Environement

The delicate balance between the "polluter pays" principle and the charges *in rem* for the restoration and rehabilitation of the contaminated site borne by the owner not responsible for the damage

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With a judgment that heralds important consequences for the owners of potentially contaminated areas, on 4 March 2015 the Court of Justice of the European Union ("*CJEU*") ruled on the much-debated topic of the whether it is lawful to impose preventive measures, emergency safety measures, environmental restoration and rehabilitation, upon the owner of a contaminated site even when the damage has not been caused by his fault or negligence.

The events that determined the involvement of the CJEU date back to 2011. Following the purchase, on part of three separate companies of various plots of land located in the province of Massa Carrara, in Tuscany (plots that had been classified in 1998 as the "Massa Carrara site of national interest" as they were seriously contaminated by chemical substances due to the manufacture of insecticides and herbicides carried out by the previous

owners), the Ministry for the Environment and the Protection of Land and Sea (the "***MEPLS***") notified to the companies at issue an act ordering them to adopt specific emergency safety measures and to submit the amendment to the project for the rehabilitation of the area. The latter despite the fact that such companies were not responsible for the contamination. As a consequence of such imposition, the companies resorted to the Regional Administrative Court of Tuscany and obtained the annulment of the above order.

Subsequently, when asked to rule on the three appeals brought by the MEPLS against the three judgments of the Regional Administrative Court of Tuscany, the Plenary Assembly of the Council of State, having acknowledged the lack of a common approach in case law, referred the matter to the CJEU for a preliminary ruling.

As a matter of fact, according to one trend in case law, assigning the consequences of the ascertainment of environmental liability also to owners who, through an omission, do nothing to reduce or eliminate the pollution caused by the land they own, is in line with the legal basis of the "polluter pays" principle. Instead, based on the opposite trend in case law, there are no systematic reasons for imposing upon the owner of the area the obligation to adopt environmental restoration and rehabilitation measures.

The CJEU first of all observed that, based on the directive on environmental liability ("***Directive 2004/35/EC***"), in principle, the administrator of

a site must bear the costs of the environmental restoration and rehabilitation measures that follow as a consequence of environmental damage. However, pursuant to the "polluter pays" principle, which shapes all EU and national environmental regulation, such costs are not charged to the administrator if the latter gives evidence that there is no link between the environmental damage and his activity.

Based on applicable national legislation on rehabilitation, where it is not possible to identify the person responsible for the pollution, the owner or the administrator of the polluted site have the right carry out the environmental restoration and rehabilitation works. If neither the owner of the site, nor others do this, the competent authorities themselves must intervene directly, and subsequently bring an action for damages against the owner or the administrator of the site. The latter subject to the need to adopt a reasoned decision justifying the impossibility of identifying the entity responsible or of recovering the credit from the latter.

Therefore, the owner of a contaminated site who is not responsible for the pollution cannot be required by the competent administrative authorities to adopt environmental restoration and rehabilitation measures directly. However, pursuant to art. 253 of the Environmental Code, he is nonetheless required to bear the costs pertaining to the interventions adopted by the competent authority in light of the charges *in rem* ('*oneri reali*') and the special preferential right *in rem* ('*privilegio speciale immobiliare*') on the land, even if up to a maximum of the market value of the site, to be determined by taking into account both the plot of land and the properties on it.

With such ruling, based on the primacy of the "polluter pays" principle, the CJEU appears to have put an end to the age-old case law dispute on the lawfulness of the imposition of environmental restoration and rehabilitation measures upon owners not responsible for contaminated sites. However, the declared lawfulness of the charges *in rem* and the special preferential right *in rem* of the owner that is not responsible, does not dispel the doubts on the de facto existence of a form of his "objective liability", which clashes with the "polluter pays" principle.

If, on the one hand, it is true that the liability of an owner who is not responsible is founded on the specific provision of the charges *in rem* on the areas, which are justifiable in light of the financial benefits arising from the rehabilitation of the polluted area, it is also true that, according to this interpretation, such owner is subject to an actual liability determined by his "position", totally independent both of the subjective standpoint of fault or negligence and of whether or not he contributed to the contamination.

The CJEU's ruling is however based on the text of Directive 2004/35/EC which, though shaped on the "polluter pays" principle, expressly provides

for the right of member states to maintain and enact more stringent provisions in relation to the prevention and remedying of environmental damage (including the identification of other responsible parties).

In light of such reconstruction, the difference between the person responsible for the pollution and the owner who is not responsible, appears to lie not only in the different nature of their liability, but al so in the fact that the latter is required to bear the costs connected to the rehabilitation exclusively due to the charges *in rem* and the special preferential right *in rem* that rest on the site.

As a consequence, the owner who wishes to avoid losing ownership of the site, is always required to hold the administration harmless from the costs for the environmental restoration and rehabilitation measures up to a maximum of the market value of the site.

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