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THE REGULATORY POTENTIAL OF CHARGES ON LAND FOR ENVIRONMENTAL LIABILITIES

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AN EXAMPLE

Chemicals spill from containers at an industrial site, migrating to and affecting adjacent premises causing environmental damage to land.

The environmental regulator undertakes the requisite remediation works as the operator does not have the funds to do so itself.

The proposed statutory power would enable the regulator to take a first-ranking charge over any heritable property owned by the operator in respect of the costs incurred, including accrued interest.

The power of sale under the charge could be exercised to recover the sum.

REGULATORY CONTEXT (1)

Where the operator enters into liquidation with unpaid environmental liabilities, the regulator will be an unsecured, non-preferential creditor.

Likely to receive very little, meaning costs transferred to society.

Requirement for operators to make **financial provision** (e.g. hold insurance or provide a bond) is absent in key frameworks and even where it is mandated, tolerance of self-insurance is prevalent.

Within this regulatory context, a regulator with a ‘charge’ over the operator’s heritable property would have direct recourse to that asset if full payment was not forthcoming (e.g. in the event of its liquidation).

REGULATORY CONTEXT (2)

Commercial and human rights implications for creditors (e.g. banks) whose charges are overreached by a regulator's charge and no longer secure the entire debt owed to them.

And the regulator's charge would deplete the pool of assets available to unsecured creditors upon the company's entry into insolvency proceedings.

The environmental policy arguments must be compelling, and drafting of the statutory power unequivocal, if these consequences are to be justifiable.

THE 'POLLUTER-PAYS' PRINCIPLE OF EU LAW

Guides policy development at the EU institution level.

In so doing, it may be seen to possess three core policy rationales:

1. allocating environmental costs fairly in society (*equitable* dimension);
2. cost internalisation (*economic* dimension); and
3. avoiding distortions in trade created through state subsidisation (*economic equity* dimension).

[The principle cannot be deemed to possess the same normative status in the UK legal system.]

(1) EQUITABLE DIMENSION

‘[t]he “polluter pays” principle also has the aim of *fair* allocation of the costs of environmental pollution. *The costs are not imposed on others, in particular the public, or simply ignored, but assigned to the person who is responsible for the pollution.*’

Case C-254/08 *Futura Immobiliare Srl Hotel Futura v Comune di Casoria* [2009] 3 CMLR 45, Opinion of AG Kokott, para 32 (emphasis added).

(2) ECONOMIC DIMENSION

The first-ranking charge affords a means of ‘internalising’ an operator’s environmental costs,

1. creating market-orientated incentives for those who *may* cause environmental damage to avoid doing so (environmental protection perspective), and
2. ensuring that the cost of producing the goods or providing the services more accurately reflects the environmental costs attributable to them (price may increase).

WIDER UTILITY

A statutory power facilitative of the above policy rationales could generate more responsible, sustainable corporate conduct:

1. it could encourage creditors to be (more) rigorous in their **due diligence**, e.g. undertaking a risk assessment of the operator's environment impacting activities prior to dealing with it,
2. a secured creditor could mandate that the operator hold **appropriate financial provision** (e.g. EIL insurance) throughout the period of the loan.

THE DOWNSIDE: RISKS WITH THE POWER

Could impact on the availability and cost of credit:

- Creditors may be less inclined to advance funds to, or enter into trade with, operators engaged in certain industrial sectors,
- Or, they may be willing to do so only at a high interest rate, under stricter trading terms or in tandem with the provision of appropriate insurance.

Market conditions and demand for that particular piece of heritable property may impact upon timeliness of a sale and the price achieved.

There may be evasive behaviour by operators (intra-group transfers).

CONCLUSION

The statutory power has an important role to play in fulfilment of the core rationales for the ‘polluter-pays’ principle of EU law.

But, secure and sufficient financial provision (e.g. insurance, bonds and guarantees) offers a greater prospect of ensuring that funds are available when required.

In the absence of financial provision, and it *is* absent in many frameworks, the charge offers a valuable enforcement tool for regulators to protect taxpayer’s funds and the environment itself.