

France



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1 Environmental Policy and its Enforcement

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

The basis of French environmental law policy is provided by:

- European law, especially the Treaty establishing the European Community and relevant EU Directives;
- the French Environmental Charter (*Charte adossée à la Constitution*), added to the French Constitution on 28 February 2005. This provides the right for each citizen to public health and to live in a balanced environment. The constitutional value of this charter was recognised by the Administrative Supreme Court (*Conseil d'État*) on 3 October 2008; as a consequence, each citizen can challenge an administrative decision on the basis of the Charter; and
- Article L. 110-1 of the French Environmental Code (in the following, references '*Article*' refers to an article of the French Environmental Code), which sets out main principles like the precautionary principle, the principle of preventive and corrective action, the 'polluter pays' principle or the principle of participation.

Competence for the implementation of environmental policy is distributed between national and local levels.

At national level, this competence is mainly entrusted to the Ministry of Ecology, Energy, Sustainable Development and Sea (*the MEEDDM*). The MEEDDM is vested with wide powers, mainly the integration of sustainable development issues into government policies, the control of global warming (including negotiations on climate change), the prevention of risks and pollutions (including policies relating to classified installations (as defined below)), management of the nuclear industry and transport and energy policies.

In addition, several national agencies, linked to the MEEDDM, are in charge of certain specific environmental fields. For instance, the INERIS (*Institut National de l'Environnement industriel et des risques*) draws up reports and analyses intended to reduce and forestall risks which economic activities may imply for public health and the environment.

At local level:

- the local representative of the State (the *Préfet*) has strong powers under the law relating to 'classified installations for the protection of the environment' (Article L. 511-1 *et seq.*), known as the *classified installations regime*, which imposes restrictions on certain activities carried out on specific industrial sites and, more generally, on any activities which may affect the neighbourhood, the environment or public health (the *classified installations*). The *Préfet* issues

environmental permits relating to classified installations (*environmental permits*) and administrative sanctions;

- the DREAL (*Directions Régionales de l'Environnement, de l'Aménagement et du Logement*), which have replaced or will replace the DRIRE (*Directions Régionale de l'Industrie, de la Recherche et de l'Environnement*), attached to the MEEDDM, are in charge of the technical validation of submissions for environmental permits and the inspection of classified installations (the process of substituting the DREAL for the DRIRE is on-going and depends on their location).

Concerning the judicial system:

- administrative courts assess the legality of administrative decisions about environmental issues, such as environmental permits. Regarding classified installations, the legality of an administrative decision may be challenged either by way of an ultra vires action (*recours pour excès de pouvoir*) or an unlimited jurisdiction action (*recours de plein contentieux*). According to Article L. 514-6, most of the individual administrative decisions relating to classified installations are subject to appeal with unlimited jurisdiction. The judge can cancel or modify the administrative decision or grant an environmental permit on the *Préfet's* behalf; and
- civil and criminal courts also have jurisdiction, regarding civil and criminal liability issues. For instance, see question 5.5 below.

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

The general policy approach taken is to enforce environmental legislation by providing financial incentives for companies to comply with it. On the one hand, such incentives rely on the polluter pays principle, which requires the polluter to pay for the environmental damages he has caused. Also, various fees are charged, such as the fees for liquid waste discharges or emissions to atmosphere. On the other hand, tax assistance on investment is available for companies intending to improve their environmental management.

Concerning the classified installations, the inspectors employed to carry out environmental inspections numbered only 1,180 in 2007 for around 51,000 classified installations subject to authorisation. Since this number was insufficient, the MEEDDM decided in 2008 to appoint 200 new inspectors and 160 have already been appointed, or will be appointed, in 2010. The aim is for an environmental inspection to be carried out at least once a year for the 3,000 most dangerous installations, every three years for the 10,000 installations known to present serious risks and every seven years for other installations subject to authorisation. In 2008, 26,500 inspections took place and all of the most dangerous installations were inspected thoroughly at least once.

Where an installation is found not to comply with the classified installations regime, the *Préfet* sends the operator a formal notice requiring compliance before taking administrative sanctions (see question 2.4 below). In practice, when an operator demonstrates he is acting in good faith, the public authorities tend to seek pragmatic solutions to bring the installation into compliance with environmental law.

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

Article 7 of the Environmental Charter and Article L. 124-1 provide that each person has the right to have access to environment-related information which is held, received or drawn up by the public authorities or on their behalf. This right is exercised under the conditions defined by the provisions of Law no. 78-753 of 17 July 1978 on the access to administrative documents.

Thus, access to public documents must generally be allowed, since a precise written request has been sent to the public authorities. Under Article L. 124-4, the public authority can reject such request where the consultation or communication interferes with the interests of national defence, public security or other secret information protected by the law.

The ‘*Grenelle 1*’ law (Law no. 2009-967 of 3 August 2009) provides that the State will ensure the access to environmental information, namely through the creation of a web portal helping users to access information held by public authorities or involvement in public decisions affecting the environment.

2 Environmental Permits

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

Environmental permits are required for all installations mentioned by the official classified installations nomenclature which lists activities that may have a negative impact on the environment (Article L. 511-2 and R. 511-9; nomenclature available on <http://www.ineris.fr/aida/>). Legislative order no. 2009-663 of 11 June 2009 has created a new regime of ‘simplified’ environmental permit, entitled ‘registration’ (*enregistrement*); it should enter into force in 2010 and apply to the 20 per cent less dangerous installations subject to authorisation.

Article R. 512-68 provides that environmental permits can be transferred to a new operator provided that the latter informs the *Préfet* of this change within a one month period from the date it begins to pursue the activity. Besides, an additional authorisation of the *Préfet* is necessary to transfer environmental permits for installations needing financial guarantees (Article R. 516-1).

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?

The refusal to grant an environmental permit or the provisions of the permit can be challenged by the future operator before the local administrative tribunal within a two-month period as from the notification of the permit or its refusal.

In case there is no response from the *Préfet* on an application for an environmental permit within the three-month period provided by Article R. 512-26 al. 2, the general administrative principle would be

that the lack of a response can be considered as an implied decision of refusal which can be challenged. However, case law has specifically held that the absence of a response cannot be considered as an implied decision and the *Préfet* still has to decide on the application (*Conseil d’État*, 9 June 1995, *Tchijakoff*, n° 127763).

Under Article L. 514-6, third parties having an interest in doing so have the right to challenge the permit within a four-year period as from the date of publication or posting of the permit.

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

According to Articles L. 122-1 and L. 512-1, the application file for an environmental permit must include an environmental impact study (*étude d’impact*) and a risk assessment study (*étude de dangers*). The environmental impact study must analyse the initial situation of the site, the effects on the environment and health produced by normal activity of the installation and the countervailing measures. The risk assessment study must describe the risks related to exceptional accidents.

Furthermore, such studies can be requested by the *Préfet*, for instance when actual discharges from the installation exceed authorised levels (Article R. 512-31).

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

Environmental regulators can impose sanctions when an installation is operated without the required permit or does not comply with legal or administrative prescriptions. Such infringements can be alleged by a complaint or established by the environmental inspection.

Article L. 514-1 provides for a specific procedure giving wide powers to the *Préfet*. A formal notice is served on the operator. If the operator does not comply with the notice within the given period, the *Préfet* can take administrative sanctions: he can order that the sums needed to comply with the conditions of the permit be deposited or suspend the operation of the installation until the conditions imposed have been fulfilled.

Where it is proved that the classified installation cannot meet the requirements of the permit, a decree taken with the approval of the *Conseil d’Etat* can order to shut it down (Article L. 514-7).

Furthermore, criminal penalties can be imposed. For instance, according to Article L. 514-11, operating a classified installation while failing to comply with the above-mentioned formal notice is punishable by six months of imprisonment and a fine (75,000 Euros for individuals and 375,000 Euros for legal entities).

3 Waste

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

Article L. 541-1 provides for two definitions of waste. First, ‘waste’ is defined as ‘any residue of a process of production, transformation or use, any substance, material, product or more generally any movable goods abandoned or destined to be abandoned by its holder’. Also, ‘ultimate waste’ is defined as ‘waste, either resulting or not from the treatment of waste, which is not likely to be treated under the technical and economic conditions of the moment, notably by the extraction of the reusable part or by

the reduction of its pollutant or hazardous character'. Therefore, the fact that some waste may be reused later does not exclude its qualification as waste.

Facilities for the storage of waste are only authorised to receive waste for ultimate disposal (Article L. 541-24).

Several categories of waste are subject to specific rules involving additional duties. These categories include, for instance, special waste (*déchets spéciaux*), which include radioactive waste, used oils, medical waste or other hazardous waste mentioned by Decree no. 2002-540 of 18 April 2002 (annexed to Article R. 541-8), waste electrical and electronic equipment (WEEE) (Article L. 541-10-2) and, as from 1 January 2010, household waste resulting from dangerous chemical products (Article L. 541-10-4). The cross-border shipment of waste is also subject to specific rules (Article L. 541-40 *et seq.* resulting from legislative order no. 2009-894 of 24 July 2009 which implements EU regulation no. 1013/2006/EC and provides the administrative measures and sanctions that the French public authorities can take in this field).

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

Producers of waste are not allowed to store it on the site where it was produced (unless the site is itself an ultimate waste treatment unit): waste must be conveyed to waste treatment professionals sites. Temporary storage pending elimination is allowed, provided this complies with the environmental permit.

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)?

According to administrative case law (*Conseil d'État*, 13 July 2006, *SMIR*, Req. no. 281231), the producer of waste is liable until its elimination, even if waste has been transferred to another person for treatment off-site. If the lawful holder does not eliminate the waste correctly or entirely, the public authorities can order its elimination at the producer's or holder's expense (pursuant to *Circulaire* of 18 September 2006). However, operators of waste elimination or storage installations must provide financial guarantees in such a way that such risks are reduced for producers.

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

Various provisions specific to certain categories of waste set a recovery obligation for producers. For instance, the regulations dealing with worn batteries (Article R. 543-130-I) or domestic packaging (Article R. 543-56).

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?

Three different liability systems coexist traditionally:

- administrative liability: the site operator may be exposed to a specific liability under the classified installations regime. However, generally, the *Préfet* first serves a formal notice to comply within a specific timeframe. In case of non compliance, the *Préfet* takes administrative sanctions (see

question 2.4 above) that can be challenged before administrative courts;

- civil liability: a person can be held liable for damages caused to third parties under the French Civil Code. Claimants must provide the court with evidence of wrongful conduct, damage and a causal link. The amount of compensation may be reduced if the liable person provides evidence of fault of the victim who has suffered the damage; and
- criminal liability: the site operator's criminal liability can be sought on general criminal grounds, such as poisoning or endangering a person's life for instance, or on the basis of specific environmental laws which provide for criminal sanctions (Articles L. 514-9 to L. 514-11). Any person who has suffered damage or the public prosecutor, is entitled to institute proceedings. Sanctions can be fines or imprisonment. For instance, see question 5.5 below.

A new liability regime has been added to the above-mentioned regimes by Law no. 2008-757 of 1 August 2008 (Articles L. 161-1 *et seq.*) and Decree no. 2009-468 of 23 April 2009 (Articles R. 161-1 *et seq.*) implementing the EU environmental liability directive (Directive no. 2004/35/EC). This regime is only triggered when serious and measurable deterioration occurs directly or indirectly to the environment and affects (i) land where its contamination creates a significant risk of harming human health, (ii) water, (iii) species and natural habitat protected under EU Birds and Habitats Directives or (iv) ecological services. Where the regime is triggered, operators are required to take necessary preventative or remedial measures and public authorities can compel them to take such measures. The '*state of the art*' defence is available: operators may avoid remediation costs where an emission or activity was not considered likely to cause environmental damage given the state of scientific and technical knowledge at the time that the damage occurred. This new regime does not apply when the event causing the damage occurred before 30 April 2007.

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

Since Article L. 514-19 provides that permits are granted notwithstanding the rights of third parties, the operator is liable for any pollution or physical or material damage caused by his activity, even where such activity has been performed in compliance with its permit. Similarly, the new law on environmental liability (above-mentioned under question 4.1) does not provide for a permit defence.

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?

Directors and officers of corporations (D&Os), as well as legal entities, can be held liable, either criminally or civilly, for environmental wrongdoing.

D&Os' criminal liability may be sought for the breach of any environmental regulation that provides for criminal sanctions. Such liability may be insured only provided that the offender did not intend to cause the damage.

Furthermore, since 2004 (Law no. 2004-204 of 9 March 2004), companies' criminal liability may be implied for all offences committed for their account by their representatives or bodies. Companies can be punished by a fine (which is five times higher than the one applicable to a physical person for the same offence) or additional penalties (such as the closure of the establishment or the exclusion of the company from public procurement tender

procedures).

D&Os may also be held civilly liable, directly or indirectly, on several grounds, provided that their wrongdoing has caused damage to third parties. Firstly, their civil liability may result directly from their criminal liability when the criminal offence also constitutes a civil fault. Secondly, D&Os' civil liability may be sought by their own company when the latter incurred damages to be paid to third parties, resulting from any mismanagement or any violation of statutes or bylaws. This proceeding may be introduced by (i) the company itself or (ii) its shareholders on its behalf. Suing the company appears as the easiest way for third parties to get damages, since it may prove very difficult to establish D&Os' direct liability: for these purposes, third parties would have to establish the existence of a '*detachable fault*', that is to say incompatible with the D&Os' functions.

A special insurance coverage called '*Directors Civil Insurance*' may be subscribed by companies on behalf of their D&Os. Such insurance covers all damages incurred by third parties, except damages caused directly to nature. That is the reason why, as aforementioned, third parties typically would rather sue the company directly, to avoid facing the insolvency of an individual. Furthermore, legal entities benefit from insurance coverage, dedicated to redress the wrongs suffered by third parties (cf. below question 11.1).

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?

In the event of an asset or site purchase, the new site operator (provided that it carries out the same activity) inherits the whole responsibility for clean up and the liability for any pollution of its predecessor. Nonetheless, case law considers that where it is clear that pollution was caused by prior operators, the environmental liability for past activities cannot be transferred to the new operator (*C.A.A Lyon*, 30 July 2003, no. 99LY02122).

Concerning share sales, the major part of the academic opinions considers that there is no change of operator. Therefore, the environmental liability remains on the same entity. However, Article L. 516-2 provides that, for installations needing financial guarantees, the operator is required to inform the *Préfet* in case of a substantial modification of the technical or financial capacities. A change of majority shareholder may be considered as a change of such financial and technical capacity.

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

The general rule is that lenders financing polluting activities (or parent companies for their subsidiaries) are not liable. This principle is limited by the rules of commercial law providing that lenders (like parent companies) may be liable where it can be shown that they have direct control over the polluting entity.

Nonetheless, in the course of a major environmental summit held in 2007 (*the Grenelle de l'environnement*) and in a report on ecological governance published in 2008 the introduction into French legislation of the liability of lenders financing dangerous or polluting activities was proposed. However, the '*Grenelle 1*' law (Law no. 2009-967 of 3 August 2009) did not recognise the liability of lenders and the '*Grenelle 2*' bill (article 83), which should be passed in 2010, only provides that credit institutions must indicate in their annual report how they take into account the environmental consequences of their activity.

5 Contaminated Land

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

France does not have a comprehensive soil protection system and no specific liability law exists. The liability regimes that apply to soil contamination are contained in various non-specific legal and regulatory frameworks.

The main liability regime applicable to soil or groundwater contamination is the classified installations regime which mainly targets the current or last operator of the site. The operator is defined as the person who controls the activity on a daily basis and/or holds an operating permit or declaration receipt. In the context of a site closure, remedial action may be imposed on the last site operator for a thirty-year period from the date on which the closure was properly notified to the authorities; however this thirty-year prescription does not apply to cases where risks are concealed (*Conseil d'État*, 8 July 2005, *Société Alusuisse Lonza France*, no. 247976).

The new environmental liability regime (above-mentioned under question 4.1) applies to land contamination that creates a significant risk of harming human health and to serious damage to water. This regime targets the operator, defined as any individual or legal entity, subject to public or private law, profit-making or not, carrying on or controlling effectively an occupational activity. However, it does not apply to historic contamination, when the event causing the damage occurred before 30 April 2007 or when this event results from an activity having ceased definitively before 30 April 2007.

Other regimes include the waste regime (which targets the waste producer and the waste holder), the water regime and the civil law regime (which targets any person who causes damage). Consequently, in the absence of a site operator, tenant or occupant, the site owner may be deemed to be the waste holder and therefore liable for waste disposal.

Finally, where the liable person is unknown, insolvent or defaulting, the site is considered to be 'orphan' and the French State may take over its remediation through the Environment Agency, ADEME.

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

Under the classified installations regime, the site operator is responsible for any soil and groundwater contamination caused by the activities/installations he is operating (or has operated), including historic contamination caused by such installations/activities even though he was not legally present on site at that time.

The last site operator is not only liable for contamination which it caused, but also for that caused by the installations/activities it has taken on from former operators, provided that the last operator succeeded them in the same activity and took over their rights and duties. In this case, a contractual liability allocation cannot override power of the public authorities to take enforcement action (*Conseil d'État*, 11 April 1986, *Ministre de l'environnement c/ société des produits chimiques Ugine-Kuhlman*, no. 62.234; 8 September 1997, *SARL SERACHROM*, no. 121904; *Cour de cassation*, Civ. 3, 16 March 2005, *Hydro Agri France*).

To the contrary, where a change of site operator is not notified to the public authorities, or where the new operator carries on a different activity, the new site operator cannot be held liable for remedial action imposed by the authorities. However, there is some lack of certainty and clarity in the case law on this point and public authorities are reluctant to accept a division of the liability for

remedial action, even if various activities have been carried out on the site, and tend to consider the last site operator as liable.

As to the site owner, its potential liability under the classified installations regime is limited: the authorities must demonstrate that he is the successor of the site operator, i.e. he behaved like the site operator, before issuing any remediation orders against him. However, the site owner can be held liable to third parties under the Civil Code if he is considered to be responsible for the contamination.

The new environmental liability regime (abovementioned under question 4.1) does not apply to pollution of a diffuse character, unless the administrative authority establishes a causal link between the damage or its threat and the activities of each of the operators. In cases of multiple party causation, the costs of preventative or remedial measures are allocated by the administrative authority among the operators up to the contribution of their activity to the damage or its imminent threat.

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?

In principle, a programme of environmental remediation is not 'agreed' with public authorities (even though, in practice, some negotiations take place between operators and *Préfets*). The only agreement authorised by the Environmental Code defines the 'future use' of the site, in consideration of which the public authorities will determine remediation obligations (Articles L. 512-6-1, R. 512-74-III and R. 512-75). This agreement may be concluded between the site operator, the site owner and the mayor in the context of the closure of a site when its future use was not defined in the environmental permit (sites authorised before 1 March 2006 are concerned).

Once the future use and the remediation measures are determined (following an agreement or not), the *Préfet* can decide additional measures or works (Article R. 512-76). This additional order can be challenged by the mayor or third parties. However, third parties may not be able to challenge the abovementioned agreement, since it could be considered as an administrative contract (its qualification remains unclear).

After the completion of the remedial action, the environmental inspector records that the works have been completed (Article R. 512-76-III). However, this record does not constitute a final clearance certificate if contamination resulting from the activity of the former operator appears later. Consequently, the authorities can require additional works (Article R. 512-78); there is however a time limitation, expiring after thirty years (see question 5.1, second paragraph).

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?

The owner or operator of a site can be held liable to third parties if it is responsible for damage comprising site contamination under articles 1382 (which implies a fault or negligence) to 1384 (which implies a control over the asset causing the damage) of the Civil Code. Third parties having a right of action are those harmed in some way by the contamination, including recognised environmental NGOs.

The last site operator is also free to commence civil proceedings before the courts against the former operator or owner. The last site operator can itself also be held liable to the new owner if it has not

complied with its remediation obligation under the Environmental Code, which constitutes a civil fault (Cass. civ. 3, 9 September 2009, no. 08-13.050), notwithstanding the existence of a non-recourse clause in the sale contract (Cass. civ. 3, 2 December 2009, no. 08-16.563).

The last operator selling contaminated land cannot transfer his administrative obligation of remediation to the purchaser: he remains liable *vis-à-vis* the authorities in spite of any contractual provision (*Cour de cassation*, Civ. 3, 16 March 2005, *Hydro Agri France*, no. 03-17.875). However, the sale contract can provide that the purchaser will bear the financial consequences of the remediation (Court of Appeal of Paris, 31 January 2008, *SARL Kappa immobilier c/ SA Comptoir des minéraux et matières premières 'CMMP'*) or will become 'the last operator' following the administrative procedure of change of operator.

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

The new liability regime established by Law no. 2008-757 of 1 August 2008 (abovementioned under question 4.1) includes the concept of 'pure environmental damage' caused to nature. The operator is required to bear the remediation costs or to reimburse them if the public authorities or other persons have taken measures themselves because the operator failed to do so or could not be found (Articles L. 162-17 *et seq.*). Local governments are explicitly allowed to claim damages for a harm caused to their territory and violating environmental law (Article L. 142-4).

Before law no. 2008-757 was adopted, case law had recognised the possibility to compensate the environmental harm as such (and not, for example, as a moral harm). In the case relating to the wreck of the 'Erika' ship, a local government with environmental competence (and an environmental NGO) obtained indemnities related to the environmental harm suffered (*Tribunal de Grande Instance of Paris*, 16 January 2008, no. 9934895010). The French State also obtained a large amount of damages, but they recovered the public expenses involved in responding to the pollution and not compensation for the environmental damage.

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.?

Such powers are vested in environmental inspectors (mentioned under question 1.1): they may visit the installations under their supervision at any time (Article L. 514-5) and may take away documents, but only after a list has been drawn up and countersigned by the operator.

Production of documents and site visits also take place during the authorisation process: various studies or analysis by an independent expert can be required by the *Préfet* in the application file for an environmental permit (Articles R. 512-6 *et seq.*) and sent to the environmental inspectors (Article R. 512-11). A site visit can take place during the public enquiry (Article R. 512-16). Finally, the environmental permit must provide for analysis and supervision measures to take place during the operation of the site and the results of which must also be sent to the environmental inspectors (Article R. 512-28). Subsequently, the *Préfet* can also require new or updated information (Article R. 512-31).

For the purpose of enforcing the new liability regime established by Law no. 2008-757 of 1 August 2008 (above-mentioned under

question 4.1), officials placed under the supervision of the public authority may require the production of any necessary information or documents and access the occupational premises, places, installations and means of transport (Article L. 162-13).

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?

In the event of an accident or incident resulting from the operation of a site and likely to endanger the environment or public health, the operator must declare it as soon as possible to the environmental regulator (Article R. 512-69). In the event of an environmental damage as defined by Law no. 2008-757 of 1 August 2008 on environmental liability (abovementioned under question 4.1), the operator must also inform the public authority immediately (Article L. 162-4).

Most dangerous industrial sites must be covered by an emergency plan (*plan particulier d'intervention* or *PPI*) which determines the measures to be taken in case of an accident migrating off-site, such as the immediate information of neighbouring populations (Law no. 2004-811 of 13 August 2004 and Decree no. 2005-1158 of 13 September 2005).

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

A person may have an obligation to investigate land for contamination before and after being granted an environmental permit (see question 6.1). The application file for an environmental permit must include an environmental impact study with an analysis of the initial condition of the site (Article R. 512-8), which usually implies an investigation for contamination. On site closure, the operator must send the *Préfet* a report disclosing any potential pollution of the site (Article R. 512-76).

Based on Articles L. 512-3, L. 512-20 or R. 512-31 and the evidence of risks to the environment, public authorities can also require site operators to perform in-depth site review (with soil surveys).

Prior to the sale of a plot of land (see also question 7.3), the seller must investigate and check whether a classified installation was operated on its site, to comply with its information duty under article L. 514-20 (*Cour de cassation*, Civ. 3, 17 November 2004, *Sté Dassault Aviation*, no. 03-14.038, no. 03-14.213); the seller cannot be exonerated by its ignorance of the existence of a classified installation (Court of Appeal of *Nîmes*, 4 March 2008, *SA Citadis*, n° 06/00516).

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?

Unlike in real estate transactions, there is no specific information obligation in the context of merger and/or takeover transactions. However, the seller's silence on environmental problems may constitute deception (*dol*), which is a ground for annulment of a contract (article 1116 of the Civil Code); in this case, the purchaser can claim damages on the ground of article 1382 of the Civil Code (Court of Appeal of *Orléans*, 21 March 2002, *Cts Faverio c/ Drogo*, *Juris-Data* no. 2002-176581 ; Court or Appeal of *Lyon*, 10 April 2003, *Société La Mure Bianco SA c/ Société Total Fina Elf France SA*, *Juris-Data* no. 2003-219240).

Nevertheless, the purchaser must also inform itself.

In the context of the sale of a plot of land on which a classified installation subject to an environmental permit was operated **in the past**, the seller must inform the purchaser of (i) the past operation of a such installation and (ii) of the risks resulting from the operation of the site, provided that he knows them (Article L. 514-20). Otherwise, the purchaser can request the cancellation of the sale, a reduction of the price or remediation by the seller. This information obligation only concerns past operation and does not apply to plots of land on which a classified installation is **currently** being operated (*Cour de cassation*, Civ. 3, 9 April 2008, *SCI Coignières Logistic*, no. 07-10795); other information obligations apply to the sale of sites in activities.

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?

Contractual provisions like warranties and indemnification clauses may limit the trigger, duration and amount of the potential environmental indemnity.

However, an indemnity clause cannot be used as a defence to enforcement action taken by the public authorities: the operator selling a contaminated land cannot transfer his administrative obligation of remediation to the purchaser (*Cour de cassation*, Civ. 3, 16 March 2005, *Hydro Agri France*; *Conseil d'Etat*, 11 April 1986, *Ministre de l'environnement c/ société des produits chimiques UGINE-Kuhlman*, no. 62.234 and see question 5.4, last paragraph).

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 company law, a company can be dissolved in specific circumstances only and, where such dissolution is decided, the shareholders must have just grounds for doing it. To escape environmental liabilities is not likely to be considered as such.

Where a subsidiary operating a classified installation becomes insolvent, the parent company will not be considered as the operator or the holder of the installation and the bankruptcy proceedings of the subsidiary will be extended to the parent company only in limited situations. However, the environmental liability of parent companies may evolve in the near future (see question 8.3 below).

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?

As a general rule, the shareholders and the parent company are not liable for breaches of law or damages caused by a company. Consequently, where the operator becomes bankrupt or insolvent, the *Préfet* cannot order its shareholders or parent company any environmental remediation.

However, the environmental liability of parent companies may evolve in the near future. According to the '*Grenelle I*' law (Law no. 2009-967 of 3 August 2009), France will support the

introduction of parent company liability in cases of serious environmental damage caused by subsidiary companies at EU and international level. The ‘Grenelle 2’ bill provides that a parent company may have to or may decide to bear the remediation costs where its subsidiary (the operator) is defaulting or insolvent. However, these provisions may evolve to a large extent before their final adoption, which is expected to take place in 2010.

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

Under the ‘Grenelle 1’ law (Law no. 2009-967 of 3 August 2009), the environmental ‘alert’ will be reorganised within a pluralistic national framework and the creation of an authority designed to protect alert and expert appraisal will be studied.

Current legislation only punishes by imprisonment and fines those who wilfully fail to offer assistance to a person in danger or voluntarily abstain from taking or initiating measures to combat a natural disaster that is likely to endanger the safety of others (articles 223-6 and 223-7 of the Penal Code).

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

Class actions do not exist in France and, though their introduction has been seriously considered for several years, the French government seems now to be reluctant to introduce them and, in any event, they seem unlikely to be available for environmental claims.

However, certain group proceedings that already exist can be compared to class actions. Indeed, people having suffered environmental damage, pollution or inconvenience can mandate an officially approved environmental association to initiate proceedings on their behalf before civil or criminal courts (Article L. 142-3).

Further, associations can bring an action before the courts, as long as the collective interests they protect are directly concerned with, or suffering from, the contested activity. All environmental associations have access to administrative (Article L. 142-1) and civil courts. Besides, where they are officially approved (or lawfully declared for five years), they have also access to criminal courts.

Exemplary or punitive damages are not available in France: the judge only aims to compensate the damage of the victim and not the fault which has been committed.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in France and how is the emissions trading market developing there?

France implemented the EU Emissions Trading Directive in Articles L. 229-5 to L. 229-19 and R. 229-5 to R. 229-37 (and R. 512-28 and R. 512-46 for classified installations) which set out a greenhouse gas allowance trading scheme.

A national allocation plan (NAP) has been adopted for the 2005-2007 period, then for the 2008-2012 period. The first NAP allocated an excessive quantity of allowances, the price of which slumped on the European market in 2006. The NAP for the 2008-2012 period has been tightened up and corresponds more closely to actual emissions.

Bluenext, a specialist carbon exchange based in Paris handles 80 per cent of spot trading related to the EU emissions trading scheme. Since June 2009, transactions on Bluenext have been exempted of

VAT, following the discovery of a VAT fraud.

There is currently a move towards the auctioning of allowances, in accordance with the EU Emissions Trading Directive: the ‘Grenelle 1’ law provides that France will contemplate the auctioning of emission allowances as from 2013 and, although it has already failed several times in doing so, the French government intends to make the electricity sector pay for its allowances before 2013 (in order to increase the reserve of free allowances for new entrants).

10 Asbestos

10.1 Is France likely to follow the experience of the US in terms of asbestos litigation?

In France, the number of claims for asbestos exposure is very high (even though it is not comparable to the US situation), but it started to decrease for the first time in 2008. To face these claims, Article 53 of Law no. 2000-1257 of 23 December 2000 established a dedicated compensation fund, the *Fonds d’indemnisation des victimes de l’amiante* (FIVA). Three categories of person can be indemnified: people who suffer from an occupational disease related to the use of asbestos, people who suffer a prejudice due to exposure to asbestos in France, and the successors of these two categories. In 2008, the FIVA received around 15,000 demands for indemnification.

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

The prohibition of the use of asbestos is rather recent (Decree no. 96-133 of 24 December 1996). Articles R. 1334-14 *et seq.* of the French Public Health Code provide a set of obligations and duties that is imposed on the property owner. The owners of premises other than housing for individual use are required to identify the presence of asbestos on site. If the presence of asbestos is detected, the state and condition of the asbestos must be assessed.

Furthermore, the owners of immovable property had until 2006 to draw up a technical report (*dossier technique amiante*) accounting for the possible presence of asbestos, the technical controls performed and remediation measures.

Concerning occupational disease, the employer (in charge of a safety obligation) is presumed responsible and will need to prove the contrary. If an employer has knowingly exposed his employees to asbestos, he will be exposed to criminal sanctions for inexcusable fault and to compensation payments.

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 France?

Environmental insurance policies are available in France, and have evolved significantly. For a long time, environmental damages used to be covered by general insurance policies. However, since the beginning of the 80’s, they have been progressively excluded from insurance given the high probability of accidents generating environmental damages and the huge sums at stake.

To compensate for this lack of insurance, a group of insurers named ‘Assurpol’ created new insurance policies, specifically dedicated to remedy environmental damages. These policies can only be subscribed by companies and not directly by their D&Os.

As a general rule, these policies cover the financial consequences of civil liability for damages caused to third parties or goods, and the costs incurred to contain environmental risks (for instance, for contaminated land remediation). However, they do not cover the financial consequences of 'pure ecological damage'. Furthermore, they do not insure damages due to a voluntary infringement of environmental laws or civil or penal fines imposed for environmental damage. Examples of such insurance policies include the 'RCAE Contract', covering environmental damages caused by classified installations, the 'Multi Risk Contract' which includes the coverage of remedial actions and measures as regards contaminated land, and the 'RPL Contract', dedicated to public authorities and companies to remedy the damages caused by oil slicks. Besides, the most polluting or dangerous classified installations must provide appropriate financial guarantees.

The Law of 1 August 2008 regarding environmental liability (above-mentioned under question 4.1) is likely to give impetus to the environmental insurance market. As this law creates a new liability regime to redress 'pure environmental damage', insurers may design new policies to cover this new risk. In this respect, it may be noted that Assurpol already anticipated this opportunity by creating a policy containing a specific guarantee covering the costs of prevention and remediation of pure environmental damage.

11.2 What is the environmental insurance claims experience in France?

Taking out of environmental insurance policies is not compulsory. The increasing importance of environmental issues has led companies to modernise their facilities and to invest in the anticipation of environmental damages.

The environmental insurance policies market is evolving and information about insurance claims is not available yet.

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 France.

The new regime of 'simplified' environmental permit (or 'registration') should be implemented in 2010 following the adoption of the related decrees and ministerial orders.

The 'Grenelle 2' law is expected to be passed in Spring 2010. It will provide detailed measures for the implementation of the 'Grenelle 1' law and deal with construction, town planning, transport, energy, climate, biodiversity, environmental risks, health, waste, agriculture, governance and environmental information. Some of its aspects were discussed under questions 4.5, 8.3 and 8.4.

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