Environmental damage. For an implementation of the companies' liability. Remedial perspectives

KEY FINDINGS

Under almost all European legislation, the detection of a polluted area gives rise - primarily and where possible – to an obligation to undertake safety and reclamation activity.

In line with the “polluter pays” principle, as a matter of priority, it is the party responsible for the pollution that must take care of the above-mentioned operations. The liable party, however, may also not coincide with the owner (or operator) of the area which is generally exonerated from environmental recovery if it did not contribute to the pollution.

European law allows forms of no-fault liability, which may be issued by national laws towards owners who did not contribute to the pollution.

The exclusion of a positional liability regime in the European experience never completely exonerates the party who is (or enters into) a legal relationship with the asset from the weights (and costs) of environmental recovery activities. Weights and costs that, if the party liable for the pollution is not identifiable or is insolvent, cannot fall entirely on the public administration which in this case is called to intervene as an alternative, which must be able to claim back from the author of the pollution or, subordinately, from the owner of the site.

Mandatory financial guarantees should be introduced to protect against risks of this type; it is also appropriate to provide for a right of preference in case of fulfillment of an environmental credit.

It is necessary to implement territorial planning tools, which, through a system of incentives, or even through concrete exchanges between building rights and reclamation activities, encourage environmental recovery also through the involvement of the person not responsible for the pollution.
The European system of environmental liability. The experience of member states: limits and problems.

The European system of environmental liability is centred on prevention¹ and remedial² actions.

Among EU Member States, only Spain and Lithuania have opted for monetary protection, which, however, is conditional on the prior remedial measures implementation of being impossible. Worth noting also the example of Estonia, which exonerates the liable party from payment whenever this latter has already remedied the damage, or it provides for a refund in the event of a partial remedy. In any case, compensation for equivalent is always quantified in view of the costs necessary for the environmental recovery³.

Beyond the experiences mentioned above, under almost all European legislation, the detection of a polluted area gives rise - primarily and where possible - to an obligation to undertake safety and reclamation activity.

In line with the "polluter pays" principle, as a matter of priority, it is the party responsible for the pollution that must take care of the above-mentioned operations⁴. The liable party, however, may also not coincide with the owner (or operator) of the area which is generally exonerated from environmental recovery if it did not contribute to the pollution⁵.

The Italian experience is noteworthy since a conflict between the courts concerning precisely the possible involvement of the owners who are not at fault for the pollution in the decontamination operation⁶ gave the European Court of Justice the opportunity to offer a clarification⁷. According to the European Court of Justice, EU legislation, for the purposes of environmental liability, never strays away from the casual link between the event giving rise to the damage and the conduct of the operator⁸. Thus, Italian law was ruled compatible with European law, since it does not allow public administration to force owners who are not at fault for the pollution to adopt preventive and remedy measures, except for the reimbursement of costs for interventions carried out by the public administration acting as a replacement, within the limit of the increase in value of the de-polluted and/or rehabilitated areas⁹.

On the same occasion, in fact, the Court of Justice retained the possibility for other Member States to adopt more severe provisions, including through the identification of additional liable parties¹⁰. Therefore, it is not entirely excluded that some forms of no-fault liability, that may be issued by national laws against so-called innocent owners may in turn be compatible with European law.

Worth mentioning, in this regard, article L556-3 of the French Environmental Code that, in the case of potentially dangerous installations (so-called ICPE), assigns the decontamination obligations primarily to the last operator ("le dernier exploitant") that caused the pollution and to the possible third party that has assumed the burden of returning a complex to its original condition according to article L512-1. So, in the event that successive operators managed the same ICPE, the last operator is presumed responsible for any pollution connected to its activity, even if this actually was the fault of the previous operator; in this case, the last operator would only be left with the protection provided for in Article 1382 of the French Civil Code for the recovery of the costs incurred for the decontamination, provided that it can prove the culpability of the previous operator and the causal link between the latter’s conduct and the damage. If, however, the pollution is due to something besides an ICPE, the liability falls on the owner of the land, but only "a titre subsidiaire, en l’absence du responsable," if its negligence is proven, or, in any case, if it is proven that the
owner is not extraneous to the phenomenon ("s’il est démontré qu’il a fait preuve de négligence ou qu’il n’est pas étranger à cette pollution")\(^{11}\).

In the German system, the obligations of precaution, prevention and remedy are placed on any party whose activity has brought changes to the land and in particular on the owners and occupants of the land ("Der Grundstückseigentümer, der Inhaber der tatsächlichen Gewalt über ein Grundstück"), who are required to take measures to prevent environmental damage. In the event of damage, the responsibility lies with the party that caused the pollution ("Der Verursacher") or its universal successor ("Gesamtrechtsnachfolger")\(^{12}\); failing that, with the owner of the land or its occupant or, ultimately, with the previous owner, but provided that the transfer took place after March 1, 1999 and that this entity knew or was required to know that the soil was contaminated when they sold it\(^{13}\). The strictness of the regulation has been harshly criticized by the German doctrine that, in recognizing the “guilt” of the seller regardless of its polluting activity, has recognized a strict liability that is linked to the sole ownership of the property, contrary to the constitutional protection of property\(^{14}\). The Bundesverfassungsgericht intervened on this issue\(^{15}\), recognizing the constitutional legitimacy of the owner’s liability because of its power of control over the property and the relationship between the duties and benefits it represents, while it considered illegitimate the absence of any limit to the owner’s liability, which the Constitutional Court itself has reasonably identified in the value of the land to be decontaminated. Therefore, the German legislature shifts the environmental liability to the last owner of the land, who, called to perform safety and decontamination operations by the competent Public Administration, can claim for the entire cost incurred on all the parties who contributed to the damage, in proportion to their connected contribution. However, the action under a right of recourse does not protect the liable party from the risk of insolvency, leaving open the possibility that the economic cost of the pollution falls on a subject different from the one who has carried out the polluting activity.

In other Member States too, the strictness of the polluter pays-principle is to some extent mitigated. This is the case in Hungary, where the owner or the de facto users of the land are the presumed liable parties until it is proven that they are not involved with the event that caused the damage. In Poland and Sweden, on the other hand, they are called to be jointly and severally liable with the injured operators even if they are merely aware of the harmful activity of others or, in any case, have allowed it to take place.

From the picture presented above, it emerges that the exclusion of a positional liability regime in the European experience never completely exonerates the party who is (or enters into) a legal relationship with the asset from the weights (and costs) of environmental recovery activities. Weights and costs that, if the party liable for the pollution is not identifiable or is insolvent, cannot fall entirely on the public administration which in this case is called to intervene as an alternative, which must be able to claim back from the author of the pollution or, subordinately, from the owner of the site\(^{16}\). And the critical issues increase where the assets concerned are transferred, in which case the third-party purchaser must be protected, both if unaware and aware of the pollution, so that this party is called to take charge, if necessary, only of the decontamination activities already planned (or foreseen) at the time of purchase.

Therefore, the conflicts that can affect environmental recovery operations are many. This imposes, from the methodological point of view, the need to search for necessarily comparative solutions that – even in view of the unique mixture between rules of liability and rules of ownership – reasonably balance, in concrete terms, the demands recorded from time to time: from human health to ecological protection, from the social function of ownership to the freedom of private economic initiative\(^{17}\).
The allocation and assessment of environmental responsibility

As outlined, with regards to EU law, the vast majority of Member States places the burden for the obligation to environmental restoration, first of all, on the entity responsible for the pollution.

For the activities explicitly labelled by EU legislation as “dangerous” in Annex III to the ELD Directive, and that thus fall under a liability without fault, in national laws the allocating responsibility tends to have a subjective nature. In this case too, stricter regimes are not lacking. Poland, for example, includes among dangerous activities – and thus subject to a strict liability regime – all activities likely to release gases or dust in the atmosphere; whereas France and Latvia have done the same for activities inherent to the transportation of oil through pipelines. Further, in Hungary, Poland, Slovenia, Sweden and Estonia, the concept of “operator” itself under Article 2, § 6 of the ELD Directive was extended to include every entity that comes into contact with the environment, regardless of whether it operates an occupational activity.

It must be noted, also, the tendency of other Member States to ease the burden of proof for ascertaining environmental liability, accepting the use of rebuttable presumption. Finding factual elements from which it is possible to draw precise and concordant serious clues that make it likely, based on the id quod plerumque accidit, that pollution has occurred and that this is attributable to a given author, is considered decisive.

The Court of Justice of the EU has recognized that national provisions for presumptive forms of liability are compatible with EU law, but requires that the publication administration has “plausible evidence capable of justifying its presumption, such as the fact that the operator’s installation is located close to the pollution found and that there is a correlation between the pollutants identified and the substances used by the operator in connection with his activities.” However, national courts tend to exclude liability whenever it emerges that the harmful event would have been avoided “only by bearing an objectively disproportionate sacrifice” and therefore “cannot be reasonably required.” This aspect is often strongly influenced by the state of scientific knowledge at the time when the polluting activity took place.

The same matters that affect the liable party, especially if it is a corporate entity, affect also the assignment of the decontamination obligations. In the event of the bankruptcy of the company responsible for the contamination, there is a tendency to rule out the possibility that the guardianship may be the recipient of measures aimed at ensuring the safety or decontamination of the owned areas; therefore, the public administration has no choice but to proceed with the ex officio execution of the decontamination works and the recovery of the sums advanced, with the inclusion of the resulting credit in the bankruptcy liabilities. It is worth mentioning the case of Finland, where the Government has set up a Working Group aimed at establishing, among other things, whether and to what extent the bankruptcy assets are liable for the environmental remediation of the assets falling under the procedure. On this occasion, it was suggested that bankruptcy legislation include the obligation for the guardianship to remedy the most serious environmental violations, at the expense of the overall, overriding in other cases. There was no lack of controversy, however, in a system, such as the Finnish one, that is contrary to establishing pre-emption rights.

The substitute intervention of the public authority and the involvement of the innocent owner. Remedial solutions

If the party liable for the contamination cannot be identified, does not agree to provide for the operations or is insolvent, the decontamination is generally carried out ex officio by the competent local authority. In order to ensure that the costs of the intervention do not fall entirely on the community, national legislation provides for certain types of guarantees to finance the Public Administration acting as a substitute.

In this regard, the Italian experience is worth mentioning, where safety and decontamination measures constitute a real burden on the area to be decontaminated and the financing of the public administration
that performs them is assisted by pre-emption rights (special claim on real estate) in case of fulfilment through enforcement procedures.

The system of guarantees established by the Italian Environmental Code so that the clean-up costs do not fall entirely on the community represents an effective incentive for the innocent owner who, although not obligated to do so, can decide to take charge of the clean-up in order to avoid losing the property. As in other national legislations, it is determined that the environmental liability falls on the owner of the polluted area, regardless of the subjective imputability of the harmful event, which is strongly debated, in Italy as in other Member States.

However, the establishment of the real burden, as conceived by the Italian legislature, does not determine a total overlap between the innocent owner and the polluter which is what the German Law Judge based his judgment of constitutional illegality on, in the above-mentioned precedent.

In fact, in the Italian system, the public administration that has carried out the decontamination: a) can make claims against the innocent owner, but within the limits of the value acquired by the site once cleaned up; b) before proceeding, has the obligation to adopt a substantiated decision, through which it gives an account on why it was impossible to exercise claim against the party responsible for the contamination; c) even earlier, it is required to forward the order of warning for the implementation of decontamination activities not only to the party responsible for the contamination, but also to the owner, so as to allow him to assess the opportunity to do so in person and thus avoid the activation of the guarantee mechanisms that may lead to the loss of the property.

The system of guarantees provided by national legislations so that, in the event that the liable party is not identified or is otherwise insolvent, the costs for the environmental restoration don’t fall entirely on the public administration called to act as a substitute, have created a need to identify efficient mechanisms to protect the buyer of the polluted area that did not contribute to the pollution. Here we must differentiate between a situation where the buyer knows about the need for decontamination, and one where the buyer is not aware of such a need, through no fault of his.

In this regard, the advertising system in place in many Member States may prove very useful.

In Italy, for example, once the restoration plan has been approved by the public administration, the relevant real burden is mentioned in the town planning use class certificate (“certificato di destinazione urbanistica”) of the asset, so that third parties are informed before opening negotiations on the asset.

If the asset is sold without the town planning use class certificate being attached and the transferor is silent on the restoration obligations, the unaware buyer has the right to use the remedies that the legislation of the Member States provides on the topic of res vendita, from a reduction in price to the termination of the contract.

It should not be excluded that the state of the contamination may make the execution of the contract impossible, so as to give rise to the recognition of an aliud pro alio datum.

Worth noting, in this sense, an Italian precedent that recognised a scenario of aliud pro alio datum and thus led to the termination of the sales contract for breach on the seller’s part, in the transfer of a site purchased for building purposes, but that later proved to be unsuitable for building due to the presence of a mixed terrain with waste, whose disposal costs turned out to be much higher than the price paid for the purchase.

It is also possible, and indeed expected, that the party interested in the purchase may be aware of the environmental liabilities and comes to an agreement with the transferor on how to distribute the weights and costs of the decontamination:
1) the seller may undertake to hold harmless the buyer from the burden of the decontamination; or, which happens more often:

2) the buyer himself may assume the burden of the environmental restoration against a proportional reduction in the transfer price.

In this case, due diligence assumes a central role, so that the “environmental information” can be duly guaranteed. And this is also because it is mostly economic entities that invest in the purchase of disused and in any case potentially polluting areas and for such entities, conflict, especially of a judicial nature, burdened by strong uncertainties (in time and costs), has a specific weight in the evaluation of the convenience of the operation.

In this sense, legal praxis provides for efficient systems for the prevention of litigation, also through the agreement of so-called ecological clauses, which may constitute atypical guarantees for the buyer or, alternatively, limit the liability of the seller.

So, we have come across:

a) sales whose effectiveness is subject to the (positive) outcome of a technical assessment ordered by the purchasing party;

b) preliminary agreements where the negative results of the technical inspections give the prospective buyer the option to refuse the stipulation of a final contract;

c) sales option where the optional-buyer reserves the right to choose to conclude or not the contract based on the results of in-depth environmental inspections.

Suggestions de iure condendo

The picture outlined above confirms that strong conflict characterizes a contaminated asset, especially if it is the subject of transfers.

Regarding this matter, EU law precludes the weights and costs of the environmental restoration from falling on parties that have not contributed to causing the pollution; but, at the same time, leaves open the option for Member States to enact stricter measures.

An analysis of national legislations has revealed a tendency of the Member States to provide mechanisms that end up involving the unaware buyer himself in the safety and decontamination activities.

To ensure that, in such cases, the costs of the restoration don’t fall completely on the unaware buyer or in any case on the public administration called to act as replacement and thus on the community, it becomes necessary to have provisions on compulsory financial guarantees that protect from risks of this type (a scenario already in practice in various member states), or in any case a preferential right in the event of fulfilment of an environmental credit in collective proceedings.

Because of the attention paid by European legislature to the role of the administrative authority in enforcing the prevention and remedial obligations of economic operators, territorial planning tools should be implemented even earlier, tools that through a system of incentives, or even through actual exchanges between building rights and decontamination activities, incentivize environmental recovery also through the involvement of the party not responsible for the pollution.

Indeed, the security and decontamination activity may be the subject of agreements between the competent administration and the owner or operator of the area, whether this latter is liable or not for the pollution.
In this regard, we note the implementation of supplementary or substitute agreements, expressly subject to the rules of private law under Italian law.footnote

The most recurring scenario is the following.

Once the need to rehabilitate an area is ascertained, an agreement is reached whereby the private party, not responsible for the pollution, assumes a series of commitments of an environmental nature (such as the decontamination or redevelopment of the site), against which the public administration recognizes the possibility of building on the same area.

Think of the renovation of a disused industrial complex which a real estate company chooses to take over so that it can possibly build a shopping centre, perhaps also taking on the obligation to give employment to workers living in the area or to grant space to local traders.

In such cases, it often happens that, once the decontamination is underway, other pollutions are identified, as are other intervention areas.

In principle, it is to be excluded that the innocent owner can invoke an unforeseen increase in costs in order to free himself from his commitments.

However, in the face of contingencies such as those just described, the principles of good faith and loyal cooperation on which the administrative action must be based require a redetermination of the decontamination program, so that the private entity is not burdened by obligations no longer proportionately balanced by the building perspective granted to it (think of a reduction in construction fees).

If, then, it becomes materially or legally impossible to carry out the construction project, as in the case of revocation (or judicial annulment) of the relative authorization, the private party not environmentally liable must be considered free from the constraint.

Nor, from a preventive point of view, it is possible to exclude the stipulation of clauses that govern excessive onerousness in the execution of the decontamination interventions, at the occurrence of which the private party could renounce the building project and, at the same time, free itself from the commitments undertaken.

Nor, finally, for what has been debated, can the renunciation of ownership of the area be excluded.

After all, the restoration would in any case be guaranteed by the intervention of the public administration acting as a substitute, and these costs, with the operation of the mechanisms already provided for in national legislation, would not fall entirely on the community.

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1 Article 5 ELD.
2 Article 6 ELD.
4 Article 1 ELD. The polluter pays-principle is set out in the Treaty on the Functioning of the European Union (Article 191(2) TFEU).
5 Article 8 (3)(a) ELD. According to N. De Sadleer, The polluter-pay principle in EU Law. Bold Case and Poor Harmonization, in Pro Natura: Festschrift Til H. C. Bugge, Oslo, 2012, p. 410, the polluter pays derives from a more general European principle, such as that of proportionality.
6 Consiglio di Stato, Adunanza Plenaria, ordinanza n. 21, 25 September 2013.
8 Decision of 4 March 2015, C534/13, cit., §54.
9 Ibidem, §63.
10 Ibidem, §61.
11 Similar conclusions have been reached by French jurisprudence also for the hypothesis of reclamation resulting from dumping of waste: «Mais attendu qu'en l'absence de tout autre responsable, le propriétaire d'un terrain où des déchets ont été entreposés en est, à ce seul titre, le détenteur au sens des articles L. 541 1 et suivants du code de l'environnement dans leur rédaction applicable, tels qu'éclairés par les dispositions de la directive CEE n° 75 442 du 15 juillet 1975, applicable, à moins qu'il ne démontre être étranger au fait de leur abandon et ne l'avoir pas permis ou facilité par négligence ou complaisance» (Cour de Cassation, 11th July 2012, n. 11-10.478).


13 BbodSchG, §4, n. 6: «Der frühere Eigentümer eines Grundstücks ist zur Sanierung verpflichtet, wenn er sein Eigentum nach dem 1. März 1999 übertragen hat und die schädliche Bodenveränderung oder Altlast hierbei kannte oder kennen musste».


16 Article 8(2) ELD.

17 Amplius R. Landi, Bonifica e circolazione della proprietà, Napoli, 2018.

18 Study on analysis of integrating the ELD into 11 national legal frameworks, cit.


22 However, cfr. Article 8(2) ELD: «the competent authority may decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified».

23 Article 253 Italian environmental code.

24 Cfr. retro, note n. 15.

25 Article 253(4) Italian environmental code.

26 Article 253(3) Italian environmental code.

27 Article 244(3) Italian environmental code.

28 Article 253(1) Italian environmental code; see also Article 251 Italian environmental code.


30 Recently discussed in Environmental liability of companies, May 2020, p. 38.


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