

The International Comparative Legal Guide to:

Environment Law 2009

A practical insight to cross-border Environment Law



Published by Global Legal Group, in association with Freshfields Bruckhaus Deringer LLP,
with contributions from:

Advokatfirman Vinge KB
Arnold & Porter LLP
Arntzen de Besche Advokatfirma AS
Avbreh, Zajc & Partners
Baker & McKenzie
Barrera, Siqueiros y Torres Landa
Bonn Schmitt Steichen
Borislav Boyanov & Co.
Bowman Gilfillan
Čechová & Partners
Central Law, A Central American Law Firm
ChanceryGreen
Clayton Utz
De Brauw Blackstone Westbroek N.V.
Fraser Milner Casgrain LLP
Gencs Valters Law Firm

Gessel
Gide Loyrette Nouel A.A.R.P.I.
Goltsblat BLP
Gómez-Pinzón Zuleta
Guevara & Gutiérrez S.C.
Hammarström Puhakka Partners, Attorneys Ltd.
Harris Kyriakides LLC
Horten
Kocián Šolc Balaščík
Kyriakides Georgopoulos & Daniolos Issaias
L K Shields
Law Firm SMA
Tark & Co.
McGrigors LLP
Mifsud & Mifsud Advocates
M.V. Kini & Co.

Nishimura & Asahi
Oppenheim
Pachiu & Associates
Rattagan Macchiavello Arocena & Peña Robirosa
Salans
Schellenberg Wittmer
Slaughter and May
Squire, Sanders & Dempsey L.L.P.
Tonucci & Partners
University College London
Uría Menéndez
Urrutia & Cía. Abogados
Veirano Advogados
Yulchon
Ziv Lev Law Offices
Žurić i Partneri

Ireland



LK Shields Solicitors

1 Environmental Policy and its Enforcement

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

The Department of Environment, Heritage and Local Government (the **Department**) is responsible for policy, legislation and programme formulation in relation to the environment, the promotion of sustainable development, ensuring environmental protection and the protection of natural heritage.

The Environmental Protection Agency (the **EPA**) has responsibilities for a wide-range of licensing, enforcement, monitoring and assessment activities associated with environmental protection.

Local Authorities also have a significant responsibility in decision making and administration, as well as the enforcement of law relating to land development and the management of air and water.

Decisions of Local Authorities regarding planning issues may be appealed to the national Planning Appeals Board (the **Board**).

The Department of Communications, Energy and Natural Resources also has a role, together with Harbour Authorities and the Fisheries Board, in administering environmental legislation in respect of marine pollution.

The Radiological Protection Institute of Ireland provides the Department with advice, research and information regarding radiological safety and has a monitoring function in relation to the presence of environmental radioactivity. It also regulates the provision, use and disposal of certain radioactive substances used in the Health Sector.

EU Directives strongly influence national legislation and strategy and inform environmental policy and its enforcements procedures.

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

The EPA is directly responsible for enforcing EPA Licences. It also supervises the environmental protection activities of Local Authorities by auditing their performance, providing advice and guidance, and in appropriate cases, giving binding directions. The EPA works with other public sector bodies in enforcing environmental law.

Under the Waste Management Acts, the Local Authorities have an enforcement role in relation to the holding and recovery of waste within their respective areas.

The Director of Public Prosecutions, also has responsibility for the

prosecution of indictable criminal offences.

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

EU Directive 2003/4/EC have been implemented through the European Communities (Access to Information on the Environment) Regulations 2007. Under these regulations most environmental information must be made available to third parties, including members of the public upon request. Information can also be sought under the Freedom of Environmental Information Acts 1997 and 2003.

2 Environmental Permits

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

Permits required

Environmental permission is required for almost all commercial activity with an environmental dimension. Since 1964 permission has been required for the construction of any building and also for the change of use of a building. Local authorities are the primary grantors of such permissions. Discharges to water and air must also be licenced by a local authority and private sector operators must hold an authorisation in order to collect, manage, dispose or recover waste. The EPA is given responsibility on a national basis for the licencing of activities for which an Integrated Pollution Control Licence (**IPPC Licence**) is required.

Transfers of Permits

In some instances - for example planning permission - the permit goes with the land and a transfer of the land will amount to a transfer of the permit.

In other instances the licence is personal to the licensee and where a business incorporating the licenced activity is being transferred it will be necessary for the transferee to make application for a licence in its own name.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

The Answer to this question depends on the nature of the permit sought.

Planning Permission

In the first instance application is made to the local authority in whose area the property is situated. A decision of that authority may be appealed to the Board.

IPPC Licences

The Environmental Protection Agency Acts 1992 - 2003 provide a statutory framework for application for judicial review of EPA decisions in regard to licences or applications for licences.

Waste Management

A refusal of a permission to collect may be appealed to the District Court - the lowest court in the Irish court system. A refusal of a permission to recover or dispose of waste may be appealed to the EPA.

Air Pollution Licences and Water Pollution Licences

A refusal to grant a licence may be appealed to the Board.

Judicial Review

There is always an inherent right to seek judicial review by the High Court of a decision taken by an authority (including the Board and the EPA). The High Court however may not always agree to hear such application for review.

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

Yes. Pursuant to Directive 85/337/EEC (as amended by 97/11/EC) an Environmental Impact Assessment must be made before approval of certain projects as classified in the Directives. Additionally, outside the scope of those Directives, it is always open to a planning authority in granting planning permission to provide as a condition of a grant of planning permission that there be on-going monitoring and/or reporting.

In addition, holders of emissions trading licences are obliged to submit each year a verified annual installation emissions report reporting emissions from their installations during the preceding calendar year.

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

Regulators have significant powers of enforcement and can compel cessation of activity, removal of an unauthorised structure and/or remediation of the environment. Additionally much environmental legislation will provide for continuing daily fines for breach of environmental legislation.

3 Waste

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

In Ireland Waste is defined as set out in the Waste Framework Directive 2006/12/EC (WFD).

“Hazardous waste” as defined in both the Hazardous Waste Directive (Directive 91/689/EEC) and the new Waste Framework Directive (2008/98/EC) requires additional controls. Additional controls also apply in the context of tyres and waste tyres, waste oils, packaging, WEE, PCB’s, farm plastics, end-of-life vehicles, batteries and accumulators.

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

Waste can be stored or disposed of at the place where it was produced if this is permitted by the appropriate environmental authorisation. Temporary storage of waste (not exceeding six months) is generally not regarded as waste disposal under Irish waste management law.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

An authorised producer of waste who has legitimately transferred it to an authorised person would not retain residual liability. A person who transfers waste to an unauthorised person may retain residual liability in respect of the waste.

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

Producers who supply over 10 tonnes of packaging material annually and who have an annual turnover of more than €1 million are required to recover and recycle a proportion of their packaging waste.

Waste electrical and electronic equipment is another category of waste in which the producers are subject to take-back and recovery obligations under the Irish regulations implementing Directive 2002/96/EC on waste and electrical and electronic equipment.

The End of Life Vehicle (ELV) Directive was implemented in Ireland by the Waste Management (End-of-Life Vehicles) Regulations 2006 (S.I. No. 282 of 2006). The Regulations require importers to take financial responsibility for the free take back and recovery of ELVs.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Types of Liabilities

Environmental breaches may be committed by a range of people from companies or officers of companies to an individual manager within a company. The ensuing liabilities can be civil, criminal or both.

Environmental actions can arise under common law or statute law (Irish or EU).

Common Law and equitable claims may be taken by plaintiffs by way of action in negligence, nuisance, trespass or by way of seeking injunctive relief. Statutory liability enhances the common law right to damages.

Criminal liability can arise where there is a failure to comply with the Court Order issued in relation to proceedings taken under the provisions of the above Acts.

Defences

In the context of the Environmental Liability Directive (the ELD), a permit defence is specifically provided for. However, under the terms of the ELD, operators of “occupational activities” that cause environmental damage will be liable for such damage.. Occupational activities are widely defined to include public and private activities, business and undertakings, irrespective of whether or not they are undertakings for profit.

Defences at common law will usually turn on evidential issues such as the Plaintiff being unable to prove negligence, trespass, nuisance or failing to comply with the Statute of Limitations etc. Each case and its respective defence will turn of course on its own facts.

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

Holding a licence does not entitle a party to pollute. While discharge in accordance with the licence will avoid liability under the relevant statute in respect of the discharge, the licence does not allow the holder to avoid other liabilities arising out of the discharge. The operator may for example be liable at common law for the torts of negligence, nuisance, trespass and under the rule in *Rylands -v- Fletcher* despite the fact that the polluting activity operated within the permitted limits.

Conformity with a validly issued licence (issued by the EPA/ Local Authority) will be a defence to claims under subsections 3, 10, 11 and 20 of the Local Government (Water Pollution) Acts 1977-1990 and section 28 of the Air Pollution Act 1987 and Part II of the EPA Act 1992.

It is possible under the IPPC regime for operators to be found liable for any environmental harm caused, notwithstanding compliance with the requirements of an IPPC permit.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Personal liability for directors and other officers of companies can be imposed for breaches of environmental law if, as a result of their own acts or omissions, they can be said to have created circumstances giving rise to the commissioning of the offence. In such cases both the company and the director may be found guilty of an offence.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

In a share purchase the environmental liabilities of the company remain with the company and thus indirect economic risk passes to the purchaser. In an asset purchase, the purchaser does not automatically inherit liability for failure of the vendor to comply with environmental law. However, increasingly asset purchasers may be deemed liable as owners or occupiers of contaminated lands or lands from which pollution is emanating or as transferees of IPPC or waste licences. In particular, if a purchaser is aware of a breach of environmental law and/or an environmental condition in relation to the asset acquired and has the ability to prevent or to remedy the condition, but fails so to do, the purchaser may be found liable.

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

Lenders would not usually have control over the application of the loan funds to prevent pollution occurring and accordingly are not likely to be made liable for environmental wrongdoing.

Lenders may be however held liable if, for example, they act as shadow directors or in relation to the enforcement of security. If the lender takes possession of a property in a receivership it may potentially become liable for the remediation of contamination of the property. The lender could also incur liability if it could be

deemed to have caused or knowingly permitted or perpetuated the presence of contamination to the relevant property.

5 Contaminated Land

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

Under Irish common law, liability is typically predicated on the basis of “causing” or “knowingly permitting” contamination. The original polluter as well as subsequent owners or occupiers may therefore become liable for contamination that predates their ownership or occupation of a property where they have both the knowledge of the presence of the substance causing pollution and the power to take remedial action but fail so to do.

Individuals suffering injury or damage may also bring proceedings in respect of an offence under the Waste Management (Miscellaneous Provisions) Regulations 1998, under the Local Government (Water Pollution) Act 1977 and under the Air Pollution Act 1987. Such statutory rights of action are in addition to rights available at common law for the torts of negligence, nuisance, trespass and strict liability (*Rylands -v- Fletcher*).

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

As against a third party, the liability of the polluter and/or the landowner may be joint and several. As between the polluter and the subsequent landowner an action may lie against the polluter on foot of indemnities provided by the polluter on the acquisition of the property (in an asset purchase) or the shares (on a share purchase).

5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

Given the nature of land/ground water contamination it is to be expected that the Regulator may insist upon additional works/measures to be taken.

The decisions of the regulator may, however, be the subject of judicial or other review. A third party might then be required to show some illegality or procedural irregularity. Certain issues may also be referable to the EPA or to the Courts.

It is difficult, however, to see how a regulator acting reasonably, and in the interests of public safety, would be estopped from seeking additional measures.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

As set out at question 5.1 above, liability is predicated on the basis of “causing” or “knowingly permitting” contamination. Subsequent owners or occupiers may therefore be liable for contamination which predates their ownership or occupation of property.

A private right of action may arise in favour of the subsequent landowner where the earlier owner/original polluter has failed to make full disclosure or there has been misrepresentation or

fraudulent concealment.

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

Yes. The most common statutory remedies include general damages, fines (with possible imprisonment), and clean up costs.

6 Powers of Regulators

- 6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?**

Competent authorities may undertake preventative and/or remedial measures in certain circumstances and recover the costs from the operator where the operator can be found culpable. This is usually done by the EPA and by Local Authorities.

Authorised officers of the EPA also have a right of entry during normal office hours, and at any time if there is imminent threat of danger, and may carry out inspections and take photographs, copies or samples.

Most environmental permits expressly require the permit holders to give access to the permitted facility for inspections and for review of documents, though they do not usually require employee interviews. If a government agency has cause to believe that a violation has occurred at a site that does not have a permit, it can usually obtain access.

7 Reporting / Disclosure Obligations

- 7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?**

Under the European Communities (Environmental Liability) Regulations 2008 (the **2008 Regulations**) which came into effect on 1 April 2009 to implement the Environmental Liability Directive there is a statutory obligation on an operator (as defined in the 2008 Regulations) to notify the EPA without delay on becoming aware of environmental damage which has occurred.

It is also common place that environmental permits will oblige the permit holder to notify the permitting agency of any pollution on or migrating from a site.

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

Firstly, when directed to do so by a competent authority or pursuant to a statutory obligation.

Secondly, when applying for an IPPC licence a site condition report must be submitted as part of the application for the licence.

Thirdly, under the Regulations implementing the ELD, where environmental damage has not yet occurred but an operator is aware that there is imminent threat that it will occur the operator is obliged to take necessary preventative measures without delay and if the operation does not form the opinion that the preventative measures will dispel the imminent threat environmental damage the operator is obliged as soon as possible to inform the agency of the imminent threat.

- 7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?**

There is no obligation in statute law to make such a disclosure.

A seller who misleads the purchaser as to the environmental state of property may be liable in tort for damage for deceit or fraudulent or innocent misrepresentation.

As mentioned at question 4.4 above, it is customary in M&A transactions for purchasers to seek detailed representations and warranties on environmental matters and where deemed appropriate to seek an indemnity for environmental loss or damage which might arise.

8 General

- 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?**

A private contract environmental indemnity will not preclude or limit civil or criminal liability under statute. As a matter of private contract, civil liability as between private parties could be limited by way of using such an indemnity.

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

Failure to make provision in the accounts for potential environmental liability would not in any manner limit or exclude liability for breach of environmental law.

On the liquidation of a company, creditors including those who have a contingent claim can make application to share in the assets of the company, thus a company would not necessarily avoid having to make recompense by entering into a process of dissolution.

- 8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?**

Typically, a shareholder in a limited liability Irish company who is not an officer of the company could not be held liable for breach of environmental law and/or pollution caused by the company. There is no provision of Irish law by which a non-Irish parent of an Irish company could be sued in the parent's home jurisdiction. Similarly an Irish parent company can not be used in Ireland for the acts of its foreign subsidiary.

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

There are no such statutory laws. However, a "whistle-blower" who in good faith reports environmental violations/matters would have the protection of employee legislation protecting against unfair dismissal.

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

Generally speaking class actions are not permitted in Irish law, whether in environmental matters or otherwise. The Irish courts however give broad latitude to persons seeking to bring an action pursuing environmental claims and thus rules on locus standi are not strictly enforced. Other than as provided in the waste management acts environmental legislation does not provide for penal or exemplary damages.

9 Emissions Trading and Climate Change

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

Ireland has implemented Directive 2003/87/EC by the European Communities (Greenhouse Gas Emissions Trading) Regulations 2004 (SI 4372004).

Emissions trading permits have been granted primarily to operators in the pharmaceutical, agricultural, energy/power generation, and construction, sectors. Given the small size of the Irish economy no significant element of domestic emissions trading has developed here.

10 Asbestos

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

Asbestos litigation in the Republic of Ireland is a relatively recent phenomenon and perhaps less litigated upon than in the US. Such claims are based on physical harm incurred or, on the effect of the fear of such harm as a result of exposure to or coming into contact with asbestos.

As with most torts, it is necessary for a claimant to establish both causation and reasonable foreseeability of the harm caused.

In a recent Irish Supreme Court decision of **Fletcher -v- Office of Public Works**, the Irish Supreme Court accepted the possibility of psychological illness without the need for physical injury was a potential point of claim. In **Swaine -v- The Commissioners for Public Works in Ireland**, the Supreme Court held that aggravated damages could become payable in cases of gross negligence.

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

Asbestos waste is hazardous and must be disposed of properly. Before commencing any demolition work a landowner must identify which waste facility is licensed by the EPA for disposal of asbestos waste. Hazardous waste transfer stations can accept asbestos waste and then arrange to have it disposed off at an appropriate facility in the Republic of Ireland or abroad. There must be strict adherence to any instructions given by the Local Authority or waste collection permit holder regarding the packaging of the waste for removal. Asbestos cement waste must only be surrendered to Local Authority waste collectors or to an authorised waste collection permit holder.

The Health and Safety Authority also has authority to carry out reactive and proactive inspections of property and work places with regard to conditions of work and work practices. Employers should also be mindful of the Asbestos Regulations and the Safety, Health and Welfare at Work (Construction) Regulations.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Ireland

Public liability insurance held by Irish businesses will often contain cover against "sudden and accidental" environmental damage. However typically such provision will not extend to cover the costs of preventative measures that may be incurred by reason of the ELD - see the comments on the 2008 Regulations at question 7.2 above. How the market for such cover develops will remain to be seen.

11.2 What is the environmental insurance claims experience in Ireland?

There is none that has been the subject of any significant level of publicity so that it is not possible to make a meaningful comment.

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Ireland.

The transposition of the ELD, on 1 April 2009, is the most recent development in Irish law. The ELD also enshrines a polluter pays liability. Elective provisions of the ELD such as the non-adoption of Article 12(5) will require to be adopted by primary legislation and a draft statute - the Environmental Liability Bill 2008 - has been published but has not yet been enacted.



Gerard O'Hanlon

LK Shields Solicitors
39/40 Upper Mount Street
Dublin 2
Ireland

Tel: +353 1637 1544
Fax: +353 1661 0883
Email: gohanlon@lkshields.ie
URL: www.lkshields.ie

Gerard O'Hanlon is a partner in the Commercial Property Department. He is also a member of the Environment and Energy Law Units.

In construction matters he acts for and advises developers as well as banks and mortgage providers on a wide range of construction, planning and environmental issues.

He also specialises in renewable energy and in particular wind energy.

Practice areas

- Environmental
- Commercial property and planning
- Construction
- Financing
- Wind energy

Qualifications

- B.C.L. University College Dublin.
- Admitted as a solicitor in Ireland in 1990.

Recommendations

- Highly recommended in *European Legal Experts 2009*.
- Gerard is 'very professional and gives excellent service' according to *Chambers Global and Chambers Europe 2008* in which he is recommended.



LK Shields Solicitors is a leading law firm based in Dublin, Ireland.

Our priority is to provide first rate, solution focused legal services delivered in a manner that compliments our clients' commercial aims and objectives. We focus upon cultivating long-term relationships with all of our clients, and pride ourselves on the longevity of those relationships. We work closely with our clients to provide bespoke legal and commercial solutions.

While we are proud of our achievements, we are never complacent. We constantly anticipate change and strive to continually improve our standards and client services. As a full service law firm we provide our clients with legal advice and assistance on all aspects of their business. The commercial nature of our firm is reflected in the fact that our areas of practice include:

- | | |
|--|---|
| ■ Environment | ■ Commercial Law |
| ■ Litigation & Dispute Resolution | ■ Commercial Property & Planning |
| ■ Banking & Financial Services | ■ Corporate Finance |
| ■ Insolvency & Corporate Restructuring | ■ Energy & Natural Resources |
| ■ Competition | ■ Mergers & Acquisitions |
| ■ Intellectual Property & Technology | ■ Gaming & Gambling |
| ■ Healthcare | ■ Pensions, Employment & Employee Benefit |