

International Insurance Law Association (A.I.D.A.)

World Congress, Rio de Janeiro, Brazil, October 2018

Topic IV – Pollution Insurance – Methods, Coverage and Beneficiaries

Questionnaire

1. Environmental legal aspects

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

In the fields of environmental liability, there are several different claims for damages under German civil law. First, the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) provides some “conventional” liability rules settled in Sect. 823, 906 and 1004 whose main purpose is to protect a person’s property and its physical integrity. In addition, the German legislator has established some special regulations on environmental liability law. These major rules are regulated in Sect. 89 of the Water Resources Act (WRA; *Wasserhaushaltsgesetz, WHG*), in Sect. 14 sent. 2 of the Federal Immission Control Act (ICA; *Bundesimmissionsschutzgesetz, BImSchG*) as well as in Sect. 1 of the Environmental Liability Act (ELA; *Umwelthaftungsgesetz, UmweltHG*).

Especially the last-mentioned Environmental Liability Act (ELA)¹ adopted in 1990 is the core of German environmental liability and therefore of great relevance as far as environmental damages are concerned. However, this rule does not apply to the remediation of environmental damages, but only to claims for personal injury and property damage arising from an environmental damage. In contrast, the liability for environmental damages is allocated to public law, more precisely to the so-called Environmental Damage Act (EDA; *Umweltschadensgesetz, USchadG*).² This difference should already be pointed out here because it is essential for a better understanding of the “diametrical” German environmental liability law as well as of the corresponding insurance coverage.

¹ *Umwelthaftungsgesetz (UmweltHG)* from December 10th 1990, BGBl. I, p. 2634.

² *Umweltschadensgesetz (USchadG)* from May 10th 2007, BGBl. I, p. 666.

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1. How are environmental damages described under the law?

The above-mentioned distinction between civil and public environmental liability law has already an impact on the definition of environmental damages. According to the Environmental Liability Act, a damage is due to an environmental impact when it is caused by substances, vibrations, noises, pressure, radiation, gases, vapours, heat or other phenomena that have spread in the soil, air or water.³ On the other hand, the definition of environmental damages given by the Environmental Damage Act is more restrictive and only limited to the protection of soil as well as natural habitats and waters.⁴

1.2.2. Who may be (either directly or indirectly) made liable?

The ELA provides a liability for *installations* specified in Annex 1 to the ELA. This means that the liability is directed against the operator of an installation. This can be a person who operates an installation for its own account, who can freely dispose of the installation and who is responsible for the costs of maintenance.⁵ According to Sect. 2 ELA, the operator of an installation can also be made liable even if the installation is not yet completed or no longer in operation. However, the latter requires that the environmental impact is due to circumstances that substantiate the dangerousness of the installation.

1.2.3. How is the determination of causal link of environmental damages?

Due to difficulties in proving a causal link between an environmental damage and the occurred damage on the part of the claimant, the legislator has established a *presumption rule* in Sect. 6 para. 1 ELA. Pursuant to this rule, it is presumed that the damage was caused by an installation if this installation is likely to cause the damage that occurred on the basis of the given facts of the individual case. The likelihood in the individual case shall be evaluated on the basis of the operating procedures, the facilities used, the type and concentration of the substances used and released, the meteorological factors, the time and place the damage occurred and the type of damage as well as all

³ See Sect. 3 para. 1 ELA.

⁴ See Sect. 2 para. 1 EDA.

⁵ *Münkel*, in: Geigel, *Haftpflichtprozess*, 27th edition, Munich 2015, chapter 24 marginal nr. 46.

the other given facts that speak for or against the causing of damage in the individual case.

However, this presumption rule is not applicable if the installation was operated in accordance with its intended use. Operation in accordance with the intended use shall be deemed to exist if the specific operating obligations have been observed and there has been no disruption of operations.⁶ Furthermore, the presumption shall not apply if another circumstance is likely to cause the damage on the basis of the given facts of the individual case.⁷

1.2.4. Does your legislation provide for strict of fault-based environmental liability?

The ELA is based on a *strict liability* that does not only include accidents and breakdowns but also damages arising from normal operation. However, installations that are operated in accordance with their intended use are privileged in two respects: First, as already mentioned, the presumption rule in Sect. 6 ELA does not apply.⁸ Second, the obligation to pay compensation for damage to property is excluded if the item of property is impaired only insignificantly or to an extent that may be reasonably expected under the local circumstances.⁹

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

The ELA itself does not distinguish between air, soil and water pollution.¹⁰ Nevertheless, it has already been mentioned at the beginning of this questionnaire that there are also other regulations on environmental liability besides the ELA. The liability for *water pollution*, for instance, can also be based on Sect. 89 WRA (*Water Resources Act*). This is a strict liability as well that is applicable in addition to the liability under Sect. 1 ELA.¹¹ However, it differs from the ELA in the fact that the WRA provides a wider definition of installations and includes financial losses.¹²

⁶ See Sect. 6 para. 2 ELA.

⁷ See Sect. 7 ELA.

⁸ See question 1.2.3.

⁹ See Sect. 5 ELA.

¹⁰ See Sect. 3 para. 1 ELA.

¹¹ See Sect. 18 ELA.

¹² *Schwendner*, in: Sieder/Zeitler/Dahme/Knopp, Wasserhaushaltsgesetz (WHG), 51st supplement (February 2017), Munich 2017, Sect. 89 WHG marginal nr. 17.

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

1.4.1. What is the scope of activity of these entities?

1.4.2. How do they operate, and on which legal grounds?

(the following answer refers to both questions)

Sect. 7 EDA (*Environmental Damage Act*) entitles the competent authority to supervise the necessary measures in order to avoid, to limit and to remediate environmental damages. In addition, the authority can oblige the responsible person to provide detailed information about an immediate danger, the suspicion or the occurrence of an environmental damage. The federal legislator does not prescribe which authority is in charge of these activities. This is subject to the legislation of the individual *Federal States* in Germany. The competent authority in Berlin, for example, is the *Senate Administration for Environment, Transportation and Climate Protection*.¹³

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

1.5.1. Who is in charge of keeping the environmental protection?

1.5.2. How does this system work?

(the following answer refers to both questions)

Since environmental protection is the declared aim of the Federal Republic of Germany according to Art. 20a of the German Basic Law (*Grundgesetz*), it is part of administrative law. Responsible for environmental protection is primarily the *Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety* (*Bundesministerium für Umwelt, Naturschutz, Bau und Reaktorsicherheit*) as well as the *Federal Environmental Agency* (*Umweltbundesamt*). Moreover, there are further authorities in charge of environmental protection at the State level such as the above-mentioned Senate Administration in Berlin.

2. Legal aspects on environmental insurance policies

¹³ *Berliner Gesetz zur Ausführung des Umweltschadensgesetzes* from May 20th 2011, GVBl. Nr. 14 from June 1st 2011, p. 209.

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

Environmental insurance policies are not regulated by law, neither by the ELA nor by the EDA. Sect. 19 para. 1 ELA only contains a provision according to which operators of certain installations specified in Annex 2 to the ELA shall ensure that they can meet their statutory obligations to compensate for damage occurring when an environmental impact caused by an installation leads to a person's death, injury to his body or damage to his health or to an item of property. Such an obligation to provide "*financial security*" must not be confused with a compulsory environmental insurance because the conclusion of a liability insurance policy is not the only possibility to fulfil this obligation. The financial security can also be provided by means of an exemption or guarantee obligation of the Federation or of a German State or of a credit institution if it is guaranteed that it offers securities comparable with liability insurance policies.¹⁴

If the operator does not meet his obligation to provide financial security and does not provide evidence of financial security within an appropriate period, the competent authority may prohibit the operation of an installation entirely or partly.¹⁵ A violation of the duty to provide financial security can even be punished with imprisonment or a fine.¹⁶ However, the legal obligation pursuant to Sect. 19 ELA and the related sanctions do not have any practical significance.¹⁷ The reason for this lies in the fact that there is no regulation that rules the key points of the financial security, such as the time or the extent of the financial security. As a consequence, Sect. 19 ELA is without legal effect towards the operators of an installation.¹⁸

¹⁴ See Sect. 19 para. 2 nr. 2 and 3 ELA.

¹⁵ See Sect. 19 para. 4 ELA.

¹⁶ See Sect. 21 ELA.

¹⁷ Nitsch, in: Spickhoff (ed.), beck-online-Großkommentar, UmweltHG (version: May 1st 2017), Munich 2017, Sect. 20 marginal nr. 4.

¹⁸ Salje/Peter, Umwelthaftungsgesetz, 2nd edition, Munich 2005, Sect. 20 marginal nr. 5; Kohler, in: Staudinger, BGB, vol. 2 – Umwelthaftungsrecht, edition 2017, Berlin 2017, Sect. 20 ELA marginal nr. 2; Peter, "Deckungsvorsorgeregelungen nach Um-

2.3. Does the law provide for compulsory environmental insurance?

2.3.1. If so, which would be the relevant risks?

Beyond the above-mentioned obligation to provide financial security, a compulsory environmental insurance does not exist in Germany. Sect. 20 ELA authorizes the Federal Government to issue detailed rules by means of statutory instruments concerning, for example, the time from which an installation operator is required to provide financial security pursuant to Sect. 19 ELA,¹⁹ the extent and amount of the financial security²⁰ as well as the obligations of the installation operator, of the insurance company and of the party that has taken on an exemption or guarantee obligation.²¹ Although this provision was already adopted in 1990, the German Government still has not made use of this option till this day.

A similar problem concerns the liability under the EDA. According to Art. 14 para. 1 of the underlying European Environmental Directive 2004/35/CE²², the Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators. This is to be understood as a political request which is not legally binding. The introduction of a compulsory insurance for environmental damages has been politically controversial ever since the Environmental Directive has been adopted by the European Union. The decision on establishing a mandatory insurance remains reserved for the European Commission which regularly evaluates the Directive and is able to submit proposals for a compulsory insurance system.²³ The German EDA itself does not provide a compulsory insurance because the German legislator was of the opinion that this could complicate the development of adequate environmental insurance products.²⁴ Indeed, there are several strong reasons, especially constitutional concerns that speak against the introduction of a com-

welthaftungsgesetz – ein gesetzgeberisches und verfassungsrechtliches Trauerspiel”, Landes- und Kommunalverwaltung (LKV) 2007, p. 493 et seq.

¹⁹ See Sect. 20 para. 1 nr. 1 ELA.

²⁰ See Sect. 20 para. 1 nr. 2 ELA.

²¹ See Sect. 20 para. 2 nr. 6 ELA.

²² Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, Official Journal of the European Union from April 30th 2004, L 143, p. 56.

²³ See Art. 14 para. 2 of the European Environmental Directive.

²⁴ See the statement by the German Bundesrat (Council), BT-Drucksache 16/3806, p. 35.

pulsory insurance for environmental damages.²⁵ Against this background, the implementation of Art. 14 of the Environmental Directive into a prescribed legal framework at the national level is deemed unlikely.²⁶

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

2.4.1. In which step of a venture should such policy be submitted under the law?

(the questions are obsolete)

3. Operational methods for pollution insurance

3.1. Which are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

The common way of obtaining insurance coverage for environmental liability is to conclude a liability insurance contract. Claims for personal injury and property damage arising from an environmental damage were formerly covered by conventional public liability insurance policies. After the ELA was adopted, the *German Insurance Association (Gesamtverband der Deutschen Versicherungswirtschaft, GDV)* developed model conditions for a special *Environment Liability Insurance (ELI; Umwelthaftpflichtversicherung, UHV)*²⁷ which are specifically tailored to the liability under the ELA. As already mentioned under question 2.2., operators can also protect their liability risk by means of an exemption or guarantee obligation of the Federation or of a German State,²⁸ which comes pretty close to performance bonds. However, this option is in practice only available for regional or local authorities and their activities that are subject to public law.²⁹ It is also likely to remain a rare exemption that credit institutes are willing to

²⁵ See *Armbrüster/Schreier*, "Aktuelle Rechtsfragen der Umweltschadensversicherung", *Zeitschrift für die gesamte Versicherungswissenschaft (ZVersWiss)* 2016, p. 3, 32 et seq.

²⁶ *Kohler*, in: *Staudinger, BGB* (fn. 18), Einleitung zum UmweltHR marginal nr. 435.

²⁷ The current version of the ELI (February 2016) is available at http://www.gdv.de/wp-content/uploads/2016/02/Umwelthaftpflichtversicherung_Feb2016.pdf.

²⁸ See Sect. 19 para. 2 nr. 2 ELA.

²⁹ *Hager*, in: *Landmann/Rohmer, Umweltrecht*, 83rd supplement (May 2017), Munich 2017, Sect. 19 ELA marginal nr. 13; *Kohler*, in: *Staudinger, BGB* (fn. 18), Sect. 19 ELA marginal nr. 11.

submit a declaration of commitment according to Sect. 19 para. 2 nr. 3 ELA.³⁰ Hence, private enterprise companies are basically forced to conclude a civil liability insurance contract. Furthermore, the liability risk under the EDA which stipulates a public liability for installation operators can be insured by means of an *Environmental Damage Insurance* (EDI; *Umweltschadensversicherung, USV*).³¹ The corresponding model conditions were released by the German Insurance Association in April 2007.

Even though these model conditions are not binding for insurance companies, they are widely spread on the German insurance market, regardless of the fact that a compulsory environmental liability and damage insurance has not been introduced so far. For this reason, the individual terms can be taken as a basis for the following questions concerning the content of the ELI and of the EDI.

3.1.1. What kind of risks should be covered thereunder?

According to Nr. A2.-1.1.1 ELI 2016, the insurance cover is extended under the terms and within the scope of the insurance contract to the legal liability according to private law of the insured person as a result of personal injury and property damage caused by environmental impact. The term of “*environmental impact*” is identical with Sect. 3 para. 1 ELA.³² The extent of the insured risks depends on the agreements concluded and stated in the insurance policy (so-called “*declaration principle*”). The ELI provides a system of “*risk components*” that refer to different installations under Nr. A2.-1.1.3. These are, above all, installations in terms of the WRA and the ELA.³³ The declaration principle and the system of risk components also applies to the EDI.³⁴ The Environmental Damage Insurance covers, by contrast, the liability under public law according to the EDA for the remediation of environmental damages.

³⁰ *Hager*, in: Landmann/Rohmer (fn. 29), Sect. 19 ELA marginal nr. 13; *Kohler*, in: Staudinger, BGB (fn. 18), Sect. 19 ELA marginal nr. 11.

³¹ The current version of the EDI (February 2016) is available at http://www.gdv.de/wp-content/uploads/2016/02/Umweltschadensversicherung_Feb2016.pdf.

³² See question 1.2.1.

³³ In detail *Schimikowski*, in: Langheid/Wandt (eds.), *Münchener Kommentar zum Versicherungsvertragsgesetz (VVG)*, vol. 3, 2nd edition, Munich 2017, *Umwelthaftpflicht- und Umweltschadensversicherung* marginal nr. 28 et seq.

³⁴ See Nr. A2-2.1.3 EDI 2016.

3.2. Does the law or administrative rule define upper limits for losses or coverage?

For want of legal or administrative provisions concerning the content of environmental liability insurance contracts, upper limits for losses or coverage can only be provided in the individual insurance contract. Such restrictions are mostly arranged in connection with the agreements regarding the sum insured. Therefore, environmental liability insurance conditions usually rule that the compensation paid is restricted to the maximum amount stated in the policy (sum insured) per claim/insured occurrence.³⁵

3.2.1. Which are the criteria that should apply to limits' definition?

Upper limits for losses or coverage are determined by a certain amount of money. Some environmental liability insurance contracts provide a generalised insurance sum, others provide separate insurance sums that differentiate between personal and property damages as well as financial losses. Worth mentioning here are also the frequently agreed “*serial damage clauses*”: Where several insured events occur during the validly insured period, these will be deemed to constitute one insured event occurring at the time of the first insured event if these events are caused by the same environmental impact.³⁶

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

Both private and state-owned ventures can be made liable for environmental damages so that there are no differences as regards civil liability. Consequently, the insurance coverage does not depend on the policyholder's legal form either.

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

It is often determined in environmental liability insurance contracts that damages arising from the use of a motor vehicle are not insured. The purpose of this provision is to differentiate the environmental liability insurance from the motor vehicle liability insurance. However, conventional motor vehicle liability insurance conditions do not cover the liability risk for environmental damages under the EDA. This demand for insurance coverage can be met by the conclusion of an additional motor vehicle environmental damage insurance.³⁷

³⁵ See Nr. A2-1.4.1 ELI 2016 / Nr. A2-2.8.1 EDI 2016.

³⁶ See Nr. A2-1.4.2 ELI 2016 / Nr. A2-2.8.2 EDI 2016.

³⁷ In detail *Schwab*, “Umweltschäden durch Kraftfahrzeugunfälle”, *Deutsches Autorecht (DAR)* 2009, p. 186 et seq.; *Meinecke*, in: *Stiefel/Maier, Kraftfahrtversicherung*, 19th edition, Munich 2017, Kfz-USV marginal nr. 1 et seq. The current version of the Motor

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

The ELI policies³⁸ – and also typical public and professional liability insurance policies³⁹ – do not cover claims resulting from *subsidence damages* as well as from *mining operations* pursuant to Sect. 114 of the Federal Mining Act (*FDA; Bundesberggesetz, BBergG*) which provides a strict liability on damages in connection with mining damages. Whereas subsidence damages are only excluded as far as damages of properties are concerned, damages arising from mining operations (firedamp as well as water and carbonic acid penetrations) are not covered at all.

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

3.6.1. What are the most usual ones?

According to Sect. 19 para. 1 of the Insurance Contract Act (*ICA; Versicherungsvertragsgesetz, VVG*), the policyholder shall disclose to the insurer before making his contractual acceptance the risk factors known to him which are relevant to the insurer's decision to conclude the contract with the agreed content and which the insurer has requested in writing. This general rule states a pre-contractual duty of disclosure which is regularly repeated in the insurance conditions of the ELI.⁴⁰

Vehicle Environmental Damage Insurance (May 2015) is available at http://www.gdv.de/wp-content/uploads/2015/05/Kfz_Umweltschaden_KfZ_USV_Mai2015.pdf.

³⁸ See Nr. 6.12 of the Environmental Liability Model (September 2009; available at http://www.gdv.de/wp-content/uploads/2014/07/22_Umwelthaftpflicht-Modell_0909.pdf).

³⁹ See Nr. A1-7.13 of the General Conditions for the Public and Professional Liability Insurance (December 2016; available at http://www.gdv.de/wp-content/uploads/2016/12/AVB-Betriebs-und-Berufshaftpflichtversicherung_Dez_2016n.pdf).

⁴⁰ See Nr. 23.1 of the General Conditions for the Liability Insurance (February 2016; available at <http://www.gdv.de/wp-content/uploads/2016/02/AVB-fuer-die-Haftpflichtversicherung-AHB-Jan2016.pdf>).

4. Coverage under pollution insurance

4.1. Which are the major covered risks relating to civil liability arising from pollution?

As previously described,⁴¹ the insurance cover is extended under the terms and within the scope of the insurance contract to the legal liability according to private law of the insured person as a result of personal injury and property damage caused by environmental impact. Furthermore, financial losses are covered that were caused by the violation of appropriation rights, the right to an established and operating business as well as user rights or authorities granted under water legislation.⁴² The insurance coverage mainly concerns civil claims according to Sect. 1 ELA, Sect. 89 WRA, Sect. 823 para. 1, 906 para. 2 sent. 2 and Sect. 1004 German Civil Code as well as Sect. 14 sent. 2 ICA.⁴³ The term of “*environmental impact*” refers to the definition given in Sect. 3 para. 1 ELA.⁴⁴

Because the insurance coverage for civil environmental liability is defined very broadly, the question is less which risks are covered, but rather which ones are not. Hence, ELI policies regularly provide a set of *exclusion clauses* that restrict the insurer’s contractual performance promise.⁴⁵ Among the most important are the exclusion for so-called “*spilling damages*”⁴⁶ that relate to handling water-polluting substances as well the exclusion for damages arising from *normal operation*.⁴⁷ Apart from that, as already indicated, the exact extent of the covered risks always depends on the “risks components” in relation to specific installations that are agreed under the ELI policy.

Another issue is the definition of the insured event in the Environmental Liability Insurance. Its time delimitation refers to the so-called “*discovery principle*”. This means that the insured event is understood as the *verifiably first discovery* of a personal injury, property damage or an (exceptionally covered) financial loss by the claimant, the policyholder or other third parties.⁴⁸ Accordingly, the insured event is shifted quite a big

⁴¹ See question 3.1.1.

⁴² See Nr. 1.2 para. 2 ELI-model 2009/Nr. A2-1.1.1 (2) ELI 2016.

⁴³ *Schneider*, in: Späte/Schimikowski, *Haftpflichtversicherung*, 2nd edition, Munich 2015, Nr. 1 UHV marginal nr. 3.

⁴⁴ See question 1.2.1.

⁴⁵ See Nr. 6 ELI-model 2009; Nr. A2-1.6 ELI 2016.

⁴⁶ See Nr. 6.1 ELI-model 2009; Nr. A2-1.6.1 ELI 2016.

⁴⁷ See Nr. 6.2 ELI-model 2009; Nr. A2-1.6.2 ELI 2016.

⁴⁸ See Nr. 4 ELI-model 2009; Nr. A2-1.2 ELI 2016.

step backwards. The idea behind this is to fix a definable time for the insured event. This is often difficult in practice, especially when it comes to environmental damages because in most cases, it is not possible to determine the beginning of the pollution.

4.2. Which are the major covered guarantees for events arising from pollution?

As a civil liability insurance, the ELI covers the examination of the liability question, the defense against unjustified claims for damages as well as the indemnification against justified claims for damages. Furthermore, the insurer is obliged to compensate costs incurred *before the occurrence of the insured event* in order to avoid or to mitigate an otherwise unavoidable personal injury, property damage or insured financial loss.⁴⁹ A condition for this is, however, that these expenses result from an operational disturbance or from an administrative order.

4.3. Which are the major covered operational risks arising from pollution?

As already mentioned above, operational risks are not covered as far as they result from “*normal operation*”. This exclusion refers to damages arising from environmental impacts which are necessary and accepted to sustain normal operation. It is often regarded as unsatisfactory in the view of policyholders because it leads to a *significant coverage gap*.⁵⁰ However, the reason for this exclusion clause is that normal operational risks shall be borne by the operator of an installation on the one hand and that the risk assumed by the insurer shall remain calculable on the other hand.⁵¹

4.4. Does the insurance cover fines?

Compensation claims with punitive character, particularly punitive or exemplary damages, are not covered pursuant to the ELI.⁵² This also applies to claims which are raised abroad.⁵³ Such an exclusion clause is rather of less practical relevance because punitive damages are contrary to the German civil liability system. For this reason, foreign judgements (especially of American courts) that are based on punitive damages cannot

⁴⁹ See Nr. 5 ELI-model 2009/Nr. A2-1.3 ELI 2016.

⁵⁰ Vogel, in: Vogel/Stockmeier, Umwelthaftpflichtversicherung/Umweltschadensversicherung, 2nd edition, Munich 2009, 2. Teil C marginal nr. 1151 with further citations.

⁵¹ See Sasserath, in: Knopp (ed.), Neues Europäisches Umwelthaftungsrecht und seine Auswirkungen auf die deutsche Wirtschaft, Heidelberg 2003, p. 104, 116; Wagner, “Das neue Umweltschadensgesetz”, Zeitschrift für Versicherungsrecht (VersR) 2008, p. 565, 578.

⁵² Nr. 9.3.2 ELI-model 2009.

⁵³ Nr. 10.1.1 ELI-model 2009.

be enforced in Germany according to the jurisdiction of the Federal Court.⁵⁴ Nevertheless, the insurance parties still have the possibility to make deviating agreements by which punitive damages are covered.⁵⁵

4.5. *Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?*

As described above, the ELI covers, inter alia, the civil liability of the insured person as a result of a personal injury. Hence, the insurance does not only cover the immediate personal damage, but also all consequential damages that are traced back “adequately causally” on the injury sustained. This also includes *damages for pain and suffering* which can be claimed according to Sect. 253 para. 2 German Civil Code and – as far as environmental liability is concerned – to Sect. 13 sent. 2 ELA.

4.6. *Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?*

The German civil liability law is characterized by the so-called “*immediacy principle*” according to which the damaging party is only liable for an *immediate* violation of legal interests.⁵⁶ As a consequence, there is basically no compensation for indirect damages of secondary victims. The German jurisdiction has made an exemption of this principle, to be interpreted strictly, only for close relatives of the damaged party who have suffered from a psychological damage that has to be considered as a “*shock*”.⁵⁷ However, as one of the last European countries, the German legislator has recently introduced a compensation for *deep sorrow* of an external third party who lost a loved one as a result

⁵⁴ See Federal Court (*Bundesgerichtshof, BGH*), judgement of June 4th 1992 – IX ZR 149/91, BGHZ 118, p. 312.

⁵⁵ *Spickhoff*, “Das Verbot der Versicherung von punitive damages im internationalen Versicherungsvertragsrecht”, in: *Versicherungsrecht, Haftungs- und Schadensrecht*, Festschrift für Egon Lorenz zum 80. Geburtstag, Karlsruhe 2014, p. 487, 501 et seq.

⁵⁶ *Brand*, „Schockschäden, Angehörigenschmerzensgeld und der dritte Weg“, in: *Festschrift für Lothar Jaeger zum 75. Geburtstag*, Cologne 2014, p. 191.

⁵⁷ Federal Court (*Bundesgerichtshof*), judgement from April 4th 1989 – VI ZR 97/88, NJW 1989, p. 2317; judgement from February 10th 2015 – VI ZR 8/14, NJW 2015, p. 2246.

of the damaging event.⁵⁸ This compensation shall also be due for the strict liability in the event of an environmental damage.⁵⁹ The coverage of the ELI extends to these moral damages as well.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

See answer to question 4.4.

5. Beneficiaries

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

Since the ELI is a civil liability insurance contract, the insurer's promised benefit is understood as the exemption from claims raised by the damaged party. This means that the damaged party cannot directly sue the liability insurer for compensation, but rather has to claim against the damaging party. Nevertheless, the damaged party receives the recoverable compensation in practice directly from the liability insurer who fulfils his contractual obligations towards the policyholder this way – always provided that the policyholder's liability is covered by the ELI contract in the individual case.

6. Market status

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

No information available.

6.1.1. As regards the figures thereof, what is the yearly participation of premiums of collected under environmental insurance?

No information available.

⁵⁸ „Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld“ from July 17th 2017, Bundesgesetzblatt (BGBl.), part I, Nr. 48.

⁵⁹ See Sect. 12 para. 3 ELA.

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

The ELI model of the German Insurance Association does not contain a blanket coverage of all conceivable environmental risks. It rather covers – according to the above-mentioned declaration principle – specific risks components which are tailored to the needs of the individual policyholder and which have to be agreed separately. Hence, the customer group addressed by the ELI ranges from smaller agriculture holdings or gardening businesses to large facilities handling with environmentally hazardous substances.

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

No information available.

6.3.1. What percentage of the aforesaid losses was covered under insurance?

No information available.

7. Academic development

7.1. Are there research institutes focused on the study of environmental insurance? Please identify them.

As far as is known, there are not any research institutes who specifically deal with the study of environmental insurance. However, the German Insurance Association – which safeguards the interests of German environmental liability insurers – is concerned with the needs and legal problems of the environmental liability insurance. It regularly monitors its coverage and has often revised the responding model conditions in the course of the years.

7.2. Are there academic and scientific works produced in the fields of law, economy, environment or other similar area that specialize in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

The following works can be mentioned representatively for specialized literature concerning German environmental liability insurance law:

- *Armbrüster, Christian / Schreier, Vincent*: “Aktuelle Rechtsfragen der Umweltschadensversicherung”, *Zeitschrift für die gesamte Versicherungswissenschaft (ZVersWiss)* 2016, p. 3 et seq. (concerning the Environmental Damage Insurance)
- *Beckmann, Roland Michael / Matusche-Beckmann, Annemarie* (eds.), *Versicherungsrechts-Handbuch*, 3rd edition, Munich 2015 (§ 27 concerning the Environmental Liability Insurance)
- *Hellberg, Nils*: ELD implementation – Update on German developments, Brussels 2013 (document available at http://ec.europa.eu/environment/legal/liability/pdf/eld_meetings/German_insurance_update.pdf [as of November 22nd 2017])
- *Hellberg, Nils / Orth, Markus / Sons, Jörg / Winter, Dietrich*: *Umweltschadensgesetz und Umweltschadensversicherung*, Karlsruhe 2008 (concerning the Environmental Damage Insurance)
- *Langheid, Theo / Wandt, Manfred* (eds.): *Münchener Kommentar zum Versicherungsvertragsgesetz*, vol. 3, 3rd edition, Munich 2017 (chapter 330 concerning the Environmental Liability Insurance and the Environmental Damage Insurance)
- *Späte, Bernd / Schimikowski, Peter* (eds.): *Haftpflichtversicherung*, 2nd edition, Munich 2015
- *Vogel, Joachim / Stockmeier, Hermann* (eds.): *Umwelthaftpflichtversicherung / Umweltschadensversicherung*, 2nd edition, Munich 2009
- *Wagner, Gerhard*: “Umwelthaftung und Versicherung”, *Zeitschrift für Versicherungsrecht (VersR)* 1991, p. 249 et seq.
- *Wagner, Gerhard*: “Die Zukunft der Umwelthaftpflichtversicherung”, *Zeitschrift für Versicherungsrecht (VersR)* 1992, p. 261 et seq.
- *Winter, Gerd*: *German Environmental Liability Law, Basic Texts and Introduction*, Nijhoff/Graham & Trotman, Dordrecht 1994 (for an overview of German environmental liability law)