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Liability for Soil and Groundwater
Contamination under
German Environmental Law

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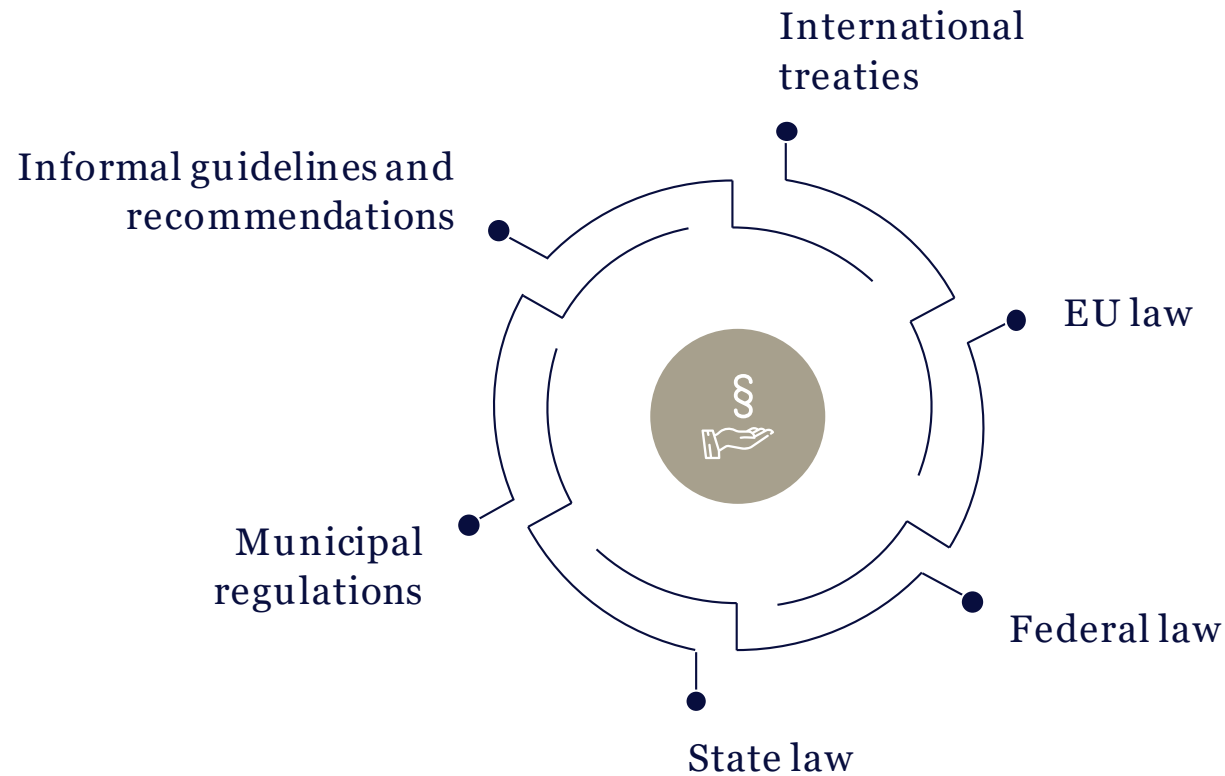
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AGENDA

1. Environmental law architecture in Germany
2. Case: Legacy contamination
3. Investigation and remediation obligations under public law
4. Waste law and soil management
5. Liability under private law
6. Questions and discussion

Intro: Environmental law architecture in Germany

Multi-level environmental law framework



Intro: Environmental law architecture in Germany

Fundamental distinction between public law and private law

■ Public law

Statutory rights and obligations of public authorities vis-à-vis individuals/companies

- Promote "common good", prevention of hazards
- Enforcement by public authorities
 - State (and municipal) authorities enforce federal (and EU) law in their own responsibility
- Judicial review of administrative actions by administrative courts

■ Private law

Statutory rules governing legal relationships between two (or more) legal or natural persons

- Contractual and statutory claims
- Driven by individual benefit
- Enforcement of claims before civil ("ordinary") courts

Case: Legacy contamination

- Chemicals company C used, produced and discharged persistent and bioaccumulative chemicals over decades. Operations were in line with regulatory requirements and emissions were permitted under the Federal Emissions Control Act.
- Based on epidemiological studies, production, use and emission of these chemicals becomes subject to progressively tightening restrictions. C phases out production and use of the chemicals in question.
- Through air deposition, chemicals have been introduced into the soil in large area surrounding the production facilities. Chemicals are seeping into the groundwater which is used for the municipal drinking water supply.
- Chemicals *in situ* or in agricultural produce cause no threat to health. Excavated soil may have to be treated or disposed of in designated facilities.
- Guidance levels for drinking water are and will be for the foreseeable future exceeded in the public drinking water wells. The municipal water supplier has to install and operate a filter facility.



- Obligation to investigate and/or remediate the soil and groundwater contamination?
- Liability towards municipality for costs of filter facility?
- Liability towards property owners for costs of soil treatment/disposal and/or loss of property value?

Investigation and clean-up obligations under public law (Federal Soil Protection Act) (1/2)

01

(Suspicion of a) harmful soil alteration

- Investigation and/or remediation obligations are triggered by a "harmful soil alteration"
Detrimental impacts on soil functions that are able to bring about hazards, considerable disadvantages or considerable nuisances for individuals or the general public
- In particular: presence of potentially harmful chemicals
- Specified by way of threshold values for certain contaminants

02

Obligations in case of (the suspicion) of a harmful soil alteration

- Investigation of (potential) harmful soil alteration, in particular: determination of the presence of contaminants and assessment of resulting risk
- Development of a remediation concept (in particularly complex or severe cases)
- Remediation of soil alteration, *e.g., in situ/ex situ* soil washing, desorption, retardation, surface sealing, pump-and-treat, ...

Investigation and clean-up obligations under public law (Federal Soil Protection Act) (2/2)

03

Responsible Parties

- Person who caused the harmful soil alteration ("polluter"), including universal legal successors
- Current owner
- Former owner (unless in good faith)
- Person that gave up ownership
- Current occupant

04

Principles of enforcement

- Authority has discretion in selecting a responsible party based on considerations of, *inter alia*, efficiency ("deep pockets") and proportionality.
- No requirement of fault or illegality; emission control permits do not shield against liability
- Costs to be borne by responsible party (internal "polluter pays" recourse)

05

Practical considerations

- "Voluntary" investigation/remediation to avoid formal decision
- Public-law remediation agreements

Waste law and soil management

Soil as waste

- Excavated contaminated soil (*ex situ*) qualifies as waste and is subject to waste law
- Person causing or in possession of waste must treat or dispose of it in line with waste law requirements

Recycling and disposal obligations

- Where feasible, excavated soil must be recycled, *e.g.*, used as construction material or for landscaping
- Recycling must comply with, *inter alia*, soil protection law, *i.e.*, reintroduction of contaminated soil must not cause/intensify any harm to soil *in situ*
- If recycling is not feasible: Disposal in designated facilities (incineration, landfills)
 - Significant cost factor and resulting liability risk
 - Shortage of disposal capacities

Soil management

- Specific local framework to minimize treatment/disposal of soil waste
- Typically developed by responsible party in coordination with authority
- Soil protection law allows for relocation of contaminated soil within the affected area (if no additional impairment)
 - Valuable instrument, particularly in cases of widespread and homogenous contamination

Private law liability (1/3)

01

General aspects

- Generally restrictive liability framework compared to the U.S.
 - No punitive damages
 - No class action industry (yet?)
 - Restrictive rules on contingency fees for attorneys
- Burden of proof lies with the plaintiff (with certain exceptions)
 - Standard: beyond reasonable doubt, not preponderance of the evidence

02

Strict liability for environmental damages under Environmental Liability Act

- Based on EU directive, implemented into German law
- Strict liability for operators of certain (industrial) facilities
- Requires damage to life, body, health, movables or real property based on environmental impacts
- Covers immediate and consequential damages (soil disposal costs)
- Environmental permits do not shield against liability

Private law liability (2/3)

03

Strict liability for impairment of bodies of water under Federal Water Act

- Strict liability for operators of facilities that handle hazardous substances
- Requires impairment of the quality of a body of surface or groundwater (not necessarily damage to property)
- Environmental permits do not shield against liability

04

Removal claim under Civil Code

- Soil contamination as "property interference" if not only negligible (comparable to common law trespass concept)
- Property owner may request removal of interference from polluter, *i.e.*, clean up and/or compensation for disposal costs (not loss of property value)
- Fault not required
- Environmental permits do not shield against liability

05

Tort law claim under Civil Code

- Requires unlawful and at least negligent damage to property
- Typically no liability if contamination caused within limits of permits/statutory requirements

Private law liability (3/3)

06

Product liability?

- Strict liability of manufacturer for damage caused by defective products
- Defect requires deficiency in safety that could reasonably be expected when placed on the market
- Liability excluded if product was in compliance with binding statutory standards and state of the art
 - Generally little relevance in environmental context

07

Class actions?

- Registered environmental organizations have standing to challenge certain administrative decisions under public law (*e.g.*, emission control permits)
- Class actions recently introduced into Code of Civil Procedure
 - Admissible for uniform claims of at least 50 consumers
 - Landmark case: Volkswagen diesel matter
 - Court does not award damages but only determines liability *per se* (individual follow-up claims/lawsuits necessary to quantify damage award)
 - So far no cases in the area of environmental law (potential obstacles: lack of uniformity; difficulty to prove individual damage)

Thank you and contact details



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