

Malta

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1 Environmental Policy and its Enforcement

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

The basis of Environmental law in Malta is the Environmental Protection Act (EPA), 2001 (Chapter 435 of the Laws of Malta) and the Development Planning Act, 2001 (Chapter 356 of the Laws of Malta) the basis of which lies principally on the adoption of the EU environmental *acquis communautaire* which Malta had to conform with in part by the day of its accession to the European Union in May 2004. The *Malta Environment and Planning Authority (MEPA)* is the competent authority responsible for regulation, monitoring and enforcement in the fields of environment and spatial planning. Other agencies involved in the managing of the environment include: the Ministry responsible for the Environment which is responsible for the implementation of policies relating to the protection of the environment; and *The National Commission for Sustainable Development (NCSD)* which deals with, *inter alia*, encouraging and stimulating good practice in the use and management of natural resources, in particular their minimal use and maximum reuse by recycling (Sect. 8 EPA).

Other national agencies entrusted however, with specific tasks include the *Department for Parks, Afforestation and Countryside Restoration* responsible for afforestation and the maintenance for rural areas and national parks and the *Strategic Assessment Audit Team* (LN 418/2006) responsible for the overseeing of the SEA Directive (Directive 2001/42/EC). *WasteServ Malta Ltd.* is responsible for providing waste management infrastructure. As none of these entities can provide strategic environmental policy direction, the Ministry needs to develop the necessary capacity to plan, design and promote environmental and embellishment policies, programmes and initiatives. Hence, the *Directorate of Environment Policy and Initiatives* was set up in September 2005 to advise the Ministry on the formulation of environmental policy, own all policy options developed within the Ministry and ensure that policy options are implemented through the development and execution of appropriate programmes.

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

Although the authorities responsible for the environment continue to organise information campaigns intended to demonstrate the benefits reaped from environmental protection, the enforcement of environmental law in Malta is still a highly sensitive issue.

However the enforcement measures by the competent authorities is constantly on the increase and a change in mentality by the public is being noticed. Enforcement is not looked at anymore as a source of administrative and criminal penalties but as a safeguard to the environment. The enforcement of environmental regulations is done through inspections and direct actions; pollution monitoring, prevention and control.

Maltese law states that, in enforcing environmental law, MEPA may require an operator to: provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat, take the necessary preventive measures. An operator is defined as any natural or legal person (whether public or private) who operates or controls the occupational activity or to whom decisive economic power over the technical functioning of such an activity has been delegated according to national legislation (LN26/2008). MEPA may take these measures itself if the operator, *inter alia*, fails to comply with the obligations.

MEPA, on behalf of the state, is also authorised to sue an operator for causing environmental damage, and also for such an operator to take measures to remedy such damage. A precautionary approach is also taken in that regulations specify that the primary duty of an operator is to take any action he deems appropriate to avoid such damage, and positive action may be requested from such an operator even if he anticipates the likely occurrence of damage.

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

The "*Freedom of Access to Information on the Environment Regulations, 2005*" (LN 116/2005) allow the general public to request environmental information from the competent authority - the Malta Environment and Planning Authority, and those bodies or persons as the Minister responsible for the environment may so appoint. MEPA may refuse to provide the requested information if the request is unreasonable; too general; concerns internal communications or material in the course of completion; or if the disclosure would adversely affect confidentiality, public security, the course of justice, intellectual property rights, the interests or protection of the person who supplied that information, or the protection of the environment. In this instance, while MEPA is duty bound to provide such information, the request for information is initiated by the public.

MEPA then has the positive obligation to inform, at its own initiative, the public through public notices or other appropriate means such as electronic media where available, about any proposals for plans or programmes or for their modification or

review and that relevant information about such proposals is made available to the public including *inter alia* information about the right to participate in decision making and about the competent authority to which comments or questions may be submitted. This latter duty to provide information is however limited to those programmes relating to: Waste Management, Protection of Waters against Pollution by Nitrates from Agricultural Sources, and Air Quality (LN 74/2006).

2 Environmental Permits

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

The power to grant or refuse a request for an environmental permit lies with MEPA as the designated competent authority. In granting such permits, MEPA is entitled to impose any conditions it deems appropriate (Sect. 11(2) EPA). An environmental permit from the competent authority is generally required before any activity relating to the following may be carried out: activity relating to biodiversity; waste management; pollution control or discharge; and genetically modified organisms (Sect. 11 EPA).

An environmental permit, issued by MEPA is also required for the operation of installations concerning integrated pollution prevention and control, IPPC (LN 234/02). The IPPC legislation contains basic rules for integrated permits. "Integrated" means that the permits must take into account the whole environmental performance of the plant, i.e. emissions to air, water and land, generation of waste, use of raw materials, energy efficiency, noise, prevention of accidents, risk management, etc. This helps industrial installations identify ways by which they can minimise their contribution to pollution.

Environmental permits are also required for volatile organic compounds (LN 225/01); waste production or management operations (LN 106/07); discharge of trade into the public sewerage system (LN 8/993); and the discharge or injection of surface waters and groundwater.

By virtue of it being a Party to the "Convention on International Trade on Endangered Species of Wild Flora and Fauna" (CITES), Malta regulates international exports and imports of specimens of species of live and dead animals and plants and their parts and derivatives. This is based on a system of permits and certificates that can be issued if the requirements needed are met.

No new or updated permits for industrial installations that ensure minimal pollution emissions, have been set up by the Maltese authorities.

A permit is generally not transferable unless MEPA's approval would have been sought and granted for this purpose (LN 234/02 Reg.20).

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?

MEPA's functions are generally divided into two primary activities: one relates to development planning concerning land or property; while the other relates to MEPA's obligation to safeguard the environment. With regard to the former activity, a right to appeal generally exists. In the case of a development permit, an applicant may either request that the decision be reconsidered or may alternatively lodge an appeal with the Planning Appeals Board

(Development Planning Act Sect.37). A further final appeal may then be lodged with the Court of Appeal (PDA Sect. 15(2)) on points of law only.

However, while there exists a right to appeal from a decision taken by MEPA for any matter relating to development control, there appears to be no explicit right to appeal from a decision taken by MEPA on *environmental* control. Maltese law however grants the power to the courts to enquire into the validity of any administrative act or to declare the act null, invalid or without effect in specific cases defined by law (Code of Organisation and Civil Procedure, Sect. 469A).

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

The Environment Protection Act (Articles 12-15) requires the competent Minister to make regulations prescribing a list of categories of developments which because of their nature, extent and locality and, or, other environmental considerations might be subject to an Environment Impact Assessment before a development permission may be granted by the Planning Authority under the Development Planning Act. As explained earlier, MEPA's functions are generally divided into development planning on the one hand and environmental on the other. With regard to the former, certain developments will require an environmental impact assessment before a decision on development permission is taken by MEPA (LN 204/2001).

The Environment Impact Assessment must in all cases separately address and give information as to how the project will impact on: human beings and social structures; biodiversity; all natural resources including land, water, air, climate and the landscape; and on any other matter ancillary to the above items.

An Environment Impact Assessment must also identify and assess the transboundary effects of a project.

A Strategic Environmental Assessment is furthermore required by S.L. 435.64. This requires the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision making and the provision of information to the public on the decision taken.

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

As part of its powers in relation to the field of development planning, MEPA enjoys considerable enforcement powers. These include, *inter alia*, the power to enter upon any land and inspect, survey or verify whether illegal development is taking place; to monitor all development operations; and to serve a stop notice requiring works or the development to be stopped forthwith (PDA Sects. 50-52).

As part of its powers in relation to the management and protection of the environment, MEPA's enforcement powers are generally less and are more categorically applied. Thus, in the case of an IPPC and waste management permit, where MEPA believes that an operator is, or is likely to be, in breach of the conditions attached to a permit, it may issue an enforcement notice specifying the breach of the conditions, the steps which must be taken to prevent it and the time in which the steps must be completed.

If an operator fails to comply with a remedial or enforcement notice, the competent authority may revoke the permit in whole or in part, itself undertake the remedial action required defraying the expenses incurred out of the operator financial guarantee if any.

Further, it may bring into effect any punitive measures specified therein, including confiscation of all or part of the financial guarantee (S.L. 435.49 Sect. 29(4)).

In the case of a limitation of emissions permit, the matter is normally resolved through the courts of law which may, upon the finding of a breach of the applicable regulations order the revocation of the permit provided.

3 Waste

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

"Waste" is generally defined as any thing, substance or object which the holder discards or intends to discard, or is required to keep in order to discard, and includes such other thing, substance or object as the Minister responsible for the environment may prescribe (EPA Sect. 2).

The Waste Management (Permit and Control) Regulations then classify the different types of waste in its first Schedule. These include: wastes resulting from exploration, mining, quarrying and physical and chemical treatment of minerals; wastes from agriculture, horticulture, aquaculture, forestry, hunting and fishing, food preparation & processing; wastes from wood processing and the production of panels and furniture, pulp, paper and cardboard.

Additional duties and controls are imposed for certain categories of waste, particularly those that fall within the definition of "hazardous waste". E.g. the managers of hazardous waste disposal sites shall keep site plans showing as precisely as possible the location where different categories of hazardous waste have been disposed of and shall identify such hazardous waste (S.L. 435.34 Sect. 17).

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?

The law requires that management of waste and in some cases, production of waste, require a permit to be issued from MEPA (LN 106/07 and LN 337/01). This effectively means that a producer of waste would firstly have to obtain a permit if he intends to store or dispose of, on site, the waste that he produces and secondly, the permit would need to specify the place in which the waste is being produced, stored and/or disposed. Storage of waste in the place where it is produced is generally subject to certain limitations that generally relate to the amount in weight of waste present on site at any one time (S.L. 435.73 Schedule 1).

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)?

Maltese environmental law provides that *any* person who causes damage to the environment, shall without prejudice to any other civil liability to make good any damages to any person or authority, be liable to pay such sum, as may in the absence of agreement be fixed by the court *arbitrio boni viri*, to make good for the damage caused to environment and suffered by the community in general by the non-observance of any law or regulation by such person or by his negligence or wilful act or inability in his art or profession (EPA Sect.24).

The wording of the law therefore seems to suggest that some form of residual liability will be available, provided however that there exists a nexus between the producer of the waste and the damage caused.

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

Producers or third parties acting on their behalf are required to, with respect to packaging waste arising from their activities, use existing systems or set up systems, individually or collectively, or both, in accordance with any existing laws and regulations, to provide for: the return and, or collection of used packaging and, or packaging waste in order to channel it to the most appropriate waste management alternatives; the reuse or recovery including recycling of the packaging and, or packaging waste collected; the use of materials obtained from recycled packaging waste for the manufacturing of packaging and other products. It is unlawful for an economic operator to dispose of such packaging waste without first making it available for reuse or recovery including recycling (S.L. 435.69 Sect. 13).

Car producers and importers also have onerous duties in regard to end-of-life vehicles that are manufactures or imported by them (LN 99/04). Similarly, take back and recovery rules apply for electrical and electronic equipment (LN 63/2007). The development of new recovery, recycling and treatment technologies is encouraged as a matter of policy.

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?

Breaches of Maltese environmental law can potentially give rise to two different forms of liability: civil liability and criminal liability. Civil liability is in turn divided in two further sub-categories, that is, civil liability for damages caused towards the person who actually suffered the loss; and civil liability in respect of the actual damage caused to the environment. With regard to the latter, the EPA has provided for the setting up of the *Environment Protection Fund* (Sects. 18 and 24). The sum of money that is payable by the tortfeasor is intended to compensate for or make good the damage that is inflicted on the environment and suffered by the community in general by the negligence, wilful act, or by the non-observance of any law or regulation by such person (Sect. 24(1)). The different types of compensable damage under Maltese law refer to *damnum emergens* and *lucrum cessans*. No moral damages are generally provided for breaches of environmental law.

Apart from the ordinary civil remedy procedure for liability for an act that has caused damage, Maltese environment law also generally provides for criminal liability for any person who commits an offence against the regulations enacted. The penalty generally consists of a fine and/or the confiscation of the *corpus delicti* and/or any permit or licence that might have been issued in favour of the offender.

The environment regulations do not specify what defences may be raised and therefore the defences available in the ordinary procedure would apply. In the case of a civil action, the ordinary remedies of tort (act causing damage, damage and causation) and therefore the absence of any of these may serve as an adequate defence; while in the case of the criminal action, again, the ordinary remedies (such as extinction of the criminal action) may serve as a defence.

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

Subsidiary legislation generally refers to liability only in those

cases where a person has committed an offence against the regulations, i.e., by implication, it seems that acting within the limits of a permit should not give rise to liability. The Environment Protection Act, however, refers to "any person who causes damage to the environment..." (Sect. 24) and therefore this should include even those persons who acted within the limits of their permit but who nonetheless caused damage to the environment.

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?

Where the environmental wrongdoing gives rise to a criminal offence, then the punishment imposed for that offence will be attributed to the person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer, or who was at the time purporting to act in such capacity, unless that person manages to prove in court that the offence was committed without his knowledge *and* that he exercised all due diligence to prevent the commission of the offence (Chapter 249 Sect.13). A general presumption of liability therefore exists against such person in the case of criminal liability.

Where the environmental wrong does not amount to a corporate wrongdoing, but amounts to a wrong committed by the director or officers of the company personally, then the latter would be liable according to the general principles of law.

An offence against the Environment Protection Act (2001) may also result in the imposition of a fine which shall in all cases be due to the Government as a civil debt. Where the person guilty of the offence is a director, secretary or manager of a body corporate for the economic benefit of whom the offence was committed, such body corporate shall be liable *in solidum* with the offender for the payment of the said civil debt (EPA Sect. 9(2)(n)).

The Employers' Liability Act requires company officials to take out an insurance policy against any harm or damage that may be occasioned by their employees. Therefore a civil debt for damage caused to an employee from any breach of environmental rules and regulations would be covered by an insurance policy. Although it appears that insurance policies or indemnity will protect directors from personal liability (although not criminal), the law fails to specify how far insurance policies or other indemnity protection can protect company officers from a breach of environmental law resulting in a civil debt due to the Government.

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

The different implications from an environmental liability perspective of a share sale and an asset purchase are quite large. In the case of a share sale, the shareholders are generally not held liable for the environmental wrongdoing caused by the company. The principle of separate juridical personality would normally protect the shareholders from such form of liability, unless the action in question falls within a limited category of cases where the piercing of the corporate veil is specifically allowed by law (which cases generally deal with fraud).

With regard to an asset purchase on the other hand, although the new owner may not be held liable for the environmental wrongdoing caused by the previous owner, once an environmental wrongdoing is discovered, the environmental permit may be revoked. In such circumstances, it would not be a legitimate excuse for the new owner to claim that the wrongdoing was caused at a

time when he was not the owner. Moreover, any subsequent enforcement procedures will directly affect the new owner.

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

The notion that the lender is deemed responsible with the borrower in committing an environmental offence, attributing liability to the lender for the wrongdoing of the borrower is, as yet, not applicable within the Maltese jurisdiction. Where, however, the collusion with the wrongdoer is proven or where fault or negligence is directly attributable to the lender, then according to the general principles of Maltese tort law, liability for the latter will arise.

5 Contaminated Land

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

As far as groundwater is concerned, a water policy framework has been established for the protection of Malta's groundwater. All discharges of substances into groundwater require prior authorisation in pursuance of Council Directive 80/68/EC (S.L. 435.80 Schedule III). The designated authority responsible for this is the *Malta Resources Authority* (MRA) and is empowered to take the necessary remedial action even if the pollution occurred prior to the acquisition of land by the present owner, operator or permit holder (LN 194/04).

With regard to soil contamination, MEPA would take the approach of subjecting any new permit for land development to the restoration of the land regardless of who caused the contamination and when it was caused.

Moreover, with regard to contamination due to agricultural activity, any person shall be guilty of an offence if he *inter alia* fails to comply with any order lawfully given in terms of any provisions which limit land contamination. Such person shall, on a first conviction, be liable to a fine not exceeding €2,329.37; and on a second or subsequent conviction, to a fine not exceeding €4,658.75 or to imprisonment for a term not exceeding two years, or to both such fine and imprisonment (LN 343/01 and 233/04).

The person found guilty of such offence may also be required to pay for the expenses incurred by the public entities, or other persons acting on their behalf involved in the restitution of the environment as a result of the said offence, the revocation of the permit issued by the Police and the confiscation of the *corpus delicti* (S.L. 435.40 Sects 11-12).

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

Article 10 of S.L.435.80 provides that the provisions of the regulation are without prejudice to any provisions of other relevant legislation concerning cost allocation in cases of multiple party causation, especially concerning the apportionment of liability between the producer and the user of a product.

The Maltese Civil Code regulates the matter of multiple party causation and cost allocation. Where two or more persons have maliciously caused any damage, their liability to make good the damage shall be a joint and several liability. Where some of them have acted with malice, and others without malice, the former shall be jointly and severally liable, and each of the latter shall only be liable for such part of the damage as he may have caused (Sect.

1049 Civil Code). In such cases, the court may apportion among them the sum fixed by way of damages, in equal or unequal shares, according to circumstances; saving always the right of the injured party to claim the whole sum from any one of the persons concerned who in regard to him shall be all condemned jointly and severally (Sect. 1050 Civil Code).

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

The environmental regulator is free to enter into agreements involving a programme of remediation provided this is within the limits allowed by law. This is, however, not commonplace within the Maltese jurisdiction. Provided that the possibility is not contemplated within the agreement, it would not be possible for the regulator to come back, once the agreement is reached, and require additional works.

The general principle under Maltese law is that where the third party is not privy to an agreement, that contract would be *res inter alios acta* with regard to him and could not therefore challenge such a contract. Where, however, a third party is prejudiced by the programme agreed upon, he would be able to seek compensation from the regulator provided he can demonstrate that he actually suffered a loss as a direct consequence of the programme. Elsewhere, third parties are also entitled to voice their concern in public consultation processes, when such an opportunity arises. Alternatively, a complaint with the Ombudsman may be lodged.

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?

According to general principles of law, a right of action lies with the purchaser of land against the seller if the purchaser can demonstrate that the contamination: amounts to a breach of warranty or of a condition, express or implied, in the contract of acquisition; renders the land not fit for its intended use (provided the buyer was unaware of the contamination prior to the acquisition); or causes the purchaser to suffer a substantial diminution in the quality of the land (provided the purchaser was unaware of the contamination prior to the acquisition) (Sects. 1424-1432 Civil Code).

While it is possible for the seller to transfer in the contract of sale the civil risks of damages for contamination, the criminal liability arising out of contamination remain the responsibility of the seller and may not be transferred.

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

Maltese law prohibits any person from discharging from any premises into the public sewer any effluent containing any material which alone, or in combination with the contents of the sewer, is likely to bring about adverse aesthetic or other objectionable effects on the marine ecosystem upon discharge into the marine environment. Such material includes excessive amounts of floating materials; settleable solids which smother benthic marine life; and substances which are toxic to marine life (S.L. 423.15 Sect. 5(d)). A breach of this rule will entitle the government to monetary damages for aesthetic harm.

Moreover, the EPA allows the State to bring an action against the polluter for the payment of a sum of money to make good the harm "caused to the environment and suffered by the community", generally. In this sense, monetary compensation for aesthetic harm to public assets that do not refer specifically to discharge into the public sewer described above, would also be recoverable. Such actions would be brought against the polluter by the *Environment Protection Fund* and must be instituted within eight years (EPA Sect. 24).

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?

The Director for the Protection of the Environment has the power, whether personally or through his officers, to carry identification attestations signed by the Minister responsible for the environment, to inspect any place in Malta, or any vehicle, ship, platform, airplane or other craft existing therein, or any such vehicle, vessel or aircraft belonging to Malta outside the territorial waters of Malta, in order to ascertain the levels of protection of the environment as well as to investigate suspected violations of the provisions of the Environment Protection Act, as well as the codes of practice and the regulations issued in relation to the said act, and to secure proof of any such violation.

However, the Director personally or any of his officers may not accede into a private dwelling unless accompanied by a police officer not below the rank of Inspector. In ascertaining the levels of protection and investigating violations, the Director or his officials have the power to measure, take samples and copy records or electronic data, as well as conduct tests, on any object of any nature.

The Director, personally, may issue under his hand, execution orders to prevent or to minimise threatened damage to the environment, to prevent threatened violations to laws or regulations concerning the protection of the environment, or to secure evidence of such violations. Finally, the Director may in writing request any information concerning any matter which might affect the level of environmental protection (S.L. 435.05 Sect. 3).

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?

There is no legal obligation to report pollution found on a site unless the person who identifies the pollution is himself responsible for the pollution caused or is responsible for the operation of the trade or industry that has led to the pollution. In the latter case, for instance, operators of installations are obliged to inform without delay the competent authority of any incident or accident significantly affecting human health and the environment, as may be one that leads to exceeding the maximum emission levels stipulated in their operating permit (S.L. 435.49 Sect. 26). The operator would be guilty of a criminal offence should he fail to inform the authority of such harm (Sect. 33). Where the pollution is migrating off-site, a duty to disclose arises firstly, as a general principle of law which prohibits an owner to allow his property to cause harm to a third party; and secondly, under the *European Pollutant Release and Transfer Register Regulation* (EC 166/2006 Art. 5).

Moreover, any natural or legal persons affected or likely to be affected by environmental damage, or having a sufficient interest in environmental decision making relating to the damage, is entitled to submit to the competent authority any observations relating to instances of environmental damage of which they are aware and shall be entitled to request the competent authority to take action to prevent or remedy the environmental damage (S.L. 435.80 Sect. 13).

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

There is generally no affirmative duty to investigate land for contamination. However, such a duty may be imposed on a developer when seeking to obtain a development permit. This duty to investigate includes the obligation on a proponent to carry out a strategic environmental assessment (which would include an investigation into the existing environmental problems of the land to be used) for all plans and programmes which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II of the Directive 85/337/EEC (S.L. 435.64 Schedule 5). Finally, MEPA also has a residual competence to investigate and prevent or remedy any environmental damage that may be caused.

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?

In the case of the amalgamation of companies, an expert report is normally drawn up to examine the draft terms of merger and to draw up a report to the shareholders. In this case, the expert will be entitled to investigate into any liabilities, including therefore any environmental problems that might exist. Although the company has no positive obligation to disclose the information, it has no authority to stop the expert from making the necessary investigations. Furthermore, there is a duty on the part of the company to act in good faith. The acquiring company would therefore be in a position to bring an action against the target company for failure to disclose the environmental problem if this failure amounts to a breach of the principle of good faith or is tantamount to deceit or fraud. Another right of action would lie against the seller if the buyer proves that the environmental problem renders the object purchased unfit for its intended use (as per question 5.4).

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?

Such an indemnity is perfectly legal and would be binding between the parties. It is also possible to draw up such an indemnity agreement to cater both for the polluter's responsibility towards third parties as well as the polluter's responsibility to the authorities or the Environment Protection Fund. The criminal responsibility would not form part of an indemnity agreement as this would violate public policy.

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

The directors of a company are required to prepare the accounting documents for an accounting reference period, which accounts are to be approved by an auditor. An auditor must at all times adhere to the rules on independence and professional ethics set out in the Code of Ethics and any other regulations, directives or guidelines issued from time to time in terms of the Accountancy Profession Act. It would therefore be difficult for a company to shelter environmental liabilities off the balance sheet.

The Maltese Companies Act provides various grounds according to which a company may be dissolved, amongst which one finds insolvency or by extraordinary resolution of the general meeting. It is therefore plausible for a company to be dissolved to avoid its liabilities, however, upon entering into liquidation, the payment of debts follows an orderly process according to which, provided that the creditor does not have a privileged debt, liabilities are paid on a pro rata basis. Therefore, unless the company is insolvent, the environmental liabilities would still have to be honoured even though the company is being dissolved. Moreover, where fraud is discovered in the running of the company's affairs, the liquidator is entitled to proceed against the directors or officers of the company for the recovery of the sums owed.

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?

According to the Doctrine of Separate Juridical Personality, which Malta adopts, a Company has rights and obligations different from those of its shareholders. The shareholders who have fully paid up their shares will not be liable for the payment of the company's obligations. Those who have not paid up the entire value remain liable with respect to the amount left unpaid - residual liability. The corporate veil may be lifted or pierced in order to assess whether the shareholders should be found liable but this is generally limited to cases dealing with agency, fraud, group enterprises, trusts, tort, enemy, and tax.

Under Maltese Private International Law, the law of the defendant's domicile governs the jurisdiction of the Court. Therefore, if the parent company is responsible for the debt and has its registered office in Malta, then the parent company may be sued in Malta for breaches of its subsidiary caused elsewhere. Where the parent company is not responsible for the damage, an action against the parent company based in Malta for pollution caused by its foreign subsidiary will not succeed in Malta. However with regard to civil liability, EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies in Malta. This would effectively mean that a subsidiary company may be sued abroad in an EU Member State and, where assets of the company are present in Malta, the judgment may be enforced in Malta with relative ease and payment may be obtained in this way.

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

Despite the ongoing political debate relating to the introduction of a whistle-blowers act, there are currently no laws in force protecting whistle-blowers who report environmental violations.

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

Class Actions are generally not allowed under Maltese law; however an exception is made with regard to the Environment Protection Act and its subsidiary legislation. Any natural or legal persons may request the competent authority to take action to prevent or remedy the environmental damage. Moreover, there is nothing to stop a class action if the parties' respective actions are connected to the subject matter, or if the decision of one of the actions might affect the decision of the other action and the evidence in support of one action is generally the same as that to be produced for the other actions (Code of Organisation and Civil Procedure Sect. 161(3)).

Penal damages in the sense of punitive damages are not allowed in Maltese law as a matter of public policy. Exemplary damages, in the sense of confiscation of the *corpus delicti* or of an administrative fine being imposed, are available. These types of recoverable damages are contemplated as has been said above with regard to contributions that in certain instances can be claimed by the Environment Protection Fund.

9 Emissions Trading and Climate Change

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

At present only one sector (the power generation sector) falls within the scope of the emissions trading scheme, and a total of 10.95 million tonnes of CO₂ in allowances has been allocated across the two existing installations in this sector over a five-year period (2008-2012), taking account of projected growth in electricity consumption including the impact of measures to reduce demand, more efficient electricity generation and the contribution of renewable energy sources.

A further allocation of 3.83 million tonnes of CO₂ has been placed into a reserve, and will be made available to 'new entrants' in the power sector or in other sectors covered by the emissions trading scheme.

10 Asbestos

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

It is highly unlikely that the same US litigation experience will arise in Malta as the treatment, transport, and the control of products containing asbestos is highly regulated in Malta and has been so since 2002. Also, the number of claims that have been brought so far relating to damage caused due to asbestos exposure, are relatively few.

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

No person in Malta may make use of asbestos. The competent authority shall ensure that asbestos emissions into the air, asbestos discharges into the aquatic environment, and solid asbestos waste are, as far as reasonably practicable, reduced at source and prevented (S.L. 435.13). In the case of existing and new plants, it is required that the best available technology not entailing excessive

costs be used to reduce and eliminate emissions of asbestos into the air. Moreover, all asbestos containing materials are to be adequately maintained by the user or operator.

Specific regulations have been enacted in Malta that place this matter as a health and safety issue. Workers are protected against risks to their health, including the prevention of those risks arising or likely to arise from exposure to asbestos at work (LN 123/04 and 323/06). Employers are by law obliged to conduct regular monitoring, consult and inform workers, make regular reports to the Occupational Health and Safety Authority, take samples, and are prohibited from handling asbestos in certain ways.

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 Malta?

Environmental risks insurance is not yet quite common within the Maltese jurisdiction. The principal types of environmental risk insurance in Malta relate mainly to marine pollution, particularly oil spills, which are obligatory under international conventions and local regulations.

11.2 What is the environmental insurance claims experience in Malta?

As explained earlier in the previous question, environmental claims insurance have still not gained much ground in Malta, such claims are indeed rarely brought before the Maltese courts. Although some claims relating to marine environmental insurance were brought, it is, therefore, still premature to assess the Maltese experience with regard to these claims.

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 your country.

Following the general election in March 2008, MEPA has fallen within the portfolio of the current Prime Minister whose electoral promise was to reform the set-up of the authority, with, however, a particular emphasis placed on development and planning rather than on MEPA's environmental obligations per se. Despite this focus, the current trend within the Maltese environmental scenario seems to suggest that a reform within the Malta Environmental and Planning Authority will also lead to a greater focus and enforcement on MEPA's environmental obligations. On Monday 27th October 2008, a coalition of environmental NGOs presented the Prime Minister with their submissions toward the MEPA reform process currently underway. Other important trends consist in the increased number of incentives being offered by the Government of Malta to the Maltese public to reduce energy consumption and to encourage the use of environmentally friendly energy sources.



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Cedric Mifsud is a founding partner of Mifsud & Mifsud Advocates. He is a lawyer specialised in European Law (Masters in EU Law) but also has extensive experience in Commercial, Corporate and Telecommunications Law. Through his specialisation he mainly focuses on assisting individual and corporate clients in the compliance of EU regulatory affairs. Although his practise is based locally his clients are predominately international. He also has experience in advising public entities on a number of issues. In 2005, Cedric was nominated by the Minister of Health as a member and the legal consultant of the Bioethics Consultative Committee, which gives recommendations to the government on any Bioethical issues. He is also a director of a corporate services company, Portfolio Services Limited, and a Credit Management company, Credit Solutions Limited. Cedric Mifsud is a Member of the Malta Chamber of Advocates.



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MIFSUD & MIFSUD ADVOCATES

Mifsud & Mifsud Advocates is a law firm with its head office based in Valletta, Malta and with a branch office in Catania, Sicily. Its client base, besides local, is predominantly European and North American, however the law firm is also active in North Africa and the Middle East. Mifsud & Mifsud Advocates was set up, by Dr Malcolm Mifsud, a lawyer specialised in Commercial and Maritime law, together with his brother Dr Cedric Mifsud, who is specialised in Corporate and European Law.

Since its inception, due to its founders' experience in other legal consultancy set ups, Mifsud & Mifsud Advocates has seen a swift expansion of its practice in a number of sectors; mainly the areas of EU regulatory compliance services, Financial Services such as trading and holding corporate structures, trust services, tax advisory, Shipping and Mergers and Acquisitions.

The founders have also conserved and invested in the growth of other traditional practice areas, mainly those related to advisory and litigation in various sectors such as competition law, commercial and corporate advisory and due diligence services. Mifsud & Mifsud Advocates, through the expertise of its founders and the rest of the team working for the firm, has become a portfolio law firm offering specialised legal services in a number of areas for local and foreign, individual and corporate clients requiring a one stop shop in a number of specialised legal fields.