Environment & Climate Regulation 2022

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Environment & Climate Regulation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the European Union.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, James M Auslander and Brook J Detterman of Beveridge & Diamond PC, for their continued assistance with this volume.

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Getting The Deal Through

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LEGISLATION

Main environmental regulations

1 | What are the main statutes and regulations relating to the environment?

The main statutes and regulations relating to the environment at EU level are dispersed in various directives and regulations, including the following:

- Directive 2010/75/EU (the Industrial Emissions Directive);
- Directive 2004/35/EC (the Environmental Liability Directive);
- Directive 2008/98/EC (the Waste Framework Directive);
- Directive 2008/50/EC (the Ambient Air Quality Directive);
- Directive 2000/60/EC (the Water Framework Directive);
- Directive 2008/56/EC (the Marine Strategy Framework Directive);
- Directive 2009/147/EC (the Birds Directive);
- Directive 92/43/EEC (the Habitats Directive;
- Directive 2002/49/EC (the Environmental Noise Directive);
- Directive 2014/95/EU (the Non-Financial Reporting Directive);
- Directive 2011/92/EU (the Environmental Impact Assessment Directive); and
- Directive 2001/42/EC (the Strategic Environmental Assessment Directive).

In addition, several pieces of legislation in relation to specific topics exist, such as Directive 2006/66/EC (the Batteries Directive), Directive 2000/53/EC (the End of Life Vehicles Directive), Directive 1999/31/EC (the Landfill Directive), Directive 2006/21/EC (the Mining Waste Directive), Directive 94/62/EC (the Packaging and Packaging Waste Directive), Directive 96/59/EC (the Directive on the Disposal of PCBs/PCTs), Directive 2011/65/EU (the RoHS Directive), Directive 86/278/EEC (the Sewage Sludge Directive), Regulation (EU) No. 1257/2013 (the Ship Recycling Regulation), Regulation (EU) 2019/1021 (the POPs Regulation), Regulation (EC) No. 1013/2006 (the Waste Shipments Regulation), and Directive 2012/19/EU (the WEEE Directive).

Most directives and regulations foresee the possibility for member states to sanction breaches of environmental law; this is thus regulated on a member state level.

Integrated pollution prevention and control

2 | Is there a system of integrated control of pollution?

Yes. Directive 2010/75/EU (the Industrial Emissions Directive) forms the main EU instrument regulating pollutant emissions from industrial installations. The Industrial Emissions Directive relates to all the environmental impacts of a number of activities which are subject to prior review and (as the case may be) specific conditions. The specific conditions may be re-examined and updated in the course of the operation of the installations or activities.

According to the Industrial Emissions Directive, installations are subject to a prior review, operating conditions and monitoring. Installations include all stationary technical units in which one or more activities in the following sectors are carried out: energy, metal production and processing, minerals, chemicals, waste management and other sectors such as pulp and paper production, slaughterhouses and the intensive rearing of poultry and pigs.

First, member states are obliged to take all necessary measures to ensure that no installation as mentioned above, combustion plant, waste incineration plant or waste co-incineration plant is operated without a permit.

According to the Industrial Emissions Directive, the permit must include all measures required to achieve a high level of environmental protection in general and to ensure that the installation is operated in compliance with the general principles governing the operator's basic obligations. The permit must, inter alia, also include emission limit values for polluting substances, or equivalent parameters or technical measures and monitoring requirements.

The permit conditions should be set on the basis of the best available techniques (BATs), that is, the most effective and advanced stage in the development of activities and their methods of operation which indicates the practical suitability of particular techniques for providing the basis for emission limit values and other permit conditions designed to prevent and, where that is not practicable, to reduce emissions and the impact on the environment as a whole.

Second, member states are given the possibility to include requirements for certain categories of installations, combustion plants, waste incineration plants or waste co-incineration plants by the means of 'general binding rules'. In this regard, member states must ensure an integrated approach and a high-level of environmental protection equivalent to that achievable with individual permit conditions.

Lastly, a system of monitoring is foreseen. According to the Industrial Emissions Directive, operators must supply the competent authority at least annually with information on the basis of results of emission monitoring and other required data that enables the competent authority to verify compliance with the permit conditions. In addition, the Industrial Emissions Directive obliges member states to set up a system of environmental inspections of installations addressing the examination of the full range of relevant environmental effects from the installations concerned and to draw up inspection plan accordingly. Every one to three years, using risk-based criteria, a visit of the installations must take place.

As announced in the European Green Deal, the European Commission will propose a revision of the EU measures addressing pollution from large industrial installations (including a revision of the Industrial Emissions Directive). To this extent, the Commission launched an Open Public Consultation on 22 March 2021, and is undertaking an impact assessment with a view of tabling a proposal for its revision in early 2022.

Soil pollution

3 | What are the main characteristics of the rules applicable to soil pollution?

At EU level, there is no binding, overarching framework that defines (parameters for) soil protection or rules applicable to soil pollution; such rules are mainly set by the member states, detailing the person or persons that are responsible for clean-up activities, applicable thresholds for investigating (and as the case may be, remediating) soil pollution, etc.

The EU rules applicable to soil pollution are mostly derived as a consequence of delivering environmental objectives that are not explicitly soil-focused, such as the reduction of contamination and the prevention and remedying of environmental damage. These objectives are enshrined in a suite of pieces of EU legislation, including Directive 2004/35/EC (the Environmental Liability Directive) and the Industrial Emissions Directive.

Regulation of waste

4 | What types of waste are regulated and how?

Directive 2008/98/EC (the Waste Framework Directive) forms the framework of general rules that apply to all categories of waste and integrates or consolidates formerly applicable (specific) directives, in particular with regard to hazardous waste and the disposal of waste oils. The abandonment, dumping or uncontrolled management of waste is prohibited by the Waste Framework Directive.

Waste includes any substance or object that the holder discards or intends or is required to discard. It does not cover certain types of waste such as gaseous effluents, land (in situ), uncontaminated soil, radioactive waste, decommissioned explosives, faecal matter, animal by-products and waste from extraction activities.

In particular, waste should not be confused with by-products. By-products are substances or objects obtained from production processes, where the primary aim is not the production of those items, when the following four conditions are fulfilled: (1) the further use of the substance or object is certain; (2) the substance or object can be used directly without any further processing other than normal industrial practice; (3) the substance or object is produced as an integral part of a production process; and (4) further use is lawful. Animal by-products are separately regulated under Regulation (EC) No. 1069/2009, laying down health rules as regards animal by-products and derived products not intended for human consumption.

The Waste Framework Directive sets out a waste hierarchy that applies as a priority order in waste prevention and management legislation and policy: prevention, preparing for re-use, recycling, other recovery and disposal. Member states should take appropriate measures to this end.

Member states must require establishments or undertakings intending to carry out waste treatment to obtain a permit from the (national) competent authority. Such permit must specify the types and quantities of waste that may be treated, the technical and any other requirements relevant to the site concerned, the safety and precautionary measures to be taken, the method to be used for each type of operation, monitoring and control operations (as far as necessary) and closure and after-care provisions (as far as necessary).

Furthermore, the Waste Framework Directive introduces the 'polluter pays' principle, which entails that the costs of waste management shall be paid by the original waste producer, and the 'extended producer responsibility' concept, which consists of a set of measures taken by member states to ensure that producers of products bear financial responsibility for the management of the waste stage of a product's life cycle. It furthermore incorporates certain provisions on hazardous waste (ie, waste that displays one or more of the hazardous properties listed in Annex III of the Waste Framework Directive) and waste oils (ie, any mineral or synthetic lubrication or industrial oils which have become unfit for the use for which they were originally intended, such as used combustion engine oils and gearbox oils, lubricating oils, oils for turbines and hydraulic oils).

In addition to the Waste Framework Directive, several pieces of legislation on specific categories on waste exist, such as Directive 2006/66/EC (the Batteries Directive), Directive 2000/53/EC (the End of Life Vehicles Directive), Directive 1999/31/EC (the Landfill Directive), Directive 2006/21/EC (the Mining Waste Directive), Directive 94/62/EC (the Packaging and Packaging Waste Directive), Directive 96/59/EC (the Directive on the Disposal of PCBs/PCTs), Directive 2011/65/EU (the RoHS Directive), Directive 86/278/EEC (the Sewage Sludge Directive), Regulation (EU) No. 1257/2013 (the Ship Recycling Regulation), Regulation (EU) 2019/1021 (the POPs Regulation), Regulation (EC) No. 1013/2006 (the Waste Shipments Regulation), and Directive 2012/19/EU (the WEEE Directive).

Regulation of air emissions

5 | What are the main features of the rules governing air emissions?

Regarding air emissions, a distinction should be made between the rules concerning ambient air quality and clean air on the one hand, and the rules concerning emissions of pollutants on the other hand.

Directive 2008/50/EC (the Ambient Air Quality Directive) provides for concentration limit values and alert triggers, as well as the establishment of air quality plans. According to this Directive, air ambient quality must be assessed in all agglomerations. These are conurbations with a population in excess of 250,000 inhabitants or with a given population density per km² to be set by the member states.

The concentration limit values are fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and the environment, and must be attained within a given period and must not be exceeded once attained. They should be distinguished from critical levels and alert triggers.

In addition, air quality plans set out measures in order to attain the limit values or target values, which must be established by member states in agglomerations where the levels of pollutants in ambient air exceed the concentration limit value (increased by any relevant margin of tolerance).

Regarding measures concerning emissions of pollutants, several aspects are regulated. First, the emissions of motor vehicles and their fuels are regulated. Numerous directives and regulations exist in this regard. Introduced in Regulation 595/2009 for heavy-duty vehicles and Regulation 715/2007 for light-duty vehicles, the so-called EURO 6/VI standards entail the emission limit values for motor vehicles and are mandatory for all vehicles placed on the market since 2015. Standards have also been set for fuels, including limit values for lead and benzene with respect for petrol and sulphur for diesel fuel. It should be noted that member states can require that fuels must comply with more stringent specifications for all or part of the vehicle fleet. Second, the emissions of certain plants (eg, combustion plants and volatile organic compounds) are regulated. The main tool used by the relevant directive in this regard, the Industrial Emissions Directive, is emission limit values.

The measures regarding emission reduction that apply to activities or goods that release greenhouse gases (GHGs) are described in the European Union Climate Regulation chapter of *Lexology Getting The Deal Through – Environment & Climate Regulation*.

Protection of fresh water and seawater

6 | How are fresh water and seawater, and their associated land, protected?

Directive 2000/60/EC (the Water Framework Directive) and Directive 2008/56/EC (the Marine Strategy Framework Directive) form the main legal framework for the protection of fresh water and marine resources.

The Water Framework Directive foresees in a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. In this regard, the Directive provides for both structures as well as instruments.

First, member states must identify the river basins located within their territories, which are then regrouped in river basin districts. It is at the level of such districts that the management of water resources must take place, which implies that all administrative arrangements for the application of the Directive must be made individually within each district.

Second, member states are bound to a systematic observation. This implies that they must ensure that they establish programmes with the purpose of monitoring the water status within each river basin district.

Third, member states are requested to establish river basin management plans, as well as specific programmes of measures to achieve the objectives of the Water Framework Directive. River basin management plans are established for each river basin district and include, inter alia, a summary of significant pressures and impact of human activity on the status of surface water and groundwater.

The Water Framework Directive is supported by other directives, such as Directive 2006/118/EC (the Groundwater Directive), Directive 98/83/EC (the Drinking Water Directive), Directive 2006/7/EC (the Bathing Water Directive), Directive 91/676/EEC (the Nitrates Directive), Directive 91/271/EEC (the Urban Waste Water Treatment Directive), Directive 2008/105/EC (the Environmental Quality Standards Directive) and Directive 2007/60/EC (the Floods Directive). The Urban Waste Water Treatment Directive, for example, sets minimum standards and timetables for the collection, treatment and discharge of urban waste water.

The Marine Strategy Framework Directive made it a priority to achieve a good environmental status of the European marine waters by 2020 and to continue its protection and preservation, as well as to prevent subsequent deterioration.

To achieve the aforementioned good environmental status, member states had to develop their own ecosystem-based strategies for their marine waters, which had to be reviewed every six years. The strategy included, inter alia, the establishment of environmental targets and associated indicators, as well as a monitoring programme and regular updates of targets to achieve a good environmental status by 2020.

In 2020, the EU Biodiversity Strategy for 2030 was adopted, aiming to further strengthen the protection of marine ecosystems.

Protection of natural spaces and landscapes

7 | What are the main features of the rules protecting natural spaces and landscapes?

With regard to the conservation of flora and fauna species and their habitats, two directives are relevant, namely Directive 2009/147/EC (the Birds Directive) and Directive 92/43/EEC (the Habitats Directive). Central to both Directives is the designation and conservation of special protection areas for certain bird species (the Birds Directive) and special areas of conservation for certain natural habitats and wild fauna and flora (the Habitats Directive). These two types of areas form the Natura 2000 network, which forms a coherent European ecological network.

As far as natural spaces and landscapes are concerned, the Habitats Directive is the most relevant due to its protection of natural habitats. Natural habitats are terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural. The aim of the Habitats Directive is to ensure, through the designation of special areas of conservation, the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status. Annexes I and II list these natural habitat types and species respectively.

In the Habitats Directive, the protection of the aforementioned areas and against harmful plans and projects is regulated as well. The protection requirements stipulate, inter alia, that plans or projects that adversely affect special areas of conservation may be authorised only under certain cumulative conditions: an appropriate assessment must be carried out and the public must be given the opportunity to participate. If the appropriate assessment concludes that the plan or project will have significant effects in the area, further conditions must be fulfilled.

In principle, it is up to the member states to make the special areas of conservation subject to a set of appropriate rules for their conservation. The Habitats Directive does not specify in detail what measures a member state must take, but that member states must maintain or restore a favourable conservation status for natural habitats and, in particular, special areas of conservation through conservation measures, preventive measures and compensatory measures. However, the Habitats Directive stresses that, in the special areas of conservation, there must be no deterioration of natural habitats and the habitats of species, nor disturbance of the species for which the areas have been designated. The same applies in relation to the Birds Directive.

Protection of flora and fauna species

8 | What are the main features of the rules protecting flora and fauna species?

With regard to the conservation of flora and fauna species, the Birds Directive and the Habitats Directive are relevant.

The Habitats Directive protects flora and fauna species in the following way: for species listed in Annex IV, a strict protection regime must be applied across their entire natural range within the EU, both within and outside Natura 2000 sites; and for species listed in Annex V, member states shall take measures to ensure that the exploitation and taking in the wild of aforementioned species is compatible with maintaining them in a favourable conservation status.

Regarding the protection of fauna, the Birds Directive is relevant. The Birds Directive aims to protect all wild bird species that naturally occur in the EU. The Directive protects the wild bird species in the following way: for wild bird species listed in Annex I and for all migratory bird species, member states must designate special protection areas for their survival; and only wild bird species listed in Annex II can be hunted, albeit under certain conditions.

Furthermore, both Directives ban several activities. The Birds Directive stipulates a number of prohibitions on the taking, possessing and trading of, in principle, all species of birds covered by the Birds Directive. This includes the deliberate capture or killing of birds and the destruction of their nests. The Habitats Directive contains a number of prohibitions on taking, possessing and trading as well. In addition, regulations on habitat protection are mentioned in the Habitats Directive. By a way of example, the damage or destruction of breeding sites or resting places of the animal species concerned is, in principle, prohibited.

Noise, odours and vibrations

9 | What are the main features of the rules governing noise, odours and vibrations?

Directive 2002/49/EC (the Environmental Noise Directive) aims to define a common approach intended to avoid, prevent or reduce on a

prioritised basis the harmful effects, including annoyance, due to exposure to environmental noise. Environmental noise entails unwanted or harmful outdoor sound created by human activities, including noise emitted by means of transport, road traffic, rail traffic, air traffic, and from sites of industrial activity such as those defined in Annex I to Directive 96/61/EC (the IPPC Directive, which, in the meantime, has been replaced by the Industrial Emissions Directive).

According to the Environmental Noise Directive, the following actions must be implemented by the member states: (1) the determination of exposure to environmental noise through noise mapping; (2) ensuring that information on environmental noise and its effects is made available to the public; and (3) the adoption of action plans, based upon the noise-mapping results, with a view to preventing and reducing environmental noise where necessary and particularly where exposure levels can induce harmful effects on human health and to preserving environmental noise quality where it is good.

In addition to the Environmental Noise Directive, there are various directives that define maximum permissible sound levels that a range of products must comply with in order to be placed on the market. By a way of example, motor vehicles, lorries, buses and aeroplanes are subject to limit sound emission values.

Lastly, regarding odours, the Industrial Emissions Directive should be mentioned as it obliges member states to take all necessary measures to ensure that industrial activities giving rise to pollution are covered under a permit. The permit conditions should be set on the basis of BATs.

Liability for damage to the environment

10 | Is there a general regime on liability for environmental damage?

The Environmental Liability Directive forms a framework based on the polluter pays principle to prevent and remedy environmental damage.

Environmental damage is defined as damage to protected species and natural habitats (ie, any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species), damage to water (ie, any damage that significantly adversely affects the ecological, chemical or quantitative status or the ecological potential of the waters concerned and the environmental status of the marine waters concerned) and damage to land (ie, any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms).

According to the Environmental Liability Directive, the principle is that an operator whose activity has caused environmental damage or causes the imminent threat of such damage is to be held financially responsible. In this way, operators are encouraged to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to the financial consequences of their liability is reduced.

The Environmental Liability Directive applies to (1) environmental damage caused by any of the occupational activities listed in Annex III of the Directive and to any imminent threat of such damage, occurring by reason of any of those activities, and (2) damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III of the Directive, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

Among other things, the Environmental Liability Directive lays down a number of important obligations for operators. For instance, the Environmental Liability Directive provides that the operator has to take the necessary preventive measures immediately when environmental damage has not yet occurred but there is an imminent threat of such damage occurring. When environmental damage has occurred, the operator must immediately inform the competent authority of all relevant aspects of the situation and take all steps to immediately control, contain, remove or otherwise manage the relevant pollutants and any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health. In addition, the operator must also take all necessary remedial measures. The operator shall bear the costs for the preventive and remedial measures taken.

Environmental taxes

11 | Is there any type of environmental tax?

The European environmental tax revenue is broken down into the following four categories: energy taxes, transport taxes, pollution taxes and resource taxes.

The taxation differs from member state to member state, apart from energy taxation. As required by Directive 2003/96/EC, there is a comprehensive energy taxation in the member states.

Environmental reporting

12 | Are there any notable environmental reporting requirements (eg, regarding emissions, energy consumption or related environmental, social and governance (ESG) reporting obligations)?

Yes. According to Directive 2014/95/EU (the Non-Financial Reporting Directive), all large undertakings or parent undertakings of a group exceeding on their balance sheet an average number of 500 employees during the financial year must disclose information on the way they operate and manage social and environmental challenges. More specifically, in their management report, undertakings must include a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

A proposal for a Corporate Sustainability Reporting Directive has been adopted in April 2021, which would, inter alia, extend the scope of the Non-Financial Reporting Directive to all large companies and all companies listed on regulated markets (except listed micro-enterprises), require the audit of reported information and introduce more detailed reporting requirements.

Additionally, the EU and the member states, as parties to the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement, are obliged to both annually report on their GHG emissions, as well as regularly report on their climate policies, measures and progress to the United Nations. Regarding the annual reporting on emissions, the Regulation on the Governance of the Energy Union is of importance, as it lays down a monitoring mechanism for GHG emissions and sets out the EU's own internal reporting rules.

Government policy

13 | How would you describe the general government policy for environmental issues? How are environmental policy objectives influencing the legislative agenda?

The general government policy for environmental issues is gaining increased attention and is being reinforced and accelerated as part of the European Green Deal.

To achieve the European Green Deal's objectives, the EU has set the ambitious goal to further cut GHG emissions by at least 55 per cent by 2030 and to become the world's first climate-neutral continent by

2050. To this extent, on 14 July 2021, the European Commission adopted a series of legislative proposals setting out how it intends achieve climate neutrality by 2050. The 'Fit for 55' legislative proposals cover a wide range of policy areas, including environmental and climate issues.

HAZARDOUS ACTIVITIES AND SUBSTANCES

Regulation of hazardous activities

14 | Are there specific rules governing hazardous activities?

Yes. The permitting of hazardous activities is regulated on a member state level but follows from Directive 2010/75/EU (the Industrial Emissions Directive) as well. The Industrial Emissions Directive obliges member states to take all necessary measures to ensure that industrial activities giving rise to pollution are operated without a permit. The permit conditions should be set on the basis of BATs.

Regulation of hazardous products and substances

15 | What are the main features of the rules governing hazardous products and substances?

Hazardous products and substances are regulated under various pieces of EU legislation (depending on the nature of the products or substances).

In relation to chemicals, REACH is the key piece of legislation. REACH aims to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation.

In principle, all existing and new chemical substances are covered by REACH. There are, however, exceptions. The underlying principle is that chemical substances which are subject to other European legislation that guarantees the same high level of protection of human health and the environment are not subject to REACH.

REACH lays down a system that may require registration, evaluation, authorisation and restrictions. First, chemicals cannot be manufactured or placed on the market as such in quantities of one tonne or more per year by any manufacturer or importer or contained in one or more preparations unless it has been registered. This is also referred to as 'no data, no market'. Secondly, the test proposals are reviewed, with a particular attention for those involving vertebrate animals. Lastly, certain chemicals (so called 'substances of very high concern') are subject to prior authorisation. In addition, if the manufacture, the placement on the market or use of certain hazardous substances involve unacceptable risks to human health or the environment, they may be (made) subject to restrictions.

Hazardous substances are subject to specific pieces of legislation. For instance, in relation to genetically modified organisms, the contained use and the deliberate release into the environment is regulated by Directive 2001/18/EC and Directive 2009/41/EC (eg, all deliberate releases of genetically modified organisms must give rise to one or several notifications, where their containment is reduced as their assessment progresses). Other regulated (hazardous) substances include, inter alia, biocidal products (Regulation (EU) 528/2012), POPs (the POPs Regulation) and asbestos (Directive 2009/148/EC).

Industrial accidents

16 | What are the regulatory requirements regarding the prevention of industrial accidents?

The SEVESO III Directive aims to prevent major accidents involving dangerous substances and limit the consequences for people and the environment should such accidents occur despite preventive measures.

The SEVESO III Directive applies to establishments where dangerous substances are present in quantities equal to or in excess of the thresholds set out in Annex I to the Directive. The SEVESO III Directive makes a distinction between lower-tier and upper-tier establishments, depending on the quantities of dangerous substances present.

The operator of such an establishment is required to take all necessary measures to prevent major accidents and to limit their consequences for people and the environment. This includes submitting a notification file and (in the case of an upper-tier establishment) a safety report to the competent authority, giving detailed information on the substances concerned, the installation and the protection and intervention measures. Operators of upper-tier establishments also have to draw up an internal emergency plan. For new installations, the notification must be made before the installation is brought into operation.

On the basis of the information provided, the competent authority must draw up an external emergency plan. Internal and external emergency plans should be reviewed at appropriate intervals and revised if necessary. The establishments concerned should also be inspected and monitored on a regular basis.

According to the SEVESO III Directive, member states should integrate the aim of preventing major accidents and limiting the consequences of such accidents into land-use planning and other relevant policies. This is thus regulated on a member state level.

Lastly, the population at risk must be adequately informed. Information obtained pursuant to the Directive should be available to any person requesting it. Exceptions may be made for reasons of confidentiality. When a major accident occurs, the operator must immediately inform the authorities and provide the information described in the SEVESO III Directive. The Commission will, on the basis of reports from the member states, provide a register and an information system containing details of major accidents which have occurred within the territory of the member states.

ENVIRONMENTAL ASPECTS IN TRANSACTIONS AND PUBLIC PROCUREMENT

Environmental aspects in M&A transactions

17 | What are the main environmental aspects to consider in M&A transactions?

The main environmental aspects to be considered in M&A transactions are to be assessed on a case-by-case basis, and in light of the domestic environmental rules. These range from permits, soil pollution and noise to the use of hazardous substances.

As a general rule, asset deals require increased attention as such deals may trigger additional requirements (such as notification obligations towards the national, competent authorities in case of a transfer of an environmental permit, or compliance with transfer of land rules, in case of (potentially) polluted land), whereas share deals usually do not trigger such obligations. However, environmental due diligence has become quite standard, both in the context of asset and share deals, and nowadays, many buyers are seeking protection for environmental matters (regardless of whether this is in an asset purchase agreement or a share purchase agreement).

Environmental aspects in other transactions

18 What are the main environmental aspects to consider in other transactions?

It is common to perform environmental due diligence in other types of transactions (such as IPOs or real-estate transactions or corporate restructuring matters) to identify environmental risks that must be disclosed (eg, breaches of permits, the presence of asbestos or soil pollution and related costs), transfer requirements or factors that could delay the transaction (eg, in case soil pollution must be further investigated or remediated, before the transaction can take place or before a forced sale can take place in case of a bankruptcy).

Environmental aspects in public procurement

19 Is environmental protection taken into consideration by public procurement regulations?

Contracting authorities have a wide discretion when defining the subject matter of the contract, as Directive 2014/24/EU (the Public Procurement Directive) does not prevent them from implementing or imposing environmental considerations or requirements. Environmental considerations may be integrated at various stages of the public procurement procedure.

First, the technical specifications or the award criteria may be formulated in terms of performance or functional requirements, including environmental aspects (eg, environmental and climate performance levels or production processes and methods).

Secondly, environmental considerations may be relevant or decisive in the selection phase and award phase. The Public Procurement Directive explicitly states in article 18(2) that member states must take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by national law, EU law, collective agreements or the international provisions listed in Annex X of that Directive. As a general principle, contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established that the tender does not comply with the applicable obligations referred to in article 18(2) of the Public Procurement Directive.

Furthermore, both mandatory and optional grounds of exclusion are laid down in the Public Procurement Directive. According to the Directive, contracting authorities may exclude any economic operator from participation in a procurement procedure when environmental obligations are violated. Contracting authorities must, however, reject the tender, when they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in article 18(2).

Lastly, environmental considerations are also possible in the contract performance stage. Namely, the Public Procurement Directive authorises the contracting authorities to set out specific conditions relating to the performance of a contract, which may include economic, innovation-related, environmental, social or employment-related considerations.

It should be mentioned that the Public Procurement Directive gives member states the discretionary power to implement in their legislation that contracting authorities do not have to use price or cost as the sole award criterion. This enables contracting authorities to award contracts based on the best price-quality ratio as determined by the award criteria that may include environmental considerations.

ENVIRONMENTAL ASSESSMENT

Activities subject to environmental assessment

20 Which types of activities are subject to environmental assessment?

With regard to environmental assessment, a distinction should be made between projects, which are subject to Directive 2011/92/EU (the Environmental Impact Assessment Directive), and plans and programmes, which are subject to Directive 2001/42/EC (the Strategic Environmental Assessment Directive).

Regarding projects, the Environmental Impact Assessment Directive stipulates that, before consent is given, projects that are likely to have significant effects on the environment by virtue of, inter alia, their nature, size or location are subject to a requirement for development consent and an assessment with regard to their effects.

More specifically, the Environmental Impact Assessment Directive applies to certain public and private projects likely to have significant effects on the environment. However, the Environmental Impact Assessment Directive provides for exceptions for projects serving national defence purposes and projects adopted by a specific act of national legislation. In *World Wildlife Fund (WWF) and Others* v *Autonome Provinz Bozen and Others*, the CJEU made it clear that these exceptions must be interpreted restrictively.

In the Environmental Impact Assessment Directive, a distinction is made between projects that are always subject to environmental impact assessment and that are included in Annex I of the Directive (eg, crude oil refineries, nuclear power plants and construction of motorways) and projects that are subject to environmental impact assessment at the discretion of the member states and that are included in Annex II of the Directive (eg, land consolidation projects, wind farms, permanent camping sites). Regarding the latter, member states have to assess this on a case-by-case basis, using thresholds or criteria, taking into account the selection criteria set out in Annex III of the Directive (such as the size of the project, the risk of accidents and the sensitivity of the area concerned).

Regarding plans and programmes, the Strategic Environmental Assessment Directive aims to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes. Certain plans and programmes that are likely to have significant effects on the environment are subject to an environmental assessment under this Directive.

More specifically, the Strategic Environmental Assessment Directive applies to the preparation, adoption and modification of plans and programmes by a public authority. An environmental assessment must be carried out for all plans and programmes that are prepared in relation to agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and that set the framework for future development consent of projects for which a project environmental impact assessment is required under the Environmental Impact Assessment Directive.

Such an environmental assessment should, according to the Strategic Environmental Assessment Directive, also be carried out for all plans and programmes that are likely to have an adverse effect on the Natura 2000 network. For other and smaller plans and programmes, the environmental assessment is only required if they are likely to have significant environmental effects.

Environmental assessment process

21 | What are the main steps of the environmental assessment process?

With regard to the environmental assessment process, a distinction should be made between projects, plans and programmes.

Regarding projects, member states must ensure that projects covered by the environmental assessment are subject to development consent. Before such consent is granted, projects must be subject to an environmental assessment. Environmental assessment involves the proper identification, description and evaluation of direct and indirect effects on the environment.

An environmental assessment shall include, inter alia, a description of the project, a description of the measures to prevent, reduce and restore any adverse effects, the data required to identify and assess the main effects of the project on the environment, an outline of the alternatives not retained and a non-technical summary of the data provided. The information required is given in Annex IV of the Environmental Impact Assessment Directive. The responsibility for drawing up the environmental report lies with the initiator.

In addition, member states have to ensure that the different environmental authorities concerned can express an opinion and that the application for development consent and the environmental report are made available for public examination within a reasonable time before the decision on the application for development consent is taken.

The environmental assessment, the results of consultations with environmental authorities and public participation must be taken into account in the development consent procedure. The decision must be reasoned and made public.

Regarding plans and programmes, the environmental assessment must be carried out during the preparation and before the adoption of a plan or programme. An environmental report is prepared in which the likely significant environmental effects of implementing the plan or programme and reasonable alternatives are identified, described and evaluated. In an annex, Directive 2001/42/EC (the Strategic Environmental Assessment Directive) defines the information to be provided. There are similar provisions to the Environmental Impact Assessment Directive with regard to consultations, public enquiries and transboundary consultations. The environmental report and the opinions expressed during the consultations are taken into account during the preparation of the plan or programme and before its adoption.

Once a plan or programme has been adopted, information on it is supplied to the authorities concerned, the public and any member states consulted. This information shall include the plan or programme adopted and a statement of how environmental considerations and the environmental report have been taken into account and the comments made. In addition, this statement shall summarise the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with.

REGULATORY AUTHORITIES

Regulatory authorities

22 | Which authorities are responsible for the environment and what is the scope of each regulator's authority?

This is regulated on a member state level.

Investigation

23 | What are the typical steps in an investigation?

This is regulated on a member state level.

Administrative decisions

24 | What is the procedure for making administrative decisions?

This is regulated on a member state level.

Sanctions and remedies

25 | What are the sanctions and remedies that may be imposed by the regulator for violations?

This is regulated on a member state level.

Appeal of regulators' decisions

26 | To what extent may decisions of the regulators be appealed, and to whom?

This is regulated on a member state level.

JUDICIAL PROCEEDINGS

Judicial proceedings

27 | Are environmental law proceedings in court civil, criminal or both?

This is regulated on a member state level.

Powers of courts

28 | What are the powers of courts in relation to infringements of environmental law?

This is regulated on a member state level.

Civil claims

29 | Are civil claims allowed regarding infringements of environmental law?

This is regulated on a member state level.

Defences and indemnities

30 | What defences or indemnities are available?

This is regulated on a member state level.

Directors' or officers' defences

31 | Are there specific defences in the case of directors' or officers' liability?

This is regulated on a member state level.

Appeal process

32 | What is the appeal process from trials?

This is regulated on a member state level.

INTERNATIONAL TREATIES AND INSTITUTIONS

International treaties

33 | Is your country a contracting state to any international environmental treaties, or similar agreements?

The EU is a contracting state to various international environmental treaties, such as:

- the Geneva Convention on Long-range Transboundary Air Pollution (CLRTAP) and its Protocols;

- the Cartagena Biosafety Protocol to the Rio Convention on Biological Diversity and its Supplementary Protocol on Liability and Redress;
- the PIC Rotterdam Convention on Prior Informed Consent;
- the POP Stockholm Convention on Persistent Organic Pollutants;
- the Minamata Convention on Mercury;
- the Helsinki Convention on Industrial Accidents;
- the Barcelona Convention and its protocols;
- the Helsinki Convention on the Baltic Sea;
- the OSPAR Convention;
- the Bonn Agreement;
- the Lisbon Agreement;
- the Bucharest Convention on the Protection of the Black Sea Against Pollution;
- the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters and its Protocol on Pollutant Release and Transfer Registers;
- the Espoo Convention on Environmental Impact Assessment;
- the Alpine Convention and its protocols;
- the CBD Convention on Biological Diversity;
- the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits arising from their Utilization;
- the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention);
- the Bonn CMS Convention on the Conservation of Migratory Species;
- the Agreement on the conservation of African-Eurasian Migratory Waterbirds (AEWA-CMS);
- the Bern Convention on European Wildlife and Habitats;
- the Convention for the protection of Vertebrate Animals used for Experimental and other Scientific Purposes;
- the International Tropical Timber Agreement (ITTA);
- the Ramsar Convention on Wetlands of International Importance;
- the Agreement on the Protection and Sustainable Development of the Prespa Park Area;
- the CAMLR Convention for the Conservation of Antarctic Marine Living Resources;
- the UNCCD Convention to Combat Desertification in Africa;
- the Basel Convention on hazardous wastes;
- the Helsinki Convention on Watercourses and International Lakes;
- the Danube River Protection Convention; and
- the Convention on the Protection of the Rhine.

International treaties and regulatory policy

34 | To what extent is regulatory policy affected by these treaties?

International treaties to which the EU is a party drive the EU's regulatory policy agenda as the EU must implement any commitments it has undertaken in this regard, in a timely manner.

UPDATE AND TRENDS

Key developments of the past year

35 | Are there any emerging trends or hot topics in environment law in your jurisdiction?

Two key developments are the EU Green Deal and the increased focus on and importance of ESG.

On 11 December 2019, the European Commission presented the European Green Deal, an ambitious agenda for the EU to become the first climate neutral continent by 2050, while also protecting, preserving, conserving and enhancing the EU's natural capital, as well as citizens' health and wellbeing from environmental risks and impacts. The European Green Deal priorities include, inter alia, the protection of biodiversity and ecosystems, the reduction of air, water and soil pollution, and the movement towards a circular economy. In this regard, the Commission adopted a new EU Biodiversity Strategy for 2030, which forms a comprehensive, ambitious and long-term plan to protect nature and reverse the degradation of ecosystems.

In April 2021, a proposal for a Corporate Sustainability Reporting Directive was adopted, which, inter alia, extends the scope of Directive 2014/95/EU (the Non-Financial Reporting Directive) to all large companies and all companies listed on regulated markets (except listed micro-enterprises) and introduces more detailed reporting requirements on the way they operate and manage social and environmental challenges.

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