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APPROFONDISCI SEMPRE
Tribunale Bologna 24.07.2007, n.7770 - ISSN 2239-7752
Direttore responsabile: Antonio Zama

The impact of eu legislation, principles and case law on the national contaminated land regimes

Parte III

23 Ottobre 2019

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1. Introduction

Contaminated Land Regimes (CLRs) cover one of the few areas of environmental law where **detailed legislation is not in place at the EU level**. Important policy decisions are thus left to the discretion of the Member States. Arguably, the most important of these decisions concerns the allocation of the burden and costs of remediation.

The main research question this study aims to address is **whether and to what extent national CLRs are receptive to several early and recent developments in the EU legislation and case law**. In particular, we intend to focus on the (likely) effect on the national CLRs of:

1. the implementation of the Baseline Report obligation under the recent Industrial Emissions Directive 2010/75/EU (IED)

and

2. the recent European Court of Justice (ECJ) case law on the Environmental Liability Directive 2004/35/EC (ELD).

To answer this question, we have conducted a comparative analysis of the relevant legal framework in four EU countries where the presence of contaminated land is a major policy problem. The research consists of **three main parts**.

The **first part** (Chapter 2 and Chapter 3) focuses on the legislation of some European countries (UK, Italy, Spain and France) and on the relevant environmental principles adopted by the European Union. In particular, Chapter 2 has been devoted to studying the CLRs of four European countries: the UK, Italy, Spain and France.

These countries have been chosen because of their industrial history, the existence of large contaminated areas on their territories and the possibility, for the researcher, to read legal sources in their original language.

How the CLRs identify the liable party is the main aspect we have analysed. The cost allocation in cases of multiple party causation and what happens when nobody voluntarily implements the remediation are two further problems which are particularly relevant to this research. Chapter 3 reviews, the relevant EU principles, namely the polluter-pays principle, the stewardship principle, the precautionary principle, and the principle of environmental harm.

The **second part** (Chapter 4 and Chapter 5) investigates the influence of EU legislation and case law on the national CLRs. Chapter 4 examines whether and how early EU legislation and case law has affected national CLRs. We have focused my attention, in particular, on the ELD (Environmental Liability Directive), the WFD (Waste Framework Directive), and the ECJ (European Court of Justice) decision of 9 March 2010, analysing whether their tendency to refer to the polluter-pays principle only was mirrored in the national CLRs.

Chapter 5 analyses the influence of recent developments in EU legislation and case law on the CLRs. In particular, it investigates in detail how the Baseline Report obligation established by the IED is being implemented by the Member States. According to the IED, an increase in the pollution level triggers the obligation to return the site at least to the state described in the Baseline Report. However, the features of the remediation obligation as a whole are not defined by the IED, but rather left to the discretion of the Member States.

What is peculiar here is that the Baseline Report will interfere with the CLRs by requiring the enactment of an administrative procedure uniform at European level. This stage of my research examines whether national legislation and guidelines implementing the Baseline Report obligation explicitly take into account their links with the national CLRs.

To this end, it reviews the European Commission Guidance concerning baseline reports, and compares it to the national guidelines of the four chosen Member States. In addition, this chapter includes a discussion of the recent ECJ decision of 4 March 2015, as in this decision the ECJ modified its previously very rigid interpretation of the polluter-pays principle.

> **The third and conclusive part (Chapter 6) presents the output of the comparative analysis, discusses the tendency towards the approximation of the national CLRs and presents some policy considerations related to the advantages of a common EU Contaminated Land Regime) CLR and of a shared - though possibly 'vague' - Contaminated Land Language (CLL?).**

Studying the CLRs does imply **some terminological issues**. The two most important ones are related to the use of the word 'contamination' (instead of 'pollution') and of the word 'land' (instead of 'site')[1] . 'Contamination' is properly used, as it covers the state of both soil and groundwater. we would personally prefer to use the word 'site' instead of the word 'land', as it is more evident that the former also embraces groundwater, which is very often the most problematic target of any remediation activities.

However, the expression 'Contaminated Land Regime' is now commonly accepted, on the assumption that here land also refers to some bodies of water, according to the different national regulations.

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PART 3: CONCLUSIONS

6. Conclusions

I. Comparative analysis and different models of CLRs

As we have indicated from the opening of this article, Contaminated Land Regimes[2] (CLRs) cover one of the few areas of environmental law where **detailed legislation is not in place at the EU level**. Important policy decisions are thus left to the discretion of the Member States. The most important of these decisions concerns the allocation of the burden and costs of remediation.

The main research question this study aimed to address – *via* a comparative analysis - is **whether and to what extent national CLRs are receptive to various early and recent developments in the legislation and case law**. In particular, we have analysed the effects on the national CLRs of:

1. the most relevant EU **environmental principles**,

2. the implementation of the **Baseline Report** obligation under the recent Industrial Emissions Directive (IED),

and

3. the European Court of Justice **(ECJ) case law** on the Environmental Damage Directive (ELD).

The reason **why the EU does not have a common CLR** is simple: the EU countries were not able to agree on its content.

We have analysed, in chapter 2, the CLRs of four countries (the UK, Italy, France, Spain), with specific emphasis on the most important question the law needs to address in this field: **who should pay for the remediation of contaminated areas**.

The legal doctrine[3] has identified **five models of liability for remediating contaminated land**:

"*Model 1: The polluter should pay and no one else should pay. If the polluter cannot be found, there will be no liability for remediation.*

Model 2: As a priority, the polluter should pay, but where the polluter is not found, it may be possible for residual liability to rest elsewhere on, for example, owners or occupiers of land or the state.

Model 3: As a priority, the right sort of polluter should pay, but if the polluter does not meet those criteria …, then others may also be liable. Causation is not the only test for being a polluter.

Model 4: Liability is based primarily on fault, not causation.

Model 5: The polluter may be liable, but so equally may others be, regardless of fault."

The UK's CLR falls under the description of Model 2 ("*As a priority, the polluter should pay, but where the polluter is not found, it may be possible for residual liability to rest elsewhere on, for example, owners or occupiers of land or the state*.").

The law describes in detail the steps to be taken in order to identify the **appropriate person (i.e., the person who should bear the burden of the clean-up)**. A number of different and subsequent 'exclusion tests' play a key role in the identification of the appropriate person. Furthermore:

- 1) In cases of **multiple party causation** costs are allocated by the remediation notice taking into account the share of costs that each appropriate person is respectively liable to bear. To this end, liabilities must be normally determined with reference to each contaminant linkage, although this is far from being always easy.
- 2) When **nobody voluntarily takes on the responsibility for the remediation**, the enforcing authority can carry out at its own cost some remediation actions and it is then entitled to recover the reasonable cost incurred from the appropriate persons, taken however into account any reasonable hardship which might occur from the recovery.

The French CLR also falls under the description of Model 2 ("*As a priority, the polluter should pay, but where the polluter is not found, it may be possible for residual liability to rest elsewhere on, for example, owners or occupiers of land or the state*.").

As a general rule, and with very limited exceptions, the obligation to remediate or to secure contaminated land is not imposed on the innocent owner or manager of the land. The application of the **polluter-pays principle** – in its very traditional meaning – is thus **very rigid.** Furthermore:

- 1) In cases of **multiple party causation costs are allocated following a rule of proportionate liability**;
- 2) When **nobody voluntarily takes on the responsibility for the remediation**, the **responsible parties bear the obligation to reimburse the costs of the measures, if any, implemented by the public authorities**.

The Italian and the Spanish CLRs position themselves somewhere **in the middle between the description of Model 2** ("*As a priority, the polluter should pay, but where the polluter is not found, it may be possible for residual liability to rest elsewhere on, for example, owners or occupiers of land or the state* .") **and the description of Model 5** ("*The polluter may be liable, but so equally may others be, regardless of fault.*").

The Italian regime is actually quite close to Model 5. Both regimes take heavily into account the fact that the owners of a piece of land (and, to a lesser extent, its holder) gain advantages from the remediation, such as, first of all, the increased monetary value of the land they own or hold. Under Italian law, in spite of a generic obligation of the polluter to remediate, **the owner or manager of the site** – who is not responsible for the pollution - must take **part of the burden,** shouldering the following three obligations:

- **a)** Carrying out any urgent **preventive measures** that could avert further extension of the pollution (no fault or causal link is required for this obligation to come into existence);
- **b) Reimbursing** the costs related to the remediation and/or emergency measures, if any, undertaken by the competent authority, within the limit of the market value of the site;
- **c)** In specific cases, **carrying out the entire remediation (when the innocent owner or manager themselves have promised to the public authorities to do so, even if this happened in a distant past and under circumstances that are no longer present)**.

In Italy the responsible party can be identified on the ground of the "more likely than not" rule of evidence. Thus, it is not necessary to demonstrate their responsibility "beyond any reasonable doubt". This creates a problem in the relationship between administrative and criminal law, as – for the responsible party – "Failure to remediate" is a criminal offence.

Furthermore, in Italy:

- 1) In cases of **multiple party causation** costs are now allocated following the **proportionate liability rule** ("*responsabilità proporzionale*"), not the joint and several liability rule ("*responsabilità solidale")* that was applicable in the past*;*
- 2) When **nobody voluntarily takes on the responsibility for the remediation**, the **responsible parties bear the obligation to reimburse the costs** of the measures, if any, implemented by the public authorities.

The Spanish CLR establishes **a clear hierarchy among the parties that might be responsible for the remediation**. First, under the polluter-pays principle, the polluter should remediate. However, in case the polluter is not found or is not in the position to implement the remediation, the landowner is responsible for the clean up, due to the importance in general attributed to social responsibility by Spanish ownership law.

Thanks to the proportionality principle, the landowner responsibility faces a limit in the land's value. When the landowner also is not in the position to implement the remediation, then the landholder responsibility comes into consideration.

Differently from what happens in other countries (e.g., in Italy), when a piece of contaminated land has been sold, Spanish public law seems to take into account the content of the contract, while allocating liabilities for the remediation, and this is another possible exception to a rigid application of the polluter-pays principle.

Thus, to sum up, also in Spain:

- 1) In cases of **multiple party causation** costs are allocated following the **joint and several liability rule** ("*responsabilidad solidaria*")**,** not the proportionate liability rile ("*responsabilidad mancomunada*")*;*
- 2) When **nobody voluntarily takes on the responsibility for the remediation**, the **responsible parties bear the obligation to reimburse the costs** of the measures, if any, implemented by the public authorities.

II. The 'long and winding road' towards the approximation of the national CLRs, thanks to the influence of environmental principles, directives and case-law

In spite of the above-mentioned differences among the national CLRs we have examined, **they will soon probably move towards an increased level of convergence**[4], for three reasons.

First, as we have pointed out in chapter 3, the interpretation of the **relevant environmental principles, as well as the need for their reciprocal balance,** become clearer and stronger year after year. While the **polluter-pays** principle still offers solid ground for considering the polluter as the main responsible party, the **precautionary principle**, the **stewardship principle** and the **principle of environmental harm** demand that some form of accountability be put on the shoulders of the landowner and/or of the holder of the contaminated area.

This is not going to just happen when the polluter is not found or is not in the position to bear the remediation costs. Apart from this situation, there is a growing tendency, in some countries, that favours the establishment of a set of 'securing obligations' on landowners and landholders (particularly in the public law realm).

Such parties will benefit from the clean-up. It is thus reasonable they have to intervene directly when this is needed and urgent.

Furthermore, when the public authorities have to implement the remediation directly (as nobody else is available to act), it is reasonable that such authorities can sue the owner in order to obtain reimbursement of costs, within the limits of the land's value[5].

If the obligations of the landowner or landholder derive mainly from the stewardship principle, the law should state clearly "what happens if you are a bad steward"[6]. This tendency will of course allow more remediation works to be implemented.

Furthermore, worldwide national and international courts are trying to reach a point of equilibrium between environmental protection and economic development and freedom, and this also calls for sustainable but clear obligations to be put on the shoulders of landowners.

Second, the ECJ case law on the ELD is also rapidly evolving towards a converging and more balanced direction. While in 2010 the ECJ had adopted a very rigid interpretation of the polluter-pays principle (see chapter 4), a more recent decision, delivered in 2015 (see chapter 5), modified such an approach. In this decision, the ECJ established that the ELD must be interpreted as **providing national CLRs with a choice between the following two options only**:

1. **requiring the 'innocent' landowner to adopt full preventive and remedial measures**,
   or, at the very least,
2. **requiring the 'innocent' landowner to reimburse the costs related to the measures undertaken by the competent authority** up to the limit of the market value of the site (value to be calculated following the remediation[7]).

In both cases, the burden imposed on the landowner is rather heavy, as the **precautionary principle**, the **stewardship principle** and the **principle of environmental harm** require.

Third, the **implementation of the IED in the EU countries** is likely to affect - slowly, but heavily - the national CLRs. Officially, the IED has nothing to do with the CLRs. The former regulates emissions deriving from industrial plants, at EU level. The latter contains the (different) national regulations applicable to the land, soil and/or groundwater polluted by substances that can cause significant harm to the environment. However, as we have demonstrated in chapter 4, **one specific aspect of the IED does have the potential to affect importantly the national CLRs**.

> **Such an aspect is the obligation of the industrial operator to produce a Baseline Report, which must describe the state of soil and groundwater at the beginning and at the end of the 'life' of a plant's environmental licence. This obligation introduces the duty for the operator of an activity to investigate and disclose the contamination of soil and groundwater, if any . Depending on the features of the specific national CLR, such a mandatory disclosure can generate obligations (to take action and remediate), which would have otherwise arisen much later, or not at all.**

Different kinds of criminal liability may also arise, should the appropriate persons fail to remediate. The role of the "operator" within the CLRs also calls for further research. Thus, an EU piece of regulation (the IED Directive) does affect the CLRs, which in theory do not have to follow any European rules.

III. Policy considerations

All the factors described in the previous paragraph show that **the national CLRs of the EU countries are, in some way, bound to converge. Yet**, such a convergence will take place in spite of the absence of a dedicated EU regulation on this matter and, consequently, **without clear design and monitoring**.

Indeed, the EU should go back to its (failed) efforts to set a **strategy for European soil and groundwater,** with a view to turning economic development and environmental protection into two compatible imperatives. Only by discussing, deciding and implementing such a strategy, will it be possible for the national CLRs to converge following a clear, gradual and effective path. Moreover, a common EU CLR could serve as **guidance in the complex process of implementing the Baseline Report** obligation at the national level.

We need predictable CLRs and predictable implementation of the Baseline Report regulation in the EU countries. Both goals can be better pursued together. **Predictability** is certainly one of the most important "objects" that the lawyers should be able to make, following the "Law as Engineering" perspective.[8]

Of course, the merit of this discussion will not be easy to deal. Do we want to focus our attention on **soils only**, under the assumption that clean soils will sooner or later allow, through natural mitigation, the groundwater to clean itself? Or do we want to address now **also the hugely difficult task of remediating EU water tables**? In this last case, are we aware of the very high foreseeable **costs** and are we prepared to decide **who should pay** for it?

And are we also willing to change our approach towards the risk assessment/risk management framework [9] and to promote **new technologies to remediate our groundwater**? For instance, are we prepared to switch from the usual, abused and costly 'pump and treat' to a wider application of 'reactive barriers' and of other 'smart' technologies, often more effective but rarely accepted without objections by the activists and the public? There is here a huge need for **further research**, to be carried out at the intersection between legal and technical expertise[10].

Before the discussion on a common EU Contaminated Land Regime (CLR) begins, a **shared European Contaminated Land Language (CLL?)** should be defined. However, for such a language to be legally 'useful', it should remain **reasonably and intelligently "vague"**.

> **The "value of vagueness" in the law has been deeply studied by legal philosophy. Actually, "both vagueness and precision *always* bring forms of arbitrariness with them. Even though it is true that vague standards allocate power to persons who may act capriciously, that allocation of power may suit the purposes of the law very well, when the persons to whom the power is allocated are in a better position than the legislator to articulate and determine the standard"[11].**

This is what often happens in technical matters, such as the CLRs. Here, local authorities and their technical experts are in the best position to take the final decisions on the remediation targets and on the technologies to be implemented. It may not be in the interest of the law to establish too detailed goals and too clear restrictions.

Per visualizzare la parte I clicca qui e per la parte II clicca qui.

[1] For a terminological discussion of this kind, see Brandon, E. *Global Approaches to Site Contamination Law* (2013 Springer), 6-7.

[2] For the purposes of this study, a country's Contaminated Land Regime (CLR) can be defined as the national regulation applicable to the land, subsoil and/or groundwater polluted by substances that can cause significant harm to the health of the environment or of organisms living therein. Such regulation usually entails a set of rules aimed at deciding whether the mentioned pollution or significant harm are in place or can reasonably be expected. These legal regimes also define how the remediation targets should be identified, who should pay for the clean-up, and which administrative procedures and monitoring should occur for these purposes.

[3] Emma Lees, 'The polluter pays principle and the remediation of the land', International Journal of Law in the Built Environment, (2016), 6-10.

[4] This analysis does not take Brexit into account because, as far as known, the same rules and laws should apply after Brexit, at least for a certain period of time.

[5] In such a case, we should consider the land's value after the remediation activities.

[6] E. Lochery, 'Does the contaminated land regime impose stewardship obligations on owners of land?' 2011, 56, available at https://discovery.dundee.ac.uk/en/studentTheses/does-the-contaminated-land-regime-impose-stewardship-obligations- last accessed 21.6.2019.

[7] This threshold limit seems to combine a just application of the stewardship (and precautionary) principle with the proportionality rule.

[8] For a deep analysis of "Law as Engineering", see D Howarth, *Law as Engineering. Thinking About What Lawyers Do* (2013, Edward Elgar Publishing). Following Howarth's approach, the law should be aligned on "engineering styles of thought and problem solving" (p. 51).

[9] See, on this topic, E Fisher, 'Framing Risk Regulation: A Critical Reflection' European Journal of Risk Regulation, 2013 4(2), 125-132.

[10] See E. Fisher, EC Fisher, B Lange, E Scotford, *Environmental Law: Text, Cases & Materials*, (2013) Oxford, 22: "There is rarely a single and obvious answer to the question 'Is this an environmental problem and if it is, what we should do about it?'".

[11] Endicott, T. 'The value of vagueness' in Philosophical Foundations of Language in the Law, Oxford University Press (2011), 28.

TAG: *European Union, Regolamento UE, law and economics*
