MARCO MORGANTINI JUDGE ADMINISTRATIVE COURT VENICE

THE ORDERS OF THE ITALIAN PUBLIC ADMINISTRATION TO ELIMINATE AN ENVIRONMENTAL POLLUTION AND THEIR ADDRESSEE

(report held at the workshop environmental group AEAJ in Riga 7. September 2017)

INTRODUCTION

1) JUDGMENT OF THE EUROPEAN COURT OF JUSTICE 4 March 2015 C 534/13: Directive 2004/35 must be interpreted as not precluding national legislation, which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, determined after those measures have been carried out.

2) STATE ADVICE n° 1089 2017: the safety measure doesn't have a sanctioning or rehabilitation purpose and doesn't require the check of the willful misconduct or of the fault.

3) ADMINISTRATIVE COURT TURIN N° 1543/2016: for declaring the relationship of cause and effect it's not required to reach a level of probability next to 100 per cent, but it's sufficient to demonstrate a level of probability higher than 50 per cent.

4) ADMINISTRATIVE COURT VENICE N° 65 AND 468/2017: the source of the obligations for safety measures and for reclaim the land is the agreement with the participation of the company itself and therefore the claimed orders have a legal title, that is the negotiation. In this case it's not required to prove the responsibility of the pollution.

5) ADMINISTRATIVE COURT VENICE n° 196/2013: due to Italian law the owner of a polluted area is responsible as the holder and therefore the general rule applies that requires the owner to pay for damages that are caused by things in their custody.

6) ADMINISTRATIVE COURT BRESCIA n° 48/2017: due to European law, the older of the waste has to remove it, without checking if they have produced it.

7) ADMINISTRATIVE COURT VENICE n° 313/2017: if a company conducts the same activity which was conducted before by an other company at the same site, the new company is responsible for the pollution that was caused by the previous operator.

8) ADMINISTRATIVE COURT VENICE n. 1346/2014: the responsibility of the owner company is due to the omission of the measures that had to be carried out at the end of the rental agreement, and, before the end of the rental agreement, in the scope of the contractual relationship with the tenant.

9) ADMINISTRATIVE COURT FLORENCE n. 1635/2016: the expenses of reclamation are not expenses that have the aim of urbanizing the areas and so they can't be deducted from the contribution that must be paid when the building permission is granted.

10) ADMINISTRATIVE COURT ANCONA n. 83/2017: the relationship of cause and effect between the specific kind of industrial activity and the pollution has to be proved and not presumed from the subsisting relationship between other industrial activities and the pollution.

11) ADMINISTRATIVE COURT FLORENCE n. 739/2016: regarding to the "polluter pays" principle, the obligation to install some piezometer is not justified by the only circumstance that in the past the land, that is today reclaimed, was once contaminated.

12) ADMINISTRATIVE COURT PALERMO n. 2675/2016: the knowledge, the absence of surveillance and of measures for avoiding illegal disposals of waste by a third party determines the fault of the holder.

13) ADMINISTRATIVE COURT VENICE n.1504/2012: the public administration has not to give compensation to the owner for bearing expenses to carry out an order to dispose of waste. The action of the public administration is justified when facing a serious situation and therefore is in absence of fault.

14) ADMINISTRATIVE COURT BRESCIA n. 38/2017: if the bankrupt entrepreneur disposed illegally waste, the public administration can't order the insolvency administrator to remove waste and the reclamation of the land.

15) ADMINISTRATIVE COURT BRESCIA n. 146/2017: the order for giving information about the pollution in the land is not damaging for the company.

16) ADMINISTRATIVE COURT SALERNO n. 2311/2016: the managing institution of the public street has to remove waste without checking if they have caused the

illegal disposal of waste or the fault, because they have in every case to grant the security of the street.

INTRODUCTION THE PROBLEM

Article 192 of the Italian environmental code establishes that the owner of an area where waste has been illegally disposed, is not obliged to remove it, if they aren't at fault.

Article 244 of the same code establishes that the public administration can order the rehabilitation of contaminated land only whom is responsible for the pollution.

Due to article 253 of the same code the owner of the land, that isn't responsible for the pollution, has to pay the expenses of the rehabilitation (that should be done by the public administration), but in the limit of the market value, that is determined after the rehabilitation.

Article 8 paragraph a) of European directive n. 2004/35 establishes that the operator has not to pay the costs of prevention and of rehabilitation, if he can prove that the environmental damage or the imminent threat of such damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place.

Article 14 of the European directive n. 2008/98 states that the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such product may share these costs.

Although these regulations above, it's not easy in the concrete case to decide if an operator can be obliged to remove waste or to decontaminate the land.

It's therefore necessary to analyze the jurisprudence. The conclusion will be that the obligation to remove waste or to decontaminate the land occurs more often than thinking of the only proof of having caused pollution.

1) JUDGMENT OF THE EUROPEAN COURT OF JUSTICE 4 March 2015 C 534/13

From the 1960s to the 1980s Farmoplant SpA and Cersam Srl — two companies belonging to the industrial group Montedison SpA (now Edison SpA) — operated an industrial site for the manufacture of insecticide and herbicide in a municipality of the Province of Massa Carrara, in Tuscany (Italy). As the land covered by that site had been seriously contaminated by various chemical substances, including dichloroethane and ammonia, some of that land was decontaminated in 1995. Since the 'decontamination' proved to be inadequate, the land was classed in 1998 as the 'Massa Carrara Site of National Interest' for the purposes of its rehabilitation.

In 2006 and 2008, Tws Automation and Ivan, two private companies, became the owners of various plots of land on the site. Tws Automation's corporate purpose is the sale of electronic devices. Ivan is a real estate agency.

In 2011, a private company called Nasco Srl ('the Fipa Group') merged with LCA Lavorazione Compositi Apuana Srl, thereby becoming the owner of another plot of land on the same site. Fipa Group is active in the construction and boat repair business.

By administrative acts of 18 May 2007 and 16 September and 7 November 2011, respectively, the competent directorates of the Environment Ministry, the Health Ministry and Ispra ordered Tws Automation, Ivan and Fipa Group to adopt specific 'emergency safety' measures, for the purposes of the Environmental Code, consisting in the erection of a hydraulic capture barrier in order to protect the groundwater table and the submission of an amendment to a project, dating back to 1995, for the rehabilitation of the land. Those decisions were addressed to the three undertakings, in their capacity as 'guardian[s] of the land'.

Relying on the fact that they were not responsible for the pollution, those companies brought proceedings before the Regional Administrative Court of Tuscany, which, by three separate judgments, annulled the acts in question on the ground that, by virtue of the 'polluter pays' principle, specific to EU law and the national environmental legislation, the administration could not, on the basis of Title V of Part IV of the Environmental Code, impose the measures at issue on undertakings which bear no direct responsibility for the contamination observed on the site.

The Environment Ministry, the Health Ministry and Ispra brought an appeal against those judgments before the Consiglio di Stato.

The Environment Ministry, the Health Ministry and Ispra submit that, on a proper construction of Title V of Part IV of the Environmental Code in the light of the 'polluter pays' principle and the precautionary principle, the owner of a polluted site may be compelled to adopt emergency safety measures.

In those circumstances, the Consiglio di Stato decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

‘Do the European Union principles relating to the environment, laid down in Article 191(2) TFEU and in Articles 1 and 8(3) of Directive 2004/35 and recitals 13 and 24 thereto — specifically, the ‘polluter pays’ principle, the precautionary principle and the principles that preventive action should be taken and that environmental damage should be rectified at source as a matter of priority — preclude national legislation, such as the rules set out in Articles 244, 245 and 253 of [the Environmental Code], which, in circumstances in which it is established that a site is contaminated and in which it is impossible to identify the polluter or to have that person adopt remedial measures, do not permit the administrative authority to require the owner (who is not responsible for the pollution) to implement emergency safety and rehabilitation measures, merely attributing to that person financial liability limited to the value of the site once the rehabilitation measures have been carried out?’

The Court of Justice observes that the second sentence of recital 2 to Directive 2004/35 states that the fundamental principle of that directive should be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable.

In that regard, it should be borne in mind that, under Article 8(3)(a) of Directive 2004/35, read in conjunction with recital 20 thereto, the operator is not required to bear the costs of preventive or remedial action taken pursuant to that directive if he can prove that the environmental damage was caused by a third party, and occurred despite the fact that appropriate safety measures were in place, or resulted from an order or instruction emanating from a public authority.

Where no causal link can be established between the environmental damage and the activity of the operator, the situation falls to be governed by national law.

In the present case, it can be seen from the documents before the Court and from the very wording of the question referred that the respondents in the main proceedings did not contribute to the occurrence of the environmental damage at issue, which is a matter for the referring court to confirm.

Admittedly, Article 16 of Directive 2004/35 allows Member States, in accordance with Article 193 TFEU, to maintain and to adopt more stringent measures in relation to the prevention and remedying of environmental damage, including the identification of additional responsible parties, provided that such measures are compatible with the Treaties.

In the present case, however, it is common ground that, according to the referring court, the legislation at issue in the main proceedings does not permit the competent authority to compel owners who are not responsible for pollution to adopt remedial measures, merely providing in that regard that an owner may, in those circumstances, be required to reimburse the costs relating to the actions undertaken by the competent authority, within the limit of the value of the land, determined after those measures have been carried out.

In the light of all the foregoing considerations, the answer to the question referred is that Directive 2004/35 must be interpreted as not precluding national legislation such as that at issue in the main proceedings, which, in cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, does not permit the competent authority to require the owner of the land (who is not responsible for the pollution) to adopt preventive and remedial measures, that person being required merely to reimburse the costs relating to the measures undertaken by

the competent authority within the limit of the market value of the site, determined after those measures have been carried out.

This ruling of the European Court of Justice has to be understood only for stating that the European law doesn't hinder the mentioned Italian legislation. But the Court of Justice didn't analyze the fact, because the Court gave for granted the circumstance, referred in the preliminary ruling of the State Advice, that the company didn't cause the pollution. The particular fact is that the owner bought land that was contaminated and the owner knew that it was contaminated land. Therefore it's not possible to invoke the action of a third party that caused the pollution. The doubt is that the knowledge of the owner (or of the holder) about the pollution allows the consideration that they are at fault. The consequence would be that in this case the owner could be obliged to rehabilitate the land.

It's also necessary examine the most recent jurisprudence.

2) **STATE ADVICE n° 1089/2017**

The town hall of Sarzana ordered a characterization plan and safety measures in the area of property of the claimant, that is used as store of polluted mud to be submitted.

A high concentration of nickel, chromium and asbestos have been found in the mud that had been deposited and guarded in the inside of the productive area of the claimant, with danger of polluting the ground and the environment.

The company complains the ‘polluter pays’ principle, assuming that this principle implies the verification of the liability of the person that pollutes and therefore the evidence of the causality and the evidence of the fault.

The company admitted to have deposited mud, but they had received the mud used in the production cycle after the analysis of samples that excluded the presence of pollutant factors. So they were not to blame.

The State Advice observes that the safety measure is a prevention measure of the damages and so it's a task of the owner or of the holder of the site from where the damage to the environment originated. So the safety measure has not a sanctioning or decontaminating purpose and doesn't require the check of the willful misconduct or of the fault.

This observation implies the opinion that article 8 paragraph a) of the European directive 2004/35 (that allows the operator to avoid to take safety measures if he proves that the damage or the threat of damage was caused by a third party) is in part illegitimate because in contrast to the article 191 of the treaty on the functioning of the European Union that states the precautionary principle.

There isn't the evidence of the fault, but there is the evidence of the relationship of cause and effect, because the company has deposited pollutant material in their production site and so they contributed objectively to cause the threat of pollution for which prevention has been ordered the contested measure.

The ‘polluter pays’ principle doesn't admit the responsibility without the causation of the damage and doesn't require the evidence of the fault. The directive 2004/35 configures the environmental responsibility as an objective responsibility. This is an interpreting criterion of the national regulations that doesn't require the evidence of the willful misconduct or of the fault, as those regulations of the Italian environmental code that foresees the possibility for the public administration to order interventions of safety measures of the contaminated sites.

3) ADMINISTRATIVE COURT TURIN N° 1543/2016

In checking the relationship of cause and effect, in the respect of the ‘polluter pays’ principle, the more applied criterion is that of the "more probably than not". For declaring the relationship of cause and effect it's not required to reach a level of probability next to 100 per cent, but it's sufficient to demonstrate a level of probability higher than 50 per cent.

The criminal criterion, that requires the certainty beyond every reasonable doubt, is excluded.

In application of these principles above, the public authority can presume a relationship of cause and effect if there are plausible clues, such as the vicinity of the plant of the operator to the pollutants and the correspondence between the founded pollutant substances and the components that have been used by this operator.

These clues are present in the case: the position of the laboratory used by the company in the area where pollution is greater, the correspondence of the substances in the activity of industrial production of shock absorber (for example chromium) and the pollutant substances.

The company is responsible too for omission because as owner of the area did not act to eliminate the damage.

4/A) ADMINISTRATIVE COURT VENICE N° 65/2017

The claimant company received an order of the safety measures and the submission of a project for the rehabilitation of the land in an area that they hold in the Venice lagoon.

The company claims that in the past the area had been owned by Montedison and that between the State and Montedison it had been stipulated a settlement for the environmental damage.

With this settlement the State had given up on every reason or action of damage that could be referable to the industrial plants that are included in the area of the so called Petrochemical of Porto Marghera.

The claimant observes: Montedison payed 750 Million Euros to finance the embanking of the isle where the industrial site is. The State received from the main polluter only 2 per cent of the damages and would try to take the remaining 98 per cent from the groups that contributed to the pollution, without having prepared a final project of total depollution.

The court observes that it's not pertinent to check if the embanking of the area of the claimant company had been carried out with the money coming from the settlement, because there are different titles that justify the obligation of decontamination. These different titles can't be superimposed.

The company participated in the agreement with the State (program agreement for the chemistry of Porto Marghera approved by the Minister on the 15th November 2001). In this agreement the company promised to rehabilitate their own grounds.

The ministry ordered the company specific prescriptions for safety measures and to decontaminate the groundwater table and the land and for hygienic - sanitary safeguards of the people who operate in the area. The ministry advised that if the company didn't do this, the State would do this and the expenses would be payed by the company.

The source of the obligations of the company is the agreement with the participation of the company itself and therefore the claimed orders have a legal title, that is the negotiation.

4/B) ADMINISTRATIVE COURT VENICE N° 468/2017

The claimant company, according to the article 245 of the Italian environmental code, that allows the interested people to carry out the decontamination interventions, activated itself spontaneously, since the public administration didn't impose at the beginning on it. It presented to the Environment Ministry some decontamination projects, that were approved on the 27th June 2011 although with prescriptions.

The company stipulated a settlement on the 23th September 2014 in which it would participate in the public system of safety measures and decontamination of the groundwater table.

Due to the settlement, the company decided to shoulder all the burdens of running and maintenance of the systems of drainage of the groundwater table that were in connection to the embanking of safety measures and the burdens of treating the waters and generally the burdens of the hydroequilibrium in the own area.

The duty of rehabilitation has also been assumed voluntarily by the claimant company and therefore doesn't require the check of the responsibility of the pollution.

5) **ADMINISTRATIVE COURT VENICE n° 196/2013**

The owner of a polluted area in the Venice lagoon is obliged to carry out safety measures consisting in the embanking along the perimeter of the area and in the treatment of the waters.

The owner of a polluted area is responsible as the holder and therefore the general rule applies that requires the holder to pay for damages that are caused by things in their custody.

6) ADMINISTRATIVE COURT BRESCIA N° 48/2017

The claimant company had bought a polluted area and had stipulated an agreement with the town council for building and running a commercial center.

Due to European law, the holder of waste has to remove it, without checking if they have produced it. The owner is the holder because they are in possession of waste (article 3 Par. 1 number 6 European directive n. 98/2008).

The expenses of disposing of waste are up not only to the producer, but to the holder too. Due to article 14 par. 1 of the directive n. 98/2008 holding the waste involves a) the prohibition to abandon waste and b) the correct disposal of it.

Only who is not the holder of waste can invoke the absence of fault. This is the owner that has suffered the deposit of waste in his ground against his will.

Who has bought an area and knew the existence of waste can not invoke the absence of fault. In this position they have responsibility for the correct disposal of waste.

Therefore the impossibility to build the commercial center, with the subsequent inefficacy of the above mentioned agreement, can not exempt the company from removing waste.

7) **ADMINISTRATIVE COURT VENICE n° 313/2017**

If a company conducts the same activity which was conducted before by an other company at the same site, the current company is responsible for the pollution that was caused by the previous operator.

In fact the company has succeeded the previous company due to a corporate transfer and so the obligation to decontaminate the land has been transferred to the current company, although the order of decontamination has been given after the corporate transfer.

The pollution is a permanent situation that is constant till the moment in which the causes are left and the correct environmental parameter have been reestablished.

The Italian Constitution (articles 2, 3, 9, 32, 41 and 42) requires that whoever is conducting a production activity, that is dangerous for the environment and the health, has to undertake, previously, all the cautions for avoiding damages, in the environment too, and, afterwards, all the measures for reestablishing the previous environmental situation.

8) ADMINISTRATIVE COURT VENICE n° 1346/2014

The claimant company is the owner of an area that was rented for the running of an activity for storage and trade of oil products. They have received back the area from the tenant.

Once had the activity ended, the company had to remove the cisterns and the other installations that contain hydrocarbons. In fact they knew the environmental danger of the activity and the consequences of the abandonment of the storages.

After the company had again the possession of the area, they had to take measures so that the installations and the contained substances couldn't cause and aggravate the pollution.

The company had to know the contamination, that is connected with the presence of the cisterns in the subsoil.

The responsibility of the owner company is due to the omission of the measures that had to be carried out at the end of the rental agreement or, before the end of the rental agreement, in the scope of the contractual relationship with the tenant.

9) ADMINISTRATIVE COURT FLORENCE n. 1635/2016

A company that sells areas to the town council, has to sell them free from burdens and so it's up to the company the decontamination of the area.

The expenses of decontamination are not expenses that have the aim of urbanizing the areas and so they can't be deducted from the contribution (for urbanizing the area) that must be paid when the building permission is granted.

10) ADMINISTRATIVE COURT ANCONA n. 83/2017

Near the river Chienti the land has been contaminated by factories that make shoes.

The claimant company has been obliged to contribute to the decontamination of the land.

But they build furniture. So the public authority didn't demonstrate the relationship of cause and effect between this specific kind of industrial activity (building furniture) and the pollution.

The proximity to the contaminated site is not a valid clue, considering that the company had bought the land recently.

Therefore the order of the public administration has to be quashed.

11) ADMINISTRATIVE COURT FLORENCE n. 739/2016

The company works marble in an area where in the past there was a contamination caused by other companies that worked coke.

The area is now decontaminated, but the public administration ordered to the claimant company to install some piezometer to check if the groundwater table could be polluted.

This order is illegitimate. In fact regarding to the "polluter pays" principle, the obligation to install some piezometer is not justified by the only circumstance that in the past the land, that is today decontaminated, was once contaminated.

12) ADMINISTRATIVE COURT PALERMO n. 2675/2016

The town council ordered the company safety and decontamination measures. The area was held by the company and became an unchecked deposit of dangerous waste.

The company knew that other people deposited waste illegally in the area.

The knowledge, the absence of surveillance and measures for avoiding the illegal deposit of waste by a third party determines the fault of the holder.

The company has therefore to carry out the ordered measures.

13) ADMINISTRATIVE COURT VENICE n. 1504/2012

The owner of the area was not responsible for the illegal deposit of waste.

The public administration ordered the owner to remove waste.

The owner claimed for compensation of the expenses that he had for removing waste, after they said that they had carried out the order only to avoid a serious situation.

The claim was rejected because the public administration faced a serious situation with fire risk. The action of the public administration was also in absence of fault, regardless if the order was legitimate or not.

14) ADMINISTRATIVE COURT BRESCIA n. 38/2017

If the bankrupt entrepreneur disposed illegally waste, the public administration can't order the insolvency administrator to remove waste and the rehabilitation of the land.

In fact the insolvency proceeding aims to liquidate and not to continue the enterprise.

The obligation of the bankrupt entrepreneur remains. The public administration has to dispose waste and has to claim the credit in the insolvency proceeding.

This rule finds exceptions only if:

a) the illegal disposal of waste was made by the insolvency administrator;

b) the bankrupt court gave the insolvency administrator a permission to carry out the enterprise provisionally and the illegal disposal of waste was made in the scope of the provisionally enterprise.

15) ADMINISTRATIVE COURT BRESCIA n. 146/2017

The company has claimed against orders of giving information about the completion of the disposal of waste.

The claim has been rejected because the order for giving information is not damaging for the company.

16) ADMINISTRATIVE COURT SALERNO n. 2311/2016

The managing institution of the public street has to remove waste without checking if they have caused the illegal disposal of waste or the fault, because they have in every case to grant the security of the street.

Marco Morgantini