Austria

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1 Environmental Policy and its Enforcement

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

As is the case with other advanced industrialised nations in Europe, growing environmental awareness in Austria has acted as a catalyst for the enactment of new environmental laws. The escalation of environmental legislative initiatives has created an increasingly complex web of statutes and regulations that the industry must thoroughly understand in order to ensure full compliance with the law. A reduction of these environmental requirements is not in sight. To the contrary, there is broad political consensus in favour of more stringent environmental regulations in Austria.

Environmental law in Austria is for the most part based on administrative law. Consequently the authorities of general administration (*Behörden der allgemeinen staatlichen Verwaltung*) are competent for the administration of environmental laws, so enforcement and administration of environmental law follow general administrative proceedings rules.

At the federal level, such authorities are: the district authorities (*Bezirksverwaltungsbehörden*); the governors of the states (*Landeshauptmann*); and the Minister for Agriculture, Forestry, Environment and Water Management (*Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft*). At the level of the states, the authorities of general administration are the district authorities (*Bezirksverwaltungsbehörden*) and the government of each state (*Landesregierung*).

Concerning environmental issues, two specialised agencies/authorities, apart from the general administrative organisation, should be mentioned: the Federal Environment Agency (*Umweltbundesamt*); and the independent panels of environmental review (*Umweltsenat*). The Federal Environment Agency is in charge of monitoring and documenting the environmental situation in Austria, whereas the independent environmental panels hear appeals for projects involving an environmental assessment.

In the last decade, Parliament has sought to ease the burden on public agencies by including private persons in administrative matters. The Act on Environmental Management (*Umweltmanagementgesetz*) establishes an accreditation system for auditors (*Prüfer*) of plants in respect of environmental matters. Operators of plants must deliver an environmental audit report every five years. Such reports may be written by auditors that may be chosen directly by the operator. Such auditors are allowed to issue environmental statements which act as a substitute for permits otherwise issued by administrative authorities regarding alteration to plants; they must have a high-level education and are subject to a strict supervisory system.

The Austrian environmental administrative authorities do not generally publish "policies". Most of the important responsibilities for the enforcement of environmental laws lie with the nine states (*Länder*), where most laws are enforced by district authorities.

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

Environmental laws and ordinances generally are enforced fairly strictly in Austria. Since environmental laws are largely part of administrative law, the enforcement of environmental law follows general administrative procedure rules. A key for effectuating compliance with environmental standards is administrative fines. Concerning plants, the competent authority may also order the shutting down of engines, or even order the closure plants, and execute these orders by force; or the authority may withdraw the plant permit or licence.

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

The Environmental Information Law (*Umweltinformationsgesetz*) is designed to ensure that the public can obtain information, without further pre-conditions, concerning the environment, including the status of water, air, soil, flora and fauna, noise exposure, the emission of substances or waste, and any exceeding of emission limits. Plant operators must submit information as set out in ordinances and disclose certain data on emissions.

Administrative authorities, boards and representatives of the Federation (*Bund*), states (*Länder*) and municipalities are obliged to disclose environment-related information to the extent that they manage federal law matters. This obligation also applies to natural and legal persons who exercise public tasks under the supervision of the aforementioned authorities. These authorities, boards, representatives and private persons must submit any environment-related information in their possession to those who ask for it, irrespective of the nationality of the person requesting or the reason given. Environment-related information comprises: data on the condition of air, atmosphere, water, ground, landscape and natural habitats; administrative measures with impact on the environment; reports on the implementation of environmental laws; and data on human health and safety, including food safety and living conditions.

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2 Environmental Permits

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

Permit issuance is the central means by which the authorities ensure compliance with environmental regulations. Permit requirements are contained in nearly all environmental statutes, including the Federal Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgesetz* – UVP-G), the Trade Code (*Gewerbeordnung*), the Water Act (*Wasserrechtsgesetz*), the Waste Management Act (*Abfallwirtschaftsgesetz*), the Air Pollution Law for Boiler Facilities (*Emissionsschutzgesetz für Kesselanlagen*) and the Air Pollution Impact Act (*Immissionsschutzgesetz-Luft*).

Trade Code

One of the central and most comprehensive environmental regulatory framework for business operations (in particular industrial activities) is set out in the Austrian Trade Code (*Gewerbeordnung*). Sections 2 to 4 of the Trade Code list exemptions for certain sectors such as railways, road infrastructure, mining, telecommunications, waste disposal plants and almost all agricultural plants. The exemptions in the Trade Code do not mean that these sectors are unregulated. On the contrary, these sectors are subject to other specific federal laws and regulations of the Austrian states. Nevertheless, almost the whole industrial sector is subject to environmental rules under the Trade Code.

Plant permits are required when the plant: (i) might endanger the lives, health or property of neighbours or employees of the plant; (ii) might cause inconvenience to neighbours with respect to noise, dust, smoke or other pollution; (iii) might cause inconvenience to public institutions such as churches, schools, hospitals; or (iv) could possibly endanger the quality of water.

Generally speaking there are two kinds of permit requirements:

- impact-related requirements: the plant may not endanger the lives, health or property of neighbours, employees or customers, and the inconveniences to neighbours must be reduced to an acceptable standard; and
- emission-related requirements: air pollution must meet the requirements of the Air Pollution Impact Act (*Immissionsschutzgesetz-Luft*), and waste must be: (i) avoided; (ii) recycled; or (iii) disposed of properly.

When issuing a plant permit, the relevant authority usually imposes a number of conditions that the owner of the plant needs to fulfil during its operation. A hearing, to which other authorities and neighbours are invited, must be held before the issuance of a plant permit.

The administrative authority must grant the permit under the Trade Code only if the requirements of the Employee Protection Act (*Arbeitnehmerschutzgesetz*), the Water Act (*Wasserrechtsgesetz*), the Forests Act (*Forstgesetz*) and the Air Pollution Law for Boiler Facilities (*Emissionsschutzgesetz für Kesselanlagen*) will be met. Despite the Trade Code's far-reaching scope, facilities applying for a permit under the Trade Code may also have to simultaneously obtain permits under other environmental laws.

Federal Act on Environmental Impact Assessment (UVP-G)

On the other hand, the Federal Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgeset* – UVP-G) follows a different approach: The Act is based on the EU-directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. It lists different plants and projects in its Annex 1 and defines the respective thresholds and criteria. An environmental impact assessment (EIA) shall be performed for projects listed in Annex 1 as well as modifications of these projects (subject to the provisions of the *UVP-G*). Upon request by the project applicant, the authority shall state whether an EIA for a project needs to be performed and which criterion of Annex 1 or other provisions of the act apply to the project. If a full EIA needs to be performed the procedure is fully concentrated with only one authority (in most cases the provincial government – *Landesregierung*). The applicant has to file an environmental impact statement which purpose is to identify, describe and assess the direct and indirect effects that a project will or may have on human beings, fauna, flora and their habitats, on soil, water, air, and climate, on the landscape, and material assets and the cultural heritage, including interactions of several effects (integrated approach for the protection of environment.

Waste Management Act (*Abfallwirtschaftsgesetz*)

A concentrated or integrated approach similar to the one provided by the UVP-G is established by the Waste Management Act (*Abfallwirtschaftsgesetz*) for certain projects.

Additional permits

Typically (even in case of an EIA performance), an additional permit is required under the zoning law rules of the Austrian states. Under certain conditions, a permit may be required pursuant to the nature and countryside preservation legislation (*Natur- und Landschaftsschutzgesetze*) or pursuant to waste management laws (*Abfallgesetze*) of the Austrian states.

IPPC- and Seveso-II Plants

Beside provisions regarding plants with significant effects on the environment more stringent permit standards are required for plants listed in annex 3 of the Trade Code ("IPPC-plants") or plants which deal with a certain amount of dangerous substances as listed in annex 5 of the Trade Code ("Seveso-II-plants").

Transferring permits

Basically environmental permits are not transferable. There is, however, a peculiarity in Austrian law for plant permits: These permits are granted for the running of the plant itself, independent of who the owner or applicant is (*dinglicher Bescheid*). Consequently, a new owner of the plant does not have to apply for a new permit because the licence is granted to run a certain plant. In this respect, the permit can be transferred together with the ownership of the property or the plant. *Dingliche Bescheide* are known both by the Trade Code regarding plant permits as well as by the *UVP-G*.

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?

There is a right of appeal against the decision of an environmental regulator. Decisions regarding a request for a permit must be issued by the authorities in the form of an administrative decree (*Bescheid*). Against these decrees there is usually one, and sometimes two, appeal levels. Since in some cases the applicant must obtain different permits (see question 2.1), decrees are often issued by different administrative authorities so that the applicant's appeals might have to follow different, relatively complicated, appeal levels.

However, plant permits are issued in a procedure that is to a certain extent concentrated, and there is one central level of appellate authority, the independent panels of administrative review (*Unabhängige Verwaltungssenate*). For those plants that are

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subject to an EIA the independent panels of environmental review (*Umweltsenat*) generally decide on appeals.

If a panel of administrative review or the superior administrative authority dismisses an application, the applicant has the right to file a petition (*Beschwerde*) to the Administrative Court (*Verwaltungsgerichtshof*) and/or to the Constitutional Court (*Verfassungsgerichtshof*).

The Constitutional Court takes jurisdiction only if the petitioner pleads that fundamental rights granted by the Constitution (right to liberty, equal treatment, protection of property) were violated, or if the petitioner contends that the statute applied by the administrative authority was unconstitutional or the regulation applied was illegal. The Administrative Court takes jurisdiction if the petitioner pleads either that a decree has violated his rights (other than fundamental rights) or that an administrative authority has breached its obligation to decide a case within a given period (usually six months).

If the claim is justified, the relevant court will remit the case to the authority requiring it to grant the permit, repeal the unduly onerous condition or require the authority to consider the court's decision when the authority takes a new decision. The Administrative Court can decide on the matter if the authority has breached its obligation to decide.

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

As already partly mentioned above (see question 2.1), the following special permit requirements for polluting industries or large-scale installations/projects are in effect:

Plants subject to Directive 85/337/EEC

Plants with significant effects on the environment according to Directive 85/337/EEC must obtain their permits pursuant to the Federal Act on Environmental Impact Assessment (*Umweltverträglichkeitsprüfungsgeset* – UVP-G).

The disadvantage for plants or projects listed in the annexes of the *UVP-G* is that they must fulfil additional requirements pursuant to section 17 *UVP-G* (over and above the Trade Code or other Federal Laws' requirements) and are obliged to submit their request for consent in an environmental impact assessment with the participation of the public. On the other hand, the advantage of the process under the rules of *UVP-G* is that it is a fully concentrated procedure, with generally only one competent authority (state government – *Landesregierung*) issuing permits under the various environmental laws: in short, the one-stop-shop principle.

IPPC-Plants and Seveso-II-plants

Plants listed in annex 3 of the Trade Code must fulfil additional requirements with regard to the "precautionary principle" (efficient energy recovery and environmental/catastrophe precautions). Any permit applications for such plants must be made available to the public.

Plants storing materials listed in annex 5 of the Trade Code (certain amounts of petrol, chlorine, etc.) are obliged to fulfil special requirements with regard to catastrophe precautions (elaboration of a security concept, security reports and internal emergency schedules) and to inform the public about, for example, possible dangers and security measures.

General requirement of recurring environmental audits

The operators of all plants that are subject to the Austrian Trade Code have to deliver an environmental audit report every five years. Such reports have to be written by qualified persons which may be chosen directly by the operator.

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

Pursuant to Section 338 of the Austrian Trade Code, administrative authorities have the right to inspect operating plants at all times (for more details see question 6.1). Violation of the requirements and permit standards is an offence and can result in administrative fines (*Verwaltungsstrafen*) under Section 366 of the Trade Code.

Besides fining the operator, the authority can directly demand compliance with the permit within a reasonable time. If compliance is not achieved in the given time period or if the violation results in a threat to the public interest or a danger to life or health or property, the authority, pursuant to Section 360 of the Trade Code, is entitled to impose safety precautions and coercive measures (e.g. closing down of machines or parts of the plant, confiscation of goods, tools or machines, or closing down of the whole plant). As an ultimate tool, the authority has the right to withdraw the business permit completely.

The *UVP-G* provides in its Sections 20 *et seq.* that an applicant shall notify the authority of the project's completion before operations start. The competent authority will then inspect the project for compliance with the development consent and will issue an administrative order thereon. The administrative acceptance order shall stipulate the elimination of deviations found. The authority may, however, under certain circumstances approve minor deviations if the affected parties have been given the opportunity to protect their interests.

Three years at the earliest and five years at the latest after notification of completion the EIA-authority has to initiate a post-project analysis regarding projects listed in Column 1 of Annex 1 of the *UVP-G*. The post-project-analysis is to be conducted by the competent authorities according to the pertinent administrative regulations in cooperation with the EIA-authority. They have to inspect whether the realised project complies with the development consent order and to verify whether the assumptions and forecasts of the EIA correspond to the actual effects of the project on the environment. The competent authorities have to seek for and enforce elimination of deviations and the remediation of defects.

Violating a permit can also lead to criminal penalties if the environment is damaged severely.

3 Waste

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

The federal Waste Management Act (*Abfallwirtschaftsgesetz*) defines waste as mobile goods which are either: (i) thrown away (waste in a subjective sense); or (ii) of such a quality that their collection, storage, transport or treatment could affect public interests such as human health, flora and fauna or the landscape, or create inconveniences that are not reasonably to be tolerated (waste in an objective sense). Goods which are not waste in the objective sense are not classified as waste as long as they are new or being used for their designated purpose.

There are two kinds of waste: hazardous; and non-hazardous waste. According to Section 4 of the Waste Management Act, hazardous waste is defined in the Ordinance on the Declaration of Hazardous Waste (*Festsetzungsverordnung gefährlicher Abfälle*). If it is not clear whether waste is hazardous or not, one can apply for a declaratory decree from the district authority as to the correct categorisation of the waste.

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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?

Storing waste on one's own site is allowed only with a corresponding permit. Section 15, Sub-section 3 of the Waste Management Act only permits the storage of waste (no matter whether hazardous waste or not) in permitted plants or on/in a proper and designated storage place such as a garbage can. If one wants to store waste on one's property the relevant authority must be notified (in the case of non-hazardous waste) or a permit must be obtained from the authority (in the case of hazardous waste).

The disposition of waste on a site requires a permit for the operation of a waste site. This also applies to facilities for short-term storage if the facility is intended to last for longer than one year. Detailed rules are laid down in the Ordinance on Waste Deposits (*Deponieverordnung*).

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)?

Basically, the arising and extent of liability depends on one's fault. As there is no fault in transferring waste to a lawful recipient and no special provisions provide for any liability, the transferor does not retain any residual liability. However, the transferor is obliged to give accurate information on the characteristics of the waste.

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

There is no general obligation for producers to take back and recover their waste or their products that become waste at the end of their lifetime. However, the federal government has issued an ordinance requiring producers to take back the following items sold: used electrical and electronic equipment, including household appliances, IT and telecommunications equipment; consumer equipment; lighting equipment; electrical and electronic tools; toys, leisure and sports equipment; and medical devices. This ordinance implements Directive 2002/96/EC on Electrical Waste and Electronic Equipment. A similar ordinance is in place for vehicles.

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?

Since Austria is a civil code country, private environmental claims are based on statutory provisions. Judicial decisions, however, often play an important role in refining the scope of sometimes imprecise statutory provisions. In general, various civil code provisions may impose liability on a party causing contamination. These provisions include tort law (*Schadenersatzrecht*) and neighbouring property owner rights (*Nachbarrechte*).

The general rule under the Austrian Civil Code's neighbouring property provisions provides for strict liability, but only to a limited extent. A property owner can only obtain injunctive relief against a neighbour if the impact from the neighbour's property exceeds that which is customary for the locality and if the customary use of the owner's property is substantially impaired. If, on the other hand, the impairment is caused by a mining operation or by an administratively permitted plant that exceeds its "allowable emissions", the property owner only has a right to claim damages (i.e. the property owner cannot seek injunctive relief). The Supreme Court held in 2003 that this does not apply to plants that have been permitted in a fast-track proceeding, which means that the owner of such a plant can be forced by a neighbour in civil law proceedings to stop operations in specific cases.

More specific liability provisions are contained in Section 26 and 31 of the Water Act for water contamination and in Section 74 of the Waste Management Act (*Abfallwirtschaftsgesetz*) for (former) property owners of waste deposits.

Liability under criminal law

Sections 180–183b of the Criminal Code (*Strafgesetzbuch*) provide that the following activities may give rise to criminal liability: (i) contamination of water (including groundwater), air or soil; (ii) the environmentally dangerous operation of a facility; (iii) the environmentally dangerous operation of the disposal of waste; and (iv) causing severe noise nuisance. Criminal acts under these provisions are, for instance, air pollution which is a threat to life, animals or plants; the pollution of natural waters; waste disposal that endangers the environment; and the unauthorised operation of plants that are potentially damaging the environment.

Causing the above circumstances generally may trigger criminal liability if two basic elements are present: (i) the person acted negligently or intentionally; and (ii) the action causing the circumstances was in violation of law or an administrative order.

On 1 January 2006, the Act on Corporate Criminal Liability (*Verbandsverantwortlichkeitsgesetz*) entered into force. This new Act provides for the first time for criminal liability that can be imposed on corporations. Previously, only executives, board members and employees could be held accountable. Every company can now be punished for criminal offences committed by its executives and board members that have acted on behalf of the company. The corporation can only be held criminally liable for acts of employees if the enterprise was organised in a manner that was not committed to hindering the employee from violating the Criminal Code. Penalties may consist of fines, calculated on the basis of annual profit, and instructions as to proper conduct.

Procedurally, defences against prosecution can take the form of an appeal (*Berufung*) to the Higher Regional Court (*Oberlandesgericht*) or a nullity appeal (*Nichtigkeitsbeschwerde*) to the Supreme Court (*Oberster Gerichtshof*).

Liability according to administrative law

A breach of environmental laws and/or permits constitutes an administrative offence. It can only be prosecuted if it does not also violate one of the sections 180–183b of the Criminal Code (*Strafgesetzbuch*). Administrative offences may be prosecuted in the case of intent as well as in the case of negligence. For example, administrative fines up to EUR 35,000 can be imposed if the obligation to perform an EIA was not met.

The competent authority is (in most cases) the district authority. A decision may be appealed against before the independent panels of administrative review and, on the next level, before the Administrative Court (*Verwaltungsgerichtshof*) and the Constitutional Court (*Verfassungsgerichtshof*).

Most administrative environmental laws contain provisions that oblige the person who has breached the law and/or the permit to restore the lawful situation that existed before the breach.

Liability according to the acts on environmental liability

Finally, the Federal Act on environmental liability and the corresponding acts of most of Austrian provinces (*Umwelthaftungsgesetze*), all together transforming the EU directive 2004/35/CE, generally applies to specific environmental

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damage caused by occupational activities listed in its Annexes whenever an operator has been at fault or negligent. An environmental damage is defined (in detail) as a damage to protected species and natural habitats, a water damage, and as a land damage. The applicable acts provide both preventive and remedial actions. Where environmental damage has occurred the operator shall inform the competent authority of all relevant aspects of the situation and generally take all practicable steps to manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services. The operator shall bear the costs for the preventive and remedial actions taken pursuant to the pertinent provisions.

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

A valid plant permit cannot render all interferences with the property of a neighbour permissible. It is important to note in this regard that what constitutes "allowable emissions" may be more stringent than those standards contained in a permit. In a ground-breaking 1995 decision, the Supreme Court held that facility owners complying with an outdated permit were not automatically shielded from a neighbour's damage claim (OGH 11.10.1995, 3 Ob 508/93). Since then, an operator is liable even if it acts within permit limits where new security or pollution considerations arise (even when competent authorities do not impose additional conditions).

In addition, as has been stated under question 4.1 above, the Supreme Court held in 2003 that neighbours of plants that have been permitted in fast-track proceedings can force the operator to stop operations if their health or life is endangered or if the nuisance caused cannot be reasonably tolerated, even if the plant operates within the permit limits.

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?

Yes. According to Section 9 of the Administrative Penalty Act (*Verwaltungsstrafgesetz*) the legal entity is not the defendant, but rather exclusively the physical person who has been appointed *vis-à-vis* third parties to act for the legal entity. The liability imposed under Section 9 of the Administrative Penalty Act is consequently a personal liability. However, managers that would otherwise be personally liable can avoid such liability by delegating tasks to responsible appointees (*Verantwortliche Beauftragte*) for different sectors of the business. One pre-condition is that the appointee accepts this liability in writing. As a result, the responsible appointees are liable for administrative offences resulting from the operation of the plant.

With regard to indemnities, directors and officers can attract liability for environmental wrongdoing under civil law (see question 4.1). However, it is possible to cover these indemnities under standard D&O-insurance.

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 determining the different implications, one must distinguish between public law liability, liability implications towards third parties and liability implications between the parties to a transaction. As to the latter, the implications from an environmental liability perspective in both a share sale as well as in an asset purchase will depend to a large extent on the terms of the agreement negotiated between the parties. Outlined below is a brief description of the differing liability implications as they pertain to third parties.

Asset purchase

Public law liabilities remain with the polluter of the environmental damage. See section 5 below.

Section 1409 of the General Civil Code addresses the liability of purchasers of a company's assets. This provision provides for mandatory joint and several liability of a company's purchaser together with its seller towards the company's creditors for any pre-existing debts of which the purchaser knew or should have known about at the time of acquisition. This liability, however, is limited to the value of the property actually acquired.

In addition, Section 38 of the Commercial Code (*Unternehmensgesetzbuch*) provides for comparable liability for a person acquiring a business. This provision does not limit liability as does Section 1409 of the General Civil Code. However, unlike liability under Section 1409 of the General Civil Code, it is possible to limit and even to fully exclude liability under Section 38 of the Commercial Code by contractual agreement between the seller and the purchaser. In order to be valid *vis-à-vis* the company's creditors, such an agreement must be entered in the Commercial Register and published, or the creditors must be informed of the agreement.

Share sale

A share acquisition leaves the identity of the company unchanged. Public law liabilities, contracts, rights and liabilities of the company *vis-à-vis* third parties are not affected by the change of ownership.

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

Basically there is no liability for the lender for environmental wrongdoing and/or remediation costs, because environmental liability attaches to the operator of a plant or the owner of the property but not to the lender. Only if the lender has to take over the borrower's enterprise, plant or property, can liability attach to the lender himself.

5 Contaminated Land

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

In Austria, no single law comprehensively governs the clean up of waste sites. The Water Act, the Trade Code and the Waste Management Act contain provisions which form the basis of an obligation to clean up a site. Of these federal laws, the Water Act provides in practice the most important basis for authorities imposing clean up obligations. Furthermore, the Federal Act on environmental liability and the corresponding acts of the Austrian states provide (under certain circumstances) an obligation for an operator to take remedial actions on his own costs (cf. question 4.1) and additionally determine different remedial measures that can be taken or be imposed by the authorities on condition that an environmental damage (i.e. a damage of water or land) was caused.

Under the Water Act and the Waste Management Act, administrative authorities can require those parties undertaking or failing to undertake action causing or threatening water

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contamination to perform corrective measures based on a strict liability standard. These laws provide that each person is obligated to ensure, through the exercise of due care, that his action or inaction does not cause water contamination. If any person causes or threatens to cause water contamination, including groundwater contamination, despite the exercise of due care, that person must nevertheless undertake all necessary steps to prevent contamination.

The Old Waste Sites Act (*Altlastensanierungsgesetz*) created a list of suspected contaminated sites (*Verdachtsflächen*). Such sites may then be placed on a list of sites requiring clean up activity (*Altlastenatlas-Verordnung*), on the basis of an environmental assessment. Once a contaminated site is on this list, the state authority must first determine whether a responsible party can be held liable for clean up activity under other federal laws, which are specifically identified as the Water Act, the Trade Code and the Waste Management Act. If, however, a responsible party cannot be identified under the listed federal laws, or if the identified liable party cannot or refuses to undertake the clean up, the federal government is obligated to undertake the necessary steps under the Old Waste Site Act.

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

Every creator of contamination may be an addressee of a clean up obligation imposed by the administrative authority. One polluter may be forced to clean up an entire site even if his contribution to the contamination was only marginal. In such cases this party can seek compensation on the basis of civil law from others who are also responsible for the contamination.

According to Austrian civil law, each person responsible for contamination is only responsible to the extent he has caused the damage. If two or more persons act together when causing contamination, there is joint and several liability for all responsible persons, when damage was intentional or when a quantitative attribution is impossible. However, even if the responsible persons did not act in concert and a quantitative attribution is impossible, all persons having caused the damage, at least to a minor level, are jointly and severally liable for the entire damage together with the others.

Within the scope of application of the Austrian rules on liability for environmental damages, the operator is generally the responsible person for remedial actions and measures. Operator is defined as any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity. The applicable Federal Act provides that if the operator may no longer execute his activities or cannot be held liable, the owner of the property the damage derives from is liable provided he declared his consent to the plans or measures causing the damage, tolerated them voluntarily or failed to undertake reasonable preventive measures. The operator may e.g. prove that the environmental damage was caused by an independent third person and that he did take all necessary precautions and measures for the prevention of an environmental damage or that he acted according to imposed instructions by the competent authority. However, a person which was held liable in accordance with the legal provisions may claim indemnification from a third party before the courts.

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?

Generally, it is not possible in Austria to enter into an agreement with an environmental authority about the content of a decree. Orders to clean up a site contain the obligation to continue the clean up activities until the legal limits of contamination of the groundwater are reached. At such point the activities may be interrupted and after a certain time period the assessment will be repeated. Depending on the result, the authority will either issue another decree imposing clean up obligations, or will take no action. In practice, a “remediation-concept” (*Sanierungskonzept*) can be agreed on with the authority. The decrees may then be based on this concept, although the creator of the contamination has no legal right to have its concept utilised.

Neither the order to clean up a site nor the remediation concept as such can be challenged by third parties.

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?

Yes. Section 1042 of the General Civil Code provides that if someone performs an act that should have been performed by another person, the person acting has a right of action to seek contribution (*Bereicherungsregress*). As set out in question 4.4, where there is a contract that has been entered into between the parties, the parties are generally free to allocate liability amongst themselves, and therefore the content of the contract will in such case be determinative. However, public law liability *vis-à-vis* the administrative authority cannot be transferred from the polluter to the purchaser.

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

No. In general, the government cannot obtain compensation for aesthetic harm to public assets. The reason for this is that only property damage (e.g. costs for clean up measures, restoration and the like) are indemnities that may require compensation under Austrian tort law. Non-property damages, such as aesthetic damage to public assets, do not give rise for compensation.

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.?

There is no general rule regarding official inspection and monitoring. Nevertheless, different laws provide for various measures to be taken: For example, according to Section 338 of the Trade Code, the relevant authority is entitled to enter and inspect the premises, to control invention, to inspect documents, and to take samples. In taking samples, the authority must issue an affirmation of the sampling. During a Section 338 inspection, employees can be questioned as informants about their activities concerning safety management. According to section 84d of the Trade Code, the

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authority must create a programme of inspection for each plant in order to be able to control compliance with the obligations of the proprietor in a systematic way. Pursuant to Section 84d Sub-section 5 of the Trade Code, hazardous plants must be inspected by the relevant authority within an appropriate period of time in order to ascertain whether the plant complies with permit requirements.

Section 75 Waste Management Act contains similar provisions regarding hazardous waste. This provision is also applicable in case of Seveso II-plants. In contrast, Section 62 Waste Management Act dealing with installations for the treatment of waste follows a more general approach providing that the authority has to inspect the site at least every five years. If any activity is carried out without the necessary permit the authority can take the required measures to re-establish a status complying with the law. For EIA-related aspects cf. question 2.4.

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?

Section 31 of the Water Act provides that all operatives undertaking activities that might have an impact on water are obliged to ensure, through the exercise of due care, that their action or inaction does not cause water contamination. If any person causes or threatens to cause water contamination, including groundwater contamination, despite the exercise of due care, this person must nevertheless undertake all necessary steps to prevent contamination, and must also immediately notify the relevant authorities. The water authorities may order the person causing the contamination to undertake all steps to prevent, contain and/or remedy contamination. If the responsible party does not undertake such steps, and the water authority performs the necessary clean up activity itself, the water authority is authorised to recover its costs from the party causing the contamination. Potentially affected third parties are required to tolerate necessary measures. Similar obligations can be imposed as additional plant permit conditions.

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

There is no general obligation to investigate land when there is no suspicion of contamination. However, obligations can arise from various ordinances issued under the rules of the Trade Code. For instance, according to sections 10–12 of the Ordinance on Plants, where solvents are used (*HKW-Anlagen-Verordnung*) the proprietor is required at least once a year to quantify the concentration of chlorinated organic solvents in the purified exhaust air, the purified wastewater and the cooling water. This requirement is limited in that it only applies to defined chlorinated hydrocarbon facilities. Where the permit limit has been exceeded, the proper authority must dictate the required measures. Similar regulations exist for many business and industry sectors.

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 existing or suspected contamination, the purchaser may be able to claim compensation. If nothing else is expressly agreed, under Austrian law the seller is liable for any defect relating to the property sold, unless the buyer has been made aware of such defect or if the buyer should readily have been aware of such defect. "Defect" in this sense includes groundwater contamination under the Water Act. The buyer may then have the right to either rescind the contract or reduce the purchase price accordingly.

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?

Yes. In Austria it is possible to agree by contract on an environmental indemnity. However, making a payment to another person under an indemnity in respect of a certain matter does not discharge the indemnifier's potential liability *vis-à-vis* the authority in respect of that matter.

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

Environmental liabilities, as contingent liabilities in general, might have to be taken into account as accruals. Whether an accrual has to be recorded or not depends on the probability of the occurrence and how concrete the liability already is according to Austrian generally accepted accounting principles (GAAP) or International Accounting Standards (IAS). The difference with regard to environmental liabilities is that under GAAP the precautionary principle carries more weight as compared to certain other contingent liabilities.

Dissolving a company may not be an appropriate solution to escaping environmental liability (unless the company goes bankrupt), because in principle liability will attach to any legal successor of the company.

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 an affiliate and its parent company are different legal entities, there generally is no liability for the parent company in the event that the affiliate violates a law or breaches a contract. Only in the event that the parent has unlawfully contributed to such violation or breach is it liable for its contribution.

However, there are a few exceptions: where, for example, there has been an abuse of the corporate form, the corporate veil may be pierced.

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

There is no specific legislation to protect "whistle-blowers". However, if passing on the information to the environmental authority was justified, the employer may not give termination notice to or discriminate against the whistle-blower.

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

There are no procedural possibilities for bringing "civil actions" (*Bürgerklage*) for environmental claims as in the US. In Austria, such claims only exist under the Consumer Protection Law, the Cartel Law and the Competition Law. The initiation of a "*Verbandsklage*" under environmental law has been discussed for some long time; however no such proposal has been adopted as of yet.

However, in May 2007 the competent Austrian minister proposed an amendment of the Code of Civil Procedure (*Zivilprozessordnung*) which would allow group actions (*Gruppenverfahren*). According to the draft such group action in principle can be initiated by at least three persons representing at least fifty claims, provided that these claims are founded essentially on the same legal basis and factual circumstances against the same person(s) or enterprise(s). The judge may, however, only render a declaratory judgment on mutual questions of fact and law, the compensation for each case still requiring individual assessment in subsequent proceedings.

This amendment should have come into force on 1 January 2008 but has been heavily criticised in legislative proceedings and still has not been promulgated. It therefore remains unclear as to if and when it will become law.

9 Emissions Trading and Climate Change

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

Under the Kyoto Protocol and based on the European Burden-Sharing Agreement Austria has committed itself to reduce emissions of greenhouse gases by 13% during the commitment period 2008-2012 in comparison to the basis year 1990. As an EU Member State, Austria has implemented the Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emissions allowance trading within the Community by the federal Act on Emission Allowances (*Emissionszertifikategesetz*). The Austrian trading regime entered into force on 1 January 2005. Pursuant to Section 11 of the Act on Emission Allowances the competent minister has issued the Allocation Ordinance for the second period 2008 to 2012, stating the total quantity of allowances and the method of allocation in October 2007.

The Austrian Emissions Trading Registry (www.emissionshandelsregister.at) is in full operation and ensures the precise tracking of holdings, issuances, transfers, cancellations and retirements of allowances and Kyoto units. The EU allowances (EUA) for 2008 have been allocated to the accounts of Austrian operators by end of February 2008.

In respect of the two flexible mechanisms of Joint Implementation (JI) and Clean Development Mechanism (CDM) of the Kyoto Protocol the Austrian government launched the Austrian JI/CDM Program for purchases of emission reductions in form of Emission Reduction Units (ERU) and Certified Emission Reductions (CER) generated by JI and CDM projects. The programme is regulated under the Austrian Environmental Support Act (*Umweltförderungsgesetz*) as well as in Section 19 b of the Act on Emission Allowances. In addition to EU allowances, companies may also trade CER and since 1 January 2008.

Emission allowances can be traded at the Energy Exchange Austria ("EXAA", www.exaa.at).

10 Asbestos

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

Austria has not seen the development of an "asbestos litigation industry" to anywhere near the same extent as in the US.

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

The Ordinance on the Ban of certain Chemicals (*Chemikalien-Verbotsverordnung*) generally prohibits the manufacture, the use and the putting on the market of products that contain asbestos. This prohibition applies especially to coating materials, adhesives, asphalt, grout, floor covering and paving, and insulation. Under Austrian law, real estate owners or occupiers have no general duty to conduct an asbestos survey.

Where an item containing asbestos has become defective or has deteriorated, resulting in a release of asbestos fibres, the deteriorated item (e.g. insulation containing asbestos that has fallen from pipes) may result in such material being regarded as a hazardous waste under the Waste Management Act.

Employers are under a general obligation to safeguard and protect the life and health of their employees. As such, the exposure to and working with materials containing asbestos is permissible only under narrowly regulated conditions. Employers failing to fulfil their safeguarding duty may be subjected to administrative fines or become liable towards individual employees under general tort law. The authorities are empowered to close down work premises which are contaminated with asbestos.

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 Austria?

There is no special type of "environmental insurance" in Austria. Environmental risks are, to a certain extent, usually covered by standard commercial general liability insurances (*Unternehmenshaftpflichtversicherung*). Depending on the business, these standard insurance contracts are amended with regard to the specific risks. The Association of Austrian Insurance Companies publishes general terms and conditions for liability insurance (*Allgemeine und Ergänzende Allgemeine Bedingungen für die Haftpflichtversicherung*), wherein Article 6 governs rules for environmental damage.

Traditionally, environmental risk insurance has not played a major role in Austria. However, due to increased public awareness of environmental issues and tougher regulations, the role of environmental risks in insurance contracts has certainly increased.

11.2 What is the environmental insurance claims experience in Austria?

Due to the fact that Austrian insurance companies tend to seek settlements with their policyholders, Austria has seen comparatively little environmental litigation concerning insurance. The majority of the cases deal with the interpretation of the general terms and conditions for liability insurance (*Allgemeine und*

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Ergänzende Allgemeine Bedingungen für die Haftpflichtversicherung); compare to question 11.1.

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 Austria.

As already mentioned under questions 4.1, 5.1 and 5.2, Directive 2004/35/EC has finally been adopted and both a Federal Act on Environmental Liability (*Bundes-Umwelthaftungsgesetz*) and corresponding acts of most of the Austrian states have been promulgated.

A new version of the UVP-G entered into force on 19 August 2009. It entails, amongst others modifications, changes of the thresholds and criteria contained in its annexes, clarifications regarding the competences of the respective authorities and measures to enforce climate protection.

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