Q&A on Environmental Law in Germany

CLIFFORD
CHANCE

Contents

Introduction

Using a Q&A format, this article provides a guide to environmental law in Germany and gives a practical description of a wide range of topics including:

- Emissions to air and water
- Environmental impact assessments
- Waste
- Contaminated land
- Environmental issues in transactions.

The article was prepared by David Elshorst of Clifford Chance, Frankfurt. Details of the author can be found in the Appendix.

It is one of a series of 10 articles produced by Clifford Chance covering Australia, Belgium, Czech Republic, France, Italy, Germany, the Netherlands, Poland, Spain and the United Kingdom (England & Wales). These articles can be found on this link: http://www.cliffordchance.com/environment

This article was first published by Practical Law. The law is stated as at 1 October 2013.

Environmental regulatory framework

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

Environmental issues are predominantly regulated through national legislation. Domestic legislation is increasingly influenced by international law, particularly EU law.

The main sources of environmental law are:

- The federal government and the federal states' constitutions.
- The federal government and the federal states' Acts of Parliament.
- Executive ordinances based on parliamentary laws and enacted by agencies of the federal government and the federal states (Agencies).
- Technical directives enacted by Agencies following certain public procedures.
- Administrative regulations enacted by supervisory agencies and binding lower levels.
- Bye-laws and statutes enacted by public law bodies.

The principal regimes in environmental law (as complemented by federal and state legislation) are:

- Emission control under the Federal Emission Control Act (*Bundes-Immissionsschutzgesetz*) (BImSchG) (Emission Control Act) (*see Questions 4 to 6*).
- Waste control, disposal and management under the Closed Cycle Management Act (*Kreislaufwirtschaftsgesetz*) (KrWG) (*see Question 12*).
- Water control and management under the Federal Water Resources Act (*Wasserhaushaltsgesetz*) (WHG) (Water Resources Act).
- Soil conservation under the Federal Soil Protection Act (*Bundes-Bodenschutzgesetz*) (BBodSchG) (Soil Protection Act) (*see Questions14 and 15*).

- Hazardous substances control under the Chemical Act (*Chemikaliengesetz*) (ChemG).
- Radiation protection and nuclear energy under the Atomic Act (*Atomgesetz*) (AtomG).
- Genetic engineering under the Genetic Engineering Act (*Gentechnikgesetz*) (GenTG).
- Nature and landscape conservation under the Nature Protection and Landscape Conservation Act (*Bundes-Naturschutzgesetz*) (BNatSchG).
- Environmental impact assessment under the Environmental Impact Assessment Act (*Umweltverträglichkeits-prüfungsgesetz*) (UVPG) (Environmental Impact Assessment Act) (see Question 10).

Regulated entities can incur liability for non-compliance with environmental legislation, resulting in obligations to act or cease and desist. Financial liability can also arise.

Public environmental law

A number of states sanction administrative offences through fines, which can be substantial (*see section 62, Emission Control Act and section 41, Water Resources Act*). Fines can be imposed on individuals and, by contrast to criminal environmental law, they can also be imposed on associations and on other legal entities.

Private law

Environmental private law regulates the claims of private third parties against a party causing damage to the environment by operating certain installations. Private law contains several environmental statutes and has undergone considerable expansion through the Environmental Liabilities Act 1990 (*Umwelthaftungsgesetz*), which is widely viewed as an independent, environmental private law.

Criminal law

Criminal environmental law is not common, even though it is considered as appropriate to compel environmentally responsible conduct. The following offences are prosecuted as criminal acts:

- Water or air pollution in contravention of environmental law.
- Waste disposal that causes a threat to the environment.
- The unauthorised operation of installations that are potentially damaging to the environment.
- The creation of serious danger to health by the release of noxious substances.

Criminal penalties generally involve imprisonment or a fine, but they can only be imposed on individuals. Imprisonment can be imposed for up to ten years.

Regulatory authorities

There is no principal environmental regulator. State authorities (usually district or county authorities) guided by their respective State Environmental Ministry carry out day-to-day operational activities. Their competence is usually defined geographically and the first step towards identifying the relevant authority is generally to contact the local municipality.

The Federal Ministry of the Environment (*Bundes-Umweltministerum*) (*see Page 23, The regulatory authorities*) only has responsibility over federal agencies' activities, except concerning nuclear energy.

The Federal Environmental Agency (*Bundesumweltamt*) (see *Page 23, The regulatory authorities*) only has certain responsibilities over the private sector associated with emission trading.

Recent developments

In early May 2013, EU Directive 2010/75/EU (Industrial Emission Directive) was implemented into German law by a framework legislation which amended the central bodies of environmental law, in particular the:

- Emission Control Act.
- Water Resources Act.
- Closed Cycle Management Act.
- Criminal Code.

The statutory provisions are addressed to operators of around 9000 large-scale plants in Germany. The German Government has calculated that costs incurred by the implementation of the Industrial Emission Directive totals approximately EUR12.5 billion for the relevant operators.

The main element of the implementation is the examination and update of the permit requirements based on the 'best available technique' (BAT). BAT reference documents (*BAT-Hinweise*) now constitute a compulsory minimum standard, for example, in relation to emission thresholds. Previously they were only taken into consideration. The competent authorities must check at regular intervals whether permits require modification due to changes of BAT requirements. It is expected that it will be difficult for

the competent authorities to supervise the compliance with the relevant BAT requirements in Germany.

Large-scale plants are now also subject to environmental inspections (*Umweltinspektionen*) which must take place at intervals of between one year and three years, depending on the risk class of the relevant plant. After each inspection, the competent authority must issue a report in relation to compliance with legal requirements and potential required measures. The report must be accessible to the public after four months.

Several laws were enacted to accelerate the permitting and construction of electricity grids, which is very important for the expansion of renewable energy generation capacity. These include:

- Grid Expansion Acceleration Act (*Netzausbaubeschleunigungsgesetz*) (NABEG).
- Electricity Line Expansion Act (*Energieleitungsausbaugesetz*) (EnLAG).
- National Requirement Plan Act (*Bundesbedarfsplangesetz*) (BBPIG).

In addition, the Energy Industry Act (*Energiewirtschaftsgesetz*) (EnWG) has been amended. It created the first mandatory and coordinated grid expansion plan for the main electricity grids and long-distance gas lines (10-year grid development plans). The aim of grid development plans is to assist with the required level of grid expansion and increase public acceptance of line construction through comprehensive consultations with the stakeholders. Based on such plans, the BBPIG provides that grid expansion is required in order to deliver the wind-generated electricity of the North to the consumption centres of the West and South. The NABEG has created conditions for faster expansion by ensuring public broad participation rights from an early stage. In addition, these laws prioritise specified projects and provide for a consistent permitting procedure under the BBPIG and by one competent authority (*Bundesnetzagentur*). This process replaces using several competent authorities in different federal states. Framework conditions for the construction of cross-border power lines and the use of underground cables in the 110kv range have also been modified. Cluster connections for offshore wind farms to the grid have also been allowed, rather than costly individual connections

Regulatory enforcement

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

Environmental law is generally strictly enforced. The governmental organisations that supervise compliance with environmental laws are generally well organised and staffed, and therefore able to fulfil their tasks effectively. In particular, undertaking activities without a permit where one is required usually prompts an immediate response from the authorities. This often includes closing down the offending operations and imposing fines. The strict enforcement culture complements strict permitting regimes, which often exceed the basic requirements of EU directives.

Environmental NGOs

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

There are several active NGOs (including international organisations such as Greenpeace). These organisations usually participate vigorously in major environmental law-making procedures, and in the public hearings for all major permitting procedures for infrastructure (such as airports, motorways (*Autobahnen*) and railways). In doing so, NGOs increasingly use specialised lawyers and also initiate court proceedings to stop or change projects perceived to have an adverse effect on the environment. All major projects that significantly affect or are likely to affect the environment are challenged in court. These claims can prevent the project from going forward, or lead to amendments of the relevant permits.

The NGOs' legal position has been strengthened in Germany as a result of a decision by the European Court of Justice (*Trianel Kohlekraftwerk Lünen (Case C-115/09) [2011]*). NGOs can now challenge a permit even if they would not have had standing to sue under the general principles of German environmental law. It is expected that this will lead to investors seeking earlier and closer contact with environmental NGOs to anticipate and, where possible, avoid challenges after the permit has been granted.

Environmental permits

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

There is generally an integrated permitting regime for industrial facilities, through an emission control permit (Emission Control Act permit) (*section 4, Emission Control Act*). This permit has a "concentrative effect", that is, it includes most of the permitting elements necessary to conduct and operate an industrial facility (for example, building permits, nature protection permits, occupational safety and health permits). The primary purpose of section 13 of the Emission Control Act is to co-ordinate and expedite the administrative permitting procedure.

Single/separate permits

However, some activities are not included by the Emission Control Act permit and must be permitted separately, including:

- Permits and binding licences based on water protection laws (sections 7 and 8, Water Resources Act) (*see Question 6*).
- Regulatory decisions based on certain planning approvals (mostly large infrastructure projects, such as electricity lines).
- Regulatory decisions based on nuclear law.
- Permits concerning operating plans based on mining law.

5. What is the framework for the integrated permitting regime?

Permits and regulator

For material industrial activities, an Emission Control Act permit must be obtained (section 4, paragraph 1, Emission Control Act), including for:

- The construction and operation of new installations that are particularly likely to have harmful effects on the environment, because of their nature or operation, or any other reason.
- Fundamental alterations to existing installations of the nature mentioned in the previous bullet point.

The competent body to which permit applications are made varies for different types of facilities. It can also differ from one state to another, since Germany, as a federal republic with 16 federal states, does not have a central administrative organisation.

Each federal state has its own laws regulating the organisation of its administration. However, as a rule, the mid-level administrative bodies of the federal states, usually called *Landramtsamt* or *Regierungspräsidium*, have permitting authority. Permit applications must be made to the relevant competent authority for the facility's proposed location.

A permit application initiates the permitting procedure, which regularly includes a public hearing. Certain third parties (municipalities, specialised agencies and neighbours) are invited to comment. The procedure ends with the written permit being issued or denied.

Length of permit

Emission Control Act permits are usually unlimited in time, but some other permits are limited (such as, certain water extraction permits). When a facility holding an Emission Control Act permit is modified, the necessary amending permit can lead to new standards or requirements (for example, monitoring requirements) being incorporated into the original permit for the facility. An Emission Control Act permit becomes invalid if the operations covered by the permit are not carried out during any period of three years. This is also true for most other environmental permits and licences.

Restrictions on transfer

Environmental permits usually relate to certain technical facilities or buildings. If the facility is transferred, the permit automatically transfers to the new owner. There are, however, exceptions where the permit not only relates to a technical facility, but also to specific personal qualities of the operator, such as knowledge and reliability. This applies to permits to operate production facilities using genetically modified organisms, and the operation of waste dumps and any type of nuclear facility.

Contaminated land and groundwater

The Emission Control Act provides that an applicant for a new or modified permit for a plant that is subject to the Industrial Emission Directive and will be handling hazardous substances, must provide a report on the pre-existing condition of the site in relation to soil and ground water contamination. After closure of the plant, the current condition of the plant must be compared with its pre-existing condition. If contamination has been caused or made worse, the plant operator is obliged to restore the soil and/or groundwater to its pre-existing condition. This is provided that the contamination was caused after 7 January 2013 and the restoration to its pre-existing condition is proportionate.

Penalties

If an operator does not comply with the permitting regime, as a minimum, the relevant competent authorities can request immediate legal compliance, including immediate submission of a permit application. If this is not done, the authorities can order the immediate closure of the relevant facility.

The competent environmental authorities can also impose administrative fines against individuals, associations, or other legal entities. In addition, the competent police authorities (*Staatsanwälte*) can prosecute individuals for any environmental criminal offence committed as a result of non-compliance. The most important criminal offences that can arise out of non-compliance include:

- Illegal pollution of bodies of water.
- Pollution of the air that causes harm to health.
- Waste disposal that threatens the environment.
- Unauthorised operation of installations that are potentially damaging the environment.
- Creation of serious dangers to health by the release of noxious substances.

The offences are punishable by a fine and/or imprisonment.

Water pollution

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Permits and regulator

A permit is required for any extraction from, or discharge of pollution into, any watercourse (*section 7 or 8, Water Resources Act*). Under the Law for the Regulation of the Water Law (*Gesetz zur Ordnung des Wasserhaushalts*), which came into force in March 2010, a permit is also required for depositing solids into the groundwater. A water extraction or pollution permit and a deposit permit is always a separate permit as these activities are not included in the concentrative effect of an Emission Control Act permit (*section 13, Emission Control Act*) (*see Question 4*).

The penalties for failure to obtain these permits follow the general rules that apply to Emission Control Act permits (*see Question 5, Penalties*). On a transfer of ownership, both types of permit transfer to the new owner of the installation that makes use of the water (or, where granted for a plot of land, to the new owner of that land).

Prohibited activities

Causing water pollution without the necessary permit is generally prohibited.

Clean-up/compensation

Clean-up can be requested under the relevant water protection legislation. If the responsible party is unwilling or unable to execute the clean-up, the authorities can do so at the polluter's cost. Wider compensation in relation to loss of biodiversity is not recoverable.

See also *Question 5, Contaminated land and groundwater*.

Penalties

Severe cases of non-compliance with the regulatory regime can result in criminal liability. Criminal law penalties include imprisonment and fines. The administrative fines for offences can be up to EUR50,000.

Air pollution

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Permits and regulator

Where an Emission Control Act permit is unnecessary (*see Question 4*), usually due to the comparative insignificance of the facility, air emissions are dealt with in a separate building permit, which covers the construction and operation of minor facilities.

Prohibited activities

It is generally prohibited to cause air pollution or discharge substances into the air without the necessary permit.

Clean-up/compensation

Clean-up of the polluted air is not feasible, as the air pollution usually disperses naturally and, once this has happened, it can no longer reasonably be cleansed from the air. Clean-up of soil, water or damaged goods can be requested if there is a causal connection between the air pollution and the damage (which is rare). If the responsible party is unwilling or unable to execute the clean-up, the authorities can do so at the polluter's cost. Wider compensation for damages is not generally available.

Penalties

Severe cases of non-compliance with the regulatory regime can result in criminal liability. Criminal law sanctions include imprisonment and fines. The administrative fines for offences can be up to EUR50,000.

Climate change, renewable energy and energy efficiency

8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)?

Greenhouse gas emission reduction

Under the targets set to comply with the Kyoto Protocol (*see Question 9*) and the EU Emissions Trading System (EU ETS) (*see Question 10*), Germany has adopted a national target for reducing greenhouse gas emissions for those emissions subject to the EU ETS to 453 million tonnes of carbon dioxide emissions per annum from 2008 to 2012. In addition, the objective of the German Government's Climate Protection Programme 2005 is to reduce greenhouse gas emissions by 21% compared to 1990 levels from 2008 to 2012, thereby fulfilling Germany's Kyoto Protocol obligations. For post-2012, Germany has adopted the Integrated Energy and Climate Programme (*Integriertes Energie- und Klimaprogramm*). The programme aims to reduce greenhouse gas emissions by 40% compared to 1990 levels by 2020. To reach this goal, the government has adopted several laws and ordinances such as the Renewable Energy Heating Law (*Erneuerbare-Energien-Wärmegesetz*), which entered into force in 2009. This law obliges owners of new buildings to use a certain percentage of renewable energy to heat their buildings. The required percentage depends on which source of alternative energy the owner of a building decides to use (for example, solar energy must satisfy at least 15% of the building's heat requirements and biomass must satisfy at least 50%). Alternatively, other measures can be adopted such as improving a building's insulation.

Renewable energy

As a result of strong legislative activity in Germany in the past 20 years in favour of renewable energies, the development of renewable energies has substantially progressed. In particular wind power, solar power and biomass plants are now well-established types of renewable energy and constitute a substantial share in electricity production. Biomass plants also aid in heat

production. In electricity production, wind power has become the most important renewable energy source. While it has become increasingly difficult to find suitable onshore sites for wind turbines, it is expected that offshore wind farms will soon contribute considerably to the further development of wind power. Several offshore wind farm projects are currently being planned and developed in the North Sea and Baltic Sea.

Geothermal energy facilities used to produce heat energy are already established, whereas the (additional) production of electricity through geothermal energy plants is expected to develop in the near future. There are also other renewable energy facilities such as hydropower and landfill projects. They contribute a small share of the entire energy output.

According to the Renewable Energies Act (*Erneuerbare Energien-Gesetz*) (EEG), the share of renewable energies in the overall power supply in Germany will total 30% by 2020 and will continuously increase. This 30% target is a concrete aim stipulated in the EEG, but the target is not legally binding. However, the target is a general principle for the execution of the EEG and a political target of the government. The target exceeds the 20% target set out by the EU to be achieved by 2020.

In addition, according to the Renewable Energies Heat Act (*Erneuerbare-Energien-Wärmegesetz*) (EEWärmeG), the share of renewable energies in the overall heat supply in Germany will total 14% by 2020. This target is also not legally binding. However, the EEWärmeG does contain certain legally binding targets for the use of renewable energies in buildings (*see Question 17*).

The following renewable energies are covered by the EEG:

- Hydro power, including wave power, tidal power, salt gradient and flow energy.
- Wind energy.
- Solar radiation.
- Geothermal energy.
- Energy from biomass, including biogas, landfill gas and sewage treatment plant gas.
- Biodegradable fraction of municipal and industrial waste.

The EEG entitles operators of renewable energy facilities to claim a specific, fixed amount of feed-in tariff for the production of renewable energies and the feed-in to the public grid. The EEG guarantees these tariffs for 15 years or more, providing long-term security for investors. In addition, renewable energies take priority over non-renewable energies in relation to the feed-in and transmission of electricity in the public grid. This means that grid operators must accept the feed-in of electricity from renewable energy facilities, that is, at the same time reduce capacity from non-renewable energy production facilities. In contrast to other legal systems, however, the EEG does not contain obligations for energy companies to produce or sell a certain amount of their energy from renewable energy sources. The existing mechanism under the EEG is a subsidy mechanism entitling the operator of a renewable energy facility to claim a fixed feed-in tariff, which is higher than the market price. It thereby gives incentives for operators to erect renewable energy facilities to gain the legally guaranteed feed-in remuneration.

In addition, the Combined Heat and Power Act (*Kraft-Wärme-Kopplungsgesetz*) (KWKG) promotes CHP-facilities by guaranteeing a fixed feed-in remuneration for the power produced in these facilities. The same incentive mechanism applies as described above for the EEG.

The EEWärmeG contributes to a dynamic development of renewable energies in the production of heat by two main measures. Firstly, it contains the obligation to use a certain amount of renewable energies for the heat supply of newly constructed buildings. Secondly, it contains financial incentives.

All three pieces of legislation are constantly under review to better adapt the regulatory framework and the feed-in tariffs to changing circumstances and requirements.

Financial incentives are the key mechanism of the renewable energy legislation such as EEG, KWKG and EEWärmeG to promote the development of renewable energies. The main approach is to provide long-term guaranteed feed-in tariffs for electricity produced in renewable energy facilities, which are considerably above the market standard tariff for electricity. These guaranteed tariffs will provide reliable conditions and, therefore, low and calculable risks for investments in renewable energy. From a legal point of view, these incentives are not subsidies.

The financial incentives vary depending on the renewable energy used. Relatively high feed-in remuneration for solar energy is guaranteed to promote its use. The same applies to energy from offshore wind farms, particularly because this technology is not yet well established and requires high investment in offshore wind farms. However, there is a strong political will to develop the high potential of offshore wind energy.

National targets for increasing energy efficiency

To reduce greenhouse gas emissions by 21% compared to 1990 levels from 2008 to 2012, certain measures aim to increase energy efficiency in the building sector. It is the source of over one-third of Germany's entire end-use energy demand. The national programme to reduce greenhouse gas emissions is mainly based on public relations, incentive measures, research and innovation, and regulatory measures. All measures are intended to ensure the efficient use of energy and the security of supply as well as to increase energy efficiency and the use of renewable energy. There is, however, no fixed target relating to the reduction of greenhouse gas emissions from buildings.

The energy efficiency requirements for buildings are regulated under the Energy Conservation Regulations (*Energieeinsparverordnung*). The legal basis of the Energy Conservation Regulations, which implement Directive 2002/91/EC on the energy performance of buildings (Energy Performance Directive) into German law, is the German Energy Conservation Act (*Energieeinsparungsgesetz*).

Under the current Energy Conservation Regulations, which entered into force on 1 October 2009, specified minimum standards for energy performance must be met in relation to both:

- Constructing new buildings.
- Carrying out structural alterations of existing buildings such as modernisation, conversion, expansion and extension.

In a few specific cases, retro-fitting obligations relating to old boilers and thermal insulation also apply. For example, central heating boilers installed before 1 October 1978 must be taken out of operation and replaced. In addition, the Energy Conservation Regulations contain minimum energy performance requirements on heating, cooling and ventilation techniques, and hot water supply. The relevant limit values and standards are set out in annexes to the Energy Conservation Regulations.

The Energy Conservation Regulations apply to heated and cooled buildings or autonomous parts of a building (for example, new constructed parts of a building with more than 50 square metres of used area). However, certain buildings (for example, buildings which are not normally heated or cooled such as leisure residences, buildings constructed for temporary use such as tents, and buildings with specified uses such as greenhouses or cattle sheds) are exempt from most of the energy saving requirements.

The only applicable regulations to these kinds of buildings are those relating to the inspection of air-conditioning systems and the operation of boilers.

Failure to comply with the Energy Conservation Regulations can be sanctioned as a regulatory offence with the potential imposition of fines up to EUR15,000, for example, if either:

- The required inspection of the air-conditioning systems is not carried out.
- Boilers or central-heating are not installed in compliance with the regulations.

On 25 October 2012, the EU adopted the Directive 2012/27/EU on energy efficiency. This Directive establishes a common framework of measures for the promotion of energy efficiency within the Union. This is to ensure the Union achieves a 20% headline target on energy efficiency by 2020 and to lead the way for further energy efficiency improvements beyond that date. It lays down rules designed to remove barriers in the energy market and to overcome market failures that hinder efficiency in the supply and use of energy. In particular the Directive provides for the establishment of indicative national energy efficiency targets for 2020 and a compulsory requirement for large companies to have energy audits every four years. Member States are required to bring into force the laws necessary to comply with the Directive by 25 June 2014 (*Article 28(1)*). Discussions over implementation in Germany are ongoing.

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

The EU and Germany are parties to the UNFCCC and the Kyoto Protocol.

The EU's emissions reduction target under the Kyoto Protocol was to reduce its greenhouse gas emissions by 8% from 1990 levels in the period 2008 to 2012 (the end of the first commitment period). The EU's target was redistributed among member states, and Germany agreed to a 21% reduction for the first commitment period. A second commitment period has now been agreed until 2020 with

parties setting their own reduction objectives. The Parties have also agreed to an amendment to the Kyoto Protocol to provide for an overall objective of reducing emissions by 18% below 1990 levels by 2020 (the original objective was a 5% reduction below 1990 levels in the first commitment period). The EU and Member States have committed to this target on a joint basis (and the EU has pledged to strengthen the commitment to a 30% reduction if a strong international agreement is reached). Parties that have signed up to the second commitment period will review their emissions reduction objectives in 2014.

Implementation

The requirements of the Kyoto Protocol are transformed into EU law by Directive 2003/87/EC, and into German national law by, among others, the:

- Greenhouse Gas Emission Trading Act (*Treibhausgas-Emissionshandelsgesetz*) (TEHG).
- National Allocation Plan (no longer relevant, *see Question 10*).
- Allocation Ordinance 2020 (*Zuteilungsverordnung 2020 ZuV 2020*).
- Project Mechanism Act (*Projekt-Mechanismen Gesetz - ProMechG*).
- Emission Trading Auctioning Ordinance (*Emissionshandels-Versteigerungsverordnung) (EHVV*).

Many of these laws are regularly updated to reflect the respective allocation period.

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

EU ETS overview

As an EU member state, Germany is covered by the EU ETS, which works in four compliance stages:

- Phase I of the EU ETS ran from 2005 to 31 December 2007.
- Phase II ran from 1 January 2008 to 31 December 2012.
- Phase III started on 1 January 2013 and will run to 31 December 2020 (see below, Phase III).
- Phase IV will most likely begin in 2021.

The EU ETS applies to specified heavy industrial activities and energy production activities and establishes a mandatory cap-and-trade system. In Germany, facilities subject to the EU ETS must obtain a greenhouse gas permit. Participants must surrender allowances (or other credits) at the end of each compliance period to match their emissions. In addition, the operator must still return the missing allowances. Each allowance represents the emission of one tonne of carbon dioxide.

Following allocation and auctioning, allowances are subsequently traded in an online registry enabling companies to purchase additional allowances to meet their obligations. Each person wishing to participate in trading also has a register account with the German agency responsible for supervising the EU ETS (Deutsche Emissionshandelsstelle) (DEHSt). To obtain and surrender allowances, a participant must have an account in an online registry. Operators can also obtain credits (that can be traded in the EU ETS) by investing in:

- Qualifying projects to reduce emissions in industrialised countries and certain countries in economic transition (known as joint implementation (JI) under the Kyoto Protocol).
- Projects to reduce emissions in developing countries (known as the clean development mechanism (CDM) under the Kyoto Protocol).

Operators can surrender any of these credits as well as EU allowances to comply with their obligations under the EU ETS.

Aviation

From 1 January 2012, the EU ETS covers any aircraft operator, whether EU- or foreign-based, operating international flights on routes to, from or between EU airports. There are certain exemptions, including for light aircraft, military flights, flights for government business and test flights. Various complaints were made by non-EU countries at the inclusion of flights to or from destinations outside the EU into the EU ETS. As a result the EU excluded such flights during 2012 from the EU ETS, pending discussions at international level over the future position of international aviation in the scheme.

Phase III

Phase III will commence on 1 January 2013. The main changes for Phase III are as follows:

- There is a single EU registry for all users, which was activated on 20 June 2012, rather than national member state registries.

- There is a single EU-wide cap on emissions, which will decrease annually meaning that the former National Allocation Plans will no longer be required.
- Other greenhouse gases and industrial sectors will be included.
- Allocation of allowances will be replaced to a large degree by auctioning, with at least 50% of allowances auctioned from 2013.
- The use of credits from JI and CDM projects is limited.

Environmental impact assessments

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

An EIA, or a screening, must be carried out for large-scale projects. The list of projects requiring an EIA is contained in Annex 1 to the Environmental Impact Assessment Act. Projects requiring an EIA include:

- Constructing and altering nuclear technology installations.
- Waste disposal sites.
- Installations for the thermal treatment of waste.
- Major power stations.
- Highway and railway construction projects.
- Establishing industrial areas.
- Urban development projects.
- Holiday villages.
- Hotel complexes.
- Wind parks.
- Certain oil and gas facilities.
- Certain forestry and water management projects (according to the Law on the New Order of Environmental Provisions (*Rechtsbereinigungsgesetz Umwelt*)), which came into force in March 2010.

An EIA must cover the direct and indirect impact of the project on (Article 2, Environmental Impact Assessment Act):

- Human beings, animals and plants.
- Soil, water, air, climate and landscape.
- Cultural assets and other material resources.
- The interaction between the protected resources specified in the above three bullet points.

Permits and regulator

No permits or licences are required to begin an EIA. The EIA is conducted by the permitting agency and forms an integral part of the permitting procedures for a project (*Article 2, Environmental Impact Assessment Act*).

For projects that require an EIA, the relevant Emission Control Act permit or planning approval cannot be issued without the permitting agency having conducted and taken into account the EIA (without necessarily following its conclusions). In some cases, planning consent for an EIA project requires the consent of several public authorities of the federal states. The individual federal states must appoint one lead authority between them (*section 14, Environmental Impact Assessment Act*). However, the lead authority only has powers of co-ordination, not decision-making.

Penalties

It is an administrative offence to construct a relevant project without a plan approval or a planning consent. Offences are sanctioned by a fine (*section 23, Environmental Impact Assessment Act*).

Waste

12. What is the regulatory regime for waste?

Permits and regulator

There is no separate permitting regime for waste generation. Permitting requirements are dealt with in the relevant building or Emission Control Act permits. During the permitting procedure the operator must show how he is minimising waste generation.

All activities associated with the disposal of waste are subject to the waste management regime in the Closed Cycle Management Act (*Kreislaufwirtschaftsgesetz*) (KrWG) implementing EU Waste Directive 2008/98/EU into German Law. Contrary to the former Economic Cycle and Waste Law (*Kreislaufwirtschafts- und abfallgesetz*) (Krw-/AbfG), the KrWG is based on a multi-level waste hierarchy consisting of:

- Waste prevention.
- Reuse.
- Recycling.
- Recovery (for example, for energy generation purposes).
- Waste disposal.

Ordinances will be enacted to determine which of the five options is most suitable for different kinds of waste. Until then, the KrWg will determine this based on EU jurisdiction. For example, energy recovery is preferable if a heating value of 11,000 kJ/kg is reached. This is even though the hierarchy can otherwise prescribe that a different mode of treatment would take precedence (for example, recycling).

In addition, the KrWG aims to strengthen the impact of recycling and imposes fixed recycling quotas (for example, a recycling quota of at least 65% for domestic waste until 2020, compared to the EU quota of 50% for paper, metal, plastic and glass or a recycling quota of at least 70% for demolition debris). By 2015 the separate collection of bio-waste, paper, metal, plastic and glass waste must be implemented throughout Germany (so far, such separate collection is only carried out in some cities or districts).

Finally, the KrWG strengthens the shared responsibility for waste disposal between public and private suppliers of waste disposal services (duale Entsorgungsverantwortung).

Following the enactment of the Closed Cycle Management Act, in July 2013 the German cabinet adopted the first nationwide waste prevention programme for the public sector. It recommends specific instruments and measures to prevent waste and addresses the production as well as the design and retail process (for example, reusing products, designing minimal-waste products and extending the life span of products).

The installation and operation of waste dumps and landfills requires a licence under the Closed Cycle Management Act. An Emission Control permit is all that is generally required for installing and operating other waste disposal and recycling facilities.

Collectors, transporters, brokers and traders of wastes must either notify the competent authority of their activities (if activities relate to non-hazardous waste) (section 53 KrWG) or require a permit (if activities relate to hazardous waste, unless the relevant entities are organised under public law or are certified waste management companies), (section 54 KrWG).

Documentation requirements exist for all activities in connection with the disposal of hazardous waste and are imposed on all relevant parties involved in the process:

- The waste generator/possessor.
- Each of the waste transporters/collectors.
- The waste disposal or recycling facility that takes the waste.

The competent body to which applications for permits or licences are made varies depending on the type of facilities or federal state in question (see Question 5, Permits and regulator).

Prohibited activities

Criminal law prohibits (*section 326, Criminal Code*):

- Storing, disposing or draining any waste that can damage the environment outside the boundary of facilities designed for this purpose or in breach of licence requirements.
- Delivering waste that can damage the environment without the necessary licence.
- Failing to hand over radioactive waste to the authorities.

Prosecution can lead to imprisonment or a fine.

The following, among others, are administrative offences subject to fines (*section 69, Closed Cycle Management Act*):

- Storing or disposing of waste outside the boundary of facilities designed for this purpose.
- Installing or altering a landfill without a licence.
- Collecting or transporting waste without a licence or in breach of certain licence conditions.

Operator criteria

Waste facility operators are not subject to special operator criteria, specifically, operators do not have to show that they have sufficient financial means to operate waste disposal sites, except in the case of landfills and other waste dumps. However, the competent permitting body must demand that the operator provide security (or an equivalent) to guarantee recultivation, and to minimise harmful effects on the public after the closure of the landfill or waste dump (*section 36, paragraph 3, Closed Cycle Management Act*). This requirement only applies to landfills and dumps, not other waste management plants.

Special rules for certain waste

Hazardous waste is subject to many specific regulations. These are usually incorporated in the Emission Control Act

or building permit, as the permit application must state the intention to handle or dispose of hazardous waste and special requirements are imposed in the resulting permit. To transport hazardous waste, the operator must also:

- Make a number of official notifications (for example, to the road traffic authorities).
- Obtain a section 45 Closed Cycle Management Act licence.

Many ordinances and bye-laws supplement the waste management regime and deal with special sections of waste generation, often derived from EU directives. Examples include:

- The *ElektroschrottG* (based on Directive 2002/96/EC on waste electrical and electronic equipment (WEEE Directive)), which deals with recycling of electrical and electronic equipment.
- The Packaging Ordinance 1991 (as amended) (*Verpackungsverordnung*).
- Special ordinances dealing with landfills, among other things.

Penalties

Criminal law penalties for non-compliance with the regulatory regime consist of imprisonment and fines. The fine for offences contained in the Closed Cycle Management Act can reach EUR100,000 (*section 69, Closed Cycle Management Act*).

Asbestos

13. What is the regulatory regime for asbestos in buildings?

Prohibited activities

The production and use of asbestos is prohibited (*subject to section 16, paragraph 1, Ordinance for Hazardous Wastes (Gefahrstoffverodnung) in connection with Article 67, Annex XVII of EU Ordinance 1907/2006 and subject to section 16, paragraph 2, Annex 2, No 1, Ordinance for Hazardous Substances*). This includes the use of asbestos in buildings, for example, as fire insulation. Exceptions are made for:

- Scientific analysis.
- Maintenance.
- Rehabilitation.
- Demolition works.
- Waste disposal.
- Extraction and processing of natural mineral sources.

Main obligations

The owner of a building is responsible for investigating whether friable asbestos is present in the building, if there is sufficient evidence that this may be the case. The authorities can order the owner to carry out this investigation, or they can do so themselves (at the owner's cost), if a building is thought to contain friable asbestos which is hazardous to health.

It is the employer's responsibility to investigate risks to employees from hazardous substances. The employer must implement measures to minimise and/or remove the risks to employees' health from asbestos. The employer must assess the nature and condition of the asbestos, particularly whether it is friable or not (that is, asbestos-containing material that when dry, can be easily crumbled or pulverised to powder by hand). If there is a serious risk of danger to health, this must be reported to the authorities and the asbestos removed or treated as appropriate. In these circumstances, a licence may be required to continue the relevant asbestos work. Technical rules, particularly TRGS 519 (*Technische Regeln Gefahrstoffe*), contain detailed provisions, for example, in relation to protection measures and investigation requirements.

Permits and regulator

Installations for the production, treatment and/or processing of asbestos or asbestos-based products require an Emission Control Act permit.

Asbestos waste (including asbestos in soil if excavated) is treated as hazardous waste, and therefore several official notifications (for example, to the road traffic authorities) must be made to transport it.

Penalties

Non-compliance with the regulatory regime can be sanctioned by imprisonment or a fine.

Contaminated land

14. What is the regulatory regime for contaminated land?

Regulator and legislation

The regulatory regime relating to land contaminated by hazardous substances is based on the Soil Protection Act. Federal and state water protection laws cover contaminated groundwater.

Several public authorities are responsible for enforcing the regime, and in this context they are known as the soil protection agencies. Identifying the relevant authorities depends on which environmental media are affected (soil, soil and air, groundwater and leachate) and how they are affected..

Investigation and clean-up

If the competent authority has sufficient evidence of contaminated land, it can order all potentially responsible parties to investigate the matter. If the investigations identify levels of contamination above certain threshold parameters (set out in a number of generally used guidelines, some of which are binding and some of which are not) then remediation measures such as clean-up, containment or monitoring can be ordered.

The standard of remediation that the soil protection agency can order depends on the sensitivity of the property's permitted use.

Penalties

Non-compliance with the regulatory regime, particularly a clean-up order, can be punished by a fine or, in severe cases, with imprisonment. The authorities can also carry out the necessary works themselves, at the cost of the responsible parties. The authorities' cost claim can be secured by a mortgage on the property.

See also *Question 5, Contaminated land and groundwater*.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

The following parties are potentially liable to investigate and remediate contamination, and the authority can pursue any of them (Soil Protection Act):

- The party that caused the residual contamination (the polluter), even if he no longer owns or occupies the property.
- The polluter's legal successor (for example, following a merger).
- The owner, lessee or any occupant of the relevant property even if he did not cause the contamination.
- Any former owner of the property ("eternal liability") if he both:
  - sold the property on or after 1 March 1999;
  - was aware of the residual contamination's presence when he sold the property.

In the first two bullet points, the party is referred to as a "disturber by conduct". In the third and fourth bullet points, the party is referred to as a "disturber in fact".

In circumstances where the corporate veil can be lifted, shareholders and parent companies may be liable, in line with established corporate and commercial law concepts. (The authorities have not yet tried to pursue shareholders and parent companies in practice.) Whether liability is as a disturber by conduct or a disturber in fact follows the entity whose liability the shareholder or parent assumes.

Owner/occupier liability

See above, *Liable party*.

Previous owner/occupier liability

See above, *Liable party*.

Limitation of liability

Considerable relief against liability is available for a party pursued by the authorities, including a statutory claim for compensation by, for example:

- A disturber in fact against a disturber by conduct (but a disturber by conduct cannot claim against a disturber in fact).
- A disturber by conduct (who has been held liable) against other disturbers by conduct that were not pursued by the soil protection agencies.

The soil protection agency must bear the costs of investigating unsubstantiated pollution allegations.

16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

A creditor cannot be found liable for the borrower's environmentally harmful conduct (in contrast to US law). This would breach the general principles of public law, particularly the principle of directness (*Unmittelbarkeitsgrundsatz*), which requires a direct link between conduct and liability.

Minimising liability

Lenders generally conduct due diligence to avoid lending on contaminated land.

17. Can an individual bring legal action against a polluter, owner or occupier?

A party who illegally contaminates another's land (whether directly or through migration of contaminants) is liable to pay compensation for the damage caused under the principles of violation of property rights (*section 823, paragraph 1, Civil Code*). In addition, a party suffering damage can seek an order to prevent further harm occurring in the future (*sections 906 and 1004, Civil Code*). A person whose land has been contaminated may also be able to claim for contamination removal against the responsible person (*section 823, paragraph 1, Civil Code and section 24, paragraph 2, Soil Protection Act*).

Environmental liability and asset/share transfers

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

When acquiring assets, any pre-acquisition liabilities associated with the assets generally remain with the seller.

A buyer's principal concern is the potential for incurring liability for any contamination that may be present on the target's properties. A buyer is potentially liable under the contaminated land regime as the property owner (*see Question 15*). If the contamination migrates onto nearby land, the buyer is also at risk of a civil claim from the owner of that land (for example, a claim under section 906 or section 1004 of the Civil Code).

Where the buyer is proposing to buy a business he should also consider whether:

- The business has all necessary environmental permits.
- The permits are transferable.
- The seller has complied with all applicable environmental laws.

While the buyer is not liable for pre-acquisition breaches of law or permits, the buyer must know if there are any issues to address to continue the business legally after the sale (for example, any necessary upgrades to plant or equipment). In addition, once the buyer owns the business, he must have the necessary operating permits. It is not a defence that the business was run by the previous owner without these permits.

Liabilities in asset acquisitions are often structured in the same way as in a share acquisition (*see below, Share sale*). Therefore, a buyer may contractually agree to assume the seller's pre-acquisition liabilities.

Share sale

When acquiring a company's shares, the buyer also generally acquires any liabilities incurred by the target, as liabilities remain with the target post-acquisition. This is true irrespective of whether the liabilities:

- Existed pre-acquisition.

- Arose post-acquisition but relate to the acts or omissions or circumstances pre-acquisition.

A buyer is primarily concerned about the risk of the target company bringing with it liability in relation to:

- The target's compliance with environmental laws and permits.
- Contamination on the target's current properties and on any properties it formerly owned, used or occupied.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

The seller remains responsible for all existing liabilities of the business as at the time of sale but the buyer may contractually agree to assume those liabilities.

The seller can also incur liability after the sale. For example, if the seller caused contamination on a property which it is selling, it continues to be potentially liable under the contaminated land regime after the sale, even if the buyer agrees to bear the risk of contaminated land liabilities (when it is advisable for the seller to obtain an indemnity for this from the buyer).

Share sale

Liabilities incurred by the target pre-sale (or post-sale but relating to acts or omissions pre-sale) remain with the target post-sale. The seller should, therefore, not be at risk of retaining any environmental liabilities post-sale. There is a small risk that if the seller had sufficiently direct involvement in the target's activities during the time he owned the target's shares, he could incur liabilities post-acquisition (that is, the corporate veil could be lifted, exposing shareholders to potential liability).

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Asset sale

In both an asset and a share sale, the seller must generally disclose known environmental matters, particularly soil or groundwater contamination, to a buyer. If the seller fails to do this, the buyer may have a claim in damages, which cannot be excluded contractually. The Anglo-Saxon principle of "buyer beware" is not a guiding principle of German law. Therefore, due diligence disclosure is usually thorough on environmental matters. A seller can also be liable to the buyer if he misrepresents or misleads the buyer by his conduct.

Share sale

See above, *Asset sale.*

21. Is environmental due diligence common in an asset sale/a share sale?

Scope

Although it is becoming increasingly common for environmental due diligence to be carried out in commercial transactions, much depends on:

- The nature of the target's activities.
- The parties' attitudes to environmental risk.
- Any time constraints.

For example, financial and private equity buyers tend to be more risk averse than trade buyers and may require more thorough environmental due diligence, as well as contractual protections (such as warranties and indemnities). The same is true of lenders, who typically take a cautious approach to environmental risk.

Areas which are typically covered are the following:

- Residual pollution and hazardous substances within buildings.
- Zoning status.
- Public building law aspects such as the required number of parking spaces and fire protection issues.
- Material permit requirements, particularly in relation to emission thresholds, transferability and limitation in time.
- Energy efficiency certificates and green building certificates (mainly in pure real estate deals).

Types of assessment

Environmental due diligence can involve the following activities (among others):

- Desk-top environmental assessment.
- Pre-contract enquiries of the seller.
- Reviewing information in a data room.
- Appointing environmental consultants to carry out detailed environmental assessments including compliance reviews and soil and groundwater investigations.

Environmental consultants

In some cases, sellers commission their own environmental reports for the sale and provide the buyer with copies of these, often to discourage buyers from insisting on warranties or indemnities. Buyers in these circumstances usually seek a letter of reliance or a collateral warranty from the seller's environmental consultants so that the buyer can rely on the reports. However, buyers often engage their own environmental consultants to assist in identifying material environmental risks.

When engaging environmental consultants, negotiation of their terms usually focuses on the:

- Scope of the review.
- Financial and time limits of the consultant's liability.
- Extent of the consultant's professional indemnity insurance cover.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

Whether sellers provide environmental warranties and/or indemnities to buyers in commercial transactions depends on a number of factors, such as:

- The nature of the target's business and the likelihood of significant environmental impacts.
- Whether significant environmental issues have been identified during due diligence.
- The parties' attitudes to the allocation of environmental risk.
- Whether it is an auction sale or a private agreement.
- The bargaining strength of each party.

Asset sale

A seller normally grants the following types of environmental warranties in an asset sale:

- The target business has all environmental permits necessary to operate the business.
- The target business has obtained and complied with applicable environmental laws and permits.
- The target business is not subject to any environmental proceedings, claims, investigations or complaints.
- So far as the seller is aware, there is no contamination or pollution present on any of the target's properties.
- The seller has disclosed all environmental reports relating to the target business or the properties.

Sellers usually seek to limit as many warranties as possible by referring to seller awareness and materiality. A time limit on claims under environmental warranties of two to three years is often agreed.

Share sale

Similar warranties and indemnities (see above, Asset sale) are usually agreed in a share sale. As the target being transferred to the buyer retains all liabilities and potential liabilities relating to historic operations of the business, the buyer can obtain additional warranties and indemnities, for example, in relation to the target's former properties.

23. Are there usually limits on environmental warranties and indemnities?

If the seller agrees to grant an environmental indemnity, this is generally limited to liabilities associated with any contamination present on the target's properties pre-sale. It usually covers costs incurred as a result of regulatory action and third party civil claims, and sometimes covers the costs of voluntary clean-up. Indemnities tend to be time-limited (typically, ten years or less).

Reporting and auditing

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Every person has the right to obtain environmental information from the environmental authorities provided an application is filed (section 3, paragraph 1, Environmental Information Act (*Umweltinformationsgesetz*)). It is not necessary for the applicant to have any legal or other interest worthy of protection to apply. Information can only be obtained if it is contained in information carriers such as files, data files, maps, plans, videos, pictures or sound storage mediums.

Public registers

There are no public registers aimed at comprehensively collecting environmental permits and/or contamination relating to a property.

Mid-level authorities operate contaminated land registers. However, these collect only the data the soil protection authorities have become aware of. A "clean" result of an enquiry to the contaminated land register therefore means that there is no information known to the authorities, it does not mean that the property is not contaminated.

Third party procedures

There is no comprehensive registers of third party procedures.

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

Environmental auditing is not compulsory. Establishing an environmental management system (*Umweltmanagementsystem*) is voluntary. However, the significance attached to proactive environmental management means that this system is already expected of many companies in Germany. Two types of environmental management systems dominate the market:

- The EC Eco-Audit Ordinance (EMAS), that was recently re-enacted and is implemented by the Environmental Audit Act (*Umweltauditgesetz*).
- The international environmental management systems standard, ISO 14001:1996.

The considerable initial differences between them have now been significantly reduced through EMAS II. Both systems have a common purpose in creating incentives for organisations to voluntarily undertake continual improvements in their contribution to environmental protection.

Reporting requirements

Environmental permits frequently contain a reporting condition. For example, Emission Control Act permits must contain a condition that emissions are monitored and results provided to the competent authorities. Public reports on environmental performance are only required from the few facilities subject to Directive 96/82/EC on the control of major accident hazards involving dangerous substances (Seveso II Directive) (implemented by the Major Hazard Ordinance (2000) (*Störfallverordnung*)). In addition, reporting can be required under contractual relationships or may be necessary in light of the increasing trend for corporate social responsibility.

Operators of large-scale plants now have reporting obligations in relation to results of emission measurements, non-compliance with permit requirements and pollution incidents (unless such reporting is required under other legal provisions such as the Major Hazard Ordinance) (*section 31 Emission Control Act*).

The implementation of Directive 2003/51/EC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings (Accounts Modernisation Directive) will require companies to report on environmental performance in a business review. To date, the directive has not been implemented into German law.

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

There is no general obligation to notify the competent environmental authorities that an environmental incident has occurred, unless the facility is subject to the Seveso II Directive. Many federal states require reporting of soil contamination. However, obligations are usually incorporated in the relevant Emission Control Act permit to notify the environmental authorities of an incident. If the incident caused death, major injury or disease, the relevant workers' protection organisations (*Berufsgenossenschaften*) must also be notified.

See also *Question 5, Contaminated land and groundwater*.

27. What access powers do environmental regulators have to access a company?

All environmental laws include specific powers for regulatory authorities to:

- Access a company's documents.

- Inspect a site.
- Have questions answered.

However, the authorities do not (apart from criminal law proceedings) have the power to interview a specific person at their discretion. All regulatory powers must be used according to the constitutional principle of proportionality (*Verhältnismäßigkeit*) and must not be abused.

Environmental insurance

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

Liability insurers do not offer special insurance for residual pollution. The insurance market is dominated by an insurance model introduced by third party liability insurers in 1991.

A third party insurance policy covers:

- Damage to persons and property caused by environmental pollution of air, water or land, if resulting from an incident.
- Certain monetary losses.

Future gradual operational pollution is not covered under the insurance and early salvage costs are no longer reimbursed.

The policy is triggered by the first occurrence of one of the following:

- Personal injury.
- Property damage.
- Damage to financial interests covered by the policy.

Obtaining insurance

The insurance market currently includes a few special and innovative insurance packages such as remediation cost cap insurance and other specific solutions. Remediation cost cap insurance covers the risk that the expenditure for clean-up work exceeds an agreed amount.

Insurance against residual pollution is available. However, it is not usually required.

Environmental tax

29. What are the main environmental taxes in your jurisdiction?

Three types of environmental levies can be identified, depending on the aim of their use.

Environmental financing levies

Environmental financing levies raise revenue to directly finance environmental protection measures. This is usually described as a special levy earmarked for a specific purpose, determined by statute. An example is the "water *pfennig*" levied in Baden-Württemberg by the water supply and regulation authorities as a consideration for withdrawing groundwater.

Special levies create constitutional law problems, as they are not regulated in the Constitution nor by straightforward statutes, such as the Tax Code. The Federal Constitutional Court has declared several regulations of the federal states concerning environmental levies to be unconstitutional and therefore void, such as the entire Hesse Hazardous Waste Tax Act (*Hessisches Sonderabfallabgabengesetz*). The Court held that there was no constitutional basis for the state's Act. However, Baden-Württemberg's water pfennig was considered to be constitutionally sound.

Environmental guidance levies

The purpose of environmental guidance levies is to encourage environmentally sound conduct by applying financial disincentives to polluting activities.

Typical of this type of levy is the wastewater levy under the Waste Water Levy Act (*Abwasser-Abgabengesetz*), which is charged for introducing wastewater into a watercourse. It has been qualified as a special levy without constitutional issues. It is payable by the operator of a facility discharging wastewater into public water. Calculation of the tax and the applicable tax rates depend on the amount of water, and the amount and type of pollution. For example, in the case of Phosphorus the discharge of more than 0.1 milligram of Phosphorus per litre and 15 kilograms per year will lead to a levy of as much as EUR35.79 per three kilograms of Phosphorus.

Environmental compensation levies

Environmental compensation levies are usually raised to provide compensation for damage caused to the environment, payable by those causing the damage.

These levies are rare and examples include the nature protection levies that have been included in most federal states (*section 8, paragraph 9, Nature Protection and Landscape Conservation Act*), and represent compensation for forest clearance.

Tax liability

Tax liability depends on the relevant tax, no general statement is possible.

Tax rates

Tax rates depend on the relevant tax, no general statement is possible.

Reform

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

The current German Government and relevant Ministries intend to reform the Renewable Energies Act (EEG). Under the EEG, costs of providing guaranteed remuneration for renewable energy generators are passed on to certain electricity end-users by EEG-allocation (EEG-*Umlage*). The quantity of renewable energy subject to the EEG-allocation has been continuously increasing in the last few years. This has lead to high rising electricity costs for private households and also for the smaller companies to which the EEG-allocation applies. Controversially many energy-intensive companies are not subject to these EEG-allocation costs. Following the elections in September 2013, it is still not certain which parties will form the next German Government. As a result it is not known how the conflict between increasing energy costs and the promotion of renewable energy (particularly off-shore wind energy) will be resolved. In addition, it will also be necessary to take into consideration the guidelines on the promotion of renewable energy which are expected to be published by the European Commission in the near future.

The regulatory authorities

There is no principal environmental regulator. State authorities (usually district or county authorities) guided by their respective State Environmental Ministry carry out day-to-day operational activities. Their competence is usually defined geographically and the first step towards identifying the relevant authority is generally to contact the local municipality.

Federal Ministry of the Environment (*Bundes-Umweltministerum*)

Main activities. The Federal Ministry of the Environment only has responsibility over federal agencies' activities, except in relation to nuclear energy.

W *www.bmu.de/english*

Federal Environmental Agency (*Bundesumweltamt*)

Main activities. The Federal Environmental Agency only has certain responsibilities over the private sector associated with emission trading.

W *www.umweltbundesamt.de/index-e.htm*

Online resources

There are no official translations of environmental laws into English. The following resources are available:

Federal resources

W *www.gesetze-im-internet.de*

Description. This website is officially maintained by the German Federal Ministry of Justice.

State resources

Many of the 16 federal states' Ministries of Justice also maintain websites, for example, Bavaria and Hesse:

W *www.gesetze-bayern.de for Bavaria*.

W *www.rv.hessenrecht.hessen.de* for Hesse.

Appendix: Author details

Author

David Elshorst
Partner

Qualified. Germany, 1996

Areas of practice.
Environmental law; emission trading; administrative/public law; real estate law.

T +49 6971 9901
E: david.elshorst
@cliffordchance.com