Germany

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1 Environmental Policy and its Enforcement

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

German environmental policies and the implementation of environmental laws are based on three main principles:

- The "precautionary principle" (*Vorsorgeprinzip*) is aimed at avoiding or minimising the possibility of pollution or threats to the environment at an early stage. Authorities are therefore entitled to intervene and regulate industrial installations even if they have not (yet) been proven harmful.
- The "polluter pays principle" (*Verursacherprinzip*) means that anyone responsible for endangering, polluting or causing damage to the environment will be liable for the costs related to avoidance or clean up.
- The "co-operation principle" (*Kooperationsprinzip*) means that environmental policy must be developed in close co-operation (exchange of information, public hearings etc.) with all relevant public and private organisations to prevent future harm to the environment and to clean up damage caused in the past.

Enforcement Bodies

Key areas of German environmental law are regulated by federal acts, often leaving the 16 states (*Bundesländer*) with the power merely to complete the framework of environmental legislation. Administering and enforcing environmental law, though, is mainly the task of the *Bundesländer*. According to Article 83 of the German Constitution, the *Bundesländer* enforce federal statutes as if they were their own statutes, subject only to the legal supervision of the federal government.

Following a constitutional reform of the federal system which came into force on 1 September 2006 (see below question 12.1), the allocation of legislative powers between federal and state levels in the area of environmental law has been modified.

Due to the lack of direct enforcement powers, only a small number of authorities have been set up by the federal government. Important federal authorities are, for example, the Federal Ministry for the Environment (*Bundesministerium für Umweltschutz*) and the Federal Environmental Agency (*Umweltbundesamt*). Whilst the Federal Ministry defines the political agenda, the Environmental Agency is in charge of environmental research, planning and the administrative tasks assigned to it by the Federal Ministry.

The administrative procedure in the various states is standardised to a certain extent. Traditionally, states covering larger geographic areas feature a three-tiered administration: the ministries as the highest environmental authorities; followed by government districts (*Regierungsbezirke*) with monitoring powers at the intermediate tier; followed by counties (*Kreise*) or independent cities (*kreisfreie Städte*) at the lowest administrative tier. This structure underlies the administrations of North Rhine-Westphalia, Bavaria, Baden-Wurttemberg and Hesse. Other states such as Lower Saxony, Rhineland-Palatinate or Saxony-Anhalt have switched to a two-tier system, deleting the intermediate tier of government districts. The same applies to states that have always operated on a two-tier system, including the city-states of Berlin, Hamburg, Bremen, or larger states such as Mecklenburg-Western Pomerania or Thuringia.

As a general rule, most environmental tasks are delegated to the counties or independent cities. They are in charge of all local environmental tasks, acting either as subordinated authorities of the general state administration (e.g. the state-wide nature protection authority), or as bodies responsible for municipal self-administration. As regards technical and scientific questions, they are usually supported by various special agencies that have only limited administrative responsibilities. Recently, there has been a reform of administrative agencies in some of the states, where environmental tasks have been transferred from district governments to special environmental agencies at state level (e.g. North Rhine-Westphalia State Environmental Agency – *Landesumweltamt*).

In addition, local municipalities (*Gemeinden*) exercise significant influence on the development of commerce and industry with their planning and zoning decisions. As part of the municipal self-administration, they are responsible for public water supply, waste management and sewage disposal.

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

The German administration exerts a strong influence on environmental issues. Pursuant to Article 20a of the German Constitution (*Grundgesetz*) - as well as the respective provisions in the Constitutions of most *Bundesländer* - the protection of the environment constitutes a guiding principle for all state organs, including the enforcement of laws by public authorities. This has led commentators to describe Germany as an "Environmental State", i.e. a state that regards environmental protection as one of its central tasks. Moreover, public opinion in Germany is traditionally very sensitive to environmental issues. These circumstances have resulted in investors recognising the significance of environmental issues in Germany, and realising that the utmost care must be applied when dealing with such issues. However, there appears to be an increasing awareness of the need for speedier administrative permit procedures to ensure future investments in Germany. In

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2006, an Act to accelerate the planning procedure for major infrastructure projects was adopted at federal level (*Verkehrswegeplanungsbeschleunigungsgesetz*). The Act facilitates planning procedures of highways, railways, waterways or airports in the new Länder. A variety of means are used to achieve this goal. For example, and depending on the project: judicial review proceedings will only be allowed to be taken in the federal administrative court, and such proceedings will not suspend the commencement of development; associations now have to object to draft plans within the same time frame as ordinary citizens; and the planning authority is given the discretion to waive the requirement for an obligatory public hearing. A reform of the Federal Immission Control Act in 2007 follows this trend by making the public hearing in the permitting procedure optional, and by assigning more types of facilities to fast track procedures.

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

The revised Environmental Information Act 2004 (*Umweltinformationsgesetz, UIG*), implementing the revised European Environmental Information Directive 2003/4/EC into German law, has expanded public access to environmental information at the federal level. According to the revised Act, not only environmental authorities but all public authorities (at the federal level) in possession of environmental information are obliged to grant every citizen free access to such information. Moreover, the right to information has been expanded to include environmental information held by private law entities (e.g. companies) if they provide (subject to the control of federal authorities) public services or perform public administrative functions related to the environment. There are, however, certain restrictions imposed on making claims under the Act. Access to environmental information may be denied in order to protect certain public and private interests, including the protection of business secrets, intellectual property rights, or personal data.

The Environmental Information Act 2004 applies only to authorities at the federal level. Access to environment-related information at the state and municipality level falls within the legislative competence of the 16 federal states (*Bundesländer*). All 16 *Bundesländer* have adopted similar Acts.

2 Environmental Permits

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

Licences and permits are the central instruments used to ensure compliance with environmental regulations. Licensing and permit requirements are contained in several environmental statutes, including the Federal Immission Control Act, the Closed Substance Cycle and Waste Management Act, the Federal Water Act, the Federal Mining Act, the Nuclear Energy Act, the Genetic Engineering Act, etc. Certain projects may require several authorisations from different authorities. Each authority will review only those provisions for which it is responsible. Some permits have a so-called "concentrating" effect, i.e. they replace all or most of the other permits that would otherwise be necessary (most importantly: permits under the Federal Immission Control Act). In such cases, the authorities whose permits are replaced are consulted internally by the permit-issuing authority.

The exploitation or diversion of water and the introduction and discharge of substances into the water require an official permit (*Erlaubnis*) or licence (*Bewilligung*). Note that the "concentrating" effect as it applies to industrial plants and infrastructure projects does not include water permits or licences. There are only a few exceptions to the permit or licensing requirement, such as the use of groundwater for domestic or farming purposes.

The possibility of the transfer of a permit is dependent on whether the permit is a personal permit (*Personalkonzession*), i.e. containing personal elements which are inseparable from the permit holder, or an object-related permit *in rem* (*Sachkonzession*) which is independent of personal elements and is purely object-related, e.g. related to real property or an installation. Personal permits - which are very rare in environmental law - cannot be transferred from one person to another. Object-related permits (e.g. an operator permit pursuant to the Federal Immission Control Act) exist independently of the operator's identity and can therefore usually be transferred. In some cases, elements of both personal permits and object-related permits are combined, meaning that a transfer is generally possible but requires approval by the competent public authority.

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 applicant may challenge the refusal of an environmental permit. Alternatively, the applicant may challenge individual conditions stipulated in the permit which he thinks are unduly onerous. As a general rule, a party must follow an administrative objection procedure before suing in an administrative court. Objections have to be filed within one month of the authority's decision. In these procedures, the superior authority reviews the objection. If the superior authority dismisses the application, there is a right of appeal to the administrative court. If the claim is justified, the court will remit the case to the authority and require the authority to grant the permit; repeal the unduly onerous condition; or - at least – to consider the court's decision when taking a new decision.

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

The construction and operation of installations that are particularly likely to harm the environment (i.e. industrial and infrastructure projects such as power plants, refineries, chemical plants, paper mills, incineration plants, storage areas for hazardous substances, etc.) are subject to particular licensing requirements. The installations concerned are defined in Annex 1 to the 4th Ordinance to the Federal Immission Control Act (*4. Bundes-Immissionsschutzverordnung*). This list includes different types of installations. Depending on the size and type of installation, a formal permit procedure may be necessary.

The formal permit procedure requires public consultation. This includes public notices of the relevant project in the Official Gazette, as well as in local newspapers or on the internet. The application and accompanying documents must be available for inspection by the public, generally for a period of one month. During the public consultation period, anyone may object to the proposed project. This is followed by a public hearing, during which the licensing authority has to discuss the project with the applicant and any person who has raised any objections. The permit decision is normally made within the seven months following the application. Several statues (e.g. the Federal Immission Control

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Act and the Waste Act) provide that once permits have been issued, they can no longer be challenged on the basis of objections that were not actually raised during the consultation process.

Certain industrial and infrastructure projects, such as power stations, chemical plants, waste management facilities, railway tracks and airports, cannot be permitted without an environmental impact assessment (EIA). An EIA is not an additional permit requirement but part of the licensing procedure. However, the need for an EIA can significantly delay the permit decision. The authority determines, describes and evaluates the likely environmental effects of the project based on comprehensive information that has to be provided by the applicant. The information must be passed on to every authority concerned with the project and to the general public. Furthermore, a public hearing must be held and the authority must produce a comprehensive report on the project's effects. Authorities must consider such effects, although the actual permit decision is made on the basis of the specific environmental laws. In 2001, pursuant to an EU Directive, Germany had to expand the scope of the EIA Act of 1990. Numerous projects, such as paper mills, wind farms, industrial zones or shopping malls now require a preliminary 'screening' of their environmental effects in order to decide whether a full EIA is necessary. The role of the public was broadened in 2006 by the Public Participation Act (*Öffentlichkeitsbeteiligungsgesetz*), which sets certain minimal requirements so as to ensure public participation in permit procedures.

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

The administrative authorities have a variety of administrative enforcement instruments at their disposal. They may directly compel the permit holder to comply with the permit, levy an enforcement fine (*Zwangsgeld*), carry out substitute performance at the expense of the permit holder, revoke the permit, or shut down a facility. In addition, in most areas of environmental law the administrative authorities may impose administrative fines (*Bußgeld*) in the event of a permit being violated.

The violation of permits is also subject to criminal penalties. Most notably, breaches of permits related to some industrial activities incur criminal liability, even if no environmental damage has been caused (see also question 4.1).

3 Waste

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

The Closed Substance Cycle and Waste Management Act of 1996 (*Kreislaufwirtschafts- und Abfallgesetz*), which is currently being amended due to the Revised Waste Framework Directive (2008/98/EC), has expanded the definition of "waste" considerably and therefore extended the overall scope of waste law. "Waste" is defined in the Act as movable property of which a person rids himself, wishes to rid himself or must rid himself. A distinction is made between 'waste for recycling' and 'waste for disposal'.

While the intended amendment would introduce a 5-level hierarchy, the current Act stipulates a basic 3-level hierarchy: at the top is waste prevention, which takes priority over recycling, while recycling takes precedence over disposal. The Act imposes a duty on producers and possessors of waste to keep it in separate categories and to recycle it as far as economically and ecologically reasonable. Recycling and incineration of waste to produce energy have equal status under the Act. However, in each case priority is given to the soundest solution from an environmental viewpoint, be it disposal or recycling.

According to the Closed Substance Cycle and Waste Management Act waste is subdivided into hazardous and non-hazardous waste. The scope of registration duties pertaining to waste handling depends on the type of waste as well as the type of handling, i.e. waste production, transportation or collection, or disposal. Waste disposing companies are subject to registration duties even for non-hazardous waste. As of April 2010, the registration and documentation process must be carried out electronically.

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?

While waste from private households is disposed of by the municipalities, waste from commercial activities must be disposed of by the producers or possessors. They are also responsible for preparatory and accompanying measures such as the collection, transport, storage and treatment of waste for further use.

However, there is a general obligation under s. 27 of the Closed Substance Cycle and Waste Management Act to dispose of waste only in authorised plants or facilities. If commercial waste cannot be treated or recycled in compliance with regulatory requirements, it must be handed over to the municipalities.

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 s. 16 (1) of the Closed Substance Cycle and Waste Management Act, the parties responsible for waste may commission third parties to meet their obligations. However, such commissioning does not absolve them of their responsibility to meet the relevant obligations. In fact, the commissioner can incur criminal and civil liability if the waste has not been disposed of properly by the third party and if the commissioner has violated its responsibility to select the third party with due care. Case law has set strict standards in this regard. Third parties must appear reliable, having regard to the hazardousness of the waste, the technical problems of the disposal and the extent of the commission.

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

The Packaging Ordinance (*Verpackungsverordnung*) obliges manufacturers and distributors to take back returned packaging free of charge and to have it recycled in an environmentally friendly way. As an important amendment to the Packaging Ordinance in 2008, packaging manufacturers and distributors are obliged to take part in a waste disposal system (s. 6 para. 1, 3 of the Packaging Ordinance). This system must guarantee regular collection from private consumers. At present, the most widespread system established in Germany that meets the statutory requirements is the DUALES SYSTEM Deutschland (DSD). Distributors of packaging are obliged to document the quantities and compliance with recovery requirements of packaging distributed by them in statements of completeness (*Vollständigkeitserklärungen*).

As of May 2006 and pursuant to s. 9 of the Packaging Ordinance, the deposit of 25 cents on one-way drink cans (*Dosenpfand*) has been extended to all ecologically unfriendly one-way packaging from 0.1 to 3 litres. Packaging of juices, milk, and wine, as well as ecologically more sound packaging such as drink cartons, remains

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exempt from any deposit. Under the "individual solutions" framework that has lapsed in 2006, retailers only had to take back one-way drink packaging sold by their own sales chain. Under present legislation drinks retailers are obliged to take back any packaging which is made of the respective material they sell (i.e. PET, or glass). Customers may therefore return empty one-way cans, glass or plastic bottles at any retailer that sells one-way packaging of the same material. Limitations to this take-back duty apply to retailers with a sales area less than or equal to 200m².

The End-of-Life Vehicles Ordinance (*Altfahrzeugverordnung*) obliges manufacturers or importers to accept all returned vehicles which have been licensed in the EU, free of charge and to ensure their proper recycling. The ordinance also defines recycling targets: by 2006, a minimum of 85% of the parts of a used vehicle must be recyclable and by 2015 this amount will be increased to 95%.

The Ordinance on the Return and Disposal of Used Batteries (*Batterieverordnung*) obliges consumers to return batteries to collection points. Distributors of batteries must accept returned batteries and return them to the manufacturer who must then recycle or dispose of them according to the Closed Substance Cycle and Waste Management Act.

Consumers can return electronic waste at collection points free of charge according to the Electrical and Electronic Equipment Act (*Elektro- und Elektronikgerätegesetz*). Producers, importers and (under certain circumstances) re-sellers must take back, recycle or dispose of them properly. Since November 2005, producers must register before placing electrical equipment on the market. The competent body for the registration is the foundation *Stiftung Elektro-Altgeräte Register* (EAR) which has been set up by the industry and vested with administrative powers by the Federal Environmental Agency (*Umweltbundesamt*).

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?

Environmental liabilities are primarily prescribed under public law provisions. Public liability is laid down in various statutes, ordinances and administrative regulations at federal and at state levels (in some cases also at the local level). If specific regulations (such as s. 4 of the Federal Soil Protection Act or s. 21 of the Closed Substance Cycle and Waste Management Act are not applicable, the competent authority may issue the appropriate orders under the state's general police laws (*Polizei- und Ordnungsrecht*). Such actions presuppose a danger to public safety and order, such as danger to human health and the environment. Authorities will take appropriate measures against the person/entity directly responsible for causing the situation, i.e. the polluter (*Handlungsstörer*), or alternatively, the person/entity that owns or possesses the facilities or the site (*Zustandsstörer*). Liability is strict and includes the responsibility for both investigation and remediation measures.

Private claims for compensation or indemnity claims in respect of environmental damage are governed by the Civil Code. For example, neighbours may seek an injunction against emissions (e.g. gases, smells, vapours, smoke, heat, noises, vibrations and other similar interferences) affecting their property, with liability arising independently of negligence (s. 906 of the Civil Code and s. 14 of the Federal Immission Control Act). If, however, the emission cannot be prevented with commercially viable means, the sole remedy available to the injured party is monetary compensation for the damage.

Health and personal property are protected by tort law. Under s. 823 of the Civil Code, compensation may be sought if the damage is caused by wilful or negligent conduct. The Federal Supreme Court (*Bundesgerichtshof*) has eased the rules of evidence for potential claimants and reversed the burden of proof. The injured party now only needs to establish a causal link between the emission and the damage or injury. The courts have also applied the concept of a 'duty to protect the public' (*Verkehrssicherungspflicht*) to environmental liability. Under this concept, anybody creating environmental hazards has a duty to take all reasonable precautions to prevent damage to third parties.

S. 1 of the Environmental Liability Act (*Umwelthaftungsgesetz*) provides for strict liability with respect to harmful effects on the environment. If any person is killed, suffers bodily harm or damage to health or if property is damaged as a result of a hazardous installation (e.g. major industrial and energy facilities), the operator of the installation is under an obligation to compensate the aggrieved party for the resulting damage. According to s. 6 of the Environmental Liability Act, the burden of proof is reversed where there is a likelihood that the installation caused the damage and the relevant responsibility may be presumed.

S. 22 of the Federal Water Act provides strict civil liability for water pollution. Under this provision, any person who introduces or discharges any substance into water or takes any action which results in a change to the physical, chemical or biological composition of the water, is liable to compensation if damage is caused to any other person as a result of this action.

The German Criminal Code (*Strafgesetzbuch*) contains several provisions dealing with environmental offences (s. 324 to s. 330d). Criminal acts under these provisions include the pollution of natural waters, the creation of harmful air pollution, the creation of serious dangers to health by the release of noxious substances, waste disposal which endangers the environment, and the unauthorised operation of installations which are potentially damaging to the environment.

In 2007, the German parliament adopted legislation to implement the European Environmental Damage Directive 2004/35/EC. The purpose of the Environmental Damages Act (*Umweltschadensgesetz*), which entered into force on 14 November 2007, is to prevent and remedy damage caused by certain occupational activities to protected habitats and species, inland waters and soil. The Act does not, however, apply to claims for damage suffered to personal property or to the health of individuals – such claims continue to be brought under the existing Environmental Liability Act (*Umwelthaftungsgesetz*). The Act closely mirrors the wording of the Directive. However, two provisions may cause controversy, particularly from the perspective of German industry. Firstly, the Act does not provide for a permit defence. Instead it is to the federal states' discretion whether to stipulate the possibility of a permit defence. Therefore only in states granting permit defences will operators be able to avoid liability for environmental damage by complying with the conditions of a permit. This could easily result in a fragmented liability regime developing within Germany. Secondly, non-governmental organisations (NGOs) are entitled to initiate proceedings against decisions of authorities under the Act and claim that remedial measures need to be taken. Contrary to traditional German legal principles, NGOs are therefore entitled to take legal action even if they are not affected by the decision themselves.

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

There is no permit defence against strict liability under the Environmental Liability Act, i.e. in principle liability is not

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influenced by whether the installation has been operated in accordance with applicable public law provisions and the conditions of the permit. Proof of normal operation nevertheless brings two types of relief to the operator: causation is no longer presumed; and liability for insignificant damage to property is excluded.

In cases of environmental hazards the operator may also be held responsible under the fault-based liability of s. 823 of the Civil Code. An exclusion of liability may be derived from compliance with environmental standards imposed by statutory provisions and the permit. As another defence the operator may prove that he took all reasonable measures to avoid environmental damage.

The Environmental Damage Act does not provide for a permit defence but leaves it to the federal states to introduce such legislation (see question 4.1 above).

There is on-going debate as to whether the permit defence against public liability is a generally recognised legal instrument under German law. Some case law holds that the scope of the permit defence has to be determined on a case-by-case basis, taking into account the underlying statutes and the terms of the individual permit. However, there are also other court rulings which hold that – as a matter of principle – any activity or operation for which a permit has been issued cannot trigger public liability.

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?

In general, directors and officers are not personally liable for environmental wrongdoing. There is no specific precedent set by German civil courts in the area of environmental damage. However, some commentators claim that directors and officers can be held liable if they violate their obligations to organise and supervise environmental safety (e.g. under the Federal Immission Control Act, the Federal Water Act, Closed Substance Cycle and Waste Management Act). The criteria and scope of such liability remain unclear. In particular, it is disputed whether compliance with organisational standards such as EMAS 9001 provides a sufficient defence. Even more controversial is the question of whether personal liability can be incurred by environmental officers (*Beauftragte*), i.e. employees appointed by the operator of a plant to monitor compliance with specific environmental obligations, but who are not bound by the instructions of corporate management.

German criminal law applies only to individuals and not to companies. Thus the prosecuting authorities must allocate environmental duties and non-compliant behaviour to individuals within a company. According to s. 14 of the Criminal Code, the environmental duties of an enterprise are assigned to the company management as a whole and therefore all members of the management can be held liable for any failure to comply with environmental laws. This joint liability can be limited to some extent by clearly specifying in advance the areas each manager is responsible for. The management may delegate responsibility to subordinate company levels. However, this will not discharge the management from its overall responsibility. Rather, the obligations of the management are transformed into monitoring duties.

Irrespective of criminal proceedings, administrative authorities may fine senior company personnel based on s. 130 of the German Regulatory Offences Act (*Ordnungswidrigkeitengesetz*) if environmental or other offences are committed by employees. This regulatory regime sanctions proprietors for failing to take supervisory measures within their company. Under s. 9 of the German Regulatory Offences Act, sanctions may also be imposed on directors, officers and other company representatives.

Specifically, proprietors and other senior company personnel will be liable to a fine for intentional or negligent failure to take supervisory measures if such measures were necessary to prevent violations of company-related duties which had been delegated to employees. The required supervisory measures imply obligations to conduct diligent employment processes; to constantly supervise employees; to maintain a functional and clearly structured organisation; and to act appropriately in case of any irregularities.

The fine is generally limited to EUR 1 million, although this amount may be extended in order to ensure that the offender retains no economic benefit from the offence (s. 30 para. 2 in conjunction with s. 17 paras 1 and 4 of the German Regulatory Offences Act). Irrespective of any fines imposed on individual company personnel, the relevant administrative authorities may also fine the company itself (s. 30 in conjunction with s. 130 of the German Regulatory Offences Act). Such fines for administrative offences are generally enforced by the administrative authorities at the state level rather than through the criminal prosecution system. However, if the administrative offence is related to a criminal investigation, the administrative proceedings can be integrated into the criminal proceedings against the relevant individual (s. 130 of the German Regulatory Offences Act).

Insurance protection is available for claims under public or civil law as well as for fines and criminal penalties. However, since the environmental liability laws are not consolidated and stipulate various offences (e.g. relating to water, soil, air, waste, plants and animal protection) in various acts, a great variety of insurance policies are available to cover specific risks. For example, policies have been developed to cover public claims based on the Environmental Damages Act (*Umweltschadensgesetz*) and civil claims based on the Environmental Liability Act (*Umwelthaftungsgesetz*). Other policies include water pollution insurance and product liability insurance. Insurance is also available to protect against the cost of conducting a defence to industry-related criminal proceedings.

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?

The extent of possible liability risks related to transactions depends to a large extent on the nature of the transaction.

In share deals, i.e. if the investor acquires the shares of the target, the target will remain liable for the clean-up of any contamination caused as polluter. The same risk arises in mergers, i.e. if the investor becomes the legal successor of the target. In such a scenario, the purchaser may become liable under public and civil law (compensation claims) for any contamination that the target company (or any of its legal predecessors) has ever caused on any former site or adjacent properties.

In asset deals, i.e. if the purchaser acquires the assets of the target, the purchaser will be liable as the future owner (or occupier) of the land. The Federal Constitutional Court ruled in 2000 that the liability of the landowner is in principle limited to the market value of the site after the completion of remediation measures. The owner's liability may be limited further where the contamination was caused by a natural occurrence, by the public or by an unauthorised third party, and if he did not know about the pollution when he bought the assets.

In addition, with asset deals that took place after 1 March 1999, the target company will remain liable as the former owner if it knew or ought to have known about the contamination.

Due to the complexity of possible environmental risks involved, the

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parties should always consider any stipulations under contractual provisions (e.g. environmental indemnity) on how environmental liabilities are to be shared between them (see question 8.1 below).

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

The concept of lender-liability, under which a creditor is responsible for environmental damage caused by the borrower, does not exist in German environmental law. Under the Federal Soil Protection Act (*Bundes-Bodenschutzgesetz*), a lender qualifies neither as a polluter, because he does not directly create a danger through his actions or omissions, nor as an operator or a person exercising factual control over the land - because lending money does not give him a significant and determining influence on the location, nature or specific operations of a facility.

Aspects of environmental risks do play a part in the banks' assessment of the credit-worthiness of a business, e.g. contaminated land is less suitable as collateral, and the environmental liability of the borrower adversely affects his solvency and credit-worthiness.

5 Contaminated Land

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

Until 1999, soil and groundwater contamination was handled individually by the 16 federal states, mostly according to their general police and water laws. With the enactment of the Federal Soil Protection Act, which came into force on 1 March 1999, a uniform standard was introduced for the first time. The Act aims to protect the soil against future deterioration and provides for liability and remedial measures for existing contamination. An ordinance sets out threshold values, which are to be used for evaluating contamination risks.

Under the Federal Soil Protection Act, several persons/entities can be held liable:

- the polluter;
- the universal legal successor (*Gesamtrechtsnachfolger*) of the polluter;
- the operator;
- the owner;
- the person exercising factual control over the land (*Inhaber der tatsächlichen Gewalt*), e.g. a lessee;
- any former owner, provided that he transferred the property after 1 March 1999 and knew or ought to have known the existence of the contamination; or
- the person/entity responsible under general principles of commercial or corporate law for the legal entity owning the site.

If there are sufficient grounds for suspecting that a site has been contaminated, the competent authority may require any of these persons or entities to carry out an inspection at their own expense in order to determine the degree of environmental damage. If there is evidence of a threat to the environment or environmental damage, the authority is allowed to order remedial action.

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

A hierarchy or 'class' system of responsible persons is unknown to German soil protection law. Rather, the Federal Soil Protection Act assumes that all responsible persons are, in principle, of equal status. In particular, there is no principle of prior-ranking responsibility of the polluter. For example, if the polluter is difficult to determine or financially incapable of carrying out remediation, the authority may charge the property owner with remediation. In turn, the property owner may then have a compensation claim against the polluter according to S. 24 (2) of the Federal Soil Protection Act.

In principle, the authority has full discretion to decide which responsible party it wants to charge with investigation/remediation measures or the costs thereof. This decision is subject to limited judicial review only. In general, that measure which will most efficiently and immediately avert the danger should be taken, subject to the principle of proportionality. In addition, the authority may recover the costs of those measures which it has itself taken in order to avert risks of environmental damage. When recovering such costs, the authorities can choose, as one criterion, the party in the strongest financial position as the liable party.

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?

The classic instruments of German soil protection law with regard to the remediation of contaminated land are administrative orders by the competent authorities (e.g. a formal investigation or remediation order). However, 'public law contracts' (*öffentlich-rechtlicher Vertrag*) are becoming increasingly important as a flexible instrument to deal with various public law issues. The Federal Soil Protection Act provides for a 'remediation-contract' (*Sanierungsvertrag*) between the environmental authority and the person(s) liable for remediation under the Act. Such a contract may involve third parties (e.g. other responsible parties or future site owners). Once the contract has been made the authorities are bound by the agreed remediation target and cannot require additional works. Only if the inherent basis of the contract is changed may the authority demand an adjustment or the termination of the contract.

Remediation contracts which contain provisions affecting third parties may require the written consent of the affected third parties. The need for consent is limited to the relevant provisions of the contract. If the contract is agreed without the necessary consent, the third party has the right to challenge the contract.

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?

As a general rule, the costs for remediation are to be borne by the person who is obliged to conduct the remediation. However, in cases involving several responsible persons, the Federal Soil Protection Act provides for a statutory compensation claim between these various responsible persons, irrespective of their being called to account by the authorities. Where no other arrangements are agreed, the obligation to provide such compensation, and the amount of compensation, depends on the extent to which the hazard or damage was caused primarily by one party or the other. For example, if a property owner who has not caused the contamination is obliged by the competent authorities to carry out remediation, he has a statutory compensation claim against the polluter.

Claims for compensation become time-barred after three years. The

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beginning of this three-year period differs depending on whether the authority or a private party has carried out the remediation measures. In the case of an authority taking the measures, the three-year period begins with its collection of the costs; in the case of a private party taking the measures, the three-year period starts on the date the private party becomes aware of the other responsible party. Regardless of such knowledge, claims become time-barred thirty years after the completion of the remediation measures. Liability risks in connection with claims under s. 24 (2) of the Federal Soil Protection Act should not be underestimated, in particular as there appears to be an increasing willingness to test cases in court.

The statutory claim for compensation pursuant to s. 24 (2) of the Federal Soil Protection Act can be excluded by contract. In 2004, the Federal Supreme Court ruled that such exclusion must be stipulated by explicit contractual terms; moreover, the exclusion is valid exclusively between the contracting parties and not in relation to future purchasers. From a transactional perspective, this means that a vendor must contractually oblige the purchaser to pass on the exclusion of the statutory claim against the vendor to any onward purchasers and subsequent users in order to safeguard against claims by future purchasers or users based on s. 24 (2) of the Federal Soil Protection Act.

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 general compensation for aesthetic harms to public assets. According to s. 19 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz*), the person or entity which has caused any encroachment on nature and landscape has to compensate for any unavoidable impairment by taking nature and landscape conservation measures. However, this duty is limited to encroachments caused by specific projects that are subject to a permit or licence. The federal states have authority to extend these compensation duties and impose them on projects that do not require a permit or licence. Moreover, the Environmental Damages Act (*Umweltschadensgesetz*) which entered into force on 14 November 2007 provides for, inter alia, remediation duties with regard to damage caused by certain occupational activities to protected habitats and species, inland waters and soil.

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.?

Environmental regulators have a variety of instruments at their disposal to control compliance with environmental law provisions. Their powers are contained in the respective environmental statutes (e.g. Federal Immission Control Act, Federal Water Act, Closed Substance Cycle and Waste Management Act, Nuclear Energy Act, Chemicals Act). They are supplemented by general provisions in the Law on Administrative Proceedings (*Verwaltungsverfahrensgesetz*). The powers comprise the right to conduct site inspections, to require the production of documents and to take samples. Operators and site owners are under an obligation to disclose relevant information. Under both the Nuclear Energy Act and the Chemicals Act the authorities also have the right to interview employees. According to many environmental laws, non-compliance with the duty to cooperate with the authorities makes the offender liable under administrative penal law. The authorities' right to pass on the collected data to the tax authorities is restricted.

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 general, the answer to this question depends on the applicable laws of the individual German states: according to the soil protection laws of various states (e.g. Bavaria, Baden-Württemberg), contamination and signs of contamination must be reported to the authorities by the responsible parties. It has to be considered on a case-by-case basis whether the disclosure obligation is limited by the privilege against self-incrimination. However, operators must take into account the fact that non-disclosure may result in an administrative fine.

Where a person is required to carry out site investigations or remediation measures, owners of the affected property as well as other affected authorised users and the affected neighbourhood have to be informed about the intended measures. The same duty applies to parties who are required to submit a remediation plan.

According to the Environmental Damage Act which entered into force in 2007 (see above question 4.1), any existing environmental damage within the meaning of the Act or the imminent danger that such damage will occur (*unmittelbare Gefahr eines Umweltschadens*) must be notified by the polluter to the competent authorities.

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

If there is sufficient reason to suspect that a site is contaminated, the authorities may order the persons liable under the Federal Soil Protection Act to carry out investigations to assess the relevant hazards (*Gefährdungsabschätzung*). These investigations may include the duty to commission experts and investigating bodies.

In the case of contaminated sites, the authorities may require all potentially responsible parties to carry out self-monitoring measures, especially soil and water investigations, and to install and operate measuring stations. The authorities may require self-monitoring measures even after decontamination has been completed. Moreover, especially in the case of particularly hazardous or widespread contamination, the authorities may order a responsible person to conduct an investigation in order to determine the type and extent of the required measures (*Sanierungsuntersuchung*) or to submit a remediation plan (*Sanierungsplan*).

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?

If the seller fails to inform the purchaser about any existing or suspected contamination, the purchaser may be able to claim compensation. Under German purchase laws, the purchaser is afforded strong protection. According to German civil law – unless expressly agreed otherwise - the seller is liable for any defect relating to the property he sells, unless the buyer has been made aware of such defect. “Defect”, in this sense, includes any dangerous contamination under the Federal Soil Protection Act

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because it can lead to several forms of liability (public and private liability to clean up, private compensation for the costs of remediation or to a restriction in use). The buyer then has the right to either rescind the contract or reduce the purchase price accordingly. If a seller fails to inform a buyer about any existing or suspected contamination, the buyer may be able to claim compensation. Generally, the buyer must assert these rights within two years.

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?

Public law liability for contaminated land, i.e. the liability of a responsible person towards the competent authority, cannot be modified by private contracts. A polluter, therefore, cannot transfer his public law liability as polluter onto a purchaser: he will remain responsible as the polluter of land after the land is sold. However, the parties can stipulate through contractual provisions how any environmental liability is to be shared between them.

The parties may agree on contractual terms such as a financial cap, a *de minimis* threshold, a time limit to the buyer's claims, or sliding scales increasing the buyer's share of liability over time (e.g. for two years, seller 80%, buyer 20%; next three years, seller 50%, buyer 50%, etc.).

The parties should agree on a comprehensive and clear contractual definition of the kind and scope of contamination that triggers liability (e.g. soil, groundwater, munitions, buildings, etc.). Given the strong influence which the German administration exerts on all public and environmental issues, the agreements should always contain a clause defining the parties' mutual rights and obligations in dealing with administrative proceedings (e.g. the buyer's duty to protest against orders in co-operation with the seller).

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

A parent company can transfer environmental liabilities to a subsidiary by transferring title to the real property and its possession to the subsidiary. In such a case however, the parent company can still be held liable as a historic polluter, as a former owner or under general principles of corporate law ("piercing the corporate veil"). It is of particular importance in this connection that under-capitalisation of the subsidiary is avoided. (Compare question 8.3.)

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?

The Federal Soil Protection Act clarified that an entity/person which - under general principles of corporate law – is responsible for its subsidiaries/affiliates, may be held liable for contaminated land owned by its subsidiary. The rule of a strict separation between the corporation (GmbH or AG) as a legal entity and its shareholders may be disregarded, allowing the "corporate veil" to be pierced under the principles of corporate law, if, for example: (i) the subsidiary is under-capitalised; (ii) finances are mixed up with its shareholders' finances; or (iii) both entities form '*de facto* consolidated companies' (*qualifiziert-faktischer Konzern*).

German courts do not have jurisdiction over claims by a foreign claimant against a German parent company for pollution caused by its subsidiary abroad.

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

There is no general legislation protecting environmental whistle-blowers. However, some statutes expressly allow for such protection. For instance, if health and safety thresholds are breached by a company, and if the employee has tried to find an internal solution to the problem without success, the employee is entitled to notify the authorities under the Work Safety Act (*Arbeitsschutzgesetz*). Where no such provision applies, whistle-blowing is not justified and can lead to the employee's dismissal. Under general employment laws (*Betriebsverfassungsgesetz*), the employee must always seek a solution within the company and, in turn, the employer must not discriminate against him because of internal complaints. Only in exceptional circumstances, where the employer is about to commit a severe environmental crime, can the constitutional principle of legality (*Rechtsstaatsprinzip*) justify a notice to the criminal prosecution authorities. Even then, employees must first examine very carefully the factual basis of their claim. In addition to labour law consequences, an infringement of the criminal statute of s. 17 of the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) may be determined. This sanction comes into consideration if whistle-blowers disclose confidential information or company secrets to the public.

It is unclear, whether specialist environmental compliance officers (*Betriebsbeauftragte*) may, in exceptional circumstances and after having exhausted the internal reporting lines, report environmental issues to the competent authorities.

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

In general, neither US-style class actions nor punitive damages are available under German law, and the amounts of compensation awarded to the aggrieved parties are usually significantly lower than in the US. Traditionally, only nature protection laws provide for certain group actions (*Verbandsklage*) by which environmental associations can bring a claim against a limited scope of decisions related to nature protection laws (e.g. declaration of nature reserves). This limited scope was significantly broadened in 2006 by the Environment Appeal Act (*Umwelt-Rechtsbehelfsgesetz*), which implemented the European Public Participation Directive 2003/35/EC. Contrary to traditional German legal principles, the Act provides for the introduction of comprehensive group actions comprising all areas of environmental law and impacting on nearly all permit decisions for major industrial and infrastructure projects. Environmental group action rights were further expanded in 2007 by the Environmental Damages Act (*Umweltschadensgesetz*) under which non-governmental organisations (NGOs) are entitled to initiate proceedings against decisions of authorities under the Act.

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9 Emissions Trading and Climate Change

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

Germany participates in the EU Emissions Trading Scheme (EU ETS), which was launched at the beginning of 2005. The EU ETS Directive was implemented into German law by linking the new Greenhouse Gas Emissions Trading Act (TEHG) to the existing Federal Immission Control Act (BImSchG). The EU Linking Directive was transposed into German law by the Project-based Mechanisms Act (ProMechG), giving the participants the opportunity to use carbon credits from CDM and JI projects as well. Separate, trading period-specific allocation acts supplement the Greenhouse Gas Emissions Trading Act. The Allocation Act for the second trading period 2008 – 2012 (ZuG 2012) - like the allocation act for the first period - defines a national overall cap and the allocation rules for that trading period. Specifically, the total amount allocated for the current second period is 453 million allowances annually, which includes 11 million allowances for installations that were not previously covered by the emissions trading scheme, and 23 million allowances in a reserve for new installations. Allocation between industrial installations is based on grandfathering, with a cap ensuring overall reductions of 1.25% as compared to their historic emissions. The energy sector is allocated allowances according to a benchmarking system and additional pro rata cuts to meet any reduction shortfall. As a result, companies from the energy sector are facing significant reduction obligations in the allocation period 2008-2012. In addition, the German Parliament decided not to continue the so-called allocation guarantees previously granted under the Allocation Act 2005-2007. This political decision is currently being challenged in court. Small installations emitting less than 25,000 tonnes CO2 per year are not covered by the scheme, but will receive allowances on the basis of a business as usual scenario.

During the first trading period (2005-2007), the German Emissions Trading Agency (DEHSt) allocated 495 million allowances (EUA) per year to around 1,850 installations. More than 800 operators filed objections to the allocation decisions, mostly claiming a greater number of allowances. In many cases the operators took legal action against the allocation decision when their objections were rejected in the first instance by the DEHSt. A significant number of these lawsuits have not yet been decided by the courts. Some legal experts have argued that operators will be entitled to claim allowances for the current trading period 2008-2012, if their lawsuits succeed. It is widely expected that the German Federal Administrative Court will decide on this legal question of principle in the course of 2010.

From 1 January 2013, when the third trading period (2013-2020) commences, individual national allocation plans for each Member State will be replaced by one EU-wide cap on emissions. The cap will reduce annually by 1.74% of the average annual level of the Phase II cap, with a view to delivering an overall reduction of 21 percent below 2005 verified emissions by 2020. The Commission will publish the absolute Community-wide cap for 2013 during 2010.

By virtue of Aviation Directive 2008/101/ EC, the EU ETS is soon also to be expanded so as to include emissions from the aviation sector, starting 1 January 2012. The expanded system will apply to all airlines which operate commercial flights departing from or arriving in the territory of an EU Member State. Emissions will be calculated on the basis of entire flight distance, not just the distance travelled within EU airspace. There are currently doubts as to whether such an expansion potentially violates the EU's obligations under public international law, in particular, the Chicago Convention. Accordingly, it is likely that a reference will be made from one or more of the Member States to the European Court of Justice to clarify this issue. In the meantime, however, Germany is in the process of implementing the Aviation Directive into German law as part of a two step process. The first step has already been taken with the adoption of the Ordinance on the Collection of Data for the Inclusion of Aviation and Additional Activities in the Emissions Trading Scheme (*DEV 2020*) in July 2009. This Ordinance implements the obligations upon affected aircraft operators both to submit a monitoring plan setting out measures to monitor and to report the emissions caused during each calendar year (starting 1 January 2010) to the DEHSt. According to the European Commission's List of Administering Member States, DEHSt is in charge of 326 aircraft operators in total. The second step, which involves the implementation of all other obligations and rights of aircraft operators (most notably, the obligation to surrender emissions allowances) will be implemented into German law by way of amending the existing Greenhouse Gas Emissions Trading Act. This is widely expected to be completed by the end of 2010.

In March 2005 the DEHSt-based German Emissions Trading Registry went into operation. Since then, trading has developed well. The European Energy Exchange (EEX) in Leipzig established the main trading floor for EUAs in Germany. In February 2010, the German Emissions Trading Registry suffered a cyber attack as hackers accessed the registry and stole allowances worth around EUR 3 million.

10 Asbestos

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

Germany has not seen a development of an "asbestos litigation industry" that is in any way comparable to the extent of litigation taking place in the US. As far as we can see, this is not going to change any time soon.

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

German law does not provide for a general duty on property owners or property occupiers to conduct an asbestos survey or to produce a register of asbestos. Such registration can, however, be required by the authorities on a case-by-case basis as a precautionary measure, especially when the affected building is frequently used by people. There is also no general obligation to remove asbestos contained in buildings or individual building parts (such as heaters, roofs etc.). However, if threshold values for asbestos are exceeded or if an asbestos-containing building is demolished or is undergoing construction, all measures have to be agreed to by the competent authority. The authority has the power to issue all orders deemed necessary to protect human health. In addition, the responsible party can incur civil liability for personal injuries based on its duty to protect the public (*Verkehrssicherungspflichten*).

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 Germany?

Recently, a few major transactions have involved environmental

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indemnity liability insurance that protects against government clean-up orders. Increasingly, major insurers have shown themselves to be prepared to negotiate and offer more flexible policies in transactions. Traditionally, however, environmental risks insurance has not played a major role in Germany. Public liability and fault-based civil liability are difficult to cover under environmental risks insurance policies. Practically, environmental liability insurance mainly plays a role with regard to strict liability under the Environmental Liability Act.

The scope of the traditional, strict liability insurance is limited to those risks which are expressly and clearly described in the policy. Any environmental damage caused by the normal operation of an installation is excluded from insurance cover, even though the operator of an installation is liable for such damage under the terms of the Environmental Liability Act. An exception to this rule applies only if the insured party proves that he could not reasonably have been expected to recognise the possibility of such damage given the state of technology at the time of the effect on the environment. Only in more recent times have a few big international insurance companies started to offer environmental liability policies against governmental orders to fill this gap in insurance coverage.

11.2 What is the environmental insurance claims experience in Germany?

So far, there has been comparatively little litigation, particularly on personal injury (and there does not seem to have been a dramatic change in the legal climate as a result of the strict liability scheme). There have been some property damage claims, but most appear to have been settled with the backing of the relevant insurance policies.

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 Germany.

With climate change remaining an emotive political issue, the push to regulate greenhouse gases at EU and national levels is unlikely to be dampened by the failure of the Copenhagen conference. Four trends are worth noting:

- Carbon markets and the price of carbon: the EU cap-and-trade scheme and the levying of taxes on fuels to raise the price of carbon-intensive goods will exert increasing pressure on companies.
- 'Climate risk' disclosure: although no EU regulations presently require this, investors are becoming increasingly concerned that companies disclose their emission policies and financial exposure to emissions regulations.
- Product regulation and labelling: schemes such as Germany's Project Carbon Footprint aim to inform consumers of the environmental credentials of businesses.
- Energy efficiency regulations: the German government is increasingly implementing mandatory measures to ensure owners make buildings more energy efficient, and a proposal to give tenants a right to reduced rent if buildings do not meet efficiency standards has been suggested.

Central to Germany's environment and energy policies is a resolution to the debate on nuclear power. Under the Schröder government's 2001 *Atomkompromis*, the operational lives of all German nuclear plants was limited to an average of 32 years, with all to be phased out by 2021. However, changing political and public attitudes amidst concerns that emission targets may not be reached and fears of dependence on unstable supplies of Russian gas, has led to a reopening of the nuclear question, with the coalition government led by Angela Merkel promoting suspending the phase-out and a lifespan extension of up to 60 years has been floated. In recent months, however, Environment Minister Norbert Roettgen has broken ranks and rejected calls for a lengthy extension. The resolution of this question will undoubtedly be a central theme in the long-term energy strategy which Ms Merkel is due to unveil later in 2010.

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Wolf was born in Stuttgart in 1958. He completed his legal education at the universities of Tübingen and Freiburg and holds the degree of Doctor of Laws (Dr iur) from the University of Freiburg. First he practised in the firm's Düsseldorf office and then relocated to Berlin in response to Berlin's increasing importance as Germany's capital in respect of developments in environmental and regulatory law.

Wolf lectures and speaks regularly on various aspects of European and German environmental and regulatory law (eg Beck Online Kommentare Umweltrecht., VwVfG) and is a member of the editorial boards of Carbon & Climate Law Review and the Journal for European Environmental & Planning Law. In various international and national directories he has been continuously recognised as a leading lawyer in the fields of environmental and administrative law.

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