme for Year 2 include a workshop with regulators from across Europe to share experience, and the development of a practical guide in support of good regulatory process and decision making in the field of financial provision.

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The parent company would, depending upon the construction of the terms of the relevant guarantee, be required under contract to meet a specified level of the operator’s environmental liabilities.

Financially, the parent company’s de facto immunity from environmental liabilities arising from its subsidiary’s activities.

The parent company by agreeing to bear some of the risk, is incentivised to reduce the prospect of its subsidiary incurring a large financial liability.

The parent company may have suffered financially as a result of its subsidiary’s financial decline/insolvency and this could affect its ability to meet its obligations under the guarantee. There is also the risk that the parent company may be wound-up before the guarantee can be called upon.

The parent company’s liability will be limited to a predetermined sum, meaning that it may not be contractually obliged to bear its subsidiaries environmental liabilities in full.

There may be difficulties associated with pursuing a parent company registered outside the EU for liabilities covered under the guarantee.

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Many of the mitigation measures detailed above in respect of self-insurance will apply equally in the context of parent company guarantees.

To avoid problems associated with enforcing the guarantee against companies registered outside the EU, consider limiting parent company guarantees to parent companies registered in the EU.

Ensure that the ‘triggers’ for payment under the guarantee align with the expectations of the regulator.

Insolvency of the subsidiary should be included as a ‘trigger’ for payment under the parent company guarantee.

Attention must be paid to expiry dates for parent company guarantees.

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**LINKS**

- IMPEL Project Page

**KEY WORDS**

- Insolvent
- Financial provision
- Parent company