

Austria

Christian Schmelz and Bernd Rajal,
Schönherr Rechtsanwälte GmbH

www.practicallaw.com/0-422-1535

REGULATORY FRAMEWORK

1. Please briefly set out the key environmental legislation and regulatory authorities in your jurisdiction.

In Austria, environmental law is mainly based on administrative (public) law. Therefore, an overview of the Austrian environmental regulatory framework requires an understanding of the constitutional and administrative legal system.

Austria is a federal state. Government responsibilities are shared by three levels of territorial authority:

- Federal state (*Bund*).
- Nine provinces (*Länder*).
- Local authorities/municipalities (*Gemeinden*).

The distribution of the major government responsibilities between the federal state and the provinces is determined by the Federal Constitution (*Bundes-Verfassungsgesetz*).

Responsibility for the environment is shared between the federal state and the provinces (*Federal Constitution*). Some environmental issues, such as constructing and maintaining waterways, are entirely the responsibility of the federal state (direct federal administration (*unmittelbare Bundesverwaltung*)). Other environmental issues, such as nature conservation, rest entirely with the provinces. In other areas, such as waste management and forestry, the federal state is responsible for legislation and the provinces for administration (indirect federal administration (*mittelbare Bundesverwaltung*)).

Accordingly, environmental law is complex and a large number of regulatory authorities are responsible for its enforcement (see box, *The regulatory authorities*):

- At federal level, the district authorities (*Bezirksverwaltungsbehörden*) and the nine governors of the provinces (*Landeshauptmann*) are competent for administering environmental law.
- For other federal environmental issues, the Ministry for Agriculture, Forestry, Environment and Water Management (*Bundesminister für Land-und Forstwirtschaft, Umwelt und Wasserwirtschaft*) is the competent authority.

- At provincial level, the district authorities (*Bezirksverwaltungsbehörden*), the governments of the provinces (*Landesregierung*) and the municipalities (*Gemeinden*) are responsible for administering environmental law.
- The Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*) of each province hears appeals on certain environmental matters.
- The Independent Environmental Tribunal (*Umweltsenat*) hears appeals for projects involving an environmental impact assessment.

Additionally, the Federal Environment Agency (*Umweltbundesamt*) is in charge of monitoring and recording the environmental situation in Austria.

The ombudsman for the environment preserves the environmental interests of the province and participates as a legal party in certain plant permit procedures (see *Question 5*). In this role, the ombudsman has the right to appeal against decisions of the regulatory authority competent to issue the plant permit.

The main national laws and regulations relating to the environment are the:

- Environmental Impact Assessment Act 2000 (*Umweltverträglichkeitsprüfungsgesetz 2000*).
- Trade Act (*Gewerbeordnung*).
- Federal Waste Management Act 2002 (*Abfallwirtschaftsgesetz*).
- Nine Waste Management Acts of the provinces (*Landesabfallwirtschaftsgesetze*).
- Waste Register Regulation (*Abfallverzeichnisverordnung*).
- Waste Treatment Regulation (*Abfallbehandlungspflichtenverordnung*).
- Water Act (*Wasserrechtsgesetz*) and more than 35 regulations on water.
- Clean-up of Contaminated Sites Act (*Altlastensanierungsgesetz*).
- Directive on Funding Clean-Up of Contaminated Sites 2008 (*Förderungsrichtlinien 2008 für die Altlastensanierung oder-sicherung*).

- Forest Act 1975 (*Forstgesetz 1975*).
- Chemicals Act 1996 (*Chemikaliengesetz 1996*) and the Chemicals Regulation 1999 (*Chemikalienverordnung 1999*).
- Administrative Criminal Act 1991 (*Verwaltungsstrafgesetz 1991*).
- Criminal Act (*Strafgesetzbuch*).
- Air Pollution Impact Act (*Immissionschutzgesetz-Luft*).
- Ozone Act (*Ozongesetz*).
- Federal Act on a System for Trading Allowances (*Emissionszertifikatgesetz*).
- Industrial Accident Regulation (*Industrieunfallverordnung*).
- Environmental Subsidies Act (*Umweltförderungsgesetz*).
- Air Pollution Act for Boiler Facilities (*Emissionsschutzgesetz für Kesselanlagen*).
- Mineral Resources Act (*Mineralrohstoffgesetz*).
- Federal Environmental Liability Act (*Bundes-Umwelthaftungsgesetz*).

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

Environmental issues are taken very seriously by the government and by the public. Consequently, the regulatory authorities strictly enforce environmental requirements.

The regulatory authorities can impose administrative fines or withdraw the plant permit (see *Question 5*) for non-compliance with environmental provisions. The withdrawal of the plant permit can even result in temporary or final closure of the plant.

Further, regulatory authorities have the right to inspect the plant for environmental compliance purposes and can impose safety precautions and coercive measures (for example, closing down machines and confiscating goods).

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

Environmental interests are broadly represented by different NGOs (for an overview of active NGOs, see www.cpc.at/infocenter/in_Links.asp). The influence of NGOs has increased since they obtained the right to participate as legal parties to certain administrative (environmental) proceedings. This gives NGOs the right to be heard by the regulatory authority and to appeal against the authorities' decisions. The participation of NGOs can therefore cause substantial delays in the permit procedure.

In addition to NGOs, some citizens' groups are also active. Citizens' groups usually concentrate on single projects relevant to the environment and can also participate as legal parties to environmental impact assessment proceedings.

EMISSIONS

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?

There is no integrated permitting regime in Austria. Environmental requirements are spread over a large number of laws and regulations.

However, the permit procedure for plants under the Trade Act provides for a consolidated permit procedure (*konzentriertes Genehmigungsverfahren*). The plant permit (*Betriebsanlagengenehmigung*) covers most of the plant's activities relevant to environment, such as emissions to air and water, but additional permits may be required under provincial laws. For example, most outdoor plant projects require an additional permit according to the respective nature protection law of the province concerned.

Additionally, a separate water use permit may be required (see *Question 6*) or an environmental impact assessment permit (EIA permit). There is also a consolidated permit procedure under the EIA permit (see *Question 10*).

5. If there is an integrated permitting regime, please provide a brief overview of it, in particular:

- What permits are needed and which regulator issues them?
- How long do permits last?
- Are there restrictions on transferring permits?
- What are the penalties for non-compliance?

Permits

There is no integrated permitting regime controlling the environmental impacts of industrial installations and plants. The only exception is set out in the EIA Act (*chapter 10, Environmental impact assessments*). A partially consolidated permitting procedure is provided in the Trade Act and the Federal Waste Management Act. For example, in the Trade Act, most of the federal law issues are "stapled together" in a single consolidated plant permit.

Plant permits are required if the activities of the plant might (*Trade Act*):

- Endanger the lives, health or property of neighbours or employees of the plant.
- Disturb neighbours due to noise, dust, smoke or other emissions.
- Disturb public institutions.
- Endanger water quality.

In most cases, the plant permit contains numerous conditions and limitations, such as emission limits for air or water pollution.

Duration of permits

In principle, a plant permit is issued for an unlimited period of time. There are only a few exceptions, where plant permits are issued temporarily and must be renewed periodically (for example, permits under the Water Act). However, regulatory authorities can review plant permits *ex officio* at any time. Particularly in response to the findings of a permit review, the regulatory authority can amend permit conditions because additional conditions are needed to deal with new matters or where compliance assessment has identified a need to do so. According to the national IPPC rules, the regulatory authorities must review the permits of IPPC installations periodically. Permit reviews are required to check whether permit conditions continue to reflect appropriate BAT (best available techniques) standards. As the BAT will continually change, operators of IPPC plants must adapt or change parts of the plant from time to time. The regulatory authorities have the right to update and amend existing plant permits to make sure that BAT are applied by the IPPC plants.

Transfer of permits

Generally, environmental permits are not transferable. The plant permit is connected to the plant, and therefore remains with the plant regardless of a change in operator or owner of the plant.

Plant permits can also be issued by the government of a province as part of the EIA permit procedure (see *Question 10*).

Penalties

The penalties for non-compliance include administrative fines or compulsory measures, such as the closure of the plant by the regulatory authority.

6. Please summarise the regulatory regime for water pollution (whether part of an integrated regime or separate). In particular:

- What permits or other authorisations are required and which regulator issues them?
- Are any activities prohibited (such as causing or failing to prevent water pollution)?
- Can the regulator require a polluter to clean up or pay compensation for water pollution?
- What are the penalties for non-compliance?

Water pollution is mainly regulated at federal level, particularly by the Water Act and by specific regulations concerning wastewater disposals.

The Water Act differentiates between publicly owned water (*öffentliches Gewässer*) and privately owned water (*Privatgewässer*). Publicly owned water can be used by everyone without special authorisation, provided that the use does not exceed general use (for example, bathing and watering). If the intended use exceeds general use, a permit is required (water use permit). For example, the operation of a plant which is linked to a specific water use (*Wasserbenutzung*) or water influence (*Einwirkung auf Gewässer*)

must be permitted by the regulatory authority, such as water use for production facilities or wastewater disposal to bodies of water.

The same applies to privately owned water. Water use exceeding general use is prohibited unless the user holds a water use permit. Unlike publicly owned water, the use of privately owned water is generally reserved for the owner of the land. Therefore, use of private water requires the landowner's consent.

At federal level, the district authorities (*Bezirksverwaltungsbehörden*) are generally the competent authority to issue water use permits. However, there are many exceptions to this general rule.

In principle, a water use permit is only issued if the intended use will not significantly impair public interests, as defined in section 105 of the Water Act. Further, the application of BAT is a precondition to obtaining a water use permit.

For wastewater disposal, the relevant emissions limits, as determined by specific regulations, must not be exceeded.

The regulatory regime for water pollution is further influenced by Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive). The Water Act has adopted most of the Water Framework Directive's provisions concerning the protection and improvement of waters. For example, it provides a general prohibition on impairing the condition of waters. The impairment of waters requires a permit which is granted only in exceptional cases under stringent conditions. The regulatory authority can also update and amend existing water use permits to improve the condition of waters.

The Water Act provides a general duty of care for water. Anyone whose activities may impact water (including groundwater) must take precautions to avoid contamination or other hazards to water. If contamination or other damage occurs, the polluter can be ordered to clean up the contaminated water, or to bear the clean-up costs.

A polluter can be punished by administrative fines imposed by the regulatory authority.

The Federal Environmental Liability Act applies to direct or indirect damage and imminent threat of damage to the aquatic environment resulting from occupational activities, where a causal link can be established between the damage and the activity. If there is an imminent threat of damage to the aquatic environment, the competent authority will require the operator (the potential polluter) to take the necessary preventive measures, or will take such measures itself and recover the costs incurred. If there is damage to the aquatic environment, the competent authority will require the operator concerned to take the necessary restorative measures, or will take such measures itself and recover the costs incurred. Where several instances of environmental damage have occurred, the competent authority can determine the order of priority according to which they must be remedied. The Federal Environmental Liability Act is aimed at restoring the environment to how it was before it was damaged. For this purpose, the damaged natural resources or impaired services must be restored or replaced by identical, similar or equivalent natural resources or services.

7. Please summarise the regulatory regime for air pollution (whether part of an integrated regime or separate). In particular:

- **What permits or other authorisations are required and which regulator issues them?**
 - **Are any activities prohibited (such as discharging certain substances into the air without a permit or causing air pollution)?**
 - **Can the regulator require the polluter to clean up or pay compensation for air pollution?**
 - **What are the penalties for non-compliance?**
-

The EIA Act, the Trade Act, the Air Pollution Act for Boiler Facilities and so on provide provisions to prevent and reduce air emissions of industrial facilities and plants.

The Air Pollution Impact Act deals with areas that are heavily affected by air pollution. For breach of mandatory limit values for public health, air redevelopment areas (*Luftsanierungsgebiete*) are defined. In these areas, it is necessary for the regulatory authority to take air pollution reduction measures to comply with the limits or targets. These measures are compiled in air quality programmes which describe how the air pollution reduction measures are bringing concentrations below the limits or targets of the Air Pollution Impact Act.

The limits or targets for air pollution determined by the Air Pollution Act must be considered in the consolidated plant permit procedure (see *Question 5*), as well as in EIA permitting proceedings (see *Question 10*).

CLIMATE CHANGE

8. Please provide a brief overview of emissions trading schemes in your jurisdiction, including any national targets and carbon allowances systems. Is your jurisdiction party to international agreements on this issue and how have they been implemented into your national law?

Austria is a signatory to the 1997 Kyoto Protocol, under which the EU has agreed to lower emissions of carbon dioxide between 2008 and 2012 by 8% compared to 1990 levels.

In the EU, Austria has agreed to lower its carbon dioxide emissions by 13%. To fulfil its Kyoto Protocol obligations, the EU established an emission trading system (EU ETS) under Directive 2003/87/EC, establishing a scheme for greenhouse gas emission allowance trading within the Community (Emissions Trading Directive). The Emission Trading Directive has been implemented by Austria by the Federal Act on a System for Trading Allowances (*Emissionszertifikatgesetz*).

The EU ETS applies to specified heavy industrial activities and energy generators. It establishes a mandatory cap and trade system which, in Austria, requires participating companies to obtain a licence from the governor of the province or district authority to discharge specific emissions.

Participants are allocated EU allowances (EUAs) for their licence by their member state for the relevant compliance period, free of charge. Each EUA permits the emission of one tonne of carbon dioxide. Companies emitting more than their allocated allowance can buy additional allowances through the EU ETS. Operators must submit sufficient EUAs to cover their emissions for the year and failure to comply results in a penalty.

The EU ETS is split into compliance periods:

- Phase 1 runs from 1 January 2005 until 31 December 2007.
- Phase 2 runs from 1 January 2008 until 31 December 2012.
- Phase 3 runs from 1 January 2013 until 31 December 2020.

Member states must draw up a national allocation plan (NAP) specifying the number of EUAs they require for the compliance period, and the allocation per installation. The NAP is to be approved by the European Commission (Commission). On 2 April 2007 the Commission adopted a decision on Austria's NAP for 2008 to 2012 (NAP II). In its decision, the Commission required Austria to reduce its proposed cap by 2.1 million tonnes of carbon dioxide equivalent to 30.7 million tonnes per year. The Commission also required changes to Austria's NAP concerning the:

- Application of preferential allocation rules in the form of differentiated compliance factors for selected industries.
- Proposed extent of companies' use of credits from emission-reduction projects carried out in third countries under the Kyoto Protocol's flexible mechanisms.

Austria must ensure that using these credits does not add more than 10% to its annual allocation.

Austria has adapted NAP II in line with the Commission decision. The reduction of carbon dioxide equivalent amounts to a 6.4% reduction of free of charge certificates and was allocated to the energy sector and other industry sectors in equal shares. On 12 October 2007, the Federal Minister for Agriculture, Forestry, Environment and Water Management (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*) enacted the national regulation on the allocation of emission certificates for 2008 to 2012. This regulation is the basis for individual allocation of certificates to plants.

According to the Austrian allocation plan and the respective ordinance, Austria will offer for sale by auction 500,000 EUAs annually from 2009, totalling 2 million EUAs in total during the second trading period 2008 to 2012 (1.3% of the total amount). The first auction took place in March 2009.

Austria also participates in international emission trading by linking the national Emission Trade Register with the international register of the UN at the Climate Secretariat in Bonn. The Austrian Emission Trade Register is operated by the Federal Environmental Agency (*Umweltbundesamt*) and ECRA (Emission Certificate Registry Austria GmbH).

EU ETS 2013 onwards

The revised ETS will apply from the start of the third trading period on 1 January 2013. It provides that EUAs will no longer

be given to industry for free, but will be auctioned from 2013 onwards. ETS sectors must start by buying 20% of their emissions permits at auctions in 2013. That rate will rise gradually to 70% in 2020, with a view to reaching 100% in 2027. In future, specific energy intensive sectors will still receive a certain proportion of the EUAs free of charge. However, power producers must acquire all of their emissions allowances at auctions.

9. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

There are no mandatory targets for the reduction of greenhouse gas emissions from buildings. However, the Building Acts of the provinces (*Bauordnungen der Länder*) provide minimum energy efficiency criteria for the engineering and construction of new buildings. To be eligible for construction promotion (*Wohnbauförderung*), energy efficiency standards must go beyond the best available techniques.

ENVIRONMENTAL IMPACT ASSESSMENTS

10. Please provide a brief overview of the requirements to carry out environmental impact assessments (EIAs) for certain projects (for example, construction of an oil and gas facility). In particular:

- **What type of projects and impacts are covered?**
- **Are permits or other documents required before the project can start and which regulator issues them?**
- **What are the penalties for non-compliance?**

Austria has implemented Directive 85/337/EEC (as amended) on the assessment of the effects of certain public and private projects on the environment (EIA Directive) into national law through the Environmental Impact Assessment Act 2000 (EIA Act).

The types of activities subject to environment assessments are listed in Annex 1 of the EIA Act. In particular, the following may require an assessment (*EIA Act*):

- Waste management projects, for example, hazardous waste treatment plants.
- Infrastructure projects, for example, constructions of roads or railways.
- Energy plants, for example, oil and gas facilities, thermal power stations, combustion plants and plants for harnessing wind power.
- Water projects, for example, hydropower plants.
- Plants for chemical production.

Under certain circumstances, changes to these plants may require an EIA as well. The regulatory authority in charge of the EIA proceeding is normally the relevant government of the province.

The operator of a plant listed in Annex 1 of the EIA Act must apply for a specific EIA permit (*UVP-Genehmigung*). In this case, the regulatory authority applies a consolidated permit procedure, which means that the EIA permit will incorporate all other permits required by the project, such as a plant permit under the Trade Act (*see Questions 4 and 5*), water use permit under the Water Act (*see Question 6*) and permit under nature protection law.

The main steps of the EIA proceeding are as follows:

- The EIA permit application is filed, including the environmental impact statement.
- The application and environmental impact statement are examined by the authority.
- There is a public consultation period (six weeks).
- Environmental impact expertise is prepared.
- There is a public consultation on the environmental impact expertise (four weeks).
- There is a hearing of parties.
- The authority makes a final decision (*UVP-Bescheid*).

The environmental impact statement must be drafted by the applicant and contain a detailed description of the project, including:

- Information on the site, design and size of the project.
- Physical characteristics of the project.
- An outline of the production and processing procedures.
- Data on expected residues and emissions.
- Estimated increase in the concentration of pollutants.

The environmental impact expertise is drafted by the authority in charge, taking into consideration the environmental impact statement and the results of the expert examinations.

The parties involved in EIA proceedings include:

- The project applicant.
- Ombudsman for the environment.
- Water management planning body.
- Any neighbours that may be affected.
- The relevant municipality.
- Citizens groups.
- NGOs.

At the conclusion of the EIA proceeding, the plant will either be granted an EIA permit, or a permit will be denied. The Independent Environmental Tribunal hears EIA proceeding appeals.

If the operator or the authority failed to apply for an EIA proceeding, and one is required under the EIA Act, any permits received in other administrative proceedings are not effective.

The operator of a plant can be fined if he operates a plant without the required EIA permit.

WASTE

11. Please provide a brief overview of the regulatory regime for waste. In particular:

- What permits or other authorisations are required and which regulator issues them?
- What activities are prohibited (such as storing or disposing of waste without a permit)?
- Do operators need to meet certain criteria (such as having sufficient financial means to operate landfills and other waste disposal sites)?
- Are there special rules for certain types of waste (such as hazardous waste or electrical equipment)?
- What are the penalties for non-compliance?

The regulatory regime for waste is contained in, among others, the Federal Waste Management Act and the respective Waste Management Acts of the provinces.

Waste is defined as movable goods which are thrown away or of such quality that their collection, storage, transport or treatment may affect the public interest (such as human health, flora and fauna or the land), or which may cause inconvenience. Waste can be classified as either hazardous or non-hazardous.

The Federal Waste Management Act mainly refers to the handling of hazardous waste and contains special requirements for waste treatment plants. Waste treatment covers the recovery and the disposal of waste. In most cases, operating a waste treatment plant requires a permit issued by the competent regulatory authority (the governor of the province or district authority). For certain waste treatment plants, the operator must apply for an EIA permit (see *Question 10*).

Waste treatment must comply with the treatment principles of the Federal Waste Management Act. There are special treatment obligations for:

- Waste containing:
 - polychlorinated biphenyls (PCB);
 - waste oil; or
 - persistent organic pollutants.
- Dumping hazardous waste.

The Waste Treatment Regulation (*Abfallbehandlungspflichtenverordnung*) provides minimum requirements for the storage, collection and treatment of special kinds of waste, such as electronic waste, accumulators, PCB and asbestos.

Austria has implemented Directive 02/96/EC on waste electrical and electronic equipment (WEEE Directive) through the Federal Waste Management Act. The municipalities must establish waste collection sites for electrical and electronic equipment. Producers of such equipment must finance the collection system.

ASBESTOS

12. Please provide a brief overview of the regulatory regime for asbestos in buildings. In particular:

- What activities are prohibited?
- What are the main obligations (such as investigating the presence of asbestos and risk assessments for employees) and who is liable to carry them out?
- What permits or other authorisations are required and which regulator issues them?
- What are the penalties for non-compliance?

Austria has adopted Directive 83/477/EC on the protection of workers from the risks related to exposure to asbestos at work. The manufacture, use and placement on the market of asbestos or products containing asbestos is generally prohibited (*section 2, Regulation concerning prohibited chemicals (Chemikalien-Verbotsverordnung) 2003*).

The Regulation concerning thresholds for cancer-causing substances used at work (*Grenzwertverordnung 2006*) provides different obligations for handling asbestos. Employers must safeguard and protect the health of their employees and must announce any intended work with asbestos to the competent Labour Inspection Authority. Exposure to, and working with, asbestos is only permitted as an exception, and only under stringent conditions.

Employees must be informed about the health risks of handling asbestos, and employers must investigate and regularly monitor the concentration of asbestos in the workplace. As asbestos may qualify as hazardous waste under the Federal Waste Management Act, a special permit may be required for its removal or handling.

For non-compliance with the provisions relating to the safeguard and protection of employees, employers can be fined by the competent regulatory authority. Premises contaminated with asbestos can also be closed down.

CONTAMINATED LAND

13. Please provide a brief overview of the regulatory regime for contaminated land. In particular:

- Which regulator is responsible and which legislation applies?
- In what circumstances can a regulator require the investigation and clean-up of contaminated land?
- What are the penalties for non-compliance?

There is no single regulatory regime for contaminated land. Provisions dealing with soil and groundwater pollution are spread over numerous laws and regulations, such as the:

- Clean-up of Contaminated Sites Act.

- Trade Act.
- Water Act.
- Federal Waste Management Act.
- Forest Act.
- Federal Environmental Liability Act.

The Clean-up of Contaminated Sites Act and the Austrian Directive on Funding Clean-Up of Contaminated Sites 2002 (*Förderungsrichtlinien 2002 für die Altlastensanierung oder -sicherung*) contain provisions for the clean-up of contaminated sites. However, the Clean-up of Contaminated Sites Act is only applied if no other law or regulation provides a suitable legal basis for clean-up.

The Directive on Funding Clean-Up of Contaminated Sites contains provisions concerning the public funding of clean-up.

There is no specific regulator responsible for handling land contamination. This depends on the legislation used to require clean-up. The district authority is the competent authority under the Clean-up of Contaminated Sites Act.

The penalties for non-compliance differ from case to case.

14. In relation to liability for contaminated land:

- **Which party is liable for carrying out or paying for environmental investigation and clean-up?**
 - **Can an owner or occupier who has not caused contamination be liable for investigation and clean-up of contamination on their land?**
 - **Can previous owners or occupiers be liable for contamination they have caused in the past?**
 - **Are there limits on liability or ways for a party to limit its liability?**
-

Liable party

The main principle concerning liability for contaminated land is the “polluter pays” principle. This means that whoever caused the pollution is primarily responsible for its clean-up. Therefore, when a contaminated site is identified, the regulatory authority must first determine if the polluter can be found and held liable for clean-up. Polluter is defined in the broadest sense, and includes every person who causes pollution.

Owner or occupier liability

The competent authority can force the polluter to undertake clean-up and remediation of the land. If the polluter is not available (for example, if the polluter is unknown, no longer exists or is insolvent), the property owner can have secondary liability. A property owner who is not a polluter himself is only liable if he concurred with the contaminating behaviour, or if he tolerated it by not taking any reasonable measures against it. A property owner can only be held liable if he was, or should have been, aware of the contamination.

Limits on liability

Polluter liability is a strict liability. However, public funding assistance may be available for remediation and safeguard measures under the Directive on Funding Clean-Up of Contaminated Sites. Under this directive, only clean-up of contamination which occurred before 1 July 1989 can be funded. Funding for clean-up is not available if the applicant seeking funding caused the contamination in a premeditated or grossly negligent way. For areas of high public interest, public funding may be granted for up to 95% of the eligible clean-up costs.

Federal Environmental Liability Act

The Federal Environmental Liability Act applies to direct or indirect contamination of the land which creates a significant risk to human health. The liability scheme applies to damage resulting from occupational activities, where a causal link can be established between the damage and the activity. Where there is an imminent threat of environmental damage, the competent authority will require the operator (the potential polluter) to take the necessary preventive measures, or will take such measures itself and recover the costs incurred. Where contamination has occurred, the competent authority will require the operator concerned to take the necessary restorative measures, or will take such measures itself and recover the costs incurred. Where several instances of environmental damage have occurred, the competent authority may determine the order of priority according to which they must be remedied. For damage affecting the land, the Federal Environmental Liability Act requires that the land concerned be decontaminated until there is no longer any serious risk of negative impact on human health.

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

Generally, a lender cannot be held liable for land contamination because, in principle, liability for contaminated land is linked to the polluter (*see Question 14*). However, if a lender becomes the owner of a contaminated property after foreclosure on a mortgage, it could incur secondary liability if it was or should have been aware of the contamination.

16. Can a private individual bring legal action against a polluter, owner or occupier (for example, for damage caused by the movement of contamination onto his land)?

The General Civil Code provides for strict private liability if a property impacts a neighbouring property to a level that exceeds what is customary for that locality, and substantially impairs the neighbouring property. The affected neighbour can file an action for an injunction. However, if the impact to the neighbour's property is caused by a mining operation or by an administratively licensed facility, the neighbour cannot seek injunctive relief, but can claim damages if the facility exceeds its permitted emissions.

Tort law provides for civil claims for environmental damage resulting from intentional or negligent infringement of environmental

protection provisions of administrative law. However, this is only available if the particular provision aims to protect individual goods.

Contamination matters are primarily regulated by administrative law, not civil law. In any case, private individuals can inform the competent regulatory authority about contamination without any risk of costs. The authority must then take action against the polluter. For this reason, most cases of contamination are handled in administrative proceedings.

Other administrative provisions contain strict private liability, for example, liability for damage caused by radioactivity (*Act on Nuclear Liability (Atomhaftungsgesetz)*).

TRANSACTIONS

17. In what circumstances can a buyer inherit pre-acquisition environmental liability in:

- An asset sale?
- The sale of a company (share sale)?

Asset sale

Under Austrian law, a distinction is made between public law and civil law liabilities. For civil law liabilities, a company's buyer has mandatory joint and several liability with its seller to the company's creditors for any pre-existing debts of which the buyer knew, or should have known, at the time of acquisition (*section 1409, General Civil Code*). Consequently, the buyer may be liable for civil environmental damage claims, even when the environmental damage has been caused before acquisition, if the buyer knew or should have known about the damage.

Further, a person acquiring a company and continuing its business under the existing company name may be jointly and severally liable with the seller for any pre-existing debts which the buyer knew or should have known of at the time of acquisition (*section 25, Commercial Code*). Such debts could include civil environmental liabilities. Unlike section 1409 of the General Civil Code, liability under section 25 of the Commercial Code is not limited and can be excluded by agreement between the parties. However, exclusion is only effective against third persons (creditors) if the agreement is registered in the Commercial Register or all creditors are individually notified.

Public environmental law liabilities, such as clean-up of contaminated land, remain with the polluter and, generally, are not inherited by the buyer. However, the buyer and subsequent owners of contaminated land or water may be liable for its clean-up under certain conditions (for example, if it knew, or should have known, of the situation causing the contamination).

The buyer may also have to tolerate clean-up measures taken by the relevant authority. This could result in a temporary restriction of land use or temporary closure of a plant or parts of a plant.

Share sale

A share sale does not change the identity of the company.

Therefore, liabilities of the company under public environmental law are not affected by change of ownership.

18. In what circumstances can a seller retain environmental liability after disposal in:

- An asset sale?
- A share sale?

Asset sale

Environmental liabilities remain with the polluter. Therefore, the seller remains liable for environmental damage caused by him before the sale. However, the seller and buyer can agree on a liability clause, where the buyer is liable for any environmental damage occurring after disposal which, from the authority's point of view, the seller would be liable for.

Share sale

A share sale does not change the identity of the company. Therefore, environmental liabilities remain with the company. The seller of shares usually cannot be held liable for environmental damage caused by the company.

19. Does a seller have to disclose environmental information to the buyer in:

- An asset sale?
- A share sale?

In an asset or a share sale, there is no general obligation to disclose environmental information to the buyer. However, the General Civil Code provides that in selling goods, the seller guarantees the good's features and standard characteristics. Therefore, if the seller does not disclose any potential or existing contamination of the property acquired, and the buyer is not aware of the contamination, the buyer has a statutory claim (*Gewährleistungsanspruch*) against the seller. The buyer can claim a reduction in the purchase price or can even rescind the contract.

20. Is environmental due diligence common in an asset sale or a share sale? If yes:

- What areas are usually covered?
- What types of environmental assessments are available?
- Are environmental consultants usually used? If so, what issues should be covered in an engagement letter (for example, limit on consultant's liability)?

Areas covered

Environmental due diligence is common in Austria, particularly when a large or complex plant is targeted. Environmental due diligence usually consists of an investigation into the following:

- Environmental permits, to ensure all required permits have been obtained and their conditions adhered to.

- Any contamination on the site.
- Emission limits of the plant, particularly if the buyer intends to expand production.
- BAT application, particularly if the plant is regulated by the national IPPC rules.

Types of assessment

There are two main types of assessment:

- Assessment mainly consisting of an overall document check. This is when legal counsel assesses the environmental situation of the company by looking at the written permits and other documents relevant to the environment. This is the usual method if there are time constraints on the acquisition.
- Detailed analysis of all environmental aspects of the acquisition, particularly in relation to potential environmental liabilities. This type of assessment is very time consuming and involves a physical inspection of the plant. At this level of assessment, involving environmental consultants and technicians is recommended.

Environmental consultants

Buyers sometimes engage 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, the financial and time limits of the consultant's liability and the extent of their professional indemnity insurance cover.

21. When are environmental warranties and indemnities usually given and what issues do they usually cover in:

- An asset sale?
- A share sale?

Asset sale

The type of warranties and indemnities given depends on the facts of the specific case. The following are examples of environmental warranties typically granted by a seller concerning its business:

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

An indemnity is usually limited to liabilities in relation to contamination present on the property at the time of the sale.

Share sale

Generally, similar warranties and indemnities are agreed in a share sale.

22. Are there usually limits on environmental warranties and indemnities, for example, time limits or financial caps?

It is common to limit environmental warranties and indemnities with time limits and financial caps, however this depends on the circumstances of the case and the agreement between the parties.

REPORTING AND AUDITING

23. Do regulators keep public registers of environmental information (for example, of environmental permits or contaminated properties)? What is the procedure for a third party to search those registers?

Contaminated sites, or sites which are suspected of contamination, are registered and disclosed to the public in various lists, for example, the list of suspected contamination sites (*Verdachtsflächenkataster*) or the map of brownfield areas (*Altlastenatlas*).

Disclosure of environmental information to the public is based on the Environmental Information Act (*Umweltinformationsgesetz*). Environmental information to be provided to the public mainly concerns the condition of water, air, land and any breach of emission limits. Accordingly, operators of plants must submit environmental information to the relevant authorities, including certain data on the plant's emissions.

Generally, the information is published online and can be searched and accessed by everyone.

There is no public register of environmental permits.

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

Generally, operators of plants must provide an environmental audit report every five or six years, depending on the type of plant (*section 82b, Trade Act*). Operators of plants subject to Directive 96/82/EC on the control of major accident hazards involving dangerous substances (*Seveso II Directive*) have an ongoing obligation to inform the public of potential dangers and security measures.

There are various other obligations relating to environmental auditing, which are spread over a large number of laws and regulations (*see also Question 23*).

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

The operator of a plant must report an accident to the relevant authority immediately. It must also outline the steps it will take

THE REGULATORY AUTHORITIES

Federal level

Ministry of Agriculture, Forestry, Environment and Water Management (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*)

Main responsibilities. General affairs of environmental protection, for example, environmental protection policy, EIA, air pollution control, water management in residential areas and industrial water management, waste management, remediation of contaminated sites and species protection.

W www.lebensministerium.at

Ministry of Economy, Family and Youth (*Bundesminister für Wirtschaft, Familie und Jugend*)

Main responsibilities. General affairs of the Trade Act and its regulations, issuance of gas trading permits and so on.

W www.bmwfj.gv.at

Federal Ministry of Transport, Innovation and Technology (*Bundesminister für Verkehr, Innovation und Technologie*)

Main responsibilities. Regulatory authority for EIA procedures concerning federal motorways and railways.

W www.bmvit.gv.at

Provincial level

Provincial government (*Landesregierung*)

Main responsibilities. Responsible for the legislation and administration of environmental issues related to provincial competences.

Governor of a province (*Landeshauptmann*)

Main responsibilities. Responsible for administering environmental issues related to federal competences (indirect federal administration).

District authorities (*Bezirksverwaltungsbehörden*)

Main responsibilities. Conducts environmental permitting procedures at first instance, except for some exemptions (for example the EIA Act and Federal Waste Management Act).

Independent Administrative Tribunal (*Unabhängiger Verwaltungssenat*)

Main responsibilities. The IAT of each province hears appeals on certain environmental issues.

Independent Environmental Tribunal (*Umweltsenat*)

Main responsibilities. This hears appeals for projects involving an EIA.

W www.umweltsenat.at

to limit the damage and prevent further accidents (*section 84c, paragraph 3, Trade Act*). The Federal Ministry for Economics and Labour has established the Central Office for Major Accidents. Major accidents must be reported to the Central Office, which then informs the European Commission.

26. What powers do environmental regulators have to access a company's documents, inspect sites, interview employees and so on?

The regulatory authority can (*section 338, Trade Act*):

- Enter and investigate plants.
- Demand environmental information from the operator or employees.
- Inspect documents.
- Take samples.
- Confiscate goods.

Further, the relevant authority has the power to set up an inspection timetable (*Inspektionsprogramm*) to enforce compliance with the operator's obligations. Plants handling hazardous substances can be inspected by the authorities on an ongoing basis (*section 84d, Trade Act*).

Several other laws and regulations provide the regulator with similar powers.

INSURANCE

27. 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 usually obtained in practice?

There is no special insurance covering environmental liabilities. However, environmental risks and damage may be covered by general liability insurance for companies. Generally, the insurance covers liability for damage to property caused by unforeseeable environmental disturbances (*unvorhersehbare Umweltstörungen*). Environmental damage to individuals and damage caused by non-compliance with environmental provisions are not usually covered by the insurance.

TAX

28. What are the main environmental taxes in your jurisdiction (for example, tax on waste disposal, carbon tax and tax breaks for carrying out clean-up of contaminated land)? For each tax, please briefly state how it is calculated, who pays it and the tax rates.

Environmental taxes mainly exist in connection with waste management (treatment, disposal and transport of waste).

Operators of certain activities, such as waste disposal sites (*Deponien*) or waste combustion plants (*Verbrennungsanlagen*), as well as operators producing waste that needs to be treated or disposed of, may be obliged to pay a contaminated site tax (*Altlastenbeitrag*). The contaminated site tax system can be very detailed and complicated, particularly in identifying the taxpayer and assessing the tax amount. The applicable tax rate mainly depends on the kind of waste disposal site or waste combustor plant operated.

REFORM

29. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

The EIA Act will be amended in 2009, particularly in relation to the obligation to carry out an EIA for certain types of plants. Specific thresholds of plant capacities which may activate an EIA obligation will be adopted. This amendment will result increase EIA procedures by up to 50%). Further, the operator has to provide an energy concept to the permitting authority reflecting the energy demand and the energy efficiency of the plant. The EIA would be simplified for operators as the potential impacts on the environment do not have to be assessed on a worst case basis any more. Only realistic impacts (*voraussichtliche Umweltauswirkungen*) have to be assessed by the operator. To speed up the increase of the percentage of renewable energy on the Austrian energy market, operators of hydro power plants can optimise their existing plants without carrying out an EIA.

The Green Electricity Act (GEA) regulating the aid for green energy and combined heat and power generation on a nationwide basis has been amended in 2008 and provides for a re-evaluation of the feed-in tariffs. The coming into force of the most relevant provisions of the 2008 amendment is subject to approval from the Commission (expected by the responsible Federal Ministry of Economy, Family and Youth in summer 2009).

In 2009, Directive 2008/101/EC on aviation and climate change will be implemented into national law. A draft proposal to alter the Federal Act on a System for Trading Allowances (*Emissionsszertifikatgesetz*) already exists. The proposal includes aviation in the EU ETS.

The public consultation of the national water management plan (*Nationaler Gewässerbewirtschaftungsplan*) is pending. As part of the national implementation of the Water Framework Directive, the document contains action plans and time schedules for each Austrian water body. These plans might affect both existing and planned hydro power plants.

CONTRIBUTOR DETAILS

Christian Schmelz and Bernd Rajal

Schönherr Rechtsanwälte GmbH

T +43 1 534 37 227

+43 1 534 37 203

F +43 1 534 37 6100

E c.schmelz@schoenherr.at

b.rajal@schoenherr.at

W www.schoenherr.eu

PLC Law Department

PRACTICAL LAW COMPANY



“We expect all our commercial and transaction lawyers to use PLC Law Department. Frankly, I would be surprised if our external law firms and other blue chip in-house departments did not take the same view.”

Clive Grant, Legal Counsel, Shell International Limited.

PLC Law Department is the essential know-how service for in-house lawyers. Never miss an important development and confidently advise your business on law and its practical implications. www.practicallaw.com/ld