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Environment & Climate Change Law

2024

21st Edition

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Q&A Chapters

European Union


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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in your jurisdiction and which agencies/bodies administer and enforce environmental law?

The European Union ("EU") is competent to act in all fields of environmental policy, including air and water pollution, waste management and climate change. EU environmental policy is based on the principle of subsidiarity and Articles 11 and 191–193 of the Treaty on the Functioning of the European Union ("TFEU"). Article 3 (3) of the Treaty on the European Union ("TEU") lists "*sustainable development* […] *based on* […] *inter alia a high level of protection and improvement of the quality of the environment*" among the EU's objectives. According to Article 191 (1) of the TFEU, the EU shall contribute to: (i) preserving, protecting and improving the quality of the environment; (ii) protecting human health; (iii) prudent and rational utilisation of natural resources; and (iv) promoting measures at an international level to deal with regional or worldwide environmental problems, in particular, combatting climate change. EU environmental policy shall be based on the precautionary principle, the "polluter pays" principle, and on the principle that preventive action should be taken and that environmental damage should, as a priority, be rectified at the source.

Over the last 40 years, the body of law that makes up the European environmental *acquis* has steadily expanded, although, in more recent years, it has been reaching maturity. Nevertheless, this body of law is continually under assessment, with significant developments having taken place in the chemicals sector, but also in the waste, air and water sectors.

The vast majority of EU environmental legislation is in the form of Directives. In addition, the EU legislature is empowered to adopt Regulations and Decisions to implement the aforementioned principles. Currently, several hundred legal acts exist in the field of EU environmental law and climate change, covering areas such as air quality, waste management, water protection, nature protection, industrial pollution control, chemicals management, noise and greenhouse gas emissions. Other instruments deal with crosscutting issues such as environmental impact assessments ("EIAs"), access to environmental information, public participation in environmental decision-making and liability for environmental damage. Whereas EU Regulations apply in the national legal orders of the Member States without the need for transposition, Directives aim at approximation through transposition (into national law) and implementation, of which the Member States enjoy a certain discretion. Examples of the former include the Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals ("REACH"); examples of the latter are the Waste Framework Directive, the Air Quality Framework Directive and the Industrials Emissions Directive.

Besides these instruments, the case law of the Court of Justice of the European Union ("CJEU") is also an important source of EU environmental law.

The main driver behind EU policy on the environment is the European Commission ("Commission"). The Commission proposes environment policies, formally adopted by the European Council and the European Parliament, and safeguards its implementation based on multiannual Environmental Action Programmes. As the "Guardian of the Treaties", the Commission is empowered under Article 17 of the TEU to ensure the correct application of the EU instruments in the field of environmental law. The Directorate-General for Environment is the Commission department responsible for EU policy on the environment; climate change is the responsibility of the Directorate-General for Climate Action.

On 11 December 2019, the Commission announced the European Green Deal, an ambitious agenda for the EU to become the first climate-neutral continent by 2050 and to protect, preserve, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environmental risks and impacts. The European Green Deal also announced the adoption of a new Environmental Action Programme to complement the European Green Deal. On 2 May 2022, the eighth Environmental Action Programme entered into force as the EU's legally agreed common agenda for environment policy until 2030. Building on the European Green Deal, the Action Programme aims to speed up the transition to a climate-neutral, resource-efficient economy. In addition, it forms the basis of the EU for achieving the United Nation's 2030 Agenda and its Sustainable Development Goals.

Other specialised agencies and bodies also play an important role in the enforcement of environmental law. Important examples are the European Chemical Agency ("ECHA") in

the field of chemicals and the European Food Safety Authority ("EFSA"), which monitors food safety issues, in collaboration with national agencies and bodies. The European Environment Agency ("EEA") assists the Commission with providing information on the environment.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The enforcement of EU environmental law is primarily the responsibility of the national authorities. Therefore, the focus of the Commission is on facilitating compliance and enforcement on the national level through guidelines, better knowledge and responsiveness. Key in that regard is the 2008 Commission Communication on implementing European Community Environmental Law that sets out the Commission's enforcement strategy to tackle breaches of EU environmental law.

In addition, Directive 2008/99/EC on the protection of the environment through criminal law defines a number of serious offences that harm the environment and requires EU countries to introduce effective and proportionate penalties constituting a deterrent for such offences, if they are committed intentionally or with at least serious negligence. These offences include: discharging, emitting or otherwise releasing dangerous materials into air, soil or water; collecting, transporting, recovering or disposing of hazardous waste; shipping noticeable quantities of waste; operating an industrial plant that conducts dangerous activities or stores dangerous substances (e.g. factories producing paints or chemicals); manufacturing, treating, storing, using, transporting, importing, exporting or disposing of nuclear material and hazardous radioactive materials; killing, possessing or trafficking noticeable amounts of protected animal and plant species; and damaging protected habitats and producing, trading in or using substances that deplete the ozone layer (e.g. chemicals in fire extinguishers or cleaning solvents). The Commission evaluated Directive 2008/99/EC in 2019/2020 and found that the Directive did not have much effect on the ground; over the past 10 years, the number of environmental crime cases successfully investigated and sentenced remained very low. Based on the evaluation findings, the Commission decided to revise the Directive. The Commission proposed to replace Directive 2008/99/EC in December 2021. The proposal of the Commission has six objectives: (i) improve the effectiveness of investigations and prosecutions by updating the scope of the Directive; (ii) improve the effectiveness of investigations and prosecutions by clarifying or eliminating vague terms used in the definitions of environmental crime; (iii) ensure effective, dissuasive and proportionate sanction types and levels for environmental crime; (iv) foster cross-border investigation and prosecution; (v) improve informed decision-making on environmental crime through improved collection and dissemination of statistical data; and (vi) improve the operational effectiveness of national enforcement chains to foster investigations, prosecutions and sanctioning. On 16 November 2023, the co-legislators reached a provisional agreement on the text, to be formally adopted early in 2024.

Specific EU instruments in the field of environmental law, such as REACH, require effective enforcement mechanisms, which also include criminal sanctions.

If a Member State fails to fulfil its obligations under EU environmental law, the Commission may bring infringement proceedings against that Member State before the CJEU on the basis of Article 258 of the TFEU. The Commission shall deliver a reasoned opinion on the matter first after giving the Member State concerned the opportunity to submit its observations. If the Member State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the CJEU. There are numerous examples of Member States brought before the CJEU in accordance with Article 258 of the TFEU.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Regulation 1367/2006 requires the EU's institutions and various bodies to implement the obligations contained in the Aarhus Convention, i.e. to guarantee public access to information, participation in decision-making and access to justice on environmental issues. The CJEU considers access to environmental information to be an integral part of the exercise by EU citizens of their democratic rights. In principle, no interest is required to obtain environmental information.

In addition to the foregoing, the EEA provides the public with objective, reliable and comparable information on the state of the environment.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

EU law does not provide for general rules on when an environmental permit is required. This is a matter of national law. Specific EU environmental regulations nonetheless contain permit obligations. The Industrial Emissions Directive, for example, requires some large-scale industrial installations to obtain an operating permit granted by the national authorities. Other pieces of EU legislation, although not entailing any explicit permit requirements, impose some form of development consent for some activities with adverse effects on the environment. Under Article 6 (3) of the Habitats Directive, for example, the competent national authorities shall agree to a plan or project only after having ascertained that it will not adversely affect the integrity of a protected site. The EIA Directive, too, requires Member States to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location, are made subject to a requirement for development consent and an assessment with regard to their effects on the environment.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

EU law does not regulate the rights of applicants of an environmental permit. This remains a matter of domestic law of the Member States. However, domestic procedural rules shall not deprive EU law of its effects, including the right of access to justice under EU environmental law.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

EU law provides for a mandatory environmental assessment of certain plans and programmes, through the Strategic

Environmental Assessment ("SEA") Directive, and projects, through the EIA Directive. The aim of these instruments is to ensure that environmental considerations are integrated into the preparation and authorisation of plans, programmes and projects. Environmental assessments apply to airports, nuclear installations, railways, roads, waste disposal installations, wastewater treatment plants, etc.

Some EU instruments in the field of environmental law, such as the Industrial Emissions Directive, require some form of mandatory environmental reporting, too.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

EU law does not regulate the enforcement powers of national environmental regulators in connection with the violation of permits. This remains a matter of domestic law of the Member States. However, domestic procedural rules shall not deprive EU law of its effects, including the obligation under EU law to effectively enforce EU environmental law in the domestic legal order.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The Waste Framework Directive is the main instrument in the field of waste management in the EU and establishes a waste hierarchy: prevention; re-use; recycling; and recovery for other purposes such as energy and disposal.

Waste is defined in the Waste Framework Directive as "*any substance, object that the holder discards, intends to discard, or is required to discard*". It does not cover certain types of waste such as radioactive elements, decommissioned explosives, faecal matter, wastewater and animal carcasses.

The Waste Framework Directive is based on the polluter pays principle, whereby the original waste producer must pay for the costs of waste management. It introduces the concept of "extended producer responsibility" on certain categories of waste (*infra* question 3.4), which may include an onus on manufacturers to accept and dispose of products returned after use. It furthermore incorporates certain provisions on hazardous waste (e.g. cannot be mixed or diluted), waste oils and equally includes re-use and recycling targets for, *inter alia*, paper, metal, plastic and glass. On 5 July 2023 the Commission published its proposal for a directive amending the Waste Framework Directive, in line with the objectives set out in the European Green Deal, the Circular Economy Action Plan and the review clauses in the Directive. This proposal focuses on two resource intensive sectors: textiles and food, with the following general objectives: (i) to reduce environmental and climate impacts, increase environment quality and improve public health associated with textiles waste management in line with the waste hierarchy; and (ii) to reduce the environmental and climate impacts of food systems associated with food waste generation.

In addition to this framework Directive, there exist several pieces of legislation on specific categories, such as: the Waste from Electrical and Electronic Equipment ("WEEE") Directive (currently under review); the End-of-Life Vehicles Directive (note that the Commission proposed a new Regulation on 13 July 2023); the Packaging Waste Directive (note that on 30 November 2022, the Commission published its proposal for a regulation on packaging and packaging waste instead of a directive, the legislative process is currently still ongoing); and the Waste Shipment Regulation (note that on 17 November 2021 the Commission proposed a regulation amending the Waste Shipment Regulation, the plenary vote is scheduled for 26 February 2024). On 12 July 2023, the new Batteries Regulation was adopted, which repeals the previous Batteries Directive.

3.2 To what extent is a producer of waste permitted to store and/or dispose of it on the site where it was produced?

In principle, any original waste producer or other holder must carry out the treatment of waste himself or have the treatment handled by a dealer, establishment or undertaking that carries out permitted waste treatment operations, or arrange for it to be disposed of by a private or public waste collector. Member States may decide that the responsibility for arranging waste management is to be borne partly or wholly by the producer of the product from which the waste came and that distributors of such product may share this responsibility. In practice, most Member States opted for a collective waste-management system, based on a shared responsibility of the waste producers.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/ disappears)?

Under the Waste Framework Directive, as a general rule, the transfer of waste does not discharge the original producer or holder of the waste from its responsibility to ensure the correct treatment of the waste in accordance with the principles of the waste hierarchy.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

The Waste Framework Directive provides for a system of extended producer responsibility, based on the polluter pays principle, to strengthen the re-use, prevention, recycling and other recovery of waste. Under EU law, extended producer responsibility is mandatory within the context of, among others: the WEEE Directive; the Batteries Regulation; the End-of-Life Vehicles Directive; and the Single-Use Plastics Directive. The applicable legal framework puts the responsibility for the financing of collection, recycling and responsible end-of-life disposal of WEEE, batteries, accumulators and vehicles and certain single-use plastics on the producers. The Packaging Waste Directive requires Member States to take necessary measures to ensure that systems are set up for the collection and recycling of packaging waste. On 29 January 2024, the European Parliament and the European Council reached an agreement on a revision of the Urban Wastewater Treatment Directive. This revision implies, among other things, an extended producer responsibility scheme for producers of pharmaceuticals and cosmetics leading to urban wastewater pollution by micropollutants.

Many Member States, such as Belgium, have take-back obligations that go beyond what is minimally required at EU level.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

At EU level, the Environmental Liability Directive lays down liability rules in the aftermath of a breach of environmental law and/or permits. The cornerstone of this Directive is the polluter pays principle, meaning that an entity causing environmental damage is liable for it and must take the necessary preventive or remedial action and bear all the related costs. The Directive defines environmental damage as damage that significantly affects the environmental (ecological, chemical or quantitative) status of water resources, damage to land creating a significant risk to human health and damage to protected species and natural habitats that adversely affects conservation. This definition includes, among others, the discharge of pollutants into the air, inland surface water and groundwater.

The Environmental Liability Directive provides for both fault-based liability as well as strict liability. According to this so-called faultless liability system, operators of certain listed dangerous activities – such as energy industries, production and processing of metals, mineral industries, chemical industries and waste management – are liable if a causal link is established between that activity and the environmental damage, even if the operator did not commit any wrongful behaviour. Liability in the context of environmental damage to protected species and natural habitats (or its imminent threat) caused by other activities than those listed in the Directive, occurs only if the entity is at fault or negligent.

Defences for breaches of environmental law under the Environmental Lability Directive include, among others, (i) the third-party defence (i.e. environmental damage or imminent threat thereof caused by a third party despite appropriate safety measures), (ii) the compulsory order defence (i.e. environmental damage or imminent threat thereof resulted from compliance with a compulsory order or instruction emanating from a public authority), and (iii) the permit defence (*infra* question 4.2). In addition, the Directive shall not cover environmental damage (or an imminent threat of such damage) caused by: (i) an act of armed conflict, hostilities, civil war or insurrection; or (ii) a natural phenomenon of exceptional, inevitable and irresistible character.

The Commission is currently evaluating the Environmental Liability Directive to assess whether it is fit for purpose and to identify any possible shortcomings.

In addition, Directive 2008/99/EC holds that Member States shall ensure that legal persons can be held liable for the offences listed in Articles 3 and 4 of the Directive. The Commission proposed to replace Directive 2008/99/EC in December 2021 (*supra* question 1.2).

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

Under the Environmental Liability Directive, Member States can permit the operator not to bear the cost of remedial action taken pursuant to the Directive where he demonstrates that: (i) he was not at fault or negligent; and (ii) the environmental damage was caused by an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and Regulations that implement those legislative measures adopted by the EU specified in Annex III of the Directive, such as waste-management operations. Having said that, the permit defence is not generally accepted in the internal legal order of many Member States, where a general duty of care applies to operators, even when they act within the limits of their permits.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Under the Environmental Liability Directive, an "operator" is defined as any legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated.

Hence, if directors and officers of corporations operate or control the occupational activity, they might qualify as "operators", and incur liability under the Environmental Liability Directive.

Liability for environmental damage can be covered by insurance (*infra* section 11).

In practice, however, we witness an evolution towards personal liability of directors in case of environmental wrongdoing, especially in the context of climate change. A good example of this evolution is the draft Corporate Sustainability Due Diligence Directive ("CSDDD"), on which a provisional political agreement was reached by the European Parliament and the Council of the EU on 14 December 2023. The CSDDD is scheduled to be adopted in Q1 2024. Directors must take into account the consequences of their business decision for sustainability matters, including, where applicable, human rights, climate change and environmental consequences in the short, medium and long term. Not taking this specific consideration into account when fulfilling the duty to act in the best interest of the company will have to qualify as a breach of directors' duties under the laws of the Member States. In addition, the directors will be responsible for setting up and overseeing the due diligence processes and integrating due diligence into the corporate strategy. Directors should thereby take into account the input of stakeholders and civil society organisations.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

EU law does not address the different implications from an environmental liability perspective of a share sale *vs* an asset purchase. This remains a matter of domestic (corporate) law of the Member States.

Often, however, the seller remains liable for all matters concerning the business that occurred prior to the purchase under an asset deal, whereas in the case of a share deal, the buyer acquires or takes over all liabilities (no assets but shares are acquired). In practice, division or allocation of (environmental) liabilities, including soil contamination, will be settled among the parties and set out in the purchase agreement by way of stipulating it in specific guarantees, representation and warranties, often based on the findings from a due diligence investigation.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Since lenders do not operate or control the occupational activity, they will not be liable for environmental wrongdoing under the Environmental Liability Directive.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

EU environmental law does not yet provide for a comprehensive legal framework on soil contamination. In November 2021, however, the Commission published the EU Soil Strategy for 2030, which sets out a framework for concrete measures to protect and restore soils and ensure that they are used in a sustainable manner. It is a key deliverable of the EU biodiversity strategy for 2030 and will contribute to the objectives of the European Green Deal. The Soil Strategy for 2030 also announces a new Soil Health Law to ensure a level playing field and a high level of environmental and health protection. The Commission published its proposal for such a Soil Health Law on 5 July 2023. The ultimate objective of the proposed law is to have all soils in healthy condition by 2050.

Regulations in other fields such as agriculture, water, waste, chemicals and prevention of industrial pollution nonetheless contribute to the protection of soil. Under the Industrial Emissions Directive, for example, Member States must ensure that the permit for certain listed activities includes at least the appropriate requirements ensuring protection of soil and groundwater and periodic monitoring of soil and groundwater in relation to relevant hazardous substances likely to be found on site.

Groundwater is dealt with under the Water Framework Directive and the Groundwater Directive with the aim of achieving good quantitative and chemical status of groundwater (both currently under review). Member States are the addressees of those obligations and must, *inter alia*, take appropriate measures to achieve the water quality standard and avoid a deterioration of the water quality.

As to liability for the contamination of soil and groundwater, the aforementioned framework laid down in the Environmental Liability Directive applies.

5.2 How is liability allocated where more than one person is responsible for the contamination?

The allocation of liability in case of multiple-party causation falls, in principle, beyond the scope of EU law. The Environmental Liability Directive, for example, provides that the Directive is without prejudice to any provisions of national regulation concerning cost allocation in cases of multiple-party causation.

5.3 If a programme of environmental remediation is "agreed" with an environmental regulator, can the regulator come back and require additional works or can a third party challenge the agreement?

EU environmental law does not address the question of environmental remediation agreements. This remains a matter of national law. Under the Environmental Liability Directive, however, the competent authority under domestic law may at any time require supplementary information or require the operator to take the necessary remedial measures, or give instructions to the operator as to the necessary remedial measures.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination, and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

Under the Environmental Liability Directive, an operator is not required to bear the cost of preventive or remedial actions when he can prove that the environmental damage or imminent threat thereof was caused by a third party. Member States must provide for the possibility in such cases to enable the operators to recover the costs incurred.

The question of transfer of liability must be assessed under domestic law of the Member States.

5.5 Does the government have authority to obtain from a polluter, monetary damages for aesthetic harms to public assets, e.g. rivers?

There is no specific basis for authorities to obtain monetary damages from a polluter for aesthetic harm to public assets, such as rivers, under EU law.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

As discussed in section 1 above, the focus of EU environmental law is on facilitating and promoting compliance of Member States with the applicable pieces of environmental legislation. Although the Commission plays an important role in this regard, the national environmental regulators are the predominant actors for enforcing compliance with EU environmental law.

Recommendation 2001/331/EC nevertheless sets, in a non-prescriptive way, minimum criteria for organising, performing, following-up and publishing the results of environmental inspections in all Member States with the aim of improving compliance and ensuring that EU environmental legislation is applied and implemented more consistently. The Recommendation has strongly influenced the legal framework on environmental inspections in numerous EU acts in the field of environmental law, such as the WEEE Directive.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

EU environmental law does not address the question of disclosing pollution to an environmental regulator or potentially affected third parties. This remains a matter of national law.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

EU environmental law does not yet provide for a comprehensive legal framework on soil contamination (*supra* question 5.1). The question remains a matter of national law.

Under the Industrial Emissions Directive, however, where certain listed activities, such as energy industries and the production and processing of metals, involve the use, production or release of relevant hazardous substances and having regard to the possibility of soil and groundwater contamination at the site of the installation, the operator shall prepare and submit to the competent authority a baseline report before starting the operation of an installation or before a permit for an installation is updated for the first time. Upon a definitive cessation of the activities, the operator shall assess the state of soil and groundwater contamination by relevant hazardous substances used, produced or released by the installation. Where the installation has caused significant pollution of soil or groundwater by relevant hazardous substances compared to the state established in the baseline report, the operator shall take the necessary measures to address that pollution so as to return the site to that state. In addition, where the contamination of soil and groundwater at the site poses a significant risk to human health or the environment as a result of the permitted activities carried out by the operator, the operator shall take the necessary actions aimed at the removal, control, containment or reduction of relevant hazardous substances, so that the site, taking into account its current or approved future use, ceases to pose such a risk.

The Commission's proposal for a European Soil Health Law is expected to put in place a comprehensive European regulatory framework to protect, manage and restore contaminated EU soils. Supported by the Commission, Member States will first monitor and then assess the health of all soils in their territory, so that appropriate measures can be taken by authorities as well as landowners. To this end, Member States shall systematically and actively identify all sites where a soil contamination is suspected based on evidence collected through all available means, and ensure that all these potentially contaminated sites are subject to soil investigation. The proposed European Soil Health Law stipulates that Member States shall also establish specific events that trigger an investigation.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

The disclosure of environmental problems, for example, in the context of a merger and/or takeover transactions, is not subject to any specific EU legislation. There exist, however, general transparency requirements for listed companies under Directive 2004/109/EC. The information to be published is of a predominantly financial nature, such as, for example, yearly and half-yearly financial reports, major changes in the holding of voting rights and *ad hoc* inside information that could affect the price of securities.

The latter might, in theory, include information related to environmental problems. In practice, especially in the context of sizeable mergers and/or takeover transactions, the process of exchanging (environmental) information is organised through a due diligence investigation process. Information on the status of the soil, for example, is publicly available in many Member States.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

EU law does not prevent such indemnities from being binding among parties to the agreement. However, this does not prevent third parties from relying on the provisions of the Environmental Liability Directive to hold an operator liable for environmental damage suffered.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

Under the International Financial Reporting Standards ("IFRS"), approved by and applied within the EU, it is generally not possible to shelter environmental liabilities off balance sheet. IAS 37 provides that companies should recognise a provision in their balance sheets when: (i) an entity has a present obligation (legal or constructive) as a result of a past event; (ii) it is probable that an outflow of resources will be required to settle the obligation; and (iii) a reliable estimate can be made of the amount of the obligation. When an environmental liability arises that meets all aforementioned conditions, an example of which is clean-up costs for unlawful environmental damage, the company is therefore obliged to recognise a corresponding provision.

EU law does not address whether a company can be dissolved in order to escape environmental liabilities. This question therefore remains a matter of domestic law.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

EU environmental law does not address the question of shareholder and parent company liability for breaches of environmental law in general. This remains a matter of national law. Under the Environmental Liability Directive, however, the shareholder and parent company can be held liable for environmental damage if they operate or control the occupational activity, where this is provided for in national legislation.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of EU law lays down common minimum standards for the protection of persons reporting, *inter alia*, breaches of EU law on protection of the environment. "Information on breaches" is defined as "*information, including reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur in the organisation in which the reporting person works or has worked or in another organisation with which the reporting person is or was in contact through his or her work, and about attempts to conceal such breaches*". By 17 December 2021, Member States should have adopted measures to comply with Directive (EU) 2019/1937.

The draft CSDD also entails some obligations for companies in terms of procedures to report environmental and human rights violations.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

The possibility of filing a "class" action claim with the CJEU under EU law is limited due to the restrictive *locus standi* criteria laid down in Article 263 (4) of the TFEU and the case law of the CJEU. In 1963, the CJEU ruled in the *Plaumann & Co vs Commission* case that "*persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*". Recently, the EU General Court applied the Plaumann doctrine to climate litigation: "*[I]t is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application.*" On 25 March 2021, the CJEU confirmed the ruling of the EU General Court.

There has been, however, an ongoing debate on whether the Plaumann doctrine is compatible with the right of access to justice for the public concerned under the Aarhus Convention. To this end, the EU revised the Aarhus Regulation, broadening the scope of the procedure for internal review of acts adopted, or omissions, by EU institutions and bodies, where these violate EU environmental law. On 6 October 2021, the EU adopted Regulation 2021/1767, which amended the Aarhus Regulation, to allow for better public scrutiny of EU acts of general scope affecting the environment by non-governmental organisations and other members of the public. The revision significantly increased the range of administrative acts that fall within the scope of internal review under the Regulation.

EU environmental law does not prevent punitive or exemplary damages, although the application thereof remains rare.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There is no general rule exempting certain individuals or public interest groups from liability to pay costs when pursuing environmental litigation before the European courts. As a general rule of procedure of the CJEU, the unsuccessful party shall be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Where each party succeeds on some and fails on other heads, the parties shall bear their own costs. However, if it appears justified in the circumstances of the case, the court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

9 Climate Change and Emissions Trading

9.1 What is the overall policy approach to climate change regulation in your jurisdiction?

The EU has subscribed to the Paris Agreement objective to keep the global temperature increase to well below 2°C and pursue efforts to keep it to 1.5°C.

In this regard, the 2030 climate and energy framework includes EU-wide targets and policy objectives for the 2021–2030 period. The key targets for 2030 were initially: (i) at least 40% cuts in greenhouse gas emissions (from 1990 levels); (ii) at least a 32% share for renewable energy; and (iii) at least 32.5% improvement in energy efficiency. On 17 September 2020, the Commission presented the 2030 Climate Target Plan, submitting a proposal to raise the climate ambition of the EU to a 55% cut in emissions by 2030, as a stepping-stone to the 2050 climate-neutrality goal. On 14 July 2021, the EU adopted the "Fit for 55", a package of legislative proposals to make the EU's climate, energy, land use, transport and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels. Achieving these emission reductions in the next decade is crucial to Europe becoming the world's first climate-neutral continent by 2050. These proposals concern, among others, the ETS Directive, the Effort Sharing Regulation and the LULUCF Regulation. On 6 February 2024, the Commission initiated the process of preparing the 2040 reduction target. Based on the Impact Assessment and the advice of the European Scientific Advisory Board on Climate Change (ESABCC), the Commission recommends a 90% reduction in net GHG emissions by 2040. The legal proposal to table the 2040 climate target will be the responsibility of the next Commission, following the European elections and the debates and dialogue which are expected to take place in the coming months.

To achieve these targets, the EU Member States are involved. Pursuant to Regulation 2018/1999/EU on the governance of the energy union and climate action, each EU Member State must draft an integrated National Energy and Climate Plan ("NECP") covering the five dimensions of the energy union: energy security; internal energy market; energy efficiency; decarbonisation; and research, innovation and competitiveness. Each Member State must also report on the progress that it makes in implementing its NECP, mostly on a biennial basis. The Commission will monitor EU progress (as a whole), notably as part of the annual state of the energy union report.

In the longer term, the Commission intends to achieve a climate-neutral European economy by 2050. With the European Green Deal, the EU is to transform the EU into "*a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use. It also aims to protect, conserve and enhance the EU's natural capital, and protect the health and well-being of citizens from environment-related risks and impacts*" (COM(2019) 640 final, p. 2.). To that end, on 30 June 2021, the EU adopted Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality and amending Regulations (EC) 401/2009 and (EU) 2018/1999 ("European Climate Law"). Pursuant to Article 2 of the European Climate Law, EU-wide greenhouse gas emissions and removals regulated in EU law shall be balanced within the EU at the latest by 2050, thus reducing emissions to net zero by that date, and the EU shall aim to achieve negative emissions thereafter. The relevant EU institutions and Member States shall take the necessary measures at the EU and national levels to enable the collective achievement of the climate-neutrality objective, taking into account the importance of promoting both fairness and solidarity between Member States and cost-effectiveness in achieving this objective.

9.2 What is the experience of climate change litigation in your jurisdiction?

The number of climate cases brought before the CJEU is very slim

due to the application of the Plaumann doctrine. On 25 March 2021, the CJEU decided that an action for annulment against several EU acts relating to greenhouse gas emissions is inadmissible due to the lack of individual concern. The so-called People's Climate Case, was brought by 10 families from Europe, Kenia and Fiji and a Swedish association representing the indigenous Sami youth, all particularly affected by climate change.

In addition, on 2 September 2020, six Portuguese youths filed a complaint against 33 countries before the European Court of Human Rights arguing that these countries violate(d) their human rights by failing to take sufficient action on climate change. It is the first climate case brought before the ECHR. The ECHR held a Grand Chamber hearing in September 2023.

Climate litigation is, as of today, mostly situated before the national courts of the EU Member States. National courts of EU Member States are indeed increasingly receptive of claims against public authorities for alleged inaction in light of international and European climate and environmental obligations, as shown in the *Urgenda* judgment of the Dutch Supreme Court of 20 December 2019, but also in more recent examples such as the Decision of the Administrative Court of Paris of 3 February 2021, the judgment of the French *Conseil d'État* of 1 July 2021 in the *Grande-Synthe* case, and the Decision of the Brussels Court of Appeal of 30 November 2023 in the Belgian climate case. In addition, more and more cases are brought against private companies for alleged violation of climate goals. In its landmark judgment of 26 May 2021, for example, a Dutch Civil Court ordered Shell to reduce its emissions by 45% compared to 2019 levels by 2030 (appeal pending).

9.3 What emissions trading schemes are in operation in your jurisdiction and how is the emissions trading market developing?

The EU has created the EU emissions trading system ("EU ETS") with a view to reducing greenhouse gas emissions cost-effectively. The EU ETS is a "cap and trade" system applicable to emitters of greenhouse gases from energy-intensive industries and the energy generation sector, as well as the aviation sector.

Since 2013 (phase 3 of the EU ETS), the allocation of allowances has been made on the basis of centrally approved allocation plans rather than by Member States alone. The default method for allocating allowances is now via auctions. Despite the auctioning of allowances being the intended method, the manufacturing industry continues to receive a share of allowances for free on the basis of greenhouse gas emission performance benchmarks. Sectors facing carbon leakage risks receive a higher share of the allowances for free. Currently, these free allowances are based on a preliminary calculation of the number of free allowances that should be allocated to each plant, i.e. the National Implementation Measures ("NIMs").

The legislative framework of the EU ETS for its next trading period (phase 4 2021–2030) was revised in early 2018 to enable it to achieve the EU's 2030 emission reduction targets in line with the 2030 climate and energy policy framework and as part of the EU's contribution to the 2015 Paris Agreement. To increase the pace of emission cuts, the overall number of emission allowances will decline at an annual rate of 2.2% from 2021 onwards, compared to the previous 1.74%.

On 10 May 2023, the EU approved the revision of the ETS Directive in line with the "Fit for 55" legislative package. The revised ETS Directive entails a reduction in the emissions of the sectors covered by the EU ETS of 62% compared to 2005, as one of the measures to reach at least a 55% net emission reduction by 2030 compared to 1990 levels. The revised ETS Directive also created a new emissions trading system (ETS 2), separate from the existing EU ETS, for CO_2-emissions from fuel combustion in buildings, road transport and additional sectors (mainly small industry not covered by the existing EU ETS).

9.4 Aside from the emissions trading schemes mentioned in question 9.3 above, is there any other requirement to monitor and report greenhouse gas emissions?

As parties to the UNFCCC, its Kyoto Protocol and the Paris Agreement, the EU and its member countries are required to report to the UN: (i) annually on their greenhouse gas emissions ("greenhouse gas inventories"); and (ii) regularly on their climate policies and measures and progress towards the targets ("biennial reports" and "national communications"). EU environmental law also contains specific monitoring and reporting obligations. For example, the LULUCF Regulation requires Member States to keep track of their emissions and removals concerning land use, land use change and forestry. Additionally, the Corporate Sustainability Reporting Directive (CSRD) requires certain companies to report on their greenhouse gas emissions.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Directive 1999/77/EC banned the marketing and use of products containing asbestos, while Directive 2009/148/EC aims at enhancing the protection of asbestos-exposed workers.

European case law regarding asbestos, and the ban thereof, is limited but important, and mainly concerns the exposure of workers to this dangerous substance.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on-site?

The mere presence of asbestos is not illegal. Directive 2009/148/EC nevertheless lays down exposure limits and specific requirements with regard to safe work practices, including in respect of: demolition, repairing, maintenance and asbestos-removal work; information, consultation and training of workers; and health monitoring.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in your jurisdiction?

Environmental liability insurance is an increasingly popular means of covering liability for environmental damage and harm under the Environmental Liability Directive. Insurance Europe, the European (re)insurance federation of which the national insurance associations in 37 States (including all the Member States) are members, plays an important role in this regard.

11.2 What is the environmental insurance claims experience in your jurisdiction?

We are not aware of any case law of the CJEU in the field of environmental insurance.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in environment law in your jurisdiction.

Climate change remains a top priority for the Commission, as evidenced by the European Green Deal, presented on 11 December 2019. The European Green Deal covers all sectors of the economy, notably transport, energy, agriculture, buildings, and industries such as steel, cement, ICT, textiles and chemicals. Under the European Green Deal, the European Investment Bank is set to facilitate €1 trillion in funding over the next decade and set itself the target of doubling its climate target from 25% to 50% by 2025, thus becoming Europe's climate bank. On 17 September 2020, the Commission presented the 2030 Climate Target Plan, submitting a proposal to raise the climate ambition of the EU to a 55% cut in emissions by 2030, as a stepping-stone to the 2050 climate-neutrality goal. This goal is currently laid out in the European Climate Law.

Furthermore, the EU is also increasingly taking legal measures to set environmental standards for companies. On 23 February 2022, the Commission adopted a proposal for a Directive on corporate sustainability due diligence. In addition, on 5 January 2023, the Corporate Sustainability Reporting Directive entered into force. This new directive modernises and strengthens the rules on the social and environmental information, including human rights, that companies must report. A broader set of large companies will now be required to report on sustainability. Also noteworthy in that regard, is the Taxonomy Regulation, which was adopted on 18 June 2020. The Taxonomy Regulation is the dictionary defining the conditions under which an economic activity may be deemed environmentally sustainable. Certain large undertakings and financial market participants must disclose the degree to which their activities are Taxonomy aligned. By setting strict requirements on a classification as an environmentally sustainable economic activity, the Taxonomy Regulation aims to promote investments in these types of activities and mitigate the risk of "greenwashing".

Another key element of the European Green Deal concerns circular economy. In March 2020, the Commission adopted the new Circular Economy Action Plan. The new Action Plan announces initiatives along the entire life cycle of products. It targets how products are designed, promotes circular economy processes, encourages sustainable consumption, and aims to ensure that waste is prevented and the resources used are kept in the EU economy for as long as possible. The Commission is currently reviewing, among others, the Packaging Waste Directive, the Waste Framework Directive and the Industrial Emissions Directive. In addition, the EU continues to focus on reducing plastics, including microplastics, packaging and single-use plastics. Action on plastics was identified as a priority in the Circular Economy Action Plan. The EU Strategy for Plastics in the Circular Economy aims at transforming the way plastic products are designed, used, produced and recycled in the EU. We expect this to have a major impact on the European recycling industry in general and the plastics sector in particular. The European Green Deal also encompasses the EU's chemicals strategy, addressing issues such as the use and pollution by per- and polyfluoroalkyl substances (PFAS) in the EU. Both a general restriction and a specific restriction for firefighting foam of PFAS has been initiated within the framework of REACH.

Lastly, the European Green Deal also strives at improving nature conservation and restoration. On 22 June 2022 the Commission proposed a new Nature Restoration Law. This proposal extends the existing obligations under the Habitat Directive and aims to put measures in place to restore at least 20% of the EU's land and sea areas by 2030, and all ecosystems in need of restoration by 2050. We expect that the implementation of this proposal, on which a political agreement between the Council of the EU and the European Parliament was reached on 22 November 2023, will have a big impact on nature conservation and restoration in the EU and its Member States. Another initiative in this regard concerns the Regulation on Deforestation, which was adopted on 31 May 2023. Under this regulation, any operator or trader who places certain commodities (cattle, wood, cacao, soy…) on the EU market, or exports from it, must be able to prove that these products do not originate from recently deforested land or have contributed to forest degradation.

Jan Bouckaert heads Stibbe's Environment & Planning practice group. Jan focuses his daily practice on environmental law in its broadest sense, including regulation (chemicals, electrical appliances, hazardous substances, etc.), climate change, emission rights and renewable energy, EIA, waste and soil, water, air and nature conservation at all levels (international, European and Belgian). In addition, he has broad expertise in project development, licensing, planning and zoning, expropriation and nuclear law. He also has extensive experience in drafting, adapting and interpreting laws and regulatory texts for governments at federal and regional level. In the field of dispute resolution, he has extensive experience in proceedings before the Council of State, the Council for Permit Disputes, the Constitutional Court, the Court of Justice and administrative and civil courts. He advises and defends the interests of clients from both the public and the private sector.

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