INSURANCE AND LIABILITY REGIME FOR UK SPACE LAUNCH ACTIVITIES

Consultation and draft regulations published

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As promised in July in the UK Government's consultation on the package of regulations implementing the Space Industry Act 2018[1] (see our comments on that consultation here), a further consultation covering insurance and liability requirements under the Act has now been published. The proposed rules will have an impact on all companies in the UK's fledgling launch industry, including satellite and other space technology manufacturers and their supply chain.

This article sets out the key features of the proposed liability and insurance regime, as it sits within the wider draft Space Industry Regulations.

The insurance and liability consultation requests views on:

- the operability and effectiveness of the proposed liabilities and insurance requirements to implement the Space Industry Act 2018, including the use of licence conditions to cover insurance requirements
- The draft Space Industry (Liabilities) Regulations[2] and associated guidance documents, namely
  - Guidance for stakeholders on insurance and liabilities requirements under the Space Industry Act 2018
  - Guidance on the Modelled Insurance Requirement Determination Process
- assumptions in the impact assessment

The consultation response deadline is **10 November 2020**.

[1] Unlocking Commercial Spaceflight for the UK - The consultation on the draft Space Industry Regulations closed on 21 October 2021 and the consultation on these draft Space Industry (Liabilities) Regulations closes on 10 November 2020 although the documents state the two consultations should be read in conjunction.

[2] Which will be merged with the wider Space Industry Regulations following consultation

PROPOSED LIABILITY REGIME

There are two types of statutory liability applicable to the launch operator and he orbital operator set out in the proposed regime, as highlighted in our comments on the draft Space Industry Regulations 2020:

- strict liability on an operator carrying out spaceflight activities for injury or damage caused to persons or property on land or water in the United Kingdom or in the territorial sea adjacent to the United Kingdom, or to aircraft in flight (Space Industry Act 2018 Article 34)
- liability to indemnify the Government against any claims in respect of damage or loss arising out of or in connection with spaceflight activities (Space Industry Act 2018 Article 36)

These categories of operator liability (and any common law claims) are to be covered by third party liability insurance.

Following the conclusions of a report commissioned by the Government which included an analysis of liability regimes in other jurisdictions, and concerns expressed by stakeholders and industry that unlimited liability for operators would be uncommercial and uncompetitive, it was decided that limit of liability in these categories was justified.

The level of operator liability can be limited, and the intention expressed in the consultation is for the limit to be the level of the Modelled Insurance Requirement calculated by CAA[3].

The definition of "spaceflight activities" in section 34 and 36 does not include the operation of spaceports or the provision of range control services – so the strict liability regime only applies to launch operators and satellite operators.

Claims may be brought against those undertaking "associated activities" including the operator of a spaceport or range control service provider, but such claims will be fault based (or indeed contractual, subject to the rules on cross waivers noted below). There is no corresponding limit on liability for spaceports or the provision of range control services as this concept works together with the strict liability regime.

INSURANCE REQUIREMENTS FOR LICENSEES

Pursuant to the new draft Regulations, insurance requirements for all licensees will be set out in individual licence conditions. Only Third Party Liability Insurance in respect of launch activities are mandatory. The Government does not intend to mandate pre-launch insurance (usually taken out by the satellite manufacturer for the period before the launch activity), employer liability, and other types of

[3]Unless OST limit applies at 60m

insurance that spaceport operators and range control service providers might obtain based on commercial needs, such as weather damage or natural disaster, environmental/pollution damage and security risks are not mandatory, property/infrastructure and products liability cover.

The Guidance for stakeholders on insurance and liabilities requirements provides detail on the approach to various anticipated licence conditions, including the limit of an operator's liability (under Article 34 and 36) and requirements for any reciprocal waivers of liability (flow-down waivers).

Satellite operators (orbital operator licensees) and other parties including spaceport operators and range control service providers will need to demonstrate they either hold or are able to benefit from TPL insurance.

There is a waiver of insurance for the lowest risk satellite operations as per the current policy under the Outer Space Act 1986 - either deployed from the International Space Station or otherwise launched to an operational altitude below that of the ISS. A low-risk satellite at these very low, sparsely-populated altitudes, with an orbital lifetime of less than a year and with few high-value assets nearby, would, in most cases, carry a negligible risk of third-party damage.

LEVEL OF INSURANCE REQUIRED

The draft regime proposes that the level of TPL insurance for launch activity is based on a Modelled Insurance Requirement (MIR)[4].

This is a calculation of the realistic amount of damage that could be caused by each mission or the "potential third party liability claims" against an operator "in a realistically possible scenario"[5]. The MIR value will be calculated on a case by case basis, rather than applying a fixed limit applying to all missions.

The draft Guidance on the Modelled Insurance Requirement Determination Process sets out the methodology to be used for such calculations. The inputs for modelling this requirement will be common to those used for the safety case (as referred to in our commentary).

The modelling and assessment of the MIR value will be done by the Regulator based on inputs provided as part of the licensing process and key parameters specified in the draft Guidance. Stakeholders should therefore be encouraged to consider those key parameters in the proposed Guidance carefully.

The MIR Determination Guidance suggests that the operator will not need to carry out MIR modelling, although it seems likely applicants will want to

[4] similar to the Maximum Probable Loss approach used in the United States of America and Australia

[5] See Guidance on the Modelled Insurance Requirement Determination Process

Another key issue in relation to the MIR value is that under the proposed regime the insurance requirement is potentially highly sensitive to risk controls and mitigations in place – licensees will need to focus on the extent to which they can maximise or improve actual controls and processes in order to reduce your own view of MIR for a specific mission; to the extent these will be accepted by the regulator and cost effective relative to the insurance required under a higher MIR

CROSS WAIVERS

Another key condition to be included in licenses relates to waivers and indemnities of liability for injury or damage. Such 'cross waivers' are already commonly used in respect of launch activities in other jurisdictions including the USA.[6]

They reflect the principle that parties involved agree to bear their own losses in the event of a launch failure or some other issue. So, conditions in operator, spaceport and range control service licenses may require the licensee to waive their right to claim against the parties they contract with in connection with the relevant activity[7].

The requirement may also then include indemnities in such contracts against claims made by employees, contractors and sub-contractors and their employees against the other party.

This is intended to minimise liability and claims between parties involved in the activity, and the Guidance suggests the conditions will apply to sub-contractors. However, the extent of the waivers will be decided by the CAA on a case by case basis. These conditions will relate directly to the exposure of contractors, subcontractors and their insurers (and the cost of cover) including manufacturers and the 'supply chain'.

The consultation highlighted the fact that it will be crucial to identify an all associated contracts where liability for each of the different risks sit, in order to avoid complex and drawn out liability claims.

[6] In launch service contracts between the launch service provider and the customer, these cross waivers are standard and are generally flowed down to subcontractors.

[7] no such condition or waiver will not apply to individuals taking part in spaceflight activities in a role or capacity prescribed under section 17(1) of the Act, i.e. those giving informed consent to participation

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