REMEDIATION OF HISTORICAL SOIL CONTAMINATION: OWNER RESPONSIBILITY AND WASTE LAW[1]

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SUMMARY: 1. Soil contamination and innocent landowner: the problem **- 2.** Waste holder and responsibility rule **- 3.** After WFD and ELD, TTK case.

1. Soil contamination and innocent landowner: the problem.

According to the judgment of the European Court[2], the "polluter pays" principle, as principle that is on the grounds of the Environmental liability directive (ELD), is applied into the burden and the rules of the directive and not directly.

1 Update of a speech in ERA Seminar, "*The Environmental Liability Directive (ELD) in practice*", Brussels, 29 November 2018.

2 ECJ, 4 March 2015, C-534/13, *Fipa Group*. Analized by: N. de Sadeleer, *Preliminary Reference on Environmental Liability and the Polluter Pays Principle: Case C-543/13, Fipa*, in *Reciel*, 2015, 232 ff.; B. Pozzo, B. Vanheusden, L. Bergkamp and E. Brans, *The Remediation of Contaminated Sites and the Problem of Assessing the Liability of the Innocent Landowner: a Comparative Law Perspective*, in *European Review of Private Law*, 2015, 1071 ff.; S. Varvaštian, *Environmental Liability under Scrutiny: the Margins of Applyng the EU Polluter Pays principle against the Owners of the Polluted Land who did not Contribute to the Pollution*, in *Environmental Law Review*, 2015, 270 ff.; V. Corriero, *The Social-Environmental Function of Property and the EU Polluter Pays Principle: the Compatibility between Italian and European Law*, in *Italian law Journal*, 2016, 479 ff.; F. Goisis and L. Stefani, *The Polluter Pays Principle and Site Ownership: the European Jurisprudential Developments and the Italian Experience*, in *Journal for European Environmental & Planning Law*, 2016, 218 ff.

To understand the relevance of the ruling of the European Court, you have to look at the argument, knowing that the problem is not in the European law, but in the interpretation of the national Italian law. We will see that a problem of European law is in the linking between Italian law and waste law.

According to the Italian soil contamination law - that is now in the Environmental Code - polluters are subject to a liability rule - in my opinion they are subject to a strict liability rule – while innocent landowners have a duty to implement preventive measures and to reimburse costs of rehabilitation of the site within the limits of the market value of the land.

The problem of the referring Italian highest administrative court, *Consiglio di Stato* (Council of State), was about the interpretation of the words "preventive measures": if it means "emergency safety measures" or requires only minor interventions.

Emergency safety measures could be very expensive, usually exceeding the market value of the land, because they have the scope of limiting contamination and are regulated in detail by Italian law[3]. There isn't however a specific regulation on preventive measures.

The Plenary Assembly of Council of State supports the opinion that landowners don't have to implement emergency safety measures, but only to reimburse costs of them, or costs of repair, within the limit of the market value: the Italian Court believes that is not coherent with the "polluter pays" principle to demand all the expensive costs of the emergency safety measures from innocent landowners[4].

The other line of authority in Council of State, that considers the owner under the obligation to adopt emergency safety measures[5], believes that "polluter pays" principle means that the public power does not have a duty

3 About the definition of emergency safety measures, see Council of State, 20 May 2014, n. 2526.

4 Council of State, Plenary Assembly, 8 July 2013; 25 September 2013, n. 21; 13 November 2013, n. 25. Also: Council of State 15 July 2010, n. 4561; 21 February 2012 n. 282; 30 April 2012, n. 3361; 26 September 2013, n. 4784; 26 September 2013 n. 4791; 10 September 2015, n. 4225; 30 September 2015, n. 3756; 5 October 2016, n. 4099; 5 October 2016, n. 4119; 7 November 2016, n. 4647; 21 November 2016, n. 4875; 25 January 2018, n. 502.

5 Council of State, 5 September 2005 n. 4525. This view is prevalent in the most recent judgments: Council of State, 16 July 2015, n. 3544; 14 April 2016, n. 1509; 8 March 2017, n. 1089; 4 December 2017, n. 5668; 1 October 2018, n. 5604; 17 January 2020, n. 122; 12 March 2020, n. 1759; 15 September 2020, n. 5447. See also Circular of the Ministry of Environment, 23 January 2018, on https://www.minambiente.it/sites/default/files/bonifiche/contenuti/gruppi/inquinamento/Prot.1495.STA.pdf

to implement measures if there is someone that is linked, in any way, with the contamination or the contaminated land.

That is the reason why the Plenary Assembly referred to European Court the question if "polluter pays" principle requires innocent landowners to limit contamination, or even to repair it, if public power doesn't find a solvent polluter.

The ruling of the European Court is coherent with the opinion of the Plenary Assembly, because the ELD does not preclude a rule that limits the liability of innocent landowners within the market value of the land. But the ruling of the European Court could be coherent with any other interpretation of Italian law, because the same Court doesn't exclude that landowner could be responsible beyond that value: his ruling is based on the assumption of the referring Court, for which the Italian law doesn't demand the owner to implement emergency safety measures.

The problem could be whether there is a limit in the European law for the opposite interpretation of the Italian law on the measures applying to the innocent landowner. The problem is not limited to Italian law, because also in other European countries there are stringent responsibility rules, which apply to innocent owner.

In application of the article 16 of the ELD, Member State may adopt more stringent rules, including the identification of additional responsible parties: this provision allows Member States to expand the scope of the ELD, by adding new activities subject to the strict liability rule, in addition to those already listed in Annex III, or to the negligence rule, even beyond the damage to the biodiversity. The same provision allows Member States to provide for the liability of persons other than operators, such as the tortfeasor, employee of business or outsider to activity of the operator. The question - that I have already posed in a Report for EFFACE research project (2015)[6] - is whether the directive allows Member States to also provide for the liability of the owner of the land, appears to be more difficult: such a provision, in that opinion, would be inconsistent with the "polluter pays" principle, whenever the owner is held liable even if he did not cause environmental damage.

6 Salanitro, U. (2015) *Directive 2004/35/EC on Environmental Liability,* on https://efface.eu/sites/default/files/EFFACE_Directive%202004_35_EC%20on%20Environmental%20liability.pdf

2. Waste holder and responsibility rule.

In my opinion, the resolution of this problem is interfered by the interpretation of European waste law.

Italian soil contamination rules, before the approval of the Environmental Code in 2006, were disposed in a Decree on Waste Law, approved in 1997: even today, you find soil pollution rules in the part of the Environmental Code on waste management.

I already proposed the idea that Italian rule on owner responsibility was, and is, implementation of the article 15 of the Waste Directive, that - in application of the "polluter pays" principle, as interpreted by the Court of Justice in the cases Van de Walle and Commun de Merquer (Erika case)[7] - provides that each waste producer could be responsible for all costs of the waste disposal[8].

Indeed, article 11 - and after the amendments of the directive in 1991 article 15 - of the Waste Directive provides that the responsibility of the waste disposal is not only on the waste producer but also on each waste holder. If contaminated soil is waste, the owner of the contaminated land is, or could be, a waste holder[9].

According to an opinion, that is based on the forth recital (consideranda) of the waste directive, only chattels could be usually waste; but in the first attachment of the waste directive contaminated soil falls into the categories of waste.

Valerie Fogleman already exposed very well the relationship between Waste Framework Directive and national soil contamination laws and the

7 ECJ, 7 September 2004, C-1/03, *Van der Walle*; ECJ, 24 June 2008, C-188/07, *Commun de Mesquer*. Analized by: N. de Sadeleer, *Liability for Oil Pullution Damage versus Liability for Waste Management: the Polluters Pays Principle at the Rescue of the Victims*, in *Journal of Environmental Law*, 2009, 299 ff.; A. Bleeker, *Does the Polluter Pay? The Polluter- Pays Principle in the Case Law of the Court of Justice,* in *European Energy and Environmental Law Review*, 2009, 289 ff.

8 U. Salanitro, *Danno ambientale e bonifica tra norme comunitarie e Codice dell'ambiente: i criteri di imputazione della responsabilità*, in G. Alpa and others (eds.), *Rischio di impresa e tutela dell'ambiente. Precauzione - responsabilità - assicurazione*, Napoli, ESI, 2012, 225 ff.; U. Salanitro, *La responsabilità per lo smaltimento dei rifiuti*, in L. Carbone, G. Napolitano and A. Zoppini (eds), *La disciplina della gestione dei rifiuti tra ambiente e mercato*, Bologna, Il Mulino, 2018, 373 ff.

9 Opinion of Advocat General J. Kokott, 20 November 2014, Case C-534/13, Fipa Group, §§ 60 ss.

problems of coherence of these rules with the Environmental Liability Directive[10].

Other national laws on soil contamination seem to be an application of the waste responsibility principles.

In Ireland, according to the Waste Management Act (1996), the owner of contaminated land is considered the waste holder and is responsible for the cleaning if the person who caused the contamination cannot be found or is not solvent. There is a similar rule in Spanish Royal Decree on Waste and Contaminated Land; also in Soil Management Decree of Walloon region and in the Brussels Clean Up Statute[11].

The same principle is confirmed by the UK Environmental Protection Act of 1990, which imposes responsibility on the innocent owner of contaminated land to remediate the same land which he\she owns, if the person who caused contamination cannot be found. In the English Act there is another interesting rule that seems to be the application of the prevention principle: if the owner is aware that the land is contaminated, he becomes liable for the contamination that escaped to other land if he had not adopted measures to prevent the spread.

In other European countries, there is another principle, which goes beyond the responsibility of those who have produced the contamination: the owner is responsible if he knew or should have known that the land was contaminated when he acquired it and the producer of waste cannot be found or is not solvent. This principle is adopted, with variations, in France, in Germany, in Austria and in other countries. In Germany, the responsibility of the current innocent owner, at the moment of the contamination, is limited within the market value of the land by a judgement of the Constitutional Court in 2000.

In my opinion, all these national rules are different implementations of the European principle of the responsibility of the waste holder: the variations and the limitation of responsibility are an application of the provision - that is now expressed in the article 15 paragraph 3 of the Waste Framework

10 V. Fogleman, *Landowners' Liability for Remediating Contamined Land in the EU: EU or National law? Part I: EU law; Part II; National Law*, in *Environmental Liability - Law, Policy and Practice*, 2015, 6 ff., 42 ff.; V. Fogleman, *Innocent Landowners and Historical Contamination; Liability in the Absence of a Polluter*, in M. Meli and S. Adorno, *Il futuro del polo petrolchimico siracusano. Tra bonifiche e riqualificazione*, Giappichelli, Torino, 2017, 91 ff.

11 See also H. Keersmaekers, *Soil contamination in Belgium: a state of play*, in *Environmental Liability - Law, Policy and Practice*, 2004, 202 ff.

Directive (2008) - which consents to share - and therefore to limit - the responsibility of the waste holder among the actors of the treatment chain.

3. After WFD and ELD, TTK case.

After the approval in 2004 of the Environmental Liability Directive, whose priority is the rehabilitation of the contaminated land, the European Union changed the Directive on Waste into the Waste Framework Directive in 2008 and reformed the categories of waste, excluding contaminated soil. I think that the purpose of these changes are clear: contaminated soil is no longer waste and the owner of contaminated land is no longer waste holder[12].

Perhaps the literal meaning allows some doubt, as Valerie Fogleman observed, but the interpretation of the purposes of the European law seems clear. What does this overruling mean in the European law? I think that nothing has changed for the historical contaminations, which are subject to the national law and the old directive on waste: Environmental Liability Directive is not a retroactive law, because it will only apply for the future.

It is not easy to understand what will happen in the repair of future contaminations. Cleaning up soil contamination is out of the current scope of the Waste Framework Directive: only the rule of the Environmental Liability Directive will apply.

National laws have to implement Environmental Liability Directive, but member States could adopt rules that are more stringent. In some cases, national law has implemented the ELD adopting a rule that provides that owner could be subject to a secondary liability rule. The major problem is whether the old rules of contaminated soil national law could be applied, as an integration of the ELD implementation rule, when they have the same content[13].

Indeed, in July 2017, the European Court of Justice, in *Túrkevei* case, declared a Hungarian Act, establishing joint liability between the innocent owner of the land on which the pollution occurred and the polluter,

12 E. Scotford, *The New Waste Directive – Trying to Do it All … An Early Assessment*, in *Environmental Law Review*, 2009, 75 ff., 83.
13 B. Pozzo, *Environmental Liability: the Difficulty of Harmonizing Different National Civil Liability Systems*, in M. Peeters and M. Eliantonio, *Research Handbook on EU Environmental Law*, Elgar, 2020, 231 ff., 239.

compatible with ELD, without it being necessary to establish a causal link between the conduct of the owner and the damage established[14].

According to the European Court the national rules must, firstly, seek to attain the objective of Directive 2004/35 as defined in Article 1 thereof, namely to prevent and remedy environmental damage and, secondly, to comply with EU law, in particular its general principles, which include the principle of proportionality.

According to the ruling, "*To the extent that, without affecting the liability in principle of the operator, such national legislation seeks to prevent a lack of care and attention on the part of the owner, as well as to encourage the owner to adopt measures and develop practices likely to minimise the risk of damage to the environment, it contributes both to the prevention of such damage and, as a result, to the attainment of the objectives of Directive 2004/35. The effect of this national legislation is that the owners of land in the relevant Member State are deemed to monitor the conduct of those using their property and to report such users to the competent authority in the event of environmental damage or the threat of environmental damage, failing which, the owners will themselves be held jointly and severally liable*".

The motivation of the ruling is clear and the rule has only the scope of the responsibility of the owner of the land on which the polluting activity has made.

Out of this case, in my opinion, the principles, which are in the grounds of the ruling of the European Court, lay in that sense of the coherence of national law, which provides the following: the owner is responsible, beyond the value of the land, for the reimbursement of the cost of measures that help to avoid the spread of contamination to other land and environment (like emergency safety measures)[15]; the owner is responsible too, beyond the value of the land, if he knew or should have known that the land was contaminated when he acquired it, to prevent the previous owner from getting rid of responsibilities due to his activity or his negligence.

In other cases, the answer is doubtful after the changes in the waste law. I'm not sure that the current owner of a land, bordering the land from which the contamination comes, may be considered responsible for the reimbursement of costs beyond the market value of the land.

14 ECJ, 13 July 2017, C-129/16, *Túrkevei Tejtermelő Kft.*

15 About preventive measures, see V. Fogleman, *The duty to prevent environmental damage in environmental damage directive; a catalyst for halting the deterioration of water and wildlife*, in ERA Forum, 2020, 707 ff.