



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012/13

ENVIRONMENT

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in key jurisdictions

Analysis of critical
legal issues



Ireland

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ENVIRONMENTAL REGULATORY FRAMEWORK

1. What are the key pieces of environmental legislation and the regulatory authorities in your jurisdiction?

Ireland has a well-developed system of environmental legislation, much of which is based on EU directives. Environmental legislation is principally administered and enforced by the Environmental Protection Agency (EPA), regional/local authorities throughout Ireland and the Minister for the Environment, Community and Local Government (Minister). The Health and Safety Authority (HSA) is the competent authority for implementation of the European Communities (Major Accident Hazards of Certain Industrial Activities) Regulations (1986 – 1992) (COMAH), and the Radiological Institute of Ireland enforces legislation in relation to protecting the environment from ionising radiation. In relation to water pollution, harbour authorities around Ireland and regional fisheries boards also have enforcement roles.

The key pieces of environmental legislation are:

- Environmental Protection Agency Act (1992).
- Protection of the Environment Act (2003).
- Environmental (Miscellaneous Provisions) Act (2011).
- Waste Management Acts (1996 to 2011).
- Air Pollution Acts (1987 and 2011).
- European Communities (Environmental Liability) Regulations (2008 – 2011) (Environmental Liability Regulations).
- COMAH.
- European Communities (Control of Major Accident Hazards Involving Dangerous Substances) Regulations (2000 – 2006).
- Local Government (Water Pollution) Acts (1977 – 1990).
- Water Services Acts (2007 – 2012).
- Dangerous Substances Acts (1972 – 1979).
- Fisheries (Consolidation) Acts (1959 – 2003).

Primary legislation forms the framework, with regulations made by the Minister under the legislation setting out the detail of the regulatory requirements. The legislation and important regulations are listed at www.irishstatutebook.ie and www.environ.ie.

REGULATORY ENFORCEMENT

2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

Environmental requirements are principally enforced by the EPA and local authorities. Enforcement is backed up by the court system with the vast majority of enforcement actions requiring court sanctions, as the use of administrative sanctions remains relatively undeveloped. The Regional Fisheries Boards also have the ability to take enforcement actions through the courts.

The EPA adheres to a policy framework when enforcing environmental legislation. Enforcement action is not taken in every case. The Office of Environmental Enforcement (OEE) of the EPA is responsible for enforcement and will only pursue a prosecution after full consideration of the event giving rise to environmental concerns. The OEE will consider the environmental and other effects of the offence, the foreseeability of the offence or the circumstances leading to it, the intent of the offender, individually and/or corporately, the history of offending, the attitude of the offender and the level of co-operation provided to investigating authorities, and where appropriate other factors that may arise.

A prosecution will not be commenced or continued by the OEE unless it is satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed and that there is a realistic prospect of conviction. In addition, the OEE encourages local authorities to adopt a similar approach to prosecution in relation to enforcement of environmental legislation.

ENVIRONMENTAL NGOS

3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

Environmental NGOs and other pressure groups are active and well organised in Ireland. These include the:

- National Trust for Ireland (*An Taisce*) (www.antaisce.org), which is the best known.
- Friends of the Irish Environment.
- Bird Watch Ireland.
- Irish Peatland Conservation Council.



Region or topic-specific organisations also include Friends of the Curragh Environment and Shell to Sea. There is also an umbrella group, the Irish Environmental Network (*see website, <http://ien.ie>*).

ENVIRONMENTAL PERMITS

4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Integrated/separate permitting regime

Many activities require both an environmental permit and planning permission. These regimes are separate. Planning permission deals with the entitlement to build particular infrastructure and use it for a particular purpose, but does not typically deal with operational requirements.

Activities likely to have a significant effect on the environment require a separate environmental licence or permit either from the local authority or the EPA. The First Schedule of the Protection of the Environment Act 2003 lists those activities that require an Integrated Pollution Prevention and Control (IPPC) licence, including, among other activities:

- Mining.
- Large-scale energy production.
- Chemical production.
- Manufacturing.
- Cement production.

The Third and Fourth Schedules of the Protection of the Environment Act 2003 list the waste disposal and recovery activities that require a waste licence from the EPA.

Other activities likely to have a lesser effect on the environment, and which do not come within the listed activities, may nevertheless require a licence or permit from the relevant local authority. These licences deal with minor air emissions, discharge of trade effluent to drains and sewers, and smaller waste storage, transfer and recovery operations.

Single/separate permits

IPPC licences deal with all environmental emissions, while local authority permits are emissions specific.

In both cases, the licences or permits are subject to conditions on the operation of the facility and usually also include financial contribution conditions. Financial contributions may be reconsidered every year. Detailed monitoring and reporting obligations are normally imposed. IPPC and EPA waste licences are lengthy and detailed, and such facilities are regularly audited by the EPA. Local authority granted licences and permits are much shorter and typically less onerous. All can be reviewed, and applications for such licences must be published and can be (and often are) commented on by members of the public, and decisions appealed.

5. What is the framework for the integrated permitting regime?

Permits and regulator

The EPA is the regulator for the administration of Ireland's IPPC regime. The EPA grants both IPPC licences and EPA waste licences for listed activities (*see Question 4*).

Length of permit

IPPC licences are generally open-ended, subject to compliance with their conditions, although a limited time can be included as a condition. Waste licences often have a limited time span. IPPC licences for activities that are not carried out for a three-year period cease to have effect, as long as this does not affect the application of the other licence conditions.

Restrictions on transfer

IPPC and EPA waste licences can only be transferred with the EPA's prior consent. The EPA will not consent to such a transfer unless it is satisfied as to both the technical and financial competence of the proposed transferee. A detailed application procedure must be adhered to, with the submission of extensive information on the environmental status of the relevant site, and the financial and technical competence of the proposed transferee. The application process typically takes a number of months to complete.

Penalties

Significant penalties for non-compliance with IPPC licences and EPA waste licences apply. Fines of up to EUR3,000 per offence in the lower courts and up to EUR15 million in the higher courts apply, together with potential prison terms of up to ten years for individuals, including directors and managers of licensed companies, who can be shown to have done or failed to do something that led to the breach. In addition, licences can be withdrawn, and clean-up orders can be imposed.

WATER POLLUTION

6. What is the regulatory regime for water pollution (whether part of an integrated regime or separate)?

Permits and regulator

IPPC licences deal with emissions to water for IPPC activities, as do Local Authority Effluent Discharge Licences for lower grade activities. The EPA grants IPPC licences, and the local authorities issue Effluent Discharge Licences.

Prohibited activities

It is prohibited to cause or permit any "polluting matter" to enter "waters". "Polluting matter" is defined widely by reference to the effect that substance may have on the receiving environment, including the quality of the water itself, injury to fish, injury to public health, or injury to domestic, commercial, industrial, agricultural or recreational use. "Water" is also defined widely and includes rivers, streams, lakes, canals, reservoirs, aquifers, ponds, tidal waters and inland waters, as well as adjacent areas. Sewer discharges are also licensed. It is a criminal offence to cause or permit any polluting matter to enter waters, or to discharge to a sewer, without a licence or outside a licence's terms.



Clean-up/compensation

The EPA and all local authorities and/or fisheries boards can require a polluter to clean up following a water pollution incident. Such clean-ups can include the:

- Replacement of fish stocks.
- Removal of polluting matter from waters.
- Water treatment.
- Repair or replacement of treatment equipment.
- Provision of alternative water supplies.

Under the Environmental Liability Regulations, the objective of remediation of environmental damage is to provide the same level of natural resources or services as would have existed if the damage had not occurred. The EPA can require that this objective is to be achieved using a combination of:

- Primary remediation, which deals with the original damaged resource or service.
- Complementary remediation, which is required where it is not possible or cost effective to remediate the original damaged resource or service to its baseline condition and which therefore relies on improvement of a similar resource or service.
- Compensatory remediation, which is intended to compensate society for the time the resource or service that has suffered damage is not available. This is delivered by way of remediation or enhancement of another site equivalent to the loss suffered.

AIR POLLUTION

7. What is the regulatory regime for air pollution (whether part of an integrated regime or separate)?

Permits and regulator

Air pollution is governed by the Air Pollution Acts 1987 and 2011 and is regulated by both local authorities and the EPA. IPPC licensed activities and those within the EPA waste licensing regime will have air emission limits included in those permits, while other activities may have separate air emission licences granted by their local authority. In each case, the licences will be subject to conditions.

Prohibited activities

It is an offence to cause or permit a pollutant to enter the atmosphere in such quantity as to be liable to be damaging to public health, flora, fauna, property or amenity value generally. A "pollutant" is anything likely to cause air pollution, including substances listed in the First Schedule to the Air Pollution Act 1987.

Clean-up/compensation

The EPA and local authorities can require measures to be taken to force an activity to cease causing air pollution. Although the Environmental Liability Regulations do not make provisions for the inclusion of atmospheric damage in the definition of environmental damage, air pollution may be of relevance in circumstances where there is a causal connection between it and damage to protected species or natural habitats.

Penalties

Breaches of the Air Pollution Act 1987 attract penalties of between EUR1,270 and EUR12,700 per offence, together with potential sentences of up to two years. In addition, a fine of up to EUR1,270 can also be imposed for every day on which the offence continues.

CLIMATE CHANGE, RENEWABLE ENERGY AND ENERGY EFFICIENCY

8. Are there any national targets for reducing greenhouse gas emissions, increasing the use of renewable energy (such as wind power) and/or increasing energy efficiency (for example in buildings and appliances)?

The EPA administers Ireland's Greenhouse Gas (GHG) Emissions Trading Policy, implementing Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community. Phase 2 (running from 1 January 2008 to 31 December 2012) coincides with the "first commitment period" of the Kyoto protocol. Phase 3 will run for eight years from 1 January 2013 to 31 December 2020. Ireland submitted its national implementation measures to the European Commission on 22 December 2011 and discussion on this document between the Commission and member states is expected to continue until late 2012. Ireland is on track to meet its Kyoto GHG emissions target for the 2008 – 2012 period.

Ireland is also bound by the European Commission's climate and energy package, which is to be met by 2020. The targets include:

- A reduction in EU greenhouse gas emissions of at least 20% below 1990 levels.
- 20% of EU energy consumption to come from renewable resources.
- 20% reduction in primary energy use compared with projected levels, to be achieved by improving energy efficiency.

9. Is your jurisdiction party to the United Nations Framework Convention on Climate Change (UNFCCC) and/or the Kyoto Protocol? How have the requirements under those international agreements been implemented?

Parties to UNFCCC/Kyoto Protocol

Ireland is party to the UNFCCC and the Kyoto Protocol.

Implementation

See *Question 8*.

10. What, if any, emissions/carbon trading schemes operate in your jurisdiction?

An emission-trading scheme operates in Ireland under the provisions of the Kyoto Protocol as enforced by the European Commission. See *Question 8*.



ENVIRONMENTAL IMPACT ASSESSMENTS

11. Are there any requirements to carry out environmental impact assessments (EIAs) for certain types of projects?

Scope

Large-scale projects typically require an EIA before they can be granted planning permission, and before being granted an IPPC or EPA waste licence. The types of projects that are covered include:

- Crude oil refineries.
- Waste and infrastructure projects.
- Chemical and food manufacturing industries.
- Large-scale housing and tourism projects.

Irish regulations, principally in planning legislation, have implemented the following EU Directives:

- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (EIA Directive).
- Directive 97/11/EC on the assessment of the effects of certain public and private projects on the environment (Amended EIA Directive).
- Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (Public Participation Directive).
- Directive 2009/31/EC on the geological storage of carbon dioxide.

Permits and regulator

Compliance with EU law requires that an assessment of the potential impact of a proposed activity is carried out before granting planning permission and/or any required environmental operating licence. An EIA involves an assessment of the environmental impact statement (EIS) presented by the proposer of the development, together with any responding documents submitted by opponents and the assessment carried out by the regulators themselves. Such projects may well be subject to an oral hearing as part of the application process, and in large infrastructural projects it is not unusual for the planning appeals board or the EPA to themselves appoint an expert to assist in the EIA process. If granted, it is likely that the planning permission or environmental operating licence will include conditions requiring the implementation of mitigation measures. The split assessment decision-making between the EPA and planning authorities used in Ireland was criticised in the case of *C-50/09 Commission v Ireland*, which found, among other things, that there was a possibility that the EPA alone could decide on a project before an EIA is carried out by the planning authority. Regulations are planned to provide for increased consultation between the planning authorities and the EPA in respect of EIA development to address this deficiency.

Penalties

Failure to comply with EIA requirements will mean that the necessary permission will not be obtained. If a planning authority issues a planning permission without carrying out an adequate EIA, that permission will be vulnerable to legal challenge. In addition,

following the ECJ decision in case C-215/06, *Commission -v- Ireland* (known as the *Derrybrien* case) it is no longer possible for retention permission to be obtained for development that should have been subject to EIA, except in exceptional circumstances. The Planning and Development (Amendment) Act 2010, which amended Irish law to comply with this decision, has set out a procedure whereby substitute consent may be applied for where an EIA has not been carried out, if there are exceptional circumstances. Ultimately, development carried out without an EIA may be subject to enforcement action, such as a planning injunction requiring the development to cease or be removed.

WASTE

12. What is the regulatory regime for waste?

Permits and regulator

Both the EPA and the local authorities have licensing and regulatory functions, depending on the level of waste activity. Large-scale waste disposal/recovery/storage facilities require a waste licence from the EPA, which will be a lengthy document with extensive conditions included. That licence will also include the requirement for the provision of financial security. Local authorities issue permits for relatively small-scale waste storage and recovery operations. The collection and transport of waste can only be done by authorised persons who hold a valid waste collection permit for the type of waste being collected. Additional legislation applies to hazardous waste.

Prohibited activities

It is an offence to hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution. It is not possible to dispose or recover waste except under and in accordance with an applicable licence or waste facility permit. Strict controls apply to the transfer and surrender of waste licences.

Operator criteria

To be granted a waste licence, operators must demonstrate to the EPA that they meet both technical and financial competence criteria, which can be adjusted each year by the EPA depending on the operational status of the facility. Strict controls also apply to the transfer of waste licences, meaning that the EPA must be satisfied as to the technical and financial competence of the transferee.

Special rules for certain waste

There are special rules for certain types of waste including hazardous waste, end-of-life vehicles, asbestos and radiological waste. Producer responsibility, where the producers of waste must finance the waste's treatment, is imposed for several categories of waste, for example, batteries, electrical and electronic equipment, and packaging waste.

Penalties

Offences are punishable by a fine of between EUR3,000 and EUR15 million per offence and imprisonment of up to ten years. In addition, clean-up orders can be imposed. The penalties apply to any person guilty of an offence. Where offences are committed by a corporate body, individual directors, managers and secretaries can be found criminally liable, if it is demonstrated that they



did, or failed to do, something that led to the offence. There is also case law to the effect that civil clean-up orders can be made against directors of companies where it is demonstrated that those directors had an active and controlling role (*South Dublin CoCo v Clean Build Ltd and Ors [2011] IEHC 350*).

ASBESTOS

13. What is the regulatory regime for asbestos in buildings?

Prohibited activities

Legislation provides a specified threshold level of asbestos dust, over which workers must not be exposed. Work exposing workers to asbestos dust must not be carried out without the preparation of a risk assessment and a plan of work, and notification must be made to the HSA. It is an offence to remove asbestos except in accordance with legislative requirements, which prescribes the steps that must be taken to remove and dispose of asbestos, and in the event that workers may be exposed to asbestos. Asbestos is treated as hazardous waste and its removal must be carried out under carefully controlled conditions.

Main obligations

The Safety, Health and Welfare at Work (Asbestos) Regulations 2006 and 2010, as well as more general health and safety regulations, and regulations relating to construction, set out the requirements in relation to asbestos-containing materials in the workplace. An employer must prepare written risk assessments for any activity where an employee may be exposed to asbestos dust, to identify asbestos, assess any risk for employees, and take any prescribed action to remove or mitigate such risk. Employers must take all reasonable steps to identify asbestos-containing materials before repair, maintenance or demolition, and asbestos work activities must be notified to the HSA 14 days before work commencing. The obligation is on the employer and/or operator of the relevant workplace. Specialist asbestos contractors must be used for the removal of asbestos (see www.hsa.ie for more information). The EPA licenses the storage of hazardous waste, including asbestos, and the specialist companies that remove and transport it.

Permits and regulator

Specialist asbestos removal contractors must be used for the removal and disposal of asbestos. They are regulated by the EPA.

Penalties

Failure to comply with health and safety obligations give rise to potential fines of up to EUR3 million per offence and imprisonment of up to two years. Breach of an EPA licence will give rise to potential penalties (see *Question 5*).

CONTAMINATED LAND

14. What is the regulatory regime for contaminated land?

Regulator and legislation

Ireland does not have a dedicated contaminated land regime and there is no register of contaminated land. Instead,

contaminated land issues tend to be dealt with either in the context of redevelopment (by the imposition of conditions in planning permission) or by clean-up orders under the water or waste regime. The most typical mechanism for the clean up of land is an application for a clean-up order under Sections 57/58 of the Waste Management Act 1996, as amended. This can be directed to the “holder” of the waste, which can be the current landowner or any persons (such as a previous owner) who released or permitted the release of contaminants on the land. If the contaminated land is creating a risk to the environment (for example, to ground or surface water) the water pollution legislation can also be used. Typically, the EPA or the local authorities take the requisite enforcement action.

Investigation and clean-up

Local authorities and the EPA are entitled to investigate contaminated land, and apply to court for it to be cleaned up by the current or previous holders of waste. “Holder” of waste is defined as “the producer of the waste or the natural or legal person who is in possession of it”. The EPA and the local authorities may carry out the works themselves and recover the costs as a simple contract debt, but this is rare.

Penalties

The same penalties apply as those under the water and waste legislation as far as it can be demonstrated that a breach of the water and/or waste legislation has taken place. Where a civil clean-up order has been made and that order has not been complied with, the entity or person against whom the order was made can be prosecuted for contempt and imprisoned for breach of the court order.

15. Who is liable for the clean-up of contaminated land? Can this be excluded?

Liable party

The party or parties who caused or permitted the contamination, or those that are currently in control of the contamination, are liable for the clean up of contaminated land. It is not unusual for several parties to be potentially responsible. In cases involving numerous parties the court allocates responsibility between the various parties.

Owner/occupier liability

Owners of land who did not cause the contamination can nevertheless be liable to pay for the clean up, as they are currently in control of holding the waste. Typically, the entity that caused the contamination is required to meet the majority of the clean-up costs but if that entity is not in a financial position to do so, the liability falls to the owner of the land. If the current occupier of land did not themselves cause the contamination, they can also face liability, although it is likely to be in conjunction with the owner. If the owner is not in a financial position to comply with the order then it is possible that the occupier will be ordered to do so.

Previous owner/occupier liability

Previous owners of contaminated land can be liable if they caused the pollution to occur, or permitted it to occur, for example by not taking preventative steps, or remedial steps if they were aware of the contamination.



Limitation of liability

There is no limitation of liability as such, other than as part of the court's consideration of an appropriate allocation of responsibility between a number of parties. The court will ensure that any clean-up order is the minimum clean up required to meet the statutory objective of ensuring there is no longer any risk of environmental pollution from that site. Some parties will seek to put environmental impairment liability risk insurance in place, see *Question 28*.

A party can exclude civil liability through an indemnity providing, for example, that any costs, expenses or damages resulting from the contamination must be met by the seller, or buyer, as appropriate. However, as a matter of public policy, it is not possible to indemnify against criminal liability. Therefore, if an offence was committed in either causing the contamination, permitting it to continue, or by breaching licence conditions, then this liability cannot be excluded or insured against.

16. Can a lender incur liability for contaminated land and is it common for a lender to incur liability? What steps do lenders commonly take to minimise liability?

Lender liability

There is no lender liability for contaminated land legislation as such. Lenders can be affected by issues associated with contaminated land in as far as it affects the value of the security and/or the ability of the borrower to repay. In addition, if the lender takes control of the contaminated land, or enters as mortgagee in possession, or appoints a receiver or liquidator, then liability can attach to that lender.

Minimising liability

Lenders should carry out appropriate due diligence before advancing funds. Security documentation should include notification obligations on the part of the borrower to maintain the site, comply with legislation and notify in the event of contamination. Before the enforcing of security, an updated survey should be carried out to ascertain the extent of any contamination issues so that an informed decision can be made as to the extent to which it is worthwhile enforcing security, and on the remedial measures that may need to be taken to preserve the site or clean up for resale. Receivers/liquidators may seek indemnity from lenders before their appointment, as should any managers put in to operate a site on behalf of the lender as mortgagee-in-possession. Clear baseline data should be assembled before taking control of title to protect against any action taken by the borrower at a later date.

17. Can an individual bring legal action against a polluter, owner or occupier?

An individual can bring legal action against a polluter, owner or occupier in relation to air pollution, water pollution, waste, noise or other adverse impact in so far as it affects them or their property. Individuals can make an application for an injunction requiring that a polluting activity cease and any pollution be remediated under various provisions of noise, waste, water and IPPC legislation. Individuals can also seek either compensation or an injunction under common law, if they can establish nuisance, trespass, negligence or breach of statutory duty.

ENVIRONMENTAL LIABILITY AND ASSET/SHARE TRANSFERS

18. In what circumstances can a buyer inherit pre-acquisition environmental liability in an asset sale/the sale of a company (share sale)?

Asset sale

A buyer can inherit pre-acquisition environmental liability in an asset sale in so far as the asset may still be contaminated or have some other current environmental risk attached. The buyer then becomes the legal owner in control of the environmental issue and is consequently vulnerable to any enforcement action. Due diligence should be carried out to identify any environmental risk associated with the assets being purchased.

Share sale

In a share sale scenario, buyers will step into the shoes of the vendor. Therefore, they may be responsible not only for contamination of, or pollution arising from, currently owned or occupied land or facilities but also for historic environmental liabilities, such as a previous pollution incident or contamination of previously owned land. They will therefore be exposed to the same environmental enforcement action as the vendor would have been. Again due diligence should be carried out to assess environmental risk.

19. In what circumstances can a seller retain environmental liability after an asset sale/a share sale?

Asset sale

The seller can retain environmental liability in relation to historic environmental incidents either past or current. In so far as the vendor can be demonstrated to have caused or permitted the environmental issue or pollution they remain vulnerable to enforcement action. They will not be responsible for environmental issues arising after the asset sale. It may be important to have a baseline survey carried out at the time of sale so as to be able to clearly distinguish between the different parties' liability.

Share sale

Generally, sellers do not retain environmental liability after a share sale, except under contract in so far as warranties and indemnities have been given to the purchaser.

20. Does a seller have to disclose environmental information to the buyer in an asset sale/a share sale?

Asset sale

The general principle of "buyer beware" applies but is subject to limitations. A seller must not misrepresent or misdescribe an asset. Standard conditions of sale include a condition stating that the seller will disclose all liabilities that affect the property and which might affect it after sale. Standard requisitions on title require disclosure of any environmental notices that have been received or threatened, and require disclosure of any breach of environmental controls. It is generally considered that environmental information that cannot be ascertained from a standard



property survey should be communicated to the buyer in an asset sale scenario. Buyers usually carry out legal and environmental due diligence and issues of environmental liability are dealt with by warranties, disclosures and/or indemnities.

Share sale

As with an asset sale, the general principle of “buyer beware” applies, but fair disclosure is generally required through the due diligence process. There should be no misrepresentation as to the environmental liabilities of the target company. If environmental warranties are to be given, disclosure may be made against them to limit recovery.

21. Is environmental due diligence common in an asset sale/a share sale?

Scope

Environmental due diligence is common in an asset sale/share sale. Typically, buyers ask questions in relation to:

- Site contamination.
- Discharges to water or air.
- Historic or current waste issues.
- Historic use of PCBs.
- Underground and over ground storage tanks.
- Underground pipes.
- Proximity to designated areas.
- Environmental licences.
- Issues with neighbours.
- Application of COMAH.

Types of assessment

Typically, due diligence includes both legal and technical due diligence. The legal due diligence concentrates on examining the publicly available documents and those supplied by the vendor in relation to environmental compliance, including any previous consultants' reports, current and past licences, correspondence with regulator and so on. Purchasers do not always commission environmental site assessments but this is advisable where either contamination is known or suspected on site or where the target company/asset is in a sector where environmental issues are likely to be a concern for the purchaser. An environmental site assessment will commence with a phase 1 non-intrusive site survey to include, if possible, interviews with key staff. A phase 2 intrusive environmental study may be warranted on receipt of the results of the phase 1 survey.

Environmental consultants

Environmental consultants are used for technical site surveys. Their engagement letter typically deals with:

- The documentation that has been made available to them.
- The public sources they will use.
- The interviews they can carry out.
- The site visit to be conducted.

- Any specialist operational issues.
- The timing of the report.
- Any limitation of liability.

22. Are environmental warranties and indemnities usually given and what issues do they usually cover in an asset sale/a share sale?

Asset sale

Environmental indemnities are only given for significant known issues. They are generally topic-specific and detail the scenarios in which liability would arise. Environmental warranties are usually more wide ranging and cover issues such as:

- Having and complying with all necessary licences to operate.
- Not having caused environmental damage.
- Not using hazardous substances.
- Not causing issues with neighbours.
- Not being aware of circumstances in which their licences may be revoked.

Disclosures are typically made against those warranties.

Share sale

The position in relation to environmental indemnities is the same as that in respect of asset sales. The position in relation to environmental warranties again is the same as in respect of asset sales with typically warranty cover also being required that the target company both:

- Has acted at all times in accordance with best practice.
- Is not aware of any claims regarding any damage to the environment or any violation of environmental law.

23. Are there usually limits on environmental warranties and indemnities?

Where no specific issues arise in relation to the due diligence process, and environmental issues are not central to the underlying business, environmental warranties are usually subject to the general time limits (typically two years) and financial limits set out in the share purchase agreement (which will be dictated by the terms of the commercial transaction). However, where there are specific concerns and/or environmental issues are central to the underlying business, the time limits on warranties may be extended to the same period as applies to tax warranties (typically five years). Environmental warranties will regularly also be qualified by reference to the “best of the knowledge, information and belief of the vendors”.

As with all indemnities in corporate transactions, typically there will be time limits on when a claim can be made and financial (minimum and maximum) caps. There are also likely to be controls on the notification, investigation and remediation of any environmental issues and the conduct of claims.



REPORTING AND AUDITING

24. Do regulators keep public registers of environmental information? What is the procedure for a third party to search those registers?

Public registers

The EPA maintains a register of IPPC and waste licences granted and correspondence exchanged with licensees (see *website, www.epa.ie*). While the register is reliable it is not necessarily comprehensive. An Annual Environment Report (AER) must be completed by the licensed facilities, which contains summary reports on their environmental performance and discloses information on waste management, emissions and resource consumption. These AERs are available online on the EPA's website.

As part of the AER, Ireland has a Pollutant Release and Transfer Register (PRTR) where information is provided by the licensed facilities as to the amount of pollutant releases to air, water and waste water in addition to off-site transfers of waste. This data (which is available at <http://prtr.epa.ie>) shows whether pollutants in excess of thresholds set out in EU legislation are being released. Any information provided that is below the thresholds is noted as such in the Irish PRTR. The information on the website is only provided in detail where the relevant thresholds have been exceeded and have been reported to the EU for inclusion in the European PRTR.

The local authorities maintain registers of issued planning permissions and enforcement notices. Files of correspondence are also available from the local authorities and the EPA offices for inspection. There are no registers of contaminated properties. There are, however, registers maintained by the local authorities and other authorities on water quality, designated areas and derelict sites.

Third party procedures

Information on environmental matters is widely available to the public as a result of Directive 2003/4/EC on public access to environmental information (and repealing Directive 90/313/EEC) and subsequent implementing legislation enacted in Ireland. This covers information on air quality, water quality, noise, radiation, waste and information on policies for environmental protection. Under the legislation, an applicant need not state their interest and the information must be made available within one month of the request being received. This period is extended to two months in the case of the information requested being particularly complex or voluminous. While access to and examination of public registers and lists must be free of charge, authorities may make a reasonable charge for the supply of environmental information. Requests for information may be refused for various stated (but limited) grounds, such as for reasons of confidentiality. A notification of the refusal giving reasons must be sent to the applicant within one month. A request can also be made under the Freedom of Information Act 1997, as amended, for environmental information (but generally an applicant will have less restricted rights to environmental information under the Directive (and the Irish implementing legislation) than under the 1997 Act).

25. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

Environmental auditing

In general, there is no obligation on a company to carry out environmental auditing unless it is a condition of an environmental licence or permit issued for a facility. EPA permitted and/or licensed facilities must carry out environmental auditing/monitoring. In practice, many companies carry out such auditing/monitoring, not only because they are required to do so under a licence or permit but also in order to obtain the ISO 14000 environmental management standard certification.

Reporting requirements

In general, there is no obligation on a company to report on its environmental performance unless that company is operating under a licence or permit. It is a standard condition of IPPC and EPA waste licences that licensees must complete an AER on their environmental performance in the previous calendar year. An AER includes the programme of environmental works that the licensee is planning for the coming year (see *Question 24*). AERs are publically available on the EPA website at www.epa.ie. Permits issued by local authorities (in the case of facilities that do not require IPPC licences or where discharge thresholds are not met) generally also contain reporting requirements (although these permits are often subject to less stringent requirements than would typically be imposed by the EPA).

26. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

As a condition of IPPC and EPA waste licences, licensees must regularly report information to the regulators on environmental performance and environmental incidents. This would include discharges to the air, water, soil, and so on. This information is available to the public on request. Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive) and subsequent implementing legislation in Ireland sets out the responsibilities of the operators or controllers of the occupational activity. A fundamental principle throughout is that a proactive stance is taken to deal with imminent threats of damage and actual damage. Where the operator or controller is of the opinion that the preventative measures do not dispel the threat of environmental damage, he must inform the EPA and other relevant stakeholders as soon as possible so that threats and actual damage can be dealt with quickly. The Environmental Liability Directive also set out the roles of the EPA when assessing whether there is an imminent threat of damage, when damage has occurred and the steps that are required to remedy that damage.

Irish air and water legislation also contains notification obligations where accidents occur.



27. What access powers do environmental regulators have to access a company?

Environmental regulators have extensive rights of access to a company's premises, documents and employees for the purposes of investigation in the event of a suspected environmental incident. Authorised persons can bring members of the police with them. They can take photographs, carry out tests, take samples, inspect plant and vehicles, and require information whenever they consider this necessary for the purposes of exercising any powers conferred on them under the relevant legislation. Failure to co-operate is an offence. These access and investigative powers are similar to other regulators (such as under competition/anti-trust legislation) and "dawn raids" by regulators generally are relatively common in Ireland.

ENVIRONMENTAL INSURANCE

28. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it common in practice?

Types of insurance and risk

The environmental insurance market in Ireland is still developing but the following are the principal types of insurance generally available in the market:

- Contractor's pollution liability. This covers the liability of consultants, contractors and sub-contractors arising from operations or projects on third-party sites.
- Pollution legal liability. This covers loss from historical contamination on sites.
- Premises pollution liability. This covers losses from contamination caused by ongoing operations on site.
- Remediation/clean-up cost cap policies. These cover loss arising from specific additional remuneration costs in excess of budget.
- Business-based liability. This covers liabilities arising from the business activities of the insured, which would cover gradual as well as sudden and accidental first- or third-party environmental liabilities.
- Closure/post-closure policies. These are designed to meet financial assurance requirements imposed by regulators/competent authorities.

Although each insurer has standard policy forms and these standard policy forms are typically modified through negotiations with the underwriters (to ensure that the agreed policy terms and conditions meet the insured's requirements), it is possible to purchase insurance in the Irish market for the following risks (which will vary depending on the type of policy being written):

- Remediation costs imposed by regulators, including for the insured's own premises and any off-site land, water or natural resources.
- Clean-up costs incurred in relation to third party claims or where required by environmental law.

- Liability for third party bodily injury, property damage, clean-up costs and nuisance.
- Liability under the Environmental Liability Directive and any associated member state law.
- Losses caused by the transportation of products or waste.
- First party business interruption resulting from pollution.
- Liability for damage to bio-diversity including complementary and compensatory remediation costs.
- Loss mitigation costs including emergency expenses incurred in responding to an incident.
- Legal costs incurred in defending any criminal or civil law proceedings brought by regulators or third parties.

As set out above, most environmental liability insurance policies cover both sudden and accidental as well as gradual pollution incidents.

No insurance policy can give an indemnity in respect of any criminal sanctions imposed against the insured (as a matter of public policy). However, environmental liability insurance policies can be extended to indemnify both the insured and any director of the insured in respect of its and their civil liabilities (subject to the terms and conditions of the relevant policy).

Obtaining insurance

The environmental insurance market in Ireland has developed much more slowly and is a less mature market than in either the US or the UK (largely due to the more stringent environmental legislation and its more rigorous enforcement in both of these jurisdictions). However, environmental insurance is relatively widely available in the Irish market and many of the underwriters in the UK market also operate in Ireland.

Environmental insurance has not commonly been obtained in practice but it is anticipated that it will become more common over the coming years (as the insurance market in Ireland often follows trends in the UK market).

ENVIRONMENTAL TAX

29. What are the main environmental taxes in your jurisdiction?

The main environmental taxes are carbon tax, landfill tax and a plastic bag levy.

Tax liability

Carbon tax. Following the "polluter pays" principle, the person generating the carbon dioxide is responsible for paying the tax.

Landfill tax. Users of a landfill site are responsible for paying the tax.

Plastic bag levy. The recipient is obliged to pay for the plastic bag. Retailers are obliged by law to pass the charge to the recipient and any receipt given must reflect the charge for the bag. Certain plastic bags are exempt from the levy, such as smaller plastic bags, which are used to store non-packaged goods.



THE REGULATORY AUTHORITIES

Environmental Protection Agency (EPA)

Main activities. IPPC licensing, waste licensing, administering the emissions trading scheme, environmental monitoring.

W www.epa.ie

Department of the Environment, Community and Local Government

Main activities. The minister can give directions and the department has oversight over mining activities.

W www.environ.ie

Tax rates

Carbon tax. EUR20 per tonne of carbon dioxide emitted from fossil fuels, including petrol, auto-diesel, kerosene, marked gas oil, liquid petroleum gas (LPG), fuel oil and natural gas. The Irish government has committed to further increase this levy to EUR30 per tonne in or before 2014.

Landfill tax. EUR65 per tonne for each tonne of waste disposed of at authorised and unauthorised landfill facilities. The Irish government has committed to increasing the rates of the landfill tax by specified increments over the coming years.

Plastic bag levy. EURO.22 per plastic bag.

REFORM

30. What proposals are there for significant reform (changes) of environmental law in your jurisdiction?

Waste

Directive 2008/98/EC on waste (Revised Waste Framework Directive) was transposed in to Irish law in March 2011. This legislation introduces many new obligations for both public and private waste operations, as well as for regulatory authorities. In August 2011, a new National Waste Strategy was discussed by the government in an effort to reduce waste, discourage disposal and to ensure an effective waste management market and infrastructure.

On 25 July 2012, the government published its new waste management policy entitled "A Resource Opportunity – Waste Management Policy in Ireland". The policy encompasses a range of measures on prevention and minimisation, reuse, recycling, recovery and disposal of waste. Under the new policy, Waste Management Plans will continue to be developed by the local authorities, while a completion date of 31 December 2012 has been set for reviewing all existing waste management plans to ensure compliance with the Revised Waste Framework Directive. In addition, a review of the respective waste regulation and enforcement roles of the EPA's OEE and local authorities is being initiated and will be completed by the end of 2013.

Climate change

Greenhouse gas mitigation is central to climate protection policy and there are at present two commitment periods in operation for Ireland. The first is the 2008-2012 period, which is governed by the Kyoto Protocol, and under which Ireland has committed to limit average greenhouse gas emissions by the end of this period to 13% above 1990 levels. In November 2011, the Department of Environment, Community and Local Government published a Review of National Climate Policy, which shows that Ireland is currently on track to meet its Kyoto Protocol commitment for 2008-2012. However, the Review shows that Ireland may face challenges in reaching its targets for the second commitment period, which runs from 2013-2020, under which the EU expects a reduction of between 20-30% on 1990 emissions by 2020.

See *Question 8*.

Water

The provision of water services is currently the responsibility of the 34 local authorities. In early 2012, it was announced that Irish Water would become the new water services authority in Ireland with an expectation that Irish Water will acquire statutory responsibility in 2013. Irish Water will be established as an independent state-owned subsidiary within the Bord Gáis Éireann group (the state-owned gas and electricity utility) with responsibility for:

- Providing water and waste water services to homes and businesses connected to a public water supply.
- Upgrading the water and sewerage networks in Ireland.
- Taking over water investment and maintenance programmes.

This takeover will also include the introduction of domestic water charges through a metering system and it is anticipated that the installation of meters will commence in late 2012. Irish Water will be regulated by the EPA from an environmental perspective and it will be the responsibility of the Commission for Energy Regulation to determine the free allowance and the level of the water charges to be introduced for residential users (for the first time) and for commercial users (who already pay water charges). An implementation plan is due to be released in late 2012, which will provide detailed information regarding the changes.

Environmental Liability Bill

A revised Environmental Liability Bill was published in 2011. The Bill provides for various new provisions such as that, under certain conditions, operators will not bear the cost of remedial action where it can be proven that they were not at fault or negligent. It also provides that requests for action in relation to imminent threats of environmental damage that are deemed vexatious may be dismissed by the EPA. In addition, it provides for the extension of the application of the European Communities (Environmental Liability) Regulations 2008-2011 to certain habitats and species and enables the exclusion of the spreading of sewage sludge for agricultural purposes under certain conditions. The Bill has not yet been enacted.

See also *Questions 6 and 7*.



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